SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0448-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIMOTHY A. HORNE, a/k/a TIMOTHY ALLEN HORNE, NICE, and BABY DRE,

Defendant-Appellant.

Submitted March 5, 2018 – Decided May 24, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment Nos. 11-07-1675, 11-08-1730, 14-03-0873 and Accusation No. 12-02-0424.

Joseph E. Krakora, Public Defender, attorney for appellant (Rebecca Gindi, Assistant Deputy Public Defender, of counsel and on the brief).

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Kevin J. Hein, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

A jury convicted defendant Timothy A. Horne of second-degree aggravated assault, N.J.S.A. 2C:12-1b(1) (causing serious bodily injury (SBI)); third-degree aggravated assault, N.J.S.A. 2C:12-1b(2) (causing bodily injury with a firearm); fourth-degree aggravated assault, N.J.S.A. 2C:12-1b(4) (knowingly pointing a firearm at another with extreme indifference to the value of human life); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a; and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b. In a separate trial that immediately followed, the same jury convicted defendant of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7b.[1]

After appropriate mergers, and after granting the State's motion to impose an extended term, see N.J.S.A. 2C:44-3a, the judge sentenced defendant to a twenty-year term of imprisonment, subject to an 85% period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2, and a consecutive ten-year term with five years of parole ineligibility on the certain persons offense.

Before us, defendant raises the following arguments:

[1] The jury acquitted defendant of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3, and the prosecutor dismissed a charge of third-degree receiving stolen property, N.J.S.A. 2C:20-7a.

POINT I

REVERSAL IS REQUIRED UNDER STATE V. OSORIO BECAUSE THE STATE FAILED TO PROVIDE ACCEPTABLE SITUATION-SPECIFIC REASONS FOR USING PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN VENIREPERSONS, AND THE COURT FAILED TO PROPERLY ANALYZE HORNE'S GILMORE OBJECTION.

POINT II

THE CONVICTIONS FOR SECOND-DEGREE AGGRAVATED ASSAULT UNDER N.J.S.A. 2C:12-1b(1) AND THIRD-DEGREE AGGRAVATED ASSAULT UNDER N.J.S.A. 2C:12-1b(2) MUST BE REVERSED BECAUSE THE COURT FAILED TO CHARGE THE LESSER-INCLUDED OFFENSE OF FOURTH-DEGREE RECKLESS AGGRAVATED ASSAULT UNDER N.J.S.A. 2C:12-1b(3). (NOT RAISED BELOW)

POINT III

BECAUSE POLICE CONTINUED TO QUESTION MR. HORNE AFTER HE INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT, THE GUN FOUND AS A RESULT OF HIS SUBSEQUENT STATEMENT SHOULD HAVE BEEN SUPPRESSED. (NOT RAISED BELOW)

A. MR. HORNE'S AVOIDANCE OF THE DETECTIVES' QUESTIONS COUPLED WITH HIS REPEATED REQUEST THAT THE DETECTIVES TALK TO J.R. INSTEAD OF HIM WAS AN INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT. U.S. CONST., AMENDS. V, XIV.

B. ALTERNATIVELY, MR. HORNE'S REQUEST TO MAKE A PHONE CALL TO SOMEONE HE TRUSTED FOR ADVICE WAS AN INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT. U.S. CONST., AMENDS V, XIV.

C. THE IMPROPER ADMISSION OF THE GUN AT TRIAL AMOUNTED TO PLAIN ERROR.

POINT IV

THE SENTENCING COURT MADE SEVERAL ERRORS REQUIRING MR. HORNE'S SENTENCE BE VACATED AND REMANDED FOR IMPOSITION OF A LOWER SENTENCE. (NOT RAISED BELOW)

A. MR. HORNE'S SENTENCE MUST BE VACATED AND REMANDED BECAUSE THE SENTENCING COURT ENGAGED IN IMPROPER DOUBLE COUNTING AS THE BASIS FOR BOTH IMPOSING AN EXTENDED TERM AND FINDING AGGRAVATED FACTORS AND ALSO FAILED TO INCLUDE A STATEMENT OF REASONS FOR AGGRAVATING FACTORS SIX AND NINE.

B. ALTERNATIVELY, MR. HORNE'S SENTENCE MUST BE VACATED AND REMANDED BECAUSE THE SENTENCING COURT FAILED TO FIND MITIGATING FACTORS ELEVEN AND TWELVE WHICH ARE CLEARLY INDICATED IN THE RECORD. AS A RESULT, THE COURT IMPROPERLY WEIGHED AND BALANCED THE AGGRAVATING AND MITIGATING FACTORS.

C. THE TRIAL COURT ERRED BY FAILING TO PROVIDE REASONS FOR IMPOSING THE MAXIMUM SENTENCE ON THE CERTAIN PERSONS, AND BY RUNNING THE CERTAIN PERSONS AND AGGRAVATED ASSAULT SENTENCES CONSECUTIVELY.

In appellant's pro se supplemental brief, he provided additional points for our consideration.

POINT I

APPELLANT'S RIGHT TO REMAIN SILENT WAS NOT "SCRUPULOUSLY HONORED" DURING HIS CUSTODIAL INTERROGATION AND THE LOWER TRIAL COURT ERRED I[N] PERMITTING IT INTO THE STATE'S CASE IN-CHIEF AND THE DEFENSE WAS INEFFECTIVE FOR NOT

RAISING THE FACT TO THE LOWER TRIAL COURT. (NOT RAISED BELOW)

POINT II

[DEFENSE COUNSEL] WAS WOEFULLY INEFFECTIVE IN THE RULE 104(c) HEARING FOR, INTER ALIA, FAILING TO ADVANCE "CLEARLY ESTABLISHED" PRECEDENT IN DEFENSE OF HIS CLIENT. (NOT RAISED BELOW).

POINT III

THE LOWER TRIAL COURT ERRED BY NOT PERMITTING [DEENSE COUNSEL] TO MOVE TO SUPPRESS THE .357 REVOLVER NUNC PRO TUNC. (NOT RAISED BELOW)

POINT IV

APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED PURSUANT TO BATSON AND GILMORE BY THE STATE'S JURY SELECTIONS AND THE COURT'S RESPONSE THERETO. (NOT RAISED BELOW)

POINT V

THE LOWER TRIAL COURT ERRED BY REFUSING TO "CHARGE THE JURY AS TO IGNORANCE OR MISTAKE" OF FACT AS IT WAS CLEARLY IN THE RECORD. (PARTIALLY RAISED BELOW)

POINT VI

[DEFENSE COUNSEL] WAS INEFFECTIVE FOR NOT ADVANCING; NOR DEVELOPING SELF DEFENSE AS A CLAIM FOR HIS CLIENT. (PARTIALLY RAISED BELOW)

POINT VII

STRICKLAND AND BRADY WERE VIOLATED IN APPELLANT'S CASE WHERE JESSICA'S DRESS WAS NOT TESTED FOR GSR BY THE STATE NOR PURSUED BY [DEFENSE COUNSEL] & WHERE THE STATE WITHHELD IN EXCESS OF "3500 PAGES" OF DISCOVERY AND THE

DEFENSE FAILED TO ADEQUATELY PURSUE AS MUCH. (NOT RAISED BELOW)

POINT VIII

DUE TO THE CUMULATIVE IMPACT OF ALL THE TRIAL ERRORS, APPELLANT WAS DEPRIVED A FAIR TRIAL. (NOT RAISED BELOW)

Having considered these contentions in light of the record and applicable legal standards, we affirm defendant's convictions and the sentences imposed on all but count eight, the certain person conviction. We remand to the Law Division for resentencing on that count.

I.

We briefly summarize the State's evidence at trial to place defendant's arguments in context.

On August 28, 2013, defendant was living with his girlfriend, J.R., J.R.'s sister, Jen.R., and her four-year-old son.[2] That morning, as she readied for work in the bedroom, J.R. heard defendant "fumbling with a gun." As she turned toward defendant, she saw him pointing the gun at her. With only the bed between them, defendant shot J.R.

Jen.R. heard the shot, exited her bedroom and saw J.R. bleeding and searching for her keys. Jen.R. found them, and

[2] We use initials to maintain the confidentiality of those involved.

defendant grabbed them from her hand. Defendant gathered his things in a small athletic bag, before unlocking the gated front door. He and J.R. entered J.R.'s car, but defendant refused to let Jen.R. enter the car before driving to nearby Cooper Hospital.

J.R. claimed defendant drove around the hospital three times before leaving her at the entrance door and driving away. Jen.R. testified that she saw defendant drive back past the house and was concerned he was coming back to shoot her. But, defendant did not stop. J.R. was admitted to the hospital, underwent surgery that required the removal of her gall bladder and part of her liver, and remained hospitalized for three weeks.

Camden County Police Department Lieutenant Jeff Frampton responded to the hospital and viewed surveillance tape showing the car that dropped off J.R. As he left, Frampton passed a similar looking car heading in the opposite direction toward the hospital. Frampton executed a U-turn and stopped the car, which defendant was driving. Frampton removed defendant and his passenger from the car and transported them to headquarters for questioning.

Detective Ryan Bell of the Camden County Police Department and other officers interrogated defendant, and the jury saw a redacted video recording of the statement. After being advised

of his Miranda[3] rights, defendant initially told detectives to speak to J.R. first. At some point thereafter, defendant told detectives he wanted to speak to a "friend," FBI Agent Vito Roselli, for whom defendant was a confidential informant. In the midst of defendant's interrogation, the detectives reached Roselli by phone, and defendant spoke to the agent. Defendant then went on to explain the shooting was an accident, and that he and J.R. were "tussling" over the gun as she questioned him about being a "snitch."

Roselli arrived at the police station and took custody of defendant. Defendant told Roselli the gun was in the trunk of defendant's car, which was parked in a motel parking lot in Cherry Hill. Together, they drove to the motel, where Roselli recovered the weapon, a .357 magnum.

Roselli said defendant asked him if he could "get [defendant] out of the case, basically have the prosecutor drop the gun charge or whatever charge they were hitting him with." Roselli refused, but told defendant he would let the prosecutor know the extent of defendant's "cooperation up to that point." On cross-examination, Roselli confirmed that approximately one week before the shooting, defendant had text-messaged him with concerns that J.R. had looked

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

at his phone. Roselli acknowledged that defendant had supplied him with information that may have implicated J.R.'s family members or acquaintances in criminal activity. Roselli agreed that defendant would be in danger if those individuals knew he was providing information to the FBI.

The State's ballistic expert testified that the amount of force required to pull the trigger on the .357 magnum was substantial, thereby implying the shooting was not accidental. Defendant elected not to testify.

II.

The judge conducted a pretrial hearing pursuant to N.J.R.E. 104(c) to determine the admissibility of defendant's recorded statement and verbal statements to Roselli. Bell and Roselli testified at the hearing, and the judge had the opportunity to view the entire video recording of the interrogation, which was in two parts.

Bell read defendant his Miranda rights from a card, and defendant acknowledged he understood. As noted, defendant first told detectives they should speak to J.R., but the detectives said she was still in surgery. Defendant never invoked his right to remain silent, nor did he ask for an attorney. In response to defendant's request, the detectives tried to reach Roselli by

phone, but were unsuccessful and left a voicemail. They ultimately did speak to Roselli, who in turn talked to defendant by phone.

After a short break, the detectives again read defendant his Miranda rights, and defendant again acknowledged his understanding. Thereafter, defendant answered the detectives' questions, telling them that the shooting was an accident. When Roselli picked up defendant, he did not re-Mirandize him, nor did he interrogate defendant about the shooting.

After properly stating the governing legal principles, the judge noted defendant's statement was not "a classic confession," and "when it became obvious to [the detectives] that [defendant] wanted to speak to [his] FBI handler before he would have any further discussions[,] they took a break to reach the agent, and in fact did reach the agent." The judge found the detectives specifically asked if defendant was requesting a lawyer, and defendant "indicated he was not." The judge also found Bell was a credible witness, and defendant admitted his prior involvement with and knowledge of the criminal justice system. In short, the judge concluded defendant waived his Miranda rights and provided a voluntary statement to the detectives.

The judge also concluded that Roselli did not have to reissue Miranda warnings to defendant, and the agent was "circumspect" in discussing the case with defendant. The judge found it was

defendant's voluntary "design" to have Roselli retrieve the weapon.

In Point II, defendant argues the detectives continued to question him after he implicitly invoked his right to remain silent by not answering their questions, directing they speak to J.R. first, and by asking to speak to Roselli. Defendant argues the seizure of the gun was the "fruit of the poisonous tree" resulting from this violation of his Fifth Amendment rights, and, therefore, the judge should have suppressed the gun and not admitted it into evidence.

Defendant never argued before the trial court that the seizure of the gun resulted from a constitutional violation. We could therefore refuse to consider the argument now. State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009) ("For sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'"). Nevertheless, for the sake of completeness, we address the issues surrounding the admissibility of defendant's statements.

"Appellate courts reviewing a grant or denial of a motion to suppress must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the

record." State v. Hubbard, 222 N.J. 249, 262, (2015) (citing State v. Gamble, 218 N.J. 412, 424 (2014); State v. Elders, 192 N.J. 224, 243 (2007)). However, we do not defer to the trial court's legal conclusions, which we review de novo. Id. at 263.

Even when Miranda warnings are properly administered, "the State bears the burden of proving beyond a reasonable doubt that a defendant's confession is voluntary and not resultant from actions by law enforcement officers that overbore the will of a defendant." Id. at 267 (citing State v. Hreha, 217 N.J. 368, 383 (2014); State v. Galloway, 133 N.J. 631, 654 (1993)). "Determining whether the State has met that burden requires a court to assess 'the totality of the circumstances, including both the characteristics of the defendant and the nature of the interrogation.'" Hreha, 217 N.J. at 383 (quoting Galloway, 133 N.J. at 654).

When a suspect unambiguously asserts his right to remain silent, all questioning must stop. State v. S.S., 229 N.J. 360, 382 (2017). Our state law privilege extends greater protection: "a request, however ambiguous, to terminate questioning . . . must be diligently honored." Ibid. (quoting State v. Bey (Bey II), 112 N.J. 123, 142 (1988)). "[I]f the police are uncertain whether a suspect has invoked his right to remain silent, two alternatives are presented: (1) terminate the interrogation or (2) ask only

those questions necessary to clarify whether the defendant intended to invoke his right to silence." Id. at 383 (citation omitted). In making the threshold determination of whether a suspect has invoked his or her right to counsel, the trial court employs "a totality of the circumstances approach that focuses on the reasonable interpretation of defendant's words and behaviors." State v. Diaz-Bridges, 208 N.J. 544, 564 (2012).

In State v. Johnson, 120 N.J. 263 (1990), the Court held that a suspect who has "'nothing else to say,' or who '[does] not want to talk about [the crime]'" has invoked the right to remain silent. Id. at 281 (citation omitted) (alterations in original). An unwillingness to respond, therefore, may be considered an invocation of the right to remain silent. Id. at 285.

Here, however, immediately after acknowledging he understood his rights, defendant affirmatively told Bell that he wanted to waive those rights and give a statement. Defendant never maintained long periods of silence in the face of questioning, nor did he ever say he no longer wished to speak to the detectives. Under the totality of the circumstances presented, telling the detectives to speak to J.R. first was not an ambiguous invocation of the right to remain silent.

We acknowledge that under certain circumstances, a suspect's request to speak to a friend or family member before answering any

questions is an implicit invocation of the privilege. See, e.g., State v. Maltese, 222 N.J. 525, 534-37, 546 (2015) (the defendant's repeated request to speak to his uncle before answering any questions was invocation of his right to remain silent); State v. Harvey, 121 N.J. 407, 415-16, 419-20 (1990) (after three days of interrogation, the defendant's request to speak to his father compelled the reissuance of Miranda warnings afterwards and prior to further interrogation).

Here, however, defendant never indicated an unwillingness to speak to the detectives unless and until he spoke to Roselli. See State v. Roman, 382 N.J. Super. 44, 65-66 (App. Div. 2005) (the defendant's request to speak to his parents was not an invocation of his right to remain silent because the defendant "never gave the police any indication that he wanted to stop talking"). As borne out by defendant's eventual phone conversation with the agent, he was not seeking Roselli's advice. See, e.g., State v. Brooks, 309 N.J. Super. 43, 52-57 (App. Div. 1998) (the defendant did not assert his right to remain silent by asking to speak to his mother because he was not seeking her advice); see also Diaz-Bridges, 208 N.J. at 569-570 (the defendant's request to speak to his mother was not an invocation of his right to remain silent because he continued to speak with detectives and only wanted to speak with his mother for "the chance to tell her first").

In short, the judge properly admitted defendant's statements.[4]

III.

The indictment charged defendant with three different types of aggravated assault:

> N.J.S.A. 2C:12-1b(1) (count two) "causes [serious bodily] injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly");
>
> N.J.S.A. 2C:12-1b(2) (count three) ("purposely or knowingly causes bodily injury to another with a deadly weapon");
>
> N.J.S.A. 2C:12-1b(4) (count four) ("Knowingly under circumstances manifesting extreme indifference to the value of human life points a firearm . . . at or in the direction of another").
>
> [(Emphasis added).]

As lesser included offenses of count two, the judge provided instructions on aggravated assault, N.J.S.A. 2C:12-1b(7) ("purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes

[4] In his supplemental pro se brief, defendant asserts trial counsel rendered ineffective assistance during the N.J.R.E. 104(c) hearing, by failing to specifically move to suppress the gun and by failing to advance a self-defense claim at trial. "We decline to address th[ose] argument[s] because [they are] better suited for review on post-conviction relief and not direct appeal." State v. Mohammed, 226 N.J. 71, 81 n.5 (2016).

. . . significant bodily injury") (emphasis added); and simple assault, N.J.S.A. 2C:12-1a(1) ("purposely, knowingly or recklessly causes bodily injury to another") (emphasis added). He also gave instructions on simple assault, N.J.S.A. 2C:12-1a(2) ("Negligently causes bodily injury with a deadly weapon"), as a lesser included offense of count four. Defendant did not request any other instructions nor object to those given.

Before us, defendant argues the judge committed plain error by failing to sua sponte instruct the jury on fourth-degree aggravated assault, N.J.S.A. 2C:12-1b(3) ("Recklessly causes bodily injury to another with a deadly weapon") (emphasis added), as a lesser included offense of SBI aggravated assault. Defendant contends the jury could have convicted him of b(3) aggravated assault and acquitted him of SBI aggravated assault because the jury could have found he only acted recklessly, and ordinary reckless conduct is a lesser level of culpability than reckless conduct manifesting extreme indifference to the value of human life. State v. Farrell, 250 N.J. Super. 386, 390 (App. Div. 1991); N.J.S.A. 2C:1-8d(3).

"[W]hether an included offense charge is appropriate requires (1) that the requested charge satisfy the definition of an included offense set forth in N.J.S.A. 2C:1-8d, and (2) that there be a rational basis in the evidence to support a charge on that included

offense." State v. Thomas, 187 N.J. 119, 131 (2006). "[W]hen . . . it is the defendant who requests a lesser-included offense charge, 'whether the lesser offense is strictly "included" in the greater offense . . . is less important . . . than whether the evidence presents a rational basis on which the jury could acquit the defendant of the greater charge and convict the defendant of the lesser.'" State v. Cassady, 198 N.J. 165, 178 (2009) (quoting State v. Brent, 137 N.J. 107, 117 (1994)).

"In the absence of a request or an objection, we apply a higher standard, requiring the unrequested charge to be 'clearly indicated' from the record." State v. Alexander, ___ N.J. ___ (2018) (slip op. at 12). Under these circumstances, "the evidence supporting a lesser-included charge must 'jump[] off the page' to trigger a trial court's duty to sua sponte instruct a jury on that charge." Id. at 13 (quoting State v. Denofa, 187 N.J. 24, 42 (2006)).[5]

[5] In contrast, a court is not required to sua sponte provide instructions on a lesser-related offense, i.e., "those that 'share a common factual ground, but not a commonality in statutory elements, with the crimes charged in the indictment.'" Id. at 14 (quoting Thomas, 187 N.J. at 132). "[A] trial court may instruct the jury on a related offense only when 'the defendant requests or consents to the related offense charge, and there is a rational basis in the evidence to sustain the related offense.'" Id. at 15 (quoting Thomas, 187 N.J. at 133).

Whether the assaults defined in subsections b(1) through (5) are five distinct types of aggravated assault, or whether those defined in subsections b(2) through b(4) are lesser included offenses of b(1), has been the subject of sometimes confusing results. See Cannel, New Jersey Criminal Code Annotated, cmt. 6 on N.J.S.A. 2C:12-1 (2017). In State v. Sloane, 111 N.J. 293, 303-04 (1988), the Court held that, when requested by a defendant and even though they require the use of a weapon, aggravated assaults requiring less than serious bodily injury may be charged as lesser-included offenses of N.J.S.A. 2C:12-1b(1). See also State v. Villar, 150 N.J. 503, 516-17 (1997) (explaining Sloane by stating, "when a defendant is indicted for second-degree aggravated assault and the proofs show commission of the assault with a deadly weapon and the evidence requires that other lesser-included assault charges be given, the court must instruct the jury that third-degree aggravated assault with a deadly weapon is a lesser-included offense of second-degree aggravated assault, whether or not committed with a weapon").

Here, defendant never requested a charge as to subsection b(3). Therefore, the failure to provide the charge was not error unless evidence supporting the charge "jumped off the page." We do not think it did.

Even though the judge instructed the jury on b(2) aggravated assault, and simple assault under subsections a(1) and (2), all of which have "bodily injury" as an element, it was not "rationally debatable," Sloane, 111 N.J. at 294, that J.R. only suffered bodily injury. See N.J.S.A. 2C:11-1a ("'Bodily injury' means physical pain, illness or any impairment of physical condition."). In returning a guilty verdict on count three (b(2) aggravated assault), the jury concluded beyond a reasonable doubt that defendant acted "purposely or knowingly," and that he used a "deadly weapon," defined as one "capable of producing death or serious bodily injury," N.J.S.A. 2C:11-1c. The need to provide instructions on b(2) aggravated assault at all resulted from the prosecutor's unwise overcharging in the indictment. Under all the circumstances, a charge on b(3) aggravated assault was not "clearly indicated."

Even if we were to conclude the judge erred by not including instructions on b(3) aggravated assault, any omission was not plain error. The Court has said that

> [i]n the context of a jury charge, plain error requires demonstration of "[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. Burns, 192 N.J. 312, 341 (2007) (second alteration in original) (emphasis added) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).]

The allegation of error must be assessed in light of "the totality of the entire charge, not in isolation." State v. Chapland, 187 N.J. 275, 289 (2006) (citing State v. DiFrisco, 137 N.J. 434, 491 (1994)).

In this case, the jury was given the opportunity to consider whether defendant engaged in simple "reckless" conduct when the judge provided instructions on simple assault, N.J.S.A. 2C:12-1a(1), as a lesser included offense under count two, SBI aggravated assault. The jury rejected that alternative, instead concluding defendant acted with a level of culpability greater than simple reckless conduct. In short, even if the judge should have sua sponte provided instructions for b(3) aggravated assault, his failure to do so was not plain error requiring reversal.

IV.

We address Point I raised in defendant's brief and the points raised in defendant's pro se supplemental brief before turning to the sentencing arguments.

After the prosecutor used her ninth challenge to remove a second African-American juror, defense counsel objected and moved for a new panel. The judge heard the prosecutor's reasons at

sidebar, denied defendant's request and ordered the prosecutor to come to sidebar prior to exercising any more challenges to minority jurors. Defendant now argues the prosecutor used her peremptory challenges in a discriminatory fashion. We disagree.

The United States and New Jersey Constitutions prohibit the prosecution and defense counsel from exercising peremptory challenges of jurors on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986); State v. Gilmore, 103 N.J. 508, 522-23 (1986). The trial judge must engage in a three-stage, burden-shifting analysis. State v. Osorio, 199 N.J. 486, 492 (2009). We will not disturb "a trial court's ruling on the issue of discriminatory intent . . . unless it is clearly erroneous." State v. Thompson, 224 N.J. 324, 344 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)).

Here, the trial judge evidenced a commendable sensitivity during the jury selection process and reacted in compliance with our jurisprudence. We find no reason to conclude otherwise.

At trial, defense counsel urged the judge to charge mistake of fact, N.J.S.A. 2C:2-4(a), contending the jury could find defendant mistakenly believed the gun was not loaded. The prosecutor objected, noting there was no evidence, even in defendant's statement to detectives, supporting that claim. The judge agreed and refused to give the charge.

Defendant now argues the judge should have charged mistake, see Model Jury Charge (Criminal), "Ignorance or Mistake" (2007), but he fails to assert what mistake of fact or law was supported by the evidence at trial, arguing only the shooting was accidental. The argument warrants no further discussion in a written opinion, as do the remaining arguments defendant raises in his pro se supplemental brief. R. 2:11-3(e)(2).

V.

Defendant posits several arguments regarding his sentence. He contends the judge: improperly "double counted" by using defendant's prior criminal history to impose an extended term and to justify the maximum sentence; failed to state why aggravating factors six and nine applied and failed to apply mitigating factors eleven and twelve, resulting in an improper balancing of sentencing factors; and failed to explain why he imposed a consecutive, maximum sentence on the certain persons conviction. We largely disagree and affirm the sentence, with the exception of the sentence imposed on count eight, the certain persons conviction.

We begin by recognizing "[a]ppellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Generally, we only determine whether:

> (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) (quoting State v. Roth, 95 N.J. 334, 364-65, (1984)).]

The judge granted the State's motion to impose an extended term because defendant was a persistent offender. See N.J.S.A. 2C:44-3(a) (a person, at least twenty-one years old, "who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 . . . if the latest . . . is within 10 years of the date of the crime for which the defendant is being sentenced"). Defense counsel acknowledge defendant was eligible for an extended term.

In State v. Pierce, 188 N.J. 155 (2006), the Court provided guidance to trial judges considering such motions. After determining a defendant is eligible for an extended term, the judge must then "weigh the aggravating and mitigating circumstances to determine the base term of the extended sentence." Id. at 164 (quoting State v. Dunbar, 108 N.J. 80, 89 (1987). The available sentence range "starts at the minimum of the ordinary-

term range and ends at the maximum of the extended-term range." Id. at 169.

Here, the judge found aggravating sentencing factors three, six and nine. N.J.S.A. 2C:44-1a(3) (the risk of re-offense); a(6) (the extent and seriousness of defendant's prior record); and a(9) (the need to deter). Although tersely stated, the judge explained his reasons for these findings beyond defendant's prior criminal record. The judge also explained his reason for rejecting mitigating factors eleven and twelve. N.J.S.A. 2C:44-1b(11) (defendant's imprisonment would work a hardship for his family); b(12) (defendant's cooperation with law enforcement). As to the latter, the judge explained that defendant's cooperation agreement with the FBI forbade him from engaging in any criminal conduct.

The judge clearly explained his reason for imposing a consecutive sentence on the certain persons conviction by considering the factors set out by the Court in State v. Yarbough, 100 N.J. 627, 643-44 (1985), and we find no mistaken exercise of discretion in this regard. However, defendant correctly notes that the judge never explained why he was imposing the maximum term of ten years. See State v. Miller, 108 N.J. 112, 122 (1987) ("Where the offenses are closely related, it would ordinarily be inappropriate to sentence a defendant to the maximum term for each offense and also require that those sentences be served

consecutively, especially where the second offense did not pose an additional risk to the victim.").

We recognize the judge was required to impose a mandatory minimum term of five years on the certain persons count. N.J.S.A. 2C:39-7b. However, he was not compelled to impose a maximum, consecutive sentence of ten years after imposing the maximum extended term sentence on the other counts. Without the benefit of any explanation by the judge, we reluctantly must remand the matter for resentencing on the certain persons conviction, count eight of the indictment. As the Court more recently said, "we adhere to the cautioning in Miller . . . against the imposition of multiple consecutive maximum sentences unless circumstances justifying such an extraordinary overall sentence are fully explicated on the record." State v. Randolph, 210 N.J. 330, 354 (2012).

Affirmed in part; the sentence on count eight is vacated and the matter is remanded for resentencing on that count. See ibid. (advising the court must conduct "an up-to-date viewing of defendant at the time of resentencing").