SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4031-15T1
A-4086-15T1
A-4605-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HAROLD FERMIN,
ISMAEL PERALTA, and
MICHAEL ALMONTE,

Defendants-Appellants.

Argued February 7, 2018 – Decided May 23, 2018

Before Judges Alvarez, Nugent, and Currier.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 13-04-0309.

Steven E. Braun argued the cause for appellant Harold Fermin.

Robert J. Galluccio argued the cause for appellant Ismael Peralta (Goodman, Galluccio & Chessin, attorneys; Robert J. Galluccio, on the brief).

Adalgiza A. Núñez argued the cause for appellant Michael Almonte.

Robert J. Wisse, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Tom Dominic Osadnik, Assistant Prosecutor, of counsel and on the briefs).

PER CURIAM

Tried by a jury, defendants Harold Fermin, Ismael Peralta, and Michael Almonte were convicted of third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) and N.J.S.A. 2C:2-6 (count one); first-degree possession with the intent to distribute a CDS in a quantity of five ounces or more, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(1), and N.J.S.A. 2C:2-6 (count two); third-degree possession with the intent to distribute a CDS within 1000 feet of a school zone, N.J.S.A. 2C:35-7, N.J.S.A. 2C:35-5(a), and N.J.S.A. 2C:2-6 (count three); and second-degree conspiracy to possess with the intent to distribute five ounces or more of a CDS, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(1), and N.J.S.A. 2C:2-6 (count four). Only Fermin and Peralta were indicted and convicted of third-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(1) (counts five and six). Only Peralta was indicted and convicted for third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(1) (count seven).

The court sentenced defendants on April 15, 2016. The trial judge merged the third-degree possession conviction and second-

degree conspiracy with the first-degree possession offense for each defendant.

Fermin was sentenced to fifteen years imprisonment on the first-degree offense, subject to a five-year parole disqualifier, and a concurrent four-year prison term on the hindering apprehension charge. The court sentenced Peralta to fourteen years imprisonment on the merged convictions, subject to four years and eight months of parole ineligibility. His sentence also included a concurrent three-year prison term on the hindering offense. Almonte's sentence consisted of a twelve-year prison term with a four-year parole disqualifier on the first-degree crime. Defendants appeal, and we affirm, consolidating the matters for decision.

We glean the following facts from the trial record. On September 29, 2012, Passaic County Sheriff's Department Detective Stephan Lantigua and other officers executed a search warrant at a commercial building in Paterson. Defendants were in a unit similar in size and configuration to a single-car garage, with an interior loft. A sign outside read "K&H Auto Alarm and Service," and another sign indicated the business was closed. Over the course of two hours of surveillance before the execution of the warrant, Lantigua observed several people walk into the building and promptly depart.

At approximately 5:00 p.m., Peralta entered the building, where he remained until arrested approximately an hour later. At 6:00 p.m., the detectives, dressed in bullet-proof vests with badges visible, knocked on the front door and announced they were police officers. Lantigua noticed two video surveillance cameras facing the entrance from opposite directions. As the detectives continued to knock, they "overheard several male voices coming from inside." One of the men said, "oh shit, the cops are outside. Get rid of that shit," then Lantigua heard "a loud movement."

Concerned with officer safety and destruction of evidence, the detectives breached the door with a battering ram. Lantigua entered first and saw two individuals running a couple of steps to empty the contents of a wooden box into a five-gallon bucket of water that was no more than six inches full, or containing about a gallon. The men were later identified as Fermin and Peralta.

Lantigua heard a noise from the loft. When he ran upstairs, he found Almonte, who was breathing heavily, seated on a couch. The officers seized thirty-one small, green-tinted Ziploc bags and seven clear, knotted plastic bags, all containing a white powdery substance suspected to be cocaine. They also recovered a brick-shaped folded paper towel from a hydraulic press that contained

suspected cocaine powder, a box of baking soda, two digital scales, a police scanner, and numerous empty baggies.

Once Lantigua arrived at headquarters, he secured the evidence. He noticed the paper towel contained a "dusting" of suspected cocaine. Lantigua emptied the paper towel into one of the seven knotted bags and secured the paper towel separately. He did not identify the bag into which the powder had been deposited. Lantigua acknowledged he violated police procedure related to the processing of evidence and he should have secured the residue from the paper towel into a separate evidence bag.

Matthew Marino, the State's forensic scientist and expert witness, initially tested only four of the seven knotted bags, because their weight exceeded the five-ounce minimum for a first-degree possession charge. Once the critical weight was reached, state police procedure allowed for the testing to stop. The laboratory does not test for the presence of adulterants in the drugs, which often contain cutting agents.

In October 2015, when Lantigua explained the manner in which he emptied the paper towel to the prosecutor during trial preparation, the prosecutor sent the remaining three bags and paper towel for testing. The first four bags collectively weighed 6.37 ounces. The remaining three bags weighed 10.474 grams, 0.303 grams, and 0.370 grams respectively, and the cocaine extracted

from the paper towel weighed 0.112 grams. The thirty-one small baggies filled with suspected cocaine were not tested or weighed.

The court qualified Detective Tory Weaver as an expert in the illegal drug trade. He testified drug dealers often increase the amount of their product by the use of cutting agents, such as baking soda or inositol powder. At times, a liquid and a cutting agent are blended together to create a paste mixed with the drugs. The paste is wrapped in a paper towel and repeatedly squeezed to remove any excess liquid. The cocaine is then heat-dried, resulting in a "finished, hard brick." The end product is cut, measured into one-half to one gram portions using digital scales, and packaged in small baggies. High-level drug dealers package drugs into bags weighing approximately one ounce for distribution. Drug dealers sometimes use a police scanner to monitor police activities.

Prior to trial, the judge denied defendants' application to suppress the drugs on the basis Lantigua's act of emptying the paper towel into one of the bags irretrievably tainted the evidence. The judge also denied defendants' motion to bar the State from referring to the search warrant during trial.

At trial, the judge instructed the jury on the limited use of the information regarding the execution of a search warrant. We later describe in detail the judge's decision on the motion for

acquittal made under Rule 3:18-1 at the close of the State's case, the motion for a new trial, and his sentencing statement and findings regarding aggravating and mitigating factors.

Fermin raises the following issues:

> POINT I — THE STATE'S CONTROLLED DANGEROUS SUBSTANCE EVIDENCE SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE AS IT WAS NOT IN THE SAME CONDITION AS WHEN THE ALLEGED CRIME OCCURRED. IN THE ALTERNATIVE, THE EVIDENCE DOES NOT ESTABLISH A FIRST-DEGREE CRIME
>
> POINT II — THE MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED AS TO THE CONSPIRACY AND THE POSSESSION OF CONTROLLED DANGEROUS SUBSTANCE CHARGES
>
> POINT III — PRINCIPLES OF DUE PROCESS ENTRAPMENT MANDATE THAT THE INSTANT CONVICTION BE REVERSED
>
> POINT IV — FREQUENT REFERENCES TO THE EXISTENCE OF A SEARCH WARRANT PREJUDICED THE FAIRNESS OF MR. FERMIN'S TRIAL BECAUSE THE LEGALITY OF THE SEARCH WAS NOT IN ISSUE
>
> POINT V — ADMISSION OF THE PHOTOGRAPH OF THE SCANNER [], THE SCANNER ITSELF [], AND THE PHOTOGRAPH OF THE BOX OF ARM & HAMMER BAKING SODA WAS UNDULY PREJUDICIAL AND SHOULD HAVE BEEN EXCLUDED PURSUANT TO N.J.R.E. 403
>
> POINT VI - THE TRIAL COURT IMPROPERLY INTERFERED WITH THE PRESENTATION OF THE DEFENSE CASE WHEN IT PROHIBITED THE DEFENSE FROM REFERRING TO THE STATE'S EVIDENCE AS TAINTED OR AS CONTAMINATED
>
> POINT VII — THE HEARSAY EVIDENCE OF THE STATEMENT OF AN UNIDENTIFIED PERSON TO THE EFFECT THAT "OH, SHIT. THE COPS ARE HERE. GET RID OF THAT SHIT," OR WORDS TO THAT EFFECT,

WAS INADMISSIBLE HEARSAY WHICH SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE, AND THE VALUE OF THE EVIDENCE WAS OUTWEIGHED BY ITS PREJUDICE

POINT VIII — THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY REGARDING THE WEIGHT OF THE ALLEGED CONTROLLED SUBSTANCES, AN ELEMENT OF THE CONSPIRACY TO POSSESS 5 OUNCES OR MORE OF COCAINE WITH THE INTENT TO DISTRIBUTE

POINT IX — THE MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED

POINT X — CUMULATIVE ERROR REQUIRES A NEW TRIAL

POINT XI — THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE AND ERRONEOUS DUE TO THE FAILURE OF THE COURT TO PROPERLY CONSIDER THE AGGRAVATING AND MITIGATING FACTORS

Peralta contends the trial judge committed error as follows:

POINT I
THE COURT SHOULD NOT HAVE SUBMITTED THE CASE TO THE JURY AS A FIRST DEGREE CRIME BECAUSE AS A MATTER OF LAW THE STATE HAD NOT MET ITS BURDEN THAT THE COCAINE SEIZED WAS IN A QUAN[T]ITY OF FIVE OUNCES OR MORE

POINT II
PROSECUTION SHOULD HAVE DISMISSED INDICTMENT OR DISMISSED FIRST DEGREE COUNT ONCE IT LEARNED OF CONTAMINATED EVIDENCE

Almonte raises the following points for our consideration:

POINT I: DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT ALLOWED THE STATE TO PRESENT STATE POLICE LABORATORY REPORTS NOT PROBATIVE TO THE ELEMENTS OF THE OFFENSE

POINT II: THE TRIAL COURT ERRED IN ALLOWING EXCESSIVE REFERENCES TO THE SEARCH WARRANT AS

IT WAS UNDULY PREJUDICIAL AND DEPRIVED DEFENDANT OF AN IMPARTIAL JURY AND FAIR TRIAL

POINT III: DEFENDANT WAS DENIED A FAIR TRIAL AS THE ADMITTANCE OF THE OUT-OF-COURT STATEMENT WAS UNDULY PREJUDICIAL, IRRELEVANT, AND AN INADMISSIBLE CO-DEFENDANT STATEMENT

POINT IV: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS

We address defendants' joint points of error, followed by discussion of individual issues.

I.

We first turn to defendants' contention that the admission of the State's proofs regarding the weight of the CDS was prejudicial error. It is well-established a trial judge is accorded broad discretion in determining the admissibility of evidence. State v. Scherzer, 301 N.J. Super. 363, 424 (App. Div. 1997) (citing State v. Wilson, 135 N.J. 4, 20 (1994)). Absent a clear abuse of discretion, we will uphold the trial court's evidentiary decisions. State v. Gorthy, 226 N.J. 516, 539 (2016) (citing State v. T.J.M., 220 N.J. 220, 233-34 (2015); State v. Buda, 195 N.J. 278, 294 (2008)). An abuse of discretion occurs when the "jurors are diverted 'from a reasonable and fair evaluation of the basic issue of guilt or innocence.'" State v. McDougald, 120 N.J. 523, 582 (1990) (citing State v. Sanchez, 224 N.J. Super. 231, 251 (App. Div. 1988)). The trial court's

evidentiary rulings are disturbed only where they are "so wide off the mark that a manifest denial of justice resulted." Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016) (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

We reiterate Lantigua described the quantity of powder on the paper towel that he emptied into a bag as a "dusting." The jury obviously found him to be credible, as they were unconvinced by the defense arguments that the addition of the material from the paper towel irretrievably tainted the State's evidence. We are unconvinced as well. The argument that the material on the paper towel may have wrongfully tipped the weight into an excess of five grams simply runs contrary to Lantigua's testimony, and to common sense.

Even if defense counsel were correct that the dusting emptied into a bag was baking soda or some other adulterant, that does not mean the weight would therefore be reduced. The State is not required to test for purity, nor is it obligated to test every specimen submitted to the lab. N.J.S.A. 2C:35-5(b); State v. Gosa, 263 N.J. Super. 527, 536-37 (App. Div. 1993). Rather, the State may test a small, randomly selected sample. Id. at 537.

The facts in Gosa are illustrative. There, the state police chemist tested only fifteen vials randomly selected from a total of 180. Ibid. All were filled with a white powdery substance.

Ibid. The defense theory was since less than ten percent of the vials were tested, a reasonable jury could not conclude the remaining vials contained CDS, nor could the untested vials be used to calculate five ounces. Id. at 534. We disagreed, because if the randomly chosen vials all contained cocaine, "the clear inference is that the other 165 vials, if tested, would also be found to contain cocaine." Id. at 537.

Similarly, in the present case, the police recovered seven knotted plastic bags, and thirty-one small Ziploc baggies, all filled with a white powdery substance. The first four knotted bags tested positive for cocaine and weighed an aggregate 6.37 ounces. The rest of the knotted bags and the residue that remained on the paper towel also tested positive for cocaine. The forensic scientist did not total the last group that was tested, but the parties agreed during trial if the heaviest bag was removed, the weight of the remaining six bags would total 4.99 ounces. But that calculation assumes, however, the quantity of cocaine from the paper towel was equivalent to the heaviest bag, a conclusion not supported by the testimony.

The chemist tested and weighed the additional drugs, concluding they came to 180.74 grams, or 6.37 ounces. He also tested the paper towel, which contained 0.112 grams of cocaine. Obviously, it would have been preferable if Lantigua had separately

bagged the dusting on the towel, but its addition does not taint the evidence overall. The argument is entirely based on speculation——not a clear inference——and is unsupported by our caselaw. Assessing the evidence and the expert testimony, the jury could have reasonably concluded the State proved its case beyond a reasonable doubt. Likewise, Lantigua's credibility, in light of his failure to follow police procedures, is for the jury to decide. See State v. O'Brien, 200 N.J. 520, 534 (2009). The clear inference from the lab results is that the seven bags, the paper towel, and the untested thirty-one baggies together contained cocaine in excess of five ounces. The jury had sufficient evidence to draw the conclusion from the evidence presented to them.

Defendants also contend, in an argument not raised below, the chain of custody was inadequate for admission. That point also lacks merit.

A party proffering physical evidence must lay a proper foundation for its admission, including "a showing of an uninterrupted chain of possession." State v. Brunson, 132 N.J. 377, 393 (1993) (citing State v. Brown, 99 N.J. Super. 22, 27 (App. Div. 1968)). If the custodian of the evidence is the State, it is "not obligated to negate every possibility of substitution or change in condition of the evidence." Ibid. The evidence is

admissible so long as the trial court "finds in reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when the crime was committed." Brown, 99 N.J. Super. at 28 (citations omitted).

Lantigua confirmed he personally gathered the cocaine from the garage, secured it, and took it to headquarters where he poured the white powder from the paper towel into a bag. He then packaged the materials for analysis by the lab. The evidence receipts delivered to the lab corroborated the testimony.

Although two pieces of evidence were combined in violation of state police lab protocol, the chemist noted and corrected this paperwork confusion. In no way does that substantiate any potential chain of evidence claim. Nothing in that minor irregularity in the paperwork means the evidence was not in the same condition as when seized. This argument does not require further discussion in a written opinion. R. 2:11-3(e)(2).

II.

"[A] defendant is entitled to a judgment of acquittal on a charge 'if the evidence is insufficient to warrant a conviction.'" Gosa, 263 N.J. Super at 535 (quoting R. 3:18-1). On appeal, we apply the same standard as the trial court. State v. Moffa, 42 N.J. 258, 263 (1964). We determine "whether, viewing the State's

evidence in its entirety, be that evidence direct or circumstantial," and giving the State the benefit of all favorable inferences, "a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 459 (1967) (citing State v. Fiorello, 36 N.J. 80, 90-91 (1961)).

Fermin and Almonte argue the judge should have granted their motion for judgment of acquittal because the State did not prove the drugs weighed five ounces or more. The judge said as to the conspiracy count:

> I do find testimony as to this issue Detective Lantigua to be credible, that he found [Mr. Almonte] up on a loft, sitting on a couch breathing heavily. This was after he had entered the premises with the other officers . . . and observed the other two individuals, Mr. Peralta and . . . Mr. Fermin committing an act of what he . . . felt to be disposing of drugs. . . .
>
> In addition, I note there was [sic] various amounts of cocaine discovered in the premises. This was a very small [] one-car garage. . . . [There were] many other indicia of narcotics throughout . . . .
>
> Taking that testimony and what can be inferred from it, I find that . . . a reasonable fact-finder[] could determine beyond any reasonable doubt that the State has carried its burden of proof as to the charge of conspiracy [against Almonte]. . . .
>
> Secondly, as to the other defendants, I think it's even more clear. They were seen by Detective Lantigua discarding what appeared to be a controlled substance. There were

> numerous other controlled dangerous substances [and paraphernalia] found in this . . . very small building. . . . The motion will be denied.

The judge also denied the motion as to the first-degree possession with intent to distribute count, explaining:

> [T]he towel from which the alleged cocaine was dumped did contain residue of it. In addition, the bag that it was dumped into was – after being tested by the State laboratory disclosed that it was containing cocaine. The bag clearly was not empty. . . . I find that a reasonable fact-finder, giving the State the benefit of all reasonable inferences, could determine that the amount that's alleged to have been involved here was in excess of five ounces. Accordingly, that aspect of the motion is going to be denied.

The parties were found in a small one-car garage with substantial quantities of drugs and drug paraphernalia. Shortly after police entered the premises, and Fermin and Peralta attempted to discard the cocaine, Almonte was discovered seated upstairs in the loft, breathing heavily. Drawing all reasonable inferences in the State's favor, as the judge was obliged to do, there was sufficient evidence from which a reasonable jury could find defendants guilty beyond a reasonable doubt of conspiracy. It is similarly reasonable for a jury to have concluded the combination of drugs, including the additional thirty-one baggies filled with white powder, provide sufficient evidence for the jury to have

convicted defendants. The court properly denied the motion of acquittal.

III.

Defendants argue the State's references to the execution of the search warrant had limited probative value and were exceedingly prejudicial. Fermin and Almonte specifically claim repeated references to the warrant were unnecessary, and the judge's limiting instruction did not protect them from the ensuing prejudice flowing from them. This argument also lacks merit, and warrants little discussion in a written opinion. R. 2:11-3(e)(2).

As our Supreme Court directed in State v. Marshall, 148 N.J. 89 (1991), "a properly instructed jury will not presume guilt based on the issuance of a search warrant." Furthermore, "that a warrant was issued might necessarily be put before a jury in order to establish that the police acted properly." Id. at 240.

More recently, in State v. McDonough, 337 N.J. Super. 27 (App. Div. 2001), we clarified evidence of search warrants was prejudicial only when the suggestion is made that a non-testifying witness has given the police evidence of an accused's guilt. Adhering to the Supreme Court's decision in Marshall, we said so long as a jury is properly instructed, a search warrant can be mentioned during the course of a trial. McDonough, 337 N.J. Super. at 32-33.

The search warrant in this case was relevant to establish the officers' right to enter the place of business after hours. No one mentioned an arrest warrant for any individual or that a judge issued the warrant, or made any reference to the warrant process.

The trial judge issued a limiting instruction early in the case, advising "[t]he execution of a search warrant has no evidential relevance whatsoever concerning the alleged guilt of an individual, and cannot be considered in that regard in any fashion during your deliberations." The judge included the limiting instruction in his closing charge. The requirements in Marshall were met and the judge did not abuse his discretion in allowing the State to refer to the search warrant. 148 N.J. at 212.

IV.

Peralta now argues for the first time the prosecutor should have dismissed the indictment upon the disclosure of Lantigua's mixing of the cocaine from the paper towel into the cocaine in a plastic bag. That act simply did not contaminate all the evidence. Admission of the drugs was not a plain error clearly capable of producing an unjust result. R. 2:10-2.

We agree where the authorities have lost or destroyed evidence, the State must bear the consequences flowing from the loss. State v. Dreher, 302 N.J. Super. 408, 483 (Law Div. 1997).

But we do not agree a due process violation occurred here because there was no loss or suppression of evidence, and thus no due process violation. See ibid. There was no bad faith or connivance on the part of the government. The amount of the material tossed into the knotted bag was a "dusting," and thirty-one baggies with white powder were neither weighed nor tested. Moreover, there was no evidence Lantigua's manipulation was intended to prejudice defendants' rights, or had that effect. See ibid. Therefore, no dismissal of the indictment is warranted based on a due process violation. Failure to dismiss the indictment on those grounds was not error at all, much less plain error.

Fermin adds the court should have allowed defendants' use of the terms "tainted" or "contaminated" when referring to the State's evidence. He argues the court's prohibition amounted to unwarranted judicial interference.

"[A] trial court has wide discretion in controlling the courtroom and the court proceedings." D.G. ex rel. J.G. v. N. Plainfield Bd. of Educ., 400 N.J. Super. 1, 26 (App. Div. 2008) (citing Ryslik v. Krass, 279 N.J. Super. 293, 297 (App. Div. 1995)). A trial judge's decisions must be reviewed within the context of the entire record in order to determine whether it had prejudicial impact. Ibid. (citing Mercer v. Weyerhaeuser Co., 324 N.J. Super. 290, 298 (App. Div. 1999)). We uphold a discretionary

ruling of the trial court, absent an abuse of discretion. See Persley v. N.J. Transit Bus Operations, 357 N.J. Super. 1, 9-10 (App. Div. 2003).

Here, the trial judge reasoned:

> [T]he definition of "taint" from Merriam-Webster Dictionary states, to hurt or damage the condition of something; to make something dangerous or dirty, especially by adding something harmful or undesirable to it.
>
> Now while obviously . . . I'm not going to preclude any questioning as to — this . . . important issue. . . . in this Court's view[,] that's too strong of a phrase to be utilized to describe what occurred here and it could be unduly prejudicial to the jury. The same with the word "contaminate." I certainly feel that improperly mixed or mishandled would be more appropriate.

The judge reasonably exercised his discretion in ensuring more precise terms would be used. The evidence was not "tainted" or "contaminated." The addition of the powder from the paper towel to the cocaine in one of the bags neither tainted nor contaminated the evidence in the literal sense of the words.

V.

Almonte contends the court improperly allowed Lantigua to testify as to the comments he heard while standing outside the garage before entry: "oh shit, the cops are outside. Get rid of that shit." The argument is since it cannot be attributed to any particular defendant, its admission is prejudicial to all. For

the first time on appeal, Fermin and Almonte also argue the statements were inadmissible hearsay, and their admission violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. The trial judge did not exclude the statement because everyone found in the garage was charged.

Clearly, the statement is not hearsay, as it was not offered for the truth of the matter asserted. See N.J.R.E. 801(c); N.J.R.E. 802. Hearing the statement, Lantigua ordered the breach of the door, concerned about the safety of his officers and the destruction of potential evidence. Shortly after the officers' entry, Lantigua witnessed Peralta and Fermin attempting to destroy cocaine by dumping it into a bucket of water. The statement was offered merely to explain the forceful entry into the garage, not to prove the truth of the contents. Its admission was neither an abuse of discretion nor hearsay.

Defendants also argue admission of the statement violated the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 1, Paragraph 10 of the New Jersey Constitution under the principles enunciated in Crawford v. Washington, 541 U.S. 36 (2004). We consider the argument under the plain error rule, as it was not made to the trial judge. See R. 2:10-2 ("[T]he appellate court may, in the interests of justice,

notice plain error not brought to the attention of the trial court.").

The overheard comments were spontaneous, as opposed to statements from a formal interview or to a government official. See Buda, 195 N.J. at 304 (Crawford, 541 U.S. at 511). The declarant's statement was akin to the "casual remarks to an acquaintance" described in Buda. Ibid. (Crawford, 541 at 511). Hence, admission did not violate the Confrontation Clause.

VI.

We review sentencing decisions of the trial court deferentially. State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Where the "aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced," the sentence will stand. Ibid. (citing State v. Natale, 184 N.J. 458, 489 (2005)). We do not substitute our judgment for that of the trial court and only disturb those sentences that are "clearly unreasonable so as to shock the judicial conscience." State v. Roth, 95 N.J. 334, 365 (1984).

Only Fermin challenges his sentence as manifestly excessive. The trial judge found aggravating factors nine, N.J.S.A. 2C:44-1(a)(9), and eleven, N.J.S.A. 2C:44-1(a)(11), and mitigating factors seven, N.J.S.A. 2C:44-1(b)(7), and nine, N.J.S.A.

2C:44-1(b)(9) in this case. Fermin owned the business targeted by the search warrant, had been employed as a technician for twenty years, and had no prior criminal history. The judge took into account that although this was first-degree weight, it "was not a great deal over that five ounce threshold." The judge concluded Fermin's sentence should be somewhat more severe because it was his business that was targeted and the aggravating and mitigating factors were in equipoise. Thus, he sentenced defendant in the mid-range for the first-degree conviction. The judge's discussion displayed a thoughtful weighing and balancing of the statutory factors. His sentence does not shock our conscience.

VII.

Fermin contends the court should have excluded the police scanner, a photograph of the scanner, and a box of baking soda because their probative value was outweighed by their potential prejudicial effect.

Evidence is relevant, and therefore admissible, if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401; accord N.J.R.E. 402; State v. Williams, 190 N.J. 114, 122-23 (2007). Relevant evidence may be excluded by the trial court if its probative value is substantially outweighed by the risk of unfair prejudice or

other factors delineated in N.J.R.E. 403. Griffin, 225 N.J. at 420-21 (citations omitted).

A photograph may be admitted into evidence despite its inflammatory nature if it is probative of some material fact in the case. State v. Bucanis, 26 N.J. 45, 51 (1958). In State v. Wakefield, for example, our Supreme Court upheld the admission into evidence of the photograph of a victim's body because it corroborated the testimony of several witnesses regarding the injuries to the victim and the location of the body. 190 N.J. 397, 432 (2007).

Here, the trial court admitted a police scanner, a photograph of the scanner, and a photograph of a box of baking soda. Lantigua testified he recovered a scanner and a box of baking soda as a result of the search. The detective confirmed he recognized the photographs of the police scanner and the baking soda, and the pictures accurately depicted the locations where the items were found, thus establishing an adequate foundation for their admission. The photographs were relevant and corroborated Lantigua's testimony that those items were recovered during the search.

Taken together with Weaver's expert testimony, the jury could reason that the items had a tendency to prove defendants were acting in furtherance of a drug distribution scheme. Such an

inference is neither inflammatory nor prejudicial, in light of the other physical evidence—cocaine powder, drug packaging paraphernalia, and digital scales.

Therefore, the trial judge did not abuse his discretion by admitting the scanner and photographs into evidence.

VIII.

Fermin asserts the trial court erred in failing to repeat the jury instructions regarding the weight of the cocaine when he gave the jury the conspiracy instruction. Since this argument was not made to the trial judge, we again employ the plain error standard. See R. 2:10-2.

It is black letter law that in considering a jury instruction, plain error requires a showing of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify" reversal. State v. Singleton, 211 N.J. 157, 182-83 (2012) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). The trial judge did instruct the jury about the weight element of the first-degree possession with intent to distribute. Having charged the jury correctly with reference to the first-degree offense and the need for the jury to determine the weight involved, there was no need to repeat the instruction on the conspiracy count. Repetition was unnecessary, as noted in

the Model Jury Charges.[1] This argument does not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

IX.

Pursuant to Rule 3:20-1, a trial judge may grant a defendant's motion for a new trial "if required in the interest of justice." The trial judge must "set aside the verdict of the jury as against the weight of the evidence" if "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice." Ibid.; accord State v. Saunders, 302 N.J. Super. 509, 523 (App. Div. 1997). The trial judge must consider "not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury's domain, so-called 'demeanor evidence', and the intangible 'feel of the case' which he [or she] has gained by presiding over the trial." Dolson v. Anastasia, 55 N.J. 2, 6 (1969). "[T]he question is whether the result strikes the judicial mind as a miscarriage of justice." Ibid. (quoting Kulbacki v. Sobchinsky, 38 N.J. 435, 459 (1962)). Fermin asserts the court should have granted the motion for a new trial because

[1] The Model Jury Charge for conspiracy, N.J.S.A. 2C:5-2, directs the judge to "IF NOT PREVIOUSLY STATED GIVE MODEL CHARGE FOR THE UNDERLYING OFFENSE." Model Jury Charges (Criminal), "Conspiracy" (revised April 12, 2010).

it was a "manifest denial of justice" to allow the jury to "consider a first-degree crime despite the co-mingling of substances."

The judge observed the issue of whether the State proved the CDS was five ounces or more was "very hotly contested," including during pretrial and the application for a judgment of acquittal at the end of the State's case.

In denying defendants' motion for a new trial, the judge said:

> The jury had the ability to consider the testimony and the cross examination of both Detective Lantigua and the State's chemist. . . .
>
> In this [c]ourt's view the jury had ample opportunity to pass on a credibility of these two witnesses. . . . This [c]ourt is not clearly convinced that there was a manifest denial of justice, so under the law in terms of the jury's decision as to this issue.

The jury had the opportunity to consider and weigh the testimony of Lantigua and Marino with reference to the quantity of drugs and other materials seized in the garage. The jury observed the thorough cross-examination of the State's witnesses by three defense attorneys. Thus, contrary to Fermin's assertion, no injustice resulted from the judge's denial of a motion for a new trial.

X.

Issues raised at trial are reviewed under the harmless error standard. R. 2:10-2. An alleged error brought to the trial court's attention will not be reversed unless it is "clearly capable of producing an unjust result." Ibid. Where constitutional rights are implicated, the reviewing court must consider whether the State has "proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Scherzer, 301 N.J. Super. at 454 (citation omitted) (quoting Chapman v. Cal., 386 U.S. 18, 24 (1967)). A new trial is required where cumulative error is not harmless. State v. Weaver, 219 N.J. 131, 162 (2014).

In considering whether a defendant received a fair trial, a reviewing court must remember, "no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness. A defendant is entitled to a fair trial but not a perfect one." Wakefield, 190 N.J. at 537 (quoting State v. R.B., 183 N.J. 308, 333-34, (2005)).

We disagree with Fermin that cumulative errors warrant a new trial. No errors were committed by the trial judge. Defendants were accorded a fair trial.

XI.

Fermin now argues for the first time on appeal Lantigua's mishandling of the cocaine constituted such "outrageous" conduct as to be the equivalent of due process entrapment. This issue was not raised below. Due process entrapment is an affirmative defense which must be proved by a preponderance of the evidence. State v. Florez, 134 N.J. 570, 583 (1994) (citing State v. Gibbons, 105 N.J. 67 (1987); State v. Medina, 201 N.J. Super. 565 (App. Div. 1985)). This point is so lacking in merit as to not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Fermin also argues the officer's undisputed act of emptying a paper towel that had a "dusting of white powder" into a bag with drugs was such outrageous conduct it warranted a sanction. The argument that the undisputed violation of protocols regarding the processing of evidence violated due process also lacks merit. The point does not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.