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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1797-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

H.C.L.,

Defendant-Appellant.

Submitted December 20, 2017 – Decided May 11, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 13-01-0074.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Confusione, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Monica do Outeiro, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Tried by a jury, defendant H.C.L. was convicted of the lesser-included offense[1] of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count one); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4A (count three); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count four); and third-degree endangering the welfare of a child (count five). The verdict was reached at defendant's second trial, the trial judge having declared a mistrial of the first because of jury misconduct. Defendant testified at the first trial.

After merging count three into count one, the aggravated assault count, on November 20, 2015, the trial judge sentenced defendant to an eight-year term of imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, concurrent to five years imprisonment on counts two and four, and four years imprisonment on count five. Defendant appeals and we affirm.

We glean the following circumstances from the trial record. On May 31, 2012, Tom[2] went to the gym with his son Ben around 4:00 p.m. Tom and Ben's mother, Mary, were divorced. Ben, then

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[1] Defendant was originally charged in that count with first-degree attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3.

[2] We use fictitious names throughout.

seventeen years old, lived with his mother, two younger sisters, and defendant, who was the father of Ben's youngest sister. Tom dropped Ben off, but returned almost immediately because he was concerned about his son's uneasy state of mind. As he drove back, he saw Ben run across the street while defendant gave chase. Tom could hear "yelling and screaming," heard the sound of a shot, did not see a weapon, but saw a flash of light. Defendant ran back into the house as Tom headed towards Ben.

When Tom reached his son, Ben said "Dad, Dad, he's shooting at me. He's shooting at me." Tom called 911 as defendant drove past them.

Tom also testified that a year or two before this incident, he contacted police about defendant on Ben's behalf. His son had shown him a substance that Ben had found in the home, which appeared to be marijuana. Ben told him that defendant had a lot of visitors and that he feared defendant was selling marijuana. Following this testimony, the trial judge instructed the jury as follows:

> In this case the State has introduced some evidence that the defendant learned that [Tom and Ben] reported to the Neptune police that the defendant was selling marijuana from the home . . . .
>
> Normally such evidence is not permitted under our Rules of Evidence. Our rules specifically exclude evidence that a defendant

has committed other crimes, wrongs, or acts when it is offered only to show that he has a disposition or tendency to do wrong and, therefore, must be guilty of the charged offenses; however, our Rules of Evidence do permit evidence of other crimes, wrongs, or acts when the evidence is used for certain specific narrow purposes.

Here, it is not being offered to prove that the defendant did sell marijuana but rather to show the defendant's state of mind or motive or intent for his actions on May 31st, 2012; that is, that the defendant knew that [Tom and Ben] were making a claim that the defendant was selling marijuana from the home . . . .

Whether this evidence does, in fact, demonstrate the defendant's state of mind, motive, or intent is for you to decide. You may decide that the evidence does not demonstrate the defendant's state of mind, motive, or intent, and it is . . . not helpful to you at all. In that case you must disregard this evidence.

On the other hand, you may decide that the evidence does demonstrate the defendant's state of mind, motive, or intent and use it for that specific purpose. However, you may not use this evidence to decide that the defendant has a tendency to commit crimes or that he is a bad person; that is, you may not decide that just because the defendant has committed other crimes, wrongs, or acts that he must be guilty of the present crime.

I have admitted this evidence only to help you to decide the specific question of motive, intent, state of mind. You may not consider it for any other purpose and may not find the defendant guilty now simply because the State has offered evidence that he may have committed other wrongs or acts.

When asked, Tom acknowledged that Ben's conflicts with defendant included more than the teenager's suspicion that defendant was selling marijuana from the house.

Ben testified that on the date in question he had found "weed, a weed smell in [his] grandfather's room, on a scale in his room." His grandfather had been recently hospitalized with a stroke, so the room was empty. The scale had never been in his grandfather's room before that date, and Ben knew it belonged to defendant. Ben threw the scale outside. He had previously spoken to defendant about marijuana in the home because of the presence of his younger sisters. The house smelled of marijuana, and strangers often came looking for defendant. Ben acknowledged that he and defendant had other conflicts, and that the relationship worsened after his father called the police.

When defendant arrived at the house, Ben and defendant argued. Ben yelled at defendant, at which point defendant drove off. A few minutes later, when defendant returned, Ben was still standing outside the front door. Defendant approached, and the two "began tussling" in the middle of the street.

Mary broke up the fight, and defendant went in the house. Mary stood inside the front screen door to block Ben. Defendant approached the screen door, calling out that he was going to kill Ben and that the home was his. Ben threw a punch at defendant

through the screen door, saw something black in defendant's hand and a "flash." He immediately ran away, but could not remember hearing anything with the first flash. As Ben ran down the street, he heard a "second shot" and "started jetting it because [he thought defendant was] really trying to get [him] now." Once he reached his father and a neighbor, he saw defendant speed by.

Both of Ben's sisters were in the house when the incident occurred. Susan was thirteen at the time, and Janet, defendant's daughter, was seven. Mary testified that she first became aware of the confrontation when Susan asked her to go outside because Ben looked upset. She saw defendant pull in, and he and Ben began to fight. Mary could not stop them, but eventually defendant went into the house while she stood behind the door. After Ben punched it, she heard a gunshot, and Ben ran.

Defendant pushed Mary out of the way and chased after Ben. Mary turned to Susan, who was "in shock or something so she came down the steps and then I made sure she got to the couch." Janet was also there, although she seemed not to understand what was taking place. Everything happened very fast; Mary did not see a gun in defendant's hands. Mary was cross-examined about her continued contacts with defendant, once he was arrested and housed in the jail. She visited him, called him, and was initially willing to help him raise money for bail. The State introduced

photographs showing a bullet strike through a window, broken glass, and shell casings around the front door.

Neptune Township Detective Jason Petillo responded to the scene and days later interviewed defendant in Maryland, once he was taken into custody. The recorded interview took place in police barracks.

Petillo testified that before the interview with defendant began, he explained to defendant that charges had been filed against him, and he read defendant his Miranda[3] rights from the warning and waiver form card. Defendant agreed to waive his right to remain silent, and the approximately one-hour-long recording of the interview was played to the jury. Halfway through it, defendant asked Petillo his name. Petillo said that he did not recall if he had told defendant his name initially, but that defendant absolutely knew they were police detectives from New Jersey.

During the interview, defendant asked about bail, and refused to disclose the whereabouts of the weapon. The gun, which had an eight-bullet capacity, was eventually recovered. When recovered, it held six bullets.

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[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Petillo testified initially that he promised defendant that the woman friend with whom he was staying in Maryland would not be charged. He then said that although he did not know if that was conveyed by way of promise, it was not his intent "to prosecute anyone; just try to recover the weapon."

At the Miranda hearing, defendant argued that the detectives' failure to introduce themselves meant he did not knowingly and intelligently waive his Miranda rights. He also claimed that the statement was coerced because he believed he needed to talk to the detectives to be allowed bail and protect the woman with whom he stayed in Maryland.

The trial judge denied the Miranda motion. He observed that the interview was relaxed, and that the officers did not threaten or intimidate defendant. The judge found Petillo's testimony credible in that he read defendant his Miranda rights from a card, that defendant knew about the charges from the outset, knew he was speaking to police officers, and "that whatever he said could and would be used against him." Defendant's questions regarding bail, and efforts at convincing the officers to release him, did not in any way invalidate his knowing and voluntary waiver of his rights.

The judge also denied defendant's application to redact the recorded interview to exclude his discussion of the marijuana scale, and Ben's prior call to police about defendant selling

marijuana. In doing so, the judge applied the test formulated in State v. Rose, 206 N.J. 141 (2011). He concluded the evidence was admissible because defendant's defense theory was that he and Ben had significant conflicts because of Ben's suspicion that defendant was selling drugs. Accordingly, the State wanted to present the evidence to the jury to establish defendant's state of mind. The potential prejudice was outweighed by the evidence's probative value.

Over defendant's objection, the trial judge permitted the State to introduce defendant's testimony from the first trial as a statement of a party opponent. See N.J.R.E. 803(b)(1). He left to the parties to decide how it would be presented.

When the transcript was read to the jury, Petillo played the role of defendant, and the prosecutor of defense counsel. Once read, but prior to Petillo's cross-examination, defense counsel objected to Petillo's reading, arguing that it did not adequately reflect some of defendant's inflections, and that it diminished the exculpatory effect of his actual testimony. Defense counsel further argued that the State should have applied for the audio backup recording and played that, as opposed to having Petillo read the testimony into the record. The State responded that Petillo's inflections made defendant seem more, rather than less,

sympathetic. The jury followed along with their copies of the transcripts during the reading.

The judge overruled the objection, finding that the statement was admissible as the statement of a party opponent simply by the production of the transcript. He agreed with the State that Petillo's reading made defendant "sound more human rather than dehumanizing [him]."

During the testimony he gave at his first trial, defendant repeated some of the narrative of events he gave to the officers when interviewed in Maryland. He said that Ben initiated the confrontation, cursed at him, accused him of selling drugs out of his grandfather's room, and threatened to "shoot" him. After hearing this, defendant left for about twenty minutes.

When defendant returned, Ben was blocking the front door, and as he approached, Ben punched him. On the date of the incident, Ben weighed around 230 pounds and was five foot nine inches. Defendant fell on his back, trying to keep Ben at a distance. Ben then dragged him by the legs, at which point defendant said he became angry and started fighting back. After he kicked Ben under the chin, the fight stopped. His daughter was crying in the house, and when defendant went inside, he tried to comfort her. He heard Ben say he was going to "F him up," and tell his mother to move out of the way. Defendant saw Mary blocking the door, and he just

got "tired of this" and started looking for something with which to hit Ben. Then he realized he would get into trouble for that, and thought it would be better if he could just frighten Ben away.

Defendant grabbed the gun, approached the door, and "wanted to time it perfect so I didn't have to really do nothing with the gun." When Ben saw him, Ben punched the door, at which point defendant approached and displayed the gun. Ben began backing away, and defendant reached for the door since he just wanted Ben to keep moving. As he reached forward, however, Mary backed into him, and the gun accidentally fired. Ben began to run, but stopped at the corner.

Defendant said he chased Ben because he wanted him further away from the house. He denied firing a second shot, and explained that he fled because he knew it was going to be a long battle and he wanted to "try to set up all [his] eggs."

During summation, the prosecutor referred to defendant's "attempt[] to take the Fifth at the time in the testimony." The prosecutor was referring to defendant's refusal on cross-examination while testifying at the first trial to answer questions about his acquisition of the gun.

The prosecutor also told the jury that the defense theory "is nonsense. It is absolutely nonsense." The trial court sustained trial counsel's objection to the comment and instructed the

prosecutor to continue, which he did. The prosecutor added only that the claim of self-defense "should [not] carry the day."

When the prosecutor told the jury that defendant was "setting up" his defense for trial, counsel objected. The judge did not sustain that objection.

After the trial, defendant filed a motion before the assignment judge seeking to obtain the audio from the backup recorder server, commonly known as Courtsmart, of his prior trial testimony as well as Petillo's read-back. Counsel argued that it was necessary to a fair decision on defendant's motion for a new trial as well as his appeal. The assignment judge denied the motion without prejudice, noting that Administrative Directive 07-10 limits access to Courtsmart audio only to cases where the official trial record is lost. Since that was not defendant's situation, she denied the application.

In his motion for a new trial, defendant argued that Petillo's read-back was unduly prejudicial, his convictions for endangering the welfare of a child were against the weight of the evidence, and that references to marijuana, and the prosecutor's description of the self-defense theory as nonsense, deprived him of a fair trial.

When the trial judge denied defendant's motion for a new trial, he said:

> At the time the [c]ourt felt, listening to the read back, that the officer read the testimony in a way that did not denigrate the defendant or change the meaning of the words and so ruled at the time listening to it contemporaneously.
>
> It's worth noting that the prosecutor in this case today, who did not hear the testimony, hearing the officer read back, felt that it was overly sympathetic to the defendant. But in either event the ruling made at the time listening to the transcript read is not a basis for a new trial or in any way sufficient to overturn the jury verdict.

Furthermore, the judge considered the references to marijuana to be necessary because they elucidated the ongoing conflict between defendant and Ben. Additionally, he had instructed the jury that pursuant to N.J.R.E. 404(b), they were not to use the information to find defendant had the propensity to commit a crime, but only to explain the genesis of the dispute. The judge opined that defendant's use of a fully-loaded semi-automatic handgun, safety off, during a confrontation clearly endangered all three children.

With regard to the summation, the judge said the "nonsense" comment was no different than saying that the theory of self-defense made "no sense."

The judge further observed that during his interview with police, defendant clearly tried to assess the information the officers possessed about the incident in order to "suffer less

responsibility." Defendant admitted leaving New Jersey in order to set up his defense, and therefore, the State's comment on the evidence was not prejudicial.

Defendant had at least five felony convictions, served time in state prison and been sentenced to probation, albeit he was last convicted in 1986. Since then, he had been convicted of three disorderly persons offenses and petty disorderly persons offenses, the last of which took place in 2005. During his allocution at the sentence hearing, defendant expressed no remorse.

The judge found aggravating factor three, the risk defendant would commit another offense, N.J.S.A. 2C:44-1(a)(3), aggravating factor six, the extent of defendant's prior criminal history, N.J.S.A. 2C:44-1(a)(6), and aggravating factor nine, since there was "a need to deter the defendant and others from violating the law under these circumstances." N.J.S.A. 2C:44-1(a)(9).

The judge did not find any mitigating factors. He rejected mitigating factor three since "[t]here was no strong provocation." N.J.S.A. 2C:44-1(b)(3). Mitigating factor four did not apply because the circumstances of the dispute did not warrant the use of lethal force. N.J.S.A. 2C:44-1(b)(4). In light of defendant's criminal history, mitigating factor seven was inapplicable. N.J.S.A. 2C:44-1(b)(7). The judge did not find mitigating factor

eight because defendant "to this day has no comprehension of the seriousness of his actions." N.J.S.A. 2C:44-1(b)(8). The judge also rejected mitigating factor eleven, despite the argument that defendant was responsible for the care of his aging mother and that his incarceration would otherwise present unusual difficulties. N.J.S.A. 2C:44-1(b)(11).

On appeal, defendant raises the following points:

> Point 1 The admission of defendant's prior trial testimony through Officer Petillo unduly prejudiced the defendant and denied him a fair trial.
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> Point 2 The trial court erred in denying defendant's motion for the audio back up recording.
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> Point 3 The admission of references to marijuana and to other bad acts of defendant deprived defendant of a fair trial on the charges at issue below.
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> Point 4 The trial court erred in denying defendant's motion to suppress his statements to police.
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> Point 5 The prosecutor's references in summation that the defense theory of self-defense was nonsense, that the defendant began setting up his defense during his statement to police, and that the defense was attacking the victim, collectively deprived the defendant of a fair trial.

Point 6 Reference to defendant being in custody unfairly prejudiced defendant before the jury.

Point 7 The trial court erred in denying defendant's motion for a new trial on the endangering convictions.

Point 8 Defendant's sentence is improper and excessive.

I.

Because "the admissibility of evidence is fact sensitive," this court's review of a trial court's evidence determinations is deferential and governed by the abuse of discretion standard. State v. Fortin, 178 N.J. 540, 591 (2004) (citation omitted). "[U]nless clear error and prejudice are shown," this court will not interfere with the trial court's evidentiary determinations. State v. Wakefield, 190 N.J. 397, 452 (2007) (quoting State v. Murray, 240 N.J. Super. 378, 394 (App. Div. 1990)).

Defendant contends that Petillo's reading of his trial testimony was unfair and prejudiced the outcome. He alleges Petillo "used inflections in his voice" that should not have been heard by the jury, the jury should have heard the testimony directly from the Courtsmart audio, and that the reading alone warrants a new trial.

"Courts have broad discretion as to whether and how to conduct read-backs and playbacks." State v. Miller, 205 N.J. 109, 122

(2011) (citation omitted). "Traditionally, [for read backs,] court reporters read without inflection from their notes or transcripts . . . ." Id. at 120. However, as our Supreme Court in Miller noted, over the years, as "court reporters have become increasingly less common in the trial courts," more courtrooms have begun using "digital recording equipment to create the record." Ibid. This was precisely the case in Miller, as the record had been created by a digital recording. Id. at 121. When the jury requested to hear the testimony again, instead of having the jury wait until the recording was transcribed, the trial judge permitted a playback of the video. Ibid.

The Court held that the judge properly exercised his discretion, noting that:

> We trust juries with the critically important task of determining facts and making credibility assessments to reach a fair verdict. To fulfill that responsibility, juries should be provided with the best available form of evidence, upon request, unless there is a sufficiently strong, countervailing reason not to proceed in that way. In the digital age, that means presumptively providing video playbacks in favor of read-backs, if the jury so requests.
>
> [Ibid.]

Here, during the pre-trial conference, the State indicated its intention to utilize defendant's prior trial testimony. The judge properly found that the testimony was admissible, which

defendant does not dispute on appeal. The State also indicated that it was open to working with defense counsel as to the manner in which the testimony was to be presented, whether through the court reporter or through one of the State's witnesses, and the judge left that determination up to the parties. Defendant did not object until after the process had begun.

During the read back, each juror had a copy of the transcript. Moreover, the trial judge, who presided over both trials, stated that the inflections in the reading did not prejudice defendant. He said that he "felt, listening to the read back, that the officer read the testimony in a way that did not denigrate the defendant or change the meaning of the words and so ruled at the time listening to it contemporaneously."

It would have been proper for the jury to have been presented with a transcript of the testimony. See N.J.R.E. 803(b)(1). Role-playing by a detective and a prosecutor is not optimal, however, no alternative was agreed upon. The judge, who presided over the first trial and heard the read back during the second trial, thought the inflections, if anything, favored defendant. Therefore, we are satisfied that no error, harmless or otherwise, occurred.

II.

Defendant also contends it was error for the assignment judge to deny his motion for the audio back-up recording. Access to Courtsmart materials is governed by rule and directive. Rule 1:2-2 and Directive 07-10 only allow access to the extent necessary to reconstruct transcripts when the original audios or transcriptions are lost. Because that was not the case here, the exception did not apply. We see no error in the denial of the motion based on the rule and directive.

III.

In his third point, defendant asserts that the judge erred by allowing references to marijuana to be admitted. N.J.R.E. 404(b) governs the admission of evidence of "other crimes, wrongs, or acts," as follows:

> Except as otherwise provided by [N.J.R.E.] 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.
>
> [(Emphasis added).]

"The underlying danger of admitting other-crime evidence is that the jury may convict the defendant because he is a bad person in

general." State v. Rose, 206 N.J. 141, 159 (2011) (quoting State v. Cofield, 127 N.J. 328, 336 (1992)). "Thus, evidence of uncharged misconduct would be inadmissible if offered solely to prove the defendant's criminal disposition, but if that misconduct evidence is material to a non-propensity purpose such as those listed in Rule 404(b), it may be admissible if its probative value is not outweighed by the risk of prejudice." Ibid. (citation omitted).

Here, the trial court correctly relied upon N.J.R.E. 404(b) and the four-part test outlined in Cofield, 127 N.J. at 338:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
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> 2. It must be similar in kind and reasonably close in time to the offense charged;
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> 3. The evidence of the other crime must be clear and convincing; and
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> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [Rose, 206 N.J. at 160 (citing Cofield, 127 N.J. at 338).]

Defendant contends that the introduction of the marijuana-related evidence was highly prejudicial. However, the two cases defendant relies upon in support of the argument, State v. Hernandez, 170 N.J. 106 (2001), and State v. Darby, 174 N.J. 509 (2002), are inappropriate because they involved evidence of prior

bad acts similar to the crimes with which the defendants were charged.

In Hernandez, the defendant was charged with various drug-related offenses. 170 N.J. at 113. Our Supreme Court remanded the matter for a new trial after finding the admission of a witnesses' testimony that he and defendant sold drugs in a similar manner twenty times during the two months prior to their arrest, "extremely prejudicial." Id. at 130. Similarly, in Darby, the defendant was charged with robbery, and the Court remanded for a new trial finding that an accomplice's testimony that he and the defendant committed a similar robbery only days earlier was prejudicial, in addition to failing to meet the other three prongs of the Cofield test. Darby, 174 N.J. at 513, 516, 521.

In this case, the prior conduct was relevant. It explained an important aspect of the ongoing conflict between Ben and defendant, the reason Ben's discovery of a scale in his grandfather's bedroom would have enraged him, and the reason his act of throwing it out enraged defendant. Evidence of a defendant's state of mind and motive are particularly relevant. State v. Calleia, 206 N.J. 274, 293 (2011). It has the "unique capacity to provide a jury with an overarching narrative, permitting inferences for why a defendant might have engaged in the alleged criminal conduct." Ibid. (citation omitted). In this

case, it was important to explain the ongoing dispute between Ben and defendant.

The second Cofield factor has not been universally required. See Rose, 206 N.J. at 160. "Temporality and similarity of conduct is not always applicable, and thus not required in all cases." Ibid.

The evidence was clear and convincing. The probative value was not outweighed by the apparent prejudice——the probative value was great as it was the context for the confrontation.

Furthermore, the judge warned the jury following the testimony:

> I have admitted this evidence only to help you to decide the specific question of motive, intent, state of mind. You may not consider it for any other purpose and may not find the defendant guilty now simply because the State has offered evidence that he may have committed other wrongs or acts.

The admission of the references to marijuana was not an abuse of discretion.

IV.

When reviewing a motion to suppress, we uphold the factual findings of the trial court when they are based upon "sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007) (quoting State v. Locurto, 157 N.J. 463, 474 (1999)). Deference is given to the trial court's factual findings because

of the trial court's ability to observe the witnesses firsthand. Id. at 244 (citing State v. Johnson, 42 N.J. 146, 161 (1964)). A trial court's factual findings will not be disturbed merely because an appellate court would have reached a different conclusion. Ibid. (citing Johnson, 42 N.J. at 161). However, the trial court's factual findings will be disturbed if justice so demands. Ibid. (citing Johnson, 42 N.J. at 161).

Defendant asserts that the court erred in denying his motion to suppress his statement because his waiver of his right to remain silent was not knowing and voluntary. He reiterates the same arguments made before the trial judge——that the police officers did not specifically identify themselves, threatened to charge his girlfriend, and promised that his bail would be reduced. After viewing the taped interview, we do not agree that the record supports these claims.

Defendant was interviewed in a police barrack in Maryland after being taken into custody on a New Jersey warrant. He knew he was being interviewed by New Jersey police officers, and when pressed for the whereabouts of the gun he had used in the incident and the identity of the person with whom he stayed, he simply refused to answer. The officers made clear to him that no promises could be made with regard to bail. In fact, Petillo told defendant that until an extradition hearing was conducted, the issue could

not even be addressed. These points are so lacking in merit as to not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

V.

Defendant also asserts that the prosecutor made comments during summation that prejudiced his right to a fair trial. This includes the prosecutor's description of defendant's self-defense theory as "nonsense," his references to defendant "setting up" his defense during his initial police interview, his comment that defendant attacked the victim on cross-examination, and mention of the fact that he was in custody before the trial.

"[P]rosecutorial misconduct can be a ground for reversal where the prosecutor's misconduct was so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999) (citing State v. Siciliano, 21 N.J. 249, 262 (1956)). In determining whether a prosecutor's remarks warrant reversal of a verdict, this court must consider "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Ibid. (citations omitted).

Defendant draws a parallel between the prosecutor's comments in his case and those of the prosecutor in State v. Munoz, 340

N.J. Super. 204 (App. Div. 2001). In that case, the prosecutor said that defendant and his attorney "concocted" an alibi. Munoz, 340 N.J. Super. at 217. We held that a prosecutor may not "demean the role of defense counsel or cast unjust aspersions upon a lawyer's motives." Id. at 218 (citations omitted). That, however, is different from the comments in this case.

After the incident, defendant went from New Jersey to Maryland, and readily acknowledged doing so in his recorded interview. He told the officers that he did so because he needed time to "set up all [his] eggs." Thus, the record itself directly supported the prosecutor's words that defendant was setting up his defense. Given defendant's own words, which were heard by the jury, the comment was not improper.

Defendant's assertion of self-defense, when it is undisputed that he chased an unarmed teenager while holding a loaded handgun, safety disengaged, certainly makes, as the trial judge commented, "no sense." Nonetheless, the judge sustained the objection at trial to the prosecutor's "nonsense" statement. It certainly did not prejudice defendant's right to a fair trial.

That the prosecutor said defendant attacked Ben during cross-examination was not prejudicial either. The prosecutor was merely responding to defendant's attempt to discredit the victim. Defense counsel focused on Ben's credibility during cross-examination and

in summation. In fact, in his closing statement, counsel argued that if "[Tom and Ben] are willing to lie about small details such as where [Ben] ran that day, about what [Tom's] purpose was for coming to the house that day was, maybe they're also willing to lie about the big things like whether there was a second shot or not." Thus, the prosecutor's words were merely a response to the defense theory that the victim was incredible. See State v. McGuire, 419 N.J. Super. 88, 145 (App. Div. 2011).

Defendant's contention that the jurors would have been prejudiced by knowledge of his incarceration also lacks merit. During the State's presentation, the judge instructed the jury to disregard the fact defendant may have been in custody. In the final charge, he added that defendant being "in custody at some point has no bearing whatsoever on whether he is guilty of the crimes for which he is on trial." Additionally, it was defense counsel, in order to discredit Mary, who asked about her contacts with defendant while he was in jail, including visiting and calling him there, and being willing to contribute towards his bail. It was defense counsel who wanted the references to bail to remain in defendant's statement. We find no error in the jury learning that defendant was in custody.

Furthermore, if error, it was invited error. Defendant cannot request a court follow a course of conduct, and then if the outcome

is not favorable, claim it was error and prejudicial. State v. Young, 448 N.J. Super. 206, 225 (App. Div. 2017). "[W]hen a defendant ask[ed] the court to take his proffered approach and the court does so . . . relief will not be forthcoming on a claim of error by that defendant." State v. Jenkins, 178 N.J. 347, 358 (2004). Having developed a theory of the case upon which the trial judge relied in making his rulings, defendant cannot be heard now to repudiate it.

VI.

Defendant asserts that his convictions for endangering the welfare of children should be vacated because the State's proofs were insufficient to establish that the shooting occurred in the presence of the two young girls in the home, and that his application for a new trial should have been granted. The 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." R. 2:10-1. "That inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must afford 'due deference' to the trial court's 'feel of the case,' with regard to the assessment of intangibles, such as witness credibility." Jastram v. Kruse, 197 N.J. 216, 230 (2008) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)).

The court considered defendant to have placed all the children in the home at risk. The girls were upset about what had occurred and were present when defendant shot at Ben. The State was not obligated to prove more. The trial judge properly exercised his discretion in denying the motion. See State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000).

VII.

The standard of review of a trial court's sentence is "one of great deference and judges who exercise discretion and comply with the principles of sentencing remain free from the fear of second guessing." State v. McGuire, 419 N.J. Super. 88, 160 (App. Div. 2011) (quoting State v. Dalziel, 182 N.J. 494, 501, (2005)).

We review sentences deferentially. State v. Lawless, 214 N.J. 594, 606 (2013). We ask only if legislative guidelines have been followed, if competent credible evidence supports each finding of fact upon which the sentence was based, and, whether application of the facts to the law is such a clear error of judgment as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 364-65 (1984). Aggravating and mitigating factors must be fully supported by the evidence. State v. Blackmon, 202 N.J. 283, 297 (2010). Appellate review of the length of a sentence is limited. State v. Miller, 205 N.J. 109, 127 (2011).

The trial judge had ample support in the record for his conclusions. Defendant's criminal history and statements at sentencing established that he was at risk to reoffend. Defendant's prior criminal history was significant, albeit from years prior. Chasing and shooting at an unarmed child with a loaded semi-automatic handgun is conduct that requires deterrence.

We also agree that none of the mitigating factors applied. Accordingly, this mid-range sentence was entirely appropriate given the presence of aggravating factors and absence of any mitigating considerations. The judge more than adequately stated his reasons. The competent, credible evidence supported the judge's findings of fact, and his conclusions of law based on those facts were reasonable. The sentence does not shock our conscience.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION