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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0513-05T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PAUL J. KUCHERA, SR.,

Defendant-Appellant.

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Argued May 31, 2007 - Decided June 27, 2007

Before Judges Stern, Sabatino and Lyons.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. 00-10-0860.

Leonard S. Baker argued the cause for appellant (Mitnick, Josselson, DePersia & Baker, attorneys; Mr. Baker, of counsel and on the brief).

Deborah C. Bartolomey, Deputy Attorney General, argued the cause for respondent (Stuart Rabner, Attorney General, attorney; Karen Fiorelli, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant was convicted of second degree conspiracy to commit burglary, third degree aggravated assault, and two counts of third degree criminal restraint.<sup>1</sup> On this appeal he argues:

- I. THE CONVICTIONS IN THE CASE BEFORE THE COURT MUST BE REVERSED BECAUSE THE JURY WAS MISINFORMED, ONCE AGAIN, ON THE CONCEPTS OF CONSPIRACY AND ACCOMPLICE LIABILITY, WHICH ERROR LED THE JURY TO HOLD DEFENDANT ACCOUNTABLE FOR ALL OF THE CONDUCT OF DANIEL KETTLE ONCE IT FOUND THE EXISTENCE OF A CONSPIRACY.
- II. THE GUILTY VERDICT AGAINST PAUL KUCHERA WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD BE REVERSED.
- III. SINCE THE STATE FAILED TO PROVE EACH ELEMENT OF THE CRIME OF CRIMINAL RESTRAINT, THE GUILTY VERDICTS FOR THESE OFFENSES SIMPLY CANNOT STAND.
- IV. PAUL KUCHERA WAS DEPRIVED OF A CONSTITUTIONALLY FAIR TRIAL AS A RESULT OF THE FACT THAT THE ENTIRETY OF THE EVIDENCE AGAINST HIM CONSISTED OF TESTIMONY SUPPLIED BY AN ALLEGED COCONSPIRATOR WHO PLEADED GUILTY AND TESTIFIED AGAINST HIM IN PRISON ATTIRE AND LEG SHACKLES IN THE ABSENCE OF BOTH A SECURITY HEARING AND AN APPROPRIATE JURY INSTRUCTION ON THE ISSUE.
- V. THE SENTENCE IMPOSED ON DEFENDANT, PAUL KUCHERA, IS ILLEGAL AND EXCESSIVE.
  - A. The Trial Court Erred in Failing to Merge the Conspiracy Count into the Substantive Crimes.
  - B. The Trial Court Erred in Imposing Consecutive Sentences Under the Circumstances.

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<sup>1</sup> The judgment incorrectly refers to conspiracy to commit criminal restraint. The counts on which defendant was convicted of criminal restraint alleged no conspiracy; and, while they were presented on a conspiratorial theory, the judgment with respect to the convictions on counts four and nine must be corrected.

VI. PAUL KUCHERA'S CONVICTION MUST BE REVERSED DUE TO PROSECUTORIAL MISCONDUCT.

We find that these contentions, except as to merger, are without merit and warrant only the limited discussion that follows. R. 2:11-3(e)(2).

We affirm the convictions for conspiracy and the criminal restraint of one of the victims, and we merge the remaining convictions into the conspiracy conviction.

I.

Defendant was charged in a Burlington County indictment with second degree conspiracy, in violation of N.J.S.A. 2C:5-2 (count one); second degree burglary, in violation of N.J.S.A. 2C:18-2(a)(1) (count two); first degree robbery, in violation of N.J.S.A. 2C:15-1(a)(1) (count three); two counts of first degree kidnapping, in violation of N.J.S.A. 2C:13-1(b)(2) (counts four and nine); second degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(1) (count five); third degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(2) (count six); two counts of fourth degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(4) (counts seven and ten); third degree terroristic threats (threat to kill), in violation of N.J.S.A. 2C:12-3(b) (counts eight and eleven); possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a) (count twelve), unlawful possession of a weapon, in violation of

N.J.S.A. 2C:39-5(b) (count thirteen); and possession of a firearm by convicted persons, in violation of N.J.S.A. 2C:39-7(b) (count fourteen). The conspiracy count, count one, alleged:

ON OR ABOUT BETWEEN December 26, 1999 & December 31, 1999 IN Mount Laurel Twp. IN BURLINGTON COUNTY, AND WITHIN THE JURISDICTION OF THIS COURT, PAUL J. KUCHERA WITH THE PURPOSE OF PROMOTING OR FACILITATING A CRIME, DID CONSPIRE WITH DANIEL F. KETTLE TO COMMIT THE CRIMES OF ROBBERY IN THE FIRST DEGREE AND/OR AGGRAVATED ASSAULT IN THE SECOND DEGREE AND/OR BURGLARY IN THE SECOND DEGREE AND/OR POSSESSION OF A WEAPON FOR UNLAWFUL PURPOSE IN THE SECOND DEGREE, IN VIOLATION OF N.J.S. 2C:15-1a(1), 2C:12-1b(1), 2C:18-2a(1) AND 2C:39-4a;

CONTRARY TO THE PROVISIONS OF N.J.S. 2C:5-2, AND AGAINST THE PEACE OF THIS STATE, THE GOVERNMENT AND DIGNITY OF THE SAME.

At defendant's first trial, he was convicted of second degree conspiracy to commit burglary and aggravated assault,<sup>2</sup> as alleged in count one, second degree kidnapping as a lesser included offense on counts four and nine, and second degree aggravated

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<sup>2</sup> Without the verdict sheet from that trial, it is not clear what happened at the first trial with respect to the alleged conspiracy to commit robbery. The judgment refers to a conviction for "conspiracy to commit burglary," but our opinion on the direct appeal refers to a conviction for "conspiracy to commit burglary and aggravated assault." In any event, at the retrial, the jury was presented with both a conspiracy to commit burglary and a conspiracy to commit aggravated assault. Defendant was acquitted of the latter. There is no double jeopardy issue raised on the appeal.

assault as alleged in count five. On December 19, 2003, we reversed the convictions and remanded for a new trial (A-5723-01T2).

On the retrial, defendant was found guilty of second degree conspiracy to commit burglary in violation of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2(a)(1) (count one), two counts of criminal restraint, in violation of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:13-2 (counts four and nine), and third degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(1) (count five). The criminal restraints were presented as lesser included offenses to the kidnappings for which defendant was convicted at the first trial. Counts four and five referred to victim Robert Lesino ("Lesino"), and count nine referred to victim Joanne Cooper ("Cooper").

The verdict sheet on the charges resulting in convictions read as follows:<sup>3</sup>

1. On the charge that defendant Paul Kuchera conspired with Daniel Kettle to commit an unlawful entry into the residence of Mr. Lesino with purpose to inflict or threaten bodily injury (i.e. a burglary) our verdict is:

Not Guilty:     0  
Guilty:       [12]

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<sup>3</sup> We do not include the lesser included offenses of the crimes for which defendant was convicted.

If you answered Guilty to Question #1, please answer the following question and then proceed to question #2.  
If you answered Not Guilty to Question #1, please proceed directly to question #2.

Did the defendant Paul Kuchera, or an accomplice or co-conspirator for whom Mr. Kuchera was legally accountable, use a deadly weapon, or threaten the immediate use of a deadly weapon?

Yes   X    
No       

. . . .

4. The defendant Paul Kuchera is charged as an accomplice and/or co-conspirator with the Aggravated Assault- attempting to cause [or causing] significant bodily injury to Mr. Lesino- our verdict is:

Not Guilty:         
Guilty:   [X]  

. . . .

7. The defendant Paul Kuchera is charged as an accomplice and/or a co-conspirator with the unlawful criminal restraint and exposing Robert Lesino to the risk of serious bodily injury - our verdict is:

Not Guilty:         
Guilty:   [12]  

. . . .

10. The defendant Paul Kuchera is charged as an accomplice and/or a co-conspirator with the unlawful criminal restraint of Joanne Cooper by exposing her to the risk of serious bodily [injury]- our verdict is:

Not Guilty:

Guilty:        [X]

As can be seen from the verdict sheet, the substantive charges were presented to the jury on theories of accomplice and conspiratorial liability.<sup>4</sup> See N.J.S.A. 2C:1-8(d)(2); N.J.S.A. 2C:2-6(b), (c). Defendant was not present at the scene of the crimes.

Defendant was sentenced to an aggregate term of fifteen years. The sentence on count one (conspiracy to commit burglary) was eight years with 85 percent parole ineligibility under the No Early Release Act (NERA) to be served concurrently with a four-year sentence on count five (aggravated assault of Lesino). On count four (criminal restraint of Lesino), defendant was sentenced to four years imprisonment to be served consecutively with his sentences for counts one, five, and nine. On count nine (criminal restraint of Cooper), defendant was sentenced to three years imprisonment, to be served consecutively to the other sentences. The court also instructed that "defendant shall not, if practicable, be housed at the same institution as [his co-defendant who testified against him],

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<sup>4</sup> See, supra, n.1. Defendant was found guilty of conspiracy to commit a burglary only. However, an aggravated assault was substantively alleged and found to have occurred. A burglary is an unlawful entry to commit an offense therein. N.J.S.A. 2C:18-2.

Daniel Kettle." Mandatory fines, penalties, and a period of parole supervision were also imposed.

Following the trial judge's retirement, another judge amended defendant's sentence on count five to run concurrently with the sentence in count one, eliminating the language that had provided that it run consecutively with counts four and nine. The judgment stated that the alteration was part of "a negotiated plea agreement between the Prosecutor and the defendant." The record reflects no such negotiated plea,<sup>5</sup> and the amendment was technical and did not affect the aggregate term.

While the appeal was pending, we permitted supplementation of the record to reflect Kettle's attire while he testified at the second trial.

## II.

Defendant is married to Arlene Kuchera ("Arlene"). Prior to her marriage to defendant, Arlene was married to Lesino. She and Lesino have a daughter, Kristen, who was thirteen at the time of the incident in this case. Arlene and Lesino's divorce was "not [] friendly" and "always very tense." They were frequently in family court over custody and other matters stemming from the divorce. While defendant and Arlene "had gone

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<sup>5</sup> On the record, the judge stated she was merely clarifying the sentence.

through a bankruptcy[,]" at the time of the incident, Lesino was a federal government employee. In the fall and winter of 1999, Kristen lived primarily with her mother and defendant, and Lesino had parenting time. At the time of the incident, Lesino was dating Cooper.

Defendant's relationship with Lesino was "not good." Lesino described defendant as "very disagreeable" and stated that "[they] didn't get along." Defendant testified that Lesino was "constantly taking [Arlene] to [c]ourt [and] [u]psetting his daughter constantly. She never wanted to visit him." He explained that Lesino and Arlene were in court "maybe once, twice a year."

Lesino testified about an incident that occurred between defendant and him in the summer of 1999 while Lesino was picking his daughter up for visitation. According to Lesino, as he approached the front door, defendant "came flying out of the door and grabbed me by the shirt and started pushing me backwards and said, 'I'm going to get you. I want you to stay away from our house. I don't want you around her anymore.'" Lesino testified that he responded by "kind of like [taking] my hands and [breaking] [defendant's] hands and [saying], "'How dare you touch me. You have no right to touch me.'" Things like that." The police were never called. Defendant testified that

this incident never occurred and "the first time [he] heard that allegation was at the last trial.

Lesino further testified that, although the severity of the confrontation was unusual, "[e]very time I went to pick up my daughter I would have some sort of nasty remark at the door. Some sort of incident at the door." Lesino viewed defendant as a major obstacle to his relationship with his daughter.

In the fall of 1999, Lesino and Arlene went to court over Kristen's custody. Lesino believed that defendant and Arlene were "interfering with [his] visitation[,]" explaining that "when I would go to pick [Kristen] up or try to call her, she would not come for visitation or not return my phone calls." Lesino and Arlene returned to court again "around Christmas time."

According to Lesino, he was "supposed to have visitation" with Kristen at Christmas, "but that particular Christmas [he] called the house several times. Never got a return phone call from Kristen or anyone. . . . [a]nd Kristen never came for Christmas to visit with me." He then explained that, the next day while preparing to attend a party with Cooper, he "got a very strange call from Kristen saying come pick me up right now. Right away. I've got to see you right now."

Kettle and defendant worked together stocking shelves at Zagara's Food Market on the graveyard shift. Kettle testified

that, although they were not friends outside of work, they discussed finances and family while at work. Kettle explained defendant's attitude towards Lesino, stating that "[h]e hated the man. Up and around Christmas he wanted to - and right after Christmas - he wanted to get revenge on him for an incident that happened over at Christmas involving the daughter." Kettle testified that, on the night of December 26, defendant explained that his fury towards Lesino stemmed from an event that occurred over Christmas, which caused Kristen to cry:

[Defendant] told me that over the holidays his stepdaughter had wanted to spend Christmas with her father. And she had called ahead of time to go over and the conversation on the phone didn't go well. He had told her something to the effect that he had a lady friend over, that she was more important. And this in turn upsetted the daughter and in turn upsetted [defendant]. Because [defendant] had an affection for her like his own daughter.

Kettle testified that defendant told him that he wanted Lesino "to pay for" upsetting Kristen. Kettle stated that defendant

wanted to rough [Lesino] up. He wanted him to feel the pain that the daughter had felt and obviously had spread on to him and the wife. So we talked a lot over the next days about that. And he offered me money if I would go and rough up [Lesino].

Kettle explained that defendant solicited his assistance in a series of conversations between Sunday, December 26 and

Thursday morning, December 30. Kettle agreed to the plan during his shift on the night of December 29-30, 1995. In exchange for "rough[ing] [Lesino] up" and "mak[ing] him look black and blue[,]" Kettle said defendant

offered me up to \$1,000. He had told me information inside the house. That there was a safe with money in it and coins, collectables or something. He had told me that [Lesino] had a laptop. He told me that there should be around \$2,000 in cash inside the safe, which was inside the closet.

Kettle explained that "[t]he robbery was like a payment as such for me[,]" as Kettle was to keep all of the proceeds, and it was intended to "cover the fact of roughing [Lesino] up." Kettle agreed "because [he was] in financial trouble[,]" and believed he would receive the robbery money plus the promised \$1,000. Kettle also said that defendant specifically told him not to kill Lesino, "because [defendant] needed the money that he was receiving from him . . . ."

Defendant testified that none of this ever occurred. Defendant also testified that he knew nothing about the safe located in Lesino's bedroom and did not tell Kettle about the safe's location, despite Lesino's testimony that the "safe was there long before he and Arlene were divorced."

Kettle further testified that defendant did not give him specific instructions on how to "make [Lesino] feel the pain and make him black and blue[,]" instead leaving that to Kettle's

discretion. Kettle stated that he then decided to buy "a flat bar, some duct tape, a ski mask and a hooded sweater" in order to perform the job. He said that, of these items, defendant only recommended that he purchase the ski mask. Kettle also explained that he chose to tie the victims up with duct tape, "because I am hard of hearing. And if I have to ransack the house, I don't know where they are or what they're doing." However, he testified that he and defendant discussed using a gun "to scare [Lesino.]" As Kettle did not own one, defendant supplied him with a loaded gun in a holster.

Defendant denied owning or ever giving Kettle a gun. At trial, Kettle stated that he "believe[d]" that the gun that was in evidence from the crime scene was the gun defendant gave him, but he did not know much about guns.

Kettle also explained that defendant could not personally attack Lesino, "because [defendant] was getting money from alimony or mortgage payments or something. That would affect . . . them receiving that money from him." Kettle said defendant chose him, "[b]ecause [he] wouldn't be recognized." Additionally, Kettle testified that defendant chose New Year's Eve as the date of the attack "because that way he would have an alibi."

Finally, Kettle testified that he had never met Lesino prior to the attack, nor did he know where he lived. Kettle

identified a map that he said defendant drew while at work "to help [him] locate the house." Defendant denied ever seeing the map until "it was shown to him" about nineteen or twenty days after he was arrested. Kettle explained that he was "familiar with the area[,] " so defendant's map guided him using landmarks such as Wawa and "a swimming pool complex or something like that" for street markers. After using the map, Kettle testified that he "ripped it up."

In contrast, defendant testified that, around Thanksgiving, Kettle brought gloves into work "out of the blue and asked me to do robberies with him[,] " explaining that Kettle "was in financial trouble and the only way he could see out of it was to rob." Defendant testified that he took the gloves but refused to take part in robberies, telling Kettle that he "just [did not] do that anymore."

Cooper and her daughter, Colleen, spent New Year's Eve, December 31, 1999, at Lesino's townhouse. They arrived at approximately 7:30 p.m. Cooper's two other college-aged children were anticipated to join them. According to Lesino, at approximately 7:45 p.m., he heard a knock on his front door, and, when he answered the door, he was greeted by "a man all dressed in black with a stocking mask on his face covered[,] " who was "somewhere between 6'2", 6'3". Lesino testified that he thought the man was Cooper's son playing a joke on him, so

"within . . . a few seconds" of opening the door, he "reached out" and "grabbed the ski mask and pulled it off the person[,] realizing then that it was not Cooper's son. Lesino then stated that he "blurted out[,] [']it's Paul[']," explaining that he anticipated revenge for "the incident with [defendant] earlier in the summer[.]" However, Lesino did not recognize the man at the door, having never seen him before.

Lesino testified that he grabbed Kettle's hand when Kettle started to move and knocked a roll of duct tape, which Kettle had been holding, across the room. Kettle then reached for a gun in his waist pocket, and Lesino struggled with him, yelling to Cooper to "call 911." During the struggle, Kettle pushed Lesino backwards, hit him across the face with the gun "several times," and threw him against drywall, smashing it. Both men eventually fell to the floor in the struggle. Kettle then pointed the gun at Lesino and said "[s]tay down or I will shoot you." Kettle then saw Cooper, pointed the gun at her, and called her over, threatening to shoot her if she did not comply. Kettle then had Lesino and Cooper

lay face down and he started gathering up telephone cords and other cords and he picked up the duct tape . . . [and] [s]tarted . . . hog-tying us with our legs behind us, our hands behind us. Grabbing some kitchen towels and stuffing them in our mouths.

At some point during these events, Kettle cut the telephone cord. Lesino did not know where Cooper's daughter Colleen was at this point.

After securing Lesino and Cooper, Kettle "immediately started roaming around the house . . . [b]eing destructive. Pulling drawers out, grabbing things." Lesino stated that Kettle stole "money, credit cards f[rom] [his] wallet, [his] stamp collection, silver dollars [he] had collected. Stamps, things like that[,]" with the collections valued over \$1,000 each. However, despite making a mess of the house, Kettle did little to Kristen's bedroom, leaving it "kind of pristine."

Lesino testified that, while ransacking the house, Kettle repeatedly looked outside the window for the police, "or something like that[,]" and, at one point, "put [a knife] to [Cooper's] throat and her face and said, 'Did you call the police, bitch?'" She replied that she had not. Cooper testified that Kettle also told her that "if [she] ever identified him, he would come back and cut [her] up."

Lesino testified that, at a later point, Kettle must have seen the police when he looked out the window, because Kettle commented, "'I guess we have a hostage situation now.'" Lesino stated that approximately ten to fifteen minutes later, Kettle "kind of had a change in demeanor . . . [a]nd he started to come and untie us." After untying them, Kettle instructed Cooper to

"go into the kitchen [and] [g]et stuff to clean up your friend[,]" because Lesino was bleeding.

Kettle then sat at a table with Cooper and Lesino and told them his story. Lesino stated that Kettle explained, in a somewhat apologetic manner:

how he is desperate for money. That he works with [defendant] at Zagara's department or grocery store. And that Paul paid him \$1,000 to come over and break into my house and terrorize us and burglarize it to get money. Because he's desperate for money. And that he knows [defendant] from having worked together at Zagara's for a long time.

Lesino also testified that Kettle explained that defendant had instructed him "that the blacker and bluer [Lesino] [is] or the more bruised that [Lesino] [is], the better he would like it. Or that that's how - that's what he was commissioning him to do."

After Kettle explained defendant's involvement to Lesino and Cooper, Lesino stated that he offered Kettle \$5,000 "to get [him] out of the house." Kettle accepted, and told Lesino that he wanted to go to Wawa, a nearby grocery store. The three started to leave together. Cooper walked out of the house first, Lesino "grabbed [his] car keys" and clicked the unlock function so the car would beep and alert the police that they were coming out, if police were there. Upon exiting the door, a police officer "pulled [Cooper] to the side" and Lesino "dove

for [his] car by the driver's side" in case the police opened fire. The police then tried to subdue both Lesino and Kettle with handcuffs, and, after guidance from Cooper, only arrested Kettle.

While the incident was occurring inside the house, Cooper's daughter Colleen "had slipped out into the garage with a phone" and called 911. She hid there until rescued by police about five minutes after their arrival.

Lesino testified that the police sent Cooper and him to the emergency room in an ambulance, although Cooper was not "physically harmed[.]" At the emergency room, Lesino received "about 30 stitches above [his] eye." His other injuries included a "cut [] on the side of [his] eye. And [he] had floaters in [his] eye which [he] still ha[s] to this day." Lesino explained that he "[saw] an ophthalmologist and also an eye surgeon" and was told that he "will just have to live" with the floaters. He explained that they are a "[p]ermanent condition. Not operable."

Lesino also testified that "the whole experience [lasted] maybe several hours[,]" and he "thought [he and Cooper] were going to die since [Kettle] had a gun. I was really scared for [Cooper] that he might rape her. Do something like that to her." Cooper also expressed that she was afraid for her life and the lives and well-being of her children.

Kettle made two taped statements to the Mount Laurel Police Department on the night of the incident, the first occurring at approximately 12:01 a.m. and the second at about 12:45 a.m. In the first statement, Kettle told police that defendant "offered to pay [him] to go beat [Lesino] up." While giving the first statement, Kettle denied having a gun, but in the second statement, approximately forty-five minutes later, Kettle "[t]old [police] that [he] had [a gun] and [] told them where [he] had hidden it."

Police found Kettle's loaded .22 caliber handgun in an ottoman in Lesino's family room. Police also found a Wal-Mart receipt in Kettle's car which showed that he had purchased a "[u]tility bar, duct tape, a video, face mask and a zipper hood" at 5:55 p.m. on the day of the incident. The video was for Kettle's daughter and unrelated to the incident. The police also came into custody of a map after it was brought to them by Kettle's wife. The original map was destroyed during forensic testing to find fingerprints, but the copy showed that the map had 144 Calderwood written on its side.

Defendant was arrested on January 1, 2000. In searching his home pursuant to a warrant, police found a .22 caliber bullet capable of being fired by the gun used in the incident. Police found "[n]othing else of evidential value" in the search. Defendant explained that he found the bullet "in a school yard

while [he was] with [his] son[,] " [he] picked it up [and put it] in [his] pocket[,] " and "put it on the top of [his] refrigerator so [his] son wouldn't get it." Defendant explained that he did not throw the bullet in the trash, because he thought it might be a bullet and meant "to turn it over to someone" but forgot.

The police sent the map, bullets, and the gun clip to be tested for fingerprints. Detective-Sergeant Jeffrey Scarafazza of the New Jersey State Police, who conducted the fingerprint analyses, testified that the map was tested, but no readable fingerprints were found. Scarafazza also stated that the bullets were "too small" to have sufficient surface to leave space for readable fingerprints. The clip also was not processed, because Scarafazza deemed it "not suitable for latent print examination." William Davis, a forensic document examiner employed by the Department of Criminal Justice testified as a handwriting expert. Davis compared the writing on the map to defendant's handwriting and "was unable to make a determination as to authorship" because of the limited amount of writing on the map and the "fact that [the examined map] was a copied document[.]" Davis concluded "that [defendant] was unable to be identified or eliminated as being the author of [the writing on the map]."

Detective Kirk Russell, who investigated the crime, also testified that "[b]ased upon the evidence, [he] [had] absolutely no idea who drew [the map]." According to Detective Russell, Kettle told the police that he obtained the gun from defendant, but the police were unable to find any connection between defendant and the gun's prior owner.

Cedric A. Edwards, Kettle's attorney, testified Kettle entered into an open plea in exchange for his cooperation against defendant. As part of the plea, certain counts of the indictment were dismissed. Kettle pled guilty to second degree burglary, first degree robbery, two counts of first degree kidnapping, second degree aggravated assault, two counts of fourth degree aggravated assault, second degree possession of a weapon for an unlawful purpose, and third degree possession of a weapon for an unlawful purpose, totaling nine of what was originally fourteen counts. Kettle was sentenced to seventeen years imprisonment, with a requirement that he serve 85% of thirteen of those years prior to becoming eligible for parole.

Finally, Kettle testified that defendant approached him approximately a week after the incident, while both were in Burlington County Jail, and said that if Kettle "did not testify against him, that he would see to it that [Kettle's] wife at the time would be taken care of." In exchange for Kettle's testimony at the second trial, the State agreed to allow him to

"apply for reconsideration of sentence." In essence, Kettle's involvement was clear, and he provided the only direct evidence against defendant.

### III.

Defendant first argues that "[t]he convictions in the case before the court must be reversed because the jury was misinformed, once again, on the concepts of conspiracy and accomplice liability, which error led the jury to hold defendant accountable for all of the conduct of [Kettle] once it found the existence of a conspiracy." As defendant made clear at argument before us, he attacks the conviction on the substantive counts as a result of the charge, and can hardly attack the conviction for conspiracy if Kettle was believed by the jury. Defendant states that the trial court did not explain "that accomplices are not automatically guilty of each other's crimes, even when there is sufficient evidence of a conspiracy." Additionally, defendant argues that the court failed "to charge the jury on whether the scope of the conspiracy applied factually to each substantive crime[.]" Defendant cites the indefinite format of the jury verdict sheet, which stated that defendant was "charged as an accomplice and/or co-conspirator[,]" as adding to this confusion.

After the close of testimony, the trial judge had an extended discussion with the attorneys regarding his intended

jury charges. The following day, the parties made their closing statements, and the jury charge was given. No objection was made with respect to the instructions.

In the charge, the judge explained that the indictment contained "a charge for conspiracy[,]" "a charge for aggravated assault that involves [Lesino][,]" "[a]nd . . . two kidnapping charges that involve both [Lesino] and [Cooper]." He later stated that "they are separate offenses brought in separate counts of the Indictment[,]" emphasizing that the counts should be considered separately.

The judge began his discussion of conspiracy and accomplice liability by stating:

The State alleges that these two men, [Kettle] and [defendant], conspired to have [Kettle] go into [Lesino's] home and rough up [Lesino] and make it look like a robbery. Also our law allows the jury to find that one person is liable as an accomplice if he is legally accountable for the other person's conduct. Of course you must be satisfied beyond a reasonable doubt that that is what happened.

First consider if [defendant] did conspire with [Kettle] and only if you find that, to what extent did he conspire. That is, even if there was some agreement between them, did [Kettle] overstep that agreement? It's your job and your duty to determine whether or not [defendant] should be held criminally responsible for the acts of [Kettle].

As you will be instructed, an individual can only be held criminally

responsible for the conduct of another person if you find beyond a reasonable doubt that the State has met its burden as to each and every essential element of the charge. And here we'll talk about the conspiracy as I'm going to explain that to you.

You must also consider whether or not you believe that [Kettle] committed acts which were not within the contemplation of [defendant]. In other words, if you find that any conspiracy existed, you must then determine whether each of the separate acts committed by [Kettle] were acts which were foreseeable as natural consequences of any conspiracy. If you find that [Kettle] committed acts which exceeded the contemplated scope of any conspiracy or which were not reasonable or natural consequences of the contemplated scope of any conspiracy, then you would find [defendant] not guilty of those charges.

[Emphasis added.]

The judge then explained that the first count of the indictment was for conspiracy to commit a second degree burglary and a second degree aggravated assault, a crime that "can stand alone." He also explained that he would charge the jury regarding lesser included offenses. The judge further charged the jury on what a conspiracy entails and then said:

In other words, a person may be found guilty of the crime of conspiracy regardless of whether that defendant is guilty or not guilty of the offenses of those underlying crimes. And in order for you to find [defendant] guilty of the crime of conspiracy, the State has to prove beyond a reasonable doubt the following elements:

That [defendant] agreed with [Kettle] that they would engage in conduct which constitutes a crime or an attempt or solicitation to commit such crime. And that [defendant's] purpose was to promote or facilitate the commission of the crime, crimes of burglary and/or aggravated assault. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist.

In order to find [defendant] guilty of the crime of conspiracy, the State does not have to prove that he actually committed the crimes of either burglary or aggravated assault. However, to decide whether the State has proven the crime of conspiracy, you must understand what constitutes the crimes of burglary and aggravated assault.

After charging further, the judge concluded the conspiracy charge by stating:

Now, in summary the State has to prove these elements: That [defendant] agreed with another person that they or one of them would engage in conduct which constitutes a crime or an attempt or a solicitation to commit such crime. And that [defendant's] purpose was to promote or facilitate the commission of either of those crimes, burglary or aggravated assault. You will have to consider each crime separately in order to determine whether Mr. Kuchera engaged in a conspiracy as to that particular crime. And if, after consideration of all the evidence, you are convinced beyond a reasonable doubt that the State has proven all of these elements, then you would find Mr. Kuchera guilty of a

conspiracy. On the other hand, if you find that the State has failed to prove to your satisfaction beyond a reasonable doubt any or more of those elements, then you must find Mr. Kuchera not guilty of the crime of conspiracy.

[Emphasis added.]

The charge covered the Model Jury Charges (Criminal), § 2C:5-2 Conspiracy (June 19, 1995).

After giving the conspiracy charge, the judge reemphasized that the indictment's counts must be considered separately, and a finding of guilt on one count does not implicate guilt on another.

The judge then addressed the substantive offenses. He first detailed the concept of accomplice liability, stating:

A person is guilty of an offense if it is committed by his own conduct or the conduct of another person for which he is legally accountable, or both. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of an offense. A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, he, A, solicits such other person to commit it, and/or B, aides [sic] or agrees or attempts to aide [sic] such other person in planning or committing it.

This provision of the law means that not only is the person who actually commits the criminal act responsible for it, but one who is legally accountable as an accomplice is also responsible as if he committed the crime or crimes himself.

Now, in this case the State alleges that [defendant is] guilty of some of the crimes committed by [Kettle] because [Kettle] acted as his accomplice. In order to find [defendant] guilty, the State must prove beyond a reasonable doubt each of these following elements:

That [Kettle] committed certain crimes. That [defendant] solicited him to commit them and/or did aide [sic] or agree or attempt to aide [sic] him in the planning or committing of them. Three, that [defendant's] purpose was to promote or facilitate the commission of the offenses. That [defendant] possessed the criminal state of mind that is required to be given against the person who actually committed those acts. And again a person acts purposely with respect to his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. And I have used that word solicit. What does that mean in the law? Solicits means to strongly urge, suggest, lure, or proposition. Aide [sic] means to assist, support or supplement the efforts of another person. Agrees to aid means to encourage by promise of assistance or support. Attempt to aide [sic] means that a person takes substantial steps in a course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of the substantive offense.

If you find that [defendant], with the purpose of promoting or facilitating the commission of the offenses, solicited [Kettle] to commit them and/or aided, agreed or attempted to aide [sic] him in planning or committing them, then you should consider him as if he committed the crimes himself.

Again, remember that the accomplice status has to be considered separately as to each charge.

The judge then gave a charge for conspiracy-vicarious liability regarding kidnapping and aggravated assault, stating:

Our law provides that a person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable or both. A person is legally accountable for the conduct of another person when he is engaged in a conspiracy with that other person. And the conduct is within the scope of the conspiracy or a reasonably foreseeable or reasonably anticipated consequence of the conspiracy. And not too far removed or too remote from the objectives of the original conspiracy to hold the defendant justly liable for the conduct of his co-conspirator. Thus, you must decide whether [defendant] engaged in a conspiracy with [Kettle] to commit the crime or crimes of aggravated assault and/or burglary. And you must also consider whether the kidnappings of [Lesino] and [Cooper] and the aggravated assault by attempting to cause serious bodily injury to [Lesino] were objectively foreseeable and reasonably anticipated results of the original conspiracy, or whether the commission of these offenses is beyond the scope of the conspiracy.

A reasonably foreseeable consequence means one which, under all of the circumstances presented, a reasonable person would foresee.

The law does not require that [defendant] actually recognize or subjectively believe that the kidnapping of [Cooper] and [Lesino] and the aggravated assault by attempting to cause serious bodily injury to [Lesino] were foreseeable

consequences of the conspiracy to commit an aggravated assault and burglary. The test is an objective one. That is, whether under the circumstances a reasonable person would foresee the kidnappings and the aggravated assault by attempting to cause serious bodily injury to [Lesino] as real potential consequences of the conspiracy to commit the aggravated assault, burglary against [Lesino]. A defendant can be liable for a substantive crime, that is, a crime such as kidnapping and aggravated assault by attempting to cause serious bodily injury even though the substantive crimes were not within the actual contemplation of or within the scope of the conspiracy as originally planned. Provided that the substantive crimes were reasonably and closely connected to the conspiracy and a necessary or natural consequence thereof.

So that it would not be unjust to hold [defendant] liable for the kidnappings of [Lesino] and [Cooper] and/or the aggravated assault by attempting to cause serious bodily injury to [Lesino].

Prior to explaining the elements of burglary, aggravated assault, and kidnapping, the judge stated that the jury must determine if defendant "was involved in any conspiracy or even involved as an accomplice." He explained, "[t]he distinction between conspiracy and accomplice is made because the Indictment alleges some crimes were part of the conspiracy and others were in furtherance of the conspiracy." The court also separately mentioned both conspiracy and accomplice liability in its discussion of each of the elements of the crime. Additionally, during its deliberations, the jury requested "the legal

definition of accomplice and co-conspirator (conspirator?)[,]" and the judge provided them, with counsel's assent, with copies of the jury charges for "[l]iability for another's conduct[,][a]ccomplice" and "[c]o-conspirator liability[.]"

#### IV.

We reject defendant's contentions addressed to the charge, particularly that the instructions on conspiracy erroneously affected the substantive offenses. As the Supreme Court recently stated, in the absence of an objection to the charge, the plain error standard

"requires 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, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970)). We have emphasized that "[t]he alleged error is viewed in the totality of the entire charge, not in isolation[,]" and that "any finding of plain error depends on an evaluation of the overall strength of the State's case." Ibid.; State v. DiFrisco, 137 N.J. 434, 491 (1994). See also State v. Chew, 150 N.J. 30, 82 (1997) ("Because defendant did not object to the challenged instruction he has waived any challenge to the instruction on appeal. R. 1:7-2. This Court may reverse only if it finds 'plain error.' R. 2:10-2.").

[State v. Wakefield, \_\_\_ N.J. \_\_\_, \_\_\_ (2007) (slip op. at 84).]

In this case, a lengthy charge conference was conducted before the parties' summations. It is clear from the record, and defendant acknowledged at oral argument before us, that defendant requested portions of the charge that was given, and other parts of the charge were read to counsel by the judge and approved at the conference. In any event, defendant had no objection to the charge.<sup>6</sup> Moreover, the jury was given written copies of the charge "that each attorney has read and reviewed for their consideration."

Reviewing the charge as a whole, we find no plain error.

As already noted, at argument before us, defendant expressly stated that his concern was not with the conspiracy charge itself but with its impact on the substantive offenses. We reject defendant's contention that the jury may have been led to believe that "once [it] decided that there was a conspiracy between [defendant] and [Kettle] under Count One[,]" the jury had to "automatically" hold defendant "responsible for all of

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<sup>6</sup> It would be helpful if the proposed verdict sheet were also addressed on the record, at least if there is an objection thereto. The record reflects, however, that counsel apparently reviewed it before submission, perhaps before summation, and had no objection. While the verdict sheet's reference to accomplice liability relating to the conspiracy in count one may have been erroneous, see, e.g., State v. Samuels, 189 N.J. 236, 252-55 (2007), we discern no plain error in the format of the verdict sheet, recognizing that it could have been improved by fully segregating the theories of conspiracy and accomplice liability. See State v. Samuels, supra.

the misconduct of [Kettle] on the night in issue." The jury was clearly instructed to consider each count on its own merit and that conspiratorial or accomplice liability had to be proven with respect thereto.

V.

At argument before us, defendant also stated that his primary concerns relating to the convictions on the substantive offenses and the consecutive sentences thereon would be resolved if his merger contentions were accepted. We agree there should be merger, but we merge only the convictions on the substantive offenses relating to Lesino into the more serious second degree conspiracy. See State v. Connell, 208 N.J. Super. 688, 692-97 (App. Div. 1986). There can be no doubt, based on the proofs and allegations of count one, that it was contemplated Lesino might be restrained, and was to be injured, incident to the conspiracy. In fact, the burglary was for that purpose.

However, "if the conspiracy proven has criminal objectives other than the substantive offense proven, the offenses will not merge." State v. Hardison, 99 N.J. 379, 380 (1985). Thus, "a defendant cannot be convicted both for conspiracy and for a substantive offense if the objectives of the conspiracy are limited to consummation of that same substantive offense."

State v. Rodriguez, 234 N.J. Super. 298, 304 (App. Div.),  
certif. denied, 117 N.J. 656 (1989).

The record does not reflect that restraint of Cooper was reasonably within the contemplated conspiracy or agreement to enter Lesino's home for purposes of injuring him. Moreover, the timing and extent of the restraint of Cooper provides a separate basis for rejecting merger with respect to her. We therefore merge all of the substantive offenses regarding Lesino into the second degree conspiracy but decline to merge the conviction for third degree criminal restraint of Cooper.

#### VI.

Defendant argues that he was "deprived of a constitutionally fair trial as a result of the fact that the entirety of the evidence against him consisted of testimony supplied by an alleged coconspirator who pleaded guilty and testified against him in prison attire and leg shackles in the absence of both a security hearing and an appropriate jury instruction on the issue." The record was supplemented with a certification by the trial prosecutor, Burlington County First Assistant Prosecutor Raymond E. Milavsky, certifying that "[o]n, February 3, 2005," Kettle was transported to the courthouse from Northern State Prison "and he was then brought directly to [the] courtroom in the morning. [Kettle] was transported to the courtroom in standard prison garb." The record reflects that

Kettle was brought into the courtroom and seated at the witness stand prior to the jury's arrival. No hearing was held as to his appearance, but the judge spoke to security officers and required that Kettle's hands be uncuffed, despite the officers' "policy [] to keep everything on." Kettle's leg shackles were left in place, and he was seated in a location where they "w[ould] be less obvious to the jury."

In 2003, before this case was tried, the Supreme Court announced that it would preclude

defense witnesses [from] appear[ing] in physical restraints unless the trial court determines in a hearing, out of the jury's presence and for specific reasons, that the restraints are "necessary to maintain the security of the courtroom." State v. Artwell, 177 N.J. 526, 537-38 (2003) (citation omitted). The Court also held that a defense witness is prohibited from testifying in "prison garb." Id. at 539. The latter holding was expressly made prospective, ibid.; the former was not. Artwell did not apply its ban on defense witnesses testifying in "prison garb" to the witness in that case, and used the term "going forward" to specify that the change in policy was prospective only. Id. at 530, 539. However, regarding a defense witness testifying while handcuffed, the Court found that "the trial court's failure to state on the record its reasons for requiring defendant's witness to appear in restraints was reversible error." See id. at 530, 538.

[State v. King, 390 N.J. Super. 344, 363-64 (App. Div.), certif. denied, \_\_\_ N.J. \_\_\_ (2007).]

After the conviction currently being appealed, we extended the holding in Artwell to witnesses for the prosecution. State v. Russell, 384 N.J. Super. 586 (App. Div. 2006). This court determined that, under the circumstances of Russell, State's witnesses in any future hearing in that case may not testify in prison garb. Id. at 599. There, over defendant's objection that the co-conspirator's "appearance in restraints and clothing identifying him as a prisoner . . . prejudiced defendant[,]" the co-conspirator "testified for the State while dressed in prison garb and while restrained both by handcuffs and leg shackles." Id. at 591-92. No jury instructions were given that "that [the jury] could draw no inference of defendant's guilt from [the co-conspirator's] appearance" and civilian clothes were not made available for the co-conspirator. Id. at 592.

In this case, there is no showing that the co-conspirator's leg shackles were observed by the jury. Moreover, the essence of the defense was that Kettle's credibility was lacking, because he was serving a lengthy term of imprisonment and was trying to obtain a reduced sentence by inculcating someone else in the crime he committed. Defense counsel's cross-examination of Kettle demonstrates that counsel was trying to discredit Kettle based on his being in prison for the underlying crime at

issue and having accepted a plea bargain.<sup>7</sup> Further, in his closing statement, the defense attorney emphasized that Kettle was in prison and argued that "say[ing] the things the State needs said" was Kettle's way to get out of prison or obtain a reduced sentence regardless of the truth. Defendant was not prejudiced by Kettle's attire.

Based on the circumstances of this case, the fact that Kettle testified in prison garb does not require reversal.

#### VII.

The conviction for conspiracy, the conviction for criminal restraint of Joanne Cooper, and the sentences thereon are affirmed. However, the matter is remanded to the Law Division for purposes of amending the judgment of conviction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION

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<sup>7</sup> Defense counsel's first substantive question in the cross-examination of Kettle was "Mr. Kettle, would you agree with me that the Northern State Prison or any prison is not a place where you want to be[,]" which was repeated due to Kettle's hearing impairment, as "[y]ou don't want to be in prison?"