

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5388-11T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMIE SPARKS a/k/a
JAMEEL GATLIN, JAMMIE SPARKS,
JAMMIE L. SPARKS,¹

Defendant-Appellant.

Argued November 2, 2016 – Decided February 22, 2017

Before Judges Accurso and Manahan.²

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Indictment
No. 09-07-1981.

¹ Defendant's name is misspelled as "Jamie Sparks" throughout the record. Defendant verified the correct spelling at sentencing and in his pro se supplemental brief.

² Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges.

Elizabeth C. Jarit, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Jarit, of counsel and on the brief).

LeeAnn Cunningham, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Carolyn A. Murray, Acting Essex County Prosecutor, attorney; Andrew R. Burroughs, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Jammie Sparks was convicted after a trial by jury of robbery, felony murder, and other offenses in connection with a home invasion in which he and two others sought to steal money and drugs from an acquaintance, J.R.³ On appeal, defendant argues that the court erred by failing to declare a mistrial during jury selection after a family member of a victim spoke to prospective jurors. He also argues his motion for judgment of acquittal of aggravated assault was erroneously denied, there were errors in the jury instructions, and that a detective's testimony contained impermissible references to evidence outside the record. Defendant further argues that his sentence is excessive. We affirm in part, reverse in part, and remand for re-sentencing.

³ We use initials to refer to the victims in this case for the purpose of confidentiality.

Defendant was charged in Essex County Indictment 09-07-1981 with second-degree conspiracy to commit burglary pursuant to N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2 (count one); second-degree burglary pursuant to N.J.S.A. 2C:18-2(b)(1) (count two); two counts of first-degree armed robbery against M.M. and J.R., respectively, pursuant to N.J.S.A. 2C:15-1 (counts three, four); second-degree aggravated assault against J.R. pursuant to N.J.S.A. 2C:12-1(b)(1) (count five); first-degree murder of E.P. pursuant to N.J.S.A. 2C:11-3(a)(1) and (2) (count six); first-degree felony murder of E.P. pursuant to N.J.S.A. 2C:11-3(a)(3) (count seven); second-degree unlawful possession of a weapon pursuant to N.J.S.A. 2C:39-5(b) (count eight); second-degree possession of a weapon for an unlawful purpose pursuant to N.J.S.A. 2C:39-4(a) (count nine); and third-degree endangering the welfare of a child pursuant to N.J.S.A. 2C:24-4(a) (count ten).

Essex Indictment 10-05-1288 charged defendant with first-degree murder pursuant to N.J.S.A. 2C:11-3(a)(1) and (2) (count one); second-degree unlawful possession of a weapon pursuant to N.J.S.A. 2C:39(5)(b) (count two); and second-degree possession of a weapon for an unlawful purpose pursuant to N.J.S.A. 2C:39-4(a) (count three). The indictments were later consolidated.

Trial was held over five days from February 23 to March 2, 2012. During the trial, the State called J.R., M.M., an

acquaintance of defendant's, Reginald Mulligan, and Detective Paterson Pasteur, among others, as witnesses. On February 29, 2012, the court granted defendant's motion for acquittal on count six, the murder charge.⁴ The judge denied defendant's motion for acquittal on count five, the aggravated assault charge.

On March 2, 2012, the jury found defendant guilty of counts one, two, four, five, seven, eight, nine, and ten of Indictment 09-07-1981. The jury found defendant not guilty of count three, the robbery charge, and of all counts under Indictment 10-05-1268.

On May 14, 2012, the court sentenced defendant to twenty years imprisonment with an eighty-five percent parole disqualifier on count four; seven years imprisonment with an eighty-five percent parole disqualifier on count five; fifty years imprisonment with an eighty-five percent parole disqualifier on count seven; seven years imprisonment with an eighty-five percent parole disqualifier on count eight; and four years imprisonment on count ten. All remaining counts were merged.

The sentences for counts four, five, seven, and ten were to run concurrently, and the sentence for count eight was to run consecutively. Defendant's aggregate sentence was fifty-seven

⁴ The transcript recites that the court "denied" the motion, but this appears to be a typographical error, as the trial court later stated that it would not submit this count to the jury.

years with an aggregate parole ineligibility of forty-five-years-and-six-months. The three-years-and-six-months parole ineligibility period imposed for count eight was to run consecutively to the forty-two-year period of ineligibility pursuant to the sentence on the other concurrent counts.

We recite the following facts taken from the trial record. On January 4, 2009, J.R., his girlfriend M.M., and M.M.'s six-year-old son, X.T., were living in an apartment to which they had recently moved in Newark. The apartment was on the first floor of a three-story building; it had a common door to the outside. There was an interior door for entry into the apartment. The interior door opened into the living room. There were two bedrooms, one for J.R. and M.M. and one for X.T. The kitchen and bathroom were at the rear of the apartment.⁵ On January 4, J.R. and M.M. were unpacking and preparing to paint the apartment. At some point before 5:00 p.m., J.R.'s friend, E.P. arrived for a visit.

Later that evening, three men arrived at the apartment to buy marijuana. J.R. had previously sold marijuana to them from his former address. J.R. was familiar with one of the buyers, and later identified him at trial as defendant. At the time of the

⁵ The floor plan of the apartment played a role in what transpired and what witnesses observed.

transaction, J.R. knew defendant only by the nickname "Hood," having seen defendant around the neighborhood "pretty much every day," as both men "hung around" the same area. M.M. also later identified defendant as one of the men who came to buy drugs. She too had seen defendant around the neighborhood, and knew him as "Hood."

While the three men were in the apartment, J.R. called M.M. into the bedroom and said that he needed money to pay the rent. The two counted \$950 in cash, in view of the men, who could see them through the open bedroom door. M.M. left the bedroom with the rent money, and J.R. brought the three men into the room whereupon he sold defendant "a bag or two" of marijuana. At the time, J.R.'s cache of "about half a pound" of marijuana was on the bed.

After the three men left, J.R. and M.M. prepared to paint ceiling tiles for X.T.'s room while X.T. played video games with E.P. Approximately an hour or two thereafter, there was a pounding sound from the outer door of the building. Upon hearing the pounding, M.M. went with X.T. into the living room. J.R. and E.P., who was still present, were in the kitchen. There was a second pounding, this time on the inner door to the apartment.

The door "blew open," and three men wearing bandanas covering the lower part of their faces entered, pointing guns and demanding

money. Two of the men entered the kitchen and told J.R. and E.P. to lie on the floor. J.R. was then told to get up and go to the bedroom. E.P. remained lying face down on the kitchen floor.

One of the intruders remained in the living room with M.M. and X.T., one went into the kitchen, and the third escorted J.R. into the bedroom where he pointed his gun at J.R. and demanded money. J.R. recognized the intruder as defendant. After J.R. mentioned his nickname, defendant removed his bandana mask. J.R. pleaded with defendant not to shoot him, and asked him why he was doing this. Defendant struck J.R. once "across his forehead" with his gun.

During the robbery, M.M. gave the gunman who stayed in the living room with her a \$100 bill from her pocket. J.R. gave defendant "over a hundred bucks" at gunpoint in the bedroom. Defendant also took M.M.'s phone, the marijuana in the bedroom, and a pack of cigarettes.

From her position in the living room, M.M. could see into the bedroom. The intruder who stayed in the living room pointed his gun at both M.M. and X.T. Although M.M. did not recognize two of the men, she recognized the man who went into the bedroom with J.R. as "Hood," as she saw his face after he removed his bandana.

A few minutes after the three men entered the apartment, J.R. and M.M. heard a gunshot coming from the kitchen. The intruder

in the kitchen with E.P., later determined to be Edward Dunn, ran into the living room, and yelled to defendant, "shoot 'em, shoot 'em," referring to shooting J.R. Defendant did not shoot J.R., but continued pointing his gun at him as if he was going to shoot as he backed away. When leaving, defendant told J.R. that if he "had a problem with" what had happened, he "knew where to find [defendant]" and could "go see him in the streets about it."

After the intruders fled, X.T. told M.M. that he thought E.P. "fell asleep" because he could hear "snoring in the kitchen." J.R. and M.M. entered the kitchen and found E.P. lying on his stomach on the floor, shot in the head, with "blood everywhere."

J.R., M.M., and X.T. left and drove to a nearby police station to report the incident. While at the station, J.R. and M.M. told police that they knew one of the men who broke into their home as "Hood," but did not know his actual name, and did not recognize either of the other intruders. They also advised police that their friend, E.P., was shot. J.R. and M.M. agreed not to advise the police that "Hood" visited the apartment earlier in the day to buy marijuana, so that information was omitted in their initial statements. Upon their report, police officers were dispatched to the apartment.

When the officers arrived at the apartment, they discovered E.P. lying on his back on the kitchen floor, unresponsive and

bleeding profusely from a gunshot wound to the head. E.P. was alive, and "gurgling on his blood." E.P. was later pronounced dead by EMTs summoned to the scene. The autopsy confirmed that E.P. died of a gunshot to the top of his head. The medical examiner ruled the manner of death a homicide.

On the morning of January 6, 2009, police were called to an address on Parker Street in Newark, where a lifeless body was discovered. The body, identified as Dunn, was found in front of a van parked in a residence's driveway. The autopsy revealed that Dunn was shot twice – once in the top of the head, and once in the left side of the face. The medical examiner ruled the manner of death a homicide. The day after Dunn's body was discovered, police showed J.R. a photo of Dunn, whom he identified as a participant in the robbery.

Sometime in January 2009, defendant went to South Carolina to stay with Mulligan who had known defendant since childhood and continued telephone contact with him into adulthood. Defendant admitted to Mulligan that he fled New Jersey because he was in trouble for "two homicides." The two had "a couple" of conversations during which defendant discussed his involvement with the two crimes. Defendant described to Mulligan the incident when he purchased marijuana at someone's apartment and then returned to "rob the place" with two others. Defendant told

Mulligan that he held the drug dealer at gunpoint while searching for "money and weed," which he then took. Defendant also related that one of participants in the robbery shot and killed a man who was in the apartment. Defendant said he asked him why he did that, and he replied, "I thought you told me to leave 'em," which Mulligan explained meant "kill 'em." Defendant told Mulligan that he intended to shoot the drug dealer, but his gun misfired.

Defendant told Mulligan that after the robbery he decided he had to "whack," or "kill," the man who shot someone. Defendant told Mulligan he asked this individual to commit another robbery with him on January 5, 2009. Defendant drove with this individual to the location where the invented crime would take place, and then defendant "shot him in the head and left him in the bushes."

Mulligan asked defendant to leave because his landlord had discovered someone was staying there who was not on the lease, and because Mulligan, who was "already a fugitive," did not want to be involved with any murders. After Mulligan was later arrested, he advised law enforcement he had information implicating defendant in two homicides.⁶

⁶ At time of trial, Mulligan was incarcerated in federal prison on an unrelated charge of weapons possession.

Defendant was arrested on February 2, 2009. Police considered Dunn the second intruder in the robbery and the murder of E.P. The third participant was never located or identified.

On appeal, defendant raises the following arguments:

POINT I

SPARKS WAS DENIED HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY WHEN THE COURT FAILED TO CONDUCT A SUFFICIENT VOIR DIRE AND THEN DENIED THE MOTION FOR A MISTRIAL AFTER THE VICTIM'S SISTER SPOKE TO [PROSPECTIVE] MEMBERS OF THE JURY.

POINT II

LIEUTENANT PASTEUR'S TESTIMONY ABOUT THE CONTENT OF THE WITNESSES' STATEMENTS AND WHY HE CHOSE SPARKS' PHOTOGRAPH TO INCLUDE IN THE PHOTO ARRAYS WAS IMPERMISSIBLE HEARSAY AND HIGHLY PREJUDICIAL BECAUSE IT IMPLIED THAT PASTEUR POSSESSED ADDITIONAL INFORMATION, NOT ADMITTED AT TRIAL, INCULPATING SPARKS IN THE ROBBERY. (Not raised below)

POINT III

THE MOTION FOR JUDGMENT OF AQUITTAL ON SECOND-DEGREE AGGRAVATED ASSAULT SHOULD HAVE BEEN GRANTED BECAUSE THERE WAS NO EVIDENCE OF AN INTENT TO CAUSE SERIOUS BODILY INJURY.

POINT IV

THE COURT'S FAILURE TO TAILOR THE IDENTIFICATION INSTRUCTION DENIED SPARKS DUE PROCESS AND A FAIR TRIAL.

POINT V

FAILURE TO INSTRUCT THE JURY ON HOW TO EVALUATE THE DEFENDANT'S ORAL OUT-OF-COURT

STATEMENTS AND TO USE CAUTION IN SAID EVALUATION DENIED SPARKS DUE PROCESS AND A FAIR TRIAL. (Not raised below)

POINT VI

THE CUMULATIVE IMPACT OF THE ERRORS DENIED SPARKS A FAIR TRIAL. (Not raised below)

POINT VII

RESENTENCING IS REQUIRED BECAUSE THE COURT BASED ITS FINDING OF AGGRAVATING FACTORS ON IMPERMISSIBLE GROUNDS, IMPROPERLY IMPOSED CONSECUTIVE SENTENCES, AND IMPOSED A MANIFESTLY EXCESSIVE AGGREGATE SENTENCE OF [FIFTY-SEVEN] YEARS IMPRISONMENT.

A. The court improperly found aggravating factors one and two based on aggravating factors that were not personal to him, and by double-counting the elements of the crimes.

B. The court improperly based aggravating factor three on Sparks' "failure" to admit responsibility for the crimes.

C. Imposition of a consecutive sentence on the weapons conviction was not supported by the record and double-counted the elements of the offenses.

D. The court did not properly assess the real-time consequences of the imposed sentence.

E. The fifty-seven-year aggregate sentence with a forty-six-year

period of parole ineligibility is manifestly excessive.⁷

I.

Defendant argues that the court erred by failing to question prospective jurors individually, and by denying his motion for a mistrial, after it was revealed that C.L., Dunn's sister, spoke to potential jurors in the hallway outside the courtroom during a break. Defendant asserts that the communications between C.L. and prospective jurors had the capacity to prejudice them against him.

"An appellate court reviews the trial court's jury-related decisions under the abuse of discretion standard." State v. Brown, 442 N.J. Super. 154, 182 (App. Div. 2015) (citing State v. R.D., 169 N.J. 551, 559 (2001)). "This standard respects the trial court's unique perspective[,]" while showing "traditional deference" to the court in "exercising control over matters pertaining to the jury." Ibid.

The test for determining whether any alleged outside influence on a jury merits a mistrial is whether it "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge."

⁷ Defendant filed a supplemental pro se brief that raised essentially the same arguments except for the argument that the court should have conducted a hearing regarding his statement to J.R. that if J.R. "had a problem with" what happened, he "knew where to find him." We address this argument below.

R.D., 169 N.J. supra, at 558. The inquiry is not whether the extraneous influence actually affected the result, but whether it had the capacity to do so. Id. at 590. If the record does not establish whether an irregularity was prejudicial, it is presumed to be so unless it is affirmatively shown to have no tendency to influence the verdict. State v. Grant, 254 N.J. Super. 571, 584 (App. Div. 1992). The burden is upon the State to establish that the outside influence "was harmless to the defendant." State v. Scherzer, 301 N.J. Super. 363, 487 (App. Div. 1997) (citations omitted).

"The decision to grant a new trial based on jury taint resides in the discretion of the trial court[.]" R.D., supra, 169 N.J. at 558. A new trial is not warranted in every instance where it appears that a juror has been exposed to outside influence. Id. at 559.

On February 22, 2012, following a break during the jury selection process, the assistant prosecutor informed the court that he was advised by C.L. that, while waiting in the hallway in the presence of prospective jurors, she engaged in a conversation with a prospective juror. Upon receiving this information, the court interviewed C.L. outside any potential jurors' presence. C.L. reported that she approached a female juror, identified herself as a victim's sister, and asked, "what had happened thus

far" in the case. The juror responded that the charges had been read. A male juror sitting on the floor nearby "apologized for [her] loss" as he overheard C.L.'s conversation. C.L. did not tell these prospective jurors the name of the victim to whom she was related.

The court asked C.L. to describe the woman and man. Based on these descriptions, the court requested that two sheriff's officers go into the hallway and attempt to locate them. The man was found, but the woman C.L. described by race, gender, and clothing was not.

The court questioned the male prospective juror who stated that he overheard C.L. talking to a woman and saying she lost her brother. The juror said that C.L. spoke in a "very low" voice and that he had overheard because he "just happened to be right next to her." The juror could not identify the woman spoken to by C.L. Following this interview, the court excused the juror from service.

The court brought the remaining prospective jurors into the courtroom, and asked if any of them "participate[d] in a conversation out in the hall with someone seeming to have some connection to the facts in this case, or to [the] case." No jurors responded. The court next asked if they "happen[ed] to overhear a conversation between someone claiming to have some connection to [the] case and another juror." Again, no jurors responded.

The court then described the male juror's appearance, and asked more specifically whether any of the jurors had overheard "any conversation that man was having with anybody whom [they] thought, based on what [they] heard or observed, had some connection to [the] case." Once more, there were no responses.

The court asked a sheriff's officer to escort C.L. through the courtroom and out the door, in view of the prospective jurors. The judge asked the jurors whether they had observed C.L. while they were waiting in the hallway, and whether they had overheard or participated in a conversation with her. One juror raised her hand, and was brought to sidebar to be interviewed. This juror stated that C.L. asked her if she was "in this courtroom with Judge Ravin" and whether she had seen "the lawyers." C.L. identified herself as a relative of a victim, and the juror told her that she could not speak to her. After that, C.L. "went over and sat down." The juror did not pay any further attention to C.L., and did not discuss the conversation with any other jurors. The court excused her.

Defendant moved for a mistrial. The court stated that he did not "know any reason, based upon the record that we have now, to disqualify this entire jury," since both interviewed jurors were excused. The court then asked the jurors whether, "between the time [they] first got sent up to [the] courtroom for [the] trial

and this point right here," there was "anything that would interfere with [their] ability to be a fair and impartial juror in the case." When no jurors responded, the court denied the motion.

Under R.D., supra, 169 N.J. at 558-61, the court has discretion to decide, after interrogating the jurors, whether it is necessary to individually voir dire the remaining members of the prospective jury panel. We discern no abuse of discretion in this judge's inquiry into C.L.'s conversation and his denial of a mistrial. There was no basis for the judge to have granted defendant's motion once the only two affected jurors were excused.

II.

Defendant next argues, for the first time on appeal, that the court erred by allowing Detective Pasteur to testify regarding statements made to him by J.R. and M.M. during a "pre-interview" prior to their recorded statements. Defendant also challenges the admissibility of the detective's testimony that he attempted to pair the street name "Hood" with a specific person, which led to the inclusion of defendant's picture in photo arrays presented to J.R. and M.M. Defendant contends that this testimony constituted improper hearsay as it suggested to the jury the detective was in possession of information not included in the record indicative of his guilt. See State v. Bankston, 63 N.J. 263 (1973).

As defendant failed to object to this testimony during trial, we evaluate the argument under the plain error standard. State v. Adams, 194 N.J. 186, 206 (2008) (citing R. 2:10-2). We must determine whether the court's admission of this testimony was "clearly capable of producing an unjust result[.]" R. 2:10-2. Having considered this argument in light of the record and our standard of review, we conclude that the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following.

The detective testified that after the pre-interviews, he would take formal statements. Notably, J.R. and M.M. both testified at trial and were subjected to rigorous cross-examination concerning their identifications of defendant and their statements to police. The cross-examination included reference to discrepancies between those statements and their trial testimony. We are satisfied that defendant's right to confront the adversarial State witnesses was neither implicated nor violated.

III.

Defendant also argues that the court erred in denying his motion for judgment of acquittal on the charge of aggravated assault because the State failed to present sufficient evidence

to establish that he intended to cause serious bodily harm to J.R. when he struck him in the face with a gun.

Per Rule 3:18-1, at the close of the State's case or after all parties' evidence is presented, a court shall, either on the defendant's motion or sua sponte, order the entry of a judgment of acquittal on an offense charged in the indictment if the evidence is insufficient to warrant a conviction. The test for deciding a defendant's motion for acquittal is:

whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

[State v. Reyes, 50 N.J. 454, 459 (1967)
(citation omitted).]

This analysis "governs not only the trial judge's consideration of the motion, but also appellate review of his [or her] ruling." State v. Moffa, 42 N.J. 258, 263 (1964) (citing State v. Fiorello, 36 N.J. 80, 90 (1961)).

Following the close of the State's case, defendant moved for both a judgment of acquittal regarding the knowing and purposeful murder of E.P., which the court granted, and the aggravated assault against J.R., which the court denied. In denying the motion, the court found that while the State conceded that no serious bodily

injury resulted from J.R. being struck with a gun, the issue "should go to the jury as to whether or not [there was an] attempt to cause serious bodily injury[.]"⁸

We find no error in the court's denial of defendant's motion for acquittal. There was evidence that defendant struck J.R. in the head with a heavy metal object, a handgun. Although defendant did not cause serious bodily injury to J.R., the conduct had the capacity to inflict such injury. Further, there was evidence in the record from Mulligan's testimony that defendant told him that as he fled the crime scene, he attempted to shoot J.R. but could not because his gun jammed. Giving the State the benefit of all reasonable inferences, the evidence was sufficient for a jury to find beyond a reasonable doubt that defendant's purpose was to harm J.R. in a serious and significant manner or to kill him in the course of the home invasion.

IV.

Defendant also argues that the court erred by refusing to include three factors relevant to determining the reliability of

⁸ The court charged the lesser included third-degree offense of purposeful or knowing bodily injury with a deadly weapon under N.J.S.A. 2C:12-1(b)(2) when it instructed the jury on aggravated assault, along with the original offense of aggravated assault by attempting to cause serious bodily injury under N.J.S.A. 2C:12-1(b)(1). The jury found defendant guilty of second-degree aggravated assault under N.J.S.A. 2C:12-1(b)(1).

eyewitness identifications in its jury instruction. Specifically, the court should have instructed the jury on the impact of stress, the presence of a weapon, and the bandanas hiding the assailants' faces. These factors were identified by the Supreme Court in State v. Henderson, 208 N.J. 208, 296-99 (2011), and are now a part of the jury instruction on eyewitness identification. See Model Jury Charge (Criminal), "Identification: Out-of-Court Identification Only" (2012). These additions to the charge had not yet been approved at the time of defendant's trial. Nevertheless, defendant contends that the factors should have been included because the jury instruction in effect at the time required tailoring the charge to the facts of the particular case, and these factors were "appropriate" and "relevant."

Correct and adequate jury instructions are "essential for a fair trial[,]" and "erroneous instructions on material points are presumed to be reversible error." State v. Martin, 119 N.J. 2, 15 (1990) (citations omitted). However, an appellant must show that there was a reasonable doubt as to whether the error in an instruction "led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). A reviewing court must determine whether an alleged error was "harmless[,]" or whether there was a "possibility that it led to an unjust verdict." State v. Bankston, 63 N.J. 263, 273 (1973).

In crafting its jury instructions, a court may utilize the model criminal jury charges, which are often "helpful" for this purpose. State v. Concepcion, 111 N.J. 373, 379 (1988). However, a court should also mold its instruction "in a manner that explains the law to the jury in the context of the material facts of the case." Ibid.

The Henderson Court set forth requirements for police in administering identification procedures and for courts in analyzing proffered evidence at an admissibility hearing. The Court stated that if eyewitness identification evidence is admitted, the court should give "enhanced instructions" to "guide juries about the various factors that may affect the reliability of an identification in a particular case." Henderson, supra, 208 N.J. at 296. The Court directed the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft revisions to the existing jury instruction on eyewitness identification, and to present them to the Court "for review before they are implemented." Id. at 298.

The Court also performed a retroactivity analysis, and decided to apply its ruling "to future cases only," aside from the case then before it and one companion case. Id. at 302. The Court stated that the requirements it had set forth would take

effect "thirty days from the date this Court approves new model jury charges on eyewitness identification." Ibid.

Defendant argues that the court erred by not instructing the jury to consider certain factors set forth in the new jury instruction created in accordance with Henderson. During a colloquy concerning the court's proposed instructions, defense counsel acknowledged that the Henderson model charges had not yet been approved, but requested that factors discussed in Henderson, included in a draft of the model, be inserted into the charge. The trial court asked counsel to draft an instruction.

The court reviewed defendant's proposed instruction on eyewitness identification, and held that it would not "charge consistent with Henderson" because the Supreme Court had not yet adopted the draft jury charge. The court then gave defense counsel an opportunity to draft a suggested charge that "comment[ed] on the evidence itself."

Following a recess, the court stated that the parties had agreed that:

rather than having the jury charge on identification contain any references to the evidence itself, the parties prefer that . . . the judge not comment on the specific evidence in the jury charge, and . . . will leave themselves to their own devices in summations to comment on the evidence as they see it concerning the subject of identification.

However, the judge noted that defendant's objection to his refusal to charge in accordance with Henderson remained unresolved, and "may or may not be a subject for [a] reviewing tribunal to consider."

The court commenced its instruction on eyewitness identification with J.R. and M.M.'s descriptions of defendant as one of the individuals who broke into their apartment. The court instructed the jury that it must determine whether these identifications were "reliable and believable," or "based on a mistake, or for any reason . . . not worthy of belief." The court further instructed the jury to consider "the observations and perceptions on which each identification was made," as well as the circumstances under which the identifications were made.

The court informed the jury that:

[a]lthough nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence standing alone may not be an indication of the reliability of the identification.

The court further instructed the jurors from the model jury instructions then in effect regarding their evaluation of the credibility of the identification of defendant. The court listed the factors for consideration as to police administration of an

identification proceeding, consistent with the jury instruction in effect at the time of trial. Model Jury Charge (Criminal), "Identification: Out-of-Court Identification" (2007).

The instruction concluded with a reminder that unless the identifications resulted "from the witness's observations or perception of the perpetrator during the commission of the offense," they "should be afforded no weight." The court told the jurors that the ultimate issue of the trustworthiness of the identifications was for them to decide.

We find no error in the court's refusal to instruct on the Henderson factors defendant offered in his proposed charge. They were not required to be charged at the time of the trial. Thus, it was not error to issue an instruction in accord with the existing jury charge.

Defendant's argument that the court's instruction was not properly tailored to the facts of the case under the existing jury instruction because it did not include the three Henderson factors requested is without merit. Here, the court described the circumstances under which J.R. and M.M. made their identifications, repeatedly advised jurors that identifications may be unreliable, stated the factors listed in the then-applicable model charge, and explained the jurors' role in determining the credibility of the witness' identifications. That the court did

not specifically address the potential effects of stress, weapons, or disguises on identifications did not render the instruction insufficient as the testimonial record was replete with those factors. We find no basis to conclude that the jurors disregarded those factors in reaching their verdict. Moreover, the parties agreed that the instruction should not comment more specifically on the evidence, in contravention to defendant's assertion on appeal. See State v. Harper, 128 N.J. Super. 270, 277 (App. Div.) (invited error not a basis for reversal on appeal), certif. denied, 65 N.J. 574 (1974).

v.

Defendant further argues for the first time on appeal that the court erred by failing to issue jury instructions regarding the evaluation of defendant's out-of-court statements to J.R. and Mulligan in accordance with State v. Hampton, 61 N.J. 250 (1972), and State v. Kociolek, 23 N.J. 400 (1957). Defendant specifically contends that the court should have instructed the jury regarding his statement that if J.R. "had a problem with" what happened, he "knew where to find him." Defendant also argues that the instructions should have been given by the court sua sponte regarding his statements to Mulligan about his involvement with the robbery and murder and the later murder of Dunn. According to defendant, in the absence of the instructions, the jury was

left uninformed as to the method for assessing the credibility, reliability, and weight to be given to his alleged statements.

Defendant did not request either a Hampton or Kociolek charge, and did not object to the omission of such instructions. This argument, therefore, must also be evaluated under the plain error standard. Adams, supra, 194 N.J. at 206.

In Hampton, supra, 61 N.J. at 272, the Court held that when determining the admissibility of an out-of-court statement by a defendant, a trial court must evaluate whether Miranda⁹ warnings were given, whether the defendant waived his or her rights, and whether the statement was given voluntarily in light of all the circumstances.¹⁰

In State v. Baldwin, 296 N.J. Super. 391, 397 (App. Div.), certif. denied, 149 N.J. 143 (1997), we clarified that the Hampton instruction is required only "where there has been a pre-trial hearing involving the admissibility of [a] statement on the grounds of an alleged violation of the defendant's Miranda rights or involuntariness." This court noted that "every case in which we have concluded that a Hampton instruction was required involved a

⁹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

¹⁰ The Hampton holding is now codified in N.J.R.E. 104(c).

defendant's statement made while in police custody." Id. at 399 (citations omitted). As defendant's statements were not made to police in a custodial situation, there was no error in the court's omission of a Hampton instruction.

In Kociolek, supra, 23 N.J. at 421, the Court held that the trial court erred in refusing to charge the jury that it should "receive, weigh and consider" testimony by a witness recalling a statement the defendant allegedly made "with caution, in view of the generally recognized risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer." The Court stated that the "antidote" to the "general distrust" of testimony reporting extrajudicial oral statements by an accused is "an instruction to the jury against trusting overmuch the accuracy of such testimony." Ibid.

Since the focus is upon the oral nature of the statements rather than upon police custody, a court should instruct consistent with Kociolek wherever an alleged inculpatory statement "was oral and there is a genuine issue regarding its precise contents." Baldwin, supra, 296 N.J. Super. at 401. In such an instance, the jury should be cautioned with respect to "the risk that the hearer misunderstood or inaccurately recalled the statement." Ibid.

The absence of the charge "must be viewed within the factual context of the case and the charge as a whole." State v. Crumb, 307 N.J. Super. 204, 251 (App. Div. 1997) (finding no plain error where the trial court gave a lengthy, general instruction on evaluating witness credibility), certif. denied, 153 N.J. 215 (1998). See also State v. Harris, 156 N.J. 122, 183 (1998) (finding no plain error where "devastating cross-examination" accomplished the purpose of casting a skeptical eye on witness testimony as to defendant's alleged inculpatory statements), cert. denied, 532 U.S. 1057, 121 S. Ct. 2204, 149 L. Ed. 2d 1034 (2001); State v. Jordan, 147 N.J. 409, 426-28 (1997) (finding no plain error where there was substantial additional evidence of defendant's guilt apart from witness testimony as to alleged inculpatory statements).

Here, the court provided an instruction on evaluating the credibility of witnesses. The charge included instruction as to a witness's demeanor; interest in the outcome of trial, if any; means of obtaining knowledge of the facts; apparent biases, and inconsistencies in testifying, if any, among others. The court instructed the jurors that different witnesses may see or hear an incident differently, and cautioned that sometimes witnesses may "mis-recollect" events. The court also instructed that the jury could consider Mulligan's prior crimes and potential interests in

the outcome of the case when deciding whether he was a credible witness.

We conclude that the instructions given were sufficient. There was compelling evidence of defendant's guilt outside of Mulligan's testimony, including J.R. and M.M.'s testimony as to identity who, along with Mulligan, were subjected to rigorous cross-examination by defense counsel. In light of the above, we conclude the failure to provide the Kociolek charge, even if error, did not produce an unjust result. See R. 2:10-2.

Defendant argues for the first time in his pro se supplemental brief that the court erred by failing to make a preliminary determination as to the admissibility of his out-of-court statement to J.R. that he "knew where to find him." Since defendant did not request a hearing on the admissibility of this statement, we conclude the argument lacks sufficient merit to warrant further discussion. R. 2:11-3(e)(2).¹¹

¹¹ It is uncertain whether defendant's statement would have been subjected to a 104(c) hearing even if requested. See State v. Gorrell, 297 N.J. Super. 142, 152 (App. Div. 1996) (hearing required to consider admissibility of adoptive admission); State v. Huff, 292 N.J. Super. 185, 191-92 n.2 (App. Div. 1996) (no hearing required to consider admissibility of defendant's statement during robbery to victim, "I have a gun here."), aff'd o.b., 148 N.J. 78 (1997); State v. Baldwin, 296 N.J. Super. 391, 398-99 (App. Div.) (statements made to non-police witnesses may be admitted without a 104(c) hearing), certif. denied, 149 N.J. 143 (1997).

VI.

Defendant also argues for the first time on appeal that the court's instruction on the crime of endangering the welfare of a child and on the crime of burglary was erroneous. Concerning the endangering charge, defendant argues that the judge should have defined "harm or abuse." The record reflects that this language was considered by the court, but that both parties "advocate[d]" that nothing defining harm was necessary, and that both believed the jury should "determine for itself" whether what allegedly happened to X.T. caused him harm, "per the meaning of that in the statute." See Harper, supra, 128 N.J. Super. at 277 (invited error not a basis for reversal on appeal).

Defendant's argument that the instruction on burglary was insufficient is similarly without merit. In its instruction of burglary, the court provided the elements of the crime and the State's burden to prove beyond a reasonable doubt each of those elements.

VII.

Defendant argues that even if none of the above-alleged errors individually requires reversal of his convictions, taken together they have cumulatively denied him a fair trial. Having concluded none of the claims of error have any merit, we conclude this

argument is also without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

VIII.

We next turn to defendant's arguments relating to the sentence. Defendant contends that the court erred by applying aggravating factors one and two based upon the actions of his co-robber, and that the court double counted elements of his crimes when imposing these factors. He further argues that the court erred in basing its application of aggravating factor three upon his lack of expressed remorse. Defendant also challenges the court's imposition of a consecutive sentence for possession of a weapon without a permit. Defendant argues the court did not properly assess the real-time consequences of the sentence when stating that the aggregate sentence imposed involved a period of parole ineligibility of forty-five years and six months, while the correct total was forty-six years. Finally, defendant argues that his sentence is manifestly excessive.

"Appellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). A trial court enjoys "considerable discretion in sentencing." State v. Blann, 429 N.J. Super. 220, 226 (App. Div. 2013) (citing State v. Dalziel, 192 N.J. 494, 500 (2005)), rev'd on other grounds, 217 N.J. 517 (2014).

An appellate court first "must determine whether the sentencing court followed the applicable sentencing guidelines." State v. Natale, 184 N.J. 458, 489 (2005) (citing State v. Roth, 95 N.J. 334 364-65 (1984)). The Code of Criminal Justice categorizes crimes by degree, and "each degree contains a range within which a defendant may be sentenced." State v. Case, 220 N.J. 49, 63 (2014) (citing N.J.S.A. 2C:43-6(a)).

Here, defendant was convicted of felony murder under N.J.S.A. 2C:11-3(a)(3). Under N.J.S.A. 2C:11-3(b)(1), a person convicted of this crime shall be sentenced to a term of thirty years without parole, or to "a specific term of years which shall be between [thirty] years and life imprisonment of which the person shall serve [thirty] years before being eligible for parole." The court sentenced defendant to fifty years.

Defendant was also convicted of armed robbery, graded as a crime of the first degree pursuant to N.J.S.A. 2C:15-1(b). Pursuant to N.J.S.A. 2C:43-6(a)(1), the court could sentence defendant to a term "between ten years and twenty years" for this crime. It sentenced him to twenty years. For defendant's convictions of second-degree aggravated assault pursuant to N.J.S.A. 2C:12-1(b)(2) and second-degree unlawful possession of a weapon pursuant to N.J.S.A. 2C:39-5(b), the court could sentence him to terms "between five years and ten years." N.J.S.A. 2C:43-

6(a)(2). He was sentenced to seven years for each of these crimes. Finally, for defendant's conviction of third-degree endangering the welfare of a child pursuant to N.J.S.A. 2C:24-4(a), the court could sentence him to a term "between three years and five years." N.J.S.A. 2C:43-6(a)(3). Defendant's sentence for this crime was four years. Defendant's sentences for each count were within the statutory ranges.

A reviewing court must ensure that any aggravating factors found by the trial judge pursuant to N.J.S.A. 2C:44-1 are based upon sufficient credible evidence in the record. State v. Miller, 205 N.J. 109, 127 (2011). If they are, the sentence must be affirmed even if the reviewing court would have reached another result. State v. O'Donnell, 117 N.J. 210, 215 (1989) (citations omitted). However, an appellate court may remand for resentencing where the trial court "considers an aggravating factor that is inappropriate to a particular defendant or to the offense at issue." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. Pineda, 119 N.J. 621, 628 (1990)).

The court considered each statutory aggravating factor and their application count by count. The court found that aggravating factor one, "the nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner,"

applied to the armed robbery, aggravated assault, and child endangerment offenses. N.J.S.A. 2C:44-1(a)(1). The court found that aggravating factor two, "the gravity and seriousness of harm inflicted on the victim," applied solely to the robbery conviction. N.J.S.A. 2C:44-1(a)(2). The court held that these two factors would not apply to the felony murder offense since defendant was "not vicariously liable for aggravating factors that are not personal to him," and he did not murder E.P.

When assessing factors one and two, a court "must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Fuentes, supra, 217 N.J. at 74-75 (citations omitted). In a homicide case, it is not an aggravating factor that a life was lost or in a robbery case that property was taken. State v. Martelli, 201 N.J. Super. 378, 386 (App. Div. 1985).

A court may justify a finding of aggravating factor one without double-counting "by refer[ring] to the extraordinary brutality involved in an offense." Fuentes, supra, 217 N.J. at 75. For example, a court may apply this factor where it finds that a defendant intended to harm his or her victim "in a particular manner" that "maximized the victim's pain." O'Donnell, supra, 117 N.J. at 217-18. To impose aggravating factor two without double-counting, a sentencing court must assess "the totality of harm inflicted by the offender on the victim," with

the goal that defendants who purposely or recklessly inflict more substantial harm receive more severe sentences than others do. State v. Kromphold, 162 N.J. 345, 358 (2000). A wide variety of physical and psychological harms may support a finding of this aggravating factor. Id. at 357.

Here, when applying aggravating factor one to the robbery charge, the court found that defendant's conduct in carrying out this offense "went well beyond the minimum elements of first-degree robbery[.]" He considered defendant's separation of the four victims during the break-in, his striking of J.R. with a pistol, the killing of E.P., and the pointing of a gun at M.M. and X.T. as "wholly unnecessary" to the commission of that crime. The court also considered evidence that defendant played "some leadership role" in the robbery. The court gave "some weight" to defendant's role in the robbery offense, and more weight to the "nature of the offense" aspect of aggravating factor one.

The court also found that aggravating factor two applied to the robbery based on the slaying of E.P. However, the court placed "limited weight" on this aggravating factor, because defendant did not purposely or recklessly cause E.P.'s death, and there was no indication that J.R. was "seriously or gravely harmed" during the robbery.

As to the aggravated assault, the court found that factor one applied in that there was "an element of cruelty in defendant's choice to pistol-whip [J.R.]," since defendant appeared to inflict this pain "as an end in itself." The court stated that the "threat of the gun was enough to commit the aggravated assault," and that the pistol-whipping "went beyond those bounds." Notwithstanding, the court found that this action by defendant was not heinous enough to warrant a high-end sentence "on this aggravating factor alone" and gave the factor "limited weight."

Regarding the child endangerment charge, the court found that aggravating factor one applied, because X.T. was harmed "beyond the minimum elements needed to convict defendant" of this crime. The judge stated that defendant exposed X.T. to an armed robbery, and that in the course of the crime, a gun was pointed at this "innocent child," which made the offense "ever so more 'depraved.'" However, the court found that because no physical harm came to X.T., the aggravating factor should be given "limited" weight.

Defendant argues that the court erred by applying factors one and two to these offenses based upon the death of E.P., because he was not personally responsible for that death. He argues that the court also erred in applying factor one to the child endangerment offense because he did not personally point a gun at X.T. He further asserts that the court impermissibly double-

counted the hitting of J.R. with a gun when applying factor one to the assault, because to convict on second-degree aggravated assault, there needed to be a finding that he attempted to cause serious bodily harm to J.R., not just that he threatened him with a gun.

It is well-recognized that "[a]ppellate review of the length of a sentence is limited." Miller, supra, 205 N.J. at 127. We assess whether the aggravating and mitigating factors "were based upon the competent credible evidence in the record." Ibid. (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)). We do not "substitute [our] assessment of aggravating and mitigating factors' for the trial court's judgment." Ibid. When the judge has followed the sentencing guidelines, and the findings of aggravating and mitigating factors are supported by the record, we will only reverse if the sentence "shocks the judicial conscience" in light of the particular facts of the case. Roth, supra, 95 N.J. at 364; accord State v. Cassidy, 198 N.J. 165, 183-84 (2009).

The Court recently noted that "[w]hen applying [factor one], the sentencing court reviews the severity of the defendant's crime, the single most important factor in the sentencing process, assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public." Fuentes, supra,

217 N.J. at 74 (internal quotation marks omitted). "[A] sentencing court may justify the application of aggravating factor one . . . by reference to the extraordinary brutality involved in an offense." Id. at 75 (emphasis omitted). "A sentencing court may consider aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior." Ibid. (alteration in original) (citations and internal quotation marks omitted).

Here, the court's basis for applying this factor was premised upon detailed findings regarding the heinous nature of defendant's conduct. Those findings fully support the judge's conclusion that aggravating factor one applied.

Aggravating factor two "is normally considered jointly with the nature of the offense under [aggravating factor one]." Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:44-1 (2015). In State v. Soto, 340 N.J. Super. 47, 72 (App. Div.), certif. denied, 170 N.J. 209 (2001), we recognized that "the brutal circumstances surrounding the victim's suffering[,]" fully justified the finding of aggravating factor two. Here, the court found aggravating factor two was applicable due to the "death of E.P.," but gave it limited weight. Even were we to conclude that this aggravating factor was inapplicable, we perceive no impact stemming from this factor upon the overall sentence imposed, and

would regard any error as harmless. State v. Gallagher, 286 N.J. Super. 1, 21 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

Concerning defendant's remaining arguments regarding the applicability of aggravating factors three and nine, the court's findings are amply supported by the record. The court carefully considered the totality of the circumstances in making determinations regarding those aggravating sentencing factors and there is no basis to support a finding of error.

Finally, defendant argues that the court erred in imposing a sentence for unlawful possession of a weapon that runs consecutive to the sentences on his other offenses. Defendant asserts that the weapon possession crime had the same objective as the crimes during which that weapon was used, and that a consecutive sentence was improper. He also argues that the court's finding that the threat of violence associated with his possession of a weapon justified a consecutive sentence constituted impermissible double-counting of an element of the crime of robbery.

N.J.S.A. 2C:44-5(a) provides that when multiple sentences of imprisonment are imposed on a defendant for more than one offense, these sentences "shall run concurrently or consecutively as the court determines at the time of sentence." The statute gives no further guidance on how a court may decide whether to impose consecutive sentences, but states that there "shall be no overall

outer limit on the cumulation of consecutive sentences for multiple offenses." Ibid. Under this statute, a court may decide, in its discretion, to impose any number of consecutive sentences.

In State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), the Supreme Court set forth certain criteria for sentencing courts to consider when determining whether to impose consecutive sentences for a set of crimes. If a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not usually be disturbed on appeal. Miller, supra, 205 N.J. at 129.

The "no free crimes" guideline stated in Yarbough factor one "does not require the court automatically to impose consecutive sentences for multiple offenses." State v. Rogers, 124 N.J. 113, 121 (1991). Instead, the sentencing court must consider all of the Yarbough guidelines, with special emphasis placed on the five subparts to the third guideline. Ibid. These subparts should be applied qualitatively, not quantitatively, and consecutive sentences may be imposed even though a majority of the subparts support concurrent sentences. State v. Carey, 168 N.J. 413, 427 (2001).

In State v. Copling, 326 N.J. Super. 417, 440-42 (App. Div. 1999), certif. denied, 164 N.J. 189 (2000), the trial court imposed

a term for an unlawful possession of a weapon offense that was to run consecutive to the defendant's sentences for murder and manslaughter. The trial court reasoned that the objectives of the weapon possession and homicides were different, and the victims were different; the homicide victims were two individual men, while the weapon possession's victim was "society as a whole." Id. at 441. We held that the imposition of consecutive sentences on that basis was "unreasonable[,]" because the two homicide victims were actually "part of the group of victims in society whom the possessions statute sought to protect." Id. at 442. Further, the purposes of the statutes circumscribing murder, manslaughter, and possession of a weapon without a permit were "similar," in that all have an "ultimate goal" of "protect[ing] others from being killed by those who own weapons." Id. at 441. As a result, we remanded for resentencing on the weapon possession conviction, for the trial court to amend the sentence to run concurrently with the others. Id. at 442.

Here, the court evaluated the Yarbough factors as to all of defendant's crimes, but concluded that only the weapons possession sentence should run consecutively to the others. The court found that defendant's unlawful possession of a weapon had a separate objective from the other crimes, namely, "to come into possession of an unregistered firearm." The court stated that the unlawful

possession constituted a threat of violence separate from the violence manifested by the other crimes, "even though the gun was eventually used to commit these crimes."

In applying Yarbough, the court found that the unlawful possession offense occurred at a different time and separate place than the other crimes, because defendant "necessarily" came into possession of the handgun before committing the other crimes. The court further found that defendant had been convicted of crimes, including the weapons possession, that harmed three separate victims – J.R., E.P., and X.T. – who were also each harmed in distinct and different ways. Defendant's convictions were "numerous," and he would be sentenced "on five different indictable convictions."

The court's rationale here for imposing a consecutive sentence is similar to the rationale we rejected in Copling. The statutes prohibiting unlawful possession of a weapon have similar objectives to the statutes against robbery, murder, aggravated assault, and child endangerment: to protect the public from unscrupulous owners of weapons. Although in this case defendant's violent crimes affected multiple victims, in applying Copling, we find the victims fell within the larger societal group intended to be protected by the weapons possession statute. Predicated upon this determination, the conviction for the unlawful

possession must be served concurrently. We are constrained, therefore, to remand for re-imposition of this aspect of the sentence.

Finally, we hold that defendant's remaining arguments regarding the real-time consequences of NERA and that the sentence was manifestly excessive are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2). With the exception of our ruling resulting in the remand, we affirm both the conviction and the sentence.

Affirmed in part. Reversed in part, and remanded for resentencing. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION