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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2897-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVEN SOLARI, a/k/a STEVE,

Defendant-Appellant.

Argued January 4, 2016 - Decided February 2, 2016

Before Judges Messano, Simonelli, and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 11-08-01555.

Edward C. Bertucio argued the cause for appellant (Hobbie, Corrigan & Bertucio, P.C., attorneys; Mr. Bertucio, of counsel and on the briefs).

Paul H. Heinzel, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Acting Monmouth County Prosecutor, attorney; Mr. Heinzel, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Steven Solari, a Little Silver police officer, was convicted of four counts of second-degree official misconduct, N.J.S.A. 2C:30-2. The official

misconduct charges included failing to obtain proper medical treatment for Mr. Casey, an injured prisoner (Count One); assaulting Casey at police headquarters while he was handcuffed (Count Four); preparing and submitting a false police report (Count Seven); and witness tampering (Count Twelve). Defendant was also convicted of third-degree hindering apprehension, N.J.S.A. 2C:29-3b(4) (Count Five); and simple assault, N.J.S.A. 2C:12-1a, as a lesser-included offense of third-degree aggravated assault, N.J.S.A. 2C:12-1b(7) (Count Three). The jury acquitted defendant of second-degree aggravated assault, N.J.S.A. 2C:12-1b(1) (Count Two); third-degree witness tampering, N.J.S.A. 2C:28-5a(2) (Count Eight); and fourth-degree obstruction, N.J.S.A. 2C:29-1 (Count Eleven). Counts Six (fourth-degree obstruction, N.J.S.A. 2C:29-1); Nine (third-degree hindering apprehension, N.J.S.A. 2C:29-3b(2)); and Ten (second-degree hindering apprehension, N.J.S.A. 2C:29-3b(3)) were dismissed by the court or at the request of the State during trial.

On March 6, 2014, the trial court denied defendant's motion for judgment notwithstanding the verdict (JNOV) or, alternatively, for a new trial. Following applicable mergers, the court sentenced defendant to concurrent five-year terms of

imprisonment without parole on counts one, four, and seven. Defendant was also ordered to forfeit his public office.

On appeal, defendant raises the following arguments:

> POINT I
>
> THE TRIAL COURT'S JURY CHARGE AS TO OFFICIAL MISCONDUCT WAS LEGALLY INADEQUATE, CONFUSING, AND SELF-CONTRADICTORY, REQUIRING REVERSAL OF ALL FOUR OFFICIAL MISCONDUCT CONVICTIONS
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> POINT II
>
> II. A. THE CONVICTION SHOULD BE REVERSED AS TO THE OBJECTED TO "LESSER INCLUDED OFFENSE" TO COUNT 3 (SIMPLE ASSAULT), AS SIMPLE ASSAULT, WAS TIME-BARRED AND THE COURT CHARGED RECKLESS SIMPLE ASSAULT WHEN OFFICER SOLARI WAS NOT INDICTED ON RECKLESS AGGRAVATED ASSAULT. THUS, IT WAS NOT A LESSER INCLUDED OFFENSE
>
> II. B. THE CONVICTION ON COUNT 4 (OFFIC[I]AL MISCONDUCT BASED ON ATTEMPTED AGGRAVATED ASSAULT) SHOULD BE REVERSED BECAUSE (1) THE JURY ACQUITTED OFFICER SOLARI OF ATTEMPTED AGGRAVATED ASSAULT, WHICH WAS THE ONLY BASIS CHARGED TO THE JURY UPON WHICH OFFICIAL MISCONDUCT IN COUNT 4 COULD BE FOUND AND (2) THE TRIAL COURT ERRONEOUSLY CHARGED SIMPLE ASSAULT INCLUDING THE RECKLESS VERSION AS OBJECTED TO "LESSER INCLUDED OFFENSE" OF PURPOSEFUL AGGRAVATED ASSAULT, WHICH COULD NOT SERVE AS A BASIS FOR OFFICIAL MISCONDUCT
>
> POINT III
>
> THE CONVICTION AS TO COUNT 12 (OFFICIAL MISCONDUCT BASED ON ALLEGED []WITNESS TAMPERING) SHOULD BE REVERSED AS OFFICER SOLARI WAS ACQUITTED OF WITNESS TAMPERING AND THE COURT FAILED TO CHARGE AND THE STATE FAILED TO ESTABLISH ANY LEGAL DUTY THAT WAS

VIOLATED BY A POLICE OFFICER SPEAKING TO A WITNESS

POINT IV

THE CONVICTION AS TO COUNT 1 (OFFICIAL MISCONDUCT BASED ON THE ALLEGED FAILURE TO OBTAIN AND/OR DELAYING MEDICAL TREATMENT FOR CASEY) SHOULD BE REVERSED BECAUSE THE STATE FAILED TO ESTABLISH AND THE COURT FAILED TO CHARGE AN APPLICABLE "LEGAL DUTY" FOR THE PURPOSE OF THE CRIME OF OFFIC[I]AL MISCONDUCT AND BECAUSE THE STATE FAILED TO ALLEGE AND THE COURT FAILED TO CHARGE ANY UNLAWFUL PURPOSE

POINT V

THE CONVICTIONS ON COUNTS 5 AND 7 (HINDERING AND OFFICIAL MISCONDUCT BASED ON THE ALLEGEDLY "FALSE POLICE REPORT") SHOULD BE REVERSED, AS SAID CONVICTIONS WERE TAINTED BY THE ERRONEOUS CONVICTIONS ON COUNT 4 AND THE LESSER INCLUDED OFFENSE OF COUNT 3 (WHICH SHOULD NOT HAVE BEEN CHARGED), AND AS THE STATE FAILED TO ESTABLISH AND THE COURT FAILED TO IDENTIFY WHICH "LEGAL DUTY" SUFFICIENT TO SERVE AS A BASIS FOR OFFIC[I]AL MISCONDUCT HAD BEEN VIOLATED OR THAT THE REPORT CONTAINED ANY PURPOSEFUL MATERIAL "FALSEHOODS"

POINT VI

THE VERDICTS ON ALL THE COUNTS WERE AGAINST THE WEIGHT OF THE EVIDENCE

POINT VII

THE PENAL STATUTE FOR "OFFICIAL MISCONDUCT", AS WRITTEN AND AS APPLIED IN THE INSTANT MATTER, IS UNCONSTITUTIONALLY VAGUE AND THE INDICTMENT WAS FATALLY DEFICIENT, REQUIRING REVERSAL OF THE CONVICTIONS

POINT VIII

THE CUMULATIVE ERROR COMMITTED IN THIS CASE REQUIRES THE REVERSAL OF THE CONVICTIONS AND SENTENCE

POINT IX

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR RELAXATION OF THE STIPULATION OF PAROLE INELIGIBILITY AND FOR THE DOWNGRADING OF THE OFFENSE AND THUS THE SENTENCE WAS EXCESSIVE

Having considered these arguments in light of the record and applicable standards, we affirm.

I.

The following are the most pertinent facts drawn from the trial record. In 1995, defendant began working for the Little Silver Police Department (the department) as a per-diem dispatcher. He became a full-time officer in July 1999, after graduating from the Monmouth County Police Academy. In 2004 and 2005, he instructed other officers in the use of force, firearms, and "OC" (pepper) spray. Defendant was also trained in handling individuals who were intoxicated or abusing drugs.

The department had a municipal ordinance, General Order 007-07, which required that an injured detainee should be transported directly to a hospital and not to the police station. A state policy similarly required a police officer to take an injured prisoner directly to a hospital.

At approximately 6:30 p.m. on December 20, 2009, defendant and Patrolman Justin Bradley responded to a home on Pinckney Road in Little Silver. Casey's mother expressed concern that he was inebriated and might attempt to drive. When the officers arrived, they found that Casey was highly intoxicated, was making suicidal comments, and behaving belligerently. Consequently, the officers informed Casey's step-father that he needed a medical evaluation.

Casey stood and began cursing. Defendant approached Casey and told him to calm down. Instead, Casey lunged toward Bradley and defendant shot Casey with pepper spray. Bradley attempted to subdue Casey, who continued to resist. Defendant feared for Bradley's safety, and he pulled Casey off Bradley and began punching Casey in the face and head. According to his step-father, Casey was confrontational but the police officers behaved in a calm and professional manner.

Casey eventually stopped struggling and placed his hands behind his back. Defendant and Bradley handcuffed him and, at 6:40 p.m., notified the department that Casey was under arrest. Casey was bleeding from his face; his blood was on Bradley and in two puddles on the floor.

Defendant stated in his report that he had radioed for an ambulance because Casey was intoxicated and making suicidal

statements. Department records instead indicated that it was Bradley who radioed for the ambulance, following Casey's arrest. In any event, although the ambulance was on its way to a different call in a neighboring community, defendant requested that it be directed to Pinckney Road.

Peter Giblin, a certified emergency medical technician (EMT) affiliated with the Little Silver Emergency Medical Service (EMS), was driving an EMS ambulance when he received the call from Pinckney Road. He was accompanied by two other EMTs, Chris Faherty and Elizabeth Uliano. Giblin and Faherty were both also per diem dispatchers with the department. When the ambulance arrived at Pinckney Road, Bradley met Giblin outside and told him to respond directly to police headquarters where the officers would bring Casey.

Defendant escorted Casey to the police patrol car and secured him in the back seat. According to defendant, Casey was "bleeding severely from his face and head area and was having a hard time standing without support." Defendant had to hold Casey's "arm and the back of his shirt to keep him from falling since he was so off balance." Defendant later reported that Casey needed transport to the hospital because of his "suicidal comments," his "high level of intoxication" and his "head injury sustained during the arrest."

The officers arrived with Casey at the police station at 6:58 p.m. Giblin was awaiting their arrival and witnessed blood dripping from Casey's face. Defendant brought Casey to the processing room where he was seated in a chair against the wall. According to defendant's report, he instructed the EMTs to begin treating Casey for his injuries. Faherty, however, stated that defendant would not permit him to treat Casey until he finished processing Casey and took his picture. Nonetheless, Giblin retrieved equipment from the ambulance and Faherty began to treat Casey's injuries.

Defendant asked Casey to move his head for a side photograph, but Casey cursed and refused to move. At that point, Faherty was holding Casey's head while trying to control the bleeding. Defendant became angry, handed Giblin the camera, and asked for gloves. He then attempted to physically twist and turn Casey's head for the side picture. He next tried to use his body weight to twist Casey's head but this effort also failed. Finally, according to Faherty, defendant took a fighting stance, cocked his arm back, and punched Casey on the right side of the temple, causing Casey's head to hit a filing cabinet. Casey swore and defendant punched him two more times in the same region, leading Casey to complain to Faherty of head pain.

The EMTs requested to transport Casey to the hospital but defendant wanted to complete paperwork first. After defendant issued Casey a disorderly persons summons for resisting arrest, the EMTs drove Casey and defendant to Riverview Hospital at 7:29 p.m. According to the hospital tests, Casey's blood alcohol level the night of the incident was .243 percent. He was treated and released the next day. Casey stated that he had suffered a broken nose, six chipped teeth, bruises on his face, and a concussion. He also reported that he suffered long-term symptoms of being "jumpy," "not as sharp as he had been," and stuttering. Defendant and Bradley suffered no injuries.

Defendant submitted a report of the incident. In it he stated, "[Casey] . . . began to lunge towards one of the first aid squad members, and I pushed him against the wall and began punching him in his face and head area once again until he stopped resisting and relaxed." Neither Giblin nor Faherty saw Casey lunge or try to get out of the chair. On December 23, 2009, defendant wrote a supplemental report that included information pertaining to Casey's discharge from the hospital and a recommendation that the department should seize Casey's firearm.

A few days after the incident, defendant approached Faherty at the Little Silver Fire Department (fire department) where

they were both volunteers. Defendant asked Faherty if anyone had spoken to him about the incident. According to Faherty, defendant told him, "remember, he lunged." Faherty responded, "okay." Later that day, at department headquarters, Faherty read defendant's police report.

The following day, in the station's dispatch room, defendant, in uniform, approached Faherty and repeated his statement, "remember, he lunged."[1] Faherty again responded "okay." The next day, defendant approached Faherty a third time in the dispatch room and repeated the same reminder, "remember, he lunged." Faherty and defendant had a professional and cordial relationship prior to these events.

Faherty and Giblin notified Police Captain Gary LaBruno about the incident and submitted written reports to him. La Bruno served as one of the department's Internal Affairs investigators. On January 6, 2010, Casey gave a statement to the Monmouth County's Prosecutor's Office, to which these events had been reported. Defendant was arrested the following day.

At trial, Richard Celeste, an expert in police training, testified on behalf of the State. According to Celeste, every

[1] Faherty was not sure about the exact dates that defendant spoke with him, but all three conversations took place within a few days of the incident.

officer in the State is required to take two annual trainings in the "Attorney General's policy" (AG policy). Also, police officers are trained to use caution around vulnerable parts of the body including the head. Twisting and turning Casey's head was not consistent with statewide training as the neck is a vulnerable area. While pinning Casey against the wall would have been an appropriate use of force, punching him in the head was not. Celeste acknowledged that a person in handcuffs can present a danger because the person can head butt, spit, kick and bite.

Another AG policy requires officers to take an injured person directly to a hospital. Celeste opined that taking Casey to police headquarters instead of the hospital was a violation of regulations. Celeste conceded that an officer must use his or her judgment to determine whether a person's injury is significant enough to require that he or she be taken to a hospital.

Frank Wallace testified as an expert for the defense. He concluded that defendant was justified in his use of force because, given Casey's prior violent behavior, threats, and refusal to obey, defendant had perceived Casey to be a threat. Also, according to Wallace, the transportation policy on injured

prisoners was not meant to be a hard and fast rule, but instead required an officer's discretion.

II.

On appeal, defendant argues, as he did before the trial court, that the verdicts were against the weight of the evidence. In a comprehensive sixty-five page opinion, Judge Francis J. Vernoia carefully reviewed the evidence presented by the State and concluded that it was sufficient to support each conviction.

As noted, defendant was convicted of four counts of official misconduct.

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
>
> a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or
>
> b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.
>
> [N.J.S.A. 2C:30-2.]

The underlying act that forms the basis of the official misconduct charge need not be criminal in nature. State v.

Parker, 124 N.J. 628, 640 (1991), cert. denied, 503 U.S. 939, 112 S. Ct. 1483, 117 L. Ed. 2d 625 (1992).

> The crime of official misconduct serves to insure that those who stand in a fiduciary relationship to the public will serve with the highest fidelity, will exercise their discretion reasonably, and will display good faith, honesty, and integrity. These are the obligations which every public officer assumes as a matter of law upon entering office.
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> [State v. Schenkolewski, 301 N.J. Super. 115, 145-46 (App. Div.), certif. denied, 151 N.J. 77 (1997).]

The indictment charging official misconduct must allege a duty and facts that constitute a breach of that duty. Id. at 144. Duties of office may arise from "some special law or provision of municipal charter," the Legislature, "or may arise out of the nature of the office itself." Ibid.

Most official misconduct cases involve the commission of an unauthorized act by a public official. State v. Thompson, 402 N.J. Super. 177, 198 (App. Div. 2008). However, the statute also criminalizes a knowing failure to perform a duty. Ibid. The court is authorized to "take judicial notice" of duties that are inherent in the office. Ibid.

A police officer has a duty to provide emergent medical assistance and to exercise reasonable care to preserve the life, health and safety of a person in custody. Del Tufo v. Twp. of

Old Bridge, 147 N.J. 90, 100-01 (1996). However, the duty only arises if the police officer is aware that the arrestee needs emergent medical assistance. Id. at 101.

Additionally, a person can be convicted of official misconduct even if he is not convicted of the underlying criminal act. State v. Burnett, 245 N.J. Super. 99, 104-13 (App. Div. 1990), certif. denied, 126 N.J. 333 (1991). In Burnett, the police officer was acquitted of the theft and drug offenses that served as a basis for the misconduct charge, but was nevertheless convicted of official misconduct. We upheld the conviction because it was supported by the evidence. Id. at 113. Also, in State v. Lore, 197 N.J. Super. 277, 282-84 (App. Div. 1984), certif. denied, 99 N.J. 230 (1985), a police officer who assaulted an arrestee was acquitted of aggravated assault, but convicted of official misconduct based on the assault. Ibid.

Here, with respect to Count One, Judge Vernoia found that defendant purposely delayed obtaining medical treatment for the head and facial injuries that Casey suffered during his interaction with police at Casey's home. The judge noted a confluence of evidence supporting this verdict, including: defendant was aware at Pinckney Road that Casey required transport to the hospital; defendant took Casey to police

headquarters, photographed him and completed his paperwork before transporting him to the hospital; defendant's duty to provide care was inherent in being a police officer and he was aware of this duty at Pinckney Road; Casey's injuries were severe and were depicted in a photograph that revealed he was bloody and bruised, and there were two pools of blood on the floor at Pinckney Road; and defendant delayed providing care by taking Casey to headquarters and further delayed transporting him to the hospital despite Faherty's request.

Defendant also argued that the department's General Order 007-07, which required that injured prisoners be transported to the hospital and not police headquarters, did not apply in this case. Specifically, defendant contended that Casey was not a "prisoner" within the meaning of the General Order because he did not intend to place Casey in a cell. Rejecting this argument, the judge wrote, "To suggest [] Casey was not a prisoner during this time, or that a person who is handcuffed behind his back by the police and is transported to police headquarters and detained there is not a prisoner covered by the order, is wholly illogical." The judge further noted that, "[b]y its express terms, the General Order prohibits the transport of injured prisoners to headquarters for detention. The evidence supports the conclusion that [] Casey was

transported to headquarters with the purpose to detain him because, in fact, he was detained in the police headquarters at all times during his processing." Moreover, "[t]he General Order provided additional evidence that the inherent nature of an officer's duties is to provide medical treatment for injured persons because it provided a mandated procedure for doing so."

Ultimately, in concluding that defendant's actions constituted official misconduct, the judge reasoned:

> [T]here was sufficient evidence that defendant's actions and failure to act were for the purpose to injure [] Casey or deprive [] Casey of a benefit. More specifically, the evidence presented supports the conclusion defendant was angered with [] Casey due to [] Casey's actions at Pinckney Road and later because of [] Casey's refusal to comply with defendant's direction regarding the taking of a photograph at the police station. The jury could reasonably infer that defendant, angered by [] Casey's conduct and lack of cooperation, failed to obtain medical treatment and/or delayed the provision of medical treatment to injure [] Casey. Moreover, based upon defendant's actions, the failure to provide and/or delay in providing [] Casey with medical treatment would support a reasonable finding that defendant's actions were done with the purpose of depriving [] Casey of a benefit, that being the receipt of medical treatment.

Judge Vernoia next concluded that defendant's conviction on the official misconduct charge in Count Four, based upon his assault of Casey, was amply supported by the evidence. He noted

that "punching a handcuffed and bleeding person in the head three times could arguably be for no purpose other than hurting that person." The judge also rejected defendant's argument that defendant's acquittal of the aggravated assault counts barred his conviction on Count Four. Rather,

> the indictment here did not allege the [o]fficial [m]isconduct charge was based solely upon the aggravated assaults alleged in counts [Two] and [Three]. In contrast, the indictment alleged only that the [o]fficial [m]isconduct charge was founded upon an "assault." As such, that [] defendant was not found guilty of the aggravated assault charges in Counts [Two] and [Three] does not require the court to reject the jury's finding of guilt on Count [Four].

The judge added that "[t]he fact [that] the assault turned out to be a simple assault, and not an aggravated assault, . . . changed nothing."

As noted, the jury found defendant guilty of simple assault as a lesser-included offense under Count Three. Judge Vernoia determined that Casey's testimony, that he received pain as a result of the three blows to his head, and Faherty's testimony, that the punches were delivered with sufficient force so as to push Casey's head into the filing cabinet, provided sufficient support for the jury's verdict on Count Three.

In Count Five, defendant was charged with hindering apprehension by filing a false police report. Judge Vernoia

found that falsities in defendant's report, and his subsequent directives to Faherty to remember that Casey had "lunged," were sufficient to establish that he acted with a purpose to hinder "his own detention, apprehension, investigation, prosecution, conviction or punishment for an offense." N.J.S.A. 2C:29-3(b).

This same evidence supported defendant's conviction for official misconduct under Count Seven based on his submission of the false report. The judge reasoned:

> Evidence defendant submitted a false report to hinder his own apprehension also permitted the jury to find beyond a reasonable doubt that defendant committed an unauthorized act or an authorized act in an unauthorized way. The unauthorized act was the submission of a false report to the Little Silver Police Department. The authorized act was the submission of a police report. The jury could have properly concluded the submission occurred in an "unauthorized" way because the report contained false statements.
>
> In addition, the evidence presented permitted the jury to properly infer defendant submitted the false report with the purpose to benefit himself — that benefit being the avoidance of being investigated for, apprehended for, and/or charged with an offense related to his assault upon [] Casey. Again the evidence supports the inference that defendant submitted the false report for the purpose of reaping the benefit of a factual and legal justification for his unlawful assault upon [] Casey. As such, there was evidence sufficient to permit the jury to find defendant guilty of [o]fficial [m]isconduct

> as charged in Count [Seven] beyond a reasonable doubt.

Finally, as to Count Twelve, the judge found that there was sufficient evidence to convict defendant for official misconduct based on the evidence that defendant approached Faherty on three separate occasions and told Faherty to remember that Casey had "lunged." The judge determined that the evidence supported the jury's conclusion that defendant had attempted to influence Faherty's testimony in order to benefit himself.

We use the same standard as the trial judge in reviewing a motion for judgment of acquittal pursuant to Rule 3:18-1. State v. Bunch, 180 N.J. 534, 548-49 (2004). We must determine

> whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.
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> [State v. Reyes, 50 N.J. 454, 459 (1967).]

Under Rule 3:18-1, the court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. Muniz, 150 N.J. Super. 436, 440 (App. Div. 1977), certif. denied, 77 N.J. 473 (1978). "If the evidence

satisfies that standard, the motion must be denied." State v. Spivey, 179 N.J. 229, 236 (2004).

The standard for deciding a Rule 3:18-2 motion for JNOV is the same as that used to decide a motion for acquittal made at the end of the State's case. See State v. Brooks, 366 N.J. Super. 447, 453 (App. Div. 2004). On appeal, we apply the same standard. State v. Kittrell, 145 N.J. 112, 130 (1996).

As he did before the trial court, defendant alternatively seeks a new trial. A trial judge may set aside a jury's verdict as "against the weight of the evidence," only if "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." R. 3:20-1.

We shall not disturb the trial court's denial of a motion for a new trial "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. We apply essentially the same test under Rule 3:20-1 as the trial court, giving due regard to the trial judge's "feel of the case" and opportunity to assess witness credibility and demeanor. Carrino v. Novotny, 78 N.J. 355, 360 n. 2 (1979); Dolson v. Anastasia, 55 N.J. 2, 7 (1969); State v. Gaikwad, 349 N.J. Super. 62, 82 (App. Div. 2002).

Applying these standards, we do not conclude the verdict was against the weight of the evidence. Judge Vernoia's factual findings are supported by sufficient credible evidence in the record, State v. Locurto, 157 N.J. 463, 472 (1999), and he correctly applied well-settled principles. We therefore affirm substantially for the reasons set forth in his thorough and well-reasoned March 6, 2014 written opinion.

III.

Defendant argues that the jury instructions with respect to official misconduct were erroneous because they failed to clearly state a duty that he neglected or a crime that he committed. We disagree.

Appropriate and proper charges to a jury are essential for a fair trial. State v. Collier, 90 N.J. 117, 122-23 (1982). Erroneous instructions on matters material to the jury's deliberations are presumed to be reversible error. Ibid. The court must consider the charge as a whole in determining whether it was prejudicial. State v. Wilbely, 63 N.J. 420, 422 (1973). An erroneous jury charge "when the subject matter is fundamental and essential or is substantially material" is almost always considered prejudicial. State v. Maloney, 216 N.J. 91, 104-05 (2013) (quoting State v. Green, 86 N.J. 281, 291 (1981)). An erroneous charge may only be excused if it is harmless beyond a

reasonable doubt. Collier, supra, 90 N.J. at 105. Instructions given in accordance with the model charge, or which closely track the model charge, however, are generally not considered erroneous. Mogull v. CB Commercial Real Estate Grp., Inc., 162 N.J. 449, 466 (2000). See also State v. Pleasant, 313 N.J. Super. 325, 333-35 (App. Div. 1998), aff'd o.b., 158 N.J. 149, 150 (1999).

Here, the court conducted a charge conference over the course of two days. Ultimately, it adhered to the Model Jury Charge for official misconduct when it instructed the jury on Counts One, Four, Seven, and Twelve. Model Jury Charge (Criminal),"Official Misconduct" (2006).

With respect to Count One, the court charged the jury as follows:

> [I]t is alleged that . . . [defendant] committed the crime of official misconduct by committing an act, to wit, failing to obtain and/or by delaying to obtain medical treatment for [] Casey relating to his office as a public servant but constituting an unauthorized exercise of his official functions, knowing that such act was unauthorized or that he was committing such act in an unauthorized manner with the purpose to obtain a benefit for himself or another or to injure or deprive another of a benefit, and/or by knowingly refraining from performing a duty, to wit, failing to obtain and/or delaying prompt medical treatment for [] Casey which is imposed upon him by law or which is clearly inherent in the nature of his office with the purpose to obtain a

benefit for himself or to injure or deprive another of a benefit.

. . . .

The State must prove . . . that [defendant] was a public servant . . . that he committed an act relating to his office knowing that it was unauthorized or that he committed the act in an unauthorized manner, knowing that manner was unauthorized or that he knowingly refrained from performing a duty which is imposed upon him by law or which is clearly inherent in the nature of his office; . . . and that his purpose in so acting or refraining was to benefit himself or another or to injure or deprive another of a benefit.

. . . .

An act is unauthorized if it is committed in breach of some prescribed duty of the public servant's office. This duty must be official and non-discretionary, imposed upon the public servant by law such as statute, municipal charter or ordinance or clearly inherent in the nature of his office.

The duty to act must be so clear that the public servant is on notice as to the standards that must be met. In other words, the failure to act must be more than a failure to exhibit good judgment. In addition, the State must prove that [defendant] knew of the existence of his non-discretionary duty to act prior to the incident in question.

. . . .

As to [defendant's] alleged conduct, the State must prove that there was a clear duty imposed on [defendant] to act or to refrain as alleged. That is to say, there must have been a body of knowledge, such as applicable

> law, by which [defendant] could regulate and determine the legality of his conduct.

Defendant's arguments regarding this jury charge mirror his arguments regarding the sufficiency of the evidence to support Count One. He contends that the instructions were improper because he did not have a clear duty to immediately transport Casey to the hospital and therefore there was no basis for an official misconduct conviction based on delaying medical care. However, the court followed the model jury charge, which clearly specified that the applicable duty was defendant's duty to provide immediate care for an injured prisoner.

Defendant argues that the court erred in its instruction on Count Four (official misconduct based on assault). He contends that because the jury acquitted him of attempted aggravated assault, it was unclear what duty he neglected that formed the basis of the official misconduct conviction. Defendant advanced this argument at the charge conference, but the court disagreed.

Defendant's argument fails because, as we have noted, Count Four charged that defendant committed official misconduct by assaulting Casey while he was a handcuffed prisoner. The charged conduct was not specifically limited to aggravated assault, and the jury found that defendant committed a simple assault. Moreover, a defendant can be found guilty of official misconduct even if he is acquitted of the underlying criminal

charge. See Burnett, supra, 245 N.J. Super. at 104-13; Lore, supra, 197 N.J. Super. at 282-84.

Defendant also takes issue with the jury instructions pertaining to the official misconduct charged in Count Seven. He argues that the court was required to instruct the jury that in order to find that a person has written a false police report there must be a finding of a purposeful lie and not simply a differing version of events. Defendant also raised this objection at the charge conference.

The court instructed the jury in accordance with the model jury charge for official misconduct. It employed the same language it used for Count One, but substituted the words "preparing and/or submitting a police report containing falsities" for "failing to obtain and/or by delaying to obtain medical treatment." Moreover, the jury was instructed that "[n]ot every unauthorized act . . . rises to the level of official misconduct. An unauthorized act amounts to official misconduct only if the public servant knew at the time that his conduct was unauthorized and unlawful." Viewed as a whole, we conclude that the charge sufficiently apprised the jury that it was required to decide whether defendant's report contained falsities that were of sufficient dimension as to constitute a dereliction of his duty.

Defendant's argument as to Count Twelve again represents an extension of his argument that there was an insufficient basis to convict him for official misconduct predicated on witness tampering. He contends that, because he was acquitted of witness tampering, and no other evidence or inherent duty was provided to the jury, there was no legally valid basis to sustain an official misconduct conviction.

The court once more employed the model jury charge for official misconduct and described the unauthorized act as "approaching a witness [Faherty], in an effort to have [Faherty] withhold information and/or provide false information regarding an investigation." In that context, even if defendant's actions did not rise to the level of actionable witness tampering, the court properly instructed the jury that it could convict for official misconduct if it found that defendant committed an unauthorized act in order to benefit himself when he approached Faherty in an effort to have him provide false information regarding an investigation.

Summarizing, the jury instructions accurately tracked the model jury charge and correctly specified the acts that could form the basis of a conviction for official misconduct. We discern no error in the court's instructions.

IV.

We next address defendant's contention that the court erred in charging the jury on the lesser-included offense of simple assault. Defendant further argues that the court erred in instructing the jury on recklessness as an element of that offense. He asserts that because the grand jury never indicted him for simple assault or recklessness, it was error for the jury to consider them.

The purpose of an indictment is: to enable a defendant to know the charges against him or her; to prevent double jeopardy; and to preclude substitution by a court of an offense for which the grand jury has not indicted. State v. Spano, 128 N.J. Super. 90, 92 (App. Div. 1973), aff'd, 64 N.J. 566 (1974). A defendant indicted for a particular offense is deemed to be on notice that he or she may be charged with lesser-included offenses. State v. Lisa, 391 N.J. Super. 556, 578 (App. Div. 2007), aff'd, 194 N.J. 409 (2008). An offense can be downgraded at any time so long as the prosecution of the greater offense was commenced within the statute of limitations applicable to the greater offense. N.J.S.A. 2C:1-6(d).

A trial judge has an obligation to instruct on lesser-included offenses when the evidence indicates that the jury could convict on the lesser while acquitting on the greater.

State v. O'Carroll, 385 N.J. Super. 211, 224 (App. Div.), certif. denied, 188 N.J. 489 (2006). An offense is considered a lesser-included offense when the proof required to establish the greater offense is also sufficient to establish every element of the lesser offense. State v. Thomas, 187 N.J. 119, 129 (2006).

N.J.S.A. 2C:12-1 provides that a person is guilty of simple assault if he or she attempts to cause or purposely, knowingly or recklessly causes bodily injury to another. Simple assault is a disorderly persons offense. Ibid. A person is guilty of aggravated assault if he or she attempts to cause serious or significant bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life. Ibid.

Case law has clearly established that simple assault is a lesser-included offense of aggravated assault. State v. Stanton, 176 N.J. 75, 114-15, cert. denied, 540 U.S. 903, 124 S. Ct. 259, 157 L. Ed. 2d 187 (2003). We find no error in the court's determination to charge it here. See, e.g., State v. Garron, 177 N.J. 179-80 (2003) (courts should instruct on lesser-included offenses even if doing so is at odds with defense counsel's strategies), cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004). Having been indicted for aggravated assault within the statute of limitations period,

defendant was thereby placed on notice that he could be convicted of simple assault, which includes a mens rea of recklessness.

V.

Defendant argues that the cumulative prejudice of the errors committed in this case require the reversal of his conviction. Having rejected defendant's argument that more than one error occurred during his trial, we also reject his cumulative error argument.

Defendant also contends that the official misconduct statute is unconstitutionally vague, both facially and as applied. Specifically, he asserts that there is no statutory guidance as to what constitutes an "unauthorized act," an "unauthorized manner," or a duty "clearly inherent in the nature of [an] office." We conclude that this argument lacks sufficient merit to warrant extended discussion in this opinion. R. 2:11-3(e)(2). We add only the following comments.

A statute or regulation is facially unconstitutional for vagueness if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Karins v. City of Atl. City, 152 N.J. 532, 541 (1998) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391,

46 S. Ct. 126, 127, 70 L. Ed. 322, 328 (1926)). "[A] vague statute or regulation 'creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution.'" Ibid. (quoting State v. Hoffman, 149 N.J. 564, 581 (1997)).

As noted, N.J.S.A. 2C:30-2 provides that official misconduct occurs when a public servant knowingly commits an unauthorized act relating to his or her office or refrains from performing a duty clearly inherent in the nature of his or her office in order to obtain a benefit or to injure another. Here, the indictment charged that defendant purposely delayed getting treatment for an obviously wounded prisoner, assaulted him, falsified a report, and directed a witness to mischaracterize the events. We find no vagueness in the statute, either facially or as applied to defendant, that would prevent him from understanding that such actions would violate his duty as a police officer.

VI.

As his final point, defendant contends that his five-year sentence without parole is excessive and constitutes an abuse of the trial court's discretion. We conclude that this argument is without merit.

As the Supreme Court has recently reaffirmed, sentencing determinations are reviewed on appeal with a highly deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014). The court stated,

> "[t]he appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Once the trial court has balanced the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and -1(b), it "may impose a term within the permissible range for the offense." State v. Bieniek, 200 N.J. 601, 608 (2010). See also State v. Case, 220 N.J. 49, 65 (2014) (instructing that appellate courts may not substitute their judgment for that of the sentencing court, provided that the "aggravating and mitigating factors are identified [and] supported by competent, credible evidence in the record").

N.J.S.A. 2C:43-6.5(a) provides that the court must impose a mandatory prison sentence without parole for certain crimes, including official misconduct. Defendant was found guilty of

four counts of second-degree official misconduct, each of which carries a five-year period of parole ineligibility. Ibid.

The court may waive or reduce the mandatory minimum term in "extraordinary circumstances" where its imposition "would be a serious injustice which overrides the need to deter such conduct in others." N.J.S.A. 2C:43-6.5(c)(2). When the court waives or reduces the mandatory minimum sentence, it must state with specificity its reasons for doing so. N.J.S.A. 2C:43-6.5(c)(2). In considering whether to waive or reduce a mandatory term, a court should engage in an analysis similar to the one required by N.J.S.A. 2C:44-1(d), taking into consideration "the character and condition of the defendant." State v. Rice, 425 N.J. Super. 375, 386-87 (App. Div.), certif. denied, 212 N.J. 431 (2012).

N.J.S.A. 2C:44-1f(2) provides that the court may downgrade an offense to a crime that is one degree lower where the court is clearly convinced that the mitigating factors "substantially outweigh" the aggravating factors, and where the interest of justice demands. In State v. Megargel, 143 N.J. 484, 493, 500 (1996), the Court determined that the severity of the crime is the single most important factor in the sentencing process and deterrence is one of the most important facets of sentencing. In order to downgrade, the court must be clearly convinced that the mitigating factors substantially outweigh the aggravating

factors, that the interests of justice are compelling, and that in addition to the mitigating factors, there is something extra which points to downgrading the offense. Id. at 505. Also, courts should exercise caution in downgrading offenses for crimes for which the Legislature has attached an enhanced penalty. Id. at 498.

Here, the court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (that defendant posed a risk of future crimes of violence and dishonesty), and nine, N.J.S.A. 2C:44-1(a)(9) (the need for deterrence). The court cited the need to deter police officers from betraying the public trust by engaging in criminal conduct and dishonesty. In finding both of these aggravating factors, the court emphasized that defendant had not "acknowledged his responsibility" or "expressed remorse for his criminal conduct."

The court found mitigating factor seven, N.J.S.A. 2C:44-1(b)(7) (no criminal history), and nine, N.J.S.A. 2C:44-1(b)(9) (the character and attitude of the defendant indicate that he is unlikely to commit another offense). The court noted that defendant's "life appears to be a testament to his good character." Nevertheless, the court discounted mitigating factor nine because defendant's crimes reflected troubling aspects of his character, including an inability to control

anger and a propensity to violence and lying. Again, the court emphasized defendant's "absolute lack of remorse" and "refusal to accept responsibility for his conduct" and concluded that notwithstanding the presence of mitigating factor nine, defendant did not have the attitude of someone unlikely to commit another offense.

With respect to mitigating factor ten, N.J.S.A. 2C:44-1(b)(10) (likelihood of responding to probationary treatment), the court noted that because of the mandatory sentence, defendant was not eligible for probationary treatment, but again expressed that defendant's lack of remorse would make probationary treatment, if it were available, ineffective. The court found mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11) (excessive hardship to others), because defendant's elderly mother lived with him and depended on him. However, the court did not give this factor great weight because defendant's mother was in good health, was employed, drove, had a daughter living nearby who could assist her, and had ample notice that defendant might be imprisoned.

Balancing the factors, the court placed significant weight on aggravating factor nine, the need to deter, and mitigating factor seven, defendant's lack of a criminal history. The court concluded that the mitigating factors outweighed the aggravating

factors, but not "substantially." Consequently, while recognizing that the resulting sentence was "harsh," the court declined to downgrade any of defendant's official misconduct convictions to third-degree offenses or lower or waive the parole ineligibility period.

We are satisfied the judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record, and applied the correct sentencing guidelines enunciated in the Code, including the imposition of a mandatory minimum period of parole ineligibility under N.J.S.A. 2C:43-6.5(a). Defendant received the minimum five-year sentence applicable to second-degree crimes and the further benefit of concurrent terms for his multiple offenses. The sentence the judge imposed does not constitute such clear error of judgment as to shock our judicial conscience. Roth, supra, 95 N.J. at 364-65. Accordingly, we discern no basis to disturb it.

Affirmed.