SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1473-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES HABEL,

Defendant-Respondent.

Argued November 28, 2017 – Decided April 10, 2018

Before Judges Fasciale, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 13-06-1087.

Edward C. Bertucio argued the cause for appellant (Hobbie, Corrigan & Bertucio, PC, attorneys; Edward C. Bertucio, of counsel and on the brief; Elyse S. Schindel, on the brief).

Mary R. Juliano, Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Mary R. Juliano, of counsel and on the brief).

PER CURIAM

Defendant James Habel appeals from a December 4, 2015 judgment of conviction; a December 4, 2015 order denying his motion to be sentenced as a third-degree offender on count one, for "waiver of the minimum stipulation of parole ineligibility," and for waiver of the presumption of incarceration; a November 20, 2015 order denying his motion for a mistrial and a December 4, 2015 order denying his ensuing motion for reconsideration; a July 9, 2015 order denying his motion for judgment notwithstanding the verdict or alternatively for a new trial; and September 24, 2014 orders denying his motions to dismiss the indictment and suppress evidence. He contends:

> POINT I
>
> TRIAL COUNSEL COMMITTED A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT AND VIOLATED STATUTORY LAW AND CASE LAW [PROHIBITING] SIDE-SWITCHING FROM PRIOR GOVERNMENT EMPLOYMENT WHERE HE PRESIDED OVER THE SAME INVESTIGATION OF APPELLANT THAT HE DEFENDED HIM AGAINST AT TRIAL, WHICH REQUIRES THE REVERSAL OF APPELLANT'S CONVICTIONS AND THE REMAND FOR A NEW TRIAL.
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> POINT II
>
> THE TRIAL COURT IMPROPERLY SPLIT THE SINGLE OFFICIAL MISCONDUCT COUNT IN THE INDICTMENT INTO TWO SEPARATE COUNTS, COUNT 1A AND 1B, WHEN APPELLANT WAS ONLY INDICTED FOR ONE COUNT OF OFFICIAL MISCONDUCT. THIS WAS A VIOLATION OF HIS CONSTITUTIONAL RIGHT TO INDICTMENT BY GRAND JURY AND A VIOLATION OF THE FEDERAL AND STATE RIGHTS TO PROCEDURAL DUE PROCESS, WHICH

REQUIRES THE REVERSAL OF THE CONVICTION FOR OFFICIAL MISCONDUCT AND ALL OTHER CONVICTIONS.

POINT III

THE TRIAL COURT IMPROPERLY TOOK A PARTIAL VERDICT AS TO COUNT 1A, WHERE THE JURY WAS DEADLOCKED ON COUNT 1B, AND THEREFORE THE ILLEGAL CONVICTION OF COUNT 1, OFFICIAL MISCONDUCT, MUST BE REVERSED AS WELL AS ALL OTHER CONVICTIONS.

POINT IV

THE CONVICTION FOR OFFICIAL MISCONDUCT AND ALL OTHER CONVICTIONS RELATING TO CAR MILEAGE SHOULD BE REVERSED BECAUSE EVIDENCE WAS ADMITTED IN VIOLATION OF THE STATUTE OF LIMITATIONS AND IN VIOLATION OF N.J.R.E. 404(B) AS ILLEGAL PREDISPOSITION EVIDENCE REGARDING ALLEGED CONDUCT THAT PRE-DATED 2007, WHICH CONDUCT WAS ULTIMATELY BARRED FROM CONSIDERATION AS SUBSTANTIVE EVIDENCE OF GUILT BY THE TRIAL COURT.

(A) THE JURY SHOULD HAVE BEEN INSTRUCTED THAT ALL EVIDENCE AND TESTIMONY ELICITED AS TO ALLEGED CONDUCT PRE-2007 WAS INADMISSIBLE AND NOT TO BE CONSIDERED AS SUBSTANTIVE EVIDENCE OF GUILT AND COULD NOT BE USED BY THE JURY AS PREDISPOSITION EVIDENCE EITHER. NO SUCH INSTRUCTION WAS GIVEN.

(B) THERE SHOULD HAVE BEEN A PRETRIAL N.J.R.E. 404(B) HEARING AS TO THE ADMISSIBILITY OF EVIDENCE AND TESTIMONY AS TO THE ALLEGED CONDUCT BEFORE 2007 THAT WAS NOT A THEFT, AND THERE SHOULD HAVE BEEN A LIMITING INSTRUCTION THAT SUCH EVIDENCE WAS INADMISSIBLE AS SUBSTANTIVE EVIDENCE.

POINT V

ALL OF APPELLANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY DENIED THE PRE-TRIAL AND POST-VERDICT MOTIONS TO DISMISS THE COUNTS FOR WHICH HE WAS CONVICTED AS THE INDICTMENT DID NOT ALLEGE ANY STATUTE, RULE, REGULATION, OR MUNICIPAL CHARTER THAT WAS VIOLATED BY APPELLANT AND THE TRIAL COURT FAILED TO CHARGE AND THE STATE FAILED TO ESTABLISH ANY LEGAL DUTY THAT WAS VIOLATED BY APPELLANT'S ALLEGED CONDUCT AND THE FIRST TRIAL COURT FAILED TO CONSIDER CERTAIN EXCULPATORY EVIDENCE THAT CLEARLY ESTABLISHED THAT THERE WAS NO WRONGDOING COMMITTED BY APPELLANT IN THIS CASE.

POINT VI

APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE:

> (A) DURING TRIAL THE COURT IMPROPERLY ALLOWED THE STATE TO CONDUCT AN ADDITIONAL INVESTIGATION AS TO THE ISSUE OF CAR USAGE AND MILEAGE IN VIOLATION OF [RULE] 3:13-3 AND EVIDENCE RULES, OR
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> (B) DURING THE TRIAL THE COURT IMPROPERLY PREVENTED THE DEFENSE FROM PRESENTING [EXCULPATORY] EVIDENCE.

POINT VII

THERE WERE VARIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT THAT OCCURRED THAT REQUIRE REVERSAL OF ALL OF APPELLANT'S CONVICTIONS.

> (A) THE ASSISTANT PROSECUTOR PUT APPELLANT'S TRIAL COUNSEL ON THE STATE'S WITNESS LIST TO CREATE A CHILLING EFFECT ON TRIAL COUNSEL'S REPRESENTATION OF APPELLANT, KNOWING HE WAS FIRST ASSISTANT PROSECUTOR AND ACTING MONMOUTH COUNTY PROSECUTOR FROM 2003 TO 2005.

(B) THE STATE FAILED TO REQUEST AN N.J.R.E. 404(B) HEARING, AS WAS ITS DUTY, REGARDING ALLEGED CONDUCT BEFORE 2007, WHICH WAS INADMISSIBLE AND BEYOND THE STATUTE OF LIMITATIONS.

(C) THE ASSISTANT PROSECUTOR READ TWO EMAILS ALLEGEDLY WRITTEN BY APPELLANT TO THE JURY DURING HER OPENING ARGUMENT WHICH WERE NOT INTRODUCED AT TRIAL AT ALL, NOR TESTIFIED TO REQUIRING A NEW TRIAL.

(D) THE ASSISTANT PROSECUTOR ENGAGED IN ILLEGAL NAME-CALLING AND MADE IMPROPER AND DEROGATORY COMMENTS DURING CROSS-EXAMINATION AND HER SUMMATION, ABOUT APPELLANT AND TRIAL COUNSEL, WHICH CONSTITUTED PROSECUTORIAL MISCONDUCT.

POINT VIII

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL PER SE, DUE TO THE CLEAR CONFLICT OF INTEREST IN [COUNSEL'S] REPRESENTATION OF APPELLANT, WHICH RESULTED FROM HIS ILLEGAL SIDE-SWITCHING. SAID CONFLICT OF INTEREST INFECTED APPELLANT'S ENTIRE TRIAL, REQUIRING THE REVERSAL OF ALL OF APPELLANT'S CONVICTIONS ON DIRECT APPEAL.

POINT IX

THE CUMULATIVE ERROR IN THIS CASE REQUIRES A REVERSAL OF ALL OF APPELLANT'S CONVICTIONS.

POINT X

THE SECOND TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR RELAXATION OF THE STIPULATION OF PAROLE INELIGIBILITY AND FOR A DOWNGRADE OF THE OFFENSE. THE RESULTING SENTENCE WAS, THEREFORE, EXCESSIVE.

We disagree with all of defendant's arguments and affirm.

Defendant was convicted by a jury on March 10, 2015, of second-degree official misconduct, N.J.S.A. 2C:30-2(a) (count one), and four counts of fourth-degree falsifying or tampering with records, N.J.S.A. 2C:21-4(a) (counts seven, eight, nine and thirteen).[1]

The indictment stemmed from defendant's position as superintendent of schools in the Wall Township school district — which he held since 2003; defendant acted as the Board of Education's chief executive and administrative officer, and had a general supervisory role. The charges related to accepting payments for unreported vacation-day absences and falsifying or tampering with the records relating to his district-issued automobile. Defendant's attorney, Robert Honecker, Jr., previously served as First Assistant Prosecutor and thereafter Acting Prosecutor of the Monmouth County Prosecutor's Office from 2003 to 2005.

[1] The jury acquitted defendant on count six (theft of district-issued equipment) and count twelve (falsifying or tampering with records relating to attendance documentation in his personnel file); it could not reach a unanimous verdict on count one (official misconduct) — Question 1B, count two (theft by deception), and count five (financial facilitation). On August 28, 2015, with the State's consent, the judge dismissed counts two and five.

I.

Prior to sentencing, defendant moved for a new trial contending his convictions should be automatically reversed because Honecker had a nonwaivable, "side-switching" per se conflict of interest occasioned by a meeting he attended as Acting Monmouth County Prosecutor. The meeting was part of an investigation that led to a separate, unrelated indictment against defendant that was ultimately dismissed. The motion judge summarized defendant's argument:

> [A]t some point some evidence may have been offered into the trial arising out of a meeting which occurred allegedly back in March of 2005 in which there was an ongoing dispute as to whether or not the Wall Township Board of Education and its employees, including [defendant], were adequately performing a memorandum of understanding in relation to abused children, which includes incidents of bullying or sexual misconduct because the Attorney General wanted to make clear to all of the schools in the state through the Commissioner of Education that they could not deal with these types of allegations internally.

The State requested an evidentiary hearing and cross-moved for an order declaring that defendant had waived the attorney-client privilege with respect to his communications with Honecker. On November 20, 2015, the motion judge denied both motions without prejudice.

Defendant moved for "reconsideration for a sua sponte grant

of a mistrial" based on Honecker's per se conflict of interest, arguing the time-bar applicable to a motion for a new trial did not apply to a motion for a mistrial. The judge denied defendant's motion on December 4, 2015.

Defendant now argues the attorney conflict requires a new trial in that defense counsel was First Assistant Prosecutor or Acting Prosecutor

> between 2003 and 2005 when the Monmouth County Prosecutor's Office began investigating [defendant] and the Wall Township School District for alleged financial improprieties and the alleged improper use of [defendant's] district[-]issued vehicle, a Yukon Denali. Ten . . . years later, [Honecker] represented [defendant] on the same investigation, where evidence of that investigation was introduced by the State at trial.

Under our well-settled standard of review, pursuant to Rule 2:10-1, a trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." A trial judge shall not set aside a jury verdict unless "it clearly and convincingly appears that there was a manifest denial of justice under the law." R. 3:20-1. In this context, there is no difference between "miscarriage of justice" and "manifest denial of justice under the law." See Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 3:20-1 (2018) (citing State v. Perez, 177 N.J. 540, 555

(2003)). "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000).

For legal issues, however, an appellate court's standard of review is de novo, owing no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts." State v. Maurer, 438 N.J. Super. 402, 411 (App. Div. 2014) (quoting State v. Bradley, 420 N.J. Super. 138, 141 (App. Div. 2011)); Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We agree that defendant's motion for a new trial was not timely filed. Rule 3:20-2 requires a new trial motion based on any grounds other than newly discovered evidence to "be made within [ten] days after the verdict." The judge found defendant's proffered evidence in support of the motion was known to him at the time a timely motion could have been filed. Defendant's motion was filed in September — well beyond the ten-day period from the March 10, 2015 jury verdict; that period was non-enlargeable. R. 1:3-4(c).

We also conclude the motion judge correctly ruled that defendant provided no competent factual information establishing

his right to relief. Finding defendant refused to waive his privilege regarding his communications with Honecker, the judge concluded, "The law is clear that the way in which this motion was presented, there are no facts in dispute to either have a hearing or even make any factual determination as to any of the claims as to . . . whether there was or wasn't a conflict."

The existence of a conflict is an issue of law and thus is subject to de novo review. State v. Hudson, 443 N.J. Super. 276, 282 (App. Div. 2015). In the absence of factual disputes requiring resolution on credibility grounds, a reviewing court need not defer to the trial judge's findings or ultimate decision. State v. Bruno, 323 N.J. Super. 322, 331 (App. Div. 1999). Where a per se conflict is found, prejudice is presumed. State v. Norman, 151 N.J. 5, 24-25 (1997). "Otherwise, the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown . . . to establish constitutionally defective representation of counsel." Id. at 25.

We reject defendant's attempted analogy to State v. Morelli, 152 N.J. Super. 67 (App. Div. 1977), and State v. Lucarello, 135 N.J. Super. 347 (App. Div.), aff'd o.b., 69 N.J. 31 (1975), because the attorneys in those cases had actual contact with key witnesses in the trials in which they were involved. Lucarello's attorney was not only First Assistant Prosecutor during the time "much of

the information relevant to the crimes charged in two of the indictments [against the client he was representing at trial] was gathered," id. at 352-53, he was also present at the interrogation of the key State witness, "may have talked to him," and heard a tape recording made by the witness referring to the client's criminal conduct alleged in the indictment he was defending, id. at 350. The attorney in Morelli had previously represented "a key prosecution witness" who was named in the indictment against his client as "an unindicted coconspirator"; the attorney had also been contacted by the witness after he was issued a grand jury subpoena to testify in the matter that resulted in the indictment. 152 N.J. Super. at 73. Another attorney from Morelli's counsel's office accompanied the witness and consulted with him when he testified before the grand jury. Ibid. We conclude from our de novo review that defendant's proffer in this case falls far short of the evidence that supported the disqualifications in Lucarello and Morelli.

Honecker's deposition revealed only that while he was First Assistant Prosecutor in 2005, he "may have sat in on a meeting" about an investigation of defendant. Although Honecker had supervisory duties and "operational responsibilities" at the Prosecutor's Office as First Assistant, there is no evidence he was directly involved in the investigation, or that he was even

informed about it. Indeed, the only personnel mentioned in a March 7, 2006 report submitted by the prosecutor's office in opposition to defendant's motion are Sergeant Harry Cuttrell, who was assigned the follow-up investigation and who authored the report, and Assistant Prosecutor Thomas Campo, "who was the legal [advisor] on th[e] investigation" to whom Cuttrell reported results of the investigation; the report did not mention Honecker.

Moreover, contrary to defendant's present claims, no evidence reveals that the investigation conducted while Honecker was at the Prosecutor's Office had any relation to the charges for which defendant was indicted. According to a newspaper article submitted by defendant, the matter about which Honecker commented to the newspaper in July 2005 related to a draft audit report of the 2003-2004 budget prepared by a board auditor of which Honecker — and the Wall Police Department, Monmouth County Superintendent's Office and State Board of Education — was notified by the Board attorney. The contents of the report were not disclosed in the article; "[o]fficials [were] tight-lipped about the content of the . . . report." Honecker is reported as saying his "office's financial crimes unit had set up a meeting with the district's auditor . . . to determine if the accounting inconsistencies rose 'to the level of criminal acts.'" The story continued, "Depending on the outcome of the meeting, county detectives may conduct a

criminal investigation and 'find out the nature and extent of possible criminal activities.'" Nothing indicated the investigation — which had not yet begun — involved the same matters as in defendant's trial, or in any way directly involved Honecker. Tellingly, defendant's present counsel certified:

> It is clear that beyond the fact that Mr. Honecker "may have attended a meeting" in which [defendant] was being investigated, he made statements to the press in which he was quoted at length about said investigation of [defendant] and the Wall Township school system regarding accounting "improprieties and inconsistencies[,"] including but not limited to, use of a vehicle at that time for which [defendant] was ultimately cleared and from which [defendant] was not prosecuted either earlier or in the prosecution that is sub judice.
>
> [Emphasis added.]

Cuttrell's report of March 7, 2006, buttresses defense counsel's certification. The investigation related to the contract for defendant's vehicle — not the indicted charges relating to defendant's false representations about his personal use of that vehicle. The additional investigation of the district's accounting discrepancies had nothing to do with the indictment brought against defendant, but with what were ultimately found to be non-criminal "antiquated" and "lackadaisical" financial practices. As defense counsel

certified, Cuttrell's investigation did not result in any criminal charges against defendant or any other person or entity.

We note that defendant consistently declined to waive his attorney-client privilege, effectively precluding Honecker from providing information that may have shed more light on the conflict issue. There is no evidence Honecker acquired any knowledge about the earlier investigation of defendant.

We reject defendant's contention that Honecker violated N.J.S.A. 52:13D-17 and was hence disqualified from representing defendant. Even if Honecker was considered, as defendant submits, a State employee because of his designation as a "special attorney general," nothing in the record established he was connected "with any cause, proceeding, application or other matter with respect to which [he] . . . made any investigation, rendered any ruling, [gave] any opinion, or [was] otherwise substantially and directly involved at any time during the course of his office or employment." N.J.S.A. 52:13D-17 (emphasis added). Likewise, the proofs do not establish he had "substantial responsibility" for or "personally and substantially" participated in defendant's investigation or prosecution, so as to disqualify him under RPC 1.11.

The inclusion of Honecker on the "witness list" did not create a disqualifying conflict. The judge, before reading the lengthy list, told the jury:

> I do want to note the fact that someone's name is on this list does not mean that the person is actually going to be a witness. These are individuals who may be called as witnesses or whose names you might hear during the course of the trial.

The jury would have had to speculate in order to conclude that Honecker's inclusion on the list was based on a sinister affiliation with defendant. The jury was instructed not to speculate, conjecture or guess, and they are presumed to have followed the judge's instructions. State v. Loftin, 146 N.J. 295, 390 (1996).

The same holds true for defendant's argument regarding the email he sent on which Honecker was copied. And we note that the judge told the jury that it could not consider "for any purpose" that counsel was copied on the letter defendant authored. We determine that argument, and the balance of defendant's arguments relating to the conflict issue — including his reliance on inapposite cases in which a finding of attorney conflict was based on the replaced appearance of impropriety standard — to be without sufficient merit to warrant discussion in this written opinion. R. 2:11-3(e)(2).

To the extent defendant argues Honecker rendered ineffective assistance of counsel, the record — due to defendant's election not to waive the attorney-client privilege[2] — is not sufficiently developed and is better suited for a post-conviction relief application. State v. Wiggins, 291 N.J. Super. 441, 452 (App. Div. 1996). On the record now standing, defendant's argument is deficient because he has shown neither a "significant" conflict nor a great likelihood he was prejudiced. See Norman, 151 N.J. at 24-25 (holding, where no per se conflict from an attorney's "simultaneous dual representations of codefendants" exists, "the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown . . . to establish constitutionally defective representation of counsel").

Neither the judge's denial of the motion for a new trial, nor the denial of the motion for reconsideration, was an abuse of discretion, and there is no proof of actual harm to defendant. See State v. Van Ness, 450 N.J. Super. 470, 495-96 (App. Div. 2017); State v. Lawrence, 445 N.J. Super. 270, 274 (App. Div. 2016). We also conclude the motion for reconsideration was

[2] The attorney-client privilege "does not extend to communications relevant to an ineffective-assistance-of-counsel claim." State v. Bey, 161 N.J. 233, 296 (1999); N.J.R.E. 504(2)(c).

properly denied. Our review of the denial of defendant's motion for a mistrial is the same as that for a motion for a new trial. State v. Thomas, 76 N.J. 344, 362 (1978). For the reasons we heretofore expressed, we also affirm the motion judge's denial of the motion for a mistrial.

II.

We reject defendant's arguments that the trial judge erred by splitting the first count of the indictment into two separate questions in the jury instruction and on the verdict sheet. The State's separate factual theories for count one — charging official misconduct under both N.J.S.A. 2C:30-2(a) and (b)[3] — required the judge to give a specific unanimity charge. Where the State offers

[3] N.J.S.A. 2C:30-2 provides:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
>
> a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or
>
> b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

multiple theories of culpability, based on different evidence as to a defendant's guilt, the jury must unanimously agree as to the same theory to support the defendant's conviction on that charge. State v. Frisby, 174 N.J. 583, 596-97 (2002). "The notion of unanimity requires 'jurors to be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." Id. at 596 (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)). Thus the court is required to give a specific unanimity charge if the allegations are contradictory, conceptually distinct, and not marginally related to each other. Id. at 597-98.

Defendant's trial counsel recognized that the State offered alternative theories of culpability for the official misconduct count and requested the judge to give a specific unanimity charge. Counsel agreed to the form of charge and the concomitant portion of the verdict sheet crafted by the judge that distinguished the theories: "breaching a duty to truthfully and accurately report the use of vacation days when not working for the Wall Township School District and to ensure that used vacation days were deducted from his accrued vacation balance" and "breaching a duty to knowingly refrain from falsely and fraudulently cashing in vacation days when he knew his vacation balance was carrying in the negative."

The balance of defendant's arguments regarding count one are without sufficient merit to warrant discussion here. R. 2:11-3(e)(2). We add only that, as argued by the State, defendant's request for a specific unanimity charge on the first count invoked the invited error doctrine, under which "trial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." State v. Munafo, 222 N.J. 480, 487 (2015) (quoting State v. A.R., 213 N.J. 542, 561 (2013)). Our Supreme Court declared "[t]o justify reversal on the grounds of an invited error, a defendant must show that the error was so egregious as to 'cut mortally into his substantive rights.'" State v. Ramseur, 106 N.J. 123, 282 (1987) (quoting State v. Harper, 128 N.J. Super. 270, 277 (App. Div. 1974)). Defendant has failed to make that showing. Both counsel and the trial judge correctly protected defendant from an amalgamated verdict by parsing the failure to properly record vacation time from receipt of district funds for unused vacation days. And, in light of our conclusion regarding the presentation of count one to the jury, the return of the guilty verdict on the first theory of that count was not, as contended by defendant, an erroneously accepted partial verdict.

III.

That same jury instruction gainsays defendant's argument that

the jury received no citation to any statute, rule, or municipal charter that imposed the legal duty — incumbent upon him as a public official — he allegedly breached in connection with the official misconduct count. He contends, absent specific instructions and evidence of duty, the jury was improperly allowed to speculate as to what official actions by a school district superintendent are legal or illegal.

We reject defendant's attempt to analogize State v. Jenkins, 234 N.J. Super. 311, 316 (App. Div. 1989) (holding "[a] jury is not qualified to say without guidance which purposes for possessing a gun are unlawful under N.J.S.A. 2C:39-4(a) and which are not"). The trial judge here specified both types of conduct the State alleged violated the official misconduct law and charged:

> An act is unauthorized if it is committed in breach of some prescribed duty of the public servant's office. This duty must be official and non-discretionary imposed upon the public servant by law such as statute, municipal charter, or ordinance, or clearly inherent in the nature of his office.
>
> The duty to act must be so clear that the public servant is on notice as to the standards that he must meet. In other words, the failure to act must be more than a failure to exhibit good judgment. In addition, the State must prove that [defendant] knew of the existence of his non-discretionary duty to act prior to the incident in question.
>
> Not every unauthorized act committed by a public servant rises to the level of

> official misconduct. An unauthorized act amounts to official misconduct only if the public servant knew at the time that his conduct was unauthorized and unlawful.
>
> As to [defendant]'s alleged conduct, the State must prove that there was a clear duty imposed on [defendant] to act or to refrain as alleged; that is to say, there must have been a body of knowledge such as applicable law by which [defendant] could regulate and determine the legality of his conduct. One cannot be convicted of official misconduct if the official duties imposed are themselves unclear.
>
> So if you conclude beyond a reasonable doubt that [defendant] was required to act or to refrain by statute, rule, or regulation and he failed to do so, this element will be satisfied.

It was up to the jury to determine whether the State proved the elements of the offense.

A defendant's act or omission relating to his or her express or inherent official duties and obligations can support an official misconduct conviction. State v. Kueny, 411 N.J. Super. 392, 407 (App. Div. 2010); State v. DeCree, 343 N.J. Super. 410, 418 (App. Div. 2001); State v. Schenkolewski, 301 N.J. Super. 115, 144 (App. Div. 1997). Even if not imposed by law, the duty may be "clearly inherent or implicit in the nature of the office." State v. Maioranna, 225 N.J. Super. 365, 371 (Law Div. 1988), aff'd in part and remanded in part, 240 N.J. Super. 352 (App. Div. 1990); Schenkolewski, 301 N.J. Super. at 143; State v. Lore, 197 N.J.

Super. 277, 282 (App. Div. 1984). A clearly inherent duty is "one that is unmistakably inherent in the nature of the public servant's office, i.e., the duty to act is so clear that the public servant is on notice as to the standards that he must meet." Kueny, 411 N.J. Super. at 406 (quoting II Final Report of the New Jersey Criminal Law Revision Commission, commentary to N.J.S.A. 2C:30-2, at 291 (1971)).

We acknowledge a court must give a "comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find," State v. Green, 86 N.J. 281, 287-88 (1981), and that the charge should include instruction on all "essential and fundamental issues and those dealing with substantially material points," id. at 290. The State presented evidence that defendant's misconduct was directly related to his public office; his employment contracts — and the power, influence and control he exercised over the district's functioning and his subordinates — provided both the means and opportunity for him to take vacation leave without reporting it and to manipulate his vacation leave balance to obtain vacation day payouts to which he was not entitled. As such, the jury — notwithstanding defendant's protest that the State "offered no statute, rule, or municipal charter" as the source of the legal duty — could have found that defendant's

public-official duties of office arose out of the nature of the office itself. Thus, the judge's instructions — to which no objection was made — were not erroneous and were not clearly capable of causing an unjust result. See State v. Macon, 57 N.J. 325, 335-36 (1971) (holding the possibility of an unjust result must be "one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached").

IV.

Defendant did not previously raise his present argument that the trial judge erred by admitting allegations of pre-2007 criminal conduct without a pretrial hearing or proper limiting instruction. Although we can address trial error in the absence of objection under a plain error standard where reversal is warranted — when the error is "of such a nature as to have been clearly capable of producing an unjust result," R. 2:10-2 — we decline to do so here because there was no error. See State v. Robinson, 200 N.J. 1, 20 (2009).

The trial judge narrowed the allegations in three counts from the originally charged time frame[4] to conduct commencing in

[4] Counts one (official misconduct), two (theft by deception), and five (financial facilitation) originally charged conduct from October 2003 to June 2012.

November 2007. The judge agreed with defense counsel's request during the charge conference for an instruction explaining the narrower period and told the jury:

> When this trial began, I told you about the charges that were contained in the indictment. I also explained that the indictment is not evidence but merely a written document that brings the charges before a jury so that the jury can decide whether the defendant has been proven guilty beyond a reasonable doubt.
>
> As the judge of the law, it is my responsibility to review those charges with the attorneys at the end of the case to decide which charges will be submitted to you for deliberation. Sometimes as a matter of law I may determine that not every charge within the indictment should be submitted to you.
>
> . . . .
>
> I have also ruled that those portions of Counts 1, 2, 5 of the indictment which allege [defendant] committed the offenses charged in those counts . . . between October of 2003 and October of 2007 will not be submitted to you for your consideration.
>
> You should not consider my ruling as an opinion by the [c]ourt on the merits of any of the charges that you must consider. My ruling on those charges was based on matters of law and should not be -- should not influence your deliberations. You are not to consider for any purpose in arriving at your verdict the fact that the [c]ourt may have deleted charges for your deliberation.

Evidence of the pre-2007 charges was not, as defendant argues, "other crimes evidence" that would require analysis under N.J.R.E.

404(b) and, if admitted, an appropriate jury instruction. See State v. Cofield, 127 N.J. 328, 338 (1992). The evidence pertained to allegations in the indictment which the judge ruled would not be presented to the jury. He correctly gave the model jury instruction regarding that evidence, and it was for the jury to determine whether defendant had been proved guilty "by the evidence[] which [was] relevant and material to that particular charge."[5] The pre-November 2007 evidence was not relevant and the jury, presumably, did not consider it. See State v. Manley, 54 N.J. 259, 270 (1969) (observing that jurors are presumed to follow the court's instructions). There was no error much less plain error. See Macon, 57 N.J. at 335-36.

V.

We consider defendant's arguments regarding the trial judge's evidentiary rulings under the familiar abuse of discretion standard. State v. Gorthy, 226 N.J. 516, 539 (2016); State v. J.M., 225 N.J. 146, 157 (2016). See also State v. Belliard, 415 N.J. Super. 51, 87 (App. Div. 2010) (holding appellate courts "review a trial judge's evidentiary determinations under an abuse of discretion standard, provided that the judge's rulings are not inconsistent with applicable law"). Under that standard, we find

[5] Model Jury Charges (Criminal), "Addition or Dismissal of Charges" (approved June 16, 2003).

no abuse of discretion.

Defendant first contends the trial judge erred by admitting, over defendant's trial objection, a detective's measurement of the distance between defendant's home and office — after the judge struck the same measurement as calculated by Mapquest — because the measurement was done mid-trial and was not previously disclosed to him in discovery.

The trial judge did not abuse his discretion in ruling:

> I am going to permit the detective to testify that she took a trip and it was 10.9 miles one way, 9.5 miles back the other way.
>
> . . . You have not demonstrated any prejudice whatsoever. I will give you as much time as you need to conduct an investigation as to the distance between the Wall Township central office and [defendant]'s home. This has been an issue in this case, apparently, since the beginning.
>
> . . . [E]veryone . . . understood that part of the contention here was that the driving distance between [defendant]'s home and the Wall Township Board of Education . . . is alleged to constitute personal use of his automobile, for which he should have allocated miles or a percentage of miles on the four forms which are the subject of the four counts for falsifying a record.

The judge exercised an option available under Rule 3:13-3(f) by allowing the evidence, subject to an offered continuance. That the distance from his home was known or readily knowable to defendant, and the apparentness from the indicted charges of the

information's relevancy, buttressed the judge's finding that defendant was not prejudiced. We find no abuse. See State v. Ates, 426 N.J. Super. 521, 536-37 (App. Div. 2012), aff'd, 217 N.J. 253 (2014).

Defendant also avers the trial judge should have allowed trial counsel to use a recording of a Wall Township Board of Education executive session with its counsel, surreptitiously made and disclosed by a board member; trial counsel had argued the recording "makes a difference in regards to the mortgage fraud count."

We disagree with defendant's argument that the privileged communication between the Board and its attorney was waived. The privilege belonged to the Board, not to the individual board member who released it. See Hedden v. Kean Univ., 434 N.J. Super. 1, 14-16 (App. Div. 2013) (holding the university, not its athletic director, held the attorney-client privilege, and could be waived on behalf of the "organizational client" only by "those who manage or control its activities"). Further, even if the relevance of the recording related to the mortgage fraud count, the trial judge dismissed the mortgage fraud counts. There was no basis to allow the evidence.

VI.

Defendant, in part for the first time on appeal, argues he

was denied a fair trial due to prosecutorial misconduct, claiming the assistant prosecutor: (1) included trial counsel's name on the witness list; (2) read emails during opening statements that were not admitted into evidence; (3) engaged in derogatory name-calling during cross-examination of defendant's expert and summation; and (4) presented evidence of defendant's alleged criminal conduct before 2007.

To warrant a new trial, a prosecutor's conduct must have been "'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Smith, 167 N.J. 158, 181-82 (2001) (quoting State v. Timmendequas, 161 N.J. 515, 575 (1999)). In determining whether a prosecutor's actions were sufficiently egregious we consider: (1) whether defense counsel made a timely and proper objection; (2) whether the remarks were promptly withdrawn; and (3) whether the judge struck the remarks from the record and issued a curative instruction. Id. at 182. In our review we "consider the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." Timmendequas, 161 N.J. at 575.

If no objection was made, the prosecutor's conduct generally will not be deemed prejudicial, as the failure to object indicates counsel did not consider the conduct improper and deprives the

trial judge of the opportunity to take curative action. State v. Echols, 199 N.J. 344, 360 (2009). When there is a failure to object, the defendant must establish the conduct constitutes plain error under Rule 2:10-2. State v. Feal, 194 N.J. 293, 312 (2008).

We find insufficient merit in defendant's arguments to warrant discussion here. R. 2:11-3(e)(2). Other than our previous comments on some of these issues, we add only that: Honecker's name was justifiably included on the witness list because of the potential defense use of no-billed charges in connection with which Honecker had represented defendant; the prosecutor's reference in her opening to one email that was not admitted — in light of the plethora of evidence and the judge's instruction that opening statements were not evidence — did not prejudice defendant's right to have the jury objectively weigh the evidence so as to require reversal, see State v. Land, 435 N.J. Super. 249, 269 (App. Div. 2014); the prosecutor's questioning comments and summation were based on the evidence or inferences that could reasonably be drawn therefrom, and, although a stray comment or two were marginally overzealous, they were not nearly so egregious as to warrant reversal.

VII.

We reject defendant's claim that cumulative errors deprived him of a fair trial. Reversal is required when the cumulative

impact of the errors, viewed "through the prism of how they affected [a defendant's] ability to have the jury fairly consider [the evidence]," "casts doubt on the fairness of [that] defendant's trial and on the propriety of the jury verdict that was the product of that trial." State v. Jenewicz, 193 N.J. 440, 447 (2008). "[T]he predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." State v. Wakefield, 190 N.J. 397, 538 (2007). As we have concluded, there was no error and certainly none sufficient for reversal.

VIII.

Finally, we determine defendant's arguments that the sentencing judge erred because he should have: applied mitigating factor ten, defendant was particularly likely to respond affirmatively to probationary treatment, N.J.S.A. 2C:44-1(b)(10); treated count one, official misconduct, as a downgraded third-degree offense pursuant to N.J.S.A. 2C:44-1(f)(2); waived the presumption of incarceration and sentenced defendant to probation under N.J.S.A. 2C:44-1(d); and eliminated or reduced the parole disqualifier under N.J.S.A. 2C:43-6.5, to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Defendant received a prison term of five years with a five-year parole ineligibility on the second-degree official misconduct

count, and concurrent flat terms of one year each on counts seven through nine and thirteen, fourth-degree falsifying or tampering with records. The judge's findings of aggravating factor nine, the need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9), and mitigating factor seven, defendant had no history of prior delinquency or criminal activity, N.J.S.A. 2C:44-1(b)(7), were supported by evidence in the record. See State v. Bolvito, 217 N.J. 221, 228 (2014). The record also supports the judge's consideration and denial of other mitigating factors, see State v. Grate, 220 N.J. 317, 338 (2015) (requiring sentencing courts to consider evidence of mitigating factors and applying those that are amply based in the record), and the judge's decision that the presumption of imprisonment was not overcome. The official misconduct sentence was the mandatory minimum term required by N.J.S.A. 2C:43-6.5(a). Mitigating factor ten was therefore irrelevant. State v. Kelly, 266 N.J. Super. 392, 396 (App. Div. 1993). Considering our deferential standard of review, State v. Noble, 398 N.J. Super. 574, 598-99 (App. Div. 2008), we conclude the sentencing judge did not abuse his discretion in imposing defendant's sentence.

Affirmed.