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September 6, 2024

LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v.
Gary D. Rhymes (Defendant-Appellant)
Docket No. A-1726-23

Criminal Action: On Appeal from a Judgment of Conviction, entered in the Superior Court of New Jersey, Law Division, Essex County.

Sat Below: Hon. John I. Gizzo, J.S.C., and a Jury

Honorable Judges:

Pursuant to Rule 2:6-2(b) this letter brief is submitted on behalf of the State.

Table of Contents

Counter-Statement of Procedural History

For purposes of this appeal, the State adopts the defendant's Statement of Procedural History. (Db2). The State also adopts the defendant's abbreviations and transcript designation codes. (Db2 n.1).

Counter-Statement of Facts

Norven Alcius testified that on January 19, 2022, at around 5:30 p.m., he was in the Chicken Shack when he was approached by three individuals. (6T 27:23-30:19). He identified two of the three men who approached him in the courtroom: Gary Rhymes ("defendant") and Ricotson Dolisca ("codefendant Dolisca").[1] (6T 30:20-22:12). Looking at the surveillance footage, Mr. Alcius testified that the man in the black jacket was codefendant Dolisca, and that defendant was the man wearing the red jacket.

Mr. Alcius testified that when the three men entered the store, he was cornered by them and they began asking him to "give[] something up." (6T 34:15-36:1). Then codefendant Dolisca took his phone and wallet, including his credit card, social security card, identification, cash-out card, and his ABT card. (6T 36:2-40:14).

Then, Mr. Alcius was told to take off his clothes, and codefendant Dolisca told him he had a gun. (6T 41:7-42:18). The prosecutor asked about

[1] The third defendant in this case was Mark Willis ("codefendant Willis").

defendant's actions, asking "we see this person in the red coat, he's starting to interact with you a bit more. What's going on here?" (6T 43:4-6). Mr. Alcius said he had been trying to ease the situation by talking with them, but defendant "told me to take all that off . . . they were yelling (indiscernible) my face and all that." (6T 43:7-14). When he was asked if defendant had tried to stop the robbery in any way, he stated, "Nah. No, no, no. He was with it. He wasn't trying to stop nothing." (6T 42:20-44:8). After taking his wallet, jacket, hoodie, sneakers, pants, and his phone, codefendant Dolisca pointed a gun at him, slapped him a few times, and then all three took off. (6T 46:1-47:2; 48:12-20; 49:12-14).

Officers were dispatched to the area on reports of a robbery, and Officer Terrel Brown met with the victim, and communicated the description of the three men to the other officers. (6T 5:22-7:18). Detective James Dorval received the description of three black makes, one in a red coat, one in a black coat, and one in a green coat, and one wearing white sneakers. (5T 92:17-19). He saw three men matching that description "to a tee," and identified them as defendant, codefendant Dolisca, and codefendant Willis in the courtroom. (5T 93:5-94-22). All three men were detained and patted down, and a handgun was recovered from codefendant Dolisca. (5T 96:11-97:3). All three men were placed under arrest. (5T 103:9-14).

A show-up identification was conducted, with Officer Brown driving Mr. Alcius past the highway median where all three suspects were "lined up right next to each other facing directly at the vehicle" (7:25-12:20). Mr. Alcius positively identified all three suspects. (6T 12:1-4).

After the identification, all three suspect were taken to headquarters and searched. (5T 103:9-17). They found Mr. Alcius's phone and wallet on codefendant Dolisca. (5T103:20-22).

Point I

The trial court properly found defendant's prior convictions admissible to impeach his credibility.

The trial court properly found defendant's prior convictions admissible to impeach his credibility. (6T 130:14-133:2). "Pursuant to N.J.R.E. 609(a), a defendant's prior criminal conviction is admissible for impeachment purposes, unless the defense establishes, pursuant to N.J.R.E. 403, that its admission will be substantially more prejudicial than probative." State v. R.J.M., 453 N.J. Super. 261, 266 (App. Div. 2018). However, "N.J.R.E. 609(b)(1) creates a presumption that a conviction more remote than ten years is inadmissible for impeachment purposes, unless the State carries the burden of proving 'that its probative value outweighs its prejudicial effect.'" Id. at 266.

Specifically, pursuant to N.J.R.E. 609(b)(1):

> [i]f, on the date the trial begins, more than ten years have passed since the witness'[s] conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.

In making that determination, "the court may consider"

> (i) whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,
>
> (ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud,
>
> (iii) how remote the conviction is in time,
>
> (iv) the seriousness of the crime.
>
> [N.J.R.E 609(b)(2).]

Finally, "'the court must then engage in the weighing process under (b)(1), to determine whether the State has carried its burden of proving that evidence of the remote conviction would not be more prejudicial than probative.'" State v. Hedgespeth, 464 N.J. Super. 421, 431 (App. Div. 2020) (quoting R.J.M., 453 N.J. Super. at 270), rev'd, 249 N.J. 234 (2021).

During the Sands/Brunson hearing, the State moved to admit defendant's prior convictions for third-degree possession of CDS with intent to distribute from 2007, and third-degree aggravated assault in 2011. (6T 128:5-22).

Defendant also had a violation of probation in 2015. (6T 131:23-132:4). Discussing the 2011 conviction, for which defendant received time served along with a four-year probationary sentence, the court below stated, "I believe that the calculation of time goes during the period of the sentence until completion." (6T 131:20-22).

While "probation does not qualify as confinement under N.J.R.E. 609(b)(1)," id. at 436, the court also considered "whether there are intervening convictions for crimes or offenses." N.J.R.E. 609(b)(2). The court stated that "there was not a significant gap in time between the 2007 and the 2011 conviction and the violation of probation in 2015 which extended it out to 2017." (6T 132:5-10).

It is appropriate for a trial court to "consider intervening convictions between the past conviction and the crime for which the defendant is being tried," because when a defendant has an extensive prior record, "his burden should be a heavy one in attempting to exclude all such evidence. A jury has the right to weigh whether one who repeatedly refuses to comply with society's rules is more likely to ignore the oath requiring veracity on the witness stand." State v. Sands, 76 N.J. 127, 145 (1978). The rationale is the "belief that a person who has lived contrary to society's rules and laws by committing crimes

should not be able to shield his credibility from the jury and present himself as a law-abiding individual." State v. T.J.M., 220 N.J. 220, 233 (2015).

Here, defendant had two prior convictions, and a violation of probation. That violation of probation was in 2015, it extended his probation to 2017, and he committed the current offenses in January 2022. While defendant argues the court erroneously used his violation of probation as part of its remoteness analysis, nothing was improper of the judge's use of the violation as an intervening circumstances going to remoteness. In State v. Murphy, relied on by defendant, the court noted, "[w]e do not view this violation of probation as an intervening conviction." 412 N.J. Super. 553, 565 n.1 (App. Div. 2010). That court cited to State v. Jenkins, 299 N.J. Super. 61, 71-75 (App.Div.1997) which held that a violation of probation may not be used to impeach a defendant's credibility. Ibid. Neither of these cases mandate that a trial court cannot consider a violation of probation in a remoteness analysis when considering whether defendant's convictions show a continuing course of criminal conduct, as was done here. Although the judge did not specifically state that, it is clear he considered that from his language that "there was not a significant gap in time between the 2007 and the 2011 conviction and the violation of probation in 2015." (6T 132:5-10).

Defendant's argument that his prior convictions were not more probative than prejudicial likewise fails. Defendant's argument at trial was that he was trying to deescalate the altercation. Had defendant testified to that version of events, it would have been probative that he had previously been convicted of crimes to help the jury determine his credibility. Considering the victim's testimony contradicted defendant's version of events, and portions of the video show him yelling in the victim's face while he was backed into a corner, defendant's credibility would have been at issue. (Da 16 15:25-15:35; 16:03-16:21; 16:28-16-42).

Here it is important to keep in mind this Court's standard of review. The standard of review of a trial judge's evidentiary rulings is abuse of discretion. "Trial judges are entrusted with broad discretion in making evidence rulings." State v. Muhammad, 359 N.J. Super. 361, 388 (App. Div.), certif. denied, 178 N.J. 36 (2003). Evidentiary rulings are "subject to limited appellate scrutiny." State v. Harris, 209 N.J. 431, 439 (2012) (quoting State v. Buda, 195 N.J. 278, 294 (2008)).

The trial court's decision to admit defendant's prior convictions is entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." Ibid. (quoting State v. Brown, 170 N.J. 138, 147 (2001)). The "decision whether to admit a prior conviction for purposes of

attacking the credibility of a witness rests within the sound discretion of the trial court." State v. Leonard, 410 N.J. Super. 182, 187-88 (App. Div. 2009).

A trial court's "discretion is a broad one. . . . Ordinarily evidence of prior convictions should be admitted. . . " Id. at 441 (quoting State v. Sands, 76 N.J. 127, 144 (1978)). This is in keeping with the precept that, "Our Evidence Rules generally promote admissibility of all relevant evidence, N.J.R.E. 402, and 'evince a more expansive approach to the admission of evidence.'" Ibid. (quoting Muhammad, 359 N.J. Super. at 388). Given this Court's deferential standard of review, defendant cannot show the trial judge abused his discretion in admitting defendant's sanitized convictions should he have testified.

Finally, the New Jersey Supreme Court held, "in limine N.J.R.E. 609 rulings shall continue to be reviewed under the harmless-error standard. Hedgespeth, 249 N.J. at 252. The Court noted that, while such cases may be rare, "there *can* be situations in which a defendant's decision not to testify after an erroneous N.J.R.E. 609 ruling *will not* constitute harmful error." Id. at 251 (emphasis in original).

Had the jury heard defendant's testimony, it is unlikely that they would have believed his version of events because it goes against what the victim claimed. Also, "when it comes to a defendant's testimony, 'we look to

evidence outside of defendant's testimony because it is the 'sort of evidence that a jury naturally would tend to discount as self-serving.'" Hedgespeth, 464 N.J. Super. at 437. Defendant is seen on video participating in the robbery, the victim identified defendant, and all three of codefendants were apprehended together shortly after the incident and had in their possession a handgun and the victim's property. If any error did occur, it was harmless. R. 2:10-2.

Point II

The jury was properly instructed on robbery and accomplice liability.

The trial court properly instructed the jury on robbery and accomplice liability. Defendant's argument that the trial court failed to specifically instruct the jury that in order to convict him of robbery, they had to find he shared his codefendant's purpose of committing the robbery with a gun, lacks merit because it is concerned with a single portion of the jury charge and fails to consider the jury charge as a whole to determine its overall effect. Furthermore, there was no rational basis to charge second-degree robbery in this case as a lesser-included charge, and defendant's trial counsel did not request such.

"When a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard." State v. Singh, 245 N.J. 1, 13

(2021) (citing R. 2:10-2; State v. Camacho, 218 N.J. 533, 554 (2014)). Under that standard, an unchallenged error constitutes plain error only if it was "clearly capable of producing an unjust result." R. 2:10-2. "'Thus, the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached.'" Singh, 245 N.J. at 13 (quoting State v. R.K. 220 N.J. 444, 456 (2015)).

Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial. The trial court has an absolute duty to instruct the jury on the law governing the facts of the case." State v. Concepcion, 111 N.J. 373, 379 (1988). The requirement that jury instructions be "molded" or "tailored" to the facts adduced at trial "has been imposed in various contexts in which the statement of relevant law, when divorced from the facts, was potentially confusing or misleading to the jury." State v. Robinson, 165 N.J. 32, 42 (2000). "The charge 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.'" Concepcion, 111 N.J. at 379 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). Nonetheless, it is generally left to "the sound discretion of the trial judge to decide when and how to comment on the evidence." State v.

Pigueiras, 344 N.J. Super. 297, 317 (App. Div. 2001) (citing State v. Robinson, 165 N.J. 32, 45 (2000)).

When considering a jury instruction, our Supreme Court "has repeatedly held that portions of a charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect." State v. Cagno, 211 N.J. 488, 514 (2012) (quoting State v. Wilbely, 63 N.J. 420, 422 (1973)).

Here, defendant argues that the trial court inadequately instructed the jury on accomplice liability by failing to tell them that in order to convict defendant of armed robbery, "they had to find that he shared [codefendant's] intent to commit the robbery with a gun." (Db28). However, the court properly instructed the jury on first-degree robbery, and then continued to give the charge on accomplice liability, stating:

> In this case, the State alleges that the defendants Gary Rhymes and Mark Willis are guilty of the crime committed by Ricotson Dolisca because they acted as his accomplice by soliciting or aiding or agreeing or attempting to aid Ricotson Dolisca in the planning or committing it with the purpose that the specific crime charged be committed.
>
> In order to find the defendants guilty, the State must prove beyond a reasonable doubt each of the following elements. In order to find the defendant guilty, the State must prove beyond a reasonable doubt each of the following elements:

> That Ricotson Dolisca committed the crime of robbery. I've already explained the elements of the offense of robbery. I won't repeat it here.
> [(7T 31:12-32:2) (emphasis added)]

The judge had already fully instructed the jury on first-degree robbery, including that the State had to prove a deadly weapon was used during the course of the robbery, and that defendant had to have "the purpose that the specific crime charged be committed." (7T 25:16-26;8; 31:17-18). Examining the instruction as a whole clearly shows that the failure to include the words "with a deadly weapon" in conjunction with robbery during the accomplice liability portion of the charge did not render the instruction inadequate.

Secondly, it was proper for the court not to instruct the jurors on second-degree robbery. Both defendant's and codefendant's counsel below specifically stated they were not seeking a lesser-included charge for second-degree robbery to be included, and the trial court agreed. (6T 155:24-156:6).

"A trial court's decision to charge on a lesser-included offense is governed by N.J.S.A. 2C:1–8(e)." State v. Alexander, 233 N.J. 132, 142 (2018). The trial court cannot charge a jury on an included offense unless a rational basis exists for a verdict convicting the defendant of the included offense. Ibid. (citing N.J.S.A. 2C:1–8(e)). The New Jersey Supreme Court has explained, "'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.'" Ibid. (quoting State v. Cassady, 198 N.J. 165, 178 (2009)).

Here, the trial court stated:

> And understandably so. I want the record to be clear. The video obviously shows Mr. Dolisca with a gun. It was testified to that a gun was involved which gives it a first-degree -- makes it a first-degree robbery. If that were at all in question, then clearly the lesser included of second-degree robbery or potentially theft might be included. But it is not, given the video that was introduced into evidence already and that the jury has already seen. There really isn't a lesser included. So just to be clear on that.
> [(6T 156:6-16).]

Because defendant was charged with first-degree robbery through accomplice liability, there was no rational basis to charge defendant with anything less than first-degree robbery. The principal in this case, clearly used a handgun in the commission of this robbery, as noted by the trial court. Nothing in the record indicates a lesser-included charge was required under the circumstances.

Finally, even if it were error, it was invited. Defense counsel specifically told the judge that he did not want any lesser-included charge in the robbery. (6T 155:24-156:4). By leading the court into what defendant now claims as

error, he cannot obtain a reversal on that basis. See State v. Jenkins, 178 N.J. 347, 359 (2004); State v. Cotto, 471 N.J. Super 489, 534-36 (App. Div.), certif denied, 252 N.J. 166 (2022).

Point III

No cumulative errors denied defendant a right to a fair proceeding.

Defendant has not demonstrated any cumulative errors that entitle him to relief. It is well established that "[e]ven if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) (citing State v. Jenewicz, 193 N.J. 440, 473 (2008)). However, the theory of cumulative error does not apply where no error was prejudicial. State v. Weaver, 219 N.J. 131, 155 (2014). For the aforementioned reasons, none of defendant's arguments establish a single error, let alone prejudicial errors warranting reversal.

Point IV

The trial court properly sentenced defendant.

The trial court properly sentenced defendant, and defendant's sentence is neither excessive nor should it shock the judicial conscience. The court properly considered defendant's prior arrests and convictions, found and

balanced the aggravating and mitigating factors, and properly noted the need for deterrence. Defendant was properly sentenced.

"It is well settled that when reviewing a trial court's sentencing decision, '[a]n appellate court may not substitute its judgment for that of the trial court.'" State v. Evers, 175 N.J. 355, 386 (2003) (quoting State v. Johnson, 118 N.J. 10, 15 (1990); State v. O'Donnell, 117 N.J. 210, 215 (1989)). This Court may only modify a sentence when the trial court's discretion was "clearly mistaken." Ibid.; State v. Jabbour, 118 N.J. 1, 6 (1990); State v. Jarbath, 114 N.J. 394, 401 (1989). With this limitation in mind, an appellate court can:

> (a) review sentences to determine if the legislative policies, here the sentencing guidelines, were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the facts of this case makes the sentence clearly unreasonable so as to shock the judicial conscience.

Evers, 175 N.J. at 387; Jabbour, 118 N.J. at 6 ; State v. Roth, 95 N.J. 334 364–65 (1984). "[I]n sentencing, the Code 'channel[s] the discretion of trial courts' by focusing on the gravity of the offense rather than the offender's blameworthiness or capacity for rehabilitation." Evers, 175 N.J. at 387;

Jabbour, 118 N.J. at 6; State v. Hodge, 95 N.J. 369, 375 (1984); Roth, 95 N.J. at 355.

"In determining what sentence to impose, the judge 'must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case' and '[t]he finding of any factor must be supported by competent, credible evidence in the record.'" State v. Mahoney, 444 N.J. Super. 253, 260 (App. Div. 2016) (quoting State v. Case, 220 N.J. 49 (2014)).

During sentencing, defendant's counsel argued for a number of mitigating factors, and mentioned the circumstances of the robbery in order to persuade the judge to sentence him in the second-degree range. However, the court noted:

> And as you know, under the theory of accomplice liability, it doesn't matter who's doing what. If three people are working in concert, and this jury obviously believed that at this point, at least two of them were, certainly Mr. Rhymes as well as Mr. Dolisca who were both found guilty of conspiracy and first-degree robbery, okay, that they were working in concert. Although one person might be carrying the gun, it doesn't make that other person less culpable if they are participating in and acting in the course of a robbery. [(9T 13:9-19).]

The court also stated, "understand here, the culpability is --and, again, even though you didn't have the gun, it is clear this jury believed that you were

absolutely involved and culpable . . . for robbing the victim on that day." (9T 14:12-15).

Furthermore, while defendant argues the court did not consider the mitigating factors argued by defense counsel, the court stated he received the sentencing memo submitted by counsel and that he "review[ed] everything." (9T 6:23-24; 14:18). So clearly, the court considered, and rejected, the arguments made by defendant for mitigating factors. However, the court did, on its own, find mitigating factor eleven, because defendant has "a thirteen-year-old son. And I think that the fact that you're not going to be there with him for a while is a hardship on the family and particularly on a son being deprived of being with his father." (9T 15:27-21). Thus, there was no basis for the court to sentence defendant as a second-degree offender because the mitigating factors did not outweigh the aggravating factors.

The court also clearly and thoroughly explained its reasoning for applying aggravating factors three, six, and nine. (9T 14:18-15:15). The court properly found aggravating factors three and six based on defendant's criminal history, stating: "you had two prior indictable convictions, seven arrests, one disorderly person conviction, as well as one juvenile adjudication. The Court takes all of that into consideration, even though your last indictable convictions are a little older, no doubt." (9T15:3-8).

Defendant argues it was improper for the sentencing court to consider defendant's prior arrests in connection with its finding of the aggravating factors. (Db43). However, "[a]dult arrests that do not result in convictions may be 'relevant to the character of the sentence ... imposed.'" State v. Rice, 425 N.J. Super. 375, 382 (App. Div. 2012) (alteration in original). Also, "a defendant's arrest record is a factor which may be considered in the determination of an appropriate sentence so long as the sentencing judge does not infer guilt from charges which have not resulted in convictions." State v. Tirone, 64 N.J. 222, 229 (1974). Thus the court's consideration of defendant's prior arrests was appropriate.

Defendant cites to State v. K.S., 220 N.J. 190 (2015), to support the argument that the court improperly considered defendant's prior arrests. (Db25). However, the Court in that case was considering a defendant's application for admission into a Pretrial Intervention Program. The Court stated, "[t]he prosecutor and program director may not infer guilt from the sole fact that a defendant was charged, where the charges were dismissed," and therefore, "prior dismissed charges may not be considered for any purpose." Id. at 199 (emphasis added). This case is inapplicable to the facts of the present case.

Finally, the court properly found aggravating factor nine, and gave its reasoning as, "there is a need for deterring you and other similarly situated from violating the law and the message that it must send, that when you get caught -- and you guys were caught quite frankly red-handed, red-handed here. And as I said, under any interpretation, this is the classic first-degree robbery." (9T 15:9-15). Based on the court's comments, it cannot be said the court failed to explain its rationale for finding aggravating factor nine. Based on defendant's numerous prior arrests and previous convictions, the court properly found the need to deter defendant and others from violating the law, and properly found aggravating factor nine.

Conclusion

For the foregoing reasons and authorities cited in support thereof, the State respectfully requests that this Court affirm defendant's judgment of conviction in all respects.

Respectfully submitted,

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Of Counsel and on the Brief

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1726-23
IND. NO. 22-04-00796-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Essex County.
GARY D. RHYMES,	:	
		Sat Below:
Defendant-Appellant.	:	
		Hon. John I. Gizzo, J.S.C., and a
	:	jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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DEFENDANT IS CONFINED

Of Counsel and
On the Brief.

Dated: May 29, 2024

TABLE OF CONTENTS

PAGE NOS

TABLE OF CONTENTS (CONT'D)

PAGE NOS

TABLE OF JUDGMENTS, RULINGS, & ORDERS BEING APPEALED

INDEX TO APPENDIX

TABLE OF AUTHORITES

PAGE NOS

Cases

TABLE OF AUTHORITES (CONT'D)

PAGE NOS

Cases (Cont'd)

TABLE OF AUTHORITES (CONT'D)

PAGE NOS

Cases (Cont'd)

Statutes

TABLE OF AUTHORITES (CONT'D)

PAGE NOS

Statutes (cont'd)

Rules

TABLE OF AUTHORITES (CONT'D)

PAGE NOS

Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

Defendant-appellant Gary Rhymes was convicted of first-degree robbery as an accomplice and second-degree conspiracy to commit robbery in connection with a January 19, 2022 incident at an Irvington Township Kennedy Fried Chicken. The incident began as a heated verbal dispute between Ricotson Dolisca and Norven Alcius over an alleged debt that Alcius owed Dolisca, and ended with Dolisca taking Alcius's phone, wallet, and clothing. Mr. Rhymes never touched Alcius, nor did he take anything from him during the incident.

The case turned on the jury's evaluation of Mr. Rhymes's defense that he tried to de-escalate the confrontation between Dolisca and Alcius, and that he lacked the intent or purpose to commit a robbery, let alone one with a weapon. Prior to Mr. Rhymes deciding whether he would testify, the court erroneously ruled that his prior convictions – both of which were more than ten years old – were admissible. The trial court's erroneous admission of Mr. Rhymes's prior convictions was not harmless because it prevented him from exercising his right to testify, and his testimony could have influenced the outcome of his trial. Furthermore, the trial court's failure to adequately instruct the jury on accomplice liability and to charge them on second-degree robbery as a lesser-included offense impaired the jury's ability to evaluate the merits of Mr.

Rhymes's defense. Therefore, Mr. Rhymes's convictions must be reversed. Alternatively, the case must be remanded for resentencing.

PROCEDURAL HISTORY

Essex County Ind. No. 22-04-00796-I charged Gary Rhymes with second-degree conspiracy to commit robbery, contrary to N.J.S.A. 2C:5-2a(1) and N.J.S.A. 2C:15-1a(1) (Count 1) and first-degree robbery, contrary to N.J.S.A. 2C:15-1a(1) (Count 2). (Da 1-7)[1]

Mr. Rhymes was tried together with two co-defendants, Ricotson Dolisca and Mark Willis, in October and November 2023, before the Hon. John I. Gizzo, J.S.C., and a jury. At the close of the State's case, the court denied Mr. Rhymes's motion for a judgement of acquittal. (6T:122-8 to 126-19) Prior to deciding whether he would testify in his own defense, Mr. Rhymes requested a Sands/Brunson[2] hearing. (6T:126-20 to 127-4) The court ruled that both of Mr. Rhymes's prior convictions were admissible as impeachment evidence should

[1] Da: Defendant's appendix
1T: Transcript of 10/3/2023 (Pretrial)
2T: Transcript of 10/4/2023 (Pretrial)
3T: Transcript of 10/17/2023 (Trial)
4T: Transcript of 10/18/2023 (Trial)
5T: Transcript of 11/14/2023 (Trial)
6T: Transcript of 11/15/2023 (Trial)
7T: Transcript of 11/16/2023 (Trial)
8T: Transcript of 11/17/2023 (Trial)
9T: Transcript of 1/26/2024 (Sentencing)

[2] State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993).

he elect to testify. (6T:132-11 to 133-2) Mr. Rhymes ultimately elected not to testify, and the defense presented no witnesses. (6T:136-13 to 137-18)

On November 17, 2023, the jury convicted Mr. Rhymes of second-degree conspiracy to commit robbery (Count 1) and first-degree robbery (Count 2).[3] (8T:6-11 to 9-4) (Da 8-9) On January 26, 2024, after merger, the court sentenced Mr. Rhymes to 12 years in prison with an 85% parole bar. (9T:16-22 to 17-5) (Da 10-12) A timely notice of appeal was filed on February 12, 2024. (Da 13-15)

STATEMENT OF FACTS

At Mr. Rhymes's trial, the State played surveillance video footage depicting an altercation between Norven Alcius, the complaining witness, and three men inside of a Kennedy Fried Chicken. Alcius testified regarding the events depicted in the video as it was played for the jury. (6T:30-4 to 49-10, 7T:64-2 to 6-25); (Da 16 at 17:23:44 to 17:36:36)

Alcius testified that he was at "the chicken shack" in Irvington at the time of the incident, identifying himself on the video. (6T:28-8 to 30-8) (Da 16 at

[3] Ricotson Dolisca was convicted of the same offenses, as well as weapons-related offenses. The jury was unable to reach a verdict as to Mark Willis. (8T:4-24 to 8-17); (Da 8-9)

17:24:21)[4] He identified two of the three men involved in the incident in the courtroom, pointing to Mr. Rhymes and to Dolisca. (6T:30-20 to 33-12) Alcius testified that the man standing closest to him on the video, wearing a black jacket and red headphones, was Dolisca. (6T:37-11 to 38-4) (Da 16 at 17:24:46) He stated that he was familiar with Dolisca, who had texted him the day before the incident asking for money that he believed Alcius owed him. (6T:81-2 to 24) Alcius testified that Mr. Rhymes was the man wearing the red jacket on the video, explaining that he knew him as "Gary," and that he was a friend of a friend. (6T:31-5 to 25, 43-4, 43-24 to 44-8, 89-10 to 25) Alcius confirmed that the man wearing the green jacket on the video was involved in the incident, but was unable to identify the man in the courtroom. (6T:32-11 to 33-8, 33-13 to 34-6, 52-19 to 20)

Alcius testified that after the men walked into the store, they began asking him where the money was, while he denied having it. (6T:54-22 to 55-20) (Da 16 at 17:24:26 to 17:26:52) Alcius agreed that there was a "lot of talking" at the beginning of the incident, and that Dolisca subsequently took his phone. (6T:36-2 to 25) (Da 16 at 17:26:52 to 17:29:28) Alcius initially testified that he did not have his wallet with him that day and that Dolisca did not take it. (6T:37-1 to

[4] At the time of the trial, Alcius had six third-degree pending charges in Essex County. (6T:68-11 to 72-20)

10) Alcius changed his testimony after the prosecutor asked him to watch the video segment a second time, drawing his attention to "the little black thing." Alcius identified the object on the video as "definitely [his] wallet" and agreed that Dolisca had taken it. (6T:38-18 to 40-15) (Da 16 at 17:29:28 to 17:29:45) Alcius testified that Dolisca told him that he had a gun, and that he was instructed to take off his outer clothing and complied. (6T:41-16 to 42-18, 48-12 to 15) (Da 16 at 17:29:32 to 17:31:22)

Although Alcius admitted that he was "not paying attention" to Mr. Rhymes during the incident, he claimed that Mr. Rhymes was not trying to stop the altercation between Alcius and the other men. (6T:43-20 to 23, 90-3 to 16) On cross-examination, Alcius denied that Mr. Rhymes offered to pay Dolisca the small sum of money on Alcius's behalf in order "to calm things down." (6T:91-14 to 92-24) Alcius stated that he told the men that he would pay the sum himself through Cash App, and that he was looking at his phone to try to transfer the money, but was unable do so because "he was spending too much money" on his account and could not make any transfers. (6T:92-25 to 93-25) (Da 16 at 17:30:27 to 17:31:42) Alcius subsequently denied telling anyone that he would pay the sum himself on Cash App. (6T:94-5 to 15)

Alcius stated that Dolisca pointed a gun at him and slapped him before the men left. (6T:45-19 to 46-12, 49-2 to 21) (Da 16 at 17:33:00 to 17:36:30) Alcius

testified that Dolisca was the only person who pushed or hit him during the incident. (6T:87-25 to 88-13) He also stated that Mr. Rhymes did not take anything from him inside the store, but that each of the three men "had something that belonged to [him]" as they "walked up the hill" after leaving. Alcius added that "at the moment, [he] wasn't really too focused on seeing who had what." (6T:97-15 to 99-5); (See 5T:49-17 to 50-6), (Da 16 at 17:36:10 to 17:36:32) (trial court's finding that video shows man in black jacket, or Dolisca, picking up Alcius's belongings from the counter and man in green jacket picking up Alcius's clothes before the three men leave the store). Alcius's belongings were recovered from Dolisca's jacket when the three men were arrested. (5T:103-18 to 22) Nothing was recovered from Mr. Rhymes or the man in the green jacket.

A number of law enforcement officers testified for the State regarding the investigation. Detective Davon Anderson testified about the steps that he took to obtain the surveillance video from the employees of Kennedy Fried Chicken. (5T:38-18 to 54-20); (Da 16) Det. Anderson stated that he did not recall the name of the employee who granted him access to the surveillance video, and that when he asked the employee if he was present at the time of the incident, the employee told him that "he didn't want to be involved and that he didn't know anything." (5T:60-1 to 23) It was undisputed at trial that at least one individual was present

behind the counter at Kennedy Fried Chicken for the entire duration of the incident. (See 6T:45-7 to 12) (Alcius's testimony that "the owner of the Chicken Shack was standing right there behind the glassed-in counter.") This individual was not called as a witness.

Officer Terrell Brown testified that he responded to the scene, spoke with Alcius, and relayed Alcius's description of the three men to other officers. (5T:7-5 to 18) Detective James Dorval testified that he received a description of three black males, one in a red coat, one in a black coat, and one in a green coat. (5T:91-17 to 92-19) He stated that he was driving to Kennedy Fried Chicken when he saw three men who matched the description. The men were walking on the street, about seven doors down from the store. (5T:92-20 to 93-1, 94-24 to 95-11, 111-18 to 20, 114-20 to 115-3) Det. Dorval testified that the three men were detained and patted down, and that a handgun was recovered from Dolisca. (5T:96-9 to 97-1) Dolisca was placed under arrest. (5T:103-12 to 14)

Ofc. Brown testified that he conducted a show-up identification procedure, driving Alcius past the highway median where all three suspects were "lined up right next to each other." (6T:7-19 to 8-20, 11-23 to 12-21) Alcius positively identified all three suspects as the three individuals from Kennedy Fried Chicken at the same time – telling the officers, "that's them … that's all three of them." (6T:12-4 to 11, 101-14 to 105-2)

Det. Dorval testified that following the identification procedure, all three suspects were taken to headquarters and searched. (5T:103-12 to 17) Det. Dorval searched Dolisca and recovered Alcius's cell phone and wallet. (5T:103-18 to 105-21) Alcius's clothing was later recovered on the sidewalk. (5T:106-12 to 24) None of Alcius's belongings were recovered from Mr. Rhymes. (5T:139-19 to 140-4)

POINT I

THE ERRONEOUS ADMISSION OF MR. RHYMES'S REMOTE PRIOR CONVICTIONS WAS CONTRARY TO N.J.RE. 609(b), PREVENTED MR. RHYMES FROM TESTIFYING ON HIS OWN BEHALF, AND REQUIRES REVERSAL BECAUSE HIS TESTIMONY COULD HAVE IMPACTED THE OUTCOME OF HIS TRIAL. (6T:128-24 to 130-12)

Mr. Rhymes made the crucial decision not to testify in his own defense after the trial court erroneously ruled that the prosecutor could use his remote prior convictions to impeach his credibility. Rule 609(b)(1) states:

> If, on the date the trial begins, more than ten years have passed since the witness's conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.
>
> [N.J.R.E. 609(b)(1)].

At the time of his trial, Mr. Rhymes's two prior third-degree convictions – one from 2011 and one from 2007 – were twelve and sixteen years old respectively. The trial court found that both convictions were admissible based on its misinterpretations of Rule 609(b)(1). First, the trial court found that the 2011 conviction was admissible by erroneously interpreting "release from probation" as the equivalent of "release from confinement" under the Rule. Second, the court misapplied the Rule's ten-year window to the amount of time that had elapsed between Mr. Rhymes's two prior convictions, erroneously determining that the 2007 conviction was admissible because it had been entered less than ten years prior to the 2011 conviction. Finally, the court did not weigh the prejudicial effect of admitting the convictions against their probative value. See N.J.R.E. 609(b)(1), (2).

The court's erroneous admission of Mr. Rhymes's convictions was extremely harmful because he elected not to testify, and the jury did not hear his account of the events depicted on the silent surveillance video. Had Mr. Rhymes testified, the outcome of his trial could have been different, requiring reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

A. The Sands/Brunson Hearing

Defense counsel requested that the court hold a Sands/Brunson hearing prior to Mr. Rhymes deciding whether he would testify. The State moved to

admit Mr. Rhymes's two prior convictions. Mr. Rhymes's earliest prior conviction was from May 30, 2007, for third-degree possession of CDS with intent to distribute. He was sentenced to one year of probation. The second conviction was from October 13, 2011, for third-degree aggravated assault. Mr. Rhymes was sentenced to time served and four years of probation. (6T:131-1 to 19) (PSR 5, 6) On April 10, 2015, Mr. Rhymes was resentenced to an additional two years of probation following a violation of probation. (6T:129-6 to 10; 131-23 to 132-4) (PSR 6)

At the hearing, the State did not address the age of either conviction, instead arguing that the prior convictions were relevant to Mr. Rhyme's credibility because the 2011 conviction "show[s] that there is some sort of penchant for some level of violence in Mr. Rhymes's history." (6T:128-13 to 22) The State did not address the probative value of the 2007 conviction at all.

Defense counsel argued that both Mr. Rhymes's 2011 and 2007 convictions were remote under 601(b)(1) because they were more than ten years old at the time that trial began. (6T:128-24 to 129-10) Counsel also argued that the convictions were less probative than they were prejudicial under the 601(b)(2) factors because they were both third-degree offenses, they did not involve dishonesty, lack of veracity, or fraud, and they were remote in time. (6T:129-11 to 130-6).

The court ruled that Mr. Rhymes's 2011 conviction was admissible because he was still on probation for that offense less than ten years prior to the 2022 incident that he was on trial for,[5] noting that his probationary term was extended until 2017. (6T:131-1 to 132-4) The court further found that Mr. Rhymes's 2007 conviction was admissible because it was entered within a ten-year window of his 2011 conviction and his 2015 violation of probation. (6T:132-5 to 21)

B. The court erred in ruling that Mr. Rhymes's 2011 conviction was admissible because probation does not constitute confinement under Rule 609(b)(1). The court also erroneously admitted his 2007 conviction based on its misunderstanding of the ten-year window established by the Rule.

The trial court erroneously admitted Mr. Rhymes's 2011 conviction due to its mistaken belief that the triggering date for Rule 609(b)(1)'s remoteness determination was not the date that Mr. Rhymes was convicted of the offense, but the date that he completed his probationary sentence. The court further erred in finding the 2007 conviction admissible by misapplying the Rule's ten-year

[5] The trial court incorrectly used the date of the incident instead of the date that the instant trial began for the purpose of calculating the age of Mr. Rhymes's 2011 conviction. See N.J.R.E. 609(b)(1) (stating "If, on the date the trial begins, more than ten years have passed since the witness's conviction for a crime or release from confinement for it, whichever is later," then evidence of the conviction is only admissible if its probative value outweighs its prejudicial effect). Despite defense counsel's correction, the trial court found that the 2011 conviction was eleven years old. In fact, the 2011 conviction was twelve years old at the time that the trial began. (6T:131-1 to 11)

window to the period of time that elapsed between Mr. Rhymes's prior convictions, as well as between his prior convictions and violations of probation.

Impeachment of any witness with a prior conviction is governed by Rule 609. Generally, a witness's prior conviction is admissible for credibility purposes so long as its probative value is not substantially outweighed by its prejudicial effect. N.J.R.E. 609(a)(1); N.J.R.E. 403. However, Rule 609 "creates a presumption that a conviction more remote than ten years is inadmissible for impeachment purposes, unless the State carries the burden of proving that its probative value outweighs its prejudicial effect." See State v. Hedgespeth, 464 N.J. Super. 421, 431, (App. Div. 2020), rev'd on other grounds, 249 N.J. 234 (2021) (quoting State v. R.J.M., 453 N.J. Super. 261, 266-67 (App. Div. 2018)) (internal quotations omitted). Under Rule 609(b)(1), a prior conviction is presumptively inadmissible if more than ten years have passed since either (1) the date of conviction, or (2) the date of release from confinement, whichever is later. These are the only two triggers for the start of the ten-year period.

In State v. Hedgespeth, a nearly identical case, this Court held that discharge from probation does not constitute "release from confinement" under Rule 609(b)(1). 464 N.J. Super. at 431, aff'd in relevant part, 249 N.J. 234. In that case, the trial court admitted the defendant's two sanitized third-degree prior convictions, both of which had been entered more than ten years before trial, for

use as impeachment evidence if the defendant testified. The trial court reasoned that the defendant's twelve-year-old conviction was admissible because the probationary term imposed had ended less than ten years prior to trial. The trial court further found that his sixteen-year-old conviction was admissible because it showed "a continuing course of criminal conduct" together with the later conviction. Id. at 429-30. This Court reasoned that because probation is not "confinement" under Rule 609(b)(1), a conviction that is more than ten years old at the time of trial cannot be admitted for impeachment purposes simply because the sentence's probationary term ended within ten years of the first day of trial. Id. at 432-37.

Here, as in Hedgespeth, the trial court found that Mr. Rhymes's two third-degree prior convictions – both of which were more than ten years old at the time of the trial – were admissible in sanitized form and "could be utilized should Mr. Rhymes elect to take the stand." (6T:132-11 to 13). The court erroneously ruled that the twelve-year-old conviction from 2011 was admissible because the probationary sentence ended within ten years of the incident. (6T:131-15 to 132-4) As in Hedgespeth, Mr. Rhymes's 2011 conviction was inadmissible because discharge from probation does not constitute "release from confinement" under Rule 609(b)(1). Therefore, the relevant date for determining whether Mr. Rhymes's 2011 conviction was remote and presumptively

inadmissible under Rule 609(b)(1) was the date of his conviction for the offense. Because more than ten years had elapsed between the date of Mr. Rhymes's prior conviction in 2011 and the beginning of the trial in 2023, the 2011 conviction was presumptively inadmissible and the trial court erred in ruling to the contrary. See Hedgespeth, 464 N.J. Super. at 437.

The trial court also erroneously admitted Mr. Rhymes's sixteen-year-old 2007 conviction due to its misunderstanding of the dates that Rule 609(b)(1)'s ten-year window applies to. The court mistakenly determined that the ten-year window applies not just to the period of time between a prior conviction and the trial for the present offense, but also to the period of time between a prior conviction and any intervening conviction or violation of probation. The court found that Mr. Rhymes's 2007 conviction was admissible because the "gap in time" between that conviction, his 2011 conviction, and his 2015 violation of probation was under ten years. (6T:132-5 to 13) This is a plain misreading of Rule 609(b)(1) – which applies only to the period of time between a specific prior conviction or release from confinement and the first day of trial for the present offense. See N.J.R.E. 609(b)(1).

Furthermore, the court erred in considering Mr. Rhymes's 2015 violation of probation as part of its Rule 609(b)(1) remoteness analysis. A violation of probation that does not result in a state prison sentence is not the equivalent of

a conviction and is inadmissible to impeach a defendant's credibility. See State v. Murphy, 412 N.J. Super. 553, 565 n.1 (App. Div. 2010) (recognizing that violation of probation is not an intervening conviction between prior conviction and present trial); State v. Jenkins, 299 N.J. Super. 61, 71-75 (App. Div. 1997) (holding that violation of probation may not be used to impeach a defendant's credibility); State v. Epps, 259 N.J. Super. 266, 272 (Law. Div. 1992) (holding "a violation of probation which does not result in a state prison sentence is not a new conviction.") Therefore, the court's ruling that Mr. Rhymes's 2011 and 2007 convictions were admissible based on the fact that less than ten years elapsed between them and his subsequent violation of probation in 2015 was based on a misunderstanding of Rule 609(b)(1) and constituted an abuse of discretion.

C. Mr. Rhymes's prior convictions were inadmissible because their probative value does not outweigh their prejudicial effect.

Rule 609(b)(1) only permits the admission of a conviction older than ten years if the State meets its burden of demonstrating that the probative value of the conviction outweighs its prejudicial effect. Here, the State failed to meet that burden. Furthermore, the trial court erroneously determined that Mr. Rhymes's prior convictions were not remote, therefore it made no findings regarding the relative prejudice and probative value of the convictions and failed to consider the relevant

factors set forth in Rule 609(b)(2). Had the court properly considered the relative prejudice and probative value of Mr. Rhymes's remote prior convictions under Rule 609(b), it would have found that the convictions were inadmissible because they are less probative of his credibility than they are prejudicial.

The State did not, and could not, carry its burden of establishing that Mr. Rhymes's convictions were more probative than prejudicial. Rule 609 permits the admission of a defendant's prior criminal convictions for the sole purpose of attacking the defendant's credibility. See N.J.R.E. 609(a), (b)(1). Here, the State sought to admit Mr. Rhymes's prior convictions on the basis that his 2011 conviction was probative of his propensity to commit crimes. It did not seek to admit the prior convictions for permissible impeachment purposes and did not make any argument as to the probative value of the 2007 conviction. Instead, the prosecutor argued only that Mr. Rhymes's 2011 third-degree aggravated assault conviction was probative of his "penchant for some level of violence." (128-13 to 22) Admitting Mr. Rhymes's prior convictions as evidence of his propensity to commit violent crimes is plainly prohibited under both Rule 609 and Rule 404(b). See N.J.R.E. 609; N.J.R.E 404(b). Furthermore, our courts have long recognized that the risk of prejudice in introducing a witness's prior convictions is heightened when it is applied to a criminal defendant, precisely for the reason that "the jury may be influenced to return a guilty verdict because it considers the

defendant to be a criminal." See State v. Brunson, 132 N.J. 377, 384 (1993); State v. Stevens, 115 N.J. 289 (1989) (Noting "[i]t is thought that proof of a previous crime will distract the jury, leading them to forego an independent analysis of the evidence and to rely merely on the tendency they possess in common with most people of saying 'once a thief -- always a thief.'") In seeking to admit Mr. Rhymes's prior convictions for the prohibited purpose of demonstrating his propensity to commit crimes, the State failed to carry its burden of establishing that Mr. Rhymes's prior convictions were more probative of his credibility than they were prejudicial. See N.J.R.E. 609(b).

Here, the trial court erred in determining that Mr. Rhymes's prior convictions were not remote under Rule 609(b)(1). Therefore, the court did not make any findings whatsoever regarding the relative prejudice and probative value of Mr. Rhymes's convictions and it failed to consider the relevant factors set forth in Rule 609(b)(2). The court's decision to admit Mr. Rhymes's remote prior convictions was an abuse of discretion. See Hedgespeth, 464 N.J. Super. at 437 (holding court abused its discretion when "judge erroneously admitted [defendant's prior] convictions under N.J.R.E. 609(a)'s less stringent standard, … did not consider the N.J.R.E. 609(b)(2) factors and did not analyze the admissibility of the prior convictions under N.J.R.E. 609(b)(1)'s more stringent standard.")

Rule 609(b)(2) instructs trial courts to consider four factors in weighing the prejudicial effect of admitting a remote conviction against its probative value:

> (i) whether there were intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses; (ii) whether the conviction involved a crime of dishonesty, lack of veracity, or fraud; (iii) how remote the conviction is in time; and (iv) the seriousness of the crime."
>
> [N.J.R.E. 609(b)(2)].

However, "[m]aking findings as to those four factors is not enough" on its own. R.J.M., 453 N.J. Super. at 270. Trial courts must also "engage in the weighing process" set forth in Rule 609(b)(1) "to determine whether the State has carried its burden of proving that evidence of the remote conviction would not be more prejudicial than probative." Ibid.; see N.J.R.E. 609(b)(1).

Applying the Rule 609(b)(2) factors to Mr. Rhymes's prior convictions, it is evident that their probative value does not outweigh their prejudicial effect. Mr. Rhymes's prior convictions do not involve dishonesty, lack of veracity or fraud – therefore, that factor does not support their admission. See N.J.R.E. 609(b)(2)(ii). Nor does the remoteness or the seriousness of Mr. Rhymes's prior convictions weigh in favor of their admission. See N.J.R.E. 609(b)(2)(iii), (iv). In determining the admissibility of a prior conviction, the remoteness and seriousness of the conviction must be considered together. "Serious crimes, including those involving lack of veracity, dishonesty or fraud" weigh more

heavily in favor of admissibility. See Sands, 76 N.J. at 144 (citing N.J.R.E. 609(b)(2)(iii), (iv)); see also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 609 (2024) (noting that Rule 609(b)(2), adopted in 2014, directly incorporates the analysis set forth in Sands into the Rule.) A remote prior conviction may also be admissible if the defendant "has been convicted of a series of crimes over the years." See Hedgespeth, 464 N.J. Super. at 430 (quoting Sands, 76 N.J. at 145).

In State v. Murphy, this Court held that considering the remoteness of the defendant's seventeen-year-old prior conviction for possession of CDS with intent to distribute, the offense was insufficiently serious to merit the admission of the conviction for impeachment purposes. 412 N.J. Super. at 565 (noting that "[t]he only reported decision ever to have permitted a defendant to be impeached with a conviction nearly as old as this one" involved murder conviction) (citing State v. Paige, 256 N.J. Super. 362, 371–73 (App. Div. 1992). The Murphy Court found that the defendant's conviction was not of a serious character where he received "only a probationary sentence," ultimately holding that the probative value of the conviction "was vastly outweighed by its prejudicial effect" and that trial court abused its discretion in finding it admissible. Id. at 565. As in Murphy, Mr. Rhymes's 2007 conviction for third-degree possession of CDS with intent to distribute was remote – it was sixteen years old at the time of trial.

Furthermore, while both his 2007 conviction and his 2011 conviction were remote, neither was particularly serious. Both prior convictions were for third-degree offenses and he received a probationary sentence for each. See ibid.; N.J.R.E. 609(b)(2)(iii), (iv).

In Hedgespeth, this Court found that the trial court abused its discretion in ruling that the defendant's two third-degree prior convictions – which were twelve and sixteen years old respectively at the time of trial – were admissible under the theory that they represented a continuing course of criminal conduct. See id. at 430, 437. The instant case is exactly the same – here, Mr. Rhymes's twelve-year-old third-degree conviction did not and could not render his sixteen-year-old third-degree conviction admissible as part of "a continuing course of criminal conduct." Mr. Rhymes's two intervening violations of probation do not change the analysis. See Murphy, 412 N.J. Super. at 565 n.1 (holding that a violation of probation is not an intervening conviction and could not justify admission of defendant's prior conviction for a third-degree offense). Therefore, neither the remoteness nor the seriousness factors of Rule 609(b)(2) support the admission of Mr. Rhymes's prior convictions.

Nor can the "the number, nature, and seriousness" of Mr. Rhymes's intervening offenses support the admission of his remote prior convictions where he only has one conviction for a disorderly persons offense between his prior

convictions and his trial for the present offense.[6] See N.J.R.E. 609(b)(2)(i). In State v. Higgs, our Supreme Court held that the trial court's admission of the defendant's remote prior convictions based on a single intervening disorderly persons conviction was reversible error. 253 N.J. 333, 369-71 (2021) (citing N.J.R.E. 609(b)(2)(i)). Likewise, Mr. Rhymes's single intervening conviction for a disorderly persons offense was not capable of "bridging the gap" between his remote prior convictions and his trial for the offense that is the subject of the instant appeal. See id. at 370.

Therefore, had the trial court properly considered the factors set forth in Rule 609(b)(2) and made the required findings regarding the relative prejudice and probative value of Mr. Rhymes's prior convictions, it would have found the convictions inadmissible because their probative value does not outweigh the prejudicial effect.

D. The error that prevented Mr. Rhymes from testifying cannot be dismissed as harmless where the evidence against him was far from overwhelming.

The court's erroneous admission of Mr. Rhymes's prior convictions was not harmless where he subsequently chose not to testify in his own defense. Had Mr. Rhymes testified, there was a real possibility that his testimony could have

[6] The State did not raise Mr. Rhymes's 2017 conviction for the disorderly persons offense of wandering or prowling to obtain CDS at trial. (PSR 6)

influenced the outcome of the trial. See State v. R.B., 183 N.J. 308, 330 (2005) ("The harmless error standard ... requires that there be "some degree of possibility that the error led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether it led the jury to a verdict it otherwise might not have reached.") (internal quotations omitted). Our Supreme Court has recognized that a Rule 609 error that prevents a defendant from testifying is rarely harmless. See State v. Hedgespeth, 249 N.J. 234, 250-52 (2021) (holding trial court's erroneous admission of defendant's prior convictions must be reviewed under harmless-error standard, and noting that cases "in which such error is found to be harmless may be few in number"); see also State v. Whitehead, 104 N.J. 353, 360-61 (1986) (holding "a defendant need not testify at trial to obtain appellate review of a trial court's ruling that the defendant's convictions may be used for impeachment purposes"). This is because there is perhaps no evidence more fundamental to a determination of guilt or innocence in a criminal trial than a defendant's testimony, should he exercise his right to provide it. If a defendant testifies to his innocence, and a jury finds him credible, it may acquit on that evidence alone. Therefore, the court's erroneous admission of Mr. Rhymes's remote prior convictions requires reversal.

In Hedgespeth, our Supreme Court held that the trial court's erroneous admission of the defendant's prior convictions "could have produced an unjust

result" where it prevented the jury from hearing the defendant's testimony during his trial for unlawful possession of a handgun. See 249 N.J. at 251-52 (finding "[d]efendant's choice not to testify was likely a ramification of the erroneous evidentiary ruling") The Court held that although the State produced the gun into evidence and police officers testified that they saw the defendant with the gun, the trial court's error was not harmless because there was no "indisputable evidence linking defendant to the gun," and that "[h]ad the trial court not erroneously admitted the [defendant's] prior convictions," he could have offered a counter theory of the case instead of merely casting doubt on the officers' accounts through cross-examination. Id. at 252-53. The Court noted that determining the plausibility of the defense's theory of the case "is in the sole province of the jury" and that appellate "[j]udges should not intrude as the thirteenth juror." Id. at 252-53 (internal quotations omitted); see State v. Scott, 229 N.J. 469, 484-85 (2017) (holding that the mere possibility that the jury could disbelieve a defense witness's testimony does not render a trial court's Rule 609 error harmless).

In State v. R.J.M., the improper admission of the defendant's prior convictions was deemed reversible error where he subsequently decided not to testify. 453 N.J. Super. at 270-71. One of the key factual disputes in the defendant's trial for terroristic threats and other charges was whether he had

made verbal threats or threatening gestures to a corrections officer, or whether he had only made offensive comments. Although the evidence against the defendant included video footage of the incident, this Court held that "[t]he case hinged on the jury's evaluation of witness credibility," and had the defendant testified, the jury could have acquitted him because the video did "not entirely support [the State's witnesses] version of events" and "[t]he testimony of the State's witnesses was contradictory in some respects." Ibid. The Court ultimately held that the error had the clear capacity to produce an unjust result because the "State's evidence cannot fairly be described as overwhelming, and defendant's testimony might have influenced the outcome." Ibid.

As in Hedgespeth and R.J.M., reversal is required here because the trial court's erroneous admission of Mr. Rhymes's prior convictions likely caused Mr. Rhymes not to testify, and his testimony could have led the jury to reach a different result. In response to the judge asking whether Mr. Rhymes planned to testify, defense counsel asked the court to hold a Sands/Brunson hearing before he discussed the matter with his client. (6T:126-20 to 127-5) Mr. Rhymes chose not to testify immediately after the court ruled that his two prior convictions could be used to impeach him. (6T:133-5 to 134-13, 136-13 to 137-17) Thus, the trial court's erroneous evidentiary ruling requires reversal.

Moreover, as in Hedgespeth and R.J.M., the State's evidence was hardly overwhelming or indisputable, and had the jury heard Mr. Rhymes's testimony, it may well have reached a different result. To find Mr. Rhymes guilty of robbery as an accomplice, the jury had to find that not only did he know that Dolisca or Willis was going to commit robbery, but that he acted with the purpose of promoting or facilitating the commission of the robbery. N.J.S.A. 2C:2-6; N.J.S.A. 2C:15-1. Similarly, to find Mr. Rhymes guilty of conspiracy to commit robbery, the jury had to find that he agreed to aid Dolisca or Willis in the planning or commission of the robbery, with the purpose of promoting or facilitating its commission, and that he did an overt act in furtherance of it. N.J.S.A. 2C:5-2; N.J.S.A. 2C:15-1. The State's evidence that Mr. Rhymes acted with the purpose of promoting or facilitating the commission of the robbery, or that he had agreed to aid Dolisca or Willis in planning or committing the robbery and performed some overt act in furtherance of it was far from indisputable. As in R.J.M., the video did not entirely support Alcius's version of Mr. Rhymes's role in the incident, "the case hinged on the jury's evaluation of witness credibility," and Alcius's testimony "was contradictory in some respects." See R.J.M., 453 N.J. Super. at 270.

Here, the State's evidence consisted of a silent surveillance video and Alcius's testimony that Mr. Rhymes's words and actions escalated the

confrontation between Alcius and Dolisca. (6T:43-20 to 23); (Da 16) Mr. Rhymes's version of events – presented through cross-examination and his attorney's arguments to the jury – was that the incident began as a heated verbal dispute over a small sum of money that Alcius owed Dolisca, and that Mr. Rhymes's words and actions indicated that he was trying to de-escalate and end the altercation. (6T:175-11 to 23) In his summation, defense counsel contested Alcius's account and argued that the video depicts Mr. Rhymes "trying to resolve" the situation from the beginning of the incident, motioning with his hands and telling Dolisca to stop. (See 6T:176-14 to 177-17) (See Da 16 at 17:26:45 to 17:26:56) Counsel argued that the video later shows Mr. Rhymes offering to pay Dolisca the small debt on Alcius's behalf and have Alcius pay him back later. (6T:177-22 to 178-12) (Da 16 at 17:31:27 to 17:31:45)

The only interactions between Mr. Rhymes and Alcius captured on the video appear to be verbal – but the video has no sound and does not capture the substance of any of the conversations that occurred during the incident. Mr. Rhymes did not touch Alcius or take any of his belongings during the incident. (See 6T:87-25 to 88-13, 98-15 to 20) (Alcius's testimony that Mr. Rhymes did not touch him or take any of his belongings in the store); (See 5T:49-17 to 50-6) (judge's finding that video shows Dolisca and man in green jacket taking Alcius's belongings before leaving store); (Da 16 at 17:36:10 to 17:36:32). At

trial, Alcius admitted that he "wasn't really paying attention" to Mr. Rhymes. (6T:90-11 to 16) He stated that his memory of the incident a year prior was poor. (6T:106-18 to 19) Alcius also gave contradictory testimony about what happened during the incident, including whether or not Dolisca took his wallet, and whether Alcius had attempted to pay the money back on Cash App. (6T:92-25 to 94-15)

Mr. Rhymes's defense could have been significantly strengthened had he testified and given his account of the incident. In the absence of such testimony, the jury lacked the opportunity to assess Mr. Rhymes's account or his credibility and was left only with Alcius's version of events. See Hedgespeth, 249 N.J. at 252 (noting that trial court's erroneous admission of defendant's prior convictions denied jury the ability to consider defendant's "demeanor and credibility in delivering his theory of the case.") (citing Scott, 229 N.J. at 484-85).

Had the jury heard Mr. Rhymes's testimony, it could have acquitted him of one or both charges. The jury could have found that Mr. Rhymes lacked the purpose of promoting or facilitating the commission of the robbery that was necessary to find him guilty of both charged offenses. The jury could have also acquitted him of conspiracy to commit robbery based on a finding that he did not agree to aid in planning or committing the robbery, or that he did not act in

furtherance of such an agreement. The jury could have also acquitted Mr. Rhymes of one or both offenses based on a finding that the State failed to prove any one of the elements of the offenses beyond a reasonable doubt.

Mr. Rhymes's convictions must be reversed because had the trial court properly ruled that Mr. Rhymes's prior convictions were inadmissible and had Mr. Rhymes testified, there was a real possibility that the jury could have acquitted him.

POINT II

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT INADEQUATELY INSTRUCTED THE JURY ON ACCOMPLICE LIABILITY AND FAILED TO INSTRUCT THE JURY ON SECOND-DEGREE ROBBERY AS A LESSER-INCLUDED OFFENSE. (Not Raised Below)

The trial court made two instructional errors that each independently requires reversal. First, the trial court inadequately instructed the jury on accomplice liability by failing to tell them that in order to convict Mr. Rhymes of armed robbery, they had to find that he shared Dolisca's intent to commit the robbery with a gun. Second, the trial court failed to instruct the jury on second-degree robbery, a lesser-included offense that was clearly indicated by the evidence. These errors, individually and cumulatively, require reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10; R. 2:10-2; see also State v. Bowser, 297 N.J. Super. 588,

601-03 (App. Div. 1997) (holding court made two errors that independently required reversal: 1) failing to instruct jury that "defendant must have shared co-defendant's specific purpose to use weapon in order for defendant to be convicted of first-degree robbery"; 2) failing "to instruct the jury on second-degree robbery" as lesser-included offense.)

A. The trial court failed to instruct the jury that it was required to find that Mr. Rhymes shared Dolisca's purpose to commit robbery with a deadly weapon to find Mr. Rhymes guilty of first-degree armed robbery.

The trial court failed to specifically instruct the jury that in order to convict Mr. Rhymes of first-degree robbery as an accomplice, it had to find that he shared Dolisca's purpose of committing the robbery with a gun. See N.J.S.A. 2C:15-1(b) ("Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor … is armed with or uses … a deadly weapon.") These inadequate instructions had the clear capacity to produce an unjust result absent any evidence that Mr. Rhymes even knew that the principal, Dolisca, was armed or intended to use a gun in the commission of the robbery.

Under N.J.S.A. 2C:2-6, a person may be guilty of an offense as an accomplice if he, "with the purpose of promoting or facilitating the commission of the offense: (a) Solicits such other person to commit it; (b) Aids or agrees or attempts to aid such other person in planning or committing it; or (c) Having a

legal duty to prevent the commission of the offense, fails to make proper effort to do so." N.J.S.A. 2C:2-6c(1). Here, the State contended that Mr. Rhymes either solicited Dolisca to commit the offense of first-degree armed robbery, or that he aided, agreed, or attempted to aid Dolisca in committing the offense. N.J.S.A. 2C:2-6(c)(1)(a) and (b); 2C:15-1.

The liability of each participant in a criminal offense is dependent on his own state of mind. State v. Harrington, 310 N.J. Super. 272, 278 (App. Div. 1998). To find an accomplice guilty of the same offense as the principal, "it is essential that [the accomplice] shared in the [principal's] intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act." State v. Fair, 45 N.J. 77, 95 (1965); see also State v. Maloney, 216 N.J. 91, 105 (2013) (explaining that the State must prove that the accomplice "'possessed the mental state necessary to commit the offense'") (quoting State v. Whitaker, 200 N.J. 444, 458 (2009)). It is not enough that the defendant "purposely promoted or facilitated the actor's conduct knowing that the criminal result was sufficiently likely to follow." State v. Ramirez, 246 N.J. 61, 68-69 (2021); see also State v. Weeks, 107 N.J. 396, 403 (1987) (noting that accomplice liability statute "limits the scope of liability to crimes which the accomplice had the purpose of promoting or facilitating" and "is intended not to include those which he merely knowingly facilitated substantially"). Therefore, to find an accomplice guilty of

the same offense as the principal, the jury must find that the accomplice "facilitate[d] or assist[ed] the exact crime the putative principal is accused of." Ramirez, 246 N.J. at 68.

Our caselaw is clear that "[w]hen a prosecution is based on the theory that a defendant acted as an accomplice, the trial court is required to provide the jury with understandable instructions regarding accomplice liability." State v. Savage, 172 N.J. 374, 388 (2002) (citing State v. Weeks, 107 N.J. 396, 410 (1987)). In Weeks, our Supreme Court held that where a defendant is charged with first-degree armed robbery as an accomplice, the accomplice liability jury instructions must "clearly require the jury to find that defendant had shared the [principal's] purpose to commit a robbery *with a weapon."* 107 N.J. at 405. At trial, the defendant was found guilty of robbery as an accomplice, which was elevated to the first degree because the principal was armed with a deadly weapon. Id. at 400. The trial court's accomplice liability charge "recited the statutory premise of N.J.S.A. 2C:2–6c(1)(b) that a person is an accomplice of another in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, he aids or agrees or attempts to aid the other person, and if he is found to share the same intent required to be proven against the person who actually committed the act." Ibid. (internal quotations omitted). The Court held that these instructions were inadequate, despite being practically identical to the text of the accomplice liability statute, because they

"failed to convey to the jury that in order to convict the defendant as an accomplice to robbery in the first degree," it was required to specifically find that the defendant shared the principal's purpose of committing the robbery with a weapon. Id. at 403-05; see also Bowser, 297 N.J. Super. at 601-03 (holding court erroneously failed to instruct jury that "defendant must have shared co-defendant's specific purpose to use weapon in order for defendant to be convicted of first-degree robbery").

Furthermore, our courts have consistently noted the importance of tailoring accomplice liability jury instructions to the facts of the case. See State v. Savage, 172 N.J. 374, 388-89 (2002) (noting "in addition to requiring trial courts to instruct juries that an accomplice can have a different mental state from that of the principal, our courts regularly have noted the importance of tailoring the jury charge to the facts of the case.") (citing State v. Cook, 300 N.J. 476, 488-87 (App. Div. 1993)); State v. Tucker, 280 N.J. Super. 149, 152-53 (App. Div. 1995) (reversing defendant's robbery conviction where trial court inadequately instructed jury on accomplice liability by failing to explain possible difference in intent between principal and defendant, and that defendant should be acquitted if he did not share principal's intent to rob.) Moreover, our Courts have held that trial courts are required to give something more than the general, untailored model charge for accomplice liability in cases where a defendant is charged with first-degree robbery as an accomplice. Weeks, 107 N.J. at 403-05; Tucker, 280

N.J. Super. at 152-53 (Explaining that "it is not always enough simply to read the applicable version of the criminal code, define the terminology, and set forth the elements of the crime.")

Here, the trial court's instruction on accomplice liability reproduced the relevant provisions of the accomplice liability statute without tailoring the charge to the facts of the case. The trial court instructed the jury in accordance with the model jury charge on accomplice liability that applies when no lesser-included offenses are charged. (7T:30-11 to 36-3); See Model Jury Charge (Criminal), "Liability for Another's Conduct" (N.J.S.A. 2C:2-6), Accomplice, Charge # One (rev. June 6, 2021). However, under the circumstances of this case, the court was also required to instruct the jury that they had to find that Mr. Rhymes shared Dolisca's purpose to commit the robbery using a deadly weapon in order to find him guilty of first-degree robbery as an accomplice. As in Weeks and Tucker, the accomplice liability instruction was inadequate because it did not explain the possible difference in intent between the principal and the accomplice, or the legal significance of that possible difference (i.e., that the jury should acquit Mr. Rhymes of first-degree robbery unless they found that he shared Dolisca's specific intent to commit the robbery with a gun). (See 7T:35-6 to 36-3)

Reversal is required because had the jury been properly instructed on accomplice liability, they could have acquitted Mr. Rhymes of first-degree robbery.

Our caselaw is clear that "erroneous instructions on material issues are presumed to be reversible error." State v. Lykes, 192 N.J. 537 (2007) (quoting State v. Lopez, 187 N.J. 91, 101 (2006)); see State v. Bunch, 180 N.J. 534, 541-542 (2004) ("Because proper jury instructions are essential to a fair trial, erroneous instructions on materials points are presumed to possess the capacity to unfairly prejudice the defendant."); see also Harrington, 310 N.J. Super. at 277 ("We have consistently held … that the failure of a trial court to properly charge a jury is grounds for reversal, even though defense counsel failed to object at the appropriate time.") (citing Weeks, 107 N.J. at 410).

In Weeks, our Supreme Court held that the trial court's inadequate accomplice liability jury instructions required reversal. 107 N.J. at 403-05 (holding court's failure to instruct jury that defendant must have shared codefendant's specific purpose to use gun during robbery in order to be convicted of armed robbery was reversible error). In that case, the defendant had driven the principal to and from the scene of the robbery, but claimed that he was unaware that the principal was armed with a handgun. Id. at 399. Likewise, in Bowser, this Court held that the trial court's similarly inadequate accomplice liability jury instructions were plain error where the unarmed defendant had participated in the robbery of a convenience store, but it was his codefendant who had pulled a handgun and demanded money from the proprietor during the robbery. 297 N.J. Super. at 594, 601-03 (citing Weeks, 107 N.J. at 405).

Here, likewise, a properly instructed jury could have found that Mr. Rhymes did not know that Dolisca was armed or intended to use a gun in the commission of the robbery. It was undisputed at trial that Dolisca was the only person who had or used a gun during the robbery. (6T:47-9 to 22) The State presented no evidence that Mr. Rhymes knew that Dolisca was armed prior to the incident, or that Mr. Rhymes shared Dolisca's intent to use the gun or any other weapon in the commission of the robbery. No gun is visible on the video of the incident until Dolisca removes it from his jacket. (Da 16 at 17:33:00 to 17:36:30) Although Mr. Rhymes did not testify, defense counsel argued in summation that the video suggested that Mr. Rhymes was unaware that Dolisca was armed until Dolisca revealed that he had a gun to Alcius. (6T:176-24 to 177-12, 178-10 to 12).

Therefore, the court's failure to adequately instruct the jury on accomplice liability requires reversal. Had the court adequately instructed the jury, they could have found that Mr. Rhymes did not share Dolisca's purpose as to the gun and could have acquitted him of armed robbery.

B. The trial court's failure to instruct the jury on the lesser-included offense of second-degree robbery denied Mr. Rhymes a fair trial, requiring reversal.

The evidence presented at trial clearly indicated the need to instruct the jury on the lesser-included offense of second-degree robbery (unarmed robbery) as to Mr. Rhymes. The trial court's failure to do so had the clear capacity to cause an unjust

result where, based on the facts on the record, the jury could have acquitted Mr. Rhymes of first-degree robbery (armed robbery) and convicted him of the lesser offense of second-degree robbery instead.

If a lesser-included charge is clearly indicated by the evidence, a judge is duty-bound to provide instructions. State v. Garron, 177 N.J. 147, 180 (2003) (citing State v. Powell, 84 N.J. 305, 319 (1980)). A lesser-included charge is clearly indicated where there is ample evidence based on which a jury could have convicted the defendant of the lesser offense and acquitted him of the greater offense. See State v. Harris, 357 N.J. Super. 532, 541 (App. Div. 2003) (reversing armed robbery conviction because trial court did not charge lesser-included offenses, despite ample evidence from which jury could have convicted defendant of lesser offenses.) Our Supreme Court has specifically held that an accomplice who intends to take part in a robbery, but "does not have a shared purpose to commit a robbery with a weapon is guilty of [unarmed] robbery – not armed robbery." Ramirez, 246 N.J. at 67-68 (internal quotations omitted); see Bowser, 297 N.J. Super. at 602 (finding "[i]t is possible for an accomplice to be guilty of robbery and for his compatriot to be guilty of armed robbery.") (quoting State v. White, 98 N.J. 122, 131 (1984)); see also Fair, 45 N.J. at 95 ("Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind.")

Our Supreme Court has long recognized that the requirement of submission of lesser-included offenses to the jury is designed to avoid placing the jury in a position of having to make an "all-or-nothing choice" between convicting the defendant of a greater offense and acquitting the defendant. See Harris, 357 N.J. Super. at 541. "[A] jury reluctant to acquit defendant might compromise on a verdict of guilt on the greater offense," particularly when "one of the elements of the offense is in doubt." State v. Bielkiewicz, 267 N.J. Super. 520, 534 (App. Div. 1993) (quoting State v. Sloane, 111 N.J. 293, 299 (1988)).

Here, the trial court was required to charge the jury on second-degree robbery as a lesser-included offense because it was clearly indicated by the evidence presented at trial. The court erred in concluding that a jury instruction on the lesser-included offense of unarmed robbery was unwarranted as to any of the codefendants simply because it was undisputed that Dolisca, the principal, committed the robbery with a gun. (6T:155-24 to 156-16; 7T:54-21 to 55-6); See State v. Bowser, 297 N.J. Super. at 594, 601-03 (holding that trial court's failure to instruct jury on second-degree robbery as lesser-included offense of first-degree robbery was plain error where jury could have found that defendant, an unarmed accomplice, did not share principal's purpose of committing robbery with a gun) (citing Weeks, 107 N.J. at 409; White, 98 N.J. at 129-131).

The trial court's failure to instruct the jury on unarmed robbery as a lesser-included offense of armed robbery put the jury in the position of having to make an all-or-nothing choice between finding Mr. Rhymes guilty of armed robbery and acquitting him of robbery altogether. The same facts demonstrating that the jury could have acquitted Mr. Rhymes of armed robbery had they been properly instructed on accomplice liability (discussed in Point II. A., supra) also indicate that the jury could have acquitted him of the greater offense of armed robbery and convicted him of the lesser offense of unarmed robbery had they been instructed on it. As discussed above, it was undisputed at trial that Mr. Rhymes did not have a gun, and there was no evidence that he knew Dolisca had a gun prior to the incident, let alone that he intended for Dolisca to use the gun in the commission of the robbery. Therefore, the jury could have found that Mr. Rhymes did not intend for a gun to be used in the commission of the robbery and that he had a less culpable mental state than Dolisca. Had the jury been instructed on unarmed robbery as a lesser-included offense, they could have found that Mr. Rhymes's involvement in the incident satisfied the elements of unarmed robbery, but not armed robbery. Thus, the trial court's failure to charge the jury on second-degree robbery as a lesser-included offense had the clear capacity to cause an unjust result and requires reversal of Mr. Rhymes's convictions.

POINT III

THE CUMULATIVE IMPACT OF THE ERRORS DENIED MR. RHYMES A FAIR TRIAL.

"Even if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) (citing State v. Jenewicz, 193 N.J. 440, 473 (2008). Each of the errors in Points I and II are sufficient to independently require reversal. If, however, this Court disagrees, defendant submits that the cumulative effect of these errors requires reversal.

The jury was not properly instructed on how to evaluate Mr. Rhymes's defense where the trial court failed to adequately instruct the jury on accomplice liability and on second-degree robbery as a lesser-included offense. These instructional errors were particularly harmful coupled with the court's erroneous admission of Mr. Rhymes's remote prior convictions, which resulted in his decision not to testify and prevented the jury from hearing his account of the incident. Had Mr. Rhymes testified, the testimony would have likely strengthened his defense. This is especially true where the jury's assessment of Mr. Rhymes's culpability hinged in large part on what he said during the

incident, which was contested at trial. If Mr. Rhymes had testified and if the jury had been given the proper instructions to evaluate his defense, the jury could have acquitted him. Therefore, the cumulative impact of these errors deprived Mr. Rhymes of due process and a fair trial. Accordingly, Mr. Rhymes's convictions should be reversed and the matter remanded for a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

POINT IV

RESENTENCING IS REQUIRED BECAUSE THE COURT FAILED TO ADDRESS ANY MITIGATING FACTORS RAISED BY DEFENSE COUNSEL, AND IMPROPERLY FOUND AGGRAVATING FACTORS THREE, SIX, AND NINE BASED ON MR. RHYMES'S LIMITED CRIMINAL HISTORY AND THE ACTIONS OF HIS CODEFENDANTS. (9T:5-10 to 6-24, 14-11 to 15-15)

At sentencing, defense counsel sought a downgraded sentence in the second-degree range based on the circumstances of Mr. Rhymes's involvement in the robbery, specifically noting that he never touched the victim and did not have a gun, and that he had led a law-abiding life for a substantial period of time prior to the incident. (9T:5-11 to 6-24) The sentencing court did not address any of the mitigating factors raised by defense counsel. The court also gave Mr. Rhymes "some consideration" for the fact that he wanted to accept the plea agreement prior to the beginning of trial, but was "not given the opportunity to do so because [his] co-defendant chose not to take that deal." (9T:16-7 to 21)

The court found aggravating factors three (risk of re-offense), six (extent of prior criminal history), and nine (need for deterrence). See N.J.S.A. 2C:44-1a(3), (6), (9). The court did not assign specific weight to the aggravating factors, instead finding that weighing the factors "on a qualitative basis, the aggravating factors still preponderate over the mitigating factors." (9T:15-23 to 16-1). The court merged Mr. Rhymes's convictions for second-degree conspiracy (Count One) and first-degree robbery (Count Two), sentencing him to a twelve-year prison term with an 85% parole bar. (9T:16-22 to 17-15) This case should be remanded for resentencing because the trial court failed to properly consider, find, and weigh the aggravating and mitigating factors. The trial court abused its discretion by failing to address the four mitigating factors raised by defense counsel, and by improperly finding aggravating factors three, six, and nine. Had the trial court properly considered, found, and weighed the aggravating and mitigating factors, it should have imposed a lower sentence.

The trial court's failure to consider the four mitigating factors requested by defense counsel requires the matter to be remanded for resentencing. A court's sentencing decision must involve a qualitative analysis, stating its reasoning for finding and weighing aggravating and mitigating factors. State v. Case, 220 N.J. 49, 65 (2014). "Mitigating factors that are called to the court's attention should not be ignored, and when amply based in the record ... they

must be found." Id. at 64 (citing State v. Dalziel, 182 N.J. 494, 504 (2005); State v. Blackmon, 202 N.J. 283, 297 (2010)) (internal quotations omitted). A sentencing court must "explain clearly why [a] ... mitigating factor presented by the parties was found or rejected and how the factors were balanced to arrive at the sentence." Case, 220 N.J. at 66.

At sentencing, Mr. Rhymes's defense counsel argued for the application of mitigating factor seven, N.J.S.A. 2C:44-1b(7) ("defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time"), mitigating factor eight, N.J.S.A. 2C:44-1b(8) ("defendant's conduct was the result of circumstances unlikely to recur"), mitigating factor nine, N.J.S.A. 2C:44-1b(9) ("character and attitude of the defendant indicate that he is unlikely to commit another offense"), and mitigating factor ten, N.J.S.A. 2C:44-1b(10), ("defendant is particularly likely to respond affirmatively to probationary treatment"). (9T:5-11 to 6-15) The court made no mention of any of these factors in its decision. The court's failure to address the mitigating factors argued by defense counsel, let alone "explain clearly" why they were rejected, requires a remand for resentencing. See Case, 220 N.J. at 66.

The trial court's failure to consider the mitigating factors raised by defense counsel was particularly prejudicial because mitigating factor seven was raised

by defense counsel and amply based in the record. (9T:5-11 to 20) Mr. Rhymes had only two prior indictable convictions, both of which were for third-degree offenses and were more than ten years old at the time of this trial. (See PSR 5-6) Therefore, the trial court should have found mitigating factor seven because Mr. Rhymes had led a law-abiding life for a substantial period of time prior to the present offense.

However, instead of properly considering and finding mitigating factor seven, the court abused its discretion by finding aggravating factors three, "[t]he risk that the defendant will commit another offense," and six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted." See N.J.S.A. 2C:44-1a(3), (6). The court based its finding of both factors solely on Mr. Rhymes's criminal record, noting that while Mr. Rhymes's only two prior indictable convictions were "somewhat old," his record was not "unblemished." (9T:11-6 to 13, 14-18 to 15-9).

The court also abused its discretion by improperly considering Mr. Rhymes's prior arrests – none of which resulted in convictions – in its decision to apply aggravating factor six. Our Supreme Court has made clear that "prior dismissed charges may not be considered for any purpose" unless the underlying conduct is undisputed or specific findings of fact are made. State v. K.S., 220

N.J. 190, 199 (2015); accord State v. Tillery, 238 N.J. 293, 326 (2019) (applying K.S. in the sentencing context). That is so because "deterrence is directed at persons who have committed wrongful acts," not those who have merely been arrested or accused. K.S., 220 N.J. at 199; accord State v. Farrell, 61 N.J. 99, 107 (1972) ("[U]nproved allegations of criminal conduct should not be considered by a sentencing judge.") Here, the court contravened that basic rule by considering Mr. Rhymes's seven arrests in determining "the extent of [his] prior criminal history." (9T:15-2 to 8) Thus, aggravating factors six and three should have received minimal, if any, weight – especially given that Mr. Rhymes had only two prior indictable convictions, both of which were third-degree offenses that were more than ten years old. (PSR 5-6)

Finally, the court erred in finding aggravating factor nine, "[t]he need for deterring the defendant and others from violating the law," N.J.S.A. 2C:44-1a(9), without addressing the need for specifically deterring Mr. Rhymes. Our Supreme Court has made clear that in imposing a sentence, the trial court "should address both general and specific deterrence," recognizing that "[i]n the absence of a finding of a need for specific deterrence, general deterrence has relatively insignificant penal value." State v. Fuentes, 217 N.J. 57, 79, 81 (2014) (quoting State v. Jarbath, 114 N.J. 394, 405 (1989)). Furthermore, in order to justify the imposition of aggravating factor nine, the record must disclose some

"special need for deterrence" that differentiates the case from other cases in its class. See State v. Martelli, 201 N.J. Super. 378, 385-86 (App. Div. 1985).

Here, instead of finding any special need for deterrence that would justify finding aggravating factor nine in this case, the court repeatedly noted that this case was "the classic first-degree robbery." (9T:13-8 to 11, 15-9 to 15) Furthermore, the court primarily discussed the conduct of Mr. Rhymes's codefendants in imposing the sentence, noting that Mr. Rhymes was vicariously accountable for those actions as an accomplice without discussing his specific conduct or the need for specific deterrence. (9T:13-8 to 20; 14-11 to 17). This was error because Mr. Rhymes's vicarious liability for the actions of his codefendants as an accomplice does not extend to the application of aggravating factors based on the conduct of his codefendants. See State v. Rogers, 236 N.J. Super. 378, 387 (App. Div. 1989), aff'd in relevant part 124 N.J. 113, 120-21 (1991) (finding defendant sentenced as accomplice "is not vicariously accountable for aggravating factors that are not personal to him") Therefore, the court erred in applying aggravating factor nine.

This case must be remanded for resentencing because the trial court failed to consider the mitigating factors raised by defense counsel and improperly applied the aggravating factors. Had the court properly considered, found, and weighed the aggravating and mitigating factors, it would have found that the

mitigating factors outweighed the aggravating factors, and it would have imposed something less than the twelve-year sentence given. Moreover, at a resentencing, Mr. Rhymes's family members – who were unable to attend his original sentencing due to his mother being hospitalized at the time – should be permitted to testify. (9T:7-11 to 8-10)

CONCLUSION

For the reasons set forth herein, Mr. Rhymes's convictions must be reversed. Alternatively, his sentence must be vacated and remanded for resentencing.

Respectfully Submitted,

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Dated: May 29, 2024