SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5429-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IBNMAURIC ANTHONY, a/k/a
IBNMAURICE ANTHONY and
IBNMAURICE RASHA ANTHONY,

Defendant-Appellant.

Submitted March 22, 2017 – Decided April 5, 2017

Before Judges Alvarez and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-06-1300.

Joseph E. Krakora, Public Defender, attorney for appellant (Lauren S. Michaels, Assistant Deputy Public Defender, of counsel and on the brief).

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

PER CURIAM

Tried to a jury, defendant was convicted of second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2, 2C:15-1(b) (Count One); first-degree armed robbery, N.J.S.A. 2C:15-1 (Count Two); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (Count Three); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count Four). After merging Counts One and Four with Count Two, the court sentenced defendant on Count Two to seventeen years imprisonment with an eighty-five percent parole disqualifier and five years parole supervision pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On Count Three, defendant was sentenced to a concurrent term of nine years imprisonment with a four-and-one-half year parole disqualifier. All mandatory penalties and assessments were also imposed.

On appeal, defendant argues:

> POINT I
>
> THE DETECTIVE'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF STATE V. DELGADO DURING THE IDENTIFICATION PROCEDURE REQUIRES REVERSAL, AND THE FAILURE TO INSTRUCT THE JURY ABOUT THE DELGADO VIOLATION WAS PLAIN ERROR. [(PARTIALLY RAISED BELOW)]
>
> POINT II
>
> THE COURT VIOLATED DEFENDANT'S RIGHTS TO CONFRONTATION, DUE PROCESS AND TO PRESENT A DEFENSE BY PRECLUDING HIM FROM PRESENTING

EVIDENCE OF A SPECIFIC INCIDENT OF THE COMPLAINANT'S UNTRUTHFULNESS.

POINT III

WHEN THE JURY REQUESTED A PLAYBACK OF THE VICTIM'S TESTIMONY, IT WAS ERROR TO REPLAY ONLY HIS DIRECT TESTIMONY. [(NOT RAISED BELOW)]

POINT IV

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR REPEATEDLY TOLD THE JURY THAT THE DEFENSE INVESTIGATOR WAS LYING AND TRYING TO DECEIVE THEM. [(NOT RAISED BELOW)]

POINT V

THE CUMULATIVE EFFECT OF THE AFOREMENTIONED ERRORS DENIED DEFENDANT A FAIR TRIAL.

POINT VI

THE CASE MUST BE REMANDED FOR RESENTENCING BECAUSE THE JUDGE ERRED IN WEIGHING THE AGGRAVATING AND MITIGATING FACTORS, AND IN CONSIDERING THE "LACK OF REMORSE" OF A DEFENDANT WHO MAINTAINS HIS INNOCENCE.

We reject these arguments and affirm.

I.

Between two and three a.m. on December 18, 2012, an individual named Mr. Roberts returned to his Newark home and parked his car in his driveway. He was alone. As he got out of the car, he observed three young African-American men about three to five feet away from him. They approached him and prevented him from going into his house. The area was well lit by a nearby streetlight

with a halogen light mounted on top of it, as well as two overhead motion detector lights installed on Roberts' home. None of the men wore masks, and Roberts looked directly into all of their faces and saw them clearly.

One of the men demanded of Roberts: "Give me the money, M-F."[1] When Roberts said he did not have any money, the assailant who had addressed him pointed a revolver at his torso and demanded his wallet. Roberts complied, one of the other men examined the wallet, and confirmed it had no money inside. The third assailant, later identified as defendant, then demanded the keys to Roberts' car. Again, Roberts complied. At that time, Roberts was able to view defendant from a distance of about three-and-one-half feet and could see his face "very clearly." He observed that defendant looked to be in his twenties, was about five feet and eleven inches tall, and was wearing light-colored clothing.

Defendant took the keys, unlocked the car, and rifled through the glove compartment and looked under the front and rear seats. He found nothing of value. As defendant was doing this, the interior dome light of the car was lit, allowing Roberts to continue to observe defendant the entire time.

[1] At trial, Roberts testified, "I don't want to say the word, but that's what he said."

The first assailant, still armed with a revolver, then directed Roberts to face the car and kneel down. Roberts complied. The gunman put the gun to Roberts' head and said, "I ought to kill you." The three men began to back away from Roberts, directing him not to turn around. Defendant threw Roberts' car keys to the ground. Roberts then turned his head and was able to see the three men enter a gray vehicle and drive away. Roberts went into his house and told his wife what had just happened. He then immediately called the police.

Roberts accompanied the police to the station house and gave a formal statement, including his description of each of the assailants and of the events as we have summarized them above. He told the police he would be able to identify all three of the men because he had seen them so clearly and took note of their appearances. Roberts estimated that the episode lasted approximately seven to eight minutes.

Two days later, Newark Police Detective Pablo Gonzales called Roberts and asked him to come back to the station to look at a photo array. Gonzales had prepared the array, consisting of six young African-American men with dreadlocks, and generally similar in appearance. Defendant's picture was included in the array.

The photo array was displayed to Roberts by Detective Karima Hannibal, who had no prior connection with, or knowledge of, the

case. In the course of viewing the photographs in the array, Roberts selected defendant's photograph and identified him as the man who took his car keys and searched his car. These events led to the charges being brought against defendant. The identity of the other two assailants was never ascertained.

At trial, the State produced as witnesses Roberts, Newark Police Officer Dennis Rivera, and Detectives Gonzales and Hannibal. The State produced evidence of the out-of-court identification made by Roberts, and Roberts also made an in-court identification of defendant. Defendant did not testify, and the defense called only one witness, Investigator Louis Acevedo.

II.

In his first point, defendant presents a two-fold argument pertaining to asserted deficiencies related to the out-of-court identification procedure. He first argues that because the police failed to immediately record, as part of the record of the out-of-court identification procedure, in Roberts' own words, his statement of confidence upon identifying defendant's photograph, evidence of the out-of-court identification should have been inadmissible. Second, defendant contends that even if the out-of-court identification evidence was admissible, the court's failure to instruct the jury as to how that circumstance should be considered in evaluating the reliability of the identification

—— an instruction that defendant did not request —— constituted plain error. Under either argument, defendant contends his conviction must be reversed and that he is entitled to a new trial.

We first set forth the controlling legal principles. The admission of an unreliable out-of-court identification in a criminal trial constitutes a violation of the defendant's due process rights under the Fourteenth Amendment. See Manson v. Brathwaite, 432 U.S. 98, 106, 97 S. Ct. 2243, 2249, 53 L.Ed. 2d 140, 149 (1977). The framework for reliability determinations are now governed in New Jersey by State v. Henderson, 208 N.J. 208 (2011). Also relevant to the issue before us are the dictates laid down in State v. Delgado, 188 N.J. 48 (2006), and the provisions of Rule 3:11.

In Delgado the Supreme Court invoked its supervisory powers under Article VI, Section 2, Paragraph 3 of the New Jersey Constitution to "require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure." Delgado, supra, 188 N.J. at 63. The Court noted that Guidelines promulgated in 2001 by the New Jersey Attorney General prescribed, among other things, that when conducting an identification procedure the line-up administrator or investigator should "[r]ecord both identification and nonidentification results

in writing, including the witness' own words regarding how sure he or she is." Id. at 61 (quoting Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1 (Apr. 18, 2001)).

In Henderson the Court recounted the Delgado requirement. Henderson, supra, 208 N.J. at 241. The Court further elaborated on the reason for the importance of the requirement:

> Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record——written or otherwise——of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.
>
> [Id. at 254.]

In setting forth the revised framework to be followed in determining reliability, the Court included as one of the system variables: "Recording Confidence. Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?" Id. at 290. Similarly, among the estimator variables, the Court included: "Level of certainty demonstrated at the confrontation. Did the witness express high confidence at the

time of the identification before receiving any feedback or other information?" Id. at 292.

In the aftermath of Henderson, in 2012 the Court adopted Rule 3:11, entitled "RECORD OF AN OUT-OF-COURT IDENTIFICATION PROCEDURE." The Rule requires that an out-of-court identification "conducted by a law enforcement officer shall not be admissible unless a record of the identification procedure is made." R. 3:11(a). Contemporaneous recording in writing or, if feasible, electronically, is required, and if contemporaneous recording cannot be accomplished, a record shall be prepared as soon as practicable thereafter. R. 3:11(b). When a written record is utilized, "it shall include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness." Ibid. If a written verbatim account cannot be made, a detailed summary should be prepared. Ibid.

As to the contents of the written record, a number of requirements are prescribed, including "a witness' statement of confidence, in the witness' own words, once an identification has been made." R. 3:11(c)(7).

Finally, the Rule provides a remedy in the event the record is lacking in important required details if it would have been feasible to obtain and preserve those details. R. 3:11(d). In

such cases, "the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification." Ibid.

The asserted Delgado violation here is that Detective Hannibal did not record Roberts' verbatim comments about his degree of confidence when he identified defendant's photograph. Instead, in that portion of the record entitled "Comments and Demeanor of Witness (to be written by officer conducting line-up)," the detective entered that Roberts was "confident in his choice." Because this is written in the third person, rather than the first person, it is assumed these were not Roberts' words, but the words of Detective Hannibal.

Detective Hannibal used a standard Newark Police Department form, consisting of three pages. Page one provides blanks for the date, location, case number, time of commencement of the procedure, and the name of the witness, followed by a set of instructions to be read to or by the witness, and then signed by the witness and witnessed by the law enforcement officer under the following statement in all capital letters, boldface, and in large print: "I HAVE READ THE ABOVE INSTRUCTIONS, OR THEY HAVE BEEN READ TO ME, AND I FULLY UNDERSTAND THEM."

The instructions provide, in part:

> In a moment, I will show you a number of photographs one at a time. You may take as much time as you need to look at each of them. You should not conclude that the person who committed the crime is in the group merely because a group of photographs is being shown to you. The person who committed the crime may or may not be in the group, and the mere display of the photographs is not meant to suggest that the police believe that the person who committed the crime is in one of the photographs. **You do not have to select any photograph**.
>
> . . . .
>
> If you select a photograph, please do not ask me whether I agree with or support your selection. I do not know whom the suspect is, if they are in the line[-]up, or [in] what photograph he/she may be present. **It is your choice alone that counts.**

Roberts signed the form, and Detective Hannibal witnessed his signature. At trial, Detective Hannibal and Roberts both testified that the identification procedure was conducted in accordance with these instructions. The entries in the photographic identification form reflected that, from the time of commencement to completion of the procedure, a total of seven minutes elapsed.

Page two of the record form lists the names of the six individuals, including defendant, whose photographs were in the array, the comment and demeanor of the witness to be written by the officer conducting the line-up, which was completed in the

manner we have previously set forth, and a question as to whether the witness asked to see any of the photographs again, which was answered in the negative. Detective Hannibal signed this page.

Finally, the third page included a statement by Roberts indicating he had an opportunity to read and sign the photo display instructions, and then view a group of six photographs, which were displayed one at a time and never shown next to one another, each depicting the face of "BLACK MALES" and nothing else. The final sentence of this statement provided, "I examined the photographs carefully until I identified photograph number _____ as being that of the _____ who _____." As to the number identified, "#3" was written in and then, in his own handwriting, Roberts filled in the remainder to say "as being that of the man who ask[ed] me for my car keys during the robbery."

Finally, page three concluded with this statement, followed by Roberts' signature, which was witnessed by Detective Hannibal:

> Detective K. Hannibal of the Newark Police Department is the person who asked me to view these photographs. Neither he/she nor anyone else used any threats or promises, urged or prompted me in any way to cho[o]se any of the aforementioned photographs. I have been given an opportunity to read this form (or had it read to me) and have been asked to sign my name to it, if the contents are the truth to the best of my knowledge and belief.

At trial, Roberts provided testimony that tracked this closing statement. When asked at trial whether he was confident in his selection of defendant's photograph as the individual that went into the car, Roberts replied, "I was very confident." Similarly, when Detective Hannibal was asked at trial to describe Roberts' demeanor, she said: "He was calm and confident in the choice that he made."

Notably, although this asserted Delgado violation had been mentioned in defendant's pre-trial motion seeking a Wade[2] hearing, which the court denied, defense counsel never raised the issue at trial. The trial testimony by Detective Hannibal and Roberts regarding the out-of-court identification was presented without objection. Neither attorney asked either of these witnesses what words Roberts used in expressing his confidence. Nor did defense counsel cross—examine either witness on the issue in an effort to show that Roberts' confidence level was lower than they described.

The record establishes that the out-of-court identification procedure was conducted appropriately and in accordance with all of the dictates of Henderson and Rule 3:11. The manner in which the array was constructed was proper, the person conducting the array was a "blind" detective, the instructions were thorough and

[2] United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

understandable, and defendant acknowledged his understanding of them. There is no hint or suggestion anywhere in this record that anyone prompted or influenced Roberts in any way to select defendant's photograph. Most importantly, with respect to the recordation deficiency asserted by defendant, there is no evidence or suggestion that after making the identification, Roberts was subjected to any positive feedback that might have had the capacity to distort his confidence level, this being the primary purpose of the requirement for recording the witness' actual words expressing confidence.

The court charged the jury in accordance with the Model Jury Charge (Criminal), "Identification: In-Court And Out-of-Court Identifications" (2012). Utilizing the model charge, the judge, referring to the out-of-court identification, told the jury:

> As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable factor of accuracy.

Viewing in its entirety the manner in which the out-of-court procedure was conducted and the entirety of the written record that was contemporaneously made, the consistent testimony of Roberts and Detective Hannibal, the absence of objection at trial,

and the jury instruction that was given pertaining to the significance of a witness' confidence, we cannot conclude that the failure to record Roberts' actual words conveying that he was confident in his identification was a sufficient violation (if a violation at all) of Delgado and Rule 3:11 to warrant exclusion of the evidence. To the extent that there may have been any error, it was harmless in the overall circumstances of this case.

This brings us to defendant's second argument under Point I, that the judge committed plain error by failing to give an appropriate instruction as to how the jury should consider the failure to record Roberts' actual words in the report. Such a remedy is available to the court under Rule 3:11(d). Had this entire issue been raised at trial, and if a request had been made for an instruction, the court might have supplemented the identification charge with an additional statement to the effect that, contrary to the Rules that require police to include the actual words used by a witness in expressing his or her level of confidence in making an out-of-court identification, that was not done in this case, with the detective instead recording that Roberts was "confident in his choice," and that the jury may take this into consideration in evaluating the reliability of the identification.

Because defendant never raised the issue or requested the charge at trial, our review is guided by the plain error standard, which requires a showing of error "clearly capable of producing an unjust result." R. 2:10-2. In the context of a jury trial, a mere possibility of an unjust result will not suffice; the possibility must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). With respect to a jury charge, plain error is "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Hock, 54 N.J. 526, 538 (1969) (citation omitted), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970).

A contemporaneous written record was made. It included a statement indicating that Roberts was confident in his identification. Evidence of the out-of-court identification was admitted at trial without objection. The identification charge given was thorough and correct. In these circumstances, we are not persuaded that the absence of a supplemental charge, as now suggested by defendant, of itself, possessed a clear capacity to

bring about an unjust result. We therefore do not find plain error on this point.

III.

We now address the arguments defendant raises in Points II through V, alleging various other trial errors.

In Point II, defendant argues that the court erred in denying his pretrial application for permission to impeach Roberts by presenting evidence, pursuant to N.J.R.E. 608(b), that Roberts previously made a false accusation, namely, filing a false report to the police of a carjacking in violation of N.J.S.A. 2C:28-4(b)(1). At a Rule 104 hearing, it was developed that although such a charge had been filed against Roberts, it was downgraded to a municipal ordinance violation of which Roberts was convicted. However, a review of that ordinance reveals that no provision in it dealt with making false reports. Further, the prior incident occurred thirteen years before the robbery that is the subject of this case. Also noteworthy is that the defense never disputed that Roberts was robbed. Defense counsel readily admitted this fact in his opening statement and summation.

The court found that, due to the remoteness in time, the failure of defendant to establish that Roberts filed a false report, and the capacity of this evidence to mislead and confuse the jury and constitute a waste of time, the evidence should not

be allowed. The judge's exercise of discretion was clearly appropriate. We will not find error in such a discretionary determination absent a finding that it "was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

In Point III, defendant argues that the court erred when, during deliberations, the jury requested a replay of only the direct testimony of Roberts and the court did not include playback of the cross-examination. The initial note submitted by the jury simply stated that the jury wanted to hear Roberts' testimony again. The judge consulted with counsel on the record and said he would bring the jurors back in and ask them "to be a little more specific, unless they want to hear everything, direct and cross[-]examination, and then we'll see what happens." There was no objection.

The jurors were brought into the courtroom and the judge asked them to go back into the jury room "and then by another note let me know exactly what you want to hear. For instance, do you want to hear some specific portion of his testimony; do you want to hear all of the testimony that's direct and cross[-]examination, or some combination of the two?" The judge then told the jurors that his recollection was that the entire testimony lasted about two and one-half hours. The judge then concluded by saying, "[I]f

you want to hear the entire testimony that's fine. But if that's not what you[r] request is, I hate to spend two and a half hours, and then . . . find out that's not really what you wanted. Okay? Thank you." The jurors submitted another note saying they only wanted to hear Roberts' testimony on direct. Again, there was no objection or argument.

Trial courts have broad discretion in conducting read-backs and playbacks of testimony. State v. Miller, 205 N.J. 109, 122 (2011). There was no mistaken exercise of discretion here. Without objection, the court presented the jurors with the opportunity to receive a playback of whatever they wanted. They responded, and were given what they requested. Because there was no objection, this argument is reviewed under the plain error standard which we have previously mentioned. There was no error here, let alone plain error.

In Point IV, defendant argues that reversal is required because the prosecutor repeatedly told the jury that the private investigator who testified as a defense witness was lying and trying to deceive them. That investigator, Louis Acevedo, interviewed Roberts on July 8, 2014, about one-and-one-half years after the crime, and nearly a year before trial. Acevedo took notes during the interview, but did not tape record the conversation or transcribe the specific questions he asked or

Roberts' answers. He later prepared a report from his notes, but never showed the report to Roberts to enable him to check it for accuracy, nor did Roberts ever sign the report.

During his cross-examination of Roberts, defense counsel posed a number of questions about what he had told Acevedo, attempting to reveal inconsistencies in his version of the events and of the descriptions given of defendant and the other perpetrators. Under this line of questioning, Roberts insisted that he had not told Acevedo many of the things that were contained in the report. Roberts further testified that Acevedo had told him he was an investigator working for the State. Finally, Roberts contended he felt that Acevedo was "there to try to trip me up" and "trick me up," and that he was "really offended about" it and believed Acevedo was "trying to . . . falsify the statements that I had given" and get him "to say things that [I] shouldn't be saying." As we mentioned previously, Acevedo later testified as the sole witness for the defense, and he testified that Roberts did indeed make the inconsistent statements to him in the course of his interview.

Roberts' credibility and the reliability of his recollection and recounting of the events were critical factors for the jury to resolve. Defense counsel devoted much of his summation to attacking Roberts' credibility. Of course, he referred to

Acevedo's testimony in support of this argument. In doing so, defense counsel argued that the jury should find Acevedo more credible than Roberts. In his summation, the prosecutor refuted these arguments and attempted to demonstrate to the jurors why they should believe Roberts over Acevedo. During the course of the prosecutor's summation, defense counsel never objected.

Now, for the first time on appeal, defendant contends that the prosecutor's comments impermissibly disparaged the defense, conveyed to the jury the prosecutor's opinion of defendant's guilt, implying that the opinion was based on information beyond the evidence presented at trial, and interfered with the jury's fact-finding function. The State responds that, in context, each of the passages now complained of were fair and appropriate responses to arguments defense counsel had just made in his summation.

Defendant points to three passages from the prosecutor's summation. This is the first passage:

> And you know perhaps it was the investigator from the defense that wasn't so confident. That's what drove him, not once, not twice, but three times to go and speak to Mr. Roberts unrecorded, without recording verbatim what was actually said, his own words being put forth and then coming here and representing to you all and to the [c]ourt what his interpretation of what took place was. Two years -- two years after the fact, that's when he wants to go and speak to the victim, under the guise that he's working for the State, working for the prosecution.

The State points out, however, that this passage was immediately preceded by the following:

> Now, the State would agree with opposing counsel that confidence in and of itself doesn't carry this case. But the facts carry the case. Mr. Roberts was close enough to the defendant and two other people that robbed him to make an identification.

With these prefatory remarks, the remainder of the passage does not constitute an improper attack on Acevedo. It responds to the defense argument that Roberts' confidence in identification, in and of itself, does not establish reliability. The prosecutor then went on to suggest a defense bias on Acevedo's part inducing him to skew Roberts' answers and the methods he used to do so.

The second passage defendant relies upon is as follows:

> And then here an investigator who comes in and simply tries to start to implant lies[,] ladies and gentleman, untruths, falsities.

In isolation, this passage could be viewed as an improper attack on Acevedo's credibility, suggesting that the prosecutor was aware of information not presented at trial that established Acevedo was lying. However, the prefatory comments immediately preceding that passage reveal that it too was an appropriate response to defense counsel's argument that Roberts should not be believed because of his indignant manner of responding to cross-

examination questions about his interview with Acevedo. The prosecutor said this:

> You heard Mr. Roberts. So I'm sorry, the State would have to disagree with that characterization of Mr. Roberts as being indignant. No. His response is what you would expect when people try to put words in your mouth. That's what you would expect. That's what his demeanor says. And even then, he wasn't as upset as most people would get when you feel as though people are putting words in your mouth, or twisting the words that you said, or trying to trick you. He explained that he was offended. That's a normal reaction. Who would not be. The man was robbed in his own driveway by this defendant and two other people.

Viewed in this light, the passage, in its entirety, conveys that Roberts believed, as he contended in his testimony, that Acevedo was trying to implant lies, untruths, and falsities into the description of events that he had truthfully recounted.

Finally, defendant complains the prosecutor accused Acevedo of testifying to "[t]hings that were not true, plain and simple." However, when viewed in the context of the immediately preceding comments by the prosecutor, the result is the same as with the passages previously discussed. What follows is the prosecutor's full comment that ended with the phrase now complained of:

> So he wrote a report. But then the victim never had an opportunity to sign. The victim never had an opportunity to review. The victim never had an opportunity to know what was actually in that report. All Mr. Roberts

> knows, is that this man Mr. Acevedo came in here and said a whole bunch of things that he didn't agree with, that Mr. Roberts did not agree with. Things that were not true, plain and simple.

The prosecutor then went on to contrast Acevedo's interview and report-writing techniques with those utilized by the police in taking Roberts' statement within hours of the crime. In the police process, questions and answers were typed out on a computer as they were spoken, after which Roberts read through it for accuracy and signed it.

We see no impropriety in contrasting these two procedures as a means of demonstrating why Roberts did not agree with the contents of Acevedo's report as things which were, in his estimation, not true.

"When counsel fails to object at trial, the reviewing court may infer that counsel did not consider the remarks to be inappropriate." State v. Vasquez, 265 N.J. Super. 528, 560 (App. Div.) (citing State v. Johnson, 31 N.J. 489, 511 (1960)), certif. denied, 134 N.J. 480 (1993). Defendant's failure to object also prevents the trial court from taking curative action, should it be appropriate. State v. Frost, 158 N.J. 76, 84 (1999) (citing State v. Bauman, 298 N.J. Super. 176, 207 (App. Div.), certif. denied, 150 N.J. 25 (1997)). When this type of prosecutorial impropriety is alleged for the first time on appeal, our sole

concern is whether "the remarks, if improper, substantially prejudiced the defendant['s] fundamental right to have the jury fairly evaluate the merits of [his] defense, and thus had a clear capacity to bring about an unjust result." Johnson, supra, 31 N.J. at 510.

Courts afford prosecutors "considerable leeway" in the vigor and force of the language used in closing arguments, "so long as their comments are reasonably related to the scope of the evidence presented." State v. Timmendequas, 161 N.J. 515, 587 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). That said, it is improper for a prosecutor to declare he or she knows a defendant is guilty in a manner suggesting the State knows information to which the jury is not privy. State v. Wakefield, 190 N.J. 397, 440 (2007). So long as a prosecutor does not "vouch for the State's witnesses, offer a personal opinion of defendant's veracity, or refer, explicitly or implicitly, to matters outside the record," the prosecutor may make comments "based on reasonable inferences drawn from the evidence presented during the trial." State v. Morton, 155 N.J. 383, 457-58 (1998) (finding no error when a prosecutor called defendant's testimony a "self-serving pack of lies" when defendant's statements were contradicted by other witnesses at trial).

In his testimony, Roberts insisted that Acevedo was writing things down in a manner "to make me seem, you know, incorrect about I had -- what had happen[ed] to me." Roberts continued:

> I thought they were coming to find out what had happened, you know, with the robbery. And then when it was all said and done, when they left, I was under the impression[] that they were there trying to make my statement, falsify the statements that I had given.

This testimony provides a basis, in the evidence presented to the jury, to support the State's argument that the prosecutor's comments about Acevedo's lack of truthfulness was in the eyes of Roberts, and not an improper opinion by the prosecutor.

From our review of the entirety of both summations, we are satisfied that the prosecutor did not violate the principles we have discussed. Accordingly, we find no impropriety in the now-complained-of comments.

In light of our determinations on each of the trial errors asserted by defendant, we need not discuss defendant's argument in Point V that the cumulative effect of the asserted errors denied him a fair trial.

IV.

Finally, we address defendant's sentencing argument in Point VI. The court found the applicability of three aggravating factors, namely factors (3), the risk that defendant will commit

another offense, (6), the extent of defendant's prior criminal record and the seriousness of the offenses of which he has been convicted, and (9), the need for deterring the defendant and others from violating the law. N.J.S.A. 2C:44-1(a)(3), (6) and (9). The judge found as a non-statutory mitigating factor the youth of the defendant, who was nineteen-years-old at the time of this crime. Upon a qualitative weighing and balancing of factors, the judge found that the aggravating factors substantially preponderated over the mitigating factor.

Defendant argues that the court erred by finding lack of remorse as one of the bases underpinning aggravating factor (3), as well as failure to take responsibility for his actions by failing to identify the other two perpetrators. Defendant argues this was improper because defendant continues to assert his innocence. We agree with defendant. Defendant has never given a statement, made any comment, or testified in a manner that would implicate him in this crime. No forensic evidence tied him to the crime. He continues to assert that he was misidentified and was not a participant in the crime. Under the circumstances, a lack of remorse and failure to identify other perpetrators is understandable. In these circumstances, where defendant has not pled guilty, nor given any statement implicating himself in the

crime, failure to express remorse or acknowledge responsibility did not provide a proper basis supporting aggravating factor (3).

That said, aggravating factor (3) was well-supported by other evidence. Defendant had been the subject of four petitions as a juvenile, three of which resulted in adjudications. Undeterred by those experiences, he incurred four adult arrests resulting in two prior indictable convictions for second-degree unlawful possession of a handgun and fourth-degree resisting arrest. He had served a three-year custodial term as a result of his adult convictions, and, at the time of sentencing, defendant had an open bench warrant from the Newark Municipal Court. These circumstances provided more than ample support to substantially establish aggravating factor (3).

The court imposed a seventeen-year NERA sentence, two years above the mid-range for a first-degree crime. The sentence imposed was based upon aggravating and mitigating factors well supported by competent and credible evidence in the record, it is not manifestly excessive or unduly punitive, and it does not constitute a mistaken exercise of discretion. State v. O'Donnell, 117 N.J. 210, 215-16 (1989); State v. Ghertler, 114 N.J. 383, 393 (1989); State v. Roth, 95 N.J. 334, 363-65 (1984).

Affirmed.