SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4419-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEITH V. CUFF,

Defendant-Appellant.

Submitted December 12, 2017 – Decided February 2, 2018

Before Judges Reisner, Gilson, and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-05-1446.

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

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Nancy P. Scharff, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Keith Cuff was indicted for fifty-five crimes related to five robberies and the stop of a vehicle. A jury

convicted defendant of nineteen of those crimes. Defendant's convictions included two counts of first-degree armed robbery, N.J.S.A. 2C:15-1; three counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1); second-degree burglary, N.J.S.A. 2C:18-2; two counts of second-degree conspiracy to commit robbery "and/or" kidnapping, N.J.S.A. 2C:5-2, N.J.S.A. 2C:15-1, and N.J.S.A. 2C:13-1(b)(1); and various weapons offenses. Defendant was sentenced to an aggregate term of ninety-eight years in prison, with over sixty-six years of parole ineligibility.

Defendant appeals his convictions and sentences. We affirm all of his convictions and sentences, with the exception of the two convictions for conspiracy to commit robbery "and/or" kidnapping. We vacate and remand those two convictions, which were counts 15 and 46 of the indictment, for further proceedings.

I.

The charges against defendant arose out of five separate armed robberies and an incident where a vehicle in which he was riding was stopped, but defendant fled and stole a truck in the process of getting away. Defendant was indicted for those crimes along with three co-defendants. One of the robberies took place in June 2010, and the other four robberies took place between February and May 2011. Four of the robberies involved home

invasions, where numerous victims were threatened with guns and tied up.

At trial, one of the co-defendants and a cooperating witness gave testimony against defendant and described his involvement in the various incidents. The cooperating witness admitted to participating in all of the robberies and testified that he was the driver of the vehicle that was stopped and from which defendant fled. The State also presented testimony from several of the victims. Those victims recounted that the men who robbed them wore black masks, threatened them with guns, and bound their hands and legs, mainly using zip ties. The State's physical evidence included two guns, masks, and zip ties that were recovered from or near the stopped vehicle from which defendant fled. DNA evidence linked defendant to one of the masks.

The first robbery occurred on June 25, 2010, in Cherry Hill. The homeowner testified that when he entered his home, he encountered three men, one of whom pointed a gun at his head. The men took money, traveler's checks, and a Rolex watch. Before leaving, they tied his hands and feet. The cooperating witness testified that he, defendant, and another co-defendant committed that robbery.

The second robbery occurred on February 28, 2011, in Cherry Hill. A family consisting of a husband, wife, and four children

lived in that home. The parents had gone out for the evening, leaving their children at home. When the parents returned home at approximately 11:30 p.m., two masked men armed with guns "jumped" the husband. The husband's hands were tied behind his back with zip ties. The men then took several thousand dollars from the husband's pockets. Thereafter, the men left the husband and wife tied up in their home. Eventually, the husband was able to untie his hands. When he went upstairs, he found two of his teenage daughters tied up.

The cooperating witness testified that he and defendant committed the robbery on February 28, 2011. He explained that they knew that the homeowner owned a jewelry and pawn shop and that they had followed him home a few days before the robbery. The cooperating witness also explained that he and defendant broke into the home, tied up the daughters, and waited armed with guns for the homeowner to arrive.

The third robbery took place on March 3, 2011, in Pine Hill. The homeowner owned a local grocery store. He arrived home at approximately 10:30 p.m., parked his van, and encountered two armed men wearing black masks. One of the men pointed a silver gun at the back of his neck. He was ordered to lie down, and the men took everything he had in his pockets, which included $2200

in cash, his wallet, and keys. The men then left in the homeowner's van.

The cooperating witness testified that a third party drove him and defendant to the home. He explained that he and defendant were armed with handguns and waited for the victim to come home. When the victim arrived, they took his money and his van. They parked the van around the corner and then left that scene in the vehicle driven by the third party. The police later recovered the victim's van.

The vehicle stop occurred on March 29, 2011, in Gloucester Township. The police responded to a call regarding an incident at a shopping center involving persons driving a white Honda Accord. A car matching that description was pulled over by a police officer. The officer testified that as the car came to a stop, the front passenger door opened and a man exited the car and ran away. The police searched the car and found three black ski masks, a cell phone, and zip ties. DNA tests revealed defendant's DNA on one of the recovered black masks. During a search of the surrounding area, the police found two loaded handguns.

The cooperating witness was the driver of the car. He testified that defendant was the man who ran from the car. The cooperating witness also testified that defendant later told him that he was able to get away because he stole a truck from a

construction site. The owner of the truck testified that his truck was taken from his excavation company, which was in the vicinity of where the car was stopped.

The cell phone recovered from the white Honda Accord was examined, and text messages between the cooperating witness and defendant were recovered. One of the messages discussed getting zip ties the night before the robbery on March 3, 2011. Another message referenced defendant by the nickname "Bleak."

The fourth robbery occurred on April 2, 2011, in Gloucester Township. The homeowner lived with his daughter, son, and fiancée. The daughter was home alone. At approximately 11:30 p.m., the homeowner, his fiancée, and his son arrived home. After entering the home, each of them was confronted by masked men armed with guns. The men took the homeowner upstairs where he was directed to open a safe in his bedroom. The men then took money from the safe and jewelry from a cabinet. The homeowner was tied up, carried into a bathroom, and placed in a bathtub. His bound fiancée was also placed in the bathtub. After the men left, the homeowner freed himself with the help of his fiancée.

The fiancée and the two children, who were ages sixteen and twelve at the time of the robbery, also testified. They each described being confronted by armed men who tied them up. The

daughter recounted how she was hog tied and left for approximately ninety minutes.

The cooperating witness testified that he and defendant, together with two other men, committed the robbery on April 2, 2011. He explained that a person they knew had worked for the homeowner and knew that the homeowner had a safe in his home. That person then showed defendant the location of the home. The cooperating witness described how the men went to the home, tied up the daughter, waited for the homeowner, confronted the victims with guns, took over $60,000 from the safe, and left the victims tied up.

The fifth and final robbery took place on May 14, 2011, in Sicklerville. When the homeowners, a man and woman, came home, they were confronted by three masked men with guns. The men directed the man upstairs where he opened his safe. The cooperating witness testified that he and defendant, along with two other men, committed the robbery on May 14, 2011.

Before trial, defendant moved to sever the various counts of the indictment so that the counts relating to each of the six incidents would be tried separately. The trial court denied that motion, finding that there were similarities among each of the incidents and that defendant would not be prejudiced by having a comprehensive trial.

Defendant and one of his co-defendants were tried together over twelve days. At trial, the jury heard testimony from numerous witnesses, including law enforcement personnel, victims, a co-defendant and, as previously noted, the cooperating witness. Both the co-defendant and cooperating witness had negotiated deals with the State. None of the State's witnesses were offered as expert witnesses and, thus, they testified as fact witnesses.

The jury convicted defendant of crimes related to the robberies that took place on February 28, 2011, March 3, 2011, and April 2, 2011, and the car stop on March 29, 2011. Defendant was acquitted on the charges related to the robberies that occurred on June 25, 2010, and May 14, 2011.

Specifically, defendant was convicted of two counts of first-degree armed robbery, N.J.S.A. 2C:15-1; three counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1); one count of second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1; two counts of second-degree conspiracy to commit robbery "and/or" kidnapping, N.J.S.A. 2C:5-2, N.J.S.A. 2C:15-1, and N.J.S.A. 2C:13-1(b)(1) (counts 15 and 46); three counts of second-degree unlawful possession of weapons, N.J.S.A. 2C:39-5(b); two counts of second-degree possession of weapons for unlawful purposes, N.J.S.A. 2C:39-4; one count of second-degree burglary, N.J.S.A. 2C:18-2; two counts of fourth-degree aggravated assault

with a firearm, N.J.S.A. 2C:12-1(b)(4); two counts of fourth-degree unlawful taking of means of conveyance, N.J.S.A. 2C:20-10(b); and a disorderly persons offense of false imprisonment, N.J.S.A. 2C:13-3.

As noted, defendant was sentenced to an aggregate term of ninety-eight years in prison, with over sixty-six years of parole ineligibility. For the robbery "and/or" kidnapping convictions, he was sentenced to eight years in prison on count 15, while the conviction on count 46 was merged with convictions on other counts.

II.

On appeal, defendant makes five arguments which he articulates as follows:

> POINT I — THE TRIAL COURT'S REFUSAL TO GRANT RELIEF FROM THE PREJUDICIAL JOINDER OF THE SIX SEPARATE INCIDENTS VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL. THIS PREJUDICE WAS EXACERBATED BY THE TRIAL COURT'S FAILURE [TO] ISSUE A PROPER LIMITING INSTRUCTION REGARDING THE PROHIBITED USE OF ONE INCIDENT TO SHOW A PROPENSITY TO COMMIT ANY OF THE OTHERS.
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> POINT II — THROUGHOUT THE CASE, WITNESSES' TESTIMONY OVERSTEPPED THE BOUNDARIES OF ACCEPTABLE LAY OPINION TESTIMONY, NECESSITATING REVERSAL OF DEFENDANT'S CONVICTIONS.
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> A. Introduction
>
> B. The Testimony of the Six Lay Witnesses

C. The Witnesses Provided Expert Testimony Without Being Qualified As Experts And Provided Inappropriate Lay Opinions. Because All Of The Improper Testimony Bolstered The State's Case, Its Admission Necessitates Reversal Of Mr. Cuff's Convictions

D. Conclusion

POINT III — THE VERDICT SHEET AND THE TRIAL COURT'S ERRONEOUS RESPONSE TO THE JURY'S QUESTION PRECLUDED THE JURY FROM CONVICTING DEFENDANT OF SECOND-DEGREE KIDNAPPING. HIS CONVICTIONS FOR FIRST-DEGREE KIDNAPPING MUST BE REVERSED. (Not Raised Below)

POINT IV — THE TRIAL COURT'S REPEATED USE OF "AND/OR" DURING THE JURY INSTRUCTIONS CREATED THE DANGER OF A PATCHWORK VERDICT AND NECESSITATES REVERSAL OF DEFENDANT'S CONVICTIONS FOR CONSPIRACY, ROBBERY, AND KIDNAPPING. (Not Raised Below)

POINT V — THE TRIAL COURT IMPROPERLY RAN SEPARATE CHARGES STEMMING FROM THE SAME CONDUCT CONSECUTIVELY AND IMPOSED AN EXCESSIVE SENTENCE.

Having reviewed the record and law, we find no merit in defendant's arguments, except those concerning his convictions on counts 15 and 46. Thus, we affirm defendant's convictions and sentences on all other counts, vacate his convictions on counts 15 and 46, and remand those two counts for further proceedings. We also vacate the sentence imposed on count 15. We will analyze each of defendant's five arguments.

1. The Motion to Sever

Defendant argues that the denial of his motion to sever the charges in the indictment violated his right to due process and a fair trial. He also contends that the prejudice from a joint trial was compounded by the trial court's failure to give jury instructions on the use of other crimes evidence. We disagree.

Two or more offenses may be charged in the same indictment if the offenses "are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting part of a common scheme or plan." R. 3:7-6. Trial courts are vested with discretion to sever charges if "it appears that a defendant or the State [will be] prejudiced by a permissible or mandatory joinder of offenses or of defendants . . . ." R. 3:15-2(b). In such circumstances, the trial court may order separate trials on certain counts. Ibid. We review such trial court rulings under an abuse of discretion standard. State v. Sterling, 215 N.J. 65, 73 (2013).

Severance should be granted if there is a danger that the jury could improperly use the evidence cumulatively. Our Supreme Court has explained

> [t]he relief afforded by Rule 3:15-2(b) addresses the inherent "danger[,] when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon

> any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all."
>
> [Ibid. (quoting State v. Pitts, 116 N.J. 580, 601 (1989)).]

"The test for assessing prejudice is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.'" Ibid. (quoting State v. Chenique-Puey, 145 N.J. 334, 341 (1996)).

In denying defendant's motion to sever, the trial judge applied the governing standard and specifically went through the requirements for admission under Rule 404(b), as set forth in State v. Cofield, 127 N.J. 328, 338 (1992). First, the court found that the other crimes evidence was relevant and probative to identity, preparation, and planning. Second, the judge found that the crimes were similar in nature and reasonably close in time. In that regard, he noted that the six incidents occurred within eleven months of each other and that all of the robberies involved multiple masked intruders and firearms. Third, he found that there was clear and convincing evidence of the other crimes from the anticipated testimony of the cooperating witness and the DNA evidence linking defendant to one of the recovered masks. Finally, the court found that the probative value of the

similarities among the incidents outweighed any potential prejudice. We discern no abuse of discretion in the trial court's decision to deny severance.

Defendant for the first time on appeal also contends that the prejudice from the joinder was exacerbated by the trial court's alleged failure to instruct the jury on the separate nature of each crime. No such limiting instruction was requested at trial. Accordingly, we review this argument for plain error. R. 2:10-2; State v. Young, 448 N.J. Super. 206, 224 (App. Div. 2017).

The court here repeatedly instructed the jury to consider each count separately and to consider only the evidence material to each particular count. The court also instructed the jurors that a verdict on one count should not control its verdict on any other count. Consequently, we discern no error and certainly no plain error.

2. The Alleged Impermissible Opinion Testimony

Defendant argues that six witnesses who testified at trial gave improper opinion testimony. Specifically, defendant argues that five of those witnesses gave expert opinions without being properly qualified as experts. Those witnesses were four law enforcement officers and an employee of the forensic laboratory of the State Police. Defendant also argues that the sixth witness, a police officer, gave an inadmissible opinion by explaining the

inferences he drew from the facts collected during the investigation.

We review the trial court's admission of testimony under an abuse of discretion standard. State v. Miller, 449 N.J. Super. 460, 470 (App. Div. 2017). In a criminal case, we will only reverse a jury conviction if the admission of the challenged evidence "undermine[s] confidence in the validity of the conviction[.]" State v. Weaver, 219 N.J. 131, 149 (2014).

Witnesses, including police officers, can testify in a variety of roles. A fact witness is one who testifies as to what "he or she perceived through one or more of the senses." State v. McLean, 205 N.J. 438, 460 (2011). In terms of police officers, fact testimony "has always consisted of a description of what the officer did and saw[.]" Ibid.

In contrast, expert witnesses "explain the implications of observed behaviors that would otherwise fall outside the understanding of ordinary people on the jury." Ibid. "Expert testimony is admissible '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" State v. Simms, 224 N.J. 393, 403 (2016) (quoting N.J.R.E. 702).

Lay opinion testimony is governed by N.J.R.E. 701, which permits a witness not testifying as an expert to provide "testimony

in the form of opinions or inferences . . . if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." See McLean, 205 N.J. at 456; Miller, 449 N.J. Super. at 471. "Courts in New Jersey have permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary." State v. LaBrutto, 114 N.J. 187, 198 (1989).

Defendant challenges the testimony of Officer Michael Rauscher, Officer Nicholas Arnold, Detective Patrick Cunane, Detective Gary McBride, Detective Paul Audino, and William Rochin, an employee of the State Police forensic laboratory. Defendant contends that none of those six witnesses were identified as experts, but that each of them gave opinion testimony without being properly qualified as an expert.

Defendant has incorrectly characterized the challenged testimony. A review of the trial transcripts shows that none of these witnesses gave impermissible opinions. Most of the challenged testimony consisted of the witnesses describing what they did as part of the investigation of these crimes. To the extent that the testimony was in the form of opinions or inferences, it fell within the ambit of admissible lay opinion

testimony. In other words, the testimony was rationally based on the perceptions of the witnesses and helped to assist in understanding the witnesses' testimony or a fact at issue. See N.J.R.E. 701; McLean, 205 N.J. at 456; Miller, 449 N.J. Super. at 471.

It also should be noted that at trial, defendant's counsel made very few objections to the testimony that defendant now seeks to challenge. We, therefore, review the unchallenged testimony for plain error. R. 2:10-2. Here, there was no plain error because the challenged testimony was not "sufficient to raise a reasonable doubt as to whether [the error] led the jury to a verdict that it otherwise might not have reached." State v. Galicia, 210 N.J. 364, 388 (2012) (quoting State v. Lazo, 209 N.J. 9, 26 (2012)).

Defendant contends that Officer Audino gave testimony that neither a fact witness nor should an expert witness be permitted to give. Specifically, he contends that Officer Audino testified as to a number of inferences that he made based on the evidence he gathered in this case, which led him to believe that defendant was the perpetrator of all five robberies. This is a mischaracterization of Officer Audino's testimony. The prosecutor asked Officer Audino if he was "assigned to assist in an investigation into a series of home invasions and armed robberies

that happened in different towns in Camden County." Officer Audino replied, "Yes, ma'am." He proceeded to testify about the investigation and explained that the items found in the car stopped on March 29, 2011, were similar to those reportedly involved in the robberies. That testimony was not impermissible testimony. Instead, it was admissible lay opinion testimony by a police officer.

3. Defendant's Convictions for First-Degree Kidnapping

Defendant challenges his three convictions for first-degree kidnapping contending that an error in the verdict sheet precluded the jury from convicting him of second-degree kidnapping. Defendant concedes that the jury was properly instructed on the range of offenses related to kidnapping, including first-degree kidnapping, second-degree kidnapping, criminal restraint, and false imprisonment. Defendant points out, however, that the verdict sheet failed to give the jury the option to indicate if defendant was guilty of second-degree kidnapping.

The State acknowledges, as the record establishes, that the verdict sheet did not provide a place to record a verdict for second-degree kidnapping. Nevertheless, the State argues that any error was harmless.

"Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial."

Galicia, 210 N.J. at 386 (quoting State v. Concepcion, 111 N.J. 373, 379 (1988)). "The charge must provide a 'comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" Ibid. (quoting Concepcion, 111 N.J. at 379)). Accordingly, a jury charge "is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations." Ibid. (quoting State v. Martin, 119 N.J. 2, 15 (1990)). "A verdict sheet is an essential component of that road map." Id. at 387.

"When there is an error in a verdict sheet but the trial court's charge has clarified the legal standard for the jury to follow, the error may be deemed harmless." Ibid. Even when the trial court correctly instructs the jury, however, an error in the verdict sheet may have the potential to mislead the jury. Id. at 387-88. Any discrepancy between the jury charge and the verdict sheet should be resolved by the court and explained to the jury. Id. at 388. "Because a verdict sheet constitutes part of the trial court's direction to the jury, defects in the verdict sheet are reviewed on appeal under the same 'unjust result' standard of Rule 2:10-2 that governs errors in the jury charge." Ibid.

Here, we find no reversible error. The verdict sheet did not give the jury a place to record a verdict for second-degree

kidnapping. Defendant made no objection to that verdict sheet at trial. Nevertheless, the jury was clearly instructed on the elements of both first- and second-degree kidnapping. More importantly, the verdict sheet listed the elements of first-degree kidnapping and the jurors checked the "guilty" box on those questions. Significantly, kidnapping is a second-degree crime if defendant releases the victim unharmed and in a safe place prior to his apprehension. N.J.S.A 2C:13-1(c)(1). Here, there was compelling evidence that defendant had left the victims tied up on the charges when he was convicted of first-degree kidnapping. Moreover, the verdict sheet also gave the jurors the option to consider lesser included crimes if they did not find all of the elements of first-degree kidnapping.

Defendant also argues that the error with the verdict sheet was compounded when the jury asked a question concerning how to designate a second-degree crime. Without specific reference to the kidnapping charge, the jury submitted a question during deliberations asking, "If applicable, how do we denote second-degree on a charge in the verdict book?" The trial judge conferred with counsel and then brought the jury in and explained:

> All right, ladies and gentlemen, a question came from the jury to the Court. I will read it into the record.

> "If applicable, how do we denote second-degree on a charge in the verdict book?"
>
> And my answer to you is this. You answer the questions as they are posed on the verdict sheet. Okay? Each individual question as posed.
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> You, the jury, are not to be concerned about the degree of the crime. That is in the Court's domain.
>
> So, you answer the question as posed, as we had talked about, you know, some of them, you -- depending upon what your answer is to one, you may go onto the next one, you may skip the next one, as we discussed when I was giving you my final instructions.

Before us, defendant contends that the combination of the error on the verdict sheet relating to the kidnapping charges and the trial court's response to the jury question precluded the jury from finding defendant guilty of the lesser included offense of second-degree kidnapping. We disagree. As already noted, the trial court properly instructed the jury on both first- and second-degree kidnapping. The verdict sheet, as it related to the kidnapping charges, first asked the jury to determine whether defendant was guilty of the elements of first-degree kidnapping. The jury found defendant guilty of three counts of first-degree kidnapping.

The verdict sheet also gave the jury the option to find defendant not guilty of first-degree kidnapping and consider

criminal restraint or false imprisonment. The jury found defendant guilty of false imprisonment as it related to one of the victims. Accordingly, the jury was following the court's correct instructions. Moreover, the jury had been given a copy of the court's charge, and they had the instructions on kidnapping in the jury room during deliberations. Here, the error in the verdict sheet was harmless.

4. The Use of "and/or" in the Jury Instructions and Verdict Sheet

Defendant next argues that the trial court's instructions concerning robbery, kidnapping, conspiracy to commit robbery, and conspiracy to commit kidnapping were flawed because they used the phrase "and/or," which could have allowed the jury to reach a non-unanimous verdict. Defendant never objected to the use of the phrase "and/or" and, accordingly, we review this issue for plain error. R. 2:10-2.

A jury must reach a unanimous verdict in a criminal case. N.J. Const. art. I, ¶ 9; R. 1:8-9. "The notion of unanimity 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. 1997)).

> Ordinarily, a general instruction on the requirement of unanimity suffices to instruct

> the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict. There may be circumstances in which it appears that a genuine possibility of jury confusion exists or that a conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts.
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> [State v. Parker, 124 N.J. 628, 641 (1991).]

A general instruction may not be sufficient where:

> (1) a single crime could be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or marginally related to each other; (4) the indictment and proof at trial varies; or (5) there is strong evidence of jury confusion.
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> [State v. Cagno, 211 N.J. 488, 517 (2012) (citing Frisby, 174 N.J. at 597).]

Our Supreme Court has instructed courts to apply a two-prong test to determine whether a specific unanimity instruction is required. Ibid. (citing Parker, 124 N.J. at 639). First, we ask "whether the allegations in the [] count were contradictory or only marginally related to each other . . . ." Parker, 124 N.J. at 639. Second, we inquire "whether there was any tangible indication of jury confusion." Ibid.

Applying this test, we find no reversible error concerning the charges for robbery or kidnapping. The trial judge used the

model jury instructions and did not use the phrase "and/or" in the instructions themselves, except when quoting from the indictment. Moreover, to the extent that the verdict sheet used that phrase, it was not used in such a way that the jury could be confused. The trial judge gave a clear instruction that they had to reach a unanimous verdict, and there is nothing in the individual instructions concerning the robbery or kidnapping charges that would have confused the jury or could have led them to reach a non-unanimous result.

The instruction concerning conspiracy to commit robbery "and/or" kidnapping, however, was capable of producing a non-unanimous jury verdict. In particular, the jury verdict sheet only listed the charge of conspiracy to commit robbery "and/or" kidnapping in the same question. Thus, the jurors were not asked to consider separately whether defendant had engaged in a conspiracy to commit robbery and whether he had engaged in a conspiracy to commit kidnapping. By asking only one question, some jurors may have been convinced that he was in a conspiracy to commit robbery, while other jurors may have been convinced that he was in a conspiracy to commit kidnapping. Accordingly, we vacate defendant's convictions on counts 15 and 46 for conspiracy to commit robbery "and/or" kidnapping. Those two counts are remanded for further proceedings.

5. The Sentences

Defendant challenges his sentences contending that the trial court improperly ran certain sentences consecutively and imposed excessive sentences. We disagree.

We review sentencing decisions for an abuse of discretion. State v. Blackmon, 202 N.J. 283, 297 (2010). "The reviewing court must not substitute its judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). We will affirm a 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
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> (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Whether a sentence violates sentencing guidelines is a question of law that we review de novo. State v. Robinson, 217 N.J. 594, 604 (2014).

Where a defendant receives multiple sentences of imprisonment "for more than one offense . . . such multiple sentences shall run

concurrently or consecutively as the court determines at the time of sentence." N.J.S.A. 2C:44-5(a). "There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." Ibid.

When deciding whether to impose consecutive or concurrent sentences, trial courts should consider the factors set forth and explained in State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014 (1986). The Yarbough factors focus upon "the nature and number of offenses for which the defendant is being sentenced, whether the offenses occurred at different times or places, and whether they involve numerous or separate victims." State v. Carey, 168 N.J. 413, 423 (2001).

Here, defendant was convicted of nineteen crimes related to robberies and kidnappings involving multiple victims. As previously noted, the trial court sentenced defendant to an aggregate term of ninety-eight years in prison. In imposing the sentences, the trial court provided a detailed analysis. Accordingly, the judge analyzed each of the aggravating and mitigating factors and explained the basis on which he found those factors.

When imposing consecutive sentences, the judge discussed the Yarbough factors and explained in detail the reasons for imposing consecutive sentences. Accordingly, the trial court correctly

applied the sentencing guidelines and law, and we discern no abuse of discretion in the sentences that were imposed.

In summary, having reviewed all of defendant's arguments, we affirm all of his convictions and sentences with the exception of his convictions on counts 15 and 46 for conspiracy to commit robbery "and/or" kidnapping. Accordingly, defendant's convictions on counts 15 and 46 are vacated and remanded for further proceedings, and the sentence imposed on count 15 is also vacated.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.