SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0926-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY S. CLARK,

Defendant-Appellant.

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Submitted January 31, 2023 – Decided February 21, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 17-11-1604.

Joseph E. Krakora, Public Defender, attorney for appellant (Stephen W. Kirsch, Designated Counsel, on the brief).

Raymond S. Santiago, Monmouth County Prosecutor, attorney for respondent (Melinda A. Harrigan, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

This appeal arises from an armed robbery of an AT&T store in Ocean Township that resulted in the theft of over $130,000 in merchandise. Defendant Anthony S. Clark[1] participated in the robbery with Richard McLaughlin, Corey Mitchell, Tyreane Tucker, and a fifth unidentified person. McLaughlin and Mitchell confessed to the robbery and testified against defendant as part of their plea agreements. Tucker denied any involvement in the robbery, but McLaughlin and Mitchell said she planned it and served as the lookout. Defendant did not deny participating in the robbery but claimed he did so under duress after McLaughlin threatened to harm him and his family if he did not cooperate. A jury rejected his defense.

On appeal, defendant challenges the court's denial of his request to present Tucker's testimony that McLaughlin had a character trait of being a manipulative bully, claiming the exclusion of that evidence violated his right to present a complete defense. He also challenges the court's refusal to provide an adverse inference charge concerning law enforcement's failure to record all of McLaughlin's and Mitchell's statements. For the first time on appeal, he challenges the duress and accomplice liability jury charges. Finally, he claims

[1] Throughout this opinion we refer to Clark as defendant and the codefendants by their surnames.

his sentence is unfairly disparate and manifestly excessive. We find no reversible abuse of discretion or error and affirm.

I.

We take the following facts from the evidence adduced at trial. At approximately 8:30 p.m. on September 6, 2016, Daniel Dennis and Louis White were working as salesclerks at an AT&T store in Ocean Township. White was in the back room beginning the process of closing the store, and Dennis was talking to White from the doorway of the back room while watching the showroom for incoming customers.

An African American man who was later identified as defendant, entered the store. Dennis recognized him from the day before. Dennis testified that the previous day, which was Labor Day, the same man had entered the store shortly before closing and inquired about purchasing a phone for his mother. Dennis identified him in surveillance camera recordings captured inside the store.

Dennis recalled that throughout their discussion on Labor Day, the man communicated with someone through an earpiece connected to his cell phone. Dennis showed the man prepaid phones, but he left without making a purchase. When asked to describe the man's demeanor on Labor Day, Dennis testified he was "[k]ind of all over the place a little bit."

When the man entered the store on September 6, Dennis approached him and, recalling their discussion from the previous day, asked if he was ready to buy the phone for his mother. The man said he was, and they walked to the back corner of the showroom. Dennis was holding an iPad tablet, which he needed to process the purchase, when he heard the front doorbell ring, alerting him that someone had entered the store. Out the corner of his eye, he saw the person "kind of jogging" towards him.

Dennis looked up and saw a dark-skinned man with a gun pointed at him. The man, later identified as McLaughlin, wore dark clothes, gloves, and a grey and white camouflage "fisherman's hat." The man who had first entered the store first placed a hand on Dennis's shoulder and told him that everything would be alright if he did what he was told. Fearing for his safety, Dennis handed his iPad tablet to him and put his hands up. In an "assertive" tone, McLaughlin said: "You can put your f**kin' hands down," and Dennis lowered them.

A third man, who had dreadlocks and was later identified as Mitchell, came in and headed to the back room where White was counting money. When asked what happened next, Dennis testified the man wearing the fisherman's hat was moving around quickly and erratically, looking for alarms. Dennis told

McLaughlin the alarms were under the counter in the front of the store. When asked where the safe was, Dennis pointed to the back room.

White heard voices in the showroom and assumed the store manager, who had recently left for the night, forgot something, and returned. The door to the back room opened, and White saw a "tall African American man" with "a very long face [and] light facial hair" wearing a grey fleece sweatshirt and a camouflage "bucket hat" pointing a gun in his face (i.e., McLaughlin). McLaughlin asked if anyone else was in the store, and White replied "no." McLaughlin told White "to stand up and drop the cash." White complied and McLaughlin asked him where the inventory room was located. As White directed him to that room, he saw Dennis moving towards them.

White walked to the door of the inventory room and began entering numbers to unlock it. While pointing the gun at him, the man with the camouflage hat (McLaughlin) smacked his hand, and yelled "what are you doing?" Dennis said White was unlocking the safe and McLaughlin lowered his gun. White entered the code, and two of the men shoved White and Dennis into the room facing the wall.

Dennis testified that he could hear the men rummaging through the inventory. One of them asked where the alarm was. Dennis replied that there

was no alarm in the inventory room. Another told Dennis and White to get on their knees. They complied, and the man with dreadlocks (i.e., Mitchell) began to tie their wrists and ankles together with zip ties but was having difficulty securing the ties.

White testified the man with the camouflage hat (McLaughlin) seemed to be "calling the shots" and hit the man with dreadlocks (Mitchell) because he was taking too long. Dennis heard the others throwing merchandise into bags. White heard the men say: "Grab the phones, get the bags, hurry, let's go." White and Dennis were told "not to do anything stupid or they'd kill [them]."

When one of the men asked if there was another exit door besides the front door, Dennis replied there was a back door but then remembered the door was connected to a fire alarm. He told them not to use that door because it would set off the alarm. Dennis heard one of them say: "It looks like we're all going . . . home to see our families tonight." White feared for his life, and this comment put him somewhat at ease.

Within a short time, it "got quiet for a couple seconds" and then one of the men asked Dennis and White to lay down on their stomachs. They complied. White heard one of them direct another to get the car and heard it pull up. The fire alarm sounded and then it grew quiet.

Dennis said White was "almost having a panic attack" and was trying to break free from the zip ties. Dennis told him to stay still because he was not sure that the men had left. They waited a short time, broke free, and called 911. Police arrived within a few minutes.

Dennis showed the police where the surveillance cameras were located. The surveillance videos were played for the jury. Dennis and White gave statements to the police. The parties stipulated that "$124,758.84 in electronics and $6,360.15 in cell phone accessories were stolen."

In the spring of 2017, federal authorities arrested McLaughlin for different robberies. He confessed to those robberies and the robbery in this case and agreed to testify against defendant. At trial, his testimony began with the nature of his relationship with defendant.

McLaughlin's Testimony

McLaughlin testified that defendant's father, Anthony Clark, Sr., was his godfather, and defendant's paternal grandmother, Kathryn Clark, was like a grandmother to him. When he and defendant were children, McLaughlin lived in Philadelphia with defendant's father's family, and defendant lived with his mother, whom McLaughlin did not know. McLaughlin typically saw defendant

on holidays and during the summer. He said that he considered defendant to be his brother, which made testifying against him difficult.

As they grew older, they did not see each other often. In 1991, McLaughlin moved to North Carolina and defendant moved to Virginia. By 2015, both had returned to Philadelphia. Defendant's paternal aunt Aretha suggested McLaughlin reconnect with defendant because they were both pursuing careers in music production.

McLaughlin reached out to defendant, and they began communicating by telephone, Facebook, and Instagram. The State introduced social media posts between defendant and McLaughlin to show they had a close relationship leading up to the robbery. The posts and accompanying images were shown to the jury.

The State then turned to McLaughlin's extensive criminal record. His first convictions dated back to 1993, when he committed attempted robbery, auto larceny, and aggravated assault. Between 2000 and 2004, he was convicted of larceny, possession of stolen property, and forgery. At the time of trial, McLaughlin had outstanding charges in multiple jurisdictions, including robbery charges in North Carolina, Pennsylvania, and New Jersey.

In June 2018, McLaughlin pleaded guilty to federal charges and agreed to testify truthfully in the federal case and this case. The federal government made no promises in relation to the plea. He faced a federal sentence of thirty-two years to life. However, in December 2018, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, became law, which substantially reduced the minimum term for the federal offenses McLaughlin committed to fourteen years. See Reduction of Sentence Under First Step Act, 18 U.S.C. §§ 3631-3635. McLaughlin also agreed to plead guilty to the charges in this case, and in exchange for his truthful testimony, the State agreed to recommend a fourteen-year NERA[2] term, to run concurrently with his federal sentence.

Prior to entering his federal plea, McLaughlin spoke with a federal prosecutor and admitted his guilt to "[e]very robbery [he] was involved with," including this one. However, he was not completely truthful in discussing this case with investigators. For example, in his first statement, which was unrecorded, he said that he and his accomplices used fake guns and that not everyone had a gun. He claimed he "was just trying to protect everybody, but at the same time I was trying to admit my guilt . . . I was trying to get out of

[2] A NERA term is subject to the eighty-five-percent period of parole ineligibility and mandatory parole supervision imposed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

doing life, the rest of my life in prison." He testified at trial that everyone who went inside the store had a firearm, including defendant.

Regarding the facts leading up to the robbery, McLaughlin testified he returned to Philadelphia in the summer of 2016, where his father lived, and he told Tucker, his ex-girlfriend, that he needed money. She suggested robbing a cellular phone store. He agreed to do so, and asked his friend from North Carolina, Mitchell, if he wanted to participate. Tucker then planned the robbery for them.

According to McLaughlin, the plan was that he, Mitchell, and a third person would travel to an AT&T store in a stolen vehicle and Tucker would serve as a lookout from across the street. McLaughlin, Mitchell and the third person would go inside and steal merchandise. Tucker would then sell the merchandise and pay McLaughlin, Mitchell and the third person for their participation. A few weeks before September 6, 2016, Tucker produced a man, who McLaughlin knew only as "Karan," to serve as the third person. Tucker stole a van and obtained zip ties, laundry bags, guns, wigs, and sunglasses, which were needed for the robbery.

McLaughlin testified Karan drove the stolen van containing the supplies from Philadelphia to New Jersey. The others followed in a separate vehicle.

Before they arrived at the store, police stopped Karan, and McLaughlin never saw him again.

Karan's arrest delayed the planned robbery. Tucker had to obtain new supplies and another stolen vehicle, and they needed a new participant to replace Karan. McLaughlin recruited defendant.

McLaughlin testified he and Tucker explained the plan to defendant while they were at Aunt Aretha's house. They told him Tucker would gather new supplies and another stolen vehicle and serve as a lookout from across the street. Defendant would go inside the store, draw people away from the front of the store, and use his cell phone to maintain constant communication with Tucker. McLaughlin would then go inside and scare the employees with a gun, and Mitchell would use zip ties to restrain whoever was inside.

Initially, McLaughlin testified defendant wanted to see the location before he agreed to participate, so on Labor Day, he, Mitchell, Tucker, and defendant traveled to the store to scope it out. But later, McLaughlin testified they went to the store on Labor Day intending to carry out the robbery, not simply to survey it. McLaughlin drove a stolen Dodge Dynasty and defendant drove McLaughlin's white Hyundai Sonata. McLaughlin and defendant communicated

by cell phones during the drive. They stopped at an apartment complex, left the stolen Dynasty in the parking lot, then drove to the AT&T store in the Sonata.

Defendant went inside the store to see where the employees and cameras were located. He used his cell phone to maintain communication with the group.

After approximately ten minutes, defendant exited the store "pissed" because it was closing early for the holiday, and they could not go through with the plan. McLaughlin said defendant was upset with Tucker for not knowing the store would close early. Defendant told McLaughlin that he did not trust her, and he believed that she would "get [them] booked." Defendant insisted they did not need her, but McLaughlin disagreed because Tucker had the "fencing connections." The group drove back to the stolen Dynasty, retrieved it, and returned to Philadelphia.

The next day, the group met in Philadelphia, went over the plan, and discussed recruiting a fifth participant. Tucker left and came back with a man who no one else knew. McLaughlin described him as a "short" "younger guy" with "dark skin" and "coarse" black hair. Like McLaughlin, his job was to be the "force, the deterrent" to scare anyone in the store.

The group travelled to the AT&T store in three cars. Defendant drove the Sonata, McLaughlin drove the stolen Dynasty, and Tucker drove her car with

Mitchell and the fifth participant as passengers. Tucker had the supplies hidden under a spare tire in her car. Everyone except Tucker had a gun. McLaughlin's gun was loaded; he did not know if the other guns were.

They parked in a neighborhood roughly ten minutes from the store and put the supplies in the stolen car. Then defendant, along with McLaughlin, Mitchell and the fifth participant, drove the stolen car to the AT&T store, and Tucker drove her car to a parking lot across the street. McLaughlin wore a camouflage hat and grey sweatshirt. Defendant wore a button-down shirt and pants, and the others wore dark clothes. Everyone except defendant wore gloves. Since it was not cold outside, he would have looked suspicious if he wore gloves.

Defendant went inside the store and remained on the phone with Tucker the entire time. He approached Dennis in the showroom and lured him to the back corner of the store. McLaughlin went in next and asked Dennis how many others were inside. Dennis told him another salesclerk was in the back room. Mitchell and the fifth man then entered the store. When Dennis put up his hands, defendant told him to put them down because if someone outside saw the salesclerk with his hands up, they would know it was a robbery. McLaughlin did not believe defendant showed his gun to Dennis.

McLaughlin directed Dennis to the back room and saw the other salesclerk counting money. McLaughlin pointed his gun at the man and took the money, which he said totaled just under $2,000. The fifth man asked where the iPhones were, and one of the clerks led him to the inventory room. McLaughlin saw the clerk enter numbers in a keypad and questioned whether he was alerting police. The clerk said that he was only unlocking the door. McLaughlin did not see defendant; he believed defendant stayed in the showroom to serve as a lookout.

McLaughlin told the clerks to get down and assured them that nothing was going to happen to them. As Mitchell tried to tie their wrists with zip ties, McLaughlin and the fifth man filled laundry bags with merchandise. McLaughlin said the zip ties were "the wrong" kind "so they weren't really working." They kept breaking, and he got frustrated with Mitchell because it was taking him too long.

McLaughlin asked one of the clerks if there were any other exit doors. One replied that there was a side door with a fire alarm, which would not alert police. McLaughlin went out the front door and drove the stolen car to the side door. He tapped on the door and defendant opened it. The alarm sounded and the robbers panicked. They tried to gather as much merchandise as they could before driving off.

McLaughlin, along with Mitchell, defendant, and the fifth man drove to the parking lot where they had left the Sonata. On the way, McLaughlin and Mitchell argued about how long it had taken Mitchell to zip tie the salesclerks.

Tucker met them at the parking lot. They left the stolen Dynasty there and it was later recovered by police. McLaughlin, Mitchell, defendant, and the fifth man drove towards Philadelphia in the Sonata, while Tucker drove her car. On the way, they stopped and put merchandise into Tucker's car. Mitchell and the fifth man then got into Tucker's car and returned to Philadelphia with her.

Defendant and McLaughlin went to McLaughlin's father's home and Tucker met them there. They took inventory of the merchandise then partied because defendant's birthday was the next day. Tucker sold the merchandise and paid defendant and McLaughlin each approximately $1,000.

Mitchell's Testimony

Mitchell also testified for the State, and his version of the robbery was substantially similar to McLaughlin's. He explained he had agreed to commit a robbery with McLaughlin, Tucker, and Karan, but the plan fell apart when Karan was stopped and arrested on the way to the store. McLaughlin then recruited defendant to participate, and they staked out the store on Labor Day.

The next day, Mitchell met the new fifth man when the group gathered to leave for the store. Defendant went inside the store with a "black Glock type" gun and distracted the salesclerk.

In Philadelphia, they took the merchandise to McLaughlin's dad's home, and Tucker "got rid of it." Mitchell was paid roughly $1,500, but believed he should have received more because they took so much merchandise.

Like McLaughlin, Mitchell had a prior record, including convictions in North Carolina and Georgia, and he agreed to testify truthfully in this case as part of his plea agreement.

Mitchell testified that he was extradited from North Carolina in November 2017. He initially lied to the authorities to minimize his involvement. When he met with them for a second time in March 2018, he gave a truthful statement, which was not recorded. In May 2018, he gave another truthful statement, which was recorded. Mitchell faced exposure to an extended term of thirty-years-to-life. He entered a guilty plea in exchange for a recommended nine-year NERA term.

Mitchell also testified he had seen defendant several times in the courthouse for proceedings in this case and that defendant had asked him to corroborate his duress defense by executing an affidavit that McLaughlin had

threatened defendant and his family if he did not participate in the robbery. Mitchell did not sign the affidavit. Mitchell testified he never heard McLaughlin threaten defendant or his family and that McLaughlin did not force defendant to commit the robbery.

Cellular Phone Analysis Testimony

The State's expert in cellular communication analysis, Detective Keith Finkelstein, testified that phone records showed that defendant's phone traveled from Philadelphia to the AT&T store on September 5 and 6, 2016, when the group staked out and robbed the store. Maps of the routes of travel were shown to the jury. While on route the first day, defendant's phone called McLaughlin's phone numerous times, and on the second day, it made numerous calls to a number that was identified as Tucker's phone. Jeremy Taylor of AT&T testified defendant's cell phone connected to the store's Wi-Fi during the robbery.

Defendant's Testimony

Defendant testified in his own defense. He claimed he had participated in the robbery because McLaughlin threatened to harm him and his family if he did not. Defendant denied he and McLaughlin were like family, claiming that their relationship was limited to their work in music production. He claimed they developed a relationship after Aunt Aretha suggested he reach out to

McLaughlin because they were both in the music business. McLaughlin rented a room in Aunt Aretha's home in Philadelphia.

Defendant testified that in the afternoon of September 5, 2016, he was at Aunt Aretha's house taking care of her dog because she was away. He saw McLaughlin, who asked him if he wanted to take a ride. Defendant had no plans, so he agreed to go. They got into a Nissan Altima that McLaughlin was driving and picked up Mitchell, who defendant had never met before. McLaughlin told them that they were going to go to a mall in New Jersey so that McLaughlin could meet his "homegirl" and get some money from her.

During the drive, defendant claimed he was arguing on the phone with his girlfriend, Ashley, and not paying attention to where they were going. He testified that he had three phones, and McLaughlin was using one of his phones while they drove. When they got to the mall parking lot, they waited approximately ten minutes, and McLaughlin's "homegirl" did not show up. McLaughlin then drove to a gas station and said the girl would meet him there. As McLaughlin exited his vehicle, the phone he was using dropped and cracked. Defendant said he was "particular" about his things and was upset the screen was cracked, so he looked around for someplace to take it to be fixed. He saw

an AT&T store a few blocks away and decided to walk there to get his phone fixed or to get a new phone.

When defendant entered the AT&T store, Dennis approached him and showed him some phones. Defendant did not buy one because he did not have enough money. He called his mother at work to ask if she could transfer money into his account, but she was too busy. He then left the store intending to deal with it later when he returned to Philadelphia.

The next day, McLaughlin called him and asked him to stop by McLaughlin's dad's house. Defendant went there and McLaughlin gave him $160 to fix his phone. He asked defendant if he wanted to go to a cookout in New Jersey with him and Mitchell, who was sitting outside. He agreed to go, and the three of them got into a Dodge, which McLaughlin said belonged to his father. Defendant sat in the front passenger's seat and did not notice anything wrong with the car. He was not aware of anyone else in any other vehicle.

During the drive, McLaughlin used one of defendant's phones for directions. They stopped at an apartment complex and a man who defendant did not know entered the car behind defendant. This made defendant feel "kind of antsy" because he had been shot twice in the past—once in the back of his head—and he was uncomfortable when someone sat behind him.

Defendant said McLaughlin drove to the AT&T store where he had been the day before and said he should go inside and get a new phone. Defendant said he did not want to, as he planned to take care of it later in Philadelphia. The man in the back seat drew a gun on him and told him to go inside and act like he was buying a phone. Defendant said he "froze a minute" then looked at McLaughlin who also had a gun pointed at him. He stumbled out the car and went inside the store.

As defendant walked in, Dennis asked him if he was ready to buy a phone, and he replied "yes." Defendant denied that he was communicating with anyone through his phone at this time. He explained that he was afraid McLaughlin, or the other man, would shoot them. Defendant said he felt confused, nervous, and scared and went along with the others because he was "just trying to get . . . home alive."

While the others were gathering merchandise, defendant said to McLaughlin, "yo just let me go outside, I don't want no parts of this, I can't be a part of this" and McLaughlin replied, "just do what I told you to or I am going to leave you out here on the side of the road." McLaughlin also threatened to "blow up" defendant's house, his sister's house, and Aunt Aretha's house.

Defendant believed the threats were "very real" and that McLaughlin was "out of his mind." He claimed he followed McLaughlin's orders out of fear.

Defendant admitted that after the robbery he continued to communicate with McLaughlin through social media but claimed that he did so because he was afraid of McLaughlin. By early November 2016, McLaughlin had moved back to North Carolina, so defendant felt safer communicating with him.

On cross-examination, defendant testified that during the robbery, McLaughlin called his father with defendant's phone and kept the phone on speaker during "[t]he majority" of the robbery. McLaughlin's father "[c]oach[ed]" McLaughlin through it. Defendant acknowledged that his phone records showed only one phone and that during the robbery a call was made to a number "associated with" Tucker. He claimed he did not know if the number was in fact Tucker's because he did not know her in September 2016.

Tucker's Testimony

Tucker testified for the defense. She claimed she did not know defendant in September 2016. She said they first met in October 2019, when they appeared in court for this case. Tucker also denied that the number defendant's phone called during the robbery was hers, and claimed she was not in contact with McLaughlin in September 2016. She also denied knowing Mitchell and Karan.

On cross-examination, the prosecutor questioned Tucker about a statement she had given to police. According to the transcript of her statement, Tucker told police that she and McLaughlin had grown up together, had been in a relationship at one point, and had remained friends after that. According to the transcript, Tucker told police that in September 2016, McLaughlin asked if she would serve as a lookout for a robbery in New Jersey; the number defendant's phone called during the robbery belonged to her; and after the robbery McLaughlin asked her if she could "fence" or "get rid of" the merchandise for him. At trial, Tucker claimed there were errors in the transcript, and she denied making those statements. Tucker testified she had a business license and that she told McLaughlin she could "get rid of" phones through her business. Over approximately a month, McLaughlin gave her $70,000 worth of cell phones and she gave them to store owners to sell.

Like the others, Tucker had a prior criminal record. She was serving a prison sentence and still faced charges in this case.

Other Testimony

To discredit McLaughlin's claim that he and defendant were like family, defendant's mother, Lisa Vera Yancey, testified defendant had no contact with his father's side of the family until 2015 or 2016, and she had never met

McLaughlin. Defendant's cousin, Wayne J. Snowden, also testified that he did not consider McLaughlin to be part of the family and described McLaughlin as "a cancer" and a "pathological liar." Snowden said everyone knew McLaughlin's reputation and no one wanted him around.

Defendant also presented the testimony of licensed psychologist Susan Blackwell-Nehlig, Ph.D., who evaluated defendant for post-traumatic stress disorder (PTSD) that he experienced after being shot on two occasions. Blackwell-Nehlig testified that defendant had eleven out of seventeen PTSD characteristics and he reported persistent nightmares, anxiety, headaches, and fear of guns.

Procedural History

A grand jury indicted defendant, McLaughlin and Mitchell for the following crimes: first-degree armed robbery, N.J.S.A. 2C:15-1; third-degree criminal restraint, N.J.S.A. 2C:13-2(a); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:58-4 and N.J.S.A. 2C:39-5(b); second-degree theft of movable property, N.J.S.A. 2C:20-3(a); and third-degree receiving stolen property, N.J.S.A. 2C:20-7(a). Tucker was charged in a separate indictment. The fifth robbery participant was never identified.

Trial began in January 2020, and lasted sixteen days. To bolster his duress defense, defendant attempted to introduce Tucker's testimony that McLaughlin had a character trait of being a manipulative bully. The trial court excluded the testimony, finding it was irrelevant based on defendant's lack of knowledge of that trait. The court reasoned that defendant had to be aware of Tucker's belief prior to the robbery for it to be relevant, and because they both claimed that they did not meet until 2019, although that fact was disputed by others, defendant was not aware of her belief at the time of the robbery in 2016.

During the charge conference, defendant requested an adverse inference instruction based on the failure to record all statements that McLaughlin and Mitchell gave to police. The court denied the unsupported request.

The jury found defendant guilty on all counts. The State moved to impose a discretionary extended term sentence. At sentencing, the court found defendant eligible for an extended term as a persistent offender but declined to impose one. Instead, it sentenced defendant to a nineteen-year NERA term, which fell within the ordinary range for armed robbery and, following merger, concurrent terms on the remaining counts. This appeal followed.

II.

Defendant raises the following points for our consideration:

POINT I

THE TRIAL JUDGE VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION WHEN SHE DENIED THE DEFENSE THE OPPORTUNITY TO INTRODUCE EVIDENCE OF THE CHARACTER OF A WITNESS FOR BULLYING, VIOLENCE, AND INTIMIDATION IN A CASE WHERE THE DEFENSE WAS DURESS AND IT WAS THAT VERY WITNESS WHO WAS ACCUSED BY DEFENDANT OF HAVING COERCED HIM, VIA ARMED THREATS OF VIOLENCE, TO COMMIT THE CHARGED CRIMES.

POINT II

THE JUDGE COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S REQUEST FOR A JURY INSTRUCTION REGARDING THE FAILURE OF THE POLICE TO ELECTRONICALLY RECORD FOUR PRIOR STATEMENTS OF THE TWO CODEFENDANTS WHO TESTIFIED AGAINST DEFENDANT.

POINT III

THE JURY INSTRUCTION ON DURESS BADLY MISINFORMED AND LIKELY CONFUSED THE JURY WITH RESPECT TO THE STATE'S BURDEN TO DISPROVE DURESS, REPEATEDLY USING LANGUAGE THAT INDICATED THAT THE JURY WAS TO DETERMINE WHETHER DURESS WAS "ESTABLISHED" (BY DEFENDANT) RATHER THAN DISPROVEN (BY THE STATE). (Not Raised Below).

POINT IV

THE JURY INSTRUCTION ON ACCOMPLICE LIABILITY WAS PLAINLY ERRONEOUS WHEN IT TOLD THE JURY THAT AN UNARMED DEFENDANT COULD BE CONVICTED OF ARMED ROBBERY IF HE HAD A PURPOSE TO AID A ROBBERY AND MERELY "WAS AWARE" THAT A CODEFENDANT WAS ARMED -- AN ERROR REGARDING THE REQUISITE MENTAL STATE THAT WAS CLEARLY NOT HARMLESS BECAUSE THE JURY THEN ASKED A QUESTION ABOUT THAT VERY INSTRUCTION. (Not Raised Below).

POINT V

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

A.

In Point I, defendant contends the court violated his constitutional right to present a complete defense when it precluded Tucker from testifying that McLaughlin had a character of being a bully who used threats to manipulate others. Defendant acknowledges that no evidence rule directly supported admission of the testimony, but contends N.J.R.E. 404(a)(2), which permits evidence of a victim's aggressive character when the defendant claims self-defense, provides support by analogy.

"All relevant evidence is admissible" unless otherwise excluded by a rule. N.J.R.E. 402. Relevant evidence is "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Thus, in analyzing relevancy, the court must examine "the logical connection between the proffered evidence and a fact in issue." State v. Jenewicz, 193 N.J. 440, 457-58 (2008) (quoting State v. Williams, 190 N.J. 114, 123 (2007)). "Once a logical relevancy can be found to bridge the evidence offered and a consequential issue in the case, the evidence is admissible, unless exclusion is warranted under a specific evidence rule." State v. Cole, 229 N.J. 430, 448 (2017) (quoting State v. Burr, 195 N.J. 119, 127 (2008)).

Generally, "[e]vidence of a person's character or character trait . . . is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait . . . ." N.J.R.E. 404(a). There are three exceptions. Subsection (a)(1) permits evidence of a pertinent trait of the defendant's character offered by the defendant in a criminal trial. Subsection (a)(2) permits evidence of a pertinent trait of the character of a victim offered by the defendant in a criminal case. Subsection (a)(3) permits "[e]vidence of the character of a witness for truthfulness or untruthfulness as provided in Rule 608."

Defendant relies upon subsection (a)(2) by analogy. It provides:

> Evidence of a pertinent trait of character of the victim of the crime [may be] offered by a defendant in a criminal proceeding or by the prosecution to rebut it, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]
>
> [N.J.R.E. 404(a)(2).]

In considering a trial court's ruling on an evidentiary issue, a reviewing court applies the abuse of discretion standard and defers to the ruling unless it was clearly erroneous. State v. Sims, 250 N.J. 189, 218 (2022). "We will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)). Only mistaken evidentiary rulings "that have the clear capacity to cause an unjust result" require the reversal of a conviction. Ibid. However, a reviewing court affords no deference to questions of law, such as those interpreting constitutional rights. Sims, 250 N.J. at 218.

Pursuant to the Sixth Amendment to the United States Constitution and Article I, Paragraph 1 of the New Jersey Constitution, "[a] defendant enjoys a fundamental constitutional right to a fair trial, which necessarily includes the right to present witnesses and evidence in his own defense." Jenewicz, 193 N.J. at 451. "Although fundamental, a defendant's right to present a defense is not

absolute." Ibid. There is no "unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (alteration in original) (quoting Taylor v. Illinois, 484 U.S. 400, 410 (1988)).

However, if a "mechanistic application of a state's rules of evidence . . . would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against the charged offenses," then the right to present a complete defense will require admission of the evidence. State v. Garron, 177 N.J. 147, 169 (2003). In deciding whether the right to present a complete defense requires the admission of otherwise excludable evidence, the court must consider whether the evidence is "necessary," "crucial," and "exquisitely important" to the defense. Id. at 171 (quoting State v. Budis, 125 N.J. 519, 533, 537 (1991)). Additionally, the court must decide whether the probative value of the evidence outweighs its prejudicial effect, risk of harassment, confusion of the issues, concern for a witness's safety, repetitive nature, or marginally relevant character. State v. J.A.C., 210 N.J. 281, 298 (2012) (quoting Budis, 125 N.J. at 532).

The trial court rejected defendant's argument that N.J.R.E. 404(a)(2), which applies in cases involving self-defense, provided support by analogy for

the admission of Tucker's testimony on McLaughlin's character. The court found that defendant's defense was dissimilar to self-defense, but did not expand on its rationale. Instead, it focused on relevance, which it believed was inextricably tied to defendant's personal knowledge at the time of the crime.

The court explained that because Tucker and defendant denied knowing each other at the time of the robbery (they both claimed they met for the first time in 2019), any information Tucker had in September 2016 on McLaughlin's reputation was not relevant because she never shared that information with defendant. Because McLaughlin's character trait would only be relevant if Tucker shared her belief with defendant, the court excluded the testimony as irrelevant.

On appeal, defendant argues that McLaughlin's character for being a manipulative bully supported his defense that McLaughlin forced him to participate in the robbery, and thus should have been admitted into evidence. He contends that McLaughlin's character, standing alone, was relevant to his defense, regardless of whether Tucker shared that information with him before the robbery. He claims that excluding the evidence violated his constitutional right to present a complete defense because Tucker's testimony was "highly relevant" to his defense and "far more probative than unduly prejudicial." He

contends its exclusion was clearly capable of producing an unjust result requiring reversal of his conviction.

Contrary to the trial court's ruling, we find the character evidence was relevant because it bolstered defendant's claim that he acted under duress. If the jury was presented with this information and found it credible, the evidence supported defendant's claim that McLaughlin forced him to commit the robbery. This was so regardless of whether Tucker shared the information with defendant before the robbery. Cf. State v. Aguiar, 322 N.J. Super. 175, 184 (App. Div. 1999) ("Personal knowledge of the victim's propensity for violence is not a prerequisite for admission of victim character evidence under N.J.R.E. 404(a)(2)."). In Aguiar, we found the victim's conviction for a violent crime was relevant to Aguiar's self-defense claim, regardless of whether Aguiar was aware of the conviction. Ibid. We explained that admissibility was not dependent upon the defendant's state of mind, but rather on the purported use of the evidence, which in Aguiar's case was to show that the victim was the aggressor. Id. at 183.

Similarly, here, McLaughlin's character for being a bully was relevant to whether defendant acted under duress in that it made it more likely McLaughlin acted in conformity with that characteristic. Whether Tucker shared her

knowledge of McLaughlin's character with defendant was not controlling. If true, McLaughlin's character trait by itself bolstered defendant's defense.

That, however, does not end our analysis. We find the evidence was nonetheless properly excluded pursuant to N.J.R.E. 404(a), which generally precludes defendant from presenting evidence of McLaughlin's character trait to show that he acted in conformity with that trait in the leadup to, or during the robbery. Here, defendant wanted to do just that— present Tucker's testimony on McLaughlin's character trait of being a manipulative bully to show that he acted in conformity with that trait when he forced defendant to participate in the robbery. The three exceptions to the rule do not apply to this case. The character trait evidence was not offered by McLaughlin himself as a defendant, McLaughlin was not a victim, and the evidence did not relate to McLaughlin's trait for truthfulness or untruthfulness. Hence, the evidence was not admissible under N.J.R.E. 404(a), even though relevant.

In interpreting a statute, a court's goal is to "effectuate legislative intent." State v. F.E.D., 251 N.J. 505, 526-27 (2022) (quoting Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 171 (2016)). To do that, a court first considers the statute's words and affords them "their plain and ordinary meaning because 'the best indicator of [legislative] intent is the plain language chosen by the

Legislature.'" Id. at 527 (quoting State v. J.V., 242 N.J. 432, 442-43 (2020)). "If the language is clear, the court's job is complete," and it enforces the statute as written. Ibid. (quoting In re D.J.B., 216 N.J. 433, 440 (2014)).

We reject defendant's argument that subsection (a)(2) should be applied by analogy. There is nothing within the text of N.J.R.E. 404 that would suggest a legislative intent to permit expansion by analogy. Federal case law interpreting Fed. R. Evid. 404 provides no support as well.[3] We decline to extend N.J.R.E. 404(a)(2) beyond a pertinent trait of character of the victim for violence or aggression.

Exclusion of the character evidence did not prevent defendant from presenting a complete defense. Defendant testified to his version of the facts, which included McLaughlin's behavior towards him. While McLaughlin's character for bullying, if true, may have bolstered his claim that McLaughlin forced him to commit the robbery, it was not necessary to the defense.

Tucker's proffered testimony also had limited probative value. Unlike in a self-defense case where a victim's propensity for aggression directly relates to whether the victim was the initial aggressor, McLaughlin's character of being a

[3] N.J.R.E. 404(a)(2) "mirrors Fed. R. Evid. 404. We thus look to federal decisions to interpret its provisions." Aguiar, 322 N.J. Super. at 181.

manipulative bully was not directly related to whether he forced defendant to commit the armed robbery. Further, Tucker's credibility was questionable. She denied playing any role in the robbery and also denied making most of the statements transcribed in her police statement. Her criminal history further undermined her credibility.

Additionally, McLaughlin and Mitchell gave substantially similar accounts of the robberies, and Mitchell testified that McLaughlin did not force defendant to participate. While both may have been motivated by a desire to receive lesser sentences, their stories were consistent and corroborated by the video surveillance recordings.

We conclude that excluding Tucker's testimony on McLaughlin's character trait for being a manipulative bully did not have the clear capacity to cause an unjust result. On the contrary, the alleged error was harmless given the overwhelming evidence against defendant.

B.

In Point II, defendant contends the court denied him due process and a fair trial by denying his request to provide an adverse inference jury charge regarding the failure to record all the statements that McLaughlin and Mitchell gave to law enforcement. Specifically, law enforcement videorecorded only the

first of three Mitchell interviews and memorialized without a video or audio recording the second McLaughlin interview.

Proper jury instructions are essential to a fair trial. State v. Green, 86 N.J. 281, 287 (1981). The court must provide 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." State v. Singleton, 211 N.J. 157, 181-82 (2012) (quoting Green, 86 N.J. at 287-88). The charge should include instruction on all "essential and fundamental issues and those dealing with substantially material points." Green, 86 N.J. at 290.

Where a defendant requested a jury charge the court refused to give, a reviewing court applies the harmless error standard to the court's ruling. State v. Baum, 224 N.J. 147, 159 (2016). To warrant reversal, the reviewing court must find that the omitted charge had the possibility of leading to an unjust result. Ibid. "The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. Lazo, 209 N.J. 9, 26 (2012) (alteration in original) (quoting State v. R.B., 183 N.J. 308, 330 (2005)).

Defendant requested the court provide a "modified" failure-to-record charge with respect to McLaughlin's and Mitchell's unrecorded statements. He

premised the argument on Rule 3:17(a), which requires that "all custodial interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with" certain enumerated offenses, one of which is robbery, unless one of the exceptions listed in Rule 3:17(b) applies. None of those exceptions apply here. Subsection (e) provides that "[i]n the absence of an electronic recordation required under subsection (a), the court shall, upon request of the defendant, provide the jury with a cautionary instruction."

Defendant argued to the trial court that the rule was intended to protect defendants and thus should be extended to this case because McLaughlin and Mitchell were codefendants. Alternatively, he argued the failure to record the statements is similar to when police destroy notes, which requires the court to provide an adverse inference charge based on their destruction. See State v. W.B., 205 N.J. 588, 608 (2011) (holding that "if notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge molded, after conference with counsel, to the facts of the case"). Defendant acknowledged this was not a case where police destroyed recordings, but rather, failed to make them.

The trial court found no support for defendant's argument and denied the request for an adverse inference charge. The court explained that, while defense counsel was free to argue in summation that the jury should question the veracity of witnesses' unrecorded statements, there was no basis to provide a cautionary instruction for an unrecorded witness statement.

On appeal, defendant advances the same arguments he made before the trial court. He underscores that codefendants McLaughlin and Mitchell were charged with robbery and contends the jury should have received a "cautionary instruction" to fully assess the credibility of their unrecorded statements.

We find no error in denial of a cautionary charge. Rule 3:17 applies only to statements by defendants. Our rules "do not currently require the recordation of all statements of witnesses obtained by law enforcement officers." W.B., 205 N.J. at 608. McLaughlin and Mitchell gave statements as witnesses in this case; thus, law enforcement was not required to record them. Recorded statements were not destroyed. Therefore, a cautionary charge was not required. Instead, the failure to record was an issue for cross-examination and summation.

C.

In Point III, defendant contends, for the first time on appeal, that the court's jury charge on duress, which mirrored the model jury charge, incorrectly

instructed that the jury must find defendant established the defense before considering whether the State had met its burden of disproving the defense. Defendant argues that once the court determined he presented sufficient evidence to support the defense, the jury's only job was to determine whether the State had disproved it.

Where, as here, a defendant fails to object to a charge or to request a specific instruction, an appellate court will review the charge under the plain error standard, which considers whether the error was "clearly capable of producing an unjust result." State v. Munafo, 222 N.J. 480, 488 (2015) (quoting R. 2:10-2).

N.J.S.A. 2C:2-9 governs the defense of duress. Pertinent here, it provides:

> a. Subject to subsection b. of this section, it is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
>
> b. The defense provided by this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was criminally negligent in placing himself in such a situation, whenever criminal negligence suffices to establish culpability for the offense charged. In a

> prosecution for murder, the defense is only available to reduce the degree of the crime to manslaughter.
>
> [N.J.S.A. 2C:9-2.]

As the Court explained in State v. B.H., the defense has two elements, the first of which contains a subjective standard, and the second, an objective standard. 183 N.J. 171, 192 (2005). The first element requires the defendant to establish an actual belief in and fear of threatened harm. Ibid. Because this element is based on the defendant's perception, "[t]he jury . . . must assess the sincerity of the defendant's asserted perception of an imminent threat of harm." Ibid. In other words, the jury must find credible the defendant's contention that he was threatened with harm. Ibid. Expert testimony on the defendant's mental condition may be relevant to considering the sincerity of the defendant's belief. See id. at 197-98 (explaining that relative to the first element, "battered woman syndrome expert evidence is relevant and admissible on the question of the sincerity of defendant's claim that she perceived a threat of harm").

The second element considers whether the "defendant's level of resistance to the particular threat" met "community standards of reasonableness." Id. at 193. "The jury must evaluate a defendant's response to the threat by applying the standard of the 'person of reasonable firmness.'" Ibid. (quoting N.J.S.A. 2C:2-9(a)). "In making this assessment, the jury must consider objectively such

factors as the gravity of the threat, the proximity of the impending harm being threatened, opportunities for escape, likely execution of the threat, and the seriousness of the crime defendant committed." Ibid.

The jury must also find that the defendant did not recklessly place himself or herself in a situation where it was probable that he or she would be subjected to duress. Id. at 194. If the jury finds that the defendant established the defense, it must then consider whether the State disproved the defense beyond a reasonable doubt. Id. at 188.

Accordingly, Model Jury Charge (Criminal), "Duress" (approved May 5, 1982) instructs that to find the defendant's conduct excused based on duress,

> the evidence must indicate that the following conditions existed at the time:
>
> (1) There was use of, or threatened use of, unlawful force against the person of the defendant or another; and
>
> (2) The force, or threatened force, would be of such a type that a person of reasonable firmness in a similar situation would have been unable to resist.
>
> This defense of duress is unavailable to the defendant if you find that he/she recklessly placed (himself/herself) in a situation in which it was probable that he/she would be subjected to duress.

The model charge then defines recklessness and unlawful force, and instructs the jury to consider:

> (1) The factor of immediacy (that is, the force or threats posed a danger of present, imminent and impending harm to the defendant or to another) as well as the gravity of the harm or threatened harm;
>
> (2) The seriousness of the crime committed;
>
> (3) The identity of the person endangered (In other words, was it the defendant or another person who was allegedly endangered?);
>
> (4) The possibilities for escape or resistance and the opportunity for seeking official assistance, if realistic.[] Remember, the standard utilized here is that which a person of reasonable firmness in the defendant's situation would have been unable to resist.
>
> [Ibid. (footnote omitted).]

The model charge concludes with the burden of proof:

> The State has the burden to prove beyond a reasonable doubt each element of the offense of _____. The State also has the burden to disprove, beyond a reasonable doubt, the defense of duress.
>
> If you find the State has proven beyond a reasonable doubt each element of the offense charged and that the State has disproved beyond a reasonable doubt the defense of duress, you must find the defendant guilty.
>
> If, however, you determine that the State has failed to prove beyond a reasonable doubt one or more

> of the elements of _____, or has failed to disprove the defense of duress, you must find the defendant not guilty.
>
> [Ibid.]

In this case, the court read the model charge but added to it, apparently to clarify the distinction between the subjective and objective elements of the defense, as explained in B.H. After defining recklessness, the court instructed:

> If you find that Anthony Clark acted recklessly by placing himself in the situation, then the defense of duress is not available and you stop there. If you find that he did not act recklessly, then the analysis becomes a twofold analysis in this case, all right?
>
> So if you do not find recklessness on the part of Anthony Clark in placing himself in this situation you now consider two components of duress. They are required to be established in order to make out the defense. First, you must be convinced of the sincerity of Anthony Clark's perception that he was being threatened. That is to say that he honestly believes there was an imminent threat of danger. In other words, you must find that the defendant was actually coerced into the criminal action by the asserted excusing condition, here the alleged fear of imminent harm upon him or his family by McLaughlin and others.
>
> Anthony Clark actually must have been influenced by it. That's what you need to find. That assessment necessarily takes into account Anthony Clark's state of mind. You must find that Anthony Clark actually believed in and was frightened by the likelihood of actual harm.

> On the consideration of whether Anthony Clark actually perceived himself to be threatened you may consider his claim for that one component that he suffered post-traumatic stress disorder, or PTSD, should you accept that as true. To the extent you believe it factored into his actual belief and the sincerity of that belief you may give that evidence the weight, if any, you think such testimony is due after you have considered all of the evidence presented regarding his conduct before, during and after the robbery of September 6, 2016.

Next, the court discussed Blackwell-Nehlig's testimony and reiterated that the jury could consider defendant's mental characteristics in assessing the first element of the duress defense. The court continued:

> If you find that the defendant did not act out of his own actual and sincere fear of imminent harm, then you must reject the duress defense and don't even move onto the second component. If you find the defendant actually and sincerely believed that he or his family were in danger of imminent harm, then you must consider the second component of the duress defense.
>
> The second component of the defense is objective in nature. A defendant's level of resistance to the particular threat must meet community standards of reasonableness. What does that mean? You, the jury, must evaluate the defendant's response to the threat by applying the standard of a person of reasonable firmness. This component presupposes an ordinary person without serious mental and emotional defects. For this reason you may not consider the defendant's personal idiosyncrasies or frailties such as his claims of PTSD, should you find they exist.

> In applying that second component or the statute's objective measure, it is a person of reasonable firmness that you, the jury, must consider in assessing the reasonableness of the defendant's conduct. You must evaluate objectively Anthony Clark's criminal conduct directed toward an innocent third person or persons, okay in this case Louis White, Daniel Dennis, and whether a person of ordinary strength and willpower would refuse to do the criminal acts allegedly committed by Anthony Clark even in the face of the harm threatened. The idiosyncratic fact, if you find such to be true, that the defendant, Mr. Clark in this case, may be susceptible to the demands of the alleged coercion because he suffers from PTSD becomes completely irrelevant to this second component. The issue is whether a person of reasonable firmness in his situation would have been able to resist the threat from the coercing influence.

The court then returned to the language of the model charge with respect to the second element's four factors. It concluded with the burden of proof as set forth in the model charge.

On appeal, defendant contends the charge confused the State's burden and the jury's role in considering the duress defense. According to defendant, once a court determines that a defendant has presented a sufficient basis for a duress defense, the jury's only job is to consider whether the State has disproved the defense. He argues the charge was erroneous because it instructed the jury to first consider the sincerity of defendant's belief that he was forced to participate

in the robbery under threat of harm to himself and his family and then consider whether the State disproved the defense. We are unpersuaded.

B.H. makes clear that the jury's role in assessing a duress defense is first to consider the credibility of a defendant's claim that he was forced to act under threat of harm. 183 N.J. at 192. This requires "[t]he jury [to] decide whether a defendant actually believed that [he] was under threat of coercion." Id. at 197. If the jury finds the claim incredible, then the duress defense fails, and the jury need consider it no further. If the jury finds the claim credible, then it must consider the defendant's conduct under a reasonableness standard. Additionally, the jury must find that the defendant did not recklessly place himself or herself in a situation in which it was probable that he or she would be subjected to duress. And finally, the jury must consider whether the State disproved the defense. The jury's roll was not limited to considering whether the State disproved the defense.

"[A] jury charge is presumed to be proper when it tracks the model jury charge verbatim because the process to adopt model jury charges is 'comprehensive and thorough.'" State v. Watson, 472 N.J. Super. 381, 502-03 (App. Div. 2022) (quoting State v. R.B., 183 N.J. 308, 325 (2005)).

The duress charge given by the court accurately instructed the jury on all required findings and, while it added to the model charge, the additions were not confusing or inaccurate statements of the law. On the contrary, the charge accurately described the requisite findings, as discussed in B.H., which was issued long after the model charge. We find the instruction accurate and understandable, and discern no error, much less plain error.

D.

In Point IV, defendant contends, for the first time on appeal, that the accomplice jury charge denied him due process and a fair trial because it allowed the jury to convict him of first-degree robbery and second-degree possession of a weapon for an unlawful purpose based on a lesser mental state than both crimes require. Defendant claims the court instructed the jury it could convict based on accomplice liability if it found defendant was "aware" that his codefendants were armed, whereas first-degree robbery and possession of a weapon for an unlawful purpose require a finding of purposeful conduct, a more exacting mental state than awareness or knowledge. Defendant argues his convictions for these crimes must be vacated because the jury may have found a lesser mental state than required. We disagree.

> A person is guilty of robbery if, in the course of committing a theft, he: (1) [i]nflicts bodily injury or

> uses force upon another; or (2) [t]hreatens another with or purposely puts him in fear of immediate bodily injury; or (3) [c]ommits or threatens immediately to commit any crime of the first or second degree.
>
> [N.J.S.A. 2C:15-1(a).]

Robbery is a crime . . . of the first degree if in the course of committing the theft the actor . . . is armed with, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:15-1(b). In turn, "[a]ny person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree." N.J.S.A. 2C:39-4(a)(1).

The Code's definition of "purposely" is more exacting than its definition of "knowingly." N.J.S.A. 2C:2-2(b) defines those terms as follows:

> (1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.
>
> (2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct

> will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

The elements of accomplice liability are set forth in N.J.S.A. 2C:2-6, which provides, in relevant part:

> a. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
>
> b. A person is legally accountable for the conduct of another person when:
>
> . . . .
>
> (3) He is an accomplice of such other person in the commission of an offense . . . .
>
> . . . .
>
> c. A person is an accomplice of another person in the commission of an offense if:
>
> (1) With the purpose of promoting or facilitating the commission of the offense; he
>
> . . . .
>
> (b) Aids or agrees or attempts to aid such other person in planning or committing it . . . .

In State v. Rumblin, the Court discussed accomplice liability in relation to first-degree robbery. 166 N.J. 550 (2001).

> Under N.J.S.A. 2C:2-6, accomplice liability attaches when a defendant shares the purpose of the principal who commits the offense charged, State v. Norman, 151 N.J. 5, 32 (1997), and the defendant "actually foresee[s] and intend[s] the result of his or her acts." State v. Bridges, 133 N.J. 447, 456 (1993). Here, to be guilty of robbery in the first degree, N.J.S.A. 2C: 15-1(b) requires that [the] principals . . . purposely attempted to inflict serious bodily harm, or were armed with, or used, or threatened to use a deadly weapon while committing the theft. For [the] defendant to be guilty of first-degree robbery as an accomplice, he, too, must have intended that the principals engage in the armed robbery and [the] defendant must have acted purposely in planning, promoting, or facilitating that robbery. See State v. Weeks, 107 N.J. 396, 403 (1987).
>
> [Id. at 555 (emphasis added).]

Defendant does not dispute that the court's charges on accomplice liability, robbery, possession of a weapon for an unlawful purpose, purposely and knowingly all tracked the applicable model jury charges. Nor does he claim those charges were erroneous. Instead, he challenges one "example" the court gave to illustrate the application of accomplice liability to robbery when codefendants participate in the robbery with different mental states.

The court began by emphasizing that the State had to prove each element of each crime and, with respect to accomplice liability, that defendant had acted purposefully to promote or facilitate the underlying crime.

> Remember that. . . Anthony Clark, can be held to be an accomplice with equal responsibility only if you find as a fact that he possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act.
>
> In order to convict Anthony Clark as an accomplice to the specific crime charged you must find that he had the purpose to participate in that particular crime. He must act with the purpose of promoting or facilitating the commission of that substantive crime with which he is charged.

The court then explained that codefendants may act with different mental states and that each defendant's liability must be individually assessed.

> Our law recognizes that two or more persons may participate in the commission of an offense, that each may participate with a different state of mind. The liability or responsibility of each participant for any ensuing offense is dependent on his own state of mind and not anyone else's. For example, if you find that . . . Anthony Clark had a shared purpose with the others to commit the robbery, and you find that he himself through sole or joint possession – about which I will instruct you in a moment as to the law – was armed with a deadly weapon, you may find him liable by his own conduct for the offense of armed robbery.

Next, the court explained the alternative theories of liability based on complicity. The example defendant challenges occurred at this point.

> Alternatively, you may also find Anthony Clark liable as an accomplice to armed robbery should you find that he had a shared purpose with others to commit the robbery but that he was not in possession himself of

> the deadly weapon but was aware that the others were so armed. You might also find that the defendant had a shared purpose with the others to commit the robbery, but you might find that he was unaware that the others would be armed with a deadly weapon. Then the defendant would be liable as an accomplice to second degree robbery, all right? An included offense, as I'll instruct you, and not the first-degree armed robbery.
>
> [(Emphasis added).]

Defendant argues this language denied him due process and a fair trial because robbery requires a purposeful state of mind and the court used the term "aware," which is synonymous with "knowing," not "purposeful." Defendant further contends this language also requires a reversal of his conviction for possession of a weapon for an unlawful purpose because that offense similarly requires a purposeful mental state based on accomplice liability. We are unpersuaded.

Trial courts should provide jury charges "tailored to the facts of the case" and "the issues before them." Green, 86 N.J. at 289-90. When the facts or legal concepts are complex, the instructions should explain the law "in the context of the material facts of the case." State v. Berry, 471 N.J. Super. 76, 107 (App. Div. 2022), certif. granted, 252 N.J. 97 (2022).

The challenged example contained a correct statement of the law. First-degree armed robbery occurs when, during a theft, the actor harms another,

threatens harm, or is armed with a deadly weapon. N.J.S.A. 2C:15-1. As the court explained, if the jury found that defendant acted with the purpose to commit the robbery and did not possess a deadly weapon himself, he could nonetheless be liable for first-degree armed robbery if he was aware that his codefendants had a firearm. The example plainly stated the jury had to find defendant's "purpose" was to participate in the robbery and that he was "aware" that his codefendants were armed. Because possession of a firearm during a robbery elevates crime to a first-degree offense, the example was accurate.

Importantly, the court provided this example after providing accurate instruction on accomplice liability, including the definition of "purposely." Further, throughout the charge, the court repeatedly emphasized that even under a theory of accomplice liability, the State was required to prove beyond a reasonable doubt: (1) each element of the underlying offense; (2) that defendant possessed the requisite state of mind for each underlying offense; and (3) that defendant purposely promoted or facilitated the underlying offense. Read as a whole, the charge accurately explained the law for both accomplice liability and robbery, in the context of the issues raised and material facts presented at trial. Thus, defendant was not denied due process or a fair trial.

E.

Lastly, in Point V, defendant contends the court imposed a manifestly excessive sentence based on an improper weighing of the sentencing factors that is harsher than the sentences his codefendants faced. We disagree.

Proper sentencing is premised on three principles: (1) sentences should be based on "structured discretion designed to foster less arbitrary and more equal sentences"; (2) punishment should fit the crime, not the criminal; and (3) sentences should be subject to meaningful appellate review to promote uniformity. State v. Roth, 95 N.J. 334, 345-49, 361 (1984). To effectuate those purposes, our criminal code grades offenses based on the severity of the crime and provides corresponding sentencing ranges for each degree of crime.[4] State v. Hodge, 95 N.J. 369, 75 (1984).

A sentencing court has discretion to set a term within the statutory range, based on a qualitative weighing of the aggravating and mitigating factors enumerated in N.J.S.A. 2C:44-1. State v. Case, 220 N.J. 49, 65 (2014); State v. Sainz, 107 N.J. 283, 288 (1987). The aggravating and mitigating factors

[4] Defendant was convicted of first-, second-, and third-degree crimes, which have the following sentencing ranges: between ten and twenty years for a first-degree crime; between five and ten years for a second-degree crime; and between three and five years for a third-degree crime. N.J.S.A. 2C:43-6(a).

consider the personal characteristics of the defendant and the circumstances of the crime, thus ensuring an individualized assessment, while maintaining uniformity and predictability in sentencing. Case, 220 N.J. at 63. This process preserves "the Legislature's intention to focus on the degree of the crime itself as opposed to other factors personal to the defendant." Hodge, 95 N.J. at 377; accord State v. Jaffe, 220 N.J. 114, 116 (2014). "[C]areful application" of the factors promotes uniformity in sentencing. State v. Cassady, 198 N.J. 165, 179-80 (2009).

In considering the factors, "a defendant should be assessed as he stands before the court on the day of sentencing." Jaffe, 220 N.J. at 116. "The factors are not interchangeable on a one-to-one basis. The proper weight to be given to each is a function of its gravity in relation to the severity of the offense." Roth, 95 N.J. at 368. Where a factor is amply supported by the record, the court is not free to disregard it, but has discretion in determining the weight the factor should receive. State v. Dalziel, 182 N.J. 494, 504-05 (2005). However, the court may not "double count" an element of an offense as an aggravating factor. State v. Fuentes, 217 N.J. 57, 74-75 (2014).

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). A sentence should only be disturbed on appeal when

the trial court failed to follow the sentencing guidelines, "the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record," or "the application of the guidelines" renders a sentence "clearly unreasonable so as to shock the judicial conscience." Fuentes, 217 N.J. at 70 (quoting Roth, 95 N.J. at 364-65).

In this case, the State requested the court impose a persistent offender extended term N.J.S.A. 2C:44-3(a) on the robbery conviction pursuant to N.J.S.A. 2C:44-3(a), based on defendant's two prior felony convictions for drug possession. The court found that defendant met the criteria for an extended term but decided to sentence him within the ordinary range for a first-degree crime (i.e., ten-to-twenty years), as opposed to the extended term range (i.e., ten-years-to-life) because this robbery was his first violent crime

With respect to the aggravating factors, the court found factor three (risk of reoffending), N.J.S.A. 2C:44-1(a)(3), based on defendant's lack of insight into his criminal behavior, refusal to accept responsibility for his actions, and attempt to portray himself as a victim. In so finding, the court considered the jury's rejection of his duress defense. Referencing social media posts that were excluded from evidence, the court found they "absolutely suggest[ed]" that

defendant's will was not overborn or that defendant feared McLaughlin. The court afforded this factor "significant weight."

The court found aggravating factor six (nature and extent of defendant's prior record), N.J.S.A. 2C:44-1(a)(6), based on prior felony drug possession convictions in 2007 and 2013, and a history of misdemeanors. The court recognized the robbery was his first violent crime but found his twenty-year record showed a "steady stream of contact with the criminal justice system." Because his prior felonies occurred years earlier and this was his first violent offense, the court afforded aggravating factor six weight, but not great weight.

The court also found aggravating factor nine (need to deter), N.J.S.A. 2C:44-1(a)(9), based on the severity of the crime and defendant's lack of remorse and insight. The court found "the calculated manner in which [the robbery] was committed heighten[ed] exponentially the need" to deter defendant. It also found an equally "great" need to deter others from committing similar crimes. The court explained: "To watch the video evidence in this case was to watch violent lawlessness and disregard for others for furtherance of personal gain in motion. There's no other way to summarize it. Such callous, opportunistic, dangerous conduct must be deterred." The court afforded factor nine "great" weight.

The court rejected defendant's request to apply mitigating factors three ("defendant acted under a strong provocation"), N.J.S.A. 2C:44-1(b)(3), and four ("substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"), N.J.S.A. 2C:44-1(b)(4). It noted the jury rejected his duress defense and the surveillance videos showed defendant "freely committing [the robbery] with zero signs of force, stress, or compulsion."

The court also rejected mitigating factors eight ("defendant's conduct was the result of circumstances unlikely to recur"), N.J.S.A. 2C:44-1(b)(8), nine ("character and attitude of the defendant indicate" he is unlikely to reoffend), N.J.S.A. 2C:44-1(b)(9), and ten (defendant likely to respond affirmatively to probation), N.J.S.A. 2C:44-1(b)(10), finding defendant willfully participated in the robbery, lacked insight, and failed to take responsibility for his actions.

Finally, the court rejected mitigating factor eleven (imprisonment "would entail excessive hardship" to dependents), which defendant argued applied because his mother was ill, and he helped care for her. Although defendant's mother would suffer while he was incarcerated, the court found her suffering was not different from the suffering all families experience when a loved one or caregiver is incarcerated.

The court further found the aggravating factors clearly outweighed the nonexistent mitigating factors. Considering the real-time consequences, defendant received a nineteen-year NERA term for the robbery conviction, a concurrent five-year term for the third-degree criminal restraint conviction, and a concurrent four-year term for the third-degree receiving stolen property conviction. The court merged the possession of a firearm for an unlawful purpose and theft by unlawful taking counts into the robbery.

On appeal, defendant contends that the sentence is manifestly excessive, claiming this was not a particularly violent or severe robbery and that he was not the "prime mover." Further, unlike McLaughlin, he was not a "career violent felon who admitted [to] committing multiple armed robberies in the past in different states." Defendant underscores that McLaughlin's plea agreement recommended a sentence of only fourteen years, to be served concurrently with his fourteen-year federal-sentence, and claims that the disparity in the two sentences, particularly when considering McLaughlin's history of violent crimes, requires a remand for resentencing.

We discern no abuse of discretion or error in the application of the aggravating factors, rejection of the mitigating factors, and sentence imposed. The court's findings were supported by the record and are entitled to deference.

Defendant had a history of involvement with the criminal justice system. The need to deter and the risk that defendant would reoffend were adequately established, as was the extent of his prior record. Indeed, defendant was eligible for sentencing as a persistent offender. Moreover, defendant clearly refused to take responsibility for his involvement in the robbery, and instead tried to portray himself as a victim. We also note the store employees were violently threatened and left restrained and more than $130,000 in merchandise was stolen.

"[W]hen the aggravating factors preponderate, sentences will tend toward the higher end of the range." Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Natale, 184 N.J. 458, 488 (2005)). Here, the court found the aggravating factors clearly outweighed the nonexistent mitigating factors. Therefore, a term in the higher range for the offenses was appropriate.

The court found that defendant qualified as a persistent offender. Although the nineteen-year term for the robbery is near the top of the ordinary sentencing range, defendant could have received a much harsher sentence had the court imposed a persistent offender extended term. Moreover, while it is five years longer than McLaughlin received for the armed robbery, unlike defendant, McLaughlin admitted his guilt, cooperated with law enforcement

authorities by giving statements and testifying as an important State's witness, and was sentenced in accordance with the terms of a plea agreement.

"[A] sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant's sentence is lighter." State v. Roach, 146 N.J. 208, 232 (1996) (quoting State v. Hicks, 54 N.J. 390, 391 (1969)). Differences in sentences among codefendants requires resentencing where "there is an obvious sense of unfairness in having disparate punishments for equally culpable perpetrators." Ibid. (quoting State v. Hubbard, 176 N.J. Super. 174, 177 (Resentencing Panel 1980)). Because "some disparity in sentencing is inevitable," the issue "is whether the disparity is justifiable or unjustifiable." Id. at 233, 234.

Our scope of review of alleged sentencing disparity is no different than when ordinary excessiveness of sentence is asserted, State v. Tango, 287 N.J. Super. 416, 422 (App. Div. 1996) (citing State v. Lee, 235 N.J. Super. 410, 414 (App. Div. 1989)), namely "whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review," State v. Ghertler, 114 N.J. 383, 388 (1989) (citing Roth, 95 N.J. at 364).

While defendant received a harsher sentence than McLaughlin for the armed robbery, we perceive no sound basis to disturb the sentence based on

disparity. McLaughlin's cooperation with the prosecution and acknowledgment of guilt were proper considerations in imposing his fourteen-year term. See State v. Balfour, 135 N.J. 30, 38-39 (1994) ("a guilty plea can have a lenient influence" on the sentence imposed, "partly because it reflects a defendant's acceptance of responsibility for his or her criminal conduct and partly because it assists in the efficient disposition of cases."); State v. Henry, 323 N.J. Super. 157, 166 (App. Div. 1999) (finding the defendant's cooperation with police "should have been a strong mitigating factor"); State v. Williams, 317 N.J. Super. 149, 159 (App. Div. 1998) ("It would be grossly unfair" for defendants "to be sentenced without regard to their candid acknowledgment of guilt or their aid to the prosecution in coping with crime.").

Here, the five-year difference in the sentences does not create an "obvious sense of unfairness" unlike the unjustifiably disparate thirty-year difference in sentences for two codefendants tried separately in Roach. See Roach, 146 N.J. at 232. We further find defendant's sentence is not manifestly excessive and does not shock the judicial conscience.

Affirmed.