SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3674-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRITZ BELONY,

Defendant-Appellant.

Argued March 9, 2022 – Decided May 11, 2022

Before Judges Sabatino and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 18-10-3299.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Kevin S. Finckenauer, of counsel and on the briefs).

Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Barbara A. Rosenkrans, of counsel and on the brief).

PER CURIAM

Defendant Fritz Belony appeals from a February 27, 2020 judgment of conviction that was entered after a jury found him guilty of committing second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1), third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), and unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), but acquitted him of first-degree robbery, N.J.S.A. 2C:15-1(a)(1). He also challenges his aggregate seven-year sentence, which was subject to a No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, period of parole ineligibility.

On appeal, defendant specifically argues the following points:

> POINT I
>
> BECAUSE THE VICTIM'S STATEMENTS IN THE BODYCAM FOOTAGE WERE CUMULATIVE AND THE RITE AID EMPLOYEE'S COMMENTS WERE UNDULY PREJUDICIAL, THE TRIAL COURT ERRED IN ADMITTING THE FOOTAGE. ALTERNATIVELY, THE TRIAL COURT SHOULD HAVE GRANTED [DEFENDANT'S] REQUEST TO REDACT THE EMPLOYEE'S STATEMENTS PRIOR TO THE FOOTAGE BEING PLAYED FOR THE JURY.
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> A. THE TRIAL COURT ERRED IN ADMITTING THE BODYCAM FOOTAGE BECAUSE IT WAS CUMULATIVE AND UNDULY PREJUDICIAL.

B. THE TRIAL COURT ERRED IN FAILING TO GRANT A BRIEF ADJOURNMENT TO REDACT THE EMPLOYEE'S PREJUDICIAL AND IRRELEVANT STATEMENTS FROM THE FOOTAGE.

C. THE ADMISSION OF THE FOOTAGE AND THE RITE AID EMPLOYEE'S PREJUDICIAL STATEMENTS HAD THE CAPACITY TO CAUSE AN UNJUST RESULT.

POINT II

THE PROSECUTOR'S REPEATED COMMENTS EXPRESSING HER PERSONAL OPINION AS TO THE VIABILITY OF CERTAIN EVIDENCE, DENIGRATING THE DEFENSE FOR NOT CALLING CERTAIN WITNESSES, INSISTING THAT [DEFENDANT] MUST HAVE COMMITTED THE OFFENSE BECAUSE HE WAS POOR, AND EXPRESSING HER BELIEF THAT [DEFENDANT] HAD A SECRET PLAN TO ALSO ROB THE VICTIM'S FATHER CONSTITUTED SIGNIFICANT PROSECUTORIAL MISCONDUCT, IRREPARABLY DAMAGED THE PROCEEDINGS, AND DEMAND REVERSAL. (PARTIALLY RAISED BELOW).

A. THE PROSECUTOR IMPROPERLY STATED HER PERSONAL OPINION ON THE VIABILITY OF CERTAIN EVIDENCE.

B. THE PROSECUTOR IMPROPERLY SHIFTED THE BURDEN OF PROOF WHEN SHE DENIGRATED THE DEFENSE FOR FAILING TO CALL ADDITIONAL WITNESSES IN SUPPORT OF ITS CASE.

C. THE PROSECUTOR IMPROPERLY INSISTED THAT THE JURY MUST FIND [DEFENDANT] GUILTY BECAUSE HE IS POOR.

D. THE PROSECUTOR IMPROPERLY CONCOCTED A "PLAN B," NOT FOUNDED IN THE EVIDENCE ADDUCED AT TRIAL, THAT [DEFENDANT] WAS GOING TO ROB OR HARM [THE VICTIM'S FATHER].

E. THE CUMULATIVE EFFECT OF THE PROSECUTOR'S COMMENTS WAS TO DEPRIVE [DEFENDANT] OF A FAIR TRIAL.

POINT III

THE CUMULATIVE IMPACT OF THE IMPROPER BODYCAM STATEMENTS AND PROSECUTORIAL MISCONDUCT DENIED [DEFENDANT] DUE PROCESS AND A FAIR TRIAL. (NOT RAISED BELOW).

POINT IV

THE TRIAL COURT IMPROPERLY USED [DEFENDANT'S] REFUSAL TO ADMIT HIS GUILT AT THE CONCLUSION OF THE TRIAL AS A BASIS FOR RENDERING A HEAVIER SENTENCE.

We are not persuaded by defendant's challenge to the video recording's admission into evidence. However, we conclude that, in her summation, the prosecutor exceeded the limits on permissible comments, and for that reason we are constrained to vacate the judgment of conviction and remand the matter for

a new trial. Because we are remanding for a new trial, we do not address defendant's contentions about his sentence.

I.

The facts leading to defendant's arrest and conviction as developed at his trial are summarized as follows. In 2017, defendant began living in his friend Yves Exil's home. Although it was understood defendant would not pay rent or utilities, there was an oral arrangement that defendant would help maintain the home and occasionally cook for everyone and their guests.

By December 2017, Exil's son, Enock Desravines, the victim in this matter, also began living in the same house. After moving in with defendant and Exil, Desravines would invite a woman named Marie to visit with him at his father's home. At the time, Marie was living with her child and a man at another location, and it was unclear what her relationship with Desravines was beyond being friends.

In the summer of 2018, defendant agreed to move out within two months at Exil's request due to the expected arrival of Desravines's son, who was scheduled to leave Florida to begin living with Exil and Desravines in September. By late July, defendant found an apartment to move into that would be ready in a week's time.

Before defendant moved out of the apartment, on the evening of July 28, 2018, Desravines was stabbed in the back of the neck. He claimed it was defendant who assaulted him. Defendant denied stabbing Desravines but admitted to walking with Desravines near their home that evening. According to defendant, two unidentified individuals ambushed them before one of the two stabbed Desravines in his neck.

After being attacked, Desravines ran into a local Rite Aid where an employee tended to him before police and an ambulance arrived. After the police arrived, an officer wearing a bodycam obtained information from Desravines, including his identification of defendant as the person who stabbed him. As depicted on the bodycam recording, defendant was bleeding extensively from the back of his neck. When the ambulance arrived, Desravines was treated and taken to a nearby hospital, where he received four stitches and was sent home.

When Desravines spoke to officers at the Rite Aid and again the next morning when he gave a formal statement at the police department, he did not mention that the person who stabbed him demanded he turn over his money. Desravines also did not mention to the hospital staff, who wrote their own report, that he was asked for money, nor did he do so a few months later when speaking

to a defense investigator that interviewed him before trial. However, while at the Rite Aid, Desravines did express concern that defendant would be going back home to harm Exil.

Immediately after the stabbing, defendant did not follow Desravines, returning instead to Exil's home. Before leaving the scene of the attack, defendant picked up Desravines's phone that had fallen to the ground. Shortly thereafter, Exil found defendant crying outside their home. Eventually police found the two there and arrested defendant, who had possession of Desravines's phone, for the stabbing.

No further investigation was conducted by the police. They charged defendant with offenses arising from the attack based on Desravines's statement. Later, a grand jury returned an indictment, charging defendant with robbery, aggravated assault, unlawful possession of a knife, and possession of a knife for an unlawful purpose.

On November 13, 2019, the trial judge held a Rule 104 hearing and determined the bodycam video taken by the officer who responded to the Rite Aid was admissible despite defendant's objection that it was cumulative and unduly prejudicial.

Defendant's trial began on December 3, 2019. After opening statements, defense counsel requested the State redact comments from the Rite Aid video tape that were made by a Rite Aid employee, describing Desravines's injury, the employee's hope that the culprit would be caught quickly, and her relief when she learned a suspect was arrested. The trial judge denied that motion.

During the ensuing trial, Desravines and Exil testified for the State, and defendant testified on his own behalf. On December 6, 2019, the jury acquitted defendant of robbery but found him guilty of the remaining charges. On February 24, 2020, the trial judge sentenced defendant to the aggregate seven-year NERA term. This appeal followed.

II.

A.

We begin our review by addressing defendant's challenge to the trial judge's pretrial ruling that the bodycam footage could be admitted into evidence and played for the jury. The video began after the assault when the police arrived at the Rite Aid. It depicted Desravines speaking with officers and being treated for a stab wound on the back of his neck, which was bleeding down his back, soaking his shirt.

In the video, Desravines is heard identifying defendant as the person who stabbed him but being unable to provide a reason for defendant doing so, other than his father telling defendant he had to move out. Also, Desravines expressed concern that he was dying and, as already noted, that defendant would harm his father.

Also, as already noted, in the video, an employee is heard describing Desravines's condition, stating, "you're bleeding really bad," "the blood is gooshing [sic] out," and "he going to be dying over here." The employee also stated the police should find whoever assaulted Desravines and "lock his ass up," and, after hearing the police apprehended defendant, stated, "Okay, thank God. They got him. Lock his ass up too so I could beat him up any time."

At the Rule 104 hearing to determine the admissibility of the bodycam footage, Detective Frank Piombo, formerly an East Orange patrol officer, testified that he responded to the Rite Aid after he received a call that a man was stabbed, that the recording was from his camera, and it accurately reflected his recollection of events from that evening.

At the hearing's conclusion, the State argued the video captured the immediate aftermath of the stabbing, the extent of Desravines's injuries, and his identification of defendant, so its probative value substantially outweighed any

risk of prejudice. Defendant argued against admitting the video, contending the video was unduly prejudicial and cumulative. Defense counsel noted the facts that Desravines was stabbed or that he claimed defendant stabbed him were undisputed and medical records were being stipulated to, so the video would be cumulative to Desravines's testimony and medical records and therefore inadmissible. Counsel further argued the video showing Desravines's shirt soaked in blood and the employee's remarks about Desravines's injuries would significantly prejudice defendant.

The trial judge determined the video was admissible. The judge found that the footage was relevant, its probative value substantially outweighed its prejudice to defendant, and the video was not cumulative. To the extent the video's content included hearsay, the judge determined it was admissible under N.J.R.E. 803(a)(3), as a declarant-witness' prior identification, under N.J.R.E. 803(c)(3), then-existing mental, emotional, or physical condition, and under N.J.R.E. 803(c)(2), excited utterance.

B.

On appeal, defendant renews the same arguments he raised before the trial judge, contending that the video was unduly prejudicial, which substantially outweighed its minimal, if any, probative value. He also again contends the

video is cumulative because he did not contest that Desravines identified defendant as the person who stabbed him or that Desravines's injuries were as described in the medical report, which was admitted into evidence. He claims the video was not probative because it did not capture the incident itself, the scene of the incident, or Desravines's actual injury. Defendant also contends the video was unduly prejudicial in that it depicted Desravines in a bloody shirt and it captured a Rite Aid employee's visceral and exaggerated description of his injuries. He highlights the judge did not articulate his reasoning in determining the video was not unduly prejudicial or cumulative. We disagree.

The decision to admit video footage is an "evidentiary ruling[] 'entitled to [our] deference absent a showing of an abuse of discretion, [that is], there has been a clear error of judgment.'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). We review such evidentiary rulings "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). We will, therefore, not substitute our own judgment for that of the trial court, "unless its

'ruling "was so wide of the mark that a manifest denial of justice resulted."'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting Brown, 170 N.J. at 147).

To be admissible, the video must have been relevant. "'Evidence must be relevant for it to be admissible,' and 'all relevant evidence is admissible' unless excluded by the Rules of Evidence or other law." State v. Williams, 240 N.J. 225, 235 (2019) (first quoting State v. Scharf, 225 N.J. 547, 568 (2016); then N.J.R.E. 402).

"Evidence is relevant if it has 'a tendency in reason to prove or disprove any fact of consequence to the determination of the action.'" Ibid. (quoting N.J.R.E. 401). "Courts consider evidence to be probative when it has a tendency 'to establish the proposition that it is offered to prove.'" State v. Burr, 195 N.J. 119, 127 (2008) (quoting State v. Allison, 208 N.J. Super. 9, 17 (App. Div. 1985)). The evidence must be probative of a fact that is "really in issue in the case," as determined by reference to the applicable substantive law. State v. Buckley, 216 N.J. 249, 261 (2013) (quoting State v. Hutchins, 241 N.J. Super. 353, 359 (App. Div. 1990)).

Under N.J.R.E. 401, "[e]vidence need not be dispositive or even strongly probative in order to clear the relevancy bar." Buckley, 216 N.J. at 261. Moreover, "[t]he proponent need not demonstrate that the evidence can, in and

of itself, establish or disprove a fact of consequence in order to meet the benchmark of N.J.R.E. 401." State v. Cole, 229 N.J. 430, 448 (2017). "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." Burr, 195 N.J. at 127; see N.J.R.E. 402.

In this case, the evidence contained in the video was clearly probative. For example, it included the victim's near contemporaneous identification of defendant as his assailant, the primary fact at issue in the trial. Moreover, the video depicted the extent of the victim's injury, a necessary element of robbery and assault. However, it also depicted that despite bleeding from his neck, Desravines was coherent and not physically disabled. And, as noted, the video contains Desravines's explanation of what defendant did to him, which conspicuously did not include any mention of demanding or taking money from him, a fact the jury no doubt relied upon in acquitting defendant of that charge.

Having agreed with the trial judge the video recording was probative, we turn to defendant's contention that it still should have been excluded because its prejudicial effect substantially outweighed its probative value, especially considering its cumulative nature. We disagree.

Rule 403 "mandates the exclusion of evidence that is otherwise admissible 'if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.'" Cole, 229 N.J. at 448 (quoting N.J.R.E. 403). "The party urging the exclusion of evidence under [Rule] 403 retains the burden 'to convince the court that the [Rule] 403 considerations should control.'" State v. Santamaria, 236 N.J. 390, 406 (2019) (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 410 (2001)).

To determine undue prejudice, the inquiry is "whether the probative value of the evidence 'is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the' issues." Cole, 229 N.J. at 448 (alteration in original) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)). "[T]he mere possibility that evidence could be prejudicial does not justify its exclusion." State v. Wakefield, 190 N.J. 397, 429 (2007) (quoting State v. Koskovich, 168 N.J. 448, 486 (2001)). "It is not enough for the opposing party to show that the evidence could be prejudicial; '[d]amaging evidence usually is very prejudicial but the question here is whether the risk of undue prejudice was too high.'" Cole,

229 N.J. at 448 (alteration in original) (emphasis omitted) (quoting State v. Morton, 155 N.J. 383, 453-54 (1998)).

Evidence may be excluded under N.J.R.E. 403 where the evidence pertains to subordinate issues, that is, issues not addressing defendant's guilt or innocence. Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 6 on N.J.R.E. 403 (2021). However, "[a]t criminal trials, 'courts generally admit a wider range of evidence when the motive or intent of the accused is material.'" Koskovich, 168 N.J. at 483 (quoting State v. Covell, 157 N.J. 554, 565 (1999)).

Here, while the evidence contained in the video was in part undoubtedly damaging, "the danger of undue prejudice" did not "outweigh [its] probative value so as to divert jurors 'from a reasonable and fair evaluation of the basic issue of guilt or innocence.'" See State v. Moore, 122 N.J. 420, 467 (1991) (quoting State v. Sanchez, 224 N.J. Super. 231, 249-50 (App. Div. 1988)). For example, as to the Rite Aid employee's statements, her remarks were prejudicial in that they described how severe she believed Desravines's injury were based on her observations in the moment. But the prejudice was diminished by the viewer's ability to observe the manifestation of his injury themselves, to the extent the video captured them, and by medical reports admitted into evidence that clinically described his wound. Notably, again, the jury here did not convict

defendant of robbery, which was consistent with the fact that Desravines never stated in the video anything about defendant demanding money from him.

Further, the employee's statements were not cumulative because the video did not continuously depict the back of Desravines's neck. The employee was in a better position to see the injury from all around, and while the medical report could not describe the initial state of the injury before medical professionals arrived at the scene, the employee provided that information from her vantage point. The employee's remarks regarding Desravines's injuries were prejudicial, but not at all cumulative, and they were highly relevant in describing his injuries in the minutes following his assault, as the judge properly concluded.

The video is prejudicial in that it depicts a bloodied Desravines, his identification of defendant as his assailant, and his expressing fear that he was dying and that Exil would be the next victim. However, here again any prejudice was diminished because the video also showed Desravines moving about on his own volition and not claiming defendant assaulted him for the money he carried that day, which helped defendant's position that Desravines misidentified his assailant and that Desravines's claims that defendant attempted to rob him were incredible. In any event, the question is not whether this depiction is prejudicial,

it is whether its risk of undue prejudice substantially outweighs its probative value. We conclude the trial judge appropriately found it did not.

To the extent the video was somewhat cumulative to Desravines's testimony, it was not a "needless presentation of cumulative evidence" that substantially outweighed its probative value. See N.J.R.E. 403. Cumulative evidence is necessary to corroborate other evidence. The State did not belabor the events at the Rite Aid by calling the officer or the Rite Aid employee to testify in addition to showing the video. Here, the State relied solely on the video to confirm Desravines's excited utterances.[1]

We turn to defendant's second request made after opening statements were delivered at trial to redact the Rite Aid employee's statements. At that time, counsel objected to all of the employee's statements, arguing they were not probative, or were cumulative at best; highly prejudicial; and inflammatory. Counsel's position was that, "it should be common sense that those comments are redacted," relying again on arguments that the defense did not contest Desravines was injured and stipulated to admitting hospital records and that the

[1] Defendant does not challenge the judge's determination that Desravines's statements were excited utterances under N.J.R.E. 803(c)(2).

employee's statements were exaggerations.[2] Notably, although counsel objected to all of the employee's statements, the concerns she raised in her objection were specific to the employee's observations of Desravines blood, not relating to the employee's statements of "locking up" whoever stabbed him.

The trial court determined it was "prejudicial to the State" that defense counsel requested the video be redacted "as the State[was] about to put their witness on the stand," considering this issue was not raised at the Rule 104 hearing or otherwise before trial began. The court overruled the objection, relying on its reasons for admitting the video expressed at the Rule 104 hearing.

On appeal, defendant challenges the trial judge's refusal to redact from the video the Rite Aid employee's statements regarding Desravines injury because defendant claims those statements were not probative, or cumulative, and highly prejudicial, and—for the first time—the employee's statements about "locking up" whoever stabbed Desravines because, according to defendant, those statements are not probative, prejudicial and inflammatory.

We conclude that the trial judge correctly allowed the portion of the video in which the employee described Desravines's injuries for the reasons already

[2] Defense also argued the employee's comments were inadmissible hearsay at trial, but concedes on appeal the comments "do not constitute inadmissible hearsay."

stated above, and, as to the "locking up" statements, since defendant did not request that those statements be redacted at trial, even assuming the trial court erred, we conclude that the judge not sua sponte redacting those portions was not plain error. See R. 2:10-2. Plain error review "is a 'high bar,' requiring reversal only where the possibility of an injustice is 'real' and '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. Alessi, 240 N.J. 501, 527 (2020) (first quoting Santamaria, 236 N.J. at 404; then State v. Macon, 57 N.J. 325, 336 (1971)). We have no cause to conclude the statements' admission had that effect on the jury.

III.

Next, we address defendant's contentions about the prosecutor's comments during summations. Specifically, defendant challenges the prosecutor's statements relative to his alleged need for money because he had "nowhere to go," and about defendant having a "Plan B" to pursue if he could not get money from Desravines, which included harming Exil. He also claims the prosecutor shifted the burden of proof to him by chastising defendant for not having produced Marie or police officers to corroborate his version of the events.

In order to place the challenged comments in context, we summarize the relevant testimony at trial.

A.

At trial, Desravines, Exil and defendant testified. They consistently testified that the three of them lived in harmony from December 2017 to July 2018 in Exil's home, that Exil asked defendant to move out to make room for Desravines's son coming to live with them, which defendant agreed to do without a problem, and that defendant found an apartment to move into. It was also consistent as to the location where the stabbing occurred and that defendant had been with Desravines when he was attacked. Their testimony diverged as to who attacked Desravines and his relationship to Marie. That relationship was significant to defendant's efforts to create a reasonable doubt about his guilt by implying that Marie's jealous significant other was the actual assailant.

i. Testimony regarding the day of the stabbing

a. Desravines's testimony

Desravines testified that, on the day he was stabbed, he carried $983 in his wallet, which he claimed he was going to send to his son to purchase a plane ticket from Florida to New Jersey and clothing. With those funds in his wallet, Desravines went to work that morning and, during his lunch break, he bought takeout to eat at home. At home, he saw defendant and, since there was no food in the house, he opened his wallet, which was in defendant's view, to give him

$10 so defendant could buy himself lunch. Afterwards, Desravines returned to work.

After work, at about 10:30 p.m., Desravines went to the nearby Rite Aid, purchased some food, and walked home. According to Desravines, defendant met him outside their home and asked him if he had any money. After Desravines replied that he did not have money, defendant insisted Desravines accompany him to a nearby house to collect money from somebody who owed defendant money, to which Desravines begrudgingly acquiesced.

The two walked side by side down the street, and, when they reached a dark area by a tree on the neighboring property, defendant, who had already placed his arm around Desravines, grabbed Desravines and stabbed him in the neck. Defendant demanded, "give me the money that you have on you," and pushed Desravines to the ground. Desravines dropped his phone and from the ground he turned around to find defendant holding a knife. At that point, Desravines stood up and ran to the Rite Aid, where police responded and recorded the ensuing events with the bodycam as discussed previously.

Desravines testified that, in the video, he does not state defendant demanded money that evening, only that the stabbing might have something to do with Exil asking him to move out. Afterwards, when asked by hospital staff

that night and officers the next morning, Desravines also did not state defendant demanded money. And again, when asked by defense investigators later, he also did not state defendant demanded money the night of the stabbing.

b. Defendant's testimony

Defendant testified he saw Desravines during his lunch break that afternoon at home, where there was plenty of food for defendant to eat. Defendant had no reason to ask Desravines for money for food and therefore no need for Desravines to open his wallet to give him money for lunch as Desravines claimed. Defendant therefore had no knowledge that Desravines was carrying a large amount of cash.

On his way out to visit a friend later that evening, defendant ran into Desravines, who was returning from work with a bag in his hand. After a brief conversation, where Desravines learned there was no milk at home, he decided to walk back to Rite Aid to buy some and the two set off in the same direction.

When they reached the neighboring property, Desravines decided to walk back home and drop off the bag he had been holding before going back to the store. Before Desravines walked far, defendant saw a person wearing a purple shirt grab Desravines from behind a tree, causing him to fall and drop what he had in his hands. Defendant ran into the middle of the street where it was better

lit, and saw another assailant yelling, "let's go, let's go." Defendant saw Desravines eventually stand up and the two started running away and screaming for help, with defendant ahead and able to hear Desravines running behind him up until about the street that would take Desravines to the Rite Aid. Defendant ran a few more blocks, eventually heading back home. On his way, defendant found Desravines's phone on the ground by the tree where he was attacked.

At home, defendant rang the bell and Exil opened the door, finding defendant crying and sweaty. Defendant relayed to him what happened, and, shortly after, the police appeared and apprehended defendant, finding Desravines phone in his pocket.

c. Exil's testimony

Exil testified about there being no issues with defendant before the night of the stabbing, and he stated that, while they lived together, defendant only ever asked him for a dollar for cigarettes. He also confirmed defendant found a basement apartment where he could live when he moved out of Exil's home.

Exil testified also that, on the night of the stabbing, defendant's crying outside their home woke him up. When he opened the door, defendant told him two men attacked him and Desravines. When Exil asked where Desravines was, defendant said Desravines ran away. Right after, the police showed up. Exil

stated he did not see a knife or any blood on defendant, and no knives were missing from his kitchen that night.

ii. Testimony regarding Marie

Desravines testified that he and Marie were "close friends" and yet he did not know her last name or whether Marie had a romantic partner or a child. He said Marie would care for him after he was stabbed, but, about a month afterwards, she "disrespected him" and they ceased speaking. Without being prompted, he added, "I'm married, I have my wife and I have my family."

Defendant testified Marie was Desravines's girlfriend and would come over and cook. Also, he testified Marie was living with the father of her child.

Defendant additionally testified, one night, Marie was at Exil's house until about midnight, and when she left, Desravines and defendant escorted her home. On their way, Marie stated, "here he is, here he is," referring to the man she lived with, and she hid behind a tree. Defendant also testified, contrary to Desravines testimony, that Desravines told him Marie lived with someone. Defendant clarified Desravines "explained to [him] what kind of life he was living with Marie."

Exil testified he knew Marie. First he acknowledged Marie and Desravines dated, then he stated they were friends. Also, he testified he did not see Marie at his home after July 28, 2018.

iii. Summations

Before the prosecutor presented her closing arguments, defense counsel presented hers. In defense counsel's closing argument, she described defendant, Desravines, and Exil being like family, and therefore defendant would not stab Desravines over a few dollars. And, she reiterated, when repeatedly asked about what happened the night of the attack, Desravines did not report the attack had anything to do with money he carried on him.

Also, counsel discussed Desravines's relationship with Marie and how he may have misidentified defendant for the person who Marie lived with. She indicated Desravines may have also misidentified defendant for someone at the Rite Aid who saw the cash Desravines carried when he went there to buy food after work. Counsel also remarked the State did not call an officer to testify on the extent of an investigation they made, which was minimal, if any. She highlighted the police did not canvass the neighborhood, secure surveillance video from nearby homes, test defendant's clothes for blood, or investigate

Marie's husband or significant other. And, she questioned whether police even searched the surrounding area for the knife.

The prosecutor's summation focused on Desravines identifying defendant as his attacker and defendant being "desperate," finding himself soon to be homeless and with no money. Her summation also commented on defendant not producing Marie or police testimony, and defendant's alleged "Plan B" to rob Exil. In relevant part, she stated the following:

> [Defendant] had nowhere to go. He had nowhere to go. Now, today was the first time I heard that he had someplace to move. That he had found a place. Defense counsel said in her closing statement, today, that he had someplace to go. But we didn't hear that in the testimony.

Regarding Marie, the prosecutor stated, "Now, [defense counsel] keeps talking about this Marie person, who I have no idea who is, and I . . . heard about her when you heard about her." "She could have brought Marie in. Let's find out who the heck is Marie."

Regarding the lack of police testimony, the prosecutor remarked:

> And just for the record, the defense counsel can subpoena any witness she wants. If she had wanted to talk to the police, if she had wanted to show you how incompetent they were, she could have had them. They are required to respond to subpoenas. I didn't need the police because I have a victim who is telling you what happened.

As to the State's theme of desperation, the prosecutor also stated:

> All three men agreed that [defendant] didn't pay rent, he didn't pay gas, he didn't pay electricity, didn't pay for food. Yeah, Mr. Exil said sometimes [when] they . . . needed something he would go and get it. But there was no arrangement of living there free and cooking. . . . Additionally, you heard testimony from Mr. Exil and Mr. Desravines that they would give this man money for [cigarettes]. They were giving a 56[-]year[-]old man pin money. So what does that tell you? He had no money. If he had money, then he could move. He had no money and he had nowhere to go. So do you know what that means when you have nowhere to go, and you have no money? That equals desperation. And desperate people do desperate things.

Again, close to the end of her summation, the prosecutor continued to make the remark that defendant's desperation was due to lack of funds. She stated the following:

> Desperate people do desperate things. Greed and opportunity. Greed that was more important than loyalty. Greed that was more important than friendship. Greed that was more important than human decency. And an opportunity that was just too easy to pass up. The window was closing. That man had $1,000 on him. Maybe a thousand dollars is not a lot to you. A thousand dollars is a lot to me. But more important, a thousand dollars is a lot to someone with nowhere to go, and no money. Somebody's looking at being homeless in a minute. A thousand dollars is a huge incentive. No, we can't see ourselves doing that, but we're not him.

Finally, as to "Plan B," the prosecutor stated:

> Isn't it interesting that the same thing he did with the son about 15, 20 minutes before that is the same thing he was doing with the dad? To get him to come outside, to get him to walk up there. What is that about?
>
> Plan B. Plan A hadn't gone so well; right? He hadn't got the money. Hadn't work out. So maybe he had to go to plan B. Maybe Mr. Desravines was right to be concerned about the man going back to see – to his home. Maybe he had a right to be worried. We don't know. We just know that it makes no sense if you're running from people who have jumped you, why you don't go in your house. It makes no sense.

Defendant never objected to any portion of the prosecutor's summation. After the summations concluded, the judge provided the jury with their final jury charges, including instructions that the comments and remarks of counsel are not evidence, and the jury was the sole judge of the evidence's credibility.

B.

On appeal, defendant argues the prosecutor deprived him of a fair trial by making improper comments in her summation. Those comments included her "personally opin[ing] on the viability of certain testimony" by stating she never heard of Marie or that defendant had found another place to live. Also, he contends the prosecutor shifted the burden of proof onto the defense by commenting on defendant not calling Marie or police as witnesses in support of his case. In addition, the prosecutor improperly asserted defendant's motive was

that he was poor and desperate. Last, the prosecutor, with no basis in the evidence, "concocted" that "defendant had a secret 'Plan B' to go back to the house and rob [Exil] after [defendant's alleged] robbery of Desravines had failed."

The State concedes the prosecutor made a mistake by stating there was no evidence defendant found a place to live, yet contends it was only "a minor inaccurate assertion." It argues any mistake made in the prosecutor's summation was not so egregious as to require a new trial and the other remarks were acceptable and generally invited by the defense.

As to Marie, the State argues the defense "placed the specter of Marie's husband or significant other as the stabber," so the prosecutor was "entitled to debunk" that theory in summation and "[i]n no way" could the jury interpret these remarks as the prosecutor expressing her personal opinion on the veracity of the evidence. Further the State argues the prosecutor "was entitled to rebuff" the defenses' themes that defendant would not rob someone he considered family and that money was not a motive.

Notably, the State also concedes "the prosecutor's attempt to use defendant's impecuniosity against him" failed. Therefore, the State contends, because the jury acquitted defendant of robbery, these comments were harmless

because the prosecutor failed in convincing the jury that money was the motive for attacking Desravines. Also, it argues the prosecutor's comments on Plan B were "a fair inference" from the evidence that defendant's attempt to take money from Desravines failed and that Desravines was concerned with Exil's safety. Finally, the State argues "any impropriety was vitiated by the trial court's two instructions that the comments and remarks of counsel are not evidence, and the jury was the sole judge of the evidence's credibility."

In our review of a prosecutor's improper remarks during summation, there are two issues to be addressed: (1) whether the prosecutor's comments amounted to misconduct and, if so, (2) whether the prosecutor's conduct justifies reversal. Wakefield, 190 N.J. at 446 (quoting State v. Smith, 167 N.J. 158, 181 (2001)).

Reversal of defendant's conviction is not justified unless the prosecutor's comments were "so egregious that [they] deprived defendant of a fair trial," ibid. (quoting Smith, 167 N.J. at 181), by creating a real possibility of an injustice "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Alessi, 240 N.J. at 527 (quoting Macon, 57 N.J. at 336). We will not reverse a conviction because of prosecutorial misconduct in summation unless it "substantially prejudice[s] the defendant's fundamental right to have the jury fairly evaluate the merits of his

defense." State v. Garcia, 245 N.J. 412, 436 (2021) (alteration in original) (quoting State v. Bucanis, 26 N.J. 45, 56 (1958)).

In making that determination, we consider whether defendant objected to the remarks, "whether the remarks were withdrawn," and "whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Williams, 244 N.J. 592, 608 (2021) (citing State v. Frost, 158 N.J. 76, 83 (1999)). Generally, if no objection was made to the prosecutor's remarks, the remarks will not be deemed prejudicial. State v. Kane, 449 N.J. Super. 119, 141 (App. Div. 2017) (quoting Frost, 158 N.J. at 83). "The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made." Frost, 158 N.J. at 84. "The failure to object also deprives the court of an opportunity to take curative action." Ibid. (citing State v. Bauman, 298 N.J. Super. 176, 207 (App. Div. 1997)).

"[V]igorous and forceful" summations are expected to be made by prosecutors and they "are afforded considerable leeway" so long as their remarks are tethered to the evidence presented and the reasonable inferences to be drawn therefrom. State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting Frost, 158 N.J. at 82). And, "[g]enerally, remarks by a prosecutor, made in response

to remarks by opposing counsel, are harmless." State v. C.H., 264 N.J. Super. 112, 135 (App. Div. 1993).

However, "our system of criminal justice does not tolerate convictions achieved by improper methods." McNeil-Thomas, 238 N.J. at 283 (LaVecchia, J., dissenting). "In fulfilling [their] duty, a prosecutor must refrain from making inaccurate [legal or] factual assertions to the jury, and from employing 'improper methods calculated to produce a wrongful conviction.'" Garcia, 245 N.J. at 435 (citation omitted) (quoting State v. Ramseur, 106 N.J. 123, 320 (1987)); Smith, 167 N.J. at 178. "Our system of justice places checks on the propagation of falsehood." Id. at 436.

Thus, a prosecutor "cannot press an argument that is untrue." Ibid. Likewise, the prosecutor cannot "express his [or her] personal opinion on the veracity of any witness." State v. Rivera, 437 N.J. Super. 434, 463 (App. Div. 2014). Additionally, the prosecutor cannot suggest poverty as the sole motive for committing a crime. State v. Mathis, 47 N.J. 455, 472 (1966); see State v. Lodzinski, 249 N.J. 116, 155 (2021).

Moreover, without the court's approval, it is improper for a prosecutor to urge the jury to infer the defendant's failure to call witnesses at trial raises an inference that he fears exposure of facts that would be unfavorable to him. State

v. Velasquez, 391 N.J. Super. 291, 306 (App. Div. 2007). In authorizing such inferences, courts must "exercise caution" that is of "special importance" when doing so in a criminal case so as to consider the presumption of innocence and the State's high burden to prove each element beyond a reasonable doubt. Id. at 306-09. The inference is improper where the witness is available to both parties, State v. Clawans, 38 N.J. 162, 171 (1962), and "whenever it is reasonable to infer that the defendant's decision to do without a witness can be explained by the defendant's reliance on the presumption of innocence." Velasquez, 391 N.J. Super. at 309.

Before addressing the prosecutor's comments directly, we observe that at trial, when defense counsel attempted to object to one of the prosecutor's early comments, counsel failed to properly interpose her objection. Instead, she merely called out that what the prosecutor was stating was "untrue." Thereafter, the trial judge admonished defense counsel for having not properly objected and instructed the jury to disregard the outburst. Defense counsel made no further attempt to object.

We conclude that, for our purposes, it does not make any difference whether a formal objection was interposed. We are satisfied that the comments had the propensity to undermine the jury's consideration of the case.

Here, the prosecutor exceeded the bounds of an acceptable summation in pursuit of justice and defendant's conviction must be vacated. The prosecutor's main theme was that defendant turned on his friend's son who was like family solely because he was desperate, facing homelessness and poverty. There was however, no evidence in the record to support that contention. First, in addition to defendant, Exil—the State's witness—testified that defendant found an apartment to move into that would be ready in a week and that he was okay with waiting another week for defendant to move. Contrary to the prosecutor's assertions, defendant was not facing homelessness and he apparently had the funds to secure another home.

The prosecutor's entire theme at summation violated defendant's right to a fair trial not only by pressing an argument that was wholly not true, but also because the only motive the prosecutor established for the stabbing was homelessness and lack of funds—poverty—without more. Additionally, to say, "we didn't hear . . . in the testimony" defendant had someplace to go was simply not true.

Also, completely misconstruing the record, the prosecutor closed her summation with an entirely new crime and theory, which defendant was not charged with, and which was not supported by any evidence elicited at trial. She

referred to her new theory as "Plan B," and argued that defendant was so desperate for money after failing to rob Desravines, he was attempting to rob Exil before police arrived. Here again, there was no evidence to support that contention. While Desravines expressed concern for Exil's safety after he was stabbed, it was not because he believed Exil would be robbed. The concern was over Exil asking defendant to move out. There was no evidence that Exil even had cash to rob or that defendant lured Desravines or his father out of the house as part of a plan to rob them. These comments, despite their failing to elicit a conviction for robbery, still substantially prejudiced defendant who could not respond to the remarks.

The problems created by those comments about poverty and "Plan B" were compounded by the prosecutor wrongly pressing to the jury that defendant could have and should have called Marie and police to testify. Even if the prosecutor followed proper protocol by requesting the court authorize her to do so, these witnesses were available to both the defense and the State, so the court would prudently not authorize such misconduct. Moreover, defendant did not present an alibi defense or self-defense, where such remarks may be acceptable. Rather, it is reasonable to infer, if not fully apparent, defendant's decision to do without Marie or police can be explained by his reliance on the presumption of

innocence, which he took the stand to proclaim. Therefore, the prosecutor deprived defendant of a fair evaluation of the merits of his defense.

The harm caused by the cumulative effect of the prosecutor's misconduct could not have been cured with the judge's general jury instruction that what the attorneys stated was not evidence or that the jurors were the sole judges of the witness's credibility. Defendant is entitled to a new trial.

IV.

Because we are remanding this matter for a new trial, we need not address his contentions about his sentence.

Affirmed in part; vacated and remanded in part for further proceedings consistent with this opinion.