SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-3609-13T2
A-5239-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARC GALLUCCI,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEPHANIE R. TYLKA,

Defendant-Appellant.

Argued December 5, 2016 – Decided July 10, 2017

Before Judges Sabatino, Nugent and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 12-09-1393.

Lauren S. Michaels, Assistant Deputy Public Defender, argued the cause for appellant Marc Gallucci (Joseph E. Krakora, Public Defender, attorney; Ms. Michaels, of counsel and on the brief.)

Michael A. Priarone, Designated Counsel, argued the cause for appellant Stephanie R. Tylka (Joseph E. Krakora, Public Defender, attorney; Mr. Priarone, on the brief.)

David M. Liston, Assistant Prosecutor, argued the cause for respondents (Andrew C. Carey, Middlesex County Prosecutor, attorney; Mr. Liston, on the brief.)

PER CURIAM

A jury found defendants Marc Gallucci and Stephanie R. Tylka guilty of the aggravated assault of Tylka's former paramour.[1] The trial judge sentenced Gallucci to a five-year prison term and Tylka to a five-year probationary term. Defendants filed separate appeals from their respective judgments of conviction.[2]

In his appeal, Gallucci contends the trial judge committed three errors. First, the judge unduly restricted evidence of the victim's past violent behavior toward Tylka and improperly instructed the jury on the victim's prior bad acts. Second, the judge failed to give a Clawans[3] charge, sua sponte, concerning two

[1] The jury found another co-defendant, Gallucci's daughter, guilty of aggravated assault. The jury acquitted a fourth co-defendant. In this opinion, we refer to Gallucci and Tylka, collectively, as "defendants"; and Gallucci's daughter and the fourth alleged participant in the crimes as the "co-defendants."

[2] These two appeals were argued back-to-back. We have consolidated them for purposes of this opinion.

[3] State v. Clawans, 38 N.J. 162 (1962).

people the State did not call as witnesses. Third, the judge mishandled an issue with a juror. In addition to these alleged errors, Gallucci contends the prosecutor committed misconduct in his summation. Lastly, Gallucci contends the cumulative effect of the court's and prosecutor's missteps deprived him of a fair trial.

Tylka makes the same arguments as Gallucci concerning the victim's prior violent behavior and the court's alleged mishandling of an issue involving a juror. She also contends the trial court erroneously admitted into evidence the content of certain text messages and a 911 call; failed to give a curative instruction, sua sponte, when the victim testified she and others were selling controlled dangerous substances; and improperly excused a juror. Like Gallucci, Tylka contends the prosecutor committed misconduct during his summation, and the cumulative prejudice resulting from the multiple errors deprived her of a fair trial. Unlike Gallucci, Tylka challenges her sentence as excessive.

Following oral argument on appeal, Gallucci filed a motion to adopt certain arguments Tylka had raised, which he had not. We granted the motion. In a supplemental brief, Gallucci contends the State's improper argument in summation concerning Tylka's pre-

arrest silence, to disprove self-defense, violated his right to due process and a fair trial.

For the reasons that follow, we affirm the judgments of conviction in their entirety. We remand for the sole purpose of correcting a clerical error in Gallucci's judgment of conviction.

I.

A.

In September 2012, defendants and co-defendants were charged in a Middlesex County grand jury indictment with second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1). In the same indictment, Gallucci was charged with third-degree witness tampering, N.J.S.A. 2C:28-5(a), and Tylka was charged with fourth-degree knowingly placing a 911 call without the purpose of reporting the need for 911 service, N.J.S.A. 2C:33-3(e).

Tylka filed a pre-trial motion seeking the court's permission to admit six prior bad acts of domestic violence she alleged the victim, her ex-boyfriend, had committed against her. Gallucci joined in the motion, arguing the victim's history of domestic violence supported his claim of defense of others, namely, Tylka. The court granted the motions, but cautioned that the prior acts had to be established at trial by competent evidence and had to be "short and sweet."

In December 2013, the case proceeded to trial. Jury selection began on December 3, and the jury returned its verdict on December 23. The jury found defendants, as well as a co-defendant, Gallucci's daughter, guilty of the lesser-included offense of third-degree aggravated assault. The jury found another co-defendant not guilty. The jury acquitted Gallucci of witness tampering and Tylka of making an unnecessary 911 call.

The court sentenced Gallucci to a five-year prison term with two and one-half years of parole ineligibility and imposed appropriate penalties and assessments.[4] The trial judge sentenced Tylka to a five-year probationary term conditioned on serving 364 days in county jail, which the court suspended. The court also imposed appropriate penalties and sanctions. These appeals followed.

B.

The State's proofs included, in addition to the testimony of law enforcement officers, the testimony of several lay witnesses.

[4] The judgment of conviction states, correctly, that Gallucci was convicted of aggravated assault, N.J.S.A. 2C:12-1(d)(7), but incorrectly designates this offense as a crime of the second-degree instead of the third-degree. See N.J.S.A. 2C:12-1 ("[a]ggravated assault . . . under paragraphs (2), (7), (9) and (10) of subsection b. of this section is a crime of the third-degree").

The lay witnesses included the victim; the person who hosted the informal gathering (the hostess) where the assault occurred; the hostess's upstairs neighbor (the text messenger), who sent text messages to Tylka; and the hostess's longtime friend, who called 911 and reported the assault.

The assault occurred on July 4, 2012, shortly before midnight. The investigation leading to the arrest of defendants continued past midnight into July 5, 2012. According to the victim, until shortly before the July 4 incident, he and Tylka had been in a seven or eight-year relationship. For the six or seven years preceding the incident, they lived together in an apartment in South Amboy. During the year preceding the assault, their relationship deteriorated.

Sometime in 2011, Tylka obtained a restraining order, which prohibited the victim from having contact with her. According to the victim, however, within the week following the issuance of the order, Tylka told him she "had it dropped." He believed her, so he moved back into the South Amboy residence. Nonetheless, the relationship continued to be "on and off" until it ended on July 4, 2012. By "on and off," the victim meant that Tylka would repeatedly break up with him and then "bring [him] back" shortly thereafter.

The victim testified he knew Gallucci and the other co-defendants because they were friends of his neighbors, who lived in the same complex. His relationship with Gallucci and the others had been friendly until shortly before they assaulted him.

A few weeks before the assault, Tylka told the victim she was seeing Gallucci. From that point, the victim and Tylka separated, but the victim continued to live with Tylka as a tenant. Upset about Tylka seeing Gallucci, the victim had a confrontation with Gallucci on the evening of July 3, 2012.

On July 3, upon arriving home from work at approximately 7:00 p.m., the victim found Tylka, Gallucci, and the two co-defendants in front of his South Amboy residence. They were gathered around his porch "doing their pills and dealing drugs in front of the house."[5] The victim told Gallucci: "you got to get the f-away from my house. This can't happen in front of it because it's a school zone and all this." A heated verbal exchange ensued. During the exchange, the victim made vulgar remarks about Tylka's comparative sexual performance with him and Gallucci. The victim made the remarks within earshot of Gallucci's granddaughter.

[5] None of the defendants objected to the admission of the victim's remarks. During cross-examination, one co-defendant questioned the victim about whether he reported the drug activity to the police.

Gallucci told the victim,, "I'll kick your ass." The victim replied, "come on, let's go in the back yard." Nothing happened. Gallucci told the victim, "you're going to get yours." The group left in Tylka's vehicle.

The next evening, July 4, the victim returned home from work at approximately 7:00 p.m., showered, went into town, and bought two beers and a half-pint of vodka. Later that night, he went to the residence of the hostess, where she and her friends had gathered to socialize before watching fireworks. During what the victim estimated to be an hour or two between his arrival and the assault, he consumed the two beers and the vodka while sitting on the hostess's porch. The hostess, her family, and her friends were socializing. By his own account, the victim was "buzzed" and intoxicated. According to the hostess, the victim's speech was noticeably slurred.

One of the hostess's upstairs neighbors, the text messenger, was also Tylka's girlfriend. The text messenger spent some time on or near the hostess's porch with the others. According to the victim, at one point the text messenger used her phone and then went upstairs.

Police recovered texts the text messenger sent to Tylka on July 4 at 10:54, 11:02, 11:06, and 11:51 p.m. The first stated,

"[the victim is] chilling with [the hostess] downstairs."[6] The last stated, "He all over her on porch. LOL." On July 5 at 12:22 a.m., the text messenger texted Tylka, "Yo, that's X-r-a-z-y girl."

The victim testified that approximately five minutes after the text messenger returned upstairs, Tylka's car skidded to a halt at the curb in front of the residence. Defendants and co-defendants came "flying out of the car." As they ran toward the victim, he yelled to the hostess, who had gone inside, to call the police. The victim claimed that in self-defense he threw a punch at Gallucci, who was leading the charge. Someone behind the victim "drop-kicked" him in his lower back and he fell to the ground. After he fell, the assailants kicked him repeatedly and "beat the crap" out of him.

The victim was certain Gallucci's daughter was the person who "drop-kicked" him. The victim also knew all the defendants were kicking him because he "could see right around me." He saw "numerous boots and sneakers" kicking him. Tylka "threw the last kick." The beating lasted for about five minutes, during which the victim heard Gallucci say, "Oh you like to say something in front [of] my granddaughter."

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[6] Although the victim's name was misspelled, no one disputed the texts concerned the victim.

The beating ended when defendants and co-defendants returned to the car. The victim was able to spit a mouth full of blood on the car before they drove off.[7] The next thing he recalled was waking up in the hospital.

The victim sustained a significant injury as a result of the beating. He underwent emergency surgery for a right eye laceration through the eyelid and tear duct. A doctor described in detail the surgery he performed to repair the lacerations. Although the doctor opined the lacerations had healed "pretty well," the victim testified he continued to have follow-up visits with the doctor; he had pain in his eye "[e]very day"; and he still experienced headaches. The victim claimed his vision was bad in his right eye.[8]

During extensive cross-examination, defendants and co-defendants elicited the history of domestic violence involving the victim and Tylka. The first incident occurred on September 20, 2009, when the victim and Tylka argued and police were called to

[7] The victim testified the distance from the hostess's front porch to the street was approximately five feet.

[8] Photographs were taken "all around [the victim's] head, his multiple injuries," and "his chest area where he had some big bruising." There was also bruising on both sides of the victim's abdomen as well as scrapes and scratches on his hands and knees.

their residence. Two years later, on September 30, 2011, the victim was drinking, shoved a curio cabinet, and broke some glass. Tylka filed a complaint. Ultimately, a final restraining order (FRO) was issued against the victim, an order that remained in effect through the July 4, 2012 assault. The victim violated the FRO. While in the county jail, he wrote a letter to a neighbor and asked the neighbor to give the letter's second page to Tylka. In the letter, he told Tylka, "I don't care what you said to police that I said, 'better watch your back.' It's your ass, . . . you know I did not say that." By writing the letter to Tylka, the victim violated the FRO and served time in jail for the violation.

Less than two months after the July 4, 2012 assault, the victim was again charged with violating the restraining order. Lastly, on January 17, 2013, the victim telephoned Tylka, "not knowing it was her number," and said, "we're on the way. The boys are on the way."

Tylka attempted to elicit from various witnesses information about domestic violence incidents involving her and the victim. Through cross-examination of a State's witness, South Amboy police officer James Charmello, Tylka established the officer responded to a report of domestic violence on April 23, 2012. Officer Charmello testified the incident stemmed from an argument between

the victim and Tylka. Officer Charmello also testified that when the April 2012 incident occurred, there was an active temporary restraining order (TRO) against the victim.

When Tylka's attorney asked Officer Charmello to read the basis for the TRO, the court sustained an objection. Defense counsel could not articulate an evidentiary basis for having the officer read the hearsay contained in the TRO. He argued, "I think the jury's entitled to know what the basis is." He also said the officer was "a gentleman who prepares these all the time"; even though the officer had not personally prepared the TRO at issue. When the court sustained the prosecutor's objection to defense counsel eliciting the hearsay information from Officer Charmello, defense counsel did not respond by citing to a rule of evidence. Rather, he continued to insist the jury was "entitled to know why it was issued."

The attorney later apologized to the court: "Judge, . . . I apologize about before. I realize that . . . witness was not the proper witness to discuss . . . the restraining order with. I subpoenaed those witnesses." During the ensuing colloquy, defense counsel again apologized: "I am apologizing, Judge, because I didn't bring it in through the proper witness." Counsel apologized a third time: "I just wanted to say, . . . I apologize. It was

not the right witness. When the right witness comes, we'll deal with it."[9]

The hostess testified for the State. Although the assault took place in front of her residence, she did not see how it started because she had gone into her house. Her longtime friend, the 911 caller, walked out of the house, and the hostess heard her yell. The hostess walked out and saw the victim on the sidewalk. One of the assailants was smashing his head into the concrete. The hostess turned and pushed her children back into the house. She, too, retreated inside the house, where she remained until the assailants were gone and the police arrived. During this time, the hostess's longtime friend called the police. When the hostess went outside a second time, the victim was lying "longways" at the bottom of her stairs on the sidewalk. His head was covered in blood and his face appeared to be damaged.

The State played the recording of the hostess's longtime friend's 911 call. The transcript reads:

> Officer: 911, where's your emergency?
>
> Female: [Gives Address].
>
> Officer: What is the problem . . .?

[9] In her case in chief, Tylka presented the testimony of two officers who testified to three incidents involving domestic violence and the FRO.

Female: Five guys beating one guy . . . they're going to kill him . . . . there's blood everywhere. . . you gotta send an ambulance.

Officer: [Announces location], fight in progress, [repeats location].

Female: Oh my God . . .

Officer: [Repeats address].

Female: . . . he's dead.

Officer: [repeats address] three individuals on one . . .

Female: Five . . .

Officer: [Repeats address]

Female: Five guys.

Second Officer: Received.

. . . .

Officer: Just relax. Just relax, police officers will be there in a second . . . .

Female: Yes, the cops are here . . .

. . . .

The first officer to arrive was South Amboy Sergeant Richard Wojaczyk. Three women on the porch pointed to the victim, who was lying on the ground and appeared to be badly beaten. His face was

starting to swell, his head had numerous open cuts, and his right eye seemed to be swelling very quickly. The sergeant began rendering first aid until a first aid squad arrived. The squad members attended to the victim and drove him to a medical center.

Sergeant Wojaczyk and other officers learned the identity of certain suspects as well as the make and model of Tylka's car. Officers did not find the car at Tylka's residence, but later located it across the street from Gallucci's daughter's home. The officers knocked on the daughter's door and rang the bell for approximately ten to twenty minutes, but no one answered. The officers knew someone was in the residence because they could see a silhouette walking back-and-forth in front of a window. They eventually left the home and the area at approximately 2:00 a.m.

Tylka called the South Amboy police station at approximately 3:00 a.m. After verifying she had reached South Amboy, she told Sergeant Wojaczyk, who by then was staffing the desk:

> Before, I noticed some people outside. I have a restraining order against [the victim]. . . They seemed to look like they had an altercation. I got in my car. It was with a couple of black guys. I got in my car, I left. I went to Sayreville and I had been there since. I want to go home now and I want to make sure I don't have any problems . . .

Tylka also told the sergeant she heard the victim was in the hospital, and "[the police] are looking for me and I don't know why." When the sergeant told Tylka to come down and clear things up, Tylka declined. She said she did not want to get in trouble for something she did not do and that she intended to get a lawyer.

Later in the morning of July 5, at approximately 4:18 a.m., patrol officers stopped Tylka, who was driving her car, and arrested her and Gallucci, her passenger. The arresting officers observed no injuries to either defendant. Following her arrest, Tylka consented to a police search of her car. The officers took samples of blood splatter from different locations on the vehicle. An officer swabbed the victim's cheek for DNA evidence. The State established through forensic evidence and expert testimony that the blood splatter came from the victim.

Tylka called two witnesses in her defense: the officers who responded to her complaints of domestic violence on September 30, 2011, August 13, 2012, and January 18, 2013. The officers testified to the details of their involvement, according to their incident reports.

Following the foregoing testimony, the court inquired as to whether Tylka would testify. Her attorney said he first needed an advance ruling. Tylka intended to testify about the domestic

violence incident that led to the restraining order, but not about the assault. For that reason, her attorney made an application to bar any reference or cross-examination to her statements regarding the assault because she would not be testifying as to those events. Specifically, defense counsel informed the court: "Now if you limited cross just to that very narrow direct, you know, I'd like to get a ruling on that. If you're going to open it up to everything, then I know how to advise my client."

An exchange followed between the court and defense counsel about the basis of the court's previous ruling during Officer Charmello's testimony. Nonetheless, in reply to counsel's inquiry, the court stated: "So if you want to get into this, I am opening up cross-examination because this is what you are trying to do, you are trying to sneak this in." Counsel objected to the characterization. After an additional exchange, the court said, "the answer is no. [I]f she testifies, that's opened to everything." Counsel thanked the court, stating, "that's what I wanted to clarify."

Neither Tylka, Gallucci's daughter, nor Gallucci testified. The fourth co-defendant testified and denied he was present during the assault. He claimed he stayed home that night. The jury found him not guilty. As previously noted, the jury found

Gallucci, Tylka, and Gallucci's daughter guilty of third-degree aggravated assault.

II.

On appeal, Gallucci raises the following points:

> I. THE TRIAL JUDGE IMPROPERLY PRECLUDED DEFENSE COUNSEL FROM OFFERING EVIDENCE THAT [THE VICTIM] HAD BEHAVED VIOLENTLY TOWARD TYLKA, AND THREATENED TO HARM HER AND ANYONE SHE DATED. THE JUDGE'S 404(B) INSTRUCTION WAS ALSO INCOMPLETE.
>
> II. THE TRIAL COURT ERRED BY NOT ISSUING A CLAWANS INSTRUCTION AFTER THE STATE FAILED TO CALL EYEWITNESSES [THE TEXT MESSENGER AND THE 911 CALLER] TO TESTIFY AT TRIAL. (Not Raised Below).
>
> III. THE PROSECUTOR IMPROPERLY BOLSTERED [THE 911 CALLER'S] 911 CALL BY TELLING THE JURY IN SUMMATION THAT PRESENT-SENSE IMPRESSIONS AND EXCITED UTTERANCES ARE MORE RELIABLE, AND ALSO CAPITALIZED ON THE COURT'S FAULTY 404(B) RULING TO ARGUE THAT THERE WAS NO EVIDENCE THAT [THE VICTIM] HAD PHYSICALLY ABUSED TYLKA. (NOT RAISED BELOW).
>
> a. The prosecutor's discussion in summation regarding the reliability of present-sense impressions and excited utterances improperly bolstered [the 911 caller's] 911 call.
>
> b. the prosecutor misled the jury by arguing that there was not prior violence between [the victim] and Tylka, contrary to evidence that was excluded at trial.
>
> c. the prosecutorial misconduct was plain error.

IV. THE TRIAL COURT ERRED IN FAILING TO VOIR DIRE, OR EVEN ADMONISH, THE JURORS WHO VIOLATED THEIR OATH BY DISCLOSING DELIBERATIONS AND BULLYING JUROR NO. 1, AND IN FAILING TO INSTRUCT THE JURY THAT JUROR NO. 1 WAS NOT REQUIRED TO CHANGE HIS MIND IN ORDER TO ACHIEVE UNANIMITY. THIS ERROR WAS COMPOUNDED BY THE JUDGE REPEATEDLY QUESTIONING ONLY JUROR NO. 1 ABOUT HIS ABILITY TO BE FAIR AND IMPARTIAL, AND INSTRUCTING HIM TO "COMPARTMENTALIZE" HIS LIFE EXPERIENCE. (PARTIALLY RAISED BELOW).

V. THE CUMULATIVE EFFECT OF THE AFOREMENTIONED ERRORS DENIED GALLUCCI A FAIR TRIAL.

Tylka raises these points:

I. THE TRIAL COURT ERRED IN ADMITTING [THE 911 CALLER] 911 CALL AND [THE TEXT MESSENGER'S] TEXT MESSAGES INTO EVIDENCE OVER DEFENDANT'S OBJECTIONS THAT THE 911 CALL AND MS. WYATT'S TEXT MESSAGES WERE HEARSAY STATEMENTS WHICH DEFENDANT WAS UNABLE TO SUBJECT TO CROSS-EXAMINATION BECAUSE [THE 911 CALLER] AND [THE TEXT MESSENGER] DID NOT TESTIFY AT TRIAL.

II. THE ASSISTANT PROSECUTOR IMPROPERLY COMMENTED ON MS. TYLKA'S SILENCE ON THE ISSUE OF SELF DEFENSE IN HER 911 CALL TO POLICE ON THE NIGHT OF HER ARREST.

III. THE TRIAL COURT ERRED IN CIRCUMSCRIBING DEFENDANT'S PROOFS OF [THE VICTIM'S] VIOLENT PROPENSITIES AND THE ASSISTANT PROSECUTOR TOOK IMPROPER ADVANTAGE OF THE ERROR BY SUGGESTING IN SUMMATION THAT THERE WAS NO EVIDENCE THAT [THE VICTIM] WAS ABUSIVE AND VIOLENT TOWARDS MS. TYLKA.

IV. THE TRIAL COURT IMPROPERLY INSTRUCTED AN INDIVIDUAL JUROR REGARDING ISSUES RAISED IN DELIBERATION AND INSTRUCTED HIM TO "COMPARTMENTALIZE" HIS LIFE EXPERIENCE AND INCORRECTLY INSTRUCTED THE ENTIRE JURY ON THEIR FURTHER DELIBERATIONS. (NOT RAISED BELOW).

V. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY TO DISREGARD [THE VICTIM'S] TESTIMONY THAT MS. TYLKA HAD BEEN SELLING PILLS IN A SCHOOL ZONE. (NOT RAISED BELOW).

VI. THE TRIAL COURT'S ERRONEOUS EXCUSAL OF [A] JUROR . . . DENIED DEFENDANT HER RIGHT TO TRIAL BY AN IMPARTIAL JURY AND REQUIRES THAT DEFENDANT BE ACCORDED A NEW TRIAL.

VII. CUMULATIVE ERROR DEPRIVED DEFENDANT OF A FAIR TRIAL AND REQUIRES THAT DEFENDANT'S CONVICTION AND SENTENCE BE REVERSED.

VIII. DEFENDANT'S SENTENCE TO FIVE YEARS PROBATION WITH A SUSPENDED TERM OF 364 DAYS IN THE COUNTY JAIL WAS EXCESSIVE AND BASED ON THE COURT'S ERRONEOUS REJECTION OF FACTOR 8 (CIRCUMSTANCES UNLIKELY TO RECUR) AND UNSUPPORTED FINDING OF AGGRAVATING FACTOR 6 (EXTENT OF DEFENDANT'S PRIOR RECORD).

We begin our discussion with defendants' contentions concerning the victim's prior bad acts. Gallucci contends in his first point, and Tylka in her third, that the trial court precluded defendants from offering certain evidence the victim had behaved violently toward Tylka, and unduly circumscribed the presentation of other such evidence. Gallucci adds that the trial court's instruction concerning the victim's prior bad acts was incomplete.

Tylka adds that the prosecutor improperly commented in summation that there was no evidence the victim was abusive and violent towards Tylka. We find no merit in these arguments.

"[A] trial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). Here, defendants' contentions have no factual support. Defendants cite the attempt to elicit the contents of a TRO through Officer Charmello as support for their argument. They overlook the reason the court sustained the State's objection as well as defense counsel's own acknowledgment he attempted to elicit the testimony through an improper witness. Later, Tylka presented the testimony of two police officers who related what Tylka told them about certain domestic violence incidents.

Gallucci's contention the court unduly restricted Tylka from testifying about prior acts of domestic violence is entirely devoid of merit. Tylka wanted to testify about prior acts of domestic violence but avoid cross-examination about the incident. Her attorney asked the court for a preliminary ruling on the issue. Although the trial court made some statements about Tylka's motive and intent in requesting the ruling, the court ultimately ruled

Tylka would be subject to cross-examination on the assault. She declined to testify.

Tylka's dilemma was understandable, but not one calling for judicial relief. "It is generally accepted that one who provokes or initiates an assault cannot escape criminal liability by invoking self-defense as a defense to a prosecution arising from the injury done to another. The right to self-defense is only available to one who is without fault." State v. Rivers, 252 N.J. Super. 142, 149 (App. Div. 1991) (citation omitted). It would have conceivably been difficult for Tylka to explain how she acted in self-defense when she, Gallucci, and others decided, near midnight, to drive to the hostess's residence where they had not been invited, exit the car, charge the victim, and pummel him so severely he required hospitalization and surgery. In any event, the record reflects that Tylka declined to testify after the court ruled she would be subject to cross-examination about the assault. The trial court did not abuse its discretion in so ruling. State v. Weaver, 219 N.J. 131, 149 (2014).

We also find unavailing Gallucci's argument that the trial court's instruction to the jury concerning the domestic violence incidents was incomplete. Defendants approved both the content and placement of the instruction before it was given, and neither

defendant objected to the instruction after it was given.[10] We find no error in the court's instruction.

Lastly, we reject defendants' arguments that the prosecutor misled the jury by arguing there was no prior violence between the victim and Tylka, "contrary to evidence that was excluded at trial." Defendants offered no competent evidence at trial that the victim had repeatedly assaulted Tylka. When Tylka declined to testify, she made no specific proffer of the details of her proposed testimony. Thus, contrary to defendants' assertions, there was no undisputed, excluded evidence that the victim had physically abused Tylka.

Moreover, in his closing remarks, Tylka's attorney told the jury, "[the victim] is a guy that Marc Gallucci knows wants to fight him. [Marc] knows that [the victim] likes to beat up Stephanie Tylka. Marc knows these two facts and that's what makes it reasonable for him to use force." No evidence presented during the lengthy trial established directly or by reasonable inference either that the victim liked to beat up Tylka or that Gallucci

[10] We also note, as to Gallucci, our Supreme Court's caution that "[o]nly when the defendant has actual knowledge of the specific acts to which a witness testifies is specific-acts testimony probative of the defendant's reasonable belief." State v. Jenewicz, 193 N.J. 440, 463 (2008) (citation omitted).

knew the victim liked to beat up Tylka. The prosecutor's pointing out that no evidence established that the victim had been physically violent was a fair comment in light of defense misconduct in asserting facts having no basis in the record.

III.

A.

In Tylka's first point, she argues the trial court committed reversible error by admitting the content of the hostess's longtime friend's 911 call to the police, and by admitting the content of the text messages the text messenger sent to her. In his third point, Gallucci argues the prosecutor's closing remarks emphasizing the reliability of present sense impressions and excited utterances improperly bolstered the content of the 911 call.

Preliminarily, we reject Tylka's contention that introduction of the 911 calls violated her Sixth Amendment right to confront witnesses. The principles embodied in the Sixth Amendment's Confrontation Clause preclude the admission against a defendant of "[t]estimonial statements of witnesses absent from trial," unless "the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d

177, 197 (2004). "Testimonial" statements often include those made during structured police interrogation. Id. at 69, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203. Nonetheless:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.
>
> [Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224, 237 (2006).]

Generally, "at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." Id. at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240 (alterations in original). That is particularly so when "any reasonable listener would recognize [the 911 caller] was facing an ongoing emergency." Ibid. If, when viewed objectively, the nature of the colloquy between the 911 caller and the person called is such "that the elicited statements [are] necessary to be able to resolve the present

emergency, rather than simply to learn . . . what had happened in the past," the content of the call is not testimonial. Ibid.

Such is the case here. Any reasonable listener would recognize the hostess's longtime friend, who placed the 911 call, was facing an ongoing emergency. The call's sole purpose was to describe present facts requiring police assistance, as in Davis. Moreover, the 911 dispatcher's questions were intended to elicit information needed to dispatch police to the scene and inform them of the circumstances. Nothing in the dispatcher's questions suggests he was asking questions to learn what had happened in the past to preserve testimony for trial.[11]

Similarly, we reject Tylka's contention that the content of the 911 call was inadmissible under New Jersey's evidence rules. The trial court did not make a specific ruling as to which hearsay exception applied to the 911 call. Rather, the trial court appeared to have been satisfied that the content of the call was admissible once the recording of the call was authenticated.

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[11] Our Supreme Court has interpreted the New Jersey Constitution's Confrontation Clause, N.J. Const., Art. I, ¶ 10, consistently with the United States Supreme Court's interpretation of the Sixth Amendment's Confrontation Clause. State ex rel. A.R., 447 N.J. Super. 485, 506 n.9 (App. Div. 2016) (citing State v. Roach, 219 N.J. 58, 74 (2014); State v. Cabbell, 207 N.J. 311, 328 n.11 (2011)), certif. granted, ____ N.J. ____ (2017).

Nonetheless, "[w]e are free to affirm the trial court's decision on grounds different from those relied upon by the trial court." State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (citing Isko v. Planning Bd. of Livington, 51 N.J. 162, 175 (1968) (noting "[i]t is a commonplace of appellate review that if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance")).

The State contends the record establishes the 911 caller's statement was admissible either as a present sense impression or an excited utterance. We agree. A present sense impression is "[a] statement of observation, description or explanation of an event or condition made while or immediately after the declarant was perceiving the event or condition and without opportunity to deliberate or fabricate." N.J.R.E. 803(c)(1). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate." N.J.R.E. 803(c)(2).

Here, the hostess's testimony and the content of the 911 statements, which could be heard on the call's recording, established the elements of both hearsay exceptions. These

exceptions apply "[w]hether or not the declarant is available as a witness[.]" N.J.R.E. 803(c).

Tylka argues that the hostess's longtime friend "was no longer in a position to observe what was occurring" when she made the 911 call. Tylka cites the hostess's testimony that her longtime friend was in the house when she was talking during the 911 call. That fact, in and of itself, does not negate the longtime friend's ability to peer outside at what was going on.

Tylka further speculates that the hostess's longtime friend was reciting "events previously observed by or described to her rather [than] a contemporaneous description of what was occurring." Nothing in the record, however, supports Tylka's supposition that the longtime friend was reporting events related to her by others. To the contrary, the evidence establishes there was insufficient time for this to have occurred. Moreover, even if the longtime friend were not reporting events she was contemporaneously witnessing, the present sense impression hearsay exception applies when the statement is "of an event or condition made . . . immediately after the declarant was perceiving the event or condition and without opportunity to deliberate or fabricate." N.J.R.E. 803(c)(1). The record amply established the elements of this hearsay exception.

Even if the present sense impression hearsay exception is inapplicable, the hostess's longtime friend's 911 statements were admissible as an excited utterance. The severe beating of the victim qualified as a startling event and it is readily apparent from the content of the 911 recorded statements that the longtime friend remained under the excitement caused by the beating. The hostess's testimony made clear her friend placed the 911 call without opportunity to deliberate or fabricate. Defendants offered no evidence to the contrary.

Gallucci argues in his third point that the prosecutor engaged in misconduct when he emphasized in summation the reliability of present sense impressions and excited utterances. The prosecutor stated:

> Now this 911 call - - we beat a path to sidebar many times during this. A lot of the objections that were made were hearsay objections and a lot of those were sustained. A 911 call actually is an exception to the - - it can be played as an exception to the hearsay rule, a present sense impression, and what that means is that this information being provided by the police contemporaneous with the incident. There's no time that would allow somebody to fabricate, to think about what was going on and - - and maybe say something that wasn't true. And when you listen to this one call, when you hear the emotion in the woman's voice who's talking to the police, you can tell that this is ongoing at the time that she's speaking to the police.

> Okay? She's not feigning her - - her horror as to what happens here. In fact a number of times she says, he's dead, they're going to kill him.

Immediately after making these comments, the prosecutor emphasized the 911 caller had identified herself and then made statements during the call entirely consistent with the victim's version of how the assailants attacked him.

Although we find no impropriety in the prosecutor emphasizing that present sense impressions and excited utterances are reliable, the prosecutor's explanation to the jury of hearsay and the basis for the court's admitting the statements was inappropriate. The prosecutor is entitled to wide latitude in his summation provided "he stays within the evidence and the legitimate inferences therefrom[.]" State v. Wakefield, 190 N.J. 397, 457 (2007) (citations omitted). Objections made during trial, sidebar discussions, and the basis of a court's rulings are not evidence. The prosecutor had no business commenting on such legal matters in summation, particularly the basis of the trial court's rulings on evidence. Such comments tend to suggest the evidence should perhaps be given greater weight than other evidence in view of the trial court's sanctioning its admissibility.

Nonetheless, the prosecutor's remarks in this case were not "so egregious that [they] deprived . . . defendant of a fair trial[.]" State v. Smith, 212 N.J. 365, 404 (2012) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). The fleeting remarks were made during the course of a lengthy trial. Defendants lodged no objection to the remarks. Such an omission generally signifies that the remarks were not prejudicial. State v. Ramseur, 106 N.J. 123, 323 (1987), cert. denied, sub nom., Ramseur v. Beyer, 508 U.S. 947, 113 S. Ct. 2433, 124 L. Ed. 2d 653 (1993). Moreover, in its charge to the jury, the court instructed that its rulings on the admissibility of evidence were not evidence, an expression of the merits of the case, or an indication evidence should be accepted by the jury. In addition, the court instructed the jury the comments the attorneys made in their closing arguments were not evidence. Considering all these circumstances, we cannot conclude the prosecutor's improper remarks "substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Smith, 167 N.J. 158, 181-82 (2001).

B.

We are also unpersuaded by Tylka's argument concerning the text messages. The text messages were not testimonial and did not

violate the Sixth Amendment's Confrontation Clause. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." Ohio v. Clark, ____ U.S. ____, ____, 135 S. Ct. 2173, 2182, 192 L. Ed. 2d 306, 317 (2015). Moreover, the text messages were not hearsay because they were not "offered in evidence to prove the truth of the matter asserted[,]" N.J.R.E. 801(c), but rather to show how defendants knew where the victim was located, and perhaps what prompted their actions.

Tylka argues the text messenger's opinion that Tylka had done something "X r a z y" left the jury to speculate about the messenger's intention in sending the message. Additionally, Tylka contends the assistant prosecutor's argument concerning the last text suggested it was substantive evidence of her guilt.

The text messenger's intention in sending the sixth text had little, if any, probative value. To the extent the text could be interpreted to demonstrate, substantively, Tylka's presence and participation in the assault, its admission was harmless. R. 2:10-2. Those facts were established by independent evidence and Tylka never denied them. Rather, she asserted self-defense. In

view of these considerations, her argument the sixth text message was unduly prejudicial is meritless.

IV.

Tylka next contends "the assistant prosecutor improperly commented on [her] silence on the issue of self[-]defense in her 911 call to police on the night of her arrest." Tylka asserts "[h]er call was not an attempt to give an account of what occurred, [rather,] she was seeking clarification of whether or not she was wanted for questioning."

Tylka's argument takes the prosecutor's remarks out of context, mischaracterizes his summation as a comment on her silence, and misstates that her call was not an attempt to give an account of what occurred, but rather an attempt to clarify whether she was wanted for questioning.

It is true the prosecutor commented on Tylka's failure to mention self-defense during the 911 call. The prosecutor said, among other things:

> The funny thing is, we don't hear that in this phone call. We don't hear anything about self[-]defense in this phone call. We hear a denial of any involvement at all. And this isn't the police questioning her. This is a phone call made to the police. This is initiated by Ms. Tylka. This is of her own accord and that is what she tells the police. . . . [a]nd then she goes on, before I noticed

> some people outside, I have a restraining order against [the victim]. They seem to look like they had an altercation, I got in my car, it was with a couple of black guys, I got in my car and left, I went to Sayreville and I've been there since, I want to go home now and I want to make sure I don't have any problems.
>
> [(Emphasis added)].

After emphasizing that defendants claimed they acted in self-defense and the victim was the aggressor, the prosecutor continued:

> But this is what she said. It seemed to look like they had an altercation. Right? Not her. Seemingly she's throwing in [the victim] because she talks about the restraining order against [him], but, you know, in this way that it reads, the only conclusion that you can reasonably draw listening to this — and, again, you don't have to accept — you have it to listen to yourselves. But the only conclusion that you can draw from this is that . . . Ms. Tylka was reporting to the police four hours after the incident and [the victim] had an altercation with two black guys. I would suggest that is very inconsistent with the claim of self[-]defense, that is, you need to defend yourself, if you need to use force against someone else and someone else is using unlawful force, you are, in a sense, a victim, and if you had the right and the need to use self[-]defense, you would proclaim as loudly as possible[.]

In Anderson v. Charles, 447 U.S. 404, 405-06, 100 S. Ct. 2180, 2180-81, 65 L. Ed. 2d 222, 224-25 (1980), at trial, the prosecutor cross-examined the defendant with a prior inconsistent statement. The Court held that the prohibition against cross-

examining a defendant on post-Miranda[12] silence "does not apply to cross-examination that merely inquires into prior inconsistent statements." Id. at 408, 100 S. Ct. at 2182, 65 L. Ed. 2d at 226. The Court determined the cross-examination "ma[de] no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of the statements, the defendant has not remained silent at all." Ibid. (citations omitted). Explaining that "two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version[,]" the Court declined to adopt such a "formalistic understanding of 'silence[.]'" Id. at 409, 100 S. Ct. at 2182, 65 L. Ed. 2d at 227.

In State v. Tucker, 190 N.J. 183, 189 (2007), our Supreme Court stated, "[w]e are in accord with the reasoning in Anderson. A defendant's right to remain silent is not violated when the State cross-examines a defendant on differences between a post-Miranda statement and testimony at trial." Our Supreme Court explained:

> [w]hen a defendant agrees to give a statement, he or she does not remain silent, but has

[12] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> spoken. Thus, we conclude that it is not an infringement of a defendant's right to remain silent for the State to point out differences in the defendant's testimony at trial and his or her statements that were freely given.
>
> [Ibid. (citations omitted).]

In Tucker, though defendant neither testified nor presented witnesses, the Court found the fact the defendant did not testify inconsequential.

> Although the present case does not involve inconsistencies between a statement and defendant's testimony at trial, it does involve inconsistencies in several statements that were freely given and admitted into evidence. We find no meaningful distinction between the two situations that would justify a different result. In both instances, a defendant has waived the right to remain silent and freely spoken.
>
> [Id. at 190.]

Here, the prosecutor did not comment on Tylka's silence. Rather, he commented on a statement in which Tylka blamed the victim's beating on two black men. We find no legally significant distinction between this situation and that in Tucker. By commenting on a statement Tylka volunteered to police during a

telephone call she initiated, the prosecutor did not violate Tylka's right to remain silent.[13]

V.

Defendants next contend — in their respective fourth points — the court mishandled a situation involving a juror. During deliberations, the jury sent the following note regarding Juror No. 1:

> Please discuss with Juror [No. 1]. He has a personal experience of being assaulted by a group of individuals and feels [the victim] got what he desires [sic]. [Juror No. 1] also has members of his family with a history of drinking. We think that [Juror No. 1] was not honest with you during the initial jury interview. We are requesting the alternate juror.

Following a discussion with counsel, in which defendants' attorneys said they preferred the jurors continue deliberating, the court conducted the following colloquy with Juror No. 1:

> The Court: What happened is . . . we received a note from one of the jurors that indicated that there's some stuff that went on in your background that might be impacting in some way, and I don't know, you know, when you're deliberating. Okay. So my question to you is really kind of simple. Can you be fair? Can you be objective in deciding the case.

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[13] For the same reason, we find Gallucci's supplemental argument — the State's improper comment on Tylka's silence violated his right to due process — to be without merit.

Juror No. 1: Absolutely. Sure.

The Court: Can you put aside any personal experiences that might in any way impact on this case, and decide the case based upon the facts and the law as [the trial judge] has given you?[14] Can you do that?

Juror No. 1: Yes. But life experiences played a part in decision making.

The Court: [A]bsolutely. But what you have to do is compartmentalize . . . and say here's the law. And [the trial judge] has given it to you. Here's the facts. We don't have any set of facts that . . . talk about, for lack of a better way of putting it so, you know, somebody deserving anything, or somebody putting them self in a bad position. The issue is simply put, if there's self-defense, great. You look at the law. If there's not, that's also fine. You look at the law. And if you have any questions, Judge Mulvihill has sent in instructions on the law. Right?

Juror No. 1: Uh-huh.

The Court: And regardless of your personal feelings, follow the law and apply the law to the facts as you find those facts to be. A simple question. Can you do it?

Juror No. 1: Can I? Yes. But two reasonable people equally informed some would disagree. And . . . . I'm entitled to my opinion - -

The Court: You are.

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[14] The trial judge was temporarily unavailable. Another judge was sitting in for him during deliberations.

> Juror No. 1: - - as far as the other eleven.
> The Court: You absolutely are. But the question is, can you listen to everybody else, and don't give up something you believe simply to agree with them; I don't want you to do that, but listen objectively, and if you remain firm in your conviction, then you continue believing whatever it is you believe, but can you be fair and objective[,] period?
>
> Juror No. 1: I thought I've been fair and objective.
>
> The Court: Okay. Awesome. Then go downstairs. Okay. You know what, why don't you go . . . in one of the other rooms. Let me ask the lawyers if they have anything that they want to ask you?
>
> Juror No. 1: Sure.

After excusing Juror No. 1, the court stated it would do the "read back" the jury had requested and "simply explain to them to listen to one another and be objective in their analysis and do no more than that." Before the court was able to address the jury, Juror No. 1 requested to speak with the judge again. Juror No. 1 requested that the court replace him with an alternate. The following colloquy then took place:

> The Court: Listen. Listen. Our jury system is such that we expect there to be deliberations. And sometimes I will tell you, . . . there are heated deliberations. I've been in cases where, you know, I've sent a sheriff's officer in to say, hey, calm down, folks. I mean, the question is, can you be fair and objective?

Juror No. 1: That's my problem I am fair and objective and that . . .

The Court: Well, listen. Listen. If you can be fair and objective, then I'm going to ask you to stay. Okay. I cannot permit jurors to be bullied. I cannot permit jurors to be, you know, intimidated into not sitting. And the bottom line is, when everybody comes back, I'll explain that everybody is entitled to their opinion and should have their opinion. All I ask each of you to do, and that includes you and everybody else, be fair and open-minded enough so if what somebody says makes sense to you, well, then take it as something that makes sense. And if it alters your opinion, great. If it doesn't, then that's also fine.

Juror No. 1: Right.

The Court: And you'll notice I'm doing nothing about - - and I'm not - - not talking about deliberations. I'm not telling you whether anybody is right or wrong. All I want is a fair, open-minded discussion. And if you folks can't agree, I'm good with that.

Juror No. 1: I would feel more comfortable if the alternate would take my spot.

The Court: Well, I can't release you simply because you feel uncomfortable. Okay. If you're telling me you can't be fair, you can't be impartial, I can talk to counsel about that. But I - -

Juror No. 1: My problem is I would be fair and impartial.

The Court: Well, - -

Juror No. 1: That's my problem.

The Court: I cannot release you at this time.

Juror No. 1: Okay.

The Court: Okay. I understand the difficulty. All I ask you to be is honest and open. And, you know, as I said, listen to the other folks. And I trust that they will listen to you, and you'll be objective in your analysis. Okay. I can't ask for anymore.

Juror No. 1: Right.

The Court: During the voir dire questioning you were asked a number of questions, for example. Were you truthful during those - -
Juror No. 1: Yes.

The Court: - - those answers?

Juror No. 1: Absolutely.

The Court: All right. Then - - then I don't really see that there's an issue. All right. So let me send you downstairs. Don't talk about the case. We'll call you back. All right?

When the jury returned for the read back, the judge instructed the jury it must "be fair and open-minded, be open to other people's positions, so that each of you can hear the positions of the others." The court reiterated to the jury to keep an open mind and to "not advocate[] for a position."

Gallucci contends for the first time on appeal the trial court committed several errors: it failed to admonish the jurors who wrote the note for disclosing information about their deliberations; it failed to give the entire model jury charge on further deliberations stating that jurors should not change their opinion simply to return a unanimous verdict; and it coerced Juror No. 1 by telling him to compartmentalize his life experiences. Tylka makes essentially the same arguments. We disagree with the contentions and with the assertions that these alleged errors require a new trial.

First, there is no evidence that after sending the note concerning Juror No. 1 to the judge, the jurors disclosed anything further about their deliberations. Gallucci demonstrates no prejudice resulting from the court's failure to admonish the jury.

Next, Gallucci's concern that Juror No. 1 may have been bullied into changing his mind about the verdict – because the trial court did not instruct the jury as a whole they should not change their opinions simply to return a unanimous verdict – is unwarranted speculation. The court emphasized to Juror No. 1 not only that he was entitled to his opinion, but he was not to "give up something you believe simply to agree with them; I don't want you to do that, but listen objectively and if you remain firm in

your conviction then you continue believing whatever it is you believe." In view of the court's instruction to Juror No. 1, it is difficult to discern how Juror No. 1 would have been unaware that he should not vote with the other jurors simply to reach a verdict.

Gallucci argues the court erred by telling Juror No. 1 to compartmentalize his life experience. The argument is without sufficient merit to warrant discussion. R. 2:11-3(e)(2).

The trial court was required to balance delicate interests when the situation arose with Juror No. 1. "Any inquiry to determine whether a deliberating juror should be removed and replaced with an alternate must be carefully circumscribed to protect the confidentiality of jury communications." State v. Musa, 222 N.J. 554, 568 (2015) (citation omitted). Moreover, "[t]rial courts do not have unbridled discretion to reconstitute deliberating juries in the face of a jury crisis. On the contrary, the removal rule may be used only in limited circumstances." State v. Hightower, 146 N.J. 239, 253 (1996). "[T]he essence of jury deliberations is the joint or collective exchange of views among individual jurors. It is therefore necessary to structure a process and create an environment so that the mutual or collective nature of the jury's deliberations is preserved and remains intact

until final determination is reached." State v. Corsaro, 107 N.J. 339, 349 (1987).

Here, the trial court carefully struck the balance between these competing considerations. We find no error in the manner in which the court exercised its discretion.

VI.

Defendant Tylka's and defendant Gallucci's remaining arguments concerning the trial are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We add only the following comments.

In his second point, Gallucci argues the court should have given a Clawans charge concerning the hostess's longtime friend and the text messenger, even though none was requested. The argument is devoid of merit. Because Gallucci did not raise the issue at trial, the trial court had no opportunity to analyze whether the charge should have been given. State v. Hill, 199 N.J. 545, 560 (2009). The trial court's involvement is critical. Id. at 561. For that reason, rarely, if ever, will such an argument be grounds for reversal on appeal. Moreover, as Hill instructs, adverse witness instructions are now generally disfavored. Id. at 566.

In any event, it is not apparent from the record that either of the witnesses at issue was available to testify. In fact, the record suggests otherwise. There was evidence the hostess's longtime friend, who made the 911 call, was in another state and severely ill. A co-defendant's attorney, who wanted to have the text messenger testify, was unable to locate the text messenger. Considering all these circumstances, the court's not giving, sua sponte, an adverse inference charge, was not error, let alone plain error. R. 2:10-2; State v. Macon, 57 N.J. 325, 335-36 (1971).

In her fifth point, Tylka contends the court should have instructed the jury, sua sponte, to disregard the victim's comment that she and others were selling drugs in front of her residence. The omission, if error, was not plain error. R. 2:10-2. One defendant cross-examined the victim on the issue, albeit briefly. Defendant's claims of self-defense and defense of another were relatively weak, given the strong evidence they were the aggressors and the extent of the beating. More significantly, the allegation about dealing drugs involved criminal activity unrelated in any respect to either the crimes with which defendants were charged or the defense of self-defense. Thus, we cannot conclude the omission to give a curative instruction, particularly in the

absence of a request to do so, was clearly capable of producing an unjust result. Ibid.

In her sixth point, Tylka contends that during jury selection, before the jury was sworn, the trial court abused its discretion by excusing a juror. The court excused the juror for two reasons: first, the juror volunteered that his grandfather was in-home hospice, and if he passed, the juror would have to attend the services. During the sidebar conference in which the juror disclosed the issue concerning his grandfather, the judge pressed him on whether he faced an economic hardship because he would not be paid for overtime. After the court pressed the issue and asked a leading question, "wouldn't that be like a hardship for you," the juror replied, "[y]eah, I guess it would." The court excused the juror for both reasons.

We can discern from the record no abuse of the trial court's sound discretion in dismissing the juror due to his grandfather's condition. Tylka does not articulate how the court abused its discretion by excusing the juror due to his grandfather's condition. We find no such error. State v. Mance, 300 N.J. Super. 37, 55 (App. Div. 1997).

Although Tylka does not explain how excusing a juror due to a relative's possible impending death is an abuse of discretion,

she contends the court coerced the juror into saying he had a financial hardship. We disagree. "When the issue of financial hardship is brought into focus at an early stage of a criminal proceeding, the balancing of interests allows greater flexibility favoring the prospective juror[.]" State v. Williams, 171 N.J. 151, 164-65 (2002) (citations omitted). In any event, given defendant's inability to articulate any cognizable argument concerning the trial court's excusing the juror due to his grandfather's illness, any error in the exercise of the court's discretion in excusing the juror on the alternate ground was harmless beyond a reasonable doubt. R. 2:10-2.

VII.

In her eighth and final point, Tylka contends her five-year probationary sentence, with a suspended term of 364 days in the county jail, is excessive. Our review of the record reveals the court's findings of aggravating and mitigating factors are supported by the record, and the court followed the sentencing guidelines in New Jersey's Code of Criminal Justice. The sentence does not "shock the judicial conscience" in light of the facts of the case. State v. Roth, 95 N.J. 334, 364-65 (1984). Accordingly, we find no basis for reversing the trial court's sentencing discretion.

Defendants' convictions and sentences are affirmed. The matter is remanded to correct Gallucci's judgment of conviction.