SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4775-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LAWRENCE P. PRICE,

Defendant-Appellant.

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Submitted March 28, 2022 – Decided April 26, 2022

Before Judges Sabatino and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 18-05-0301.

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

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Lila B. Leonard, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Lawrence P. Price appeals his convictions for unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1), possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2), arguing:

POINT I

> THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PRIOR RECORDED STATEMENTS OF A TESTIFYING WITNESS AS SUBSTANTIVE EVIDENCE PURSUANT TO N.J.R.E. 803(A)(1).

POINT II

> THE COURT HAD NO AUTHORITY TO SANITIZE THE PRIOR CONVICTION OF A STATE'S WITNESS. THIS ERRONEOUS EVIDENTIARY RULING DEPRIVED DEFENDANT OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL, REQUIRING REVERSAL OF HIS CONVICTIONS.

POINT III

> THE STATE'S FORENSIC EXPERT'S DECLARATION THAT DEFENDANT'S DNA WAS ON THE GUN IMPROPERLY INFRINGED ON THE JURY'S ROLE TO DETERMINE WHETHER DEFENDANT COMMITTED THE CHARGED OFFENSES.

POINT IV

> THE TRIAL COURT COERCED THE JURY INTO CONVICTING THE DEFENDANT BY ERRONEOUSLY INSTRUCTING THE JURY TO

CONTINUE DELIBERATING AFTER IT FIRMLY INDICATED THAT IT COULD NOT REACH A VERDICT.

POINT V

THIS COURT SHOULD REMAND FOR RESENTENCING FOR THE TRIAL COURT TO RECONSIDER DEFENDANT'S SENTENCE BASED ON THE NEW MITIGATING FACTOR, "THE DEFENDANT WAS UNDER 26 YEARS OF AGE AT THE TIME OF THE COMMISSION OF THE OFFENSE," N.J.S.A. 2C:44-1(b)(14), AND BECAUSE THE TRIAL COURT ERRED IN ITS FINDING AND WEIGHING OF AGGRAVATING AND MITIGATING FACTORS.

A. Defendant's Sentence is Excessive Because the Trial Court Erred in Finding and Weighing of Aggravating and Mitigating Factors.[1]

B. The New Youth Mitigating Factor Law Should Be Given Retroactive Application.

We have reviewed and considered each of these arguments in light of the entire record and the applicable law. For the reasons that follow, we affirm defendant's convictions and sentence.

[1] We have reorganized defendant's point headings to address first whether defendant has an independent basis for resentencing before reaching his argument regarding the retroactivity of newly-enacted mitigating factor fourteen, N.J.S.A. 2C44-1(b)(14).

I.

The following relevant facts were adduced at defendant's trial and Gross[2] hearing. On September 4, 2017, shortly before 1:00 a.m., Officers Daniel Hemenway and Michael Rizzo of the Linden Police Department exited their patrol vehicle during a motor-vehicle stop when they heard multiple gunshots. In response, the officers ended the motor-vehicle stop and headed in the direction of the sound to conduct "a grid search of the town."

As they began their search, central dispatch reported that a dark-colored, four-door sedan was leaving the scene of the shooting and turning onto a particular street in Linden. Upon arriving at that area, the officers observed a single car on the road, a red Honda, driving "at a high rate of speed." They began following the car with their lights and sirens activated and observed that the Honda "kep[t] pulling to the right as if [it was] going to park" only to "pull[] out and keep driving."

The Honda eventually stopped, and two men exited the passenger side and ran. The police chased them on foot. During the pursuit, Officer Hemenway observed that the men were wearing all black, and one had run ahead of the

[2] State v. Gross, 216 N.J. Super. 98 (App. Div. 1987), aff'd, 121 N.J. 1 (1990).

other. He also shined a flashlight on the closer individual, who was later identified as defendant, and observed a "glint of metal" in his hand.

The officers followed the men into the backyard of a nearby house. They lost sight of the farther individual when he ran behind a shed and climbed over a fence into a neighboring yard.

Defendant, however, tripped and fell, and the officers observed a firearm, which was later identified as a Browning .380 caliber handgun, on the ground approximately two feet away from him. Officer Hemenway noticed the Browning had mud and grass in the barrel and that the slide was "locked to the back," which he knew occurs when a gun is fired until the magazine is empty. Further, Officer Rizzo observed that the Browning had "carbon on the barrel, which indicated that the weapon had been fired."

Defendant stated that he did not know anything about the gun and that it was not his. Officer Rizzo handcuffed defendant and secured the Browning. By the time the officers returned to the street, the Honda had departed.

After placing defendant in a patrol vehicle, Officer Rizzo searched the neighboring backyard through which the other suspect fled and found a Glock handgun lying in the grass. He noticed that, although the grass was wet, the

Glock was dry, indicating to him that the weapon "was placed there . . . recent[ly]."

Officer Andrew Carew of the Union County Sheriff's Office Crime Scene Unit responded to the scene of defendant's arrest and collected the Glock. He then responded to 1300 Lincoln Street and recovered several shell casings from the area of the sidewalk outside the residence. He also collected multiple bullets that had been fired and observed "impact sites" in various areas of the house. The shell casings were later analyzed and confirmed to have been fired by the guns recovered at the scene of defendant's arrest. Further, the only two bullets that were recovered and in adequate condition for analysis were consistent with the Browning.

At approximately 11:45 a.m. the same day, Larry Brooks, the driver of the Honda, provided a statement to Detective Juan Velarde and Sergeant Travis Koziol of the Linden Police Department. Brooks had contacted the police seeking the return of the Honda, which had been impounded by the Roselle Police Department, and agreed to provide a statement.

Before interviewing Brooks, Detective Velarde provided him his Miranda[3] rights and had him sign a waiver form. During that process, Detective Velarde

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

confirmed that Brooks understood the meaning of "coercion," stating it meant that he was "not forcing [Brooks] to say anything," to which, Brooks responded "[i]t's almost like my own point of view."

In his statement, Brooks explained that he earned money by operating his own taxi service using the Honda. He stated on the night of defendant's arrest he was "riding around" when he saw someone he recognized, who asked him for a ride. He explained that he gave a ride to that individual and his friend and during the ride they asked him to pull over. When he did, they got out of the car and began shooting.

Brooks claimed they then got back into the car, put a gun to his head, and told him to drive. He explained that police began driving behind him and were trying to pull him over, but that the individual in his front seat threatened to shoot him if he did. Brooks stated that a few blocks later, the men "jumped out of the car, and ran on foot," and that once the police chased them, he drove away.

Detective Velarde told Brooks that his story did not make sense and did not match the information currently in their possession. He reminded Brooks that he was under oath, and "g[a]ve him another chance" to provide an accurate statement.

Brooks then provided additional details. He stated he encountered the two men when his cousin called him and asked him to "pull up." He said the two men were his cousin's friends and that he had seen one of them before, but did not know either of their names, and that his cousin told him to give them a ride. He also stated that he did not see any guns until the men got out of the car and began shooting, but acknowledged they had handguns when they got back into the car.

Brooks stated he drove away after the two men ran off because he "panicked" and "didn't want to be arrested." He also described that the two men were wearing "[a]ll black," and that one "had a big hoodie on with his face covered" and the other "had a mask on," but stated that if shown a photo array, he "would probably be able to identify" the man who wore the hoodie.

Brooks also described the car he was driving. He indicated it was a four-door 2009 Honda Accord titled in his mother's name. He also stated that he had lied to his mother, first telling her that the car was "in the shop," when in fact, a friend was using it, and later told her that he "wasn't involved in the shooting" and that the car had been stolen.

Before concluding the interview, Brooks consented to a search of the contents of his cell phone. He also confirmed that he was not "under the

influence of any drugs" and swore that "the statement [he] . . . provided . . . [was] the truth and nothing but the truth."

Brooks returned to the Linden Police Department on September 19, 2017 and met first with Detective Velarde. At the start of his recorded statement, Brooks stated that he was not under the influence of drugs or alcohol, and that Detective Velarde did not speak to him or instruct him what to say before the recording began. Detective Velarde then asked Brooks to recount the events discussed in his previous statement. He complied, providing an account that was consistent with his prior statement.

Detective Velarde then left the room and Detective Philip Marcus entered to conduct a photo array. Detective Marcus began by providing Brooks instructions including that "[t]he person who committed the crime may or not be in the group" of photographs and that he did "not have to select any photograph." After viewing six photos, Brooks asked to see one of the photographs again. He then stated that he recognized the person in that photo, which depicted defendant, and he was fifty percent sure it was the person he saw on September 4, 2017. Brooks then confirmed that no one influenced him to select any photograph and swore that he told the truth.

A Union County grand jury charged defendant thereafter with two counts of second-degree unlawful possession of a weapon (counts one and two), two counts of second-degree possession of a weapon for an unlawful purpose (counts three and four), and fourth-degree resisting arrest by flight (count five). Counts one and three related to the Browning and counts two and four related to the Glock.

Defendant proceeded to trial before Judge Candido Rodriguez, Jr. When the State called Brooks to testify, he repudiated the prior statements. He claimed that after his cousin asked him to give his friends a ride, he "took them home." He also stated that he did not remember what the men who entered his car looked like and that "[t]hey [were] covered up."

When asked about the statement he provided to the police on September 4, 2017, Brooks claimed that he did not "tell them the truth" and "kept giving them B.S. answers," and that most of the statement was a lie. Similarly, when asked whether he selected a photo from an array on September 19, 2017 and stated that he was "[fifty] percent sure that [it] was the person in the front seat of [his] car," Brooks responded "I wasn't sure. I never [saw] his face."

The State continued questioning Brooks about the events of September 4, 2017. Brooks stated that while he was driving his cousin's friends, they told him

to stop and exited the car, at which point he "heard gunshots" and the men "got back into the vehicle." He claimed, however that he "didn't see anybody shooting" and that the men did not have guns when they reentered the car.

The State asked to be heard at sidebar. There, the prosecutor requested a Gross hearing and stated that "there are two gentlemen sitting on our side of the courtroom, staring very directly at this witness." He requested that the judge find out who they were, and stated he believed they were Brooks' "cousin and his friends" and that if they were, he was "going to ask [the judge] to have them removed from the courtroom."

The prosecutor escorted Brooks out of the courtroom. Upon returning, he alerted Judge Rodriguez that as he was "show[ing] Mr. Brooks where he needs to sit down, he hit me on the shoulder, unprompted, and said those are his homies in there" and that he was "not going to say another singular word about this case . . . in front of those people or anybody."

Judge Rodriguez then questioned Brooks. Brooks stated that he did not know the two men in the courtroom but that he assumed they were defendant's friends. He also said he did not feel intimidated by their presence.

Upon further questioning, Brooks admitted he told the prosecutor that the men in the courtroom were "affecting [him] in some way." He also agreed that

his in-court testimony was different than his prior statements and the discussions he had at the prosecutor's office and the only difference was that "the defendant . . . and people . . . [that] are associated with him are present."

Judge Rodriguez then removed Brooks from the courtroom and conducted a Gross hearing. The State's first witness, Detective Velarde, testified regarding Brooks' prior statements. He stated that he did not make promises nor threats to Brooks, did not coerce him nor direct him what to say, and did not discuss the case with him prior to the recorded interview. He also described reading Brooks his Miranda rights as a "precaution." Detective Velarde further stated that Brooks was not in handcuffs, appeared "calm and collec[ted]," and seemed to understand his questions and provided appropriate answers. He also asserted Brooks did not appear to be under the influence of drugs or alcohol.

Detective Velarde stated he did not believe Brooks' September 4, 2017 statement was entirely truthful and explained that initially Brooks was being "evasive" regarding some of his questions, until he "called [Brooks] out" and "told him he wasn't being truthful." Brooks then "changed his version" and provided a statement that was "consistent with other evidence that [was] collected in the course of [the] investigation." Detective Velarde also stated that Brooks complied with a search of the electronic media on his phone, which

corroborated parts of his statement regarding his self-operated taxi service and receipt of calls from his cousin.

Detective Velarde also recounted that he spoke with Brooks briefly on September 19th but had Detective Marcus conduct the photo array because he was unfamiliar with the case. He also stated that on that date he did not make any promises nor threats to Brooks and he was not in handcuffs nor appeared to be under the influence of drugs or alcohol. The State then played the videos of defendant's two statement in their entirety.

Detective Velarde also stated he was aware that defendant was affiliated with the Neighborhood Crips gang, and that he saw two individuals in the courtroom who he also believed were affiliated with that gang based on intelligence within the Linden Police Department.

Brooks testified at the hearing as well and admitted he provided the September 4, 2017 statement voluntarily, and was not threatened, handcuffed, nor under the influence of drugs or alcohol. Brooks then reiterated that he lied to the police during both his statements. Specifically, he again claimed he falsely stated he saw the face of the man in his car, that the photo he selected from the array was the man in his car, and that he saw the men shooting and possessing guns. Further, when asked how he felt about testifying in front of

the defendant and others in court, he stated "I'm good," but also said he did not want to be in court testifying. On cross-examination, Brooks claimed he lied to the police because he was concerned that he might be arrested, especially because he was already on probation and was aware that an arrest could constitute a violation of his probation and result in a term of imprisonment being imposed.

In arguing of the admission of Brooks' statements, the State claimed that Brooks only repudiated those prior statements because he feared the repercussions of implicating defendant. In support, it argued that Brooks was calm, relaxed, talkative, and forthcoming when speaking to the police, but quieter and more reserved when testifying in court. It asserted further that Brooks was not in custody or under any "express or implicit pressure" when providing the prior statements. Finally, the State argued that the portions of the statements that Brooks claimed were false were only those that incriminated defendant, and that much of the information in his statements was corroborated by evidence.

Defense counsel disagreed and argued that the circumstances under which Brooks provided the statements made them unreliable. He asserted that Brooks was motivated to lie to avoid being charged with a crime and violating his

probation. Further, he stated that Brooks had "plenty of time to fabricate [his] story before he [told] it to the police." Before concluding the hearing, the judge discussed with the parties which portions of the statements would be admitted if he ruled in the State's favor, and instructed that "[e]verything else will be redacted."

Judge Rodriguez issued a January 29, 2019 written opinion allowing admission of relevant portions of Brooks' statements pursuant to N.J.R.E. 803(a)(1)(A). In reaching his conclusion, the judge considered the Gross factors[4] and explained that Brooks had a connection to the matter "as he was

[4] Gross, 216 N.J. Super. at 109-110, provides that in determining reliability of prior inconsistent statements, a court should consider the following factors:

> (1) the declarant's connection to and interest in the matter reported in the out-of-court statement, (2) the person or persons to whom the statement was given, (3) the place and occasion for giving the statement, (4) whether the declarant was then in custody or otherwise the target of investigation, (5) the physical and mental condition of the declarant at the time, (6) the presence or absence of other persons, (7) whether the declarant incriminated himself or sought to exculpate himself by his statement, (8) the extent to which the writing is in the declarant's hand, (9) the presence or absence, and the nature of, any interrogation, (10) whether the offered sound recording or writing contains the entirety, or only a portion or a summary, of the communication, (11) the presence or absence of any

trying to clear his name", that he waived his Miranda rights, and consented to a search of his phone and car. He further reasoned that the "statements were given to law enforcement, and [Brooks] was aware that any statements to them could expose [him] to charges for false statements."

The judge also determined that Brooks appeared at the police station voluntarily without a "scintilla of coercion, threat, nor any hinderances of impairment," and that there was no evidence that Brooks was promised anything or was spoken to before the recording began. He found further that Brooks appeared calm and collected during the interview, and that his statements were corroborated by other evidence in the case, namely that "the weapon recovered at the scene of Defendant's arrest matched shell casings found at the scene where Brooks stated that [d]efendant began shooting that weapon."

Judge Rodriquez acknowledged "there was a possible motive to fabricate" based on Brooks' probationary status at the time of his statement, the possibility that he "could be considered a suspect," his car being in the possession of the

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> motive to fabricate, (12) the presence or absence of any express or implicit pressures, inducements or coercion for the making of the statement, (13) whether the anticipated use of the statement was apparent or made known to the declarant, (14) the inherent believability or lack of believability of the statement and (15) the presence or absence of corroborating evidence.

police, and "his cousin's connection to the case," but concluded "those . . . factors . . . did not overcome his willingness to discuss the case."

Trial resumed the same day. Before continuing to hear testimony, Judge Rodriguez confirmed that the State had appropriately redacted Brooks' prior statements and that defense counsel had an opportunity to review the redacted recordings.

On cross-examination, defense counsel elicited testimony that Brooks was "on probation for the crime of theft" at the time of his statements to the police. The State objected and argued at sidebar that, while it had no objection to questions regarding Brooks' conviction and probation status, the "detail[s] of the offense [had] no relevance either [to] his credibility or anything to do with this case" and requested the defense "be precluded from going into the details of the crime." Defense counsel responded that Brooks was "not entitled to have this record sanitized in anyway" and that "the details of the offense that he committed are highly relevant to his credibility." He explained further that "[t]his is a theft of $100,000 from an employer who trusted him enough to give him a job in a security company" and that "[i]t's a very significant offense."

Judge Rodriguez stated that he was "not concerned about [the information] being inflammatory," but rather "whether or not it is relevant." He explained

that he did not "find it relevant if it would have been $100,000 or anything else" and, as such, "allowed [defense] to say that it was theft of something while he was employed" but not to discuss the amount stolen. The defense then elicited testimony that defendant had committed theft against his employer, a security company, on his first day of work, and that he was prosecuted, pled guilty, and placed on probation for that offense.

The State next called Detective Velarde who testified about his interview with Brooks on September 4, 2017. He described that "at first . . . [Brooks] was a little bit evasive" and that, in response, he "called him out" and "said he wasn't being truthful," after which he "believe[d] [Brooks] started telling the truth." The State then played the redacted videos of Brooks' statements and Judge Rodriguez instructed the jury to analyze the credibility of his prior inconsistent statement in light of the Gross factors.

Monica Ghannam, an expert in DNA analysis, also testified on the State's behalf. She explained that swabs taken from the firearms recovered at the scene of defendant's arrest were compared to defendant's DNA sample. Regarding the Browning, Ghannam testified that only one swab, taken from the trigger, contained a "usable DNA profile" and that defendant was excluded as a possible contributor to that sample.

Ghannam testified further that three swabs from the Glock had "usable DNA profiles." She stated that a sample from the gun's grip was "900 trillion times more likely" to be a mixture of defendant's and another unknown individual's DNA, than a mixture from two unknown individuals. Regarding a sample from the gun's magazine, Ghannam asserted that it was "approximately 57.4 quadrillion times more likely that the DNA [was] a mixture of [defendant's] and one unknown individual['s], than a mixture of DNA from two unknown individuals." Finally, she testified regarding a sample from the gun's slide stating it was "approximately 269 trillion times more likely that the . . . DNA [was] a mixture of [defendant's] and one unknown individual['s], than a mixture of DNA from two unknown individuals."

Ghannam then opined that defendant was "a contributor to . . . [the] sample . . . from the [Glock's] magazine" and could not be excluded as a contributor to the samples taken from its slide and grip. On cross-examination, she admitted that it is possible for someone's DNA to be transferred to an object that the individual never touched.

The parties presented their closing arguments the morning of January 30, 2019. The jury was then excused for lunch and instructed to return at 1:30 p.m.

Upon returning to court, Judge Rodriguez provided instructions to the jury, after which they deliberated until approximately 4:30 p.m.

The following day, the jury continued deliberating. At 9:58 a.m., the jury requested to review Officer Hemingway and Officer Rizzo's body camera videos and the videos of Brooks' statements to the police. The jury first viewed the body camera videos followed by the videos of Brooks' statements, which began playing at 10:38 a.m. At 12:30 p.m., Judge Rodriguez excused the jury for lunch and instructed them to return at 1:30 p.m.

At 2:17 p.m. the jury wrote a note to the judge stating "Count Number One, cannot reach a decision. Count Number Two, cannot reach . . . decision. Count Number Three, cannot reach decision. Count Number Four, cannot reach decision. Count Number Five, reach verdict." Judge Rodriguez told the parties that he intended to instruct the jury to continue their deliberations, to which no objection was lodged. The judge then instructed the jury as follows:

> It is your duty as jurors to consult one another and to deliberate with you reaching an agreement. If you could do so without (indiscernible) to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if you're convinced it is erroneous but do not surrender your honest conviction as to the weight or the effect of the evidence solely

> because of the opinions of your fellow jurors for your main purpose of returning a verdict.
>
> You're not partisans. You are judges. You are judges of the facts. I'm going to ask you to go back in there and try to reach an agreement if you can. Okay? Please go back in there and try to see if you can reach a verdict or not, okay? Thank you.

Later that day the jury returned a guilty verdict on count five, the resisting arrest charge, and counts two and four, the unlawful possession and possession for an unlawful purpose charges pertaining to the Glock. The jury found defendant not guilty of counts one and three pertaining to the Browning.

At sentencing, defense counsel argued for the application of mitigating factor seven, "[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," N.J.S.A. 2C:44-1(b)(7), and requested the judge impose concurrent terms and a minimum sentence.

The State requested the judge impose an aggregate sentence of eight years. It conceded that mitigating factor seven should apply, but also argued for the imposition of aggravating factors three, "[t]he risk that the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(3), and nine, "[t]he need for deterring the defendant and others from violating the law," N.J.S.A. 2C:44-1(a)(9). In support of aggravating factor three, the State argued that "defendant

has refused to accept accountability for what took place . . . in the face of the overwhelming evidence of [his] guilt." Further, it argued the "nature of the case" and the way "defendant was behaving" provided "insight into the type of person that [the court was] dealing with." It elaborated by explaining the "egregiousness of what took place that night" including defendant using a gun "in a manner that jeopardized the lives of a number of people."

Judge Rodriguez sentenced defendant to eight years with forty-two months of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6, on count two, eight years with forty-two months of parole ineligibility on count four, and eighteen months on count five, all to run concurrently. In reaching his decision, the judge applied aggravating factors three and nine and mitigating factor seven and found that the aggravating factors substantially outweighed the sole mitigating factor.

In support, Judge Rodriguez stated that he could not disagree with the State's arguments and that defendant's actions "were in total disregard of human life" and that "[w]e cannot accept that kind of behavior in our society." The judge also referenced "the fact that [defendant] refuse[d] to accept responsibility." In sum, Judge Rodriguez stated that his decision to apply the

aggravating factors was "based on the factors of this case." This appeal followed.

II.

In defendant's first point he argues Judge Rodriguez erred in admitting the recording of Brooks' September 4, 2017 statements under N.J.R.E. 803(a)(1). He asserts that "the circumstances underlying the statements cast considerable doubt" on their reliability. Specifically, defendant claims Brooks' statement was unreliable because: 1) the police had evidence of his involvement in the incident and he was attempting to "clear his name"; 2) he feared violating his probation; 3) he provided the statement in hopes of getting his car back; 4) he was attempting to protect his cousin; 5) he was under "psychological pressure" because he had lied to his mother and did not want to be caught; 6) Detective Velarde implicitly pressured him; 7) he "had ten hours to get his story straight"; and 8) he "consistently omitted and added various details."

Defendant argues further that the police verifying that he was self-employed as a driver was insufficient to corroborate the substantive portions of his statement. He also claims that his calm and collected nature in giving his statement was merely a consequence of him having approximately ten hours to get his story straight. Finally, defendant argues the judge could not "justify

admission on the basis that the jury would be able to assess [the statement's] believability on its own" because the portion where Detective Velarde "implicitly threatened [him] to get his story straight" was redacted. We disagree with all defendant's contentions.

We review a judge's determination to admit or exclude evidence for abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). We defer to the judge's factual findings so long as they are supported by sufficient credible evidence. State v. Locurto, 157 N.J. 463, 470-71 (1999). We owe particular deference to the judge's evaluation of witness credibility. Id. at 474.

N.J.R.E. 803(a)(1)(A) provides:

> The following statements are not excluded by the hearsay rule:
>
> (a) A Declarant-Witness' Prior Statement. The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement:
>
> (1) is inconsistent with the declarant-witness' testimony at the trial or hearing and is offered in compliance with [N.J.R.E.] 613.
>
> However, when the statement is offered by the party calling the declarant-witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the declarant-witness in circumstances establishing its reliability . . . .

Before admitting a witness's prior inconsistent statements under this rule, the trial court "should be convinced by a preponderance of the evidence that the evidence is sufficiently reliable for presentation to the jury." State v. Brown, 138 N.J. 481, 539 (1994), overruled on other grounds by State v. Cooper, 151 N.J. 326 (1997). To make this determination, the trial court must apply Gross's fifteen-factor reliability test. Ibid.

Further, the Rule is designed to "expose to the jury the possibility that the witness is lying, and to give the jury an alternative account of the events that it may choose to use as substantive evidence. The jury, however, must observe the witness and make a decision about which account is true." Id. at 544.

Here, Judge Rodriguez properly exercised his discretion in determining that Brooks' September 4, 2017 statement was sufficiently reliable to be admitted under N.J.R.E. 803(a)(1)(A). First, the most significant details of Brooks' statement, that defendant had a gun and fired it at 1300 Lincoln Street, were corroborated by the guns recovered at the scene of defendant's arrest, and the forensic analysis of the shell casings recovered at 1300 Lincoln Street. See Gross, 216 N.J. Super. at 110 ("the presence or absence of corroborating evidence").

Second, there was no indication that the police coerced, threatened, or made promises to Brooks, nor that they had discussions about the case with him off the record. See Ibid. ("the presence or absence of any express or implicit pressures, inducements or coercion for the making of the statement"). Further, we satisfied Brooks was not in custody. See id. at 109 ("whether the declarant was then in custody").

Finally, at trial, Brooks repudiated only those portions of his prior statement that implicated defendant. That fact strongly suggests that his trial testimony was untruthful and fabricated to avoid incriminating defendant in open court. In sum, we are satisfied that Judge Rodriguez's findings and conclusion were supported by credible evidence in the record, and as such, his ruling is entitled to deference. Hisenaj, 194 N.J. at 6; Locurto, 157 N.J. at 470-71.

Defendant's contention that it was improper for the judge to rely on the jury to assess the credibility of Brooks' statements as portions of his statements were redacted is without merit. As discussed, the judge's reasoning supporting the admission of the statements. Further, defense counsel did not object to the recordings of Brooks' statements being redacted, despite having multiple opportunities to do so.

III.

In his second point, defendant argues Judge Rodriguez erred by refusing to admit testimony regarding details of Brooks' prior theft conviction, specifically the amount of money he stole from his former employer. He asserts the judge "had no authority to sanitize a State's witness's conviction," and, by doing so, he violated defendant's due process right to present a complete defense. Defendant also claims Judge Rodriguez "incorrectly found that the details of Brooks' prior conviction were not relevant." We are unpersuaded by these arguments.

"[I]n making relevance and admissibility determinations," the trial judge's exercise of his "broad discretion" "will not [be] disturb[ed], absent a manifest denial of justice." Lancos v. Silverman, 400 N.J. Super. 258, 275 (App. Div. 2008). Further, the "decision whether to admit a prior conviction for purposes of attacking the credibility of a witness rests within the sound discretion of the trial court." State v. Leonard, 410 N.J. Super. 182, 187-88 (App. Div. 2009).

N.J.R.E. 609 governs impeachment by prior conviction. N.J.R.E. 609(a)(1) states: "For the purpose of attacking the credibility of any witness, the witness's conviction of a crime, subject to [N.J.R.E.] 403, shall be admitted . . . ." "'Relevant evidence' means evidence having a tendency in reason to prove

or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. "All relevant evidence is admissible" unless another rule or law excludes it. N.J.R.E. 402.

Judge Rodriguez's evidentiary decision on this point was in complete compliance with N.J.R.E. 609(a)(1). Indeed, N.J.R.E. 609(a)(1) requires only that "the witnesses' conviction of a crime . . . shall be admitted." It does not, however, mandate the admission of evidence regarding the facts underlying a witness's conviction. In any event, we note that Judge Rodriguez allowed defense counsel to elicit testimony regarding most of the facts underlying Brooks' conviction, including that the theft was committed against a security company that employed Brooks.

Further, Judge Rodriguez excluded the evidence concerning the amount of money Brooks stole because he determined the information was not relevant. In light of judges' "broad discretion" to make relevancy determinations, and because the exclusion of that fact certainly did not amount to a "manifest denial of justice," we have no basis to depart from Judge Rodriguez's ruling. Lancos, 400 N.J. Super. at 275.

IV.

In his next point, defendant argues Judge Rodriguez committed plain error by allowing Ghannam, the State's DNA analysis expert, to provide opinion testimony that defendant's DNA was present on the Glock's magazine. Specifically, he claims that while it was proper for Ghannam to testify about the likelihood that defendant's DNA was present on the Glock, it was "entirely inappropriate" for her to provide her "personal opinion" that defendant's DNA was on the gun because doing so infringed on the jury's fact-finding. He asserts that testimony "amounted to an implicit opinion that [defendant] possessed the Glock" and "an impermissible quasi-pronouncement of guilt."

Alternatively, defendant argues that Ghannam's opinion testimony should have been excluded under N.J.R.E. 403. He claims Ghannam's testimony was unduly prejudicial because it "contravened the well-accepted standards within the forensic science community" regarding how experts should discuss their findings, relying on Department of Justice guidance providing that "[a]n examiner shall not assert that a likelihood ratio of any magnitude provides an absolute identification or source attribution of a known individual to an evidentiary sample." Department of Justice, Uniform Language For Testimony

And Reports For Forensic Autosomal DNA Examinations Using Probabilistic Genotyping Systems, 4 (2019). Defendant's arguments are without merit.

When a party argues for the first time on appeal that the admission of purported prejudicial evidence to which that party did not object at trial requires a retrial, we review the argument under the plain error standard. R. 2:10-2. Under this standard of review, we disregard any error or omission "unless it is of such a nature as to have been clearly capable of producing an unjust result." Ibid. The error must have been "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. McGuire, 419 N.J. Super. 88, 106-07 (App. Div. 2011) (quoting State v. Taffaro, 195 N.J. 442, 454 (2008)).

To satisfy N.J.R.E. 702, expert testimony must satisfy three requirements: "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." State v. Kelly, 97 N.J. 178, 208 (1984). "Those requirements are construed liberally in light of [N.J.R.E.] 702's tilt in favor of the admissibility of expert testimony." State v. Jenewicz, 193 N.J. 440, 454 (2008).

Further, N.J.R.E. 703 addresses the foundation of an expert's opinion and requires that such opinions must "be grounded in facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts." Townsend, 221 N.J. at 53 (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)).

N.J.R.E. 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Our case law, however, has imposed certain limitations to N.J.R.E. 704 in order to prevent an expert's opinion from "usurp[ing] the jury's function." State v. McLean, 205 N.J. 438, 453 (2011). For example, experts may not "opin[e] about defendant's guilt or innocence," "the credibility of parties or witnesses," ibid., or a "defendant's state of mind," State v. Cain, 224 N.J. 410, 429 (2016).

Nothing about Ghannam's testimony warrants reversal of defendant's conviction. First, defendant failed to object any portion of her testimony, and we are satisfied the admission of the now challenged portions of her testimony are not "clearly capable of producing an unjust result," as her opinions were clearly relevant, admissible, and non-prejudicial. R. 2:10-2. Indeed, just prior

to providing her opinion that defendant's DNA was present on the Glock's magazine Ghannam presented scientific findings indicating it was "approximately 57.4 quadrillion times more likely" that the DNA on the magazine belonged to defendant, rather than an unknown individual. That testimony was based on overwhelmingly accurate scientific data, and its admission was not capable of "le[ading] the jury to a result it otherwise might not have reached." McGuire, 419 N.J. Super. at 106-07 (App. Div. 2011) (quoting Taffaro, 195 N.J. at 454).

Further, even had defendant objected to Ghannam's opinion testimony its admission still would have been proper because she did not "opin[e] about defendant's guilt" or even the existence of an element of a crime for which defendant was charged and, therefore, did not "usurp the jury's function." McLean, 205 N.J. at 453. Indeed, while she stated defendant's DNA was present on the Glock's magazine, she also acknowledged on cross-examination that it would be possible for a person's DNA to be on an object that the individual never touched. As such, her testimony was in full accordance with N.J.R.E. 704 and our case law interpreting that rule.

Defendant's argument that Ghannam's opinion should have been excluded under N.J.R.E. 403 is similarly unpersuasive. First, Ghannam's opinion was

based on accepted scientific data, undermining defendant's claim that "its probative value [was] substantially outweighed by the risk of . . . [u]ndue prejudice." N.J.R.E. 403. Second, trial courts have "broad discretion" in deciding whether to exclude evidence under N.J.R.E. 403, and, as such, the Department of Justice guidelines cited by defendant are of little persuasive value under the facts of this case and when considered in the context of our evidentiary rules. State v. Nantambu, 221 N.J. 390, 402 (2015).

V.

In defendant's fourth point, he argues that Judge Rodriguez erred by instructing the jury to continue deliberating after it sent a note indicating it could not reach a verdict on defendant's four firearm charges. He asserts that, instead, the judge should have issued an "impasse instruction," and his failure to do so coerced the jury and deprived him of his rights to "an impartial jury, due process, and a fair trial."

As defendant failed to request an impasse instruction, or object to any portion of the court's instructions that it did provide, we again employ a plain error standard of review. In such circumstances, when counsel fails to "object[] at the time a jury instruction is given, 'there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case.'" State v. Montalvo,

229 N.J. 300, 320 (2017) (quoting State v. Singleton, 211 N.J. 157, 181-82 (2012)).

"A judge has discretion to require further deliberations after a jury has announced an inability to agree." State v. Adim, 410 N.J. Super. 410, 423 (App. Div. 2009). In exercising this discretion, the court should consider "such factors as the length and complexity of [the] trial and the quality and duration of the jury's deliberations." State v. Czachor, 82 N.J. 392, 407 (1980). Exercise of such discretion is not appropriate, however, "if the jury has reported a definite deadlock after a reasonable period of deliberations." Adim, 410 N.J. Super. at 423, (quoting Czachor, 82 N.J. at 407).

Further, when instructing a jury to continue deliberations, a judge "may not coerce or unduly influence the jury in reaching a verdict." State v. Harris, 457 N.J. Super. 34, 50 (App. Div. 2018) (quoting State v. Carswell, 303 N.J. Super. 462, 478 (App. Div. 1997)). "[A] trial judge must be especially vigilant to avoid communicating a results-oriented message that could be perceived as intolerant of dissent and antagonistic to the free expression of strongly held beliefs that may not be shared by a majority of the deliberating jurors." State v. Gleaton, 446 N.J. Super. 478, 515 (App. Div. 2016) (quoting State v. Dorsainvil, 435 N.J. Super. 449, 481 (App. Div. 2014)).

We are satisfied that Judge Rodriguez properly exercised his discretion in instructing the jury. First, the jury's note stating, "cannot reach decision" with regard to defendant's firearms charges did not express that it had reached a "definite deadlock." Adim, 410 N.J. Super. at 423, (quoting Czachor, 82 N.J. at 407); see State v. Figueroa, 190 N.J. 219, 226, 239 (2007) (note from jury stating "we cannot unanimously agree on the verdict" merely "suggested but did not announce a deadlock"). Second, we note that the jury had deliberated for less than a full day. Adim, 410 N.J. Super. at 423; see Figueroa, 190 N.J. 226, 240 (stating "because the jury had only been deliberating briefly, . . . we [do not] fault the trial court for deciding to require the jury to continue its deliberations" where the jury had deliberated for one day).

Further, there was nothing coercive about Judge Rodriguez's instruction. Indeed, his instruction adhered nearly word-for-word to the Model Jury Charge. See Model Jury Charge (Criminal), "Judge's Instructions on Further Jury Deliberations" (approved Jan. 14, 2013); State v. Howard-French, 468 N.J. Super. 448, 467 (App. Div. 2021), certif. denied, 248 N.J. 592 (2021) (describing that a judge's utilization of language from a Model Jury Charge is "presumptively proper"). In addition, Judge Rodriguez properly tempered his instruction by stating "I'm going to ask you to go back in there and try to reach

an agreement if you can. Okay? Please go back in there and try to see if you can reach a verdict or not, okay?" (Emphasis added).

VI.

Defendant next contends that Judge Rodriguez "improperly evaluated the aggravating and mitigating factors," rendering his sentence excessive. Specifically, he first argues, relying on State v. Case, 220 N.J. 49 (2014), that the judge committed error by applying aggravating factor three without addressing how it interacted with mitigating factor seven. Second, defendant claims Judge Rodriguez improperly based his application of aggravating factors three and nine on defendant's lack of remorse. Finally, he argues that the judge erred by failing to use defendant's youth as a non-statutory mitigating factor. Defendant's arguments are all without merit.

We employ a deferential standard when reviewing a trial court's sentencing decision. State v. Grate, 220 N.J. 317, 337 (2015); Fuentes, 217 N.J. 57, 70 (2014). We must affirm a sentence unless: 1) the trial court failed to follow the sentencing guidelines; 2) the court's findings of aggravating and mitigating factors were not based on competent and credible evidence in the record; or 3) "the [court's] 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 (second alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

We assess a trial judge's finding of "aggravating and mitigating factors to determine whether they 'were based upon competent credible evidence in the record.'" State v. Bieniek, 200 N.J. 601, 608 (2010) (quoting Roth, 95 N.J. at 364-65). We are "not to substitute [our] assessment of aggravating and mitigating factors for that of the trial court." Ibid.

First, Judge Rodriguez adequately supported his imposition of aggravating factors three and nine. He explained that the factors were appropriate in light of the fact that defendant's crimes demonstrated a "total disregard of human life" and constituted behavior that "[w]e cannot accept . . . in our society." Because the judge's reasoning was "based upon competent credible evidence in the record," his decision is entitled to our deference. State v. Bieniek, 200 N.J. 601, 608 (2010) (quoting Roth, 95 N.J. at 364-65).

Second, while our case law recognizes judges' ability to utilize non-statutory mitigating factors, defendant has not cited any authority entitling him to such considerations or requiring judges to analyze non-statutory factors, nor have we identified any. See State v. Rice, 425 N.J. Super. 375, 381 (App. Div. 2012) ("we have recognized the court's ability to use non-statutory mitigating

factors in imposing a sentence" (emphasis added)). Further, while defense counsel referenced defendant's age at sentencing, he did not request that the judge consider it as a non-statutory mitigating factor. In any event, we are satisfied, based on other comments by the parties, and the materials upon which the court relied prior to issuing his sentence, Judge Rodriguez was clearly aware of defendant's age when sentencing him.

Defendant's remaining arguments are unpersuasive. First, Case does not require impose an absolute requirement upon sentencing judges to discuss the interaction of aggravating factor three and mitigating factor seven, but rather, that case determined that the court's application of aggravating factor three was erroneous where the sentencing court "did not give a reasoned explanation for its conclusion that [a] first-time offender presented a risk to commit another offense." 220 N.J. 49, 67. Here, as noted, Judge Rodriguez adequately explained his application of aggravating factor three based on the nature of defendant's offenses. Second, while Judge Rodriguez noted defendant's lack of remorse, we are satisfied from our review of the sentencing transcript as a whole that he did not rely on that characterization in imposing the aggravating factors, and instead properly focused on the nature of defendant's offense, explaining

that defendant acted in "total disregard of human life" and exhibited behavior that "[w]e cannot accept in our society."

VII.

Finally, defendant contends that his case should be remanded for the retroactive application of newly-enacted mitigating factor fourteen, "[t]he defendant was under [twenty-six] years of age at the time of the commission of the offense," N.J.S.A. 2C:44-1(b)(14). We disagree.

Absent an independent basis to remand and resentence defendant, the new mitigating factor does not apply retroactively under our holding in State v. Bellamy, 468 N.J. Super. 29 (App. Div. 2021). In Bellamy, we remanded for resentencing to permit the sentencing court to consider previously undisclosed reports from the Division of Child Protection and Permanency records and reconsider the aggravating and mitigating factors before a new judge. Id. at 45. The defendant in Bellamy had "yet to incur a penalty within the meaning of the savings statute" and was therefore entitled to application of the new mitigating factor at her resentencing. Ibid.

The Bellamy court also limited its holding regarding the retroactive effect of the new mitigating factor, emphasizing "cases in the pipeline in which a youthful defendant was sentenced before October 19, 2020" are not to be

"automatically entitled to a reconsideration based on the enactment of this statute alone." Id. at 47-48. Here, as noted, no independent basis exists to remand.

Defendant's remaining arguments, to the extent we have not addressed them, lack merit sufficient to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.