SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5138-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT B. WIGGINS,

Defendant-Appellant.

Argued April 25, 2022 – Decided May 16, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 18-03-0269.

Brian P. O'Reilly, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Brian P. O'Reilly, on the brief).

Paula Jordao, Assistant Prosecutor, argued the cause for respondent (Robert J. Carroll, Morris County Prosecutor, attorney; Paula Jordao, on the brief).

PER CURIAM

A jury convicted defendant Robert B. Wiggins of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1), second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1), and two disorderly persons drug offenses, and the court imposed an aggregate eight-year sentence with a five-year period of parole ineligibility. Defendant appeals from the trial court's denial of his motions: to suppress the evidence, a handgun, recovered from his vehicle; for reconsideration of the order denying his suppression motion; for judgment of acquittal on the unlawful possession of the handgun charge; for judgment of acquittal on the certain persons charge; and for a new trial based on prosecutorial misconduct. He also contends the court erroneously instructed the jury on possession and his sentence is excessive. Unpersuaded by defendant's arguments, we affirm.

I.

Following defendant's arrest after a motor vehicle stop resulting in the seizure of marijuana and a handgun, a grand jury indicted defendant for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); fourth-degree unlawful possession of a defaced firearm, N.J.S.A. 2C:39-3(d); and second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1). Defendant was also charged with two disorderly persons offenses—possession of

marijuana, N.J.S.A. 2C:35-10(a)(4), and possession of drug paraphernalia, N.J.S.A. 2C:36-2—and a motor vehicle offense for driving while not insured.

Defendant's Motion to Suppress

Defendant moved to suppress a handgun that was seized from his vehicle during the motor vehicle stop that led to his arrest. At the suppression hearing, the State presented the testimony of Riverdale Police Department Officer Michael Reilly, who stopped defendant's vehicle, and the court viewed a recording captured by the motor vehicle recorder (MVR) in Reilly's patrol car.

Reilly testified he stopped defendant's vehicle after he observed it traveling at a "high rate of speed" and failing to maintain its lane. Following the stop, Reilly approached the vehicle and saw Angel Calo in the driver's seat and defendant in the front passenger's seat. Calo had difficulty opening the window, and Reilly opened the driver's side door to speak with him. When the door opened, Reilly smelled the "strong odor of marijuana coming from inside the vehicle[,]" and he called for backup.

Reilly also approached the passenger side of the vehicle and spoke with defendant. Reilly asked the men about the smell of marijuana. They initially denied having marijuana in their possession, but defendant subsequently admitted possessing marijuana and turned over a "small bag containing a green

leafy substance" Reilly recognized as marijuana. Reilly "felt like . . . there was more inside the" car based on the strong odor of raw marijuana still emanating from the vehicle. Reilly asked defendant to step out of the car and patted him down.

By that time, Riverdale Police Sergeant Greggory Bogert and Patrolman Travis Roemmele had arrived. Calo was removed from the car and Reilly spoke with him at the front of the vehicle. The MVR footage shows Reilly informed Roemmele that he had "weed in his pocket"—the marijuana turned over by defendant—as Roemmele stood by the driver's side door.

Roemmele began searching the vehicle and recovered marijuana cigarettes in the ashtray and a brownish waxy substance believed to be marijuana inside the passenger side door handle. Reilly testified Roemmele continued to search the car and yelled "gun" upon discovering a handgun inside the glove compartment. Defendant and Calo were then placed under arrest. Bogert retrieved the handgun from the vehicle's glove compartment, secured the gun, and later brought it to police headquarters.

Following Reilly's testimony, defense counsel argued the search of the vehicle was unreasonable because once defendant handed over the marijuana to

Reilly, "probable cause ceased" and the subsequent search was therefore unlawful.

In the court's detailed written opinion on defendant's motion, it found Reilly was a credible witness, and it rejected defendant's claim that once defendant gave Reilly the bag of marijuana, the officers did not have probable cause to search the vehicle. The court found "probable cause existed for the warrantless search of defendant's car" based on the smell of marijuana emanating from the vehicle, and the subsequent discovery of marijuana by Roemmele as he searched the vehicle. The court further found "the scope of the search properly included the glovebox" based on its proximity to where drugs were found. The court concluded the gun was found within the scope of a search permitted under the automobile exception to the warrant requirement, and the search was limited to "places where there [was] probable cause to believe that the object of the search may be found." See State v. Esteves, 93 N.J. 498, 508 (1983). The court denied defendant's suppression motion.

Defendant's Trial

During defendant's subsequent trial, the State called the three officers, Reilly, Bogart, and Roemmele, who participated in the stop and search of defendant's vehicle. The State also called Detective Andreas Zaharopoulos of

the Morris County Sheriff's Office Crime Scene Investigation Section as an expert in the field of finger printing, and Investigator Earl Williams of the New Jersey State Police Ballistics Unit as an expert in the field of firearms examination. The MVR footage captured by Reilly's patrol car, as well as a recording of defendant's interview with police following his arrest, were admitted in evidence and played for the jury.

Reilly's testimony at trial was consistent with his testimony at the suppression hearing, and he reiterated his account of the motor vehicle stop and subsequent search. Reilly also explained what occurred after defendant and Calo were brought to police headquarters. He testified Calo said the gun was not his. Reilly further explained Calo was charged with failure to maintain his lane but was not charged in connection with the gun and was released. Reilly also testified Calo died prior to defendant's trial.

Reilly testified that during an interview with defendant following his arrest, defendant said he owned the car, and claimed ownership of the marijuana found in the vehicle. According to Reilly, defendant also admitted he knew the handgun was in the car, and he claimed ownership of the handgun.

A recording of Reilly's interview with defendant was played at trial, and a transcript was provided to the jurors. During the interview, defendant

recounted how he had discovered the handgun in the glove compartment shortly after purchasing the vehicle, while he was driving to meet his cousin in Reading, Pennsylvania, and he thought the handgun "was nice." Defendant said he took the gun's loaded magazine out, placed it back in the gun, and placed the gun back in the glove compartment. He further acknowledged it was a "bad decision, terrible decision," not to have reported the discovery of the gun in the vehicle. He then told the police he took "full ownership for that . . . firearm," and that he "knew it was there."

Roemmele testified he responded to Reilly's call for backup and arrived at the scene of the motor vehicle stop after Bogert. He explained that after defendant and Calo were removed from the vehicle, he understood from his conversation with Reilly that Reilly had recovered marijuana from the vehicle. Roemmele testified he then "observed" the vehicle from the driver's side and then the passenger's side. On the passenger's side, he "found a blue . . . plastic baggy, with" what he believed to be "wax or some type of marijuana narcotic in it" in the passenger side "door pocket." Roemmele gave this evidence to Reilly and continued searching the vehicle.

Roemmele found the handgun when he "opened the glove box." He testified the glove compartment was unlocked, nothing was obstructing access to it, and it was "within arm's reach" of the passenger seat.

Roemmele explained that when he "opened the glove box" there was "a rag, almost wedged up between the top of the dashboard and where the glove box comes down." Roemmele stated he "started pulling on the rag, and it seemed pretty tough, and when [he] pulled on it, the gun fell right at [him] and basically pointed right at [his] face" which "took [him] by surprise." He testified the gun was not wrapped in the rag, but the rag was on top of the gun, as if "the rag was placed to cover it." He testified he "backed out of the vehicle" in response to this discovery and "yelled gun," prompting his fellow officers to secure defendant and Calo. Roemmele testified that after the two men had been secured, he and Reilly found a marijuana "roach" in the ashtray.

Bogert testified that after arriving and briefly speaking with defendant, he heard Reilly tell "the driver to stop moving," which prompted Bogert to approach the driver's side and keep "an eye on the driver at that point." After Roemmele yelled "gun," Bogert handcuffed defendant and Calo. Bogert testified he retrieved the handgun from the glove compartment, where he found it "in plain view." He stated the gun was loaded, and he removed the magazine

and emptied a round from the chamber. He then transported the gun back to headquarters.

Zaharapolous testified no prints were found on the gun, the magazine or the ammunition seized. He also testified that various factors make it difficult for a fingerprint to be left on a handgun or ammunition. Williams testified he tested and processed the handgun and it was "operable and capable of being discharged." Defendant stipulated that neither he nor Calo had a permit to carry a firearm.

At the conclusion of the State's case, defendant made a Reyes[1] motion pursuant to Rule 3:18-1 seeking a judgment of acquittal, arguing the State failed to prove he possessed the handgun. Defendant argued the only evidence showing possession was his uncorroborated admission to the police, and he asserted the State had the burden of corroborating his statement beyond his mere presence in the car. The court denied this motion, finding defendant's admission he owned the gun was corroborated by "the fact that this was defendant's car," by where defendant was seated in the car, and by the "general circumstances of

[1] State v. Reyes, 50 N.J. 454, 458-59 (1967).

the stop." The court determined there was more than sufficient evidence for the possession charge to "go to the jury."

The defense called three witnesses: defendant's and Calo's cousin Robert Tomayo; Hector Castro, an investigator hired by defendant who interviewed Tomayo "a couple of times" after defendant's arrest; and Lisbeth Pena, the mother of Tomayo's children and his girlfriend of seventeen years.

Tomayo testified defendant and Calo were his cousins, they had grown up together, and he had known them his "whole life." In October 2017, Calo travelled to Tomayo's Pennsylvania home by bus and defendant drove his car to Tomayo's home. The three men spent the day "drinking and talking in the kitchen." As the men drank in the kitchen, Pena was upstairs with her and Tomayo's infant child.

Tomayo testified that while in the kitchen, Calo said he always kept a loaded gun with him because "somebody is out to kill him." Tomayo did not see Calo with a gun, but he saw "like a little bulge . . . towards the side of [Calo]" while the men were together, which suggested to him that Calo had a gun. Tomayo testified defendant never had "any control over that gun." Tomayo also testified Calo was a member of the Blood's street gang.

Tomayo explained Pena told him she heard Calo talking about a gun. Pena told Tomayo that Calo had to leave the house. Tomayo told Calo that Pena wanted him to leave. Calo apologized to Tomayo and Pena and, because Calo did not have a vehicle, he told defendant "you're going to take me home." According to Tomayo, defendant did not want to leave but agreed on the condition that Calo drive his car. Tomayo testified that as the two men left he did not see a gun, but he saw Calo reach for the glove compartment in defendant's vehicle.

Tomayo further testified that after Calo and defendant were arrested, he spoke with Calo who reported he told defendant to "take that [gun] charge for [him] . . . because if they found [him] with another gun, [he was] done." Tomayo also testified he did not call the police following this conversation with Calo because he did not want to "see [Calo] go back in jail" and he did not know where they had been arrested. Tomayo also explained Calo had died after being shot four times.

On cross-examination, the State questioned Tomayo regarding the delay in reporting his version of the events until he spoke with defense investigator Castro following Calo's death in May 2018. The State presented Tomayo with three investigative reports prepared by Castro summarizing his conversations

with Tomayo, but the State did not enter the reports into evidence. Tomayo testified during cross-examination he was "not sure if [Calo] was dead or not when [he] talked to" Castro. The State also questioned Tomayo regarding inconsistencies between Castro's reports concerning Tomayo's statements to him and Tomayo's testimony at trial.

A March 5, 2019 sworn statement made by Tomayo to the prosecutors trying the case was also presented to Tomayo on cross-examination. During its cross-examination, the State pointed out inconsistencies between the investigative reports, Tomayo's trial testimony, and his statement to the prosecutors.

Defendant's investigator Castro testified he spoke to Tomayo "a couple of times[,]" as well as Pena, and he prepared his reports as summaries of those conversations. He agreed it was important that his reports contain an accurate and complete summary of everything said during his interviews with the witnesses.

Pena testified she was upstairs with her son while the three men were downstairs "drinking and talking," and she overheard Calo say "something about having a piece on him" and "[t]hat he needed to always carry something," which she interpreted to mean a gun. Pena testified she told Tomayo that Calo needed

to leave their home after he "confirmed" Calo had a gun. On cross-examination, the State presented Pena with Castro's investigative report and questioned her regarding inconsistencies between the report and her testimony.

At the conclusion of the evidence, defendant renewed his motion for judgment of acquittal for unlawful possession of a weapon. The court denied the motion.

In its closing argument, the State attacked the credibility of Tomayo's testimony, asserting the investigative reports and Tomayo's sworn statement to the prosecutors revealed inconsistencies and omissions. The State also argued Tomayo was biased. The State emphasized the statements implicating Calo as the possessor of the handgun were not made by Tomayo until after Calo had died. The State asserted Tomayo's and Pena's version of events was a recent fabrication.

At the conclusion of the closing argument, the jury was first charged with instructions for the unlawful possession of a weapon, and, after deliberations, found defendant guilty of that offense. The jury was then informed the State and defendant stipulated to defendant's prior conviction for burglary in Connecticut, "a Class D felony," and the State entered the certified judgment of conviction for that Connecticut conviction into evidence. The jury was then

instructed on the elements of the offense of certain persons not to have firearms, and, after deliberations, found defendant guilty of that offense.

Following the jury's verdicts, defendant moved for reconsideration of the court's prior order denying his motion to suppress the firearm recovered from his vehicle, and for a new trial based on alleged prosecutorial misconduct. At the hearing on these motions, defendant argued reconsideration of his motion to suppress was warranted because Roemmele's testimony at trial—that he pulled on a rag wedged between the dashboard and the top of the glove compartment causing the handgun to fall—constituted new evidence, and it demonstrated the scope of the search exceeded the probable cause provided by the smell of marijuana.

The court denied defendant's motion for reconsideration, finding the motion court's ruling was the "law of the case," and otherwise determining there was "no basis on which to grant" defendant's motion for reconsideration. The court found "the search was a good search[,]" and there had been "no deprivation of . . . defendant's rights[.]"

In support of his motion for a new trial, defendant acknowledged that no objection had been made in response to the alleged instances of prosecutorial misconduct, but nonetheless he claimed the errors were "clearly capable of

producing an unjust result." He alleged the State improperly questioned Tomayo and Pena regarding their "delay in reporting their version of the facts" until after Calo died, to improperly suggest they fabricated their version without laying the proper foundation. Defendant further asserted the State's use of Castro's investigative reports to confront Tomayo and Pena was improper because the reports consisted of Castro's recollection's and not Tomayo's or Pena's own words, and because the reports were never admitted in evidence. Defendant also claimed the State improperly used Tomayo's sworn statement to the prosecutors without entering it into evidence, and misrepresented what Tomayo said in that statement.

The court rejected defendant's arguments and found "no basis for granting a new trial." The court explained "[t]here were factual issues here, and the prosecutor was entitled to comment in summation with respect to alleged contradictions, or alleged assertions by the defense." The court denied defendant's motion for a new trial.

At defendant's sentencing proceeding, the court also heard argument on defendant's motion for judgment of acquittal on the certain-persons-not-to-possess-a-firearm, N.J.S.A. 2C:39-7(b)(1), charge. Defendant argued the predicate offense for his status as a certain person was a Connecticut conviction

for burglary. He claimed that whether his Connecticut conviction for burglary was a comparable offense under N.J.S.A. 2C:39-7(c)[2] had to be decided by the jury. He further argued the Connecticut statutory definition of burglary "criminalizes much more conduct than the [New] Jersey statute" and is therefore "not comparable" for purposes of having a necessary predicate conviction under N.J.S.A. 2C:39-7(c).

The court rejected defendant's argument and found "[b]urglary has a common law meaning[,] . . . [a]nd both the New Jersey statute[, N.J.S.A. 2C:39-7(c),] and Connecticut statute incorporate [the] common law . . . definition of burglary." The court determined the two "statutes are comparable" and the question of whether an out-of-state crime is a comparable offense under N.J.S.A. 2C:39-7(c) is a legal issue. The court found defendant's Connecticut conviction for burglary constituted a comparable conviction of the requisite predicate offense of burglary under N.J.S.A. 2C:39-7(c) such that defendant could be properly convicted of the certain-persons offense. The court denied defendant's motion.

---

[2] N.J.S.A. 2C:39-7(c) provides that "[w]henever any person shall have been convicted in another state . . . in a court of competent jurisdiction, of a crime . . . which in the other jurisdiction or country is comparable to one of the crimes enumerated in subsection a. or b. of this section, then that person shall be subject to the provisions of this section."

In sentencing defendant, the court found three aggravating factors and one mitigating factor. It found aggravating factors: three, "[t]he risk the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(3); six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted," N.J.S.A. 2C:44-1(a)(6); and nine, the need to deter defendant "and others from violating the law." N.J.S.A. 2C:44-1(a)(9). It found mitigating factor eleven applied as well, the hardship placed on defendant or his dependents by his imprisonment. N.J.S.A. 2C:44-1(b)(11).

The court sentenced defendant to an eight-year prison term with a four-year period of parole ineligibility for unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1). It sentenced defendant to a five-year prison term with a mandatory five-year period of parole ineligibility for certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b)(1). Count two of the indictment, possession of a defaced firearm, N.J.S.A. 2C:39-3(d), was dismissed. The court also found defendant guilty of the two disorderly persons drug offenses, and sentenced defendant to a six-month custodial term for each, to run concurrent to his eight-year sentence for unlawful possession of a weapon.

This appeal followed. Defendant presents the following arguments for our consideration:

POINT I

DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS VIOLATED DUE TO THE LACK OF DIRECT TESTIMONY JUSTIFYING PROBABLE CAUSE TO SEARCH ALL PARTS OF DEFENDANT'S VEHICLE; THERE WERE ZERO PROOFS INTRODUCED BY THE STATE REGARDING THE MANNER AND SCOPE OF THE SEARCH OR WHERE THE GUN WAS FOUND VIOLATING DEFENDANT'S FUND[A]MENTAL RIGHT TO DUE PROCESS AND A FAIR TRIAL.

A. There was insufficient probable cause to search all of defendant's car.

B. The suppression hearing judge erred in issuing a ruling in the absence of any testimony from the searching officer depriving defendant of his fundamental right to a fair suppression hearing and trial.

POINT II

DEFENDANT'S MOTION FOR RECONSIDERATION OF JUDGE ENRIGHT'S SUP[P]RESSION MOTION AND TO CONDUCT A NEW EVIDENTIARY HEARING SHOULD HAVE BEEN GRANTED IN THE INTERESTS OF JUSTICE DUE TO NEW EVIDENCE ADDUCED AT TRIAL DIRECTLY CONTRADICTING JUDGE ENRIGHT'S FINDING THAT LAW ENFORCEMENT ACTED REASONABLY AND THEREFORE HAD PROBABLE CAUSE TO SEARCH THE SECRETED AREA WHERE THE GUN WAS FOUND.

POINT III

DEFENDANT WAS ENTITLED A JUDGEMENT OF A[C]QUITTAL BECAUSE THE STATE CLEARLY FAILED TO CARRY ITS BURDEN OF PROOF THAT DEFENDANT WAS IN POSSESSION OF THE GUN AND THE OVERWHELMING EVIDENCE INDICATES THAT THE GUN WAS ALWAYS SOLELY POSSESSED BY DEFENDANT'S COUSIN.

POINT IV

DEFENDANT WAS ENTITLED TO A NEW TRIAL DUE TO PROSECUTORIAL MISCONDUCT IN QUESTIONING DEFENSE WITNESSES AND IN MAKING UNFOUNDED COMMENTS IN HIS CLOSING STATEMENT RESULTING IN A MANIFEST INJUSTICE UNDER THE LAW.

POINT V

THE TRIAL JUDGE ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR JUDGEMENT OF A[C]QUITTAL ON COUNT THREE OF THE INDICTMENT AS THE STATE FAILED TO PROVE THAT DEFENDANT'S CONNECTICUT CONVICTION WAS COMPARABLE TO A NEW JERSEY CONVICTION WHICH MUST BE DECIDED BY A JURY.

POINT VI

THE TRIAL JUDGE'S JURY INSTRUCTIONS ON POSSESSION WERE ERRONEOUS REQUIRING REVERSAL.

POINT VII

DEFENDANT'S SENTENCE WAS EXCESSIVE.

II.

A.

Defendant first argues the court erred by denying his motion to suppress the handgun found in his vehicle. He argues any probable cause that existed to search the vehicle based on Reilly's detection of the smell of raw marijuana was no longer extant after he turned over the small bag of marijuana to Reilly. He also argues that in the absence of testimony from Roemmele at the suppression hearing, "[t]here was an insubstantial factual basis to support" the court's conclusion the search was reasonable. Defendant further asserts Roemmele's absence from the suppression hearing deprived him of his right to a fair proceeding and violated his right to confront the witnesses against him.

When reviewing a trial court's denial of a motion to suppress physical evidence, our "scope of review . . . is limited." State v. Ahmad, 246 N.J. 592, 609 (2021). We "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." Ibid. (quoting State v. Elders, 192 N.J. 224, 243 (2007)). Factual findings of the trial court should only be set aside when those findings are

"clearly mistaken." State v. Zalcberg, 232 N.J. 335, 344 (2018) (quoting State v. Hubbard, 222 N.J. 249, 262-63 (2015)). Factual findings based on "[v]ideo-recorded evidence is reviewed under the same standard." State v. Hagans, 233 N.J. 30, 38 (2018) (citing State v. S.S., 229 N.J. 360, 381 (2017)). We owe no such deference to a trial court's legal interpretations, which we review de novo. State v. Hathaway, 222 N.J. 453, 467 (2015).

The Fourth Amendment of the United States Constitution as well as Article I, Paragraph 7 of the New Jersey Constitution guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "Warrantless searches are 'permissible only if "justified by one of the few specifically established and well-delineated exceptions to the warrant requirement."'" State v. Robinson, 228 N.J. 529, 544 (2017) (quoting State v. Witt, 223 N.J. 409, 422 (2015)).

Where evidence is seized during a vehicle stop without a warrant, "[t]he State has the burden of proof to demonstrate by a preponderance of the evidence that the warrantless seizure was valid." State v. Atwood, 232 N.J. 433, 437-38 (2018) (quoting State v. O'Neal, 190 N.J. 601, 611 (2007)). Where the State fails to establish the search falls within one of the exceptions to the warrant

requirement, the exclusionary rule requires suppression of the evidence. Id. at 449.

"One of the well-established exceptions to the warrant requirement is the automobile exception." State v. Terry, 232 N.J. 218, 231 (2018). Under the automobile exception, a vehicle may be searched without a warrant where (1) "the police have probable cause to believe that the vehicle contains contraband or evidence of an offense," and (2) "the circumstances giving rise to probable cause are unforeseeable and spontaneous." Witt, 223 N.J. at 447; State v. Rodriguez, 459 N.J. Super. 13, 22 (App. Div. 2019).

"In determining whether there is probable cause, the court should utilize the totality of the circumstances test . . . [and t]hat test requires the court to make a practical, common sense determination whether, given all of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" State v. Moore, 181 N.J. 40, 46 (2004) (citation omitted) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

Defendant does not challenge the spontaneity of the search of his vehicle, Witt, 223 N.J. at 447; he challenges only the reasonableness of the search and the probable cause justifying it. In arguing the State failed to prove the search of the car was reasonable, defendant relies on State v. Patino, 83 N.J. 1, 10-11

(1980), where the Court held "police . . . must not only have probable cause to believe that the vehicle is carrying contraband but the search must be reasonable in scope" and "a search, although validly initiated, may become unreasonable because of its intolerable intensity and scope." In Patino, the Court further held "the presence of a small amount of marijuana, consistent with personal use, does not provide [police] with probable cause to believe that larger amounts of marijuana or other contraband are being transported." Id. at 13.

Defendant's reliance on Patino is misplaced because "New Jersey courts have recognized that the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'"[3] State v. Walker, 213 N.J. 281, 290 (2013) (alteration in original) (quoting State v. Nishina, 175 N.J. 502, 515-16 (2003)). Our courts have "repeatedly recognized that . . . the smell of burning marijuana establishes probable cause that there is contraband in the immediate vicinity." State v. Myers, 442 N.J. Super. 287, 296 (App. Div. 2015) (alteration in original) (quoting Walker, 213 N.J. at 287-88). Where the persistent smell of unburned

[3] We note the search at issue on appeal occurred prior to the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, N.J.S.A. 24:6I-31 to -56, and related marijuana decriminalization statutes, which became effective February 22, 2021. L. 2021, c. 16.

or raw marijuana is detected, probable cause has been found to support even a warrantless search of a vehicle's trunk when an officer is unable to "pinpoint the source" of that odor. State v. Kahlon, 172 N.J. Super. 331, 338 (App. Div. 1980); see State v. Guerra, 93 N.J. 146, 149-50 (1983) (finding probable cause to justify the search of a vehicle's trunk when the officer searching the vehicle concluded the "strong odor of marijuana" could not have been emanating from a small container within the "car's interior"). Thus, probable cause to search defendant's vehicle persisted after defendant turned over the bag of marijuana; Reilly testified a strong odor of raw marijuana continued emanating from the vehicle after defendant handed the small bag of marijuana to him.

Probable cause to continue the search of defendant's vehicle was supported by the discovery of additional marijuana as the search progressed. The MVR footage viewed by, and relied upon, by the court showed Roemmele noticed a marijuana "roach in the ashtray too" from where he stood on the driver's side of the car, and soon thereafter he uncovered the waxy substance suspected to be more marijuana in the passenger side door handle. As the motion court correctly found, the persistent odor of marijuana discerned by Reilly, coupled with the evidence found by Roemmele shortly thereafter, provided probable cause to believe more marijuana would be found in the "immediate

vicinity" of where that contraband had been found. Myers, 442 N.J. Super. at 296.

"The scope of a warrantless search of an automobile is defined by the object of the search and the places where there is probable cause to believe that it may be found." Esteves, 93 N.J. at 508 (citing Guerra, 93 N.J. at 151). The motion court correctly determined the search reasonably included the glove compartment because it was directly in front of where defendant was sitting and it was within the immediate vicinity of where Roemmele found additional marijuana.

Moreover, contrary to defendant's claim the State did not present "valid proofs as to the manner in which the search was conducted," the court explicitly relied on the MVR footage in noting that "less than a minute after . . . Roemmele discovered contraband on the passenger side of the car, he found the gun in the glovebox." Having reviewed the MVR footage, we are satisfied it provided sufficient evidence the scope and intensity of Roemmele's search remained reasonable and was supported by the probable cause established by the odor emanating from the vehicle and Roemmele's further discovery of marijuana in defendant's car. Patino, 83 N.J. at 10-11.

We also reject defendant's argument, raised for the first time on appeal, he was denied a fundamentally fair hearing and his right to confront the witnesses against him because Roemmele did not testify at the suppression hearing. Putting aside the fact that he failed to properly preserve this issue for appeal, see Robinson, 200 N.J. at 20 (explaining we "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest" (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973))), defendant's argument fails on the merits.

Defendant does not argue he was denied the opportunity to call Roemmele as a witness. Instead, he claims Roemmele's absence violated his right to fundamentally fair hearing. The claim ignores that his counsel opted to proceed without Roemmele's appearance at the suppression hearing because Roemmele was on military leave at the time and defendant's challenge to the search was founded solely on a claim Reilly's detection of the odor of marijuana was insufficient to support the search that yielded the recovery of the gun. Thus, defendant waived his right to confront Roemmele. State v. Williams, 219 N.J. 89, 98 (2014) (explaining "[t]he right of confrontation, like other constitutional

rights, may be waived by the accused"); see State v. Kent, 391 N.J. Super. 352, 382 (App. Div. 2007) (holding that a DWI defendant's failure to call as a witness a laboratory technician who prepared the "laboratory reports and blood certificates" waived the defendant's confrontation rights).

We also discern no basis to apply the doctrine of "fundamental fairness" to support defendant's challenge to the court's order denying his motion to suppress. "Fundamental fairness is a doctrine to be sparingly applied," and "[t]he doctrine is 'applied in those rare cases where not to do so will subject the defendant to oppression, harassment, or egregious deprivation.'" State v. Miller, 216 N.J. 40, 71-72 (2013) (quoting Doe v. Poritz, 142 N.J. 1, 108 (1995)). Defendant's argument at the suppression hearing focused exclusively on his challenge to the probable cause the State asserted was established by Reilly's detection of the persistent odor of marijuana, and defendant was afforded ample opportunity to challenge Reilly on this issue. At the hearing, Reilly's testimony established probable cause to search, and, as the motion court noted, the MVR footage demonstrates that only a brief and unintrusive search of the immediate vicinity of where defendant was seated and where additional marijuana was found led to the discovery of the handgun.

We also reject defendant's assertion the motion court had an obligation to sua sponte hold a hearing on Roemmele's unavailability or adjourn the hearing until he would be available to testify. As noted, defendant's counsel was fully aware of the reason for Roemmele's unavailability and that the officer would not testify at the suppression hearing, and counsel opted to proceed in Roemmele's absence without objection. Defendant fails to establish Roemmele's unavailability and failure to testify at the suppression hearing constituted "oppression, harassment, or" an "egregious deprivation." Ibid. (quoting Poritz, 142 N.J. at 108).

In sum, we discern no error in the motion court's denial of defendant's suppression motion, and we conclude the court's findings and determination were supported by sufficient credible evidence. Ahmad, 246 N.J. at 609.

B.

Defendant next claims the court erred by denying his motion for a new hearing on his suppression motion pursuant to Rule 4:49-1. He claimed Roemmele's testimony at trial constituted "new evidence" supporting a new suppression hearing. More particularly, defendant contends Roemmele's trial testimony demonstrated the search was more invasive than had been "suggested at the [suppression] hearing" because Roemmele testified at trial he found the

gun wedged between the glove compartment and dashboard and at the suppression hearing Reilly testified the gun was recovered from the glove compartment. Defendant further contends Roemmele's testimony about the location of the gun conflicts with defendant's statement to the police that he returned the gun to the glove compartment a few days earlier after he first discovered it.

We have held a motion to suppress may be brought a second time where "'new evidence comes to light, which was unavailable at the time of the original hearing on the motion through no fault of the movant,' that would affect the legality of the search." State v. Mosner, 407 N.J. Super. 40, 60 (App. Div. 2009) (quoting State v. Roccasecca, 130 N.J. Super. 585, 591 (Law Div. 1974)). Defendant makes no such showing here.

Defendant fails to argue, let alone establish, that the purportedly "new evidence"—Roemmele's testimony—was not available at the suppression hearing "through no fault of [defendant's] own." Ibid. Again, defendant agreed to proceed in Roemmele's absence at the suppression hearing.[4] More

[4] We note that even under the standards applicable to Rule 4:49-1, which defendant urges us to apply, a party must establish their entitlement to a new trial based on new evidence by demonstrating the evidence "was unobtainable by the exercise of due diligence for use at the trial." DEG, LLC v. Twp. of

importantly, even assuming this purportedly "new evidence" proves the handgun was found in a secreted location rather than simply within the glove compartment, drug evidence coupled with a trained police officer's discovery of a "secret compartment" provides probable cause to search that compartment. State v. Nunez, 262 N.J. Super. 251, 256 (App. Div. 1993). Thus, defendant fails to make any showing that had Roemmele testified at the suppression hearing, a different determination concerning the legality of the search would have resulted.

Defendant further argues he is entitled to a new suppression hearing because the discrepancy between his statement to the police about where he put the gun—in the glove compartment—and Roemmele's trial testimony about the gun's location supports an inference Calo secreted the gun during the time Reilly first removed defendant from the vehicle. We reject the argument because the purported discrepancy has no relevance to a determination of the legality of the search. Because he fails to establish this purported new evidence effects the legality of the search and was unavailable to him at the time of the motion

---

Fairfield, 198 N.J. 242, 264 (2009) (quoting Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 445 (1980)).

hearing, defendant fails to demonstrate the court abused its discretion by denying his motion for a new suppression hearing.

III.

Defendant also argues the court erred by denying his motion for a judgment of acquittal on the unlawful-possession-of-a-weapon charge at the conclusion of the State's case. He contends the State did not meet its burden of presenting sufficient evidence establishing each element of the offense because it relied solely on his admission to the police the gun was his without presenting any evidence corroborating that was the case. See generally State v. Reddish, 181 N.J. 553, 617-19 (2004) (explaining the requirement that the State must present evidence corroborating a defendant's admissions to support a criminal conviction). Defendant also claims the evidence Roemmele found the handgun wedged between the glove compartment and the dashboard conflicted with, and therefore undermined, defendant's statement to the police that he placed the handgun in the glove compartment.

We review de novo a trial court's determination of a defendant's motion for a judgment of acquittal brought pursuant to Rule 3:18-1. State v. Dekowski, 218 N.J. 596, 608 (2014). To succeed on a motion for acquittal, a defendant "must meet a stringent burden." State v. Lodzinski, 248 N.J. 451, 463 (2021).

A court must view "the State's evidence in its entirety, be that evidence direct or circumstantial," afford "the State the benefit of all favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom," and decide whether "a reasonable jury could find guilt of the charge beyond a reasonable doubt." Id. at 464 (quoting Reyes, 50 N.J. at 459). "If any reasonable jury could find guilt beyond a reasonable doubt, the motion must be denied." Ibid.

"[T]o prove possession, the State must show 'intentional control and dominion, the ability to affect physically and care for the item during a span of time, accompanied by knowledge of its character.'" State v. Latimore, 197 N.J. Super. 197, 210 (App. Div. 1984) (quoting State v. Brown, 80 N.J. 587, 597 (1979)); State v. Kelly, 118 N.J. 370, 383 (1990). Proving actual physical possession is not required, "it is enough that [a] defendant have 'intentional control and dominion' over the object." Ibid. (quoting State v. Humphreys, 54 N.J. 406, 413-14 (1969)).

Defendant claims the court erroneously relied on his admissions the gun was his and he placed it in the glove compartment to conclude the State sustained its burden of proving possession. He argues the court could not properly rely

on his admissions because they were not corroborated by evidence establishing their trustworthiness.

In Reddish, the Supreme Court reaffirmed the principle that a defendant's confession alone is insufficient to establish guilt beyond a reasonable doubt. 181 N.J. at 617. The court explained "'the State must 'introduce independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness, plus independent proof of loss or injury.'" Ibid. (quoting State v. Lucas, 30 N.J. 37, 56 (1959)). Nevertheless, judgments of acquittal should not be granted on these grounds if "the State provides 'any legal evidence, apart from the confession of facts and circumstances, from which the jury might draw an inference that the confession is trustworthy.'" Ibid. (quoting Lucas, 30 N.J. at 62). The State's burden is rather low. Id. at 618.

The State carried its burden here. Defendant's admission he possessed the gun was corroborated by evidence the gun was found in his vehicle. It was further corroborated by the recovery of the gun in a location directly in front of where defendant was seated. In addition, although the gun was not first found directly in the glove box as defendant stated, the gun was found hidden behind a rag directly adjacent to the glove compartment such that when Roemmele

removed the rag the gun fell into the glove compartment. We are persuaded that evidence sufficiently corroborates defendant's admission of possession such that it supports the trustworthiness of his admission. The court therefore did not err by denying defendant's motion for acquittal on the unlawful possession of the handgun charge.

We are not persuaded by defendant's claim Roemmele's testimony requires a different result. As noted, Roemmele testified a rag was wedged between the dashboard and the glove compartment, and when he pulled on the rag, he caused the gun to fall and point directly at him. Defendant's statement he returned the gun to the glove compartment was not sufficiently precise to support a finding there is contradiction between his admission and the location Roemmele first found the gun. In any event, whether the gun was found hidden by a rag such that it fell into the glove compartment when the rag was removed or was actually within the glove compartment is of no moment given the other evidence concerning defendant's ownership of the vehicle and his location seated directly in front of the glove box. Those facts alone permitted a reasonable jury to conclude defendant had "intentional control and dominion" and "the ability to affect physically and care for [the handgun] during a span of time." Kelly, 118 N.J. at 383.

Thus, the court correctly found "there [was] more than sufficient evidence [for] this case [to] go to the jury." Defendant failed to meet his "stringent burden" of demonstrating that in view of all the State's evidence, and drawing all reasonable inferences in the State's favor, no reasonable jury could conclude beyond a reasonable doubt defendant possessed the handgun. Lodzinski, 248 N.J. at 463; Reyes, 50 N.J. at 458-59. The court did not err by denying defendant's motion for a judgment of acquittal.

IV.

Defendant argues the court erred by denying his motion for a new trial based on alleged prosecutorial misconduct in the State's cross-examination of defendant's witnesses and in statements made in summation. Defendant argues the State improperly: elicited testimony showing Tomayo delayed reporting his version of events preceding defendant's and Calo's arrests without a proper foundation; used Castro's investigative reports while cross-examining Tomayo and Pena; and "used Tomayo's sworn statement to prosecutors."

"The standard for reversal based upon prosecutorial misconduct is well-settled" and "requires an evaluation of the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999). "[T]o warrant a new trial the prosecutor's conduct

must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Smith, 167 N.J. 158, 181-82 (2001) (quoting Timmendequas, 161 N.J. at 575). "In determining whether a prosecutor's misconduct was sufficiently egregious, an appellate court 'must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.'" State v. Frost, 158 N.J. 76, 83 (1999) (quoting State v. Marshall, 123 N.J. 1, 153 (1991)).

Where, as here, "a defendant fails to object to the challenged statements and thus deprives the trial judge of the opportunity to ameliorate any perceived errors, he [or she] must establish that the comments constitute plain error under Rule 2:10-2." State v. Feal, 194 N.J. 293, 312 (2008). In the context of alleged prosecutorial misconduct, "[p]lain error must be 'sufficient [to raise] a reasonable doubt as to whether the error led the jury to a result that it otherwise might not have reached.'" Ibid. (second alteration in original) (quoting State v. Daniels, 182 N.J. 80, 95 (2004)).

Defendant first alleges the State engaged in prosecutorial misconduct by improperly cross-examining Tomayo regarding his delay in reporting his version of events. During its cross-examination of Tomayo, the State showed Tomayo

did not report his claim the gun was in Calo's possession while at Tomayo's home until September 18, 2018, long after defendant's arrest in October 2017 and only after Calo died in May 2018. The State also argued in summation Tomayo's and Pena's delayed claim Calo had a gun at their home constituted a recent fabrication. Defense counsel did not object to the State's cross-examination or argument in summation.

The Court has recognized that where a relative or friend of an accused possesses exculpatory information, it may be their "natural response . . . to come forward in order to avoid a mistaken prosecution," and a failure to come forward "when it would have been natural to do so" may be "akin to a witness's 'prior inconsistent statement,' and therefore, [have] probative value." State v. Silva, 131 N.J. 438, 446 (1993) (quoting Commonwealth v. Brown, 416 N.E.2d 218, 224 (Mass. App. Ct. 1981)); State v. Holden, 364 N.J. Super. 504, 512 (App. Div. 2003). However, there may be circumstances where such a failure has no probative value. Id. at 446-47.

Because cross-examination concerning a delay in coming forward with exculpatory information may be inappropriate in certain circumstances, a four-prong test applies to determine whether a proper foundation has been laid for the admission of such evidence. Id. at 447-48. A "proper foundation" is laid

where it is established "the witness was aware of the nature of the charges pending against the defendant, had reason to know he [or she] had exculpatory information, had a reasonable motive to act to exonerate the defendant, [and] was familiar with the means to make the information available to law enforcement authorities.'" Holden, 364 N.J. Super. at 511 (alteration in original) (quoting Silva, 131 N.J. at 447-48).

Our review of the trial record reveals an adequate foundation for the State's cross examination of Tomayo, and the State's arguments in summation, concerning his delayed reporting of his version of the events concerning Calo's purported possession of the gun. Tomayo's testimony on direct examination established he was aware of the charges pending against defendant—Calo told him about the arrest and defendant's charges. See Silva, 131 N.J. at 447. His direct testimony also established he knew he possessed exculpatory information—he testified Calo told him defendant had taken responsibility for the handgun following the arrest. See ibid. Tomayo's direct testimony also established a motive to exonerate defendant—he had close familial ties to defendant, an individual he knew well and who he had "hung around" with since he was young. See id. at 447-48.

The trial record also established the fourth and final foundational factor under the Silva standard—Tomayo was familiar with the means to make the information known to law enforcement. Id. at 448. Although Tomayo testified he did not "know how to get in touch with police," and he "didn't know who to contact," Tomayo did not testify that he was unable to identify the law enforcement agency with which he could share the information or that he was unfamiliar "with the means to make the information available to law enforcement authorities." Id. at 448. Tomayo implicitly recognized he could have contacted the police when he testified the reason he did not immediately contact law enforcement was because he did not want "to see [Calo] go back in jail."

We have held it is reasonable to assume adults are able to determine how to bring exculpatory information to the attention of authorities. See Holden, 364 N.J. Super. at 513 ("[W]e can infer a seventeen-year-old high school senior would probably know how to report police misconduct"). We also have upheld cross-examination concerning delayed reporting of exculpatory evidence and its subsequent use in the State's summation based on inferences drawn from proofs otherwise elicited at trial. State v. Perez, 304 N.J. Super. 609, 612-13 (App. Div. 1997) (because "the proofs permitted a finding that" the witness—the

defendant's aunt—knew of the defendant's arrest, it therefore justified the inference it "would have been natural for" the witness to contact police to provide the defendant with an alibi, despite the witness's testimony on redirect that she lacked knowledge as to the nature of the charges pending against the defendant). Thus, because each of the Silva foundational factors were established during Tamayo's direct testimony, or otherwise reasonably inferable based on that testimony and other attendant circumstances, the State's cross examination of Tamayo on his delayed reporting, and the argument in summation based on the delay, was proper. See Holden, 364 N.J. Super. at 513. Moreover, even if either the cross-examination or argument in summation were improper, defendant fails to demonstrate, and we do not otherwise find, either or both were clearly capable of causing an unjust result. R. 2:10-2.

Defendant next argues the State improperly used Castro's investigative reports, which summarized his conversations with Tomayo and Pena, during its cross-examination of those witnesses. During its cross-examination of Tomayo and Pena, the State pointed out inconsistencies between their trial testimony and the statements Castro attributed to each in his reports. For example, during Tamayo's cross-examination, the State pointed out Castro's report states Tamayo reported he saw Calo with a black loaded gun at his home, but at trial Tomayo

testified he had not actually seen the gun Calo allegedly possessed. During Tamayo's cross-examination, it was also shown Castro's reports did not reflect that Tamayo said he saw Calo reach over to the glove compartment once in defendant's vehicle, but Tomayo testified at trial as to this observation. Defense counsel did not object during the cross-examination.

Exposing a prior inconsistent statement is a proper mode of attacking a witness's credibility. Silva, 131 N.J. at 444. A witness may be examined based on an inconsistent prior statement, whether that statement is "written or otherwise." N.J.R.E. 613. "Cross-examination relating to a witness's credibility need not be based on evidence adduced at trial[,]" however, "[t]hat is not to say the prosecutor could ask questions about topics for which she had no basis in truth." State v. Martini, 131 N.J. 176, 255 (1993), overruled in part on other grounds by State v. Fortin, 178 N.J. 540, 647 (2004). "Under appropriate circumstances, [a] prior inconsistent omission can be offered solely to discredit, or also as substantive evidence." Manata v. Pereira, 436 N.J. Super. 330, 345 (App. Div. 2014).

Defendant argues our decision in Manata stands for the proposition that a "reversal is required where counsel cross-examine[s] [a] defendant using [a] police report without seeking to introduce it or call the officer who drafted the

report." He argues Manata is analogous to the facts here. In Manata, we held that "a question in cross-examination is improper where 'no facts concerning the event on which the question was based were in evidence and the [questioner] made no proffer indicating his ability to prove the occurrence.'" Id. at 348 (alteration in original) (quoting State v. Rose, 112 N.J. 454, 500 (1988)). We explained this form of questioning constitutes "phantom impeachment" or "the contradiction of a witness on 'key testimony—by someone who never takes the stand and who never says a word in court.'" Id. at 347 (quoting James McElhaney, Phantom Impeachment, 77 A.B.A.J. 82 (Nov. 1991)).

Although Castro's reports were not admitted into evidence, none of the infirmities supporting the finding of "phantom impeachment" in Manata are extant here. Ibid. Castro testified concerning his reports and he explained they accurately summarized Tomayo's and Pena's statements. Thus, the individual who prepared the reports testified, explained the reports included everything said during the conversations, and attributed the statements directly to the two witnesses. Id. at 338.

Unlike in Manata, Tomayo and Pena acknowledged they spoke with Castro, they did not claim any omission in the reports, and there was no objection from defense counsel. Id. at 345. Additionally, because defendant

called Castro following Tomayo's testimony and prior to Pena's testimony, defendant had the opportunity to question the "reliability or trustworthiness" of Castro's reports, id. at 346-47, and to place the reports in their proper context. Castro's testimony, as well as the testimony of Tomayo and Pena, provided ample evidentiary support for the State's cross-examination of Tomayo and Pena regarding the statements summarized in Castro's reports. Martini, 131 N.J. at 255-56. Further, defendant fails to make any showing that even if the cross-examination concerning the reports was admitted in error, it was clearly capable of causing an unjust result. R. 2:10-2.

In addition, defendant's conclusory assertion the State improperly used Tomayo's sworn statement lacks sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), except to note we do not find the State made "inaccurate factual assertions to the jury" or employed "improper methods calculated to produce a wrongful conviction" when it cross-examined defendant based on the statement. State v. Garcia, 245 N.J. 412, 435 (2021) (citation omitted) (quoting State v. Ramseur, 106 N.J. 123, 320 (1987)).

In sum, defendant fails to demonstrate the State engaged in any prosecutorial misconduct, or that even if it had, the purported instances of misconduct, even taken together, are "sufficient [to raise] a reasonable doubt as

to whether the error led the jury to a result that it otherwise might not have reached." Feal, 194 N.J. at 312 (alteration in original) (quoting Daniels, 182 N.J. at 95); R. 2:10-2.

V.

Defendant next claims the court erred by denying his motion for judgment of acquittal on the certain-persons-not-to-possess-weapons charge. Under N.J.S.A. 2C:39-7(b)(1), it is a second-degree offense for an individual to possess a firearm who has previously been convicted of burglary "in this State or elsewhere." Where a person has been convicted of burglary in another state, a person may be convicted under N.J.S.A. 2C:39-7(b)(1) only where the burglary conviction in the other state is "comparable to" a conviction for burglary in New Jersey. N.J.S.A. 2C:39-7(c). Defendant argues he was entitled to an acquittal on the certain-persons charge because his prior burglary conviction in Connecticut was not for an offense comparable to burglary in New Jersey. We review the court's denial of defendant's acquittal motion de novo. Dekowski, 218 N.J. at 608.

Defendant argues his prior conviction for burglary in Connecticut, under Conn. Gen. Stat. § 53a-103, is not comparable to burglary under our Criminal Code, see N.J.S.A. 2C:18-2(a), because the elements of the offenses are

different. He also asserts his Connecticut conviction was based on an Alford[5] plea and thus required a lesser standard of proof than a conviction in this state because Alford pleas are not permitted in New Jersey. See State v. Urbina, 221 N.J. 509, 527 (2015) (stating "[e]ven if a defendant wished to plead guilty to a crime he or she did not commit, he or she may not do so. No court may accept such a plea" (alteration in original) (quoting State v. Smullen, 118 N.J. 408, 415 (1990))).

Where a conviction for certain persons not to possess weapons is premised on a stipulated out-of-state conviction that is "comparable" under N.J.S.A. 2C:39-7(c) to one of the offenses listed in N.J.S.A. 2C:39-7(b)(1), the "evidence of the predicate offense" the State must offer "is extremely limited" and "[t]he most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that . . . bar a convict from possessing a gun[.]'" State v. Bailey, 231 N.J. 474, 488 (2018) (alterations in original) (quoting Old Chief v. United States, 519 U.S. 172, 190-91 (1997)). Defendant stipulated to the admission of his Connecticut conviction for burglary. Therefore, whether

[5] Providing that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." North Carolina v. Alford, 400 U.S. 25, 37 (1970).

his Connecticut conviction is for an offense comparable to the offense of burglary referred to N.J.S.A. 2C:39-7(b)(1) presents question of law.

The United States Supreme Court has considered whether a conviction for burglary in another jurisdiction "should count as 'burglar[y],'" in the context of a statute listing burglary as an enumerated prior offense for sentence enhancement purposes. Taylor v. United States, 495 U.S. 575, 600 n.9 (1990). In Taylor, the Court considered whether a defendant's burglary convictions in Missouri, id. at 578, constituted a prior conviction for an offense enumerated under 18 U.S.C. § 924(e), which provides for an enhanced sentence for defendants with three prior convictions for specific offenses, including what the Court characterized as "generic burglary[,]" id. at 598-99. The Court held that because Congress used the term "burglary" in 18 U.S.C. § 924(e)(2)(B)(ii) without any additional elements or qualifications, it intended the term that the term include a conviction of an offense "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 598-59.

N.J.S.A. 2C:39-7(b)(1) similarly refers to burglary as an enumerated offense supporting—in this case—a conviction for certain persons not to possess

weapons. But unlike the statute in Taylor, N.J.S.A. 2C:39-7(b)(1) in part requires proof of a prior conviction of burglary "in this State" and therefore necessarily refers to a burglary conviction under N.J.S.A. 2C:18-2 since that statute defining the elements of a burglary under our Criminal Code. Where an individual does not have a prior burglary conviction in New Jersey, he or she may be convicted of a certain-persons offense based on a prior burglary conviction in another state only if that conviction is for an offense "comparable" to the crime of burglary in New Jersey. N.J.S.A. 2C:39-7(c).

Defendant could be convicted of the certain-persons offense only if his Connecticut conviction for burglary was for an offense comparable to a burglary under N.J.S.A. 2C:18-2. Ibid. A comparison of the elements of the two offenses establishes that is the case. See generally Matter of A.A., 461 N.J. Super. 385, 391 (App. Div. 2019) (employing an "element-by-element" comparison of offenses in New Jersey and another state to determine if they are "similar to"[6] an offense enumerated in N.J.S.A. 2C:7-2(b)(2)).

[6] See N.J.S.A. 2C:7-2(b)(3) ("For the purposes of this act a sex offense shall include the following: . . . A conviction, adjudication of delinquency, or acquittal by reason of insanity for an offense similar to any offense enumerated in paragraph (2) or a sentence on the basis of criteria similar to the criteria set forth in paragraph (1) of this subsection entered or imposed under the laws of the United States, this State, or another state." (emphasis added)).

Defendant was convicted of burglary in Connecticut under Conn. Gen. Stat. § 53a-103(a). The statute provides "[a] person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein." Conn. Gen. Stat. § 53a-103(a). N.J.S.A. 2C:18-2 defines the crime of burglary based on conduct clearly comparable to, and essentially identical to, the conduct constituting the crime of burglary under Conn. Gen. Stat. § 53a-103(a).

In pertinent part, under N.J.S.A. 2C:18-2(a)(1) a person commits the crime of burglary "if, with purpose to commit an offense therein or thereon he . . . [e]nters a . . . structure unless the structure was at the time open to the public or the actor is licensed or privileged to enter." Thus, under the Connecticut statute and N.J.S.A. 2C:18-2(a)(1), a person commits a burglary by entering a structure, including a building, with intent to commit a crime therein. N.J.S.A. 2C:18-2(a)(1) also provides a burglary is not committed if at the time the person enters the structure, or building, it is open to the public or the person is licensed or privileged to enter. The Connecticut statute includes a comparable provision—a person commits a burglary only when he or she enters a building "unlawfully." Conn. Gen. Stat. § 53a-103(a). In sum, there is no discernable

difference between the elements of the two statutes, and we are therefore convinced they are comparable offenses under N.J.S.A. 2C:39-7(c).[7]

We similarly reject defendant's assertion his Alford plea to burglary in Connecticut did not result in a comparable "conviction" for burglary under N.J.S.A. 2C:39-7(c), because it requires lesser proof than is required for a conviction in New Jersey. He did not raise the issue before the trial court, and it does not go to the court's jurisdiction or involve a matter of public concern. See Robinson, 200 N.J. at 18-20.

Additionally, defendant presented no evidence establishing his conviction in Connecticut resulted from an Alford plea, but even if he had, N.J.S.A. 2C:39-7(c) requires only a "conviction" in another state. Although Alford pleas are not accepted in this state, Urbina, 221 N.J. at 527, a conviction based on an Alford plea in Connecticut is the equivalent of a conviction by a jury or plea agreement,

---

[7] We are not persuaded by defendant's claim a burglary under N.J.S.A. 2C:18-2(a)(2), which provides a person commits the offense if he "[s]urreptitiously remains in a . . . structure . . . knowing that he is not licensed or privileged to do so" is not comparable to the offense of burglary under Conn. Gen. Stat. § 53a-103(a) because the latter does not require that it be proven a defendant remained in a structure "surreptitiously." In our view, the offenses are comparable because an offense under N.J.S.A. 2C:18-2(a)(2) requires proof a defendant "surreptitiously remains . . . knowing that he is not licensed or privileged to do so," and, again, Conn. Gen. Stat. § 53a-103(a) includes a comparable requirement—it must be proven the defendant "remained unlawfully in a building."

State v. T.D., 944 A.2d 288, 297 (Conn. 2008) (explaining "if a defendant has been convicted of criminal conduct, following either a guilty plea, Alford plea or a jury trial," and fails to appeal, "then the conviction conclusively establishes that the defendant engaged in that criminal conduct"); see State v. Faraday, 842 A.2d 567, 588 (Conn. 2004) (stating "there is nothing inherent in an Alford plea that gives the defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction" (quoting People v. Birdsong, 958 P.2d 1124, 1130 (Colo. 1998))). A burglary conviction by way of an Alford plea is a conviction in Connecticut and constitutes a comparable conviction in another state under N.J.S.A. 2C:39-7(c).

VI.

We next turn to defendant's claim he is entitled to reversal of his convictions because the State made repeated references to the recovery of the handgun from the glove compartment during its summation, and the court erred by referring to the location the gun was found—the glove compartment—during its instructions to the jury.

Defendant did not object to the challenged jury instructions. We therefore review the instructions for plain error. State v. McKinney, 223 N.J. 475, 494 (2015); see R. 1:7-2; R. 2:10-2. "Plain error . . . is '[l]egal impropriety in the

charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Brown, 190 N.J. 144, 160 (2007) (alteration in original) (quoting State v. Torres, 183 N.J. 554, 564 (2005)). "'[T]he charge should be examined as a whole to determine its overall effect,' and 'whether the challenged language was misleading or ambiguous[.]'" McKinney, 223 N.J. at 494 (first quoting State v. Jordan, 147 N.J. 409, 422 (1997); then quoting State v. Nelson, 173 N.J. 417, 447 (2002)).

The court's references to where the handgun "was found" followed the Model Jury Charge for possession. Model Jury Charges (Criminal), "Unlawful Possession of a Handgun (Second Degree)" (approved June 11, 2018). While "not determinative," the court's use of the Model Jury Charges "is a persuasive argument in favor of the charge as delivered." State v. Whitaker, 402 N.J. Super. 495, 513-14 (App. Div. 2008) (quoting State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000)).

Contrary to defendant's argument, the court's instructions did not state as fact the gun was located in the glove compartment. Rather, in following the Model Jury Instructions, the court simply pointed to relevant considerations,

such as "where the handgun was discovered" and "where the handgun was found" which the jury could, "but [was] not limited to" consider in determining whether the State had "prove[n] constructive possession beyond a reasonable doubt." Similarly, the court's instruction regarding the permissible inference under N.J.S.A. 2C:39-2(a) that could be drawn, based on the defendant's ownership of the vehicle and the handgun's presence "in a glove compartment, trunk, or customary depository[,]" was punctuated by the court's instruction that it was the jury's "exclusive province to determine whether the facts or circumstances drawn by the evidence support any inferences."

The jury heard Roemmele's testimony during trial regarding where he first discovered the handgun, as well as Bogert's testimony he found the gun in the glove compartment, and the court's instructions explicitly directed the jury to consider all the evidence. State v. Burns, 192 N.J. 312, 335 (2007) ("One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions."). In view of the record and considering the instructions "as a whole," we are persuaded the instruction, referring to the gun as being found in the glove compartment, was misleading or inaccurate. McKinney, 223 N.J. at 494 (quoting Jordan, 147 N.J. at 422). We discern no error on the court's part, let alone plain error, depriving defendant of his right to a fair trial.

Defendant also argues the court erred in imposing sentence and by imposing an excessive sentence. He claims the court failed to find mitigating factor one, whether "defendant's conduct neither caused nor threatened serious harm," N.J.S.A. 2C:44-1(b)(1); two, whether "defendant did not contemplate that the defendant's conduct would cause or threaten serious harm," N.J.S.A. 2C:44-1(b)(2); and eight, whether "defendant's conduct was the result of circumstances unlikely to recur," N.J.S.A. 2C:44-1(b)(8). Defendant further argues the court failed to afford proper weight to mitigating factor eleven, the hardship placed on defendant or his dependents resulting from defendant's imprisonment, N.J.S.A. 2C:44-1(b)(11), which the court found applicable.

Our review of a sentencing court's decision is "deferential," State v. Case, 220 N.J. 49, 65 (2014), and we review for an abuse of discretion, State v. Jones, 232 N.J. 308, 318 (2018). A reviewing court "will 'not substitute [its] judgment for that of the sentencing court.'" State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)).

We will affirm a sentence when: "(1) the trial court followed the sentencing guidelines; (2) its findings of fact and application of aggravating and mitigating factors were 'based upon competent credible evidence in the record;' and (3) 'the application of the guidelines to the facts' of the case does not 'shock[]

the judicial conscience.'" State v. A.T.C., 454 N.J. Super. 235, 254 (App. Div. 2018) (alteration in original) (quoting State v. Bolvito, 217 N.J. 221, 228 (2014)). In considering mitigating factors, "[t]he sentencing court is required to consider evidence of a mitigating factor and must apply mitigating factors that 'are amply based in the record.'" State v. Grate, 220 N.J. 317, 338 (2015) (quoting State v. Dalziel, 182 N.J. 494, 504-05 (2005)).

The trial court followed the sentencing guidelines, and the record supports the judge's finding of aggravating factors: three, "[t]he risk that the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(3); six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted," N.J.S.A. 2C:44-1(a)(6); and nine, "[t]he need for deterring the defendant and others from violating the law," N.J.S.A. 2C:44-1(a)(9). A.T.C., 454 N.J. Super. at 254. Defendant does not challenge the court's conclusions with respect to the aggravating factors.

Regarding the mitigating factors defendant argues should have been applied at sentencing, the court considered these mitigating factors and rejected them. Because defendant was convicted of possessing "a loaded gun that was immediately accessible," the court rejected mitigating factor one, "defendant's conduct neither caused nor threatened serious harm," N.J.S.A. 2C:44-1(b)(1);

and mitigating factor two, "defendant did not contemplate that the defendant's conduct would cause or threaten serious harm," N.J.S.A. 2C:44-1(b)(2). The court additionally rejected mitigating factor eight, "defendant's conduct was the result of circumstances unlikely to recur," N.J.S.A. 2C:44-1(b)(8), based on defendant's criminal history. Although the trial court was not required to "explicitly reject every mitigating factor argued" it clearly considered all mitigating factors raised by defendant and we are convinced the court fairly evaluated each of them. See Fuentes, 217 N.J. at 73 (quoting State v. Bieniek, 200 N.J. 601, 609 (2010)).

We recognize a "[r]emand may be necessary when 'a sentencing court failed to find mitigating factors that clearly were supported by the record.'" State v. Rivera, 249 N.J. 285, 300 (2021) (quoting Bieniek, 200 N.J. at 608). However, defendant's conclusory statements regarding the application of these mitigating factors fail to demonstrate the trial court's consideration and rejection of them was in error, let alone that they are supported by the record.

We also find no error in the court's weighing of the aggravating and mitigating factors and the court's imposition of an eight-year sentence, which is slightly above the mid-range for a second-degree offense. N.J.S.A. 2C:43-6(a)(2); see State v. Natale, 184 N.J. 458, 488 (2005) (explaining when a court

weighs the aggravating and mitigating factors under N.J.S.A. 2C:44-1(a) and (b), "reason suggests" but does not require "when the aggravating factors preponderate, sentences will tend toward the higher end of the range"). We reject defendant's claim the court failed to afford sufficient weight to the mitigating factor found. For these reasons, we are satisfied the court properly exercised its discretion in imposing defendant's sentence.

To the extent we have not expressly addressed any of defendant's remaining arguments, we find they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.