SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3357-14T2
A-3395-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIWAN FLAGLER, a/k/a
TUQAUN ASHLEY,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARNELL WILSON,

Defendant-Appellant.

Submitted May 10, 2017 – Decided May 11, 2018

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-01-0081.

Joseph E. Krakora, Public Defender, attorney for appellant Tiwan Flagler (Stephen W. Kirsch, Assistant Deputy Public Defender, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Darnel Wilson (Michele A. Adubato, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Kerry J. Salkin, Assistant Prosecutor, on the briefs).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

A Hudson County grand jury indicted defendants Tiwan Flagler and Darnell Wilson for first-degree armed robbery, N.J.S.A. 2C:15-1 (count one); second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 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). Flagler was also indicted in two additional counts for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count five); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count six). Following a joint jury trial, defendants were convicted on all counts.[1] After appropriate

[1] At the close of the State's case, the trial court granted Flagler's motion to dismiss count six pursuant to Rule 3:18-1.

merger, Wilson was sentenced to an aggregate eighteen-year prison term, subject to the eighty-five percent parole ineligibility provisions of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Flagler was sentenced to an aggregate extended term of thirty years, subject to NERA.

The convictions stemmed from defendants robbing a traveling salesman at gunpoint after luring him to a secluded location. The victim promptly reported the robbery to the police and provided a description of his assailants, who had been regular customers, as well as a description of the vehicle they were driving. A few days later, police conducted a motor vehicle stop of the suspect vehicle and apprehended the two occupants, who matched the victim's descriptions and were later identified as defendants. A handgun matching the victim's description was found on Flagler's person during the ensuing pat down.

In these back-to-back appeals, which we now consolidate for purposes of this opinion, defendants appeal their convictions and sentences. Wilson raises the following arguments for our consideration:

> POINT I
>
> THE WARRANTLESS STOP AND SEARCH OF THE NISSAN AUTOMOBILE VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM UNLAWFUL SEARCH AND SEIZURE GUARANTEED BY THE NEW JERSEY AND FEDERAL CONSTITUTIONS.

POINT II

MR. WILSON'S MOTION [TO] SEVER COUNTS FIVE AND SIX THAT RELATED ONLY TO . . . FLAGLER, SHOULD HAVE BEEN GRANTED.

POINT III

TESTIMONY OF DETECTIVE POST THAT BASED ON INFORMATION PROVIDED HE WENT TO [THE BUREAU OF CRIMINAL INVESTIGATIONS] TO OBTAIN DEFENDANT'S PHOTOGRAPH FOR A PHOTOGRAPH ARRAY WAS GROSSLY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT IV

CERTAIN COMMENTS MADE BY THE PROSECUTOR IN SUMMATION WERE GROSSLY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT V

IT WAS ERROR FOR THE TRIAL COURT TO DENY DEFENDANT'S REQUEST FOR A "FALSE IN ONE, FALSE IN ALL" CHARGE.

POINT VI

THE AGGREGATE SENTENCE IMPOSED UPON THE DEFENDANT OF EIGHTEEN (18) YEARS WITH 85% PAROLE INELIGIBILITY WAS EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED. (Not Raised Below).

Flagler raises the following points for our consideration:

POINT I

THE BRANCH ERRORS, WHICH OCCURRED WHEN THE PROSECUTOR ELICITED FROM POLICE WITNESSES THAT THEY TOOK PARTICULAR ACTION IN THE CASE -- MOST NOTABLY ASSEMBLING PHOTO ARRAYS USED TO IDENTIFY THE DEFENDANT AND CODEFENDANT -- BASED UPON INADMISSIBLE HEARSAY EVIDENCE, i.e., UPON "INFORMATION RECEIVED," VIOLATED

DEFENDANT'S RIGHTS AGAINST HEARSAY EVIDENCE AND HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION, AND CONSTITUTES REVERSIBLE ERROR. (Partially Raised Below).

POINT II

WHEN A JUROR WAS DISMISSED AT THE BEGINNING OF THE TRIAL FOR READING NEWS COVERAGE ABOUT THE CASE, THE JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO CONDUCT A VOIR DIRE OF THE REST OF THE JURY TO DETERMINE IF THE DISMISSED JUROR HAD CONVEYED ANY OF WHAT SHE READ TO THE OTHER JURORS. (Not Raised Below).

POINT III

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

After considering the arguments presented in light of the record and applicable law, we affirm.

I.

We recount the pertinent facts from the trial record. On August 10, 2012, M.I.[2] was in Jersey City selling home theater and stereo systems out of his truck. Although he was operating without a license, M.I. purchased the systems wholesale from a manufacturer and sold them on the street for a profit. Defendants were two of M.I.'s repeat customers, having previously purchased from M.I. on multiple occasions. On the evening of August 10, M.I. agreed to meet Wilson and Flagler at the Gulf gas station on Route 440 and Duncan Avenue in Jersey City so that they could make a purchase.

[2] We use initials to identify the victim to protect his privacy.

According to M.I., defendants arrived in a green Nissan Altima that was being driven by Wilson. Flagler was the front seat passenger.

After examining the goods in M.I.'s truck, Wilson offered to buy several items, and advised M.I. that a friend of his also wished to make a purchase. However, because Wilson's friend was supposedly still at work, M.I. agreed to follow Wilson to his friend's job. While enroute, they communicated by phone so that they would not get separated. When they arrived at a school parking lot, Wilson switched his story, explaining that his friend was now "at his house." Although apprehensive, M.I. continued to follow defendants to a residence on Van Nostrand Avenue. Upon arrival, both cars parked in the adjacent driveway, but there was no sign of Wilson's friend. Nonetheless, M.I. and defendants exited their respective vehicles and continued to negotiate prices for the goods.

Flagler then asked M.I. to show him "how to connect a phone for your [MP3] to the back of the receiver." M.I. reached through the passenger side window of his truck to retrieve the MP3 wire to demonstrate. When he turned around, Flagler was pointing a gun in his face. Flagler slid the gun down into M.I.'s mid-section, pinning M.I. against the truck, and threatened M.I. stating, "[i]f you move . . . I don't give a f***, I'll blow it." Meanwhile,

Wilson removed three home theater systems from M.I.'s truck and rifled through M.I.'s pockets, removing his cell phone and approximately twenty-one dollars in cash. When they returned to their vehicle to flee, M.I. pleaded with defendants to return his cell phone. Instead, Flagler pointed the gun out of the passenger side window towards M.I., prompting M.I. to duck behind his truck as defendants drove off.

After defendants left, M.I. drove to a gas station to get directions to the closest police station because he was unfamiliar with the area. M.I. was directed to the Jersey City police station where he reported the robbery to Officer Ryan Macaluso. M.I. also provided descriptions of defendants, their vehicle, a partial license plate, and the gun used in the robbery. M.I. described his assailants as "two Black males, approximately five[-]foot seven . . . 200 pounds, both between [the] age of approximately 19 and 23[,]" one with a "crew cut" and the other with "dreadlocks." M.I. described their vehicle as a green four door "2000 Nissan Altima" bearing a license plate beginning with the letter B and ending with the letter L. He described the weapon as a "black colored revolver with white tape on the handle." Once M.I.'s report was filed, Detective Michael Post was assigned to investigate the case.

Five days later, on August 15, 2012, Jersey City Police Officer Joseph Seals conducted a motor vehicle stop of a vehicle matching M.I.'s description being driven by a woman named Alexis Street. Based on information obtained during the stop, Post identified Wilson as a possible suspect and a six-person photo array, including Wilson's photograph, was prepared and presented to M.I. in a photo line-up identification procedure. As a result, M.I. positively identified Wilson as one of the robbers and Post issued a warrant for Wilson's arrest. Five days later, on August 20, 2012, Seals observed the same vehicle occupied by two males matching M.I.'s descriptions traveling north on Bergen Avenue. Seals along with three other officers, including Officer Ed Redmond, conducted another motor vehicle stop. After the stop, Seals approached the Nissan on the driver side and identified Wilson as the driver. Upon confirming that the arrest warrant issued by Post was active, Seals placed Wilson under arrest.

Meanwhile, Redmond approached the Nissan from the passenger side and noted that both occupants were "breathing heavily," were "sweating" and "appeared nervous." Redmond observed a bulge on the left side of the passenger's waistline. Based on the location and the size of the bulge, Redmond suspected that it was a weapon and ordered the passenger, who was later identified as Flagler, out of the vehicle. After Flagler exited the vehicle, Redmond

conducted a pat down and retrieved a loaded .380 caliber handgun with light colored tape on the handle from Flagler's waistline. Flagler was then placed under arrest. Redmond secured the gun by removing the magazine, which contained seven rounds, and clearing the chamber of one round.[3] The following day, Post prepared a six-person photo array, including Flagler's photograph, and arranged for the array to be presented to M.I. in a photo line-up identification procedure. As a result, M.I. positively identified Flagler as the second robber. At trial, M.I. identified both defendants as the robbers and the handgun seized from Flagler as the gun used during the robbery.

Following the guilty verdict, on February 6, 2015, the trial court granted the State's motion for an extended-term sentence, finding Flagler met the persistent offender criteria set forth in N.J.S.A. 2C:44-3(a). After merging counts two and four into count one, the court sentenced Flagler to thirty years' imprisonment, subject to NERA, on count one, and a concurrent ten-year term with a five-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6, each on counts three and five. As to Wilson, the court sentenced him to eighteen-years' imprisonment, subject to NERA, on count one and a concurrent ten-year term with

[3] The State produced a firearms expert who testified that the handgun was operable.

a five-year period of parole ineligibility on count three. A memorializing judgment of conviction was entered on March 23 and February 17, 2015, respectively, and these appeals followed.

II.

In Point I of his merits brief, Wilson contends the trial court erred in denying his pre-trial suppression motion. Wilson argues "the [c]ourt's denial of the motion on the grounds that the stop was justified because defendant was not wearing a seatbelt, that there was a warrant for [Wilson's] arrest and there was probable cause . . . was erroneous." We disagree.

At the pre-trial suppression hearing conducted on November 19, 2013, Seals and Edmond testified consistent with their trial testimony. According to Seals, on August 15, 2012, when he pulled over Street because she was operating a vehicle matching the description of a vehicle involved in an armed robbery, she advised him that her boyfriend, Wilson, was the only other operator of the vehicle. After Seals provided this information to the detective bureau, a warrant was issued for Wilson's arrest. Five days later on August 20, 2012, when Seals observed the same vehicle occupied by two males fitting the description of the robbers, neither of whom were wearing a seat belt, he conducted a second motor vehicle stop.

After the stop, as Seals approached the driver side of the vehicle, he noted that both occupants were breathing heavily as if they were nervous. Seals confirmed that the driver was, in fact, Wilson and that the warrant for his arrest was active. Meanwhile, after observing a bulge on the left side of the front seat passenger's waistline and the same nervous behavior detected by Seals, Edmond removed the passenger, later identified as Flagler, from the vehicle and conducted a pat down, resulting in the seizure of the loaded handgun.

Following the hearing, the court found the officers credible and made factual findings consistent with their testimony. The court rejected Wilson's arguments, renewed on appeal, "that the stop of the motor vehicle for a seatbelt violation was merely a pretext utilized by the officers to stop the vehicle" and that "the officers did not have a heightened sense of danger sufficient to order the occupants to exit the vehicle."

In denying the motion, the court stated:

> Whether or not the officers were more interested in investigating the armed robbery than the minor traffic violation is completely irrelevant with regard to the justification for the stop. It is beyond dispute that police officers may lawfully stop a motor vehicle for a violation of our motor vehicle laws. Here, the driver of the vehicle was operating the vehicle without a seatbelt, and that's a violation. Therefore, the stopping of the

> motor vehicle as a consequence of that violation was lawful.
>
> Even if that were not the case, the testimony here establishes, based upon the totality of the circumstances[,] that these officers had far more than merely a reasonable suspicion of criminal activity. There was at that time a warrant for the arrest of . . . Wilson. And both officers were aware of its existence.
>
> They were further aware of the allegations involving the use of a handgun in the robbery. They were aware of the descriptions provided of these defendants, as well as a detailed description of the vehicle, and these defendants and the vehicle matched those descriptions. The existence of the warrant, standing on its own, establishes that probable cause existed for the arrest of . . . Wilson.
>
> Since the vehicle stop was lawful and the officers were aware that the particular crime for which Wilson and the second man matching the physical characteristics of the vehicle's passenger were wanted . . . involved a handgun, when the officers observed a bulge in the passenger's waistband, I'm satisfied it was more than objectively reasonable for him to have a heightened sense of danger and lawful under the circumstances to require the occupants to exit the vehicle to enable him to conduct a protective search for a weapon.
>
> The search . . . conducted did not exceed the scope permitted for a limited protective search.

Our Supreme Court has explained our standard of review of a trial court's ruling on a motion to suppress as follows:

> We are bound to uphold a trial court's factual findings in a motion to suppress provided those "findings are 'supported by sufficient credible evidence in the record.'" Deference to those findings is particularly appropriate when the trial court has the "opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy." Nevertheless, we are not required to accept findings that are "clearly mistaken" based on our independent review of the record. Moreover, we need not defer "to a trial . . . court's interpretation of the law" because "[l]egal issues are reviewed de novo."
>
> [State v. Watts, 223 N.J. 503, 516 (2015) (alteration in original) (citations omitted) (first quoting State v. Elders, 192 N.J. 224, 243-44 (2007); then quoting State v. Vargas, 213 N.J. 301, 327 (2013)).]

Applying this standard, we discern no basis to disturb the judge's ruling.

It is a well-established constitutional principle that "[m]otor vehicle stops are seizures for Fourth Amendment purposes." State v. Sloane, 193 N.J. 423, 429-31 (2008). "Under both the Fourth Amendment [of the United States Constitution] and Article I, Paragraph 7 [of the New Jersey Constitution], ordinarily, a police officer must have a reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-vehicle violation or a criminal or disorderly persons offense to justify a stop." State v. Scriven, 226 N.J. 20, 33-34 (2016). Unless the totality of the circumstances

satisfies the reasonable and articulable suspicion standard, the investigatory stop "is an 'unlawful seizure,' and evidence discovered during the course of an unconstitutional detention is subject to the exclusionary rule." Elders, 192 N.J. at 247 (quoting State v. Rodriquez, 172 N.J. 117, 132-33 (2002)).

In determining the reasonableness of the police conduct, an objective test is used, "recognizing that raw, inchoate suspicion grounded in speculation cannot be the basis for a valid stop." Scriven, 226 N.J. at 34. Rather, "a reviewing court must assess whether 'the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate.'" State v. Mann, 203 N.J. 328, 338 (2010) (quoting State v. Pineiro, 181 N.J. 13, 21 (2004)). The State bears the burden of proving "by a preponderance of the evidence that it possessed sufficient information to give rise to the required level of suspicion." State v. Amelio, 197 N.J. 207, 211 (2008).

A pat-down of an occupant ordered from a car after an investigatory stop is a separate event that is also subject to constitutional scrutiny and must be evaluated under the standard enunciated in Terry v. Ohio, 392 U.S. 1 (1968). "[T]o justify a pat-down of an occupant once alighted from a vehicle, specific, articulable facts must demonstrate that a 'reasonably prudent man

in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" State v. Smith, 134 N.J. 599, 619 (1994) (quoting Terry, 392 U.S. at 27). "A 'hunch' forms an insufficient basis on which to conduct the uncomfortable and often embarrassing invasion of privacy that occurs in a pat-down of a person's body." Ibid. However, a bulge alone has been held sufficient to validate a protective pat-down. See Pennsylvania v. Mimms, 434 U.S. 106, 111-12 (1977); State v. Wanczyk, 201 N.J. Super. 258, 264 (1985) ("[o]nce defendant exited the car and the police observed the bulge in the left sleeve of defendant's jacket, the officers unquestionably had the right to conduct a frisk of the defendant under the principles pronounced in [Terry]."). "In this one respect, the Terry standard [to justify a pat-down] and the standard for ordering a passenger out of a car are the same." Smith, 134 N.J. at 619.

Here, the trial court's finding that the totality of the circumstances justified an investigatory stop of the vehicle and a pat-down of Flagler was derived from Seals' and Edmonds' testimony, which the court accepted as credible. The court found that: (1) defendants and the vehicle matched the victim's descriptions of the armed robbers and the getaway vehicle, respectively; (2) an arrest warrant had been issued for Wilson; (3) police observed a motor vehicle violation by virtue of Wilson's

operation of the vehicle without wearing a seat belt;[4] (4) when the officers approached the vehicle, defendants appeared nervous; and (5) Edmonds observed a bulge on Flagler's waistline. We are satisfied that the trial court's findings are amply supported by the record. See State v. Stovall, 170 N.J. 346, 367 (2002) (noting even though nervousness may be normal, it "does not detract from the well-established rule that a suspect's nervousness plays a role in determining whether reasonable suspicion exists").

III.

In Point II of his merits brief, Wilson argues the trial court erred in denying his pre-trial motion to sever counts five and six that related only to Flagler, and charged weapon possession offenses during the August 20 motor vehicle stop that occurred subsequent to the robbery. Specifically, Wilson contends that the two "Flagler counts . . . did not relate to him and a joint trial including those two counts would be grossly prejudicial." We disagree.

At the pre-trial motion hearing conducted on November 5, 2014, the trial court denied Wilson's request for severance of counts five and six after rejecting his argument that the State's

[4] N.J.S.A. 39:3-76.2f(a) provides, in pertinent part, that "each driver and front seat passenger of a passenger automobile operated on a street or highway in this State shall wear a properly adjusted and fastened safety seat belt . . . ."

introduction of evidence from the August 20 motor vehicle stop, which resulted in the recovery of the handgun during the pat-down of Flagler, prejudiced his right to a fair trial. Based on the State's contention that the handgun involved in the August 5 armed robbery was the same gun recovered from Flagler during the August 20 pat-down, the court determined that

> [T]hese two incidents occurred very close in . . . time. The evidence of the possession of a firearm is certainly clear and convincing, and the prejudice to the defendant . . . is not overwhelming. The probative value is more significant than the prejudice to the defendant.
>
> So, I don't . . . find any reason why this evidence wouldn't be admissible at a joint trial in any event, so severance is not required . . . .

The decision whether to deny defendant's motion to sever counts at trial "rests within the trial court's sound discretion and is entitled to great deference on appeal." State v. Brown, 118 N.J. 595, 603 (1990). Thus, the "[d]enial of such a motion will not be reversed in the absence of a clear showing of a mistaken exercise of discretion." State v. Krivacska, 341 N.J. Super. 1, 38 (App. Div. 2001). "[W]here the evidence establishes that multiple offenses are linked as part of the same transaction or series of transactions, a court should grant a motion for

severance only when defendant has satisfied the court that prejudice would result." State v. Moore, 113 N.J. 239, 273 (1988).

Because courts have recognized that any trial involving several charges "probably will involve some potential [prejudice], . . . other considerations, such as economy and judicial expediency, must be weighed" when deciding a severance motion. State v. Coruzzi, 189 N.J. Super. 273, 297 (App. Div. 1983). These interests may require that charges remain "joined for a single trial, so long as the defendant's right to a fair trial remains unprejudiced." Id. at 298 (citations omitted). Thus, "'the mere claim that prejudice will attach' is not sufficient to support a motion for severance[.]" Moore, 113 N.J. at 274 (quoting State v. Kent, 173 N.J. Super. 215, 220 (App. Div. 1980)).

Rule 3:7-6, which governs the joinder of offenses, provides that

> [t]wo or more offenses may be charged in the same indictment . . . if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan.

Under Rule 3:7-6, "[r]elief from prejudicial joinder shall be afforded as provided by [Rule] 3:15-2." Rule 3:15-2(b) provides that if it appears that a defendant is prejudiced by a joinder of "defendants in an indictment[,]" the court "may order an election

or separate trials of counts, grant a severance of defendants, or direct other appropriate relief."

In determining whether joinder is prejudicial, the critical inquiry is "whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges." State v. Chenique-Puey, 145 N.J. 334, 341 (1996) (alteration in original) (quoting State v. Pitts, 116 N.J. 580, 601-02 (1989)). Where evidence would be admissible at both trials, severance may be denied as "a defendant [would] not suffer any more prejudice in a joint trial than he would in separate trials." Ibid. (quotation omitted). Under N.J.R.E. 404(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.

"Evidence of conduct including other criminal acts of an accused, subsequent to the offense charged is admissible if it is probative of guilt." State v. Johnson, 287 N.J. Super. 247, 262 (App. Div. 1996).

Here, the trial court correctly denied Wilson's severance motion because the evidence would have been admissible under

N.J.R.E. 404(b) based on the State's position that the gun found on Flagler's person following the motor vehicle stop was jointly possessed by both Flagler and Wilson, and was the gun used to perpetrate the armed robbery for which Wilson was on trial. The offenses were therefore interrelated and probative of guilt. As the court correctly found, any prejudice to Wilson did not overwhelm the extreme probative value of the evidence relating to the charged offenses. Moreover, joinder was warranted in "[t]he interests of economy and efficiency . . . ." Coruzzi, 189 N.J. Super. at 298. See also State v. Urcinoli, 321 N.J. Super. 519, 543 (App. Div. 1999) (finding no abuse of discretion in denying the motion to sever in the absence of undue prejudice and acknowledging judicial economy).

IV.

In Point III of his merits brief, Wilson argues that Detective Post's testimony regarding "information received" and "'names' obtained" constituted inadmissible hearsay evidence. According to Wilson, Post's testimony "[c]oupled with reference to BCI which implied a prior criminal history," and the trial court's denial of his "request to crop [defendant's] photograph to eliminate the police identifiers so a juror could not lift the tape[,]" unfairly

prejudiced him, and "[t]he trial court's charge regarding police photos did not dissipate this prejudice."

At trial, Post testified during his direct examination that on August 15, 2012, he received a report "regarding a car stop of a vehicle that matched" the robbery victim's description. Using the "name that was provided" in the report, Post "went to [the] Bureau of Criminal Investigations and --[.]" Before Post completed this sentence, Wilson's counsel objected and the following colloquy ensued:

> [WILSON'S COUNSEL]: I think we are getting into where he developed the photo array. I think he was about to open to he went to his Criminal Investigation Unit to get the pictures which is concerning —
>
> [THE COURT]: What is it you're trying to get out, sir?
>
> [PROSECUTOR]: . . . He said he looked at pictures of the guy and matched, so he set up [a] photo array and asked [M.I.] to come in.
>
> [THE COURT]: Looked up a picture of what guy, it matched what?
>
> [PROSECUTOR]: . . . [L]ooked up a picture of . . . Wilson and matched the description provided by [M.I.], so he set up a photo array and called [M.I.] to come in.
>
> [THE COURT]: You are going to have to skip all of the preliminaries and get to the photo array because without Alexis Street testifying that she told them her boyfriend is Darnell

> Wilson, he uses the car, there is no connection between the two. You don't have her, so everything he's going to say is going to be hearsay. You can't go there, but you can get to the point he sets up a photo array and asked him if he could identify him.
>
> [WILSON'S COUNSEL]: I don't have a problem if you lead him into that, you set up a photo array.
>
> . . . .
>
> [THE COURT]: Based on information received, set up photo array, lead to the identification of [Wilson], simple and clean.

At that point, Flagler's counsel made the following request, which was joined by Wilson's attorney:

> [S]ince the Bureau of Criminal Identification has already been said by this Detective, [I request] that you instruct the jury to take no negative inference from him going there. It has nothing to do with anything related to this case. He said Bureau of Criminal Identification and it may be in the jury's head it has something to do with them in criminal activity.

The court agreed and instructed the jury as follows:

> Ladies and gentlemen, a moment ago in the response, the witness indicated that there is some facility within the Jersey City Police Department called their Bureau of Identification or BCI, Bureau of Criminal Investigation or Identification, they're two different things and, you're to take no negative inference from the fact that a photograph or photographs may have been taken from there and utilized in this investigation.

> As I indicated to you previously, photographs come into possession of police departments in many different ways that are unconnected with any illegal activity or criminal activity on the part of a person. You're to draw no negative inferences from the fact that a photograph or photographs were obtained from the Bureau of Criminal Identification.

There was no objection to the court's charge.

Following the court's instruction, the State continued its direct examination of Post, inquiring whether Post set up a photo array "based on any information" obtained on August 15, 2012. Post responded in the affirmative and testified that after he set up the photo array containing a total of six photos, he contacted M.I. to come in and view the photographs. He arranged for an "independent [d]etective" to conduct the identification procedure, which resulted in a positive identification of Wilson as one of the robbers.

After the photo array was admitted into evidence, Wilson's counsel noted that there was "a placard on those photos showing Jersey City mug shots." Counsel urged the court to "cut off" the placard so that "just [the] picture of the face" appears, rather than just covering the placard with masking tape. According to counsel, it would be "quite easy for a juror to peel that tape off and see what's behind there[,]" and "[w]hat's behind there is

extremely prejudicial and has no probative value here." In denying defense counsel's request, the court stated:

> I gave [the jury] multiple instructions with respect to the photographs and the fact they're not to . . . draw any negative inferences from the fact that Jersey City [p]olice happen to have photographs of your clients. So I have done that at least three times. I am going to do it in the final instructions. I don't see any reason why the [c]ourt should believe they would not comply with that instruction and tamper with the evidence. I don't think that's appropriate.

We first address Wilson's argument that Post's testimony regarding "information received" and "'names' obtained" constituted inadmissible hearsay. Because a defendant has a constitutional right to confront his accusers, statements made by non-testifying persons suggesting defendant is involved in unlawful conduct are excluded unless admissible on some other basis, and unless defendant had the opportunity for cross-examination. State v. Cabbell, 207 N.J. 311, 329-30 (2011) (citing Crawford v. Washington, 541 U.S. 36, 59 (2004)). Such statements must be excluded if they connect in some improper manner to the criminal prosecution in question. Id. at 329.

In State v. Branch, 182 N.J. 338 (2005), an officer "testified that he included defendant's picture in a photographic array because he had developed defendant as a suspect 'based on information received.'" Id. at 342. He also testified to the

out-of-court descriptions of a burglar given by "non-testifying child victims." Ibid. Our Supreme Court found the testimony to be "inadmissible hearsay that violated defendant's right of confrontation" because the source of the information was not called as a witness, and defendant had no opportunity to cross-examine. Ibid. The Court noted:

> When a police officer testifies concerning an identification made by a witness, . . . what counts is whether the officer fairly arranged and displayed the photographic array and whether the witness made a reliable identification. Why the officer placed the defendant's photograph in the array is of no relevance to the identification process and is highly prejudicial. For that reason, we disapprove of a police officer testifying that he placed a defendant's picture in a photographic array "upon information received." Even such seemingly neutral language, by inference, has the capacity to sweep in inadmissible hearsay. It implies that the police officer has information suggestive of the defendant's guilt from some unknown source.
>
> [Id. at 352-53 (citation omitted).]

Here, these principles were clearly violated. Thus, we must now determine whether the trial court's admission of the detective's testimony constituted harmless error. Rule 2:10-2 directs reviewing courts to disregard "[a]ny error or omission . . . unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." Known as the harmless

error doctrine, the rule "requires that there be 'some degree of possibility that [the error] led to an unjust result.'" State v. R.B., 183 N.J. 308, 330 (2005) (alteration in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)). As to the extent of error required for reversal, "[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." Ibid. (second alteration in original) (quoting Bankston, 63 N.J. at 273).

Unlike Branch, this was not "a close case." 182 N.J. at 353. Here, the State's evidence was overwhelming. The victim knew and identified both defendants from their prior encounters and a loaded handgun matching the victim's description was recovered from Flagler in a vehicle also matching the victim's description. In light of the total record, we are satisfied that the detective's hearsay testimony that he assembled a photo array based on "information" obtained and "the name provided" in the August 15, 2012 report did not lead the jury to a verdict it otherwise might not have reached.

Next, we turn to Wilson's argument that Post's reference to BCI and the trial court's denial of his request to remove rather than cover the placard with masking tape unfairly prejudiced him despite the court's charge. References to a photograph as a "mug

shot" or otherwise obtained from police sources, as here, have been found to be harmless error where they are solitary and fleeting, and accompanied by an appropriate cautionary instruction to the jury. See State v. Harris, 156 N.J. 122, 173 (1998) (holding that a witness' reference to mug shots was not plain error despite the absence of a curative instruction because the reference was "fleeting and came after testimony that defendant had been arrested"); State v. Porambo, 226 N.J. Super. 416, 425-26 (App. Div. 1988) (holding that a detective's reference to the defendant's mug shots was not plain error because the judge gave a proper curative instruction and the reference was "fleeting and not subject to prolonged examination").

Here, we conclude that the reference to BCI was harmless error and the trial court's limiting instruction, substantially the same as the Model Jury Charge (Criminal), "Identity - Police Photos" (1992), was sufficient to cure any potential prejudice caused by Post's passing reference. We also conclude that because "identification [was] an issue" and the State's use of the photos in the photo array was "reasonably related to that issue," the photos were "admissible for that purpose" and were presented "in as neutral a form as possible . . . ." State v. Taplin, 230 N.J. Super. 95, 99 (App. Div. 1988). We therefore reject Wilson's

contention that the court erred in denying his request to remove rather than cover the placard.

V.

In Point IV of his merits brief, Wilson argues that the prosecutor made "improper" comments during summation about "facts not in evidence" that "were unduly prejudicial and deprived [him] of a fair trial." Wilson asserts that although "[t]he trial court sustained the objection," "the improper conduct . . . was not ameliorated by the [c]ourt" because the court "did not strike the testimony or instruct the jury to disregard it."

A defendant's conviction should only be reversed due to prosecutorial wrongdoing "where the . . . misconduct was so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999). While a prosecutor "in . . . summation may suggest legitimate inferences to be drawn from the record," a prosecutor "commits misconduct when [the summation] goes beyond the facts before the jury." Harris, 156 N.J. at 194.

However, to warrant reversal, the misconduct "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. Timmendequas, 161 N.J. 515, 575 (1999) (quoting State v. Roach, 146 N.J. 208, 219 (1996)). In this regard, we consider three factors: "(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." Frost, 158 N.J. at 83.

Here, defense counsel attacked M.I.'s credibility throughout his summation, among other things, focusing on incoming and outgoing telephone calls on M.I.'s cell phone on the day of and the day after the robbery, which defense counsel characterized as "a critical piece of information" in his attempt to discredit M.I. In response, the prosecutor stated to the jury:

> Now, this whole phone call business that . . . [d]efense [c]ounsel wants you to believe that [M.I.] made this call or received this phone call. Ladies and gentlemen, I asked . . . . M.I. about that phone call. I asked him prior to trial because our [o]ffice is here to search for the truth, okay. That's why he knew that question was coming because I asked him, our [o]ffice asked him straight and directly --

Defense counsel promptly objected to the prosecutor's remarks, the trial court sustained the objection and admonished the prosecutor "[y]ou may not testify." The prosecutor resumed his summation stating:

> Ladies and gentlemen, [M.I.] testified right here that he didn't call that phone call. I submit to you, that phone call was made by the [d]efendants to the phone number which they believe was of the phone that they still had the phone they had stolen from [M.I.], okay.

While we agree with the trial court that the initial remarks were improper, we conclude that they did not substantially prejudice defendant's fundamental right to have the jury fairly evaluate the merits of his defense or compromise the jury's ability to fulfill its fact-finding function. Moreover, while the court did not strike the remarks from the record, it instructed the jurors that they were "the sole and exclusive judges of the evidence," and that "summations of [c]ounsel [were] not evidence and must not be treated as evidence." We presume the jurors followed the court's instructions. State v. Montgomery, 427 N.J. Super. 403, 410 (App. Div. 2012).

Regarding the latter remarks, we are satisfied that those remarks were "based on the facts of the case and reasonable inferences therefrom," and "what is said in discussing them, 'by way of comment, denunciation or appeal, will afford no ground for reversal.'" State v. Smith, 167 N.J. 158, 178 (2001) (quoting State v. Johnson, 31 N.J. 489, 510 (1960)). Additionally, the challenged remarks "were prompted by comments in the summation of defense counsel." State v. Smith, 212 N.J. 365, 403-04 (2012).

VI.

In Point V of his merits brief, Wilson argues that the trial court's denial of his request "to give the jury the Model Jury Instruction 'false in one, false in all' . . . was error" that

denied him a fair trial. Wilson asserts that "[s]ince credibility of . . . [M.I.] was of such paramount importance to the jury and to the case[,]" and "[M.I.] gave varying versions of events and statements[,]" the "charge was necessary for a fair adjudication of the facts." We disagree.

"[A]ppropriate and proper charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Jury instructions 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." Id. at 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "[I]n reviewing any claim of error relating to a jury charge, the 'charge must be read as a whole in determining whether there was any error[.]'" State v. Gonzalez, 444 N.J. Super. 62, 70-71 (App. Div.) (quoting State v. Torres, 183 N.J. 554, 564 (2005)), certif. denied, 226 N.J. 209 (2016).

The "false in one, false in all" charge instructs the jury that if they find any witness "willfully or knowingly testified falsely to any material facts in the case, with intent to deceive [them], [the jury] may give such weight to his or her testimony as [they] may deem it is entitled." Model Jury Charge (Criminal), "False in One-False in All" (2013). It has long been recognized, however, that the issuance of this charge rests within the sound discretion

of the trial court. State v. Ernst, 32 N.J. 567, 583-84 (1960); State v. Fleckenstein, 60 N.J. Super. 399, 408 (App. Div. 1960) (noting that the evidential inference of repetitive falsity is not mandatory). Moreover, "inadvertent misstatements or immaterial falsehoods are not ground[s] for complete rejection of a witness'[s] testimony." State v. D'Ippolito, 22 N.J. 318, 324 (1956).

Here, the trial court did not abuse its discretion in declining to give the "false in one, false in all" jury instruction. The inconsistencies in M.I.'s statements identified by defendant[5] were not patently indicative of deliberate lying and, as the jury undoubtedly found, was not grounds for complete rejection of his testimony. Notably, M.I. never wavered on the most critical aspect of the incident, his description and identification of defendants as the robbers. Under these circumstances, the customary and comprehensive general jury instruction given by the court regarding evaluating a witness' credibility, including an assessment of whether any witness "testified with an intent to deceive you," sufficed. Model Jury Charge (Criminal), Criminal Final Charge "Credibility of Witnesses" (2014).

[5] At trial, M.I. was extensively cross-examined on discrepancies in details provided to different police officers.

VII.

In Point I of his merits brief, Flagler argues that in addition to the Branch violations involving Detective Post that we previously addressed in Point III of Wilson's brief,[6] Officers Redmond and Seals violated the strictures of Bankston by testifying that they stopped the Nissan on August 20 because they were informed it was involved in an armed robbery. Flagler asserts that, as a result, his "hearsay, confrontation, due-process and fair-trial rights were badly compromised, and his convictions must be reversed and the matter retried . . . ." Because Flagler did not object to the testimony at trial, we review his argument under the plain error standard. Under that standard, an error is reversible only if it was "clearly capable of producing an unjust result . . . ." R. 2:10-2. The error must have been "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. Taffaro, 195 N.J. 442, 454 (2008) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

[6] Similar to his testimony regarding Wilson, Post testified that on August 21, 2012, he "read Seals' report . . . and found out there was a second occupant in the car when he arrested Darnell Wilson" on August 20, 2012. As a result, Post set up another photo array "for the second individual" because he matched the description provided by M.I. Our conclusion that the error was harmless in the circumstances of this case applies here as well.

In Bankston, our Supreme Court held that an officer can testify that he or she approached a suspect or went to a crime scene based on "information received." 63 N.J. at 268. However, if the officer "conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged[,]" the testimony violates both the Confrontation Clause of the Sixth Amendment, U.S. Const. amend. VI, and the rule against hearsay. Branch, 182 N.J. at 350; see also Bankston, 63 N.J. at 268-69. Thus, under Bankston and its progeny, an officer cannot testify to specific details of the crime or imply that he or she received evidence of a defendant's guilt from a non-testifying witness. See State v. Luna, 193 N.J. 202, 216-17 (2007).

Examining plain error in the Bankston context, hearsay testimony is prejudicial to the defendant when the State's case is tenuous. However, "when a case is fortified by substantial credible evidence—for example, direct identification of the defendant—the testimony is not likely to be prejudicial under the 'plain error' rule." State v. Irving, 114 N.J. 427, 448 (1989). Here, while M.I.'s testimony was undoubtedly the key to proving defendant's guilt, its reliability was established through independent evidence, namely, the discovery of a loaded handgun

matching M.I.'s description on Flagler's person, thus nullifying any perceived Bankston prejudice.

Moreover, unlike the testimony at issue in Bankston and Branch, the officers' testimony did not "permit[] the jury to draw the inescapable inference that a non-testifying declarant provided information that implicated" defendant in the commission of a crime, nor did it "suggest[] that some other person provided information that linked the defendant to the crime." Branch, 182 N.J. at 351. To the contrary, the officers' testimony suggested only what the jury already knew from M.I.'s testimony,[7] that the police were searching for defendant and a green Nissan Altima implicated in the commission of an armed robbery. Accordingly, we conclude that admission of the challenged testimony did not lead the jury to a result it otherwise might not have reached.

VIII.

In Point II of his merits brief, Flagler argues that although the trial court excused Juror Eleven for reading a newspaper article about the case, the court's failure to "conduct[] a voir dire of the rest of the jury to determine if any of [them] . . . had actually been tainted by Juror Eleven's actions . . . violated his Sixth Amendment right to an impartial jury, his Fourteenth

[7] At trial, M.I. was the first witness to testify for the State.

Amendment right to due process and his corresponding state-constitutional rights." We disagree.

Prior to the jury being sworn, defense counsel informed the court that there were on-line newspaper articles about the case and Flagler's "subsequent arrest" involving "a gun[.]" After noting that it was able to locate two articles online, the court addressed the jury as follows:

> Ladies and gentlemen, before we begin the proceedings for today, . . . I spoke to you before you left about the possibility of media coverage of the trial. I didn't anticipate any, but apparently, [c]ounsel have indicated to me there has been some newspaper interest in the case and some articles have been written about it since the time we left. So I have to inquire as to whether or not any of you have, in fact, seen or read any of those articles or discussed the matter with anyone.

Juror Eleven responded that she had read one of the articles but specified that she had not "discussed it with anybody." None of the remaining jurors indicated that they had read any of the articles or disputed Juror Eleven's assertion that she had not discussed the article with them. After questioning Juror Eleven individually, at counsel's request, the court excused Juror Eleven and instructed the remaining jurors:

> Ladies and gentlemen, I have had to excuse [Juror Eleven] because she did not comply with the [c]ourt's [o]rder respecting media coverage. There is always the potential for prejudice and it is your duty to the State

> or [d]efendant not to read any newspaper article because as I indicated to you earlier, they're often based on second or third hand information. They're based in large measure on hearsay [and] haven't been subjected to cross-examination as to the accuracy of the information. It has the potential to prejudice . . . both parties.
>
> Once again, I'm going to stress to you that it is critically important to your function that you completely avoid any newspaper . . . coverage of the trial or anyone discussing. This decision has to be made, as I indicated to you multiple times, has to be made based only on information you receive here in the courtroom.
>
> So, we are down to 13. If we drop below 12, we have to declare a mistrial and all of your time and everyone else's time was wasted. Please comply with that instruction. It is very, very important.

Counsel did not object to the instruction or request the court to conduct any further voir dire of the remaining jurors. Thereafter, the jurors were sworn and the trial commenced.

It is well-established that "[a] defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007). "[I]f during the course of the trial it becomes apparent that a juror may have been exposed to extraneous information, the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." State v. R.D., 169 N.J. 551, 557-58 (2001). However, a juror's exposure to

outside influences does not necessarily mean that there must be a new trial, because it would be nearly impossible to guard against any and all outside influences that could potentially affect a juror's vote. Id. at 559. "Ultimately, the trial court is in the best position to determine whether the jury has been tainted." Ibid. Accordingly, our standard of review is abuse of discretion, the application of which "respects the trial court's unique perspective" and accords deference to the trial court "in exercising control over matters pertaining to the jury." Id. at 559-60.

In State v. Bey, 112 N.J. 45 (1988), our Supreme Court established the standard for determining when a piece of potentially damaging external information may contaminate the jury:

> The presumption that jurors will faithfully adhere to the trial court's instructions regarding all facets of their role is not inviolate . . . .
>
> > [In a publicity-laden trial] [a]nother alternative [to sequestration] is clear and definitive instructions to the jury not to read or listen to media reports of the trial and to decide the issues only on evidence presented in open court. Realistically, however, in many cases it would be difficult to conclude that a jury could avoid receiving such reports or that such

> instructions, no matter how forceful, would overcome prejudice to a defendant resulting from the jury learning of a confession or other evidence which the trial court had ruled was inadmissible. . . .
>
> Courts have agreed that publicity-related warnings may be inadequate when inherently prejudicial information has been released or published during a trial in such a manner as to render it likely that one or more of the jurors could have been exposed.
>
> [Id. at 81 (alterations in original) (quoting State v. Allen, 73 N.J. 132, 142 (1977)).]

The Court established a two-part test to determine whether such information is potentially damaging to a defendant's constitutional rights. Id. at 84-87. First, "[t]he court should . . . examine the information disseminated to determine if it has the capacity to prejudice the defendant." Id. at 84. Second,

> [i]f the court is satisfied that the published information has the capacity to prejudice the defendant, [the court] should determine if there is a realistic possibility that such information may have reached one or more of the jurors. . . .
>
> Where the court concludes there is a realistic possibility that information with the capacity to prejudice defendant's right to a fair trial may have reached members of [the] jury, it should conduct a voir dire to determine whether any exposure has occurred. If there is any indication of such exposure or knowledge of extra-judicial information, the court should question those jurors individually in order to determine precisely what was learned, and establish whether they

> are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner, based strictly on the evidence presented in court.
>
> [Id. at 86-87 (citations omitted).]

In Bey, while acknowledging that the form of voir dire is discretionary, the Court noted that polling the jurors individually, in camera, is the most effective method to ensure juror truthfulness, and suggested that a court may want to "err on the side of caution" by conducting individual juror polling. Id. at 86 n.26, 89. However, in State v. Feaster, 156 N.J. 1, 53-54 (1998), the Court found that the trial court acted properly in polling jurors as a group even though there was a realistic possibility that publicity reached the jurors.

Here, there was no evidence that any of the remaining jurors had any knowledge of the newspaper articles. The judge polled the jury as a group and individually questioned the juror who admitted reading one of the articles before excusing her. Defendant never requested any further voir dire of the remaining jurors and raises the issue for the first time on appeal. Thus, at the very least, defendant must show it was plain error to forego a voir dire he never requested. State v. Winder, 200 N.J. 231, 252 (2009); see, e.g., R.D., 169 N.J. at 554 (finding no plain error for not questioning a juror about extraneous knowledge). Based on this

record, we find that the two-prong analysis articulated in Bey was satisfied and the trial court acted within its discretion in questioning the jurors as a group. Feaster, 156 N.J. at 53-54. We find no error, much less plain error, warranting reversal.

IX.

In Points VI and III of their merits briefs, Wilson and Flagler, respectively, challenge their sentences as excessive. Wilson argues that "the minimum sentence of fifteen (15) years should have been imposed" given his "limited criminal history," and that the "court's reliance on N.J.S.A. 2C:44-1a(3) was unjustified." Flagler argues the court "failed to follow the applicable sentencing rules regarding extended terms[.]" We disagree.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). "The reviewing court must not substitute its judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). Instead, we will

> affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

In sentencing Flagler, the court found aggravating factors three, six, and nine, N.J.S.A. 2C:44-1(a)(3), (6), (9), and no mitigating factors. The court explained the considerations bearing on its sentencing analysis as follows:

> Defendant is 26 years old. His first contact with the [c]riminal [j]ustice [s]ystem came at the age of 15, when he was adjudicated delinquent on a charge of robbery. Before he reached his majority, he was arrested an additional nine times and adjudicated delinquent on two other separate occasions for offenses involving the unlawful possession of weapons. He received at least four separate probationary sentences and violated his various probationary periods on at least four occasions.
>
> As an adult, between the ages of 18 and 26, he has been arrested ten times, and been convicted of indictable offenses on four previous occasions.
>
> As an adult, he has been placed on [p]robation four times before committing the present offense.
>
> Given the extensive history of criminal involvement and its continuing nature, there is no doubt that this [d]efendant poses a significant risk of re-offending.
>
> . . . .
>
> As an adult, he's been convicted of hindering prosecution; aggravated assault; attempted theft; possession of drugs; and now an armed robbery. His record indicates he is an armed and violent thief.
>
> As far as . . . aggravating factor nine is concerned, the multiple unsuccessful prior

> periods of [p]robation previously imposed have clearly failed to deter this [d]efendant from continuing his criminal conduct. The frequency and seriousness of his escalating criminal behavior requires a substantial deterrent.
>
> I can find no statutory mitigating factors. Consequently, the aggravating factors clearly, convincingly, and substantially outweigh any concerns of mitigation.

Finding that the State had satisfied the statutory prerequisites, the court granted the State's motion for "imposition of a discretionary [e]xtended [t]erm pursuant to [N.J.S.A.] 2C:44-3(a)" on count one based on defendant's 2009 theft conviction and 2010 drug possession conviction. The decision to sentence a defendant within the extended term range "remains in the sound judgment of the [sentencing] court" subject to review under "an abuse of discretion standard . . . ." State v. Pierce, 188 N.J. 155, 169 (2006). Because Flagler qualified as a persistent offender pursuant to N.J.S.A. 2C:44-3(a), his sentencing exposure was from ten years' imprisonment to life. N.J.S.A. 2C:43-6(a)(1); N.J.S.A. 2C:43-7(a)(2).[8]

[8] Once a criminal defendant is deemed to be a persistent offender, "the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." Pierce, 188 N.J. at 169. Because the ordinary term of imprisonment for a first-degree crime is between ten and twenty years, N.J.S.A. 2C:43-6(a)(1), and the extended

In Pierce, 188 N.J. at 170, the Court made clear that in setting the appropriate term within the extended range,[9]

> courts . . . will perform their sentencing function by using the traditional approach of finding and weighing aggravating and mitigating factors and imposing a sentence within the available range of sentences. That determination will be reviewed for reasonableness.
>
> The court may consider the protection of the public when assessing the appropriate length of a defendant's base term as part of the court's finding and weighing of aggravating factors and mitigating factors.

Here, the court concluded that an extended term "between [twenty] years to life in prison" was appropriate for the following reasons:

> First, the [d]efendant has had the benefit of multiple terms of [p]robation without any moderation in his criminal conduct.
>
> Second, his crimes have been predatory in nature, robbery, assaults, theft, et cetera.
>
> And third, he is on many occasions, armed with illegal weapons. In short, he's shown

---

term of imprisonment for a first-degree crime is between twenty years and life, N.J.S.A. 2C:43-7(a)(2), a persistent offender convicted of first degree armed robbery, as here, is exposed to a term of imprisonment from ten years to life. Pierce, 188 N.J. at 169.

[9] Flagler does not appear to challenge his eligibility for sentencing as a persistent offender but rather the length of the term imposed.

himself to be a violent predator and a danger to this community.

In sentencing Wilson, the court found aggravating factors three and nine, N.J.S.A. 2C:44-1(a)(3), (9), and no mitigating factors. The court explained its reasoning as follows:

> This [d]efendant's involvement with the [c]riminal [j]ustice [s]ystem began at the age of 15 in the juvenile matters. He has two adjudications of delinquency as a minor and, as an adult, he also has a prior distribution conviction and served a prison sentence. So, although he's only 25, he's been involved at least three times in the last 10 years.
>
> Additionally, the [d]efendant received a diversion with respect to his first juvenile offense and [p]robation for his second, and a prison sentence for his first adult offense, none of those sentences either helped or deterred the [d]efendant from further criminality.
>
> The [d]efendant's criminal behavior has escalated rather than having been remediated by the prior actions. Consequently, I find both three and nine to be weighty factors at this sentence.
>
> I can't find any statutory mitigating factors. I had considered mitigating factor ten and although the factor would not have an effect on the in or out analysis, it could have [a]ffected the balancing of factors and had some beneficial effect for the [d]efendant.
>
> However, after reflection, I cannot honestly find this [d]efendant a good candidate for [p]robation. He has previously squandered two opportunities for rehabilitation and his crimes have escalated.

> Additionally, I point out that the [r]ecord of this trial established that subsequent to the commission of this armed robbery, this [d]efendant and his co-defendant were apprehended with a loaded firearm in the vehicle in which they were traveling.
>
> Consequently, the aggravating factors substantially outweigh any concerns of mitigation.

We are satisfied that the sentencing guidelines were not violated, the aggravating factors found by the court were based upon competent and credible evidence in the record, and neither sentence is clearly unreasonable nor shocks our judicial conscience. Accordingly, we discern no basis to disturb the court's exercise of its broad discretion.

Affirmed.