SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0609-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROGER HOWARD,

Defendant-Appellant.

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Submitted May 7, 2024 – Decided June 20, 2024

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-07-1891.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, on the briefs).

William E. Reynolds, Atlantic County Prosecutor, attorney for respondent (Linda A. Shashoua, Designated Counsel, on the brief; Courtney Marie Cittadini, Assistant Prosecutor, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Roger Howard appeals from a September 2, 2022 order denying his petition for post-conviction relief (PCR) following an evidentiary hearing. We affirm.

I.

We summarize the relevant facts from our prior opinions on defendant's direct appeal, State v. Howard, No. A-5705-13 (App. Div. Mar. 1, 2017) (slip op. at 1) (Howard I), and his appeal from the March 19, 2019 denial of his PCR petition without an evidentiary hearing, State v. Howard, No. A-4990-18 (App. Div. Dec. 11, 2020) (slip op. at 1) (Howard II).

> In October 2012, cousins A.T. and Q.D.[1] were walking on New York Avenue in Atlantic City with three other friends on their way to Q.D.'s house a few blocks away. The group stopped at a convenience store called "501" and went in. While in the store, A.T. was approached by a person dressed in a dark-colored hoodie with a mask of some type pulled down around his neck, and asked A.T., who was wearing "Obsidian Jordan 12" sneakers, about the size of his shoes. A.T., who wore a size thirteen sneaker, said the sneakers were size eight. After that person left the store, A.T. peeked outside to see if the person was gone and, being satisfied, the group left.

[1] We use the victims' initials to protect their privacy, consistent with our opinions in Howard I and Howard II.

Once outside, they proceeded toward Q.D.'s house, but three members of the group crossed to the other side of the street, leaving A.T. and Q.D. together. Shortly thereafter, A.T. and Q.D. were accosted from the shadows of a dark alleyway by an individual holding a gun in his hand and wearing a mask. After instructing A.T. to go into the alleyway, the assailant addressed Q.D. with his childhood name, and told Q.D. that he could leave. When A.T. would not go into the alley and started to back away from the assailant, and Q.D. would not leave his cousin, the assailant told them to run and as A.T. and Q.D. did so, the assailant started shooting. One bullet struck A.T. in the left leg and a second shot st[r]uck him in the right leg, breaking his femur and incapacitating him. The assailant shot Q.D. in the leg as well, but Q.D. was able to continue running for a short distance. With A.T. incapacitated, the assailant approached him, laid the gun down between A.T.'s legs, took his sneakers, rifled through his pockets[,] and then left with the gun.

Ten shell casings were found by the police in three different locations at the scene of the attack. A surveillance video from the convenience store showed the exchange between A.T. and the suspect, although there was no audio.

A.T. and Q.D. told the police, both at the scene and again at the hospital, that they could not identify who shot them. It was not until later when a second photo array was shown to A.T. that he identified defendant as the shooter. Q.D. testified that defendant came to his home several days after the shooting and denied that he was the shooter, apparently to counter word on the street to the contrary. Although Q.D. would not initially identify defendant as his attacker, he ultimately did so based on a photo array. Both victims were familiar with defendant. A.T. went to high school

with him and Q.D. played football with him when they were younger. The victims both expressed they were initially fearful of identifying their assailant.

[Howard I, slip op. at 2-3.]

Defendant was indicted in 2013 on charges including: first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1), (2) (counts one and two); first-degree robbery, N.J.S.A. 2C:15-1 (counts three and four); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts five and six); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count seven), second-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(a) (counts eight and nine); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7) (counts ten and eleven), fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (counts twelve and thirteen), and fourth-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7 (count fourteen). Counts four and nine were dismissed before trial. Defendant was convicted of the remaining counts. . . . Defendant was sentenced to a nineteen-year term under count one[,] subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, a consecutive eighteen-year term under count two[,] subject to NERA[,] and a consecutive eighteen-month term under count fourteen. The remaining counts were merged.

We affirmed his convictions and sentence. [Howard I, slip op. at 16]. The New Jersey Supreme Court denied certification. State v. Howard, 230 N.J. 551 (2017).

Defendant filed a PCR petition [i]n March . . . 2018[,] contending ineffective assistance of his trial counsel for not conducting a pre-trial

> investigation about A.T.'s knowledge of firearms. Assigned [PCR] counsel filed an amended petition in December 2018[,] raising multiple issues of ineffective assistance. . . .
>
> Defendant claimed his trial counsel failed to speak with 501 store employees who saw him go into the store later that night wearing a blue, green[,] and white sweatshirt and hat, not a dark colored hoodie with a Champion logo. His counsel did not ask defense witnesses about the portion of the surveillance video that showed this or ask to have that part of the tape introduced as evidence.
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> . . . .
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> [I]n February . . . 2019, defendant filed a "Supplemental Addendum in Support of P.C.R. Petition" [arguing] . . . the trial court erred by not charging aggravated assault with a weapon as a lesser included offense and that his trial counsel was ineffective by not objecting to the term "and/or" in the jury charge and verdict sheet.
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> [Howard II, slip op. at 4-6 (emphasis added).]

On March 19, 2019, the PCR court entered an order, denying defendant's petition without an evidentiary hearing, finding defendant failed to establish a prima facie case for PCR relief. Id. at 7. The next year, we affirmed the order in part, and vacated and remanded in part, "for an evidentiary hearing on whether [trial] counsel provided ineffective assistance of counsel [(IAC)] by not questioning witnesses about a segment of surveillance videotape[from the

convenience store], and . . . for the PCR court to address defendant's [IAC] claims raised in his February . . . 2019 pro se supplement to the amended PCR petition." Id. at 1. The New Jersey Supreme Court subsequently denied defendant's petition for certification. State v. Howard, 247 N.J. 144 (2021).

In August 2022, Judge Pamela D'Arcy conducted the remand hearing. Defendant's trial counsel died prior to the remand hearing.

Defendant testified at the hearing, as did the assistant prosecutor who tried the case in 2014. Before PCR counsel elicited defendant's testimony, he asked to call Q.D.'s former girlfriend to the stand, explaining this witness was "in th[e] video" from the 501 convenience store on the day of the shooting. PCR counsel also admitted this witness "was never called to testify" during the 2014 trial. The State objected to Q.D.'s former girlfriend testifying, arguing her testimony would be beyond the scope of the remand hearing. Judge D'Arcy reserved decision on this issue, pending her review of the convenience store footage and further argument from counsel.

When the testimony from defendant and the assistant prosecutor concluded, PCR counsel stated, "I have to concede [testimony from Q.D.'s girlfriend is] not part of the appellate remand." He reiterated, "I will concede

that," adding, "[h]owever, . . . it was an issue [defendant] raised to me, so . . . I leave it to the discretion of the [c]ourt" as to whether to allow her testimony.

Judge D'Arcy barred the contested testimony, stating, "[t]his is an evidentiary hearing regarding the portion of the video that was[not] shown to the jury. . . . [T]his is not a re-trial . . . for [defendant] to bring [in] new witnesses. . . . So[,] . . . [his] request to have her testimony [admitted] is denied."

On September 2, 2022, Judge D'Arcy entered an order denying defendant's PCR petition. In a well-reasoned fifteen-page opinion accompanying her order, the judge concluded defendant failed to show "[t]rial [c]ounsel's performance prejudiced him at trial." Next, the judge rejected defendant's two pro se arguments from his February 19, 2019 "supplemental addendum," i.e., "that . . . trial counsel was ineffective by not objecting to the term[,] 'and/or' in the jury charge[s] and verdict sheet," and "the trial court erred by not charging aggravated assault with a weapon as a lesser included offense." Howard II, slip op. at 6.

Regarding defendant's IAC claims, the judge found the second portion of the video was of "low[-]image quality," and defendant's testimony about "his conversations with his attorney and about the videos" was only "marginally reliable." Noting defendant "did not testify at his trial," she further concluded

"his collective testimony and physical appearance" during the remand hearing suggested "he was not being entirely truthful" with the court. The judge also found defendant's testimony was "self-serving and against the weight of the evidence." Conversely, the judge found the testimony of the lead prosecutor at defendant's trial "to be credible and inherently believable," noting the prosecutor testified she did not play the second portion of the video at trial because she did not think it "was relevant," and "believed . . . it depicted someone other than the shooter."

Turning to defendant's contention that trial counsel was ineffective for failing to play the second portion of the surveillance video at trial, to show defendant was at the 501 convenience store shortly after the shooting wearing clothing different than that worn by the shooter, Judge D'Arcy stated,

> it remains unclear whether [t]rial [c]ounsel's decision not to play [this portion of] the video was strategic. For example, the second part of the surveillance footage may not have bolstered [defendant]'s defense and could have ultimately hindered it. Trial [c]ounsel entered [defendant]'s clothing—including the white, green, and blue sweatshirt—into evidence [at trial], but it remains possible that this clothing did not match the clothing depicted in the [latter portion of the] video.[] [Defendant]'s entire defense would have been significantly undermined if there was any visual discrepancy between the clothing entered into evidence and the clothing seen in the video. . . .

> Nevertheless, . . . the trial record also indicates . . . [t]rial [c]ounsel did attempt to enter this portion of the video into evidence, after the [t]rial [j]udge charged the jurors and sent them to deliberate. . . . To be sure, it would constitute deficient performance if [t]rial [c]ounsel failed to play the video simply because he either forgot or lacked the technological prowess to do so. Unfortunately, [t]rial [c]ounsel is now deceased, and . . . unable to testify as to his decision-making during [defendant]'s trial. Therefore, this [c]ourt is unable to determine whether his performance was []constitutionally deficient.
>
> Regardless, [defendant] is unable to satisfy the second prong of the Strickland-Fritz[2] test, which requires him to prove that [c]ounsel's deficient performance prejudiced him. The [c]ourt finds that even if the jury had seen the second portion of the video, it would not have affected the outcome of [defendant]'s trial. In finding . . . [him] guilty, the members of the jury demonstrated that they were not persuaded by [his] witnesses and alibi defense. This could be because several of these witnesses told stories that were rebuttable by the State's evidence. For example, [two of defendant's witnesses] testified that immediately after the shooting, [one of them] called . . . [defendant] to see if he was okay. However, [defendant]'s cell phone records did not show any evidence of this phone call. . . .
>
> Furthermore, even if the jury did view this footage, it is possible that it would have been skeptical as to the time frame. The first portion of the surveillance footage—which depicts the shooter,

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[2] This is a reference to the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted in State v. Fritz, 105 N.J. 42, 58 (1987).

> wearing black, talking to the victims in the store—has a timestamp of about 10:28 p.m. . . . . The shooting took place . . . between 10:32 and 10:36 p.m. The footage that [defendant] argues depicts him entering the store has a timestamp of 10:46 p.m . . . . Even if [defendant] was the man in the white sweatshirt, he would have had time to change his clothing after the shooting and before re-entering the store. It is notable that [defendant]'s own witnesses described how . . . [defendant]'s mother's house and girlfriend's car were located very close to both the store and the scene of the shooting. [Defendant] could have changed his clothing at either of these locations.

In rejecting defendant's IAC claims, Judge D'Arcy also "t[ook] into account the significant amount of evidence the State presented at [defendant]'s trial," including: (1) A.T.'s testimony "that the man in the black sweatshirt[] who spoke to him in the convenience store, was [defendant]"; (2) A.T.'s testimony "that he knew . . . [defendant] from around the neighborhood"; (3) Q.D.'s testimony "that he recognized the man in the black sweatshirt" at the convenience store because "they played football together for several years"; and (4) Q.D.'s testimony "that the man in the black sweatshirt [wa]s the person who shot him several minutes later." Moreover, the judge stated, "most importantly, [Q.D.] testified that right before firing the weapon, the shooter said, 'you, [G]imp, you can go,'" which "was likely in reference to [Q.D.]'s childhood nickname, 'Gimp.'" Thus, the judge concluded,

> [g]iven the weight of the evidence presented against . . . [defendant] and the significant flaws in his alibi defense, . . . even if [t]rial [c]ounsel played the second portion of the surveillance footage for the jury, the outcome of the trial would have remained the same. Accordingly, even if [defendant] demonstrated that [t]rial [c]ounsel's performance was []constitutionally deficient, he has not shown . . . this deficient performance prejudiced him.

Next, Judge D'Arcy addressed defendant's contention that trial counsel was ineffective for failing to object to jury charges that included the phrase, "'and/or' . . . because this phrase is ambiguous, [and] the jury may have been confused." The judge disagreed, explaining the contested term, "'and/or[,]' was commonplace" before we issued our decision in State v. Gonzalez, 444 N.J. Super. 62 (App. Div. 2016) and concluded this phrase was "imprecise." Further, Judge D'Arcy aptly noted "Gonzalez was decided in January 2016, nearly two years after [defendant]'s trial" and Gonzalez was "not retroactive[ly]" applied. Therefore, the judge determined if defense counsel objected to the use of this phrase at trial, "his objection would have been overruled, as Gonzalez . . . had not yet been decided."

Finally, the judge rejected defendant's contention that the trial judge erred in "fail[ing] to, sua sponte, instruct the jury on the lesser included charge of [a]ggravated [a]ssault" "after instructing the jury as to [a]ttempted [m]urder."

Considering defendant "fired a handgun at [A.T.] multiple times, while [A.T.] attempted to run away," and defendant "fired a handgun at [Q.D.], while [Q.D.] attempted to run away," and both victims were shot, Judge D'Arcy concluded "[t]his evidence was sufficient to prove [the attempted murder counts]." She added, "a reasonable juror could have inferred . . . [defendant] intended to cause the death of both victims when he fired a handgun at them." Further, the judge found that because "[t]he facts adduced at [defendant]'s trial d[id] not clearly indicate that a reasonable jury could have acquitted [defendant] on the [a]ttempted [m]urder charges," "the [t]rial [c]ourt did not commit reversible error when it failed to instruct the jury on the lesser included [a]ggravated [a]ssault charge."

II.

On appeal, defendant raises the following arguments for our consideration:

> POINT I
>
> THE PCR JUDGE ERRED WHERE SHE REJECTED DEFENDANT'S CLAIM THAT HIS TRIAL ATTORNEY'S FAILURE TO INTRODUCE INTO EVIDENCE PERTINENT VIDEO FOOTAGE PREJUDICED HIS RIGHT TO A FAIR TRIAL.

POINT II

DEFENDANT'S PRO SE [IAC] CLAIMS REQUIRE AN EVIDENTIARY HEARING.

A. WHERE DEFENDANT'S TRIAL ATTORNEY DID NOT OBJECT TO THE AMBIGUOUS PHRASE "AND/OR" USED REPEATEDLY IN CHARGING THE JURY REGARDING COUNTS FIVE, SIX, TEN[,] AND ELEVEN, THE DETERMINATION OF GUILT WAS NOT RELIABLE.

B. IF DEFENDANT'S TRIAL ATTORNEY HAD SOUGHT TO HAVE THE AGGRAVATED ASSAULT OFFENSES CHARGED AS LESSER INCLUDED OFFENSES OF THE ATTEMPTED MURDER COUNTS, IT IS REASONABLY PROBABLE THAT THE JURY WOULD HAVE FOUND DEFENDANT NOT GUILTY OF BOTH ATTEMPTED MURDERS.

POINT III

THE PCR JUDGE ERRED WHERE SHE DID NOT ALLOW DEFENDANT ORAL ARGUMENT WITH RESPECT TO HIS PRO SE [IAC] CLAIMS.

POINT IV

THE PCR JUDGE ERRED WHERE SHE DENIED DEFENDANT'S REQUEST TO CALL A WITNESS AT THE EVIDENTIARY HEARING.

In his pro se supplemental brief, defendant argues:

POINT I

THE PCR JUDGE'S DECISION DENYING DEFENDANT'S PETITION WAS NOT BASED ON SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD. THUS[,] DEFENDANT WAS DENIED . . . HIS RIGHT TO DUE PROCESS OF LAW.

Our review of a PCR claim after a court has held an evidentiary hearing "is necessarily deferential to [the] PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). Thus, following an evidentiary hearing, we do not disturb "the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting Nash, 212 N.J. at 540). However, we review any legal conclusions of the trial court de novo. Nash, 212 N.J. at 540-41.

To succeed on an IAC claim, a defendant must satisfy by a preponderance of evidence the two-prong test enunciated in Strickland. 466 U.S. at 687; see also State v. Gaitan, 209 N.J. 339, 350 (2012). Failure to satisfy either Strickland prong requires the denial of a PCR petition. 466 U.S. at 700; see also State v. Parker, 212 N.J. 269, 280 (2012) (citing State v. Echols, 199 N.J. 344, 358 (2009)).

Under the first Strickland prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. Because a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," "the defendant must overcome the presumption that, under the circumstances, the challenged action [by counsel] 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Castagna, 187 N.J. 293, 314 (2006) (citing State v. Marshall, 123 N.J. 1, 165 (1991)). Additionally, trial counsel's "failure to raise unsuccessful legal arguments does not constitute [IAC]." State v. Worlock, 117 N.J. 596, 625 (1990).

To satisfy the second Strickland prong, a defendant must show counsel's alleged "deficient performance prejudiced the defense." 466 U.S. at 687. Therefore, a defendant must show both "that counsel's errors were so serious as

to deprive the defendant of a fair trial, a trial whose result is reliable," ibid., and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694. It is insufficient for "the defendant to show the errors had some conceivable effect on the outcome." Id. at 693.

Therefore, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if . . . [it] had no effect on the judgment." Id. at 691. "Important to the prejudice analysis is the strength of the evidence that was before the fact-finder at trial." Pierre, 223 N.J. at 583.

It also is well settled that "[a]ppropriate and proper jury instructions are essential for a fair trial." State v. A.L.A., 251 N.J. 580, 591 (2022) (citing Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015)). "[E]rroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." State v. McKinney, 223 N.J. 475, 495-96 (2015) (quoting State v. Afanador, 151 N.J. 41, 54 (1997)).

"Nonetheless, not every improper jury charge warrants reversal and a new trial. 'As a general matter, [appellate courts] will not reverse if an erroneous jury instruction was incapable of producing an unjust result or prejudicing

substantial rights.'" Prioleau, 223 N.J. at 257 (alteration in original) (quoting Mandal v. Port Auth. of N.Y. & N.J., 430 N.J. Super. 287, 296 (App. Div. 2013)). Additionally, instructions given in accordance with the model jury charge, or which closely track the model jury charge, are generally not considered erroneous. Mogull v. CB Com. Real Est. Grp., Inc., 162 N.J. 449, 466 (2000); see also State v. Ramirez, 246 N.J. 61, 70 (2021) (finding no plain error where the judge read the model charge verbatim, and no objection to the challenged instruction was made at trial).

If a defendant does not object when a charge is given, "there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012). When there is no objection, we review for plain error and "disregard any alleged error 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2).

Plain error in a jury charge "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 . . . 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)).

To determine whether there was error in a jury charge, "[t]he charge must be read as a whole." State v. Torres, 183 N.J. 554, 564 (2005) (citing State v. Jordan, 147 N.J. 409, 422 (1997)). Further, the error "must be evaluated in light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

We also "review for plain error the trial court's obligation to sua sponte deliver a jury instruction when a defendant does not request it and fails to object at trial to its omission." State v. Alexander, 233 N.J. 132, 141-42 (2018) (citing State v. Cole, 229 N.J. 430, 455 (2017)). In Alexander, the Court instructed:

> A trial court's decision to charge on a lesser-included offense is governed by N.J.S.A. 2C:1-8(e). Under that statute, the trial court cannot charge a jury on "an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." We have explained that "whether the lesser offense is strictly included in the greater offense . . . is less important . . . than whether the evidence presents a rational basis on which the jury could acquit the defendant of the greater charge and convict the defendant of the lesser."
>
> A party must request a charge or object to an omitted charge at trial for the rational basis test to apply. . . . When a defendant requests a lesser-included-offense charge, "the trial court is obligated, in

> view of defendant's interest, to examine the record thoroughly to determine if the rational-basis standard has been satisfied." "The rational-basis test sets a low threshold" for a lesser-included-offense instruction.
>
> In the absence of a request or an objection, we apply a higher standard, requiring the unrequested charge to be "clearly indicated" from the record. . . . [T]rial courts have an independent duty to sua sponte charge on a lesser-included offense "only where the facts in evidence clearly indicate the appropriateness of that charge."
>
> The "clearly indicated" standard does not require trial courts either to "scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty," or "to meticulously sift through the entire record . . . to see if some combination of facts and inferences might rationally sustain a lesser charge." Instead, the evidence supporting a lesser-included charge must "jump[ ] off the page" to trigger a trial court's duty to sua sponte instruct a jury on that charge.
>
> [Alexander, 233 N.J. at 141-43 (first quoting N.J.S.A. 2C:1-8(e), then quoting several New Jersey Supreme Court cases from 1986 through 2017).]

Applying these principles, we discern no abuse of discretion in Judge D'Arcy's denial of defendant's PCR petition following an evidentiary hearing. Instead, we conclude her determination that defendant provided "marginally reliable" testimony and failed to demonstrate trial counsel's alleged errors prejudiced him is amply supported by the record. Moreover, we perceive no

basis to disturb her finding defendant failed to demonstrate it was reasonably probable that showing the jury the "low[-]image quality" video of defendant purportedly entering the convenience store after the shooting would have led the jury to believe his witnesses over the testimony of the two victims who identified defendant as the shooter. This is particularly true given the record reflects both victims testified they knew defendant before the shooting, and Q.D. testified the shooter referred to Q.D. by his childhood nickname, "Gimp." The record also supports Judge D'Arcy's determination that the police recovered "a 9 mm magazine . . . hidden under the mattress in [a] room that [defendant] shared with [his girlfriend]," the same caliber used by the shooter.

Next, as Judge D'Arcy observed, even if defense counsel played the second portion of the video at trial to establish defendant was at the 501 convenience store shortly after the shooting—wearing different attire than the shooter—defendant failed to show it was reasonably probable this fact would have led the jury to find he was not the shooter.[3] She reasoned jurors could still have concluded defendant had the time to change his clothing between the

[3] Because defendant did not present the clothing he purportedly wore in the second portion of the surveillance video, Judge D'Arcy stated she "c[ould]not determine whether these items were similar to those worn by the man in the video."

shooting and his arrival at the convenience store, considering his mother's home and his girlfriend's car were near where the shooting occurred. We discern no error in this regard.

Similarly, we have no basis to disturb Judge D'Arcy's determination that trial counsel was not ineffective for failing to object to certain jury charges that included the phrase, "and/or." As Judge D'Arcy noted, this phrase was routinely used in model jury instructions at the time of defendant's trial, so even if defense counsel objected to the phrase, it is likely, "this objection would have been overruled, given that Gonzalez had yet to be decided." To provide effective assistance, an attorney is not obliged "to anticipate that an otherwise valid jury instruction would later be deemed improper." Funchess v. Wainwright, 772 F.2d 683, 691 (11th Cir. 1985). Further, we observe that in denying certification in Gonzalez, the Court expressly limited the panel's holding "to the circumstances in which it was used in th[at] case."[4] State v. Gonzalez, 226 N.J. 209 (2016).

[4] In Gonzalez, the defendant was charged as a co-conspirator and accomplice with robbery and three counts of aggravated assault. 444 N.J. Super. at 73. We found error in the jury charge on conspiracy and accomplice liability because the charge referred to "robbery and/or aggravated assault" when referring to the substantive crimes the co-defendants were alleged to have committed for which the defendant was to be considered accountable. Id. at 73-75. We explained the critical flaw in the charge as follows:

[T]he nature of the indictment required that the jury decide whether defendant conspired in or was an accomplice in the commission of a robbery, or an aggravated assault, or both. By joining (or disjoining) those considerations with "and/or" the judge conveyed to the jury that it could find defendant guilty of either substantive offense[—]which is accurate[—]but left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery. In short, these instructions did not necessarily require that the jury unanimously conclude that defendant conspired to commit or was an accomplice in the same crime. Such a verdict cannot stand.

The jury was also told that "to find the defendant guilty of committing the crimes of robbery and/or aggravated assault charges, the State must prove [among other things] that [the co-defendant] committed the crimes of robbery and/or aggravated assault." Assuming the "and/or" in this instruction was interpreted as being a disjunctive, it is entirely possible the jury could have convicted defendant of both robbery and aggravated assault even if it found [the co-defendant] committed only one of those offenses, i.e., the jury was authorized, if it interpreted "and/or" in this instance as "or," to find defendant guilty of robbery because it was satisfied the State proved that [the co-defendant] committed an aggravated assault.

[Id. at 75-77 (fourth alteration in original) (citations omitted).]

We also agree with Judge D'Arcy that the trial judge did not err in failing to sua sponte charge the jury on aggravated assault as a lesser included offense of the attempted murder charges.[5] As Judge D'Arcy aptly found, the "evidence was sufficient to prove" the attempted murder counts "beyond a reasonable doubt" because "[b]ased on these facts, a reasonable juror could have inferred that [defendant] intended to cause the death of both victims when he fired a handgun at them." Further, we concur with her conclusion that "[t]he facts adduced at [defendant]'s trial d[id] not clearly indicate that a reasonable jury could have acquitted [defendant] on the [a]ttempted [m]urder charges."

Finally, we decline to conclude Judge D'Arcy erred in denying defendant's request to have Q.D.'s former girlfriend testify. As PCR counsel conceded during the evidentiary hearing, the proposed testimony from Q.D.'s former girlfriend was beyond the scope of our remand.

In sum, we affirm the September 2, 2022 order substantially for the reasons set forth in Judge D'Arcy's thoughtful and comprehensive written opinion. To the extent we have not addressed defendant's remaining arguments,

[5] We parenthetically note that defendant's PCR challenge to the trial judge's failure to sua sponte charge the jury on the lesser included offense of aggravated assault could have been raised on direct appeal. See R. 3:22-4.

they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.