SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4453-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORNETTE M. TERRY, a/k/a
KEITH TERRY, KEITH M. TERRY,
ORHETTE TERRY, and RASHEIA TERRY,

Defendant-Appellant.

Argued May 25, 2016 – Decided June 13, 2016.
Remanded by Supreme Court March 16, 2018.
Resubmitted April 24, 2018 – Decided May 8, 2018.

Before Judges Ostrer, Haas and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 11-04-0466.

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, of counsel and on the brief).

Kimberly L. Donnelly, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Ann M. Luvera, Acting Union County Prosecutor, attorney; Kimberly L. Donnelly, of counsel; Amanda K. Dalton, Special Deputy Attorney

General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

This matter returns to us upon remand, State v. Terry, ___ N.J. ___ (2018), for a determination of the arguments raised on appeal but not addressed in our prior opinion.

Defendant Keith Terry[1] appeals his conviction for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and fourth-degree possession of hollow-nose bullets, N.J.S.A. 2C:39-3(f) based upon purported trial errors. We affirm.

I.

We recite the facts from the record that are essential to our determination. On December 31, 2010, Union Township Police Officer Joseph Devlin was traveling east on Morris Avenue at approximately 6:50 p.m. during his patrol shift. Devlin observed a white GMC truck run a stop sign at Ingersoll Terrace and turn right onto Morris Avenue. He drove behind the truck and activated his lights and siren to effect a motor vehicle stop. The vehicle did not stop, switched lanes multiples times without signaling, and

[1] Defendant's legal name is Keith Terry. He was tried as Keith Terry in a second trial after the first trial resulted in a mistrial when the State introduced evidence that defendant misrepresented his name as being "Ornette" Terry. The State's witnesses were barred from referring to defendant as Ornette Terry in the second trial.

continued to travel for approximately one-half of a mile before stopping at a BP gas station.

Devlin notified dispatch of the situation and provided the license plate number and model of the truck. Dispatch informed Devlin that the truck was a rental from Hertz. There was no report that the truck was stolen.

Devlin and another Union police officer who responded to the gas station blocked defendant's truck, drew their weapons, and approached the vehicle. Devlin ordered defendant to show his hands multiple times but defendant did not comply. Devlin then opened the door and ordered defendant out of the truck. Defendant stepped out of the truck, leaned against it and placed his hands in his pockets. On multiple occasions, Devlin instructed defendant to take his hands out of his pockets. Devlin proceeded to pat defendant down, checking defendant's pants and jacket pockets. No weapons or contraband were found.

After an exchange between defendant and Devlin, Devlin proceeded to the passenger's side of the truck to search the glove compartment for the registration card and insurance for the purpose of issuing a motor vehicle summons. Devlin did not locate any credentials in the glove box. As he was exiting the vehicle, Devlin saw a reflection on the floor of the truck through use of his flashlight. The reflection was from a handgun located on the

floorboard protruding from under the seat. Defendant was placed under arrest and the truck was impounded at the Union police station. The handgun was later seized pursuant to a search warrant.

The first trial commenced on August 13, 2013. However, the judge granted a mistrial based on the State's failure to produce any evidence that defendant had misrepresented himself as "Ornette" Terry. Defendant filed a motion to bar retrial, which was denied. A second trial commenced on August 21, 2013, and concluded on August 28, 2013. Defendant was convicted on both counts. On November 22, 2013, defendant was sentenced on count one to five years in state prison subject to an eighty-five percent parole disqualifier and a concurrent one-year sentence on count two.

II.

The parties stipulated at trial that the handgun was an operable 6.35-millimeter semi-automatic pistol, with six .25-caliber hollow-nose bullets, and that defendant did not have a permit to carry a gun. Testimony was taken from Devlin; Union Township Detectives Odete Mirao and Donald Cook; and Monica Ghannam, a DNA expert.

No fingerprints were recovered from the gun, but Ghannam found usable DNA on two areas of the gun. DNA from two individuals

was found. Comparing a buccal swab of defendant's DNA to the DNA found on the gun, Ghannam was unable to exclude defendant as a possible source of the DNA obtained from the gun. At trial, defendant argued that defendant's DNA might have been placed on the gun through transference.[2] In rebuttal, Cook and Mirao testified regarding the chain of custody of the weapon and how it was handled, as well as inconsistencies in their reports.

Prior to trial, the State represented that a Hertz employee would testify that the rental car was cleaned, vacuumed, and inspected prior to defendant's rental. However, no witness from Hertz testified. Rather, Mirao testified that he spoke to a Hertz representative, who confirmed that Hertz has a policy of thoroughly cleaning rental vehicles and reporting the discovery of contraband to the police, and that no gun was found prior to defendant's rental of the vehicle. Defendant's counsel sought to discredit that testimony by eliciting testimony from Mirao that the Hertz employee he spoke to does not work at the Newark branch and was not there on December 31, 2010 when Hertz cleaned the vehicle.

During summation, the prosecutor stated:

> What [defense counsel] did not do is this. There are certain facts that she did not even

[2] Defendant asserts that because hearsay testimony was admitted, which "obliterated [his] most compelling defense: that he did not know that the gun was in the car when he rented it[,]" he was forced to construct a defense that he was framed by the police.

> dispute to you. Why is [defendant] driving for almost two minutes after the lights go on in that car? Why is he driving three-quarters of a mile shifting lanes back and forth?
>
> She got up here just now and never even disputed those facts. She never once said in front of all of you just now, his lawyer, that he drove three-quarters of a mile switching lanes back and forth. She didn't dispute it at all, nothing.

The prosecutor continued this theme by stating "[w]hat are you doing? What are you doing for three-quarters of a mile, switching lanes back and forth? Two facts undisputed in this case." Defendant's counsel objected, arguing that the State was attempting to shift the burden of proof. The judge overruled the objection. The prosecutor also stated that defendant "drove three-quarters of a mile and weaved in and out of traffic for some unknown explanation . . . ."

The prosecutor further commented that defendant failed to pull over because he "is switching lanes, he is driving three-quarters of a mile because human beings have a reaction, it's fight or flight." The prosecutor further commented, "[h]e freaked out when he saw the lights because he just blew a stop sign and took three-quarters of a mile switching lanes to buy . . . time to drop and get rid of that gun and figure out what am I doing." Again, defendant's counsel objected. The judge overruled the objection. The prosecutor continued by posing the question, "is

the explanation for why I'm taking two minutes to pull over and drive three-quarters of a mile, I got a problem, I got a problem?"

During the jury charge, the judge instructed that in order to convict defendant of possessing a prohibited device, it must find that the handgun contained hollow-nosed bullets and that defendant "knowingly possessed" the bullets. The judge further explained that possession meant "knowing intentional control of a designated thing accompanied by a knowledge of its character."

During deliberations, the jury asked, by a note, "How do we know the defendant knew if [hollow-nose] bullets were prohibited?" Following a repetition of the full jury charge on possession of a prohibited weapon or device, the judge stated, "Thus, the defendant must know or be aware that he possessed the items. Here, the items alleged are the ammunition. The State is not required to prove that at the time that he knowingly possessed the ammunition, the defendant also knew that it was [hollow-nose] ammunition." There was no objection to the charge.

On appeal, among other arguments, defendant argued that the trial court erred in denying the motion to suppress. In an unpublished opinion, this court determined that the warrantless search of the truck violated both the Fourth Amendment of the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution. The Court granted the State's petition for

certification. 228 N.J. 448 (2016). As noted, the Court reversed this court's decision and remanded for a consideration of the issues not reached by us on direct appeal. This appeal followed.

We now determine the following arguments raised by defendant on appeal.

POINT [I]

> BECAUSE THE ADMISSION OF EXTENSIVE HEARSAY TESTIMONY VIOLATED BOTH THE CONFRONTATION CLAUSE AND THE RULES OF EVIDENCE AND EVISCERATED . . . DEFENDANT'S MOST COMPELLING DEFENSE, HIS CONVICTIONS MUST BE REVERSED. [NOT RAISED BELOW]
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> . . . .

POINT [II]

> THE PROSECUTION'S SUMMATION BOTH IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENSE AND INAPPROPRIATELY URGED THE JURY TO FIND THAT . . . DEFENDANT FLED THE POLICE DUE TO HIS GUILT WITHOUT A SUFFICIENT EVIDENTIARY BASIS. THE RESULTANT PREJUDICE REQUIRES REVERSAL OF . . . DEFENDANT'S CONVICTIONS. [PARTIALLY RAISED BELOW]
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> . . . .

POINT [III]

> THE TRIAL COURT'S ERRONEOUS INSTRUCTION THAT THE STATE DID NOT HAVE TO PROVE THAT . . . DEFENDANT KNEW THE AMMUNITION WAS [HOLLOW-NOSED] IN ORDER TO BE FOUND GUILTY . . . REMOVED THE STATE'S BURDEN TO PROVE . . . DEFENDANT'S MENS REA AND THEREFORE VIOLATED HIS CONSTITUTIONAL RIGHTS TO HAVE ALL ELEMENTS FOUND BY A JURY BEYOND A REASONABLE DOUBT. [NOT RAISED BELOW]

III.

We commence with the precepts that inform our decision. An appellate court should not give deference to a trial judge's interpretation of the law. State v. Vargas, 213 N.J. 301, 327 (2013); State v. Gandhi, 201 N.J. 161, 176 (2010); State v. Handy, 412 N.J. Super. 492, 498 (App. Div. 2010) (stating that our review of the judge's legal conclusions is plenary). Legal issues are reviewed de novo. Vargas, 213 N.J. at 327. "A trial court's interpretation of the law . . . and the consequences that flow from established facts are not entitled to any special deference." State v. Lamb, 218 N.J. 300, 313 (2014) (citation omitted).

Similarly, the appellate court accords "substantial deference to a trial court's evidentiary rulings." State v. Morton, 155 N.J. 383, 453 (1998). Discretionary decisions made by a court in the course of a trial are addressed to the court's discretion and will be reversed on appeal only if an abuse or mistaken exercise of that discretion is shown. State v. Brown, 170 N.J. 138, 147 (2001). "[T]he decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Goodman, 415 N.J. Super. 210, 224-25 (App. Div. 2010) (alteration in original) (quoting State v. Carter, 91 N.J. 86, 106 (1982)).

"A prosecutor is given 'considerable leeway in summing up the State's case.'" State v. Atkins, 405 N.J. Super. 392, 401 (App. Div. 2009) (quoting State v. Williams, 113 N.J. 393, 447 (1988)). As long as the comments are reasonably related to the scope of the evidence, prosecutors are expected to make a vigorous and forceful closing argument to the jury. State v. Frost, 158 N.J. 76, 82 (1999); see also State v. Pratt, 226 N.J. Super. 307, 323 (App. Div. 1988); State v. Johnson, 287 N.J. Super. 247, 265 (App. Div. 1996).

A conviction will not be reversed based on a prosecutor's unfair comment unless it is "clearly and unmistakably improper" and if the comment "substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. McGuire, 419 N.J. Super. 88, 150 (App. Div. 2011) (quoting State v. Timmendequas, 161 N.J. 515, 575 (1999)). In weighing whether a prosecutor engaged in misconduct during summation, a reviewing court must examine "whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court gave the jury a curative instruction." Atkins, 405 N.J. Super. at 401 (quoting State v. W.L., Sr., 292 N.J. Super. 100, 110 (App. Div. 1996)).

When reviewing jury instructions claimed to be flawed, the appellate court must consider the charge as a whole to weigh

whether the "jury was misinformed as to the controlling law" or whether the instruction was overall "ambiguous or misleading." State v. R.B., 183 N.J. 308, 324 (2005) (quoting State v. Hipplewith, 33 N.J. 300, 317 (1960)).

IV.

Defendant first argues that the admission of testimony by Mirao regarding the conversation he had with a Hertz employee was impermissible hearsay and otherwise violated the Confrontation Clause. As a result, defendant contends his most convincing defense, that he had no idea the gun was in the car, was "crippled."

The following exchange took place when defense counsel cross-examined Mirao:

> Question: And you investigated this alleged crime, correct?
>
> Answer: Yes.
>
> Question: And you spoke with the Hertz people, correct?
>
> Answer: Yes.
>
> Question: And you . . . weren't able to speak with anyone specifically who had cleaned this car, correct?
>
> Answer: That's correct.
>
> Question: And you gave him the evidence inventory sheet?
>
> Answer: That's correct.

Question: But you did not give him a consent to search form to sign?

Answer: No.

Immediately following this testimony, Mirao testified on re-direct as follows:

Question: You did speak to someone named Dennis Casey from Hertz, right?

Answer: Yes.

Question: And you did speak to him and find out about how the car was, prior to it being rentaled [sic], right?

Answer: Yes.

Question: And you did find out that, when a car is returned, it gets washed, and vacuumed, and gassed, right?

Answer: Yes.

Question: And you did find out that they have a protocol, that if there's something in the car, a weapon, that they would call the cops, right?

Answer: Yes.

Question: Did you get any information that that was done in this case?

Answer: Yes. It was . . . [.]

Question: You got information that someone called the cops about a —

Answer: No. No.

. . . .

Question: Did . . . he tell you, the Hertz representative, that anyone called the cops because there was a gun in this car, after it was vacuumed?

Answer: No.

As noted, no objection to the testimony was raised by defendant as to hearsay or to the leading questions.

"The Sixth Amendment to the United States Constitution and Article 1, Paragraph 10 of the New Jersey Constitution guarantee a criminal defendant the right to confront 'the witnesses against him.'" State v. Branch, 182 N.J. 338, 348 (2005) (quoting U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7). "The right to confront and cross-examine accusing witnesses is 'among the minimum essentials of a fair trial,' and applies to the states through the [F]ourteenth [A]mendment . . . ." State v. Budis, 125 N.J. 519, 531 (1991)(citations omitted) (quoting Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973)). To be sure, "[t]he Confrontation Clause does not condemn all hearsay. An established and recognized exception to the hearsay rule will not necessarily run afoul of the Confrontation Clause." Branch, 182 N.J. at 349 (citing Crawford v. Washington, 541 U.S. 36 (2004)).

"Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]'" N.J.R.E. 801(c), and

is not admissible unless otherwise provided by the New Jersey Rules of Evidence, N.J.R.E. 802. Branch, 182 N.J. at 357; N.J.R.E. 803, 804 (enumerating the exceptions to the rule against hearsay).

Saliently, "both the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." Branch, 182 N.J. at 350 (citing State v. Bankston, 63 N.J. 263, 268-69 (1973)). Our Supreme Court addressed this issue when it stated:

> To be sure, there are circumstances in which an officer will be allowed to testify, based generally on hearsay evidence, to explain the course of his or her investigation. State v. Roach, 146 N.J. 208, 224-25 (1996). For example, an officer might explain that he received information that caused him to approach a suspect or brought him to the scene of a crime. Bankston, 63 N.J. at 268. However, "when the officer becomes more specific by repeating what some other person told him concerning a crime by the accused, the testimony violates the hearsay rule" and implicates defendant's Sixth Amendment confrontation rights. Ibid.
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> [State v. Frisby, 174 N.J. 583, 592 (2002).]

The limited admissibility of this type of hearsay is for the purpose of rebutting a suggestion that the officer was acting in an arbitrary manner. Biunno, Weissbard, & Zegas, Current N.J. Rules of Evidence, comment 4 on N.J.R.E. 801 (2017). However, the

testimony cannot "create an inference that the defendant has been implicated in a crime by some non-testifying individual." Ibid. Comment 4 on N.J.R.E. 801 references our courts' application of the Bankston rule. Ibid.

Our Supreme Court has declared that the admission of hearsay without objection is subject to a plain error analysis. Frisby, 174 N.J. at 591 ("Because no objection was advanced with respect to that hearsay evidence at trial, it must be judged under the plain-error standard: that is, whether its admission 'is of such a nature as to have been clearly capable of producing an unjust result.'") (quoting R. 2:10-2); see also R. 1:7-5 (stating that a trial court "may notice any error of such a nature as to have been clearly capable of producing an unjust result, even though such error was not brought to its attention by a party.").

Although we agree that Mirao's testimony on re-direct relating to the information he received from Hertz was hearsay, defense counsel raised the "Hertz" issue on cross-examination. During that examination, defense counsel elicited hearsay from Mirao relating to his conversations with Hertz, albeit by implication. That line of questioning relating to the cleaning of the rented vehicle by Hertz was in furtherance of defendant's argument that the weapon was in the vehicle at the time of his rental and without his knowledge. Mirao's testimony on cross-

examination both "opened the door" to re-direct on the related subject and placed the issue of defendant's knowledge of the subject weapon before the jury for its determination. As such, in our application of the plain error analysis to the trial record, we discern no error that undermines our confidence in the outcome. R. 2:10-2; State v. Macon, 57 N.J. 325 (1971).

V.

Defendant next argues that the State's summation was prejudicial because it shifted the burden of proof to defendant by "denigrating his decision not to testify[,]" and also because it suggested that defendant fled due to a "consciousness of guilt . . . ."

"[I]t is improper for a prosecutor to remark that the defense has offered 'no explanation,'" or "that the State's evidence was 'uncontradicted[.]'" State v. Engel, 249 N.J. Super. 336, 381 (App. Div. 1991) (citations omitted). "[A] prosecutor should not in either obvious or subtle fashion draw attention to a defendant's decision not to testify." State v. Cooke, 345 N.J. Super. 480, 486 (App. Div. 2001) (citing Engel, 249 N.J. Super. at 382). "When a prosecutor's comments indicate or imply a failure by the defense to present testimony, the facts and circumstances must be closely scrutinized to determine whether the defendant's Fifth Amendment privilege to remain silent has been violated and his right to a

fair trial compromised." Ibid. (citing State v. Sinclair, 49 N.J. 525, 549 (1967); Engel, 249 N.J. Super. at 382).

We do not view the prosecutor's comments as burden-shifting or a criticism of defendant's invocation of his right not to testify. Instead, the prosecutor pointed out that facts submitted by the State were not disputed. His questioning — "[w]hat are you doing? What are you doing for three-quarters of a mile, switching lanes back and forth? Two facts undisputed in this case[,]" — appears to be more rhetorical and, only noted that certain key facts were undisputed. Although Sinclair warns against characterizing evidence as "uncontradicted[,]" this is so in the context of a prosecutor's comments "stress[ing] a failure to present testimony," and "reflect[ing] upon a defendant's Fifth Amendment right to remain silent." 49 N.J. at 549. Again, we do not view the prosecutor's comments as a suggestion that defendant could have or should have testified. Even if the comments did have that effect, we are not persuaded that they were so forceful or repetitive as to have constituted prejudice that would have swayed a jury.

VI.

We next address defendant's argument that the prosecutor's comments during summation regarding defendant's failure to pull

over were intended to demonstrate defendant's consciousness of guilt.

In State v. Randolph, 441 N.J. Super. 533, 563 (App. Div. 2015), this court provided guidance as to how consciousness-of-guilt evidence should be introduced to a jury:

> Although evidence of flight is generally admissible, "[t]he potential for prejudice to the defendant and the marginal probative value of evidence of flight," requires the court to carefully consider the manner in which such evidence is presented to a jury. [State v. Mann, 132 N.J. 410, 420 (1993)]. The probative value of flight evidence depends on:
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> > the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.
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> [Ibid. (quoting United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)).]

The court continued by warning that "[g]iven the indirect value of such evidence, and its potential for profound prejudice to a defendant," we "carefully craft a charge to the jury explaining the proper uses and limits of such evidence." Ibid.

However, no "carefully crafted" jury charge, i.e., Model Jury Charge (Criminal), "Flight" (2010), was given here.

At trial it was established that defendant failed to pull over for approximately seven-tenths of a mile. Defendant also changed lanes several times without signaling. While that conduct might constitute evidence of flight, it is "marginal" whether that conduct constitutes a consciousness of guilt. Randolph, 441 N.J. Super. at 563.

No objection to the jury charge relative to the absence of an explanation regarding the use of this evidence was raised as required by Rule 1:7-2 ("no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires . . . ."). Defendant did object to the consciousness-of-guilt argument during summation. The judge overruled the objection without providing any reason.

In summation, a prosecutor is generally limited to commenting on the evidence and to "drawing any reasonable inferences supported by the proofs." State v. Zola, 112 N.J. 384, 426 (1988). This does not prevent a prosecutor from making "a vigorous and forceful presentation of the State's case." Ibid. (quoting State v. Bucanis, 26 N.J. 45, 57 (1958)). A prosecutor is given "considerable leeway in closing arguments as long as the comments are reasonably related to the scope of the evidence presented."

R.B., 183 N.J. at 332. In order to warrant a reversal of a conviction, it must be evident that the prosecutor's conduct was "clearly and unmistakably improper," and "so egregious that it deprived the defendant of a fair trial." State v. Wakefield, 190 N.J. 397, 438 (2007).

Based upon these principles that guide our decision, we view the "flight" comments as fair comment upon the testimony. Even were we to view the prosecutor's comments to be straddling the boundary between fair and improper comment, when considered with the leeway afforded to prosecutors in closing arguments, as well as the instruction to the jury that the comments of the attorneys were not evidence, we are satisfied that the prosecutor's comment was not "so egregious that it deprived the defendant of a fair trial." Frost, 158 N.J. at 83.

Moreover, the judge provided jury charges regarding the burden of proof as well as defendant's right not to testify. Juries are presumed to understand and follow instructions. State v. Feaster, 156 N.J. 1, 65 (1998); see also State v. Muhammad, 145 N.J. 23, 52 (1996) ("While there is no way to assure that a jury adheres scrupulously to the mandate of a limiting instruction, there is no reason to believe that jurors will not act responsibly in performing their duty.").

VII.

Defendant further argues the judge gave an erroneous instruction by removing the State's burden of establishing the requisite mens rea for possession of hollow-nose bullets.

The judge gave the following charge, in part, in response to a jury question regarding the burden of proof for count two: "[t]hus, the defendant must know or be aware that he possessed the items. Here, the items alleged are the ammunition. The State is not required to prove that at the time that he knowingly possessed the ammunition the defendant also knew that it was [hollow-nosed] ammunition." There was no objection to the charge.

The failure to "interpose a timely objection constitutes strong evidence that the error belatedly raised . . . was actually of no moment." State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999); see also State v. Krivacska, 341 N.J. Super. 1, 43 (App. Div. 2001) (finding, when defense did not request instruction, "to rerun a trial when the mistake could easily have been cured on request, would reward the litigant who suffers an error for tactical advantage . . . ."). "A claim of deficiency in a jury charge to which no objection is interposed will not be considered unless it qualifies as plain error . . . ." R.B., 183 N.J. at 321 (quoting State v. Hock, 54 N.J. 526, 538 (1969)).

In this context, "plain error requires demonstration of '[l]egal impropriety . . . prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Burns, 192 N.J. 312, 341 (2007) (alteration in original) (emphasis added) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). Also, an erroneous jury instruction must be "examined as a whole to determine its overall effect." State v. Wilbely, 63 N.J. 420, 422 (1973). The reviewing court must consider "the overall strength of the State's case." State v. Chapland, 187 N.J. 275, 289 (2006).

Defendant was charged in count two for violating N.J.S.A. 2C:39-3(f), which states in pertinent part:

> (1) Any person, other than a law enforcement officer or persons engaged in activities pursuant to subsection f. of [N.J.S.A.] 2C:39-6, who knowingly has in his possession any hollow nose or dum-dum bullet . . . is guilty of a crime of the fourth degree.

The issue raised by defendant was raised in a substantially similar context in State v. Smith, 197 N.J. 325 (2009). There, the Court was faced with deciding "whether a defendant must know that a weapon is defaced to be convicted of the offense of

possession of a defaced weapon, contrary to N.J.S.A. 2C:39-3(d)."[3] Id. at 326. After an examination of relevant case law and subsections (a) through (d) of N.J.S.A. 2C:39-3, Smith, 197 at 334-36, the Court interpreted the parallel phrasing in each subsection to suggest "[a]n obvious pattern of language[,]" which indicated the Legislature's intent "for the term 'knowingly' to modify only a defendant's 'possession' of the illicit object[.]" Id. at 337. The Court reached its conclusion by noting that "the Legislature placed the term 'knowingly' immediately before the phrase, 'has in his possession a firearm,' and followed it with another, subordinate phrase, 'which has been defaced,' that describes further the nature of the proscribed item." Id. at 332.

In State v. Pelleteri, 294 N.J. Super. 330, 331-34 (App. Div. 1996), this court addressed the issue presented here when it was required to interpret N.J.S.A. 2C:39-5(f) ("[a]ny person who knowingly has in his possession an assault firearm is guilty of a crime of the second degree"). We held "the Legislature intended to proscribe knowing possession, as distinguished from knowledge of the illegal character of the article possessed." Id. at 334; see also State v. Scott, 429 N.J. Super. 1, 8-12 (App. Div. 2012)

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[3] "Any person who knowingly has in his possession any firearm which has been defaced, except an antique firearm or an antique handgun, is guilty of a crime of the fourth degree." N.J.S.A. 2C:39-3(d).

(analyzing the mens rea required to convict a defendant of a community gun charge, N.J.S.A. 2C:39-4(a)(2), and determining that the State need not prove that the defendant knows the firearm is a community gun).

Defendant contends that subsection (f) is written in precisely the manner the Court in Smith suggested subsection (d) could have been written to require that a defendant both knowingly possessed the item and knew of its nature. Smith, 197 N.J. at 333 ("[The Legislature] could have chosen to use an adjective ("knowingly has in his possession a [defaced] firearm") to modify the term 'firearm,' instead of using a passive phrase that further attenuates the fact of defacement from the term, 'knowingly.'"). Defendant's argument, although somewhat attractive, is unavailing for two reasons.

First, Smith noted that even the altered phraseology for subsection (d) "would not have compelled a different conclusion, particularly in light of the similar phrasing of other subsections of N.J.S.A. 2C:39-3 . . . ." Id. at 333. Second, there is a fundamental difference between the nature of the illegal items proscribed in subsections (d) and (f). Hollow-nosed bullets have an inherent illegal characteristic (hollow noses). On the other hand, firearms are not defaced when they are created. Thus, in order to be illegal, the act of defacing must have taken place.

In sum, applying our standard of review to the jury charge, we discern no basis for error, much less, plain error.

Affirmed.