SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3677-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DWAYNE E. DRICKETTS,[1]

Defendant-Appellant.

Argued October 5, 2017 – Decided April 18, 2018

Before Judges Simonelli, Rothstadt and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 10-04-0439.

Susan Brody, Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Susan Brody, of counsel and on the briefs).

Sarah Lichter, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Garima Joshi, Deputy Attorney General, of counsel and on the brief; Sarah Lichter, on the brief).

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[1] Referenced in the record also as Dwayne Erick Dricketts and a/k/a "Pimp."

PER CURIAM

A grand jury indicted defendant Dwayne E. Dricketts and his co-defendant, Tyrell Jackson, for first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(a) (count three). Following severed jury trials, defendant and Jackson were convicted on all counts.[2] The trial judge sentenced defendant to a forty-five year term of imprisonment with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

The charges against defendant and Jackson stemmed from the shooting death of Dana Reid on May 9, 2005. The State presented evidence at trial that defendant and Jackson were engaged in a drug dealing operation headed by defendant, Jackson was defendant's close friend and the drug operation's "enforcer," defendant ordered Jackson to kill Reid after Reid failed to pay for drugs defendant gave him to sell, and Jackson shot and killed Reid. Witnesses heard defendant threaten to shoot Reid, and a witness identified Jackson as the person who shot him.

[2] On direct appeal, we affirmed Jackson's conviction. State v. Jackson, No. A-2372-11 (App. Div. Sept. 12, 2016). Our Supreme Court denied certification. State v. Jackson, 230 N.J. 556 (2017).

On appeal, defendant raises the following contentions:

POINT I

> DEFENDANT'S CONVICTION OF MURDER MUST BE REVERSED. THE TRIAL JUDGE'S INSTRUCTIONS WERE HOPELESSLY WRONG IN THAT THEY CONFLATED THREE SEPARATE THEORIES OF LIABILITY: MURDER AS AN ACCOMPLICE; CONSPIRACY TO COMMIT MURDER; AND GUILT OF THE SUBSTANTIVE OFFENSE OF MURDER AS A CO-CONSPIRATOR UNDER STATE V. BRIDGES[, 133 N.J. 447 (1993)]. (Partially Raised Below).

POINT II

> DEFENDANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT IMPROPERLY ADMITTED A HOST OF [N.J.R.E.] 404(b) EVIDENCE THAT PRESENTED HIM TO THE JURY IN AN UNFAVORABLE LIGHT. (Partially Raised Below).

POINT III

> THE AGGREGATE [FORTY-FIVE] YEAR TERM IMPOSED WAS MANIFESTLY EXCESSIVE UNDER ALL OF THE APPLICABLE CIRCUMSTANCES, AND COUNT TWO WAS REQUIRED TO MERGE INTO COUNT ONE FOR SENTENCING PURPOSES.

We affirm defendant's conviction, but remand for resentencing.

I.

Reid's girlfriend, F.B.,[3] testified at trial that at approximately 12:30 a.m. on May 9, 2005, she and Reid were walking down Madison Avenue in Elizabeth toward East Grand Street on their

[3] We use initials to identify the witnesses involved in this matter to protect their identity.

way to a restaurant on Broad Street. She heard footsteps, turned her head to look behind her, and saw a man running toward them holding a gun out in his right hand and aiming towards them. Reid said to her, "baby, get down," and threw himself on top of her. F.B. heard five shots and saw that Reid had been struck. She tried to resuscitate him, but he was dead by the time help arrived. She later identified Jackson as the person who shot Reid.

L.P. testified that in 2005, she lived in the second floor apartment of a house in Elizabeth called the "Honeycomb" or "the Honeycomb Hideout" because "it was a hideout for drug dealing." Numerous people stayed in the apartment, including F.B., to sleep or get high. L.P. was not sure if F.B. was a prostitute, but they used drugs together. F.B. introduced L.P. to Reid.

L.P. allowed drug dealers to stay in her apartment to sell drugs in order to support her own drug habit. In the beginning, there were five or six dealers, and at the "peak," there were at least ten drug dealers. Drug dealers and prostitutes "partied" at her apartment and sold drugs in shifts.

L.P. left town for a few weeks and when she returned, her nephew and a few others, including defendant, were selling drugs out of her apartment. L.P. identified defendant by his street

nickname "Pimp"[4] and testified he sold crack cocaine. Defendant had people working for him who were "enforcers" whose job was to "protect them from somebody to come stick them up or if anybody got out of line."

According to L.P., Jackson was one of defendant's closest friends. L.P. described defendant as "the boss" of the drug operation and Jackson as "the worker[.]" Defendant introduced Jackson as "the enforcer" and said Jackson carried guns in order to protect the house. In an earlier statement, L.P. said defendant told her that Jackson's role was "Triggerman." L.P. saw both defendant and Jackson with guns at the Honeycomb, including a "[s]awed-off shotgun, 9 millimeter, [and] 380."

L.P. testified she saw Reid at the Honeycomb at the same time defendant and Jackson were there. At some point in early 2005, she saw defendant give Reid a package with "50 dime bottles" of crack cocaine with yellow caps, or a "K-pack[,]" which sold for ten dollars each. Defendant said to Reid: "[D]on't mess the pack up like you did the last time." L.P. explained that "messing up a pack" meant that "the money is short."

After that exchange, L.P. never saw Reid at the Honeycomb

[4] Throughout the trial, witnesses identified Jackson by his street nickname "Twist" and Reid by his street nicknames "KU" or "D." Other individuals mentioned during the trial were also identified by their street nicknames.

again. Defendant and Jackson told her that if Reid came there to tell him "he better have his money." About two weeks before Reid was murdered, L.P. heard defendant say: "If [Reid] didn't have his money, he'd pop him." She explained that "pop" meant to shoot.

M.R. testified that she sometimes stayed at the Honeycomb, used drugs, and made a living by "escorting." She was Reid's fiancée until they broke up in February 2005. Before their breakup, they stayed together at the Honeycomb. Reid started out selling drugs and then began using crack cocaine. He sold drugs "for himself" that he got from people she did not know. His drug use "got progressively worse" at the beginning of 2005. She did not see him much after their breakup, but saw him the first week of May 2005.

M.R. met defendant at the Honeycomb and saw him there selling crack cocaine. She referred to defendant as "Pimp" and identified him in court. She testified that she bought crack from defendant at the Honeycomb and would sometimes hold packages for him or "go and make a sale for him." She admitted she did not like defendant and "[t]ried to" stay away from him. She never saw Reid with defendant.

M.R. gave a statement to the police after Reid was murdered. She said that sometime between February and May 2005, she encountered defendant in the hallway of the Honeycomb. Defendant's

voice was "loud, like angry" and he had the gun in his hand "trying to bully [her.]" He put the gun to her face and asked if she had seen Reid. Defendant said he had given Reid five bottles of crack cocaine to sell so he could make money and get on his feet, but had not seen Reid and wanted to know where he was. Defendant also said, "you're his girlfriend so you're going to pay his debt." When she said she had not seen Reid, defendant "kind of relaxed [the gun]." She also said she would not pay Reid's debt, and left the hallway and went to L.P.'s apartment. She told Reid about the encounter during the first week of May.

M.R. testified that between 9:00 p.m. and 11:00 p.m. on May 8, 2005, she and Reid went for a walk on Madison Avenue and sat on a stoop next to a bank parking lot. As they were sitting and talking, she noticed defendant drive by them. She noticed because of the earlier incident with defendant and did not believe Reid's claim that he had already taken care of the debt. She did not know if defendant saw them, but the car did not stop. She told Reid that they should leave, so they started walking, and at some point became separated.

T.B. testified she sold crack cocaine in 2005, and made a living selling drugs and prostituting. There were a number of drug dealers in the neighborhood then, including defendant, who she identified in court as "Pimp[,]" and defendant's best friend,

Jackson. Those were the "main players in the game" but there were "runners" as well who would "get a package from one of those guys and sell it." Jackson was part of defendant's "crew[.]"

T.B. witnessed defendant selling drugs. She sold drugs in the same area where he sold drugs and sometimes shared a sale with him or other drug dealers if a buyer wanted more than what she had on hand. T.B. testified that defendant came to Elizabeth in the beginning of 2005, and he and Jackson were always together. She described Jackson as defendant's "right handyman" and defendant as "definitely the higher-up."

T.B. was a friend of L.P.'s and knew the Honeycomb "had a lot of drug dealers" there, including defendant. She knew Reid, as they used crack cocaine together and he she saw him and M.R. at the Honeycomb. She also knew Reid sold crack cocaine in the neighborhood and got the drugs to sell from defendant. She described one occasion when she was riding in a car with defendant and Jackson to a corner store. As they approached the store, they saw Reid and defendant said to the driver "hey, hey, hey, stop the car[.]" According to T.B.:

> When the car stopped, that's when the defendant said to [Reid], hey, yo, yo, come over here, you got my fuckin' money . . . and [Reid] was like, nah, nah. And [defendant] was like, yo, you better get my fuckin' money, you better get my money, I'm telling you, I'm telling you.

T.B. then heard defendant say to Reid: "[I]f you don't have my money, I'm going to put a cap in your ass." T.B. explained this was slang for going to "shoot you with a bullet." She described defendant as "[a]ngry" when he spoke to Reid and that Reid "looked scared for his life." As the car drove off, defendant told T.B. that he "gave [Reid] a package, and [Reid] messed the package up and owed him so[me] money, so he was after [Reid] for his money."

T.B. testified that sometime in 2005, she saw defendant with a gun. He said to her "yo, can you take this around the block for me" and asked her to open her purse. When she did, he dropped a "heavy gun" into it. Defendant asked her to take the gun around the block to "Shorty," and followed her on a bicycle while she did so. T.B. also testified about a statement she gave to the police in May 2005. She told the police about defendant, the gun he had her bring to "Shorty," and the incident in the car with defendant and Reid.

J.W. testified that in 2005, he sold crack cocaine, otherwise known as "cook-up[,]" in small bottles with colored caps that signified who supplied the drugs. He generally either sold drugs on the street or in the Honeycomb, and sold with defendant's group, which included Jackson. He identified defendant as "Pimp" in court, and described defendant and Jackson as friends. He also witnessed defendant supplying drugs to Jackson to sell.

Defendant told J.W. that Jackson had come from New York to sell drugs and to be a "hit man" who would beat up or kill somebody if they owed money or "did something wrong." J.W. saw both defendant and Jackson with a handgun at the Honeycomb and at a hotel. He maintained that Jackson worked for defendant, although in his statement to the police he said Jackson worked for both defendant and another drug dealer known by the street nickname "Sheik."

J.W. knew L.P. and was at her apartment at the Honeycomb between January and May 2005 to sell her drugs. He saw defendant and Jackson selling drugs there as well. J.W. also knew M.R. because he sold drugs to her in and around the Honeycomb. He knew M.R.'s boyfriend was Reid, a drug user, and he saw Reid at and around the Honeycomb.

J.W. testified he sold drugs "along with" defendant. He maintained that defendant had a number of people working for him and was a supplier, but not on the level of other suppliers. J.W. also testified another supplier had sellers "punished for not paying for drugs" or for "messing up" the money or drugs, and that when a drug dealer was owed money, the person could be beat up or required to "make up the money" by selling more drugs without taking their cut. J.W. had been in that situation himself and it was "a common practice." He testified that "guns [were]

threatened[,]" although he had previously testified he was not sure guns had been used in these situations before.

J.W. testified he saw defendant give drugs to Reid in the hallway of the Honeycomb sometime between January and May 2005. Defendant gave Reid a "pack" of fifty vials of "[c]ook-up" and told him to "[b]ring him back" $350. J.W. never saw Reid return money to defendant for those drugs. At some time later, defendant asked J.W. if he had seen Reid because "[Reid] owe[d] him money[,]" but J.W. had not seen him since defendant gave him the drugs.

J.W. also testified that, in the early morning hours on May 9, 2005, he was selling drugs on Catherine Street in front of the corner store that intersected William Street and East Grand Street. He saw defendant and Jackson running across Catherine Street from the direction of William Street and toward the highway at "1 and 9," and they "seemed nervous." Defendant told J.W. to "get low, get off the block and meet him at the hotel." J.W. understood this to mean "something in the area just happened, and the police are around." He waited for five to ten minutes until he heard police sirens and then left. He did not go to the hotel and did not tell anyone that he saw defendant and Jackson running. A few weeks later, he asked defendant why he and Jackson were running, and defendant said "that they got at [Reid]" and Jackson had killed him.

In June 2005, J.W. gave the police a statement about the shooting of Reid and identified defendant and Jackson by photos. J.W. said he knew Reid was killed because of a drug exchange with defendant that took place at the Honeycomb and "they . . . got at him" over money that was owed. He said defendant told him that Jackson killed Reid because he "didn't come up with the money or the drugs." He also said that in that neighborhood, when people owed drug dealers money, the person who was owed the money was able to give a "warning" and allowed time for payment, or people could be "beat up." He only knew one person who owed defendant money, and that was Reid.

II.

The State never claimed defendant was the shooter. Rather, the State's theory to charge and convict defendant focused on the conspiracy between him and Jackson to commit murder as payback for the unpaid drug debt. Defendant argues in Point I that the court's jury instructions were "hopelessly wrong in that they conflated three separate theories of liability: murder as an accomplice; conspiracy to commit murder; and guilt of the substantive offense of murder as a co-conspirator[.]" Defendant also argues the court erred in refusing to delete language from State v. Bridges, 133 N.J. 447 (1993) in the co-conspirator charge because he was not charged with conspiracy and there is a "critical difference"

between conspiracy and accomplice liability that could have impacted deliberations based on conflicting witness testimony. These arguments lack merit.

"[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)). "The trial court must give 'a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" Id. at 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "Thus, the court has an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party.'" Ibid. (alteration in original) (quoting Reddish, 181 N.J. at 613). "Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." Ibid. (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)).

When a defendant fails to object to an error regarding jury charges, we review for plain error. State v. Funderburg, 225 N.J. 66, 79 (2016). "Under that standard, we disregard any alleged error 'unless it is of such a nature as to have been clearly

capable of producing an unjust result.'" Ibid. (quoting R. 2:10-2). "The mere possibility of an unjust result is not enough. To warrant reversal by this Court, an error at trial must be sufficient to raise 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)). A jury charge "must be read as a whole in determining whether there was any error." State v. Torres, 183 N.J. 554, 564 (2004). Moreover, the effect of any error must be considered "in light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

Because defendant actively participated in the charge conference, submitted proposed charges, and only partially objected to the final charges, we provide the following context for our analysis.

At the charge conference after the close of proofs, the court reviewed the parties' proposed charges in depth.[5] During the discussion of lesser-included offenses, defendant requested the

[5] The discussion is difficult to follow, as the parties' reference page numbers and lines to defendant's proposed charges that were not included in the record on appeal, even though it was marked as an exhibit for this purpose.

following language on vicarious liability and co-conspirator liability:

> Dwayne Dricketts as part of his general denial of guilt contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that Tyrell Jackson is the person who committed the alleged offense . . . and that Dwayne Dricketts acted as his co-conspirator and/or accomplice to commit the murder.

Defendant did not object to adding a reference to the lesser-included offenses to that proposed charge.

In discussing the identification charge, defendant argued his proposed charge was "more consistent with the rest of the charge on co-conspiracy and vicarious liability" because the jury first had to determine if Jackson was the shooter. The court rejected this argument. Defendant also asked the court to instruct the jury that "the defendant has pleaded not guilty, denies his guilt and denies that he was part of any such conspiracy," which the court allowed, and to instruct on conspiracy to commit murder as a lesser-included offense, which the court rejected. Thus, despite defendant's argument on appeal that "conspiracy was simply not in the case," it is clear his proposed charges included language related to the conspiracy between him and Jackson as presented by the State and his general denials that he participated in that conspiracy.

In discussing what the language should be in the conspiracy charge, the court found Bridges used the language "reasonably foreseeable as the necessary or natural consequences of the conspiracy." When the court stated it was "just quoting exactly the language from Bridges[,]" defense counsel responded: "Yes. Thank you." However, defense counsel asked that the court not use the Bridges language and instead charge conspiracy to commit murder as a lesser-included offense. The court denied the request. Relying on State v. Cagno, 211 N.J. 488 (2012), the court explained there was no basis to charge conspiracy as a lesser-included offense because "the conspiracy was consummated" when the murder occurred as planned and there would have been no basis to find defendant guilty of conspiracy to murder without finding him guilty of murder.

Prior to closing arguments, the court noted that both parties received a copy of the final charges and the court had not received any comments or objections. However, after closing arguments, defendant again moved to strike the Bridges language. Arguing that conspiracy was not part of the case, defendant also moved to strike the language: "a co-conspirator may be liable for the commission of a substantive crime and criminal acts that are not within the scope of the conspiracy if they are reasonable and foreseeable and necessary under natural consequences of a

conspiracy" because it was not part of the State's theory of the case. Defendant provided no authority that required the State to argue every single alternative theory. The court denied the request.

Right after issuing the limiting charge on N.J.R.E. 404(b) evidence, the court issued the following charge, which defendant challenges on appeal:

> Dwayne Dricketts as part of his general denial of guilt contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that Tyrell Jackson is the person who committed the crimes of murder or any lesser included offense; possession of a handgun without a permit, and possession of a weapon for an unlawful purpose; and that Dwayne Dricketts acted as his co-conspirator and/or his accomplice to commit those offenses.
>
> The burden of proving the identity of the person who committed the crime is upon the State. For you to find the [d]efendant guilty, the State must prove beyond a reasonable doubt that Tyrell Jackson is the person who committed the crimes of murder or any lesser included offense; possession of a handgun without a permit; and possession of a weapon for an unlawful purpose; and that Dwayne Dricketts acted as his co-conspirator and/or accomplice to commit those offenses.
>
> The [d]efendant had neither the burden nor the duty to show that the crime if committed was committed by someone else or to prove the identity of that other person. You must determine, therefore, not only whether the State has proven each and every element of the offense charged beyond a reasonable

> doubt, but also that Tyrell Jackson is the person who committed the crimes of murder or any lesser included offense; possession of a handgun without a permit; and possession of a weapon for an unlawful purpose; and that Dwayne Dricketts acted as his co-conspirator, and/or as accomplice to commit those offenses.

The court then instructed the jury as to co-conspirator and accomplice liability before instructing on the substantive offenses. The court also instructed the jury that defendant was presumed innocent until the State proved each and every element of each offense beyond a reasonable doubt.

Despite his request for the court to charge conspiracy to commit murder as a lesser-included offense, defendant concedes on appeal that the court correctly denied that request under Cagno, 211 N.J. at 522. In Cagno, the Court found no rational basis to charge the included offense of conspiracy to commit murder because "the conspiracy was consummated when [the victim] was murdered as planned." Ibid. Similarly, in this case, the conspiracy between defendant and Jackson to kill Reid over a drug debt, as alleged by the State, was consummated when Reid was killed. As such, there was no basis to instruct the jury on conspiracy to commit murder as a lesser-included offense.

However, defendant argues on appeal that since "conspiracy was simply not in this case," the court erred in charging the jury that it could convict defendant "as either an accomplice or a co-

conspirator (or perhaps both)." This argument fails to recognize that "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." N.J.S.A. 2C:2-6(a). "That section makes a person legally accountable for the conduct of another when, among other things, he 'is engaged in a conspiracy with such other person.'" State v. Mance, 300 N.J. Super. 37, 63-64 (App. Div. 1997) (quoting N.J.S.A. 2C:2-6(b)(4)).

"Although there is 'a great deal of similarity between accomplice and conspirator liability and frequently liability may be found under both theories' the concepts are not identical." State v. Samuels, 189 N.J. 236, 254 (2007) (quoting Cannel, N.J. Criminal Code Annotated, cmt. to N.J.S.A. 2C:2-6(c) (2006) (additional citations omitted)). "The critical difference is that, as statutorily defined, conspiracy requires proof of an agreement to commit a crime whereas accomplice liability does not." Ibid.

Citing no supporting authority, defendant argues the court should have given the jury the option to convict him as just a co-conspirator because of the "sentencing ramifications," and erred in instructing the jury that it need not be unanimous as to whether he was guilty as an accomplice or co-conspirator. However, "[a] defendant . . . may be found guilty of murder even if jurors cannot

agree on whether the defendant is a principal, accomplice, or a co-conspirator." State v. Roach, 146 N.J. 208, 223 (1996). Given the reasonable inferences to be drawn from the evidence of both accomplice and co-conspirator liability, including evidence that defendant ordered Jackson to shoot Reid and was present when it happened, the court properly charged the jury on both theories. See also State v. Brown, 138 N.J. 481, 511 (1994) ("unanimity is not required to support a verdict that a defendant guilty of murder did not commit the murder by his own conduct").

Moreover, not only did defendant not object to the language of the charge instructing the jury it need not be unanimous as to whether he was guilty as an accomplice or co-conspirator, he included that language in his proposed charge. The court correctly charged that "[a]ll jurors do not have to agree unanimously concerning the basis, meaning of co-conspirator or as an accomplice for the [d]efendant's guilt regarding murder or the lesser included offenses so long as all believe that the State has proven the [d]efendant's guilt beyond a reasonable doubt either as a co-conspirator or an accomplice."

Defendant also challenges the court's inclusion of the Bridges language in the conspiracy charge. It is important to note that the model jury charge for co-conspirator liability has not been updated in almost thirty years. Model Jury Charge

(Criminal), "Conspiracy — Vicarious Liability (N.J.S.A. 2C:2-6b(4))" (Oct. 17, 1988). Significantly for this case, it has not been updated to incorporate the change in law that occurred in 1993 with the Supreme Court's decision in Bridges. See 133 N.J. at 466-67. Therefore, it could not be used as the exclusive source for the court's co-conspirator charge. See Pressler & Verniero, Current N.J. Court Rules, cmt. 8.1 on R. 1:8-7 (2018) (stating that in using model jury charges, court and counsel should be aware of "intervening contrary case law[;]" and failure to adapt the model charge to the facts in evidence may be error); State v. Green, 318 N.J. Super. 361, 376 (App. Div. 1999) (holding that "[t]he Model Jury Charges are only guidelines, and a trial judge must modify the Model Charge when necessary so that it conforms with the facts, circumstances, and law that apply to the facts being tried").

Defendant does not challenge the specific language the court used in its modified charge incorporating Bridges. He argues only the court should not have added the language because he was not charged with conspiracy as a separate offense. However, the jury was not asked to decide the issue of conspiracy as a separate charge. See Mance, 300 N.J. Super. at 63 (noting that "[t]he conspiracy charge was simply part of the overall charge on accomplice liability").

Defendant argues this charge was error because the jury could have determined he engaged in a conspiracy to harm Reid "in some nonfatal way" but did not intend Reid's death and was not acting as an accomplice at the time Jackson killed Reid. Although defendant cites to conflicting testimony of key witnesses and evidence presented that a lesser punishment was customary for such a small drug debt, he minimizes his own role in this, claiming his threats to "shoot" Reid were not the same as saying "kill," and evidence of his threats came from untrustworthy sources.

When the charge is viewed as a whole, as it must, the jury was properly instructed that in order to find defendant guilty of murder, or a lesser-included offense, it must first be convinced beyond a reasonable doubt that Jackson committed the murder and defendant acted as his accomplice or co-conspirator. The instructions used at trial were derived from the model charge, case law, and suggestions from counsel which were tailored to the facts of the case. The jury had a written copy of the charges in the deliberation room and there is nothing on the record to suggest there was any confusion on this issue. We are satisfied the court did not conflate the theories of liability or otherwise err in the charge on accomplice or co-conspirator liability.

This does not end our inquiry. At oral argument and in a post-argument supplemental brief, defendant added a twist to his

initial challenge to the charge. He argues that neither party addressed how N.J.S.A. 2C:1-8(d)(2) and our Supreme Court's interpretation of the statute in State v. LeFurge, 101 N.J. 505 (1986) would impact the legal analysis. He posits the statute does not apply in this case and falls outside the parameters enunciated in LeFurge because there was no evidence of a conspiracy, and thus, the essential elements of the crime of conspiracy were not clearly implicated in the evidence the grand jury considered when it indicted him for the substantive offense.

N.J.S.A. 2C:1-8(d)(2) provides that "[a] defendant may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense. An offense is so included when . . . [i]t consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein[.]" In LeFurge, a grand jury indicted the defendant for theft, but not conspiracy to commit theft. 101 N.J. at 409. Although the defendant was not indicted for conspiracy to commit theft, the crime involved an elaborate prearranged plan of theft involving a number of people over a course of several months that could only be described as a conspiracy. Id. at 422-23. The Court found N.J.S.A. 2C:1-8(d)(2) constitutional as applied to the defendant, who was found not guilty of the substantive offense of theft, but guilty of conspiracy to commit

theft as an included offense. Id. at 424. The Court determined there was no constitutional violation of notice to the defendant because the essential elements of the crime of conspiracy to commit theft were clearly implicated in the evidence the grand jury considered when it indicted the defendant for the substantive offense. Ibid.

By contrast, defendant argues the allegation that he and Jackson engaged in a conspiracy to murder Reid did not represent a course of criminal conduct. Rather, it involved a single act by only two people that may or may not have been planned in advance, and there was no evidence of any interaction between the two alleged co-conspirators prior to the shooting. We disagree. There was a plethora of evidence that the shooter, Jackson, acted as the enforcer for defendant's drug operation and shot Reid over a drug debt. We find nothing in the record to suggest that just because one theory of a case may not support a finding of conspiracy, when another theory could support it, the inclusion of co-conspirator liability in the charge was error.

We also disagree with defendant that the charge presented conspiracy as a separate or additional theory of guilt. Rather, the court instructed the jury that in order to find defendant guilty, it had to first determine whether the State proved beyond

a reasonable doubt that Jackson actually committed the crime of murder or any lesser-included offense, and then the jury was to determine if defendant acted as Jackson's co-conspirator and/or accomplice in committing those offenses. Because unanimity is not required to support a verdict that a defendant guilty of murder did not commit the murder by his own conduct, the charge of both co-conspirator and accomplice liability was appropriate based on the evidence presented at trial. For these reasons, we discern no error in the charge and no reason to reverse defendant's conviction.

III.

Defendant contends in Point II the court improperly admitted N.J.R.E. 404(b) other crimes, wrongs, or acts evidence that presented him in an unfavorable light. For the first time on appeal, defendant challenges the use of his street nickname "Pimp." He argues "the likely impact on the jury of being hammered with that name over and over throughout the course of the trial was substantial prejudice rising to the level of plain error[.]"

Defendant also argues the court improperly admitted evidence of his prior possession of a gun. He asserts this evidence was irrelevant because he was not charged as the shooter, the court erred in finding it admissible to show opportunity, and the

testimony about his prior gun possession was cumulative to other admissible testimony that Jackson carried guns.[6]

"Trial court decisions concerning the admission of other-crimes evidence should be afforded 'great deference,' and will be reversed only in light of a 'clear error of judgment.'" State v. Gillispie, 208 N.J. 59, 84 (2011) (quoting State v. Barden, 195 N.J. 375, 390-91 (2008)). "The admissibility of such evidence is left to the sound discretion of the trial court, as that court is in the best position to conduct the balancing required under [State v. Cofield, 127 N.J. 328 (1992)] due to its 'intimate knowledge of the case.'" Ibid. (quoting State v. Covell, 157 N.J. 554, 564 (1999)). "Therefore, a trial court's decision concerning the admission of other-crimes evidence will not be disturbed absent a finding of abuse of discretion." Ibid. (quoting Covell, 157 N.J. at 564). We discern no abuse of discretion here.

N.J.R.E. 404(b) governs other crimes, wrongs, or acts evidence and provides 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,

[6] Defendant does not challenge the admission of evidence that he was a drug dealer.

> opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

"'[B]ecause [N.J.R.E.] 404(b) is a rule of exclusion rather than a rule of inclusion,' the proponent of evidence of other crimes, wrongs or acts must satisfy a four-prong test." State v. Carlucci, 217 N.J. 129, 140 (2014) (quoting State v. P.S., 202 N.J. 232, 255 (2010)). Under the four-prong test, in order for other crimes, wrongs, or acts evidence to be admissible under N.J.R.E. 404(b), the evidence: (1) "must be admissible as relevant to a material issue;" (2) "must be similar in kind and reasonably close in time to the offense charged;"[7] (3) "must be clear and convincing; and "(4) its probative value "must not be outweighed by its apparent prejudice." Cofield, 127 N.J. at 338. The court must provide limiting instruction to inform the jury of the purposes for which it may and may not consider the evidence of the defendant's uncharged misconduct, both when the evidence is presented and in the final instructions. Gillispie, 208 N.J. at 92-93.

To satisfy the first prong, the evidence must have "a tendency in reason to prove or disprove any fact of consequence to the

[7] Proof of the second prong is not required in all cases, but only in those that replicate the facts in Cofield, namely, illegal drug possession. Carlucci, 127 N.J. at 141. This prong is not at issue here.

determination of the action." See N.J.R.E. 401 (defining "[r]elevant evidence"). "Consequently, to be relevant, the other-crimes evidence must bear on a subject that is at issue at the trial, for example, an element of the offense or some other factor such as motive, opportunity, intent, or plan." P.S., 202 N.J. at 255 (citations omitted). "In relevance determinations, the analysis focuses on 'the logical connection between the proffered evidence and a fact in issue.'" State v. Williams, 190 N.J. 114, 123 (2007) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004)). Where the fact to be proven is an element of the offense, such as motive and intent, the relevance prong is satisfied. See State v. Brown, 180 N.J. 572, 584-85 (2004) (holding that other crimes evidence is admissible where the State must prove an element of the offense).

Other crimes evidence may be admissible under N.J.R.E. 404(b) on the issue of motive. State v. Yormark, 117 N.J. Super. 315, 336 (App. Div. 1971). "Generally, in 'motive' cases under [N.J.R.E.] 404(b) . . . the evidence in question is designed to show why a defendant engaged in a particular, specific criminal act." State v. Mazowski, 337 N.J. Super. 275, 283 (App. Div. 2001). Thus, in contrast to pattern evidence, establishing motive does not require similarity between the other bad acts and the crime charged. Id. at 286 n.3. Other crimes evidence may be

admissible under N.J.R.E. 404(b) if it discloses the defendant's mental intention or purpose when he committed the offense or to negate the existence of innocent intent. State v. J.M., Jr., 438 N.J. Super. 215, 223 (App. Div. 2014).

The third prong requires clear and convincing proof that the person against whom the evidence is being used actually committed the other crime or wrong. Carlucci, 217 N.J. at 143; Cofield, 127 N.J. at 338. The fourth prong is typically the most difficult to overcome. Barden, 195 N.J. at 389. "Because of the damaging nature of such evidence, the trial court must engage in a 'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice." Ibid. (citation omitted). The analysis incorporates balancing prejudice versus probative value required by N.J.R.E. 403, but does not require, as does N.J.R.E. 403, that the prejudice substantially outweigh the probative value of the evidence. Reddish, 181 N.J. at 608. The risk of undue prejudice must merely outweigh the probative value. A "very strong" showing of prejudice is required to exclude motive evidence under this prong. State v. Castagna, 400 N.J. Super. 164, 180 (App. Div. 2008).

Under the fourth prong, the trial court must also consider if other less prejudicial evidence may be presented to establish

the same issue on which the other crimes or wrongs evidence was offered. P.S., 202 N.J. at 256. Additionally, in order to minimize "the inherent prejudice in the admission of other-crimes evidence, our courts require the trial court to sanitize the evidence when appropriate." Barden, 195 N.J. at 390 (citation omitted).

Whenever the State seeks to admit evidence of other crimes, wrongs, or acts, the court must make a threshold determination as to whether it is subject to a N.J.R.E. 404(b) analysis or whether the evidence is intrinsic to the charged crime and admitted as an exception to the Rule. State v. Rose, 206 N.J. 141, 179 (2011). "[E]vidence that is intrinsic to the charged crime is exempt from the strictures of [N.J.R.E.] 404(b) even if it constitutes evidence of uncharged misconduct that would normally fall under [N.J.R.E.] 404(b) because it is not evidence of other crimes, wrongs, or acts." Id. at 177. To determine what is intrinsic, the Court adopted the test in United States v. Green, 617 F.3d 233, 248-49 (3d Cir. 2010), and held that evidence is considered intrinsic if it "directly proves" the crime charged or if the acts in question are performed contemporaneously with, and facilitate, the commission of the crime charged. Id. at 180 (quoting Green, 617 F.3d at 248-49). Courts have utilized a "case-by-case approach" in making this determination. Id. at 179.

In addition, the Court appeared to have broadened the intrinsic evidence exception by noting "that other crimes evidence may be admissible if offered for any non-propensity purpose, [including] the need 'to provide necessary background information' about the relationships among the players as a proper purpose." Id. at 180-81 (alteration in original) (quoting Green, 617 F.3d at 249). The Court held that such background evidence is admissible "outside the framework of [N.J.R.E.] 404(b)," and when admissible for this purpose, the evidence is subject to the probative value/prejudice balancing test under N.J.R.E. 403, not N.J.R.E. 404(b). Id. at 177-78, 181. The Court added:

> There is no need to regard [N.J.R.E.] 404(b) as containing an exhaustive list of the non-propensity purposes permitted of other crime evidence. . . . [T]here is no reason that our courts cannot allow, under [N.J.R.E.] 404(b), evidence to be admitted for a . . . 'necessary background' or, as otherwise stated, 'the need to avoid confusing the jury, non-propensity purpose.'
>
> [Id. at 181 (quoting Green, 617 F.3d at 249).]

Defendant concedes he did not object to the admission and use of his street nickname "Pimp" at trial. "[I]if the party appealing did not make its objection to admission known to the trial court, the reviewing court will review for plain error, only reversing if the error is 'clearly capable of producing an unjust result.'" Id. at 157 (quoting R. 2:10-2).

The "use of defendant's street nickname during trial cannot serve as a per se predicate for reversal." State v. Paduani, 307 N.J. Super. 134, 146 (App. Div. 1998). When a nickname is pejorative, such as "Marijuana" or "Trouble[,]" it should generally be kept from the jury unless it is relevant for some purpose. Id. at 147. The admission of irrelevant nicknames does not mandate reversal unless "some tangible form of prejudice is demonstrated, i.e., where such names have been intentionally offered as indicia of guilt." Ibid. (quoting State v. Salaam, 225 N.J. Super. 66, 73 (App. Div. 1988)).

Here, defendant's nickname was not used intentionally as indicia of his guilt or bad character, and he acquiesced to its repeated use throughout the trial. Use of his nickname was relevant and necessary to identify him because the witnesses knew him only by that nickname. The court carefully instructed the witnesses not to mention defendant's connection to promoting prostitution and the witnesses complied with that mandate. Moreover, defense counsel frequently used and referenced the street nicknames of defendant, witnesses, and other drug dealers, and relied on those nicknames as part of his trial strategy that defendant was merely a low-level drug dealer lacking the power to order an execution and other drug dealers from whom Reid stole drugs may have murdered him.

Despite the negative connotation of defendant's street nickname, he failed to show any tangible form of prejudice from its use. There was no evidence presented connecting defendant to promoting prostitution. In view of the overwhelming evidence of defendant's guilt of the crimes charged, use of his street nickname was not clearly capable of producing an unjust result. See Salaam, 225 N.J. Super. at 76 (holding "in view of the overwhelming proof of defendant's guilt, there was no real possibility that the trial court's reference to defendant's [alias] names 'led the jury to a result it otherwise might not have reached'"). Accordingly, we find no error in the admission and use of defendant's street nickname "Pimp" throughout the trial.

We also find no error in the admission of evidence of defendant's prior gun possession. Defendant was charged with possession of a weapon for an unlawful purpose and unlawful possession of a weapon. The State was required to present evidence that defendant, who was vicariously liable for Jackson's actions, knowingly possessed a handgun and possessed it with a purpose to use it against another's person or property. Because the evidence of defendant's prior gun possession directly proved the charged offenses, it was intrinsic to the charged crimes, and thus, exempt from the strictures of N.J.R.E. 404(b). Rose, 206 N.J. at 177, 180. Because the evidence was exempted from the strictures of

N.J.R.E. 404(b), no limiting instruction was necessary.

Even if not intrinsic, the evidence was admissible under N.J.R.E. 404(b). When motive or intent are at issue, our courts "generally admit a wider range of evidence." State v. Jenkins, 178 N.J. 347, 365 (2004) (quoting Covell, 157 N.J. at 565). "That includes evidentiary circumstances that 'tend to shed light' on a defendant's motive and intent or which 'tend fairly to explain his actions,' even though they may have occurred before the commission of the offense." Covell, 157 N.J. at 565 (quoting State v. Rogers, 19 N.J. 218, 228 (1955)).

In this case, the court found that evidence of defendant's prior gun possession was relevant to his motive to kill Reid for failing to pay a drug debt and as to his method of using guns in his drug operation and using Jackson as an enforcer. The court specifically found the evidence admissible because of defendant's "access to guns in relation to the drug business. That this is all relevant to the motive of the [d]efendant to kill [Reid]. That it was done because he shorted him on the package allegedly. And that it was important to his general street reputation as somebody who would not be a pushover on the street in the drug business."

The State's theory of the case was that defendant ordered Jackson to shoot Reid because Reid failed to pay a drug debt. Thus, evidence related to access to guns, the threat with the gun,

and the relationship between defendant and Jackson would shed light on the motive, intent, and opportunity for the crime, and was properly admissible under N.J.R.E. 404(b).

IV.

Defendant challenges his sentence in Point III. He argues a remand is necessary because the court failed to engage in a qualitative analysis of the aggravating and mitigating factors. He also argues the court erred in failing to merge count two (possession of a weapon for an unlawful purpose) into count one (murder).

We review a court's sentencing decision under an abuse of discretion standard. State v. Fuentes, 217 N.J. 57, 70 (2014). As directed by the Court, we must determine whether:

> (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)).]

"[T]he court must describe the balancing process leading to the sentence." State v. Kruse, 105 N.J. 354, 360 (1987) (citations omitted). "To provide an intelligible record for review, the trial court should identify the aggravating and mitigating

factors, describe the balance of those factors, and explain how it determined defendant's sentence." Ibid. "Merely enumerating those factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis." Id. at 363 (citation omitted). We may remand where the court errs in applying the aggravating and mitigating factors to the facts in the record, or where no qualitative analysis of sentencing factors was placed on the record. Ibid.

In sentencing defendant to a forty-five year term subject to NERA, the court made only these brief comments:

> As mentioned, I've sat through the trial. You testified at the trial. The jury obviously didn't believe you. The testimony reflected that, as does your criminal record, that you spent a number of years drug dealing, in possession and control of weapons. And the jury in this case found that you ordered an execution over a small debt. And it's really a horrible reflection of yourself and the environment on the streets where these drugs are sold.
>
> There's four adult indictments and I'm considering this New York charge, a first-degree robbery, as a juvenile charge, but there was a three to six-year state prison sentence, and it's a serious charge. It's the only charge you have that involves violence. I acknowledge that it happened at -- at [age seventeen].
>
> I find that aggravating factors three, six, and nine outweigh no mitigating factors.

> You're sentenced to [forty-five] years, [eighty-five] percent on the murder charge concurrent to seven and concurrent to four on the two drug -- gun charges, 982 days of jail credit. DNA and prints. Three $50 fines, three $75 fines, and one $30 fine.

The court did not engage in a qualitative analysis of the aggravating and mitigating factors that applied to this case. Although the court noted defendant's prior criminal record, including four adult indictments, it then merely found three aggravating factors without any discussion, analysis, or application to defendant in particular. Accordingly, we remand for resentencing and direct the court engage in a qualitative analysis of the aggravating and mitigating factors. The court shall also address the merger issue.

Defendant's conviction is affirmed, and the matter is remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.