SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-2754-17
A-2900-17
A-3526-17
A-4291-17

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES FAIR,

Defendant-Appellant.

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HANEEF WALKER,

Defendant-Appellant.

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEITH GERMAN,

Defendant-Appellant.

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALTYREEK LEONARD,

Defendant-Appellant.

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Submitted October 19, 2020 – Decided April 19, 2022

Before Judges Currier, Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-10-1876.

Joseph E. Krakora, Public Defender, attorney for appellant James Fair (Frank M. Gennaro, Designated Counsel, on the brief).

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

Joseph E. Krakora, Public Defender, attorney for appellant Keith German (Kisha M. Hebbon, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Altyreek Leonard (David A. Gies, Designated Counsel, on the briefs).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Assistant Prosecutor, of counsel and on the briefs; Lisa Sarnoff Gochman, of counsel and on the briefs).

Appellant, Haneef Walker, filed a pro se supplemental brief.

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

These appeals arise from a lengthy and broad-based investigation into criminal activity in the Asbury Park area beginning in the Fall of 2013. The investigation, which was supervised by members of the Monmouth County Prosecutor's Office (MCPO) and dubbed "Operation Dead End," targeted an alleged racketeering conspiracy among gang members and others believed to be part of a criminal enterprise specializing in the unlawful acquisition and use of firearms, drug trafficking, and associated crimes. The investigation involved the interception of over 27,000 communications consisting of texts and phone calls pursuant to wiretap orders, the retrieval of historical phone records and cell-site information, physical surveillance, undercover drug purchases, and the seizure of physical evidence. The resulting indictment returned on October 27,

2014, consisted of 219 counts charging forty-four defendants with numerous offenses, the most serious of which were conspiracy to engage in racketeering, conspiracy to commit murder, promoting organized street crime, armed robbery, aggravated assault, burglary, theft, drug, and gun offenses.

Gang members James Fair, Haneef Walker, and Altyreek Leonard were among those indicted. Fair was charged in 159 counts, Walker was charged in fifty-four counts, and Leonard was charged in fifty-six counts. Keith German, an Asbury Park police officer, was also indicted and charged in nine counts based on conversations intercepted on the wiretap of Fair's cell phone as well as other evidence uncovered during the investigation.

Critically, in the racketeering conspiracy charged in count one, Fair, Walker, Leonard, and German, along with numerous other co-defendants, allegedly agreed

> that, in conducting the affairs of the [criminal] enterprise, the defendants would commit robberies, burglaries, thefts, and shoplifting, in order to obtain money and/or controlled dangerous substances [CDS] and/or other proceeds for members of the enterprise, and that the defendants would acquire and transfer firearms between members of the criminal enterprise for use in the commission of said crimes as well as for the targeting of rival gang members; and further, that the defendants would be on the lookout for, and would report the location of, rival gang members targeted for homicide and/or assault by members of the enterprise,

> and that the defendants would attempt to kill and/or assault said rival gang members when located; and further that defendants would obtain cocaine and/or heroin and/or methylone a/k/a "Molly" and/or oxycodone in order to redistribute said [CDS] to buyers in and around Monmouth County.

Prior to trial, various defendants moved to: (1) dismiss counts of the indictment; (2) suppress statements to police, physical evidence seized pursuant to a search warrant issued after a motor vehicle stop, and communications intercepted during the three-month wiretap investigation; and (3) sever defendants for purposes of trial. As a result of the State's motion for joinder, on March 30, 2017, the trial judge ordered that the six remaining defendants, whose cases still awaited disposition, would be separated into two trial groups with Fair, Walker, and German in one group, and Leonard and two other co-defendants, one of whom was Harry Clayton, in the other group. Additionally, in May 2017, the State successfully moved to admit intrinsic evidence that co-defendant Clayton was involved in manufacturing crack cocaine as well as evidence, under N.J.R.E. 404(b), of Fair's, Walker's, and Leonard's gang membership.

After three days of jury selection, a joint jury trial of Fair, Walker, and German commenced on June 6, 2017. At the close of the State's case, defendants moved for judgment of acquittal pursuant to Rule 3:18-1, which the trial court

granted for certain counts but otherwise largely denied.[1] The trial ended on September 27, 2017, with the jury's verdict after six days of deliberations.

The jury convicted Fair of eighty crimes: first-degree conspiracy to engage in racketeering, N.J.S.A. 2C:5-2 and 2C:41-2(c) and (d) (count one); second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2 and 2C:15-1 (counts two, six, and eleven); second-degree robbery, N.J.S.A. 2C:15-1(a)(1) (count three); first-degree armed robbery, N.J.S.A. 2C:15-1 (count twelve); second-degree attempted armed robbery, N.J.S.A. 2C:5-1 and 2C:15-1 (count seven); second-degree conspiracy to commit unlawful possession of a handgun, N.J.S.A. 2C:5-2 and 2C:39-5(b) (count fifty-eight); second-degree conspiracy to commit possession of a firearm for an unlawful purpose, N.J.S.A. 2C:5-2 and 2C:39-4(a) (counts thirty-five and forty-nine); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts eight, fifteen, thirty-six, thirty-nine, forty-four, and fifty); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count seventeen); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (counts nine, sixteen, forty, forty-five, and fifty-nine); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count eighteen); second-

[1] The racketeering conspiracy count was dismissed against German.

degree unlawful possession of a community gun, N.J.S.A. 2C:39-4(a)(2) (count sixty); first-degree promoting organized street crime, N.J.S.A. 2C:33-30(a) (count forty-seven); second-degree promoting organized street crime, N.J.S.A. 2C:33-30(a) (counts twenty-five and forty-one); third-degree conspiracy to commit burglary, N.J.S.A. 2C:5-2 and 2C:18-2 (counts nineteen and twenty-two); second-degree burglary, N.J.S.A. 2C:18-2 (count thirteen); third-degree burglary, N.J.S.A. 2C:18-2 (counts twenty and twenty-three); fourth-degree aggravated assault by pointing a firearm, N.J.S.A. 2C:12-1(b)(4) (count fourteen); third-degree conspiracy to commit theft of movable property, N.J.S.A. 2C:5-2(a)(1) and 2C:20-3(a) (count twenty-seven); fourth-degree theft of movable property, N.J.S.A. 2C:20-3(a) (count twenty-one); third-degree theft of movable property, N.J.S.A. 2C:20-3(a) (counts twenty-four and twenty-eight); conspiracy to commit the disorderly persons offense of theft by deception, N.J.S.A. 2C:5-2 and 2C:20-4 (count twenty-nine[2]); the disorderly persons offense of theft by deception, N.J.S.A. 2C:20-4 (count thirty); second-degree conspiracy to commit shoplifting, N.J.S.A. 2C:5-2, 2C:20-11, and 2C:20-7.1 (count thirty-one); second-degree shoplifting, N.J.S.A. 2C:20-11(b)(1) (count thirty-two); third-degree fencing, N.J.S.A. 2C:20-7.1 (count thirty-three);

[2] This conviction was ultimately dismissed.

third-degree conspiracy to commit aggravated assault, N.J.S.A. 2C:5-2 and 2C:12-1(b)(2) (count thirty-seven); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (count thirty-eight); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count forty-three); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3 (count forty-two); second-degree child endangerment, N.J.S.A. 2C:24-4(a) (counts 46 and 124); third-degree false public alarms, N.J.S.A. 2C:33-3 (count seventy-five); fourth-degree conspiracy to commit stalking, N.J.S.A. 2C:5-2 and 2C:12-10 (count seventy-seven); third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (counts 164 and 209); third-degree distribution of CDS, N.J.S.A. 2C:35-5(b)(3) (counts 102, 109, 116, 119, 127, 134, 139, 144, 166, 180, 187, and 194); third-degree conspiracy to commit distribution of CDS, N.J.S.A. 2C:5-2 and 2C:35-5 (counts 85, 167, 202, and 208); third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(3) and 2C:35-5(b)(5) (counts 165 and 210); second-degree distribution of CDS within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1 (counts 106, 113, 123, 131, 184, 191, and 198); third-degree distribution of CDS within 1,000 feet of school property, N.J.S.A.

2C:35-7 (counts 141 and 146); and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1) (count 213).[3]

Along with Fair, the jury convicted Walker of twenty-five crimes: racketeering conspiracy (count one); conspiracy to commit armed robbery (counts two and six); attempted armed robbery (count seven); conspiracy to commit possession of a firearm for an unlawful purpose (counts thirty-five and forty-nine); conspiracy to commit unlawful possession of a handgun (count fifty-eight); possession of a weapon for an unlawful purpose (counts eight, thirty-six, thirty-nine, and fifty); unlawful possession of a weapon (counts nine, forty, and fifty-nine); unlawful possession of a community gun (count sixty); conspiracy to commit shoplifting (count thirty-one); shoplifting (count thirty-two); fencing (count thirty-three); third-degree conspiracy to commit aggravated assault (count thirty-seven); third-degree aggravated assault (count thirty-eight); third-degree conspiracy to possess CDS (counts 85, 167 and 202);[4] third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (count eighty-eight); and conspiracy to commit distribution of CDS (count 208).

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[3] Trial of the certain persons count was bifurcated from the other counts.

[4] While Fair was convicted of conspiracy to distribute CDS, Walker was convicted of the lesser included offenses of conspiracy to possess CDS.

The jury convicted German of eight crimes, consisting of second-degree official misconduct, N.J.S.A. 2C:30-2(a) (counts seventy-six, seventy-nine, and eighty-one); second-degree computer theft, N.J.S.A. 2C:20-25(e) (count eighty-two); second-degree unlawful access and disclosure of computer data, N.J.S.A. 2C:20-31(b) (count eighty-three); fourth-degree conspiracy to commit stalking, N.J.S.A. 2C:5-2 and 2C:12-10 (count seventy-seven); third-degree hindering apprehension of another, N.J.S.A. 2C:29-3(a) (count eighty); and the disorderly persons offense of harassment, N.J.S.A. 2C:33-4(a) (count seventy-eight).

All three defendants filed motions for a new trial, which motions were denied on December 18, 2017. On December 21, 2017, Fair was sentenced to an aggregate term of eighty-two years, with fifty years and nine months of parole ineligibility. On December 20, 2017, Walker was sentenced to an aggregate term of forty-seven years, with 26.4 years of parole ineligibility. On December 19, 2017, German was sentenced to an aggregate term of ten years, with ten years of parole ineligibility. Memorializing judgments of conviction were entered on December 29, 22, and 21, 2017, respectively, with amended judgments of conviction later entered with respect to Fair and Walker.

Instead of proceeding to trial, after losing his pretrial motions, Leonard entered a negotiated guilty plea to first-degree racketeering conspiracy, N.J.S.A.

2C:5-2 and 2C:41-2(c) and (d) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count fifty-two); and third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(13) (count 206). During the November 2, 2017 plea hearing, Leonard admitted that from September 15, 2013, to February 9, 2014, while residing in Asbury Park, he was a member of a criminal enterprise and in furtherance of the enterprise, he sold CDS, specifically methylone (Molly), and possessed a handgun for unlawful purposes. On February 9, 2018, he was sentenced in accordance with the plea agreement to an aggregate term of seventeen years' imprisonment, subject to 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 remaining fifty-three counts charged in the indictment were dismissed. A memorializing judgment of conviction was entered on February 12, 2018.[5]

The ensuing appeals challenge the investigation, the indictment, the constitutionality of the promoting organized street crime statute, N.J.S.A. 2C:33-30, the joint trial, the guilty plea, and the sentences.

Specifically, Fair raises the following points for our consideration:

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[5] Given the mammoth indictment and varying dispositions, for ease of reference, attached as an appendix to this opinion is a chart specifying the offense alleged in each count, the defendant charged, and the disposition attained.

POINT [I]

THE INITIAL WIRETAP AFFIDAVIT LACKED PROBABLE CAUSE, FAILED TO DEMONSTRATE THAT NORMAL INVESTIGATIVE PROCEDURES HAD BEEN UNSUCCESSFUL, AND TELEPHONE CALLS WERE INTERCEPTED IN VIOLATION OF THE MINIMIZATION RULES.

POINT [II]

THE STATE DENIED DEFENDANT A FAIR TRIAL BY BRINGING A MULTIPLICITOUS INDICTMENT WHICH IMPROPERLY FRACTIONALIZED ONE CONSPIRACY INTO TWENTY-FOUR DIFFERENT CONSPIRACIES, AND WHICH CHARGED MULTIPLE COUNTS OF FIREARMS POSSESSION RELATING TO THE SAME FIREARMS DURING THE SAME TIME PERIOD. (NOT RAISED BELOW).

POINT [III]

N.J.S.A. 2C:33-30, PROMOTING ORGANIZED STREET CRIME, IS UNCONSTITUTIONALLY VAGUE.

POINT [IV]

THE TRIAL COURT'S IMPROPER JURY INSTRUCTION FOR PROMOTING ORGANIZED STREET CRIME DENIED DEFENDANT A FAIR TRIAL. (NOT RAISED BELOW).

POINT [V]

THE STATE'S ACQUISITION AND USE OF HISTORICAL WIRELESS TELEPHONE CELL[-

]SITE INFORMATION WITHOUT A SEARCH WARRANT VIOLATED DEFENDANT'S FOURTH AMENDMENT RIGHTS. (NOT RAISED BELOW).

POINT [VI]

THE TRIAL COURT'S FAILURE TO GRANT A MISTRIAL DUE TO REPEATED JUROR MISCONDUCT DURING JURY DELIBERATIONS DENIED DEFENDANT A FAIR TRIAL.

POINT [VII]

THE TRIAL COURT ERRED BY FAILING TO GIVE THE "FALSE IN ONE, FALSE IN ALL" JURY INSTRUCTION.

POINT [VIII]

THE AGGREGATE SENTENCE OF [EIGHTY-TWO] YEARS WITH 50.75 YEARS PAROLE DISQUALIFIER IS EXCESSIVE, THE MANNER IN WHICH THE TRIAL COURT ARRIVED AT THE AGGREGATE IS ILLEGAL, THE IMPOSITION OF AN EXTENDED TERM WAS IMPROPER, THE MULTIPLE CONSECUTIVE TERMS ARE EXCESSIVE, AND THE SENTENCE VIOLATES THE DOCTRINE OF MERGER.

In his counseled brief, Walker raises the following points for our consideration:

POINT I

THIS MULTIPLICITOUS INDICTMENT WAS GROSSLY PREJUDICIAL AND DENIED

[DEFENDANT] A FAIR TRIAL. (NOT RAISED BELOW).

POINT II

THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE STATE[] OBTAINING CELL PHONE HISTORICAL DATA WITHOUT FIRST OBTAINING A SEARCH WARRANT AND THE COURT'S FAILURE TO A[FF]ORD DEFENDANT AN OPPORTUNITY TO FILE A MOTION TO SUPPRESS THOSE RECORDS. (NOT RAISED BELOW).

POINT III

THE REPETITIVE PLAYING OF RECORDINGS OF INTERCEPTED PHONE CALLS DURING TRIAL AND DURING PROSECUTOR'S SUMMATION OVER THE DEFENSE OBJECTION WAS ERROR.

POINT IV

THE FAILURE OF THE TRIAL COURT TO QUESTION THE JURORS REGARDING THE DISSEMINATION ON THE INTERNET OF A PHOTOGRAPH OF THE DEFENDANT IN HANDCUFFS DEPRIVED HIM OF A FAIR TRIAL.

POINT V

THE ADMISSION OF CERTAIN TELEPHONE CALLS INVOLVING INDIVIDUALS WHO DID NOT TESTIFY AT TRIAL WAS HEARSAY WHICH VIOLATED THE DEFENDANT'S RIGHT OF CONFRONTATION OF THE WITNESSES AGAINST HIM.

POINT VI

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON FALSE IN ONE, FALSE IN ALL AS REQUESTED BY THE DEFENSE.

POINT VII

THE FAILURE OF THE COURT TO EXCUSE JUROR [NUMBER TWO] AND TO GRANT MOTIONS FOR MISTRIAL FOR JURY IRREGULARITIES DENIED DEFENDANT HIS RIGHT TO AN UNBIASED JURY AND A FAIR TRIAL.

POINT VIII

DENIAL OF THE DEFENDANT'S MOTION FOR NEW TRIAL WAS ERROR.

POINT IX

THE AGGREGATE SENTENCE IMPOSED BY THE SENTENCING COURT OF FORTY-THREE . . . YEARS WITH 26.4 YEARS PAROLE INELIGIBILITY WAS EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED.

POINT X

THE AGGREGATE ERRORS DENIED DEFENDANT A FAIR TRIAL. (NOT RAISED BELOW).

In his pro se supplemental brief, Walker makes the following arguments:

POINT I

THERE WAS INSUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY BEYOND A REAS[]ONABLE DOUBT AS TO CONSPIRACY TO [COMMIT] ROBBERY AND ARMED ROBBERY.

POINT II

THERE WAS INSUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF THE CRIME OF ATTEMPTED ROBBERY.

German raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SEVERANCE BECAUSE DEFENDANT WAS DENIED A FAIR TRIAL BY BEING TRIED WITH CO-DEFENDANTS WHO WERE CHARGED WITH HEINOUS OFFENSES THAT DID NOT INVOLVE DEFENDANT.

POINT II

THE STATE FAILED TO MEET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT IN THAT THE GUILTY VERDICT FOR HINDERING APPREHENSION OF ANOTHER WAS AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE REVERSED.

POINT III

THE STATE FAILED TO MEET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT IN

THAT THE GUILTY VERDICTS FOR COMPUTER THEFT, UNLAWFUL ACCESS/DISCLOSURE, AND OFFICIAL MISCONDUCT, WERE AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE REVERSED.

POINT IV

DEFENDANT'S SENTENCE IS EXCESSIVE AND NOT SUPPORTED BY THE PROPER ASSESSMENT OF AGGRAVATING AND MITIGATING FACTORS.

Leonard raises the following points for our consideration:

POINT [I]

WHERE THE TRIAL COURT FAILED TO CONSIDER THE ADVANCED KNOWLEDGE OF THE DETECTIVES THAT THE AUTOMOBILE WAS GOING TO BE STOPPED REGARDLESS OF THE MOTOR VEHICLE INFRACTION, ITS DECISION AS TO THE REASONABLENESS OF THE DURATION AND DEGREE OF THE DETENTION WAS UNSOUND.

POINT [II]

THE SEARCH WARRANT SHOULD BE INVALIDATED BECAUSE THE NEUTRAL MAGISTRATE WAS UNABLE TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES BEFORE ISSUING IT WHERE THE APPLICANT DID NOT RECITE IN HIS AFFIDAVIT THAT REGARDLESS OF THE MOTOR VEHICLE STOP HE WAS GOING TO DETAIN THE BLACK COUPE SINCE HE BELIEVED IT CONTAINED FIREARMS. (NOT RAISED BELOW).

POINT [III]

THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE OF DEFENDANT'S GANG MEMBERSHIP SHOULD BE REVERSED WHERE ITS PROBATIVE VALUE DID NOT OUTWEIGH ITS PREJUDICIAL EFFECT.

POINT [IV]

THE TRIAL COURT'S DECISION TO ADMIT AGAINST DEFENDANT AS INTRINSIC EVIDENCE PROOF OF [CO-DEFENDANT HARRY] CLAYTON'S MANUFACTURING OF CRACK COCAINE WAS AN ABUSE OF DISCRETION WHERE NO WIRETAP SURVEILLANCE INTERCEPTED ANY COMMUNICATION BETWEEN DEFENDANT AND THE DRUG MANUFACTURER.

POINT [V]

THE TRIAL COURT'S DECISION TO JOIN THE TRIALS OF DEFENDANT AND CLAYTON WAS AN ABUSE OF DISCRETION WHERE IT DID NOT WEIGH THE INTERESTS OF JUDICIAL ECONOMY AGAINST DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT [VI]

DEFENDANT'S GUILTY PLEA SHOULD BE VACATED BECAUSE, WITH RESPECT TO N.J.S.A. 2C:41-2(c), HE DID NOT ADMIT THAT HE PARTICIPATED IN THE AFFAIRS OF THE ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY.

We have reviewed the points raised in light of the voluminous record and the applicable legal principles. We affirm the convictions of Fair, Walker, and Leonard. As to German, we remand to mold the verdict on count eighty-three to a third-degree conviction of the lesser included offense of unlawful access and disclosure of computer data, contrary to N.J.S.A. 2C:20-31(a), and affirm the convictions in all other respects. Regarding the sentences, we vacate the sentences of Fair, Walker, and German and remand for "sentencing anew." State v. Robinson, 217 N.J. 594, 610-11 (2014). We affirm Leonard's sentence.

I.

At the joint trial of Fair, Walker, and German, fifty-six witnesses testified for the State, including thirty-three law enforcement officers. The remaining witnesses included victims, cooperating co-conspirators, drug users, and others. The jury viewed numerous exhibits and heard hundreds of intercepted communications from the wiretap investigation. We summarize the evidence most relevant to the issues raised on appeal.

Detective Keith Finkelstein, a member of the MCPO Gang and Criminal Enterprise Unit, described the investigation spanning 2013 to 2014 and his role as "the lead detective." Finkelstein explained that in Asbury Park, the primary gangs were the Bloods and the Crips, with each organization having various

subsets. According to Finkelstein, unlike other parts of the country, in Asbury Park, it was common for members of different gangs to work cooperatively due to friendships and familial relationships.

That cooperation took several forms. For example, when communicating with one another, gang members used code words to refer to certain items, locations, and activities to disguise their criminal behavior. Gang members also coordinated their activities to protect themselves from arrest, including: sharing their knowledge of law enforcement's presence and surveillance; changing phones they believed might be tapped; and attempting to distract officers from criminal activity in one location by reporting fake "shots fired" in a different location, shooting a gun into the air in a different location, or interacting with an officer to distract him or her from observing ongoing criminal activity.

In 2013 and 2014, Fair, also known as Dough Boy, resided in Asbury Park with his girlfriend, Ciara Williams, and their two-year-old daughter. Fair was a high-ranking member of the Bloods gang, specifically the Neighborhood Bloods. As a gang leader, Fair planned and directed a variety of crimes that were ultimately carried out by other gang members. Walker, also known as Nutty, was a member of the Crips gang in Asbury Park, specifically the 47 Neighborhood Crips. Notwithstanding their different gang affiliations, Fair and

Walker were close friends and participated in numerous crimes together, with Fair occasionally directing Walker's activities.

The proofs adduced at trial showed that in late 2013 to early 2014, several gang-related disputes led to shootings, attempted shootings, and physical assaults. Police intercepted numerous calls and text messages between Fair, Walker, and their associates in which they discussed these disputes and their possession and exchange of guns for use in these criminal activities. The guns were stored in specific locations, including Leonard's home, and often shared amongst gang members with permission from ranking gang members or the owner of the gun. Fair, Walker, and Leonard accessed these shared guns and directed their movement among other gang members notwithstanding the fact that neither Fair nor Walker had been issued a permit to purchase or carry a handgun or assault weapon. During the investigation, police seized several of the guns from various locations affiliated with multiple gang members.

From September 2013 to February 2014, Fair and Walker were also involved in several robberies and attempted robberies, as well as an organized retail theft operation, during which Fair received orders for specific items, relayed the orders to others and arranged for the disposition of the stolen items. Wiretapped phone calls, surveillance video, witness testimony, cell phone

records, cell tower data, and information drawn from the Instagram accounts of Fair and Walker proved the commission of these offenses.

Additionally, the evidence established the commission of several burglaries from September to December 2013, in which Fair was involved. In one instance, based on a video of the burglary recorded by a neighbor, police determined that the vehicle used in the burglary belonged to Williams, Fair's girlfriend. At trial, Williams admitted participating in the burglary with Fair and acknowledged that their daughter was in the vehicle while they committed the crime. A text message and an intercepted phone call between Williams and Fair also confirmed their involvement in the burglary, as did a statement Fair made to MCPO Lieutenant Scott Samis, while Samis wore a wire.

Williams also testified that on another occasion, she assisted Fair in orchestrating a burglary at a neighbors' apartment by telephoning the victims to ensure they were not at home. Although a different person performed the burglary, Fair directed the person's movements inside the apartment because Fair knew where the neighbors stored their cocaine, which was the object of the theft.

Regarding drug trafficking activities, although Fair's counsel admitted in his opening statement that Fair was "a low[-]level drug dealer," the trial

evidence revealed that during the course of the investigation, Fair was overheard and observed selling drugs on almost a daily basis. Fair would receive an order from a buyer, acquire the requested drug from a supplier, then meet with the buyer to complete the sale. Depending on the drug sought, Fair would contact designated suppliers. For example, Clayton specialized in supplying both powdered cocaine and crack cocaine, which he manufactured, and Leonard distributed Molly, a form of MDMA/ecstasy. Between November 8 and December 13, 2013, nine controlled undercover drug purchases were made from Fair. During one of the purchases, Fair's daughter was present. During Finkelstein's testimony, he specified which of Fair's drug transactions occurred within 500 feet of public housing and which ones occurred within 1,000 feet of school property.

As to Walker's illicit drug activities, a Crips gang member testified that both Fair and Walker sold cocaine and heroin. Further, on October 27, 2013, during a search of Walker's home, police found several bags of marijuana and crack cocaine. No drug paraphernalia was found that would have suggested Walker's possession of crack cocaine was for personal use. Also, Finkelstein testified that Walker's home was in a public housing complex and within 1,000 feet of school property.

As a result of the investigation, Fair was arrested on February 11, 2014, and Walker was arrested the following day.

The State's case against German encompassed two different components: (1) providing Fair and other gang members with unlawful access to law enforcement information; and (2) stalking and harassing a woman while on- and off-duty. As to the former, on January 24, 2014, while acting in his official capacity, German transported a prisoner, Deron Anglin, to the Asbury Park Police Department for processing, following Anglin's arrest for possession of a firearm discovered after a motor vehicle stop. Leonard was also an occupant in the stopped vehicle. Although German was not involved in the traffic stop, after transporting Anglin, German sent a message to Leonard, via Leonard's girlfriend, telling him, "one of his boys got locked up for a gun." A few days later, German informed Fair in a phone call that "the County" was "doin[g] wiretaps now."

The following month, on February 8, 2014, Fair called German and asked him to check whether he had any outstanding warrants because the police had towed his car, and he wanted to know if it was safe to pick it up. The next day, German called the sheriff's office dispatcher and asked her to run a "warrants" check on Fair. Knowing that his access to the database was limited to work

purposes only, German told the dispatcher he was preparing a domestic violence report, which was untrue. The dispatcher informed German that Fair had no outstanding warrants, which German relayed to Fair.

Regarding German's stalking charge, from 2013 through early 2014, German conspired with Fair and others to stalk and harass a woman from Asbury Park. To that end, German enlisted the aid of Fair and others to post flyers, write social media posts, and communicate with the victim's boyfriend to spread a rumor that the victim was HIV positive. Further, while "in uniform [and] in a cop car," German approached the victim's sister repeatedly and indicated to her that he needed to see the victim. On one occasion, German told her that "[he] and two other officers had a bet on [her] sister" to see "who could have sex with her first," and since "he lost the bet . . . he had to pay [her] sister the money." German also approached the victim's father and told him he had "to see [the victim]" because he "owed her some money." Additionally, using his own phone, as well as a "burner phone,"[6] German communicated directly with the victim and made harassing statements to her.

[6] The burner phone was not registered to German. However, review of the phone records strongly suggested that German was the person using the burner phone to communicate with the victim.

The victim testified that she was living in Asbury Park at the time, and she knew German from seeing him around town but had no relationship with him. She also confirmed German's harassing conduct. Eventually, the victim and her sister reported German's behavior to the Asbury Park Police Department and gave statements to the MCPO. Subsequently, the victim learned German had also filed a complaint against her for harassment.

MCPO Detective Ryu Washburne investigated the victim's complaint against German, along with the Asbury Park Police Department's Internal Affairs Unit. As part of the investigation, Washburne listened to multiple wiretapped phone calls in which German asked Fair to distribute the disparaging flyers about the victim and post information about her on Instagram. During the conversations, German and Fair discussed the effect the posts were having on the victim. Some of the phone conversations occurred while German was on duty as an Asbury Park Police Officer. Washburne also recovered text messages between German, Fair, and others pertaining to the victim; photos of the victim stored on German's cell phone, including those used on the flyers; and a record of German's calls and text messages with the victim.

In addition, during the investigation, Washburne discovered German's January 24, 2014 communication about the arrest of Leonard's confederate, as

well as the February 2014 communications about performing the warrant check for Fair.

Washburne arrested German on February 12, 2014. During questioning, German ultimately admitted telling the stalking victim's boyfriend about the HIV rumor and exchanging text messages with the victim. German also acknowledged his phone calls with Fair and admitted disclosing the arrest of Leonard's confederate. Further, German acknowledged that the warrant check he did at Fair's request was wrong and admitted understanding that he could not use a warrant check for anything other than law enforcement purposes.

II.

In Point I of his brief, Fair argues the judge erred in denying his motion to suppress the wiretap evidence. Specifically, he argues: (1) the wiretap order was not supported by "fresh probable cause for the princip[al] crime for which it was sought," namely, the 2009 murder of Jonelle Melton;[7] (2) the wiretap affidavit "failed to demonstrate that normal investigative procedures had been

[7] Fair was charged in connection with the Jonelle Melton murder in a separate indictment that is not the subject of this appeal. See John T. Ward, Red Bank: Trio Guilty of Teacher's Murder, Red Bank Green, https://www.redbankgreen.com/2019/03/red-bank-jonelle-melton-murder-trio-guilty-verdict/ (last visited March 14, 2022).

unsuccessful;" and (3) communications were intercepted in "violation[] of the minimization rules."

"The Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guard against unreasonable searches and seizures." State v. Ates, 217 N.J. 253, 265 (2014); see also U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. These "provisions extend to the interception of [communications] by law enforcement officials," requiring the government to obtain a search warrant prior to engaging in such a search. Ibid.

The New Jersey Wiretapping and Electronic Surveillance Control Act (Wiretap Act), N.J.S.A. 2A:156A-1 to -37, governs the standards state law enforcement officials must follow when seeking a search warrant to intercept wire, electronic, and oral communications. "The Wiretap Act 'regulates the electronic interception of communications in New Jersey . . . to protect citizens' privacy from unauthorized intrusions.'" State v. Martinez, 461 N.J. Super. 249, 266 (App. Div. 2019) (quoting State v. Toth, 354 N.J. Super. 13, 21 (App. Div. 2002)). To that end, "[i]t provides a series of procedures to be followed with regard to wiretaps." Toth, 354 N.J. Super. at 21.

Critically, the Act permits the Attorney General or county prosecutor to "authorize . . . an ex parte application to a [designated] judge" for "an order

authorizing the interception of a wire, or electronic or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation when such interception may provide evidence" of the commission of certain enumerated offenses. N.J.S.A. 2A:156A-8. These offenses include: murder, robbery, aggravated assault, burglary, theft, distribution of CDS, unlawful use of firearms, racketeering, or any conspiracy to commit these offenses. Ibid.

N.J.S.A. 2A:156A-9 specifies the required contents of such an application, including the identity of the individual authorizing the application, the qualifications of the applicant, and "[a] particular statement of the facts relied upon by the applicant." Under N.J.S.A. 2A:156A-10, after reviewing the application,

> judges can authorize a wiretap if, among other things, they find probable cause to believe that:
>
> > "a. The person whose communication is to be intercepted is engaging or was engaged over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an [enumerated] offense . . . ;
> >
> > b. Particular communications concerning such offense may be obtained through such interception;

> c. Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ; [and]
>
> d. Except in the case of an application meeting the requirements of [N.J.S.A. 2A:156A-9, the roving wiretap provision], the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted, are or have been used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, such individual."
>
> [State v. Feliciano, 224 N.J. 351, 368 (2016) (alterations in original) (quoting N.J.S.A. 2A:156A-10(a) to (d)).]

The Wiretap Act "also contains strict minimization requirements." Ibid.

Specifically, N.J.S.A. 2A:156A-12 provides:

> No order entered under this section shall authorize the interception of any wire, electronic or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by said order.

Under N.J.S.A. 2A:156A-21,

> [a]ny aggrieved person in any trial . . . may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:
>
> a. The communication was unlawfully intercepted;
>
> b. The order of authorization is insufficient on its face;
>
> c. The interception was not made in conformity with the order of authorization or in accordance with the requirements of [N.J.S.A. 2A:156A-12.]

An "'[a]ggrieved person' means a person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed." N.J.S.A. 2A:156A-2(k). The Wiretap Act "should generally be strictly construed," In re In-Progress Trace of Wire Commc'n, 76 N.J. 255, 260 (1978), and an aggrieved person is not required to make "a showing of bad faith" on the part of law enforcement officials to warrant suppression of evidence obtained in violation of the Act. State v. Worthy, 141 N.J. 368, 384 (1995).

"An appellate court reviewing a motion to suppress evidence in a criminal case must uphold the factual findings underlying the trial court's decision, provided that those findings are 'supported by sufficient credible evidence in the

record.'" State v. Boone, 232 N.J. 417, 425-26 (2017) (quoting State v. Scriven, 226 N.J. 20, 40 (2016)). "The suppression motion judge's findings should be overturned 'only if they are so clearly mistaken "that the interests of justice demand intervention and correction."'" Id. at 426 (quoting State v. Elders, 192 N.J. 224, 244 (2007)). "However, we owe no deference to conclusions of law made by [trial] courts in suppression decisions, which we instead review de novo." Ibid. (citing State v. Watts, 223 N.J. 503, 516 (2015)); accord State v. K.W., 214 N.J. 499, 507 (2013).

Between December 20 and 23, 2016, the trial judge conducted hearings on motions filed by multiple defendants, including Fair, to suppress communications intercepted pursuant to the wiretap orders. By way of background, the judge specified that during the investigation, MCPO intercepted 27,635 communications consisting of phone calls and text messages,[8] of which 11,377 were identified by the State as non-pertinent to the investigation. Defendants challenged both pertinent and non-pertinent calls and texts.

During the hearings, the judge considered Finkelstein's testimony and reviewed the initial December 6, 2013 affidavit and subsequent applications

[8] Approximately 17,700 communications were phone calls.

Finkelstein submitted to the wiretap judge. He also listened to challenged and unchallenged interceptions.

Finkelstein testified he had worked in law enforcement for more than ten years and was assigned to the MCPO's Gang and Criminal Enterprise Unit, responsible for targeting known members of criminal street gangs with a propensity for violence. Before serving as the lead detective in Operation Dead End, Finkelstein had been involved in other wiretap investigations and had received training in wiretaps.

During his testimony, Finkelstein detailed the extensive investigation of Fair and his known associates, which began after the 2009 home invasion murder of Jonelle Melton, a teacher. According to Finkelstein, although solving Melton's murder was one object of the investigation, Fair and his associates were suspected of "committing numerous crimes," "as an organization." Finkelstein testified the investigation involved gathering intelligence from confidential and anonymous sources as well as police databases, interviewing witnesses and named subjects, conducting physical surveillance, reviewing social media postings, engaging in controlled undercover drug purchases, and analyzing records obtained from communications data warrants (CDWs).

Based on the investigation, in December 2013, Finkelstein submitted an initial affidavit in support of an application for a wiretap order. In the affidavit, Finkelstein recounted the investigation into the 2009 Melton murder, which continued through November 2013, and revealed Fair's involvement in other criminal activities. Specifically, the affidavit detailed nine controlled undercover drug purchases from Fair from July 15 to November 30, 2013; Fair's suspected involvement in a September 15, 2013 burglary and a September 25, 2013 armed robbery; and Fair's use of a telephone facility from July 27 to December 2, 2013, to communicate with individuals believed to have engaged in illegal narcotics and other criminal activities.

In the affidavit, Finkelstein averred there was probable cause to believe Fair, Walker, and others were using prepaid wireless telephones to facilitate the commission of the crimes of racketeering, gang criminality, murder, weapons offenses, drug offenses, robbery, burglary, and conspiracy. Finkelstein also affirmed that normal investigative techniques were insufficient to reveal the full scope of the criminal conspiracy due to the level of violence and intimidation of witnesses who would not likely cooperate with an investigative grand jury, the unlikelihood that an undercover detective could safely infiltrate the tight-knit group of associates, the targets' frequent changes in the location of transactions

and their use of locations that were difficult to covertly surveil, and the ineffectiveness of search warrants and telephone records analysis to provide information about the full scope of the criminal enterprise.

The issuing judge granted the wiretap application, as well as renewal applications, which were filed every thirty days. The applications encompassed different phone numbers associated with Fair and his associates. Pursuant to the orders, between December 2013 and February 2014, the MCPO tapped the phones of Fair, Leonard, and Clayton. The wiretaps were active for eighteen hours per day, seven days per week, and were monitored by detectives who were assigned to the investigation and had been trained on wiretaps, including minimization and spot monitoring.[9] The monitors were provided with written "minimization instructions," directed to avoid calls involving "attorney[s]," "clergy," or "spouse[s,]" and supervised by a senior detective.

The minimization instructions directed monitors to "listen to the beginning of each conversation only so long as . . . necessary to determine the

[9] Spot monitoring is "a technique whereby the monitoring agent stops listening to a conversation if, after a short while, it appears to be irrelevant. However, rather than terminating the interception indefinitely, the agent continues to tune in periodically to see if the conversation has turned to criminal matters." State v. Catania, 85 N.J. 418, 446 (1981). "If it has, then he resumes full interception." Ibid.

nature of the conversation," and "consider the information contained in the affidavits, the parties to the conversation, the present status of the investigation, the past conduct of the parties, the nature of the conversation, and any other [relevant] factors" in "determining whether a conversation [was] pertinent." For minimization purposes, monitors were trained to listen to a phone call for "[t]wo to three minutes" beginning "[w]hen the phone start[ed] ringing."

Finkelstein testified that although "reasonable efforts" were made to minimize irrelevant calls, there were "several calls out of the 17,000 [intercepted] phone calls that exceeded . . . three minutes and that were not spot monitored based on various circumstances." According to Finkelstein, the degree of minimization and spot monitoring depended on the content of the call as well as the people involved in the call and the regularity with which they discussed criminal activity. In particular, Finkelstein testified that because Fair and Williams were both "co-parents" and "co-conspirators," their conversations oftentimes pertained to pertinent and irrelevant subjects. For example, in some conversations, they would "argue" about their relationship and their daughter, and then Williams would switch to "threatening to go to the police about [Fair's] crimes."

Additionally, some of Williams's phone calls were made from jail after her arrest and not minimized because she had no right to "privacy" with respect to those calls. See State v. Jackson, 460 N.J. Super. 258, 277 (App. Div. 2019) (explaining that "no reasonable expectation of privacy exist[s]" in "a prison setting" because "there is a reasonable expectation that law enforcement will hear the calls").

According to Finkelstein, when the investigation began, fifteen suspects had been identified. As a result of the wiretap, over fifty individuals were ultimately identified.

On January 17, 2017, the judge entered an order denying Fair's motion to suppress. In an accompanying written opinion, the judge found Finkelstein's testimony credible, describing the testimony as "clear, candid, . . . convincing," and "uncontroverted." The judge also determined that "the December 6, 2013 affidavit sufficiently set forth facts more than adequate to support a finding of probable cause." To support his finding, the judge detailed the scope of the investigation of Fair, which demonstrated Fair's involvement in racketeering activities, drug and weapons offenses, burglaries, and home invasion robberies, one of which resulted in Melton's murder.

The judge stated:

> [L]aw enforcement officers from the [MCPO] began investigating . . . Fair in the fall of 2009. The investigation began after . . . Melton was murdered in her Neptune City apartment on September 14, 2009. During this investigation, authorities received information about the murder of . . . Melton from several sources who chose to remain anonymous out of fear of retaliation. These sources revealed that an individual with the alias "Dough Boy" may have been involved in the home invasion that led to . . . Melton's murder. After conferring with [Asbury Park Police Department] officers . . . , [detectives] . . . learned that "Dough Boy" was an alias of . . . Fair. The officers also learned that . . . Fair was involved in dealing drugs and had a reputation for committing robberies of other drug dealers.[10]
>
> Detectives confirmed the information received from the anonymous sources that . . . Fair was involved in drug distribution. Specifically, officers conducted nine controlled purchases of heroin and crack-cocaine from . . . Fair over the course of four and a half months. These controlled purchases were carried out by confidential informants [CIs] as well as undercover detectives.

According to the judge, detectives also learned from a reliable source that "Fair 'almost always ha[d] one of two guns on him.'" Additionally, they learned

[10] According to the affidavit, anonymous sources informed police "the Melton homicide was the result of a home invasion of the wrong apartment." Sources said "assailants . . . entered Melton's apartment . . . with the intent to rob a drug dealer" who "reside[d] in the apartment adjacent to the victim."

the identity of "some of . . . Fair's close associates, including . . . Leonard and . . . Walker." Further,

> [t]he investigation also revealed that . . . Fair and his associates were involved in both planning and committing a burglary and robbery. The investigation revealed that . . . Fair's telephone facility . . . was used to help facilitate these crimes. A review of the historical call record of . . . Fair's cell phone revealed a heavy volume of communications between . . . Fair and other co-[d]efendants over a very limited time. The substantial amount of information learned during the investigation led to suspicions that . . . Fair and his associates were involved in continuing racketeering activity. Detective Finkelstein further swore that based on his training and experience, he had probable cause to believe intercepting communications would reveal the hierarchy of the organization, those yet unknown individuals involved with the organization, and the full scope of the unlawful activity being conducted by the organization.
>
> Finally, . . . [i]nformation from both [reliable] tipsters and [CIs], as well as the investigation . . . revealed that . . . Fair's activities went beyond minor drug offenses. The investigation also revealed that . . . Fair and other named [d]efendants had gang associations and were continually engaging in various criminal activities.

The judge found the information relied upon to establish probable cause was "not stale." Although "the investigation . . . began in the fall of 2009," the judge stated, "the December 6, 2013 affidavit set forth sufficient information to suggest . . . [d]efendants were engaged in ongoing criminal activity." Thus,

"[t]he affidavit was not based solely on the 2009 murder, but rather on information uncovered during an extensive investigation into a burgeoning criminal enterprise with a number of individuals potentially involved in racketeering activities."

Next, the judge determined that the affidavit sufficiently demonstrated that normal investigative techniques were ineffective and established the need for wiretaps. In that regard, the judge noted "the numerous investigative techniques used by [the MCPO] detectives" and the limited ability of those techniques to penetrate or reveal the entire criminal enterprise. Specifically, according to the judge, although "the use of [CIs] had aided in revealing some members of the criminal enterprise," and had been "utilized . . . to make controlled [drug] purchases from . . . Fair," the CIs "acted under confidentiality due to a fear of retaliation" and "[o]ne of the informants who did not act under anonymity was shot, allegedly because th[e] individual provided information to law enforcement." Similarly, "the use of undercover detectives produced only limited results" because "the criminal enterprise was very tight knit and unwelcoming to outsiders." Additionally, "[t]he unpredictability of where and when a [d]efendant would set up a drug transaction with an undercover detective made setting up security for a controlled buy more difficult."

Regarding the futility of physical surveillance and search warrants, the judge stated "the [tight] layout of the housing complex where the criminal enterprise was allegedly operating" made "it easy for . . . Fair and his associates" to "detect new vehicles or people in the complex." The judge stated further that by the "third affidavit, dated January 30, 2014," Finkelstein "noted how members of the enterprise had begun to engage 'in counter-surveillance measures and [were] hyper-vigilant as to physical and electronic surveillance.'"

Finally, the judge found that the wiretap monitors had adequately minimized non-pertinent phone calls. As to extrinsic minimization, the judge explained:

> Before applying for the warrant . . . , investigators reviewed the telephone activity of . . . Fair's telephone facility . . . . Investigators discovered that from July 30, 2013 to December 2, 2013, more than 26,190 calls and 2,460 [text] messages were made to or from the device. From that analysis, investigators determined that . . . Fair's phone was most often being used from 9:00 a.m. to 3:00 a.m. each day. Additionally, officers continually sought the use of [Dialed Number Retrievers (DNRs)] twenty-four hours a day to detect patterns in usage of the wiretapped telephone facilities.

The judge explained "the DNRs were to be utilized to help detect patterns of heightened phone activity to aid in the officers' extrinsic minimization efforts."

Because "[t]he initial [o]rder and all subsequent [o]rders limited interception to eighteen hours a day, [from 9:00 a.m. to 3:00 a.m.,] seven days a week, for thirty days," and "[n]othing in the record . . . suggest[ed] that monitoring officers intercepted communications outside the time permitted under [the orders,]" the judge determined "the officers' efforts in regards to extrinsic minimization were objectively reasonable."

In assessing the monitors' intrinsic minimization efforts, the judge acknowledged defendants' "use[of] a range of ambiguous and coded language" as well as the "extensive use of call waiting," rendering minimization "difficult." However, the judge emphasized it was "[o]f great importance" that "Fair was being investigated as the leader of a criminal enterprise," who "was in constant communication with many of the other co-defendants" regarding "[m]uch of the planning for the criminal enterprise." Thus, "[d]ue to the volume of the communications and the leadership role of . . . Fair in the criminal enterprise, monitors were justified in listening to . . . Fair's phone calls with additional scrutiny."

The judge noted further that "[i]t was reasonable for [monitors] to initially intercept all communications to establish patterns of relevant and non-relevant calls" and "monitor seemingly innocent calls because even th[o]se might reveal

'valuable information.'" Also, because monitors "were aware that the [d]efendants were engaged in a large-scale narcotics distribution operation, as well as engaging in thefts, burglaries, robberies, and the illicit transfer and possession of firearms," monitors "were continually seeking to uncover the identities of additional co-conspirators." Thus, the judge concluded the monitors "acted objectively reasonabl[y]" in their minimization efforts during the monitoring of Fair's communications.

Addressing the monitors' "subjective good-faith efforts to minimize intrinsically," the judge recounted Finkelstein's testimony "regarding the efforts employed throughout the investigation to ensure monitors exercised good faith." Those efforts included "specific training on minimization and spot monitoring"; "training on how to pinpoint relevant calls"; written "instructions on proper minimization protocols" provided "each time a new telephone facility was wiretapped"; and supervision by officers with knowledge of the investigation who were "always available . . . to assist monitors in determining the relevance of a particular call or telephone facility" and who "told monitors . . . to implement minimization efforts where the officer was unsure if an intercepted communication contained relevant information." Additionally, "monitors were told to listen to phone calls for two to three minutes to determine whether the

call should be minimized," and monitors "log[ged] relevant information" to "keep[] track of names and numbers of those potentially involved in the criminal enterprise" to "help . . . quickly identify which telephone facilities might be relevant to the investigation."

In rejecting Fair's specific challenge to fifty-five phone calls that he asserted "were either not minimized at all or provide[d] evidence of unreasonable efforts to minimize," the judge pointed out that "[t]hirty-four" were "less than three minutes," and "[f]orty-two . . . were intercepted during the first month of the investigation" when monitors were typically allowed "more leeway" while attempting "to uncover all involved conspirators." Of the "[twenty-one] challenged calls lasting longer than three minutes," four "were minimized," admittedly "a minimization rate of [nineteen percent]." The judge acknowledged that many of the challenged calls were between Fair and Williams. However, the judge was persuaded by the record and Finkelstein's credible testimony that "the[] calls provided relevant information regarding crimes committed by . . . Fair and . . . Williams" and also "kept monitors informed" of locations and transportation methods used by Fair. The judge concluded "[u]nder the circumstances and given the extensive nature of the

investigation in th[e] case, . . . the monitoring officers made subjective good faith efforts to minimize . . . Fair's intercepted communications."

On appeal, Fair first contests the judge's finding of probable cause, asserting "that[] as the State . . . failed to establish the existence of a course of criminal conduct which continued from [the] 2009 [Melton murder] to the issuance of the wiretap order, the wiretap was based upon stale probable cause."

"Probable cause has been defined as 'a well grounded suspicion that a crime has been or is being committed,' and as 'a reasonable ground for belief of guilt.'" State v. Gibson, 218 N.J. 277, 292 (2014) (citations omitted) (first quoting State v. Sullivan, 169 N.J. 204, 211 (2001), then quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). "It 'is more than a mere suspicion of guilt, [but] less than the evidence necessary to convict a defendant of a crime in a court of law.'" Ibid. (alteration in original) (quoting State v. Basil, 202 N.J. 570, 585 (2010)).

Undoubtedly, "probable cause to justify the issuance of a search warrant must exist[] at the time the warrant is issued." State v. Blaurock, 143 N.J. Super. 476, 479 (App. Div. 1976). However, "[t]he question of the staleness of probable cause depends more on the nature of the unlawful activity alleged in

the affidavit than the dates and times specified therein." Ibid. (quoting United States v. Harris, 482 F. 2d 1115, 1119 (3d Cir. 1973)). Indeed,

> the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit. Together with the element of time we must consider the nature of the unlawful activity. Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.
>
> [Ibid. (quoting United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972)).]

In assessing the showing of probable cause upon a motion to suppress, "[t]he critical and only question is whether a sufficient showing of probable cause to search was presented to the warrant-issuing judge," State v. Chippero, 201 N.J. 14, 31-32 (2009), and "substantial deference must be paid by a reviewing court to th[at] determination," State v. Evers, 175 N.J. 355, 381 (2003).

Here, we are satisfied that a sufficient showing of probable cause was presented to the wiretap judge. Contrary to Fair's argument, Finkelstein's affidavit established a course of criminal conduct which continued from the

2009 Melton murder to the application for the wiretap order on December 6, 2013. The affidavit set forth probable cause that Fair had engaged in racketeering, gang criminality, murder, weapons offenses, drug offenses, robbery, burglary, and conspiracy, and was engaging in these crimes on an ongoing basis. Therefore, the probable cause was not stale.

Fair also argues "[t]he facts recited in the wiretap affidavit debunked the notion that normal investigative procedures had been unsuccessful" as required under N.J.S.A. 2A:156A-10(c). However, in our view, the affidavit fully complied with the requirements of N.J.S.A. 2A:156A-10(c), also known as the necessity requirement, as it amply established the limited success of alternate investigative techniques, and provided a reasonable basis for the judge to find that the enterprise could not otherwise be infiltrated. See United States v. Vento, 533 F.2d 838, 849-50 (3d Cir. 1976) (noting courts "have not insisted that the government exhaust all possible traditional investigative techniques prior to the [wiretap] applications," but only require "the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation");[11] see also

[11] "Because the [New Jersey] Wiretap Act is closely modeled after [the federal statute, 18 U.S.C. §§ 2510-2520], we give careful consideration to federal decisions interpreting the federal statute." Ates, 217 N.J. at 269.

United States v. Cartagena, 593 F.3d 104, 109 (1st Cir. 2010) ("To establish necessity, the government is not required to show that other investigative methods have been wholly unsuccessful . . . .").

Next, Fair maintains "the State . . . neglected to properly perform intrinsic minimization on a number of intercepted phone calls" by not terminating interception of those calls when it became apparent they were not relevant to the investigation. Specifically, defendant points to twenty-two of the original fifty-five challenged calls between himself and Williams, asserting the "conversations involved strictly personal issues, unrelated to the crimes under investigation."

In State v. Catania, our Supreme Court held, "the police must make reasonable efforts to minimize both 'extrinsically,' by attempting to limit their hours of interception, and 'intrinsically,' by attempting to terminate the interception of non-relevant phone calls on an individual basis within the authorized hours of interception." 85 N.J. at 423. Further, "not only must the actual minimization have been reasonable, but the monitoring agents must also have made a good-faith effort to comply with the minimization requirement during the course of the wiretap." Ibid. Courts should determine "the

sufficiency of minimization efforts" employed by law enforcement "on a case-by-case basis." Id. at 433.

In Catania, the Court offered guidance for determining the objective reasonableness of police minimization efforts. Id. at 432-33. The Court explained, that "the police are not expected to terminate the interception of all non-relevant phone calls" because "[t]his would demand a prescience on their part that is humanly impossible." Id. at 433. Similarly, "courts should avoid 'blind reliance' on numbers and percentages alone" because "[t]here may be many situations where high percentages of non-relevant calls are intercepted yet the minimization efforts are nevertheless reasonable." Ibid.

Instead, the objective reasonableness of law enforcement's "intrinsic minimization will be judged by . . . three factors." Id. at 434.

> The first factor is the nature of the individual phone calls, which may make them difficult to minimize. Some calls may be short and the conversation might end before the monitor has had a chance to determine their relevance. Others may be one time only calls, in which case the monitors may have no chance to determine whether a particular caller is linked to the conspiracy. Often calls may be ambiguous and guarded, or employ cryptic language, and their full relevance cannot be ascertained until later in the investigation.
>
> Second, the purpose of the wiretap is often a key consideration. When the police are investigating a

> conspiracy, more extensive surveillance is justified to determine the full scope of the enterprise. Also, where the telephone is being used to transact illegal business, . . . closer surveillance may be called for.
>
> Finally, the reasonable expectation of the agents as to what they would overhear based on the information available to them at the time of the wiretap is an important consideration. Early in the wiretap investigation, the agents may have to intercept all but the most patently innocent phone calls in order to establish patterns of relevant and non-relevant calls. Also, otherwise innocent phone calls may yield valuable information about the movements of a suspect or transactions in which he is about to engage. Once patterns of relevant and non-relevant phone calls and callers have been established, and gaps in the agents' knowledge of the conspiracy have been filled in, the agents are less justified in intercepting calls that seem to fall within the non-relevant category.
>
> [Id. at 433-34 (citing Scott v. United States, 436 U.S. 128, 140-41 (1978)).]

In measuring an agent's subjective good faith, the Court explained:

> Courts must often infer good faith from a person's actions. Thus, in some cases a finding of good faith will automatically follow a finding that the agent's minimization actions were reasonable. However, there is additional objective evidence a court may examine to determine whether an agent acted in good faith. Written minimization instructions may have been distributed to all of the monitors at the outset of the wiretap. The monitors may have compiled lists of non-pertinent categories of calls and callers as the wiretap progressed. More important, the actual termination of non-pertinent calls is always evidence of good faith.

> Conversely, full interception of lengthy conversations that were highly personal and clearly irrelevant would be evidence of bad faith.
>
> [Id. at 443-44.]

The Court also pointed out that "spot monitoring is highly persuasive evidence of a good-faith intention on the part of the monitors to minimize." Id. at 446. According to the Court, spot monitoring "protect[s] the privacy of innocent callers without providing a loophole through which criminals could avoid detection by prefacing their conversations with innocent small talk." Ibid. The Court acknowledged "that monitors are not prophets, and thus they are not expected to anticipate and screen out all non-relevant phone calls. All they are expected to do is make reasonable efforts to identify innocent, non-relevant phone calls and minimize their interception." Id. at 445.

Applying these principles, we are satisfied that the State fulfilled all minimization requirements. In particular, we agree with the judge's assessment of the sufficiency of the monitors' intrinsic minimization efforts and affirm substantially for the reasons expressed in the judge's January 17, 2017 written opinion. Admittedly, many of the challenged calls between Fair and Williams involved personal issues. However, as in State v. Burstein, 85 N.J. 394, 415 (1981), where the police intercepted "deeply personal and emotionally

turbulent" phone calls between the defendant and his girlfriend, here, under the circumstances, it was reasonable for the State to intercept these calls. Indeed, similar to the calls in Burstein, "[d]espite the personal nature of many of these conversations, they were frequently peppered with references to criminal activity" including "threats . . . to go to the police or otherwise divulge facts about the conspiracy, and references to other criminal activities." Id. at 416. "Although some additional calls might conceivably have been minimized, we have never required the State to minimize its interception of all non-relevant phone calls." Ibid.

III.

In Point II of Fair's brief and Point I of Walker's brief, defendants argue the "multiplicitous" indictment "denied [them] a fair trial" because of the prejudice engendered by the multiple counts. Walker did not move to dismiss the indictment in the trial court. Although Fair moved to dismiss the indictment prior to trial on a variety of grounds, he did not challenge the indictment for multiplicity. Because defendants did not raise this issue in the trial court, the multiplicity challenge is waived.

Rule 3:10-2(c) provides that

> all . . . defenses and objections based on defects in the institution of the prosecution or in the indictment or

> accusation, except as otherwise provided by R[ule] 3:10-2 (d) (defenses which may be raised only before or after trial) and R[ule] 3:10-2 (e) (lack of jurisdiction), must be raised by motion before trial. Failure to so present any such defense constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver.

"The Supreme Court has held that the failure to timely assert defenses or objections based on defects in the indictment may constitute a waiver under R[ule] 3:10-2, even if 'constitutional rights' are involved." State v. Lee, 211 N.J. Super. 590, 596 (App. Div. 1986) (quoting State v. Del Fino, 100 N.J. 154, 160 (1985)).

Defendants have failed to establish any good cause for their failure to raise the multiplicity challenge to the indictment before trial. Thus, we deem their arguments waived, notwithstanding their contention that their constitutional rights were implicated. Even if defendants could show good cause for their delay, "the merits of th[e] assertion 'must be persuasive.'" Lee, 211 N.J. Super. at 598 (quoting Del Fino, 100 N.J. at 161). However, under the circumstances presented here, we find no substantive merit in their multiplicity challenge.

"[T]he rule against multiplicity prohibits the State from charging a defendant with multiple counts of the same crime, when defendant's alleged conduct would only support a conviction for one count of that crime." State v.

Hill-White, 456 N.J. Super. 1, 11 (App. Div. 2018). "Thus, '[m]ultiplicity occurs when a single offense is charged in several counts of an indictment.'" Id. at 11-12 (alteration in original) (quoting State v. Evans, 189 N.J. Super. 28, 31 (Law Div. 1983)). On the other hand, the State is entitled to charge a defendant with multiple crimes arising from the same course of conduct. That is, "a single act or transaction may be charged in several counts where a number of criminal statutes may reach it." State v. LaFera, 35 N.J. 75, 91 (1961).

"The bar against multiplicity relates to the Double Jeopardy principle prohibiting 'multiple punishments for the same offense.'" Hill-White, 456 N.J. Super. at 12 (quoting State v. Salter, 425 N.J. Super. 504, 515-16 (App. Div. 2012)). "Multiplicity may also implicate a defendant's right to a fair trial, because trying a defendant for multiple counts of the same offense, when only one offense was committed, may prejudice the jury." Ibid. "A court may remedy multiplicity by setting aside all but one of the multiple convictions after the verdict, but the better approach is to address the issue before trial by dismissing the improperly duplicative counts of the indictment." Ibid.

The question of merger is separate, but related. "Merger is based on the principle that 'an accused [who] has committed only one offense . . . cannot be punished as if for two.'" State v. Miller, 108 N.J. 112, 116 (1987) (alterations

in original) (quoting State v. Davis, 68 N.J. 69, 77 (1975)); see also N.J.S.A. 2C:1-8(a) (defining when merger is statutorily required); State v. Robinson, 439 N.J. Super. 196, 200 (App. Div. 2014) (describing the courts' more flexible non-statutory approach to merger).

Like multiplicity, "[m]erger implicates a defendant's substantive constitutional rights." Miller, 108 N.J. at 116. However, while "similar to a double jeopardy analysis," merger implicates "[s]lightly different interests." Ibid. "In double jeopardy cases the defendant seeks to avoid both multiple prosecution and multiple punishment; in merger cases, only multiple punishments are at issue." Ibid. "The failure to merge convictions results in an illegal sentence for which there is no procedural time limit for correction." State v. Romero, 191 N.J. 59, 80 (2007).

Here, Fair argues the indictment was "multiplicitous" for two reasons. First, in addition to the racketeering conspiracy, the objectives of which encompassed murder, robbery, burglary, theft, gun, and drug offenses, he asserts "the State charged [him with twenty-three] additional conspiracies[12] to commit

[12] Fair argues multiplicity with respect to the conspiracies charged in counts 2, 6, 10, 11, 19, 22, 25, 26, 27, 29, 31, 35, 37, 41, 42, 47, 49, 51, 58, 77, 85, 167, and 202.

the same crimes that were the objectives of the racketeering conspiracy, during the same period." Second, "by failing to specify the firearm or firearms alleged to be possessed" in thirteen counts,[13] he asserts he was subjected to a "multiplicitous indictment" and "unconstitutional multiple punishment for the same crime."

We reject both arguments. As to the first, "[t]he RICO[14] crime is independent from the commission of the underlying offenses." State v. Ball, 268 N.J. Super. 72, 148 (App. Div. 1993), aff'd, 141 N.J. 142 (1995). Also, a racketeering conspiracy is separate from a conspiracy to commit a predicate offense. See State v. Cagno, 211 N.J. 488, 513 (2012) (noting that a racketeering conspiracy is different from a conspiracy to commit a specified predicate offense). Unlike the agreement required in the predicate conspiracies, a racketeering conspiracy does not require "a specific agreement on [the

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[13] The firearms offenses, encompassing possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a), and possession of a firearm without a permit, N.J.S.A. 2C:39-5(b), were charged in counts four, five, eight, nine, fifteen, sixteen, thirty-nine, forty, forty-four, forty-five, fifty, fifty-nine, and sixty-one.

[14] The source of New Jersey's racketeering laws, N.J.S.A. 2C:41-1 to -6.2, is the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 to 1968, commonly known as the RICO Act or RICO. State v. Ball, 141 N.J. 142, 156 (1995); see also State v. Taccetta, 301 N.J. Super. 227, 245 (App. Div. 1997). As such, the New Jersey laws are often also collectively referred to as the RICO Act.

defendant's] part to commit specific criminal acts." Id. at 518. It only requires that the defendant "agreed to join a RICO enterprise." Ibid. Thus, charging a racketeering conspiracy in addition to the predicate conspiracies does not entail multiplicity.

Indeed, "[t]he object of punishment under RICO is not the commission of the underlying predicate act, but rather the participation in an enterprise that engages in a pattern of racketeering activity." Ball, 268 N.J. Super. at 148. Thus, a conviction for racketeering does not merge with convictions for the predicate offenses, and the sentences run consecutively. N.J.S.A. 2C:5-2(g); cf. State v. Hardison, 99 N.J. 379, 380 (1985) ("[I]f the conspiracy proven has criminal objectives other than the substantive offense proven, the offenses will not merge."). That said, because the racketeering conspiracy and the predicate conspiracies are separate crimes, exposing defendant to separate punishment, charging them separately was not improper.

As to Fair's second argument, while the counts charging possession of a firearm for an unlawful purpose and possession of a firearm without a permit did not specify the firearm, the counts were not multiplicitous because they charged different criminal conduct involving different dates, events, victims, and co-defendants. See Salter, 425 N.J. Super. at 513-15 (finding that an

indictment was not defective for "charg[ing] defendant with two counts using identical language and time frames," so long as "'in light of the facts in the particular case . . . , the defendant . . . received "fair notice" of the charges against him.'" (quoting State v. Hass, 218 N.J. Super. 133, 138 (App. Div. 1987))). Moreover, Fair was not punished twice for the same offense.

Acknowledging that the trial judge "imposed concurrent sentences," like Fair, Walker challenges on multiplicity grounds the State charging him with racketeering conspiracy in count one and multiple offenses encompassing the objectives of the racketeering conspiracy in other counts of the indictment. We reject Walker's contention for the same reasons we rejected Fair's. Walker also asserts that because he was charged with four counts of conspiracy to distribute CDS[15] within the same time frame, they were the same offenses and thereby "multiplicitous." However, the counts alleged conspiracies to distribute different drugs and were therefore separate crimes. See State v. Jordan, 235 N.J. Super. 517, 520 (App. Div. 1989) ("[T]he legislature intended that each drug possessed with intent to distribute is a separate crime.").

[15] The four counts were counts 85, 167, 202, and 208.

Likewise, Walker's contention that counts thirty-five, forty-nine, and fifty-eight, charging conspiracy to possess a firearm for an unlawful purpose during the same time period, were "multiplicitous," is baseless because the counts refer to different events, victims, and co-defendants. See Salter, 425 N.J. Super. at 514. For the same reason, we reject Fair's additional assertion that the six counts alleging possession of a weapon for an unlawful purpose[16] were "multiplicitous."

IV.

In Point III of his brief, Fair argues that promoting organized street crime, N.J.S.A. 2C:33-30, "is unconstitutionally vague" because "it fails to apprise persons of common intelligence of what conduct it proscribes, and . . . provides law enforcement with absolutely no guidance as to its proper application, encouraging arbitrary and erratic enforcement." In Point IV, Fair contends the jury charge on promoting organized street crime was deficient because the trial judge failed to instruct the jury that Fair must have occupied a high-level position or a position of superior authority to others engaged in the conspiracy as "a material element of the crime[]."

[16] The six counts were counts eight, nine, thirty-six, thirty-nine, forty, and fifty.

N.J.S.A. 2C:33-30 defines and grades promoting organized street crime as follows:

> a. A person promotes organized street crime if he conspires with others as an organizer, supervisor, financier or manager to commit any crime specified in chapters 11 through 18, 20, 33, 35, or 37 of Title 2C of the New Jersey Statutes; N.J.S. 2C:34-1; N.J.S. 2C:39-3; N.J.S. 2C:39-4; section 1 of P.L.1998, c.26 (C.2C:39-4.1); N.J.S. 2C:39-5; or N.J.S. 2C:39-9.
>
> b. Grading. Promotion of organized street crime is a crime of one degree higher than the most serious underlying crime referred to in subsection a. of this section, except that where the underlying offense is a crime of the first degree, promotion of organized street crime is a first degree crime and the defendant, upon conviction, and notwithstanding the provisions of paragraph (1) of subsection a of N.J.S.2C:43-6, shall be sentenced to an ordinary term of imprisonment between 15 and 30 years. A sentence imposed upon conviction of the crime of promotion of organized street crime shall be ordered to be served consecutively to the sentence imposed upon conviction of any underlying offense referred to in subsection a. of this section.

Fair was charged with promoting organized street crime in counts ten, twenty-five, forty-one, and forty-seven. Count ten was ultimately dismissed. In count twenty-five, Fair was charged with second-degree promoting organized street crime by knowingly conspiring with Clarence Jackson and Williams, "as an organizer, supervisor, financier or manager" to commit the crimes of burglary or theft of cocaine from the apartment of his neighbors, Keon Bellamy and

Latrice Treadwell, on December 12, 2013. At trial, Fair's wiretapped phone calls and Williams's testimony provided evidence that Fair orchestrated the burglary. First, at Fair's behest, Williams called to make sure the victims were not at home. Next, Jackson broke into the premises while Fair directed his movements, telling him where his neighbors stored their cocaine. Fair was found guilty and sentenced to eight years' imprisonment, consecutive to the underlying burglary charged in count twenty-three.

In count forty-one, Fair was charged with first-degree promoting organized street crime by knowingly conspiring with Walker, Alexander Walton, Jackson, Corderian Strickland, and Shamere Reid "as an organizer, supervisor, financier or manager" to commit the crimes of murder and possession of a firearm for an unlawful purpose on December 2, 2013. The charge related to a December 2 shooting at the home of Diquan Speights, orchestrated by Fair and motivated by disputes between Speights and Fair and between Speights and Walton. Fair and Walton did the shooting, while Walker, Reid, Jackson, and Strickland acted as lookouts. At trial, Reid testified about the shooting. Fair was found guilty of the lesser included offense of promoting organized street crime by conspiring with others to commit the crime of aggravated assault with a deadly weapon and sentenced to fifteen years'

imprisonment, consecutive to the underlying weapons possession offense charged in count thirty-nine.

In count forty-seven, Fair was charged with first-degree promoting organized street crime by knowingly conspiring with Walton and Reid "as an organizer, supervisor, financier or manager" to commit the crimes of murder and possession of a firearm for an unlawful purpose on December 11, 2013. The count related to the attempted murder of Dameyon Barnes. After Fair located Barnes at Mac Records in Asbury Park, he directed Reid and Walton to shoot Barnes and gave Reid a gun for that purpose. Walton had his own gun. Fair then orchestrated the shooting while driving in a car with Williams and their daughter. However, the shooting was aborted. Based on intercepted phone calls and Reid's testimony, when undercover police cars responded to the area, Fair directed Reid and Walton to "stash" their weapons and stay off the streets. Fair was found guilty, with the jury finding the predicate offense of possession of a weapon for an unlawful purpose. He was sentenced to fifteen years' imprisonment, consecutive to count forty-two, which charged Fair with first-degree conspiracy to commit the murder of Barnes.

Constitutionality of Promoting Organized Street Crime Statute

In his motion to dismiss the indictment filed in the trial court, Fair challenged the constitutionality of the statute, N.J.S.A. 2C:33-30, making the same arguments now presented on appeal. In a June 8, 2016 order and accompanying written opinion, the trial judge rejected the arguments and denied the motion. The judge found no ambiguity in the statutory language, concluding that an ordinary person would understand the meaning of the terms "organizer," "supervisor," and "manager," and reasoning that the terms "street crime" and "promoting" were not elements of the offense, but rather "a shorthand description of the acts necessary to trigger liability." Thus, the judge concluded the statute was "facially valid." "Because the issue is purely legal in nature," we review the judge's ruling "de novo." State v. Pomianek, 221 N.J. 66, 80 (2015).

"A presumption of validity attaches to every statute," and "the party challenging the constitutionality of a statute . . . bears the burden of establishing its unconstitutionality." State v. Lenihan, 219 N.J. 251, 265-66 (2014). Criminal statutes, however, are scrutinized more closely than civil statutes, and "the gravity" of the penal sanction for violating a criminal statute should factor into the court's consideration. State v. Afanador, 134 N.J. 162, 170 (1993).

"A fundamental element" of the constitutional right to due process "is that a law 'must give fair notice of conduct that is forbidden or required.'" Pomianek, 221 N.J. at 84 (quoting FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012)); see also U.S. Const. amend. XIV, § 1. "[T]he constitutional ban on vague laws is intended to invalidate . . . enactments that fail to provide adequate notice of their scope and sufficient guidance for their application." State v. Cameron, 100 N.J. 586, 591 (1985). To be sure, "[v]ague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement." Afanador, 134 N.J. at 170 (quoting Town Tobacconist v. Kimmelman, 94 N.J 85, 118 (1983)).

To avoid the pitfall of vagueness, "[t]he vagueness test 'demands that a law be sufficiently clear and precise so that people are given notice and adequate warning of the law's reach.'" State v. Lee, 96 N.J. 156, 165 (1984) (quoting Town Tobacconist, 94 N.J. at 125 n.21). "A statute that criminalizes conduct 'in terms so vague that [persons] of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process of law.'" Pomianek, 221 N.J. at 85 (alterations in original) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

Fair presents a facial challenge to the validity of N.J.S.A. 2C:33-30. "A statute that is challenged facially may be voided if it is 'impermissibly vague in all its application,' that is, there is no conduct that it proscribes with sufficient certainty." Cameron, 100 N.J. at 593 (quoting Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 495 (1982)); accord Lenihan, 219 N.J. at 267. Specifically, Fair argues the promoting organized street crime statute is unconstitutionally vague because the terms "organizer," "supervisor," "financier," and "manager" are not defined in the statute.

"Absent any explicit indications of special meanings, the words used in a statute carry their ordinary and well-understood meanings." Afanador, 134 N.J. at 171. In Afanador, our Supreme Court interpreted a comparable statute, the drug kingpin statute, which provides in pertinent part that it is a crime to act as the "leader of a narcotics trafficking network" by conspiring with others "as a financier, or as an organizer, supervisor, or manager of at least one other person" in "a scheme or course of conduct to unlawfully manufacture, distribute, dispense, bring into or transport in this State" certain specified substances. 134 N.J. at 169-74; N.J.S.A. 2C:35-3 (emphases added).

The Court concluded the statute "[did] not suffer from facial vagueness" by failing to define the terms organizer, supervisor, or manager because "a

person of average intelligence [would] comprehend[] the meaning" of those terms. Afanador, 134 N.J. at 171, 173. Finding "no indication" that the Legislature "intended [those terms] to have special meanings," the Court "accord[ed] those words their common definitions" and concluded the terms were "not facially vague." Id. at 171.

In particular, the Court rejected any ambiguity in the term "organizer." Id. at 171-72. The Court found that "[t]he clear implication of 'organizer,' particularly in a statute dealing with a 'leader' of a drug-trafficking network, is that the term describes a person who exercises some supervisory power over others." Id. 172. Also, "the inclusion of the word 'organizer' among other terms denoting authority to direct the acts of another obviously indicates that it carries a similar connotation, namely, the primary meaning of 'organizer' in common usage." Ibid. Thus, the Court found that the statutory language "unambiguously indicates that a defendant violates the statute only if the defendant exercises some ability to dictate the conduct of others in a drug-trafficking scheme." Id. at 173.

The Court explained:

> Although undoubtedly severe, the statute is not unconstitutionally vague on its face: it describes the elements of the offense in common, well-understood terms and therefore affords notice of the potential

> criminal liability for its violation. The harshness of the penalty should not lead us to attach ambiguity to words used by ordinary citizens in everyday conversation.
>
> [Id. at 175.]

The same reasoning applies to the interpretation of N.J.S.A. 2C:33-30(a), and its use of the terms "organizer, supervisor, financier or manager." In the absence of any indication that the Legislature intended the terms to have special meanings, the words carry their ordinary and well-understood meanings. Fair also argues "[t]he statute purports to apply to 'organized street crime'" but "contains no definition of that term." On the contrary, the statute delineates the predicate crimes an accused must "conspire[] with others as an organizer, supervisor, financier or manager" to commit in order to "promote[] organized street crime." N.J.S.A. 2C:33-30(a). Although the statute is severe, it is not unconstitutionally vague.

Promoting Organized Street Crime Jury Charge

Fair also challenges the promoting organized street crime jury charge but acknowledges "[d]efense counsel did not object" to the charge and "indeed, consented to [it]."

A "[d]efendant is required to challenge instructions at the time of trial." State v. Morais, 359 N.J. Super. 123, 134 (App. Div. 2003) (citing R. 1:7-2).

"Where there is a failure to object, it may be presumed that the instructions were adequate." Id. at 134-35 (citing State v. Macon, 57 N.J. 325, 333 (1971)). "The absence of an objection to a charge is also indicative that trial counsel perceived no prejudice would result." Id. at 135.

Because Fair did not object to the jury charge, we review for plain error and only reverse if the error was "clearly capable of producing an unjust result." State v. McKinney, 223 N.J. 475, 494 (2015) (quoting R. 2:10-2). "The mere possibility of an unjust result is not enough." State v. Alexander, 233 N.J. 132, 142 (2018) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)). "Rather, '[t]he possibility must be real, one 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 Macon, 57 N.J. at 336).

> In the context of jury instructions, plain error is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and 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. Camacho, 218 N.J. 533, 554 (2014) (alteration in original) (quoting State v. Adams, 194 N.J. 186, 207 (2008)).]

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. Afanador, 151 N.J. 41, 54 (1997); see also

State v. Green, 86 N.J. 281, 287 (1981) ("Appropriate and proper charges to a jury are essential for a fair trial."). To that end, "[t]he [trial] judge 'should explain to the jury in an understandable fashion its function in relation to the legal issues involved'" and "deliver '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.'" McKinney, 223 N.J. at 495 (quoting Green, 86 N.J. at 287-88). "[B]ecause clear and correct jury instructions are fundamental to a fair trial, erroneous instructions in a criminal case are 'poor candidates for rehabilitation under the plain error theory.'" Adams, 194 N.J. at 207 (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

In State v. Alexander, 136 N.J. 563, 574-75 (1994), our Supreme Court addressed the requirements of a jury charge for the drug kingpin statute, the constitutionality of which had been upheld in Afanador. The Court explained:

> [A] proper instruction should, in addition to reciting the statutory language of N.J.S.A. 2C:35-3, at least inform the jury that it must find that the defendant occupies a high-level position of authority in the scheme of distribution (or manufacture or dispensing or transporting, as the evidence may permit). A court should instruct the jury that a defendant's position and status must be at a superior or high level in relation to other persons in the drug trafficking network and that the defendant's role must be that of a "leader" in the drug organization or system and, in that capacity, the defendant exercised supervisory power or control over

> others engaged in the organized drug-trafficking network.
>
> [Id. at 574.]

Although N.J.S.A. 2C:35-3's statutory language did not specify the defendant's leadership role in the drug trafficking network as a requirement for culpability, the Court determined "that the words of the statute alone . . . without any further explanation would not fully convey to the jury the nature of the actual elements of the conduct that the Legislature intended to criminalize." Id. at 571. "Those elements, in addition to the activities enumerated in N.J.S.A. 2C:35-3, such as supervision, management, financing, and the like, include the role of the defendant as an 'upper-level member' of a drug operation." Ibid.

The Court reasoned that:

> The statement of purpose expressly makes the defendant's "upper-level" role in a drug network central to the activity criminalized by the Legislature. The prominence of the upper-level status of the defendant in the description and explanation of the purpose of the crime clearly evidences the Legislature's intent that the status or the position of the defendant in the drug trafficking network is a substantive part of the crime. Consistent with that intent, the status or position of the defendant should be considered a material element of the crime.
>
> [Id. at 570.]

Here, Fair argues the promoting organized street crime jury charge was deficient because it "did not include as an element of the crime that [Fair] occupied a high-level position, or a position of superior authority over the others engaged in the conspiracy," like the drug kingpin jury charge. Fair asserts "the greatly enhanced penalties of [the promoting organized street crime statute] evince a legislative intent that the status or position of the accused in the conspiracy must be considered a material element of the promoting conspiracy." However, the legislative intent that supported the Alexander Court's interpretation of the drug kingpin statute is not present in the promoting organized street crime statute's legislative commentary, statement, policy, or purpose.

"[J]udicial construction need not disturb the plain meaning of" the statute. State v. Kittrell, 145 N.J. 112, 126 (1996). "The language in the statute is clear, and it plainly communicates the Legislature's intent." State v. Munafo, 222 N.J. 480, 490 (2015). N.J.S.A. 2C:33-30 does not require that the accused occupy a high-level or superior position over others engaged in the conspiracy. Instead, it requires only that the defendant "conspire[] with others as an organizer, supervisor, financier, or manager to commit" one of the specified crimes. N.J.S.A. 2C:33-30(a). Therefore, it would be inappropriate to add the proposed

language to the jury charge because to do so would add an element to the crime that is not supported by the statutory language or the legislative intent.

V.

In Point V of Fair's brief and Point II of Walker's brief, defendants argue the State obtained historical cell-site data without a search warrant in violation of their constitutional rights. Defendants assert the violation requires the suppression of all wiretap evidence obtained therefrom "as fruit of the poisonous tree."

Neither defendant made a motion to suppress the evidence on this basis at the time of trial. A defendant waives his right to object to the admission of evidence "on the ground that such evidence was unlawfully obtained" if he fails to move for its suppression before trial. R. 3:5-7(f); see also State v. Jenkins, 221 N.J. Super. 286, 292 (App. Div. 1987) ("It is now well established that constitutional claims, such as Fourth Amendment rights, may be waived unless properly and timely asserted.").

"Appellate review is not limitless." State v. Robinson, 200 N.J. 1, 19 (2009); see, e.g., Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is

available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959))).

Moreover, "appellate courts retain the inherent authority to 'notice plain error not brought to the attention of the trial court[,]' provided it is 'in the interests of justice' to do so." Robinson, 200 N.J. at 20 (alteration in original) (quoting R. 2:10-2). Likewise, appellate courts may address errors "'clearly capable of producing an unjust result,'" despite "the absence of an objection" at trial. Ibid. (quoting R. 1:7-5). However,

> these exceptions are not without practical boundaries; they are not intended to supplant the obvious need to create a complete record and to preserve issues for appeal. To permit otherwise would allow the "clearly capable of producing an unjust result"/"interests of justice" standard of Rule 2:10-2 to render as mere surplusage the overarching requirement that matters be explored first and fully before a trial court.
>
> [Ibid. (quoting R. 2:10-2).]

Where, as here, the issue was "never . . . raised before the trial court, . . . its factual antecedents" were "never . . . subjected to the rigors of an adversary hearing," and "its legal propriety" was "never . . . ruled on by the trial court, the issue was not properly preserved for appellate review." Id. at 18-19.

To support their belated legal challenge, defendants rely on Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (2018), where the United States Supreme Court ruled that "[b]efore compelling a wireless carrier to turn over a subscriber's [cell-site location information]," the Government is required to obtain a warrant supported by probable cause. Id. at 2221. However, "case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances." Id. at 2222. For example, a warrant may not be necessary in exigent circumstances, including "the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." Id. at 2222-23. Moreover, Carpenter was decided after the trial was concluded and neither the United States Supreme Court nor any New Jersey state court has ruled on its retroactive application.[17]

Further, the record contains insufficient factual information to address the issue for the first time on appeal. In the December 6, 2013 wiretap application,

[17] See People v. Cutts, 88 N.Y.S.3d 332, 335 (N.Y. Sup. Ct. 2018) (declining to apply Carpenter retroactively to the defendant's collateral attack of his conviction after direct appeals were exhausted).

Finkelstein averred that CDWs,[18] which included authorization for the installation of a DNR, had been obtained for Fair's phone, but the affidavits in support of these warrants and the warrants themselves are not part of the record. While Finkelstein's affidavit does not specify whether any cell-site location data was obtained from the CDWs, his pretrial and trial testimony indicated that cell-site location data was included in the information provided pursuant to the CDW and wiretap warrants and legally authorized.

Additionally, at trial, a Verizon Wireless representative testified that pursuant to a court order, certain information had been turned over to law enforcement, including "cell[-]site antenna locations," "detailed location information," and "ranging data," meaning "estimates of the distance" of the cell phone from cell towers. The representative further testified that with a wiretap order, law enforcement was able to obtain the specific location of the phone being tapped. At first blush, it would appear that the State obtained historical cell-site data pursuant to search warrants supported by probable cause in accordance with Carpenter. However, given the factual shortcomings in the record to evaluate the claim in an informed and deliberate manner, we decline

[18] To obtain a CDW, "N.J.S.A. 2A:156A-29(a) requires . . . that a law enforcement agency obtain a warrant upon a showing of probable cause." State v. Finesmith, 408 N.J. Super. 206, 212 (App. Div. 2009).

to consider the issue. See Robinson, 200 N.J. at 21 ("Given this record, an appellate court should stay its hand and forego grappling with an untimely raised issue.").

VI.

In Point VI of Fair's brief and Points IV and VII of Walker's brief, defendants argue the trial judge erred by not granting a mistrial due to repeated incidents of juror misconduct and erred in failing to voir dire jurors about purported irregularities during the trial.

"A mistrial is an extraordinary remedy used when necessary to prevent a manifest injustice." State v. Terrell, 452 N.J. Super. 226, 274 (App. Div. 2016), aff'd, 231 N.J. 170 (2017). Our Supreme Court "has also observed that granting a mistrial 'imposes enormous costs on our judicial system,' and . . . the prospect of a retrial after days or weeks of testimony creates a sense of futility." Ibid. (quoting State v. Jenkins, 182 N.J. 112, 124 (2004)).

"Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.'" State v. Smith, 224 N.J. 36, 47 (2016) (quoting State v. Harvey, 151 N.J. 117, 205 (1997)). "To address a motion for a mistrial, trial courts must consider the unique circumstances of the case." Ibid. "Appellate courts 'will not disturb a trial court's ruling on a motion for a mistrial,

absent an abuse of discretion that results in a manifest injustice.'" Ibid. (quoting State v. Jackson, 211 N.J. 394, 407 (2012)). "If there is 'an appropriate alternative course of action,' a mistrial is not a proper exercise of discretion." Ibid. (quoting State v. Allah, 170 N.J. 269, 281 (2002)).

"The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants 'the right to . . . trial by an impartial jury.'" State v. R.D., 169 N.J. 551, 557 (2001) (alteration in original) (quoting U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10); see also State v. Loftin, 191 N.J. 172, 187 (2007) ("A defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial."). "That constitutional privilege includes the right to have the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters." R.D., 169 N.J. at 557.

"[A] new trial will be granted when jury misconduct or the intrusion of irregular influences into jury deliberations 'could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge.'" State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div. 1997) (quoting Panko v. Flintkote Co., 7 N.J. 55, 61 (1951)). "The test is 'not whether the irregular matter actually influenced the result but whether it had the

capacity of doing so.'" Ibid. (quoting Panko, 7 N.J. at 61). "Where the record does not show whether the irregularity was prejudicial, it will be presumed to be so." Ibid.

"A new trial, however, is not necessary in every instance where it appears an individual juror has been exposed to outside influence." R.D., 169 N.J. at 559. "As the United States Supreme Court has said, 'it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" State v. McGuire, 419 N.J. Super. 88, 154 (App. Div. 2011) (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith, 455 U.S. at 217.

"We traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." R.D., 169 N.J. at 559-60.

> Ultimately, the trial court is in the best position to determine whether the jury has been tainted. That determination requires the trial court to consider the gravity of the extraneous information in relation to the case, the demeanor and credibility of the juror or jurors who were exposed to the extraneous information, and the overall impact of the matter on the fairness of the proceedings.
>
> [Id. at 559.]

Determining whether it is necessary to voir dire jurors to ascertain whether impermissible tainting occurred, and the extent of the questioning needed to assess whether jurors "'are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner,'" id. at 558 (quoting State v. Bey, 112 N.J. 45, 87 (1988)), "best remain[] . . . matter[s] for the sound discretion of the trial court," id. at 561. Such "determination[s] should be explained on the record to facilitate appellate review under the abuse of discretion standard." Id. at 560-61. "Application of that standard respects the trial court's unique perspective." Id. at 559.

Here, jury deliberations began on September 14, 2017. Both Fair and Walker contest the judge's handling of incidents that occurred during deliberations. First, on September 20, 2017, juror number two, the sole alternate juror, reported to the judge in the presence of counsel that there were "disagreement[s] in the [jury] room" regarding the verdict on two charges, "the racketeering charge" and "one of the gun charges." As a result, jurors were "very upset" and "[felt] needlessly badgered because of their opinions." Juror number two became aware of the disagreements when she overheard discussions between a few jurors as they were leaving for the day. According to juror number two, one discussion began with a juror asking another "[a]re you okay,"

because the juror apparently felt she was "being badgered in [the jury room] because of her decision." Juror number two did not have any discussions with the deliberating jurors about the case or their deliberations, except to tell the foreperson that "[she] should tell the judge" about the disagreements. She later learned the jurors decided to "handle it" amongst themselves.

Fair's and Walker's attorneys moved for a mistrial, as did German's attorney. In denying the motion, the judge stated:

> I think clearly there is tension as there is with most cases where there are serious charges in issue. I think this case would lend itself even more so to that in light of the number of charges that we're talking about. And it's not inconceivable that it may be a number of different counts that they could be hung up on thereby causing more tension than you would normally have if it were just fewer in number.
>
> And based on the questions that we asked of the alternate, some of these things she overheard, some of this she was directly approached, but in terms of deliberations and talking about the specific facts or specific elements for any of the charges, I did not hear any of that. It was just more the emotional aspects of sitting as a juror. So I'm going to deny the motion for a mistrial.

After rendering his ruling on the mistrial and consulting with counsel, the judge re-instructed the jury in pertinent part:

> It is your duty as jurors to consult with one another, and to deliberate with a view to reaching an

> agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect[] of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans, you are judges, judges of the facts.

The judge also provided the regular admonition to avoid outside influences and to "decide the facts of th[e] case solely from the evidence produced in the courtroom and nothing else." Further, the jurors were instructed to have "no further discussions with anyone about th[e] case" and to not deliberate outside of the jury room.

The following day, September 21, 2017, juror number two advised the judge that she overheard another discussion outside the jury room as the jurors were heading out to lunch. Specifically, she heard one juror tell another juror "that they needed to re[-]word [a] question" to the court, and the other juror promptly responded "don't talk about it now." The sheriff's officer responsible for escorting the jurors reported to the judge that he had not overheard the conversation reported by juror number two.

After discussions with counsel, the judge decided to give a stronger instruction, which he included as part of the instructions he typically gave at the close of the day. The judge told the jurors:

> Discussions about this case with your fellow jurors happens in the jury deliberation room. There and only there are where these discussion should take place. Once you leave the jury deliberation room, there should be no further discussion about this case.

We discern no abuse of discretion in the judge's handling of juror number two's revelations. Fair argues the judge should have conducted "a complete inquiry into the situation, including interviews of the deliberating jurors to ensure the integrity of the deliberations." However, "the extent of the court's inquiry depends upon the nature of the allegations." State v. McLaughlin, 310 N.J. Super. 242, 256 (App. Div. 1998). Here, there is no indication in the record that juror number two exposed the deliberating jurors to extraneous information or influences or discussed the evidence with the jurors to warrant questioning each juror individually. See id. at 257 (finding "no abuse of discretion in the trial court's refusal to separately question each juror" where "the comments made by a few of the jurors did not pertain to the substance of the case").

The record shows that the discussions outside the jury room involved the jurors' feelings about their interactions during deliberations, rather than case

specific information. "Although jurors are urged to attempt to reach consensus, discord, not just assent, is a natural part of the deliberative process." State v. Musa, 222 N.J. 554, 566 (2015). "It is to be expected that in the interplay of personalities attending a jury's deliberations there will be occasions when some jurors will give vent to feelings of exasperation or frustration." State v. Athorn, 46 N.J. 247, 253 (1966). Indeed, "[i]t is well known that jury deliberations can be boisterous and contentious." State v. Gleaton, 446 N.J. Super. 478, 523 (App. Div. 2016).

Here, there was no evidence that juror conflict or dissension caused a breakdown in the deliberative process. Cf. State v. Dorsainvil, 435 N.J. Super. 449, 482 (App. Div. 2014) ("A physical altercation between two or more deliberating jurors constitutes an irreparable breakdown in the civility and decorum expected to dominate the deliberative process."). None of the deliberating jurors felt so intimidated or upset that they brought the issues to the judge's attention. Thus, there was no need for the judge to question the jurors and risk interfering in their deliberations. Gleaton, 446 N.J. Super. at 523-24. Re-instructing the jurors to conduct their deliberations in the jury room and respect each other's views, as the judge did, sufficed.

As deliberations continued, on September 27, 2017, juror number seven, a deliberating juror, disclosed to the judge in counsel's presence that she was "afraid . . . that [she] might have done something wrong." She explained:

> [A] particular issue that we [were] reviewing involved a distance that was in question.
>
> . . . .
>
> The men, . . . who all play football . . . said oh, three football fields, no problem, but the women got very emotional and said we don't know what that means, we don't know how to visualize that distance. It became so emotional that we had to sidestep that issue and go home that weekend. So . . . I know how to measure things. So I simply laid out by [fifty] foot increments across the [courthouse] parking lot[19] and I was able to go in and tell them Tuesday morning if you're concerned that you've never had any feel for what that distance is, it would constitute from this sidewalk when we leave down that down ramp, way down to the tree line is 800 feet, and now we all have right here on court property the same equal shot at seeing a distance in the neighborhood of the one we had been discussing and they didn't care. They had all calmed down over the weekend and they were like oh, we're all right with it now, but I worried.

All three defense attorneys again moved for a mistrial, which the judge denied. Surmising that the measurement pertained to the 1,000-foot school zone drug charges, the judge stated:

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[19] The juror stated she made the markings with chalk.

> I am satisfied, based on the demeanor and the manner in which [the juror] came to us that that measurement is not part of a larger scheme where she was outside researching anything else. It was a measurement. It was a distance in feet. They were looking to get a fix on how far a thousand feet actually is.

The judge distinguished the juror's actions from going "out to the crime scene . . . and then d[oing] all the measurements there." Instead, "[s]he was just looking to satisfy herself on a distance" and "looking for a . . . frame of reference that the men apparently had given to the women in the jury room." The judge analogized it to his use of the courtroom measurements "during the course of a trial" to give jurors a frame of reference when witnesses referred to a distance while testifying.

The same day, the jury returned its verdict. Notably, the jury found Walker and Fair not guilty of several counts involving measurements.

"Jurors are expected to use their common sense and experiences in evaluating evidence and arriving at a verdict." State v. Gould, 123 N.J. Super. 444, 448 (App. Div. 1973). Estimating distances is a matter of common sense and experience. As juror number seven explained, the deliberating male jurors were able to visualize the distance based on their experience by comparing it to a football field. The female deliberating jurors did not have a comparable frame

of reference. Juror number seven's actions, while improper, were taken to even the playing field, so to speak.

Fair argues juror number seven "conduct[ed her] own investigations," "[d]espite being instructed not to." Indeed, jurors are instructed that they "are not permitted to visit the scene of the alleged incident, do [their] own research or otherwise conduct [their] own investigation." Model Jury Charges (Criminal), "Instructions After Jury is Sworn" (rev. Oct. 15, 2012). While jurors are permitted to perform experiments during deliberations, admittedly, such experiments must occur in the confines of the jury room. See Fiorino v. Sears Roebuck & Co., 309 N.J. Super. 556, 568 (App. Div. 1998) ("An experiment or demonstration is proper when conducted by the jury with the use of exhibits properly submitted to it for the purpose of testing the truth of statements made by witnesses or duplicating tests made by witnesses in open court." (quoting Muchell v. V & V, Inc., 263 N.J. Super. 412, 417 (Law Div.1992))).

Here, although obtained extrajudicially, we do not consider the knowledge gained by juror number seven's measurement of the courthouse parking lot and shared with the other jurors to illustrate a distance, misconduct warranting reversal of defendants' convictions. We agree with the judge that juror number seven's actions were distinguishable from investigating a crime scene or

otherwise considering extraneous information and discern no abuse of discretion in the judge's denial of a mistrial on this basis. See State v. Pease, 163 P.3d 985, 993 (Alaska Ct. App. 2007) (finding that the deliberating jurors' misconduct did not rise to the level of reversible error where the jurors left the jury room without authorization and went outside to "get a better measurement of [a] distance"); People v. Smith, 453 N.E.2d 1079, 1080 (N.Y. 1983) (finding that a "juror's evaluation of the ability to observe the interior of an automobile through its rear window, made while walking to dinner between deliberations and again while riding in a bus with jurors to the hotel after being sequestered, is properly classified as an everyday experience and, therefore, not misconduct").

In addition to these incidents, Walker cites the judge's handling of the jurors during other incidents that occurred during the trial as depriving him of "a fair trial." One such incident occurred on June 13, 2017, when juror number two, who ultimately became the sole alternate, was approached in the lunchroom by Fair's father. He told her she "looked familiar," "asked . . . if he could talk to [her,]" and requested "[her] cell phone number." Juror number two replied repeatedly that she could not talk to him. In response to the judge's questions, juror number two stated that she did not know the man, and that the experience would not prevent her from being fair and impartial going forward. The judge

also questioned the three jurors who had witnessed the lunchroom interaction, all of whom told the judge the experience would not prevent them from being fair and impartial.

After the questioning, there were no applications made by any defense attorneys. Nonetheless, as a result of the incident, the judge barred Fair's father from the courtroom.

Two months later, on August 15, 2017, juror number two reported to the judge in counsel's presence that, over the weekend, Fair's father had again attempted to speak with her at her mother's home. According to the juror, as she stood on her mother's porch, Fair's father "pulled up in a van" and honked his horn. Then, he parked behind the juror's vehicle, got out of his van, and asked if he could speak with her. Juror number two responded that she could not speak with him, at which point he left. She had not seen him since.

In response to questions by the judge and counsel, juror number two said she did not believe either Fair or Walker had anything to do with the encounters. She stated she had no concern for her safety but was concerned that someone would think she was "doing something wrong." She also confirmed that she could be "fair[] and impartial[]" and had not spoken with any jurors about the incident.

All three defense attorneys asked that the juror be excused. In denying the request, the judge explained:

> This juror is not afraid for her safety. . . . I have had the opportunity to question her, to judge her veracity, her truthfulness. I think she's been very candid and honest with us and there's nothing that I see that in any way either this incident or the prior incident is going to impact her ability to be fair and impartial with regard to the facts and the verdict in this case . . . .

"When jurors have been exposed to extraneous information, the court must act swiftly to investigate and to determine whether the jurors are capable of fulfilling their duty in an impartial and unbiased manner." McGuire, 419 N.J. Super. at 153. That occurred in this case, and we discern no abuse of discretion in the judge's refusal to excuse juror number two. After questioning the juror, the judge found her responses credible and was satisfied by her assurances that she could be fair and impartial despite the encounters. "Although a juror's professions of impartiality will not always insulate [her] from excusal for cause, they will be accorded a great deal of weight." State v. Singletary, 80 N.J. 55, 64 (1979) (citations omitted). Because the trial judge observes the juror's demeanor, he is "in a position to accurately assess the sincerity and credibility of such statements, and we should therefore pay due deference to his evaluation." Ibid.

Walker also challenges the judge's handling of an incident that occurred during the final charge. Over the course of six non-consecutive days from August 31 to September 14, 2017, the judge issued the final charge to the jury. Before the charge was concluded, on September 12, 2017, four jurors reported to the judge in counsels' presence that they observed a man holding a phone in the jury assembly room who appeared to be taking pictures. One juror specified that the man, who was wearing "a jury tag" different from theirs, "seemed to be [taking] a selfie," but the phone "was in video mode apparently" and as the jurors walked by, their images were "capture[d] . . . in his frame." Upon being questioned by the judge, all four jurors confirmed that nothing about the incident would prevent them from being fair and impartial.

A sheriff's officer investigated the incident at the judge's request. The officer learned that the man "was a juror . . . waiting for jury service," and "[t]here were no pictures of any of the jurors" on his phone. When the judge expressed his intent to tell the jurors the outcome of the investigation and move forward with the trial, all three defense attorneys asked that the four jurors be disqualified, which was tantamount to a mistrial given that there were only thirteen jurors at that point. Fair's attorney also asked the judge to question each juror individually.

Finding that all four jurors "candidly" acknowledged without "hesitation" or "equivocation" that "they could be fair and impartial," the judge denied the requests, and instead told the jurors:

> My understanding is at the end of the luncheon recess, as you were coming on to the elevator . . . there was a gentleman who appeared to be taking photographs.
>
> . . . [T]he sheriff's officer took that phone, went through that phone, there were no photographs on the phone of any of the jurors. It was a gentleman there who was waiting . . . to be picked himself as a juror so he was taking selfies downstairs. Clearly he shouldn't have been, but I just wanted to reassure you that . . . he was a fellow juror and he was not taking photographs of you.

In State v. Tindell, 417 N.J. Super. 530, 564 (App. Div. 2011), "some jurors expressed concern that they may have been photographed in the hallway outside the courtroom." The trial judge took similar measures as the judge here, and we endorsed that approach. There, the judge found "it unnecessary to voir dire the jurors, either individually or en masse." Id. at 562. Instead, the judge "promptly investigated the incident and ascertained the innocuous nature of the event," and thereafter informed the jurors of the outcome of the investigation. Id. at 562, 565. Likewise, here, we are satisfied that the judge's prompt and effective handling of the incident was appropriate.

Finally, Walker challenges the judge's handling of a photograph published on the internet depicting him and Fair in handcuffs, arguing the judge's "denial of [his] request to voir dire the jury . . . deprived [him] of a fair trial."

On the second day of trial, June 7, 2017, all three defense attorneys advised the judge that a photo had been published on the internet by the Asbury Park Press, depicting Fair and Walker in handcuffs. Counsel asked the judge to inquire whether any juror "ha[d] looked at any print or [i]nternet coverage of th[e] case . . . at any point yesterday or today" and also inquire "every morning" whether the jurors had seen any print or internet coverage of the case.

The judge rejected counsels' request. First, the judge described the photograph, stating Fair and Walker "were either coming into or leaving court," "were handcuffed towards the front," and were dressed "in street clothes," "not . . . prison garb." Next, the judge described the process to get to the photograph, explaining that "it was quite a bit of work to find." The judge first visited NJ.com, scrolled down to "[n]ews," then clicked on the link to Monmouth County News, after which the photograph appeared with the fourth story on the page. According to the judge, "it was not, if you will, the splash page of NJ.com." "It was not the splash page of the news section and it was certainly not the splash page of the County section once you finally did get to

Monmouth." The judge also indicated that the photograph had since been removed.

In declining to question the jurors as requested by counsel, the judge recounted the comprehensive cautionary instructions repeatedly given to the jury, forcefully directing them not to read any media coverage of the case, have anyone read any account to them, or perform any outside research about the case, including on the internet. See, e.g., Model Jury Charges (Criminal), "Instructions After Jury is Sworn" (rev. Oct. 15, 2012); Model Jury Charges (Criminal), "Instructions Regarding Juror Research – First Recess" (rev. Oct. 24, 2016). The judge pointed out that the jurors were warned about being "sanctioned for intentionally going out of their way to gather information outside of what was presented in the courtroom."

The judge explained:

> I'm not going to start every day for a trial which is anticipated to go the better part of four months with a question of these jurors to see whether or not they can follow this instruction and every other instruction. I have certainly over the course of my dealings with jurors found them to be candid, honest, and straightforward. If some type of issue comes to their attention, I think we make it clear throughout the course of this case how they can deal with it, bring it to my court officer's attention, and we will deal with it on that basis.

> I am concerned with these type of inquiries and every time we make this type of inquiry we potentially risk the possibility of inadvertently prejudicing the jury and . . . I'm not going to open that up every morning [asking] the question because at some point during the trial somebody is going to get curious, well, why does the judge keep asking these questions, are we missing a whole world of news out there, so I think the instruction that I have been giving is fair, I think the instruction I give certainly with the caution about the potential for sanctions, puts them on notice of how severe this may be.

The judge added "parenthetically," that because Fair's attorney had noted during opening statements that certain State witnesses had cooperated in order "to get out of jail," it was not going to be a surprise that defendants had also been arrested.

Throughout the trial, the judge continued to give the cautionary instruction to the jurors, warning them to avoid media coverage and other outside influences or risk sanction. More than two months later, on August 9, 2017, Fair's counsel asked that the photo published on the internet on June 6, 2017, be marked for identification, and both Fair and Walker then moved for a mistrial based on the judge's failure to inquire whether the jurors had seen the photo. The judge denied the motion for the same reasons stated when he denied defense counsels' request to question the jurors. The judge added that, "at this point," he had read the cautionary instructions "dozens of times," and because

jurors had brought numerous other issues to the court's attention throughout the trial, the judge found no reason to believe the jurors had disregarded the instructions.

"If news organizations publish 'inherently prejudicial information' during the course of a trial, and it is likely that one or more jurors may have been exposed to it, general warnings to jurors to not read trial publicity will be inadequate." Tindell, 417 N.J. Super. at 563 (quoting State v. Harris, 156 N.J. 122, 152 (1998)). "Our Supreme Court has defined 'inherently prejudicial information' as news reports of a confession, significant evidence that has been suppressed or is otherwise ruled inadmissible, important facts that the defendant will dispute at trial, emotionally charged editorials, and prejudicial accounts of a defendant's criminal history." Ibid. (quoting Harris, 156 N.J. at 142-43).

> If the trial judge is satisfied that mid-trial publicity "has the capacity to prejudice a defendant," it should first determine whether there is a realistic possibility that one or more jurors may have been exposed to it. If that possibility exists, the court should voir dire the jurors to determine whether any exposure has occurred.
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> [Id. at 564 (quoting Harris, 156 N.J. at 152).]

In State v. Bey, our Supreme Court stated in assessing whether there is a realistic possibility that the published information may have reached one or

more of the jurors, "[r]elevant considerations include the extent, notoriety, and prominence of the media coverage." 112 N.J. at 86.

> 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.
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> [Id. at 86-87.]

The Court noted that while "[t]he procedure of questioning an impaneled jury when prejudicial publicity threatens the fairness and integrity of a defendant's trial should not be invoked begrudgingly," not every type of "publicity relating to the defendant or the proceedings will automatically require that the jury be polled." Id. at 89. However, "where a timely, properly supported midtrial motion to poll the jury concerning prejudicial publicity is refused, and there is a realistic possibility that information with the capacity to prejudice the defendant may have reached one or more members of the jury, the defendant must be given a new trial." Id. at 91.

Applying these principles, we are satisfied the judge properly denied the motion for a mistrial. We are also convinced the judge acted reasonably when he declined all three defendants' request to conduct individualized questioning

of the jurors when the photograph depicting Walker and Fair in handcuffs appeared on the internet as well as the request to question the jurors every morning thereafter.

First, as described by the judge, the photograph did not qualify as "inherently prejudicial information," given the fact that Walker and Fair were dressed in street clothes, not prison garb, and the jury's likely knowledge that Walker and Fair had been arrested along with the other cooperating co-conspirators. See State v. Sykes, 93 N.J. Super. 90, 94 (App. Div. 1966) (rejecting the "argument that [the defendant] was prejudiced by having been seen by the jury while handcuffed" where the "defendant was [not] manacled at any time during the trial itself," and "[t]he handcuffing took place outside the courtroom and was designed to prevent [the] defendant . . . from attempting to escape"); see also State v. Jones, 130 N.J. Super. 596, 602 (Law Div. 1974) (citing several decisions recognizing "that a defendant is not denied a fair trial and is not entitled to a mistrial solely because he was momentarily and inadvertently seen in handcuffs by jury members"). Next, given that the photo was not prominently displayed, was difficult to access, and had been removed fairly quickly, there was no realistic possibility that the photo may have reached one or more of the jurors.

VII.

In Point VII of Fair's brief and Point VI of Walker's brief, defendants argue the judge's refusal to give the "false in one, false in all" jury charge as requested by their attorneys deprived them of a fair trial. Fair asserts the judge "abused [his] discretion by refusing" to provide the charge because certain key State witnesses who were co-defendants and participants in the criminal events upon which the indictment was predicated admitted "that they had lied to the authorities, and changed their testimonies only after receiving generous plea agreements from the State." According to Walker, although the judge "charge[d] the jury on the credibility of witnesses, and advised that they could accept or reject part or all of [the] witnesses['s] testimony," the judge "never instructed [the jurors] that they could disregard all of a witness's testimony if they believed they testified with intent to deceive" as provided in the "false in one, false in all" jury charge.

"It has been long recognized that the issuance of a false in one, false in all charge rests in the sound discretion of the trial judge." State v. Young, 448 N.J. Super. 206, 228 (App. Div. 2017). "[A] trial judge in his discretion may give the charge in any situation in which he reasonably believes a jury may find a basis for its application." State v. Ernst, 32 N.J. 567, 583-84 (1960). However,

the charge "'is not a mandatory rule of evidence, but rather a presumable inference that a jury . . . may or may not draw when convinced that an attempt has been made to mislead them by a witness in some material respect.'" State v. Fleckenstein, 60 N.J. Super. 399, 408 (App. Div. 1960) (quoting State v. Guida, 118 N.J.L. 289, 297 (Sup. Ct. 1937)). "[I]t merely informs the jury of a truth of character which common experience has taught all of them long before they become jurymen." Ernst, 32 N.J. at 584 (quoting 3 Wigmore on Evidence § 1010 at 678 (3d ed. 1940)); see also Capell v. Capell, 358 N.J. Super. 107, 111 n.1 (App. Div. 2003) ("This rule is simply one of many aids which the trier-of-fact may utilize to evaluate the credibility of a witness.").

Fair's counsel argued the "false in one, false in all" jury charge applied to four witnesses: robbery victim Humphrey Mitchell, and cooperating co-conspirators Williams, Reid, and Pedro Rosario. Fair's counsel asserted all four individuals gave incomplete and contradictory statements to police. Specifically, Mitchell admitted that when he initially reported to police that he had been robbed at gunpoint by Fair and Walker, he did not mention that he was attempting to purchase cocaine from them and omitted other details. He explained that at the time of the incident he was on parole in New York and was not supposed to be in New Jersey. Williams admitted she initially lied to the

police about her participation with Fair in a burglary because she did not want to go to jail. Reid denied that he had initially lied to the police but admitted that he did not tell them everything. He also did not want to give a videotaped statement because he did not want the video to end up on the street. Rosario admitted he did not initially tell the authorities everything because he was scared and did not want to implicate his fellow gang members.

Finding that "the general model jury charge for credibility" sufficiently covered the "discrepancies or inconsistencies" in the witnesses' testimony, the judge refused to give the "false in one, false in all" jury charge. We discern no legal or factual basis to overturn the judge's ruling. Indeed, in the beginning of the trial, the judge instructed the jury on the effect of "[i]nconsistencies or discrepancies" in assessing credibility, including "whether the discrepancy results from an innocent error or willful falsehood." See Model Jury Charges (Criminal), "Instructions After Jury is Sworn" (rev. Oct. 15, 2012). At the end of the trial, the judge provided comprehensive instructions on determining whether a witness is credible, including "whether the witness testified with intent to deceive you." In that regard, the judge instructed the jurors that "[a]s the judges of the facts," they must "weigh the testimony of each witness" and determine whether to "accept all of it, a portion of it or none of it." See Model

Jury Charges (Criminal), "Criminal Final Charge" (rev. May 12, 2014). Additionally, the judge instructed the jury how the witnesses' prior inconsistent statements, prior convictions, and cooperation/plea agreements could be considered in assessing witness credibility. See Model Jury Charges (Criminal), "Testimony of a Cooperating Co-Defendant or Witness" (rev. Feb. 6, 2006); Model Jury Charges (Criminal), "Credibility – Prior Conviction of a Witness" (rev. Feb. 24, 2003); Model Jury Charges (Criminal), "Prior Contradictory Statements of Witnesses (Not Defendant)" (approved May 23, 1994).

These principles convey the same principles contained in the "false in one, false in all" jury charge, which provides:

> If you believe that any witness or party willfully or knowingly testified falsely to any material facts in the case, with intent to deceive you, you may give such weight to his or her testimony as you may deem it is entitled. You may believe some of it, or you may, in your discretion, disregard all of it.
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> [Model Jury Charges (Criminal), "False in One – False in All" (rev. Jan. 14, 2013).]

"[P]ortions of a charge alleged to be erroneous cannot be dealt with in isolation . . . ." State v. Wilbely, 63 N.J. 420, 422 (1973). "[T]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." State v. Jackmon, 305

N.J. Super. 274, 299 (App. Div.1997) (quoting State v. Sette, 259 N.J. Super. 156, 190-91 (App. Div. 1992)). Here, we are convinced from a reading of the charge as a whole that there was no abuse of discretion in the judge's refusal to give the "false in one, false in all" jury charge, and, if there was an error, it was harmless. See State v. Baum, 224 N.J. 147, 160 (2016) ("'The key to finding harmless error in [the jury charge] is the isolated nature of the transgression and the fact that a correct definition of the law . . . is found elsewhere in the court's instructions.'" (quoting Jackmon, 305 N.J. Super. at 299)).

VIII.

In Point III of his brief, Walker argues the judge erred by permitting the State to "repeatedly play[] intercepted phone calls involving [him] and others during the questioning of various witnesses" and "during its summation." He asserts that by allowing the calls to be played during the State's summation, the judge "failed to place reasonable limits on the State's use of the recordings." He contends that the repetition was "cumulative" and "unduly prejudic[ial]," in violation of N.J.R.E. 403.

"[T]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Scott, 229 N.J. 469, 479 (2017) (alteration in original) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369,

383-84 (2010)). Under N.J.R.E. 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of . . . [u]ndue prejudice, confusion of issues, or misleading the jury; or . . . [u]ndue delay, waste of time, or needless presentation of cumulative evidence."

At trial, the State played several intercepted phone calls multiple times during different witnesses' testimony to glean the different perspectives on the calls offered by different witnesses. Because Walker's challenge to the repeated playing of the phone calls is made for the first time on appeal and was not presented to the trial judge, we review the assertion for plain error. "Under that standard, an appellate court can reverse only if it finds that the error was 'clearly capable of producing an unjust result.'" State v. Pressley, 232 N.J. 587, 593 (2018) (quoting R. 2:10-2).

Judged by that standard, we are satisfied there was no error, much less plain error. This was a lengthy trial, with numerous charges, witnesses, and intercepted phone calls. Under the circumstances, playing particularly relevant phone calls more than once, during the testimony of different witnesses, did not result in undue prejudice, delay, waste of time, or needless presentation of cumulative evidence. Moreover, Walker's attorney's failure to object is an indication that counsel did not perceive any prejudice in the repeated playing of

the phone calls. See State v. Ross, 229 N.J. 389, 415 (2017) ("We view counsel's failure to object as an indication that counsel perceived no prejudice in the court's questioning.").

Turning to Walker's challenge to the State's summation, prosecutors are permitted to "sum up cases with force and vigor, and are afforded considerable leeway so long as their comments are 'reasonably related to the scope of the evidence presented.'" Pressley, 232 N.J. at 593 (quoting State v. Timmendequas, 161 N.J. 515, 587 (1999)). "To warrant reversal on appeal, the prosecutor's misconduct must be 'clearly and unmistakably improper' and 'so egregious' that it deprived defendant of the 'right to have a jury fairly evaluate the merits of his defense.'" Id. at 593-94 (quoting State v. Wakefield, 190 N.J. 397, 437-38 (2007)).

In State v. Muhammad, 359 N.J. Super. 361, 378-79 (App. Div. 2003), we held that it is within the trial court's discretion whether to permit a party to use videotape playback of trial testimony during summation. However, we cautioned that "[c]are must be taken that the video excerpts shown during summation are not so lengthy as to constitute a second trial emphasizing only one litigant's side of the case and that the edited portions do not distort or misstate the evidence." Id. at 379. We stressed that "[u]se of the excerpts may

only constitute an aid incidental to the argument of counsel" rather than "an end in itself." Id. at 380. Further, "[i]n criminal trials, where much of the evidence is usually produced by the State, special care must be taken to assure that the State does not use this technique as a means of 'piling on' by undue repetition of its live testimony." Id. at 381.

We outlined the procedure to be followed when utilizing the technique as follows:

> An attorney who intends to use this technique should so inform the court and all other counsel at the earliest possible time, certainly before any party sums up. If not sooner, the intent should be disclosed at the charge conference. A N.J.R.E. 104(a) type hearing should be conducted in all cases, unless the proponent has identified the excerpts to be played and opposing counsel, with knowledge of those excerpts, expressly waives a hearing with the court's approval.
>
> [Id. at 380.]

We explained that, in their broad discretion, trial judges "may permit some or all of the proposed video playbacks, or they may reject their use entirely." Id. at 381. The judges' "determination is guided in each case by balancing the benefit to the proponent against the possible prejudice to the opposing party" and "[r]ejection may . . . be based on undue consumption of time, inability to avoid delay between summations, potential to confuse or mislead the jury, or

any other appropriate consideration." Id. at 381-82. We also noted "[s]pecial caution should be exercised to avoid playback of testimony of an inflammatory nature." Id. at 382.

Additionally,

> [t]he judge should give a cautionary instruction, preferably at the time the video is played during summation and again in the final charge. The judge should inform the jury that attorneys are permitted to show the video to assist in displaying what they consider significant testimony, but it is the jury's function and obligation to determine the facts based on its recollection of all of the evidence, including both direct and cross-examination of all witnesses, and jurors should not place any extra emphasis on portions of testimony played back.
>
> [Id. at 382.]

Here, prior to summations, the prosecutor requested the judge's permission to play some of the intercepted phone calls that were admitted at trial during his summation. At a N.J.R.E. 104(a) type hearing, the prosecutor specified that he intended to play ninety-one of the approximately "1,200" intercepted calls played during the trial, about thirty of which had been played twice during the trial. Fair objected to the use of "[thirty] or so calls" that had repeatedly been played during the trial as unduly repetitious and prejudicial, and Walker joined in the objection. The prosecutor countered that the thirty calls

were highly relevant and short in duration, most of them lasting "between [ten] and [forty] seconds." He argued that replaying the calls after such a lengthy trial was not unduly repetitive because it was not "reasonable" to "expect [the] jury to remember all of them at this point."

The judge rejected Fair's and Walker's contentions that the repetition was unduly prejudicial or cumulative. Relying on Muhammad, the judge permitted the prosecutor's use of the recorded phone calls during summation, subject to a limiting instruction. Thus, during the prosecutor's summation, the judge instructed the jury:

> Ladies and gentlemen, when we started this case, I explained that you are the judges of the facts. You are the sole and exclusive judges of the evidence, credibility of the witnesses, and the weight to be attached to the testimony of each witness. Regardless of what counsel or I may say recalling the evidence in this case, your recollection of the evidence is what should guide you as judges of the facts.
>
> Summation of counsel are not evidence and must not be treated as evidence. Although the attorneys may point out what they think is important in this case, you must rely solely on your understanding and recollection of the evidence that was admitted during the trial.
>
> Here the State has chosen to highlight excerpts of recorded phone calls and videos that you heard or viewed during the trial. Attorneys are permitted to play excerpts of phone calls and videos during summation to assist in conveying what they consider significant

> evidence in the case. It is, however, solely the jury's function and obligation to determine the facts based on its recollection of all the evidence, including both direct and cross-examination of all witnesses.
>
> You must not place any extra emphasis on the excerpts of recorded phone calls or videos played for you during summation. Attorneys are permitted to point out to you what they think is important in the case, including certain recorded communications. However, you must rely solely upon your understanding and recollection of all of the evidence that was admitted during the trial.

During the final charge, the judge again instructed the jury that counsel's comments were not evidence, and the jurors were the sole judges of the facts.

We discern no abuse of discretion in the judge's ruling. While we acknowledge that the prosecutor did not replay witness testimony from the trial, we view the guidance offered in Muhammad as instructive nonetheless. Both the prosecutor and the judge complied with the safeguards set forth in Muhammad. The prosecutor's use of the recordings served as an aid to his argument, tying the evidence to the crimes charged. Considering the length of the trial, the number of witnesses, and the short duration of the calls, we discern no undue prejudice to Walker from the replaying of the calls or "'piling on' by undue repetition." Id. at 381. The prosecutor's use of the technique did not misstate or distort the evidence, and there is no indication that the jury was

confused. Further, the cautionary instructions provided adequate guidance to the jury in performing its role.

IX.

In Point V of his brief, Walker argues the judge erred by admitting certain intercepted telephone calls involving individuals who "did not testify at trial," including co-defendants Jackson, Ayres Gray, and Imere Meredith, in violation of "his constitutional right" to confront witnesses against him. At trial, Walker did not object.

"The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution confer on a defendant the right to confront the witnesses against him." State v. Williams, 219 N.J. 89, 92 (2014). "The Confrontation Clause 'prohibit[s] the use of out-of-court testimonial hearsay, untested by cross-examination, as a substitute for in-court testimony.'" Id. at 98 (alteration in original) (quoting State ex rel. J.A., 195 N.J. 324, 342 (2008)). The right to confront witnesses "gives a defendant the opportunity to bar testimony in violation of the Confrontation Clause and the opportunity to cross-examine a witness." Id. at 92.

While a "[d]efendant ha[s] 'the burden of raising his Confrontation Clause objection,'" id. at 101 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305,

327 (2009)), a defendant "is not obliged to exercise his confrontation right if doing so will harm his cause," id. at 92-93. Indeed, "[t]he right of confrontation, like other constitutional rights, may be waived by the accused." Id. at 98. "Defense counsel, many times as a matter of trial strategy, will refrain from objecting to hearsay that may inure to the advantage of the defendant." Id. at 99. Thus, "[a]s part of a reasonable defense strategy, [the defendant] may waive his right of confrontation and choose not to object to testimony or choose not to cross-examine a witness." Id. at 93.

"Because counsel and the defendant know their case and their defenses, they are in the best position to make the tactical decision whether to raise a Confrontation Clause objection." Id. at 99. "Therefore, generally, a defendant must attempt to exercise his confrontation right and object when necessary, if he wishes later to claim that he was denied that right," because by "fail[ing] to raise or preserve [a] confrontation claim," a defendant waives his Confrontation Clause arguments. Id. at 93, 101.

In Williams, the defendant appealed from a murder conviction, claiming that "his confrontation right was violated when a medical examiner, who did not conduct the victim's autopsy, testified about both his own and the absent medical examiner's findings." Id. at 93.

> At trial, defendant raised no objection to the testimony of the medical examiner presented by the State. Indeed, he cross-examined the medical examiner, eliciting information seemingly consistent with his defense. On appeal, for the first time, defendant raised a Confrontation Clause claim, asserting that the medical examiner's testimony was constitutionally barred because his testimony did not give a first-hand account of how the autopsy was performed and merely passed through the findings of the absent medical examiner.
>
> [Ibid.]

In upholding the defendant's conviction, the Court declined to reach the merits, holding:

> In the circumstances here, defendant's failure to object on confrontation grounds and his decision to cross-examine the medical examiner constitute a waiver of his confrontation right. Given his knowledge of the strengths and weaknesses of his case, defendant was in the best position to decide whether objecting or playing through best advanced his strategic trial interests. We will not second-guess that decision on the present record.
>
> [Ibid.]

Likewise, here, because Walker failed to object to the admission of the intercepted phone calls at trial, we decline to address the merits of his Confrontation Clause claim on appeal. We acknowledge that Fair's counsel objected to the admission of out-of-court statements made by non-testifying witnesses. Fair's objection related to phone calls between Fair and alleged co-

conspirators, including non-testifying co-defendants Jackson, Gray, and Meredith. Those calls related to racketeering and other conspiracies. The judge overruled the objections.

Fair renewed the objections in his motion for judgment of acquittal on certain counts of the indictment. The judge denied the motion, finding that the wiretapped phone calls were admissible under the co-conspirator exception to the hearsay rule, N.J.R.E. 803(b)(5). See State v. Phelps, 96 N.J. 500, 508 (1984) ("[W]here two or more persons are alleged to have conspired to commit a crime or a civil wrong, any statement made by one during the course of and in furtherance of the conspiracy is admissible in evidence against any other member of the conspiracy."); State v. Savage, 172 N.J. 374, 402 (2002) ("That the co-conspirator exception does not offend the Sixth Amendment's guarantee of a defendant's right to confront the witnesses against him is well-established.").

Instead of objecting to the admission of intercepted phone calls involving Fair and others, Walker forfeited his right by silence, choosing instead to disassociate himself from the criminal activities evidenced in the calls. The strategy was partially successful as Walker was acquitted of three of the four

drug distribution conspiracy counts with which he was charged, counts 85, 167, and 202.[20]

This was not an "instance[] where the failure to object [was] so patently unreasonable and so clearly erroneous that no rational counsel acting within the wide range of professional norms would pursue such a course." Williams, 219 N.J. at 99. Had that been the case, we would be inclined to review Walker's Confrontation Clause argument under the plain error standard of review. See R. 2:10-2; cf. United States v. Moon, 512 F.3d 359, 361 (7th Cir. 2008) ("That it may be to defendants' advantage to accept the hearsay version of evidence makes it problematic to entertain a Crawford claim via the plain-error [standard] . . . ."). However, "[g]iven his knowledge of the strengths and weaknesses of his case," Walker "was in the best position to decide whether objecting or playing through best advanced his strategic trial interests," and "[w]e will not second-guess that decision on the present record." Williams, 219 N.J. at 93.

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[20] In each of those counts, Walker was convicted of the lesser included offense of conspiracy to possess CDS, specifically, counts 85 (cocaine), 167 (heroin), and 202 (methylone/Molly). During the trial, Detective Finkelstein testified that on October 27, 2013, when several small bags of crack cocaine and a quantity of marijuana were found in Walker's apartment, Walker admitted he possessed the drugs for his own personal use and exonerated the other occupants of the apartment.

Moreover, out of approximately 1,200 intercepted phone calls played at trial, in his merits brief, Walker has not identified which specific calls he claims should have been excluded. Walker "ignore[s] the fact that it is [his] responsibility to refer us to specific parts of the record to support [his] argument." Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 474 (App. Div. 2008). "Our rules clearly impose upon the attorneys for the parties to the appeal the absolute duty to make unnecessary an independent examination of the record by the court, R. 2:6-9, even though the court inevitably undertakes to review the record for itself." State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977).

X.

In Point VIII of his brief, Walker argues the judge erroneously denied his motion for a new trial. Specifically, he argues the judge should have dismissed the convictions on counts 1, 6, 7, 9, 33, 85, 167, 202, and 208. In his pro se supplemental brief, Walker contends the judge erred by denying his motion to dismiss the convictions on counts two and seven.

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295,

306 (App. Div. 2016) (alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)). Under Rule 3:20-1, the trial judge

> may grant the defendant a new trial if required in the interest of justice. . . . The trial judge shall not, however, set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law.

Thus, a new trial motion "is decided in the court's discretion in light of the credible evidence and with deference to the trial judge's feel for the case and observation of witnesses." Terrell, 452 N.J. Super. at 268-69.

We review a trial judge's ruling on a motion for a new trial "under an extraordinarily lenient standard of review." Jackson, 211 N.J. at 414. Specifically, under Rule 2:10-1, the trial judge's determination on "whether a jury verdict was against the weight of the evidence . . . shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." In that regard, "[t]here is no 'miscarriage of justice' when 'any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present.'" Jackson, 211 N.J. at 413-14 (quoting Afanador, 134 N.J. at 178). "A reviewing court should not disturb the findings of a jury merely

because it might have found otherwise upon the same evidence." State v. Johnson, 203 N.J. Super. 127, 134 (App. Div. 1985).

Furthermore, "[i]n our review, we do not attempt to reconcile the verdicts on the different counts nor do we speculate whether verdicts resulted from 'jury lenity, mistake, or compromise,' and even inconsistent verdicts." Terrell, 452 N.J. Super. at 269 (quoting State v. Muhammad, 182 N.J. 551, 578 (2005)). For our purposes, we "consider[] the evidence presented in support of each count as though it were presented in a separate indictment" and will uphold a jury verdict "where there is sufficient evidence to support the conviction on that charge." Ibid.

Following the verdict, Walker along with the other defendants moved for a new trial.[21] Walker asserted the verdict on every count of which he was convicted was against the weight of the evidence. Following oral argument, on

[21] At the close of the State's case, all three defendants had moved for judgment of acquittal pursuant to Rule 3:18-1, requiring "the entry of a judgment of acquittal . . . if the evidence is insufficient to warrant a conviction." See State v. Reyes, 50 N.J. 454, 458-59 (1967). The judge denied the motions on most of the challenged counts. "A motion made at the close of the State's case is controlled by a different standard than a motion for a new trial." Johnson, 203 N.J. Super. at 133. On appeal, Walker does not challenge the judge's ruling on the motion for judgment of acquittal.

December 18, 2017, the judge entered an order with an accompanying written decision denying all three defendants' motions.

On appeal, Walker argues the judge erred in denying his new trial motion based on the sufficiency of the evidence pertaining to counts 1 (racketeering conspiracy), 2 (conspiracy to commit robbery on September 25, 2013), 6 (conspiracy to commit robbery on December 11, 2013), 7 (attempted armed robbery on December 11, 2013), 9 (unlawful possession of a handgun on December 11, 2013), 33 (fencing), 85 (conspiracy to possess cocaine), 167 (conspiracy to possess heroin), 202 (conspiracy to possess methylone/molly), and 208 (conspiracy to distribute oxycodone).

N.J.S.A. 2C:5-2(a) defines conspiracy as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

"[T]o be guilty of conspiracy, the conspirators do not have to know each other, nor need they have personal knowledge of the outcome of the plan, and they do not have to join in the common purpose at the same time." Ball, 141 N.J. at 178-79 (citation omitted). If a person "knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime." N.J.S.A. 2C:5-2(b). Moreover, an individual will be guilty of the predicate 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). An individual will be held legally accountable for another's actions when "[h]e is engaged in a conspiracy with such other person." N.J.S.A. 2C:2-6(b)(4). Thus, if two individuals had an agreement to commit a crime, and one individual carries out the crime, the other individual will additionally be held liable.

However,

> [n]o person may be convicted of conspiracy to commit a crime other than a crime of the first or second degree or distribution or possession with intent to distribute a controlled dangerous substance . . . as defined in chapter 35 of this title, unless an overt act in pursuance of such conspiracy is proved to have been done by him or by a person with whom he conspired.

[N.J.S.A. 2C:5-2(d)].

"Actual commission of the crime is not a prerequisite to conspirator liability." State v. Samuels, 189 N.J. 236, 245-46 (2007). "Intervention is permitted to prevent completion of a planned crime and facilitating prosecutions that strike 'against the special dangers of group criminal activity.'" Id. at 246 (quoting State v. Hardison, 99 N.J. 379, 385 (1985)). Further, "[b]ecause the conduct and words of co-conspirators is generally shrouded in 'silence, furtiveness and secrecy,' the conspiracy may be proven circumstantially." Ibid. (quoting Phelps, 96 N.J. at 509).

Under N.J.S.A. 2C:5-1(a), a person is guilty of an attempt to commit a crime if "acting with the kind of culpability otherwise required for commission of the crime," he:

> (1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;
>
> (2) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part; or
>
> (3) Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Conduct constitutes a substantial step if "it is strongly corroborative of the actor's criminal purpose." N.J.S.A. 2C:5-1(b).

"The RICO Act, generally, makes it a crime for a person to be employed by or associated with 'an enterprise' and to engage or participate or become involved in the business of the enterprise 'through a pattern of racketeering activity.'" Ball, 141 N.J. at 151 (quoting N.J.S.A. 2C:41-2(b) and 2(c)). "The Act also makes it a crime for a person to conspire to engage in such conduct." Ibid. (citing N.J.S.A. 2C:41-2(d)). "The RICO conspiracy proscribed by N.J.S.A. 2C:41-2d consists of an agreement to violate the substantive provisions of the RICO Act." Id. at 176. Walker was prosecuted and convicted under N.J.S.A. 2C:41-2(d).

"[U]nder the RICO Act 'enterprise' is an element separate from the 'pattern of racketeering activity,'" and "the State must prove the existence of both in order to establish a RICO violation." Id. at 161-62. "The enterprise is the association, and the pattern of racketeering activity consists of the predicate incidents." Id. at 162. "Nevertheless, evidence that serves to establish such an enterprise need not be distinct or different from the proof that establishes the pattern of racketeering activity." Ibid.

An enterprise is defined as: "any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities." N.J.S.A. 2C:41-1(c) (emphasis added). The enterprise

> must have an "organization." The organization of an enterprise need not feature an ascertainable structure or a structure with a particular configuration. The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary when a group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the "enterprise" because when a group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an "organization."
>
> This understanding of the kind of organization that establishes an "enterprise" is different from, but not necessarily inconsistent with, that understanding of "enterprise" premised on an "ascertainable structure." Thus, evidence showing an ascertainable structure will support the inference that the group engaged in carefully planned and highly coordinated criminal activity, and therefore will support the conclusion that an "enterprise" existed. Apart from an organization's structure as such, however, the focus of the evidence must be on the number of people involved and their knowledge of the objectives of their association, how

> the participants associated with each other, whether the participants each performed discrete roles in carrying out the scheme, the level of planning involved, how decisions were made, the coordination involved in implementing decisions, and how frequently the group engaged in incidents or committed acts of racketeering activity, and the length of time between them.
>
> [Ball, 141 N.J. at 162-63.]

"[T]he New Jersey statute does not contain a requirement that in order 'to conduct or participate in an enterprise,' a defendant must be found to exercise responsibilities of 'operation or management.'" Id. at 175. Rather, "under N.J.S.A. 2C:41-2c, a person is 'employed by or associated with an enterprise' if he or she has a position or a functional connection with the enterprise that enables him or her to engage or participate directly or indirectly in the affairs of the enterprise.'" Ibid. (quoting N.J.S.A. 2C:41-2(c)). Thus,

> [p]articipatory conduct or activities . . . may be found in acts that are below the managerial or supervisory level, and do not exert control or direction over the affairs of the enterprise, as long as the actor, directly or indirectly, knowingly seeks to carry out, assist, or further the operations of the enterprise or otherwise seeks to implement or execute managerial or supervisory decisions.
>
> [Ibid.]

"Racketeering activity" consists of specified crimes, including "murder"; "robbery"; "burglary"; "theft"; "unlawful . . . use or transfer of firearms"; "all

crimes involving illegal distribution of a . . . [CDS] . . . except possession of less than one ounce of marijuana"; and "violation of N.J.S.A. 2C:12-1[, assault,] requiring purposeful or knowing conduct." N.J.S.A. 2C:41-1(a). A "[p]attern of racketeering activity" requires:

> (1) Engaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years (excluding any period of imprisonment) after a prior incident of racketeering activity; and
>
> (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.
>
> [N.J.S.A. 2C:41-1(d).]

To establish a pattern of racketeering activity, there must be more than a string of disconnected, isolated, or sporadic offenses. Instead, "some degree of continuity, or threat of continuity, is required and is inherent in the 'relatedness' element of the 'pattern of racketeering activity.'" Ball, 141 N.J. at 168.

Unlike conspiracy in general,

> a RICO conspiracy has two separate elements: an agreement to violate RICO and the existence of an enterprise. The agreement to violate RICO itself has two aspects. One involves the agreement proper, that

> is, an agreement to conduct or participate in the conduct of the affairs of the enterprise. The other involves an agreement to the commission of at least two predicate acts. If either agreement is lacking, the defendant has not embraced the objective of the conspiracy--the substantive violation of the RICO Act--that is required for any conspiracy conviction under classic conspiracy law.
>
> [Id. at 176 (citing United States v. Neapolitan, 791 F.2d 489, 494-500 (7th Cir. 1986)).]

Regarding the nature of the agreement required of a RICO conspirator, "the level of awareness of a defendant need not be extensive." Ibid. While "[a] defendant must have some minimal knowledge of the extent of [the] enterprise," he "need not know the identities of all the conspirators, nor . . . all the details of the enterprise." Ibid. "It is sufficient if a defendant knows 'the general nature of the enterprise and know[s] that the enterprise extends beyond his individual role.'" Id. at 176 (alteration in original) (quoting United States v. Eufrasio, 935 F.2d 553, 577 n.29 (3d Cir.1991)).

"Moreover, '[f]or purposes of a RICO conspiracy, it is irrelevant whether each defendant participated in the enterprise's affairs through different and unrelated crimes, so long as the jury may reasonably infer that each crime was intended to further the enterprise's affairs.'" Id. at 180 (alteration in original) (quoting Ball, 268 N.J. Super. at 110). Further, "consistent with the Code

definition of conspiracy, N.J.S.A. 2C:5-2a," a defendant need not agree to personally "commit . . . at least two predicate acts of racketeering." Ibid.

N.J.S.A. 2C:15-1 defines robbery as follows:

> a. . . . A person is guilty of robbery if, in the course of committing a theft, he:
>
> (1) Inflicts bodily injury or uses force upon another; or
>
> (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
>
> (3) Commits or threatens immediately to commit any crime of the first or second degree.
>
> An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.
>
> b. . . . Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

N.J.S.A. 2C:39-5(b)(1) defines unlawful possession of a handgun as follows: "Any person who knowingly has in his possession any handgun . . . without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree."

N.J.S.A. 2C:20-7.1(b)(1) defines fencing, in pertinent part, as follows: "A person is guilty of dealing in stolen property if he traffics in, or initiates, organizes, plans, finances, directs, manages or supervises trafficking in stolen property." (emphases added).

N.J.S.A. 2C:35-5(a)(1) provides it is "unlawful for any person knowingly or purposely: . . . [t]o manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance." Under N.J.S.A. 2C:35-10(a)(1), it is a third-degree crime "for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog," classified in Schedule I, II, III, or IV, of the Code "unless the substance was obtained directly, or pursuant to a valid prescription or order from a practitioner."

In count one, Walker was found guilty of racketeering conspiracy with "the pattern of racketeering activity" involving "crime[s] of violence," specifically "attempted murder," "robbery," "burglary," "the use of firearms," or "conspiracies or attempts to commit such offenses." Walker argues he could not be found guilty of racketeering conspiracy because "the State never established

that [he] was employed by an 'enterprise' which had an organization"[22] and "[t]here was no nexus proven . . . to establish a pattern of racketeering activity." On the contrary, the proofs adduced at trial showed an enterprise with an organization in which Fair served as a leader and directed associates, including Walker, to commit various crimes, establishing a pattern of racketeering activity. Additionally, there was substantial cooperation amongst associates particularly in relation to drug distribution and gun possession related offenses.

In denying the new trial motion, the judge found sufficient evidence to support all the elements of racketeering conspiracy, including an enterprise and pattern of racketeering activity. The judge explained:

> In this case, [Walker] was convicted of several criminal activities including attempted armed robbery, possession of weapons, shoplifting, fencing, aggravated assault, and conspiracy to distribute CDS. The State proved over [twenty] criminal counts beyond a reasonable doubt that were related to the mission of the enterprise. Intercepted phone calls played throughout the trial by the State demonstrated the relatedness of the crimes and co-conspirators. Based on these facts and witness testimony a jury could find [Walker] guilty beyond a reasonable doubt.

In count two, Walker was found guilty of conspiracy to commit armed robbery related to the September 25, 2013 robbery of Mitchell at the Centerfolds

[22] In the trial court, Walker did not dispute that an enterprise existed.

Club in Howell. According to Mitchell, he went to the Centerfolds with his girlfriend where he encountered Fair and inquired where he could purchase marijuana or cocaine. After exchanging phone numbers, the two later communicated by phone and met outside the club where Mitchell got into a van with Fair. Once inside the van, Walker put a gun to Mitchell's head. Fair took his watch and demanded money. Mitchell called his girlfriend who was inside the club and directed her to bring him $700, which Fair took before letting Mitchell out of the van.

Responding police officers obtained surveillance video from Centerfolds, which was shown to the jury, and identified the phone number Mitchell had called as belonging to Fair. Additionally, Fair's cell phone records from that night indicated communications with Walker and Mitchell, and incriminating cell tower data placed Fair's cell phone in the area of Centerfolds. Fair also admitted committing the robbery in discussions with Reid and Williams, and Williams testified that Fair also implicated Walker in the robbery. Further, nine days after the robbery, when Asbury Park police officers conducted a motor vehicle stop, Fair and Walker were passengers in the van used in the robbery.

Walker was found not guilty of the actual armed robbery and argues there was insufficient evidence to support the conviction for conspiracy to commit the

robbery because the record did not establish that he agreed to participate. However, the conviction was supported by Fair's cell phone records, incriminating cell-site location data, and the testimony of Mitchell and Williams. "In our review, we do not attempt to reconcile the verdicts on the different counts nor do we speculate whether verdicts resulted from 'jury lenity, mistake, or compromise,' and even inconsistent verdicts." Terrell, 452 N.J. Super. at 269 (quoting Muhammad, 182 N.J. at 578).

Walker was found guilty of conspiracy to commit armed robbery, attempted armed robbery, and unlawful possession of a handgun in counts six, seven, and nine, respectively, pertaining to a December 11, 2013 incident at Mac Records in Asbury Park. On December 11, 2013, the same day as the aborted shooting of Barnes at Mac Records, Fair had phone conversations with Walker and instructed him to commit an armed robbery at Mac Records. Cell tower data placed both defendants' phones in the area at the time, and Williams testified that she overheard Fair planning the robbery.

Walker argues he could not be found guilty of counts six, seven, and nine, because they were supported only by a single phone call between himself and Fair, without any corroborating evidence or "proof that [he] took any step, substantial or otherwise, to commit the alleged crime[s]." In particular, he

asserts that no witness observed him with a weapon or in the vicinity of Mac Records.

In denying the new trial motion, the judge found sufficient evidence to support the convictions, stating:

> The State presented several intercepted phone calls from . . . Fair to . . . Walker indicating that Fair had located a potential robbery victim, who had a "couple hundred" dollars on him. Moreover, during the phone call Fair asked . . . Walker to bring a gun to Mac Records in Asbury Park to commit the crime. Cell tower records establish that Fair drove from the area of Mac Records to . . . Walker's location in Asbury Park Village, and then back to the area of Mac Records.
>
> In addition to the intercepted phone calls, the State presented the testimony of . . . Williams who testified that she was with . . . Fair in the car outside Mac Records on the day of the robbery. She further testified that she was with Fair when he called . . . Walker about the robbery. Fair dropped her and her daughter off in order to pick-up . . . Walker so the crime could be committed. The State additionally presented evidence from an intercepted phone call between Fair and . . . Walker, where Fair called off the robbery because the intended victim was "looking" presumably in the direction of . . . Walker.
>
> In this case, there was sufficient evidence presented to the jury in order to prove that an attempted robbery occurred outside Mac Records. Fair and . . . Walker took a substantial step to commit the robbery when . . . Walker started walking towards the intended victim with a gun. The only reason the plan did not move forward was because Fair, as the lookout, said

> that the intended victim was "looking" at [Walker]. Based on these facts and witness testimony a jury could find [Walker] guilty beyond a reasonable doubt.

In count thirty-three, Walker was found guilty of fencing property valued over $500. The trial evidence showed that Fair and Walker were involved in an organized retail theft operation during which Fair received orders for specific items, including orders from a pawn shop by the name of Cash It In. Fair then relayed the orders to others, and groups of individuals, sometimes including Fair and Walker, would visit the targeted stores. Some individuals would distract the stores' employees while others carried out the thefts. The stolen items would then be sold to Cash It In, or returned in exchange for gift cards that were then sold to Cash It In.

Walker argues he could not be found guilty of fencing because "[h]e was not a dealer in stolen property but at best sold items to the fence." However, there was specific evidence tying Walker to the fencing of stolen items at Cash It In and receiving the proceeds of those sales. In denying the new trial motion, the judge found overwhelming evidence implicating Walker in the shoplifting and fencing of shoplifted items, including store surveillance video, intercepted phone calls between Fair and Walker, and a receipt from Cash It In, evidencing Walker's having sold stolen toothbrushes.

Walker was found guilty of conspiracy to possess CDS in counts 85 (cocaine), 167 (heroin), and 202 (methylone/Molly), and conspiracy to distribute CDS in count 208 (oxycodone). He argues there was insufficient evidence to support the convictions because Finkelstein "admitted there was no evidence that . . . Walker ever sold drugs to a third person." However, in denying the new trial motion, regarding the possession conspiracy, the judge pointed to Walker's admission that he possessed CDS for personal use. Additionally, there was testimony that both Fair and Walker sold cocaine and heroin.

As to the distribution conspiracy, the judge stated:

> There was enough evidence presented at trial for a jury to find . . . Walker committed the crime of distribution of oxycodone beyond a reasonable doubt. The State presented evidence of intercepted phone calls between . . . Walker and . . . Fair discussing the distribution of oxycodone. There is adequate evidence to support a finding of an agreement between . . . Walker and other co-conspirators of the enterprise to distribution of oxycodone. Thus, the evidence supports the jury's verdict and . . . Walker's motion for a new trial should fail. Based on these facts and witness testimony a jury could find [Walker] guilty beyond a reasonable doubt. There was no manifest denial of justice under the law and, therefore, the motion for a new trial should be denied.

The judge's analysis of the sufficiency of the evidence is supported by the record, and, given our lenient standard of review, we see no basis to interfere with the judge's decision on appeal.

XI.

In Point X of his brief, Walker argues "the aggregate of errors committed during the course of th[e] case deprived [him] of a fair trial."

Our Supreme Court has recognized "that even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008). Because "[a] defendant is entitled to a fair trial but not a perfect one," Wakefield, 190 N.J. at 537 (quoting State v. R.B., 183 N.J. 308, 334 (2005)), "[i]f a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair," State v. Weaver, 219 N.J. 131, 155 (2014).

Here, we conclude there were no reversible errors either alone or combined. Thus, defendant's cumulative error argument must also fail. While not perfect, we are satisfied Walker's trial was fair.

XII.

In Points II and III of his brief, German argues his convictions for hindering apprehension of another (count eighty), computer theft (count eighty-two), unlawful access and disclosure of computer data (count eighty-three), and official misconduct (count eighty-one) were "against the weight of the evidence."

As previously stated, at the close of the State's case, all three defendants moved for judgment of acquittal pursuant to Rule 3:18-1. Following the verdict, all three defendants moved for a new trial pursuant to Rule 3:20-1. On appeal, German appears to be challenging the judge's denial of his motion for judgment of acquittal on count eighty and the denial of his motion for a new trial on counts eighty-one, eighty-two, and eighty-three.

"In assessing the sufficiency of the evidence on an acquittal motion, [an appellate court applies] a de novo standard of review." State v. Williams, 218 N.J. 576, 593-94 (2014). The court "must determine whether, based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt." Id. at 594 (citing Reyes, 50 N.J. at 458-59).

In count eighty, German was charged with third-degree hindering apprehension of another, contrary to N.J.S.A. 2C:29-3(a). The State's theory was that German hindered the apprehension of Fair and Leonard for racketeering and unlawful possession of a handgun, respectively, by warning Leonard about Anglin's arrest on gun possession charges in a car Leonard had jointly occupied and warning Fair that a wiretap was in place. The jury found German guilty, and the judge merged the conviction with his conviction on count seventy-nine for second-degree official misconduct arising from the same conduct. German does not contest the official misconduct conviction.

N.J.S.A. 2C:29-3(a)(4) provides, in pertinent part:

> a. A person commits an offense if, with purpose to hinder the detention, apprehension, investigation, prosecution, conviction or punishment of another for an offense . . . he:
>
> . . . .
>
> (4) Warns the other of impending discovery or apprehension. . . .

German argues he could not be found guilty of violating N.J.S.A. 2C:29-3(a)(4) because "[t]he State failed to present evidence that [he] knew that . . . Fair and . . . Leonard were under investigation for . . . racketeering and unlawful possession of a handgun," and "there [was] insufficient evidence for the jury to

infer that [he] . . . acted with the purpose to avoid their apprehension." The judge rejected these arguments. We do the same.

Contrary to German's argument, the State was not obligated to prove he "had actual personal knowledge" that Fair and Leonard were under investigation for committing racketeering and unlawful gun possession offenses. N.J.S.A. 2C:29-3 encompasses "efforts by a defendant to stay out of the official cross-hairs of law enforcement, without necessarily believing that official action exists or is contemplated." State v. D.A., 191 N.J. 158, 169 (2007). Instead, the State only needed to prove that German "knew such facts either by [his] own observations or by information given to [him] as would reasonably alert someone" that Fair and Leonard "could" or "might" be charged with racketeering and unlawful gun possession offenses. Model Jury Charges (Criminal), "Hindering Apprehension or Prosecution of Another (N.J.S.A. 2C:29-3a)" (rev. May 12, 2014). Further, proof of German's knowledge and purpose could "be determined by inferences from conduct, words or acts." Ibid.; see also State v. Brady, 452 N.J. Super. 143, 161 (App. Div. 2017).

Here, the State proved the requisite level of knowledge and purpose. In particular, the record reflects that German was a police officer in Asbury Park, a small town in which there was a substantial amount of criminal gang activity.

Fair was known to law enforcement as the leader of a subset of the Bloods gang in Asbury Park, and German had a personal relationship with Fair. German also knew that Leonard was a criminal and "not a good dude," and he knew that Leonard was associated with Anglin, an individual who had been arrested while unlawfully possessing a handgun.

In recounting the evidence presented in connection with the hindering apprehension charge, the judge stated:

> On January 29, 2014, police intercepted a call between . . . German and Fair where . . . German warned Fair that Fair and his friends needed to be "careful" because the Prosecutor's Office was conducting wiretaps. . . . German was aware that . . . Fair could be charged with crimes based on the wiretaps. . . . When . . . German warned Fair about the wiretaps he warned Fair of impending discovery, and acted with purpose to hinder the investigation of Fair . . . .
>
> On January 24, 2014[,] police intercepted a phone call that . . . German made to Lenasia Banks. In the phone call [German] could be heard instructing Ms. Banks to tell Leonard that "his boy" . . . Anglin, "just got locked up for that gun.". . . When . . . German told Ms. Banks to pass the information along to Leonard he was alerting Leonard of impending discovery, and acted with purpose to hinder the investigation of Leonard.

Affording the State all favorable and reasonable inferences, these facts support the jury's finding that German violated N.J.S.A. 2C:29-3(a)(4).

German's challenge to his convictions on counts eighty-one (second-degree official misconduct), eighty-two (second-degree computer theft), and eighty-three (second-degree unlawful access and disclosure of computer data), pertains to his February 9, 2014 call to the sheriff's office dispatcher to inquire about outstanding warrants for Fair and subsequent communication of the dispatcher's response to Fair. In denying German's new trial motion, the judge found that the evidence supported German's convictions, stating:

> A reasonable jury could find that . . . German acted beyond the scope of his authorization when he accessed the personal identifying information of Fair. . . . German was not on duty in his official capacity as a police officer when he requested the warrant check[.] . . . [German] lied to the county dispatcher to retrieve the information. . . . German told the dispatcher that the warrant check was regarding a domestic violence incident that . . . German needed in order to finish a report.
>
> Moreover, [German] retrieved this information from a computer and disclosed the results of the data check to Fair, an unauthorized individual. A reasonable jury could therefore find that . . . German was also guilty of wrongful access and disclosure of information.
>
> Additionally, based on . . . German's employment as an Asbury Park police officer, a rational jury could find that . . . German committed this crime knowing that it was an unauthorized act. A jury could find that all the essential elements of the crime were met for counts [eighty-one], [eighty-two], and [eighty-three]. Based

> on these facts and witness testimony a jury could find [German] guilty beyond a reasonable doubt.

At sentencing, the computer theft and unlawful access and disclosure counts were merged into the official misconduct count. On appeal, German principally attacks the computer crimes upon which the official misconduct is predicated, asserting "reversal of the computer crimes mandates the reversal of the official misconduct" conviction.

Pursuant to N.J.S.A. 2C:20-25, "a person is guilty of computer criminal activity," as charged in count eighty-two, if

> the person purposely or knowingly and without authorization, or in excess of authorization:
>
> . . . .
>
> e. Obtains, takes, copies or uses any data, data base, computer program, computer software, personal identifying information, or other information stored in a computer, computer network, computer system, computer equipment or computer storage medium.
>
> [N.J.S.A. 2C:20-25(e).]

Under N.J.S.A. 2C:20-25(g),

> [a] violation of subsection e. is a crime of the third degree, except that it is a crime of the second degree if the data, data base, computer program, computer software, or information . . . is or contains governmental records or other information that is

> protected from disclosure by law, court order or rule of court.
>
> [N.J.S.A. 2C:20-25(g)(2).]

Likewise, pursuant to N.J.S.A. 2C:20-31(b), a person is guilty of second-degree unlawful access and disclosure of computer data, as charged in count eighty-three,

> if the person purposely or knowingly and without authorization, or in excess of authorization, accesses any data, data base, computer, computer storage medium, computer software, computer equipment, computer system or computer network and purposely or knowingly discloses or causes to be disclosed any data, data base, computer software, computer program or other information that is protected from disclosure by any law, court order or rule of court.

N.J.S.A. 2C:20-23(a) defines "[a]ccess" as "to instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer storage medium, computer system, or computer network." N.J.S.A. 2C:20-23(q) defines "[a]uthorization" as

> permission, authority or consent given by a person who possesses lawful authority to grant such permission, authority or consent to another person to access, operate, use, obtain, take, copy, alter, damage or destroy a computer, computer network, computer system, computer equipment, computer software, computer program, computer storage medium, or data. An actor has authorization if a reasonable person would believe that the act was authorized.

The phrase "in excess of authorization" is not defined in the statute.

German argues the proofs failed to establish that he obtained the warrant information for Fair "without authorization or in excess of his authorization" to access the law enforcement database. In support, he relies on a Law Division case, State v. Riley, 412 N.J. Super. 162 (Law Div. 2009), where the trial court dismissed an indictment containing identical charges based on the court's interpretation of the "in excess of authorization" language in the computer crimes statute.

In Riley, the defendant was a police sergeant who had password access to a database that contained "automatically downloaded digital record[ings]" of motor vehicle stops conducted by the borough's police officers. Id. at 167. Although the defendant was authorized under the department's policy to access recordings of his "subordinates for training purposes," he allegedly viewed and shared a recording of a stop conducted by a fellow sergeant to subject the sergeant to "embarrassment and discipline." Id. at 167-69. The department's policy expressly "prohibited a sergeant from accessing a recording of another sergeant's stop." Id. at 169. The State asserted that the "defendant gained entry to the . . . database, and viewed the recordings of [the sergeant's] stop, for a

purpose not permitted by the . . . [p]olicy" and "[t]herefore . . . accessed data without authorization or in excess of authorization." Ibid.

In dismissing the charges, the trial court held that "unauthorized access under [N.J.S.A. 2C:20-25(a) and 2C:20-31(a)] does not encompass entry into a computer database by an insider with a current password." Id. at 180-81. Instead, the court reasoned, the "in excess of authorization" language "covers a situation where someone has password or code-based permission to enter certain databases but not others, but hacks his way into a second level within the computer data base." Id. at 174. Thus, the court concluded "the law" did not "cover[] employees who enjoy password-protected access to computerized information, but who view or use such information in ways or for purposes that their employer prohibits." Id. at 166.

In his merits brief, German does not cite State v. Thompson, 444 N.J. Super. 619 (Law Div. 2014), another Law Division case where the trial court rejected the holding in Riley. Thompson involved a criminal prosecution of two information technology (I.T.) employees in the East Orange Police Department who "possessed an administrative login and password that permitted them access to the email system for the purpose of conducting maintenance or correcting problems within the email system." Id. at 623. Without authorization, the

defendants allegedly used "their administrative passwords to open and read the emails of several high-ranking employees" for "the purpose of obtaining information" related to their "pending lawsuit against the City of East Orange involving work-related issues." Id. at 623-24, 626.

In denying the defendants' motion to dismiss the criminal complaint charging them with computer theft, the trial court rejected the analysis in Riley and concluded that the plain language of N.J.S.A. 2C:20-25 explicitly criminalizes "computer criminal activity if he or she acts 'in excess of authorization,' which had already been granted." Id. at 627. According to the court, "[t]his interpretation posits a scenario where an employee with password-protected access utilizes this access in a way that exceeds the scope of his employment." Ibid. The court explained "[t]he access at issue was unrelated to defendants' role as I.T. employees. Instead, defendants were using the login to access personal information beyond their purview as employees. A different interpretation . . . would render the final clause, 'in excess of authorization,' as superfluous," ibid., a result disfavored by the canons of statutory construction. See State v. Camillo, 382 N.J. Super. 113, 121 (App. Div. 2005).

In rejecting the reasoning in Riley, the Thompson court explained:

> The Riley court noted that the Legislature did not define "in excess of authorization." The court concluded that

> "the [Senate] Committee expressed the intent not to reach access authorized in the ordinary course of business." However, . . . an analysis of the statutory language does not support this conclusion. The language of N.J.S.A. 2C:20-25 assigns criminal culpability to a person who commits one of the enumerated acts either purposely, knowingly and without authorization, or in excess of authorization. The latter disjunctive term, "in excess of authorization," one of three terms separated out by the legislature, anticipates an actor with existing authorization such as defendants who allegedly engaged in criminally culpable activity. To allow defendants to escape culpability because they were not outsiders breaking into the computer system suggests a limit on computer crime that does not exist in reality. It is important to recognize that computer criminal activity may be perpetuated by insiders within an organization . . . .
>
> [Thompson, 444 N.J. Super. at 630-31 (citation omitted) (quoting Riley, 412 N.J. Super. at 177).]

The Thompson court acknowledged that "the risk of 'arbitrary enforcement of the computer crime law,' as contemplated in Riley, is a serious consideration that should not be taken lightly." Id. at 632 (citation omitted) (quoting Riley, 412 N.J. Super. at 186). However, the court declined to interpret the statute to "create[] a safe haven for violators who happen to function from within an organization," reasoning that "arbitrary enforcement can be safely curtailed by sound prosecutorial discretion." Ibid.

We use this opportunity to expressly adopt the conclusion reached in Thompson for the reasons expressed in the opinion. In so doing, we reject German's assertion that "[h]is actions could not be legally deemed to be in 'excess of . . . authorization,'" because "as a police officer," he was "'authorized' to obtain the information he requested," notwithstanding the fact that he "used the information in a manner contrary to policies and limitations on the permissible uses." On the contrary, defendant's "authorization" to access the law enforcement database, directly or indirectly, was expressly related to his authority and duties as a police officer and was strictly limited to law enforcement purposes.

In accordance with the Asbury Park Police Department's Mobile Data Terminal (MDT)/Criminal Justice Information System (CJIS) policy admitted into evidence, German acknowledged being notified that he had access to the law enforcement database as an Asbury Park Police Officer, was prohibited from accessing the database to "[o]btain information for unauthorized persons," and would be subjected "to criminal and/or civil liability" for "any improper access or dissemination of . . . information." During his statement, German admitted that requesting the warrant check at Fair's behest was wrong and violated departmental policy.

Moreover, the testimony established that the sheriff's office dispatcher would not have provided the information she released to German to anyone other than a law enforcement officer. German's manifest abuse of authority in accessing computerized law enforcement information for a non-law enforcement purpose falls well within the scope of the computer crimes statute's reach. The fact that German lied to the dispatcher to obtain the information established, beyond a reasonable doubt, that his access was not authorized, and he acted with the requisite purposeful or knowing state of mind.

German also argues "there was no proof that the existence of a warrant for an individual was protected from disclosure by law, court order, or rule of court." His point is well-taken and has merit. One element of the second-degree crime of unlawful access and disclosure of computer data is that the information the defendant discloses is "protected from disclosure by any law, court order or rule of court." N.J.S.A. 2C:20-31(b). At trial, the State never produced any "law, court order, or rule of court" upon which the MDT/CJIS policy was based. Without conceding the point, the State requests that the guilty verdict be molded to convict German of the lesser included third-degree offense, which omits that element and requires a lesser culpability element of knowing or reckless disclosure.

Specifically, N.J.S.A. 2C:20-31(a) provides:

> A person is guilty of a crime of the third degree if the person purposely or knowingly and without authorization, or in excess of authorization, accesses any data, data base, computer, computer storage medium, computer software, computer equipment, computer system and knowingly or recklessly discloses or causes to be disclosed any data, data base, computer software, computer programs or personal identifying information.
>
> [(Emphasis added).]

In State v. Farrad, 164 N.J. 247 (2000), our Supreme Court held:

> A guilty verdict may be molded to convict on a lesser-included offense even if the jury was not instructed on that offense if "(1) defendant has been given his day in court, (2) all the elements of the lesser included offense are contained in the more serious offense and (3) defendant's guilt of the lesser included offense is implicit in, and part of, the jury verdict."
>
> [Id. at 266 (quoting State v. Hauser, 147 N.J. Super. 221, 228 (App. Div. 1977)).]

More recently, the Court "reaffirm[ed] the test established in Farrad," and added that "when all three Farrad factors are met and 'no undue prejudice will result to the accused,' the State's request for a molded verdict should be granted." State v. R.P., 223 N.J. 521, 528 (2015) (quoting Allison v. United States, 409 F.2d 445, 451 (D.C. Cir. 1969)).

On this record, we are satisfied all three Farrad factors are met and no undue prejudice to German will result. Indeed, molding the conviction in count eighty-three to a lesser-included third-degree conviction would have no impact on German's judgment of conviction because the third-degree conviction would still merge into the second-degree official misconduct conviction in count eighty-one. See also N.J.S.A. 2C:1-8(d)(1), (3). Accordingly, we grant the State's request and remand for the conviction on count eighty-three to be molded to a conviction for the lesser-included third degree offense.[23]

XIII.

In Point I of his brief, German argues "he was denied a fair trial by being tried with [Fair and Walker] who were charged with heinous offenses that did not involve [him]." German contends that, as a result, he was "substantial[ly] prejudice[d]" and "found guilty by association."

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[23] The computer theft conviction in count eighty-two does not suffer from the same proof deficiency because "it is a crime of the second-degree if the . . . information . . . is or contains governmental records or other information that is protected from disclosure by law, court order or rule of court." N.J.S.A. 2C:20-25(g)(2) (emphasis added). "[T]he word 'or' in a statute is to be considered a disjunctive particle indicating an alternative." In re Est. of Fisher, 443 N.J. Super. 180, 192 (App. Div. 2015) (alteration in original) (quoting State v. Kress, 105 N.J. Super. 514, 520 (Law Div. 1969)). The State presented sufficient evidence to support the jury's finding that the information German obtained and disclosed to Fair constituted "governmental records."

"The decision to sever is within the trial court's discretion, and it will be reversed only if it constitutes an abuse of discretion." Weaver, 219 N.J. at 149; see also State v. Brown, 118 N.J. 595, 603 (1990) ("The decision whether to grant severance rests within the trial court's sound discretion and is entitled to great deference on appeal."). An abuse of discretion only "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). "'An appellate court can also discern an abuse of discretion when the trial court fails to take into consideration all relevant factors and when its decision reflects a clear error in judgment.'" State v. S.N., 231 N.J. 497, 515 (2018) (quoting State v. C.W., 449 N.J. Super. 231, 255 (App. Div. 2017)).

Rule 3:7-7 provides that "[t]wo or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Relief from prejudicial joinder is provided under Rule 3:15-2(b), which authorizes the trial court to "grant a severance of defendants" if "it

appears that a defendant . . . is prejudiced by a permissible or mandatory joinder of . . . defendants in an indictment."

"When the crimes charged arise from the same series of acts, and when much of the same evidence is needed to prosecute each defendant, a joint trial is preferable." Brown, 118 N.J. at 605. "The danger by association that inheres in all joint trials is not in itself sufficient to justify a severance, provided that by proper instructions to the jury, the separate status of co-defendants can be preserved." Ibid. "Joint trials also offer advantages to our criminal justice system other than judicial economy." Ibid. Critically, they "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability — advantages which sometimes operate to the defendant's benefit." Richardson v. Marsh, 481 U.S. 200, 210 (1987). They also "spare witnesses and victims the inconvenience and trauma of testifying about the same events two or more times." State v. Sanchez, 143 N.J. 273, 282 (1996) (citing Richardson, 481 U.S. at 210).

Thus, "[d]espite a concern for prejudice, in considering a motion for severance," Brown, 118 N.J. at 605, trial courts must "balance the potential prejudice to defendant's due process rights against the State's interest in judicial efficiency," Sanchez, 224 N.J. Super. at 245. In that regard, "[t]he test for

granting severance . . . is a rigorous one" and "the quantum of real prejudice" to the defendant "is critical in any determination to grant a severance." Brown, 118 N.J. at 605-06.

Here, when German and the thirteen other defendants then pending trial moved for severance, the judge reviewed the relevant facts and governing law and granted severance, in part, in an order dated August 5, 2016. In an accompanying written decision, the judge considered defendants' arguments that they would be unduly prejudiced if tried jointly. After weighing the interests of judicial economy and efficiency against the fairness of the trial as to each defendant, the judge determined the defendants would be severed into four trial groups, with Fair and German tried jointly in one group. To support his decision, the judge explained that "German [was] facing nine counts, five of which stem[med] from allegations that involve[d] acts of official misconduct with . . . Fair."

Subsequently, after more cases resolved and the total number of defendants going to trial was further reduced, the judge granted the State's motion for reconsideration,[24] and, on March 30, 2017, entered an order reconstituting the trial groups into two groups, with German to be tried jointly

[24] The motion was also referred to as "the State's [m]otion for [j]oinder."

with Fair and Walker. In an accompanying written decision, the judge reasoned given "the number of shared counts, a substantial amount of the evidence presented by the State [would] overlap between the [d]efendants."

We discern no abuse of discretion in the judge's severance decision. The same evidence was needed to prove the racketeering enterprise in which German allegedly participated, the criminal investigation of that enterprise with which German allegedly interfered, and German's involvement of Fair and others in his stalking and harassment crusade.

We acknowledge that Fair and Walker were charged in many counts with which German was not charged or involved, and much of the evidence at trial related to those defendants, as opposed to German. However, "that fact by itself, is not sufficient grounds for a severance." State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985). Indeed, severance is not required when "the vast bulk of the evidence presented at trial pertain[s] to the guilt of . . . co-defendants." Id. at 41-42. "[T]he potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial." Id. at 42; see also State v. Johnson, 274 N.J. Super. 137, 151 (App. Div. 1994) ("[A] defendant does not have a right to severance simply because the defendant

believes that a separate trial 'would offer defendant a better chance of acquittal.'" (quoting State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975))).

Further, we perceive no prejudice to German in view of the judge's repeated and carefully worded instructions to consider each defendant separately. During the final charge, the judge instructed the jury:

> There are multiple offenses charged in the [i]ndictment. They are separate offenses set forth in separate counts in the [i]ndictment. Each [d]efendant should be considered by you separately. The fact that you may find a particular [d]efendant guilty or not guilty should not control your verdict as to the charge against the other [d]efendant.

As the judge pointed out to counsel, that instruction was repeated "on [forty] different occasions" throughout the charge.

The verdict convincingly demonstrates that the jury complied with the judge's charge. The jury was able to compartmentalize and weigh the evidence against each defendant separately and rendered separate verdicts as directed. In particular, with respect to count seventy-eight (stalking), the jury found Fair not guilty, but found German guilty of the lesser included offense of harassment. Similarly, the jury issued differing verdicts on several counts in which Fair and Walker were jointly charged. See Scioscia, 200 N.J. Super. at 43 (upholding the trial judge's denial of the defendants' severance motion and finding "no possible

prejudice to defendants" where the judge gave "repeated and carefully worded instructions on the subject of separate verdicts," and "the jury's ultimate verdict . . . convincingly demonstrate[d] that they were able to comply with the court's charge").

Our conclusion is not altered by the fact that the judge ultimately granted German's motion for a judgment of acquittal on count one, the racketeering conspiracy, at the close of the State's case. Because German suffered no cognizable prejudice from the joinder and the verdict demonstrated the jury was able to compartmentalize the evidence in relation to each defendant as directed, the dismissal of count one does not undermine our determination. See United States v. Cowley, 720 F.2d 1037, 1041 (9th Cir. 1983) (finding no abuse of discretion where the defendants were charged with conspiracy and the trial judge denied their severance motion but later granted their motion for judgment of acquittal on the conspiracy count); United States v. Cruz, 478 F.2d 408, 414 (5th Cir. 1973) (finding no abuse of discretion in denial of a severance motion where the defendant, "who was charged on only two substantive counts . . . was kept in the case along with eleven other defendants accused of large-scale conspiracy continuing over a three-year period," and "his partial directed verdict of acquittal at the conclusion of the government's case" was granted).

XIV.

In Points I and II of his brief, Leonard challenges the denial of his motion to suppress a handgun seized pursuant to a search warrant issued after a motor vehicle stop conducted during Operation Dead End. Leonard seeks to invalidate both the stop and the search warrant.

At the three-day suppression hearing conducted on non-consecutive days in May 2016, the State produced Detective Finkelstein and three other law enforcement officers, MCPO Detectives William Crosta and Christopher Camilleri, and MCPO Sergeant Todd Rue, each of whom had twenty-five or more years of law enforcement experience. The proofs adduced at the hearing showed that on January 19, 2014, police intercepted phone calls involving Leonard, Anglin, and Gray indicating that Leonard was possibly in possession of a firearm. Additionally, video surveillance footage from that evening suggested Leonard was riding in "[a] black coupe." The wiretap facility relayed this information to Crosta, who was told to be on the lookout for the vehicle.

Between 8:45 p.m. and 9:20 p.m., Crosta, who was in plain clothes and an unmarked minivan, observed a black coupe, "possibly a Nissan," and followed it as directed as it traveled a circuitous route through the streets of Asbury Park. After "[a]pproximately seven" or "eight minutes," Rue and Camilleri, who were

in an unmarked car with covert emergency lights, took over the surveillance and continued to follow the coupe. Rue testified that they could not stop the vehicle based solely on the intercepted phone calls and did not want to compromise Operation Dead End by tipping off Leonard that they knew about the gun in the car.

During the surveillance, Rue and Camilleri observed the coupe slow down at a stop sign but fail to come to a complete stop. After traveling another block, the coupe pulled over and stopped. Based on the officers' observation of a traffic violation, at approximately 9:30 or 9:40 p.m., Camilleri, who was driving, pulled up behind the coupe and activated the emergency lights. Both officers then approached the vehicle and observed four occupants, none of whom was wearing a seatbelt. Additionally, according to the officers, as soon as the car window was rolled down, there was "a strong odor of burnt marijuana" coming from inside the car. Rue testified one of the occupants "admitted that they had been smoking earlier."

Camilleri requested the driving credentials of the driver and the identification of the passengers to issue summonses "for not wearing their seat belts." Based on the identification produced, the driver was identified as Tyan Harvey, the front seat passenger was identified as Leonard, and the rear seat

driver side passenger was identified as Anglin, who was also the owner of the vehicle. After providing two false names, the other rear seat passenger was ultimately identified as Alvin Durham and arrested for giving false information and an outstanding warrant.[25]

The officers called for "a narcotics K-9" officer and "[an] explosives K-9" officer to conduct exterior sniffs of the vehicle to ascertain whether there was narcotics or gun powder in the car. While awaiting the arrival of the K-9 units, the monitors at the wiretap facility intercepted real-time communications between Leonard and his girlfriend, Dominique Banks, which they conveyed to Camilleri and Rue. One of the intercepted communications was a 10:26 p.m. text message from Leonard to Banks telling her the "police got us pulled and there's something in . . . here." Leonard also called Banks and asked her to take a cab to his location, so she could record the stop.

The K-9 units arrived in separate cars "around 11:00 [p.m.]" After Camilleri directed the remaining three occupants to exit the car and briefed the K-9 handlers about their suspicions that there was possibly narcotics or a gun in

[25] After the arrest, Camilleri asked the other occupants whether the arrestee had left any identification in the car. Leonard responded by "open[ing] . . . the passenger door" and "pull[ing] the seat forward" to "show[Camilleri] that he didn't drop anything in the back."

the car, the K-9 officers conducted "independent searches of the car." While the sniffs were underway, Camilleri asked Anglin if he would consent to a search of the car. Initially, Leonard "encouraged" Anglin to agree to the search. However, before Anglin signed the consent forms, Leonard "quickly changed his tone," and told Anglin not to sign, "yelling out to him, [f]our-[f]ive, [f]our-[f]ive," which the officers interpreted to mean that "there was a .45 caliber gun in the car." As a result, Anglin did not consent to a search of the vehicle.

After both K-9 officers "gave positive indications," Camilleri told the occupants that "the car was going to be impounded," "[he] was going to apply for a search warrant, and they were free to leave." Before they left the scene, at about midnight, Camilleri issued each a seat belt summons and issued the driver a summons for failing to stop at the stop sign and failing to produce credentials.

While awaiting the tow truck, the officers received information from Finkelstein at the wire facility about additional intercepted communications. Some of the communications indicated that Leonard was arranging "to have the car followed" to the impound lot "to either steal the car or break in to get the item out." During an intercepted phone call that occurred at 12:11 a.m., Leonard told Gray to "start shooting" in a different part of Asbury Park to distract the officers from impounding the car, and pull them away from the area because

"[w]ifey in the car," which the officers understood to mean "there[was] a gun in the car." After Gray agreed, Rue traveled to the location identified in the call and assisted other Asbury Park police officers in apprehending Gray after a foot chase, during which Gray discarded a gun.

Later that day, Camilleri applied for and obtained a search warrant for the coupe. During the search, Camilleri discovered a .45 caliber handgun "[i]n the trunk."

Following oral argument, on June 8, 2016, the judge denied Leonard's motion. In an accompanying written decision, after finding the officers "honest" and "straightforward" and their testimony "clear, candid, and convincing," the judge made factual findings as described above in accordance with their testimony. Next, applying the governing legal principles, the judge determined that the motor vehicle stop was valid based on Camilleri's and Rue's observations of a motor vehicle violation, namely, "fail[ing] to stop at a stop sign." According to the judge, "[a]fter the lawful motor vehicle stop, the officers were justified in ordering the passengers out of the car as they were not wearing seatbelts and there was a strong odor of burnt marijuana emanating from the vehicle." Further, after the vehicle's owner refused to consent to a search and the K-9 officers gave positive indications, the car was properly impounded and

towed. The judge concluded, "throughout the encounter, the officers scrupulously safeguarded [Leonard's] constitutional rights."

We have previously addressed our standard of review for suppression motions. See Elders, 192 N.J. at 243. Here, we are satisfied the judge's factual findings are amply supported by sufficient credible evidence in the record and turn to our de novo review of the judge's legal conclusions. See State v. Sencion, 454 N.J. Super. 25, 31-32 (App. Div. 2018).

"To be lawful, an automobile stop 'must be based on reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed.'" State v. Bacome, 228 N.J. 94, 103 (2017) (quoting State v. Carty, 170 N.J. 632, 639-40 (2002)). "In a suppression motion hearing challenging a moving stop, '[t]he State has the burden of proof to demonstrate by a preponderance of the evidence that the warrantless seizure was valid.'" State v. Atwood, 232 N.J. 433, 437-38 (2018) (alteration in original) (quoting State v. O'Neal, 190 N.J. 601, 611 (2007)).

The required "'articulable reasons' or 'particularized suspicion' of criminal activity" necessary to justify a stop "must be based upon the law enforcement officer's assessment of the totality of circumstances with which he is faced[,] . . . in view of [the] officer's experience and knowledge, taken together

with rational inferences drawn from those facts." State v. Davis, 104 N.J. 490, 504 (1986). "The objective reasonableness of police officers' actions—not their subjective intentions—is the central focus of federal and New Jersey search-and-seizure jurisprudence." Bacome, 228 N.J. at 103. Thus, "[r]ather than focus on the detectives' putative intentions, our attention belongs on the objective reasonableness of the stop." Ibid.; see also State v. Bruzzese, 94 N.J. 210, 219 (1983) ("[T]he proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent.").

Here, the stop was justified based on the officers' observations of a traffic violation, specifically, a violation of N.J.S.A. 39:4-144(a) ("No driver of a vehicle . . . shall enter upon or cross an intersecting street marked with a 'stop' sign unless . . . [t]he driver has first brought the vehicle . . . to a complete stop . . . ."). Leonard argues the stop was invalid under "the totality of the circumstances" because it was "preordained" given the officers' "advanced knowledge." In essence, Leonard asserts the stop was pretextual.

In Bacome, detectives "were engaged in an undercover drug patrol" when they observed a vehicle with two occupants – the defendant, who was driving,

and a front seat passenger – both of whom the detectives recognized from previous encounters as men who "used and dealt narcotics." 228 N.J. at 97. The detectives followed the vehicle as the defendant drove to "an area of Newark known for . . . drug trafficking," presumably to purchase drugs. Ibid. Ultimately, the detectives observed the front seat passenger not wearing a seatbelt and "conducted a traffic stop." Ibid. During the ensuing investigation, the defendant and the passenger gave inconsistent accounts about their destination, and a detective observed narcotics paraphernalia in plain view inside the vehicle. Id. at 97-98. Eventually, the detectives obtained consent to search the vehicle, leading to the recovery of "thirteen vials of crack cocaine" and other contraband. Id. at 98.

In a split decision, this court reversed the trial court's denial of the defendant's suppression motion, holding, among other things, that "stopping the vehicle for a seatbelt violation was a 'ruse' that allowed the detectives to conduct a narcotics investigation." Id. at 99 (quoting State v. Bacome, 440 N.J. Super. 228, 244 n.11 (App. Div. 2015)). In reversing our decision, the Supreme Court held that "[t]he detectives' subjective intent [was] irrelevant in light of the objective grounds for the stop," namely "the detectives' observation of a traffic code violation." Id. at 103.

In State v. Abreu, 257 N.J. Super. 549, 551 (App. Div. 1992), following an extended covert investigation, the State Police identified the two defendants "as likely drug couriers because of their characteristic conduct" but failed to uncover "enough evidence to support an application for a search warrant." While the investigation was ongoing, a state trooper who had been "briefed . . . concerning the prior month-long surveillance" was directed to follow a cab that the defendants had entered and stop the cab if any reason arose in order to "attempt to establish the identity of the occupants." Ibid. After the trooper observed the cab fail to stop at a stop sign, he conducted a motor vehicle stop and eventually searched a bag that each occupant denied owning, uncovering heroin and other contraband inside. Id. at 552-53. Given those facts, we determined "[t]he motor vehicle stop was proper and not objectively 'pretextual.'" Id. at 554.

Likewise, here, we hold that the motor vehicle stop was "proper and not objectively 'pretextual.'" Ibid. Although Camilleri and Rue suspected there was a gun in the car, their "subjective intent [was] irrelevant in light of the objective grounds for the stop" predicated on their credible observation of a traffic code violation. Bacome, 228 N.J. at 103. "[T]he reasonableness of a police action under the Fourth Amendment is viewed objectively, based on the circumstances

of the particular search or seizure, 'regardless of the individual officer's state of mind.'" State v. Gonzales, 227 N.J. 77, 98 (2016) (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006)); see also Scott, 436 U.S. at 138 ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.").

Defendant also argues that the duration of the stop was unjustified. "During an otherwise lawful traffic stop, a police officer may inquire 'into matters unrelated to the justification for the traffic stop.'" State v. Dunbar, 229 N.J. 521, 533 (2017) (quoting Arizona v. Johnson, 555 U.S. 323, 333 (2009)). "And if, as a result of the initial stop or further inquiries, 'the circumstances "give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions."'" Dunbar, 229 N.J. at 533 (alteration in original) (quoting State v. Dickey, 152 N.J. 468, 479-80 (1998)).

"An officer's ability to pursue incidental inquiries, however, is not without limitations," and "[a] lawful traffic stop can transform into an unlawful detention 'if its manner of execution unreasonably infringes' on constitutionally protected interests." Ibid. (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.
>
> [Dickey, 152 N.J. at 477 (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).]

Thus, the duration of the detention must be "'reasonably related in scope to the circumstances which justified the interference in the first place,'" and a detention can become unlawful by lasting longer than needed to diligently investigate suspicions. Id. at 476-77 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). "This is not to say that a stop over two hours can never be permissible, but any detention of that duration must be justified by the circumstances." Id. at 482. For instance, if after a stop, police develop "articulable suspicion that the vehicle contain[s] drugs," then "a detention for sufficient time to bring the K-9 unit to the scene would not be unreasonable." Id. at 486. See Dunbar, 229 N.J. at 539 ("[A] canine sniff performed during a lawful detention does not constitute a search under the Fourth Amendment to the United States Constitution or Article I, Paragraph 7 of the New Jersey Constitution.").

Here, after lawfully stopping the coupe, the detectives approached and detected the strong odor of burnt marijuana emanating from the vehicle.

Moreover, one of the occupants admitted they had smoked marijuana earlier. "New Jersey courts have [long] recognized that the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Walker, 213 N.J. 281, 290 (2013) (second alteration in original) (quoting State v. Nishina, 175 N.J. 502, 515-16 (2003)). Thus, the detection of the odor of marijuana coming from the vehicle provided more than sufficient grounds to prolong the detention to await the arrival of the narcotics K-9 unit. Additionally, given the intercepted communications regarding the firearm, we are satisfied there was independent articulable reasonable suspicion regarding the presence of a handgun to justify awaiting the arrival of an explosives K-9 officer.

"To appropriately view the 'whole picture,' the Court must not engage in a 'divide-and-conquer' analysis by looking at each fact in isolation." State v. Nelson, 237 N.J. 540, 554-55 (2019) (quoting District of Columbia v. Wesby, 583 U.S. __, 138 S. Ct. 577, 588 (2018)). Instead, "a court must consider 'the totality of the circumstances -- the whole picture.'" Id. at 554 (quoting State v. Stovall, 170 N.J. 346, 361 (2002)). Based on the totality of the circumstances, we find no constitutional violation. Although waiting for the canine units prolonged the stop to approximately two-and-one-half hours, under the

circumstances, the delay was justified because the police had probable cause to search the vehicle for marijuana and articulable reasonable suspicion that the occupants possessed a handgun. Thus, this case "does not involve any delay unnecessary to the legitimate investigation of the law enforcement officers." State v. Chapman, 332 N.J. Super. 452, 465 (App. Div. 2000) (quoting Sharpe, 470 U.S. at 687).

Leonard asserts further that the "degree of the intrusion upon [his] person exceeded the limits of a reasonable Terry-like investigatory stop." "Even a stop that lasts no longer than necessary to complete the investigation for which the stop was made may amount to an illegal arrest if the stop is more than 'minimally intrusive.'" Dickey, 152 N.J. at 478. "In the absence of probable cause, the stop must first be found not unduly intrusive before any balancing of the government's interest against the individual's interest becomes appropriate." Ibid. Moreover, "[t]hat suspects have been removed to an office or to a police station" are significant factors in measuring the level of intrusiveness. Id. at 482-83. Likewise, "the use of handcuffs heighten[s] the degree of intrusion upon the liberty of the suspects." Id. at 483.

Here, the degree of intrusion did not exceed permissible limits. Leonard and the other two occupants were neither handcuffed, confined, nor removed

from the scene. On the contrary, while the stop was in progress, they remained free to communicate by phone with their confederates, planning and conspiring to thwart the detectives' impoundment and ultimate search of the vehicle.

Next, Leonard argues for the first time on appeal that the search warrant "should be invalidated" because the issuing judge was not provided with "the totality of the circumstances." Specifically, Leonard asserts the affidavit Camilleri submitted to obtain the search warrant "did not recite . . . that regardless of the motor vehicle infraction[,] he and . . . Rue were going to stop the black coupe since they believed the vehicle contained a firearm." According to Leonard, "[t]his omission was made in reckless disregard of the truth" and "established a material falsity upon which the search warrant was issued." We will briefly address the issue notwithstanding Leonard's failure to properly preserve the issue for appellate review. Robinson, 200 N.J. at 18-19.

"It is well settled that a search executed pursuant to a warrant is presumed to be valid and that a defendant challenging its validity has the burden to prove 'that there was no probable cause supporting the issuance of the warrant . . . .'" State v. Jones, 179 N.J. 377, 388 (2004) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)). In reviewing the affidavit submitted to obtain the warrant, the issuing judge "make[s] a practical, common-sense decision whether, given all

the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983).

Where the challenge is to information included in the warrant affidavit, the defendant's burden is significant. See State v. Dispoto, 383 N.J. Super. 205, 216-17 (App. Div. 2006) (explaining that to "be afforded an evidentiary hearing," a defendant must first "'make a substantial preliminary showing that the affiant, either deliberately or with reckless disregard of the truth, failed to apprise the issuing judge of material information which, had it been included in the affidavit, would have militated against issuance of the search warrant'" and "then establish by a preponderance of the evidence that the circumstances giving rise to the hearing did in fact occur" (quoting State v. Sheehan, 217 N.J. Super. 20, 25-26 (App. Div. 1987))), aff'd as modified, 189 N.J. 108 (2007).

On the other hand,

> [t]he core issue presented in the context of a challenge to an affidavit, where the challenger alleges the affidavit is fatally inaccurate by reason of omission, is whether the information omitted from the affidavit is material. The test for materiality is whether inclusion of the omitted information would defeat a finding of probable cause; it is not . . . whether a reviewing magistrate would want to know the information.

[State v. Smith, 212 N.J. 365, 399 (2012).]

Camilleri's affidavit detailed the intercepted communications that led the officers to believe that there was a gun in the vehicle. It also described the stop and ensuing investigation, including the detection of the odor of burnt marijuana emanating from the vehicle, the positive indications by the K-9 officers, the intercepted communications between Leonard and Banks following the stop, and Leonard's coded reference to the presence of a .45 caliber gun in the vehicle when he directed Anglin not to sign the consent to search form. We reject Leonard's contention that Camilleri's omission of his subjective intent or belief concerning the gun was a material omission. Contrary to Leonard's assertion, if the information had been included, it would not have defeated a finding of probable cause to justify the issuance of the search warrant. See State v. Marshall, 148 N.J. 89, 193-94 (1997) ("[W]e consider the totality of the circumstances to determine whether a warrant was issued consistently with the dictates of the Constitution.").

XV.

In Points III, IV, and V, Leonard challenges several pre-trial rulings rendered by the judge. Specifically, in Points III and IV, Leonard challenges

the judge's evidentiary rulings following the State's in limine motions. In Point V, he challenges the judge's ruling on the severance motions.

Pre-trial, Leonard joined co-defendants Fair and Walker in opposing the State's motion to admit evidence of defendants' gang membership under N.J.R.E. 404(b) at trial, and to admit evidence of co-defendant Clayton's manufacturing and distributing crack cocaine as intrinsic evidence. In a May 5, 2017 order, the judge granted both motions. In an accompanying written decision, regarding the N.J.R.E. 404(b) motion, the judge found that the evidence satisfied "the four-part test set forth in State v. Cofield, 127 N.J. 328 (1992)." Regarding the proffered intrinsic evidence, the judge reasoned that evidence indicating "that Clayton 'cooked' crack cocaine and distributed [it] to . . . Fair and other co-defendants," qualified as intrinsic evidence under the principles enunciated in State v. Rose, 206 N.J. 141 (2011) and was "not unduly prejudicial" to require exclusion under N.J.R.E. 403.

In Point III, Leonard argues the judge erred in admitting the Rule 404(b) evidence because the evidence of his gang membership "was, if at all, only minimally relevant to his motive for associating with an enterprise," and its probative value did not outweigh "its prejudicial effect." In Point IV, he asserts the judge erred in finding that evidence of Clayton's manufacturing and

distribution of crack cocaine was admissible as intrinsic evidence against him because there was no "proof of [Leonard's] relationship with Clayton." In Point V, he contends the judge erred in granting the State's joinder motion. He challenges being re-grouped from his initial trial group with Gray to being "join[ed] with Clayton and Berry for trial." In support, he asserts "the cases against each" "minimally" "overlap[ped]."

As a jurisdictional matter, the State argues that by entering a non-conditional guilty plea, Leonard waived his right to raise these challenges. We agree.

"Generally, a guilty plea constitutes a waiver of all issues which were or could have been addressed by the trial judge before the guilty plea." State v. Davila, 443 N.J. Super. 577, 585 (App. Div. 2016) (quoting State v. Robinson, 224 N.J. Super. 495, 498 (App. Div. 1988)). This "waiver even applies to claims of certain constitutional violations." Ibid.; see also State v. Crawley, 149 N.J. 310, 316 (1997) ("Generally, a defendant who pleads guilty is prohibited from raising, on appeal, the contention that the State violated his constitutional rights prior to the plea."); Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent

claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.").

"Our rules provide for three exceptions to the general rule of waiver." State v. Knight, 183 N.J. 449, 471 (2005). "First, Rule 3:5-7(d) and Rule 7:5-2(c)(2) permit a defendant to appeal the denial of a Fourth Amendment-based motion to suppress evidence after a conviction whether based on a guilty plea or a conviction." Ibid.; see also State v. Greeley, 178 N.J. 38, 50-51 (2003) ("[O]nly motions for suppression on the grounds of unlawful search and seizure automatically survive the entry of a guilty plea."). Thus, while this exception applies to Leonard's Fourth Amendment challenge, which we have already addressed, it does not apply to the adverse determinations arising from the pre-trial motions raised in Points III, IV, and V of his brief.

"Second, Rule 3:28(g), permits a defendant to appeal the denial of admission into a pretrial intervention program." Knight, 183 N.J. at 471. That exception is clearly inapplicable here.

"Third, and pertinent here, Rule 3:9-3(f), expressly authorizes a defendant to 'enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion.'" Knight, 183 N.J. at 471 (quoting R. 3:9-3(f)). Entry of a conditional guilty plea requires "the

approval of the court and the consent of the prosecuting attorney." R. 3:9-3(f). "In the event a defendant prevails on appeal, he or she 'shall be afforded the opportunity to withdraw his or her plea.'" Knight, 183 N.J. at 471 (quoting R. 3:9-3(f)).

Here, Leonard's guilty plea was non-conditional and no other exception applies. Moreover, in our view, based on the record, adherence to the requirements of Rule 3:9-3(f) will not result in an injustice. See State v. Gonzalez, 254 N.J. Super. 300, 304 (App. Div. 1992) (considering an issue on appeal notwithstanding the defendant's entry of a non-conditional guilty plea because the issue "relate[d] in part to sentencing," and "[s]trict adherence to the requirements of R[ule] 3:9-3(f) 'would result in an injustice'" (quoting R. 1:1-2)); accord State v. Benjamin, 442 N.J. Super. 258, 263-64 (App. Div. 2015), aff'd as modified, 228 N.J. 358 (2017).

XVI.

In Point VI, Leonard challenges the factual basis for his guilty plea to count one, arguing he did not admit to a "pattern of racketeering activity," as required by N.J.S.A. 2C:41-2(c).

Despite the entry of a guilty plea, a defendant "retain[s] the right on appeal to raise as reversible error the absence of 'a factual basis for the plea.'" State v.

Butler, 89 N.J. 220, 224 (1982) (quoting R. 3:9-2). Because "'[a]n appellate court is in the same position as the trial court in assessing whether the factual admissions during a plea colloquy satisfy the elements of an offense,'" our "review is de novo." State v. Urbina, 221 N.J. 509, 528 (2015) (quoting State v. Tate, 220 N.J. 393, 404 (2015)).

Under Rule 3:9-2, a court shall not accept a guilty plea

> without first questioning the defendant personally, under oath or by affirmation, and determining by inquiry of the defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea.

"A factual basis for a plea must include either an admission or the acknowledgment of facts that meet 'the essential elements of the crime.'" Tate, 220 N.J. at 406 (quoting State ex rel. T.M., 166 N.J. 319, 333 (2001)).

However, not every deficiency in a factual basis provided by a defendant during the plea colloquy will "invalidate [a] conviction." State v. D.D.M., 140 N.J. 83, 95 (1995). While Rule 3:9-2 "require[s] a judge to elicit a factual basis for a guilty plea," as "long as a guilty plea is knowing and voluntary, . . . a court's failure to elicit a factual basis for the plea is not necessarily of constitutional

dimension and thus does not render illegal a sentence imposed without such a basis." State v. Mitchell, 126 N.J. 565, 577 (1992).

Instead, "[a] factual basis is constitutionally required only when there are indicia, such as a contemporaneous claim of innocence, that the defendant does not understand enough about the nature of the law as it applies to the facts of the case to make a truly 'voluntary' decision on his own." Ibid.; see also State v. Barboza, 115 N.J. 415, 421 n.1 (1989) ("A guilty plea violates due process and is, thus, constitutionally defective if it is not voluntary and knowing" and "[a] factual basis is not constitutionally required unless the defendant accompanies the plea with a claim of innocence."); State v. Belton, 452 N.J. Super. 528, 530 (App. Div. 2017) ("In view of defendant's contemporaneous claim of innocence, the failure to elicit a sufficient factual basis was of constitutional dimension and warrants [post-conviction relief].").

Here, during the plea hearing, in eliciting a factual basis for racketeering conspiracy, possession of a weapon for an unlawful purpose, and possession of CDS with intent to distribute, the following questioning between defense counsel and Leonard occurred:

> [DEFENSE COUNSEL]: Mr. Leonard, I'm going to address your attention to the dates of September 15, 2013 up and until February 9, 2014. During that time

period, you resided in Asbury Park, New Jersey; is that correct?

[LEONARD]: Yeah.

[DEFENSE COUNSEL]: And . . . in Asbury Park[,] there existed a criminal enterprise; is that correct?

[LEONARD]: Yeah.

[DEFENSE COUNSEL]: And you were a member of that criminal enterprise?

[LEONARD]: Yeah.

[DEFENSE COUNSEL]: And in furtherance of that criminal enterprise you did, in fact, sell a controlled dangerous substance, to wit, Molly; is that correct?

[LEONARD]: Yeah.

[DEFENSE COUNSEL]: You would also agree that the criminal enterprise used firearms . . . to achieve their unlawful purposes; is that correct?

[LEONARD]: Yeah.

. . . .

[DEFENSE COUNSEL]: Additionally, during that same date period of September 15, 2013 to February 9, 2014, you did . . . have in your possession a firearm, to wit, a handgun; is that correct?

[LEONARD]: Yes.

> [DEFENSE COUNSEL]: And the purpose of your possession of that handgun was in furtherance of unlawful purposes; is that correct?
>
> [LEONARD]: Yeah.
>
> [DEFENSE COUNSEL]: And more specifically, on January 31, 2014, you were in the city of Asbury Park; is that correct?
>
> [LEONARD]: Yes.
>
> [DEFENSE COUNSEL]: And you did have in your possession a [CDS], to wit, Molly; is that correct?
>
> [LEONARD]: Yeah.
>
> [DEFENSE COUNSEL]: You did possess that Molly with the intent to sell it to a third person; is that correct?
>
> [LEONARD]: Yes.

We reject Leonard's contention that his factual admissions were inadequate to satisfy the crime of racketeering conspiracy, the elements of which we have previously detailed. We examine Leonard's admissions "in light of all surrounding circumstances and in the context of an entire plea colloquy," noting that he makes no claim of innocence. T.M., 166 N.J. at 327. Instead, Leonard admitted being a member of the criminal enterprise during the relevant time period and in the area where the enterprise operated. He admitted that, as a

member of the enterprise, he engaged in racketeering activities in furtherance of the enterprise, specifically, distribution of CDS.

Leonard asserts he did not admit to at least two predicate acts of racketeering activity because he did not specify that "the number of [drug] sales" or "his possession of a firearm . . . for some unlawful purpose" was "relat[ed] to the activities of the enterprise." However, it is not necessary for a RICO conspirator to "agree to commit personally at least two predicate acts of racketeering." Ball, 141 N.J. at 180. His "agreement that others will commit the predicate acts is sufficient." Id. at 177. "[R]equiring a defendant to agree to commit personally at least two predicate acts would 'dilute the effectiveness of the RICO conspiracy remedy, and thwart [the legislative] objectives' of the statute" by "immuniz[ing] a mob boss who neither agreed to commit personally nor actually participated in the commission of the predicate acts." Id. at 181 (second alteration in original) (quoting Ball, 268 N.J. Super. at 123).

XVII.

Finally, Fair, Walker, and German all challenge their respective sentences as excessive. Fair asserts that his sentence is, in some respects, illegal.

We review sentences "in accordance with a deferential standard," State v. Fuentes, 217 N.J. 57, 70 (2014), and are mindful that we "should not 'substitute

[our] judgment for those of our sentencing courts,'" State v. Cuff, 239 N.J. 321, 347 (2019) (quoting State v. Case, 220 N.J. 49, 65 (2014)). Thus, 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."
>
> [Fuentes, 217 N.J. at 70 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

In State v. Yarbough, 100 N.J. 627, 644 (1985), our Supreme Court set forth the following criteria as "general sentencing guidelines" for evaluating the threshold question of whether to impose concurrent or consecutive sentences for multiple offenses pursuant to N.J.S.A. 2C:44-5(a):

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence shall be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence

> or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous.
>
> (4) there should be no double counting of aggravating factors; [and]
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense . . . .
>
> [Id. at 643-44.[26]]

"The Yarbough factors serve much the same purpose that aggravating and mitigating factors do in guiding the court toward a sentence within the statutory range." State v. Abdullah, 184 N.J. 497, 514 (2005). "[T]he five 'facts relating to the crimes' contained in Yarbough's third guideline should be applied qualitatively, not quantitatively," and consecutive sentences may be imposed

[26] In Yarbough, the Court identified a sixth factor, limiting the cumulation of consecutive sentences for multiple offenses. 100 N.J. at 644. That factor was eliminated by the Legislature's amendment of N.J.S.A. 2C:44-5(a), to provide that "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses."

"even though a majority of the Yarbough factors support concurrent sentences." State v. Carey, 168 N.J. 413, 427-28 (2001); see also State v. Molina, 168 N.J. 436, 442-43 (2001) (affirming consecutive sentences although "the only factor that support[ed] consecutive sentences [was] the presence of multiple victims").

"A sentencing court must explain its decision to impose concurrent or consecutive sentences in a given case; '[a] statement of reasons is a necessary prerequisite for adequate appellate review of sentencing decisions.'" Cuff, 239 N.J. at 348 (alteration in original) (quoting Miller, 108 N.J. at 122). "When a court 'fails to give proper reasons for imposing consecutive sentences at a single sentencing proceeding, ordinarily a remand should be required for resentencing.'" Id. at 348-49 (quoting Carey, 168 N.J. at 424).

In Abdullah, the Court reminded trial judges "that when imposing either consecutive or concurrent sentences, '[t]he focus should be on the fairness of the overall sentence,' and that they should articulate the reasons for their decisions with specific reference to the Yarbough factors." 184 N.J. at 515 (alteration in original) (quoting Miller, 108 N.J. at 122). In State v. Torres, 246 N.J. 246 (2021), the Court held that when imposing lengthy consecutive sentences, "an explanation for the overall fairness of a sentence by the sentencing court is required" in order "to 'foster[] consistency in . . . sentencing in that arbitrary or

irrational sentencing can be curtailed and, if necessary, corrected through appellate review.'" Id. at 272 (alterations in original) (quoting State v. Pierce, 188 N.J. 155, 166-67 (2006)).

The Court stated "[t]he sentencing court's explanation of overall fairness provides a proper record for appellate review of the sentencing court's exercise of discretion." Ibid. The Court reasoned that "[f]ailure to police the fairness of consecutive sentences not only undermines Yarbough's goal of promoting predictability and uniformity in sentencing, but also risks deviating from the Legislature's command that the Code be construed so as to 'safeguard offenders against excessive, disproportionate or arbitrary punishment.'" Torres, 246 N.J. at 272-73 (quoting N.J.S.A. 2C:1-2(b)(4)). Thus, consideration of the fairness of the overall sentence is "a necessary feature in any Yarbough analysis." Cuff, 239 N.J. at 352.

Applying these principles, we remand all three cases for resentencing for "an explanation for the overall fairness of [the] sentence[s]" as required by Torres. 246 N.J. at 272.

As to German's sentence, after appropriate mergers, German was sentenced on each official misconduct count, counts seventy-six, seventy-nine, and eighty-one, to five years' imprisonment, with a five-year period of parole

ineligibility.[27] Count eighty-one was to be served concurrently with count seventy-nine, and count seventy-six was to be served consecutively to counts eighty-one and seventy-nine, for an aggregate sentence of ten years' imprisonment with a ten-year period of parole ineligibility. German does not challenge the judge's finding of aggravating factors three and nine,[28] and mitigating factors seven and eight,[29] or the judge's weighing and balancing of those factors.[30] Instead, he asserts the judge "erred in imposing consecutive

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[27] Under N.J.S.A. 2C:43-6.5, "a person who . . . served as a public officer or employee under the government of this State, or any political subdivision thereof, who is convicted of a [second-degree] crime that involves or touches such office or employment," including official misconduct, "shall be sentenced to a mandatory minimum term of imprisonment without eligibility for parole" for "five-years." N.J.S.A. 2C:43-6.5(a), (b).

[28] See N.J.S.A. 2C:44-1(a)(3) ("[t]he risk that the defendant will commit another offense"); and N.J.S.A. 2C:44-1(a)(9) ("[t]he need for deterring the defendant and others from violating the law").

[29] See N.J.S.A. 2C:44-1(b)(7) ("[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense"); and N.J.S.A. 2C:44-1(b)(8) ("[t]he defendant's conduct was the result of circumstances unlikely to recur").

[30] The judge found the aggravating factors "substantially outweigh[ed]" the mitigating factors but nonetheless sentenced defendant to the lowest end of the sentencing range for a second-degree crime. See N.J.S.A. 2C:43-6(a)(2); see also State v. Natale, 184 N.J. 458, 488 (2005) (stating that while "no inflexible

sentences." While we find no fault with the judge's analysis of the Yarbough factors and application of factor 3(a) to support a consecutive sentence on count seventy-six involving the harassment and stalking victim, we are constrained to remand for resentencing in compliance with Torres.

Turning to Walker, after appropriate mergers, Walker was sentenced to an aggregate term of forty-seven years' imprisonment, with 26.4 years of parole ineligibility, for racketeering conspiracy, eleven other conspiracies, and related substantive offenses. The judge found aggravating factors one, three, five, six, and nine[31] and no mitigating factors. Accordingly, after applying the Yarbough factors, the judge sentenced Walker to five consecutive sentences as follows:

- Count 1 (first-degree racketeering conspiracy): 15 years, subject to NERA;
- Count 2 (second-degree conspiracy to commit armed robbery): 7 years, subject to NERA, consecutive to count 1;
- Count 7 (second-degree attempted armed robbery): 7 years, subject to

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rule applies, . . . when the aggravating factors preponderate, sentences will tend toward the higher end of the [sentencing] range").

[31] See N.J.S.A. 2C:44-1(a)(1) ("[t]he nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner"); N.J.S.A. 2C:44-1(a)(5) ("[t]here is a substantial likelihood that the defendant is involved in organized criminal activity"); N.J.S.A. 2C:44-1(a)(6) ("[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted").

NERA, consecutive to count 2;

- Count 32 (second-degree shoplifting): 7 years, consecutive to count 7;
- Count 36 (second-degree possession of a weapon for an unlawful purpose): 7 years, with 3 1/2 years of parole ineligibility, consecutive to count 32;
- Count 85 (third-degree conspiracy to possess CDS): 4 years, consecutive to count 36.

Walker does not contest the imposition of a separate and consecutive sentence for the RICO conspiracy and the underlying offenses. See Ball, 268 N.J. Super. at 148 ("Concurrent sentences for the RICO offense and its predicate acts would both frustrate legislative intent and give defendants the benefit of 'free crimes.'"). Instead, he asserts the other "conspiracies should not have been consecutive sentences."

Walker received consecutive sentences on two of the other conspiracy counts for which he was convicted, count two pertaining to the September 25, 2013 robbery of Mitchell at the Centerfolds Club, and count eighty-five, pertaining to his possession of cocaine from September 15, 2013, to February 12, 2014. The other conspiracy counts either merged or a concurrent sentence was imposed. The other consecutive sentences Walker received were imposed on counts seven, thirty-two, and thirty-six, pertaining to the December 11, 2013 attempted armed robbery at Mac Records, shoplifting spanning October 1, 2013,

to May 22, 2014, and unlawful gun possession from September 15, 2013, to February 12, 2014, respectively. In analyzing the Yarbough factors, the judge determined consecutive sentences were appropriate because the crimes were "separate and distinct." Similar to German, we remand for compliance with Torres.

Additionally, Walker, who was twenty-one-years-old when the offenses were committed, posits that given his "age" and the "actions . . . attributed to him," his sentence should be "reduced to a[n aggregate] sentence of twenty-two . . . years with [twelve] years of parole ineligibility." He argues there was insufficient evidence to support aggravating factor one because "[t]here was no evidence that any offense was committed in a brutal, cruel manner beyond that necessary to accomplish the offense." He also argues "[a]ggravating factor [six] . . . does not apply" because his "sole adult conviction was for theft from the person when he was [nineteen-]years[-]old" and his "juvenile adjudications" were "not more serious than possession of marihuana and disorderly conduct."

In finding aggravating factor six, the judge stated that at "[twenty-five] years of age, . . . [Walker] had an extensive involvement with the criminal justice system" consisting of "seven matters as a juvenile, . . . three deferred dispositions, three municipal court convictions," and one prior "adult

conviction." Walker was previously adjudicated delinquent for possession of marijuana, aggravated assault on a law enforcement officer, harassment, obstruction, and violation of probation. His prior indictable conviction was for third-degree theft, for which he received a three-year prison sentence with a one-year parole disqualifier.

In finding aggravating factor one, the judge stated:

> Clearly, based on the facts and circumstances that came out during the course of this four-month trial, Mr. Walker was involved in a conspiracy to commit racketeering that had far-reaching implications in the community. Clearly, what we are talking about is a community, one of [fifty-three] municipalities in Monmouth County, one of our smaller communities. The land mass is approximately 1.4 square miles with an approximation of 16,116 people there. So clearly anything that happens within that community has ripple effects throughout.
>
> Mr. Walker was convicted of [twenty-five] crimes including attempted armed robbery, unlawful possession of a weapon, aggravated assault, and various drug-related offenses. And I do believe that his crimes threatened not only the safety of the direct victims involved but also the safety of the community at large, and for those reasons I do find that that aggravating factor does apply.

"When applying factor one, 'the sentencing court reviews the severity of the defendant's crime, "the single most important factor in the sentencing process," assessing the degree to which defendant's conduct has threatened the

safety of its direct victims and the public.'" State v. Miller, 237 N.J. 15, 29 (2019) (quoting State v. Lawless, 214 N.J. 594, 609 (2013)). Further, "[w]hen it assesses whether a defendant's conduct was especially 'heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Fuentes, 217 N.J. at 74-75. "In appropriate cases, a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense." Id. at 75.

In that regard, "[a] sentencing court may consider 'aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.'" Ibid. (quoting State v. Henry, 418 N.J. Super. 481, 493 (Law Div. 2010)). However, to "ensure that facts necessary to establish the elements of the defendant's offense are not double-counted for purposes of sentencing," the trial court's assessment of the nature and circumstances of the offense to support a finding of aggravating factor one "requires a nuanced analysis of the defendant's offense" and must "fairly reflect[] the record before it." Id. at 76.

Here, unlike Fair, Walker did not have a leadership role in the enterprise. In addition, Walker was twenty-one-years-old at the time of the offenses.

Effective October 19, 2020, the Legislature added youth as a statutory mitigating factor. See N.J.S.A 2C:44-1(b)(14) ("The defendant was under [twenty-six] years of age at the time of the commission of the offense."). Given Walker's age, on resentencing, the judge "is free to consider defendant's youth at the time of the offense and apply mitigating factor fourteen, which was given immediate effect in all sentencing proceedings on or after October 19, 2020." State v. Rivera, 249 N.J. 285, 303-04 (2021).

On remand, the judge should also reconsider aggravating factor six through the lens of the new mitigating factor. Admittedly, Walker had an extensive record, but it consisted primarily of a juvenile record and one prior indictable adult conviction. See State v. Radziwil, 235 N.J. Super. 557, 575-76 (App. Div. 1989) (holding that defendant's prior convictions for driving under the influence of alcohol could not be considered an aggravating factor under N.J.S.A. 2C:44-1(a)(6), "although they could be considered as part of defendant's overall personal history in the same fashion as convictions in municipal court or a juvenile record"); cf. Rivera, 249 N.J. at 303 (concluding that "the presumption that a defendant's youth may have prevented the defendant from having a criminal record cannot support a finding of aggravating factor three"). Additionally, in light of Walker's role and involvement in the

commission of the crimes, the judge should give a fuller explication of the rationale for finding aggravating factor one.

We take no position on the outcome of the resentencing proceeding and acknowledge that the judge imposed mid-range sentences on all the counts for which Walker was convicted, except for count thirty-three for which the judge imposed a sentence at the bottom of the sentencing range. See Natale, 184 N.J. at 488.

Finally, we consider Fair's sentence. After mergers, Fair was sentenced to an aggregate term of eighty-two years' imprisonment, with fifty years and nine months of parole ineligibility. Similar to Walker, the judge found aggravating factors one, three, five, six, and nine and no mitigating factors. The judge determined the aggravating factors substantially outweighed the non-existent mitigating factors. Additionally, for the racketeering conspiracy conviction, the judge granted the State's motion to impose an extended term as a persistent offender based on Fair's four prior convictions,[32] and explained that

[32] See N.J.S.A. 2C:44-3(a) ("A persistent offender is a person who at the time of the commission of the crime is [twenty-one] years of age or over," and "has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least [eighteen] years of age," and "the latest . . . of these crimes or the date of the defendant's last release from confinement, whichever is later, is within [ten] years of the date of the crime for which the defendant is being sentenced.").

as a persistent offender, the sentencing range for racketeering conspiracy was between ten years and life imprisonment.[33] Also, the judge imposed five consecutive terms, noting that consecutive sentences were mandated on the racketeering conspiracy count, see Ball, 268 N.J. Super. at 148, and the promoting organized street crime count, see N.J.S.A. 2C:33-30(b) ("A sentence imposed upon conviction of the crime of promotion of organized street crime shall be ordered to be served consecutively to the sentence imposed upon conviction of any underlying offense . . . .").

Fair was originally sentenced on December 21, 2017. As a result of discrepancies on the judgment of conviction, the Department of Corrections (DOC) requested clarification. On August 3, 2018, in the presence of all the parties, the judge clarified the sentence as requested by DOC and resentenced Fair as follows:

- Count 1 (first-degree racketeering conspiracy): 25 years, subject to NERA;
- Count 12 (first-degree armed robbery): 15 years, subject to NERA, consecutive to count 1;

[33] The State elected to move for discretionary extended term sentencing under N.J.S.A. 2C:44-3(a), foregoing the mandatory extended term sentencing under N.J.S.A. 2C:43-6(f) for which Fair was also eligible. See Robinson, 217 N.J. at 610 ("N.J.S.A. 2C:44-5(a)(2) bars the imposition of a discretionary extended term and a mandatory extended term in the same sentencing proceeding.").

- Count 23 (third-degree burglary): 4 years, consecutive to count 12;

- Count 36 (second-degree possession of a firearm for an unlawful purpose): 8 years, with 4 years of parole ineligibility, consecutive to count 23;

- Count 42 (first-degree conspiracy to commit murder): 15 years, subject to NERA, consecutive to count 36;

- Count 47 (first-degree promoting organized street crime): 15 years, consecutive to count 42.

The remaining counts were merged or concurrent sentences were imposed.

Fair argues "the manner in which the court arrive[d] at the aggregate is illegal, the imposition of the extended term was improper, the multiple consecutive sentences are excessive, and the sentence violates the doctrine of merger." Specifically, Fair asserts the judge: (1) engaged in impermissible double-counting in finding aggravating factor one; (2) abused his discretion in granting the State's motion for a discretionary extended term; (3) erred in imposing consecutive sentences; and (4) failed to perform legally required mergers.

The State concedes "[t]here were sentencing errors" for which a remand for resentencing is appropriate but does not agree with all of Fair's points. The State agrees that the imposition of a concurrent fifteen-year sentence on count

forty-one charging promoting organized street crime is illegal[34] because Fair was convicted of promoting a third-degree crime, rather than a second-degree crime as originally charged. Therefore, pursuant to N.J.S.A. 2C:33-30(b), the conviction on count forty-one was a second-degree crime,[35] rendering the fifteen-year sentence illegal. See N.J.S.A. 2C:43-6(a)(2). Likewise, pursuant to N.J.S.A. 2C:33-30(b), consecutive sentences should have been imposed on counts forty-one and twenty-five, which also charged promoting organized street crime.

Further, the State agrees that count forty-two, charging first-degree conspiracy to commit murder, should merge with count forty-seven, charging promoting organized street crime because count forty-seven "relat[ed] to the same criminal plan" as count forty-two. Fair correctly points out that conspiracy to commit one of the enumerated substantive crimes does not trigger N.J.S.A. 2C:33-30's mandatory consecutive sentencing provision. The State asserts,

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[34] The State points out that the imposition of a flat concurrent eighteen-month sentence on count fourteen charging fourth-degree aggravated assault by pointing a firearm is also illegal because the sentence did not include the mandatory eighteen-month parole disqualifier required under N.J.S.A. 2C:43-6(c). We agree.

[35] See N.J.S.A. 2C:33-30(b) ("Promotion of organized street crime is a crime of one degree higher than the most serious underlying crime . . . .")

however, that the NERA eighty-five percent parole disqualifier should survive the merger, an assertion with which we agree. See Robinson, 439 N.J. Super. at 201 (explaining that "the more severe aspects of each sentence should survive merger" (quoting Cannel, N.J. Criminal Code Annotated, cmt. 9 on N.J.S.A. 2C:1-8 (2014-15))). At the resentencing hearing, these errors should be corrected.[36]

Fair also argues counts thirty-nine and fifty, both charging possession of a firearm for an unlawful purpose for which he received concurrent sentences, should have merged into count thirty-six because they "charged the same crime during the same time period covered by [c]ount [thirty-six]." For the same reason, he argues counts nine, sixteen, forty, and forty-five should have merged into count fifty-nine, all charging unlawful possession of a firearm for which he received concurrent sentences. We reject these merger arguments because the

[36] The State also notes that the judge was correct to merge count 141 into count 139 and count 146 into count 144 but asserts that the mandatory minimum three-year parole ineligibility period prescribed by N.J.S.A. 2C:35-7(a) should have been preserved. We agree. See State v. Brana, 127 N.J. 64, 67 (1992) (construing the school-zone statute "to allow merger of school-zone offenses into . . . Section 5 offenses provided that a defendant convicted of a drug offense in a school zone is sentenced to no less than the mandatory minimum sentence provided in the school zone statute." (quoting State v. Dillihay, 127 N.J. 42, 55 (1992))).

convictions related to separate offenses. See Davis, 68 N.J. at 81 (explaining that a merger analysis entails, among other things, consideration of "the time and place of each purported violation" as well as "whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count").

Fair does not dispute that he qualified for a discretionary extended term sentence as a persistent offender, or the sentencing range considered by the judge. Instead, he argues given "the number of counts on which sentence was to be imposed, the operation of [NERA], and the mandatory consecutive sentences," the imposition of an extended term sentence "was excessive, as it contributed to an aggregate sentence in excess of that imposed, in many cases, for the crime of murder." However, we discern no abuse of discretion in the judge's imposition of an extended term sentence. See State v. Tillery, 238 N.J. 293, 323 (2019) (outlining the court's required inquiry in determining whether to impose a discretionary extended term sentence); State v. Bauman, 298 N.J. Super. 176, 211 (App. Div. 1997) (reviewing imposition of extended term sentence for abuse of discretion). Moreover, as the judge noted, the sentence was on the lower end of the extended term range for a first-degree offense. See N.J.S.A. 2C:43-7(a)(2).

Likewise, we reject Fair's contention that the judge "failed to consider the real-time consequences of NERA." In State v. Marinez, 370 N.J. Super. 49, 57-58 (App. Div. 2004), we observed "that one of the consequences of NERA has been its discernible effect on sentencing disparity" and recognized that sentencing and appellate courts must "be mindful of the real-time consequences of NERA and the role that it customarily plays in the fashioning of an appropriate sentence." We noted with approval that some "judges sentence the defendant to the presumptive term even where the aggravating factors might legitimately be found to have outweighed the mitigating factors, apparently taking into account that the severity of NERA sentencing compensates for the outweighing aggravating factors." Id. at 58.

Here, we are satisfied the judge considered the real-time consequences of NERA. Despite finding that the aggravating factors substantially outweighed the non-existent mitigating factors, the judge imposed base terms with the NERA sentences that were marginally above or at the midpoint of the sentencing range, and, as previously noted, the extended base term was at the lower end of the range.

Like Walker, Fair challenges the judge's finding of aggravating factor one, arguing the factor "was not applicable, as it constituted double-counting." In finding aggravating factor one, the judge stated:

> [Fair] was one of the driving forces behind the criminal enterprise and the crimes committed in furtherance of that enterprise. [Fair] was involved in a conspiracy to commit racketeering that had far-reaching implications in the community. [Fair] was convicted of [seventy-nine] crimes, including conspiracy to commit murder, attempted armed robbery, unlawful possession of a weapon, aggravated assault, and various drug-related offenses. These crimes threatened not only the safety of his direct victims, but also the safety of the public at large.

Additionally, relying on State v. Rivers, 252 N.J. Super. 142 (App. Div. 1991), the judge found that the crime committed against Speights was committed in an especially heinous, cruel, or depraved manner, stating:

> [Fair] shot multiple rounds into a house where he believed a rival gang member, Diquan Speights, was located. In fact, there were nine other individuals in the house that could have been harmed from defendant's reckless . . . behavior. Based on the . . . facts and circumstances and certainly the information that was placed before this [c]ourt over the four months of this trial, I do believe that aggravating factor one applies, and I do believe that based on the manner in which the case was indicted and the proofs that were set forth, that this would not be . . . double-counting.

We discern no abuse of discretion in the judge's application of aggravating factor one to the specified crimes – count one charging the racketeering conspiracy and counts thirty-seven to forty-one pertaining to the shooting at Speights's home during which one person was injured. See id. at 153 ("[D]efendant shot and threatened to shoot unarmed individuals. Therefore, there is evidential support for the aggravating factor that the crime 'was committed in an especially heinous, cruel or depraved manner.'"). However, when Fair is resentenced, the judge should clarify whether he applied aggravating factor one to any other offense and explain his reasoning. See Lawless, 214 N.J. at 600 ("[E]ach [aggravating factor] requires a distinct analysis of the offense for which the court sentences the defendant.").

Fair also challenges the judge's imposition of multiple consecutive sentences, arguing the judge "did not provide reasons for the imposition of the various consecutive terms, nor for [his] decision to impose so many . . . consecutive terms." Although the judge articulated the controlling Yarbough factors and noted that consecutive sentences were mandated on the racketeering conspiracy and promoting organized street crime offenses, he did not address the applicable Yarbough factor as to each count for which a consecutive sentence was imposed or comply with Torres. Moreover, when the judge

clarified the sentences at the request of DOC, he changed the consecutive sentences from those ordered at the original sentencing hearing.

Undoubtedly, consecutive sentences were justified given the number and variety of Fair's offenses committed over several months and involving different victims. However, when Fair is resentenced, the judge should explain his reasons for the imposition of each consecutive sentence as Yarbough requires and give "an explanation for the overall fairness of [the] sentence[s]" as required by Torres. 246 N.J. at 271; see also Cuff, 239 N.J. at 350, 352 (remanding for resentencing for the trial court to provide a more detailed explanation of its reasoning to support the imposition of multiple consecutive sentences and consider the fairness of the overall sentence); State v. Cassady, 198 N.J. 165, 181-82 (2009) (upholding the imposition of consecutive sentences because "the sentencing court faithfully paired the Yarbough factors with the facts as found by the jury").

In a supplemental letter submitted at our request, Fair contends that the newly enacted mitigating factor allowing consideration of his youth "should be applied retroactively to cases on direct appeal." According to Fair, because he

was under the age of twenty-six at the time of the crimes,[37] mitigating factor fourteen should be "considered at any new sentencing hearing."

The State agrees. Consistent with its position that a remand for resentencing is required, the State asserts that the resentencing proceeding should comport with State v. Randolph, 210 N.J. 330 (2012). Such a resentencing would entail "a new analysis of the aggravating and mitigating factors" applicable to "defendant as he appears on the day of resentencing." Id. at 354. Thus, according to the State, "it would follow that the b(14) amendment, now effective, would be considered by the resentencing [c]ourt." See State v. Bellamy, 468 N.J. Super. 29, 48 (App. Div. 2021) ("[W]here, for a reason unrelated to the adoption of the [new mitigating factor] statute, a youthful defendant is resentenced, he or she is entitled to argue the new statute applies."). However, the State posits mitigating factor fourteen "should ultimately carry no weight in mitigation under the circumstances of this case."

Because we are ordering reconsideration of the sentence and requiring the sentencing court "to conduct a new sentencing proceeding," Robinson, 217 N.J. at 611, for reasons unrelated to the adoption of the amendment, we agree that

[37] Fair was born in February 1988.

mitigating factor fourteen should be considered at the resentencing hearing, and we need not address the retroactivity issue.[38]

In sum, we affirm Leonard's convictions and sentence. We affirm Fair and Walker's convictions but vacate their sentences and remand for resentencing. As to German, we remand to mold the verdict on count eighty-three to a third-degree conviction of the lesser included offense of unlawful access and disclosure of computer data but affirm the convictions in all other respects. We vacate German's sentence and remand for resentencing.

Affirmed in part; reversed in part; remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

* * *

Appendix

[38] In Bellamy, we held that mitigating factor fourteen does not automatically apply retroactively to criminal convictions that were not on direct appeal when the statute was enacted in 2020. 468 N.J. Super. at 48. We are mindful, however, that our Supreme Court has granted certification in State v. Lane, 248 N.J. 534 (2021), in which the pure legal question before the Court is whether, and if so, to what extent, N.J.S.A. 2C:44-1(b)(14) applies retroactively.

Appendix
Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
1	First degree racketeering conspiracy (Sept. 15, 2013 -Aug. 15, 2014), N.J.S.A. 2C:5-2, 2C:41-2(c) and (d)	X	X	X	X	Fair: guilty; 25 yrs. extended term; NERA Walker: guilty; 15 yrs.; NERA German: dismissed	Leonard: pled guilty 17 yrs.; NERA
2	Second degree conspiracy to commit armed robbery (Sept. 25, 2013), N.J.S.A. 2C:5-2, 2C:15-1	X	X			Fair: guilty; merges into count 3 Walker: guilty; 7 yrs. consecutive; NERA	
3	First degree armed robbery (Sept. 25, 2013), N.J.S.A. 2C:15-1	X	X			Fair: guilty; Second-degree robbery 8 yrs. concurrent; NERA Walker: not guilty	
4	Second degree possession of a weapon for an unlawful purpose (Sept. 25, 2013), N.J.S.A. 2C:39-4(a)	X	X			Fair: not guilty Walker: not guilty	
5	Second degree unlawful possession of a weapon (Sept. 25, 2013), N.J.S.A. 2C:39- 5(b)	X	X			Fair: not guilty Walker: not guilty	
6	Second degree conspiracy to commit armed robbery (Dec. 11, 2013), N.J.S.A. 2C:5-2, 2C:15-1	X	X			Fair: guilty; merges into count 7 Walker: guilty; merges into count 7	
7	Second degree attempted armed robbery (Dec. 11, 2013), N.J.S.A. 2C:5-1, 2C:15-1	X	X			Fair: guilty; 8 yrs. concurrent; NERA Walker: guilty; 7 yrs. consecutive; NERA	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
8	Second degree possession of a weapon for an unlawful purpose (Dec. 11, 2013), N.J.S.A. 2C:39-4(a)	X	X			Fair: guilty; merges into count 7 Walker: guilty; merges into count 7	
9	Second degree unlawful possession of a weapon (Dec. 11, 2013), N.J.S.A. 2C:39-5(b)	X	X			Fair: guilty; 8 years concurrent; 4 years parole ineligibility Walker: guilty; 7 yrs. concurrent	
10	First degree promoting organized street crime (Dec. 11, 2013), N.J.S.A. 2C:33-30(a)	X				Dismissed	
11	Second degree conspiracy to commit armed robbery (Jan. 8, 2014), N.J.S.A. 2C:5-2, 2C:15-l	X				Fair: guilty; merges into count 12	
12	First degree armed robbery (Jan. 8, 2014), N.J.S.A. 2C:15-1	X				Fair: guilty; 15 yrs. consecutive; NERA	
13	Second degree burglary (Jan. 8, 2014), N.J.S.A. 2C:18-2	X				Fair: guilty; 8 yrs. concurrent; NERA	
14	Fourth degree aggravated assault by pointing a firearm (Jan. 8, 2014), N.J.S.A. 2C:12-l(b)(4)	X				Fair: guilty; 18 months concurrent	
15	Second degree possession of a weapon for an unlawful purpose (Jan. 8, 2014), N.J.S.A. 2C:39-4(a)	X				Fair: guilty; merges into count 12	
16	Second degree unlawful possession of a weapon (Jan. 8, 2014), N.J.S.A. 2C:39-5(b)	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	
17	Third degree possession of a weapon for an unlawful purpose (Jan. 8, 2014), N.J.S.A. 2C:39-4(d)	X				Fair: guilty; merges into count 12	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
18	Fourth degree unlawful possession of a weapon (Jan. 8, 2014), N.J.S.A. 2C:39-5(d)	X				Fair: guilty; merges into count 12	
19	Third degree conspiracy to commit burglary (Sept. 15, 2013), N.J.S.A. 2C:5-2, 2C:18-2	X				Fair: guilty; merges into count 20	
20	Third degree burglary (Sept. 15, 2013), N.J.S.A. 2C:18-2	X				Fair: guilty; 4 yrs. concurrent	
21	Third degree theft of movable property (Sept. 15, 2013), N.J.S.A. 2C:20-3(a)	X				Fair: guilty – fourth-degree theft (see N.J.S.A. 2C:20-2(b)(3) at least $200 but does not exceed $500); 18 months concurrent	
22	Third degree conspiracy to commit burglary (Dec. 12, 2013), N.J.S.A. 2C:5-2, 2C:18-2	X				Fair: guilty; merges into count 23	
23	Third degree burglary (Dec. 12, 2013), N.J.S.A. 2C:18-2	X				Fair: guilty; 4 yrs. consecutive	
24	Third degree theft of movable property (Dec. 12, 2013), N.J.S.A. 2C:20-3(a)	X				Fair: guilty; 4 yrs. concurrent	
25	Second degree promoting organized street crime (Dec. 12, 2013), N.J.S.A. 2C:33-30(a)	X				Fair: guilty; 8 years concurrent	
26	Third degree conspiracy to commit burglary (Dec. 13, 2013), N.J.S.A. 2C:5-2, 2C:18-2	X				Fair: not guilty	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
27	Second degree conspiracy to commit theft (Dec. 21, 2013), N.J.S.A. 2C:5-2, 2C:20-3	X				Fair: guilty - third-degree conspiracy to commit theft (see N.J.S.A. 2C:20-2(b)(2)(a), exceeds $500 but less than $75,000); merges into count 28	
28	Second degree theft of movable property (Dec. 21, 2013), N.J.S.A. 2C:20-3(a)	X				Fair: guilty – third-degree theft (see N.J.S.A. 2C:20-2(b)(2)(a), exceeds $500 but less than $75,000); 4 yrs. concurrent	
29	Third degree conspiracy to commit theft (Feb. 9, 2104), N.J.S.A. 2C:5-2, 2C:20-3	X				Fair: dismissed	
30	Third degree theft from person (Feb. 9, 2014), N.J.S.A. 2C:20-3	X				Fair: not guilty; guilty of lesser included offense of theft by deception; N.J.S.A. 2C:20-4; 6 months concurrent	
31	Second degree conspiracy to commit shoplifting and/or fencing (Oct. 1, 2013 -May 22, 2014), N.J.S.A. 2C:5-2, 2C:20-11, 2C:20-7.1	X	X		X	Fair: guilty; second-degree conspiracy to commit shoplifting $1,000 or more; merges into count 32 Walker: guilty; second-degree conspiracy to commit shoplifting $1,000 or more; merges into count 32	Leonard: dismissed

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
32	Second degree shoplifting (Oct. 1, 2013 - May 22, 2014), N.J.S.A. 2C:20-11(b)(l)	X	X		X	Fair: guilty; $1,000 or more; 8 yrs. concurrent Walker: guilty; $1,000 or more; 7 yrs. consecutive	Leonard: dismissed
33	Third degree fencing (Oct. 1, 2013 - May 22, 2014), N.J.S.A. 2C:20-7.1	X	X		X	Fair: guilty; exceeds $500; 4 yrs. concurrent Walker: guilty; exceeds $500; 3 yrs. concurrent	Leonard: dismissed
34	Third degree receiving stolen property (Oct. 1, 2013 - May 22, 2014), N.J.S.A. 2C:20-7(a)						
35	Second degree conspiracy to commit possession of a firearm for an unlawful purpose (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:39-4(a)	X	X		X	Fair: guilty; merges into count 36 Walker: guilty; merges into count 36	Leonard: dismissed
36	Second degree possession of a weapon for an unlawful purpose (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-4(a)	X	X		X	Fair: guilty; 8 yrs. consecutive; 4 yrs. parole ineligibility Walker: guilty; 7 yrs. consecutive, 3 1/2 yrs. parole ineligibility	Leonard: dismissed

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
37	First degree conspiracy to commit murder (Dec. 2, 2013), N.J.S.A. 2C:5-2, 2C:11-3	X	X			Fair: not guilty; guilty of conspiracy to commit aggravated assault - bodily injury with a deadly weapon; merges into count 39 Walker: not guilty; guilty of conspiracy to commit aggravated assault - bodily injury with a deadly weapon; merges into count 39	
38	First degree attempted murder (Dec. 2, 2013), N.J.S.A. 2C:5-l, 2C:11-3	X	X			Fair: not guilty; guilty of aggravated assault - attempt to cause bodily injury to another with a deadly weapon; merges into count 39 Walker: not guilty; guilty of aggravated assault - attempt to cause bodily injury to another with a deadly weapon; merges into count 39	
39	Second degree possession of a weapon for an unlawful purpose (Dec. 2, 2013), N.J.S.A. 2C:39-4(a)	X	X			Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility Walker: guilty; 7 yrs. concurrent; 3 1/2 yrs. parole ineligibility	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
40	Second degree unlawful possession of a weapon (Dec. 2, 2013), NJ.S.A. 2C:39-5(b)	X	X			Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility Walker: guilty; 7 yrs. concurrent; 3 1/2 yrs. parole ineligibility	
41	First degree promoting organized street crime (Dec. 2, 2013), N.J.S.A. 2C:33-30(a)	X				Fair: not guilty; guilty of second degree promoting organized street crime based upon conspiracy to commit second-degree aggravated assault - attempt to cause bodily injury to another with a deadly weapon; 15 yrs. concurrent	
42	First degree conspiracy to commit murder (Dec. 11, 2013), N.J.S.A. 2C:5-2, 2C:11-3	X				Fair: guilty; 15 yrs. consecutive; NERA	
43	First degree attempted murder (Dec. 11, 2013), N.J.S.A. 2C:5-l, 2C:11-3	X				Fair: not guilty; guilty of second-degree aggravated assault - attempt to cause serious bodily injury, N.J.S.A. 2C:12-1(b)(1); merges into count 42	
44	Second degree possession of a weapon for an unlawful purpose (Dec. 11, 2013), N.J.S.A. 2C:39-4(a)	X				Fair: guilty; merges into count 42	
45	Second degree unlawful possession of a weapon (Dec. 11, 2013), N.J.S.A. 2C:39-5(b)	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
46	Second degree endangering the welfare of a child (Dec. 11, 2013), N.J.S.A. 2C:24-4(a)	X				Fair: guilty; 8 yrs. concurrent	
47	First degree promoting organized street crime (Dec. 11, 2013), N.J.S.A. 2C:33-30(a)	X				Fair: guilty; predicate crime possession of a weapon for an unlawful purpose; 15 yrs. consecutive	
48	Second degree un awful possession of a weapon (Dec. 22, 2013), N.J.S.A. 2C:39-5(b)						
49	Second degree conspiracy to commit possession of a firearm for an unlawful purpose (Sept. 15, 2013 - Feb. 12, 2014); N.J.S.A. 2C:5-2, 2C:39-4(a)	X	X		X	Fair: guilty; merges into count 50 Walker: guilty; merges into count 50	Leonard: dismissed
50	Second degree possession of a weapon for an unlawful purpose (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-4(a)	X	X		X	Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility Walker: guilty; 7 yrs. concurrent; 3 1/2 yrs. parole ineligibility	Leonard: dismissed
51	Second degree conspiracy to possess a firearm for an unlawful purpose (Sept. 15,2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:39-4(a)	X	X		X	Fair: not guilty Walker: not guilty	Leonard: dismissed
52	Second degree possession of a weapon for an unlawful purpose (Sept. 15, 2013 -Feb.12, 2014), N.J.S.A. 2C:39-4(a)	X	X		X	Fair: not guilty Walker: not guilty	Pled guilty; 8 yrs. with 4 yrs. parole ineligibility pursuant to Graves Act, concurrent

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
53	First degree promoting organized street crime (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:33-30(a)				X		Leonard: dismissed
54	Second degree possession of a weapon for an unlawful purpose (Jan. 11, 2014), N.J.S.A. 2C:39-4(a)				X		Leonard: dismissed
55	Second degree unlawful possession of a weapon (Jan. 11, 2014), N.J.S.A. 2C:39-5(b)				X		Leonard: dismissed
56	First degree use of a juvenile to commit a crime (Jan. 11, 2014), N.J.S.A. 2C:24-9(a)				X		Leonard: dismissed
57	First degree promoting organized street crime (Jan. 11, 2014), N.J.S.A. 2C:33-30(a)				X		Leonard: dismissed
58	Second degree conspiracy to commit unlawful possession of a handgun (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:39-5(b)	X	X		X	Fair: guilty; merges into count 59 Walker: guilty; merges into count 59	Leonard: dismissed
59	Second degree unlawful possession of a weapon (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-5(b)	X	X		X	Fair: guilty; 8 yrs. concurrent 4 yrs. parole ineligibility Walker: guilty; 7 yrs. concurrent	Leonard: dismissed
60	Second degree unlawful possession of a community gun (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-4(a)(2)	X	X		X	Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility Walker: guilty; 7 yrs. concurrent; 3 1/2 yrs. parole ineligibility	Leonard: dismissed

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
61	Second degree unlawful possession of a weapon (Dec. 18, 2013), N.J.S.A. 2C:39-5(b)	X	X			Fair: not guilty Walker: not guilty	
62	Fourth degree obstructing the administration of law or other governmental function (Jan. 17, 2014), N.J.S.A. 2C:29-l						
63	Second degree eluding (Jan. 17, 2014), N.J.S.A. 2C:29-2(b)						
64	Fourth degree obstructing the administration of law or other governmental function (Jan. 17, 2014), N.J.S.A. 2C:29-1						
65	Second degree unlawful possession of a weapon (Jan. 17, 2014), N.J.S.A. 2C:39-5(b)						
66	Fourth degree possession of a prohibited weapon (Jan. 17, 2014), N.J.S.A. 2C:39-3(d)						
67	Second degree unlawful possession of a weapon (Jan. 19, 2014), N.J.S.A. 2C:39- 5(b)				X		Leonard: dismissed
68	Third degree hindering apprehension of another (Jan. 20, 2014), N.J.S.A. 2C:29-3(a)						
69	Second degree unlawful possession of a weapon (Jan. 20, 2014), N.J.S.A. 2C:39-5(b)				X		Leonard: dismissed
70	Fourth degree possession of a prohibited weapon (Jan. 20, 2014), N.J.S.A. 2C:39-3(f)				X		Leonard: dismissed

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
71	Fourth degree obstructing the administration of law or other governmental function (Jan. 20, 2014), N.J.S.A. 2C:29-1						
72	Third degree resisting arrest (Jan. 20, 2014), N.J.S.A. 2C:29-2(a)(3)						
73	First degree use of a juvenile to commit a crime (Jan. 20, 2014), N.J.S.A. 2C:24-9(a)·				X		Leonard: dismissed
74	First degree promoting organized street crime (Jan. 20, 2014), N.J.S.A. 2C:33-30(a)				X		Leonard: dismissed
75	Third degree false public alarms (Feb. 7 - Feb. 8, 2014), N.J.S.A. 2C:33-3	X			X	Fair: guilty; 4 yrs. concurrent	Leonard: dismissed
76	Second degree official misconduct (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:30-2(a)			X		German: guilty; 5 years consecutive to counts 79 and 81	
77	Fourth degree conspiracy to commit stalking (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:12-10	X		X		Fair: guilty; 18 months concurrent German: guilty; merges with count 76	
78	Fourth degree stalking (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:12-10	X		X		Fair: not guilty German: not guilty; guilty of lesser included offense of harassment; merges with count 77	
79	Second degree official misconduct (Dec. 11, 2013 - Feb. 12, 2014), N.J.S.A. 2C:30-2(a)			X		German: guilty; 5 years	

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
80	Third degree hindering apprehension of another (Dec. 11, 2013 - Feb. 12, 2014), N.J.S.A. 2C:29-3(a)			X		German: guilty; merges with count 79	
81	Second degree official misconduct (Feb. 9, 2014), N.J.S.A. 2C:30-2(a).			X		German: guilty; 5 years concurrent	
82	Second degree computer theft (Feb. 9, 2014), N.J.S.A. 2C:20-25(e)	X		X		Fair: dismissed German: guilty; merges with count 81	
83	Second degree unlawful access and disclosure (Feb. 9, 2014), N.J.S.A. 2C:20-3l(b)	X		X		Fair: dismissed German: guilty; merges with count 81	
84	First degree tampering with a witness or informant (Aug. 14, 2014), N.J.S.A. 2C:28-5(a)				X		Leonard: dismissed
85	Second degree conspiracy to commit distribution of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:35-5	X	X		X	Fair: guilty third-degree conspiracy to commit distribution of CDS; 4 yrs. concurrent Walker: not guilty; guilty of lesser included offense of conspiracy to possess a CDS; 4 yrs. consecutive	Leonard: dismissed
86	Second degree conspiracy to commit possession of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:35-10(a)(l)						
87	Third degree possession of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.SA. 2C:35-l0(a)(l) ·						

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
88	Third degree possession of a CDS (Oct. 27, 2013), N.J.SA. 2C:35-10(a)(l)	X	X		X	Fair: dismissed Walker: guilty; 4 yrs. concurrent	Leonard: dismissed
89	Third degree possession of a CDS with intent to distribute (Oct. 27, 2013), N.J.SA. 2C:35-5(b)(3)	X	X		X	Fair: dismissed Walker: not guilty	Leonard: dismissed
90	Third degree possession of a CDS on or within 1,000 feet of school property with intent to distribute (Oct. 27, 2013), N.J.S.A. 2C:35-7	X	X		X	Fair: dismissed Walker: not guilty	Leonard: dismissed
91	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Oct. 27, 2013), N.J.S.A. 2C:35-7.1	X	X		X	Fair: dismissed Walker: not guilty	Leonard: dismissed
92	Third degree possession of a CDS (Jan. 29, 2014), N.J.S.A. 2C:35-10(a)(l)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
93	Second degree possession of a CDS with intent to distribute (Jan. 29, 2014), N.J.SA. 2C:35-5(b)(2)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
94	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Jan. 29, 2014), N.J.S.A. 2C:35-7	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
95	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Jan. 29, 2014), N.J.S.A. 2C:35-7.1	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
96	Third degree possession of a CDS (Feb. 12, 2014), N.J.SA. 2C:35-10(a)(l)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
97	Third degree possession of a CDS with intent to distribute (Feb. 12, 2014), N.J.SA. 2C:35-5(b)(3)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
98	Third degree possession of a CDS on or within 1,000 feet of school property with intent to distribute (Feb. 12, 2014), N.J.S.A. 2C:35-7	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
99	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Feb. 12, 2014), N.J.S.A. 2C:35-7.1	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
100	Third degree possession of a CDS (Nov. 14, 2013), N.J.SA. 2C:35-10(a)(l)	X				Fair: dismissed	
101	Third degree possession of a CDS with intent to distribute (Nov. 14, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
102	Third degree distribution of a CDS (Nov. 14, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 106	
103	Third degree possession of a CDS on or within 1,000 feet of school property with intent to distribute (Nov. 14, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
104	Third degree distribution of a CDS on or within 1000 feet of school property (Nov. 14, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
105	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Nov. 14, 2013), N.J.S.A. 2C:35-7.1	X				Fair: dismissed	
106	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Nov. 14, 2013), N.J.S.A. 2C:35-7.1	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	
107	Third degree possession of a CDS (Nov. 19, 2013), N.J.SA. 2C:35-10(a)(l)	X				Fair: dismissed	
108	Third degree possession of a CDS with intent to distribute (Nov. 19, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
109	Third degree distribution of a CDS (Nov. 19, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 113	
110	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Nov. 19, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
111	Third degree distribution of a CDS on or within 1,000 feet of school property (Nov. 19, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	
112	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Nov. 19, 2013), N.J.S.A. 2C:35-7.1	X				Fair: dismissed	
113	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Nov. 19, 2013), N.J.S.A. 2C:35-7. l	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	

Appendix
Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
114	Third degree possession of a CDS (Nov. 22, 2013), N.J.SA. 2C:35-10(a)(l)	X				Fair: dismissed	
115	Third degree possession of a CDS with intent to distribute (Nov. 22, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
116	Third degree distribution of a CDS (Nov. 22, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; 4 yrs. concurrent; 2 yrs. parole ineligibility	
117	Third degree possession of a CDS (Nov. 26, 2013), N.J.SA. 2C:35-10(a)(l)	X				Fair: dismissed	
118	Third degree possession of a CDS with intent to distribute (Nov. 26, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
119	Third degree distribution of a CDS (Nov. 26, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 123	
120	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Nov. 26, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
121	Third degree distribution of a CDS on or within 1000 feet of school property (Nov. 26, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	
122	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Nov. 26, 2013), N.J.S.A. 2C:35-7.1	X				Fair: dismissed	
123	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Nov. 26, 2013), N.J.S.A. 2C:35-7. l	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
124	Second degree endangering the welfare of a child (Nov. 26, 2013), N.J.S.A. 2C:24-4(a)	X				Fair: guilty; 8 yrs. concurrent	
125	Third degree possession of a CDS (Nov. 30, 2013), N.J.SA. 2C:35-10(a)(l)	X				Fair: dismissed	
126	Third degree possession of a CDS with intent to distribute (Nov. 30, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
127	Third degree distribution of a CDS (Nov. 30, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 131	
128	Third degree possession of a CDS on or within 1,000 feet of school property with intent to distribute (Nov. 30, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
129	Third degree distribution of a CDS on or within 1,000 feet of school property (Nov. 30, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	
130	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Nov. 30, 2013), N.J.S.A. 2C:35-7.1	X				Fair: dismissed	
131	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Nov. 30, 2013), N.J.S.A. 2C:35-7.1	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	
132	Third degree possession of a CDS (Dec. 9, 2013), N.J.SA. 2C:35-10(a) (l)	X				Fair: dismissed	
133	Third degree possession of a CDS with intent to distribute (Dec. 9, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
134	Third degree distribution of a CDS (Dec. 9, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; 4 yrs. concurrent; 2 yrs. parole ineligibility	
135	Third degree possession of a CDS on or within 1,000 feet of school property with intent to distribute (Dec. 9, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
136	Third degree distribution of a CDS on or within 1,000 feet of school property (Dec. 9, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	
137	Third degree possession of a CDS (Dec. 11, 2013), N.J.SA. 2C:35-10(a)(l)	X				Fair: dismissed	
138	Third degree possession of a CDS with intent to distribute (Dec. 11, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
139	Third degree distribution of a CDS (Dec. 11, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; 4 yrs. concurrent; 2 yrs. parole ineligibility	
140	Third degree possession of a CDS on or within 1,000 feet of school property with intent to distribute (Dec. 11, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
141	Third degree distribution of a CDS on or within 1,000 feet of school property (Dec. 11, 2013), N.J.S.A. 2C:35-7	X				Fair: guilty; merges into count 139	
142	Third degree possession of a CDS (Dec. 13, 2013), N.J.SA. 2C:35-10(a)(l)	X				Fair: dismissed	
143	Third degree possession of a CDS with intent to distribute (Dec. 13, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
144	Third degree distribution of a CDS (Dec. 13, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; 4 yrs. concurrent; 2 yrs. parole ineligibility	
145	Third degree possession of a CDS on or within 1,000 feet of school property with intent to distribute (Dec. 13, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
146	Third degree distribution of a CDS on or within 1,000 feet of school property (Dec. 13, 2013), N.J.S.A. 2C:35-7	X				Fair: guilty; merges into count 144	
147	Third degree possession of a CDS (Jan. 8, 2014), N.J.SA. 2C:35-10(a)(l)						
148	Third degree possession of a CDS with intent to distribute (Jan. 8, 2014), N.J.S.A. 2C:35-5(b)(3)						
149	Third degree distribution of a CDS (Jan. 8, 2014), N.J.S.A. 2C:35-5(b)(3)						
150	Third degree possession of a CDS (Jan. 10, 2014), N.J.SA. 2C:35-10(a)(l)						
151	Third degree possession of a CDS with intent to distribute (Jan. 10, 2014), N.J.S.A. 2C:35-5(b)(3)						
152	Third degree distribution of a CDS (Jan. 10, 2014), N.J.S.A. 2C:35-5(b)(3)						
153	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Jan. 10, 2014), N.J.S.A. 2C:35-7						
154	Third degree distribution of a CDS on or within 1000 feet of school property (Jan. 10, 2014), N.J.S.A. 2C:35-7						

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
155	Second degree possession of a CDS with. intent to distribute while on or within 500 feet of a public housing facility (Jan. 10, 2014), N.J.S.A. 2C:35-7.1						
156	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Jan. 10, 2014), N.J.S.A. 2C:35-7.1						
157	Third degree possession of a CDS (Jan. 16, 2014), N.J.S.A. 2C:35-10(a)(l)						
158	Third degree possession of a CDS with intent to distribute (Jan. 16, 2014), N.J.S.A. 2C:35-5(b)(3)						
159	Third degree distribution of a CDS (Jan. 16, 2014), N.J.S.A. 2C:35-5(b)(3)						
160	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Jan. 16, 2014), N.J.S.A. 2C:35-7						
161	Third degree distribution of a CDS on or within 1000 feet of school property (Jan. 16, 2014), N.J.S.A. 2C:35-7						
162	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Jan. 16, 2014), N.J.S.A. 2C:35-7.1						
163	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Jan. 16, 2014), N.J.S.A. 2C:35-7.1						

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
164	Third degree possession of a CDS (Feb. 11, 2014), N.J.S.A. 2C:35-10(a)(l)	X				Fair: guilty; merges into count 166	
165	Third degree possession of a CDS with intent to distribute (Feb. 11, 2014), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 166	
166	Third degree distribution of a CDS (Feb. 11, 2014), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; 4 yrs. concurrent; 2 yrs. parole ineligibility	
167	Third degree conspiracy to commit distribution of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:35-5	X	X		X	Fair: guilty; 4 yrs. concurrent; 2 yrs. parole ineligibility Walker: not guilty; guilty of lesser included offense of conspiracy to possess a CDS; 4 yrs. concurrent	Leonard: dismissed
168	Third degree possession of a CDS (Jan. 29, 2014), N.J.S.A. 2C:35-10(a)(l)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
169	Third degree possession of a CDS with intent to distribute (Jan. 29, 2014), N.J.S.A. 2C:35-5(b)(3)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
170	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Jan. 29, 2014), N.J.S.A. 2C:35-7	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
171	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Jan. 29, 2014), N.J.S.A. 2C:35-7.1	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
172	Third degree possession of a CDS (Feb. 12, 2014), N.J.S.A. 2C:35-10(a)(l)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
173	Third degree possession of a CDS with intent to distribute (Feb. 12, 2014), N.J.S.A. 2C:35-5(b)(3)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
174	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Feb. 12, 2014), N.J.S.A. 2C:35-7	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
175	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Feb. 12, 2014), N.J.S.A. 2C:35-7.1	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
176	Third degree possession of a CDS (Feb. 12, 2014), N.J.S.A. 2C:35-10(a)(l)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
177	Third degree possession of a CDS with intent to distribute (Feb. 12, 2014), N.J.S.A. 2C:35-5(b)(3)	X	X		X	Fair: dismissed Walker: dismissed	Leonard: dismissed
178	Third degree possession of a CDS (Nov. 8, 2013), N.J.S.A. 2C:35-10(a)(l)	X				Fair: dismissed	
179	Third degree possession of a CDS with intent to distribute (Nov. 8, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
180	Third degree distribution of a CDS (Nov. 8, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 184	
181	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Nov. 8, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
182	Third degree distribution of a CDS on or within 1000 feet of school property (Nov. 8, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	
183	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Nov. 8, 2013), N.J.S.A. 2C:35-7.1	X				Fair: dismissed	
184	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Nov. 8, 2013), N.J.S.A. 2C:35-7. l	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	
185	Third degree possession of a CDS (Nov. 14, 2013), N.J.S.A. 2C:35-10(a)(l)	X				Fair: dismissed	
186	Third degree possession of a CDS with intent to distribute (Nov. 14, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
187	Third degree distribution of a CDS (Nov. 14, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 191	
188	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Nov. 14, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
189	Third degree distribution of a CDS on or within 1000 feet of school property (Nov. 14, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	

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Indictment No. 14-10-1876 - Fair, Walker, German and Leonard

Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
190	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Nov. 14, 2013), N.J.S.A. 2C:35-7.1	X				Fair: dismissed	
191	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Nov. 14, 2013), N.J.S.A. 2C:35-7.1	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	
192	Third degree possession of a CDS (Nov. 19, 2013), N.J.S.A. 2C:35-10(a)(l)	X				Fair: dismissed	
193	Third degree possession of a CDS with intent to distribute (Nov. 19, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: dismissed	
194	Third degree distribution of a CDS (Nov. 19, 2013), N.J.S.A. 2C:35-5(b)(3)	X				Fair: guilty; merges into count 198	
195	Third degree possession of a CDS on or within 1000 feet of school property with intent to distribute (Nov. 19, 2013), N.J.S.A. 2C:35-7	X				Fair: dismissed	
196	Third degree distribution of a CDS on or within 1000 feet of school property (Nov. 19, 2013), N.J.S.A. 2C:35-7	X				Fair: not guilty	
197	Second degree possession of a CDS with intent to distribute while on or within 500 feet of a public housing facility (Nov. 19, 2013), N.J.S.A. 2C:35-7.1	X				Fair: dismissed	

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
198	Second degree distribution of a CDS while on or within 500 feet of a public housing facility (Nov. 19, 2013), N.J.S.A. 2C:35-7.1	X				Fair: guilty; 8 yrs. concurrent; 4 yrs. parole ineligibility	
199	Third degree possession of a CDS (Dec. 3, 2013), N.J.S.A. 2C:35-10(a)(l)						
200	Third degree possession of a CDS with intent to distribute (Dec. 3, 2013), N.J.S.A. 2C:35-5(b)(3)						
201	Third degree distribution of a CDS (Dec. 3, 2013), N.J.S.A. 2C:35-5(b)(3)						
202	Third degree conspiracy to commit distribution of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:35-5	X	X		X	Fair: guilty; 4 yrs. concurrent Walker: not guilty; guilty of lesser included offense of conspiracy to possess a CDS; 4 yrs. concurrent	Leonard: dismissed
203	Third degree conspiracy to commit possession of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:35-10(a)(l)						
204	Third degree possession of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:35- 10(a)(l)						
205	Third degree possession of a CDS (Jan. 31, 2014), N.J.S.A. 2C:35-10(a)(l)				X		Leonard: dismissed
206	Third degree possession of a CDS with intent to distribute (Jan. 31, 2014), N.J.S.A. 2C:35-5(b)(13)				X		Leonard: pled guilty; 3 yrs., concurrent
207	Third degree distribution of a CDS (Jan. 31, 2014), N.J.S.A. 2C:35-5(b)(13)				X		Leonard: dismissed

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
208	Third degree conspiracy to commit distribution of a CDS (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:5-2, 2C:35-5	X	X		X	Fair: guilty; 4 yrs. concurrent Walker: guilty; 4 yrs. concurrent	Leonard: dismissed
209	Third degree possession of a CDS (Jan. 2, 2014), N.J.S.A. 2C:35-10(a)(l)	X	X		X	Fair: guilty; merges into count 210 Walker: not guilty	Leonard: dismissed
210	Third degree possession of a CDS with intent to distribute (Jan. 2, 2014), N.J.S.A. 2C:35-5(b)(5)	X	X		X	Fair: guilty; 4 yrs. concurrent; 2 yrs. parole ineligibility Walker: not guilty	Leonard: dismissed
211	Fourth degree obstructing the administration of law or other governmental function (Jan. 2, 2014), N.J.S.A. 2C:29-l						
212	Third degree possession of a CDS (Jan. 29, 2014), N.J.S.A. 2C:35-10(a)(l)						
213	Second degree certain persons not to have weapons (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-7(b)(l)	X				Fair: guilty; 8 yrs. concurrent; 5 yrs. parole ineligibility	
214	Second degree certain persons not to have weapons (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-7(b)(l)						
215	Second degree certain persons not to have weapons (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-7(b)(l)						
216	Second degree certain persons not to have weapons (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-7(b)(l)						

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Count	Crime	Fair	Walker	German	Leonard	Resolution – Jury Trial	Resolution – Plea
217	Second degree certain persons not to have weapons (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-7(b)(l)						
218	Second degree certain persons not to have weapons (Sept. 15, 2013 - Feb. 12, 2014), N.J.S.A. 2C:39-7(b)(l)						
219	Second degree certain persons not to have weapons (Jan. 19, 2014), N.J.S.A. 2C:39- 7(b)(l)						