SUPREME COURT OF NEW JERSEY
DOCKET NO. 086617

APPELLATE DIVISION DOCKET NO. A-0913-19T1
INDICTMENT NO. 15-08-1454
CASE NO. 15001722

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	ON APPEAL AS OF RIGHT
v.	:	PURSUANT TO RULE 2:2-1(a)(1) FROM A FINAL JUDGMENT OF
CALVIN FAIR,	:	THE SUPERIOR COURT OF NEW JERSEY, APPELLATE
Defendant-Respondent.	:	DIVISION

SAT BELOW: The Honorable, Clarkson S. Fisher, Jr., P.J.A.D.
The Honorable Heidi Willis Currier, J.A.D.
The Honorable Patrick DeAlmeida, J.A.D.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY IN RESPONSE TO THE AMICUS CURIAE BRIEF FILED BY THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The State relies on the Counterstatement of Procedural History and Counterstatement of Facts as set forth in its initial brief filed on May 20, 2022.

The State also notes that in an Order dated November 1, 2022 and filed on November 7, 2022, this Court denied defendant's Motion to Dismiss the State's Notice of Appeal as of right and ordered that the appeal shall proceed pursuant to R. 2:2-1(a)(1).

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[1] ACDLb refers to the amicus curiae brief filed by the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ).
1T refers to transcript dated December 16, 2016.
2T refers to transcript dated September 29, 2017.
3T refers to transcript dated June 19, 2019.
4T refers to transcript dated June 20, 2019.
5T refers to transcript dated June 25, 2019.
6T refers to transcript dated June 26, 2019.
7T refers to transcript dated August 30, 2019.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR, LET ALONE PLAIN ERROR, IN FAILING TO PROVIDE A SPECIFIC-UNANIMITY INSTRUCTION SUA SPONTE.

A. Introduction

This Court should reject ACDL-NJ's argument that the trial judge's unobjected-to general instruction on jury unanimity was insufficient as a matter of law, and that the judge was required to provide more specific instructions on jury unanimity sua sponte. ACDL-NJ mistakenly argues that, even without a request from the parties, the trial judge was obligated to tell the jurors they could not convict defendant of terroristic threats unless they unanimously agreed as to the particular statement that qualified as the terroristic threat. Also, ACDL-NJ mistakenly argues that, again without a request from the parties, the trial judge was obligated to tell the jurors they could not convict defendant of terroristic threats unless they unanimously agreed as to the specific subsection of the statute defendant violated. Both arguments are without merit.

ACDL-NJ's arguments cannot be reconciled with this Court's longstanding precedent. Given that precedent, the jurors did not have to

unanimously agree on the particular statement made by defendant that qualified as a terroristic threat, so long as they unanimously agreed that defendant did, in fact, make a terroristic threat. Nor did the jurors have to unanimously agree on the particular subsection of the statute that defendant violated, so long as they unanimously agreed that defendant did, in fact, violate the statute. Thus, the court's general instructions on jury unanimity were sufficient, and there was no need for a specific-unanimity instruction, especially in the absence of a request therefor.

Further, under the particular facts of this case, there is no possibility that defendant was prejudiced by the absence of a sua sponte specific-unanimity instruction. First, the prosecutor made clear, in both his opening statement and his summation, that the State was relying on defendant's "head shot" comment as the comment that qualified as a terroristic threat. Defendant's other comments were introduced only to provide context to the "head shot" comment. Thus, there is no possibility that only some of the jurors convicted defendant because of the "head shot" comment, whereas other jurors convicted defendant based only on the other comments.

Second, under the particular facts of this case, guilt under N.J.S.A. 2C:12-3(a) was necessarily subsumed within N.J.S.A. 2C:12-3(b), such that no juror could find a violation of 2C:12-3(b) without also finding a violation of

2C:12-3(a). Indeed, the prosecutor told the jurors, during his summation, that they did not even have to consider subsection (b) if they were unconvinced defendant was guilty under subsection (a), because they would never find defendant guilty of subsection (b) if they were unconvinced he was guilty of subsection (a). Thus, there is no possibility that some of the jurors convicted defendant under subsection (b) but not subsection (a), whereas other jurors convicted defendant under subsection (a) but not subsection (b). Any juror who voted to convict defendant was necessarily convinced he was at least guilty under subsection (a).

B. Factual Background

N.J.S.A. 2C:12-3 (a) provides that a person is guilty of third-degree terroristic threats if he "threatens to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror . . . ." N.J.S.A. 2C:12-3 (b) provides that a person is guilty of that same crime if he "threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out."

The indictment charged that defendant, on or about May 1, 2015, committed terroristic threats by threatening to commit a crime of violence with

the purpose to terrorize [Officer Healey], or in reckless disregard of the risk of causing such terror, or by threatening to kill [Officer Healey] with the purpose to put him in imminent fear of death under circumstances reasonably causing [Officer Healey] to believe the immediacy of the threat and the likelihood that it would be carried out, contrary to N.J.S.A. 2C:12-3 (a) and/or (b). (Da1 to 2).

When the court conducted a charge conference, the prosecutor asked the judge to instruct the jury that defendant was charged under N.J.S.A. 2C:12-3 (a) and/or N.J.S.A. 2C:12-3 (b), and that defendant could be convicted if the jury found him guilty under either subsection. Defense counsel did not object or request an instruction that the jurors had to agree whether defendant was guilty under 2C:12-3(a), guilty under 2C:12-3(b), or guilty under both 2C:12-3(a) and 2C:12-3(b). Nor did defense counsel request an instruction that the jurors had to agree that a particular statement qualified as a terroristic threat. (5T11-11 to 18-20).

In the final charge to the jury, the trial judge read the indictment, (5T93-24 to 94-19), and properly instructed the jury as to the law applicable to N.J.S.A. 2C:12-3 (a) and N.J.S.A. 2C:12-3(b). The judge read the statutory subsections, word-for-word, and correctly advised the jurors of all the applicable elements. (5T93-22 to 100-12). Then, after instructing the jury as

to the law, the judge told the jurors that their verdict had to be unanimous: "You may return on each crime charged a verdict of either not guilty or guilty. Your verdict, whatever it . . . may be as to each crime charged must be unanimous. Each of the 12 deliberating jurors must agree as to the verdict." (5T103-25 to 104-4).

Upon completion of the charge, both the prosecutor and defense counsel indicated they had no objections. (5T109-24 to 110-3).

C. The applicable standard of review is the plain-error standard.

In evaluating the propriety of the trial court's unobjected-to instructions on appeal, this Court must identify and apply the appropriate standard of review, which is the plain-error standard of review. Plain error refers to error that is "clearly capable of producing an unjust result." R. 2:10-2. The mere possibility of an unjust result will not suffice. Rather, the possibility of injustice must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

In the context of a jury charge that is challenged for the first time on appeal, the plain-error rule requires a demonstration of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince

the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Chapland, 187 N.J. 275 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930 (1970)); accord State v. Burns, 192 N.J. 312, 341 (2007) (quoting Jordan, 147 N.J. at 422). To evaluate whether an alleged error meets this high standard, an appellate court must assess the degree of actual harm within the context of the entire trial, under the totality of the circumstances, by considering the weight of the State's evidence, the arguments of counsel, and any other relevant information gleaned from the record as a whole. See State v. Marshall, 123 N.J. 1, 145 (1991).

In reviewing a record for plain error, an appellate court should not be concerned with technical errors or merely prejudicial errors. Rather, an appellate court may reverse for plain error only in exceptional cases when there is error "affecting substantial rights" that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," and only when the failure to act would result in a "miscarriage of justice" such as the conviction of an actually innocent defendant. United States v. Olano, 507 U.S. 725, 731-37 (1993) (quotations omitted). In other words, appellate relief under the plain-error standard is reserved for "blockbusters," i.e., those errors "so shocking that they seriously affect the fundamental fairness and basic integrity

of the proceedings below." United States v. Griffin, 818 F.2d 97, 100 (1st Cir.), cert. denied, 484 U.S. 844 (1987).

In this case, ACDL-NJ does not even mention, much less apply, the plain-error standard of review. Neither did the Appellate Division in its published opinion reversing defendant's conviction. But this Court should take heed of the appropriate standard of review and recognize that reversal is appropriate only if defendant satisfies his burden of demonstrating plain error.

D. The trial court did not commit error, let alone plain error, in not providing a sua sponte instruction that the jurors had to be unanimous as to the particular statement that qualified as a terroristic threat.

First, regarding ACDL-NJ's argument that the trial judge was obligated to provide a sua sponte instruction advising the jurors that they needed to agree on a particular statement that qualified as a terroristic threat, this Court has made clear that jurors need not be told they must unanimously agree on a particular act that constitutes a particular offense when the defendant is alleged to have committed multiple acts that are conceptually similar and neither contradictory nor only marginally related to one another. State v. Parker, 124 N.J. 628, 639 (1991), cert. denied, 503 U.S. 939 (1992).

"Ordinarily, a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict." State v. Cagno,

211 N.J. 488, 516 (2012) (quoting Parker, 124 N.J. at 641), cert. denied, 568 U.S. 1104 (2013). Thus, in most instances, there is no need for any special instructions beyond the general instructions on juror unanimity. State v. Frisby, 174 N.J. 583, 597 (2002); Parker, 124 N.J. at 638.

Nevertheless, "[t]here may be circumstances in which it appears that a genuine possibility of jury confusion exists or that a conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts." Cagno, 211 N.J. at 516-17 (quoting Parker, 124 N.J. at 641). Such circumstances may include cases where: (1) a single crime can be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or only marginally related to each other; (4) there is a variance between the indictment and the proofs at trial; or (5) there is strong evidence of jury confusion. Cagno, 211 N.J. at 517; Frisby, 174 N.J. at 597; Parker, 124 N.J. at 635-36.

"The fundamental issue is whether a more specific instruction [is] required in order to avert the possibility of a fragmented verdict." Frisby, 174 N.J. at 598. Indeed, "[t]here may be circumstances in which it appears that a genuine possibility of jury confusion exists or that a conviction may occur as a

result of different jurors concluding that a defendant committed conceptually distinct acts." Cagno, 211 N.J. at 517 (quoting Parker, 124 N.J. at 641). But even if there is a possibility of a fragmented verdict, this Court has recognized only that a specific-unanimity instruction must be given "upon request." Cagno, 211 N.J. at 517 (quoting Frisby, 174 N.J. at 597-98) (emphasis added). Absent a request, the failure to provide such an instruction "will not necessarily constitute reversible error." Parker, 124 N.J. at 637; accord State v. Gandhi, 201 N.J. 161, 192 (2010).

Further, this Court applies a two-prong test to evaluate allegations that a trial judge erroneously omitted a specific-unanimity instruction. The first inquiry is "whether the allegations in the . . . count were contradictory or only marginally related to each other . . . ." Cagno, 211 N.J. at 517 (quoting Parker, 124 N.J. at 639). The second inquiry is "whether there was any tangible evidence of jury confusion." Ibid.

In light of the foregoing principles, juries need not unanimously agree on whether a defendant's role was that of a principal or an accomplice. Parker, 124 N.J. at 633. Nor is unanimity required when "a statute embodies a single offense that may be committed in a number of cognate ways[.]" Frisby, 174 N.J. at 597; see also Parker, 124 N.J. at 634-35 (referencing various

jurisdictions recognizing that "unanimity is not required when a statute states a single offense but provides for various modes of commission of the offense").

In this case, as noted previously, the trial judge provided the jurors with a general charge on jury unanimity. That charge, which was undeniably accurate and not objected-to below, "cannot be read as sanctioning a non-unanimous verdict." Parker, 124 N.J. at 638 (quoting State v. Jennings, 583 A.2d 915, 924 (Conn. 1990)). Indeed, the charge did not state or suggest that the jurors could find guilt if they disagreed as to the specific theory underlying their verdict or the facts upon which their verdict was based.

But even more fundamentally, the jurors did not have to agree that a particular statement uttered by defendant qualified as a terroristic threat, so long as they all agreed, unanimously and beyond a reasonable doubt, that defendant violated the terroristic-threats statute. That is because all of defendant's statements were conceptually similar and neither contradictory nor only marginally related to each other. Parker, 124 N.J. at 639. Indeed, all the statements attributed to defendant were made close in time, on the exact same date and within hours of each other, and they all reflected and revealed defendant's state of anger towards local law enforcement and Officer Healey in particular.

This was not a case where the State presented evidence of conceptually distinct and dissimilar acts triggering the potentiality of guilt based on different and divergent theories of liability. Rather, the State confined its presentation to evidence of conceptually similar and intrinsically-related threats that supported criminal liability under a single unified theory of liability, i.e., that defendant threatened Officer Healey, with a purpose of terrorizing Officer Healey, or in reckless disregard of the risk of causing that terror, and with a purpose to put Officer Healey in imminent fear of death under circumstances reasonably causing Officer Healey to believe the immediacy of the threat and the likelihood that it would be carried out.

Furthermore, if the trial judge had given a sua sponte instruction advising the jurors of the need to unanimously agree on a particular statement that qualified as a terroristic threat, there can be no reasonable doubt that the result would have been the same. Although the jury heard evidence that defendant made multiple statements, the prosecutor made clear -- in both his opening statement and his summation -- that the alleged terroristic threat was the "head shot" comment. (4T44-8 to 47-12; 5T53-24 to 79-13).

The other comments were introduced into evidence only because they gave context to the "head shot" comment, i.e., they supported the State's theory that (a) defendant made the "head shot" comment with a purpose to

terrorize Officer Healey or in reckless disregard of the risk of causing such terror. see N.J.S.A. 2C:12-3 (a), and (b) when defendant uttered the "head shot" comment, he had a purpose to put Officer Healey in imminent fear of death under circumstances reasonably causing Officer Healey to believe the immediacy of the threat and the likelihood that it would be carried out, see N.J.S.A. 2C:12-3 (b). Those other comments were also relevant because they helped establish that defendant's words and actions were "of such a nature as to convey menace or fear of a crime of violence to the ordinary person," since it is not a violation of the statute if a threat "expresses fleeing anger" or is "made merely to alarm." See Model Jury Charges (Criminal): N.J.S.A. 2C:12-3(a) (Terroristic Threats), at 2 (rev. 9/12/2016).

Thus, although ACDL-NJ asserts that "we do not know which alleged statements [the jury] found constituted terroristic threats," (see ACDLb at 4), that is simply not so. Given the prosecutor's laser focus on the "head shot" comment throughout trial, this Court should have full confidence that the jury convicted defendant based on the "head shot comment." In fact, there is no reasonable possibility that only some of the jurors convicted defendant based on the "head shot" comment whereas the rest of the jurors convicted defendant only because of some other comment or comments.

The State also notes that if the judge had told the jurors they had to separately consider each individual statement allegedly made by defendant, and come to a unanimous agreement as to whether each individual statements constituted a terroristic threat, the jurors may have mistakenly believed they had to interpret each individual statement in isolation and could convict only if a particular statement, viewed in isolation, constituted a terroristic threat. In actuality, the jury was expected to consider all the testimony and all the evidence, focusing on how each proven fact related to every other proven fact, in deciding whether, under the totality of the circumstances, defendant acted with a purpose to terrorize Officer Healey, see N.J.S.A. 2C:12-3 (a), or consciously disregarded a substantial and unjustifiable risk of causing such terror, see ibid. and N.J.S.A. 2C:2-2 (b)(3), or threatened to kill Officer Healey with a purpose to put the officer in imminent fear of death under circumstances reasonably causing the officer to believe the immediacy of the threat and the likelihood that it would be carried out, see N.J.S.A. 2C:12-3 (b).

This Court's landmark decision in Parker strongly supports the State's position. In Parker, a schoolteacher was charged with official misconduct based on a series of acts whereby the teacher endangered the welfare of her students in a variety of ways. 124 N.J. at 631-32, 639. The evidence included various allegations that Parker touched schoolchildren in their "private parts,"

showed them pornographic magazines, directed them to cut pictures from those magazines and create "collages," discussed her desires to have sex with the school administrator, used foul language, and told the class that a child was menstruating. Ibid.

Despite the multiplicity of acts potentially satisfying the official-misconduct charge in Parker, this Court held that the trial judge's general instructions on juror unanimity were sufficient, and that the judge did not have to tell the jurors they had to unanimously agree as to the specific act or acts that constituted a violation of the official-misconduct statute. Id. at 639-40. In reaching this decision, this Court explained that a specific unanimity instruction was unnecessary because the State's allegations were not contradictory or only marginally related to each other, but instead "formed a core of conceptually similar acts." Id. at 639.

Also instructive is State v. T.C., 347 N.J. Super. 219, 243-44 (App. Div. 2002), certif. denied, 177 N.J. 222 (2003). In that case, the defendant was charged with endangering the welfare of her child, Billy, based on a series of different acts over a period of more than 16 months. The State presented evidence of "a long course of sadistic, violent abuse, both physical and mental," id. at 223, and on appeal, T.C. argued that he was entitled to a specific-unanimity charge because "the jury was presented with three separate

actions which could possibly have warranted a finding of guilt: first, that defendant hit Billy with a belt; second, that defendant restrained her son by installing an alarm system on the door of his room; and third, that she did not provide him with food." Id. at 241.

The Appellate Division disagreed, noting that although there was evidence of multiple acts in T.C. that could form the basis for an endangering charge, the State did not submit "two separate theories" to the jury. Id. at 243. Rather, "[t]here was but one theory of ongoing emotional and physical abuse over a period of time, which consisted of a number of 'conceptually similar acts committed by the defendant.'" Ibid. As such, "the general unanimity charge delivered to the jury was sufficient, and there was no need for the court to deliver a specific unanimity charge which was not requested by defendant." Id. at 243-44.

Also relevant is State v. Scherzer, 301 N.J. Super. 363, 479 (App. Div.), certif. denied, 151 N.J. 466 (1997). In that case, eight defendants were charged with committing multiple acts of sexual penetration upon a mentally defective victim. The alleged sexual penetration included penetration of the victim's vagina with a broomstick, a baseball bat, and a stick. The State also introduced evidence of other sex acts, including evidence that four defendants

sucked on the victim's breasts, and evidence that five defendants had the victim perform fellatio on them. Id. at 394.

For the first time on appeal, the defense alleged that the court erred in failing to "instruct the jury that it had to agree unanimously on which act of penetration occurred as to each defendant." Id. at 478. In rejecting that argument and finding no plain error, the Appellate Division explained that the offenses "require only one type of act, sexual penetration," and that the various acts of penetration alleged were "conceptually similar enough not to have required a specific unanimity charge." Id. at 479. The Court also emphasized that the defendants "did not request an instruction on the need for unanimity as to which acts of penetration occurred," and that the allegations "were neither contradictory nor only marginally related to one another." Ibid. Thus, "the jury instructions, when considered as a whole, did not create a genuine risk of jury confusion" and "were not clearly capable of producing an unjust result." Id. at 479-80.

In contrast with these cases is State v. Frisby, supra, wherein the State offered two distinct theories, based on "two entirely distinct factual scenarios," to support a single charge of endangering the welfare of a child. 174 N.J. at 598. The first theory was that the defendant directly injured her child or caused injury by failing to provide adequate supervision. The second theory

was that the defendant abandoned the child. Ibid. These two different theories were "based on different acts and entirely different evidence." Id. at 599. As such, this Court held that a specific unanimity instruction was required because the State's alternative theories were "contradictory, conceptually distinct, and not even marginally related to each other." Id. at 600 (internal quotation marks omitted). Without more detailed instructions, the jurors may have thought they could convict defendant even though "they completely disagreed regarding contradictory and conceptually distinct theories and the evidence underlying them." Ibid.

The instant case is similar to Parker, T.C., and Scherzer, but contrasts sharply with Frisby. The State's evidence indicated that defendant made several statements, but those statements were neither contradictory nor only marginally related to each other. Moreover, the State "did not present "two separate theories to the jury." Rather, the State advanced "but one theory," and the State's evidence consisted only of "conceptually similar acts committed by the defendant." Thus, the court did not have to instruct the jurors that the jurors had to agree on the particular statement that constituted a terroristic threat. Just as no specific-unanimity instruction was required in Parker, T.C., or Scherzer, no specific-unanimity instruction was required here

What is more, given the prosecutor's emphasis on the "head shot" comment as the sole basis for the terroristic-threats charge, the facts of this case are even stronger than the facts of Parker, T.C., and Scherzer. In those other cases, the prosecutor did not focus the jury's attention only on a single act or statement. And in those other cases, the prosecutor did not argue that the jury should convict because of a single act or statement. Instead, in those other cases, the prosecutor relied on all the evidence and argued that any one of the various acts committed by the defendant could support a conviction. But in this case, as noted previously, the prosecutor made clear that the only statement alleged to constitute a terroristic threat was the "head shot" comment, and the jury was well aware that the other statements were only admitted to provide context to that comment. Thus, if the absence of a sua sponte specific-unanimity instruction was not plain error mandating a reversal in Parker, T.C., or Scherzer, it certainly was not so here.

The State also notes that the defense never disputed that defendant actually made every one of the statements attributed to him. The statements made at the scene, including the statement that was alleged to be the terroristic threat (the "headshot" comment), were captured on an MVR recording that was admitted at trial and played for the jury. The rest of the statements, which provided context to the "head shot" comment, were recovered from

defendant's public Facebook page. Defense counsel conceded that defendant made all these statements, (4T48-11 to 57-5; 5T36-17 to 50-21), so this is not a case where there is doubt whether the jurors were "in substantial agreement as to just what . . . defendant did." Frisby, 174 N.J. at 596. Nor is this a case where a conviction may have resulted "as the result of different jurors concluding that the defendant committed different acts." Parker, 124 N.J. at 636-37.

In sum, the trial court's instructions on general unanimity were sufficient, and the court did not have to tell the jurors they had to unanimously agree on the particular statement that qualified as a terroristic threat. The absence of a sua sponte specific-unanimity instruction was not error, let alone plain error that had "a clear capacity to bring about an unjust result." State v. Adams, 194 N.J. 186, 207 (2008) (quoting Jordan, 147 N.J. at 422). This Court should reject ACDL-NJ's arguments and reverse the Appellate Division's decision.

E. The trial court did not commit error, let alone plain error, in not providing a sua sponte instruction that the jurors had to be unanimous as to the particular subsection of the statute that defendant violated.

Also without merit is ACDL-NJ's argument that the judge erred by not advising the jurors sua sponte that they could not convict defendant of terroristic threats unless they unanimously agreed on the particular subsection

of the statute defendant violated, i.e., unless they unanimously agreed defendant was guilty under N.J.S.A. 2C:12-3(a), or they unanimously agreed he was guilty under N.J.S.A. 2C:12-3(b), or they unanimously agreed he was guilty under both subsections. In this regard, the State relies primarily on the arguments raised in Point II of its initial brief, which were largely ignored by ACDL-NJ.

As noted in that brief, jury unanimity is not required where, as here, a statute "embodies a single offense that may be committed in a number of cognate ways[.]" Frisby, 174 N.J. at 597. Indeed, many jurisdictions recognize that "unanimity is not required when a statute states a single offense but provides for various modes of commission of the offense." Parker, 124 N.J. at 634-35. And the United States Supreme Court has recognized that a jury need not be unanimous if a single offense may be committed by different means and those means are not "so disparate as to exemplify two inherently different offenses." Schad v. Arizona, 501 U.S. 624, 643 (1991) (Souter, J., plurality opinion).

The State also emphasizes that if the judge had told the jurors they needed to be unanimous as to the particular subsection defendant violated, the result would have been the same. For one thing, the State did not allege that defendant committed one act that qualified as a terroristic threat under

subsection (a) and a separate and distinct act that qualified as a terroristic threat under subsection (b). Rather, the State presented the exact same evidence based on the exact same facts in support of both N.J.S.A. 2C:12-3 (a) and N.J.S.A. 2C:12-3 (b).

Moreover, in the context of the facts presented in this case, the elements of N.J.S.A. 2C:12-3 (a) were subsumed within the elements of N.J.S.A. 2C:12-3 (b). If one or more jurors were convinced, beyond a reasonable doubt, that defendant threatened to kill Officer Healey with the purpose to put him in imminent fear of death under circumstances reasonably causing the officer to believe the immediacy of the threat and the likelihood that it would be carried out, see N.J.S.A. 2C:12-3 (b), then they necessarily would have been convinced, beyond a reasonable doubt, that defendant threatened to commit a crime of violence with a purpose to terrorize another or in reckless disregard of the risk of causing such terror, see N.J.S.A. 2C:12-3 (a).

The converse is also true. Any juror who felt that the State had failed to prove its case under N.J.S.A. 2C:12-3 (a) would certainly have reached the same conclusion as to N.J.S.A. 2C:12-3 (b). It simply was not possible for a juror to find guilt under subsection (b) without also finding guilt under subsection (a).

The prosecutor acknowledged this when he candidly conceded, at the close of his summation, that if the jurors were not convinced of defendant's guilt under subsection (a), they did not have to consider subsection (b) because they would never find guilt under subsection (b) if they were not convinced about guilt under subsection (a). (5T79-1 to 13). The prosecutor obviously recognized that liability under subsection (a) was necessarily subsumed within liability for subsection (b), given the particular facts of the case. Thus, there is no reasonable possibility that one or more jurors were convinced that defendant was guilty under subsection (b) but not guilty under subsection (a), whereas the remaining jurors were convinced that defendant was guilty under subsection (a) but not subsection (b). Again, on these facts, no juror could have found guilt under subsection (b) but not subsection (a). Thus, there is no concern here that the jurors were fragmented as to the legal underpinnings of their verdict. Any juror who voted to convict defendant must have been convinced, at the very least, that defendant was guilty under subsection (a).

Nonetheless, ACDL-NJ relies on Parker in arguing that a "specific unanimity instruction should be provided when 'a single crime can be proven by different theories based on different acts and at least two of these theories rely on different evidence, and [when] the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not

proven but that all of the jurors will not agree on the same theory." (ACDLb at 6). This reliance on Parker is misplaced.

First, Parker is not a case where the defendant was charged under alternate subsections of the same statute. Rather, in Parker, the State charged defendant with official misconduct, contrary to N.J.S.A. 2C:30-2a, in that she had engaged "in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children while [she] had a legal duty to care for the children and had assumed responsibility for their care." 124 N.J. at 632, 639. Thus, this Court in Parker never addressed whether a specific unanimity charge is required when the charge encompasses two alternate subsections of the same statute.

Even more importantly, as noted above, this is not a case where the State attempted to prove "a single crime . . . by different theories based on different acts and at least two of these theories rely on different evidence." Nor is this a case where there was a possibility, much less a reasonable possibility, that the jurors convicted defendant despite disagreeing on the factual theory underlying their findings of guilt. Again, the State did not present the jury with alternate factual theories that were dependent on different evidence. Instead, the State presented the jury with only a single theory, i.e., that defendant threatened to kill Officer Healey by shouting, "Watch out for a head shot!," and thereby

threatened to commit a crime of violence with a purpose to terrorize another or in reckless disregard of the risk of causing such terror, and also acted with a purpose to put Officer Healey in imminent fear of death under circumstances reasonably causing the officer to believe the immediacy of the threat and the likelihood that it would be carried out. On these facts, the omission of a sua sponte specific unanimity charge was not error, much less plain error.

Thus, although ACDL-NJ complains that "we do not know what subsection of N.J.S.A. 2C:12-3 the jury found that defendant violated," (ACDLb at 4), there is no doubt that under the particular facts of this particular case, the jurors unanimously agreed, at a minimum, that defendant was guilty under N.J.S.A. 2C:12-3(a). Again, as the prosecutor told the jurors in his summation, it simply was not possible for a juror to find defendant guilty under N.J.S.A. 2C:12-3(b) without also finding him guilty under N.J.S.A. 2C:12-3(a). Thus, there is no possibility that one or more of the jurors convicted defendant under subsection (a) but not (b), whereas the remaining jurors convicted defendant under subsection (b) but not (a).

In sum, the trial court's instructions on general unanimity were sufficient, and the court did not have to tell the jurors they had to unanimously agree on the particular subsection of the terroristic-threats statute that was violated.. The absence of a sua sponte specific-unanimity instruction was not

error, let alone plain error that had "a clear capacity to bring about an unjust result." State v. Adams, 194 N.J. 186, 207 (2008) (quoting Jordan, 147 N.J. at 422). This Court should reject ACDL-NJ's arguments and reverse the Appellate Division's decision.

CONCLUSION

For all the foregoing reasons, and for all the reasons stated in the State's initial brief, the State respectfully requests that this Court reverse the Appellate Division's decision and reinstate defendant's conviction and sentence.

Respectfully submitted,

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