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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1023-19
A-1292-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL A. MARTIN,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYSHAWN RIDDICK,

Defendant-Appellant.

Submitted (A-1023-19) and Argued (A-1292-19)
May 1, 2023 — Decided June 15, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 17-11-1359.

Joseph E. Krakora, Public Defender, attorney for appellant in A-1023-19 (Frank M. Gennaro, Designated Counsel, on the brief).

Stephen W. Kirsch, Designated Counsel, argued the cause for appellant in A-1292-19 (Joseph E. Krakora, Public Defender, attorney; Stephen W. Kirsch, on the brief).

Nancy A. Hulett, Assistant Prosecutor, argued the cause for respondent in A-1292-19 (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Nancy A. Hulett, of counsel and on the briefs).

PER CURIAM

In these back-to-back cases, defendants Rayshawn Riddick and Michael Martin appeal from their convictions after a joint trial stemming from the death of Hakim Williams (Hakim),¹ who died from gunshot wounds sustained while he was in his vehicle in New Brunswick. We affirm the convictions but remand to correct Martin's judgment of conviction to reflect that first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a)(1), merges with first-degree knowing or purposeful murder, N.J.S.A. 2C:11-

¹ Because the victim shares the same last name as a third defendant, he and that defendant will be referred to by first names. In doing so we mean no disrespect.

3(a)(1), and to correct the period of parole ineligibility from eighty-five percent to thirty-five years. We also remand to correct Riddick's judgment of conviction to change the period of parole ineligibility from eighty-five percent to thirty-five years.

On appeal Martin argues:

POINT I.

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT WAS IMPROPERLY DENIED, AS THE PROSECUTOR'S INJECTION OF ALLEGATIONS OF GANG AFFILIATION, AS WELL AS REPEATED REFERENCES TO DEFENDANT BY THE NICKNAME "MANIAC," IRREPARABLY TAINTED THE GRAND JURY.

POINT II.

THE TRIAL COURT IMPROPERLY DENIED DEFENDANTS' MOTION TO SEVER DEFENDANTS.

POINT III.

THE TRIAL COURT WRONGFULLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL.

POINT IV.

DEFENDANT'S SENTENCE OF FORTY YEARS, SUBJECT TO THE NO EARLY RELEASE ACT [(NERA), N.J.S.A. 2C:43-7.2,] IS MANIFESTLY EXCESSIVE, AND THE CONVICTION FOR CONSPIRACY TO COMMIT MURDER MUST MERGE INTO THE MURDER COUNT.

Riddick argues:

POINT I.

THE MOTION FOR A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE SHOULD HAVE BEEN GRANTED; WHILE THE STATE'S PROOFS WERE CLEARLY SUFFICIENT TO DEMONSTRATE THE CODEFENDANT'S GUILT OF MURDER, THEY WERE INSUFFICIENT TO SHOW THE DEFENDANT'S GUILT OF EITHER MURDER OR CONSPIRACY TO MURDER.

POINT II.

THE JUDGE COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S REPEATED MOTIONS FOR SEVERANCE FROM HIS CODEFENDANT AND THE POST-TRIAL MOTION FOR A NEW TRIAL THAT MADE THE SAME SEVERANCE CLAIM; THE DEFENSES OF THE TWO MEN WERE SO ANTAGONISTIC THAT DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN HE WAS TRIED WITH THE CODEFENDANT.

POINT III.

CODEFENDANT'S COUNSEL, IN AN EFFORT TO INCRIMINATE DEFENDANT, IMPROPERLY ELICITED FROM THE LEAD DETECTIVE AN OPINION THAT, BASED ON THE ONGOING POLICE INVESTIGATION, THE DETECTIVE DELIVERED DEFENDANT TO BE GUILTY BEFORE HE EVER EVEN INTERVIEWED THE CODEFENDANT. IN DOING SO, CODEFENDANT'S COUNSEL BOTH IMPROPERLY ELICITED AN OPINION ON THE DEFENDANT'S GUILT AND DID SO IN A MANNER THAT IMPLIED THERE WAS ADDITIONAL HEARSAY EVIDENCE AGAINST THE DEFENDANT THAT THE JURY WAS NOT

PRIVY TO, BUT THE DETECTIVE WAS. (Not Raised Below).

POINT IV.

THE JURY INSTRUCTION ON VICARIOUS COCONSPIRATOR LIABILITY WAS PLAINLY ERRONEOUS FOR TWO REASONS: (1) IT WAS LITERALLY THE WRONG ONE OF THE TWO POSSIBLE INSTRUCTIONS ON THAT LEGAL THEORY, AND (2) IT NEVER CORRECTLY LISTED THE ELEMENTS; THEN WHEN THE JURY ASKED FOR CLARIFICATION, THE JUDGE SIMPLY REFERRED JURORS BACK TO THE ORIGINAL INCORRECT INSTRUCTION, DESPITE JURORS STATING THAT THEY DID NOT UNDERSTAND THAT INSTRUCTION. (Not Raised Below).

POINT V.

THE JURY INSTRUCTIONS ON CONSPIRACY TO MURDER IMPROPERLY FAILED TO RESTRICT SUCH CONSPIRACIES TO AGREEMENTS TO PURPOSELY KILL THE VICTIM, INSTEAD EXPANDING THE DEFINITION OF THE CRIME TOO FAR TO INCLUDE AGREEMENTS TO PURPOSEFULLY OR KNOWINGLY KILL OR SERIOUSLY INJURE THE VICTIM. (Not Raised Below).

The record informs our decision. A Middlesex County Grand Jury indicted Riddick and Martin, charging them with first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a)(1), and first-degree knowing or purposeful murder, N.J.S.A. 2C:11-3(a)(1). Martin alone was charged with first-degree unlawful possession of a weapon, N.J.S.A. 2C:39-

5(b) and N.J.S.A. 2C:39-5(j), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). The indictment also charged Dianna Williams² with third-degree hindering, N.J.S.A. 2C:29-3(a)(1).

The State chose to first proceed against Martin, but that trial ended in a mistrial after the jury could not reach a unanimous verdict. Thereafter, the State tried Martin and Riddick jointly in June and July of 2019. Riddick filed a motion for severance, which Martin joined. However, the motion was unsuccessful.

At trial, Adrian Flores testified that on August 18, 2017, at about 11:00 p.m., he heard gunshots outside his home on a street in New Brunswick. He walked outside and saw a gray Honda coupe pass by but did not see the driver. Further down the street, he saw a car had crashed into a parked vehicle. As Flores approached the car, he saw a man, deceased, in the front seat. He called 9-1-1.

Officers arrived and inside the vehicle they saw an unresponsive man, later identified as Hakim, shot multiple times. The vehicle was still running, and all doors were closed, but the driver's side window was down. Officers collected evidence from the scene and canvassed the area for witnesses. They

² Dianna Williams is not a party to this appeal.

found shell casings in the road, a cell phone on the front seat of Hakim's vehicle, and a hotel key on Hakim's person. No handguns were recovered. An autopsy revealed Hakim suffered five gunshot wounds.

Officers interviewed Shakera Mooring, Hakim's wife, who also testified at defendants' trial. She and Hakim were together for ten months, but for the last three months, they had been living apart. Mooring explained she and Hakim were having problems with their relationship because he was dating other women.

On the day he was killed, Mooring spoke to Hakim. She believed he was going to move back in with her later that evening. At about 8:00 p.m., he told her he "was waiting on his homies to come from Newark, and they were supposed to bring him some bricks and some yams"—meaning heroin and cocaine. At about 10:30 p.m., Mooring called Hakim because it was getting late, and she wanted to know what was going on. While they were talking, Hakim said he got a text message from "his homies from Newark" that said they would be there any minute. She did not speak to Hakim again.

Video surveillance was recovered from the street. It captured vehicles, including the gray Honda described by Flores, on the roadway at the time of the incident.

Additionally, Hakim's cell phone was forensically examined. On it, numerous communications were discovered between Hakim and a cell number ending in 6106, under the contact name "M.M." On the morning of the day he died, Hakim texted M.M. Throughout that afternoon, the two called each other several times.

Hakim texted M.M. at 6:02 p.m.: "Yo, we still good or not?" M.M. told him he was "on [his] way out there now." At 7:37 p.m., Hakim sent another text message to M.M.: "My boy, do you know how long, because I gotta . . . slide out with the wife until late." M.M. assured Hakim he was almost there. Within the next couple hours, they arranged a place to meet.

By 10:34 p.m., Hakim was still waiting for M.M. and they continued to communicate. The last communication with M.M. on Hakim's phone was a call he placed to M.M. at 10:52 p.m., which lasted sixty-six seconds.

After examining the contents of Hakim's cell phone, officers retrieved the cell site data for 6106, the number listed as M.M. Notably, in the early evening hours of August 18, 2017, 6106 hit off towers in Edison and Piscataway. At 10:47 p.m. and 10:49 p.m.—close to the time of Hakim's death—the number hit off a tower in New Brunswick. Throughout the rest of

the night and into the morning, the number hit off of towers in Edison, Newark, and Piscataway.

Officers also analyzed communications made between 6106 and other contacts around the time the 9-1-1 call was made. In particular, officers discovered a communication between 6106 and a number ending in 9433 that took place at 12:43 a.m. 9433 was associated with Cassandra Herrera. The police obtained Herrera's address, as well as information pertaining to a vehicle, a Honda Civic, she had registered in her name. Officers learned motor vehicle tickets were issued to occupants of the car the day before Hakim's death. One of the occupants was Kevin Baskerville, who lived in a housing complex in Edison known as Potters. The other occupant was Martin. Officers went to Potters, and although they did not initially locate Baskerville, they located and towed Herrera's vehicle.

Officers also retrieved video surveillance footage from Potters for August 18, between the hours of 9:00 p.m. and 3:00 a.m. Clips of this footage were shown to the jury during defendants' trial. On the footage, Williams, who testified at defendants' trial, identified Herrera's Honda Civic. Williams revealed a man who lived at Potters allowed Martin and Riddick to sell drugs out of his place. On the footage, Martin and Riddick can be seen walking in

and out of the man's house together. Herrera's car is also seen leaving the parking lot and returning to the parking lot at various times.

Herrera gave police access to examine her cell phone. Importantly, 6106, the number listed as M.M. in Hakim's phone was stored in her phone, and she identified that number as belonging to Martin. She also had a number ending in 3539 saved as "Ray," later determined to be Riddick. This number also had contacts with Martin's phone. Notably, there were multiple calls placed between the two in the days leading up to Hakim's death, but no calls after 8:47 p.m. that day. There were no communications between Riddick and Hakim.

Officers obtained call detail records and cell site data for Riddick's phone. In addition to communications between Riddick and Martin, there were communications between Riddick and a number ending in 5084, later determined to be Williams'. The first time those numbers were in communication was on August 16, 2017, at 4:30 p.m. At that time, there were six calls made between the two numbers. These communications hit off a tower in Edison.

On the night Hakim died, Riddick's number hit off towers in Piscataway and Edison from 7 p.m. to 9 p.m., then, it hit off towers in New Brunswick

before once again returning to Edison and Piscataway the next morning. Communications were also discovered between Hakim's phone and Williams' but call detail records and cell site data were not obtained for 5084.

Thereafter, Riddick, Martin, and Williams were officially considered suspects. Officers eventually located and arrested Riddick and Williams in Irvington.

After Williams' arrest, she gave a statement and testified during defendants' trial. Williams—a sex worker—had dated Hakim and had an agreement with him regarding her business. She also dated Riddick, who was her daughter's father. According to Williams, Riddick did not like her prostituting and using drugs. Williams also knew Martin. She claimed Martin looked up to Riddick like he was a big brother.

On August 16, 2017, Williams was with Hakim at a hotel in South Brunswick. They had an argument during which Hakim punched her in the forehead, leaving a gash. After Hakim left Williams at the hotel, she called Riddick and told him what happened. She asked Riddick to pick her up. He arrived at the hotel to pick her up in a gray two-door Honda, which Martin was driving.

When Riddick saw the gash on Williams' head, he was angry and "he . . . said [she was] always putting [herself] in situations [with] dumb guys and doing dumb things." As for Martin, she said he "was feeding off the energy of [Riddick]," but she could not remember what his exact response was. Martin and Riddick took her to see her daughter, who was at her grandmother's house in New Brunswick. After that, Martin and Riddick took Williams back to the hotel because she had paid for the room and her belongings were still there.

The next day, Williams said Martin and Riddick drove her to her friend's house in Piscataway, where she stayed with Riddick. While there, she continued to text Hakim, and Riddick knew she was communicating with him.

Williams left Piscataway and drove herself to Hakim's aunt's house in New Brunswick in a different vehicle. Later that day, Williams spoke with Hakim at his aunt's house. He told her he was going to get fronted drugs. He did not say who he was meeting. She left Hakim's aunt's house and returned to Piscataway. On her way, she called Hakim. At some point, she experienced car trouble, so she called Riddick, who told her he left Piscataway and was with Martin. He did not tell her where he was, but he did tell her that he was going to make a drug transaction.

At around 11:00 p.m. that night, Williams called Riddick a few times, but he did not answer. Riddick returned to Piscataway sometime between 11:00 p.m. and midnight.

The next day, Williams learned Hakim was killed. She asked Riddick where he was the night before. He told her he went to meet up with "Ole Boy" to front him some drugs. "Ole Boy" was going to "show [Riddick] the ropes in New Brunswick." Williams believed "Ole Boy" was Hakim. She said Hakim and Riddick knew each other from a previous interaction.

After Hakim's death, Williams and Riddick continued to stay in Piscataway until they learned they were wanted for questioning. She and Riddick relocated to Irvington. Martin also visited them there, and at some point, said to her, "I got you, sis," which Williams took to mean that Martin had killed Hakim. Williams and Riddick stayed in Irvington until they were arrested.

On October 23, 2017, officers located and arrested Martin in Philadelphia. The police interviewed Martin. A video of the interview was played for the jury during defendants' trial.³ Initially, Martin denied

³ During the State's case-in-chief, a redacted version of Martin's statement was played for the jury that omitted any mention of Riddick. But when Martin

involvement in Hakim's death. He later admitted he was the one who shot Hakim. He said after the incident, he threw the gun in a river. He claimed he and Riddick were dealing with "Ray's beef."

At trial, Martin testified, admitting he was in New Brunswick to meet with Hakim and supply him with drugs. Contrary to his earlier statement, Martin denied shooting and killing Hakim. Martin testified at the time of the incident, he was primarily staying with Herrera, his ex-girlfriend. He was dealing drugs, and reconnected with Riddick, who suggested he deal drugs in Edison. At this time, he also learned there was money to be made dealing drugs in New Brunswick and said the first time he was in New Brunswick was on August 13, 2017, when he went to pick up Riddick from seeing his daughter. Prior to picking up Riddick, he stopped at a "Chicken Shack," where he happened to meet Hakim. He testified he spoke with Hakim about dealing drugs and exchanged phone numbers.

Martin said several days then went by, and on August 16, 2017, Riddick asked Martin to take him somewhere. They ended up in New Brunswick, so Martin decided to reconnect with Hakim. Martin took Riddick to the hotel, where he met Williams for the first time. He and Riddick picked Williams up

took the stand in his own defense, those omitted portions of his statement were introduced during the State's cross-examination.

from the hotel and took her to her grandmother's house. He said he waited outside the house until Williams got out, and then took her back to the hotel. Martin testified when Williams was in the car, he did not listen to her or speak to her.

Martin testified he got back in touch with Hakim on August 18, 2017, when they planned for Martin to front Hakim drugs, specifically, a couple of bricks. Martin asked Riddick to go with him to show him how to get there. Martin placed the drugs under the front seat of his car. When they got to where they were supposed to meet Hakim, Martin testified Riddick stepped out of the car to relieve himself. While Martin reached under the front seat to get the drugs he heard gunshots. Riddick jumped back in the car and told Martin to drive, which he did. Martin testified there was a gun in Riddick's hand. He testified he did not see who did the shooting.

Martin acknowledged he previously confessed he was the shooter and Riddick had nothing to do with Hakim's death, but explained Riddick was like a brother to him, and he had to protect him. He said when the entire incident began to haunt him, however, and he no longer wanted to lie, he said he chose to testify. He said he did not pull the trigger and did not know who did but

assumed Riddick was the shooter, because he saw Riddick get in the car with a gun.

On July 23, 2019, the jury found Riddick and Martin guilty of conspiracy to commit murder and murder. Martin was acquitted of the weapons possession counts. On September 26, 2019, both defendants moved for a new trial, which the court denied.

After granting the State's motion for an extended term, the court sentenced Martin to a forty-year term of imprisonment for conspiracy to commit murder, with an eighty-five percent period of parole ineligibility pursuant to the NERA concurrent to a forty-year term for murder.

After finding conspiracy to commit murder merged with murder, the court sentenced Riddick to a forty-year term of imprisonment, with an eighty-five percent period of parole ineligibility pursuant to NERA. These appeals followed.

I.

Riddick first argues the proofs against him were legally insufficient to support a guilty verdict for either charge; consequently, the court should have granted his motion for a judgment of acquittal at the conclusion of the State's

case. Riddick argues his convictions should be reversed and judgments of acquittal entered. We reject this argument.

Following the State's case-in-chief, counsel for both Riddick and Martin moved for a judgment of acquittal. Specifically, Riddick's counsel argued the State introduced no competent evidence that placed him at the scene of the crime. The court denied defendants' motion, finding, in pertinent part:

[A]s far as the conspiracy is concerned, based upon the evidence of . . . [Williams] that she on the [sixteenth] had an altercation or a tumultuous relationship with the decedent in this case and that it was [Riddick's] baby's mother who was hurt in the altercation

. . . Mr. Riddick would have the . . . greater motive to have [Hakim] killed. And as a result of being charged with conspiracy or access or liability, I think that, under [State v. Reyes, 50 N.J. 454 (1967)], the question of whether a trial judge can determine whether . . . viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all favorable testimony and all favorable inferences which reasonably could be drawn therefrom, . . . a reasonable jury could find guilt of the charge beyond a reasonable doubt. So I think . . . the case survives that motion.

"Rule 3:18-1 provides that a court must enter a judgment of acquittal after the close of the State's case or after the close of the defendant's case if 'the evidence is insufficient to warrant a conviction.'" State v. Lodzinski

(Lodzinski II), 249 N.J. 116, 143 (2021). "Rule 3:18-2 is an additional safeguard, authorizing a court to enter a judgment of acquittal even after the return of a verdict of guilty, when the evidence does not rationally support a conviction." Ibid. "The power to enter a judgment of acquittal cannot be invoked because a judge has a mere difference of opinion with the outcome of a trial; it can be invoked only to prevent a miscarriage of justice." Id. at 143-44.

We "apply the same standard as the trial court to decide if the trial judge should have granted a judgment of acquittal." State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990) (citing State v. Moffa, 42 N.J. 258, 263 (1964)). "That standard is the same whether the motion is made at the close of the State's case, at the end of the entire case, or after a jury returns a guilty verdict under Rule 3:18-2." State v. Fuqua, 234 N.J. 583, 590 (2018). A motion for a judgment of acquittal will not be granted if,

the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt.

[Id. at 590-91 (quoting State v. Kluber, 130 N.J. Super. 336, 341-42 (App. Div. 1974)).]

"On such a motion the trial judge is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." Kluber, 130 N.J. Super. at 342. "[A] jury may draw an inference from a fact whenever it is more probable than not that the inference is true; the veracity of each inference need not be established beyond a reasonable doubt in order for the jury to draw the inference." State v. Brown, 80 N.J. 587, 592 (1979); see Reyes, 50 N.J. at 458-59 (applying that standard after the close of the State's case under Rule 3:18-1).

We reject Riddick's assertion his situation is like the defendant's in Lodzinski II, 249 N.J. 116, where the court concluded that no rational jury—without engaging in speculation or conjecture—could conclude that defendant Lodzinski purposely or knowingly caused her son's death. Here, there was sufficient evidence for a reasonable jury to believe Riddick was responsible for Hakim's death.

Riddick and Martin were charged with conspiracy to commit murder and murder. First, as to conspiracy to commit murder, the State was required to prove: (1) the defendant agreed with another "person or persons that they or one or more of them [would] engage in conduct which constitutes [murder] or an attempt or solicitation to commit [murder]"; or that defendant agreed to aid

another "person or persons in the planning or commission of [murder] or of an attempt or solicitation to commit [murder]"; and (2) the defendant's purpose was to promote or facilitate the commission of murder. N.J.S.A. 2C:5-2.

While the State presented no direct evidence Riddick and Martin conspired to murder Hakim, it presented substantial circumstantial evidence. The absence of direct evidence is not fatal to the State's case. "[C]ircumstantial evidence often can be as persuasive and powerful as direct evidence and sufficient to support a conviction." Lodzinski II, 249 N.J. at 146-47 (citing State v. Goodman, 9 N.J. 569, 581 (1952)); see also State v. Mayberry, 52 N.J. 413, 437 (1968) (quoting State v. Corby, 28 N.J. 106, 119 (1958)) ("[I]ndeed in many situations circumstantial evidence may be 'more forceful and more persuasive than direct evidence.'").

The State showed Riddick and Martin knew one another and spent time together. In fact, Martin admired Riddick like he was an older brother. When Williams called Riddick to pick her up from the hotel after her altercation with Hakim, he arrived with Martin. Williams detailed what had happened between her and Hakim to both Riddick and Martin, and testified Riddick was angry upon hearing her story and Martin was "feeding off" of Riddick's anger.

Martin had numerous contacts with Hakim in the days leading up to his murder that showed they had planned to meet. While there were no text messages between Hakim and Riddick, there was evidence to suggest Riddick was planning to meet Hakim as well. First, the testimony from Hakim's wife, that Hakim was going to meet with his "homies," which implies he was meeting with more than one person. Second, the cell site data gathered from Riddick and Martin's cell phones, showed the men were in the same area leading up to and at the time of Hakim's murder. Third, the State presented the video surveillance footage from Potters, showing Riddick and Martin riding together, just prior to Hakim's murder, in the Honda that was at the scene. And finally, Williams testified that just prior to Hakim's murder, Riddick told her he was with Martin, and although he did not tell her where they were, he did tell her he was going to make a drug transaction.

After Hakim's murder, Riddick told Williams he had fronted drugs to "Ole Boy," which she knew was a nickname for Hakim. Moreover, after the murder and after learning they were considered suspects, Riddick, Martin, and Williams went into hiding. They each obtained new cell phones and new cell phone numbers. Williams also testified on one occasion when she, Riddick,

and Martin met after the murder, Martin told her, "I got you, sis," which she took to mean Martin murdered Hakim.

We conclude there was sufficient circumstantial evidence for a reasonable jury to believe that Riddick and Martin conspired to murder Hakim because of the altercation that occurred between Hakim and Williams and the events following the altercation.

In order to be found guilty of murder, the State was required to prove beyond a reasonable doubt: (1) defendants caused Hakim's death or serious bodily injury that resulted in Hakim's death, and (2) did so purposely or knowingly. N.J.S.A. 2C:11-3(a)(1). Riddick and Martin were not only charged as principals, they were also charged under the theories of conspiracy-vicarious liability and accomplice liability. Under conspiracy-vicarious liability,

[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both. . . . A person is legally accountable for the conduct of another person when . . . [h]e is engaged in a conspiracy with such other person.

[N.J.S.A. 2C:2-6(a) and (b)(4).]

Under accomplice liability,

[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both. . . . A person is 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; he . . . [h]aving a legal duty to prevent the commission of the offense, fails to make proper effort so to do[.]

[N.J.S.A. 2C:2-6(a) and (c)(1)(c).]

When viewing the State's evidence in its entirety and giving the State the benefit of all its favorable testimony as well as all the favorable inferences which reasonably could be drawn therefrom, what was presented to the jury was sufficient to find both defendants had committed murder, whether as a principal, accomplice, or co-conspirator, beyond a reasonable doubt. Riddick and Martin were together at the scene of the crime when Hakim was killed. They both had motive and their behavior following the incident showed consciousness of guilt.

This record is not like the circumstances in Lodzinski. Here, there was substantial evidence and testimony presented showing how, when, and where Hakim died. There was no question as to his cause of death—gunshot wounds. Hakim's injuries alone support the charge he was purposefully and knowingly

killed. A very specific motive for Hakim's death was presented by Williams, and her testimony was supported by call detail records and cell site data.

We discern no error in the trial court's denying judgments of acquittal at the conclusion of the State's case.

II.

Both Riddick and Martin argue they were denied due process and a fair trial when the court denied the motion for severance and forced them into a joint trial despite their fundamentally antagonistic defenses. They thus maintain we should reverse their convictions, order severance, and grant them new trials.

Initially, Riddick's and Martin's matters were not joined. The State chose to try Martin first. During that trial, the State presented Martin's statement to Philadelphia police officers, which included references to Riddick. Specifically, Martin told officers Riddick had nothing to do with Hakim's murder, and he alone was responsible for the shooting. However, during that trial, Martin took the stand in his own defense and testified he did not shoot Hakim, and while he also did not see Riddick shoot Hakim, he testified Riddick got out of the car at the time of the shooting and reentered the car with a gun. Ultimately, the jury there was unable to reach a unanimous

verdict. Later, after securing the cooperation of Williams, the State decided to try both defendants together.

Following the State's decision to try Martin and Riddick jointly, Riddick moved for severance, which Martin joined. Riddick argued severance was necessary to avoid undue prejudice resulting from Martin's "powerfully incriminating statements" against Riddick. Martin concurred.

In a written opinion, the court concluded: "After reviewing the controlling case law, . . . the defendants can be fairly tried together. The defenses are not mutually exclusive and irreconcilable. Further, any evidence that is admissible against one co-defendant but not the other will be accompanied by a proper instruction to the jury."

Likening this case to the circumstances in State v. Brown, 118 N.J. 595 (1990), the trial judge noted the State's theory was that "the co-defendants were working together to orchestrate this homicide" and "[t]he jury [was] not limited to only believing one of the defenses offered by the co-defendants. The jury [could] choose to believe neither co-defendant." The court also noted: "Aside from Martin's statement to police, much of the evidence that the State intends to introduce will likely be admissible against both defendants."

Defendants argue this case is more akin to State v. Weaver, 219 N.J. 131 (2014), than Brown. We are unpersuaded.

The Supreme Court in Weaver explained:

Two or more defendants may be charged and tried jointly "if they are alleged to have participated in the same act or transaction" constituting the offense. R. 3:7-1 (indictment); R. 3:15-1 (trial). Indeed, under those circumstances, a joint trial is "preferable" because it serves judicial economy, avoids inconsistent verdicts, and allows for a "more accurate assessment of relative culpability." [Brown, 118 N.J. at 605.]

[Id. at 148.]

However, "[i]f, for any reason, it appears that a defendant . . . is prejudiced by the joint trial, the trial court may sever." Id. at 148-49 (citing R. 3:15-2(b)). "The decision to sever is within the trial court's discretion, and it will be reversed only if it constitutes an abuse of discretion." Id. at 149 (citing State v. Sanchez, 143 N.J. 273, 283 (1996)). "[I]n deciding whether to grant a severance the trial court must balance the possible prejudice to the defendant against the government's interest in judicial economy and must consider the ways in which it can lessen the prejudice by other means" State v. Morant, 241 N.J. Super. 121, 134 (App. Div. 1990) (quoting State v. Barrett, 220 N.J. Super. 308, 311 (Law Div. 1987)). "[I]f by proper instructions and

charges to the jury the separate status of codefendants can be maintained, the 'danger by association' which inheres in all joint trials is effectively overcome." Ibid. (quoting Barrett, 220 N.J. Super. at 311).

Separate trials are required when codefendants present defenses that "are not simply at odds, but are 'antagonistic at their core,' meaning that they are mutually exclusive and the jury could believe only one of them." Weaver, 219 N.J. at 149 (quoting Brown, 118 N.J. at 606). It is not enough to show "[t]he mere existence of hostility, conflict, or antagonism between defendants" Brown, 118 N.J. at 606. Defenses therefore are mutually exclusive if they "force the jury to choose between the defendants' conflicting accounts and to find only one defendant guilty." Ibid.

If the jury can return a verdict against one or both defendants by believing neither, or believing portions of both, or, indeed, believing both completely, the defenses are not mutually exclusive. Defenses that do not demand that the jury choose one or the other in order to return a verdict, though clearly in conflict and antagonistic, are not mutually exclusive.

[Ibid.]

Moreover, "[t]he fact that one defendant seeks to escape conviction by placing guilt on his or her co-defendant has not been considered sufficient grounds for severance." Ibid.

In Brown, the defendants were involved in an apparent race that resulted in one of the defendant's cars striking a third vehicle, killing its driver. Id. at 600. Both defendants were indicted for death by auto and the State sought to try them jointly. Ibid. The State argued both defendants were at fault in causing the collision. Ibid. Defendants offered different versions of the events leading up to the collision, each implicating the other as the sole or primary guilty party. Id. at 601. Defendants moved for severance, and the motion court denied their request. Id. at 603. The motion court found "although the respective defenses of the defendants were antagonistic, they were 'not necessarily irreconcilable or mutually exclusive.'" Ibid. (quoting State v. Brown, 219 N.J. Super. 412, 419 (Law Div. 1987)). Thereafter, defendants were tried jointly and found guilty. Ibid.

Ultimately, the Supreme Court agreed with the motion court. Id. at 607. The Court found "although defendants' versions were in conflict, their defenses did not compel the jury to believe one defendant at the expense of the other in order to reach a verdict." Ibid. "[T]he jury could find both defendants at fault." Ibid.

The high degree of antagonism between defendants did not create impermissible prejudice, nor was it compounded by other factors that would

militate against a joint trial. The Court found "although the conflict between the defendants made difficult the jury's determination of the facts in the case, . . . the jury did not suffer irremediable confusion that impaired its deliberations or impugned its verdicts." Id. at 609.

In Weaver, an argument ensued between two defendants, Weaver and Bryant, and two victims at a high school graduation party. 219 N.J. at 138. As the argument escalated, someone drew a gun and fired five shots. Id. at 140. One of the victims was struck by three bullets, the other victim was struck by two. Ibid. The victim who suffered three gunshot wounds died, and the other was seriously wounded. Ibid. The two defendants ran from the scene. Ibid.

The central issue was who shot the victims. Id. at 141. Witnesses' testimonies differed on which defendant was responsible. Id. at 141-42. When Bryant was arrested, he admitted to possessing the gun on the night of the shooting but stated Weaver had given him the gun after the shooting with instructions to hide it. Id. at 140. Weaver, on the other hand, argued Bryant shot both the victims and had used the same gun in an earlier shooting. Ibid.

Both were subsequently charged with murder and attempted murder, among other things. Id. at 142. Weaver moved for a separate trial, which the motion court denied. Id. at 142-43. Thereafter, both defendants were tried

together. Ibid. The jury found Weaver guilty of all counts, including murder and attempted murder, and Bryant guilty only of a weapons charge and endangering an injured victim. Ibid.

The Supreme Court reversed and remanded for new trials, stating that while a joint trial is preferable, severance is in order when a "defendant's defense strategy is antagonistic at its core to the defense strategy of his co-defendant so that the jury could believe only one of them" Id. at 157.

Here, Riddick contends severance was warranted because Martin's defense was fundamentally antagonistic to his defense. The jury here was not tasked with deciding who pulled the trigger, and therefore, no mutual exclusivity of defenses existed. In other words, the jury was not forced to believe either one defendant or the other.

Unlike the defendant in Weaver, who sought to present evidence of third-party guilt which would have been impossible to introduce at a joint trial, Riddick and Martin have not been unfairly precluded from making their case. See 219 N.J. at 163. Here the jury did not have to decide who pulled the trigger. See State v. Roach, 146 N.J. 209, 223 (1996) (holding that if the facts support liability as a principal, an accomplice, or a co-conspirator, each theory supported by the facts should be charged to the jury). We conclude that

severance under Weaver is not required because the facts do not demonstrate a plausible argument that the defendants' claims were so antagonistic as to render a joint trial constitutionally deficient, nor does the record show defendants were precluded from introducing evidence otherwise barred due to the nature of a joint proceeding.

Though Martin argues "the hostility between [he and Riddick] was extremely high," as noted above, "[t]he mere existence of hostility, conflict, or antagonism between defendants is not enough." Brown, 118 N.J. at 606. Indeed, even a "high degree of antagonism" is not enough. Id. at 607. Unless the defendants' defenses are antagonistic at their core—or preclude a defendant from introducing relevant evidence that would otherwise be barred due to the nature of a joint proceeding—severance is not required. We find no error in the trial court's denial of the motion to sever.

III.

Compounding the peril of the joint trial, Riddick argues, Martin's trial attorney elicited an improper lay opinion from a State's witness that he already believed Riddick was guilty before he even took a statement from Martin, and did so in a manner that implied the statements of people who did not testify were part of the basis for that conclusion. Consequently, Riddick maintains

the witness's testimony impinged upon his federal and state constitutional rights and violated the rules of evidence. We find no reversible error in the introduction of the witness's testimony.

At trial, Sergeant Craig Marchak testified as a witness for the State. He was the lead detective assigned to investigate Hakim's death. On direct, the State asked him a number of questions regarding his investigation, including who he spoke to and how he utilized cell phone data and videos.

Martin's counsel asked Sgt. Marchak about other aspects of his investigation on cross-examination and clarified who he spoke to. Martin's counsel then continued:

[Counsel]: And at this point in time, you had taken statements from all of those people that we listed. Correct?

[Marchak]: Yes. Me or other members of law enforcement.

[Counsel]: Right. So . . . did you have in your head as the lead investigator a theory as to what went down on August 18th, 2017[,] sometime between . . . 10:52 [p.m.] and 11:02 [p.m.]?

[Marchak]: Well, I had facts . . . through my investigation.

[Counsel]: Yeah, but . . . when you're going down to question . . . Martin, I mean, you've got a theory, right, as to what happened?

[Marchak]: Yeah. I . . . would say I had a theory as well as facts, but I still had holes that I was looking to plug in.

. . . .

[Counsel]: You knew that . . . Riddick was involved. Correct?

[Marchak]: Yes, [s]ir.

For the first time on appeal, Riddick objects to the above-cited testimony claiming Marchak implied there was incriminating evidence the police knew about, which was not presented to the jury.

Because no objection was made at trial, we review Riddick's argument for plain error. See R. 2:10-2. Under that standard, an unchallenged error constitutes plain error if it was "clearly capable of producing an unjust result" Ibid. The possibility of an unjust result must be "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. Melvin, 65 N.J. 1, 18-19 (1974) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). To determine whether an alleged error rises to the level of plain error, it "must be evaluated 'in light of the overall strength of the State's case.'" State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)).

A police officer may provide testimony describing "what the officer did and saw," because "[t]estimony of that type includes no opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." State v. Singh, 245 N.J. 1, 15 (2021) (quoting State v. McLean, 205 N.J. 438, 460 (2011)). Importantly, first-hand knowledge may not be derived from hearsay. See State v. Branch, 182 N.J. 338, 350 (2005) (citing State v. Bankston, 63 N.J. 263, 268-69 (1973)) ("[B]oth the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged."). However, the hearsay rule is not violated,

when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so "upon information received." Such testimony has been held to be admissible to show that the officer was not acting in an arbitrary manner or to explain his subsequent conduct. However, when the officer becomes more specific by repeating what some other person told him concerning a crime by the accused the testimony violates the hearsay rule. Moreover, the admission of such testimony violates the accused's Sixth Amendment right to be confronted by witnesses against him.

[Bankston, 63 N.J. at 268-69 (citations omitted).]

"The common thread that runs through Bankston [and its progeny] is that a police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." Branch, 182 N.J. at 351. In Branch, the Court held:

[i]n contexts other than a photographic identification, the phrase "based on information received" may be used by police officers to explain their actions, but only if necessary to rebut a suggestion that they acted arbitrarily and only if the use of that phrase does not create an inference that the defendant has been implicated in a crime by some unknown person.

[Id. at 352.]

Here, Sgt. Marchak's testimony described what he did and saw, and therefore, was not improper lay witness testimony. He did not include an opinion as to Riddick's or Martin's guilt and did not convey information about what he believed, thought, or suspected. Rather, he recounted for the jury what he did as part of his investigation. While he was asked about certain individuals and whether he took statements from them, he did not provide any detail at all regarding the content of those statements and based on our review, did not imply to the jury he possessed superior knowledge outside the record that would implicate Riddick and Martin.

Riddick asserts the circumstances here were similar to the circumstances in Branch, where the Court reversed a defendant's robbery and burglary convictions, because the defendant's right to confrontation was violated by the investigating police officer's testimony he had "included defendant's picture in a photographic array because he had developed defendant as a suspect 'based on information received'" from an unspecified source. 182 N.J. at 342.

Branch is distinguishable because there "was no trial testimony or evidence" other than the victim's identification of defendant from the photo array "that could have led [police] to focus on defendant as a suspect . . . the jury was left to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime." Id. at 347-48. Here, there was a plethora of evidence that led investigators to focus on Riddick, Martin, and Williams as suspects. Moreover, unlike Branch, there was no suggestion made by Sgt. Marchak that the non-testifying individuals he or other investigators took statements from provided any evidence of Riddick's, Martin's, or Williams's guilt. Sgt. Marchak merely stated he took statements from them.

IV.

Riddick and Martin next argue the jury instruction on conspiracy-vicarious liability was incorrect. This error, they argue, was compounded by the court's response to the jury's question regarding the instruction. They argue the convictions must be reversed, and the matter remanded for retrial on that count. The court's instructions on conspiracy-vicarious liability were as follows:

So, accomplice liability and conspiracy[-]vicarious liability. They're two theories in which the State is alleging that . . . defendants[] are legally responsible for the conduct of each other. The first theory is known as . . . accomplice liability. The second theory is known as co-conspirator[-]vicarious liability.

These . . . theories are distinct, both theoretically and practically. The difference between these two theories focuses on what the defendant's state of mind must be with respect to their intent that a particular result or outcome would occur.

The State alleges that [defendants] . . . as accomplices are equally guilty of murder because it was their purpose that Hakim . . . be shot and killed

Alternatively, the State alleges that . . . defendants[] are equally guilty of murder because, under a co-conspirator liability theory, the murder of Hakim . . . was reasonably foreseeable.

. . . .

. . . I will now instruct you on co-conspirator[-]vicarious liability. The indictment charges that . . . defendants[] are legally responsible for the criminal conduct of each other in violation of the law which reads, in pertinent part, as follows:

A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person when he is engaged in a conspiracy with such other person or persons. A person is guilty of conspiracy with another person if the purpose of promoting or facilitating the commission of a crime, he:

One, agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or two, agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

An actor is criminally liable for the acts of his co-conspirator, even if he did not intend, contemplate, or anticipate those results. A person is liable for a crime committed by the conduct of a co-conspirator if the crime was closely connected with the conspiracy, it was the natural or necessary consequences of this conspiracy, was objectively foreseeable or reasonably to be anticipated from attempt to execute the conspiracy and was not committed in a manner too far removed from the objectives of the conspiracy to form a just basis for the person's criminal liability.

A defendant can be found guilty of the crime of murder even though he did not participate in the crime. Under the law, a co-conspirator is held to be the agent of the other conspirator as to acts which are

reasonably foreseeable. You must, of course, be satisfied beyond a reasonable doubt that the essential elements of the crime of murder—which you were previously instructed on—have been established.

The State alleges [defendants] are criminally liable for the crime of murder because they conspired with each other to commit that crime and that the murder of Hakim . . . was . . . reasonably foreseeable as a necessary or natural consequence of that conspiracy.

. . . The State alleges that . . . Martin is guilty of murder as the principal. That is, that he shot and killed Hakim

In addition, the State alleges that . . . Riddick is equally guilty of murder as the agent. That is that, even if . . . Martin shot and killed Hakim . . . , that conduct was the natural and reasonably foreseeable consequence of the conspiracy.

So, to find that . . . Martin engaged in a conspiracy with . . . Riddick, you must be satisfied beyond a reasonable doubt the following elements. One, that . . . Martin agreed to engage in conduct which constitutes the crime of murder or an attempt of solicitation to commit such crime; and, two, that when . . . Martin so agreed with . . . Riddick, . . . Martin's purpose—i.e. his conscious object was to promote or to make it easier for . . . Riddick to commit the crime of murder.

If, after all consideration of all the evidence, you're convinced beyond a reasonable doubt that the State has proven each and every one of the elements, then you must find . . . Riddick guilty of the crime of

murder under the theory of co-conspirator[-]vicarious liability.

If, however, after consideration of all of the evidence, you find that the State has failed to prove any element of the offense beyond a reasonable doubt, then you must find . . . Riddick not guilty of murder under the theory of co-conspirator[-]vicarious liability.

Alternatively, you may find that . . . Riddick is guilty of murder as the principal. That is, that he shot and killed Hakim. You may then find that . . . Martin is equally guilty of murder as the agent. That is that, even if . . . Riddick shot and killed Hakim . . ., that the conduct was the natural and foreseeable consequence of the conspiracy.

The judge then repeated the same instructions in discussing Martin as the principal.

During deliberations, jurors sent the following question: "Judge . . . , if the jury finds that . . . defendants co-conspired, does that mean that the jury has to find . . . defendants guilty of murder?"

After the parties went to sidebar to discuss the matter further, the court explained the jurors were given indictments, which contained the charges against the defendants, and that each charge had specific elements the jurors must find the State proved beyond a reasonable doubt. It said:

My function is to make sure you are not confused.

. . . .

. . . [A]t the end of the day, the question is you're asking a question about does that mean that the jury has to find the defendant guilty of murder? Well, then you have to look at the charge on murder.

And there are theories of responsibility for a murder. So you'll see that on page [eighteen], you'll have the elements of murder. On page [twenty-one], the theories of being responsible for murder as an accomplice. And then, on page [twenty-seven], you'll have another theory of responsibility for murder, as vicariously liable . . . for the murder.

. . . .

. . . And then you have to make a decision whether the elements have been met. If you find that the State has proven each and every element, then you find the defendant guilty. . . . [I]f the State has failed to prove any of the elements beyond a reasonable doubt, the defendant has to be found not guilty. Right?

So the definitions are right there on whether a person is guilty or not guilty of murder and you'll find them between pages [eighteen] and [thirty-eight]. Twenty pages of legal instruction on how a person could be or could not be guilty of murder.

Got me? . . . I see everyone shaking their heads in the affirmative.

The judge asked defendants' counsel if they had any objections to his explanation; they did not.

Riddick asserts "[t]here are two kinds of vicarious co[-]conspiratorial liability for substantive crimes." The first, he claims, "covers liability for a substantive offense for anyone who conspired to commit that same exact offense" The second theory holds "a defendant who conspires to commit one offense may be convicted of another, different substantive offense . . . if that different substantive offense is nevertheless the 'necessary or natural consequence' of the conspiracy." Riddick argues the second "had nothing to do with the instant case[.]" and yet, was "exactly what the court chose to instruct the jury."

"Appropriate and proper charges to a jury are essential for a fair trial" State v. Carrero, 229 N.J. 118, 127 (2017) (quoting State v. Daniels, 224 N.J. 168, 180 (2016)). "[A] mandatory duty exists on the part of the trial judge to instruct the jury as to the fundamental principles of law which control the case." State v. Butler, 27 N.J. 560, 595 (1958).

Because Riddick did not object to the charge that was given at trial, his argument on appeal is reviewed for plain error. R. 2:10-2.

In the context of a jury charge, 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. Adams, 194 N.J. 186, 207 (2008) (alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

Here, the court did charge the jury that "[a]n actor is criminally liable for the acts of his co-conspirator, even if he did not intend, contemplate, or anticipate those results." While this language is not included in the model criminal charge for "Conspiracy-Vicarious Liability," the charge does provide: "A person is legally accountable for the conduct of another person when (he/she) is engaged in a conspiracy with such other person and the conduct is within the scope of the conspiracy." Model Jury Charges (Criminal), "Conspiracy-Vicarious Liability (N.J.S.A. 2C:2-6(b)(4))" (approved Oct. 17, 1988) (footnotes omitted). The record is unclear why the court chose to charge the jury in the language it did.

However, we conclude the language used was not so prejudicially confusing it could have led the jury to a verdict it otherwise might not have reached. Throughout the trial, the State's theory of the case was Riddick and Martin conspired to kill Hakim. The State did not suggest Riddick and Martin conspired for some other purpose. Indeed, prior to giving the "Conspiracy-Vicarious Liability" charge, the court charged the jury on "conspiracy to

commit the crime of murder." Thus, despite the court's language in the "Conspiracy-Vicarious Liability" charge suggesting other possible objectives of the conspiracy, the jury understood there was only one objective alleged—murder.

Moreover, the court did instruct the jury as to the elements—that is: (1) the defendant agreed to engage in conduct, which constituted the crime of murder or an attempt or solicitation to commit murder; and (2) when the defendant so agreed, his purpose was to promote or to make it easier for the other defendant to commit murder.

Riddick further maintains the court compounded the error in its charge by failing to appropriately address the jury's question, which asked whether it necessarily had to find Riddick and Martin were guilty of murder if it found Riddick and Martin were guilty of conspiring to commit murder. In a similar vein, Martin argues he was entitled to a new trial because of the court's failure to appropriately answer the jury's question.

"[W]hen a jury requests a clarification,' the trial court 'is obligated to clear the confusion.'" State v. Savage, 172 N.J. 374, 394 (2002) (alteration in original) (quoting State v. Conway, 193 N.J. Super. 133, 157 (App. Div.), certif. denied, 97 N.J. 650 (1984)). "[T]he trial judge is obliged to answer jury

questions posed during the course of deliberations clearly and accurately and in a manner designed to clear its confusion, which ordinarily requires explanation beyond rereading the original charge. The court's failure to do so may require reversal." Pressler & Verniero, Current N.J. Court Rules, cmt. 7 on R. 1:8-7 (2023). But see State v. Scher, 278 N.J. Super. 249, 271 (App. Div. 1994) (finding no plain error in judge's responding by repeating the original instructions).

Essentially, the jury asked how it was to find either one or both defendants guilty of murder. In response, the court correctly told them to reread the original charge, specifically highlighting for the jury the elements of murder and the theories of accomplice liability and conspiracy-vicarious liability. At the end of the court's explanation, the jury indicated it understood what it had been told and had no further questions. There was also no objection from either defense counsel or the State. The court fulfilled its obligation of answering the jury accurately and in a manner designed to clear its confusion. Thus, there was no reversible error.

V.

Riddick argues the jury instruction on conspiracy to murder allowed the jury to convict for levels of criminal intent that fall short of what is necessary

to convict for conspiracy to murder. Riddick did not object to the conspiracy charge that was given at trial, and again, his argument on appeal is reviewed for plain error. R. 2:10-2.

Here, the court instructed the jury on conspiracy to commit murder in accordance with the model jury charge. Model Jury Charges (Criminal), "Conspiracy (N.J.S.A. 2C:5-2)" (rev. Apr. 12, 2010).

Riddick argues the instruction that was given allowed the jury to convict based on states of mind other than purposeful. But as shown in the record, the court's instruction clearly provided that in order to find the defendants guilty of conspiracy to commit murder, two elements needed to be proven beyond a reasonable doubt. First, the defendant agreed with another person or persons "that they or one or more of them [would] engage in conduct which constitutes [a] crime or an attempt or solicitation to commit such crime"; and second, defendant's purpose was to promote or facilitate the commission of the crime of murder. N.J.S.A. 2C:5-2.

As the court made clear in its instructions, conspiracy to commit murder and murder are two separate charges, and consequently, must be considered separately. While it is true a person can be found guilty of murder whether they acted purposely or knowingly, the charge of murder is distinct from the

charge of conspiracy to commit murder, which the court correctly instructed requires purpose to promote or facilitate a crime, in this case, murder.

Riddick cites to a number of cases he claims stand for the proposition that "[a] conspiracy to murder is an agreement only to purposely kill." We disagree with that interpretation. See, e.g., State v. Abrams, 256 N.J. Super. 390, 401 (App. Div. 1992) (quoting State v. Carbone, 10 N.J. 329, 336-37 (1952)) ("The offense depends on the unlawful agreement and not on the act which follows it; the latter is not evidence of the former."); State v. Fornino, 223 N.J. Super. 531, 536 (App. Div. 1988) (finding ample evidence of "plan" sufficient to support a finding of guilt of conspiracy to commit murder); State v. Madden, 61 N.J. 377, 394-95 (1972) (finding that conspiracy charge inappropriate because there was no evidence of an "agreement" to kill).

Riddick maintains "conspiracy to commit murder" and "attempted murder" are alike and points out that "improperly failing to confine the crime of attempted murder to purposeful attempts to kill was the cause of reversals and remands" in several cases. But a charge for attempt is not the same as a charge for conspiracy, and thus, the cases cited by Riddick are inapplicable. While both offenses charge a purposeful state of mind, the acts involved are different. As far as attempt is concerned,

a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (1) [p]urposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be; (2) [w]hen causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part; or (3) [p]urposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

[N.J.S.A. 2C:5-1(a).]

The statute for conspiracy, on the other hand, provides:

[a] person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (1) [a]grees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) [a]grees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

[N.J.S.A. 2C:5-2.]

In sum, the purposeful nature of the offense of conspiracy applies to the agreement itself, and not to the underlying offense.

When the State prosecutes a defendant for conspiracy to commit a first[-] or second[-]degree crime, it need

not prove that a defendant committed an overt act in pursuance of the conspiracy. N.J.S.A. 2C:5-2[(d)]. Therefore, because defendants were convicted of conspiracy to commit first[-] and second[-]degree crimes, the sufficiency of the evidence as to the commission of an overt act is not at issue. Ibid. The only question is whether a reasonable jury, viewing the State's evidence in its most favorable light, could find beyond a reasonable doubt that defendants, acting with a purposeful state of mind, agreed to commit, attempted to commit, or aided in the commission of [a crime]. Reyes, 50 N.J. at 459.

[State v. Scherzer, 301 N.J. Super. 363, 401 (App. Div. 1997).]

Thus, contrary to Riddick's argument, there is no "clear limitation that a conspiracy to murder is only an agreement to purposely kill. . . ." The underlying crime—in this case, murder—does not have to be purposeful for the agreement to be purposeful. See State v. Lavary, 152 N.J. Super. 413, 418 (Law Div. 1977), rev'd, 163 N.J. Super. 576 (App. Div. 1978) ("A conspiracy is not the commission of the crime which it contemplates, and the conspiracy neither violates nor 'arises under' the statute whose violation is its object."). Consequently, there was no error in the court's instructions.

VI.

Martin argues the court erred in denying his pretrial motion to dismiss the indictment because the grand jury was irreparably tainted by the

prosecutor's repeated references to gangs when there was no such evidence Hakim's murder was gang related. We discern no abuse of discretion in the court's decision to deny Martin's motion.

At the grand jury hearing, the jurors heard testimony from Sgt. Marchak regarding his investigation of Hakim's death. Sgt. Marchak testified regarding his examination of Hakim's cell phone, and how he learned Hakim's last contact was with a cell number ending in 6106, which was listed in his phone with the word "Crip." Sgt. Marchak explained he "took the word Crip as whoever he was talking to on the other end of that line . . . was a member of the Crips[,] . . . a criminal street gang" Sgt. Marchak testified he was able to trace the number back to a subscriber named "Maniac Hoover," who they later successfully identified as Martin. Marchak also testified they located Martin's Facebook account, which had the nickname "Maniac" attached to it and had references to membership in the Crips. Sgt. Marchak further told jurors they located a woman who indicated she was in a relationship with Martin, and who "also . . . believed Ray and Maniac were both Crips out of Newark."

Sgt. Marchak also testified regarding the statement Martin gave investigators in Philadelphia the incident with Hakim started with "Ray's beef

. . . ." Martin and the investigators discussed "the code of how the Crips street gang would operate" and the phrase "putting in work[,]" which meant "doing something on behalf of another." Marchak testified Martin told them "he was the one to have put in work for . . . his friend, Rayshawn."

Following Sgt. Marchak's testimony, the prosecutor instructed the grand jury on the law and specifically said:

You can't say well if he is in fact a gang member, he must be bad and he must have done this. You cannot in anyway let that enter into your mind.

The way you can use it appropriately in this case, is to understand why and if you believe that the name the Crip was associated with Michael Martin, why it was that way. And why some of the things played out the way they did.

But, you cannot use it to assume any predisposition to commit crime or to consider it for propensity for any matter.

The grand jury returned a true bill on the counts presented for Martin.

Martin moved to dismiss the indictment, asserting the testimony relating to gangs should have been "kept out" of the grand jury presentation. The court denied the motion, finding the State presented sufficient evidence to sustain the charge and an adequate limiting instruction was given regarding the gang evidence. Nonetheless, the court ruled, and the State agreed, no gang evidence

would be permitted during trial, including testimony as to Martin's nickname, "Maniac." Based on this ruling, Martin's statement was redacted accordingly. During Martin and Riddick's joint trial, the jury heard no evidence regarding gangs, and Martin's nickname was not permitted to be used.

"A trial court's denial of a motion to dismiss an indictment is reviewed for abuse of discretion." State v. Bell, 241 N.J. 552, 561 (2020) (quoting State v. Twiggs, 233 N.J. 513, 544 (2018)). An abuse of discretion is found only where "a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Here, Martin did not present any valid grounds supporting dismissal of his indictment. Sgt. Marchak properly testified regarding the steps he took during his investigation, and how the information he learned led him to Martin and Riddick. Martin and Riddick's gang affiliation was discussed because it was relevant to their identification as suspects and because it helped explain why Martin would get involved with "Ray's beef" The defendants' gang affiliation was not introduced for propensity purposes. In any event, because

the grand jury's "power of inquiry is not bound by the rules of evidence[,]" State v. Hogan, 336 N.J. Super. 319, 338 (App. Div. 2001), it is of no moment whether Sgt. Marchak's testimony included hearsay or evidence of prior bad acts. The State nonetheless gave an appropriate limiting instruction to the jury following Marchak's testimony, explaining it could not consider evidence, such as Martin and Riddick's gang affiliation, for propensity purposes.

Importantly, even if Sgt. Marchak's testimony regarding Martin's and Riddick's gang affiliation was improper, dismissal of the indictment would still have not been warranted because there was enough evidence for the grand jury to find probable cause that Martin and Riddick committed the crimes charged. State v. Hogan, 144 N.J. 216, 227 (1996). The standard is whether the grand jury would have reached a different result "but for" the erroneous evidence. State v. Triestman, 416 N.J. Super. 195, 202 (App. Div. 2010). Here, there was enough evidence presented despite Marchak's gang-related testimony—notably the cell phone evidence and the evidence related to the vehicle captured on surveillance footage. The court thus properly exercised its discretion in denying Martin's motion to dismiss the indictment.

VII.

Martin argues the court wrongfully denied his motion for a new trial. He posits despite the trial court's good faith attempt to protect both defendants from undue prejudice, his ability to cross-examine witnesses was unduly hampered in a joint trial. Specifically, Martin points out in her statement to police, Williams said that Riddick told her the gun that was used to kill Hakim was not Martin's but belonged to a friend of Riddick's named "Chi-Chi." Martin, however, was not permitted to "explore" that statement with Williams while she was on the stand. Martin maintains if his and Riddick's trials had been severed, he would have been permitted to cross-examine Williams on that issue.

A trial judge may grant a defendant a new trial "if required in the interest of justice." R. 3:20-1. A motion for a new trial is subject to the trial judge's discretion and a reviewing court should not reverse unless such discretion was abused. State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016). The motion is considered "in light of the credible evidence and with deference to the trial judge's feel for the case and observation of witnesses." State v. Terrell, 452 N.J. Super. 226, 268-69 (App. Div. 2016) (citing State v. Brooks, 366 N.J. Super. 447, 454 (App. Div. 2004)). "The jury verdict will be

upheld where there is sufficient evidence to support the conviction on [the] charge." Id. at 269 (citing State v. Muhammad, 182 N.J. 551, 578 (2005)).

We reject that argument because regardless of whether the defendants' trials were separated, Martin's counsel still would not have been permitted to cross-examine Williams about the gun because she had no personal knowledge of the matter. The record further shows Martin's counsel conducted an otherwise extensive cross-examination of Williams, which sought to attack her version of events and her credibility. In short, Martin has not shown any prejudice by the joining of his trial with Riddick's or by the court's decision to prohibit his counsel from questioning Williams about the gun, especially considering he was acquitted of the weapons charges.

VIII.

Martin argues his sentence was excessive, and the conspiracy conviction should have been merged with the murder conviction. He seeks remand for resentencing. The State argues for a limited remand only "to correct the period of parole ineligibility" and "to reflect that count one [conspiracy] merges with count two [murder]."

Prior to Martin's sentencing, the State moved for a mandatory extended term for repeat violent offenders, pursuant to N.J.S.A. 2C:43-7.1(b) and

2C:43-7. Finding the prerequisites for the extended term existed, the court granted the State's request.

Consequently, on the charge of conspiracy to commit murder, the court sentenced Martin to a forty-year term of imprisonment, of which he was to serve a minimum of eighty-five percent. On the murder charge, the court gave the same sentence, to run concurrently. The court found aggravating factors N.J.S.A. 2C:44-1(a)(1) and (3) were applicable. It also found aggravating factors N.J.S.A. 2C:44-1(a)(5), (6), and (9) appropriate, but gave those factors little weight. Finally, the court found mitigating factor N.J.S.A. 2C:44-1(b)(11) applied as well.

Specifically, as to aggravating factor one—which is "[t]he nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner[,]" N.J.S.A. 2C:44-1(a)(1)—the court said:

Aggravating factor [one] is appropriate in this case. Why? Because I could only imagine the look on Hakim Williams's face [L]et me just get this off my chest too.

I think the jurors read through this one thing that I don't think some of them could live with, that. . . . Martin[] said that he was going to front Hakim . . . some drugs and there were thousands of dollars worth of drugs, and I couldn't figure out who . . . is going to

front somebody thousands of dollars worth of drugs and only met them one day before that event? It just [doesn't] make . . . sense. . . . I think that's what the jury had that in their head all along, that how could that happen? So Hakim was duped into coming down, which led to his death.

Then, as to aggravating factor five, the court said:

[Five], I gave . . . very little weight because at no time did I think this was a Blood or a Crip or any kind of thing like that. It wasn't. . . .

The judge then recounted how the evidence showed the crimes were actually about the incident involving Williams.

On appeal, Martin takes issue with the court's finding that aggravating factor one applied. Martin claims the court "made no finding that the crime was committed in an especially heinous, cruel, or depraved manner[,]" and thus, its reliance on this factor was inappropriate. Martin also argues it was inappropriate for the court to find aggravating factor five applied. He claims "the record is barren of any such reference" to gang activity. Moreover, Martin argues "the court did not conduct a balancing of the factors[,]" and as a result, "failed to explain its reasons for imposing" the forty-year sentences.

We review sentencing determinations under a deferential standard. State v. Grate, 220 N.J. 317, 337 (2015). A trial court's sentence is upheld "unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating

factors found . . . were not based upon competent and credible evidence in the record; or (3) 'the application of the guidelines to the facts . . . makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Fuentes, 217 N.J. 57, 70 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Here, while some of the factors found were based on competent and credible evidence in the record, aggravating factor one was not. We note that courts applying this factor "focus on the gravity of the defendant's conduct, considering both its impact on its immediate victim and the overall circumstances surrounding the criminal event." State v. Lawless, 214 N.J. 594, 609-10 (2013). "[A]n application of [this factor] must be premised upon factors independent of the elements of the crime and firmly grounded in the record." Fuentes, 217 N.J. at 63. While the court here based its application of aggravating factor one on facts "firmly grounded in the record"—namely, the fact Hakim trusted Martin, who lured him to his death—this conduct does not rise to the level of "heinous, cruel, or depraved" required for a such an application. Heinous and depraved acts are those committed with "extreme brutality." State v. Francisco, 471 N.J. Super. 386, 427 (App. Div. 2022) (citing Fuentes, 217 N.J. at 75).

Additionally, "[i]n order to find that an offense was committed in a 'cruel' manner under the statute, there must be evidence defendant inflicted pain or suffering gratuitously and beyond that which was required to establish the elements of the crime charged." State v. A.T.C., 454 N.J. Super. 235, 255-56 (App. Div. 2018) (citing State v. O'Donnell, 117 N.J. 210, 217-18 (1989)). Courts have applied this factor in cases charging defendants with "a long course of sadistic, violent [child] abuse" or the painful deaths of children, State v. T.C., 347 N.J. Super. 219, 224, 244 (App. Div. 2002), certif. denied, 177 N.J. 222 (2003); State v. Lewis, 223 N.J. Super. 145, 148 (App. Div.), certif. denied, 111 N.J. 584 (1988); where a defendant placed a victim in a hostage situation, State v. Frost, 242 N.J. Super. 601, 621-22 (App. Div.), certif. denied, 127 N.J. 321 (1990); and where a defendant "inflicted numerous wounds on the victim, chased the victim when he tried to escape, and fatally struck him in the head with such force that the hammer penetrated his skull[,]" Francisco, 471 N.J. Super. at 427.

Next, as to aggravating factor five, contrary to Martin's arguments, there was evidence in the record to support a finding "[t]here [was] a substantial likelihood that [Martin was] involved in organized criminal activity." N.J.S.A. 2C:44-1(a)(5). Martin admitted to his gang affiliation in his presentence

report. He also spoke about his gang affiliation in his statement to investigators at the time of his arrest. Although evidence of Martin's gang involvement was not introduced at trial, that is of no moment. To be used as an aggravating factor in sentencing, involvement in organized crime need not be related to the crime for which the defendant is tried. See State v. Merlino, 208 N.J. Super. 247, 257 (Law Div. 1984) (holding that the aggravating circumstance applies to the offender and not the offense).

Finally, the record shows the court conducted an appropriate weighing and balancing of aggravating and mitigating factors. The court gave at least some weight to five aggravating factors and some weight to one mitigating factor.

As for the period of parole ineligibility imposed, the State maintains the court's imposition of an eighty-five percent period was "illegal," as N.J.S.A. 2C:43-7(a)(6) requires a "[thirty-five]-year parole bar. . . ."

N.J.S.A. 2C:43-7(a)(6) provides: "In the case of the crime of murder, for a specific term of years which shall be fixed by the court between [thirty-five] years and life imprisonment, of which the defendant shall serve [thirty-five] years before being eligible for parole" Here, the court imposed a forty-year term of imprisonment, of which Martin was to serve a minimum of

eighty-five percent, or thirty-four years. That period of parole ineligibility was illegal as it was contrary to the minimum required by N.J.S.A. 2C:3-7(a)(6).

While the State did not file a cross-appeal, pursuant to Rule 3:21-10(a) and (b) we may correct an illegal sentence "on [our] own initiative . . . at any time" Therefore, Martin's sentence is remanded for purposes of merging the conspiracy count with the murder count, but also for the purpose of increasing his period of parole ineligibility to thirty-five years in accordance with the criminal code. A court may correct an illegal sentence at any time "even though the imposition of a lawful term involves an increase in a defendant's aggregate sentence." State v. Schubert, 212 N.J. 295, 309 (2012) (citing State v. Baker, 270 N.J. Super. 55, 76 (App. Div.), aff'd o.b., 138 N.J. 89 (1994)).

We note Riddick's sentence to a forty-year term of imprisonment, with an eighty-five percent period of parole ineligibility is illegal as well. We remand Riddick's sentence in addition to Martin's sentence for purposes of increasing Riddick's period of parole ineligibility from eighty-five percent to thirty-five years in accordance with the criminal code.

Affirmed as to the convictions in A-1023-19 and A-1292-19 and remanded for resentencing in both matters consistent with this opinion. 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