SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3819-17

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYRICE O. BERRY,

Defendant-Appellant.

Submitted October 19, 2020 – Decided April 19, 2022

Before Judges Currier, Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 14-06-1040.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Confusione, Designated Counsel, on the briefs).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Maura K. Tully, Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

On June 10, 2014, defendant Tyrice Berry was charged in a Monmouth County indictment with two counts of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (counts one and two); two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1b(1) (counts three and four); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count five); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b (count eight). Following a 2017 jury trial, defendant was convicted of all counts and sentenced to an aggregate term of twenty-four years' imprisonment, subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The convictions stemmed from defendant and a co-defendant, Malik Briggs, who was tried separately,[1] approaching a parked vehicle on October 19, 2012, shooting the two men seated inside the vehicle, and then fleeing the scene.

[1] Co-defendant Briggs was charged in the same indictment with defendant. Counts six, seven, and nine of the indictment pertained only to Briggs.

On appeal,[2] in his counseled brief, defendant raises the following points for our consideration:

> POINT [I]
>
> THE TRIAL COURT ERRED IN FAILING TO INCLUDE IN ITS ACCOMPLICE LIABILITY CHARGE THE LANGUAGE REQUIRED BY STATE V BIELKIEWICZ, 267 N.J. SUPER. 520, 533 (APP. DIV. 1993) (PLAIN ERROR; NOT RAISED BELOW).
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> POINT [II]
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.
>
> POINT [III]
>
> THE TRIAL COURT INFRINGED DEFENDANT'S RIGHT TO A FAIR JURY TRIAL (PLAIN ERROR; NOT RAISED BELOW[].]
>
> POINT [IV]
>
> DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

In his pro-se brief, defendant makes the following arguments:

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[2] Although this case is calendared back-to-back with cases resulting from a large-scale wiretap investigation dubbed "Operation Dead End," which produced a 219-count indictment charging forty-four defendants, including Berry, this appeal is not related to that indictment and will therefore be addressed separately.

POINT I

DEFENDANT'S GUARANTEED STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND THE CONFRONTATION CLAUSE WERE VIOLATED BY THE STATE FAILING TO PRESENT LEAD DETECTIVE WHOSE GRAND JURY TESTIMONY HAD REFUTED CONFLICTED TRIAL TESTIMONY ABOUT THE BROKEN CHAIN OF CUSTODY AND DENIED THE DEFENDANT THE RIGHT TO PRESENT A DEFENSE.

(A) The State Failed To Meet Its Burden By Making A Case Specific Medical Proof Finding That Det[ective] Zuppa Suffered Physical Incapacity Within The Meaning Of [Rule] 3:13-2 Before Violating Constitutional Right To Confrontation Clause.

(B) Plain Error For The Court Not To Give The Adverse Inference Charge To The Jury For The State[']s Failure To Produce The Lead Forensic Detective Lou Zuppa.

(C) The Trial Court[']s Denial Of The Defense Request To Charge The Jury On The Broken Chain Of Custody In The Absen[ce] Of Detective Lou Zuppa Denied The Defendant A Fair Trial.

(D) The Failure To Secure Det[ective] Zuppa[']s Presence At Trial Or In The Alternative Take Deposition Testimony Deprived The Defendant Of His Constitutional Right To Present His Defense.

POINT II

PLAIN ERROR FOR TRIAL COURT[']S FAILURE TO VOIR DIRE JURY AS TO EXTENT OF THE POTENTIAL TAINT AND ORDERING TAINTED JUROR NOT TO REVEAL CONVERSATION WITH FELLOW JURORS ON FALSE ALL[E]GATIONS "THAT IT WAS A GANG TRIAL" VIOLATING THE DEFENDANT[']S RIGHT TO TRIAL BY AN IMPARTIAL JURY.

POINT III

THE CUMULATIVE ERRORS DENIED THE DEFENDANT THE RIGHT TO DUE PROCESS AND FAIR TRIAL GUARANTEED UNDER BOTH FEDERAL AND STATE CONSTITUTION[S].

Having considered the arguments in light of the record and applicable legal principles, we reject each of the points raised and affirm.

I.

A sixteen-day jury trial was conducted on various dates in September and October 2017, during which the State produced twenty-one witnesses, including numerous law enforcement witnesses, DNA and ballistics experts, the two victims, and a purported eyewitness. According to the State's proofs, at approximately 1:15 a.m. on October 19, 2012, Asbury Park Police Officer Steven Love was involved in an unrelated investigation when he "heard . . . about ten gunshots in the area." Love immediately drove towards the location

of the shots and observed a vehicle outside the Cameo Bar on Main Street with "both [front] doors . . . open," "the back window . . . shattered," and "bullet holes all through the car." On the sidewalk, Love saw two men "hunched over," both of whom had been shot. The injured men were later identified as Rashawn Brown and Chauncey Toran. Neither could identify the shooters. Brown had been shot in the shoulder and leg but was stable. Toran had been shot in the abdomen and groin and was in critical condition. Love promptly called for backup officers to assist in the investigation and paramedics to transport the victims to the hospital for treatment.[3]

During the ensuing investigation, Love reviewed footage from the Cameo Bar's surveillance camera, which showed "a Black male with a bushy-type beard and Afro-type style hat" carrying "a stick or a cane," walking towards another male on the corner near the Cameo Bar. Both men then "walk[ed] across the street" to the victims' car and "beg[a]n shooting [into] the vehicle."[4] Love and other responding officers interviewed individuals in the area at the time of the

[3] Brown was treated and discharged from the hospital with "a bullet still in [his] neck." Toran underwent surgery and continued seeing doctors for "[m]onths" after being discharged from the hospital.

[4] Surveillance footage of the shooting was played for the jury during the trial.

shooting to try to find witnesses. The individuals told the officers they had seen a "male with a bushy beard, bushy Afro, blue hoodie, [and] blue jeans."

Asbury Park Police Officer Gregory Parisi, who had also responded to the scene to assist in the investigation, testified that while canvassing the area, a cab driver "flagged [him] down" and told him that he saw a man "running through the backyards on the 900 block of Fifth Avenue." Fifth Avenue intersects Main Street. Based on that information, Parisi searched between the backyards of 921 and 923 Fifth Avenue but did not see anyone or locate any evidence. However, Asbury Park Police Officer Craig Breiner, another responding officer who also searched the 900 block area of Fifth Avenue, found a black Afro wig and beard on the ground near a tree.

Asbury Park Detective Javier Campos and Monmouth County Prosecutor's Office Sergeant Jeffrey Wilbert obtained additional surveillance footage from a nearby Crown Fried Chicken which showed a man in a dark hoodie carrying "a stick or cane." They also obtained footage from Georgie's Bar, located on Fifth Avenue, "just around the corner from the Cameo [Bar]." The footage showed a man "running fast" from the direction of Main Street, crossing over "the railroad tracks" and "continu[ing] west on Fifth Avenue," out of camera range. Upon canvassing the area with Wilbert, Campos found "a

stick" in a parking lot on the corner of Main Street and Fifth Avenue in proximity to the Cameo Bar.

DNA analysis was conducted on the wig, beard, and stick recovered at the crime scene. A mixture of two individuals' DNA was found on the wig and beard. Defendant's DNA matched the major contributor DNA profile on two samples from the beard,[5] while Briggs's DNA matched the minor DNA profile obtained from the beard samples. Additionally, Briggs "match[ed] the major DNA profile" obtained from the wig sample while defendant could not be "excluded as a partial contributor to the mixed DNA profile" on the wig sample. Further, a mixture of at least two individuals' DNA was identified on the stick. "[T]he major DNA profile on the stick was consistent with [defendant]."[6]

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[5] According to the State's DNA expert, the "major DNA profile" obtained from one of the beard samples "occurs in approximately one in 82.5 quintillion of the African American population, one in 1.34 . . . sextillion of the Caucasian population," and "one in 11.9 sextillion of the Hispanic population."

[6] The State's DNA expert testified that "the estimated frequency of occurrence of that deduced major profile on the walking stick" was "[one] in 1.146 quintillion unrelated individuals in the Black population," "[one] in 2.428 quintillion unrelated individuals in the Caucasian population," "[one] in 96.15 quadrillion unrelated individuals" in the "southeast Hispanic population," and "[one] in 675.4 quadrillion unrelated individuals" in the "general Asian population."

No firearm was recovered. However, an analysis of the projectiles collected from the scene revealed that "six projectiles" were fired from "the same firearm" and "four more bullets" were fired from "another . . . [t]otally different firearm." The ballistics expert opined that one firearm was a ".9 millimeter Luger" and the other firearm was a ".38 caliber."

Both victims testified at trial. Brown testified that a "[t]all," "black" man with "a stick in his hand," wearing "black clothing," "a wig[,] . . . and a fake beard," shot him. However, Brown could not see the man's face because the man was wearing a "hoodie," as well as "the fake beard." Toran testified "[he] got shot" when he got back into the driver's seat of his car after going into the Cameo Bar "to get package goods." He stated he did not see anyone before getting into the car and could not give the police much information about the shooting.

Omego Archer, who knew defendant "[a]ll [his] life," testified that on the night of the shooting, he was outside the Crown Chicken restaurant, located "[r]ight across the street from the Cameo [Bar,]" when he heard multiple gunshots and saw two men "shooting inside of a car." The men "had . . . black clothes on" and one man was wearing a "face[] mask." Archer followed one of the men, who "ran towards the train tracks" and then went inside a house.

Because Archer suspected the man was defendant, Archer called defendant's cell phone, and defendant came out of the house and told Archer he and another person had "just shot someone on Main Street."[7]

Naquan Sims, another lifelong friend of defendant, testified he was in a friend's apartment at the time in question when defendant and Archer came "bust[ing]" through the door. According to Sims, defendant said "[s]omebody owed him some money," and "so he got shot." Sims did not believe defendant until he saw the surveillance footage of the Cameo Bar shooting broadcasted on the news.[8] After seeing the surveillance footage, Sims recognized defendant as the shooter because the shooter was wearing "a Halloween mask with a fro"

[7] Archer did not identify Briggs as the second assailant but instead identified a "Caucasian male" by the name of Justin Holden as the second shooter. Additionally, Archer first told officers that he did not know anything about the shooting. However, at the time of trial, Archer had a pending charge for armed robbery and, in exchange for his testimony at defendant's trial, the State agreed to recommend a five-year sentence of imprisonment on the robbery charge. Archer also testified at trial that defendant had contacted him by phone on "three" or "four" occasions, requesting him to get Brown to sign an affidavit exonerating defendant. Brown confirmed that Archer had contacted him about the affidavit but denied ever signing any document.

[8] Defendant produced one witness, the News 12 New Jersey assignment desk supervisor, to discredit Sims's testimony based on the time the Cameo Bar shooting surveillance video was broadcasted over the air.

similar to one Sims had seen defendant wearing about a "[w]eek prior" to the shooting.

After the State rested, defendant moved for a judgment of acquittal pursuant to Rule 3:18-1, which the trial judge denied. Following the jury verdict, defendant was sentenced on January 25, 2018, and a conforming judgment of conviction was entered on February 7, 2018. This appeal followed.

II.

In Point I of his counseled brief, defendant argues for the first time on appeal that the judge erred in instructing the jury on accomplice liability because the charge lacked specific language required under State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993). Defendant asserts the judge should have informed the jury that if it found defendant did not act as a principal, he might have had a lesser intent than the intent to kill held by the principal.

A "[d]efendant is required to challenge instructions at the time of trial." State v. Morais, 359 N.J. Super. 123, 134 (App. Div. 2003) (citing R. 1:7-2). "Where there is a failure to object, it may be presumed that the instructions were adequate." Id. at 134-35 (citing State v. Macon, 57 N.J. 325, 333 (1971)). "The absence of an objection to a charge is also indicative that trial counsel perceived no prejudice would result." Id. at 135.

Because defendant did not object to the jury charge, we review for plain error and only reverse if the error was "clearly capable of producing an unjust result." State v. McKinney, 223 N.J. 475, 494 (2015) (quoting R. 2:10-2). "The mere possibility of an unjust result is not enough." State v. Alexander, 233 N.J. 132, 142 (2018) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)). "Rather, '[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (alteration in original) (quoting Macon, 57 N.J. at 336).

> In the context of jury instructions, plain error is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and 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. Camacho, 218 N.J. 533, 554 (2014) (alteration in original) (quoting State v. Adams, 194 N.J. 186, 207 (2008)).]

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. Afanador, 151 N.J. 41, 54 (1997). "Appropriate and proper charges to a jury are essential for a fair trial." State v. Green, 86 N.J. 281, 287 (1981). To that end, "[t]he [trial] judge 'should explain to the jury in an understandable fashion its function in relation to the legal issues involved,'" and "must deliver '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.'" McKinney, 223 N.J. at 495 (quoting Green, 86 N.J. at 287-88).

Pertinent to this appeal, "[w]hen a prosecution is based on the theory that a defendant acted as an accomplice, the trial court is required to provide the jury with understandable instructions regarding accomplice liability." State v. Savage, 172 N.J. 374, 388 (2002). "By definition an accomplice must be a person who acts with the purpose of promoting or facilitating the commission of the substantive offense for which he is charged as an accomplice." Ibid. (quoting Bielkiewicz, 267 N.J. Super. at 528). Accordingly, the trial court must instruct the jury that "to find a defendant guilty of a crime under a theory of accomplice liability, it must find that he 'shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.'" Ibid. (quoting Bielkiewicz, 267 N.J. Super. at 528).

When reviewing an alleged error in the jury charge, "portions of a charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect," State v. Wilbely, 63 N.J. 420, 422 (1973), and "to determine whether the challenged language was misleading or ambiguous," State v. Nelson, 173 N.J. 417, 447 (2002). In

"assessing the soundness of a jury instruction," a reviewing court considers how ordinary jurors would "understand the instructions as a whole," based upon "the evidence before them, and the circumstances of the trial." Savage, 172 N.J. at 387 (quoting Crego v. Carp, 295 N.J. Super. 565, 573 (App. Div. 1996)).

Moreover, the effect of any error "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)). "Nevertheless, because clear and correct jury instructions are fundamental to a fair trial, erroneous instructions in a criminal case are 'poor candidates for rehabilitation under the plain error theory.'" Adams, 194 N.J. at 207 (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

Here, the judge's instruction tracked the model jury charge for accomplice liability, see Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6), Accomplice, Charge # One" (rev. June 6, 2021), applicable where a defendant is charged as an accomplice and the jury does not receive instructions on lesser included offenses. In essence, defendant now argues the judge should have given the Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6), Accomplice, Charge # Two" (rev. June 7, 2021), applicable where the jury is instructed on lesser included offenses and

intended to address circumstances similar to those present in Bielkiewicz, 267 N.J. Super. at 532-35.

In Bielkiewicz, we held that "when an alleged accomplice is charged with a different degree offense than the principal or lesser included offenses are submitted to the jury, the court has an obligation to 'carefully impart[] to the jury the distinctions between the specific intent required for the grades of the offense.'" Id. at 528 (alteration in original) (quoting State v. Weeks, 107 N.J. 396, 410 (1987)). We explained that "when a prosecution is based on the theory that a defendant acted as an accomplice, the court is obligated to provide the jury with accurate and understandable jury instructions regarding accomplice liability even without a request by defense counsel." Id. at 527.

The victim in Bielkiewicz was "killed by a single gunshot wound to the chest." Id. at 526. The evidence showed that the shooting was not planned but occurred spontaneously after a verbal altercation. Id. at 535. Because witnesses could not definitively identify which of two co-defendants fired the fatal shot, the State's theory of the case was "that the defendant who fired that [fatal] shot . . . was guilty of murder as a principal and . . . the other defendant was guilty as an accomplice." Id. at 526.

The jury found both defendants guilty of murder. Id. at 523. In reversing the murder convictions of both defendants, we determined the trial court's instructions to the jury "did not convey an accurate and complete understanding of" accomplice liability principles. Id. at 530. We stated:

> [W]hile the court properly instructed the jury that a defendant must have "the purpose to promote or facilitate the crime of purposeful or knowing murder" to be found guilty of murder as an accomplice, it did not inform the jury that a defendant could be found guilty as an accomplice of aggravated manslaughter, manslaughter or assault.
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> [Id. at 531.]

"Consequently, the court's instructions could have given the jury the impression that if they found the principal guilty of murder they would be required either to acquit or also to convict the alleged accomplice of murder." Id. at 534. We concluded that "erroneous jury instructions, applicable to both defendants in a joint trial," were prejudicial to both defendants. Id. at 536. Our Supreme Court reaffirmed the Bielkiewicz holding in State v. Ingram, 196 N.J. 23, 41 (2008), based on "a core and indisputable notion: that a principal and an accomplice, although perhaps liable for the same guilty act, may have acted with different or lesser mental states, thus giving rise to different levels of criminal liability."

Here, in accord with the principles articulated in Bielkiewicz, we agree the judge should have given Accomplice Liability Model Jury Charge Number Two. "When the State proceeds under a theory of accomplice liability, . . . [t]he judge must also instruct the jury that it could find the accomplice guilty of a lesser offense than the principal." State v. Oliver, 316 N.J. Super. 592, 596-97 (App. Div. 1998) (citing Bielkiewicz, 267 N.J. Super. at 533). Thus, the judge should have explained "'to the jury the distinctions between the specific intent required for the grades of the offense,'" notwithstanding defense counsel's failure to request it at trial. Bielkiewicz, 267 N.J. Super. at 528 (quoting Weeks, 107 N.J. at 410).

However, we conclude the error does not rise to the level of plain error because "the failure to give a Bielkiewicz charge is not plain error where a jury could not reasonably conclude that defendant was an accomplice." Oliver, 316 N.J. Super. at 597. Here, the evidence showed that defendant and Briggs both possessed firearms, both ambushed the vehicle occupied by the victims, both fired directly into the car, and both fled from the scene. Thus, there was no evidence that the principal may have acted with a different purpose than the accomplice and no evidence to infer any difference in defendants' mental states. As such, there was "simply no reasonable view of the evidence that would permit

one to conclude that defendants fired the shots or aided in the firing of the shots with anything less than homicide in mind." State v. Norman, 151 N.J. 5, 38 (1997). Where, as here, "there was no evidence presented that the principal may have acted with a different purpose than the accomplice," then the error is harmless "even if the judge should have more fully instructed the jury on accomplice liability." Oliver, 316 N.J. Super. at 597.

Moreover, because the judge also instructed the jury on aggravated assault as charged in counts three and four of the indictment as well as another lesser-included offense, the jury was aware of the alternative offenses for which it could have found defendant guilty. Additionally, the fact that defendant was not tried jointly with Briggs further undercuts a finding of plain error. Although "[t]he fact defendant was tried alone is not dispositive in these circumstances," State v. Franklin, 377 N.J. Super. 48, 57 (App. Div. 2005), separate trials render it "at best, a remote possibility that [the jurors] were distracted from their task by a conclusion that the principal had possessed a more culpable intent than the accomplice," Norman, 151 N.J. at 39. The fact that defendant challenged the State's proofs identifying him as one of the shooters further supports the likelihood that he did not suffer prejudice from the error. See State v. Maloney, 216 N.J. 91, 106 (2013) ("When the State's theory of the case only accuses the

defendant of being a principal, and a defendant argues that he was not involved in the crime at all, then the judge is not obligated to instruct on accomplice liability.").

III.

In Point II of his counseled brief, defendant argues the judge erred in denying his motion for judgment of acquittal at the close of the State's case pursuant to Rule 3:18-1. He asserts the State's "entire case rested on uncorroborated identifications." Specifically, defendant argues "Sims provided 'an uncorroborated version of events,'" because not "a single witness or objective piece of evidence" confirmed his testimony. Moreover, defendant contends, Archer's testimony was "factually incredible." According to defendant, because "[n]obody witnessed [him] wearing the claimed wig and beard, . . . carrying the claimed walking stick," or "possess[ing]" a firearm, and "[n]either victim could provide any identifying information on the shooters," the State "failed to provide sufficient evidence for . . . the attempted murder and aggravated assault crimes" to warrant a conviction.

Rule 3:18-1 allows a trial court to enter "a judgment of acquittal" for the defendant if, at the close of either the State's case or after all the evidence has been presented, "the evidence is insufficient to warrant a conviction." In

assessing the sufficiency of the evidence on an acquittal motion, we apply a de novo standard of review, State v. Dekowski, 218 N.J. 596, 608 (2014), using the same standard as the trial court. State v. Tindell, 417 N.J. Super. 530, 549 (App. Div. 2011). To that end, "[w]e must determine whether, based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt." State v. Williams, 218 N.J. 576, 594 (2014) (citing State v. Reyes, 50 N.J. 454, 458-59 (1967)).

In so doing, "[w]e view 'the State's evidence in its entirety, be that evidence direct or circumstantial,'" and "[i]n considering circumstantial evidence, we follow an approach 'of logic and common sense.'" State v. Jones, 242 N.J. 156, 168 (2020) (first quoting Reyes, 50 N.J. at 459; and then quoting State v. Samuels, 189 N.J. 236, 246 (2007)). Thus, "'[w]hen each of the interconnected inferences [necessary to support a finding of guilt beyond a reasonable doubt] is reasonable on the evidence as a whole, judgment of acquittal is not warranted.'" Ibid. (second alteration in original) (quoting Samuels, 189 N.J. at 246).

To establish the elements of attempted murder and withstand an acquittal motion, the State was required to show that defendant "acted with the culpability

required for the crime of murder, as well as to have acted with the purpose of causing the result that is an element of murder, namely, the death of another." State v. Robinson, 136 N.J. 476, 484 (1994); see also N.J.S.A. 2C:11-3(a). The elements of aggravated assault pursuant to N.J.S.A. 2C:12-1(b)(1) required proof of an attempt "to cause serious bodily injury to another," or proof that defendant caused such injury "purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly cause[d] such injury."

Finding sufficient "direct" and "circumstantial evidence," the judge denied defendant's motion and concluded "a reasonable jury [could] find . . . guilt beyond a reasonable doubt." Based on our de novo review of the record, we are satisfied the judge correctly determined the evidence was sufficient to withstand an acquittal motion. The State presented expert testimony tying defendant's DNA to the beard and the walking stick the shooter was seen wearing and carrying, respectively, in the surveillance videos. Additionally, defendant's DNA could not be excluded from the DNA found on the Afro wig seen in the videos. All three items were recovered at the crime scene.

The thrust of defendant's argument is that his convictions were not supported by the evidence because Sims and Archer, whose testimony was

corroborated by the DNA evidence, were not credible witnesses. However, the issue of credibility was for the jury to decide. See State v. Garcia, 195 N.J. 192, 207 (2008) (stating that the jury is "the final arbiter of credibility"). We are satisfied sufficient evidence was presented that, if accepted by the jury, supported each element of the crimes of attempted murder and aggravated assault.

IV.

In Point III of his counseled brief and Point II of his pro se brief, defendant argues, for the first time on appeal, that the judge "failed to ensure [his] fundamental right [to an impartial jury] was secured . . . by failing to remove [a] tainted juror . . . and telling the jury to continue deliberating after they announced deadlock." Defendant asserts "[n]ot declaring a mistrial after deadlock was announced further compromised [his] fair trial right," warranting "a new trial."

We first address defendant's "tainted juror" argument. "The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants 'the right to . . . trial by an impartial jury.'" State v. R.D., 169 N.J. 551, 557 (2001) (alteration in original) (quoting U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). "A

defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007). "That constitutional privilege includes the right to have the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters." R.D., 169 N.J. at 557. "A new trial, however, is not necessary in every instance where it appears an individual juror has been exposed to outside influence." Id. at 559.

Rule 1:8-2(d)(1), which governs the dismissal of a juror after deliberations have commenced, provides:

> If the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or is discharged by the court because of illness or other inability to continue, the court may direct the clerk to draw the name of an alternate juror to take the place of the juror who is deceased or discharged.

"The Rule attempts to strike a balance between the need for judicial economy, especially in the context of lengthy trials, and the fundamental right of defendants to a fair trial by jury." State v. Valenzuela, 136 N.J. 458, 467 (1994).

> Because the circumstances in which a juror can be excused pursuant to the Rule . . . "relate exclusively to the personal situation of the juror himself and not to his interaction with the other jurors or with the case itself, they are ordinarily not circumstances having the

> capacity to affect the substance or the course of the deliberations." Therefore, substitution of a juror under those circumstances in most cases does not impair a defendant's right to trial by a fair and impartial jury.
>
> [Id. at 468 (quoting State v. Trent, 157 N.J. Super. 231, 239 (App. Div. 1978), rev'd on other grounds, 79 N.J. 251 (1979)).]

However, our Supreme Court has cautioned that the Rule "is to be employed sparingly" and "'invoked only as a last resort mechanism to avoid the deplorable waste of time, effort, and money inherent in a mistrial.'" Id. at 468 (quoting State v. Lipsky, 164 N.J. Super. 39, 43 (App. Div. 1978)). Indeed,

> [T]he "unable to continue" language of the rule must be strictly construed and must ordinarily be limited to compelling circumstances which are exclusively personal to the juror in question, and hence which do not and which by their nature cannot raise the specter of either a jury taint or a substantive interference with the ultimate course of the deliberations beyond that necessarily implicit in the effect of new personalities on group dynamics.
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> [Trent, 157 N.J. Super. at 240.]

Thus, after the jury begins deliberations, "a juror cannot be discharged as 'unable to continue' unless the record adequately establishes that the juror suffers from an inability to function that is personal and unrelated to the juror's interaction with the other jury members." Valenzuela, 136 N.J. at 472-73.

> If a court is uncertain whether a juror is unable to continue, the court should question the juror in sufficient detail to establish a record adequate to inform the trial court, as well as a reviewing court, whether the juror possesses the intellect and the emotional stability to discharge the duty of a juror.
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> [Id. at 472.]

The trial court's inquiry with the juror should be conducted "with caution," and the court "should direct the juror not to reveal confidential jury communications." State v. Ross, 218 N.J. 130, 151 (2014).

"We traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." R.D., 169 N.J. at 559-60. "Application of that standard respects the trial court's unique perspective." Id. at 559.

> Although ordinarily the decision whether to excuse a juror lies in the sound discretion of the trial judge, an appellate court is not bound by a determination when the 'particular circumstances present such a strong likelihood of prejudice that, as a matter of law,' the juror should have been removed.
>
> [Loftin, 191 N.J. at 192 (quoting State v. Biegenwald, 106 N.J. 13, 91 (1987)).]

Here, after the jury began deliberating, juror 163's co-worker notified the court that the juror had told the co-worker she was "nervous and worried about jury deliberations because it is a gang trial or . . . involves a gang member."

However, according to the co-worker, the juror did not share any details about the case with the co-worker. After consulting with counsel, the judge questioned the juror outside the presence of the other jurors. The juror admitted she told the co-worker that jury duty was "stressful and that it was taking a toll on [her]." She confirmed she did not discuss any "details" about the case with her co-worker or do any outside research on the case. The juror also admitted she told the co-worker she was "nervous and worried." In response to the judge's question whether she could "be fair and impartial if [she was] nervous and worried," the juror explained that the "feeling [she] was trying to portray" was that "sitting with the rest of the jurors, . . . there [was] a general feeling that we know what our decision[is] going to mean to another human being."

At that juncture, the following colloquy ensued between the judge and the juror:

> [COURT]: Did you mention the word gang to your coworker?
>
> [JUROR]: No. It was mentioned to me and then - -
>
> [COURT]: By whom? . . . [D]on't tell me about any discussions with other jurors.
>
> [JUROR]: Well that's what I mean.
>
> [COURT]: Okay. Well, are you certain that you did not use the word gang?

> [JUROR]: Yes, I'm certain.
>
> [COURT]: Do you . . . feel that you can be fair and impartial?
>
> [JUROR]: Absolutely. I've come this far. I certainly would not want to jeopardize the system.

The judge then consulted with counsel at sidebar, expressing concern about infringing upon jury deliberations. When the judge pointedly asked counsel whether the juror needed to be replaced, both counsel agreed she did not because "she said she can be fair." Consequently, the judge instructed the juror "[she] should continue to deliberate" and, at defense counsel's request, directed the juror to "not mention any aspect of th[e] conversation [to] the other jurors."

Because defendant challenges the judge's handling of juror 163 for the first time on appeal, we review for plain error and will reverse only if defendant demonstrates the error was "clearly capable of producing an unjust result." R. 2:10-2. However, we find no error, much less plain error, and no abuse of discretion in the judge's decision to allow the juror to continue to deliberate. Juror 163 emphatically stated she could remain fair and impartial in her deliberations and confirmed she did not discuss details of the case with her co-worker or do any outside research. Although she acknowledged being "nervous and worried," she explained the feeling arose from her recognition of the

importance of her decision to defendant. See State v. Miller, 76 N.J. 392, 406-07 (1978) (holding the judge properly substituted an alternate for a juror who explained because of "his then nervous and emotional condition, he did not think he could render a fair verdict").

Juror 163's statements revealed no bias or prejudgment of defendant but only an acknowledgment of the import of her sworn oath as a juror. Thus, there was absolutely no basis to discharge her. See State v. Jenkins, 182 N.J. 112, 128 (2004) ("[A] juror who expressly states that she cannot be impartial or that she is controlled by an irrepressible bias, and therefore will not be controlled by the law, is unable to continue as a juror for purposes of Rule 1:8-2(d)(1), and must be removed from a jury."); Valenzuela, 136 N.J. at 471 (finding the trial court improperly dismissed a juror who stated "she understood her function, . . . was willing to abide by her oath, . . . was willing and able to apply the law" and "never stated . . . 'she was unable to render a fair verdict'").

Further, the judge's examination of the juror was careful to avoid confidential jury communications, which the juror indicated was the source of the "gang" reference. See State v. Terrell, 452 N.J. Super. 226, 272 (App. Div. 2016) (explaining that in conducting an examination of a deliberating juror, "the judge must not permit the juror to reveal confidential jury communications");

State v. Musa, 222 N.J. 554, 572 (2015) ("Questioning, if not properly narrowed, had the potential to impermissibly infringe on the jury's deliberative process.").

Turning to defendant's argument that the judge should have declared a mistrial rather than continue deliberations after the jury announced a deadlock, "[a] mistrial is an extraordinary remedy used when necessary to prevent a manifest injustice." Terrell, 452 N.J. Super. at 274. Our Supreme "Court has also observed that granting a mistrial 'imposes enormous costs on our judicial system,' and . . . the prospect of a retrial after days or weeks of testimony creates a sense of futility." Ibid. (quoting Jenkins, 182 N.J. at 124). "Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.' Appellate courts 'will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice.'" State v. Smith, 224 N.J. 36, 47 (2016) (citations omitted) (first quoting State v. Harvey, 151 N.J. 117, 205 (1997); and then quoting State v. Jackson, 211 N.J. 394, 407 (2012)).

When a jury indicates it is deadlocked, the appropriate course is for the court "to inquire of the jury whether further deliberation will likely result in a verdict." Valenzuela, 136 N.J. at 469; see also R. 1:8-10 (providing "the jury may be directed to retire for further deliberations or discharged" when the jury

"poll discloses that there is not unanimous concurrence in a criminal action"). In State v. Czachor, 82 N.J. 392 (1980), our Supreme Court "provided guidance to trial courts confronted with a jury's declaration that its deliberations have progressed to an impasse," leading to the adoption of model criminal jury charges, referred to as the Czachor charge, "given to a jury that has announced a deadlock." Ross, 218 N.J. at 143-44.

> That charge admonishes jurors to "deliberate with a view to reaching an agreement," to independently decide the case "after an impartial consideration of the evidence with fellow jurors" and to re-examine and change individual views if they are erroneous; it also counsels them to avoid surrendering an honest conviction simply to conform to other jurors' opinions or to render a verdict.
>
> [Id. at 144 (quoting Model Jury Charges (Criminal), "Judge's Instructions on Further Jury Deliberations" (approved Jan. 14, 2013)).]

"The trial court's determination as to whether a Czachor charge is warranted requires a careful analysis of the circumstances" and "'should be guided in the exercise of sound discretion by such factors as the length and complexity of trial and the quality and duration of the jury's deliberations.'" Ibid. (quoting Czachor, 82 N.J. at 407). While "[a] judge has discretion to require further deliberations after a jury has announced its inability to agree," the "'exercise of that discretion is not appropriate "if the jury has reported a

definite deadlock after a reasonable period of deliberations.'"' State v. Johnson, 436 N.J. Super. 406, 422 (App. Div. 2014) (quoting State v. Adim, 410 N.J. Super. 410, 423-24 (App. Div. 2009)); see also State v. Harris, 457 N.J. Super. 34, 50 (App. Div. 2018) ("In determining what constitutes a reasonable length of time, a judge should weigh all the relevant circumstances, including 'such factors as the length and complexity of [the] trial and the quality and duration of the jury's deliberations.'" (alteration in original) (quoting State v. Figueroa, 190 N.J. 219, 235 (2007)).

"A trial judge 'may send a jury back for further deliberations when [he or she] is not satisfied that all possibilities of reaching a verdict have been exhausted, but [he or she] may not coerce or unduly influence the jury in reaching a verdict.'" Ibid. (alterations in original) (quoting State v. Carswell, 303 N.J. Super. 462, 478 (App. Div. 1997)). If the jurors' difference of opinion is "'clearly intractable' . . . then the jury is deadlocked and a mistrial should be declared." Ross, 218 N.J. at 145 (alteration in original) (quoting Figueroa, 190 N.J. at 237).

Here, on the third day of deliberations,[9] October 25, 2017, the jury sent a note to the judge that stated, "[t]here is no chance of this jury coming to an agreement on all of the charges." After consulting with both counsel, the judge provided the Czachor charge to the jury, which tracked Model Jury Charges (Criminal), "Judge's Instructions on Further Jury Deliberations" (approved Jan. 14, 2013), and instructed the jurors to continue deliberating. Defense counsel neither objected to the charge nor requested a mistrial. The jury gave no further indication that they were deadlocked and returned the guilty verdict on October 31, 2017, after deliberating for two additional days.

Confronted by the jury's statement that it was unable to reach "an agreement on all of the charges," (emphasis supplied), the judge properly exercised her discretion by providing a Czachor charge and directing the jury to continue deliberations.[10] The trial was lengthy, the witnesses were numerous, and the evidence, particularly the DNA evidence, was complex. Additionally, deliberations had been interrupted by the playback of audio and video evidence

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[9] On the first day of deliberations, October 19, 2017, the jury only deliberated for two hours before they were excused for the day.

[10] The judge interpreted the note as indicating the jury had reached a partial verdict on some of the charges and stated if the jury submitted a similar note the following day, she intended to address it as a partial verdict. See R. 3:19-1(a) (setting forth the procedure for partial jury verdicts).

as well as witness testimony. See Ross, 218 N.J. at 138, 145 (upholding the giving of a Czachor charge when, after five days of deliberations, the jury stated it could not reach a unanimous decision).

Indeed, the Ross Court rejected the idea "that an initial impasse signals the end of meaningful deliberations"; our Court instead "contemplates that a previously deadlocked jury can conduct fair and effective deliberations notwithstanding an earlier impasse." Id. at 154. Here, as in Ross,

> [t]he jury . . . did not signal an intractable divide that would warrant a declaration of mistrial. Instead, it communicated that its effort to reach consensus on the issues had fallen short. The trial court properly refrained from any inquiry that could have compromised the confidentiality of the jury's deliberations, and instructed the jury to resume deliberations in accordance with the approved Czachor charge.
>
> [Id. at 145.]

V.

In Point I of his pro se brief, defendant argues his constitutional right to confront witnesses against him and to due process of law were violated because the State "either purposely or inadvertently failed to call Detective Lou Zuppa to testify at trial knowing that Det[ective] Zuppa's [g]rand [j]ury testimony . . . and police reports directly contradict[ed] the trial testimony of Detective Javier

Campos." Defendant posits that "Zuppa's superior testimony would have unequivocally shown that there was a break in the chain of custody of the evidence that goes directly to [defendant's] guilt or . . . innocence" and Zuppa's absence impaired "his ability to present a defense."

On May 27, 2014, Zuppa, a member of the Monmouth County Prosecutor's Office (MCPO) Forensic Technical Services Unit, testified before the grand jury that he was summoned to the scene of the shooting at the Cameo Bar and arrived at approximately 3:00 a.m. on October 19, 2012. In addition to taking photographs of the scene, Zuppa collected items including clothing belonging to the victims, ballistics evidence, and the wig and beard located about a block away from the Cameo Bar. Zuppa numbered each item he collected and placed each item in its own labeled "virgin evidence envelope or bag." When asked by the prosecutor whether there was "another item that was recovered a couple days after the shooting," Zuppa responded that investigators determined from the surveillance videos that one of the suspects was holding a stick, which was "located" and "eventually" brought to him. Zuppa then sent the stick "to a private lab for touch DNA testing."

By the time of trial in 2017, Zuppa had retired and moved to Florida. Prior to trial, the State obtained a New Jersey court order pursuant to N.J.S.A. 2A:81-

20, declaring Zuppa "a material and necessary witness" in a pending New Jersey prosecution. See N.J.S.A. 2A:81-18 to -23 (setting forth the procedure to compel the appearance of a New Jersey non-resident who is a material witness in a criminal trial). The New Jersey order was presented to a Florida judge to compel Zuppa's appearance at trial in New Jersey. However, an order issued by a judge in the Seventh Judicial Circuit Court of Florida denied the application. The order stated after hearing "directly" from Zuppa in the presence of his and the State's attorney, the court determined it would "cause undue medical hardship" for Zuppa "to be compelled . . . to testify" and ordered that Zuppa be "declared legally unavailable as a witness" at the trial.

At trial, after the prosecutor produced the Florida order, defense counsel did not object to Zuppa's unavailability. The prosecutor requested a neutralizing instruction that the jury was not to draw any adverse inference against either party from Zuppa's absence at trial because he was legally unavailable. Defense counsel neither objected to the charge nor requested an adverse inference charge pursuant to State v. Clawans, 38 N.J. 162 (1962). As a result, the judge instructed the jury that Zuppa had

> been determined by the [c]ourt to be legally unavailable. Therefore, no negative inferences may be drawn against either the State or the [d]efendant for failing to produce him as a witness as they legally could

> not. In addition, you are not to speculate as to the reason for his unavailability.

Defendant now argues "the uncorroborated testimony of Det[ective] Campos that he recovered the stick the same [d]ay [as] the shooting" directly contradicted Zuppa's grand jury testimony "[w]hich unequivocally show[ed] that the stick was recovered . . . three [d]ays after the shooting." Further, according to defendant, "the jury never had the opportunity to hear from [Zuppa,] the only person who handled all of the evidence." Defendant asserts because "there was no hearing," there was no determination whether Zuppa "truly suffer[ed] a 'physical incapacity'" to excuse his appearance, and the State showed no "medical proof . . . that the witness was incapacitated." Thus, defendant contends "it was plain error not to give the [a]dverse [i]nference charge" pursuant to Clawans, that would have allowed the jury to draw an adverse inference against the State for failing to call Zuppa as a witness.

Defendant's argument that his rights under the Confrontation Clause were violated is misplaced because the State did not proffer Zuppa's testimonial statement in place of his live testimony. See Crawford v. Washington, 541 U.S. 36, 68-69 (2004) (holding that admitting a testimonial statement without providing a defendant the opportunity to cross-examine violates the Confrontation Clause). Instead, relying on the principle of comity, the judge

accepted the order entered by the Florida court declaring Zuppa legally unavailable as a witness due to medical hardship. "Comity is not a binding obligation on the forum state, but a courtesy voluntarily extended to another state for reasons of 'practice, convenience and expediency.'" City of Phila. v. Austin, 86 N.J. 55, 64 (1981) (quoting Mast, Foos, & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900)). Moreover, comity "'has substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.'" State v. Barone, 147 N.J. 599, 613 (1997) (quoting Mast, Foos, 177 U.S. at 488).

Given our Supreme Court's "policy against duplicative litigation," ibid., it was reasonable for the judge to defer to the Florida court's determination that Zuppa was unavailable for medical reasons, and we reject defendant's contention that the judge should have sua sponte permitted Zuppa's deposition testimony under Rule 3:13-2 as an alternative to his in-person testimony. As the judge pointed out, Zuppa was "not an expert" who "was crucial to the . . . case" and his testimony would not have "add[ed anything] to the case."

Likewise, we reject defendant's argument that Zuppa's unavailability prevented him from presenting a meaningful defense. To be sure, "[a]n accused in a criminal case has a constitutional right to present witnesses in his defense,

pursuant to the due process and the compulsory process provisions of the federal and state constitutions." State v. Feaster, 184 N.J. 235, 250 (2005); see also N.J. Const. art. I, ¶ 1. Moreover, "the ultimate goal of the Confrontation Clause is to test the reliability of testimonial evidence in 'the crucible of cross-examination.'" State v. Basil, 202 N.J. 570, 591 (2010) (quoting Crawford, 541 U.S. at 61). However, it is the jury that ultimately "'decide[s] where the truth lies.'" Feaster, 184 N.J. at 250 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

Here, Campos testified he found the stick in the parking lot on the corner of Main Street and Fifth Avenue on Friday, October 19, 2012. He stated he photographed the stick, bagged it "on both ends" using latex gloves, "secured it with crime scene tape," and transported it back to the Asbury Park police headquarters. He then "completed an evidence form," "attached [the form] to the bag," and placed it "into the [secure] evidence locker." Campos testified although he did not deliver the stick to an individual, he complied with departmental procedures for evidence collection and the evidence form indicated that Asbury Park Police Officer Gregory Kochmar received the stick three days later on Monday, October 22, 2012. During his testimony, Kochmar,

one of two officers assigned to the department's evidence unit, confirmed receipt of the stick.

Wilbert, who was with Campos at the time corroborated Campos's testimony. Wilbert confirmed finding the stick with Campos and testified that after recovering the stick, Campos secured it by placing "the ends" in "virgin evidence bags" "so that they wouldn't be contaminated," and "[bringing] it back to the[] evidence vault." Wilbert stated that after finding the stick, he contacted Zuppa who was in another location and thus unable to respond. As a result, Wilbert was instructed to secure the stick and then turn it over to Zuppa later.

Defense counsel subjected Campos to grueling cross-examination in connection with the three-day gap between his delivery of the stick to the evidence locker and Kochmar's receipt of it, the procedure for logging in and collecting evidence, and the identity of other law enforcement personnel in the chain of custody. Campos testified the department's evidence officers had already collected evidence from the locker when he delivered the stick on Friday and they did not work on weekends. Campos explained the evidence remained in the evidence locker "over the weekend until Kochmar [came] in on Monday" and "collect[ed] the evidence . . . left from the weekend."

During the colloquy regarding Zuppa's unavailability to testify at the trial,

the judge told defense counsel "whatever the other witnesses testified as to . . . Zuppa's involvement [was] fair game for comment" as long as defense counsel did not "have the jury draw an adverse inference [from] the fact that [Zuppa] didn't testify." Defense counsel confirmed that because one of Zuppa's roles was to collect evidence, she would "ask the jur[ors] to consider that the absence of any information with respect to how that evidence was collected, should leave a question in their minds." During summations, defense counsel highlighted those points. Thus, contrary to defendant's assertion, he was allowed to present a defense attacking Campos's credibility in connection with his collection of the stick, challenging the chain of custody, and suggesting "contamination" in the collection of the evidence. However, the jury reached a different conclusion, as was its prerogative.

Equally unavailing is defendant's contention, raised for the first time on appeal, that the judge should have given an adverse inference charge pursuant to Clawans instead of the neutralizing charge agreed to by defense counsel. In Clawans, our Supreme Court

> held that in order for a party to benefit from a favorable inference from an adversary's failure to produce a witness at trial, the court must first find that 1) the witness was available to the party against whom the adverse inference is sought, and 2) the evidence that the

> witness would have provided would not have been cumulative and would have been helpful.
>
> [State v. McGraw, 129 N.J. 68, 78 (1992) (citing Clawans, 38 N.J. at 171).]

See also State v. Dabas, 215 N.J. 114, 140 (2013) ("[D]efendant may be entitled to [a Clawans] charge if the State fails to present a witness who is within its control, unavailable to the defense, and likely to give favorable testimony to the defendant."); State v. Hill, 199 N.J. 545, 561 (2009) (prohibiting the trial court from giving Clawans charge without finding requisite factors).

Because the record did not provide the requisite factual basis for the charge, defendant was not entitled to a Clawans charge and we discern no error, much less plain error, see R. 2:10-2, in the judge's failure to give one. Notably, Zuppa was not within the State's control by virtue of the Florida court's declaration that he was legally unavailable as a witness. Furthermore, "[d]efendant's trial counsel's failure to request an instruction gives rise to a presumption that [s]he did not view its absence as prejudicial to [her] client's case." McGraw, 129 N.J. at 80. As in McGraw, "[t]he plethora of cogent strategic reasons supporting such a choice by counsel . . . strengthens that presumption in this case." Ibid. (citation omitted).

Defendant also argues because "the [S]tate failed to establish a[n] uninterrupted chain of custody," the judge erred in not giving "the chain of custody charge to the jury" as requested by defense counsel. At trial, defense counsel requested the judge to instruct the jury on a break in the chain of custody pertaining to the stick, explaining that "a colorable claim [was] raised concerning the authentication of a critical item of evidence."[11] Defense counsel argued the three-day gap in the receipt of the stick by Kochmar justified the charge. Additionally, defense counsel asserted because Zuppa did not testify, there was no "substantiation of the chain of custody with respect to his receipt of the stick . . . or his relinquishing of that stick" for DNA testing.

The prosecutor countered that no "break in the chain of custody . . . [had] been demonstrated." The prosecutor explained "that through the testimony of various witnesses and presentation of documents . . . , the chain of custody of all . . . items was maintained." She added that "to the extent . . . there might be questions about when things were collected," such questions were more appropriate for comment during summation. The judge agreed that the defense had not shown there was a break in the chain of custody and noted that the issue

[11] Defendant's proposed jury charge is not included in the record. Moreover, no model jury charge exists addressing this issue.

was "initially a question for the [c]ourt." While the judge declined defense counsel's request for a jury charge, she did permit defense counsel to argue the issue in summation.

"A party introducing tangible evidence has the burden of laying a proper foundation for its admission." State v. Brunson, 132 N.J. 377, 393 (1993). "That foundation should include a showing of an uninterrupted chain of possession." Ibid. "When the custodian is a State agency, the State is not obligated to negate every possibility of substitution or change in condition of the evidence." Ibid. "Such evidence generally should be admitted if 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.'" Id. at 393-94 (quoting State v. Brown, 99 N.J. Super. 22, 28 (App. Div. 1968)).

"Whether the requisite chain of possession has been sufficiently established to justify admission of the exhibit is a matter committed to the discretion of the trial judge, and his [or her] determination will not be overturned in the absence of a clearly mistaken exercise thereof." State v. Morton, 155 N.J. 383, 446 (1998) (quoting Brown, 99 N.J. Super. at 27). "Furthermore, a defect in the chain of custody goes to the weight, not the admissibility, of the evidence

introduced." Id. at 446-47 (quoting United States v. Matta-Ballesteros, 71 F.3d 754, 769 (9th Cir. 1995)).

"Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). When the defendant objects to the omission of a charge during trial, we apply the harmless error standard, which requires that there must "be 'some degree of possibility that [the error] led to an unjust result.'" Ibid. (alteration in original) (quoting State v. Lazo, 209 N.J. 9, 26 (2012)); see also R. 2:10-2. The possibility of an unjust result "'must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" Ibid. (alteration in original) (quoting Lazo, 209 N.J. at 26).

Here, defendant does not challenge the admission of the evidence but only the omission of the requested instruction. However, no specific jury instruction on the chain of custody was warranted. The judge's determination that the State established an unbroken chain of custody in connection with the stick is supported by the record. However, even if such a charge was warranted, the judge's failure to provide one constitutes harmless error.

Notably, the judge instructed the jury on the weight of the evidence, emphasizing that the jury and the jury "alone are the sole and exclusive judges of the evidence, of the credibility of the witnesses, and the weight to be attached to the testimony of each witness." Defense counsel extensively cross-examined Campos and Kochmar on the collection and retrieval of the stick as well as the chain of custody. She also highlighted the discrepancies and the shortcomings in the State's proofs regarding chain of custody during summation. The instructions made it clear to the jury that it was to accord the weight it deemed appropriate to the evidence in light of the witnesses' testimony and cross-examination. The jury presumably considered those instructions in its credibility determinations. See State v. Armour, 446 N.J. Super. 295, 314 (App. Div. 2016) ("Juries are presumed to understand and follow instructions."). Thus, under the circumstances, there is no real possibility that the judge's refusal to instruct the jury on the chain of custody "'led the jury to a verdict it otherwise might not have reached.'" Baum, 224 N.J. at 159 (quoting Lazo, 209 N.J. at 26).

VI.

In Point III of his pro se brief, defendant argues the cumulative effect of the errors he identified requires reversal of his convictions.

"We have recognized in the past that even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008). Because "[a] defendant is entitled to a fair trial but not a perfect one," State v. Wakefield, 190 N.J. 397, 537 (2007) (quoting State v. R.B., 183 N.J. 308, 334 (2005)), "[i]f a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair," State v. Weaver, 219 N.J. 131, 155 (2014).

Here, we conclude there were no reversible errors either alone or combined. Thus, defendant's cumulative error argument must also fail. While not perfect, we are satisfied defendant's trial was fair.

VII.

In Point IV of his counseled brief, defendant argues the judge imposed "a clearly excessive sentence." He asserts the judge erred in finding aggravating factors two, three, six, and nine, and in failing to find mitigating factors seven and eleven. He also argues the judge erred in imposing consecutive sentences on the two attempted murder convictions.

We review sentences "in accordance with a deferential standard," State v. Fuentes, 217 N.J. 57, 70 (2014), and are mindful that we "should not 'substitute [our] judgment for those of our sentencing courts,'" State v. Cuff, 239 N.J. 321, 347 (2019) (quoting State v. Case, 220 N.J. 49, 65 (2014)). Thus, we will

> affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Fuentes, 217 N.J. at 70 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

After appropriate mergers, the judge sentenced defendant to two consecutive twelve-year terms of imprisonment, each with an eighty-five percent period of parole ineligibility pursuant to NERA, on the attempted murder charges (counts one and two).[12] The judge found aggravating factors two, three, six, and nine, and no mitigating factors. See N.J.S.A. 2C:44-1(a)(2) ("[t]he gravity and seriousness of harm inflicted on the victim"); N.J.S.A. 2C:44-

[12] The judge also sentenced defendant to a concurrent eight-year term, with four years of parole ineligibility, on count eight. The aggregate sentence was to run consecutive to the sentence defendant was then serving on the racketeering indictment stemming from Operation Dead End.

1(a)(3) ("[t]he risk that the defendant will commit another offense"); N.J.S.A. 2C:44-1(a)(6) ("[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted"); and (N.J.S.A. 2C:44-1(a)(9) ("[t]he need for deterring the defendant and others from violating the law"). The judge accorded "fair weight" to aggravating factors two and three, "heavy weight" to aggravating factor six, and "very heavy weight" to aggravating factor nine.

In addressing aggravating factor two, the judge reasoned defendant "ambushed these two victims, and the gravity and seriousness of the harm was clearly demonstrated by the trauma surgeon who testified to the multiple gunshot wounds and the severity of the wounds to the intended victim" and "the unintended [victim], . . . for whom there was never a motive to harm" elicited at trial.[13]

Regarding aggravating factor three, the judge stated:

> Prior to this offense, [defendant was] charged with and eventually pled guilty to possession of a handgun . . . less than three months before . . . , and that did not deter [him]. The fact that [defendant] continued on essentially a crime spree, . . . and then went on to . . .

[13] Based on the proofs, the judge attributed defendant's motive in shooting "the intended victim" to the victim owing him money.

> be involved . . . with . . . racketeering,[14] all [while] knowing that [he] had all of these other charges that had been indicted, shows that the risk that [defendant] would commit another offense is very great.

Turning to aggravating factor six, the judge pointed out "that at the time this crime was committed, . . . defendant was [nineteen-]years[-]old," and had an extensive juvenile record, including "assault, burglary, theft, resisting arrest and receiving stolen property." According to the judge, defendant

> had accumulated [nineteen] adjudications of delinquency, he had been afforded probation numerous times, committed multiple probation violations including committing additional acts of delinquency while on probation, and had been sentenced to Jamesburg at least twice. His . . . record of arrests beg[a]n at age [thirteen] and continue[d] with unrelenting regularity up until and beyond the commission of the instant offense.
>
> And what's very troubling is that after becoming an adult, [defendant] swiftly gravitated towards the possession and use of illegally obtained handguns . . . .

Regarding aggravating factor nine, the judge found there was "a need for general and specific deterrence." As to specific deterrence, the judge believed defendant "felt that [he was] beyond . . . the law and that the law [did not] apply

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[14] The judge noted that prior to sentencing, defendant received a seven-year prison sentence "on the first-degree racketeering charge" in the Operation Dead End indictment.

to [him] and [he could] just go on and commit crimes at will." As to general deterrence, the judge explained:

> The shooting . . . was the subject of a YouTube video which . . . is still receiving attention. It really goes to the fact that [defendant] committed these crimes in such a cavalier and public way, almost as though [defendant was] seeking the public's adulation as a result of [his] bravado in descending upon these two helpless victims in a car and just shooting unrelentingly and running away.

Based on defendant's "serious prior delinquency" and "practically uninterrupted period of criminal activity since his juvenile years," the judge rejected defendant's contention that mitigating factor seven applied. See N.J.S.A. 2C:44-1(b)(7) ("[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense"). Likewise, the judge stated, "the fact that [defendant] has a minor child is not in and of itself the type of excessive hardship that would justify . . . finding . . . mitigating factor . . . [eleven]." See N.J.S.A. 2C:44-1(b)(11) ("[t]he imprisonment of the defendant would entail excessive hardship to the defendant or [his] dependents").

Contrary to defendant's assertion, the aggravating factors found by the judge are amply explained and supported by the record. We also reject defendant's baseless argument that the judge should have found mitigating factor

seven because he lacked prior indictable convictions. See State v. C.W., 449 N.J. Super. 231, 259 (App. Div. 2017) ("[A]n adult defendant's prior juvenile record may properly be considered in making sentencing determinations, particularly if the juvenile adjudications are relatively recent, voluminous, or severe."). Likewise, defendant's contention that mitigating factor eleven should have applied merely "because [he] has a young child" is without merit. See State v. Dalziel, 182 N.J. 494, 505 (2005) ("[B]ecause [the defendant] has never lived with or supported his fiancée and child, his incarceration could not constitute an excessive hardship on them.").

Defendant also argues the judge's imposition of consecutive sentences for the attempted murder charges "violates the Yarbough principle[s]." In State v. Yarbough, 100 N.J. 627, 644 (1985), the Supreme Court set forth the following criteria as "general sentencing guidelines for concurrent or consecutive-sentencing decisions . . . when sentence is pronounced on one occasion on an offender who has engaged in a pattern of behavior constituting a series of separate offenses or committed multiple offenses in separate, unrelated episodes":

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or

concurrent sentence shall be separately stated in the sentencing decision;

(3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominantly independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous.

(4) there should be no double counting of aggravating factors; [and]

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense . . . .

[Id. at 643-44.]

"The Yarbough factors serve much the same purpose that aggravating and mitigating factors do in guiding the court toward a sentence within the statutory range." State v. Abdullah, 184 N.J. 497, 514 (2005). "[T]he five 'facts relating

to the crimes' contained in Yarbough's third guideline should be applied qualitatively, not quantitatively," and consecutive sentences may be imposed "even though a majority of the Yarbough factors support concurrent sentences." State v. Carey, 168 N.J. 413, 427-28 (2001). In Abdullah, the Court reminded trial judges "that when imposing either consecutive or concurrent sentences, '[t]he focus should be on the fairness of the overall sentence,' and that they should articulate the reasons for their decisions with specific reference to the Yarbough factors." 184 N.J. at 515 (alteration in original) (quoting State v. Miller, 108 N.J. 112, 122 (1987)); see also State v. Torres, 246 N.J. 246, 271 (2021) ("[W]e require an explicit explanation for the overall fairness of a sentence, in the interest of promoting proportionality for the individual who will serve the punishment.").

Here, addressing the Yarbough factors, the judge stated "although the[] crimes were temporally committed," they were "essentially two separate acts of violence" with two separate victims. According to the judge, while "the driver was the targeted individual for a debt [owed,] . . . the passenger was collateral damage." Nonetheless, the judge stated not imposing consecutive sentences "would . . . essentially . . . give [defendant] a two for one where [defendant] can commit two acts of attempted murder and yet just have to pay for one." We find

no fault with the judge's reasoning.[15] See Carey, 168 N.J. at 428 ("Crimes involving multiple deaths or victims who have sustained serious bodily injuries represent especially suitable circumstances for the imposition of consecutive sentences."); State v. Molina, 168 N.J. 436, 442-43 (2001) (affirming consecutive sentences although "the only factor that support[ed] consecutive sentences [was] the presence of multiple victims").

In sum, based on our review of the record, we are satisfied the judge set forth reasons for defendant's sentence with sufficient clarity and particularity, made findings amply supported by competent and credible evidence in the record, correctly applied the sentencing guidelines in the Code, and did not abuse her sentencing discretion.

Affirmed.

[15] Defendant does not challenge the judge's rationale for making the sentence consecutive to defendant's sentence in the racketeering case.