SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2550-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT J. GARDNER, a/k/a
ROBERT J. GARDNER, JR.,

Defendant-Appellant.

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Submitted November 16, 2022 – Decided January 27, 2023

Before Judges Accurso, Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment Nos. 17-11-0922 and 18-09-0761.

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

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for respondent (Jonathan I. Amira, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

On the evening of September 6, 2017, after admittedly smoking phencyclidine (PCP), defendant caused two separate motor vehicle crashes, one of which was fatal, resulting in an indictment charging him with first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(l) (count one); second-degree vehicular homicide, N.J.S.A. 2C:11-5(a) (count two); third-degree causing a death while operating a motor vehicle with a suspended license, N.J.S.A. 2C:40-22(a) (count three); fourth-degree operating a motor vehicle during a period of license suspension, N.J.S.A. 2C:40-26(b) (count four); and fourth-degree assault by auto, N.J.S.A. 2C:12-l(c)(2) (count five). In a separate indictment, defendant was also charged with third-degree unlawful possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1).

A jury acquitted defendant of aggravated manslaughter but convicted him on all the remaining charges, as well as the lesser included offense of reckless manslaughter, N.J.S.A. 2C:11-4(b)(1) (amended count one). The court sentenced defendant to an aggregate thirteen-year term of incarceration.

Defendant appeals his convictions and raises the following arguments:

POINT I

THE PROSECUTOR'S SUMMATION IMPERMISSIBLY COMMENTED ON THE DEFENDANT'S CHOICE NOT TO TESTIFY, SHIFTED THE BURDEN OF PROOF TO THE DEFENSE, AND DENIGRATED THE DEFENSE. THESE ARGUMENTS DENIED DEFENDANT HIS RIGHT TO A FAIR TRIAL AND REQUIRE REVERSAL OF HIS CONVICTION.

A. The Prosecutor's Argument in Summation, Which Implied That the Defendant's Version of Events Should Be Disregarded Because He Did Not Testify Was Misconduct.

B. The State Engaged in Prosecutorial Misconduct by Impermissibly Shifting The Burden of Proof to the Defense.

C. The State Unfairly Denigrated the Defense.

D. These Improper Arguments, Both Individually and Together, Deprived the Defendant of a Fair Trial and Necessitate Reversal of His Conviction.

POINT II

THE RECKLESS MANSLAUGHTER INSTRUCTION DID NOT SUFFICIENTLY DISTINGUISH THE QUALITATIVE DIFFERENCE BETWEEN THE RECKLESSNESS REQUIRED FOR MANSLAUGHTER AND THAT REQUIRED FOR DEATH BY AUTO. (Not Raised Below).

Defendant also argues the following points challenging his convictions in his pro se brief:

[PRO SE POINT I]

THE TRIAL COURT ERRED BY NOT ADMITTING A DURESS CHARGE IN THE JURY INSTRUCTIONS.

[PRO SE POINT II]

DEFENDANT SHOULD BE ACQUITTED OF RECKLESS MANSLAUGHTER AND VEHICULAR HOMICIDE BECAUSE THE PROSECUTION NEVER DISPROVED THE AFFIRMATIVE DEFENSE OF DURESS BEYOND A REASONABLE DOUBT.

Finally, defendant raises the following points with respect to his sentence:[1]

POINT III

[DEFENDANT'S] THIRTEEN-YEAR SENTENCE MUST BE VACATED AND THE MATTER REMANDED BECAUSE THE COURT FAILED TO APPLY THE YARBOUGH GUIDELINES.

[PRO SE POINT III]

[DEFENDANT'S] [THIRTEEN]-YEAR SENTENCE FOR RECKLESS MANSLAUGHTER, VEHICULAR HOMIC[I]DE, POSSESSION OF CDS AND ASSAULT BY AUTO IS EXCESSIVE AND MUST BE REDUCED.

[1] We have rearranged defendant's point headings to reflect the order in which we address his arguments in this opinion.

We have considered defendant's contentions in light of the record and the applicable law. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I.

The events of September 6, 2017, were described in detail at trial. At approximately 9:00 p.m., witnesses saw defendant driving his Ford F-150 pickup truck in Washington Township on Route 42, a four-lane highway with two southbound and two northbound lanes, separated by a grass median, and a posted speed limit of fifty miles per hour. Several witnesses observed defendant driving on the shoulder of Route 42 and swerving on and off the road. Defendant then rear-ended Tracey Chavez's vehicle, which was stopped at a red light, pushing the car into the middle of the intersection. Chavez sustained minor injuries.

Defendant sped away from the crash and continued to drive erratically, at which point, Richard McElroy, who was driving a red Jeep Liberty, followed defendant while speaking with a police dispatcher. Defendant then "ran off the road into [a] Popeyes parking lot," where he stopped for only a few seconds before resuming at high speed down Route 42. McElroy continued to follow

defendant but could not maintain defendant's speed, which several witnesses testified was upwards of 100 miles per hour.

Defendant then ran several red lights before he lost control of his car, crossed over the median, and struck a second vehicle, which was operated by Cathleen LaBance. Witnesses testified that when they approached the scene of the accident LaBance was unconscious in her vehicle and defendant was conscious but lethargic and glassy-eyed. Defendant admitted to a Washington Township Emergency Medicine Technician at the scene that he had smoked PCP "some time prior [to] the accident." A toxicologist at Jefferson Hospital confirmed the presence of PCP in defendant's blood, and Washington Police discovered a substance which they suspected to be PCP in defendant's vehicle. LaBance died as a result of the accident.

At trial, defendant argued his erratic driving was not the result of his alleged intoxication, but rather his response to having been chased by McElroy, who he described as a "vigilante." According to defendant, "[h]e was being followed[] [and] chased[] at high speeds." During summation, defense counsel criticized the State for strategically ignoring the fact McElroy was following defendant. Defense counsel specifically stated:

> Now, they may say well based upon how he was driving, and he was driving reckless, and he had PCP in

> his system. But why do they ignore that somebody was chasing him? Why are they ignoring that? It's the strangest thing. And the witnesses that were prepped, they all were trying to talk around it.

During the State's summation, the prosecutor made the following comments in response to defendant's theory of the case:

> So this McElroy connection is nothing but a red herring. It is nothing but shift the blame because we know from other evidence in the case that their theory doesn't hold water. I mentioned Bruce Stewart. He said that [McElroy's] red truck was closer to him than it was to the F-150. And you have no evidence from the case at all, no evidence from the case, about the defendant's state of mind about this truck. You don't even have testimony in the case that he saw this truck. It's all based on the defense attorney's – the defense attorney's questions, which are not evidence. They're not evidence at all. My questions aren't evidence. Our arguments aren't evidence.
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> Nobody testified here that . . . defendant was fearful and running from a pursuer. There was no evidence presented that . . . defendant was fearful and running from a pursuer. Nothing. It's all [defense counsel]'s summation and [defense counsel]'s questions and [defense counsel]'s assumptions. I think he used that in his summation, that slide, assumptions that weren't laced into those questions. But you have no evidence at all that that's what occurred. None. That's what's called speculation.
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> . . .
>
> No testimony of what fear he was feeling. No evidence of what fear he was feeling. No evidence of anything

> that he was feeling. All in [defense counsel]'s summation, all in his questioning, but not from this witness stand and not the evidence that you're going to deliberate on.
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> [(emphasis added).]

After the prosecutor's closing remarks, defense counsel objected, contending he improperly suggested to the jurors defendant had to testify as to his mental state. The court overruled the objection and declined to provide a curative instruction to complement its existing instruction on burden of proof. The court reasoned defense counsel "opened the door" to the prosecutor's comments and noted the comments were based on "the truth," as defendant "could [have] presented other witnesses who may have testified to [defendant's] state of mind," but opted not to.

The court also explained it had earlier instructed the jury defendant was under no obligation to testify or present any evidence, and that he was entitled to a presumption of innocence. Additionally, as part of its final instructions, the court explained:

> It is [defendant's] constitutional right to remain silent. You must not consider for any purpose or in any manner in arriving at your verdict the fact that [defendant] did not testify. That fact should not enter into your deliberations or discussions in any manner, at any time. [Defendant] is entitled to have the jury consider all

> evidence presented at trial. He is presumed innocent whether or not he chooses to testify.

The court instructed the jury on the offenses of aggravated manslaughter, reckless manslaughter as a lesser included offense, vehicular homicide, causing death while operating a motor vehicle with a revoked or suspended license, assault by automobile, and unlawful possession of a CDS.

In defining the elements of aggravated manslaughter, the court provided the following instruction on recklessness, consistent with Model Jury Charges (Criminal), "Murder and Aggravated/Reckless Manslaughter" (rev. June 13, 2011):

> A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that bodily injury will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the defendant's conduct and the circumstances known to him, disregard of the risk involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation. In other words, you must find that the defendant was aware of and consciously disregarded the risk of causing death.
>
> If you find that the defendant was aware of and disregarded the risk of causing death, you must determine whether the risk that he disregarded was substantial and unjustifiable. In doing so, you must consider the nature and purpose of the defendant's conduct, and the circumstances known to the defendant, and you must determine whether, in light of those

> factors, defendant's disregard of that risk was a gross deviation from the conduct a reasonable person would have observed in the defendant's situation.

The court also included the following language from Model Jury Charges (Criminal), "Reckless Vehicular Homicide (Reckless with Driving While Intoxicated or Refusal to Submit to a Breathalyzer Test)" (rev. Apr. 20, 2020):

> Recklessness is a condition of the mind that cannot be seen and that can often be determined only from inferences from conduct, words, or acts. It is not necessary for the State to produce a witness to testify that the defendant stated he acted with a particular state of mind. It is within your power to find that proof of recklessness has been furnished beyond a reasonable doubt by inferences that may arise from the nature of the acts and circumstances surrounding the conduct in question.

In defining recklessness as an element of reckless manslaughter and vehicular homicide, the court stated it had "previously defined recklessly for you," referring to its instruction with respect to aggravated manslaughter, and did not provide any additional instructions. As noted, the jury convicted defendant of both reckless manslaughter and vehicular homicide, among other charges.

On December 6, 2019, the court sentenced defendant to an aggregate thirteen-year term of incarceration. Specifically, the court sentenced defendant to a nine-year term for reckless manslaughter, which the court merged with his

convictions for vehicular homicide, causing a death while operating a motor vehicle with a suspended license, and operating a motor vehicle during a license suspension. The court also imposed a one-year term for assault by automobile and a three-year term for possession of a CDS, both to run consecutively to the nine-year sentence. This appeal followed.

II.

In his first point, defendant argues the State denied his right to a fair trial because, in summation, the prosecutor: (1) "inappropriately commented on [defendant]'s right to remain silent"; (2) "shifted the burden of proof to the defense"; and (3) "denigrated the defense by telling the jury . . . the defense strategy was a 'red herring' and insisting . . . it was complete speculation." Defendant further contends "these improper remarks, individually and together, deprived him of a fair trial and necessitate reversal of his conviction." We disagree.

A.

Relying on State v. Irizarry, 270 N.J. Super. 669, 675 (App. Div. 1994), defendant argues the prosecutor improperly commented on his right to remain silent by referring to the absence of evidence that could only have been provided by defendant's testimony. In that case, we held the prosecutor improperly

referred in its summation to the absence of testimony that could only have been provided by the defendant and, thus, "with no acceptable excuse for doing so, the assistant prosecutor unfairly urged the jury to disregard a proper defense argument because defendant did not testify to support it." According to defendant, "as in Irizarry, the prosecutor's comments 'could be referring only to the absence of testimony by defendant' as to whether or not he saw the car, whether or not he was afraid, and to what degree," and defendant was "the only person who could testify about what was going on in his head at that time."

Defendant also identifies the following statements made during the State's summation as negatively commenting on his decision not to testify: (1) "And you have no evidence from the case at all, no evidence from the case, about the defendant's state of mind about this truck. You don't even have testimony in the case that he saw the truck."; (2) "Nobody testified here that the defendant was fearful and running from a pursuer. There was no evidence presented that the defendant was fearful and running from a pursuer. Nothing."; and (3) "The defendant was fearful, he's young, he was running. No testimony of what fear he was feeling. No evidence of what fear he was feeling . . . not from this witness stand and not [from] the evidence that you're going to deliberate on."

In an overlapping argument, defendant contends the prosecutor impermissibly shifted the burden to defendant to prove his own mental state. On this point, in addition to the comments cited above, defendant relies on the following statement made by the prosecutor during his summation:

> [Defense counsel] said in his summation the State has to . . . prove what's going on in [defendant]'s head. We don't. We can prove that element by his conduct and his conduct alone . . . . The State does not have to get inside, and indeed declined the invitation, to get inside . . . defendant's head of how he makes decisions.

"When an appellate court reviews a claim of prosecutorial misconduct with respect to remarks in summation, the issue presented is one of law." State v. Smith, 212 N.J. 365, 387 (2012). As such, we review defendant's arguments de novo. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"[P]rosecutorial misconduct is not grounds for reversal . . . unless the conduct was so egregious as to deprive defendant of a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999). A conviction will not be reversed based on the prosecutor's unfair comment unless it is "clearly and unmistakably improper" and "substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. McGuire, 419 N.J. Super. 88, 150 (App. Div. 2011) (quoting Timmendequas, 161 N.J. at 575). We review

questions of prosecutorial misconduct by evaluating "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Frost, 158 N.J. 76, 83 (1999).

We have previously held "it is improper for a prosecutor to remark that the defense has offered 'no explanation,'" or "that the State's evidence was 'uncontradicted.'" State v. Engel, 249 N.J. Super. 336, 381 (App. Div. 1991) (citations omitted). Additionally, the prosecutor "should not in either obvious or subtle fashion draw attention to a defendant's decision not to testify." State v. Cooke, 345 N.J. Super. 480, 486 (App. Div. 2001) (citing Engel, 249 N.J. Super. at 382). "When a prosecutor's comments indicate or imply a failure by the defense to present testimony, the facts and circumstances must be closely scrutinized to determine whether the defendant's Fifth Amendment privilege to remain silent has been violated and his right to a fair trial compromised." Ibid. Indeed, the prosecutor's alleged misconduct "must be viewed in the context of a protracted trial." Engel, 249 N.J. Super. at 382.

Furthermore, "[t]he State is not permitted to use omitted details or other indicia of the right to remain silent[] to shift the burden of proof to the defendant."

State v. Elkwisni, 384 N.J. Super. 351, 370 (App. Div. 2006). Although the State is permitted to present its case vigorously and forcefully, State v. Lazo, 209 N.J. 9, 29 (2012), it may not, through closing remarks or otherwise, shift the burden of proof to the defense, State v. Loftin, 146 N.J. 295, 389 (1996). It is clearly improper to imply a defendant must demonstrate innocence by producing exculpatory evidence. State v. Black, 380 N.J. Super. 581, 594 (App. Div. 2005); State v. Jones, 364 N.J. Super. 376, 382 (App. Div. 2003).

On the other hand, the prosecutor "is permitted to respond to an argument raised by the defense so long as it does not constitute a foray beyond the evidence adduced at trial." State v. Munoz, 340 N.J. Super. 204, 216 (App. Div. 2001). The court must consider the nature of the defense remarks that provoked the prosecutor's response. Ibid. In certain circumstances, the prosecutor's "otherwise prejudicial arguments may be deemed harmless if made in response to defense arguments." McGuire, 419 N.J. Super. at 145.

Here, as a threshold matter, even if we accept the prosecutor's comments "impl[ied] a failure by the defense to present testimony," we must "closely scrutinize[] . . . whether . . . defendant's Fifth Amendment privilege to remain silent has been violated and his right to a fair trial compromised." Cooke, 345 N.J. Super. at 486. Having done so, we do not view the prosecutor's comments

as statements concerning defendant's invocation of his right not to testify, but rather, taken in context, as response to defendant's vigorous arguments regarding his theory of the case.

In summation, defense counsel repeatedly argued defendant's erratic driving was due to the fact he was being followed by McElroy and criticized the prosecutor for "ignor[ing] that somebody was chasing" defendant. The prosecutor was therefore entitled to respond to defendant's theory of the case, Munoz, 340 N.J. Super. at 216, and defendant could not expect his counsel's assertions to be immune from comment during the State's summation.

Additionally, during trial, defense counsel cross-examined several of the State's witnesses regarding McElroy's conduct in following defendant after the first accident. Although several witnesses testified they did not see McElroy follow defendant, defense counsel elicited in-depth testimony about McElroy's conduct from Bruce Stewart and McElroy himself. In light of this testimony, the prosecutor's comments referring to the absence of evidence from the witnesses to corroborate defendant's theory of the case did not refer to evidence that could only have been provided by defendant's own testimony. Indeed, the first two challenged comments were made when the prosecutor was summarizing the evidence presented at trial, specifically Stewart's testimony.

Accordingly, "[v]iewing the summation as a whole, we cannot fairly say . . . the prosecutor's . . . remark[s] [were] so egregious as to deny defendant[] a fair trial." Engel, 249 N.J. Super. at 382. Moreover, the court properly instructed the jury regarding defendant's invocation of his right not to testify at the beginning of the trial and again during its final instructions. We are satisfied the court's instructions cured any potential prejudice from the prosecutor's remarks.

We are also unpersuaded the prosecutor's closing remarks had the impermissible burden shifting impact defendant ascribes to them on appeal. Nothing in the summation imposed a duty on defendant, as he argues, to produce additional evidence "that he was actually afraid." Rather, the prosecutor explained the State need not "prove what's going on in [defendant]'s head" only to inform the jury it could find defendant acted with an extreme indifference to human life based solely on his conduct.

In addition, the court instructed the jury that the "burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to . . . defendant. The defendant in a criminal case has no obligation or duty to prove his innocence or offer any proof relating to his innocence." We are satisfied these instructions were "sufficient to remove any

implication 'that the defense had some burden of proof.'" State v. Patterson, 435 N.J. Super. 498, 513 (App. Div. 2014) (quoting State v. Jenkins, 349 N.J. Super. 464, 479 (App. Div. 2002)). The jury is presumed to have followed these, and all other, instructions. See Loftin, 146 N.J. at 390.

In sum, although we are satisfied the point the prosecutor sought to make about the lack of evidence supporting defendant's theory of the case was a fair one, it did not relieve him of choosing his words carefully so as to refrain from commenting on defendant's invocation of the right not to testify or appearing to shift the burden of proof to the defendant. As we have noted, "[t]he duty of the prosecutor 'is as much . . . to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" State v. Supreme Life, 473 N.J. Super. 165, 171-72 (App. Div. 2022) (alterations in original) (quoting State v. Williams, 244 N.J. 592, 607 (2021)). We have, however, carefully reviewed each improper comment asserted by defendant, and are satisfied that, "[w]hile in several instances the prosecutor walked on . . . the line," when viewed both separately and in the aggregate, the prosecutor's comments were not improper and "did not jeopardize defendant's right to a fair trial." State v. Scherzer, 301 N.J. Super. 363, 446 (App. Div. 1997).

B.

Defendant next argues the prosecutor "repeatedly mocked [defendant's] defense" when it used "highly inflammatory and denigrating" language in its summation. On this point, defendant cites to the prosecutor's characterization of the defense theory as a "red herring," "shift[ing] the blame," and "creat[ing] a bogeyman."

Because defendant made no objection to these comments, we review for plain error. R. 2:10-2. "Under that standard, we disregard an error unless it is 'clearly capable of producing an unjust result.'" State v. Daniels, 182 N.J. 80, 95 (2004) (quoting R. 2:10-2). Additionally, defense counsel's failure to object to the statement generally implies the comment was not in fact prejudicial. See State v. Atwater, 400 N.J. Super. 319, 337 (App. Div. 2008) ("Where there was no objection at the time, there is an inference that the defense did not view the summation as prejudicial in the context of the trial."); State v. Johnson, 31 N.J. 489, 511 (1960) (We "may infer from counsel's failure to object to the remarks at the time they were made that [they] did not in the atmosphere of the trial think them out of bounds.").

"Prosecutors are entitled to forcefully advocate the State's position." State v. Ates, 426 N.J. Super. 521, 535 (App. Div. 2012). "They are not, however,

entitled to cast unjustified aspersions on the defense." Ibid. Defense counsel does not open the door to such aspersions "by simply trying to discredit the State's case." State v. Acker, 265 N.J. Super. 351, 356 (App. Div. 1993). Accordingly, we have previously determined it is "highly improper for the prosecutor to characterize the defense attorney and the defense as outrageous, remarkable, absolutely preposterous, and absolutely outrageous." Ibid.

When such "an improper comment is made . . . we must consider its context to determine whether the prejudicial effect warrants reversal." Ates, 426 N.J. Super. at 536. For example, in Ates, we determined the prosecutor's characterization of defendant's medical expert's testimony as "absolutely preposterous" was improper. Ibid. "In light of the considerable evidence of guilt and the appropriate arguments otherwise made by the prosecutor during his summation," however, we concluded the remark "was insufficient to raise a reasonable doubt that it led the jury to a verdict it would not have otherwise reached," and therefore did not constitute plain error. Ibid.

Here, the prosecutor's comments are similar to those we held improper in Acker and Ates. As noted, however, we are satisfied the prosecutor's comments did not lead the jury "to a verdict it would not have otherwise reached." Ibid. Like in Ates, the State produced considerable evidence of defendant's guilt and

appropriately relied on that evidence throughout its summation. Viewing the summation as a whole, we are satisfied the prosecutor's isolated remarks were "not so egregious as to deprive defendant of a fair trial." Timmendequas, 161 N.J. at 575.

C.

Defendant next argues, even if we find no individual errors warranting reversal, "[t]ogether, these errors bolstered the State's version of events without a basis in the record, violating [defendant]'s right to a fair trial and necessitating reversal of his conviction." We disagree.

"A defendant is entitled to a fair trial but not a perfect one." State v. Weaver, 219 N.J. 131, 155 (App. Div. 2014) (quoting State v. Wakefield, 190 N.J. 397, 537 (2007)). "In some circumstances, it is difficult to identify a single error that deprives defendant of a fair trial." Id. at 160. "Where any one of several errors assigned would not in itself be sufficient to warrant a reversal, [but] all of them taken together justify the conclusion that [the] defendant was not accorded a fair trial, it becomes the duty of this court to reverse." Id. at 155 (quoting State v. Orecchio, 16 N.J. 125, 134 (1954)). "If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply[, however,] where no error was prejudicial and the trial was fair." Ibid. Additionally, we must assess each asserted error in light of the strength

of the State's case when determining whether cumulative error applies. See State v. Sanchez-Medina, 231 N.J. 452, 469 (2018).

We have carefully reviewed each instance of alleged prosecutorial misconduct in the State's summation and, although we have determined the prosecutor made some fleeting improper comments, specifically those denigrating defense counsel's theory of the case, we are satisfied they did not, individually or cumulatively, deprive defendant of a fair trial or undermine the jury's ability to "fairly evaluate the merits of his defense," McGuire, 419 N.J. Super. at 150. In addition, the challenged comments regarding defendant's lack of evidence were primarily in response to defendant's theory of the case, as well as defense counsel's own accusations that the prosecutor strategically ignored its theory that defendant's actions were animated by McElroy's chase. And, as previously noted, the State produced overwhelming evidence of defendant's guilt and properly relied on that evidence throughout its summation. We therefore reject defendant's invocation of the cumulative error doctrine.

III.

In defendant's second point, he argues the court failed to properly instruct the jury with respect to the distinction between the reckless mental states required to convict him of reckless manslaughter and vehicular homicide.

Because the court did not provide such an instruction, defendant maintains the jury could have convicted him of reckless manslaughter "based on the less stringent conception of recklessness required for [vehicular homicide]." We agree and therefore vacate defendant's reckless manslaughter conviction.

"[A]ppropriate and proper charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Jury instructions must give "a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "Erroneous instructions on matters or issues that are material to the jury's deliberation are presumed to be reversible error in criminal prosecutions." State v. Jordan, 147 N.J. 409, 422 (1997) (citing State v. Warren, 104 N.J. 571, 579 (1986)).

Where there was no objection to the jury instructions as given, like here, we review defendant's challenges under the plain error standard. R. 2:10-2. To find plain error with respect to the court's instructions, we must discern a "legal impropriety . . . prejudicially affecting the substantial rights of the defendant," which is "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. Hock, 54 N.J. 526, 538 (1969). "The mere possibility of an unjust result is not enough." State v. Funderburg, 225 N.J. 66, 79 (2016). Rather, "[t]he possibility must be real, one 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. Macon, 57 N.J. 325, 336 (1971). Nevertheless, our Supreme Court has observed "error in a jury instruction that is 'crucial to the jury's deliberations on the guilt of a criminal defendant' is a 'poor candidate[] for rehabilitation' under the plain error theory." State v. Burns, 192 N.J. 312, 341 (2007) (alteration in original) (quoting Jordan, 147 N.J. at 422).

In State v. Hahn, 473 N.J. Super. 349, 372 (App. Div. 2022), we determined, under the plain error standard, it was reversible error for a trial court to instruct the jury on aggravated manslaughter and vehicular homicide without also providing an instruction on reckless manslaughter as a lesser-included offense of aggravated manslaughter. We explained the court's failure to instruct the jury on reckless manslaughter was reversible error for two reasons. Id. at 374-75. First, we reasoned the court's failure to explain the relationship between the aggravated manslaughter and vehicular homicide charges left the jury with "an all-or-nothing decision on the aggravated manslaughter" charge, as the

jurors were uninformed they could acquit defendant of aggravated manslaughter and convict him on lesser-included offenses. Ibid.

Second, and as pertinent to this appeal, we determined "[t]he instructions also deprived the jury of an opportunity to understand distinctions in the level of recklessness required to convict defendant of either manslaughter charge versus recklessness that is an element of vehicular homicide." Id. at 377. In doing so, we explained:

> [P]rior to adoption of 1995 amendments to N.J.S.A. 2C:11-5 that elevated vehicular homicide from a third-degree crime to a second-degree crime, see L. 1995, c. 285, our courts uniformly held there was a difference between the recklessness required for conviction of vehicular homicide, and the enhanced recklessness required to support a conviction for the then more serious offense of reckless manslaughter.
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> [Id. at 375.]

We then noted, "[t]he model charge for reckless manslaughter continues to recognize this distinction in the level of recklessness required for conviction under N.J.S.A. 2C:11-4(b), and that required . . . under N.J.S.A. 2C:11-5." Indeed, Model Jury Charges (Criminal), "Reckless Manslaughter (N.J.S.A. 2C:11-4(b)(1))" at 1 n.2 (rev. Mar. 22, 2004), states "where it is alleged that the defendant caused the death of another by operating a motor vehicle or vessel, [vehicular homicide] 'shall be considered a lesser-included offense' under

N.J.S.A. 2C:11-5(d)." Therefore, the charge instructs courts to inform the jury of the following distinction between the two offenses:

> It is important that you understand the difference between reckless manslaughter and the lesser-included offense of [vehicular homicide], for which I will soon be providing you with additional instructions. Reckless manslaughter requires proof beyond a reasonable doubt that the defendant drove [their] vehicle (or vessel) recklessly, and also that [they] engaged in additional acts of recklessness, independent of [their] operation of the vehicle (or vessel), that contributed to the victim's death. [Vehicular homicide] on the other hand, only requires proof beyond a reasonable doubt that the defendant recklessly drove [their] vehicle (or vessel), causing the death of another, and it requires no additional acts of recklessness.
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> . . .
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> Whether the defendant was reckless in [their] operation of the motor vehicle (or vessel) and/or whether the defendant was additionally reckless as alleged by the State is for you the jury to decide based on the evidence in the case. It is only where you are convinced beyond a reasonable doubt that the defendant was in fact reckless both in the operation of the motor vehicle (or vessel) and in the additional manner as alleged by the State that you may convict the defendant of the charge of reckless manslaughter. State v. Jimenez, 257 N.J. Super. 567 (App. Div. 1992).
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> [Ibid. (emphasis added).]

In Hahn, we acknowledged the 1995 amendments to N.J.S.A. 2C:11-5 elevated vehicular homicide to a second-degree offense and "permitt[ed]

separate convictions only for aggravated, not reckless, manslaughter and vehicular homicide." 473 N.J. Super. at 376. We also acknowledged commentary by Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:11-5 (2022), which concluded the 1995 amendments evinced "Legislat[ive] intent that vehicular homicide, 'rather than reckless manslaughter, is the appropriate section to charge.'" Ibid. We explained, however, "since the 1995 amendments, we have 'continued to recognize the need to differentiate the degree of recklessness required for reckless manslaughter,' and, therefore also aggravated manslaughter, 'and [vehicular homicide] as expressed by [Jimenez].'" Id. at 377 (quoting State v. Pigueiras, 344 N.J. Super. 297, 308 (App. Div. 2001)).

Additionally, when the State relies upon a defendant's intoxication to serve as the additional act of recklessness required to sustain a conviction for reckless manslaughter, our Supreme Court has observed "[a]lthough driving while intoxicated may alone satisfy the recklessness required by the [vehicular homicide] statute, more is required for reckless manslaughter." State v. Jamerson, 153 N.J. 318, 335 (1998) (citations omitted).

In Jamerson, the Court explained:

> When, as here, the State relies on the extent of drinking as one of "the additional act[s] of death causative

> recklessness," that drinking must "be more than casual drinking and more than mere intoxication, rather, it would have to be exceptional drinking to a marked extent." State v. Scher, 278 N.J. Super. 249, 269 (App. Div. 1994). In other words, a defendant's pre[-]driving conduct, such as drinking, and conduct associated with the driving must be so extraordinary and extreme as to satisfy the reckless manslaughter standard. Ibid. That standard is "quantitatively greater than the recklessness contemplated in a [vehicular homicide] charge and qualitatively less than the recklessness required to support an aggravated manslaughter case." [State v. Milligan], 104 N.J. 67, 73 (1986) (Clifford, J., dissenting). That is so because "[t]he practice in our State implicitly recognizes that only a gross deviation from reasonable care amounts to recklessness" required in a reckless manslaughter case. State v. Concepcion, 111 N.J. 373, 382 (1988) (Handler, J., concurring).
>
> [Ibid.]

We note Jamerson pertained to pre-1995 events and did not discuss the 1995 amendments to N.J.S.A. 2C:11-5. See Cannel, cmt. 3 on N.J.S.A. 2C:11-5 (2020). Nevertheless, we applied the heightened standard for intoxication articulated in Jamerson in State v. Choinacki, 324 N.J. Super. 19, 48 (App. Div. 1999), where we explained the extent of the defendant's pre-driving drinking as the "additional act constituting recklessness which caused death" must be a gross deviation from reasonable care "to satisfy the element of recklessness in a reckless manslaughter case."

In Choinacki, the trial court "properly instructed the jury that a determination of reckless manslaughter required the jury to find an additional act of recklessness beyond the reckless driving itself." Id. at 48-49. The court did not, however, instruct the jury "'mere intoxication' would not suffice and that the defendant's drinking must have been extreme and exceptional" to convict him for reckless manslaughter. Id. at 50. We concluded the court's omission of this error was not reversible under the plain error standard, as the defendant's consumption of alcohol was not "the only enhancement of recklessness." Ibid. Rather, we held "[t]he jury could well have found that [the] defendant was racing with another car at grossly excessive speed on a two-lane State highway while passing other vehicles and going around blind curves." Ibid. We concluded, "[i]n our view, such a degree of reckless operation taken together with the consumption of alcohol constitutes a sufficient basis to support the conviction for reckless manslaughter." Ibid.

Here, the court instructed the jury on the elements of reckless manslaughter as detailed in Model Jury Charges (Criminal), "Reckless Manslaughter (N.J.S.A. 2C:11-4(b)(1))," but failed to provide the footnoted language distinguishing the degrees of recklessness required to convict defendant of reckless manslaughter and vehicular homicide. Rather than

explaining a conviction for reckless manslaughter requires an additional element – that defendant engaged in an act of recklessness independent of his operation of his vehicle – the court instructed the jury that identical standards of recklessness applied to the aggravated manslaughter, reckless manslaughter, and vehicular homicide charges. The court clearly erred in failing to distinguish between the recklessness required to convict defendant of aggravated manslaughter, reckless manslaughter, and vehicular homicide.

As noted, however, to require reversal under the plain error standard, the error must be "clearly capable of producing an unjust result." R. 2:10-2. We are satisfied defendant has met that standard. Based on the court's instructions, the jury could have convicted defendant of reckless manslaughter based solely on a finding he operated his vehicle recklessly, without determining whether he engaged in any additional act of recklessness. Similarly, under the court's instructions, the jury could have convicted him of reckless manslaughter if it concluded he drove while intoxicated in violation of N.J.S.A. 39:4-50.

Defendant maintains he drove erratically because McElroy was chasing him, contrary to the State's contention that he did so because he was under the influence of PCP. Although defendant admitted to having smoked PCP at some time before driving, he argued at trial the State failed to prove the PCP impaired

his driving ability. On that point, defense counsel contended the State's expert failed to establish defendant could not have safely driven with the amount of PCP in his system at the time of the accident "[b]ecause there's no real guidelines without addressing or seeing what his behavior was like, or what was his tolerance, . . . or if he was a consistent user."

Therefore, if the jurors accepted defendant's version of events, they could have reasonably concluded defendant operated his vehicle recklessly but was not impaired to such a degree as to constitute a gross deviation from reasonable care. Such a finding would be sufficient to convict defendant of vehicular homicide but insufficient to convict him of reckless manslaughter. See Choinacki, 324 N.J. Super. at 48.

Before us, the State summarily argues "defendant engaged in additional acts of recklessness independent of the crash that killed . . . LaBance," without indicating what those additional acts were. We acknowledge the record contains sufficient evidence by which a properly charged jury could have convicted defendant of reckless manslaughter. The jury could also have concluded, however, defendant's erratic driving was animated by McElroy's chase, rather than any requisite enhancing factors of recklessness as required to convict him of reckless manslaughter. As such, the circumstances of this case warrant a

result different than in Choinacki, where the jury was instructed on the element of enhanced recklessness required to convict the defendant of reckless manslaughter, albeit without an instruction pertaining to intoxication.

In light of the "paramount importance of accurate jury instructions," Reddish, 181 N.J. at 613 (quoting State v. Marshall, 173 N.J. 343, 359 (2002)), as well as our recent articulation in Hahn as to the importance of distinguishing the mental states required to sustain convictions for vehicular homicide and reckless manslaughter, we are satisfied the court's failure to properly instruct the jury under these circumstances "raise[s] a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached," Macon, 57 N.J. at 336. Indeed, the jury did not determine whether the State proved each element of reckless manslaughter under the correct standard, and the court's failure to properly instruct the jury was therefore "clearly capable of producing an unjust result." R. 2:10-2.

IV.

In his pro se brief, defendant argues the court denied him a fair trial when it failed to instruct, sua sponte, the jury on the affirmative defense of duress. Defendant contends such an instruction was necessary in light of his theory that his allegedly criminal conduct was the result of his "fear of his pursuer, . . .

McElroy." Defendant further maintains he "should be acquitted of reckless manslaughter and vehicular homicide because the [State] never disproved the affirmative defense of duress beyond a reasonable doubt." We disagree with defendant's contentions.

As noted, we do not set aside a verdict unless the appealing party can show the omission of an unrequested jury charge was sufficiently grievous and "clearly capable of producing an unjust result." R. 1:7-2; R. 2:10-2. Moreover, a trial court should only sua sponte issue a charge on an affirmative defense "if all of the elements of the affirmative defense are clearly indicated by the evidence." State v. Daniels, 224 N.J. 168, 177 (2016). The requirement that the facts "'clearly indicate the appropriateness' of the jury instruction is paramount: 'The trial court does not have the obligation . . . to sift through the entire record in every trial to see if some combination of facts and inferences might rationally sustain a[n unrequested] charge.'" State v. Rivera, 205 N.J. 472, 489-90 (2011) (second alteration in original) (quoting State v. Thomas, 187 N.J. 119, 134 (2006)).

"If the defendant does not object to the charge at the time it is given, there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012) (citing Macon,

57 N.J. at 333-34). Because defendant did not request these charges at trial, he must now show the record "clearly warrant[ed] the unrequested jury instruction." Rivera, 205 N.J. at 489.

The defense of duress requires unlawful force be threatened or used against the defendant. State v. Morris, 242 N.J. Super. 532, 542 (App. Div. 1990). The defendant has the burden of coming forward with some evidence establishing the defense, which has both subjective and objective components. State v. B.H., 183 N.J. 171, 192-93 (2005). The subjective component requires "the defendant actually must have been influenced by" the coercive conduct. Id. at 192. The objective component requires "defendant's level of resistance to the particular threat . . . meet community standards of reasonableness" as evaluated by the standard of a "person of reasonable firmness." Id. at 193. In evaluating the objective criteria, the jury may consider such factors as "the gravity of the threat, the proximity of the impending harm being threatened, opportunities for escape, likely execution of the threat, and the seriousness of the crime defendant committed." Ibid. If the defendant "come[s] forward with some evidence of the defense . . . the burden of proof [shifts to] the State to disprove the affirmative defense beyond a reasonable doubt." State v. Romano, 355 N.J. Super. 21, 35-36 (App. Div. 2002).

Here, defendant did not allege McElroy threatened or used any force against him, but rather that McElroy followed him in his vehicle after defendant collided with another vehicle and fled. Without more evidence, a person of reasonable firmness would not have viewed the mere following of his vehicle under those circumstances as a threat of force requiring defendant to drive approximately double the posted speed limit. Under the objective criteria required to support the affirmative defense, defendant was under no direct threat by McElroy to act as he did.

Additionally, even if McElroy chased defendant at one point, McElroy was unable to keep up with defendant after he sped out of the Popeyes parking lot. Defendant created such distance between himself and McElroy that McElroy did not even witness defendant crash into LaBance. We further note the evidence produced of defendant driving in a similar manner prior to having been followed by McElroy contradicts his claim he was coerced to drive as he did.

Because defendant failed to produce evidence of "all of the elements of the affirmative defense," Daniels, 224 N.J. at 177, the record did not "clearly warrant the unrequested jury instruction," Rivera, 205 N.J. at 489. Similarly,

the State was under no obligation to disprove the affirmative defense. See Romano, 355 N.J. Super. at 35-36.

V.

In his counseled and pro se briefs, defendant asserts his sentence must be vacated and the matter reversed because the court: (1) failed to set forth its reasons for imposing consecutive sentences as required by State v. Yarbough, 100 N.J. 627, 643-44 (1985), and State v. Torres, 246 N.J. 246, 268 (2021); and (2) erroneously declined to apply several mitigating factors under N.J.S.A. 2C:44-1. Our decision to vacate defendant's conviction for reckless manslaughter obviates the need to address defendant's sentencing arguments.

Because counts two, three, and four were merged into amended count one, which charged reckless manslaughter, and defendant's conviction on amended count one has been vacated, counts two, three, and four are no longer properly merged into amended count one. Therefore, we remand this matter for resentencing on counts two, three, and four, as well as potentially reckless manslaughter, depending on the resolution of that charge pending a new trial on remand. The sentencing court shall strictly adhere to the mandates of Yarbough and Torres. Additionally, the court shall engage in a de novo assessment of the aggravating and mitigating factors under N.J.S.A. 2C:44-1 as they apply to

defendant at the time of resentencing, including youth mitigating factor fourteen. See State v. Randolph, 210 N.J. 330, 333 (2012); State v. Bellamy, 468 N.J. Super. 29, 47-48 (2021).

Affirmed in part, vacated in part, and remanded for further proceedings 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