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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2991-11T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KARRIEM SANCHEZ, a/k/a HAKEEM BANKS, KAREEM BANKS, KARIEEM BLEY, KARRIEM SIMMONS,

Defendant-Appellant.

Submitted November 4, 2013 - Decided December 3, 2013

Before Judges Parrillo and Harris.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 10-03-0788.

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Sara A. Friedman, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Following denial of his motion to suppress, defendant Karriem Sanchez was tried by a jury and convicted of second-degree conspiracy to possess with intent to distribute a

controlled dangerous substance (CDS) (heroin), N.J.S.A. 2C:5-2 (count one); third-degree possession of heroin, N.J.S.A. 2C:35-10a(1) (count two); third-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(3) (count three); third-degree possession with intent to distribute heroin within 1,000 feet of school property, N.J.S.A. 2C:35-7 (count four); and second-degree possession with intent to distribute heroin while on or within 500 feet of a public housing facility, a public park, or a public building, N.J.S.A. 2C:35-7.1 (count five). The court merged counts one through four with count five and sentenced defendant, pursuant to N.J.S.A. 2C:43-6f to a term of sixteen years with an eight-year period of parole ineligibility. Defendant appeals. We affirm the judgment of conviction save for the extended term feature of defendant's sentence, which we vacate and remand the matter for resentencing.

According to the State's proofs at the suppression hearing, on September 17, 2009, at around 11:00 a.m., Detective Lydell James set up a surveillance in the vicinity of a four- or five-story multi-family apartment building on Brunswick Street in Newark based on information from a reliable informant about drug activity occurring in apartment 3A. Although James travelled there alone in an unmarked police vehicle and in plain clothes,

a backup unit, consisting of Lieutenant William Brady, and Detectives Michael Chirico and Peter Chirico, was stationed north of James' location and in communication contact with him. From his vantage point, James observed numerous people walk in and out of the apartment building in a hurried fashion over a period of forty-five minutes to an hour. He became suspicious that something was occurring inside the building. At some point, the backup officers stopped one of the individuals, Jose Vega, whom James observed leaving the building. Vega told the officers that he had just purchased heroin from two individuals selling drugs on the third floor of the building, and described one of them, who was known as Karriem.

Lieutenant Brady, who was the supervising officer, Detective James, and Detective Michael Chirico then entered the building surreptiously. Detective Peter Chirico meanwhile stationed himself outside to prevent anyone from escaping. The door to the apartment building was an open, unsecured and unlocked metal gate.

As the officers reached the third floor landing with guns drawn, James saw three individuals in the hallway, one of whom was sitting on a window ledge and the other two were nearby, standing next to each other. James recognized the man sitting on the ledge as defendant, whom he had previously known and whom

Vega had earlier described. Defendant was counting money and also holding a bag. There was also cash resting next to him on the ledge. One of the men standing, Charles Dunlap, was holding cash and the other man, Michael Daniels, was holding a glassine envelope that James believed, based on his seventeen years of experience as a police officer, contained heroin. James was under the impression that he had just interrupted a drug transaction.

As a result, all three men were eventually detained, handcuffed and arrested. Defendant was searched, leading to the discovery on his person of forty-nine glassine envelopes, each containing heroin. While these arrests were occurring, another man, Rodriguez Medina, entered the landing and, incredibly, attempted to purchase heroin from the three arrestees.

Meanwhile, Detective Peter Chirico, who had remained outside the building, observed a female throwing bricks of heroin out a third floor window. He secured the heroin, entered the building, and along with the other officers, banged on the door of apartment 3A until a woman, Lateisha Lawrence, answered. Detective Chirico identified her as the female who threw the heroin out the window. She was then arrested. The only other person in the apartment, Ebony Lasangne, was record checked and later arrested on an open warrant from Irvington.

At the close of proofs, the judge denied the suppression motion, crediting James' testimony as "credible and reliable in all aspects," and "candid, consistent and unwavering, both on direct and cross-examination." The judge found that the unlocked and unsecured front door allowed free access by the public into the building and its common areas and therefore the officers did not need either probable cause or a search warrant to enter the building and walk its hallways. The judge also found sufficient probable cause to arrest defendant and search his person incident to that arrest:

> Detective [James] did not see Sanchez engage in a transaction or solicit anyone for narcotics. There was no observed interaction between Dunlap, Daniels and Sanchez.
>
> Nevertheless, I do believe and find that it was reasonable for police officers to conclude that Sanchez, who was within close proximity of Dunlap and Daniels and who was counting money in the open in a building known for drug and general criminal activity, had recently been involved -- believe that Sanchez -- excuse me -- had recently been involved in the transaction between Dunlap and Daniels. It was not unreasonable to believe that Sanchez was holding money made by Daniels through the sales. Based on the testimony of the officer, I do believe that the State has proven the lawfulness of Sanchez's arrest by the preponderance of the evidence.

At trial, Detective James testified consistent with his motion testimony. In addition, he stated that the glassine

envelope taken from Daniels, as well as the forty-nine glassine envelopes seized from defendant and the two hundred and fifty glassine envelopes thrown and confiscated from apartment 3A all were marked with a teal green stamp bearing the word "Vengeance." According to James, a stamp is used to identify the brand of heroin.

On appeal, defendant raises the following issues:

I. THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 7 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE WARRANTLESS SEARCH AND SEIZURE CONDUCTED INSIDE A BUILDING WHERE TRESPASSING IS PROHIBITED.

   A. THE POLICE NEEDED A WARRANT BECAUSE THEY MADE THEIR OBSERVATIONS FROM A VANTAGE POINT INSIDE A BUILDING IN AN AREA WHERE THE GENERAL PUBLIC WAS NOT ALLOWED ACCESS.

   B. THE FRISK TO SEARCH FOR DRUGS WAS UNLAWFUL.

II. THE DEFENDANT'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE ADMISSION OF HEARSAY EVIDENCE FROM ABSENTEE WITNESSES IMPLICATING THE DEFENDANT IN THE COMMISSION OF THE CRIMES. (Partially raised below).

III. THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH

AMENDMENT OF THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE IMPROPER ADMISSION OF OPINION EVIDENCE. (Partially raised below).

A. THE STATE'S LAY WITNESS RENDERED HIGHLY PREJUDICIAL OPINIONS THAT SHOULD HAVE BEEN EXCLUDED.

B. THE CURATIVE INSTRUCTION WAS ERRONEOUS, CONFUSING, AND PREJUDICIAL. (Not raised below).

IV. THE DEFENDANT'S SENTENCE IS EXCESSIVE. (Partially raised below).

A. THE TRIAL COURT ERRONEOUSLY APPLIED THE MANDATORY EXTENDED TERM PROVISION THAT EXPRESSLY APPLIES TO SCHOOL ZONE OFFENSES TO THE CONVICTION FOR A PUBLIC HOUSING/BUILDING/PARK OFFENSE. (Not raised below).

B. THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING FACTORS.

C. THE MATTER MUST BE REMANDED TO CORRECT THE WRITTEN RECORD. (Not raised below).

In addition, defendant raises the following issues pro se:

I. THE PROSECUTOR'S REPEATED CHARGE TO THE JURY THAT THEY WERE "OBLIGATED TO THE CITY, COMMUNITY, AND RESIDENTS OF THE BUILDING," TO FIND DEFENDANT GUILTY, AMOUNTED TO PROSECUTORIAL MISCONDUCT WHICH VIOLATED DUE PROCESS AND SERVED TO DENY APPELLANT THE RIGHT TO A FAIR TRIAL.

II. THE TRIAL COURT'S FAILURE TO ADDRESS COMPLAINTS MADE BY A DEFENSE COUNSEL

REGARDING JURORS WHO WERE SLEEPING DURING THE COURT'S CHARGE, DEPRIVED APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND TO A FAIR AND IMPARTIAL JURY.

III. THE CUMULATIVE ERRORS COMPLAINED OF IN COUNSEL'S BRIEF AND APPELLANT'S SUPPLEMENTAL BRIEF, SERVED EITHER INDIVIDUALLY OR COLLECTIVELY TO DENY THIS APPELLANT THE RIGHT TO A FAIR TRIAL.

I.

Defendant argues that the court erred in denying his suppression motion because the police needed a warrant to enter the building and the frisk search of his person that preceded his arrest was not supported by a reasonable belief he was armed. We disagree with both contentions.

As a threshold matter, in reviewing a trial court's decision on a motion to suppress evidence, we "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007) (internal quotation marks and citations omitted). We "'should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy.'" Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). The findings below should not be

disturbed merely because we may have reached a different conclusion. Ibid. On the other hand, if the trial court acts under a misconception of the applicable law, then we must adjudicate the matter in light of the applicable law in order to avoid a manifest denial of justice. State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966).

Here, the trial court found that the officers did not need a warrant to enter the building because the doors were unlocked and open, making it accessible to the public. Specifically, the court found that the detectives observed several individuals entering the building not using keys and that James, familiar with this building, had never encountered a locked entrance door. Indeed, none of the three men arrested, including defendant, resided in the apartment building, yet had easy access to the common hallways and landings. We agree with the trial judge that the police officers' entry into the building was lawful.

In State v. Smith, 37 N.J. 481 (1962), cert. denied, 374 U.S. 835, 83 S. Ct. 1879, 10 L. Ed. 2d 1055 (1963), the Court found that a police officer does not violate the Fourth Amendment when he enters a common passageway of a multi-family building pursuant to an investigation, id. at 496, and uses his or her own senses to detect criminal activity in a protected

area, id. at 497. Similarly, in State v. Jordan, 115 N.J. Super. 73 (App. Div.), certif. denied, 59 N.J. 293 (1971), we found that an officer did not commit an unlawful trespass when he observed criminal activity in the hallway of a hotel. Id. at 75-76. In contrast, we noted that if police officers were entering the room of the defendant, then they would have committed an unlawful trespass, rendering the seizure and subsequent arrest invalid. Id. at 75 (citation omitted). However, we determined that the defendant's seizure and arrest was valid because the officer was lawfully standing in the common hallway and observed criminal activity in plain view. Id. at 75-76 (citing Smith, supra, 37 N.J. at 495-96).

Defendant relies on State v. Jefferson, 413 N.J. Super. 344 (App. Div. 2010), but that case is inapposite. There, we held that evidence seized from defendant's apartment building should be suppressed because the officers, without a warrant, unlawfully entered the premises and conducted an investigation. Id. at 352. In Jefferson, supra, the door to the apartment building was kept locked and only the tenants and the landlord had access to the two-story building. Id. at 350. We found that the officer violated the Fourth Amendment by trying to wedge herself into the doorway of defendant's multi-family

dwelling without either a warrant or benefit of an exception to the warrant requirement. Id. at 352.

Here, in contrast, the four-or five-story multi-family apartment building had several apartments on each floor and access to the common areas was open to the public by virtue of the main door being unlocked and unsecured. Members of the public were seen entering and leaving the building over an approximately forty-minute span of time and defendant himself, as well as his cohorts, were present therein although non-residents. Under the circumstances, defendant could not have entertained any reasonable expectation of privacy in the area where he was conducting drug deals.

Having found a valid entry, the trial judge further determined that defendant was lawfully arrested based on probable cause gleaned from information police obtained from a reliable informant prior to their entry coupled with their first-hand observations on the third floor of the apartment building. We agree.

Defendant makes much of the fact that the frisk of his person preceded his arrest and was not supported, under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), by a reasonable suspicion that he was armed. While the record may not support such a belief, the fact remains that when a police

officer has probable cause to arrest prior to a search, it is not unlawful to search the individual prior to the arrest. State v. O'Neil, 190 N.J. 601, 614 (2007). "It is 'the right to arrest,' rather than the actual arrest that 'must pre-exist the search.'" Ibid.; see also State v. Doyle, 42 N.J. 334, 342 (1964). The O'Neil Court reasoned that "'the proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent.'" O'Neil, supra, 190 N.J. at 614 (quoting State v. Bruzzese, 94 N.J. 210, 219 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984)). Thus, the Court held that since the officers objectively had the probable cause necessary to arrest the defendant prior to the search, it was not unlawful to search the defendant before placing him under arrest. Id. at 615.

Here, regardless of whether there was a full blown search of defendant's person or a mere "pat down," and irrespective of whether such police action preceded defendant's arrest, objectively there existed sufficient probable cause to believe defendant committed a crime, and therefore to arrest defendant, prior to the discovery of drugs on his person.

To make a lawful arrest, it must be based on "probable cause." State v. Moore, 181 N.J. 40, 45 (2004). "Probable cause" has been defined as "'a well-grounded suspicion that a crime has been or is being committed.'" Ibid. (quoting State v. Sullivan, 169 N.J. 204, 211 (2001)). This standard is satisfied when "the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed." Id. at 46 (internal quotation marks and citation omitted). In determining probable cause, a court looks at the totality of the circumstances. Ibid.; see also Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983).

Before searching defendant, the police had sufficient probable cause to arrest him on a drug-related charge based on (1) information received from their reliable informant prior to the date of the incident; (2) Detective James' surveillance of the building's activities immediately before police entry into the building; (3) Vega's admission that "Karriem" and another individual sold him drugs on the third floor of the apartment building; and (4) police observations of defendant in the hallway counting money next to an individual who was holding

heroin, and another individual holding cash. Under the totality of these circumstances, police formed the requisite probable cause to arrest prior to the search of defendant's person.

II.

Defendant contends that his constitutional right to confront witnesses was violated because the State offered hearsay evidence of witnesses who did not testify at trial. Specifically, defendant refers to Detective James' testimony at trial that Medina attempted to purchase heroin from the trio, and that the police had obtained "information" prior to setting up surveillance of the apartment building.

Regarding defendant's first contention, Detective James, on direct examination, testified that after the trio was arrested, Medina approached the three individuals and was subsequently arrested. During this line of questioning, defense counsel objected that unless Detective James made the arrest or was aware of what happened at the time of the arrest, he should not be permitted to testify. When the State asked Detective James why Medina was arrested, defense counsel objected that the question could elicit potential hearsay statements of Medina, who was not present at trial and did not testify. The trial court overruled this objection. Detective James then testified that he witnessed Medina walk up to the third floor and attempt

to purchase heroin from the three arrested individuals. When the State asked Detective James what Medina said, the trial court sustained defense counsel's hearsay objection. However, Detective James was permitted to testify that Medina did say something while he approached the three individuals, but was not allowed to state specifically what he said.

Detective James' challenged testimony does not constitute hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). Here, James did not testify as to any statements made by Medina, but simply described the officers' personal observations of Medina's conduct and behavior. There was no error in its admission.

The next claimed violation of the Confrontation Clause pertains to Detective James' testimony, elicited on cross-examination, that the detectives had "information" prior to entering the apartment building. Specifically, defense counsel asked James:

> Q: And as a result of what [Detective Peter Chirico] told you, you attempted to gain entrance into Apartment 3A, correct?
>
> A: That's correct.

Q: Actually, you were suspicious of 3A a couple of days before, right?

A: We had information.

Q: A couple of days before?

A: We had information.

Defendant's argument here fares no better than his first.

"[T]he hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so 'upon information received.'" State v. Bankston, 63 N.J. 263, 268 (1973) (citation omitted). It is impermissible, however, when a police officer repeats specific information about what an unidentified declarant said regarding a crime committed by the accused. Ibid. Moreover, when a defendant "flagrantly and falsely [suggests] that a police officer acted arbitrarily or with ill motive[,]" that officer may be permitted to refute the challenge "despite the invited prejudice the defendant would suffer." State v. Branch, 182 N.J. 338, 352 (2005). This rule operates to prevent defendants "from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context." State v. James, 144 N.J. 538, 554 (1996).

Detective James' testimony that the detectives had "information" that made them suspicious of the apartment building did not violate the hearsay rule. Most significant, James' testimony was in response to defense counsel's question about why he was suspicious of the apartment building a couple days prior to defendant's arrest. Defendant "opened the door" to this issue by questioning Detective James' suspicion of the apartment building prior to the date of the incident. Branch, supra, 182 N.J. at 352. But separate and apart from this consideration, Detective James did not testify about specific information regarding what an unidentified informant said about defendant's involvement in drug dealing, and therefore his testimony does not come within Bankston's proscription. There was no error, much less plain error, in admitting this challenged portion of James' testimony.

III.

Defendant next contends that his constitutional right to due process was violated because Detective James, on two separate occasions, provided impermissible lay opinions that defendant and his cohorts were selling drugs. He refers first to James' testimony that, based on his observations, he believed that a narcotics transaction was occurring on the third floor,

and second, to James' testimony that Medina later approached the three arrestees and attempted to purchase drugs.

Briefly, by way of background, Detective James, on direct examination, explained that when he walked up the stairs of the apartment building he observed Dunlap holding money, Daniels holding a glassine envelope of heroin and defendant sitting on a windowsill with money lying next to him. Thereafter, the prosecutor asked James, based on his training and experience in investigations into illegal narcotics activity, whether what he observed created a suspicion in his mind. At this point defense counsel objected to this question, but the trial court overruled it. James responded that he believed that at that point a narcotics transaction was occurring.

The next day, defense counsel moved for a mistrial arguing that parts of James' direct examination elicited improper lay opinion testimony in violation of State v. McLean, 205 N.J. 438 (2011). In McLean, supra, decided just six months before defendant's trial, the Court held that a police officer, as a lay witness, is not permitted to give his opinion that he witnessed a narcotics transaction after giving a recitation of what he observed. Id. at 461. In so ruling, the Court distinguished fact testimony by police officers from expert opinions. Id. at 460. Fact testimony does not consist of

"information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." Ibid. On the other hand, a witness, with the proper qualifications, can testify as an expert and "explain the implications of observed behaviors that would otherwise fall outside the understanding of ordinary people on the jury." Ibid.

Here, in considering defendant's motion for a mistrial, the judge agreed that the admission of James' impression that a drug transaction was taking place was in error. In denying defendant's motion, however, the judge offered the following curative instruction to the jury to ensure that James' testimony was used only to explain why the officer arrested defendant and not as an opinion of defendant's guilt:

> Yesterday, as you may recall, you heard the testimony of Detective James. He testified that on the day in question he, together with other officers, entered [] Brunswick Street in the City of Newark, and that, as he approached the third floor landing of that building, he observed three males.
>
> The first he identified as . . . Mr. Daniels, and testified that Mr. Daniels was standing on the steps of the landing and holding in his hand a small glassine envelope which contained heroin.
>
> The second individual he had identified as the defendant, Mr. Sanchez, who was sitting on a window sill in close proximity

to . . . Daniels, and was counting money or cash.

The third individual, later identified as a Charles Dunlap, was also standing in close proximity to Mr. Daniels and holding a $10 bill in his hand.

He also testified, in response to the prosecutor's question, as to whether or not this activity raised any suspicions in his mind or on his behalf. Detective James said yes, and later stated or testified that he believed that a drug transaction was taking place or had taken place.

Now, this testimony of Detective James, with the reference, specific reference to the portion of his testimony concerning suspicions raised in his mind and specifically his belief or testimony that a drug transaction was taking place or had taken place, was offered by the State and permitted by the [c]ourt for the sole purpose of explaining the police officer's subsequent actions; that is, the arrest and later charging of these defendants with the charges that they are facing in court today.

It was not offered by the State and you are not to interpret that testimony as an opinion by Detective James as to the guilt of either of these two defendants in any shape, way or form as to the charges they're facing in court today.

The decision of these defendants' guilt or innocence on these charges can only be made by you, the jury, and no one else. And that decision should be made by you only on the evidence presented in the courtroom and after a careful consideration and evaluation of the evidence provided in the court and for only the [purpose] that it was presented.

> Again, that evidence was not presented or permitted by the [c]ourt for any other purpose than the [purpose] I've just explained to you. And, again, you cannot consider that evidence for any other purpose other than the purpose I've just explained or directed or informed you, okay?

Assuming error in the admission of James' impression of what he observed on the third floor, it was cured by the judge's clear, correct and comprehensive limiting instruction as to how to use this challenged testimony. Pursuant to N.J.R.E. 105:

> When evidence is admitted as to one party or for one purpose but is not admissible as to another party or for another purpose, the judge, upon request, shall restrict the evidence to its proper scope and shall instruct the jury accordingly, but may permit a party to waive a limiting instruction.

A curative instruction is sometimes necessary to remedy the potential prejudice arising from the jury's exposure to inadmissible evidence. State v. Zapata, 297 N.J. Super. 160, 176 (App. Div. 1997), certif. denied, 156 N.J. 405 (1998). Curative instructions are most effective when given to the jury contemporaneously with the trial events that triggers their necessity. State v. Cooke, 345 N.J. Super. 480, 486 (App. Div. 2001), certif. denied, 171 N.J. 340 (2002). The significance of any delay in giving an appropriate curative instruction will depend on the circumstances of a particular case. See State v. Zarinsky, 143 N.J. Super. 35, 56 n.4 (App. Div. 1976), aff'd, 75

N.J. 101 (1977) (holding that the trial court was not required to give a limiting instruction before the jury was excused for the day).

Here, the judge promptly issued an appropriate curative instruction the following day, after having had the opportunity to read the McLean decision. Defendant did not object to the instruction when it was initially charged to the jury or when the court later instructed the jury again at the end of the trial. In its final charge to the jury, the court explained:

> Now, you will recall that I gave you such a limiting instruction during the course of this trial with reference to the testimony of Detective James. Whose testimony was that he believed, as a result of his observations, etcetera, that a drug transaction had taken place involving these defendants. Again, that testimony was offered and permitted by the [c]ourt, solely to explain the police officer's subsequent actions -- that is, the arrest and charging of these defendants -- and not as evidence or as any opinion of guilt on these charges of either defendant.

We are satisfied that the curative instruction regarding James' testimony suggesting a drug transaction had taken place was sufficient to remediate any potential prejudice arising therefrom.

We find no error, however, in James' testimony about his observations of Medina walking up to the third floor and attempting to purchase drugs from the three arrestees because it

was based on what he observed firsthand. Such testimony was not based on James' opinion, but rather on what he actually witnessed. Thus, the court was not required to reference this testimony in its curative instruction because it was not impermissible opinion evidence.

IV.

Defendant contends that the court impermissibly imposed the mandatory extended term provision of N.J.S.A. 2C:43-6f, that expressly applies to school zone offenses, to his drug conviction for a public housing, building, or park offense.

As noted, the trial court merged the first four drug counts, including the third-degree school zone offense, with the second-degree conviction for possession with intent to distribute heroin within 500 feet of a public housing project and/or public building. The judge then granted the State's application for an extended term, pursuant to N.J.S.A. 2C:43-6f, sentencing defendant to a term of sixteen years with an eight-year parole bar.

Our review requires that the sentencing court apply the correct legal principles in exercising its discretion. State v. Roth, 95 N.J. 334, 363 (1984). Pursuant to N.J.S.A. 2C:43-6a(2), for a conviction of a second-degree crime, the sentencing range is between five and ten years. For a conviction of a

third-degree crime, the sentencing range is between three and five years. N.J.S.A. 2C:43-6a(3).

Certain enumerated drug offenses committed by repeat drug offenders are subject to the mandatory extended term provisions of N.J.S.A. 2C:43-6f, which provides:

> A person convicted of manufacturing, distributing, dispensing or possessing with intent to distribute any dangerous substance or controlled substance analog under [N.J.S.A. 2C:35-5], . . . or of distributing, dispensing or possessing with intent to distribute on or near school property or buses under [N.J.S.A. 2C:35-7], who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by subsection c. of [N.J.S.A. 2C:43-7], notwithstanding that extended terms are ordinarily discretionary with the court.

If a defendant is sentenced to an extended prison term in accordance with N.J.S.A. 2C:43-6f, "the court shall impose a sentence within the ranges permitted by [N.J.S.A. 2C:43-7a](2), (3), (4), or (5)[,] according to the degree or nature of the crime for which the defendant is being sentenced[.]" N.J.S.A. 2C:43-7c. Accordingly, a conviction of a second-degree crime authorizes the court to impose an extended term between ten and twenty years. N.J.S.A. 2C:43-7a(3). For a third-degree crime,

N.J.S.A. 2C:43-7a(4) permits the trial court to impose an extended term between five and ten years.

In State v. Parker, 335 N.J. Super. 415 (App. Div. 2000), we held that the trial court was required to merge a defendant's convictions of possession of CDS with the intent to distribute within 1000 feet of a school (N.J.S.A. 2C:35-7) and within 500 feet of a public housing project or public park (N.J.S.A. 2C:35-7.1). Id. at 426. In reaching this decision, we reasoned that the defendant's conduct involved a singular criminal event and that punishing defendant twice for the same conduct "would violate double jeopardy principles, due process, and principles of fundamental fairness." Ibid.

At issue here is whether the extended term provision of N.J.S.A. 2C:43-6f may attach to a conviction for the non-enumerated second-degree crime of possession with intent to distribute a CDS within 500 feet of a public recreation zone in violation of N.J.S.A. 2C:35-7.1. There is no dispute that defendant had qualifying prior drug convictions, and there is no question that defendant was subject to an extended term based upon his convictions under counts three and four of the indictment, which charged third-degree possession of heroin with intent to distribute and possession of heroin with intent to distribute within 1000 feet of school property, N.J.S.A. 2C:35-

5a(1) and N.J.S.A. 2C:35-7. But defendant received an extended term appropriate for the second-degree crime of possession within intent to distribute heroin in a public recreation zone, N.J.S.A. 2C:35-7.1 (count five). Simply put, N.J.S.A. 2C:43-6f does not authorize an extended term for that crime.

We discern no ambiguity in the statute that would permit us to look beyond the clear terms of N.J.S.A. 2C:43-6f. "If the meaning of the text [of a statute] is clear and unambiguous on its face, we enforce that meaning." State v. Reiner, 180 N.J. 307, 311 (2004). We reject the State's claim that because the public recreation zone offense requires proof of a violation of N.J.S.A. 2C:35-5, that N.J.S.A. 2C:43-6f, which refers to N.J.S.A. 2C:35-5, necessarily indicates the Legislature's intention to require an extended term for the public recreation zone offense as well. As noted, the Legislature included in N.J.S.A. 2C:43-6f a specific reference to the school zone offense, N.J.S.A. 2C:35-7. Thus, the Legislature has included one and excluded the other from the list of crimes subject to a mandatory extended term pursuant to N.J.S.A. 2C:43-6f. In our view, the Legislature's decision to list one but not both of these similar crimes eliminates the need for a judicial construction of N.J.S.A. 2C:43-6f that extends the reach of this sentence-enhancing provision. We construe penal statutes

strictly in favor of a criminal defendant, State v. Livingston, 172 N.J. 209, 218 (2002), and a "strict construction in a defendant's favor is particularly apt when the statute at issue is a penalty enhancer[,]" State v. Lewis, 185 N.J. 363, 380 (2005) (LaVecchia, J., dissenting).

The result we reach does not undermine the force of the mandatory extended term provisions included in N.J.S.A. 2C:43-6f that are applicable to defendant's third-degree convictions for violations of N.J.S.A. 2C:35-5 and N.J.S.A. 2C:35-7. The extended term for a crime of the third-degree is equivalent to an ordinary term for the second-degree crime of distribution within a public recreation zone. See N.J.S.A. 2C:43-7a(4); N.J.S.A. 2C:43-6a(2). Thus, the Legislature's goal of a longer period of incarceration is satisfied. Moreover, under the principles established in State v. Dillihay, 127 N.J. 42, 54 (1992), upon merger of defendant's second and third-degree crimes, the minimum period of parole ineligibility that N.J.S.A. 2C:43-6f requires for an extended term upon conviction of the third-degree distribution offense survives merger and must be included in defendant's sentence for N.J.S.A. 2C:35-7.1.

We conclude that where the State seeks an extended term pursuant to N.J.S.A. 2C:43-6f for a defendant convicted of a third-degree violation of N.J.S.A. 2C:35-5 or N.J.S.A. 2C:35-7

and the second-degree crime of distribution in a public recreation zone, the convictions merge. The judge must impose a term of incarceration in the second-degree range, which is also the range for the extended term for a third-degree violation of N.J.S.A. 2C:35-5a or N.J.S.A. 2C:35-7, and the judge must impose a period of parole ineligibility as required by N.J.S.A. 2C:43-6f.

Accordingly, we vacate defendant's sentence and remand for resentencing.

V.

We now address additional arguments raised by defendant pro se.

Defendant first complains that certain comments by the prosecutor in opening and closing statements violated his right to a fair trial. Specifically, defendant contends that the State, during its opening statement, inappropriately commented that the jury had an obligation to Essex County, the city of Newark, and the residents of Brunswick Street to take this matter seriously, and then during its summation, impermissibly commented that the jury had an obligation to the people of Essex County to find defendant guilty if they were convinced, beyond a reasonable doubt, that defendant committed the underlying

crimes. We find neither of these remarks, unobjected to at trial, amounts to error, much less plain error.

While a prosecutor's use of a "call to arms" or "send a message" argument would be inappropriate, see, e.g., State v. Hawk, 327 N.J. Super. 276, 282 (App. Div. 2000) (the State's "send a message" comment in its summation was inflammatory and inappropriate); State v. Goode, 278 N.J. Super. 85, 89 (App. Div. 1994) (the prosecutor's remark that the jury could "make a difference in [their] community" was a "call to arms" that impermissibly prompted the jurors to disregard their duty to view this matter objectively); State v. Holmes, 255 N.J. Super. 248, 251-52 (App. Div. 1992) (the State's reference to the "war on drugs" in the community was improper), the prosecutor here did not argue that the jury had an obligation to the community to convict defendant. Rather, the State was commenting on the importance of this case and that if the jurors were satisfied, beyond a reasonable doubt, that defendant committed these crimes, then they should convict him. The State merely reminded the jury of its important duty to the community to convict defendants if "firmly convinced" that the State sufficiently proved its case. Thus, the prosecutor's comments regarding the jury's duty to the community was fair in this instance.

Defendant also contends that the State impermissibly bolstered the credibility of Detective James' testimony while attacking defendant's witness, Dunlap. Specifically, defendant takes issue with the following comments made during the State's summation:

> Detective James' testimony is reliable and accurate -- which the State submits it is . . . of course he does. Karriem Sanchez and Michael Daniels are -- were, on September 17th, 2009, Charles Dunlap's heroin dealers, right? Does he have an interest in the outcome, Charles Dunlap? Of course he does. If he comes in here and he lies under oath and he helps Michael Daniels and Karriem Sanchez, his heroin dealers, avoid justice in this case, he's probably owed a favor, right? Next time he's short on cash, don't you think he can count on a favor, if that's what happens here? He has an interest in the outcome of the case, and you need to take that into account when determining whether or not he's a credible witness.

This portion of the prosecutor's summation was in direct response to defense counsel's closing argument in which he accused the police of conducting a sloppy investigation and commented that "after 17 years as a police officer, you really should be more precise." In addition, defense counsel argued that "[t]he prosecutor may stand up and say to you -- I don't know if he will; I would -- why would they lie? Why would the police lie? Why would they make up this whole story? Well, we

know from our common experiences that sometimes police lie, like everybody else. They want to make the case."

We find the prosecutor's challenged remarks constituted fair comment. A prosecutor is permitted to attack a witness's credibility and to point out "a witness's interests in presenting a particular version of events." State v. Johnson, 287 N.J. Super. 247, 267 (App. Div.), certif. denied, 144 N.J. 587 (1996) (citing State v. Purnell, 126 N.J. 518, 538 (1992)).

Further, the State did not vouch for Detective James' credibility, but rather responded to defendant's attack on Detective James' credibility and his recollection of events. See Johnson, supra, 287 N.J. Super. at 266 (holding that "[a] prosecutor may respond to an issue or argument raised by defense counsel"). Here, the prosecutor merely asserted that Detective James' testimony is reliable and accurate. This comment was fair, especially in light of defense counsel's argument that police officers, in general, have a motive to lie in order to "make the case."

VI.

Defendant, pro se, also contends that the trial court's failure to properly address defense counsel's complaint that he observed one juror sleeping and another juror dozing off deprived him of a fair trial. While the court was charging the

jury after closing arguments, a recess was taken, during which defense counsel asserted that he saw one juror "apparently sleeping" and another juror who "seems to be dozing." The prosecutor responded: "Judge, just for the record, I've been watching them. I haven't seen anyone dozing off[.]" The judge took note of defendant's complaint, promised to keep an eye on the jurors, and requested his court officer to keep an eye on the jurors as well. Further, the court instructed one of the officers to open all of the windows in the courtroom.

We have found that trial judges should take corrective action whenever counsel brings a complaint of a sleeping juror to its attention. State v. Scherzer, 301 N.J. Super. 363, 491 (App. Div.), certif. denied, 151 N.J. 466 (1997). Unlike State v. Burks, 208 N.J. Super. 595, 611 (App. Div. 1986), wherein the court simply responded "so what" to defense counsel's complaint of two jurors sleeping, in the present matter, the trial judge took several measures to ensure that the jurors remained awake throughout the proceedings. Moreover, after the court assured that it would keep an eye on the jurors complained of and ordered its personnel to open all the windows and monitor those jurors as well, defense counsel appeared satisfied and did not pursue any further action. Thus, once counsel brought his

complaint to the trial court's attention, the judge addressed it promptly and appropriately.

VII.

We find defendant's remaining contention to be without merit. R. 2:11-3(e)(2).

We vacate defendant's sentence for possession with intent to distribute heroin in a public recreation zone and remand for resentencing. The judgment of conviction is otherwise affirmed.