SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0777-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WAHIDUDDI KIMBROUGH, a/k/a BIRTH WAHID TYSKEY KIMBROUGH, WAHIDUDDIN KIMBROUGH, RINDELL BANKS, WAHEED CULTER, CLINTON CULVER, MARK CULVER, MAURICE CULVER, WAHEED CULVER, CLINTON CULVERT, FAHROD ELLIS, WAHEED KIMBO, BRADY KIMBROUGH, CLINTON KIMBROUGH, MARKESK O. KIMBROUGH, WAHEED KIMBROUGH, WAHID KIMBROUGH, WAHIDDUDDI T. KIMBROUGH, WAHIDUDDIN T. KIMBROUGH,

Defendant-Appellant.

———————————————————

Submitted March 22, 2023 – Decided June 19, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 18-05-1322.

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

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Caitlinn Raimo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his convictions and sentence following a jury trial. We affirm.

I.

Defendant was charged in an indictment with second-degree conspiracy to commit robbery, in violation of N.J.S.A. 2C:5-2 and 2C:15-1; first-degree robbery, in violation of N.J.S.A. 2C:15-1; and second-degree escape, in violation of N.J.S.A. 2C:29-5(a). The escape charge was later amended to a third-degree charge.

Reginold Abrams was working at a Verizon store in Newark when it was robbed by two men. During his testimony at trial, the State showed the jury the video recording taken from cameras located inside the store.

Abrams recognized defendant as one of the men. He testified that defendant had come into the store the prior week at 7:00 p.m. asking to buy a phone charger but Abrams told him the store was closed.

On the day of the robbery, defendant had come into the store three times. During the first visit, he asked to see a phone for his girlfriend. He left after fifteen minutes. When defendant came into the store the second time that day, he asked to see a display phone and attempted unsuccessfully to provide numbers to access a Verizon account.

Defendant returned to the store a third time, after 6:00 p.m., and again attempted to access a Verizon account. Abrams was the only employee in the store. Shortly thereafter, Abrams closed the store's shutters as he began to prepare for closing. He said he was talking to defendant about the phones on display. At some point, Abrams went into a room in the back of the store to take a phone out of the safe. The newer phones were kept in a safe to prevent their theft. Abrams said the door was open and he continued to talk to defendant as he removed the phone from the safe. During his interaction with defendant, Abrams went into the back room and safe to retrieve two more phones.

At approximately 6:45 p.m., Abrams attempted to access defendant's Verizon account to set up the new phone. However, none of the phone numbers

defendant provided him worked. Defendant then left the store stating he was going to his car to retrieve his phone number.

Although it was 7:00 p.m., Abrams did not lock the door. He stated it was the employees' policy to stay open a little longer in order to complete a sale. At 7:04 p.m., Abrams did lock the door so no other customers could come in. Directly thereafter defendant came to the door and Abrams let him in, leaving the door unlocked.

As Abrams was talking to defendant, he heard the door open. An unidentified man (co-defendant) entered and defendant greeted him. The co-defendant responded by saying "what's up and nodd[ing]." Abrams said co-defendant was wearing a mask and had a gun in a black plastic bag. Co-defendant "pulled the gun out and told [Abrams] to go to the back and get on [his] knees." Abrams complied. He said he was scared and "didn't want to die."

While Abrams was in the back room, defendant and co-defendant searched through drawers at the store and took money out of the cash register. Defendant then entered the break room, where the safe was located, "telling [co-defendant] to shoot [Abrams] because [Abrams] didn't open the safe for him." Abrams said he tried to enter the code to the safe but it would not open. Defendant was angry and continued yelling at him to open the safe and telling co-defendant to shoot

Abrams if he did not open it. Defendant also asked Abrams where the camera "in the back" was located, and "pulled down" a box thinking it was a video recording box.

The video footage showed co-defendant next to Abrams and pointing the gun at him as Abrams kneeled by the safe. Abrams said co-defendant was saying he did not want to hurt Abrams and if he opened the safe, co-defendant would not hurt him.

After several minutes, defendant and co-defendant told Abrams to "stay in the back" if he did not "want to die." Co-defendant took an iPad from the store. Once Abrams heard defendant and co-defendant leave the store and the door closed, Abrams locked the store door, then went into the bathroom and locked that door. He called 9-1-1 from inside the locked bathroom. The 9-1-1 call was played for the jury.

Abrams testified defendant "appeared to be in command" and "was the one that was giving the orders." According to Abrams, defendant was not forced to do anything. Co-defendant never pointed the gun at defendant. After the police arrived, Abrams unlocked the door. He later gave police a statement.

Abrams identified defendant from an array of six photographs at the police station. During trial, Abrams said he was "[a] hundred percent" certain

defendant was the man at the store who robbed him. He could not identify co-defendant because he was wearing a mask.

Lieutenant Miguel Arroyo also testified at trial. He took a recorded statement from defendant after his arrest. Prior to trial, the State moved to admit the recorded statement. The motion was granted. The recorded statement was played for the jury during Arroyo's testimony.

At the start of the interview, Arroyo informed defendant he was under arrest for a commercial robbery of the Verizon store. As Arroyo was reading defendant his Miranda[1] rights, defendant began to ask Arroyo questions. When Arroyo advised defendant of his right to talk to a lawyer and have the lawyer present, defendant interrupted the detective and the following colloquy took place:

> [DEFENDANT]: Can you stop right there? I got a question right there. Is it possible that I can contact my family right now to see if they can contact a lawyer?
>
> [ARROYO]: Well, if you want a lawyer, then we're finished. We're done. You're just asking for an adjournment.
>
> [DEFENDANT]: That's what I mean.
>
> [ARROYO]: Okay.

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

[DEFENDANT]: Whoa. Whoa. Whoa. Whoa. I was asking, is it possible?

[ARROYO]: Yes. You can get it. You can make a phone call and ask your family for an attorney.

[DEFENDANT]: I thought you said present.

[ARROYO]: Yeah. You can have him present. If you're asking for a lawyer, okay, then I have to stop. We're done. Do you understand what I'm telling you?

[DEFENDANT]: So,—

[ARROYO]: It's the same thing if he's present or you're asking your family to call for a lawyer.

. . . .

[DEFENDANT]: Let me ask you a question. If I don't have this lawyer present, do I have to go to Clinton Avenue and go through all this or I just wait here until my family shows up with this attorney?

[ARROYO]: Yeah. But if you—we can do that. That's not a problem. But, right now, you're telling me you want a lawyer by calling your family, so we're done. I've got to stop. I can't go forward. Do you understand what I'm telling you?

[DEFENDANT]: So, you're telling me I can't—like see what I'm actually being charged with and—

[ARROYO]: Well, I told you in the beginning, you're being charged with a robbery.

[DEFENDANT]: Yes. But you're . . . telling me what I'm being charged with but you're not telling me like—

I went into a store to make a purchase. Now you're telling me I'm being arrested for robbery.

[ARROYO]: Yeah. That's what I'm telling you.

[DEFENDANT]: How do you go to jail for robbery for that? That's what I'm trying to figure out.

[ARROYO]: Well, there's different things that happened in that store. Okay?

[DEFENDANT]: Yes, sir.

[ARROYO]: And if you want to talk to me about it,—

[DEFENDANT]: I'll talk to you about it.

[ARROYO]: Are you sure?

[DEFENDANT]: Yes.

[ARROYO]: You asked me for a lawyer.

[DEFENDANT]: I'll talk to you about it.

[ARROYO]: Are you sure?

[DEFENDANT]: I'll talk to you about it.

Arroyo continued to read defendant the remainder of the Miranda rights and the waiver of the rights. Defendant then initialed and signed a document acknowledging that he was read and understood his rights. Arroyo again asked if defendant wanted to talk to an attorney. Defendant responded that he wanted to talk to Arroyo.

Defendant asked Arroyo to "get to . . . the facts." Arroyo then showed defendant still photographs from the camera footage depicting two men in the Verizon store. Defendant said "I see a picture of me standing at a desk talking to a representative and then, in the next picture, I see a photo of a guy that's not me . . . robbing the store." After further colloquy, Arroyo told defendant the store employee had identified him.

Prior to trial, the State moved to admit defendant's recorded statement. After hearing testimony and viewing the video of the recorded statement, the court granted the motion in a May 1, 2019 oral decision.[2] The court found Arroyo's testimony was credible and defendant's was not. The court concluded "defendant knowingly, intelligently, and voluntarily waived his Miranda rights."

The court noted the recording did not demonstrate defendant was forced or threatened into giving the statement. In addition, the court stated: "Defendant was explicitly given multiple opportunities to stop the interrogation and in turn explicitly stated that he did not want a lawyer present and wanted to continue the interview."

Sergeant Miguel Silva also testified at trial. He stated that when he was collecting defendant's property at the municipal holding building after his arrest,

[2] The order was not included in the appellate record.

another officer opened a door and defendant "took off running" through the door before it closed. Defendant ran down the stairs but he could not open the door at the bottom of the stairs because it was an emergency door that required the use of a swipe card to open. The officers then placed defendant in handcuffs and took him into the holding area. The video of this incident was also played before the jury.

Defendant was convicted on all counts. The court sentenced him to an aggregate extended prison term of thirty-one years, subject to an eighty-five percent period of parole disqualification.

II.

On appeal, defendant presents the following points for our consideration:

> POINT I
> DEFENDANT'S STATEMENT MUST BE SUPPRESSED BECAUSE POLICE FAILED TO TELL HIM THAT HE HAD BEEN CHARGED WITH CONSPIRACY TO COMMIT ROBBERY AND BECAUSE POLICE FAILED TO APPROPRIATELY CLARIFY DEFENDANT'S AMBIGUOUS REQUEST FOR COUNSEL.
>
> POINT II
> THE JURY INSTRUCTIONS ON ACCOMPLICE LIABILITY WERE FATALLY FLAWED, REQUIRING REVERSAL OF DEFENDANT'S ROBBERY CONVICTION.

POINT III
THE TRIAL COURT'S FAILURE TO CONDUCT THE APPROPRIATE INQUIRY WHEN DEFENDANT REQUESTED NEW COUNSEL REQUIRES REVERSAL OF HIS CONVICTIONS.

POINT IV
THE 31-YEAR NERA SENTENCE IS EXCESSIVE AND MUST BE VACATED AND REMANDED FOR RESENTENCING.

A.

Defendant contends the court erred in admitting the recorded statement he gave to Arroyo because he "ambiguously invoked his right to counsel." Defendant also argues he did not knowingly waive his right against self-incrimination because the police did not inform him he was charged with conspiracy to commit robbery, in addition to robbery.

Our review of a decision whether to admit or suppress a statement is limited. State v. Ahmad, 246 N.J. 592, 609 (2021). The "trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). We defer to the factual findings because the trial court has the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244

(2007). We "will not disturb the trial court's factual findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Goldsmith, 251 N.J. 384, 398 (2022) (internal quotation marks omitted) (quoting State v. Gamble, 218 N.J. 412, 425 (2014)). However, the trial court's legal conclusions drawn from the facts are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022).

In Miranda, "[t]he United States Supreme Court set forth the framework for our analysis[,] . . . establishing the now-familiar warnings designed to safeguard the Fifth Amendment's guarantee of the privilege against self-incrimination." State v. Alston, 204 N.J. 614, 619 (2011) (citing Miranda, 384 U.S. at 444, 468-72). "[I]f the accused 'indicates in any manner and at any stage of the process that [t]he[y] wish[] to consult with an attorney before speaking there can be no questioning.'" Id. at 619-20 (quoting Miranda, 384 U.S. at 444-45). And "once 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." Id. at 620 (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

Our courts "interpret equivocal requests for counsel in the light most favorable to the defendant." State v. McCloskey, 90 N.J. 18, 26 n.1 (1982).

Moreover, if "a suspect's statement 'arguably' amounted to an assertion of Miranda rights, . . . the officer must clarify with the suspect in order to correctly interpret the statement." Alston, 204 N.J. at 621-22. The officer must make "additional neutral inquiries that clarify that the suspect desires to waive the presence of counsel." State v. Rivas, 251 N.J. 132, 154 (2022). "[C]onducting a follow-up inquiry is the only way to ensure that a suspect's waiver of their right was knowing and voluntary." State v. Gonzalez, 249 N.J. 612, 630 (2022). Then, "substantive questioning should resume only after 'the suspect makes clear that [they are] not invoking [their] Miranda rights." Ibid.

During the interview, defendant asked if Arroyo could "stop right there" and if it was "possible" to "contact [his] family right now to see if they can contact a lawyer?" Arroyo did not continue with the interview but instead responded to defendant's questions, informing defendant he was permitted to call his family to ask for an attorney. Defendant then asked, "[i]f I don't have this lawyer present, do I have to go to Clinton Avenue and go through all this or I just wait here until my family shows up with this attorney?" Arroyo responded again, telling defendant he was going to stop the questioning because defendant said he wanted to call his family to get a lawyer. Defendant said he would talk to Arroyo about the events in the store.

Thereafter, Arroyo asked defendant twice if he was "sure" he wanted to talk because he had asked for a lawyer. This was an appropriate follow-up inquiry to ensure defendant wanted to waive his Miranda rights. Arroyo then repeated defendant's rights to speak with a lawyer and for the lawyer to be present during questioning. Arroyo continued to read defendant the rest of his Miranda rights, which defendant initialed and signed, and read defendant the waiver form, which defendant also signed.

Arroyo properly clarified defendant's ambiguous invocation of his Miranda rights and did not conduct any further questioning until after defendant confirmed several times he wished to proceed without a lawyer. Therefore, there was no error in not denying the admission of defendant's statement on those grounds.

Defendant also contends his waiver was not knowing and voluntary because police did not tell him he was charged with conspiracy to commit robbery in addition to robbery. Defendant did not raise this argument before the trial court.

To determine whether a waiver was knowing and voluntary, a court generally "considers the totality of the circumstances." State v. Sims, 250 N.J. 189, 211 (2022). However, "[i]f a complaint-warrant has been filed or an arrest

warrant has been issued against a suspect whom law enforcement officers seek to interrogate, the officers must disclose that fact to the interrogee and inform [them] in a simple declaratory statement of the charges filed against [them] before any interrogation." Id. at 213 (first citing State v. Vincenty, 237 N.J. 122, 134 (2019); then citing State v. Nyhammer, 197 N.J. 383, 404-05 (2009); and then citing State v. A.G.D., 178 N.J. 56, 68-69 (2003)). "If suspects are not informed that a criminal complaint or arrest warrant has been filed against them, they necessarily lack 'critically important information' and thus 'the State cannot sustain its burden' of proving" knowing and intelligent waiver. Vincenty, 237 N.J. at 133-34 (quoting A.G.D., 178 N.J. at 68). Thus, law enforcement must inform a defendant prior to an investigative interview "of the essence of the charges filed against [them]." Id. at 134.

At the beginning of the interview, Arroyo told defendant he was under arrest for a robbery at the Verizon store. After Arroyo began to read defendant his Miranda rights, defendant asked, "[s]o you're telling me I can't—like see what I'm actually being charged with," and Arroyo told him he was "being charged with a robbery." Defendant continued, "[y]es. But you're . . . telling me what I'm being charged with but you're not telling me like—I went into a store to make a purchase. Now you're telling me I'm being arrested for robbery."

Arroyo responded, "[y]eah. That's what I'm telling you." As the interview progressed, Arroyo showed defendant the warrant and advised him he was also charged with conspiracy to commit robbery.

Our review of the custodial interview does not demonstrate any violation of the principles articulated in Sims and Vincenty. Arroyo informed defendant of the "essence" of the charges against him. See Vincenty, 237 N.J. at 134. He was told a warrant was issued and he was charged with robbery. There was no information withheld from him to mislead or extract a confession. The purpose of Arroyo's questioning was to get information about the robbery of the Verizon store. That is the crime Arroyo informed defendant he was arrested for. Even if it was better practice to apprise defendant of the conspiracy charge, the detective's omission was harmless. Defendant was apprised of the nature and seriousness of the charges filed against him. See State v. Diaz, 470 N.J. Super. 495, 515 (App. Div. 2022). The court did not err in admitting defendant's recorded statement.

B.

We turn to defendant's contentions regarding the jury charges. The court charged the jury with language tracking Model Jury Charges (Criminal),

"Liability for Another's Conduct (N.J.S.A. 2C:2-6), Accomplice, Charge # Two" (rev. June 11, 2018), stating:

> Now I'm going to instruct you as to robbery as an accomplice.
>
> In this case, as one alternative, the State contends that the defendant is guilty of the crime of robbery actually committed by the conduct of another person, more specifically, an unindicted coconspirator unknown to the grand jury, for which this defendant is legally accountable in that the defendant was an accomplice to such person in the commission of this crime.
>
> A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense. A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, he aids or agrees or attempts to aid such other person in planning or committing it.
>
> This provision of the law means that not only is the person who actually commits the criminal act responsible for it, but one who is legally accountable as an accomplice is also responsible as if he committed the crimes himself.
>
> In this case, the State alleges that the defendant is guilty of the crime committed by an unindicted coconspirator unknown to the grand jury because he acted as his accomplice.

In order to find the defendant guilty, the State must prove beyond a reasonable doubt each of the following elements:

(1) That an unindicted coconspirator unknown to the grand jury committed the crime of robbery. I've already explained the elements of this offense.

(2) That this defendant did aid or agree or attempt to aid him in planning or committing it;

(3) That this defendant's purpose was to promote or facilitate the commission of the offense;

(4) That this defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the act.

I've already defined "purpose."

"Aid" means to assist, support or supplement the efforts of another.

"Agrees to aid" means to encourage by promise of assistance or support.

"Attempt to aid" means that a person takes substantial steps in a course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of a substantive offense.

If you find the defendant, with the purpose of promoting or facilitating the commission of the offense, aided, or agreed or attempted to aid an unindicted coconspirator unknown to the grand jury in planning or committing it, then you should consider him as if he . . . committed the crime himself.

To prove the defendant's criminal liability, the State does not have to prove his accomplice status by direct evidence of a formal plan to commit a crime. There does not have to be verbal agreement by all who are charged. The proof may be circumstantial. Participation in agreement can be established from conduct as well as the spoken words.

Mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him a participant in the crime. It is, however, a circumstance to be considered with the other evidence in determining whether he was present as an accomplice.

Presence is not in itself conclusive evidence of that fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt, there must exist a community of purpose and actual participation in the crime committed.

While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime without disapproving or opposing it is evidence from which, in connection with other circumstances, it is possible for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.

An accomplice may be convicted on proof of the commission of a crime or of his complicity therein, even though the person who it is claimed committed the crime has not been prosecuted or convicted or has been convicted of a different offense or degree of offense.

In order to convict the defendant as an accomplice to the crime charged, you must find that defendant had the purpose to participate in that particular crime. He must act with the purpose of promoting or facilitating the commission of the substantive crimes for which he is charged.

It is not sufficient to prove only that the defendant had knowledge that another person was going to commit the crimes charged. The State must prove that it was defendant's conscious object that the specific conduct charged be committed.

In sum, in order to find the defendant guilty of committing the crime of robbery as an accomplice, the State must prove each of the following elements beyond a reasonable doubt:

(1) That an unindicted coconspirator unknown to the grand jury committed the crime of robbery;

(2) That this defendant's purpose was to promote or facilitate the commission of the offense;

(3) That this defendant solicited him to commit it and/or did aid or agree or attempt to aid him in planning it—planning or committing it . . . .

That this defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act.

If you find the State has proven each and every one of the elements that I have explained to you beyond a reasonable doubt, then you must find the defendant guilty. If, on the other hand, you find the State has failed to prove one or more of these elements beyond a

> reasonable doubt, then you must find the defendant not guilty.
>
> Accomplice liability only applies towards your consideration for the charge of robbery.

Defendant contends the trial court erred in instructing the jury on accomplice liability, requiring reversal of the robbery conviction, because it did not inform the jury that he and co-defendant could have participated in the crime with different states of mind, and that each participant's state of mind dictated that person's culpability. Defendant asserts the jury was not instructed "that if [defendant] acted with only the purpose to promote or facilitate the commission of a theft, then [defendant] could be found guilty only of theft even if the unknown co-defendant actually committed a robbery."

Defendant did not object to the jury charge at trial and therefore we review for plain error. "Without an objection at the time a jury instruction is given, 'there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case.'" State v. Montalvo, 229 N.J. 300, 320 (2017) (quoting State v. Singleton, 211 N.J. 157, 182 (2012)). Plain error of a jury charge "requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the

error possessed a clear capacity to bring about an unjust result.'" Id. at 321 (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

However, "[e]rroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." State v. McKinney, 223 N.J. 475, 495-96 (2015) (alteration in original) (quoting State v. Afanador, 151 N.J. 41, 54 (1997)). "[T]he failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel." Afanador, 151 N.J. at 56.

"Under N.J.S.A. 2C:2-6(c)(1), a person may be deemed 'an accomplice of another person in the commission of an offense if . . . [w]ith the purpose of promoting or facilitating the commission of the offense,' that person takes one of the courses of action specified in subsections -6(c)(1)(a) through -6(c)(1)(c)." State v. Ramirez, 246 N.J. 61, 65 (2021) (second alteration in original). For a defendant to be convicted as an accomplice, "he must be shown to have shared the same criminal intent to commit the substantive offense as the principal." State v. Hill, 199 N.J. 545, 567 (2009).

Importantly, not all participants in the crime need be convicted of the same degree. Ibid. The degree of guilt of each participant "[will] depend[] entirely upon his own actions, intent, and state of mind." Id. at 568 (alterations in

original) (quoting State v. Fair, 45 N.J. 77, 95 (1965)); see State v. White, 98 N.J. 122, 131 (1984) ("It is possible for an accomplice to be guilty of robbery and for his compatriot to be guilty of armed robbery."). If the jury is not charged with "accurate and complete instructions regarding accomplice liability for these lesser offenses, there is a . . . risk that the jury will compromise on a guilty verdict for the greater offense." State v. Bielkiewicz, 267 N.J. Super. 520, 534-35 (App. Div. 1993) (reversing the defendant's murder conviction where the trial court failed to properly charge the jury on lesser included offenses and therefore the jury could not have found that the defendant's state of mind was to aid in an assault, not a murder).

The State's theory of the case was that defendant was the principal actor in the robbery of the store. Nevertheless, the court properly instructed the jury on the lesser-included offense of theft. It also charged the jury as to defendant's potential liability as an accomplice to the unidentified co-defendant. The jury was told the accomplice liability charge only applied to the robbery charge. The court further instructed the jury that defendant had to possess the purpose to participate in the robbery and that it was his conscious object that the robbery be committed.

We are satisfied there was no plain error. The jury was instructed on the lesser-included offense and the accomplice liability charge solely as to the robbery charge. The court was clear as to the state of mind required to convict on accomplice liability. In light of all of the evidence, including the video footage, we do not see any error in the charge that was "clearly capable of producing an unjust result." R. 2:10-2.

C.

We next address defendant's issue regarding his request for new counsel. On the scheduled April 30, 2019 trial date, defendant requested an adjournment to retain new counsel. In addressing the application, the court noted defendant had previously requested new counsel in November 2018. The judge informed defendant the request was forwarded to the Office of the Public Defender who responded that a new attorney would not be assigned to defendant's case. Defendant was informed of the decision. In March 2019, defendant sent another letter requesting the assignment of new counsel. The Office of the Public Defender again declined to assign new counsel. At some point, defendant advised he intended to retain private counsel.

The court noted the matter was on the speedy trial list and it was ready for trial. Defendant told the judge his mother was present and had money to retain

private counsel. He further stated his present counsel had not given him "full discovery." The court responded it had already addressed the discovery issues and it was prepared to address defendant's motions that day prior to the start of trial. Because defendant was not entitled to his choice of public defender, and had not retained private counsel, the court denied the adjournment request.

"Both the Federal and State Constitutions guarantee criminal defendants the right to counsel." State v. Maisonet, 245 N.J. 552, 565 (2021) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). "[D]efendants who do not need appointed counsel have the right 'to choose who will represent' them." Ibid. (quoting State v. Kates, 216 N.J. 393, 395 (2014)). However, a defendant "must act 'with reasonable diligence' when choosing counsel to avoid delaying the efficient operation of the justice system." Id. at 566 (quoting State v. Furguson, 198 N.J. Super. 395, 401 (App. Div. 1985)).

When a defendant requests an adjournment to obtain counsel, a trial court's decision to deny the request "will not be deemed reversible error absent a showing of an abuse of discretion which caused defendant a 'manifest wrong or injury.'" State v. Hayes, 205 N.J. 522, 537 (2011). Such a decision "requires a balancing process informed by an intensely fact-sensitive inquiry." Id. at 538.

In Furguson, this court adopted factors developed in United States v. Burton, 584 F.2d 485, 490-91 (D.C. Cir. 1978), in considering a request for an adjournment:

> the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case.
>
> [198 N.J. Super. at 402 (quoting Burton, 584 F.2d at 490-91).]

The trial court did not refer to each factor in denying the adjournment request. However, our Supreme Court has stated that "if an appellate court can glean or infer the relevant considerations from the record, it can analyze the factors to determine whether the trial court abused its discretion in denying an adjournment." Maisonet, 245 N.J. at 567. We are satisfied there is sufficient

information in the record to consider the factors and conclude there was no abuse of discretion in denying the adjournment.

Defendant had previously requested a different public defender and an adjournment six months prior to this trial date. The request was denied. A month prior to the trial date, defendant renewed his request. It was denied. The court found there was no merit to defendant's contentions regarding his trial counsel's trial preparation. To the contrary, the court reviewed the exchange and production of discovery months before trial. The court also noted counsel had filed motions, one of which was scheduled for a hearing that day. Despite the many months that had passed, defendant had not retained private counsel. He still had not done so on the day of trial when he requested the adjournment.

The court did not abuse its discretion in denying the adjournment as private counsel was not retained, and the parties were prepared to begin trial that day.

D.

We turn to defendant's contentions regarding his sentence. He asserts the sentence is excessive and the court gave undue weight to aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need to deter defendant and others from violating the law.

We review a sentence for abuse of discretion. State v. Torres, 246 N.J. 246, 272 (2021); State v. Jones, 232 N.J. 308, 318 (2018). We defer to the sentencing court's factual findings and do not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014).

We will affirm a sentence unless it violates the sentencing guidelines; "the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or [] 'the application of the guidelines to the facts of [the] case make the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Fuentes, 217 N.J. 57, 70 (2014) (second alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

In addressing aggravating factor nine, the judge stated:

> N.J.S.A. 2C:44-1[(]a[)](9) states that when sentencing [a d]efendant a [c]ourt can consider the need to deter the defendant and others from violating the law. While there's a general need to deter people committing armed robberies, [d]efendant's lack of remorse and failure to take responsibility, as well as [d]efendant's repeated violation of the law, justify heavy consideration of factor nine.
>
> Here there is a clear need to deter this defendant specifically. While this factor is present in every case, it is especially substantial here given the defendant has at this point been totally undeterred. Defendant's been given many second chances. He's been in constant

contact with the Criminal Justice System. He has six prior felony convictions. While on probation he committed crimes. When [d]efendant committed this offense he was on parole. Nothing has served to deter him from committing subsequent criminal offenses. There's a clear need to deter this defendant and others.

. . . .

The Court finds both specific and general deterrence applicable. Since the goal of deterrence is to thwart future crimes and to modify the conduct, both of the offender and others who might commit the offenses, it constitutes a much more potent factor in the treatment of persons who have committed crimes which are perceived to be avoidable or preventable. Such crimes are usually those which result from volitional, deliberate, and non-impulsive behavior.

. . . .

Here [d]efendant must be personally discouraged from committing the same type of offenses that he committed multiple times, in addition to committing any new criminal activity. His crimes are purposeful, capable of repetition. And [d]efendant's own actions need to be punished to ensure that he personally abides by the law. General deterrence is necessary here because there is a need to deter the community from committing offenses similar to that committed by [d]efendant.

. . . .

Further there's nothing to suggest that the character and condition of [d]efendant are so idiosyncratic that incarceration for the purposes of general deterrence is not warranted. . . . This is not one

> of the very rare circumstances where general deterrence is inapplicable. And [d]efendant does not argue otherwise.

The court sentenced defendant as a persistent offender subject to an extended term.

Defendant contends it was improper for the judge to consider his lack of remorse as an aggravating factor. We are unconvinced. It is clear from the record that the court considered much more in applying aggravating factor nine than defendant's lack of remorse. The court described the need for general and specific deterrence and the escalating nature of defendant's offenses as well as his non-deterrence by prison sentences and parole. We are satisfied the court sufficiently explained the application of weight accorded to factor nine.

We are also unpersuaded by defendant's argument that the sentence was excessive. As a persistent offender, defendant faced an extended term sentence between twenty years and life. The court imposed a term of thirty-one years, stating,

> The [c]ourt finds . . . defendant is a persistent offender, has committed several other robbery and theft crimes. His criminal history, in addition to the armed nature of this current robbery which I . . . would describe as . . . anybody that works alone in a store . . . on the highway . . . or anywhere, this is their . . . worst nightmare. What happened to [the victim] was undoubtably his worst nightmare. The worst nightmare

> of anybody else that works in a standalone . . . retail store.
>
> And . . . defendant's criminal history is just unabated and violent. And it would seem to this [c]ourt, even considering the real-time consequences, that regrettably [defendant] is just a person from whom the public must be protected [for] the longest possible time . . . .
>
> Extended term is certainly imperative for the protection of the public.

We discern no reason to disturb the sentence as it was grounded in the credible evidence in the record and did not "shock the judicial conscience." See Fuentes, 217 N.J. at 70 (quoting Roth, 95 N.J. at 364-65).

Affirmed.