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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2342-13T3
A-3251-13T4[1]

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KENNETH B. GREEN,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LOUIS ADAMS,

Defendant-Appellant.

Submitted May 17, 2016 – Decided March 8, 2017

Before Judges Espinosa and Currier.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 09-09-0823, 09-09-0824 and 09-09-0825.

Joseph E. Krakora, Public Defender, attorney for appellants (Jack L. Weinberg, Designated Counsel, on he briefs in A-2342-13; Michael

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[1] These appeals originally calendared back-to-back are consolidated for purposes of opinion only.

Confusione, Designated Counsel, on the brief in A-3251-13).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Bryan S. Tiscia, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief in A-2342-13; Beverly I. Nwanna, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief in A-3251-13).

The opinion of the court was delivered by

ESPINOSA, J.A.D.

Defendants Louis Adams and Kenneth Green were convicted of the first-degree armed robbery of an off-duty Newark police officer, Daniel DeAmorim, and his companion, S.J.,[2] at the Swan Motel in Linden. In addition, Green was convicted of the carjacking of K.S.'s 2005 Infiniti from the motel parking lot as he fled the scene. Both defendants were also convicted of second-degree attempted burglary and weapons offenses.

Although DeAmorim, S.J. and K.S. were unable to identify either defendant, their presence at the motel was confirmed by forensic evidence and not disputed. The defense argued that a robbery had not occurred at all; that DeAmorim panicked upon being approached by two African-American males and the event was "massaged" into a robbery to protect him from possible fallout because he had fired his weapon. For the reasons that follow, we

[2] We use initials for civilian witnesses to protect their privacy.

affirm defendants' convictions and their sentences, reversing only on the consecutive nature of the sentences, and remand for further proceedings.

I.

DeAmorim was wearing a sweatshirt with the Newark Police Department logo on its front and carrying his service weapon, a Sig Sauer Smith & Wesson .40 caliber semi-automatic pistol, when he and S.J. arrived at the motel around 10:00 p.m. As they stood at the door to their room, two African-American men came behind them. Green put a gun to DeAmorim's lower right back and ordered, "get the F in the room" and "don't look back" or else he would shoot. DeAmorim turned his head and saw Green holding "a chrome or silver handgun." Adams, who was unarmed, told S.J. to "just follow orders and do as he say." DeAmorim testified he was in fear for their lives.

DeAmorim turned around and fired all thirteen rounds in his gun at the two men, hitting both of them. Green dropped his handgun and took two to three steps before falling to the ground. Adams, who was shot in the hand, ran away, fleeing in a dark-colored Buick he and Green had arrived in. DeAmorim and S.J. ran to the motel bar and called the police. Green ran down the stairs into the parking lot.

Meanwhile, R.M. and K.S. had arrived at the Swan Motel in K.S.'s Infiniti. K.S. remained in the car while R.M. went into the motel office to check in. Hearing gunshots, K.S. went to the motel office, leaving the car running. She observed a "dark vehicle" drive out of the parking lot and "a guy . . . running out towards [her] car."

R.M. and K.S. ran to stop the man from taking her car but Green was able to get into the driver seat before they reached the car. R.M. struggled unsuccessfully with Green for the door and had to let go when he was "knocked out of the way." Green pulled out of the motel parking lot in the Infiniti at approximately 10:15 p.m., causing R.M. and K.S. to move out of the way to avoid getting hit.

The Infiniti was recovered in Newark on the following day and returned to K.S. DNA samples were taken from inside the vehicle. Forensic scientist Monica Ghannam, an expert in DNA analysis, testified she excluded Adams but could not exclude Green as the source for the DNA. The investigation at the motel resulted in the recovery of a loaded Jennings 9 mm handgun next to a pool of blood and shell casings from DeAmorim's weapon. Ghannam testified that DNA extracted from the grip and slide of the recovered handgun was "a mixture of DNA from a minimum of two individuals." She could not exclude Adams or Green as potential contributors to the

sample from the grip of the handgun. Ghannam also recovered a mixture of at least two individuals' DNA from the slide of the gun and could exclude Green but not Adams as a potential contributor.

Between 11:30 p.m. and midnight on the night of the robbery, M.C. and two of his cousins were driving in Newark when they saw a "guy crawling" in front of a vehicle in the middle of the street at 19th Street and Springfield Avenue. At first, M.C. thought it was a joke but when they told the man -- Green -- to get out of the way, he told them he "got shot." Observing Green had "a lot of blood from his . . . jacket down to his feet" and blood on his leg, M.C. and his cousins asked if he needed medical attention. Green told them he had been shot multiple times but declined their offer to call an ambulance.

A man, later identified as Adams, drove up in a dark green car with tinted windows, and spoke to Green. Green was on the sidewalk, "calling for his mom" towards a house, which he stipulated was his residence at the time. Green's mother came out of the house. Green told her he "got shot." She yelled at him and they went inside the house.

M.C. observed that Adams was shot in his right hand. When asked what happened and whether he was shot in a drive-by, Adams said it was "something like that." M.C. and his cousins drove away but reported what they had seen to a police officer.

Officer Ronney Godwin of the Newark Police Department was dispatched to the address where Green resided. He observed blood spattering in the street and a projectile on the steps to Green's residence. Forensic evidence linked the projectile to both the shooting at the Swan Motel and to Green. Lieutenant Michael Sanford of the Union County Police Department, was qualified as an expert in forensic firearms identification. He examined the projectile recovered from Green's address and determined it was fired from DeAmorim's weapon. Ghannam testified that Green's DNA profile matched the DNA recovered from the projectile.

Around 11:55 p.m. that evening, a car pulled up to the emergency room entrance of St. Joseph's Hospital in Wayne with two men in need of medical attention. Adams stipulated that he was the man who was observed, bleeding from his hand, and carrying a second man who was bleeding around his body. Green stipulated he was the second man.

Paterson Police Officer Ronald James was called to the hospital at approximately 12:15 a.m. Adams identified himself as "Robert Brown" to James, and Green identified himself as "Charles Hinton." Adams told James he and "Hinton" were in Paterson that evening, waiting for a girl to meet them, when three masked men approached them; one pulled out a handgun and demanded their money.

Adams said the three men began shooting at them after he and Green gave the men their money and ran away.

Paterson police were unable to confirm that a shooting had occurred in the area described by Adams. Linden police officers later arrived at the hospital and arrested defendants.

Neither Adams nor Green testified at trial. They presented testimony from Officers Monica Oliveira, Eric Calleja and Morris Jones of the Linden Police department; Stacy Blackman; and Lieutenant Dean Marcantonio, Sergeant Kevin Grimmer and Detective Cassie Kim, of the Union County Prosecutor's Office; to support the defense that the handgun and other evidence were "planted at the scene after the incident and before officers were able to process the crime scene," and to impeach the testimony of witnesses called by the State. The testimony from these witnesses yielded the following:

Oliveira responded to the Swan Motel and assisted in setting up a crime scene tape and starting the crime scene log. Calleja, who assisted in placing the perimeter tape at the shooting scene, testified he noticed shell casings and a handgun on the deck and marked the shell casings with Styrofoam cups. The defense elicited from him that his supplemental report did not mention that he noticed the handgun.

Jones conducted the initial interview of DeAmorim and attempted to interview S.J., who was very upset. He did not recall if DeAmorim ever stated he was in fear for his safety or that of S.J. The State stipulated that during a subsequent interview by Grimmer, S.J. did not say she and DeAmorim were in a restaurant earlier that evening.

Blackman, a registered nurse at the emergency room of the University of Medicine and Dentistry of New Jersey, testified DeAmorim came into the emergency room at 12:49 a.m. for mental health counseling and left at 1:02 a.m., stating he was fine and did not want to be seen in the emergency room. Her notes reflected that he was awake, alert and oriented to time, person and place.

Detective Kim served as the lead detective in the investigation of the police-involved shooting. Lieutenant Marcantonio testified that the Prosecutor's Office took partial jurisdiction over the shooting at midnight; that officers from the Newark Police Department came to the scene and provided information but exerted no influence over the investigation and that DeAmorim had not received favorable treatment because of his status as a police officer.

On Indictment No. 09-09-00823, the jury convicted defendants of second-degree attempted burglary, N.J.S.A. 2C:18-2(a)(1), -(b)(2); N.J.S.A. 2C:5-1(a)(3) (count one); first-degree robbery,

N.J.S.A. 2C:15-1(a)(2) (counts two and three); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count four); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count five), and, under separate indictments, second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1). Green was also convicted of first-degree carjacking, N.J.S.A. 2C:15-2(a)(1), (2) (count six); and second-degree robbery, N.J.S.A. 2C:15-1(a)(1), (2) (count seven).

At sentencing, the court found, and defendants agreed, they both qualified for mandatory-extended term sentences on the robbery count and, as to Green, on the carjacking count, pursuant to the "Three Strikes" law, N.J.S.A. 2C:43-7.1(b)(1), (2), and that the No Early Release Act (NERA), N.J.S.A. 2C:43-7, applied to the charges.

On Indictment No. 09-09-0823, count four was merged into count two and defendants were each sentenced to: ten years on count one; forty years on counts two and three; and ten years on count five. As to the additional charges brought against Green, count seven merged into count six, and Green was sentenced to forty years. All sentences under this indictment were concurrent and subject to NERA's mandatory eighty-five percent period of parole ineligibility. On the certain persons charges, Green and Adams were each sentenced to ten years with a five-year period of

parole ineligibility, to run consecutive to the sentences under Indictment No. 09-09-00823.

Green presents the following issues for our consideration in his appeal:

> POINT I
>
> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE FAILURE OF THE STATE TO TIMELY PROVIDE THE EXPERT REPORT REGARDING DNA TESTING OF THE HANDGUN IN VIOLATION OF R. 3:13-3(a)(11). [Raised below.]
>
> POINT II
>
> THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE PURSUANT TO R. 3:18-1 WITH REGARD TO THE FIRST-DEGREE ROBBERY CHARGE. IN THE ALTERNATIVE, THE COURT SHOULD HAVE GRANTED THE MOTION ON ITS OWN INITIATIVE AT THE CLOSE OF TESTIMONY. R. 3:18-1. FINALLY, THE COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR A NEW TRIAL PURSUANT TO R. 3:20-1. [Partially raised below.]
>
> POINT III
>
> THE COURT ERRED WHEN IT DID NOT SUA SPONTE CHARGE ATTEMPTED ROBBERY AS A LESSER INCLUDED OFFENSE OF ROBBERY. [Not raised below.]
>
> POINT IV
>
> THE COURT ERRED IN ITS CHARGE ON CARJACKING. THE COURT FAILED TO

INSTRUCT THE JURY THAT THEY NEEDED TO RETURN A UNANIMOUS VERDICT WITH REGARD AGAINST WHOM THE FORCE WAS USED AND FAILED TO USE A SPECIAL INTERROGATORY ON THAT ISSUE. FURTHERMORE, THE COURT FAILED TO DISTINGUISH BETWEEN POSSESSION AND CONTROL AS DIFFERENTIATED BETWEEN SUBSECTIONS N.J.S.A. 2C:15-2a(1) AND -2a(2). [Not raised below.]

POINT V

THE PROSECUTOR'S REMARKS AND ACTIONS DURING THE COURSE OF THE TRIAL, PARTICULARLY DURING HIS CLOSING SUMMATION, CONSTITUTED PROSECUTORIAL MISCONDUCT DEPRIVING THE DEFENDANT OF A FAIR TRIAL. [Partially raised below.]

POINT VI

CUMULATIVE TRIAL ERRORS DEPRIVED THE DEFENDANT OF A FAIR TRIAL. [Raised below.]

POINT VII

THE COURT IMPOSED AN EXCESSIVE SENTENCE WHICH DID NOT TAKE INTO CONSIDERATION ALL APPROPRIATE CODE SENTENCING GUIDELINES.

Adams presents the following issues in his appeal:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.

POINT II

THE TRIAL COURT ERRED IN PERMITTING IMPROPER OTHER WRONGS EVIDENCE BEFORE THE JURY.

POINT III

THE PROSECUTOR WENT BEYOND FAIR COMMENT ON THE EVIDENCE AND TAINTED THE FAIRNESS OF THE JURY TRIAL BELOW (plain error).

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

POINT V

DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

II.

We first address arguments that require only limited discussion. R. 2:11-3(e)(2).

A.

In Point IV, Adams contends the court erred in denying his pre-trial motion to suppress defendants' statements. Prior to trial, Adams moved to suppress a police officer's testimony regarding statements the police overheard defendants make to each other while they were in the hospital. Adams now appeals from the denial of his suppression motion. Because no testimony was introduced at trial regarding these statements, neither defendant was prejudiced and the issue is moot.

B.

Both defendants argue the trial court erred in denying their motions for a judgment of acquittal on the first-degree robbery charge. They contend the State failed to prove an essential element of this charge, that they committed or attempted to commit a theft.

In reviewing the denial of a motion for a judgment of acquittal, R. 3:18-1, we conduct a de novo review of the State's evidence, State v. Dekowski, 218 N.J. 596, 608 (2014), and give the State the benefit of all favorable inferences to determine whether the evidence provides a basis for a reasonable jury to find guilt beyond a reasonable doubt, State v. Reyes, 50 N.J. 454, 458-59 (1967). The fact that defendants did not explicitly demand or obtain money from DeAmorim or Jones does not preclude a robbery conviction.

The robbery statute provides in pertinent part: "A person is guilty of robbery[3] if, in the course of committing a theft, he . . . (2) Threatens another with or purposely puts him in fear of immediate bodily injury . . . ." N.J.S.A. 2C:15-1(a)(2). DeAmorim testified that Green held a gun to his back and stated, "get the F in the room" and "don't look back" or he would shoot.

[3] Robbery is elevated to a first-degree crime if "the actor . . . is armed with, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:15-1(b).

Adams also ordered S.J. to "just follow orders and do as he say." DeAmorim testified he was in fear for his and S.J.'s lives. The circumstances provide adequate support for the inference that the threats were made to exercise dominion over DeAmorim and S.J. for the purpose of robbing them in the motel room. The motion for a judgment of acquittal was properly denied.

C.

In Point II, Adams argues the court erred by admitting testimony "that the Swan Motel . . . was a place known for drug sales, prostitution, and other unsavory activities." Adams contends this evidence was admitted in violation of N.J.R.E. 404(b) because it "smeared the defendants and took the jury's focus away from the actual issues they were being asked to decide." The plain language of the rule excludes evidence of other wrongs "to prove the disposition of a [defendant] in order to show that such person acted in conformity therewith." N.J.R.E. 404(b). Because evidence regarding the character of the Swan Motel does not constitute evidence of "other crimes, wrongs, or acts" of either defendant, N.J.R.E. 404(b) does not apply. See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 1(b) on N.J.R.E. 404 (2017) ("The general principle stated in N.J.R.E. 404 applies only when evidence of a trait of character or other specific act

is offered for the purpose of drawing inferences about the conduct of a person on a particular occasion.").

D.

Green asserts in Point VI that the cumulative effect of numerous trial errors deprived him of a fair trial. Green argues the court erred by: permitting DeAmorim to testify, over defense counsel's objection, that he believed defendants were going to kill him and S.J. or rape S.J.; sustaining the State's objection to his trial counsel's cross-examination of S.J. as to why she and DeAmorim decided to stop at the Swan Motel; permitting the State to introduce evidence concerning the reputation of the Swan Motel in violation of N.J.R.E. 404(b); and permitting Officer James to testify about the statement provided to him by Adams. We discern no merit in these arguments.

III.

In Point I, Green argues the trial court abused its discretion in denying his motion for a mistrial due to the State's noncompliance with on-going discovery requirements. He contends the State's failure to provide Ghannam's report prior to trial, as required by Rule 3:13-3, deprived him of his right to a fair trial. We disagree.

During direct examination, the prosecutor questioned Ghannam about a lab report she had prepared based on her analysis of DNA

recovered from the handgun. Ghannam testified that based on a sample from the grip of the recovered gun, she "could not exclude either [Adams or Green] as a potential contributor." Counsel for Green requested a sidebar conference following this testimony.

At sidebar, counsel for both defendants stated they had not seen the report before. Defense counsel for Green had the following colloquy with the court and prosecutor:

> [COUNSEL]: I just need a copy maybe at the break.
>
> COURT: We'll do it right now, and then you'll get copies.
>
> [COUNSEL]: Take a look at it.
>
> COURT: [Prosecutor], what does this show?
>
> [PROSECUTOR]: It shows statistically . . . . [t]hat the numbers are 1 in 30 of Black males. And I think . . . that's from the grip. And . . . 1 in 45 to the slide.
>
> COURT: So, her conclusion is going to be that this many people had to supply that DNA?
>
> [PROSECUTOR]: On the grip.
>
> COURT: How close are you finishing the direct?
>
> [PROSECUTOR]: Five, ten minutes.
>
> COURT: Can you finish the direct, and

> then after getting the copies, take a break? After he finishes direct?
>
> [COUNSEL]: Sure.

The State then continued its direct examination of Ghannam. She testified further that Green could be excluded from the DNA recovered on the slide of the gun.

Prior to cross-examination of Ghannam, the court took a recess. During that time, defense counsel were provided an additional opportunity to review the report. The defense advised the court they had received the file from the Public Defender's Office, but reiterated that they were never supplied with the report. Counsel for Adams sought to have the testimony stricken but stated that if the court denied the motion, he had "no objection to it coming into evidence." He then requested more time to review the report, which the court allowed.

Following further review, counsel for Green moved for a mistrial. The trial judge noted for the record he had asked counsel if the State could complete its direct examination of Ghannam and defense counsel did not object. The judge further stated:

> Had you said to me, no, we're considering these types of applications or we need some more time to look at [the report] to determine what kind of applications we're going to make, I would have . . . given you that opportunity

before there was any testimony or any further testimony on this issue.

The prosecutor did not challenge defense counsel's representation they had not received the report but did not concede the report was not turned over to the defense. The prosecutor stated he had "repeatedly" invited defense counsel to review the State's file; defense counsel had the evidence log sheet/exhibit list which included the expert report for three to four weeks; and the State had signed receipts for the evidence.

The court noted that defense counsel did not have a lot of time to review the report, and it was unclear whether the description "Monica DNA Report 3" on the exhibit list "tells much of anything." Nonetheless, the court denied Green's mistrial application, stating, "I don't think that this rises to that level any way." The judge suggested an alternative remedy, asking Green's counsel if he wanted Ghannam's testimony stricken from the record. Counsel for Green declined:

[COUNSEL]: I guess it's whether this small amount of prejudice --

COURT: You've got to speak louder.

[COUNSEL]: Forget it.

COURT: Whatever you said, you're withdrawing?

[COUNSEL]: I am withdrawing my ridiculous

comment. I would not -- we can't [undo] what's been done. It's out there, and it hasn't been struck.

COURT: Well, you know, I'm not saying -- I have to disagree with you in a sense that, you know, whether I think that this on a whole is helpful to you and if it didn't play out this way, you know, would you have introduced it into evidence, you know, on your own through this witness, I can't really say. I guess that's in the eye of the litigator. But, you know, no pun intended, we're not talking about smoking-gun evidence here.

[COUNSEL]: No, absolutely not.

COURT: So, to say that the jury couldn't follow a direction just to -- to not consider this, you know -- so, I don't agree with you that the jury couldn't follow that direction. . . . Tactically, I'm asking you -- I'm not granting a mistrial. That application is denied. I don't feel it rises to that kind of level.

So tactically, do you want this in evidence, or do you want it out of evidence?

. . . .

[COUNSEL]: Judge, at this time, I don't think that we could object to the report going into evidence. I mean the testimony has already been put on the record before the jury.

. . .

COURT: [The] jury could follow a direction, under these circumstances, to disregard the evidence. So what I'm saying is that, you know, tactically, do you think you're better off with this in evidence or with it not in evidence? That's what I'm asking.

[COUNSEL]: Judge, I'll answer it this way, that counsel for Mr. Green is not requesting that the testimony be struck.

Counsel for Adams subsequently withdrew his application to strike the testimony. After the proceedings reconvened, the State moved the report into evidence without objection from defense counsel.

It is not disputed that the State was required to provide defendants with a copy of Ghannam's report prior to trial pursuant to Rule 3:13-3(b)(1)(I). Assuming, without deciding, the State failed to do so, the question is whether a mistrial was required.

"A trial court is vested with broad discretion to determine what remedy, if any, it should impose because of a failure to make expert disclosures." State v. Heisler, 422 N.J. Super. 399, 414-15 (App. Div. 2011). In the exercise of its discretion, the court may consider whether: (1) "the party who failed to disclose intended to mislead"; and (2) "the aggrieved party was surprised and would be prejudiced by the admission of expert testimony." Id. at 415. In the context of surprise expert testimony, prejudice

"refers not to the impact of the testimony itself, but the aggrieved party's inability to contest the testimony because of late notice." Ibid.; see also Pressler & Verniero, Current N.J. Court Rules, comment 3.2.9 on R. 3:13-3 (2017) ("The State's failure to comply with the requirement . . . will not preclude the testimony if defendant is not thereby prejudiced.").

Green does not argue the failure to disclose was motivated by an intention to mislead and the record does not support such an intent in any case.

Turning to the prejudice prong, Green argues he was "severely prejudiced" because his counsel argued to the jury in his opening statement: "[y]ou're going to hear that there is absolutely no match to Mr. Green or Mr. Adams when it comes to . . . DNA." He contends the admission of Ghannam's testimony "not only prejudiced the defense, it tainted the course of the trial" because it "demonstrated that defense counsel had lied to the jury in opening statements, and therefore, destroyed the credibility of counsel before the jury."

Ghannam's testimony did not render the opening statement a lie as, in fact, there was no "match" of the evidence to either defendant's DNA. As both the trial judge and Green's counsel agreed, Ghannam's testimony was not of a "smoking gun" quality. Although Ghannam testified Green's DNA could not be excluded from

the DNA recovered from the grip of the gun, she also testified he could be excluded from the DNA recovered from the slide of the gun. Notably, Green's counsel used this evidence to his advantage, questioning Ghannam extensively about the unreliability of the evidence on cross-examination and emphasizing this point in his summation. The argument regarding prejudice is, therefore, not persuasive.

More important, defense counsel rejected the trial judge's offers to remedy the situation by striking Ghannam's testimony, an option clearly available pursuant to Rule 3:13-3(b)(1)(I) ("[T]he expert witness may . . . be barred from testifying at trial."); see also Heisler, supra, 422 N.J. Super. at 415 (stating under our court rules, a court may, but is not required, "to bar an expert's testimony if discovery is withheld."). Defense counsel also declined the court's offer to give a curative instruction to the jury.

Instead, the only remedy requested by defense counsel was a mistrial, a remedy that should be granted "only to prevent an obvious failure of justice." State v. Harvey, 151 N.J. 117, 205 (1997), cert. denied, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000). We review the denial of a mistrial motion for an abuse of discretion. State v. LaBrutto, 114 N.J. 187, 207 (1989) (holding that the exercise of a trial court's discretion in denying

a mistrial will be upheld on appeal unless manifest injustice would result). We find no abuse of discretion or manifest injustice here because: (1) defense counsel ably employed the report in question in cross-examination and summation, (2) the trial judge offered appropriate remedies -- to strike the expert testimony and to instruct the jury to disregard the evidence, and (3) defense counsel elected to decline the remedies offered.

IV.

In Points III and IV of his brief, Green presents two arguments regarding the jury charge: that the trial judge erred in its charge on carjacking and in failing, sua sponte, to charge attempted robbery as a lesser-included offense of robbery. Because these arguments are raised for the first time on appeal, the "plain error" standard applies and we review the charge to determine whether the alleged error is "clearly capable of producing an unjust result." R. 2:10-2; see also State v. Singleton, 211 N.J. 157 (2012). Plain error in jury instructions consists of

> [l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.
>
> [State v. Adams, 194 N.J. 186, 207 (2008) (alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).]

A.

At the charge conference, the trial judge explicitly asked defense counsel if they believed there should be any lesser-included offenses charged regarding the events outside the motel room. Other lesser-included charges were discussed, including attempted theft from the person, which the court agreed to give. Neither counsel requested a charge on attempted robbery.

The obligation to instruct the jury on lesser-included offenses arises "only if counsel requests such a charge and there is a rational basis in the record for doing so or, in the absence of a request, if the record clearly indicates a charge is warranted." State v. Denofa, 187 N.J. 24, 42 (2006) (second emphasis added). To be warranted, "the facts adduced at trial [must] clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." State v. Jenkins, 178 N.J. 347, 361 (2004). And, for the record to "clearly indicate" a lesser-included charge is warranted, the evidence must be "jumping off the page." Denofa, supra, 187 N.J. at 42.

"Attempted robbery occurs where the actor intends a theft but is interrupted before he actually harms anyone or even threatens harm." State v. Samuels, 189 N.J. 236, 250 (2007). The "interruption" in this case occurred when DeAmorim turned to confront defendants and fired his weapon at them. Prior to that,

Green thrust a loaded gun in DeAmorim's back, told him "get the F in the room" and "don't look back" or else he would shoot. The notion that these facts support an acquittal on a robbery charge and a conviction on attempted robbery borders on the frivolous. The trial judge did not commit plain error in failing to charge the lesser-included offense sua sponte.

B.

Green next argues the trial judge committed plain error in the carjacking charge. The only request Green's counsel made at the charge conference regarding this charge was that the court instruct the jury regarding the lesser-included charge of theft of a motor vehicle, which the court granted.

On appeal, he argues the trial judge committed plain error in failing to distinguish between the two subsections of the carjacking statute, N.J.S.A. 2C:15-2(a)(1) and (a)(2). In addition, although the trial judge gave the general instruction regarding the requirement that a verdict must be unanimous, defendant also contends it was plain error for the judge to fail to include, sua sponte, an instruction regarding unanimity on elements of the carjacking charge.

Green was charged under two subsections of the carjacking statute which provide in pertinent part:

> A person is guilty of carjacking if in the course of committing an unlawful taking of a

> motor vehicle . . . or in an attempt to commit an unlawful taking of a motor vehicle he:
>
> (1) inflicts bodily injury or uses force upon an occupant or person in possession or control of a motor vehicle; [or]
>
> (2) threatens an occupant or person in control with, or purposely or knowingly puts an occupant or person in control of the motor vehicle in fear of, immediate bodily injury . . . .
>
> [N.J.S.A. 2C:15-2(a).]

Count six in the indictment alleges Green:

> on or about May 18, 2009 in the City of Linden, County of Union, and within the jurisdiction of this Court, did, in the course of committing an unlawful taking of a motor vehicle, use force upon a person in possession or control of a motor vehicle and/or did threaten a person in control of a motor vehicle or purposely or knowingly put a person in control of a motor vehicle in fear of immediately bodily injury, contrary to the provisions of N.J.S.A. 2C:15-2a.(1) and/or (2), and against the peace of this State, the government and dignity of the same.
>
> [(emphasis added).]

The indictment alleged violations of two different subsections of the carjacking statute, using the alternative and conjunctive phrase, "and/or." We have criticized the use of the phrase "and/or" to define the elements of an offense and reversed a conviction where the jury charge was rendered confusing and misleading by the judge's extensive use of that phrase. State v. Gonzalez, 444 N.J. Super. 62, 71 (App. Div.), certif. denied, 226

N.J. 209 (2016). The indictment also failed to explicitly identify the person or persons victimized by the conduct alleged, identifying the victim only as "person," not as K.S. or R.M.

The jury instruction did not employ "and/or" but presented the elements to both subsections in the alternative in a single instruction:

> A person is guilty of carjacking if, in the course of committing an unlawful taking of a motor vehicle, or an attempt to commit an unlawful taking of a motor vehicle, he inflicts bodily injury, or uses force upon an occupant or person in possession or control of a motor vehicle, or threatens an occupant of [sic] person in control of a motor vehicle with, or purposely, or knowingly puts an occupant or person in control of a motor vehicle, in fear of immediately [sic] bodily injury.
>
> [(Emphasis added).]

We are constrained to observe that multiple uses of the alternative "or" in the instruction, without distinguishing between the subsections of the statute had a potential to confuse the jury. The Model Jury Charge on carjacking directs the trial judge to "select" the appropriate subsection to be charged and to "choose from the following" relevant elements to be charged. Model Jury Charge (Criminal), "Carjacking N.J.S.A. 2C:15-2" (6/13/05). The verdict sheet also failed to distinguish between the two subsections of the statute. We conclude the trial court erred in

failing to distinguish between the two subsections of the statute in its instructions to the jury.

In State v. Berardi, 369 N.J. Super. 445, 449 (App. Div. 2004), appeal dismissed, 185 N.J. 250 (2005), the defendant was indicted on only one subsection of the carjacking statute but the trial judge charged the jury on an additional, unindicted carjacking charge. Like here, the issue was raised as plain error. As we stated in Berardi,

> This is an issue that to us is not free from doubt. Nevertheless, we normally hesitate to find plain error in the context of a criminal trial unless the error has had a real capacity to impair the defendant's right to a fair trial. We cannot overlook counsel's apparent approval on the record of the charge which defendant now appeals. Trial errors "induced, encouraged, or acquiesced in or contended by defense counsel ordinarily are not a basis for reversal on appeal." Notwithstanding this limitation, if the error had prejudiced the integrity of the trial, we would not hesitate to order a new trial even though defense counsel may have precipitated the error.
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> [Id. at 449-50 (citations omitted).]

Although we conclude the charge contains a "[l]egal impropriety," Adams, supra, 194 N.J. at 207 (alteration in original), our review requires us to determine further whether that impropriety "prejudicially affect[ed] the substantial rights of the defendant," was "sufficiently grievous to justify" our

notice and convinces us "that of itself the error possessed a clear capacity to bring about an unjust result." Ibid.

We review the error within the context of the trial and consider the following relevant factors:

> (1) the nature of the error and its materiality to the jury's deliberations, (2) the strength of the evidence against the defendant, (3) whether the potential for prejudice was exacerbated or diminished by the arguments of counsel, (4) whether any questions from the jury revealed a need for clarification, and (5) the significance to be given to the absence of an objection to the charge at trial.
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> [State v. Docaj, 407 N.J. Super. 352, 365-66 (App. Div.), certif. denied, 200 N.J. 370 (2009) (citations omitted).]

Green speculates that the failure to differentiate between the two subsections permitted the jury to return a guilty verdict by conflating the two subsections to his detriment. Specifically, he argues the jury could have found him guilty if they found R.M. or K.S. were in "constructive possession" of the vehicle, satisfying the victim status in (a)(1) and were threatened with immediate bodily injury, satisfying the conduct element of (a)(2).

The error in the charge was in failing to require the jury to assess defendant's guilt separately on each of the subsections of the carjacking statute. There was, however, no increase in the penalty Green faced based upon a conviction on one charge rather than the other. See Berardi, supra, 369 N.J. Super. at 450.

Moveover, the evidence of Green's guilt on the carjacking charge was substantial. K.S. gave a first-hand account of the incident from start to finish that provided proof of all the elements of the offense under either subsection. Defendant has not alleged that the potential for prejudice was exacerbated by any argument of counsel at trial.

Green contends the jury question revealed confusion regarding the role of "constructive possession." During deliberations, the jury asked the following question:

> The law states, "A person may be either an occupant, or in possession, or control" of the vehicle when he/she temporarily steps out of the motor vehicle. Please clarify "steps out" and what distance is considered a step.

The trial judge consulted with counsel regarding the appropriate response. Green's counsel stated:

> We're not asking for anything, Your Honor. I think what distance is considered a step is a unique jury question based on the facts of any given case, so we would just ask either for the jury to inquire as to whether they want the carjacking model charge re-read . . . .

The trial judge interrupted to state he did not "particularly think they need it re-read" since they "have it in front of them." Counsel for Green agreed. As the colloquy between them continued, the judge stated the narrow answer to the question as to what "steps out" means is "steps out means when you leave the motor

vehicle." Counsel for Green replied, "Yes, absolutely." The judge proceeded to state what he intended to tell the jury:

> [T]here's no specific definition of how far you -- you step out of the vehicle, that depends on the facts and circumstances of the case, and they need to focus on possession or control, and how far someone steps away from the motor vehicle, whether they are still in possession or control depends on the facts and circumstances of the case.

Counsel for Green stated, "I agree," and when the judge asked if had any objection about that response, he stated, "No, no." When the supplemental charge was drafted, the trial judge read the proposed charge. Again, he asked if counsel agreed with the charge and counsel for Green said, "Yes."

We do not construe the jury question as reflecting "confusion" that prejudiced defendant. It was an inquiry to ascertain the level of proximity required for a person to be in control or possession of the vehicle. And, defense counsel explicitly approved the trial judge's response to the jury question.

The sufficiency of proof to sustain a conviction for carjacking does not turn on whether there was "constructive possession" but rather, whether the proximity of the victim to the automobile is sufficient to trigger the carjacking statute. As we noted in State v. Jenkins, 321 N.J. Super. 124, 131 (App. Div.), certif. denied, 162 N.J. 197 (1999), the victim's proximity to the vehicle is relevant because "it clearly bears upon the victim's

capacity to control the vehicle, either in terms of his own ability to operate it or to bar entry by others" and "is relevant as well to establish that defendant's actions exposed the victim to a particular risk of harm beyond mere loss of the vehicle." It is clear the victim need not be "within the actual structure of the vehicle." State v. Williams, 289 N.J. Super. 611, 616 (App. Div.), certif. denied, 145 N.J. 375 (1996).

In Jenkins, we concluded a conviction under (a)(2) required proof the victim was placed within "a heightened zone of danger with relationship to the subject vehicle." 321 N.J. Super. at 132. That proof was lacking in Jenkins where the victim had parked his car in a cemetery parking lot and was accosted at an unspecified time thereafter and at an unspecified distance from the vehicle. Id. at 131-32. In Jenkins, id. at 131, we noted there was sufficient proximity to support a conviction under (a)(1) in State v. Matarama, 306 N.J. Super. 6 (App. Div. 1997), certif. denied, 153 N.J. 50 (1998). In Matarama, the victim parked her car across the street from her house, locked the car, put the keys in her pocket, and crossed the street. She was badly beaten by two men after she resisted their demand for her car keys. Id. at 12. Although a distance from the vehicle, the victim remained in a "heightened zone of danger with relationship to" her car. Jenkins, supra, 321 N.J. Super. at 132.

In this case, the proximity of K.S. and R.M. to the Infiniti was sufficient to render them persons "in control of" the vehicle under either subsection of the statute. The record therefore fails to support a conclusion that defendant suffered the specific prejudice he now alleges as a result of the error in the jury charge. In light of the absence of any request or objection to the charge and explicit acquiescence to the trial judge's response to the jury question, it is fair to conclude defense counsel perceived no flaw of consequence in the charge or the response to the jury question. We are therefore not convinced the error here "of itself . . . possessed a clear capacity to bring about an unjust result." Adams, supra, 194 N.J. at 207; see also R. 2:10-2.

C.

Green also contends the judge was required to provide the jury, sua sponte, with a unanimity charge specific to the carjacking count, i.e., that the jury had to reach a unanimous verdict as to the person against whom force was used in taking the Infiniti and that a special interrogatory on that issue was required.

Although an instruction regarding unanimity as to a specific charge "should be granted on request, in the absence of a specific request, the failure so to charge does not necessarily constitute

reversible error." State v. Parker, 124 N.J. 628, 637 (1991), cert. denied, sub nom Parker v. New Jersey, 503 U.S. 939, 112 S. Ct. 1483, 117 L. Ed. 2d 625 (1992). In determining whether a specific unanimity charge should have been given, "[t]he core question is, in light of the allegations made and the statute charged, whether the instructions as a whole [posed] a genuine risk that the jury [would be] confused." State v. Gandhi, 201 N.J. 161, 193 (2010) (alterations in original) (quoting Parker, supra, 124 N.J. at 638). On review, this court is required to "examine two factors: whether the acts alleged are conceptually similar or are 'contradictory or only marginally related to each other,' and whether there is a 'tangible indication of jury confusion.'" Ibid. (quoting Parker, supra, 124 N.J. at 639).

Green argues the trial court should have given a unanimity instruction in connection with the carjacking count because there were two potential victims, R.M. and K.S. He cites State v. Gentry, 183 N.J. 30, 33 (2005), for the proposition that the jurors had to agree unanimously on which acts were committed against which victim.

Gentry is distinguishable. The defendant in Gentry was charged with robbery, and the evidence supported two alternative theories for a conviction based upon separate acts using force against two different persons. Id. at 31-32. The indictment and

verdict sheet charged the defendant with robbery against either/or the two victims. Id. at 31. Because the use of force against a person is an essential element of robbery, it was necessary for the State to prove that element as to a specific victim. Id. at 33. A note from the jury advised the court that although the jury was unanimous in finding Gentry had used force against a victim, the jury could not agree on which person Gentry had knowingly used force against. Id. at 31. In response to the jury's note, the trial court instructed that agreement as to the use of force would constitute a unanimous verdict. Id. at 32-33. Plainly, this erroneous instruction, given after the jury advised it was unable to reach unanimity on an essential element, sanctioned a verdict that failed to achieve unanimity. Ibid.

In this case, the State did not argue alternative theories of guilt based upon the evidence presented. The State presented evidence of a "continuing course of conduct" consisting of conceptually similar acts that began with defendant's struggle with R.M. and continued as he attempted to run down R.M. and K.S. when he fled the scene. This was not a case where the circumstances presented "a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory." Parker, supra, 124 N.J. at 635 (quoting People v. Melendez, 274 Cal. Rptr. 599, 608 (Cal. Ct.

App. 1990)). This case is further distinguishable from Gentry because the jury's notes did not reveal an inability to reach unanimity on any of the essential elements of the carjacking offense.[4]

V.

Defendants argue their respective sentences were manifestly excessive. Defendants do not dispute they were extended-term eligible or challenge the judge's decision to grant the State's motion for them to be sentenced to a mandatory extended term. They challenge the adequacy of the court's stated reasons to support its findings that aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3), (6) and (9), applied. Green further argues the court: failed to articulate sufficient reasons for imposing consecutive sentences; double-counted aggravating factor six; erred in not applying mitigating factor four; failed to consider the "real-time consequences" of NERA; and did not award the correct jail credits.

We apply a deferential standard when reviewing sentencing determinations. State v. Lawless, 214 N.J. 594, 606 (2013). We must affirm the sentence unless the sentencing guidelines were violated, the aggravating and mitigating factors found during

[4] In addition to the note previously discussed, the jury asked to view the surveillance video from the Swan Motel.

sentencing were not based on credible evidence in the record, or the application of the guidelines make the sentence "clearly unreasonable so as to shock the judicial conscience." State v. Fuentes, 217 N.J. 57, 70 (2014) (quoting State v. Roth, 95 N.J. 334, 365 (1984)).

Neither defendant contended at sentencing that the record supported any mitigating factor. Rather, the arguments from both defense counsel centered on the application of State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), to the determination whether consecutive sentences were appropriate here and to request the trial judge impose a term of years rather than life imprisonment.

The judge found three aggravating factors applicable in sentencing both defendants: "risk that the defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); extent of the defendant's prior criminal record and seriousness of the offense of which he has been convicted," N.J.S.A. 2C:44-1(a)(6); and "need for deterring the defendant and others from violating the law," N.J.S.A. 2C:44-1(a) (9). The court found no mitigating factors.

At sentencing, defense counsel did not dispute the extent of defendants' prior record. Adams had thirty-eight felony convictions, including robbery and certain persons weapons

offenses. Green had twenty-one felony convictions, including armed robbery, robbery and certain persons weapons offenses.

The trial judge was "clearly convinced" that aggravating factors three, six and nine were applicable and that they "substantially outweigh[ed] no mitigating factors" as to both defendants. Although the judge did not individually address the findings for each factor, the judge explained, "defendants both have an extremely long history of crimes that includes an extremely long history of violence" and were "both automatically extended-term eligible, up to life." The judge further observed that Adams's criminal record was "somewhat lengthier" than Green's, with the charges in this case being his fifteenth and sixteenth indictments. As to Green, the judge noted these were his tenth and eleventh indictments and that he also had the carjacking charge.

Within the context of the arguments of counsel and the court's statement, it is clear defendants' prior records were the reason for finding all three factors. See State v. Gallagher, 286 N.J. Super. 1, 21 (App. Div. 1995) (noting that although not expressly stated by the trial court, it obviously concluded the aggravating factors substantially outweigh the non-existing mitigating factors), certif. denied, 146 N.J. 569 (1996). Defendants' prior records are extensive and provided ample evidence and

justification to support the court's finding of the aggravating factors. See State v. Dalziel, 182 N.J. 494, 502 (2005).

Green contends the trial judge impermissibly double-counted aggravating factor six, the extent of his prior criminal record, because his prior record was used to "invoke the provisions of the Repeat Violent Offender statute" and "[t]he court did not differentiate how or why it was invoking this aggravating factor." This argument lacks merit.

"[F]acts that establish[] elements of a crime for which a defendant is being sentenced should not be considered as aggravating circumstances in determining that sentence." State v. Kromphold, 162 N.J. 345, 353 (2000) (citing Yarbough, supra, 100 N.J. at 633). Green's criminal history was not a "fact" that was a necessary element of an offense for which he was being sentenced. It was undisputed that he had more than the requisite number of offenses to qualify for an extended term. The trial judge was not required to ignore the extent of his criminal history in evaluating aggravating factors.

Green also argues the judge should have found mitigating factor (4), N.J.S.A. 2C:44-1(b)(4) ("[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"). See State v. Nataluk, 316 N.J. Super. 336, 349 (App. Div. 1998) (recognizing that a

sentencing court may consider a defendant's mental condition as a mitigating sentencing factor absent an asserted insanity defense). "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.'" State v. Case, 220 N.J. 49, 64 (2014) (citations omitted).

No argument was made for the application of this factor at sentencing. Green argues that, nonetheless, it should have been found because the presentence report contains his statement that he had been taking "psych medications" since 1999, and in 2007, he was diagnosed with schizoaffective disorder and antisocial personality disorder. There are no expert reports or medical records included in the appellate record to support a finding that these conditions established "substantial grounds tending to excuse or justify the defendant's conduct" in participating in an armed robbery and carjacking. See State v. Jarbath, 114 N.J. 394 406 (1989). Because mitigating factor four is not supported by the record, the trial judge did not err in failing, sua sponte, to find it applicable to the sentencing decision.

In sum, we discern no abuse of discretion in the court finding aggravating factors three, six and nine and failing to find mitigating factor four.

Green also asserts the court did not properly consider the "real-time consequences" of the mandatory NERA eighty-five percent parole disqualifier. We discern no merit to this argument. Although the judge did not make an explicit statement regarding those consequences, his colloquy with counsel reflects an awareness of the consequences of the mandatory NERA parole disqualifier. Pursuant to N.J.S.A. 2C:43-7(a)(2), the exposure for each defendant on the first-degree robbery charge, and, as to Green, on the carjacking charge, was between twenty years and life imprisonment. We note the court did not impose the maximum sentence available and that the sentence imposed was within the twenty to seventy-five year range requested by Adams's counsel.

Green also argues the court failed to articulate any reasons for the imposition of a consecutive sentence on the certain persons offense. We agree.

Even though the decision to impose a consecutive sentence lies within its discretion, the trial court must expressly state the reasons for imposing consecutive sentences or risk remand for resentencing. State v. Miller, 108 N.J. 112, 122 (1987). The separate statement is essential for appellate review. Ibid. A remand for resentencing is required when the court fails to set forth a separate statement of reasons for imposing consecutive sentences. Ibid.; see State v. Abdullah, 184 N.J. 497, 514-15

(2005) ("[B]ecause the trial court did not explain why it imposed consecutive sentences, we are compelled to remand for the court to place its reasons on the record."). A remand may be avoided if the "sentencing transcript makes it possible to 'readily deduce' the judge's reasoning." State v. Miller, 205 N.J. 109, 129-30 (2011) (quoting State v. Bieniek, 200 N.J. 601, 609 (2010)). "But those cases are the exception, not the rule." Id. at 130.

Although counsel for Green and the prosecutor provided their respective analyses under Yarbough, the court gave no explanation for imposing a consecutive sentence on the certain persons weapons offense. Because we have no explanation of the judge's reasoning, we are constrained to remand for the court to set forth reasons for the imposition of the consecutive sentences imposed for both Adams and Green.

Finally, Green contends the trial judge failed to award him the correct jail credits. Green was awarded 251 days of jail credit, while Adams was awarded 1585 days. Green argues he was entitled to the same number of jail credits awarded to Adams. The trial judge noted that Green received a parole violation while in custody and advised Green's counsel to send him a letter for review if he believed Green was entitled to additional credits. On appeal, Green acknowledges "[t]he record does not indicate whether

that letter or request was ever sent."[5] The judgments of conviction show Adams was in custody from May 19, 2009 to September 19, 2013; and Green was in custody from May 19, 2009 to July 19, 2009, and March 15, 2013 to September 19, 2013. Based on these dates, Green was awarded the correct amount of jail credits. Green does not argue the information in his judgment of conviction is incorrect or offer any further explanation as to why he is entitled to 1585 days of jail credit rather than 251 days. In light of the fact that this matter must be remanded to the trial court, we refer the matter of the appropriate jail credits to the court for clarification.

We affirm defendants' convictions and their sentences, reversing only on the consecutive nature of the sentences. We remand for the trial judge to: determine whether a consecutive sentence is appropriate for the certain persons offense counts, to set forth reasons for its decision and to clarify whether the appropriate number of jail credits have been awarded to Green. We do not retain jurisdiction.

[5] The State has not responded to Green's argument regarding jail credits.