

No.

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IN THE SUPREME COURT OF THE UNITED STATES

=====

ALLEN ALEXANDER,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

Michael Confusione
Hegge & Confusione, LLC
P.O. Box 366, Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (facsimile);
mc@heggelaw.com
Counsel for Petitioner, Allen Alexander

Question Presented

Can a state trial judge's failure to charge the jury on a lesser included offense violate the defendant's rights guaranteed by the Due Process Clause of the United States Constitution?

List of Parties

All parties appear in the caption of the case on the cover page.

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Petition for Writ of Certiorari

Petitioner Allen Alexander respectfully petitions for a writ of certiorari to review the Decision and Order of the Supreme Court of New Jersey, which reversed the decision of the Superior Court of New Jersey, Appellate Division, and reinstated defendant's convictions for armed robbery and related weapons crimes under New Jersey law.

Opinions Below

The April 30, 2018 Decision of the New Jersey Supreme Court is attached at Appendix A (at A1) and is a published decision.

The October 18, 2016 Decision of the New Jersey Superior Court, Appellate Division (which was subsequently reversed and vacated by the New Jersey Supreme Court) is attached at Appendix B (at A10) and is unpublished.

Jurisdiction

The Decision and Order of the New Jersey Supreme Court sought to be reviewed was entered on April 30, 2018. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257 (West).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides, “No person shall ... be deprived of life, liberty, or property, without due process of law...”

Section One of the Fourteenth Amendment to the United States Constitution provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law...”

Statement of the Case

The State alleged that petitioner conspired with another, unidentified man (referred to as “Naji”) to rob the victim Ernesto Espinal at a train station in Newark, New Jersey. According to the State’s testimony at trial, defendant held the victim around his neck while another man cut the victim's forehead. Defendant was tried before a jury and found guilty under New Jersey law of first-degree robbery, second-degree conspiracy to commit robbery, fourth-degree unlawful possession of a weapon, and third-degree possession of a weapon for an unlawful purpose. A3-5.

Petitioner appealed as of right to New Jersey’s Appellate Division, arguing that the trial judge erred in failing to charge the jury *sua sponte* on “serious bodily injury” aggravated assault, a crime governed by N.J. Stat. Ann. § 2C:12-1(b)(1)

(West). Petitioner noted that the evidence presented to the jury permitted the jury to find that defendant was not guilty of the charged robbery but guilty, instead, of the lesser crime of aggravated assault. The evidence showed that nothing was taken from the victim. Though the victim told the jury it was an attempted robbery, petitioner testified in his own defense before the jury at trial and relayed a different account. Petitioner told the jury that he bumped into the victim while petitioner was walking through the train station. The men exchanged profanities. Petitioner's friend, "Naji," then punched Espinal, causing Espinal to fall to the ground. Petitioner claimed that he tried to restrain Naji from attacking Espinal. Petitioner told the jury that he did not attempt to rob the victim and never demanded money from him. Nor did he possess a weapon, petitioner testified. A3-5, 10-12.

In arguing that the trial judge was obliged to give the jury the aggravated assault option, petitioner noted that the primary crime charged – robbery, is most often a theft or attempted theft coupled with assault. In this case, the jury could have found the assault proven beyond a reasonable doubt but rejected the claimed theft. The jury could have believed petitioner's claim that there was no money demanded of the victim, but disbelieved his claim that he was not involved in assaulting the victim or did not possess or urge Naji to use a deadly weapon (as the

prosecution alleged). The jury could have found that Petitioner was responsible for assaulting the victim following the “exchange of profanities” but that this was not accompanied by any attempt to steal from the victim. Under that factual scenario that the jury could have found, the jury could have found defendant guilty of an assault but not guilty of robbery. This obvious conclusion that the trial evidence permitted the jury to reach required the trial judge to explain to the jury, in the final charge, the lesser offense of aggravated assault. A3-5, 10-12.

The Appellate Division agreed and ruled that the trial court committed reversible error by failing to charge the jury that if it had a reasonable doubt on whether defendant intended to commit a theft, but found that defendant attempted to cause serious bodily injury to the victim (N.J. Stat. Ann. § 2C:12-1(b)(1) (West)), it should find him guilty of aggravated assault but not robbery under New Jersey law. The jury instructions failed to provide the jury that alternative, warranting a new trial for defendant, the Appellate Division ruled. A10-13.

New Jersey’s Supreme Court granted the State’s petition for review (certification) and reversed the Appellate Division’s decision, however, ruling, “the trial court had no obligation to issue a *sua sponte* jury instruction” on the aggravated assault crime. The Supreme Court agreed that robbery most-often is assault coupled with theft (or attempted theft) but said that the trial judge in this

case was not obliged to give the jury the assault-only option. The Supreme Court ruled that New Jersey's "clearly indicated" standard (which requires trial judges to instruct the jury on lesser offenses that are "clearly indicated" by the trial evidence regardless of whether a party requests the instruction) "does not require trial courts either to 'scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty.'" A6-7. "We therefore reverse the Appellate Division's decision and reinstate defendant's convictions." A1-9.

Reason for Granting the Petition

In Beck v. Alabama, 447 U.S. 625, 627, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), this Court held that the death penalty may not be imposed "when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict." Beck concerned an Alabama statute that precluded giving the jury any lesser included offense instructions in capital cases. Beck, 447 U.S. 625. The Court invalidated the statute, holding that due process entitles a defendant to a lesser included offense instruction in a capital case to protect against the risk of an unwarranted conviction. Beck, 447 U.S. 625 ("Such a risk cannot be tolerated in a case in which the defendant's life is at stake"). Beck's holding was clarified somewhat in Schad v. Arizona, 501 U.S. 624, 646, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991),

where the Court held that due process does not require the jury to be instructed on every non-capital lesser-included offense supported by the evidence, just that the jury may not be placed in an “all-or-nothing” choice between capital murder and innocence. See also Hopper v. Evans, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982) (holding no due process violation where instruction on lesser offense was not warranted under the state criminal law).

The Court should grant review to answer the open question noted by the Court in Gilmore v. Taylor, 508 U.S. 333, 342, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993), “Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error.” The Court should clarify the extent, if any, to which the United States Constitution’s Due Process Clause requires state court judges to provide the jury with instructions on lesser included offenses in non-capital cases. The Third Circuit has extended Beck to non-capital cases. Vujosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988) (citing Keeble v. United States, 412 U.S. 205, 212–13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). Other circuits have held that the failure to give lesser included offense instructions in a non-capital case does not present a federal constitutional question. See Johnson v. Keith, 726 F.3d 1134, 1135 n. 2 (10th Cir. 2013) (“[N]either this court nor the Supreme Court has recognized a federal

constitutional right to a lesser included instruction in non-capital cases”); Carney v. Fabian, 487 F.3d 1094, 1098 (8th Cir. 2007) (“Because [t]he Supreme Court has never held that due process requires the giving of lesser-included-offense instructions in noncapital cases, the trial court's refusal to give the heat-of-passion manslaughter instruction here cannot be contrary to clearly established federal law.”); Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000), cert. denied 534 U.S. 839, 122 S.Ct. 94, 151 L.Ed.2d 55 (2001); Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988); Trujillo v. Sullivan, 815 F.2d 597, 602 (10th Cir. 1987); Perry v. Smith, 810 F.2d 1078, 1080 (11th Cir. 1987).

We understand that Beck arose from a capital case, but petitioner in this case has been sentenced to spend 15 years of his life in prison despite the fact that the evidence at his trial plainly permitted the jury to find him guilty only of the far less serious aggravated assault crime under New Jersey law. This presented the jury with the non-choice the Court condemned in Beck, 447 U.S. at 627 -- precluding the jury from considering a verdict of guilt to a lesser offense even though the “evidence would have supported such a verdict” under the state’s laws. This has resulted in defendant’s far longer term of imprisonment than would have been imposed for the aggravated assault crime. Does the Due Process Clause extend to protect a defendant from such situations in non-capital, state-court prosecutions?

The Court should clarify this important area of law that affects thousands of persons facing criminal trials across our country.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Michael Confusione

Michael Confusione (counsel of record)
Hegge & Confusione, LLC
P.O. Box 366, Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (facsimile);
mc@heggelaw.com
Counsel for Petitioner, Allen Alexander

Dated: July 23, 2018

233 N.J. 132

Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Appellant,

v.

Allen ALEXANDER, a/k/a Karon

Keenan, Defendant–Respondent.

A–49 Sept. Term 2016

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078515

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Argued January 3, 2018

|

Decided April 30, 2018

Synopsis

Synopsis

Background: Defendant was convicted in the Superior Court, Law Division, Essex County, of second-degree conspiracy to commit robbery, first-degree robbery, fourth-degree unlawful possession of a weapon, and third-degree possession of a weapon for an unlawful purpose. He appealed. The Superior Court, Appellate Division, 2016 WL 6081442, reversed. State sought certification of appeal.

[Holding:] The Supreme Court, [Timpone, J.](#), held that trial court had no duty to instruct jury sua sponte on “serious bodily injury” aggravated assault as a lesser-included offense of robbery.

Reversed.

West Headnotes (12)

[1] Criminal Law **Necessity of requests**

An appellate court reviews for plain error the trial court's obligation to sua sponte deliver a jury instruction when a defendant does not

request it and fails to object at trial to its omission. [N.J. R.A.R 2:10-2](#).

[Cases that cite this headnote](#)**[2] Criminal Law** **Necessity of Objections in General**

The mere possibility of an unjust result is not enough to warrant reversal of an unchallenged error; rather, the 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. [N.J. R.A.R 2:10-2](#).

[Cases that cite this headnote](#)**[3] Criminal Law** **Reasonable or rational basis**

A party must request a charge or object to an omitted charge at trial for the rational basis test to apply, under which the trial court cannot charge a jury on an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense. [N.J. Stat. Ann. § 2C:1-8\(e\)](#).

[Cases that cite this headnote](#)**[4] Criminal Law** **Reasonable or rational basis**

When a defendant requests a lesser-included-offense charge, the trial court is obligated, in view of defendant's interest, to examine the record thoroughly to determine if the rational-basis standard has been satisfied, under which the trial court cannot charge a jury on an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense. [N.J. Stat. Ann. § 2C:1-8\(e\)](#).

[Cases that cite this headnote](#)**[5] Criminal Law** **Reasonable or rational basis**

The rational-basis test, under which the trial court cannot charge a jury on an included offense unless there is a rational basis for

a verdict convicting the defendant of the included offense, sets a low threshold for a lesser-included-offense instruction. [N.J. Stat. Ann. § 2C:1-8\(e\)](#).

[Cases that cite this headnote](#)

[6] Criminal Law

 [Necessity in General](#)

In the absence of a request or an objection, an unrequested charge must be clearly indicated from the record.

[Cases that cite this headnote](#)

[7] Criminal Law

 [Grade or degree of offense](#)

Trial courts are not required either to scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty, or to meticulously sift through the entire record to see if some combination of facts and inferences might rationally sustain a lesser charge; instead, the evidence supporting a lesser-included charge must jump off the page to trigger a trial court's duty to sua sponte instruct a jury on that charge.

[Cases that cite this headnote](#)

[8] Criminal Law

 [Relation between offenses;sufficiency of charging instrument](#)

Trial courts are never required to charge a jury sua sponte on “related offenses,” which are those that share a common factual ground, but not a commonality in statutory elements, with the crimes charged in the indictment.

[Cases that cite this headnote](#)

[9] Criminal Law

 [Relation between offenses;sufficiency of charging instrument](#)

Criminal Law

 [Reasonable or rational basis](#)

A trial court may instruct the jury on a related offense only when the defendant requests or consents to the related offense charge, and there is a rational basis in the evidence to sustain the related offense.

[Cases that cite this headnote](#)

[10] Criminal Law

 [Instructions](#)

Trial court's obligation to give unrequested instruction on aggravated assault as a lesser-included offense of robbery was subject to review to determine whether need for charge was clearly indicated; defendant had several opportunities to request aggravated assault charge before trial court but failed to do so. [N.J. Stat. Ann. § 2C:12-1\(b\)\(1\)](#).

[Cases that cite this headnote](#)

[11] Criminal Law

 [Grade or degree of offense](#)

Trial court had no duty to instruct jury sua sponte on “serious bodily injury” aggravated assault as a lesser-included offense of robbery; State charged robbery as a first-degree crime exclusively on “deadly weapon” prong, but “serious bodily injury” aggravated assault required greater injury element than that in State's robbery charge and had to be established by proof of more facts than those needed to establish bodily injury. [N.J. Stat. Ann. §§ 2C:1-8\(d\), 2C:12-1\(b\)\(1\), 2C:15-1\(a\)](#).

[Cases that cite this headnote](#)

[12] Criminal Law

 [Evidence Justifying or Requiring Instructions](#)

There may be circumstances in which the evidence adduced at trial supports a jury charge on assault as a lesser-included offense of robbery.

[Cases that cite this headnote](#)

****905** On certification to the Superior Court, Appellate Division.

Attorneys and Law Firms

Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for appellant (Robert D. Laurino, Essex County Prosecutor, attorney; Barbara A. Rosenkrans, of counsel and on the briefs).

Michael Confusione, argued the cause for respondent (Hegge & Confusione, attorneys; Michael Confusione, on the brief).

Sarah C. Hunt, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Christopher S. Porrino, Attorney General, attorney; Sarah C. Hunt, of counsel and on the brief).

Jaime B. Herrera, Assistant Deputy Public Defender, argued the cause for amicus curiae Office of the Public Defender (Joseph E. Krakora, Public Defender, attorney; Jaime B. Herrera, of counsel and on the brief).

Opinion

JUSTICE **TIMPONE** delivered the opinion of the Court.

***135** In this appeal, we address whether the trial court erred when it failed to instruct a jury sua sponte on aggravated assault as a lesser-included offense of robbery.

***136** The State alleged that defendant Allen Alexander conspired with another to rob Ernesto Espinal at Gateway Center in Newark. According to the State, defendant held the victim around his neck while another man cut the victim's forehead. Defendant and his co-conspirator left without taking any items from the victim.

Newark Police eventually arrested defendant in connection with the incident. A grand jury indictment charged defendant with second-degree conspiracy to commit robbery, first-degree robbery, fourth-degree unlawful possession of a weapon, and third-degree possession of a weapon for an unlawful purpose. A jury ultimately convicted defendant of all charges.

On appeal, the Appellate Division reversed, finding that the trial court erred in failing to charge the jury sua sponte on “serious bodily injury” aggravated assault,

N.J.S.A. 2C:12-1(b)(1). We find that the trial court had no obligation to issue a sua ****906** sponte jury instruction. We therefore reverse the Appellate Division's decision and reinstate defendant's convictions.

I.

A.

We derive the following facts from testimony presented during defendant's trial. The victim, Ernesto Espinal, and defendant provided differing accounts of the incident that occurred on July 4, 2012.

According to Espinal, he was walking alone through Gateway Center to catch a train in Newark Penn Station when defendant and three other individuals confronted him. Defendant ordered that Espinal give him twenty dollars. Espinal ignored the demand and continued walking toward the train station. Suddenly, defendant grabbed Espinal around his neck and commanded another individual to “cut” Espinal. Defendant's associate cut Espinal across his forehead with a knife while defendant continued to hold Espinal's neck. Defendant and the others then left the area without taking any money from Espinal.

***137** Espinal further stated that after the incident, he had “a lot of blood” on his face. He eventually received aid from a Dunkin' Donuts employee and a security person. Police escorted him in an ambulance to University Hospital for treatment. At the hospital, he received stitches, which were removed seven days later. His facial injury left a permanent scar.

Defendant gave the jury a different account. According to defendant, he and three of his friends were walking together through Gateway Center when he bumped into Espinal. Espinal made a facial expression and said “something in Spanish.” Believing Espinal had said “nothing nice,” defendant confronted Espinal. Espinal and defendant exchanged profanities.

Defendant testified that one of his friends “tried to jump in it,” but defendant grabbed his friend and told him to “leave it alone.” His friend pushed defendant away and punched Espinal. Defendant and his friends walked away. According to defendant, he never asked Espinal for money

and he did not see anyone go through Espinal's pockets or take Espinal's wallet. He further testified that he did not see a weapon in his friend's hand when his friend punched Espinal.

B.

Espinal gave a statement to the Newark Police Department after he left the hospital. The Newark Police Department, in turn, opened an investigation into the incident. As part of the investigation, law enforcement created a flyer using still images from the surveillance video captured at Gateway Center. Investigators circulated the flyer within the police department via email. A sergeant, who had past interactions with defendant, identified one of the photos as defendant.

Detective Filberto Padilla later conducted a six-photo array at Espinal's home. Espinal selected defendant's picture as depicting his assailant. Newark Police arrested defendant the following day on July 20, 2012.

*138 C.

On October 17, 2012, an Essex County Grand Jury returned an indictment against defendant charging him with second-degree conspiracy to commit robbery, [N.J.S.A. 2C:5-2](#) and [N.J.S.A. 2C:15-1\(b\)](#); first-degree robbery, [N.J.S.A. 2C:15-1](#); fourth-degree unlawful possession of a weapon, [N.J.S.A. 2C:39-5\(d\)](#); and third-degree possession of a weapon for an unlawful purpose, [N.J.S.A. 2C:39-4\(d\)](#). The **907 indictment did not charge defendant with aggravated assault.

The State's case against defendant went to trial before a jury on January 23, 2014 under a theory of accomplice liability. At the close of the evidence, the court conducted a charge conference. At no point did either party request an aggravated assault charge. During its closing argument, the State asserted that robbery means “in the course of committing a theft, a person causes bodily injury or uses force,” and that using a deadly weapon “makes it a first degree robbery.” Defense counsel did not object to the State's explanation.

After summations, the trial court instructed the jury to disregard statements by the attorneys that conflict with the court's charges. The trial court proceeded to instruct the jury on the charges in the indictment. The court read the State's robbery-indictment charge verbatim:

[Defendant] ... did knowingly commit an act of robbery upon Ernesto Espinal, and in the course of committing said robbery was armed with, did use, or threaten the immediate use of what appeared to be a deadly weapon, a knife contrary to the provisions of [N.J.S.A. 2C:15-1](#), a crime of the first degree and against the peace of this State, the Government and dignity of same.

The trial court instructed the jury that “[a] person is guilty of robbery if in the course of committing a theft he knowingly inflicts bodily injury or uses force upon another.” It then explained each element the State had to prove beyond a reasonable doubt to sustain a robbery conviction. Later, the court instructed:

Robbery is a crime of the second degree except that it is a crime of the first degree if the actor is armed with or uses or threatens the immediate use of a deadly weapon. In this case the State must prove beyond a reasonable doubt that the *139 defendant was armed with a deadly weapon while in the course of committing the robbery.

Defense counsel neither requested an aggravated assault charge nor objected to its omission from the trial judge's jury instructions. The jury convicted defendant of all charges. At sentencing, the trial court merged the conspiracy conviction into the robbery conviction and sentenced defendant to an aggregate fifteen-year term of imprisonment, with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, [N.J.S.A. 2C:43-7.2\(a\)](#).

D.

Defendant appealed his convictions. In an unpublished opinion, a two-member Appellate Division panel reversed and remanded for a new trial. The panel observed that, even absent requests for charges or objections to charges, trial judges have “an independent obligation to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense.” (quoting [State v. Jenkins](#), 178 N.J. 347, 361, 840 A.2d 242 (2004)). The panel then noted that “to justify a lesser[-]included offense instruction, a rational basis must exist in the evidence for a jury to acquit the defendant of the greater offense as well as to convict the defendant of the lesser, unindicted offense.” (alteration in original) (quoting [State v. Funderburg](#), 225 N.J. 66, 81, 137 A.3d 441 (2016)). Synthesizing the two tests, the panel stated the relevant inquiry as follows: “the evidence must clearly indicate that there is a rational basis to acquit the defendant of the greater offense, and to convict the defendant of the lesser offense.”

****908** After reviewing the elements of aggravated assault under [N.J.S.A. 2C:12-1\(b\)\(1\)](#), as well as defendant's testimony and defense counsel's summation, the panel reasoned that “[t]he jury could have found that defendant did not participate, either directly or as an accomplice, in a theft or attempt to commit theft.” The panel noted defendant's concession that he and his friend had an ***140** altercation with the victim, “and the friend punched the victim hard enough for the victim to fall to the ground.” It concluded that “there is a rational basis in the evidence for the jury to acquit defendant of robbery and conspiracy to commit robbery, as well as to convict defendant of aggravated assault.”

We granted the State's petition for certification. [229 N.J. 593, 164 A.3d 394 \(2017\)](#). We also granted the motions of the Attorney General and the Office of the Public Defender to participate as amici curiae.

II.

A.

The State urges us to reverse the Appellate Division decision, arguing that the trial court properly instructed the jury on robbery. The State relies on our decision in [State v. Sewell](#), 127 N.J. 133, 603 A.2d 21 (1992), to

insist that “[a]ssault simply is not an included crime of robbery.” Emphasizing that defendant never requested an aggravated assault charge, the State asserts that the trial court had no obligation “to dissect the evidence with a fine-tooth comb in search of some improbable agglomeration of facts to sustain an unrequested jury instruction.” The State also submits that the appellate panel failed to recognize the difference between lesser-included and related offenses, underscoring that trial courts are not permitted to instruct a jury on related offenses without defendant's consent.

B.

Defendant counters that the trial court did not need to “sift through the record for possible charges” because defendant's testimony “clearly indicated” that a charge on aggravated assault was appropriate. Defendant asserts that assault may be a lesser-included offense of robbery under certain circumstances like those presented here. Defendant argues that the trial court's failure to instruct on aggravated assault left the jury without an alternative ***141** in the event it found that the State failed to meet its burden of proving a theft had occurred. As a result, defendant maintains that the jury never had the option to “adopt[] defendant's testimony” and find him “guilty of an assault but not guilty of robbery.”

C.

The Attorney General echoes the State's arguments that aggravated assault is not a lesser-included offense of armed robbery, and that the trial court had no obligation to instruct the jury on the unrequested charge. The Attorney General argues that the appellate panel “improperly sifted through the record” to piece together “an unsupported combination of facts and inferences it deemed adequate to support the charge.” The Attorney General asserts that the record did not clearly indicate that an aggravated assault charge was appropriate. The Attorney General submits that a sua sponte instruction on aggravated assault would have prejudiced defendant by depriving him of adequate notice of the charge against him.

D.

Like defendant, the Public Defender stresses that aggravated assault may be a lesser-included offense of robbery under ****909** particular circumstances. The Public Defender argues that the trial court erred by failing to charge the jury sua sponte on aggravated assault. The Public Defender asserts that defendant had “fair notice” that aggravated assault may be charged as a lesser-included offense because the trial evidence “clearly indicated a rational basis upon which the jury could have acquitted defendant of robbery and convicted him of aggravated assault.”

III.

A.

[1] [2] We review for plain error the trial court's obligation to sua sponte deliver a jury instruction when a defendant does not ***142** request it and fails to object at trial to its omission. State v. Cole, 229 N.J. 430, 455, 163 A.3d 302 (2017); Funderburg, 225 N.J. at 79, 137 A.3d 441. To warrant reversal, the unchallenged error must have been “clearly capable of producing an unjust result.” R. 2:10–2. “The mere possibility of an unjust result is not enough.” Funderburg, 225 N.J. at 79, 137 A.3d 441. 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, 273 A.2d 1 (1971).

B.

A trial court's decision to charge on a lesser-included offense is governed by N.J.S.A. 2C:1–8(e). Under that statute, the trial court cannot charge a jury on “an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.” N.J.S.A. 2C:1–8(e). We have explained that “whether the lesser offense is strictly ‘included’ in the greater offense ... is less important ... than whether the evidence presents a rational basis on which the jury could acquit the defendant of the greater charge and convict the defendant of the lesser.” State v. Cassidy, 198 N.J. 165, 178, 966 A.2d 473

(2009) (ellipses in original) (quoting State v. Brent, 137 N.J. 107, 117, 644 A.2d 583 (1994)).

[3] [4] [5] A party must request a charge or object to an omitted charge at trial for the rational basis test to apply. “The appropriate time to object to a jury charge is ‘before the jury retires to consider its verdict.’ ” Funderburg, 225 N.J. at 79, 137 A.3d 441 (quoting R. 1:7–2). When a defendant requests a lesser-included-offense charge, “the trial court is obligated, in view of defendant's interest, to examine the record thoroughly to determine if the rational-basis standard has been satisfied.” State v. Crisantos, 102 N.J. 265, 278, 508 A.2d 167 (1986). “The rational-basis test sets a low threshold” for a lesser-included-offense instruction. State v. Carrero, 229 N.J. 118, 128, 159 A.3d 1284 (2017) (citing Crisantos, 102 N.J. at 278, 508 A.2d 167).

143** [6] In the absence of a request or an objection, we apply a higher standard, requiring the unrequested charge to be “clearly indicated” from the record. In State v. Garron, we explained that the “primary obligation” of trial courts is to “see that justice is done.” 177 N.J. 147, 180, 827 A.2d 243 (2003). That obligation includes ensuring “that a jury is instructed properly on the law and on all clearly indicated lesser-included offenses, even if at odds with the strategic decision of counsel.” Ibid. Our Court has long held that trial courts have an independent duty to sua sponte charge on a lesser-included offense “only where the facts in evidence ‘clearly indicate’ the appropriateness of that charge.” State v. Savage, 172 N.J. 374, 397, 799 A.2d 477 (2002) (quoting State v. Choice, 98 N.J. 295, 298, 486 A.2d 833 (1985)); accord *910** Funderburg, 225 N.J. at 81, 137 A.3d 441; State v. Thomas, 187 N.J. 119, 132, 900 A.2d 797 (2006) (quoting Jenkins, 178 N.J. at 361, 840 A.2d 242).

[7] The “clearly indicated” standard does not require trial courts either to “scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty,” Brent, 137 N.J. at 118, 644 A.2d 583 (quoting State v. Sloane, 111 N.J. 293, 302, 544 A.2d 826 (1988)), or “ ‘to meticulously sift through the entire record ... to see if some combination of facts and inferences might rationally sustain’ a lesser charge,” Funderburg, 225 N.J. at 81, 137 A.3d 441 (quoting Choice, 98 N.J. at 299, 486 A.2d 833). Instead, the evidence supporting a lesser-included charge must “jump[] off the page” to trigger a trial court's duty to

sua sponte instruct a jury on that charge. [State v. Denofa](#), 187 N.J. 24, 42, 898 A.2d 523 (2006).

We recently addressed the parameters of our trial courts' duty to charge a jury sua sponte on a lesser-included offense in the absence of a request or an objection by the defendant. In [Funderburg](#), the defendant was charged with attempted murder after stabbing his ex-girlfriend's new boyfriend during an altercation. 225 N.J. at 72–74, 137 A.3d 441. The defendant did not request a jury charge on attempted passion/provocation manslaughter as a *144 lesser-included offense of attempted murder at trial. [Id.](#) at 75, 137 A.3d 441. On appeal, the Appellate Division reversed and remanded for a new trial, finding that the trial court erred in failing to deliver that instruction. [Ibid.](#)

We reversed the Appellate Division's judgment, concluding that the trial court was not required to charge the lesser-included offense sua sponte because “the facts before [it] did not clearly indicate that the objective elements of attempted passion/provocation manslaughter were present.” [Id.](#) at 82, 137 A.3d 441. In reaching that conclusion, we “decline[d] to impose” a “burdensome requirement on trial courts” to carefully examine every piece of the record “to see if some combination of facts and inferences might rationally sustain a [lesser-included] charge.” See [id.](#) at 83, 137 A.3d 441 (quoting [Choice](#), 98 N.J. at 299, 486 A.2d 833). We also noted that not “every potential lesser-included offense must be charged to the jury.” [Ibid.](#) We therefore found that the trial court's failure to deliver an unrequested passion/provocation manslaughter charge to the jury was not in error. [Id.](#) at 83–84, 137 A.3d 441.

C.

[8] [9] In contrast to lesser-included offenses, trial courts are never required to charge a jury sua sponte on related offenses. [State v. Maloney](#), 216 N.J. 91, 107–08, 77 A.3d 1147 (2013) (discussing [Thomas](#), 187 N.J. at 129–33, 900 A.2d 797). Related offenses are those that “share a common factual ground, but not a commonality in statutory elements, with the crimes charged in the indictment.” [Thomas](#), 187 N.J. at 132, 900 A.2d 797. Jury instructions on related offenses raise constitutional concerns because criminal defendants have rights to a grand jury presentment and fair notice of criminal charges against them. [Id.](#) at 130, 132–33, 900 A.2d 797. To prevent

infringement of those rights, a trial court may instruct the jury on a related offense only when “the defendant requests or consents to the related offense charge, and there *145 is a rational basis in the evidence to sustain the related offense.” [Id.](#) at 133, 900 A.2d 797.

IV.

We now apply those legal principles to the relevant facts to determine whether **911 the trial court erred in not charging the jury sua sponte on aggravated assault, N.J.S.A. 2C:12–1(b)(1), as a lesser-included offense of robbery, N.J.S.A. 2C:15–1.

A.

[10] As a preliminary matter, we review the appropriate standard for assessing a trial court's obligation to give unrequested instructions on lesser-included offenses. The appellate panel noted the clearly indicated standard applies to cases of unrequested jury instructions but improperly applied the rational basis test in its analysis. The panel ultimately concluded, after reviewing the trial evidence, that “there is a rational basis in the evidence for the jury to acquit defendant of robbery and conspiracy to commit robbery, as well as to convict defendant of aggravated assault.”

Yet, just because a charge meets the rational basis test does not mean it meets the clearly indicated standard. As we explained earlier, when a defendant fails to request a lesser-included charge or object to its omission at trial, the need for that charge is subject to a higher threshold. In that scenario, unless that need is clearly indicated from the evidence, we will not find plain error. See [Denofa](#), 187 N.J. at 42, 898 A.2d 523.

The facts of this case call for review under the higher, clearly indicated standard. Defendant had several opportunities to request an aggravated assault charge before the trial court but failed to do so. At a pretrial conference, the parties and the trial court discussed the jury instructions to be charged, which did not include aggravated assault. Defense counsel noted his objection only to the court's accomplice liability charge. Similarly, at a conference before closing arguments, the trial court specifically *146 asked counsel if they had any additional

requests after it read the charges to counsel on the record. Defense counsel again failed to request an aggravated assault charge or to object to its omission at a charge conference before closing arguments. Defense counsel likewise did not submit a proposed aggravated assault instruction after closing arguments and before the court charged the jury.

It was not until his appeal that defendant argued the trial court erred in not charging the jury *sua sponte* on aggravated assault, [N.J.S.A. 2C:12-1\(b\)\(1\)](#). Reversal would be appropriate only if the basis for a lesser-included-offense charge were to “jump[] off the page[s]” of the record. [Denofa](#), 187 N.J. at 42, 898 A.2d 523.

B.

[11] Although we reaffirm that the clearly indicated standard is the appropriate lens through which to review any obligation to charge the jury *sua sponte* on a lesser-included offense, we need not apply that standard here.

On direct appeal, defendant only challenged the lack of an instruction concerning “serious bodily injury” aggravated assault, [N.J.S.A. 2C:12-1\(b\)\(1\)](#). The New Jersey Code of Criminal Justice provides that an offense is a lesser-included offense if:

- (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (2) It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or
- (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

****912** [[N.J.S.A. 2C:1-8\(d\)](#) (emphases added).]

Section 1-8(d) “calls for a comparison of the statutory definitions of the respective offenses to ascertain whether they have common or overlapping elements that require proof of identical facts.” [State v. Muniz](#), 118 N.J. 319, 324, 571 A.2d 948 (1990).

Under [N.J.S.A. 2C:15-1\(a\)](#), a person is guilty of robbery if that person “inflict[ed] bodily injury or use[d] force” on the victim “in the course of committing a theft.” The statute provides that ***147** robbery “is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.” [N.J.S.A. 2C:15-1\(b\)](#). Here, the State charged robbery as a first-degree crime exclusively on the “deadly weapon” prong. As a result, based on its indictment, the State had to prove that defendant: (1) “inflict[ed] bodily injury or use[d] force” on the victim; and (2) possessed, used, or threatened to use “what appeared to be ... a knife” during the commission of the robbery.

By contrast, aggravated assault under [N.J.S.A. 2C:12-1\(b\)\(1\)](#) requires proof of an attempt “to cause serious bodily injury.” The Code defines “serious bodily injury” as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” [N.J.S.A. 2C:11-1\(b\)](#). Flowing from that definition, “serious bodily injury” aggravated assault under [N.J.S.A. 2C:12-1\(b\)\(1\)](#) requires a greater injury element than that in the State’s robbery charge, *cf.* [N.J.S.A. 2C:1-8\(d\)\(3\)](#), and must be established by proof of more facts than those needed to establish “bodily injury,” *cf.* [N.J.S.A. 2C:1-8\(d\)\(1\)](#). For the same reasons, aggravated assault here is not equivalent to an attempt or conspiracy to commit robbery or one of its included offenses. *Cf.* [N.J.S.A. 2C:1-8\(d\)\(2\)](#).

Under the circumstances of this case, aggravated assault is, at most, a related offense of the State’s robbery charge. Defendant did not request or consent to an aggravated assault charge at any stage before or during his trial. [Thomas](#), 187 N.J. at 133, 900 A.2d 797. So, a *sua sponte* charge would have violated defendant’s constitutional grand jury presentment and notice rights. *See id.* at 130, 900 A.2d 797.

For all the reasons discussed, the trial court had no duty to instruct the jury *sua sponte* on “serious bodily injury” aggravated assault. We find no plain error.

***148** C.

In defense counsel's brief to our Court and during oral argument, counsel argued that other forms of aggravated assault—beyond [N.J.S.A. 2C:12-1\(b\)\(1\)](#)—may constitute lesser-included offenses of robbery. *See, e.g., N.J.S.A. 2C:12-1(b)(2)* (requiring the accused to attempt to cause or purposely or knowingly cause “bodily injury to another with a deadly weapon”); [N.J.S.A. 2C:12-2\(b\)\(3\)](#) (requiring the accused to recklessly cause “serious bodily injury to another with a deadly weapon”). Counsel did not raise those arguments before the trial court or Appellate Division. They are therefore not properly before this Court, and we decline to address them. *See DYFS v. M.C. III*, 201 N.J. 328, 339, 990 A.2d 1097 (2010) (noting that “issues not raised below will ordinarily not be considered on appeal”).

D.

Finally, we note and reject the State's argument that our opinion in [Sewell](#) affirmatively held that assault is never a lesser-included offense of robbery.

****913** In [Sewell](#), we “determine[d] the level of culpability necessary to convert theft into robbery.” 127 N.J. at 134, 603 A.2d 21. In our discussion of the mental state that must accompany the injury or force used in the course of a theft, we considered whether robbery's injury/force component is the equivalent of simple assault. *Id.* at 142–48, 603 A.2d 21. Recognizing that “one could be found guilty of second-degree robbery in some contexts in which one could not similarly be found guilty of simple assault,” we determined that “robbery cannot be viewed merely as theft accompanied by simple assault.” *Id.* at 146, 603 A.2d 21.

The Legislature added the words “or force” to the robbery statute, expanding the concept of robbery to include qualifying acts that do not require the perpetrator to inflict bodily injury. *Id.* at 146–47, 603 A.2d 21. Clearly then, “the shorthand understanding that robbery equals theft plus assault is inconsistent with the *149 clear, [but admittedly] complicated, language of the [New Jersey] Code [of Criminal Justice].” *Id.* at 147, 603 A.2d 21.

[12] [Sewell](#) should not be over-read as completely barring assault as a lesser-included offense of robbery. There may be circumstances in which the evidence adduced at trial supports a charge on assault as a lesser-included offense of robbery. Those circumstances are not before us and we comment no further. Here, we determine only that the trial court had no obligation to charge the jury sua sponte on aggravated assault as a lesser-included offense of the State's robbery charge.

V.

We reverse the judgment of the Appellate Division and reinstate defendant's convictions.

CHIEF JUSTICE [RABNER](#) and JUSTICES [LaVECCHIA](#), [ALBIN](#), [PATTERSON](#), [FERNANDEZ-VINA](#), and [SOLOMON](#) join in JUSTICE [TIMPONE](#)'s opinion.

All Citations

233 N.J. 132, 183 A.3d 903

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Reversed by [State v. Alexander](#), N.J., April 30, 2018

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

State of New Jersey, Plaintiff-Respondent,
v.

[Allen Alexander](#), a/k/a Karon
Keenan, Defendant-Appellant.

Submitted September 27, 2016

|
Decided October 18, 2016

On appeal from Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 12-10-2567.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for
appellant ([Anderson D. Harkov](#), Designated Counsel, on
the brief).

[Carolyn A. Murray](#), Acting Essex County Prosecutor,
attorney for respondent (Andrew R. Burroughs, Special
Deputy Attorney General/Acting Assistant Prosecutor, of
counsel and on the brief).

Before Judges [Fasciale](#) and [Gilson](#).

Opinion

PER CURIAM

*1 Defendant appeals from his convictions for second-degree conspiracy to commit robbery, [N.J.S.A. 2C:5-2](#) and [N.J.S.A. 2C:15-1\(b\)](#); first-degree robbery, [N.J.S.A. 2C:15-1](#); fourth-degree unlawful possession of a weapon, [N.J.S.A. 2C:39-5\(d\)](#); and third-degree possession of a weapon for an unlawful purpose, [N.J.S.A. 2C:39-4\(d\)](#). We reverse and remand for a new trial.

The victim and defendant testified during the trial about an incident that occurred on the victim's way to work. The incident involved two men who approached the victim as

he walked down a long corridor leading towards a train station. The victim and defendant gave different testimony about what happened.

The victim testified that defendant grabbed him by the neck and told another person (the friend) to cut his face. According to the victim, while defendant continued grabbing him, the friend asked the victim for money. After the victim stated he only had enough money for the train, the friend stabbed the victim in the forehead. The victim testified that defendant and the friend walked away from him without taking any money. Surveillance cameras in the area of the incident captured some, but not all, of the interaction among the victim, defendant, and the friend.

At trial, defendant acknowledged he had a verbal confrontation with the victim on the day of the incident. Defendant testified that the victim yelled profanities at him as defendant walked down the hallway singing a rap song "very loudly." This resulted in a shouting match between the victim and defendant. Defendant testified that his friend "got into the [victim's] face." Defendant testified that he grabbed his friend and said "no, don't do it. It's not worth it. It's not worth it. I'm like, leave it alone."

According to defendant, the friend then "punched [the victim] and [the victim] fell to the ground." Defendant denied talking to his friend about taking money from the victim. Defendant explained he had no discussion with anyone leading up to the incident because defendant was singing. Defendant stated he did not try to take money from the victim. Defendant testified that he did not possess a weapon, and stated that he did not see his friend using a weapon. Defendant stated that after his friend punched the victim, he and his friend walked away.

The judge merged the conspiracy conviction into the robbery conviction and sentenced defendant to fifteen years in prison subject to the No Early Release Act (NERA), [N.J.S.A. 2C:43-7.2](#). The judge imposed five and eighteen-month prison terms on the weapons convictions, concurrent to each other and the robbery conviction. The aggregate prison term was fifteen years, subject to NERA.

On appeal, defendant raises the following points:

POINT I

THE TRIAL COURT ERRED BY FAILING TO CHARGE THE JURY ON THE LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT. (Not Raised Below).

POINT II

THE PROSECUTOR'S COMMENT IN HER SUMMATION THAT NO WITNESS APPEARED TO CORROBORATE DEFENDANT'S TESTIMONY IMPROPERLY SHIFTED THE BURDEN OF PROOF TO DEFENDANT AND WAS A DELIBERATE ATTEMPT TO CIRCUMVENT AN EVIDENTIARY RULING BY THE TRIAL COURT, THUS THE COURT SHOULD HAVE DECLARED A MISTRIAL, OR AT THE VERY LEAST GIVEN AN IMMEDIATE CURATIVE INSTRUCTION.

*2 POINT III

DEFENDANT'S SENTENCE WAS EXCESSIVE AND CONSTITUTED AN ABUSE OF DISCRETION, REQUIRING HIS SENTENCE BE VACATED AND THE CASE REMANDED TO THE TRIAL COURT FOR A NEW SENTENCE HEARING.

I.

We begin by addressing defendant's contention as to the jury charge.

Defendant contends the judge erred by failing to charge the jury on the lesser-included offense of aggravated assault. Because defendant did not request the charge at trial, we review defendant's arguments for plain error, that is, error "clearly capable of producing an unjust result[.]" *R. 2:10-2*. A conviction will be reversed under this standard only if the error is "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." *State v. Daniels*, 182 *N.J.* 80, 95 (2004) (alteration in original) (quoting *State v. Macon*, 57 *N.J.* 325, 336 (1971)). "The mere possibility of an unjust result is not enough." *State v. Funderburg*, 225 *N.J.* 66, 79 (2016).

In addition to not requesting the charge at trial, defendant did not object to its omission from the court's jury instructions. "The appropriate time to object to a jury charge is 'before the jury retires to consider its verdict.'" *Funderburg*, *supra*, 225 *N.J.* at 79 (quoting *R. 1:7-2*). "Pursuant to *Rule 1:7-2*, a defendant is required to challenge instructions at the time of trial or else waives the right to contest the instructions on appeal." *State v. Belliard*, 415 *N.J. Super.* 51, 66 (App. Div. 2010) (citing *State v. Adams*, 194 *N.J.* 186, 206-07 (2008)), *certif. denied*, 205 *N.J.* 81 (2011).

"Where there is a failure to object, it may be presumed that the instructions were adequate." *Belliard*, *supra*, 415 *N.J. Super.* at 66 (quoting *State v. Morais*, 359 *N.J. Super.* 123, 134-35 (App. Div.), *certif. denied*, 177 *N.J.* 572 (2003)). However, because "[a]ppropriate and proper charges to a jury are essential for a fair trial," *State v. Daniels*, 224 *N.J.* 168, 180 (2016), and "are especially critical ... in criminal matters, improper instructions on material issues are presumed to constitute reversible error." *State v. Jenkins*, 178 *N.J.* 347, 361 (2004).

As to unrequested charges, a trial judge "has an independent obligation to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." *Ibid.* On the other hand, the judge "has no duty to instruct the jury sua sponte on an included offense charge if the evidence does not clearly indicate or warrant such a charge." *State v. Rivera*, 205 *N.J.* 472, 489 (2011) (quoting *State v. Thomas*, 187 *N.J.* 119, 132 (2006)). "[A] trial court does 'not ... have the obligation on its own meticulously to sift through the entire record in every ... trial to see if some combination of facts and inferences might rationally sustain a [lesser-included] charge.'" *Funderburg*, *supra*, 225 *N.J.* at 70 (second alteration in original) (quoting *State v. Choice*, 98 *N.J.* 295, 299 (1985)). "[T]he need for the charge must 'jump off' the proverbial page." *State v. R.T.*, 205 *N.J.* 493, 510 (2011) (quoting *State v. Denofa*, 187 *N.J.* 24, 42 (2006)).

"[T]he charging of lesser-included offenses [is] governed by statute. *N.J.S.A. 2C:1-8* provides that a trial court 'shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.'" *Funderburg*, *supra*, 225 *N.J.* at 81 (quoting *N.J.S.A. 2C:1-8(e)*). "Thus, 'to

justify a lesser-included offense instruction, a rational basis must exist in the evidence for a jury to acquit the defendant of the greater offense as well as to convict the defendant of the lesser, unindicted offense.’ ” *Ibid.* (quoting *State v. Savage*, 172 N.J. 374, 396 (2002)). The evidence must clearly indicate that there is a rational basis to acquit the defendant of the greater offense, and to convict the defendant of the lesser offense.

*3 An individual may commit second-degree aggravated assault, by either attempting “to cause serious bodily injury to another” or by “caus[ing] such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly caus[ing] such injury.” N.J.S.A. 2C:12-1(b)(1). Attempted aggravated assault requires that a defendant “purposely” attempted to cause serious bodily injury. N.J.S.A. 2C:5-1(a)(1).

An individual “acts purposely with respect to the nature of his conduct or as a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result.” N.J.S.A. 2C:2-2(b)(1). “An attempt is purposeful not only because it is so defined by statute, but because one cannot logically attempt to cause a particular result unless causing that result is one’s conscious object, the distinguishing feature of a purposeful mental state.” *State v. McCoy*, 116 N.J. 293, 304 (1989) (citation and internal quotation marks omitted).

In his summation to the jury, the defense counsel commented on the evidence and stated defendant’s friend “did something that was totally unanticipated.” Based on defendant’s testimony, he emphasized that the “very short incident” was “not a robbery, but ... was a confrontation.” Defense counsel argued to the jury that “[i]t wasn’t a robbery, ... [i]t was a confrontation ... a by-chance meeting between [the victim] and [defendant].” Defense counsel’s summation focused on the lack of any evidence that the confrontation occurred during the course of committing a theft. He stated there was no evidence that defendant possessed a weapon or knew that his friend had a weapon. Defense counsel added there was no evidence that defendant conspired or acted as an accomplice to rob the victim.

Here, there is a rational basis in the evidence for the jury to acquit defendant of robbery and conspiracy to commit robbery, as well as to convict defendant of aggravated

assault. The jury could have found that defendant did not participate, either directly or as an accomplice, in a theft or attempt to commit theft. Defendant testified that he told his friend not to “do it,” and to “leave it alone.” He also testified that he did not talk to his friend about taking money from the victim, and stated he did not attempt to take money from the victim.

However, defendant admitted he and his friend engaged in a confrontation with the victim, and the friend punched the victim hard enough for the victim to fall to the ground. The evidence therefore demonstrated that defendant, either as a principal or as an accomplice, may have committed or attempted to commit serious bodily injury by either grabbing the victim by the neck and telling the friend to cut his face, or by assisting the friend in punching the victim.

II.

We now turn to defendant’s contention that the assistant prosecutor made an improper statement in her summation, and the judge failed to give a curative instruction.

The assistant prosecutor stated “[a]nd finally[,] the lack of corroboration of testimony ... [t]he defendant testified, but who or what corroborated what he said.” Defense counsel objected and argued that the statement shifted the burden to defendant to produce evidence corroborating his testimony. In other words, the comments suggested that defendant had the obligation to produce testimony from a witness supporting defendant’s testimony. The judge sustained the objection, but did not give a curative instruction.

*4 “Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented.” *State v. Frost*, 158 N.J. 76, 82 (1999). For prosecutorial comments “[t]o justify reversal, the prosecutor’s conduct must have been clearly and unmistakably improper,” and “so egregious that it deprived the defendant of a fair trial.” *State v. Wakefield*, 190 N.J. 397, 438 (2007) (alteration in original) (citations and internal quotation marks omitted), *cert. denied*, 552 U.S. 1146, 128 S.Ct. 1074, 169 L.Ed. 2d 817 (2008). Applying these well-settled standards, we conclude that although the comments were improper, the

assistant prosecutor's conduct was not so egregious as to deprive defendant of a fair trial.

Here, the fleeting comments by the assistant prosecutor “were prompted by comments in the summation of defense counsel.” *State v. Smith*, 212 N.J. 365, 404 (2012), cert. denied, — U.S. —, 133 S.Ct. 1504, 185 L.Ed. 2d 558 (2013). For example, on the issue of credibility, defense stated that testimony from a security guard at the trial corroborated defendant's testimony that he returned to the scene on his way to the train on the way to the beach. Defense counsel argued that this corroboration implied defendant would not have gone back to the scene if he had robbed the victim.

“Whether testimony or a comment by counsel is prejudicial and whether a prejudicial remark can be neutralized through a curative instruction or undermines the fairness of a trial are matters ‘peculiarly within the competence of the trial judge.’ ” *State v. Yough*, 208 N.J. 385, 397 (2011) (quoting *State v. Winter*, 96 N.J. 640, 647 (1984)). Defense counsel did not request a curative instruction. And the judge's final charge to the jury adequately covered the issue of burdens of proof.

III.

We need not reach defendant's remaining contention, that the judge imposed an excessive sentence, because we are reversing on the jury-charge issue. For the sake of completeness, however, we see no reason to second-guess the trial court's application of the sentencing factors, nor any reason to conclude that the sentence “shocks the judicial conscience.” *State v. Roth*, 95 N.J. 334, 364 (1984); see also *State v. Bieniek*, 200 N.J. 601, 612 (2010) (reiterating that appellate courts must accord deference to trial judges in sentencing decisions). At any rate, having concluded that the evidence clearly indicates there is a rational basis to acquit the defendant of the robbery charges and to convict the defendant of aggravated assault, we set aside the convictions and sentence.

Reversed and remanded for a new trial. We do not retain jurisdiction.

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