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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0060-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN R. RAMIREZ, a/k/a JUAN  
RAMIREZ, JOHN R. IREZ, JUAN  
R. RAMIREZ, and BLESSED JOHN  
JOHN,

Defendant-Appellant.

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Submitted October 6, 2016 – Decided January 12, 2018

Before Judges Fuentes, Carroll, and Gooden  
Brown.

On appeal from Superior Court of New Jersey,  
Law Division, Cumberland County, Indictment  
No. 13-07-0593.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Tamar Y. Lerer, Assistant  
Deputy Public Defender, of counsel and on  
the briefs).

Jennifer Webb-McCrae, Cumberland County  
Prosecutor, attorney for respondent  
(Elizabeth K. Tornese, Assistant Prosecutor,  
of counsel and on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Following a jury trial, defendant was convicted of first-degree aggravated manslaughter,<sup>1</sup> N.J.S.A. 2C:11-4a (count one); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); first-degree robbery, N.J.S.A. 2C:15-1(a)(1) and (2) (count three); fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (count four); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count five); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count six). Defendant was sentenced to an aggregate extended term of life imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The convictions stemmed from defendant and a co-defendant robbing three men at gunpoint. During the robbery, defendant fatally shot one of the victims. Although the two surviving victims were unable to identify their assailants, after a brief search, police apprehended defendant in a nearby home and circumstantial evidence linked him to the crimes.

Defendant now appeals from his convictions and sentence, raising the following arguments for our consideration:

POINT I<sup>2</sup>

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<sup>1</sup> The jury convicted defendant of aggravated manslaughter as a lesser-included offense of murder, N.J.S.A. 2C:11-3(a)(1) and (2).

<sup>2</sup> We condensed Point I for clarity.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL AFTER AN OFFICER'S IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY THAT HE HAD INITIALLY RESPONDED TO THE SCENE BASED ON A REPORTED ROBBERY OF A TAXI DRIVER.

A. OFFICERS' TESTIMONY ACCUSING THE DEFENDANT OF ROBBING A TAXI DRIVER IMMEDIATELY BEFORE THE ROBBERY FOR WHICH HE WAS BEING TRIED CONTRAVENED STATE V. BANKSTON, [63 N.J. 263 (1973)], AND NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTIONS.

B. OFFICERS' TESTIMONY ACCUSING THE DEFENDANT OF ROBBING A TAXI DRIVER IMMEDIATELY BEFORE THE ROBBERY FOR WHICH HE WAS BEING TRIED CONSTITUTED INADMISSIBLE OTHER-CRIME EVIDENCE AND NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTIONS.

POINT II

BECAUSE NO IDENTIFICATION INSTRUCTION WAS ISSUED IN THIS CASE, WHICH CENTERED ON MISIDENTIFICATION, THE DEFENDANT'S CONVICTIONS MUST BE REVERSED. (NOT RAISED BELOW).

POINT III

BECAUSE THE WARRANTLESS SEARCH OF THE CLOTHING IN THE BEDROOM WAS NOT CONDUCTED PURSUANT TO ANY EXCEPTION TO THE WARRANT REQUIREMENT, THE BULLETS FOUND WITHIN MUST BE SUPPRESSED.

POINT IV

BECAUSE THE ROBBERY INSTRUCTION FAILED TO SPECIFY THAT THE JURY HAD TO UNANIMOUSLY AGREE ON THE VICTIM OF THAT CRIME, THE DEFENDANT'S CONVICTION FOR ROBBERY AND FELONY MURDER MUST BE REVERSED. (NOT RAISED BELOW).

POINT V

BECAUSE THE OFFICERS FAILED TO COMPLY WITH THE RECORDING REQUIREMENT OF STATE v. DELGADO, [188 N.J. 48 (2006)], THE OUT-OF-COURT IDENTIFICATION OF THE DEFENDANT MUST BE SUPPRESSED.

POINT VI

THE PROSECUTOR OFFERED TESTIMONY ABOUT THE FORENSIC EVIDENCE IN THIS CASE NOT PRESENTED BY ITS OWN EXPERT WITNESS, THEREBY INAPPROPRIATELY ACTING AS AN EXPERT. THIS IMPROPER ARGUMENT NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTIONS. (NOT RAISED BELOW).

POINT VII

THE DEFENDANT'S LIFE SENTENCE IS MANIFESTLY EXCESSIVE.

After considering the arguments presented in light of the record and applicable law, we affirm.

I.

We recount the pertinent facts from the trial record. In the early morning hours of October 10, 2009, Octaviano Contreras was drinking beer on a porch at xxx South Seventh Street in Vineland with two friends, Luis Reyes-Quinones and Adrian Nolasco-Cruz. At about 1:45 a.m., two men, one dressed in grey and the other in black, approached the three men on the porch. The man wearing black demanded their money and threatened them with a gun when

they refused. Both Reyes-Quinones and Nolasco-Cruz described the gun as a "black revolver."

Reyes-Quinones gave the man in grey his wallet, and Nolasco-Cruz threw his money and his cell phone on the floor, but the man in black demanded more. Contreras told the man in black to "[s]top playing with that pistol" and hit his gun-wielding hand. The gun fired, shooting Contreras in the face at close range. Contreras was later pronounced dead at the scene. Immediately after the shooting, the man in grey fled the scene, but the shooter remained. Reyes-Quinones gave the shooter two twenty dollar bills and, on the shooter's orders, rifled through Contreras' pockets for more money but found none. When Nolasco-Cruz announced that the police were approaching, the shooter fled toward a yard across the street.

Vineland Police Officer Joseph Cooper was in the area responding to a separate report of a suspicious person when he saw a man wearing a black hooded sweatshirt and black pants standing in front of the residence at yyy South Seventh Street. At the time, Cooper had no information about a shooting, but the man fit the general description of the reported suspicious person. Through the open window of his patrol car, Cooper ordered the man to stop. The man immediately ran down the driveway of the residence he had been standing in front of, and Cooper followed him on foot. During the foot chase, both men stopped "for a moment" and faced each

other on opposite sides of a car parked in the driveway. Although it was dark, Cooper saw the man's face under the hood of his sweatshirt.

The man then fled into the open garage. Cooper ran back to his car to retrieve his flashlight and give dispatch his location. When he returned to the driveway about thirty seconds later, he saw the same man he had been chasing climbing over a tall chain link fence in the back of the residence. As Cooper gave dispatch the man's description and direction of travel, Reyes-Quinones and Nolasco-Cruz approached him "visibly shaken up" and yelling in Spanish. Cooper did not understand the men because he did not speak Spanish. However, the men pointed at the man climbing the fence and then led Cooper to Contreras' body lying in a pool of blood on the porch across the street, about seventy-five feet away. Contreras had what appeared to be "a gunshot wound to the head," and was unresponsive.

By this time, more officers had arrived to secure the area. One officer saw a man "forcibly open[]" the back door of a house on Montrose Street and disappear inside. He reported his observations over his police radio. Four officers entered the house and encountered several individuals inside, one of whom was later identified as defendant. Among the other occupants were the homeowner and her son. The homeowner had observed defendant, whom

she had known for over ten years, "kick[] the door" and enter her home. According to the homeowner, police officers entered shortly thereafter.

Inside the house, the officers found defendant in a bathroom, sitting on the toilet, wearing only his underwear around his ankles. Defendant "was extremely sweaty" and appeared to be in "an elevated state." The officers ordered defendant to exit the bathroom, and, when he refused, they "physically remove[d] him from the bathroom," arrested and handcuffed him, and placed him in a patrol car. Cooper saw defendant seated in the patrol car and identified him on the scene and in court as the man he had chased up the driveway and into the garage on South Seventh Street.

During the arrest, Officer Nicholas Maslanich noticed a "pile of clothing" on the floor of the adjacent bedroom a few feet from where the officers were restraining defendant. Maslanich "picked [the clothes] up and checked through to make sure there [were] no firearms." The pile of clothing consisted of a pair of dark pants, a shirt, and a black hooded sweatshirt. In addition to being dirty, the clothing was "damp" and "moist like . . . somebody had sweated in them." Maslanich found "a wave cap" wrapped around four live .357 caliber bullets protruding from the pants pocket. The officers promptly applied for and obtained a search warrant for the premises.

While executing the search warrant, the officers found a phone under a pair of black sneakers in the bathroom where they had found defendant. Reyes-Quinones and Nolasco-Cruz later identified names and numbers on the phone's call history as associated with Contreras. At yyy South Seventh Street, the officers found three twenty-dollar bills and a cell phone<sup>3</sup> "lying in the [rear of the] driveway," a Ruger Blackhawk .357 caliber revolver "on the ground" inside the garage, and a black and gold Pittsburgh Pirates baseball cap approximately three to four feet away from the handgun. The chamber of the handgun contained one spent shell and five live rounds. In court, Nolasco-Cruz identified the gun as the one the shooter used on the night in question. The State also elicited testimony that defendant did not have a permit to carry a handgun.

Officer Charles Garrison processed defendant at police headquarters on the morning of October 10, 2009, and transported him to Bridgeton Hospital for medical clearance because he complained of pain in his ribs. While defendant was in his custody, Garrison overheard defendant talking to himself, stating at one point that "his life was over." Additionally, at the hospital, defendant said he was upset that "he let his children

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<sup>3</sup> At trial, the parties stipulated that the phone belonged to an individual by the name of Brandon Arazzo, not defendant.



down" and that "this would not have happened if he didn't get into an argument with his girl."

At trial, the State presented expert testimony on DNA, fingerprints, ballistics and forensic pathology. A buccal swab was collected from defendant at police headquarters for DNA testing. The DNA expert testified that she could not determine whether defendant was a contributor to the DNA on the gun or the cellphone found in the driveway of yyy South Seventh Street. Although the expert reported that defendant's DNA profile matched the DNA profile obtained from the baseball cap found near the handgun, the comparison did not meet the statistical threshold necessary to conclude defendant was the source of the DNA.

On the other hand, the State's fingerprint comparison expert testified that he recovered defendant's fingerprint from the barrel of the handgun found at the scene. The ballistics expert testified that the bullet recovered from Contreras' autopsy was fired from the handgun. The forensic pathologist testified that the cause of Contreras' death was "a gunshot wound of the jaw and neck" and the gun was fired from "an inch or two away . . . ."

Following the jury verdict, on March 21, 2014, the trial court granted the State's motion for an extended-term sentence, finding defendant met the persistent offender criteria set forth in N.J.S.A. 2C:44-3(a). After merging counts one and three into

count two, and counts four and five into count three, the court sentenced defendant to life imprisonment subject to NERA<sup>4</sup> on count two, and a concurrent ten-year term with a five-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6, on count six. A memorializing judgment of conviction was entered on April 1, 2014, and this appeal followed.

## II.

In Point I, defendant argues that the testimony of two police officers indicating that an unknown declarant "accused [defendant] of robbing a taxi driver shortly before the robbery at issue" violated Bankston and was inadmissible other-crimes evidence under N.J.R.E. 404(b). Defendant also argues the testimony violated a pre-trial stipulation whereby the State agreed that its testifying officers would "sanitize the reasons for the encounter" on the night of the shooting, "saying only that the 'suspect [] encountered fit the description of a suspicious person in the area.'" Defendant contends the trial court erroneously denied his motion for a mistrial because the officers' testimony was "highly prejudicial and entirely irrelevant." We disagree.

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<sup>44</sup> A defendant convicted of a first-degree crime subject to NERA must serve eighty-five percent of his sentence before he is eligible for parole. N.J.S.A. 2C:43-7.2(a). Furthermore, solely for the purpose of calculating the minimum term of parole ineligibility, a term of life imprisonment shall be deemed to be seventy-five years. N.J.S.A. 2C:43-7.2(b).

The testimony in question was elicited from two responding officers, Officer Cooper and Sergeant Matthew Browne. Prior to trial, the parties entered into the following stipulation:

The parties have agreed that references in the State's case-in-chief to prior bad acts (404b) concerning the suspected/reported possible robbery attempt of the taxi driver should be sanitized consistent with State v. Bankston . . . . The State merely wishes to give background as to why Officer Cooper approached and told the suspect to stop so as to establish that this was not some arbitrary encounter. The defense wishes to prevent inappropriate references to potential 404b evidence.

Therefore[, ] the parties have agreed that the State, in its case-in-chief, will not call the taxi driver, and has instructed Officer Cooper to sanitize the reasons for the encounter. Officer Cooper is expected to testify that based upon information received, he was dispatched to the area of [Seventh] and Montrose in Vineland and that the suspect he encountered fit the description of a suspicious person in the area. He will also testify that at the time of the encounter he had no reason to believe that there had recently been a shooting.

Officer Cooper testified in accordance with the stipulation. However, during cross-examination of Sergeant Browne, defense counsel asked, "where did you initially respond to?" Browne replied, "I initially responded to the 300 block of South Seventh Street. We had a call of a possible cab driver getting robbed." Defendant moved for a mistrial on the ground that Browne's

testimony violated the stipulation. In denying the motion, the court acknowledged that, although the stipulation only explicitly restricted Officer Cooper's testimony, "the intent was clearly to prevent the information itself from coming forward." Nevertheless, the court determined that because of "the passing nature of the reference, and the limited amount of information that was provided[,] . . . a curative instruction [could] correct any effect it may have . . . ."

Without objection by defense counsel or the State, the court determined that the curative instruction would be delivered during the final charge in order to "minimize" the impact of the reference. Accordingly, during the final charge, the court instructed the jury:

Throughout this trial, reference may have been made as to why police officers were in the area of this alleged crime. While such references may have explained or given context to the police presence, no such reference[s] are to be used against the [d]efendant.

The reason for the police officer's presence is completely unrelated to the charges brought in this case and, therefore, you are instructed not to speculate or otherwise [about] this information except for the reasons explaining the presence of the police in the area.

Defendant argues the testimony of Officer Cooper and Sergeant Browne, when viewed together, implied that he had committed the

taxi driver robbery to which the officers were responding. Defendant also challenges the adequacy of the curative instruction, which was proposed by the State without objection by defense counsel, claiming that the instruction "missed the mark entirely" by telling "the jury the exact opposite of what it needed to hear."

In Bankston, the Supreme Court held that an officer can testify that he or she approached a suspect or went to a crime scene based on "information received." Bankston, 63 N.J. at 268. However, if the officer "conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged," the testimony violates both the Confrontation Clause of the Sixth Amendment, U.S. Const. amend. VI, and the rule against hearsay. State v. Branch, 182 N.J. 338, 350 (2005); see also Bankston, 63 N.J. at 268-69. Thus, under Bankston and its progeny, an officer cannot testify to specific details of the crime or imply that he or she received evidence of a defendant's guilt from a non-testifying witness. See State v. Luna, 193 N.J. 202, 216-17 (2007).

Here, the testimony by Sergeant Browne violated the Supreme Court's holding in Bankston. By volunteering information about a reported robbery of a taxi driver, Sergeant Browne went beyond the parties' stipulation and far beyond the "upon information

received" language permitted by Bankston, 63 N.J. at 268. Thus, although Officer Cooper's testimony complied with the stipulation, Sergeant Browne's testimony did not.

When inadmissible evidence is inadvertently admitted into evidence at trial, the decision to give a curative instruction or grant the "more severe response of a mistrial" is "peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." State v. Winter, 96 N.J. 640, 646-47 (1984). We review the denial of a mistrial for an abuse of discretion and uphold the trial court's decision unless manifest injustice would result. State v. LaBrutto, 114 N.J. 187, 207 (1989).

Similarly, "when weighing the effectiveness of curative instructions," we "should give equal deference to the determination of the trial court" and reverse only when the possibility of an unjust verdict was "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Winter, 96 N.J. at 647 (quoting State v. Macon, 57 N.J. 325, 336 (1971)). In fact, "[e]ven in the context of a constitutional error, a curative instruction will not be deemed inadequate unless there is a real possibility that the error led the jury to a result it otherwise

might not have reached." State v. Scherzer, 301 N.J. Super. 363, 441 (App. Div. 1997) (citing Winter, 96 N.J. at 647).

An adequate curative instruction is "firm, clear, and accomplished without delay." State v. Vallejo, 198 N.J. 122, 134 (2009). It must also identify the specific evidence it is meant to address and "explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." State v. Winder, 200 N.J. 231, 255 (2009) (quoting State v. Stevens, 115 N.J. 289, 304 (1989)).

Reviewing the charge as a whole, State v. Wilbely, 63 N.J. 420, 422 (1973), we are satisfied that the judge's instruction was sufficient to cure any possible prejudice to defendant. Furthermore, by giving the instruction during the final jury charge, the court minimized the impact of the reference and any possible prejudice to defendant. Under these circumstances, we find the court properly denied defendant's motion for a mistrial and gave an effective curative instruction instead.<sup>5</sup>

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<sup>5</sup> Although we acknowledge that Sergeant Browne's testimony violated Bankston, we disagree that his testimony linked defendant to a taxi driver robbery so as to implicate N.J.R.E. 404(b). In fact, while explaining the police presence in the area, albeit in greater detail than necessary, Browne specified that the calls were

### III.

In Point II, for the first time on appeal, defendant argues the court's failure to give an identification instruction to the jury deprived him "of his constitutional right to due process." At the charge conference, the State requested a modified version of the Henderson<sup>6</sup> identification charge. The State asserted that, although neither Reyes-Quinones nor Nolasco-Cruz identified defendant in court as the man who robbed them and fatally shot their friend, an identification charge was necessary "out of an abundance of caution," to avoid "the jury [from inferring] that there was an in-court identification" of defendant by the victims. Defense counsel strenuously objected to an identification charge, arguing that the charge "almost becomes an explanation for why [Reyes-Quinones and Nolasco-Cruz] didn't do . . . an in-court identification." The court ultimately agreed with defense counsel and did not give an identification charge.

Defendant now asserts that because "identification was the major thrust of the defense, . . . an identification instruction was required" and the court's failure to instruct the jury sua

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separate despite being "almost simultaneous." Therefore, N.J.R.E. 404(b) is inapplicable because it "only applies to other acts of the defendant." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 7 on N.J.R.E. 404(b) (2017).

<sup>6</sup> State v. Henderson, 208 N.J. 208, 296 (2011).



sponte necessitates reversal of his convictions. Because defendant did not seek an identification instruction or object to its omission at trial, we review this issue under the plain error standard. State v. Camacho, 218 N.J. 533, 554 (2014). Under that standard, "we may reverse only if the unchallenged error was 'clearly capable of producing an unjust result.'" Ibid. (quoting R. 2:10-2). In the context of jury instructions, plain error is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant 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) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

Additionally, because the trial court relied on defendant's request to omit the identification charge, the invited error doctrine applies. Cf. State v. Jenkins, 178 N.J. 347, 358-60 (2004) (finding no invited error when trial court did not actually rely on defendant's request not to give specific charge). "Under the invited error doctrine, "trial errors that "were induced, encouraged or acquiesced in[, ] or consented to by defense counsel ordinarily are not a basis for reversal on appeal."" State v. Munafo, 222 N.J. 480, 487 (2015) (quoting State v. A.R., 213 N.J. 542, 561 (2013)). Thus, a defendant "cannot argue on appeal that

a prior ruling was erroneous when [he] urged the lower court to adopt the proposition now alleged to be error," A.R., 213 N.J. at 561, unless the reviewing court determines that applying the doctrine would "cause a fundamental miscarriage of justice." State v. Williams, 219 N.J. 89, 100 (2014), cert. denied, 135 S. Ct. 1537 (2015) (quoting A.R., 213 N.J. at 261-62).

"The charge to the jury must be read as a whole in determining whether there was any error." Adams, 194 N.J. at 207. Moreover, "[a]lthough arguments of counsel can by no means serve as a substitute for instruction by the court, the prejudicial effect of an omitted instruction must be evaluated in light of the totality of the circumstances--including all the instructions to the jury, [and] the arguments of counsel." Ibid. (alteration in original) (quoting State v. Marshall, 123 N.J. 1, 145 (1991)). "Nevertheless, because clear and correct jury instructions are fundamental to a fair trial, erroneous instructions in a criminal case are 'poor candidates for rehabilitation under the plain error theory.'" Ibid. (quoting Jordan, 147 N.J. at 422).

Whether the failure to provide a jury instruction regarding identification is "plain error depends on the strength and quality of the State's corroborative evidence rather than on whether defendant's misidentification argument is convincing." State v. Cotto, 182 N.J. 316, 326 (2005). Thus, the failure to provide a

jury instruction regarding identity is not error when there "exists substantial corroborating evidence, where the identification of the witness is positive, certain and consistent, or where defense counsel is able to attack the credibility of identification testimony through cross-examination and closing argument." State v. Salaam, 225 N.J. Super. 66, 71 (App. Div. 1988) (citations omitted).

Here, Reyes-Quinones and Nolasco-Cruz were the only eyewitnesses to the crimes, and neither victim positively identified defendant in or out-of-court. Under Henderson, where identification is at issue, the trial judge must "provide[] appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." Henderson, 208 N.J. at 296 (alteration in original). However, because the Henderson charge focuses on eliminating suggestibility in out-of-court identifications conducted by police, we are satisfied that an identification charge would not have been helpful to the jury in this case. See id. at 251-53. Here, there was no identification by eyewitnesses for the jury to evaluate with the assistance of the "various factors" delineated in Henderson "that affect the reliability of an identification . . . ." Id. at 296-99.

Further, the State offered compelling corroborative circumstantial evidence identifying defendant as the assailant, including his fingerprint on the gun used to shoot Contreras as well as the decedent's cellphone and the .357 caliber bullets seized in proximity to defendant. Additionally, defense counsel's summation focused on the fact that neither Reyes-Quinones nor Nolasco-Cruz identified defendant as the shooter. Indeed, during summation, defense counsel stated explicitly, "you don't have any identification from witnesses in this case." Moreover, the jury charge, read as a whole, emphasized the jury's responsibility to scrutinize the evidence and to determine the credibility of each witness. The court also stressed the State's burden to prove every element of each offense beyond a reasonable doubt.

Given defendant's strenuous objection to an identification charge, the court's reliance on his objection, the absence of any eyewitness identification, and the significant circumstantial evidence identifying defendant as the assailant, we conclude the court's failure to give an identification charge sua sponte was not plain error. We are satisfied that the deficiency in the instruction was not clearly capable of producing an unjust result. See R. 2:10-2.

IV.

In Point III, defendant contends the court should have granted his motion to suppress the bullets found in the pants on the floor near where officers apprehended him because "the warrantless search was not justified by any . . . exception to the warrant requirement." Defendant does not challenge the court's ruling that the entry into the Montrose Street home was justified "under the exigent circumstances and hot pursuit exceptions . . . ." However, defendant asserts that "the mere fact that the warrantless entry into the house was justified by exigent circumstances does not mean that the subsequent search of a pile of clothing in another room in the house was justified by the same circumstances." We disagree.

When reviewing a motion to suppress, we will "uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). We give the trial court's findings "particular deference when they are 'substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the "feel" of the case, which the reviewing court cannot enjoy.'" Ibid. (alteration in original) (quoting Robinson, 200 N.J. at 15). On the other hand,

if "the trial court's determination rests upon a legal conclusion, we conduct a de novo, plenary review." Ibid.

Both the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protect citizens against unreasonable searches and seizures. A search conducted without a warrant is presumptively invalid, and the State must demonstrate that the search falls within one of the well-recognized exceptions to the warrant requirement in order to overcome the presumption of invalidity. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); State v. Edmonds, 211 N.J. 117, 128-29 (2012). The existence of exigent circumstances is one such exception. See State v. Johnson, 193 N.J. 528, 552-53 (2008). Probable cause, when combined with exigent circumstances, "will excuse a police officer's failure to have secured a written warrant prior to a search for criminal wrongdoing." State v. Cassidy, 179 N.J. 150, 160 (2004).

To find exigent circumstances, the court should consider

[T]he degree of urgency and the amount of time needed to obtain the warrant; the reasonable belief that the evidence was about to be lost, destroyed, or removed from the scene; the severity or seriousness of the offense involved; the possibility that a suspect was armed or dangerous; and the strength or weakness of the underlying probable cause determination.

[State v. Walker, 213 N.J. 281, 292 (2013)  
(quoting State v. Deluca, 168 N.J. 626, 632-  
33 (2001)).]

"Hot pursuit" of a fleeing felon creates exigent circumstances. In Warden v. Hayden, 387 U.S. 294, 297-98 (1967), the United States Supreme Court upheld the warrantless search of a home where the officers found clothes in the washing machine that matched those worn by the fleeing suspect. The officers also found a firearm and ammunition in a bathroom next to the bedroom where they found the suspect feigning sleep. Id. at 298. The Court held that the officers were in hot pursuit of the suspect, and therefore, they had a right to make a warrantless entry to arrest the robber and to search for weapons. Id. at 297-98; see also Walker, 213 N.J. at 292.

Here, the trial court conducted a pre-trial hearing on defendant's motion to suppress the bullets during which Officer Maslanich testified consistent with his trial testimony. According to Maslanich, when he observed the pile of clothing that matched the description of the clothing worn by the suspect, he knew the firearm used by the suspect had not been located. He was also aware that there were other occupants in the house. Additionally, while resisting the arresting officers, defendant

"identified himself as a Latin King,"<sup>7</sup> which raised the specter of violence in Maslanich's mind. As a result, when defendant was struggling with the arresting officers and in "[v]ery close proximity" to the clothing, Maslanich "picked it up and checked through to make sure there [were] no firearms." Maslanich testified, "if [defendant] had an arm free, he would have been able to reach the pile of clothing," and he "didn't want him to have access to that."

The trial court concluded that the warrantless search fell "within the 'hot pursuit' exception to the warrant requirement." The court noted that, like Hayden, "a chase of an armed robbery suspect led the police to follow a suspect into a private residence," and "[w]hile searching for the suspect, the police found the defendant, clothing which was similar to that worn by the suspect, and ammunition." According to the court,

[a] delay by the police . . . would have created an unacceptable risk that the suspect would have escaped, or would have used force to accomplish the escape. The situation at bar was more dangerous than in Hayden, because the suspect here had already demonstrated that he was willing to shoot others.

We see no reason to disturb the trial court's factual findings, which are supported by sufficient credible evidence in

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<sup>7</sup> A stipulation between the parties excluded any reference during the trial to defendant's membership in a gang.



the record, or the court's legal conclusion. The seriousness of the offenses, the proximity in time, and the real possibility that the suspect was armed, all combined to establish the exigent circumstances necessary to justify the entry into the home and the search for weapons. See State v. Laboo, 396 N.J. Super. 97, 108 (App. Div. 2007). We have routinely placed special emphasis on the possession and potential use of firearms to present exigent circumstances. See, e.g., State v. Wilson, 362 N.J. Super. 319, 333 (App. Div. 2003). "A deadly weapon poses a special threat to both the public and police, and its presence is a significant factor in evaluating whether there are exigent circumstances which justify a warrantless search." Id. at 333. Moreover, "exigent circumstances [created by the presence of a deadly weapon] do not dissipate simply because the particular [suspects] . . . may have been . . . arrested, or otherwise restricted in their freedom of movement." Id. at 334 (quoting State v. Alston, 88 N.J. 211, 234 (1981)).

V.

In Point IV, defendant contends that "[t]he jury instructions and the verdict sheet both authorized the jury to find [defendant] guilty of both [robbery and felony murder] without agreeing on the identity of the robbery victim." According to defendant, "[t]his allowed for a non-unanimous verdict and directly contradicted

. . . State v. Gentry, 183 N.J. 30 (2005), violated [defendant's] due process rights, and necessitates reversal of his convictions for robbery and felony murder." Because defendant raises this argument for the first time on appeal, once again, the "plain error" standard applies. See R. 2:10-2.

The unanimity rule requires "'jurors to be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." State v. Frisby, 174 N.J. 583, 596 (2002) (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)). "Although the need for juror unanimity is obvious, exactly how it plays out in individual cases is more complicated." Ibid. Thus, 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).

Rather, to determine if a court should have given a specific unanimity charge, "[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, 124 N.J. at 638). In that regard, we "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, 124 N.J. at 639).

Here, in the jury instruction on robbery, the trial court used the "and/or" construction in referring to the victims:

Defendant is charged with the crime of robbery. The [i]ndictment reads in pertinent part that . . . [i]n the course of committing a theft, [defendant] knowingly did inflict bodily injury or use force upon Octaviano Contreras and/or Adrian [Nolasco-]Cruz and/or Luis Reyes-Quinones.

And/or used force upon Octaviano Contreras and/or Adrian [Nolasco-]Cruz and/or Luis Reyes-Quinones, and/or threatened immediate bodily injury upon others, purposefully put Octaviano Contreras and/or Adrian [Nolasco-]Cruz and/or Luis Reyes-Quinones, in fear of immediate bodily injury, while armed with a deadly weapon.

The court repeated this iteration in the verdict sheet, before asking the jury to enter a single finding as to whether defendant was not guilty or guilty of robbery.

The parties did not request and the court did not provide the jury with the specific "multiple victims" portion of Model Jury Charges (Criminal), "Robbery in the First Degree" (N.J.S.A. 2C:15-1) (rev. Sept. 10, 2012). However, the court completed the charge by instructing the jury, "[y]ou may return on each crime charged a verdict of either not guilty or guilty. Your verdict . . . as

to each crime charged, must be unanimous." Ordinarily, this general jury instruction requiring unanimity suffices to inform the jury that it must unanimously agree on the specific predicates of a guilty verdict. See State v. Cagno, 211 N.J. 488, 516-18 (2012).

Defendant relies on Gentry, 183 N.J. at 31, to support his argument that "[t]he robbery instruction . . . allowed the jury to be non-unanimous about which victim was robbed . . . ." 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 the use of force 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 the victim against whom Gentry had knowingly used force. Id. at 31-32. 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. Clearly, this erroneous instruction, given after the jury advised it was unable to reach

unanimity on an essential element of the offense, sanctioned a verdict that failed to achieve unanimity. Id. at 32-33.

This case is distinguishable from Gentry. Here, the State did not argue alternative theories of guilt based upon the evidence presented. Rather, the State's evidence demonstrated a continuous, unbroken course of criminal conduct against all three victims. The circumstances did not present "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, 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 did not ask questions suggesting an inability to reach unanimity on any of the essential elements of the robbery offense.

We do not condone the use of "and/or" because in particular factual scenarios, the practice invites the possibility of non-unanimous verdicts. See State v. Gonzalez, 444 N.J. Super. 62, 75-76 (App. Div.), certif. denied, 226 N.J. 209 (2016) (overturning a conviction because the improper use of the phrase "and/or" in a jury instruction injected ambiguity into the charge in the discrete factual context of that case). However, there was no risk in this case that the jury was confused or misled by the court's instructions despite the omission of the "multiple victims"

charge. Moreover, we note that while the evidence was certainly sufficient to support a unanimous jury verdict for three first-degree robberies, defendant was only convicted of one. Given the absence of any objection, we are firmly convinced that the omission of the "multiple victims" portion of the Model Charge did not "possess[] a clear capacity to bring about an unjust result." Adams, 194 N.J. at 207.

## VI.

In Point V, defendant argues that the officers' failure to record "the dialogue that occurred during the show[-]up procedure in which Officer Cooper identified [defendant]" violated State v. Delgado, 188 N.J. 48 (2006). While "[defendant] is not arguing that the identification . . . should have been suppressed as unreliable[,]" he asserts the identification testimony "was erroneously admitted at trial[,]" because of the Delgado violation, mandating reversal of his convictions.

Delgado and Rule 3:11(a) condition admissibility of an out-of-court identification on adequate recordation of the identification procedure. Delgado, 188 N.J. at 63. In Henderson, the Court explained that the recording requirement seeks "[t]o avoid possible distortion" attributable to "confirmatory feedback." Id. at 254. Under Rule 3:11(b), the record can be a verbatim written account, if feasible, or "a detailed summary of

the identification . . . ." If the record lacks important details required by Rule 3:11(c), the court "may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification." R. 3:11(d).

Here, a review of the transcripts indicates that the police prepared reports regarding the investigation of these crimes. Though identified in the record, the reports were not admitted into evidence and were not included in the record on appeal. Accordingly, we are unable to assess defendant's argument that the police violated Delgado by failing to adequately document the identification procedure. "Because this issue was not raised to the trial court,<sup>8</sup> it is defendant's burden to demonstrate that the police failed to create an adequate record of the show[-]up in those reports and that such failure was clearly capable of producing an unjust result." State v. Wright, 444 N.J. Super. 347, 362-63 (App. Div.), cert. denied, 228 N.J. 247 (2016). "As defendant has not included the reports referenced in the record,

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<sup>8</sup> Prior to trial, the court conducted a Wade hearing regarding Reyes-Quinones' out-of-court identification of defendant. However, defendant did not move to exclude Officer Cooper's identification.

thereby precluding us from assessing the merits of the claim, we reject his argument." Id. at 363.

## VII.

In Point VI, defendant argues that "in [his] summation[,] the prosecutor bolstered [the State's] almost entirely circumstantial case by offering a baseless and inaccurate expert opinion that fingerprinting is more reliable than DNA analysis." Defendant asserts that because the absence of DNA evidence "was central to the defense, this inappropriate argument necessitates the reversal of his convictions."

At the outset, we observe that defendant did not object to the prosecutor's summation. "When counsel fails to object at trial, the reviewing court may infer that counsel did not consider the remarks to be inappropriate." State v. Vasquez, 265 N.J. Super. 528, 560 (App. Div. 1993) (citing State v. Johnson, 31 N.J. 489, 511 (1960)). Defendant's failure to object also prevents the trial court from taking curative action, should it be appropriate. State v. Frost, 158 N.J. 76, 84 (1999) (citing State v. Bauman, 298 N.J. Super. 176, 207 (App. Div. 1997)). When a defendant alleges this type of prosecutorial impropriety for the first time on appeal, our sole concern is whether "the remarks, if improper, substantially prejudiced the defendant['s] fundamental right to have the jury fairly evaluate the merits of [his] defense, and



thus had a clear capacity to bring about an unjust result." Johnson, 31 N.J. at 510.

Courts afford prosecutors "considerable leeway" in the vigor and force of the language used in closing arguments, "so long as their comments are reasonably related to the scope of the evidence presented." State v. Timmendequas, 161 N.J. 515, 587 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). So long as a prosecutor does not "vouch for the State's witnesses, offer a personal opinion of defendant's veracity, or refer, explicitly or implicitly, to matters outside the record," the prosecutor may make comments "based on reasonable inferences drawn from the evidence presented during the trial." State v. Morton, 155 N.J. 383, 458 (1998). "Additionally, an appellate court will consider whether the offending remarks were prompted by comments in the summation of defense counsel." State v. Smith, 212 N.J. 365, 403-04 (2012).

Here, in response to defense counsel's comments in summation regarding the absence of DNA evidence on the gun and the specter of "contamination" in the handling of the gun, the prosecuting attorney commented, "[i]n some cases, fingerprints are better than DNA. They're not subjected to -- you didn't hear anything about mixtures. You didn't hear anything about blowback of blood, stepping in things. No, unlike DNA, fingerprints tell you exactly

who had it, who touched it." Although none of the experts testified that fingerprint evidence is better than DNA evidence, we are satisfied that the remark did not prejudice defendant's fundamental right to have the jury fairly evaluate the merits of his defense or have a capacity to bring about an unjust result. Moreover, the trial court instructed the jurors in the final charge that "summations of counsel are not evidence and must not be treated as evidence," and "[a]ny comments by counsel are not controlling."

#### VIII.

Finally, in Point VII, defendant challenges his sentence as excessive. "Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). We will

[A]ffirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Fuentes, 217 N.J. 57, 70 (2014) (second alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Here, applying State v. Pierce, 188 N.J. 155, 164 (2006), the court correctly determined that "[d]efendant qualifie[d] for an extended term under [N.J.S.A. 2C:44-3(a)]" on the felony murder

conviction because his criminal history demonstrated "a need to protect society . . . ." See State v. Dunbar, 108 N.J. 80, 95 (1987). Defendant does not appear to dispute that determination. Next, in finding aggravating factors one, three, six, and nine, N.J.S.A. 2C:44-1(a)(1), (3), (6), and (9), the court pointed out that defendant prevented the other victims "from offering any immediate aid to the [decedent]" and instead forced them to "inflict upon [the decedent] the indignity of being physically searched for nominal valuable items." The court distinguished this case from other cases by the "depravity in the mind of the [d]efendant," as demonstrated by the way that he deprived the decedent of "some element of human comfort from his friends" in "the last moments of [his] life . . . ."

Further, the court noted that at age thirty, defendant had "a juvenile record of [thirteen] arrests, eight adjudications, [and] two [v]iolations of [p]robation." His record as an adult consisted of "[twenty-four] prior arrests, one diversion, [eleven] disorderly persons convictions, [and] seven indictable convictions . . . ." According to the court, "[defendant's] conduct over an extended period of time was leading to this almost as an inevitability . . . ." The court rejected defendant's argument that mitigating factor two applied, N.J.S.A. 2C:44-1(b)(2), and, placing "substantial weight" on the aggravating factors, concluded

that "the aggravating factors . . . substantially outweigh[ed]" the non-existent mitigating factors.

Defendant argues the court erred in sentencing him "to the maximum possible sentence for felony murder." However, the sentence imposed accounted for the significant weight given the applicable aggravating factors and reflected the absence of any mitigating factors. See Fuentes, 217 N.J. at 73 (quoting State v. Natale, 184 N.J. 458, 488 (2005)) ("[R]eason suggests that when the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range.").

Affirmed.

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



CLERK OF THE APPELLATE DIVISION