

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3181-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES A. PILOTTI,

Defendant-Appellant.

Argued March 4, 2024 – Decided June 25, 2024

Before Judges Gilson, Berdote Byrne, and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 20-12-0782.

Michael Denny, Assistant Deputy Public Defender, argued the cause for appellant (Jennifer Nicole Sellitti, Public Defender, attorney; Michael Denny, of counsel and on the brief).

Lucille M. Rosano, Assistant Prosecutor, argued the cause for appellant (Theodore N. Stephens, II, Essex County Prosecutor, attorney; Lucille M. Rosano, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Following a jury trial, defendant James Pilotti was convicted of first-degree kidnapping as a crime of domestic violence, N.J.S.A. 2C:13-1(b) and N.J.S.A. 2C:25-19 (count two); second-degree aggravated assault as a crime of domestic violence, N.J.S.A. 2C:12-1(b)(1) and N.J.S.A. 2C:25-19 (count three); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (counts four, six, and ten); three counts of third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (counts five, seven, and eleven); and third-degree aggravated assault as a crime of domestic violence, N.J.S.A. 2C:12-1(b)(13) and N.J.S.A. 2C:25-19 (count nine).¹

On April 27, 2022, prior to sentencing, the State moved for a mandatory extended term because defendant was a repeated violent offender pursuant to N.J.S.A. 2C:43-7.1(b). After considering defendant's convictions, the court granted the State's motion. Accordingly, the court imposed: a forty-year prison term, subject to an eighty-five percent period of parole ineligibility

¹ Defendant was also charged with third-degree criminal restraint, which was dismissed pre-trial. The jury was unable to reach a verdict on the charge of first-degree attempted murder, which was subsequently dismissed. Neither charge is the subject of this appeal.

pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the kidnapping conviction; a nine-year prison term, also subject to NERA, on the second-degree aggravated assault conviction to run concurrent to the term for kidnapping; and a four-year prison term on the third-degree aggravated assault conviction to run concurrent with the terms for second-degree aggravated assault and kidnapping. The weapons charges were dismissed. The court assessed fines and penalties and ordered defendant to have no contact with Jordan.² We affirm.

I.

At trial, the State's proofs consisted of testimony from Jordan, his neighbor, and the responding police officers, which were not countered by any defense witnesses. Jordan and defendant met in 2014 while working construction and began a "friends with benefits" relationship. The relationship took a turn in November 2018 when defendant entered Jordan's home without permission. Defendant was arrested, ultimately pled guilty to third-degree theft, and was sentenced to four years' probation, with 364 days in jail.

² We use a pseudonym to protect the confidentiality of the victim. R. 1:38-3(d)(12).

The convictions, which are the subject of this appeal, stem from an August 15 and 16, 2019 incident that arose when defendant went to Jordan's home. A few days before August 15, Jordan was notified that defendant would be released from jail. Defendant contacted Jordan, attempting to make amends and claiming to be homeless. Jordan agreed to allow defendant to spend one night in his home. Defendant arrived around midnight. After defendant finished eating, they went into the living room to watch television. Jordan removed defendant's pants and shoes at his request and attempted to engage in oral sex.

They moved to the master bedroom where Jordan attempted to reinitiate oral sex. Jordan testified defendant wrapped a belt around Jordan's neck and attempted to choke him. He attempted to break free by wedging his left fingers between his neck and the belt. Defendant beat Jordan's left hand as he held onto the belt.

Defendant continued to choke Jordan with the belt, beat his left hand, and punch him in the head as he laid on the floor. While beating Jordan, defendant told him to move his hand out of the way and said: "[T]his is how it feels in jail" and "[I]t'll be over in five minutes. Don't fight it." Defendant

repeated in a "loud[] and mean" voice: "Remove your hand. Let go of the belt." At some point, Jordan lost consciousness.

According to Jordan, defendant "suddenly" stood up and stomped his neck "like he tried to break it" as he pulled the belt tighter. Defendant then bound Jordan's feet to the belt around his neck and behind his back with another electrical cord "like an animal on the ground." Jordan's fingers remained between the belt and his neck as he laid on the floor. Defendant continued to strike Jordan, repeatedly kneed his ribs, and beat him with a ceramic lamp and a brick used as a doorstop.

Thereafter, defendant dragged Jordan by his feet down the stairs to the lower level of the house, causing his head to bang against each step. Defendant left Jordan in the hallway while he took a shower. After showering, defendant carried Jordan back upstairs and placed him on the bed. Defendant removed the cord from Jordan's neck and feet, bound his hands and feet in front of his body with the cord, and secured the cord with duct tape and a second electric cable pulled from a heating blanket. Defendant also secured Jordan's forearms with duct tape, stating: "I have to be sure that you don't escape."

Jordan pleaded with defendant not to kill him, assured him that he would not call the police, and offered defendant cash that he kept in the kitchen drawer. Defendant took Jordan to the kitchen, broke open the drawer, and took the cash.

Afraid for his life, Jordan testified that he told defendant about \$450,000 in a bank account and gave defendant the account PIN number in an attempt to placate him. After defendant called the bank to confirm the amount, Jordan told defendant that he had been saving that money for the two of them and gave defendant permission to take all the money. Using a steak knife, defendant cut the duct tape from Jordan's forearms but left the electrical cord around his neck and feet.

Around dawn on August 16, defendant told Jordan that he needed to be asleep before he left the home. Defendant took two sleeping pills from Jordan's prescription bottle found on the nightstand and poured half a glass of whiskey with the pills down Jordan's throat. After sleeping for approximately fifteen minutes, Jordan awoke to defendant watching him. Defendant repeated that he wanted to be sure that Jordan was asleep and did not call the police. Defendant forced four additional sleeping pills and another half glass of whiskey on Jordan. Defendant then laid across Jordan's feet and fell asleep.

Jordan removed the cord from around his feet and ran across the street to his neighbor's home.

The jury heard from the neighbor, who testified that he awoke at 6:45 a.m. to Jordan "banging" on his front door, "furiously" ringing the doorbell, and "begging" for help. He opened the door and found Jordan, face bruised and swollen, and his wrists still bound by an electrical cord. After Jordan relayed that he had been held hostage by defendant, his neighbor removed the neck and wrist bindings and called 9-1-1.

At 6:50 a.m., Roseland police officers responded to the neighbor's home regarding a "possible hostage kidnapping." Captain William Mildon interviewed the neighbor after arriving at the scene.

Mildon then interviewed Jordan, who appeared "very scared" and "very traumatized." Jordan told Mildon that he had escaped after defendant had kidnapped, beaten, and bound him with duct tape and an electrical cord. Mildon also provided the jury with a graphic physical description of Jordan wearing boxers or "cut-off" shorts; covered in dried blood, bruises, and wounds; his wrists bound by duct and electrical tape; his left hand "grossly swollen" from the bindings; the left side of his face swollen from his forehead

to his jawline; his left eye swollen shut; bleeding from the back of his head; "quite clear" ligature marks on his neck; and friction burn on off his shoulders.

Jordan was taken to the hospital by ambulance and remained hospitalized for three days. Jordan testified that he sustained a concussion, bruising and swelling on his face, right arm, left hand, and ribs, and was unable to close his fingers. He also sustained injuries to his neck and a burn mark and peeled skin on his right shoulder due to being dragged down the stairs. He did not sustain any broken bones and did not require stitches or surgery. Jordan stated that could not see clearly for several months after the attack. Jordan claimed that his memory "difficulties" lingered because of the attack, and he was in fear of people "all the time."

Detective Sergeant Raymond Boulard also responded to the radio call. Boulard testified that defendant was known to him from the November 2018 burglary at Jordan's home.

The responding officers searched Jordan's home and discovered a lamp with a bloody lampshade in the garbage can sitting in the center of the kitchen, a belt on the hallway floor, and blood at the bottom of the stairs, on kitchen cabinets and appliances, and on a rolled-up rug found in another bedroom. The officers found defendant lying on the bed in the master bedroom, covered

in blood with minor cuts on his head, torso, and legs. The walls, closet door, and floor of the master bedroom were blood-stained. The bed was askew from the wall, and the bedding was also covered in blood. Two cell phones, blue jeans, a liquor bottle, a broken lamp, cigarettes, cut electrical wire, a knife, and an empty roll of duct tape were also found in the master bedroom.

Defendant was arrested and read his Miranda³ rights. On August 19, 2019, Jordan gave a recorded statement to the police and identified defendant as his kidnapper and attacker.

II.

On appeal, defendant's counsel articulates the following:

POINT I

THE DEFECTIVE VERDICT SHEET AND THE COURT'S INCOMPLETE INSTRUCTIONS PRECLUDED THE JURY FROM CONVICTING [] DEFENDANT OF SECOND-DEGREE KIDNAPPING, AND HIS CONVICTION MUST BE REVERSED. (Not raised below.)

POINT II

THE TRIAL COURT'S ERRONEOUS RULING THAT [] DEFENDANT'S DECADES-OLD PRIOR

³ Miranda v. Arizona, 384 U.S. 436 (1966).

CONVICTIONS WERE ADMISSIBLE FOR IMPEACHMENT REQUIRES REVERSAL.

POINT III

THE PROSECUTOR'S SUMMATION IMPERMISSIBLY TOLD THE JURY THAT [DEFENDANT] WAS NOT CONTESTING HIS GUILT ON MULTIPLE COUNTS, BOLSTERED THE CREDIBILITY OF THE STATE'S STAR WITNESS, AND ATTEMPTED TO INFLAME THE JURY. (Partially raised below.)

- A. The Prosecutor Improperly Argued That [Defendant] Admitted He Had Committed Some of the Crimes, Misstating the Facts.
- B. The Prosecutor Impermissibly Bolstered the Credibility of the State's Star Witness.
- C. The Prosecutor Urged the Jury to Do Its "Duty," "Its Job," and "Justice" By Convicting [Defendant].
- D. These Improper Arguments, Both Individually and Together, Deprived [Defendant] of a Fair Trial and Necessitate Reversal of His Conviction.

POINT IV

THE CUMULATIVE IMPACT OF THE ERRORS DENIED [DEFENDANT] DUE PROCESS AND A FAIR TRIAL. (Not raised below.)

POINT V

A RESENTENCING IS NECESSARY BECAUSE THE COURT FAILED TO FIND MITIGATING FACTOR TWO DESPITE IT BEING SUPPORTED BY CREDIBLE EVIDENCE IN THE RECORD.

In his self-represented supplemental brief, defendant makes these additional arguments:

POINT I

DEFENDANT'S DUE PROCESS AND CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN . . . DEFENDANT WAS INDICTED AND HELD TO STAND TRIAL ON CHARGES OF DOMESTIC VIOLENCE, WHICH WERE DISMISSED IN THE CHANCERY DIVISION. NOT ONLY [WERE] DEFENDANT'S RIGHTS VIOLATED, AND BECAUSE OF THIS ERROR, MADE IT IMPOSSIBLE TO PROVE GUILT BEYOND A REASONABLE DOUBT [ON] COUNTS [TWO], [THREE], AND [NINE] . . . WITH A [CULPABILITY] OF KNOWINGLY ATTACHING A SPECIFIC PROTECTED PERSON UNDER THE MODEL JURY CHARGE.

POINT II

[THE] TRIAL COURT ERRED IN NOT DISMISSING . . . DEFENDANT'S [SUPERSEDING] INDICTMENT FOR VINDICTIVE PROSECUTION AND WOULD ASK THIS COURT TO RECONSIDER DUE TO THE FACT THAT THE GRAND JURY AND COURT [WERE] [DECEIVED] WITH LIE[S] [AND] HALF-TRUTH[S].

POINT III

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT . . . DEFENDANT OF [SECOND][-] DEGREE AGGRAVATED ASSAULT SERIOUS BODILY INJURY WITHIN THE[] INDICTMENT (AND DEFENDANT'S CONVICTION MUST BE REVERSED).

POINT IV⁴

DEFENDANT WAS CHARGED UNDER COUNT [THREE] OF THE INDICTMENT TO EITHER CAUSE SERIOUS BODILY INJURY. FROM THE BEGINNING[,] THE STATE ALLEGE[S] THIS IS SERIOUS BODILY INJURY AGGRAVATED ASSAULT. WITHIN THE STATE'S OPENING ARGUMENT . . . [,] THE STATE SAID[:] "[JORDAN] WILL COME BEFORE YOU AND TESTIFY AS TO HIS INJUR[IES], AND NOT JUST THE OBVIOUS ONE[S] BUT HIS PERMANENT INJURIES. HOW HE CAN NO LONGER SEE OR HEAR AS HE ONCE COULD." . . . NOW, IN ADDITION TO [JORDAN]'S TESTIMONY AND THE PHOTO[S] OF HIS INJURIES[,] YOU CAN ALSO LOOK AT THE MEDICAL RECORDS THAT ARE IN EVIDENCE AND SEE THAT WHEN [JORDAN] WAS TRANSPORTED WITH LIFE[-] THREATENING INJURIES. AND WHILE HE DID [NOT] BREAK ANY BONES, AND HE DID [NOT] REQUIRE ANY STITCHES, YOU CAN USE YOUR OWN EYES TO SEE THE INJURIES THAT HE SUSTAINED.

⁴ Defendant misnumbered the point headings. We have corrected the point headings accordingly.

Having reviewed the record and considered each of these arguments and the applicable law, we conclude that none of the arguments have merit, and we affirm.

III.

Defendant raises three arguments for the first time on appeal regarding alleged errors in the jury charge and the verdict sheet. In his counsel's brief, defendant argues the trial court omitted the "safe place" element of second-degree kidnapping in the jury charge, which made it "impossible" for the jury to fully consider whether defendant was guilty of the lesser-included offense. He also argues the verdict sheet was defective because it did not accurately reflect the degree of kidnapping. In Point III of his supplemental brief, defendant argues that the court erred in giving the jury kidnapping and second-degree and third-degree aggravated assault charges, which were also charged as domestic violence crimes. He contends that the domestic violence charges were dismissed by the chancery court.

In addressing these claims on appeal, we note at the outset that defendant's argument contradicts the theory presented during trial. The defense theory presented through opening, robust cross-examination, and summation, was straightforward: defendant "panicked" and "overreacted" to

unwelcome sexual advances from Jordan. The trial court followed the model charge for kidnapping, aggravated assault – serious bodily injury, and the lesser-included offense of aggravated assault – significant bodily injury, which were also charged as domestic violence crimes. Lastly, defendant did not object to the charge during the charge conference, after the charge was issued, or the verdict sheet. No proposed jury instructions or verdict sheet were submitted by defendant. This lack of objection narrows our scope of review.

We review under the plain error standard because defendant did not object to the jury charge. R. 2:10-2; see also State v. Funderburg, 225 N.J. 66, 79 (2016). "Plain error is a high bar and constitutes 'error not properly preserved for appeal but of a magnitude dictating appellate consideration.'" State v. Santamaria, 236 N.J. 390, 404 (2019) (quoting State v. Bueso, 225 N.J. 193, 202 (2016)). Simply put, we must determine "whether there is 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting Funderburg, 225 N.J. at 79). "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated 'in light of the overall strength of the State's case.'" State v. Clark, 251 N.J. 266, 287 (2022) (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

"Appropriate and proper charges to a jury are essential for a fair trial."
State v. Lora, 465 N.J. Super. 477, 501 (App. Div. 2020) (quoting State v. Green, 86 N.J. 281, 287 (1981)). "Jury charges 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). "[T]here is a presumption that the charge was not error and was unlikely to prejudice the defendant's case" where a defendant fails to object when a jury charge is given. State v. Montalvo, 229 N.J. 300, 320 (2017) (quoting Singleton, 211 N.J. at 182).

Here, the trial court's jury charge encompassed the elements of kidnapping, making its instructions presumptively proper. State v. Whitaker, 402 N.J. Super. 495, 513-14 (App. Div. 2008); see also Model Jury Charges (Criminal), "Kidnapping (N.J.S.A. 2C:13-1b(1) to (3))" (rev. Oct. 6, 2014). The trial court instructed the jury that defendant was charged with kidnapping and read the relevant part of the indictment:

On or about the 15th of August 2019 and the 16th of August 2019 in the Borough of Roseland, in the County of Essex . . . did unlawfully remove the victim from his place of residence or business or a substantial distance from the vicinity where the victim was found, or he unlawfully . . . confined the victim for a

substantial period with the purpose to inflict bodily injury or terrorize the victim.

The jury was also instructed on the relevant provision of the statute which formed the basis of the indictment:

A person is guilty of kidnapping if he [or she] unlawfully removes from — another from his [or her] place of residence or business, or a substantial distance from the vicinity where he [or she] is found, or if he [or she] unlawfully confines another for a substantial period, . . . with any of the following purposes:

1. to facilitate commission of any crime or flight thereafter;
2. to inflict bodily injury on or to terrorize the victim or another; or
3. to interfere with the performance of any governmental or political function.

The court next instructed the jury on the harm element:

If you find that the State has proven beyond a reasonable doubt that the defendant committed the crime of kidnapping, you must go on to determine whether the State has also proven beyond a reasonable doubt that he knowingly harmed [Jordan].

The "harm" component can include physical, emotional[,] or psychological harm. If the State is contending that the victim suffered emotional or psychological harm, it must prove that the victim suffered emotional or psychological harm that is inherent — that beyond that inherent in a

kidnapping. That is, it must prove that the victim suffered substantial or enduring emotional or psychological harm.

In this case, the State alleges that defendant strangled [Jordan] and beat him and restrained him with a belt, ceramic . . . lamp and an electrical cord.

Contrary to defendant's argument, the court expressly correlated the kidnapping instruction to the first-degree kidnapping charge, which clearly explained the difference between first-degree and second-degree kidnapping:

If you find that the State has proven beyond a reasonable doubt . . . that the defendant is guilty of kidnapping, but you have reasonable doubt as to whether the State has proven beyond a reasonable doubt [that] he knowingly harmed [Jordan][,] then you should then find the defendant guilty of kidnapping in the second degree.

If you find beyond a reasonable doubt that the defendant is guilty of kidnapping and that he knowingly harmed [Jordan][,] then you should find the defendant guilty of kidnapping in the first degree.

We are satisfied that the jury charge, as written and given, was sufficient for first-degree kidnapping. Further, there was no evidence in the record to support the "safe place" element of N.J.S.A. 2C:13-1(c). The overwhelming evidence presented by the State proved that Jordan escaped and ran across the street to a neighbor's home after he had been held for a substantial period of time, severely beaten, and injured. Therefore, we conclude the judge

committed no error, much less plain error, in failing to instruct the jury on the "safe place" element for the kidnapping charge.

In Point I of his supplemental brief, defendant similarly argues the trial court erred in giving the aggravated assault jury charge because (1) Jordan's failure to appear for the two prior domestic violence complaints resulted in dismissal by the chancery court that precluded a trial on the domestic violence criminal charges and (2) telling the jury there was a previous dating relationship was fundamentally unfair. Defendant also denies the existence of a relationship and repeats that he was a victim of unwanted sexual advances. We reject defendant's arguments.

The trial court did not err by including "a crime of domestic violence" in reading the indictment for the aggravated assault offenses charged. Instead, the court's instructions closely followed the model jury charges. See Model Jury Charges (Criminal), "Aggravated Assault – Serious Bodily Injury (N.J.S.A. 2C:12-1(b)(1))" (rev. Jan. 9, 2012); "Aggravated Assault – Significant Bodily Injury to a Victim of Domestic Violence (N.J.S.A. 2C:12-1(b)(12))" (rev. Mar. 11, 2019). The trial court recited the indictment to the jury:

The defendant is charged with the crime of aggravated assault in that he allegedly on August 15th and August

16th [in] 2019 in the Borough of Roseland purposely or knowingly caused or attempted to cause serious bodily to [Jordan] who had a former dating relationship with the defendant under circumstances manifesting the extreme indifference to human life.

A complaint alleging domestic violence under the Prevention of Domestic Violence Act (the PDVA), N.J.S.A. 2C:25-17 to -35, is distinct from a criminal proceeding charging crimes for the same underlying conduct. State v. Brown, 394 N.J. Super. 492, 505 (App. Div. 2007). Therefore, the dismissal of charges under the PDVA does not bar a criminal prosecution for the same action. Ibid. In that regard, we have explained that the PDVA "further declares that a domestic violence victim must be informed of 'the right to file a criminal complaint against [his/her] attacker[,]'" N.J.S.A. 2C:25-23, and another portion of the [PDVA] explicitly states that "[f]iling a complaint [in the [f]amily [p]art alleging an act of domestic violence] shall not prevent the filing of a criminal complaint for the same act." Ibid. (alterations in original) (citation reformatted); see N.J.S.A. 2C:25-28(a). Accordingly, courts treat a family court complaint and a criminal complaint for the same acts of domestic violence as separate matters.

Under the PDVA, domestic violence occurs when an individual commits one or more predicate acts, enumerated in N.J.S.A. 2C:25-19(a), upon a person

protected under the PDVA as defined in N.J.S.A. 2C:25-19(d). The PDVA also includes a catchall provision among the enumerated offenses, which provides: "Any other crime involving risk of death or serious bodily injury to a person protected under the [PDVA]." See N.J.S.A. 2C:25-19(a)(18).

Here, Jordan was a protected person under N.J.S.A. 2C:25-19(d) because he was subjected to domestic violence by defendant, a person with whom he had a former dating relationship, albeit noncommittal and non-monogamous. The State prosecuted the criminal case against defendant on behalf of the public interest. In contrast, the purpose of the family part complaint previously filed by Jordan was to protect him as an individual. Having considered the governing principles, we discern no error.

There is nothing in the record to suggest the jury was misled or misunderstood the grading of kidnapping and the aggravated assault offenses. The jury did not ask a question regarding the first-degree kidnapping or the aggravated assault counts that would indicate a lack of understanding of the jury instructions. See State v. Savage, 172 N.J. 374, 394 (2002). Accordingly, we conclude there has been no showing that the jury charge produced an unjust result because it was otherwise accurate and fairly stated the elements of both offenses.

"[T]he verdict sheet [is] 'an essential component' of the trial court's 'road map' for the jury's deliberations." State v. Cuff, 239 N.J. 321, 340 (2019) (quoting State v. Galicia, 210 N.J. 364, 387 (2012)). "A verdict sheet is intended for recordation of the jury's verdict and is not designed to supplement oral jury instructions." State v. Gandhi, 201 N.J. 161, 196 (2010).

When the defendant does not object to a question on the verdict sheet, we review for plain error. Cuff, 239 N.J. at 340 (citing Galicia, 210 at 386). The "inquiry focuses on whether the jury understood the elements [of the offense] as instructed by the judge, and was not misled by the verdict sheet." Gandhi, 201 N.J. at 197.

Defendant's argument that the jury was "never asked" and "never considered" the degree of kidnapping due to the omission on the verdict sheet lacks merit. Defendant "had no issues with [the] verdict sheet," and the evidence presented at trial did not provide a basis for the jury to convict defendant of second-degree kidnapping. Here, the verdict sheet presented to the jury regarding the first-degree kidnapping count provided that if the jury found defendant not guilty of the first-degree kidnapping charge, they were instructed to proceed to the next question for the lesser-included offense of third-degree criminal restraint. Thus, we discern no error because the jury was

provided with the jury instructions during deliberations, and therefore, we see no cause to reverse defendant's conviction.

IV.

In Point II of counsel's brief, defendant argues the trial court committed reversible error when it ruled all his prior convictions were admissible for impeachment if he took the stand. Specifically, defendant argues that any convictions that pre-dated the 2004 robbery conviction were too remote and not admissible. He further contends that the error was not harmless because it prevented him from testifying and interfered with his ability to present his own account of the altercation with Jordan to the jury.

We review whether defendant's decision not to testify based on the trial court's evidentiary ruling was harmless. See State v. Hedgespeth, 249 N.J. 234, 250 (2021). In Hedgespeth, our Supreme Court reaffirmed "that there can be situations, although likely unusual, in which an erroneous N.J.R.E. 609 ruling may be deemed harmless even if that ruling resulted in the defendant's deciding not to testify." Ibid. "To determine whether admission of evidence constitutes harmless error, the relevant inquiry is whether the purported error 'is of such a nature as to have been clearly capable of producing an unjust result.'" Id. at 252 (quoting State v. Kuchera, 198 N.J. 482, 501 (2009)).

"[T]he harmless[-]error standard . . . requires that there be some degree of possibility that [the error] led to an unjust result." State v. Ingram, 196 N.J. 23, 49 (2008) (second alteration in original) (quoting State v. R.B., 183 N.J. 308, 330 (2005)).

Here, after the State rested, the prosecutor sought to introduce six convictions, sanitized to impeach defendant's credibility in the event he testified. The court held a Sands/Brunson hearing to determine the admissibility of defendant's prior convictions that occurred over ten years prior to the start of trial. See State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993). Following oral argument, the court rendered an oral opinion after analyzing and applying N.J.R.E. 609(b)(2) to the six prior convictions.

We are satisfied that the court correctly concluded that the 2004 robbery conviction and the ten-year sentence with a NERA parole disqualifier were admissible because defendant was in custody within ten years of the commencement of the trial. Defendant also had three convictions that fell outside the ten-year time frame: (1) a 1996 third-degree theft conviction, with a three-year prison sentence; (2) a 2002 terroristic threats and weapons offenses conviction, with an eighteen-month prison sentence; and (3) a 2004

aggravated assault conviction, with a five-year prison sentence. The court correctly determined the 2004 robbery conviction and the 1996, 2002, and 2004 convictions were bridged by defendant's numerous disorderly persons offenses and brought the latter three convictions within ten years of the trial date. We add that prior to trial, the court granted the State's motion to admit the 2019 theft conviction under N.J.R.E. 404(b), as evidence of defendant's motive for committing the August 2019 offenses against Jordan.

Moreover, the State presented a wealth of compelling evidence to contradict the defendant's theory that he "panicked" and "reacted" to unwelcome sexual advances. Critically, the testimony from Jordan recalling the events leading up to the kidnapping and further detailing the severity of the injuries Jordan sustained in the attack, was supported by witnesses. Consequently, we discern no reversible error because the jury's failure to hear defendant's testimony was not clearly capable of producing an unjust result.

V.

In counsel's brief, defendant argues that the prosecutor's summation contained multiple prejudicial and improper statements. "[P]rosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries" State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v.

Frost, 158 N.J. 76, 82 (1999)). For a prosecutor's comments to require a new trial, "there must have been 'some degree of possibility that [the prosecutor's comments] led to an unjust result.'" Id. at 276 (alteration in original) (quoting R.B., 183 N.J. at 330). Moreover, that possibility of an unjust result 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." Ibid. (alteration in original) (quoting R.B., 183 N.J. at 330). Additionally, we consider "whether the offending remarks were prompted by comments in the summation of defense counsel." State v. Smith, 212 N.J. 365, 403-04 (2012).

"In determining whether the prosecutor's comments were sufficiently egregious to deny defendant a fair trial," an overall assessment is made of "the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." State v. Timmendequas, 161 N.J. 515, 575 (1999). The consideration includes "'whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court ordered the remarks stricken from the record and instructed the jury to disregard them.'" Id. at 576 (quoting State v. Ramseur, 106 N.J. 123, 322-23 (1987)).

Defendant argues the prosecutor improperly suggested that defendant had admitted he was guilty of the charged offenses. To support that argument, defendant points to the following statement by the prosecutor during closing arguments:

Even defense admitted that [defendant] committed many of these crimes against [Jordan]. She first told you that [Jordan] took advantage of a hungry and lonely [defendant], but then she told [you] that [defendant] did this. That [defendant] reacted. But she asserted that this was not a pre-planned incident[,] but that it was a reaction to [Jordan's] unwelcomed sexual advances. As she put it, it was an overreaction. A fight between a vulnerable man and a fourth-degree black belt. A fight that didn't last long because [defendant] restrained [Jordan] in his own home.

Defendant also parses the first sentence from the prosecutor's comments, arguing the comment "directly flew in the face" of defendant's not guilty plea and the defense summation that he was not guilty of all the charges:

Defense promised you that the evidence would not support the charges against . . . [d]efendant, but she did not say that he was innocent, because it is clear from the evidence that he is not. This is an attempted murder case. This is a [kidnapping] case.

Read in context, it is clear that the prosecutor's comments were made in response to the defense summation that defendant "panicked" and "reacted" to Jordan. The prosecutor's comments were proportionate to the defense theory

of the case. Nor did defense counsel object to those now challenged comments during summation, which "suggests that defense counsel did not believe the remarks were prejudicial at the time they were made" or that they "deprive[d] the court of an opportunity to take curative action." Frost, 158 N.J. at 84. We, therefore, "infer that counsel did not consider the remarks to be inappropriate." Clark, 251 N.J. at 290 (internal quotations and citation omitted). Under those circumstances, we hold the prosecutor's comments were harmless, because the comments were not "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Bakka, 176 N.J. 533, 548 (2003) (quoting State v. Bakston, 63 N.J. 263, 273 (1973)). That view is supported by the jury verdict because the jury acquitted defendant of attempted murder and found defendant guilty of the kidnapping, aggravated assault, and related weapons charges.

Defense counsel did object to the prosecutor's comment regarding the kidnapping count: "[D]efense counsel agreed that the [d]efendant tied [Jordan] up, that he held a knife to him and refused to let him leave." Following the defense's objection, the court gave a curative instruction that the jurors were the exclusive judge of the facts, they were to rely on their recollection of the facts, and the arguments of counsel were not evidence. Such proper curative

instructions generally remove the potential prejudice resulting from improper closing remarks. See Smith, 212 N.J. at 409 (quoting Frost, 158 N.J. at 76).

Defendant next argues the prosecutor tried to bolster the credibility of Jordan by claiming he did not want to "lie" to the jury, while having no evidence to support that statement. Defendant points to the prosecutor's statement:

We know he was credible because he was honest. He sat before you and explained the details he recalled from that day two and a half years ago. He told you when he couldn't recall certain details. He couldn't recall those details sometimes often. And that is because he was telling the truth, because he didn't want to lie to this [c]ourt.

Even if the remarks were objectionable, they did not deprive defendant of a fair trial. Here, the court instructed the members of the jury at the close of trial that they were the sole determiners of credibility. We presume that the jury followed the court's instruction. State v. Burns, 192 N.J. 312, 335 (2007) (citing State v. Nelson, 155 N.J. 487, 526 (1998)) (holding that "[o]ne of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions"). Furthermore, as noted above, the jury was presented with persuasive evidence of defendant's guilt from several witnesses.

Defendant further argues that the prosecutor tried to inflame the jury by telling it that it was its job to do justice, implying that the only way to do that was by a conviction. He further argues those statements violated defendant's rights to a fair trial and due process and warrant reversal of his convictions. We disagree.

The prosecutor's final remarks referenced justice and the jurors' duty:

But what I can say is that after your deliberations, after you make your determinations as to the evidence and the facts in this case justice will be served. Because [defendant] has now received his due process and it is time for you to render judgment. And your job as jurors, your privilege, your duty as well as your job is to do justice. And on behalf of the State of New Jersey I ask that you return a verdict of guilty as charged against [defendant].

We agree that the prosecutor's remarks were not proper. Nevertheless, we conclude that when viewed in the context of the entire trial proceedings, which involved the testimony of numerous witnesses, including the victim, the remarks were not so egregious or clearly capable of producing an unjust result that they deprived defendant of a fair trial. Frost, 158 N.J. at 83. The court instructed the jury that counsel's statements were not evidence during opening and closing statements and provided a curative instruction during the prosecutor's summation. It explained that evidence came from witnesses and

documents, or tangible items admitted into evidence at trial. Having reviewed the record, we conclude the prosecutor's comments were "not 'so egregious as to [have] deprive[d] defendant of a fair trial.'" Clark, 251 N.J. at 290 (alterations in original) (quoting McNeil-Thomas, 238 N.J. at 275).

VI.

Defendant argues in Point II of his supplemental brief that the court erred in not dismissing the superseding indictment for "vindictive" prosecution. He argues that the State did not present new information to justify the kidnapping charge, repeats his challenges to the sufficiency of evidence regarding the aggravated assault charges, challenges statements made to a surgical resident, and claims a violation of the doctor-patient privilege.

Defendant's arguments are unavailing. Here, the record before us does not establish that defendant filed a motion to dismiss the indictment. Moreover, if the motion was filed, the denial of the motion is not before us. We, therefore, decline to address this issue on appeal.

VII.

Defendant challenges the sufficiency of the evidence on which he was convicted of aggravated assault – serious bodily injury. He argues there was no evidence to suggest that Jordan suffered serious bodily injury and there

were no medical records to prove the "conclusion." This argument lacks merit. Based on our review of the record, the State satisfied its burden of proving defendant caused serious bodily injury through the testimony of several witnesses. Consequentially, there was evidence supporting the jury's findings that defendant was guilty under N.J.S.A. 2C:12-1(b)(1) and N.J.S.A. 2C:11-1(b).

VIII.

We next address defendant's related argument that the court should have found mitigating factor two, that the defendant did not contemplate causing serious harm to Jordan.

Based on the risk of re-offense, the extent of defendant's prior criminal record, and the need for deterrence, the court found aggravating factors three, six, and nine. See N.J.S.A. 2C:44-1(a)(3), (6), (9). The court found no mitigating factors applied and concluded the aggravating factors substantially outweighed the non-existent mitigating factors.

In accordance with our well-established principles, we review sentences "in accordance with a deferential standard." State v. Fuentes, 217 N.J. 57, 70 (2014). We are also mindful that we "should not 'substitute [our] judgment for those of our sentencing courts,'" Cuff, 239 N.J. at 347 (quoting State v. Case,

220 N.J. 49, 65 (2014)). We are not persuaded by defendant's argument. We conclude the trial court set forth reasons for defendant's sentence with sufficient clarity and particularity and made findings that are amply supported by competent and credible evidence in the record. Defendant's sentence was in accord with the sentencing guidelines, was based on a proper weighing of the factors, and does not shock the judicial conscience.


IX.

In Point IV, defendant asserts that even if an individual error does not require reversal, the cumulative effect of the errors deprived him of a fair trial. The cumulative error doctrine recognizes "even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008) (citing State v. Koskovich, 168 N.J. 448, 540 (2001)). Having considered and addressed defendant's arguments, we conclude the alleged errors did not prejudice defendant or result in an unfair trial. State v. Weaver, 219 N.J. 131, 155 (2014).

To the extent we have not expressly addressed any of defendant's remaining arguments, we find they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION