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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0148-07T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RAY JACKSON,

Defendant-Appellant.

Submitted: October 7, 2009 - Decided: March 1, 2010

Before Judges Cuff, C.L. Miniman and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 03-07-0681.

Yvonne Smith Segars, Public Defender, attorney for appellant (Michael C. Kazer, Designated Counsel, of counsel and on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Christopher W. Hsieh, Senior Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Posing as an immigration official, defendant Ray Jackson gained entry to the apartment shared by a twenty-two year old

woman and her husband in Paterson. According to the young woman, defendant sexually assaulted her and stole her jewelry. Based on his conduct following the burglary and sexual assault, defendant was also charged with stalking.

In a separate indictment, defendant was also charged with several offenses, including attempted murder, stemming from his alleged solicitation of someone to kill the victim while defendant was awaiting trial on the first set of charges. The charges in the second indictment were joined with the first indictment and tried together.

A jury found defendant guilty of second degree burglary, N.J.S.A. 2C:18-2 (Count One); and fourth degree impersonating a police officer, N.J.S.A. 2C:28-8b (Count Four). On the burglary conviction, defendant was sentenced to an extended term of twenty years imprisonment with an 85% No Early Release Act (NERA)[1] period of parole ineligibility. The judge imposed a consecutive eighteen-month prison term with nine months of parole ineligibility on the impersonating an officer conviction. The jury found defendant not guilty of stalking and failed to reach a verdict on the following charges: aggravated sexual assault, robbery, and all charges in the second indictment. At

[1] N.J.S.A. 2C:43-7.2.

sentencing the prosecutor dismissed the remaining charges. The appropriate fees and penalties were also imposed.

On appeal, defendant raises the following arguments:

POINT I THE TRIAL COURT COMMITTED HARMFUL ERROR IN GRANTING THE STATE'S MOTION FOR JOINDER OF INDICTMENT NO. 03-07-0681 AND INDICTMENT NO. 04-08-1078.[2]

(A)
THE TRIAL COURT'S R. 404(B) ANALYSIS WAS FLAWED.

(B)
THE DEFENDANT WAS UNFAIRLY PREJUDICED BY JOINDER.

POINT II THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED BECAUSE OF A VIOLATION OF THE SEQUESTRATION ORDER (NOT RAISED BELOW).

POINT III THE DEFENDANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE OUT-OF-COURT IDENTIFICATION BY MS. BAEZ WAS UNRELIABLE AND TAINTED HER SUBSEQUENT IN-COURT IDENTIFICATION.

POINT IV THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR IN FAILING TO VOIR DIRE THE JURY WHEN A DELIBERATING JUROR REPORTED POSSIBLE JURY MISCONDUCT.

POINT V THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

POINT VI THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S PRO SE POST-VERDICT MOTION FOR A NEW TRIAL BECAUSE THE JURY VERDICT WAS AGAINST THE WEIGHT OF THE

[2] Indictment No. 04-08-1078 was dismissed in its entirety against defendant following the inability of the jury to reach a verdict on the charges in this indictment.

EVIDENCE AND RESULTED IN A MANIFEST DENIAL OF JUSTICE UNDER THE LAW.

POINT VII IMPOSITION OF AN AGGREGATE BASE CUSTODIAL SENTENCE OF 21½ YEARS WAS MANIFESTLY EXCESSIVE AND AN ABUSE OF JUDICIAL SENTENCING DISCRETION.

(A)

THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING AN EXTENDED TERM SENTENCE ON THE DEFENDANT'S CONVICTION FOR SECOND DEGREE BURGLARY ON COUNT ONE.

(B)

IMPOSITION OF AN EXTENDED BASE TERM OF 20 YEARS ON THE DEFENDANT'S CONVICTION ON COUNT ONE WAS MANIFESTLY EXCESSIVE.

(C)

IMPOSITION OF CONSECUTIVE SENTENCES WAS MANIFESTLY EXCESSIVE AND AN ABUSE OF THE COURT'S SENTENCING DISCRETION.

In a pro se supplemental brief, defendant raises the following arguments:

POINT I- THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS MOTION TO SUPPRESS VIOLATING THE DEFENDANTS CONSTITUTIONAL RIGHTS UNDER U.S. CONST. AMEN. 4 AND THE N.J. CONST. ART. 1 PARA. 7.

(A)

THE DEFENDANT WAS SEIZED ILLEGALLY FROM HIS HOME AND THE FRUITS OF THE ILLEGAL SEIZURE SHOULD HAVE BEEN SUPPRESSED.

(B)

THE DEFENDANT[']S CELLPHONE WAS SEIZED ILLEGALLY AND SHOULD HAVE BEEN SUPPRESSED.

(C)

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT[']S MOTION TO SUPPRESS CELLPHONE SUBSCRIBER INFORMATION WHICH WAS OBTAINED IN VIOLATION OF DEFENDANT[']S RIGHT TO PRIVACY.

POINT II- THE TRIAL COURT ERRED WHEN IT ALLOWED PERJURED TESTIMONY FROM WITNESSES MARGARITA BAEZ AND EDDIAL LUGO VIOLATING DEFENDANT[']S RIGHTS UNDER THE U.S. CONST. SIXTH AND FOURTEENTH AMENDMENTS AND THE NEW JERSEY CONSTITUTION ART. 1 PARA. 1 AND 10.

POINT III- THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT[']S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL PURSUANT TO RULES 2:10-A AND 3:18-2 THAT THE JURY'S VERDICT WAS INCONSISTENT AND AGAINST THE WEIGHT OF THE EVIDENCE.

We affirm.

In 2003, a twenty-two year old woman (the victim) lived in Paterson with her husband. She was born in the Dominican Republic; he was a United States citizen. During 2001, she applied for permanent residency with the Immigration and Naturalization Service (INS).

The victim worked in customer service at a market in Paterson. On February 13, 2003, another worker at the market took a phone call from a male who said he was from INS and it was important that he reach the victim. The worker gave the man the victim's cell phone number and told her about the call when she came into work later that day.

At 8:00 p.m. that evening, the victim received a call from a male stating he was an INS officer who needed to confirm her phone number and address, which she did. The caller asked where her husband was; she replied he was not home. As requested by the caller, she gave him directions to her house because he needed to drop off some paperwork. She then informed the caller her husband would be back soon and the caller should talk to him.

Her husband came home shortly thereafter and the victim told him about the call. At 8:30 p.m., the caller phoned again. She answered; the man was angry, saying that she had given him the wrong address. She explained that she had not, but that it was just tricky to get to her apartment. The caller then said he was going to leave something the next morning. She gave the phone to her husband who agreed to meet the man at 6:30 a.m. the next day at the Paterson police station.

The next day, February 14, 2003, the victim's husband left at 6:25 a.m. for the short drive to the Paterson police station. At 6:34 a.m., the male called the victim's cell phone and asked when he could expect her husband to arrive. She responded that her husband had gone to meet him. Meanwhile, at the police station, a person at the desk told the victim's husband that they did not handle immigration cases. Fearing something was

amiss, at 6:36 a.m., the victim's husband called his wife and told her that no one was at the police station and warned her not to open the door to anyone. He returned home and at 6:44 a.m. the male called the victim's cell phone. When she answered, the caller told her to send her husband back to the police station, and a female officer would come to her house with some papers. During the five-minute conversation, the caller also spoke to the victim's husband, who agreed to meet the caller in person. He left; she went to take a shower. Both the victim and her husband testified that they believed that the calls were made by the same man.

Hearing a knock at the door, the victim wrapped a towel around herself and looked through the peephole of the door. She saw a bald, short, black man, who said he was there to give her paperwork. When she protested that a female officer was supposed to come, the visitor said it was cold. She told him to wait while she put on clothes. The victim opened the door dressed in jeans with a towel wrapped around her chest. The man handed her a white envelope, then pushed the door open. He entered the apartment, looked around and asked the location of her husband and the phone. The man then punched the victim in the mouth, knocking her to the floor, before grabbing and dragging her into the bedroom, where he pushed her onto the bed,

face down. She kept turning around to look at him, so he took the towel from around her chest and covered her face with it. The man then removed her jeans and underwear, pushed his fingers into her vagina, then started to masturbate, ejaculating on her back. The man then asked for money; she replied she had none. Before leaving, he took the engagement and wedding rings off her finger.

The victim called her husband. According to him, his wife was "desperate" and "upset." When he arrived home, his wife was sitting with a towel wrapped around her, crying, and bleeding from the mouth. He said his wife did not tell him about the sexual assault. She took a shower, and then they went to the hospital.

At the hospital, two police officers, Eddial Lugo and Luis DeLucca, interviewed the victim. Afterward, the officers, the victim, and her husband returned to the apartment, where the victim explained the events of the morning. Although the apartment and the white envelope were dusted for fingerprints, no prints were found. A bloodstained sheet from the bed was analyzed, but the blood was the victim's from the cut on her mouth. Other bed linen were tested for DNA, but there was none linking defendant to the crime scene.

The victim accompanied Lugo to the police station, where she gave a statement describing the assailant as mid-twenties, five-feet four-inches tall, with a stocky build. She looked through several books of photos, but she did not identify anyone as the perpetrator.

On February 19, 2003, the victim met with a sketch artist who made a drawing of the assailant based on her description. When shown the finished sketch, she proclaimed, "That's the guy who raped me."

Using the victim's cell phone information, the police officers obtained detailed cell phone records and learned the calls to her had originated from a cell phone registered to Ray Jackson of 91 Putnam Street. On March 17, 2003, the officers went to that address. Lugo testified that when defendant answered the door, he thought, "He looks just like the sketch." After the person who answered the door identified himself as Ray Jackson, defendant agreed to come with Lugo to the police station.

Once at the station, defendant refused to give a statement, but Lugo took a photograph of him. Lugo called the victim and asked if she could come to the station to look at photographs. Lugo drove her to the police station. In the meantime, DeLucca prepared an array of six photographs. Lugo asked detective Juan

Garcia, who knew nothing about the case, to show the photographs to the victim. After giving the stack of photos to her, she spread them out in front of her and looked at them. Once she got to photograph number 3, she became "visibly shaken" and said, "That's the person who raped me." She told Garcia she was one hundred percent sure. Photo three was a picture of defendant.

Lugo then advised the victim that she had identified the suspect. She asked if he was in custody and whether she could see him. Lugo led her to the interview room where defendant was being held and allowed her to look through a one-way mirror. According to Lugo, when the victim saw defendant, she cried hysterically.

Lugo arrested defendant and took his cell phone, which was clipped to his belt. Lugo dialed the number that appeared on the victim's cell phone records; the phone seized from defendant rang. Police obtained court approval to obtain defendant's cell phone records and determined that on February 12, 2003, a call had been made from defendant's phone to the market. On February 13, 2003, two more calls were placed from defendant's phone to the market number. Calls were placed from defendant's phone to the victim's cell phone on February 13, 2003, at 7:39 p.m., 7:42 p.m., 7:52 p.m., 8:21 p.m., 8:22 p.m. and 8:31 p.m. Calls were

made from defendant's phone to the victim's phone on February 14 at 6:36 a.m. and 6:46 a.m. A call was also placed from defendant's phone to his girlfriend's number at 7:22 a.m. on February 14, 2003.

Defendant did not testify at trial. However, his brother, Gregory Jackson, testified that in February 2003, he lived at his mother's house at 91 Putnam Street and defendant occasionally stayed there and at his girlfriend's house. Gregory testified that sometime in the middle of February, when there were "peddlers" selling flowers outside, he took his brother's cell phone without permission. He never used the phone to make calls during that time. He explained that he was addicted to heroin and he took the phone to use as collateral with a drug dealer so that he could obtain drugs. After he heard that his brother was looking for him, Gregory paid the dealer forty dollars and got the phone, took it to his mother's house, and laid it by the charger. Gregory admitted that he had several drug convictions, but he denied lying to help his brother.

Stephen Menconi, the owner of a health club in Paramus testified that defendant was a member of his club. He stated that defendant swiped his admittance card to the gym at 7:38 a.m. on February 14, 2003.

Emily Lawlor, a detective in the Passaic County Prosecutor's Office, testified that she drove between the victim's apartment and defendant's gym three times. The first trip was at 7:22 a.m.--the time that defendant had called his girlfriend on February 14--and the trip took fifteen minutes; she arrived at the gym at 7:37 a.m. She made the trip at other times of day; each trip took sixteen minutes.

After he was arrested on March 17, 2003, defendant posted bond. According to the victim, from May to June 2003, defendant came to her place of employment four times while she was working.

At some point prior to trial, defendant returned to the Passaic County Jail. While there, several inmates advised police that defendant was soliciting people to kill the victim. One of the inmates also testified that defendant told him he went to the gym on the morning of February 14 to establish an alibi.

Defendant was eventually charged with attempted murder and conspiracy to commit murder as a result of the claims of the inmates. The details of these charges are largely irrelevant because the jury could not reach a verdict on these charges. We refer to these charges and the facts that informed these charges only to the extent they pertain to defendant's contention that

his motion to sever the witness intimidation charges should have been granted.

I

In one indictment, defendant was charged with burglary, aggravated sexual assault, robbery, impersonating a police officer, and stalking. All but the stalking charge occurred on the same day, February 14, 2003. The stalking charge arose from acts in May and June 2003.

A second indictment charged defendant with attempted murder, attempt to hinder prosecution, and conspiracy to commit murder. These charges arose from conduct in 2004, after the first indictment was returned. The target of the alleged conspiracy and attempted murder was the victim of the charges in the first indictment.

The trial judge granted the State's motion to join both indictments over defendant's objection. The judge reasoned that the facts and proofs were inextricably intertwined or "pieces of the same puzzle." The judge also found that severance of the sexual assault and robbery charges from the attempted murder and conspiracy charges would not prevent reference to the facts of the second indictment as the February 14, 2003 events provided the motive for the latter acts. He also found that the victim's identification of defendant was so strong that there was clear

and convincing evidence to support the crimes in the first indictment. Although evidence of the first set of offenses would cause prejudice to defendant, the probative value of those offenses was extremely strong. Thus, denial of the joinder motion would not prevent introduction of the first set of crimes in the trial of the second indictment.

The judge also examined whether the charges in the second indictment would be admissible in the trial of the first indictment. He concluded that evidence of the events of the second indictment was relevant to the issue of identity, involved crimes of violence against the same victim, and were close in time. Referring to a note written by defendant containing the victim's name and address given to an inmate about to be released, the judge found the evidence clear and convincing of the charges in the second indictment. Finally, although the evidence in support of the second indictment was prejudicial to defendant, the evidence was also highly probative of defendant's identity and consciousness of guilt.

On appeal, defendant argues that the motion should not have been granted, and he suffered demonstrable prejudice due to the joinder of both indictments. Citing the jury's inability to reach a verdict on all charges in the second indictment and the

dismissal of this indictment by the prosecutor, the State responds that defendant's prejudice argument must fail.

Rule 3:15-1(a), addressing "permissible joinder," states:

> The court may order 2 or more indictments or accusations tried together if the offenses . . . could have been joined in a single indictment or accusation. The procedure shall be the same as if the prosecution were under such single indictment or accusation.

Rule 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would unfairly prejudice the defendant.

Central to the inquiry is whether, assuming the charges are tried separately, evidence of the offenses sought to be severed would be admissible under N.J.R.E. 404(b) in the trial of the remaining charges. State v. Pitts, 116 N.J. 580, 601-02 (1989). If the evidence would be admissible at both trials, then the trial court may deny the severance motion because the defendant would not suffer any more prejudice if the counts were tried jointly than if they were tried separately. State v. Urcinoli, 321 N.J. Super. 519, 542 (App. Div.), certif. denied, 162 N.J. 132 (1999). "It is clear that where there is a course of conduct on the part of a defendant such as to make evidence of one transaction relevant to any other transaction for the purpose of establishing motive, intent or common scheme or plan, then the trial judges may properly [join the indictments]."

State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div.), certif. denied, 94 N.J. 531 (1983).

Under N.J.R.E. 404(b),

> [e]vidence of other crimes, wrongs or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

The danger N.J.R.E. 404(b) seeks to prevent is "that a defendant will be prejudiced by evidence of other acts such that a jury will convict because he or she is a bad person disposed to commit crime." State v. Moore, 113 N.J. 239, 275 (1988). In other words, the rule precludes the admissibility of evidence of other crimes to prove a defendant's propensity toward criminal conduct. Pitts, supra, 116 N.J. at 602. The Supreme Court has characterized N.J.R.E. 404(b) as a "rule[] of exclusion" rather than one of "inclusion." State v. Nance, 148 N.J. 376, 386 (1997).

The test by which the admissibility of other bad acts evidence is evaluated is found in State v. Cofield, 127 N.J. 328, 338 (1992). In order to be admissible, evidence of other crimes must meet four requirements: 1) it must be relevant to a material issue that is genuinely disputed; 2) it must be similar

in kind to that which is charged currently and must have occurred reasonably close in time to the events at issue; 3) it must be clear and convincing; and 4) its probative value must not be outweighed by its prejudice. Ibid.

"Probative value" is "the tendency of the evidence to establish the proposition that it is offered to prove." State v. Wilson, 135 N.J. 4, 13 (1994). "Relevant evidence" means "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. A court must consider whether the proposed evidence makes the desired inference more probable than it would be without the evidence. State v. Davis, 96 N.J. 611, 619 (1984).

The decision whether to join indictments rests in the sound discretion of the trial court. State v. Chenique-Puey, 145 N.J. 334, 341 (1996). This court will defer to the trial court's decision, absent an abuse of discretion. Ibid.

Defendant argues that the judge mistakenly exercised his discretion because he failed to recognize that "a joinder analysis is more restrictive under N.J.R.E. 404(b)." He maintains that the judge confined his analysis to the sexual assault charge, thereby failing to identify any material issues

in genuine dispute, including motive or identity, concerning the burglary and impersonating an officer charges.

In one sense defendant's argument is hyper-technical because it is clear to us that the judge's reference to the sexual assault charge was a shorthand reference to all of the charges in the first indictment. It is undisputed that the charges in the first indictment, i.e. burglary, robbery, sexual assault, impersonating an officer, and stalking, are all associated with the events of February 14, 2003, and all but the stalking charge occurred on that day at the same time and place.

We agree with defendant that his claim of prejudice is not rendered moot due to the dismissal on all charges in the second indictment. We also reject the notion that the disposition of the charges in the second indictment undercuts the soundness of the pre-trial decision to join both indictments. We proceed to consider whether the admission of the evidence concerning the charges in the second indictment impermissibly buttressed the evidence of defendant's guilt on the charges of burglary and impersonating a police officer.

The mere claim that prejudice will inure to a defendant is not sufficient to deny a motion for joinder; actual prejudice must be shown. State v. Moore, 113 N.J. 239, 274 (1988). Whether joinder is prejudicial "is resolved by determining

whether the jury would likely be unable to comply with the trial judge's instructions. In short, could the jury arrive at a determination on each charge irrespective of the evidence concerning guilt on other charges?" State v. Hines, 109 N.J. Super. 298, 306 (App. Div.), certif. denied, 56 N.J. 248 (1970).

Defendant has not shown any actual prejudice. Here, the victim's description of her assailant was so accurate that police officers who went to defendant's house were astonished at the accuracy of the sketch prepared at the victim's direction. Her identification of defendant by photo and in person was immediate and certain.

Finally evidence concerning the events and charges in both indictments would necessarily be admissible in any trial of individual indictments. This is particularly the case of the second indictment, the charges of which are inextricably related to the events and charges in the first indictment.

Here, too, the jury was repeatedly instructed to consider each of the charges separately, and not to infer guilt on any count "simply because the State has offered evidence that [defendant] committed other crimes, wrongs, or acts." The jury clearly followed that instruction as reflected by the difficulty in reaching a verdict on the second indictment, and its guilty verdict on two of the five charges in the first indictment.

In summary, we hold that the judge properly exercised his discretion to join both indictments.

II

Defendant argues that the photographic array procedure was unduly suggestive and tainted the victim's subsequent in-court identification. Defendant contends that the procedure was unduly suggestive because "it is most probable that Detective Garcia was aware of the fact that the defendant's photograph was in the array, and was aware of the fact that the defendant was in the police station and was being interrogated by Detective Lugo and Detective DeLucca." Defendant acknowledges, however, that Garcia testified that he did not know if a suspect's photograph was included in the array. Defendant also maintains that when the victim was being driven to the police station to view the photographs, she was advised that the photograph of the person who assaulted her "might" be in the array, and that statement was impermissibly suggestive. Further, Lugo's assurance that "everything is all right" suggested to the victim that the photograph of defendant was included in the array.

Eyewitness identification presents special concerns about reliability. Traditionally, to bar an out-of-court identification by an eyewitness, a defendant must present evidence that the circumstances of the out-of-court

identification were unduly suggestive and that the impermissibly suggestive procedure compromised the reliability of the identification. United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); State v. Madison, 109 N.J. 223, 232 (1988). The Court has prescribed certain procedures to eliminate or at least minimize suggestibility. As a condition of admission of out-of-court identifications, law enforcement officers must make and maintain a written record of the identification procedure. State v. Delgado, 188 N.J. 48, 63 (2006). In addition, the Court has directed the model jury charge on eyewitness identification must underscore the need for jurors to closely scrutinize such testimony. State v. Romero, 191 N.J. 59, 75 (2007).

Moreover, predating these efforts, in 2001 the Attorney General issued Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (the Guidelines). The Attorney General explained the need to modify existing procedures and implement standardized procedures due to the increased incidence of flawed eyewitness identifications. The Guidelines address what the witness may not be told, how the photo array is to be composed and presented, who is to conduct the photo array, and how the procedure is memorialized.

Here, the judge held a pretrial hearing on the admissibility of the out-of-court identification, and the witnesses testified, much as they did at trial, concerning the circumstances of the victim's identification of defendant in the photographic array. At the conclusion of the hearing, the judge reviewed the facts, identified the correct law, and then applied the facts to the law. After reviewing the six photographs shown to the victim during the array, the judge concluded that they "represent a fair rendition of what [defendant] looks like." He found that the photographs were "similar in terms of shape of the head, the lack of hair [and] the skin tone," and thus they were "totally appropriate and there was nothing suggestive about them." The judge believed that the victim had given "an accurate description of the assailant based on her substantial ability to view her assailant." He noted that the victim had described how she laid the photos in front of her and quickly picked the one of defendant.

The judge found that the procedure used by the police was "excellent," as Garcia, a detective who knew nothing about the case and did not know that the suspect was in custody, had conducted it. The judge concluded that there was "absolutely nothing suggestive about the identification process" and that it was reliable, and therefore, he would permit the victim's

testimony concerning the photo array and her identification of defendant's photograph.

Defendant focuses his argument on Garcia's "probable" knowledge. However, this argument is belied by Garcia's testimony. Garcia testified that he knew nothing about the crime that Lugo was investigating and that Lugo did not indicate to him whether a suspect was depicted in the array. Garcia did not know the name of the person in the photograph that the victim chose, and he had not seen him at headquarters that day. We cannot ignore the reaction of the judge. He was "very impressed" with Garcia. There is simply no basis to disturb his credibility finding concerning Garcia's lack of knowledge in the case.

In addition, neither the trial judge nor this court discern any basis to conclude that the photo array identification procedure, as related by the victim, supported a finding of suggestibility much less impermissible suggestibility. The victim testified that on March 17, 2003, Lugo called her at work to come look at photos. Lugo picked her up. When asked whether Lugo told her why he was picking her up, she replied, "Because he had some pictures to show me." Counsel then asked, "Pictures of what?" to which she replied, "Of different persons might be the person that raped me [sic]." The victim also testified that

on the ride to the station, Lugo told her "[t]hat everything was all right" and that he was going to show her some pictures. Lugo never told her that he wanted to show her a photo of the suspect. Her testimony reflected no more than a reasonable interpretation that she drew from the circumstances.

The testimony of Garcia, Lugo and the victim also provides other evidence to support the reliability of the photo identification. Garcia lacked knowledge of the case, the other five photographs shown to the victim looked similar to defendant, the victim immediately identified defendant as the person who assaulted her, and she became visibly shaken when she saw him in person. Further, there is no doubt that the victim had sufficient time to view defendant during the incident because within days of the first incident, she described him to a sketch artist in such a way that both the judge and Lugo believed the sketch looked remarkably like defendant.

In sum, defendant has presented no reason to support his argument that the identification procedure was impermissibly suggestive or that the identification was unreliable.

III

Defendant contends for the first time that his right to a fair trial was prejudiced because the victim violated the sequestration order when, during her testimony, the judge called

a three minute recess to allow her to compose herself, and the victim spent the recess with the Coordinator of Victim Women's Assistance Unit of the Prosecutor's Office. We disagree.

Under Rule 2:10-2, "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." Unless there is a reasonable doubt as to whether the error contributed to the verdict, plain error will be found harmless, and thus disregarded by the appellate court. State v. Macon, 57 N.J. 325, 340 (1971).

A "sequestration order" was in effect during the trial. The record does not detail the terms of that order. During the trial, when discussing the intimate details of what she said had happened to her, the victim "started to get emotional" and had "tears running down her eyes." According to the judge, she was not "sobbing or crying uncontrollably, she just got emotional" and "froze" and was "unable to answer" the prosecutor's questions. The victim was not "breathing normally."

The judge took a recess because "[he] saw the victim as almost being paralyzed with an inability to answer." He instructed the witness to go with "the young lady from the

Prosecutor's office." Out of the presence of the jury, the judge told that person to "tell [the victim] to take a deep breath when she finds herself unable to answer." The recess lasted for "two or three minutes."

Although defendant concedes that the judge had the discretion to excuse the witness to compose herself, he contends that the judge "abused that discretion because [he] permitted [the victim] to regain her composure with the assistance of an agent of the prosecutor's office." He further argues that his "Sixth Amendment right to confront and effectively cross-examine [the victim] was undermined by the assistance provided to the witness by prosecutor's agent. . . ."

We note that defendant provides no example of how his right to confront the witness was undermined. Defense counsel could have questioned the victim about what happened during the recess, but did not.

Further undermining defendant's contention is his failure to explain how the assistance of the victim coordinator breached the sequestration order. Moreover, even if it did, "in the absence of prejudice to defendant, such a violation does not constitute reversible error." State v. Tillman, 122 N.J. Super. 137, 140 (App. Div.), certif. denied, 62 N.J. 428 (1973). Defendant alleges no prejudice, other than the general reference

to his inability to confront the victim. Having forsaken the opportunity to question the victim about what occurred during the recess, the record provides no basis to conclude that defendant suffered any prejudice.

IV

Defendant also contends that the trial judge committed plain error when he failed to question the jury following a report of possible misconduct by one of their members. We hold this argument is without merit.

During deliberations, the jury sent a note to the judge that stated, "Two jurors are feeling indirect pressure from the long absences from their jobs and from the environment in the jury room." In the courtroom, the judge told the jury he would address the note after completion of a requested play-back of testimony.

The next day, after the play-back, the judge addressed the concerns of the jurors regarding their jobs, which is not at issue here. Juror number 4 then told the judge, "At one time, I thought I could not deal with it because maybe some of my peers in there felt that maybe we[']re not adhering to your instructions [sic]." When the judge asked in "what sense" people were not adhering to the instructions, juror number 4 replied, "To dealing with the evidence at hand and not

speculating." The judge told the juror that jurors "can draw inferences from the evidence" or draw on a past experience. The judge asked if there was a problem with the juror's health or being able to think or concentrate or follow the law, but the juror said "No" and added, "I've thought it over, and I think I can handle it now." The judge said, "[A]s long as you can . . . deliberate in accordance with the instructions I've given you." The juror assured him he would.

The judge then asked the juror what he meant by "the environment in the jury room" and he answered, "It's bordered on hostility at one point." When the judge asked, "Hostility meaning arguing over evidence?," the juror said, "Yes." When the judge asked if the hostility had abated, the juror said it had. The judge concluded that nothing further needed to be done, and gave counsel the opportunity to be heard; both declined.

Defendant did not seek a more extensive examination of the jury at trial. R. 2:10-2. Therefore, if the judge erred in failing to conduct a more thorough voir dire, we must find that the error satisfies the plain error standard.

In State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997), this court reiterated that a jury must be free of extraneous influences and noted the test

to determine whether a verdict is impermissibly tainted. We stated:

> The jury verdict must be "free from the taint of extraneous considerations and influences," and a new trial will be granted when jury misconduct or the intrusion of irregular influences into jury deliberations "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Panko v. Flintkote Co., 7 N.J. 55, 61 (1951). The test is "not whether the irregular matter actually influenced the result but whether it had the capacity of doing so." Ibid.

We noted that the "thrust of the New Jersey and federal cases on mid-trial allegations of jury misconduct is that the trial judge must make a probing inquiry into the possible prejudice caused by any jury irregularity." Id. at 487-88. "Although the trial judge has discretion in the way to investigate allegations of jury misconduct, an adequate inquiry on the record is necessary for the purposes of appellate review." Id. at 488.

Defendant maintains that because the juror reported that some of the jurors were not adhering to the court's instructions, the judge was obligated to conduct voir dire of all the jurors, and in the absence of voir dire, a new trial must be held. In support of his argument, defendant relies on State v. Bisaccia, 319 N.J. Super. 1, 18-19 (App. Div. 1999).

That case involved a juror who told the judge, in front of the other jurors, that he could not make a fair decision, and alluded to the fact that he had "heard things" during a break that might affect his ability to deliberate fairly. Id. at 8. The judge made no further inquiry of the juror, despite the urging of the prosecutor and defense counsel. Id. at 8-9. Another juror reported that he was in "fear of his life," but the judge did not conduct any inquiry. Id. at 11-12. According to the court, the issue involved the remedy to be used "when there is doubt about the integrity of the deliberative process, there is an indication that at least one juror may have been affected by outside influences, and the trial judge conducted no inquiry to ascertain whether there were such influences and the reasons therefor." Id. at 16. We determined that a remand was necessary, and that "unless the State demonstrates that the jury was not tainted, and that the deliberating jury rendered a decision based exclusively on the evidence, free of taint by improper or extraneous influences, the trial judge must award a new trial." Id. at 19-20 (internal citations omitted).

Unlike the circumstances in Bisaccia, there was no allegation of outside influence on this jury. One juror indicated that the jurors may not have been "dealing with the evidence at hand" and may have been "speculating." However,

there was no indication that anyone outside of the jury attempted to influence it. Further, unlike the judge in Bisaccia, the judge here inquired about the alleged problem with one of the jurors and addressed the entire jury. He said,

> Again, I want to remind you that there is nothing different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any questions depending upon the evidence presented to them.
>
> You are expected to use your own good common sense, consider the evidence only for those purposes for which it has been admitted, and give it a fair and reasonable construction in light of your knowledge of how people behave. . . .
>
> You are to apply the law as I have instructed you to the facts as you find them to be for the purpose of arriving at a fair and correct verdict.

The judge listened to the concern of the juror and appropriately reminded the entire panel of their duty to consider the evidence before them in light of their common sense and judgment. The jurors eventually failed to convict defendant of the majority of the charges. We discern no basis for finding that defendant was deprived of his right to have his case considered by an impartial jury.

V

In his pro se supplemental brief, defendant argues that the trial judge erred in denying his motion to suppress his cell

phone subscriber information as the fruit of an illegal search and his cell phone records as a breach of his right to privacy. He also argues that the trial judge erred by permitting perjured testimony by the victim and Lugo. In his main brief and in his pro se supplemental brief, defendant argues that the trial judge should have granted his motion for a judgment of acquittal or his motion for a new trial because the verdict is inconsistent and against the weight of the evidence. Our review of the record reveals that these issues are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

VI

Finally, defendant contests the sentence imposed by the trial judge. He argues that the decision to impose an extended term represents an abuse of the judge's considerable sentencing discretion, that the base term imposed for the second degree burglary conviction is manifestly excessive, and the sentence on the impersonating an officer charge should not be consecutive to the burglary term. The State counters that the judge properly imposed a discretionary term and fashioned a reasonable sentence.

The scope of our review of a sentence is limited. Appellate review is not an opportunity for this court to substitute our judgment for that of the trial judge and to

impose our view of the appropriate sentence. State v. Bieniek, ___ N.J. ___, ___ (2010) (slip op. at 8); State v. Evers, 175 N.J. 355, 386 (2003). Rather, we review a sentence within a set of guidelines established by the Supreme Court in State v. Roth, 95 N.J. 334, 364-66 (1984). Within these guidelines, we can

> (a) review sentences to determine if the legislative policies, here the sentencing guidelines, were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.
>
> [Id. at 364-65.]

In sentencing a defendant, a trial court must identify the relevant aggravating factors of N.J.S.A. 2C:44-1(a) and the relevant mitigating factors of N.J.S.A. 2C:44-1(b), determine which factors are supported by a preponderance of the evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence. State v. O'Donnell, 117 N.J. 210, 215 (1989). "An appellate court is bound to affirm a sentence, even if it would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and

mitigating factors that are supported by competent credible evidence in the record." Ibid.

Extended sentences for persistent offenders are discretionary. State v. Pierce, 188 N.J. 155, 161 (2006). A court may impose them on a person who is at least twenty-one years old at the time of the commission of the crime, who has been convicted of a first, second, or third degree crime, and who has previously been convicted on at least two separate occasions of two crimes, committed at different times, when he was at least eighteen years old, if the latest in time of the crimes or the date of the defendant's last release from confinement, whichever is later, is within ten years of the date of the crime for which he is being sentenced. N.J.S.A. 2C:44-3(a).

Once the court finds that the statutory eligibility requirements are met, the maximum sentence a defendant may receive is the top of the extended-term range. Pierce, supra, 188 N.J. at 169. The range for a second degree offense, of which defendant was convicted here, was between ten and twenty years. N.J.S.A. 2C:43-7(a)(3). The sentence is to be determined as "a function of the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public." Pierce, supra,

188 N.J. at 168. Within that range, the court's choice of sentence is within the court's sound judgment "subject to reasonableness and the existence of credible evidence in the record to support the court's finding of aggravating and mitigating factors and the court's weighing and balancing of those factors found." Id. at 169. "On appellate review, the court will apply an abuse of discretion standard to the sentencing court's explanation for its sentencing decision within the entire range." Id. at 169-70.

Defendant clearly met the qualifications for an extended term. He was convicted in 1987 of robbery and possession of a weapon. In October 1989, he was convicted of burglary. Later that month, he was convicted of robbery. His pre-sentence report reveals a third robbery conviction in 2000. Released from prison in 2000, he committed the offenses for which he was facing sentence in 2003.[3] Defendant was over twenty-one years old at the time he committed all of the offenses. The judge also found that "without a doubt in my mind, I [a]m clearly convinced of this, [defendant] is a persistent offender."

The judge then proceeded to identify five aggravating factors applicable to both offenses: the nature and circumstance

[3] In addition, at the time of sentencing he was awaiting sentencing on two charges of harassment.

of the offense, N.J.S.A. 2C:44-1a(1); the gravity and seriousness of the harm inflicted on a vulnerable victim, N.J.S.A. 2C:44-1a(2); the risk that defendant will commit further offenses, N.J.S.A. 2C:44-1a(3); the extent of his prior criminal record, N.J.S.A. 2C:44-1a(6); and the need for deterrence, N.J.S.A. 2C:44-2b. He also found no mitigating factors. The judge then determined that these factors "cry out for the maximum sentence" and imposed a base term of twenty years on the burglary charge and a consecutive term of eighteen months on the impersonation charge. Both terms are the maximum terms for the offense. In addition, the burglary charge is subject to the extended parole ineligibility term of the NERA, N.J.S.A. 2C:43-7.2.

Defendant does not argue that the aggravating factors identified by the judge are not warranted. He does not contend that the judge should have identified any mitigating factors. Instead, he argues that the judge did not make specific findings of fact in support of each cited aggravating factor. The judge did, however, identify each element of defendant's record earlier in his remarks, and it is clear that he intended this discussion to carry forward to his discussion of the aggravating factors. Moreover, defendant had committed a series of serious offenses in excess of the minimum offenses required to impose an

extended term and a lengthy term of imprisonment had not deterred his criminal behavior.

We find no error in imposition of a consecutive term. The reasons for imposition of the consecutive term are apparent. The impersonation charge is separate from the burglary charge. Defendant could have gained access to the victim's apartment without assuming the role of an INS officer. Moreover, the victim was particularly vulnerable to defendant in his guise as an INS officer due to her immigration status and her desire not to offend an officer who might jeopardize her chance for permanent residency in this country.

Affirmed.