SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0554-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAHI BEATTY,

Defendant-Appellant.

———————————————

Submitted November 15, 2022 – Decided March 1, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 18-11-1008.

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

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Colleen Kristan Signorelli, Assistant Prosecutor, on the briefs).

PER CURIAM

Tried before a jury, defendant Jahi Beatty was found guilty of hindering apprehension or prosecution of another, N.J.S.A. 2C:29-3(a)(3), and hindering his own apprehension or prosecution, N.J.S.A. 2C:29-3(b)(1), related to the shooting death of Amir Pleasant. Defendant was found not guilty of first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2), second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1).

Defendant was tried with codefendants Marquise Brown and Rashad Exum, who were convicted of various offenses. Brown was found guilty of murder, possession of a firearm for an unlawful purpose, unlawful possession of a handgun, and first-degree conspiracy to commit murder. Exum was found guilty of first-degree conspiracy to commit murder. A fourth person with defendants during the shooting, William Davis, who after being charged with murder, conspiracy to commit murder, and unlawful possession of a weapon, reached a cooperation agreement with the State resulting in his guilty plea to lesser charges of aggravated assault and conspiracy to commit aggravated assault in exchange for his trial testimony against defendants.

Defendant was sentenced to concurrent five-year prison terms on each hindering conviction. The sentences were consecutive to an unrelated sentence defendant was already serving.

In his initial merits brief, defendant argues:

> POINT I
>
> ERRORS IN THE JURY CHARGES ON HINDERING APPREHENSION OR PROSECUTION OF ANOTHER AND OF ONESELF REQUIRE REVERSAL OF DEFENDANT'S CONVICTIONS. (Not Raised Below).
>
> > A. The Trial Court Failed To Tailor Both Hindering Charges To The Facts Of The Case And Provide A Specific Unanimity Charge.
> >
> > B. The Instruction For Hindering The Apprehension Or Prosecution Of Another Included Confusing "And/Or" Terminology That Permitted The Jury To Return A Divided Verdict.
> >
> > C. The Trial Court Erroneously Referred To Hindering The Apprehension Or Prosecution Of Another During Its Charge On Hindering The Apprehension Or Prosecution Of Oneself.
>
> POINT II
>
> THE PROSECUTOR'S STATEMENTS IN SUMMATION ALLEGING THAT DEFENSE COUNSEL HAD MISLED THE JURY

CONSTITUTED PROSECUTORIAL MISCONDUCT. (Not Raised Below).

POINT III

THE SENTENCING COURT FAILED TO TAKE INTO ACCOUNT APPLICABLE MITIGATING FACTORS WHEN IT IMPOSED MAXIMUM CONCURRENT FIVE-YEAR TERMS AND FAILED TO EXPLAIN WHY IT WAS RUNNING THOSE TERMS CONSECUTIVE TO A SENTENCE DEFENDANT WAS ALREADY SERVING.

Following the parties' submission of their initial briefs, we granted defendant's motion to file a supplemental brief wherein he argues:

POINT I

THE DETECTIVES FAILED TO CLARIFY DEFENDANT'S REQUESTS TO REMAIN SILENT AND TO HAVE COUNSEL PRESENT, AND INSTEAD CONTINUED WITH THE INTERROGATION. THESE VIOLATIONS OF DEFENDANT'S RIGHTS REQUIRE SUPPRESSION OF HIS STATEMENT.

POINT II

EVIDENCE SEIZED FROM DEFENDANT'S CELL PHONE SHOULD HAVE BEEN SUPPRESSED AS HIS CONSENT TO SEARCH THAT PHONE WAS NOT KNOWINGLY AND VOLUNTARILY PROVIDED.

For the reasons that follow, we affirm defendant's convictions but remand for re-sentencing for the trial court to explain in accordance with State v.

Yarbough, 100 N.J. 627 (1985), and State v. Torres, 246 N.J. 246 (2021), why it was fair to impose consecutive sentences.

I.

To give context to the contentions raised in this appeal, we briefly discuss the trial testimony regarding Pleasant's murder and the suppression motion testimony regarding defendant's statements to law enforcement.

In the early morning hours of April 29, 2017, Davis was driving his girlfriend's car with defendant and Exum as passengers when they saw Pleasant, an "op[p]"—meaning "[e]nemy [o]pposition"—of theirs, at a gas station. By happenstance they saw Brown on the street and stopped to talk to him. Exum asked Brown if he had a gun because they had just "seen our op[p]s." Brown responded that he could "go get it," then got in the back seat of the car and directed Davis to drive to a nearby building. When they arrived at their destination, Brown exited the car, entered the building, and came back within five minutes. Brown returned to the car's back seat, sitting behind the front passenger. According to Davis, he did not see a gun.

Davis then drove back to where they had seen Pleasant. Once they were in the vicinity, Davis heard a gun being "cocked . . . back." Exum told Brown "[t]hat's him right there." After Davis stopped the car, Brown exited and, within

moments, Davis heard approximately four gunshots. Exum climbed into the back seat. After Brown returned to the car and sat in the front passenger seat, Davis drove away. Davis testified Brown then stated "[h]e shot [Pleasant] two times in the head. And he shot two more times." Davis identified himself, Exum, Brown, and defendant in still photographs of images captured on a surveillance video from a convenience store they went to right after Pleasant's murder.

There was no evidence defendant said anything about having seen Pleasant, the need to get a gun, or to shoot Pleasant. Davis did, however, testify that a couple of days after the shooting, defendant contacted him through private social media, telling him to get rid of the car they were in on the night of the murder because the police had questioned defendant about the car.

Almost a month after Pleasant's murder, defendant was arrested on a bench warrant for an unrelated matter. He was then taken to the Hudson County Prosecutor's Office Homicide Unit to be questioned about the murder by detectives Lashauna Swinney and Joseph Russo. Prior to being read his Miranda[1] rights, the detectives told defendant why he was picked up on a warrant and that they learned he "may have some information" about a murder.

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

Defendant replied, "homicide looked for me before" and that officers "[went] to [his] house without warrants." The following colloquy took place:

> [Swinney]: And your lawyer actually spoke to the prosecutor that's handling the case.
>
> [Defendant]: That's why I said, I said . . .
>
> [Swinney]: And we explained to your lawyer . . .
>
> [Defendant]: That's why I'm like . . .
>
> [Swinney]: . . . that you don't have a warrant for.
>
> [Defendant]: That's what I was trying to tell him but he . . .
>
> [Swinney]: Mm-hm.
>
> [Defendant]: . . . he like on some shit like, I can't, he can't come down here with me. I'm like, I just, I just want somebody to come with me 'cause I don't know what they talking about. I don't have nothing to do with nothing.
>
> [Swinney]: Mm-hm.
>
> [Defendant]: I don't know why anybody put my name in this 'cause it's always some he said, she said with my name going around.
>
> [Swinney]: Okay.
>
> [Defendant]: Every time, I every, it's anytime I get locked up, it don't even have nothing to do with me.
>
> [Swinney]: Mm-hm.

> [Defendant]: That's why I'm always this mad. That's why I didn't want to come down here 'cause this don't have not[h]ing to do with me. Like on . . .
>
> [Swinney]: Okay.
>
> [Defendant]: . . . my daughter life it didn't have nothing to do with me.
>
> [Swinney]: All right. So do you want to sort it out so we can (unintelligible).
>
> [Defendant]: Yeah, I do want to sort it out.
>
> [Swinney]: Okay. So we can do that now? That's good with you?
>
> [Defendant]: We c-, we could.

Defendant then answered some personal background information, and after being Mirandized, he waived his rights, orally and in writing. The detectives began questioning defendant about Pleasant's murder.

At one point, defendant asked the detectives if he could use his confiscated cellphone to help him respond to their questions concerning his location at the time of Pleasant's murder. The following colloquy ensued:

> [Swinney]: All right Mr. Beatty we have your, your phone. Okay?
>
> [Defendant]: Mm-hm.

> [Swinney]: Um, all right. The only way we can (unintelligible) your phone 'cause we do have rules and regs.
>
> [Defendant]: Mm-hm.
>
> [Swinney]: Um, we have to fill out the consent to search to go through phone. We just can't give you the phone and . . . let you put the code in and, we do have to go by our rules. Okay? So[,] you said you want to look through your phone to give you, help you give you an idea of where you were on April 29th [(the morning of the shooting)]. Okay? So[,] we'll go through . . . the sheet first and then we'll do the code and all that 'cause it's got a code on it. Right?
>
> [Defendant]: Mm-hm.
>
> [Swinney]: You got a code. All right. So[,] this is a black iPhone 7 plus. Right? What's the number for it?

After telling the detectives his phone number and pass code, the dialogue continued as follows:

> [Defendant]: So[,] this mean y'all can check my phone too?
>
> [Swinney]: You said you want to look through it to see where you were on the 29th. Right?
>
> [Defendant]: Oh, it's only for right now.
>
> [Swinney]: Right now and then, was that cracked or is it just a scratch 'cause I got to mark it if it is. This right here. Hold on, see it? Is that a scratch or is that a crack?

[Defendant]: I don't know. That had to just happen 'cause . . .

[Swinney]: Might, I think it's just a scratch. All right. All right, so with the phone, we'll go through it now and then, you want to distance yourself from this homicide, right?

[Defendant]: Yes.

[Swinney]: And this is a way to do it. Because we've talked to people, not only just the two people in the car but the other people, our other witnesses that we have. The people on the street that we've spoke to. They place you in that car. All right?

[Defendant]: What people?

[Swinney]: Look, listen, I'm gonna go . . .

[Defendant]: If y'all saying . . .

[Swinney]: Hear me out. Just hear me out and then you make your decision on how you want this to go. All right? Because you can only make this decision about whether you go to jail or . . .

[Defendant]: But how do other people make that decision for you and place me by the scene, they don't even know if they was there or not.

[Swinney]: Okay, well you say this phone is gonna not put you there. Right? This phone is gonna put you someplace else?

[Defendant]: Yeah.

[Swinney]: Okay.

[Defendant]: You said – all right.

[Swinney]: Because with the different video angles, you know how it goes down, ever since the twin towers went down on September 11th, how old were you back in 2001?

[Defendant]: Mm-mm

[Swinney]: You were four. All right, so when you were four years old and the towers went down, after that there's surveillance cameras everywhere. Okay? So[,] with all the video that we had pulled, you and your three friends unfortunately are in that car stalking our victim. Now, you're not the shooter, you didn't pull the trigger, you, you didn't jump out of that car on Garfield [Street] and run up Dwight [Street] and shoot him. You sat in the car. Okay? Your past prior acts of being arrested with a gun, you didn't shoot him that day. You didn't drive the car that day. But here's the thing, get yourself out of this situation so the prosecutors do[]n't charge you with conspiracy somewhere down the line. And conspiracy for a homicide is 25 years. Even though you didn't pull the trigger. But unfortunately[,] because you were with three other individuals that decided to kill Amir Pleasant, Fat Buzzin'[2] on that day, you're in here. If you just would have went home or been with your baby or your baby mama's or someplace else, with Shayanna, wherever, if you would have been any other place besides the back seat of that Honda Civic, you wouldn't be here right now.

[Defendant]: I wasn't in the back of there with anybody I killed.

. . . .

[2] Amir Pleasant's street name.

[Swinney]: Yeah.

[Russo]: Have him sign that (unintelligible).

After the exchange, defendant signed a consent form authorizing the search of his phone. Defendant entered the phone's password and showed the detectives screenshots of text messages from around the time of Pleasant's murder, explaining he deleted messages prior to his arrest. A few months later, a communications-data warrant (CDW) was obtained, and a forensic analysis of the phone was conducted.

II.

We first address the arguments raised in defendant's supplemental brief that the trial court erred in not granting his motion to suppress the statement he gave to police and the evidence seized from his phone through the CDW.

A.

In denying defendant's motion to suppress his statement, the trial court, after finding defendant was in custody, determined that none of the detectives' questions to him before he was Mirandized would have elicited an incriminating response because the questions concerned defendant's well-being and the circumstances surrounding his bench warrant. Hence, the court determined the detectives did not have to Mirandize defendant before doing so.

The court also held the detectives clarified defendant's unclear statements concerning the need for his attorney by asking him if he wanted to "sort it out." Thus, they clarified whether defendant wanted to speak to them about Pleasant's murder following his statements. Because defendant was Mirandized and waived his rights to remain silent and seek the advice of counsel, the court found his statements were admissible.

As for the search of defendant's phone, the court found defendant consented to the search after Swinney asked him, "[y]ou said you want to look through it to see where you were on the [April] 29th, right?" and he responded "[o]h, its only for right now." The court noted defendant requested access to his phone multiple times, and each time the detectives replied he had a choice in the matter, including when Swinney stated "[j]ust hear me out and then you make your decision how you want this to go." The court thus held defendant knowingly, voluntarily, and intelligently consented to the detectives searching his phone.

B.

Defendant argues the trial court erred. Citing State v. Maltese, 222 N.J. 525 (2015), and State v. Gonzalez, 249 N.J. 612, 628 (2022), he contends the detectives disregarded his Miranda rights by continuing to interrogate him after

he invoked his right to remain silent by stating: "That's why I'm not trying to, I didn't want to talk 'cause I didn't have nothing to talk . . . about." He further contends his rights were violated when he was interrogated after asking for his attorney by stating: "That's what I was trying to tell [my attorney] but he . . . [was] like . . . he can't come down here with me. . . . I just want somebody to come with me 'cause I don't know what they talking about." Claiming he unambiguously invoked his rights to remain silent and seek counsel through these statements, defendant maintains the detectives should have immediately ceased the interrogation or asked for clarification, rather than continue to question him. Moreover, defendant contends the detectives asking him if he wanted to "sort it out" was not a question "narrowly directed" to clarify if he invoked his rights. See Maltese, 222 N.J. at 545.

Despite being subsequently Mirandized and waiving his rights, defendant asserts this did not "cure the defect" caused by the detectives' failure to clarify his statements. Defendant, citing State v. Hartley, 103 N.J. 252, 256 (1986), argues a trial court must assess whether a defendant's invocation of his rights was "scrupulously honored" before determining whether his waiver of those rights was knowing, intelligent, and voluntary. Since the detectives did not

"scrupulously honor" his rights, defendant asserts his statements should have been suppressed regardless of his subsequent Miranda waiver.

C.

We defer to a "court's factual findings as to [a] defendant's Miranda waiver." State v. Tillery, 238 N.J. 293, 314 (2019). The trial court's findings "should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. Elders, 192 N.J. 224 (2007)). We review a trial court's legal conclusions de novo. Tillery, 238 N.J. at 314.

"The administration of Miranda warnings ensures that a defendant's right against self-incrimination is protected in the inherently coercive atmosphere of custodial interrogation." A.M., 237 N.J. at 397. To that end, a person subject to custodial interrogation "must be adequately and effectively apprised of his [or her] rights." State v. Nyhammer, 197 N.J. 383, 400 (2009) (quoting Miranda, 384 U.S. at 467). Under Miranda, an interrogation is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." State in Int. of A.A., 240 N.J. 341, 353 (2020) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

To admit a statement obtained during a custodial interrogation "the State must 'prove beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances.'" Tillery, 238 N.J. at 316 (quoting State v. Presha, 163 N.J. 304, 313 (2000)). The court considers factors including the defendant's "age, education, intelligence, previous encounters with law enforcement, advice received about his or her constitutional rights, the length of detention, the period of time between administration of the warnings and the volunteered statement, and whether the questioning was repeated and prolonged in nature or involved physical or mental abuse." State v. Timmendequas, 161 N.J. 515, 614 (1999).

"[O]nce a request for counsel has been made, an interrogation may not continue until either counsel is made available or the suspect initiates further communication sufficient to waive the right to counsel." State v. Alston, 204 N.J. 614, 620 (2011). "[I]n situations where a suspect's statement arguably amount[s] to an assertion of Miranda rights," officers must seek further clarification. Gonzalez, 249 N.J. at 630 (internal quotations omitted). "If the police are reasonably uncertain whether the person is asserting the right to remain silent, they may only ask questions directed to resolving that uncertainty." State v. Burno-Taylor, 400 N.J. Super. 581, 590 (App. Div. 2008).

Guided by these principles, we conclude the trial court did not err in denying defendant's motion to suppress. Prior to making the statements sought to be suppressed, defendant was questioned about his bench warrant. When defendant was told he was about to be questioned about Pleasant's murder, he replied: "I didn't want to talk 'cause I didn't have nothing to talk . . . about." After defendant was told that his attorney had spoken to the prosecutor handling Pleasant's case, he replied: "That's what I was trying to tell [my attorney] but he . . . [was] like . . . he can't come down here with me. . . . I just want somebody to come with me 'cause I don't know what they talking about." The detectives did not ask any questions which were "reasonably likely to elicit an incriminating response"; consequently, defendant was not being interrogated at that time. A.A., 240 N.J. at 353 (2020) (quoting Innis, 446 U.S. at 301).

Yet, even if we assume that the initial comments to defendant constituted an interrogation, his response was not a clear invocation of his Miranda rights. The comments were related to prior events – specifically, an interaction with the homicide unit and a conversation with defendant's attorney. Defendant stated, "homicide looked for me before" and mentioned officers "going to [his] house without warrants" before stating, in the past tense, "[t]hat's why I'm not trying to, I didn't want to talk 'cause I didn't have nothing to talk about." Similarly,

upon being told his attorney had spoken to the prosecutor handling Pleasant's case and defendant responded with "[t]hat's what I was trying to tell him but he . . . [said] he can't come down here with me. I'm like . . . I just want somebody to come with me 'cause I don't know what they talking about." Because defendant's statements were ambiguous, defendant was asked if he wanted "to sort it out[,]" and before Swinney finished her question, defendant interjected, "I do want to sort it out." Defendant was then Mirandized and responded by waiving his rights orally and in writing. We therefore agree with the trial court that defendant did not invoke his Miranda rights and his subsequent statements were admissible at trial.

D.

Defendant asserts the detectives' failure to honor his Miranda rights when they initially spoke to him nullifies his consent to search his phone, and the subsequent evidence recovered through the CDW should be suppressed as a fruit of the poisonous tree. Defendant contends if this court finds there was no Miranda violation, his consent to search his phone was not provided knowingly, voluntarily, and intelligently. He maintains the detectives never: read him the consent form; allowed him to read the form, responded to his inquiry about the scope of the form; or informed him that he could refuse consent. Citing State v.

King, 44 N.J. 346, 352-53 (1965), defendant asserts he was under arrest and subject to a custodial interrogation when he consented to the search of his phone. Additionally, despite his consistent denial of any involvement in Pleasant's murder, Swinney insinuated that providing consent to search his phone would enable defendant to distance himself from the murder based on his statements that his texts would establish an alibi for him – proving he was not near the murder scene on the morning of April 29. Because his consent was invalid, defendant asserts his statement about deleting text messages should have been suppressed.

Defendant also asserts the evidence of deleted text messages found during the CDW's forensic search of his phone should be suppressed under the exclusionary rule because the affidavit used to support issuance of the warrant relied upon his invalid consent. The CDW's affidavit explicitly discussed defendant's consent to search form, interrogation, and admission that he deleted his text messages prior to the interrogation.

Defendant's arguments are meritless. Without instigation or encouragement by the detectives, defendant asked for his phone multiple times to prove he was not with his co-defendants when Pleasant was murdered. The detectives filled out a consent to search form for the phone for their "rules and

reg[ulation]s" which defendant signed prior to unlocking his phone. Upon defendant's request, the detectives confirmed the scope of the search was for the present interview. Defendant then controlled what the detectives saw while he held the phone and pulled up screenshots of text conversations from the days surrounding Pleasant's death. While the detectives did not inform defendant he could refuse the search, consent is not at issue because defendant initiated the phone search. See State v. McGivern, 167 N.J. Super. 86, 90 (App. Div. 1979). As a result, defendant's motion to suppress his statement that he deleted his texts was properly denied by the trial court.

Given the search of the phone was lawful, the CDW was not based on any illegally obtained evidence. Even if we concluded consent to search was not knowingly, voluntarily, and intelligently provided, the video surveillance and Davis's statements provided the necessary probable cause to apply for the CDW, as set forth in the application. See State v. Holland, 176 N.J. 344, 359-61 (2003).

III.

We now address the arguments raised in defendant's initial merits brief in the order presented.

A.

Defendant contends his convictions should be vacated because the trial court gave an erroneous jury charge on the offenses of hindering apprehension or prosecution of another and hindering his own apprehension or prosecution. We are unpersuaded.

Because these alleged errors went unchallenged at trial, they are subject to plain error analysis. State v. R.B., 183 N.J. 308, 321-22 (2005). "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." R. 2:10-2. "Plain error is [an] 'error possessing a clear capacity to bring about an unjust result and which substantially prejudiced the defendant's fundamental right to have the jury fairly evaluate the merits of his [or her] defense.'" Timmendequas, 161 N.J. at 576-77 (quoting State v. Irving, 114 N.J. 427, 444 (1989)). A reversal based on plain error requires us to find that the error likely led to an unjust result that is "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. Williams, 168 N.J. 323, 336 (2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Moreover, that possibility of an unjust result "must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. McNeil-Thomas, 238 N.J. 256,

276 (2019) (alteration in original) (quoting State v. R.B., 183 N.J. 308, 330 (2005)).

We are mindful that "[a]ppropriate and proper charges to a jury are essential for a fair trial." State v. Green, 86 N.J. 281, 287 (1981). The trial court has an "independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party." State v. Reddish, 181 N.J. 553, 613 (2004) (citing State v. Thompson, 59 N.J. 396, 411 (1971)).

When evaluating whether claimed defects in the jury instructions rise to the level of reversible error, the alleged error must be "viewed in the totality of the entire charge, not in isolation." State v. Chapland, 187 N.J. 275, 289 (2006). If, upon reviewing the entire charge, the reviewing court finds that prejudicial error did not occur, the jury's verdict must stand. State v. Coruzzi, 189 N.J. Super. 273, 312 (App. Div. 1983).

None of the alleged jury charge defects raised for the first time on appeal resulted in an unjust result. Defendant argues the trial court failed to tailor the charges to the facts of the case and should have "specifically instruct[ed] the jury that it had to be unanimous as to the conduct it found [defendant] had

committed in determining if he was indeed guilty of each count of hindering." The allegations against defendant were straight forward: defendant's hindering was based on his deletion of his text messages and the Facebook message to Davis to get rid of the car. The court's general instruction that the jury had to be unanimous as to its verdict for each charge was adequate.

A special unanimity instruction may only be necessary in situations where:

> (1) a single crime could be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or marginally related to each other; (4) the indictment and proof at trial varies; or (5) there is strong evidence of jury confusion.
>
> [State v. Cagno, 211 N.J. 488, 517 (2012) (citing State v. Frisby, 174 N.J. 583, 597 (2002)).]

Because the allegations were neither confusing nor contradictory, there was no need to provide a specific unanimity instruction to eliminate the danger of a fragmented verdict. Defendant's conduct in deleting his text messages and telling Davis to get rid of the car could apply separately or equally to support either hindering offense.

Defendant also argues the charges were "confusing [in using] 'and/or' terminology that permitted the jury to reach a non-unanimous verdict." He refers to the trial court's charge:

> (1) That the defendant knew Marquise Brown and/or Rashad Exum and/or William Davis might be charged with an offense. (2) That the defendant suppressed by way of concealment, destruction, evidence of the crime, tampered with a witness, informant, document or other source of information regardless of its admissibility in evidence which might aid in the discovery or apprehension of another. (3) And that the defendant acted with purpose to hinder the detention, apprehension, investigation, prosecution, conviction or punishment of Marquise Brown and/or Rashad Exum and/or William Davis.

Thereafter, the court used the term "and/or" an additional eleven times when referring to co-defendants Brown, Exum, and Davis.

We see nothing confusing about the charge. The trial court used "and/or" to distinguish between the three co-defendants, who, based on Davis's testimony, were all in the car when Brown was asked about getting a gun and after Pleasant was murdered. The jury did not ask the court any questions during its deliberation indicating any confusion over the hindering charges against defendant. The jury did not have to unanimously agree on which crimes defendant knew his co-defendants could be charged with if the crimes related to Pleasant's murder.

Defendant's reliance upon State v. Gonzalez, 444 N.J. Super. 62 (App. Div. 2016) is misplaced and does not support reversal of his convictions. There, the defendant's conviction of robbery and assault was reversed due to the abundant use of "and/or" in the jury instruction stating, "robbery and/or aggravated assault," which made the instructions ambiguous. Id. at 66, 72-75. The jury charge failed to require unanimity in determining whether that defendant's participation in the crimes of robbery and aggravated assault were the product of duress. Id. at 73. Here, we are not faced with the abundant use of "and/or" in jury instructions in the context of two distinct offenses, as in Gonzalez. There is no evidence the jury was confused about whether defendant was guilty of (1) hindering apprehension or prosecution of another, (2) hindering his own apprehension or prosecution, or (3) both.

Defendant also claims the trial court erroneously referred to the charge of hindering his own apprehension or prosecution as hindering the apprehension or prosecution of another. He argues this "had the clear capacity to confuse the jurors as to which type of hindering they were considering in rendering a verdict." We disagree.

It is obvious from the record that the court misspoke. In reading the totality of the charges the court made no similar mistake. It gave the correct

charges as to both hindering offenses. The momentary slip of the tongue did not constitute plain error capable of producing an unjust result. See State v. Montalvo, 229 N.J. 300, 320 (2017) (noting a failure to object invokes a "presumption that the charge . . . was unlikely to prejudice . . . defendant's case.") (quoting State v. Singleton, 211 N.J. 157, 182 (2012)).

B.

Defendant contends the prosecutor's improper and egregious summation remarks denied him due process and a fair trial afforded to him by U.S. Const., amends. VI and XIV and N.J. Const., art. I, paras. 1, 9, and 10. He points to the prosecutor's statement:

> But before I get into the rest of the evidence in this case, I actually want to touch on something that the [j]udge had mentioned before we started summations yesterday and again, before we started today. Because I think it's something important for all of you to keep in mind, not only while you listen to my summation but when you review the evidence in this case. It's that what we say, the attorneys, in our closing arguments is not evidence. Anything I say that defers [sic] from your memory of the testimony, the videos or any evidence that was presented to you, I defer to your memory. And the reason I bring that up is I state that, all three defense attorneys gave their summations, there's inaccuracies. There's things that said that is just not true. There's things they said that I would state is misleading. That the evidence itself speaks for itself. (Emphasis added).

Because defendant did not object at trial to the prosecutor's remarks, we review them under the plain error standard. R. 2:10-2.

While prosecutors are entitled to zealously argue the merits of the State's case, State v. Smith, 212 N.J. 365, 403 (2012), they occupy a special position in our system of criminal justice. State v. Daniels, 182 N.J. 80, 96 (2004). "[A] prosecutor must refrain from improper methods that result in a wrongful conviction, and is obligated to use legitimate means to bring about a just conviction." Ibid. (quoting State v. Smith, 167 N.J. 158, 177 (2001)).

Even if the prosecutor exceeds the bounds of proper conduct, "[a] finding of prosecutorial misconduct does not end a reviewing court's inquiry because, in order to justify reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" Smith, 167 N.J. at 181 (quoting State v. Frost, 158 N.J. 76, 83 (1999)). The lack of any objection indicates defense counsel "perceived no prejudice." Smith, 212 N.J. at 407. We also consider "whether the offending remarks were prompted by comments in the summation of defense counsel." Id. at 403-04.

The prosecutor's summation remarks were not accurate in responding to defense counsel's contentions. Defense counsel argued in summation the evidence established that, although defendant was present in the Honda Civic,

he was not involved in the planning or commission of Pleasant's murder, and never possessed the murder weapon. He also argued, as to the hindering charges, defendant had acknowledged deleting messages in his phone to hide from his then-girlfriend that he was talking to other women. And, as to the State's allegation that defendant had messaged Davis through Facebook Messenger and told him to get rid of the Honda Civic, counsel argued that the State never produced those alleged messages in evidence at trial. None of these arguments were based on falsehoods or designed to mislead the jury. They were fair inferences from the evidence presented at trial.

Nevertheless, the prosecutor's summation remarks did not constitute plain error. They were not so egregious that it infected the jury's deliberation, thereby depriving defendant of a fair trial. The prosecutor was responding to defense counsel's arguments, and he did not belittle or denigrate counsel. Looking beyond the remarks in question, he stressed other evidence suggesting defendant played an active role in the murder and its cover-up and referred the jury to other evidence to undermine defendant's contentions as well as that of his codefendants. The fact that the jury found defendant not guilty of the more serious offenses of first-degree murder and second-degree weapons offenses indicates the prosecutor's remarks did not deprive defendant of a fair trial

because the jury found the State failed to prove those crimes. The prosecutor's summation remarks do not warrant reversal of the hindering convictions.

C.

Defendant contends there should be a remand for resentencing because the trial court erred in not applying relevant mitigating factors and failed to explain, as required by Yarbough and Torres, why it was fair that the sentence was consecutive to a sentence he was already serving. We agree there should be a remand but only for the court to explain why defendant's concurrent sentences were to be served consecutive to another sentence he was already serving.

Defendant was sentenced to two concurrent five-year terms, the maximum length for his third-degree convictions, consecutive to a sentence he was already serving on an unrelated indictment. The court applied aggravating factors six, nature and extent of defendant's prior criminal record, and nine, need for deterrence, N.J.S.A. 2C:44-1(a)(6) and (9), as well as mitigating factor two, defendant did not contemplate that his conduct would cause serious harm, N.J.S.A. 2C:44-1(b)(2). The court determined the aggravating factors outweighed the sole mitigating factor. The court rejected defendant's argument that the following mitigating factors should have been applied: three, defendant

acted under strong provocation; eight, defendant's conduct was the result of circumstances unlikely to occur; and eleven, imprisonment of defendant would entail excessive hardship to his dependent. N.J.S.A. 2C:44-1(b)(3),(8), and (11).

We discern no abuse of discretion in the court's weighing of the aggravating and mitigating sentencing factors. See State v. Bolvito, 217 N.J. 221, 228 (2014). Defendant's sentence was based upon competent evidence in the record, in accord with our sentencing guidelines, and does not shock our judicial conscience. See ibid.

The court, however, did not discuss or weigh the five factors set forth in Yarbough[3] when it determined to impose his current sentences consecutive to a

[3] The factors are:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;

sentence he was already serving. The court also did not explain the overall fairness and real-time consequences of the sentences. See Torres, 246 N.J. at 272. Therefore, we remand for the trial court to explain the imposition of consecutive sentences in accordance with Yarbough and Torres. We take no position as to whether the court should impose consecutive sentences.

> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors;
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]
>
> [Yarbough, 100 N.J. at 643-44 (footnote omitted).]

Factor six was superseded by a 1993 amendment to N.J.S.A. 2C:44-5(a), which provides "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." L. 1993, c. 223, § 1.

Affirmed in part and remanded in part for resentencing. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION