NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1049-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY D. KILLE,

Defendant-Appellant.

APPROVED FOR PUBLICATION

April 29, 2022

APPELLATE DIVISION

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Submitted January 11, 2022 – Decided April 29, 2022

Before Judges Messano, Accurso and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 18-11-0871.

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

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for respondent (Dana R. Anton, Special Deputy Attorney General/Acting Sr. Assistant Prosecutor, on the brief).

The opinion of the court was delivered by

MESSANO, P.J.A.D.

A jury convicted defendant Anthony D. Kille of the lesser-included offense of first-degree aggravated manslaughter in the death of Davontae Randall, N.J.S.A. 2C:11-4(a)(1), second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1). After merging the weapons offenses into the aggravated manslaughter conviction, the judge sentenced defendant to a twenty-four-year term of imprisonment with an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Before us, defendant raises the following arguments:

> POINT I
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> SEVERAL CRITICAL ERRORS AND OMISSIONS IN THE FINAL JURY CHARGE DENIED DEFENDANT HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. ACCORDINGLY, REVERSAL OF DEFENDANT'S CONVICTIONS IS REQUIRED. (Partially Raised Below).
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> POINT II
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> A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE SENTENCING COURT PLACED UNDUE WEIGHT ON DEFENDANT'S PRIOR CRIMINAL RECORD IN FINDING AGGRAVATING FACTORS THREE AND SIX, DID NOT FIND A SPECIFIC NEED FOR DETERRENCE WHEN IT APPLIED AGGRAVATING FACTOR NINE, AND FAILED TO CONSIDER MITIGATING FACTORS THAT HAD BEEN SUPPORTED BY THE RECORD.

A REMAND IS ALSO NECESSARY FOR THE TRIAL COURT TO CONSIDER THE NEW YOUTH MITIGATING FACTOR. (Partially Raised Below).[1]

Having considered these arguments in light of the record and applicable legal standards, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

At trial, Davontae Randall's girlfriend, Felicia Marie Daniels, testified that she knew defendant because they "grew up together." On August 15, 2018, Davontae was driving her and two friends from visiting a friend in the hospital when there was a near accident with another car in which defendant was a passenger.[2] A verbal argument ensued between Davontae and defendant.

Ten days later, Felicia and Davontae were at his mother's home. Danielle Davis had just moved into the house with her daughter, Dayshena Davis, and was hosting a party. While decorating the yard for the party, Felicia, Dayshena and Davontae saw defendant standing across the street from Danielle's home. Danielle and Dayshena overheard Davontae and Felicia recounting the earlier car incident, and Danielle decided to approach defendant.

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[1] We choose to omit the subpoint headings contained in defendant's brief.

[2] Because some of the witnesses share the same surname, and to avoid any confusion, we use first names throughout the opinion. We intend no disrespect by this informality.

As Danielle's and defendant's voices escalated, Davontae ran across the street to confront defendant, and, according to Felicia, he and defendant "were squaring up to fight." The jury saw a short video from a nearby surveillance camera showing the two circling each other. Felicia said when defendant dropped his cell phone, Davontae picked it up and said, "[T]his is mine now." Defendant said, "I'm gonna be right back," and left the scene. Davontae handed the phone to his mother.

Defendant returned shortly, cutting through a neighboring yard to the side of Danielle's yard to confront Davontae. Defendant had a gun and asked, "Now what, pussy?" Felicia begged defendant not to shoot, but, as Davontae "charged" him, defendant fired. The two men "began fighting," and Felicia heard three more shots before Davontae fell to the ground fatally wounded.

Dayshena testified that Davontae knocked defendant to the ground as he fell, landing on top of defendant. As defendant "swiggle[d] his way from . . . underneath [Davontae] to get up" and run away, Dayshena chased after him. The surveillance video did not capture the shooting but included defendant's flight from the scene with Dayshena in fruitless pursuit.

Felicia and Danielle, both acknowledged that defendant was backing up when Davontae first confronted him across the street from Danielle's house. Danielle told her son, "[C]ome on . . . he don't want to fight . . . . Let's just end

it, leave it alone." She confirmed that Davontae picked up the cell phone defendant dropped and said, "[I]t's now mine, pussy." Danielle said when defendant returned, he had a gun and shot twice before Davontae "went to grab him."

When police arrived, they secured two shell casings and a 9mm. handgun lying nearby in the street. The gun's extended magazine had nineteen more bullets in it, and, according to the State's ballistics expert, the gun "appear[ed] jammed [with] a misfeed from one of the projectiles." The medical examiner testified Davontae suffered two gunshot wounds to the torso. One, to his shoulder area, was a "contact wound"; the second, to Davontae's chest, was "more rapidly fatal," and showed "no evidence of [having been fired at] close range."

Investigators attempted to locate defendant for several days, checking various addresses where they thought he could be. On August 28, 2018, defendant turned himself in to Atlantic City police, and, after waiving his Miranda[3] rights, gave a statement to investigators from the Gloucester County Prosecutor's Office. The jury heard the audio recording of the statement.

Defendant acknowledged the earlier near accident with Davontae's vehicle. He said Davontae reacted violently by getting out of his car and

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

throwing things at defendant's friend's vehicle. Defendant said on August 25, he visited friends who lived on the same street as Danielle. He did not know Danielle had just moved there, and defendant was "just chillin'." Danielle, however, confronted him "all rude and nasty" and threatened to "get [her] son." Defendant saw Davontae, a much larger man, coming at him, but defendant kept "backing up." When defendant dropped his phone, Davontae picked it up and said, "[T]his mine now."

Defendant admitted leaving to get a gun and returning to Danielle's home. As he pointed the gun at Davontae, he said, "Bro, give me my fucking phone and I'm not playing with you." Davontae "thought [he] was playing" and "charged . . . [him]." Defendant said:

> I didn't know that I killed him. I didn't mean to kill him. I wasn't even gonna shoot the gun. I was trying to scare him. That's why I pointed it at him.
>
> . . . .
>
> I just wanted my phone back. He humiliated me in front of a lot of people. I got a reputation. People respect me. Got love for me.
>
> . . . .
>
> I didn't know I was gonna do that. . . . [I]t happened so fast. He threw the phone at me. Charged me. I shot him.

Without objection, the State introduced an affidavit from a New Jersey State Police detective stating a search of their database failed to reveal defendant made any application for, or was ever issued, a permit to purchase or carry a handgun. The State rested after its ballistics expert linked the two spent shells and the bullet recovered from Davontae's body at autopsy to the gun found at the scene. Additional DNA evidence is insignificant and irrelevant to our decision. Defendant elected not to testify or call any witnesses.

II.

Before conducting an extended charge conference on the record, the judge provided counsel with proposed written jury instructions. The judge provided the jury with a written copy of his instructions for use during their deliberations, and the appellate record contains those written instructions. Defendant now raises four specific objections to the judge's final charge, two of which were never raised, even partially, before.

The failure to object to the charge at trial forecloses any argument on appeal, Rule 1:7-2, subject only to our review for plain error, i.e., error "clearly capable of producing an unjust result," Rule 2:10-2.

The Court has said:

> In 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."
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> [State v. Burns, 192 N.J. 312, 341(2007) (alteration in original) (emphasis added) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).]

While "erroneous instructions in a criminal case are 'poor candidates for rehabilitation under the plain error theory,'" State v. Adams, 194 N.J. 186, 207 (2008) (quoting Jordan, 147 N.J. at 422), "[t]he error must be considered in light of the entire charge and must be evaluated in light 'of the overall strength of the State's case,'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). We first consider the alleged errors never raised at trial.

Defendant contends the judge should have provided a limiting instruction regarding evidence of the traffic confrontation ten days before the homicide because it was "other-bad-act[]" evidence admitted under N.J.R.E. 404(b). However, following a pre-trial hearing, the judge prohibited the State from introducing evidence defendant threatened Davontae at the time of the near accident, and both attorneys agreed to refer to the encounter simply as an argument. In his statement to police, defendant portrayed Davontae as the aggressor. Evidence of an "argument," as opposed to a threat of violence or actual violence, is not bad act evidence subject to the strictures of N.J.R.E.

404(b). The contention requires no further discussion in a written opinion. R. 2:11-3(e)(2).

Defendant's remaining arguments apply to the jury instructions on the two weapons offenses. In his final jury charge, the judge first provided instructions on the various homicide charges before instructing the jury on possession of a firearm for an unlawful purpose. Those instructions included comprehensive definitions of the legal principles regarding "possession"; defendant does not contend otherwise. The judge then provided instructions on the unlawful possession of a handgun count.

For the first time on appeal, defendant acknowledges the written instructions provided to the jury on the unlawful possession of a handgun count were complete but argues the judge omitted essential parts of the model jury charge in his oral instructions. Specifically, defendant contends the judge truncated the model charge when giving his oral charge on "possession," instead referring the jury to prior instructions on possession which he gave on the unlawful purpose count. We conclude this was not plain error because the jury had only minutes before been completely and accurately instructed on the legal concepts regarding "possession."

Defendant's second argument regarding the unlawful possession count is more significant. The judge's written instructions included the following portion of the model charge:

> The third element that the State must prove beyond a reasonable doubt is that the defendant did not have a permit to possess such a handgun. If you find that the defendant knowingly possessed the handgun, and that there is no evidence that defendant had a valid permit to carry such a handgun, then you may infer, if you think it appropriate to do so based upon the facts presented, that defendant had no such permit.[] Note, however, that as with all other elements, the State bears the burden of showing, beyond a reasonable doubt, the lack of a valid permit and that you may draw the inference only if you feel it appropriate to do so under all the facts and circumstances.
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> [Model Jury Charges (Criminal), "Unlawful Possession of a Handgun (Second Degree) (N.J.S.A. 2C:39-5(b))," at 4 (rev. June 11, 2018).]

The judge eliminated this portion of the charge entirely in his oral instructions.

Defendant contends it was plain error for the judge to omit this critical passage from his oral instructions, because, as Judge King said in State v. Lindsey, "Nothing in the rules empowers a judge to issue an instruction in written form only." 245 N.J. Super. 466, 475 (App. Div. 1991). The State's brief fails to respond to this argument.

In Lindsey, the defendant was convicted of aggravated assault, burglary, and theft, and on appeal he raised as plain error the inadequacy of the jury

instructions. Id. at 467. The oral instructions the judge provided not only omitted critical concepts but were also insufficient when compared to the model jury charges. Id. at 473–74. The defendant argued these shortcomings could not be remedied by the written "cut and paste" instructions the judge provided to jurors, and we noted "the jurors were not specifically told that each must read the 'cut and paste' sheet. Nor was the foreperson told to read it to the others." Id. at 474.

We concluded the inadequacy of the jury charge was plain error requiring reversal:

> We find the oral instructions to the jury totally inadequate in the circumstances and "plain error" requiring a new trial. At the minimum, the entire instructions should be read to the jury. We cannot assume that each juror will independently read a written instruction or that a foreperson will read it to the entire jury in an objective fashion, as a judge would do. In this case, the jurors were not even specifically instructed to each read the instruction or to listen carefully while the foreperson read it. Nor will we even assume that each juror was sufficiently literate to read and comprehend the "cut and paste" instruction.
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> [Ibid. (emphasis added).]

Rule 1:8-8 (the Rule) has been amended since our decision in Lindsey. Providing written jury instructions in a criminal trial, which was discretionary then, is now mandatory, except if the judge "finds that preparation of written instructions will cause undue delay in the trial." R. 1:8-8(b)(2).

The current iteration of Rule 1:8-8(b)(2) had its genesis in the Court's decision in State v. O'Brien, 200 N.J. 520 (2009). There, the deliberating jury requested a written copy of the judge's final charge, but the judge declined, explaining it was "not part of our process." Id. at 533. The Court reversed the defendant's conviction on other grounds, id. at 539–41, but, noting the Rule was "silent regarding the kinds of considerations that should inform" a discretionary decision to provide the jury with written instructions, the Court referred the issue to the Civil and Criminal Practice Committees. Id. at 541.

The Criminal Practice Committee (the Committee) released its recommendations in an off-cycle report dated March 28, 2012, proposing revisions "that [went] beyond the Court's interpretation of Rule 1:8-8 in the O'Brien opinion" because the "benefits gained from having more informed and knowledgeable jurors favor" the idea of requiring submitting written instructions to the jury in criminal cases. Report of the Supreme Court Criminal Practice Committee on Distribution of Written Instructions to the Jury, 3 (Mar. 28, 2012) (Committee Report).

The Committee recommended revising the Rule to require the court provide the jury with two or more copies of written instructions in all criminal cases, an approach in line with other jurisdictions and consistent with the standards and best practices developed by the American Bar Association. Id. at

23 (citing ABA Standards for Criminal Justice: Discovery and Trial by Jury, Standard 15-4.4(a) (3d ed. 1996); Principles for Juries and Jury Trials pmbl., Principal 14(B) (Am. Bar Ass'n 2005)). Importantly, the Committee Report specifically rejected submission of partial written jury instructions, which could create appellate issues or motions for a new trial based on the absence of particular parts of the charge in writing. Id. at 27. The Court's revisions to Rule 1:8-8, specifically including current subsection (b)(2), became effective January 1, 2014.

But nothing in the current Rule suggests a judge is relieved of orally conveying the contents of the charge to jurors. Indeed, since adoption of the revised Rule, the Court has reiterated the importance of providing oral jury instructions. In State v. Mohammed, the Court considered "the proper procedures a trial court should follow when faced with an allegation that a juror was inattentive during part of the trial," including the final jury charge. 226 N.J. 71, 74–75 (2016). The Court rejected "the trial judge's suggestion that the written instruction option in Rule 1:8-8 might cure a deficiency in the oral instruction." Id. at 88. Finding, "written instructions alone are insufficient to cure the juror's inattention and the resulting prejudice," ibid. (citing Lindsey, 245 N.J. Super. at 473–74), the Court held "copies distributed under the Rule

were not a substitute for oral instructions or individual voir dire to determine whether a juror was alert and attentive," id. at 89.

Whether the omission of oral instructions in this case requires reversal is a much closer question than in Lindsey because the judge's oral instructions here were not erroneous or inadequate; they simply omitted any guidance on how evidence adduced at trial could be used by jurors in deciding if the State carried its burden of proof on an essential element of the crime.

Yet, telling the jury it may infer from the State Police affidavit that defendant did not have a permit if "appropriate to do so under all the facts and circumstances," as opposed to permitting the jury in the absence of any instruction to presume the affidavit was indisputable evidence that defendant did not have a permit, is critically connected to defendant's due process rights. State v. Ingram, 98 N.J. 489, 495–98, 500 (1985). See also State v. Walten, 241 N.J. Super. 529, 534–35 (App. Div. 1990) (applying similar due process analysis to statutory presumption in motor vehicle prosecution and permitting only an inference that may be accepted or rejected by the fact finder). We cannot assume all deliberating jurors read the judge's written instructions, or that the written instructions were even examined by the jurors. The failure to give that portion of the model charge orally was plain error requiring reversal of defendant's conviction for unlawful possession of a handgun.

Defendant also argues the judge's instructions on the unlawful purpose charge were erroneous and require reversal. He contends the judge failed to tell jurors the State must prove defendant possessed the firearm with the specific purpose to use it against another person or another's property.

Defense counsel raised an objection to the judge's instructions as originally drafted because they failed to state the specific unlawful purpose alleged by the State. See Model Jury Charges (Criminal), "Possession Of A Firearm With A Purpose To Use It Unlawfully Against The Person Or Property Of Another (N.J.S.A. 2C:39-4(a))" at 5 (rev. Oct. 22, 2018) (Model Charge) (requiring judge to "[d]escribe the unlawful purpose of defendant's possession of the weapon"). The judge modified the instructions in response, telling jurors the State contended defendant's unlawful purpose was to "threaten, injure or kill Davontae."

On appeal, defendant takes a new tack, not asserted at trial, arguing the judge omitted an entire portion of the model charge that defines the third element of the crime, i.e., that defendant possessed the firearm with the purpose to use it against another person or another's property. See id. at 4–5. Indeed, although the judge started the instructions by telling jurors there were four elements to the offense, neither the judge's written instructions nor his oral charge included

the portion of the Model Charge defining the third element; the judge simply went from the second to the fourth element of the crime.

The State contends the judge's charge was sufficient because the jury could infer from the charge given all the necessary concepts regarding the crime's third element. We disagree.

The Model Charge contains four paragraphs explaining the third element of the crime. The jury never heard or saw any of those instructions. It is beyond debate that "the court must always charge on the elements of the crime." Jordan, 147 N.J. at 423 (citing State v. Vick, 117 N.J. 288, 291 (1989)). "[P]roper explanation of the elements of a crime is especially crucial to the satisfaction of a criminal defendant's due process rights." State v. Burgess, 154 N.J. 181, 185 (1998)).

Defendant's second argument alleging error in the unlawful purpose charge convinces us further that reversal is required. Defense counsel requested the judge include that portion of the Model Charge discussing the use of a firearm for a protective purpose. Such a finding by the jury may negate the crime's requisite mental state that a defendant possessed the firearm for an unlawful purpose. See Model Charge at 6. The judge refused, concluding the jury could not find defendant's return to Danielle's house with a weapon was for the purpose to protect himself or his property. At one point, the judge said the

facts did not support the charge because such a belief by defendant was "unreasonable."

However, the Model Charge clearly explains the difference between self-defense, which requires both an honest and reasonable belief in the need to use force, and the use of a weapon for a protective purpose, which only requires an honest belief, not a reasonable one. See State v. Williams, 168 N.J. 323, 334–35 (2001) (explaining the difference between the two concepts).

Here, defendant fled from an earlier physical altercation with Davontae. The jury could believe Danielle's testimony that defendant never intended to fight her son. In the process, Davontae took defendant's cell phone and refused to return it. The jury could believe defendant brought the weapon with him when he returned to protect himself as he tried to get the phone back. Certainly, there was sufficient evidence in the case to support the protective purpose instructions in the Model Charge. This error further supports our conclusion that defendant's conviction of the unlawful purpose charge must be reversed.

We hasten to add that reversal of defendant's convictions on the two weapons offenses do not affect his conviction for aggravated manslaughter, which we affirm.

III.

At sentencing, the judge cited defendant's prior criminal history, including adjudications of delinquency and a violation of juvenile probation, as well as defendant's indictable convictions and pending indictable charges. The judge gave this history "substantial weight" in finding aggravating factor three, the risk of re-offense, and aggravating factor six, the extent of defendant's prior criminal record and the seriousness of defendant's current crime. N.J.S.A. 2C:44-1(a)(3) and (a)(6). The judge gave "moderate weight" to aggravating factor nine, the need to deter defendant and others from violating the law, stating it applied to "every case of this type." The judge then reviewed all the mitigating sentencing factors, N.J.S.A. 2C:44-1(b), and concluded none applied.

The judge found the aggravating factors substantially outweighed the non-existent mitigating factors, and, based on defendant's prior record and the "nature of the present offense," he determined "a period of incarceration in excess of the midrange [wa]s mandated." The judge sentenced defendant to a twenty-four-year term of imprisonment on the aggravated manslaughter conviction, finding a "four-year departure" from the "midrange" of twenty years was appropriate.

Defendant contends the judge gave undue weight to his prior criminal record in finding aggravating factors three and six, and the judge failed to consider "specific deterrence" in finding aggravating factor nine. See, e.g., State

v. Fuentes, 217 N.J. 57, 79 (2014) (noting factor nine "incorporates two 'interrelated but distinguishable concepts,' the sentence's 'general deterrent effect on the public [and] its personal deterrent effect on the defendant'" (quoting State v. Jarbath, 114 N.J. 394, 405 (1989)). Defendant also argues the judge should have found certain mitigating factors that were advanced at sentencing.

"On review, appellate courts are deferential to sentencing determinations and 'must not substitute [their] judgment for that of the sentencing court.'" State v. Rivera, 249 N.J. 285, 297 (2021) (alteration in original) (quoting Fuentes, 217 N.J. at 70). As the Court said:

> The sentence must therefore be affirmed unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not "based upon competent 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."
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> [Id. at 297–98 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).]

Whether a sentence will "gravitate toward the upper or lower end of the [statutory] range depends on a balancing of the relevant factors." State v. Case, 220 N.J. 49, 64 (2014) (citing Fuentes, 217 N.J. at 72).

In this case, the judge gave careful consideration to all the aggravating and mitigating sentencing factors. He explained why he found certain aggravating factors, and why he rejected every mitigating factor, including those

not suggested by defense counsel. See State v. Bieniek, 200 N.J. 601, 609 (2010) (noting discussion of every factor is not required but encouraging trial courts to do so). We cannot conclude the judge mistakenly exercised his broad discretion in either the finding or weighing of the appropriate sentencing factors, and the sentence imposed does not shock our judicial conscience.

Defendant was twenty-one years old when sentenced. He also contends we should remand the case for the trial judge to consider mitigating factor fourteen, which "only requires a finding . . . '[t]he defendant was under [twenty-six] years of age at the time of the commission of the offense.'" State v. Tormasi, 466 N.J. Super. 51, 66 (App. Div. 2021) (first alteration in original) (quoting N.J.S.A. 2C:44-1(b)(14)), certif. granted and remanded on other grounds, 250 N.J. 6 (2022). The Court recently heard argument in State v. Lane, certif. granted, 248 N.J. 534, where it considered whether the new mitigating sentencing factor applied retroactively. Unless and until the Court holds to the contrary in Lane, we see no reason to deviate from our holding in State v. Bellamy, 468 N.J. Super. 29, 46–48 (App. Div. 2021), that mitigating factor fourteen does not apply retroactively to sentences, such as the one in this case, imposed prior to the statute's effective date.

We affirm defendant's conviction for aggravated manslaughter and the sentence imposed. We reverse defendant's convictions for unlawful possession

of a handgun and possession of a firearm for an unlawful purpose, and remand the matter to the trial court. If the State seeks to retry those counts, it shall notify the judge of its intention within sixty days; if not, the judge shall file a corrected judgment of conviction removing the convictions for those two counts of the indictment.

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