NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0467-10T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN D. AITKEN,

Defendant-Appellant.

Argued September 21, 2011 - Decided March 30, 2012

Before Judges Cuff and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 09-03-0217.

Richard V. Gilbert argued the cause for appellant (Evan F. Nappen, P.C., attorney; Mr. Gilbert, of counsel and on the brief).

Jennifer B. Paszkiewicz, Assistant Prosecutor, argued the cause for respondent (Robert D. Bernardi, Burlington County Prosecutor, attorney; Alexis R. Agre, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Brian D. Aitken appeals his conviction for second-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b) (count one), fourth-degree possession of a

large capacity ammunition magazine, in violation of N.J.S.A. 2C:39-3(j) (count two), and fourth-degree possession of prohibited ammunition (hollow nose bullets), in violation of N.J.S.A. 2C:39-3(f)(1) (count three). We reverse the convictions on counts one and two, but affirm the conviction on count three.

I.

We discern the following facts and procedural history from the record on appeal.

A.

On January 2, 2009, Officer Michael Joy of the Mount Laurel Police Department responded to a dropped 9-1-1 call in Mount Laurel. The call had been made by Susan Aitken, Brian's mother.[1] She informed Joy that her son had recently left her apartment by car and expressed concern that he might be suicidal. She explained that he had threatened suicide before and that he owned guns, although she did not know whether he had any of them with him. She told Joy that Brian had recently moved back to New Jersey from Colorado.

Joy contacted Brian on his cell phone several times and convinced him to return to Mount Laurel. When Brian arrived,

[1] Because defendant, his parents, and his former wife share the same last name at the time the relevant events occurred, we refer to them by their first names for the sake of convenience.

Joy asked if he was suicidal. Brian responded that he was not. Joy then asked whether he had any guns with him. Brian responded that he did not believe so.

After a pat down, Joy requested and received Brian's consent to search his car. Joy found three handguns, hollow nose bullets, and two large capacity ammunition magazines in the trunk.[2] Because Brian did not have a permit to carry the weapons, Joy arrested him. Brian was indicted on March 12, 2009.

Brian filed a motion to suppress the evidence resulting from the search of his car and the statements he made to Joy prior to and at the time of his formal arrest. He argued that "his initial detention amounted to an arrest and that he [had been] subjected to questioning prior to the administration of Miranda warnings."[3] With respect to the seized evidence, Brian argued that Joy was not justified in seeking his consent to search his vehicle, citing State v. Carty, 170 N.J. 632, 647 (2002) (a police officer must have "reasonable and articulable suspicion" to request a motorist's consent to search his or her vehicle).

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[2] There were other bullets and magazines that were not illegal for Brian to possess under the circumstances.

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The judge held an evidentiary hearing on June 22, 2009, and issued a written opinion denying the motion on June 30. The judge concluded that Joy had a "reasonable and articulable suspicion" under Carty to request consent to search Brian's vehicle, based on the information he received from Susan that she believed Brian was suicidal and that he owned guns. The judge also concluded that Brian made inculpatory statements only after he had orally acknowledged that he understood his Miranda rights.

Brian next filed a motion to dismiss the indictment. He argued that (1) the State failed to offer evidence concerning Brian's moves and then failed to instruct the grand jury that there were federal and state statutory exemptions applicable to the weapons charges, (2) the weapons statutes referred to in the indictment violated the Second Amendment of the United States Constitution under principles enunciated by the Supreme Court in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and (3) the statute prohibiting possession of large capacity ammunition magazines violated the ex post facto clauses of the United States Constitution and the New Jersey Constitution.

The judge denied Brian's motion in an oral decision following oral argument on November 30, 2009. He held that "the

State had no obligation to present information with regard to" the exemptions when it presented the case to the grand jury. He also held that Heller was not applicable because, unlike the District of Columbia, New Jersey did not ban all guns. Finally, he concluded that Brian lacked standing to challenge the constitutionality of New Jersey's weapons statutes under the ex post facto clause of the United States Constitution.

B.

Brian was tried before a jury over three days, beginning on May 27, 2010. The following evidence was developed at trial.

In September 2007, Brian and his wife Lea moved from New Jersey to Colorado. While living in Colorado, Brian legally purchased the three handguns at issue.

In April 2008, Brian and Lea came to New Jersey with their infant son to visit Susan in Mount Laurel. During the visit, Lea took their son to her mother's home in Toms River. They remained in Toms River and did not return to Mount Laurel or Colorado.

Brian returned by himself to Colorado, where he was employed. Over the next several months, Brian traveled to New Jersey at least three times. He stayed with his parents in Mount Laurel during those visits.

In September 2008, Brian began staying with a friend, Michael Torrice, in an apartment in Hoboken. He was working in New York City. Brian paid Torrice a share of the rent on a month-to-month basis, but his name was not added to the lease. During September, Torrice assisted Brian in moving some of his belongings from his parents' home in Mount Laurel to the Hoboken apartment.

During this period, Brian took weekend trips to visit his parents in Mount Laurel and his son in Toms River. In addition, Brian traveled to his home in Colorado several times.

In November 2008, the Family Part entered an order concerning Brian's parenting time with his son. The order provided for Susan to supervise the parenting time. Consequently, Brian would either drive to Mount Laurel from Hoboken or fly from Colorado, and stay with Susan for the weekend when he had parenting time. Brian would bring clothes, toiletries, and other items with him.

In December 2008, Torrice traveled with Brian to Colorado and picked up some of Brian's belongings to bring back to New Jersey. During this visit, Torrice observed that most of Brian's Colorado belongings were "packed up." In mid-December, Brian told Torrice that he intended to move out of the Hoboken apartment and live in Mount Laurel because of his finances.

However, after he started the move from Hoboken to Mount Laurel, Brian decided that he could stay in the Hoboken apartment and began moving his belongings back there.

Torrice saw Brian's weapons only once, while Brian was living in Hoboken. He did not know the exact date or where Brian kept them in the apartment.

According to Torrice, Brian made four "separate moves": (1) Colorado to Mount Laurel; (2) Mount Laurel to Hoboken; (3) Hoboken to Mount Laurel; and (4) Mount Laurel to Hoboken. Each time he moved, Brian would transfer his belongings by car. Susan and Torrice were not sure where Brian would reside permanently because of his uncertain job prospects and his need to have parenting time with his son. According to Torrice and Susan, as of the beginning of January 2009, Brian had residences and spent time in Colorado, Hoboken, and Mount Laurel. He had personal belongings in all three locations.

On Thursday, January 1, 2009, Brian traveled to Mount Laurel to pack up some of his belongings to move them to his Hoboken apartment. On Friday, January 2, Brian returned to Mount Laurel in anticipation of parenting time in Toms River the following day. At some point that evening, Lea cancelled Brian's parenting time on Saturday.

After he learned about the cancellation, Brian made statements to Susan that caused her concern that he might harm himself. Susan made a call to 9-1-1, but dropped the call for reasons not reflected in the record. Brian left the Mount Laurel house "not long" after Susan placed the 9-1-1 call. According to Susan, Brian left because she had called 9-1-1 and he was "afraid."

Joy was dispatched to Susan's house to investigate the dropped call. He found Susan upset and worried about her son. He also learned that Brian owned guns, although Susan did not know whether he had them with him. Based upon their conversation, Joy issued a general radio bulletin to surrounding police departments about a possibly suicidal person.

Joy obtained Brian's cell phone number from Susan and contacted him. Brian, who told Joy he was in Philadelphia, assured him that he was not suicidal. At Joy's request, Brian agreed to return to the house in Mount Laurel.

After Brian returned to Mount Laurel, Joy asked him if he was suicidal and then asked whether he had any guns. According to Joy, Brian responded that he did not have any on his person and he did not believe he had any in the vehicle. When Joy searched the trunk with Brian's consent, he found the three handguns, ammunition, and magazines in a shoebox. The car was

packed with other possessions, including clothes, a briefcase, one or two duffle bags, and a backpack.

Joy testified that Brian subsequently told him that he had forgotten the guns were in the trunk because he was in the process of moving from Colorado to Hoboken, but later said that he had wanted to get the guns out of Hoboken because Torrice was having a party at the apartment.

At trial, Joy identified some of the ammunition as hollow nose point bullets and two of the magazines as capable of containing sixteen rounds of ammunition. He testified that he had counted sixteen rounds as he emptied the two magazines when they were seized, and he filled one of them in the presence of the jury. Joy acknowledged, however, that he did not test fire the weapons or the hollow nose bullets, and that he did not test the sixteen-round magazines by using them in any weapon. It was stipulated at trial that the guns were legally purchased by Brian in Colorado, but that he did not have a permit to carry them in New Jersey.

At the close of the State's case, Brian moved for a judgment of acquittal on all counts. The trial judge denied the motion. Brian then presented testimony from Torrice and his father.

At the charge conference, the judge denied Brian's application that he charge the federal exemption because it was "duplicative" of the New Jersey exemption and unnecessary.[4] However, the judge subsequently denied Brian's application that he charge the New Jersey exemption, finding that it was factually inapplicable.

During deliberations, the jury asked about the exemptions, which had been mentioned during the trial despite the fact that they were not charged.[5] The judge responded that the evidence did not warrant consideration of the exceptions. The jury sent a second request: "When can you transport a weapon in your car without a permit?" The judge again instructed the jury that, although there are exemptions, he had determined, as a matter of law, that the exemption did not apply. When the jury asked

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[4] The judge stated:

> If New Jersey law didn't grant the exemption . . . and there was evidence in the case that on the date in question he was involved in an interstate transfer, and I'm not sure that there is, but I don't have to reach that question. If New Jersey law didn't provide for [the exemption] certainly . . . I'd have to consider [the federal exemption], but . . . why would I say that there's two identical exemptions?

[5] The note read: "Please define the exceptions to the law for all three charges. That is it was announced that 'moving is an exception.' We need to be clear of all exceptions, if any, for each charge."

about the exemptions a third time, the judge reiterated that the exemptions did not apply and that the jury should not consider counsel's arguments concerning them. The jury subsequently returned a verdict of guilty on all three counts of the indictment.

On August 27, 2010, Brian appeared before a different judge for sentencing. The sentencing judge found that aggravating factor nine applied, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant specifically and the public generally), but that it was offset by mitigating factors seven, N.J.S.A. 2C:44-1(b)(7) (no history of prior delinquency or criminal activity), eight, N.J.S.A. 2C:44-1(b)(8) (defendant's conduct was result of circumstances unlikely to recur), nine, N.J.S.A. 2C:44-1(b)(9) (defendant is unlikely to recidivate), and ten, N.J.S.A. 2C:44-1(b)(10) (defendant would respond affirmatively to probationary treatment).

The judge sentenced Brian to incarceration for seven years on count one, three years without the possibility of parole, as required by the Graves Act, N.J.S.A. 2C:43-6. On counts two and three, the judge sentenced Brian to nine months incarceration, both concurrent to the sentence on count one and to each other. He imposed the required fines and penalties. This appeal followed.

While the appeal was pending, Brian sought and was granted a gubernatorial commutation of his sentence, which was reduced to time served as of December 20, 2010.

II.

Brian raises the following issues on appeal:

> POINT 1: THE COURT BELOW ERRED BY FAILING TO PROVIDE JURY INSTRUCTIONS ON THE STATE AND FEDERAL EXEMPTIONS FOR THE LAWFUL POSSESSION OF FIREARMS AND AMMUNITION.
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> POINT 2: THE COURT BELOW ERRED BY FAILING TO DISMISS THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM ON DEFENSE COUNSEL'S MOTION BECAUSE THE PROSECUTOR FAILED TO PROVIDE EXCULPATORY INFORMATION AND THE STATE AND FEDERAL EXEMPTIONS FOR THE LAWFUL POSSESSION OF FIREARMS AND AMMUNITION TO THE GRAND JURY.
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> POINT 3: THE LARGE CAPACITY AMMUNITION MAGAZINE CHARGE IN THE INDICTMENT SHOULD HAVE BEEN DISMISSED ON MOTION BELOW BECAUSE NEW JERSEY'S BAN OF LARGE CAPACITY MAGAZINES IS UNCONSTITUTIONAL AS A VIOLATION OF EX POST FACTO.
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> POINT 4: THE COURT ERRED BY FAILING TO SUPPRESS EVIDENCE AND STATEMENTS GLEANED FROM THE UNLAWFUL DETENTION AND SEARCH OF DEFENDANT AND HIS AUTOMOBILE.
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> POINT 5: THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO CONVICT THE DEFENDANT BEYOND A REASONABLE DOUBT ON THE CHARGE OF POSSESSION OF LARGE CAPACITY AMMUNITION MAGAZINES.
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> POINT 6: APPELLANT WAS ERRONEOUSLY CONVICTED FROM POSSESSING HOLLOW NOSE AMMUNITION BECAUSE THE STATUTE BANNING SUCH AMMUNITION IS VOID FOR VAGUENESS AND THE STATE WAS

UNABLE TO PROVE ITS CASE; FURTHER, THE APPELLANT'S POSSESSION OF SUCH AMMUNITION IS EXEMPTED.

POINT 7: THE DEFENDANT'S POSSESSION OF HIS LAWFULLY ACQUIRED PROPERTY WAS PROTECTED UNDER THE SECOND AMENDMENT.

A.

We first address the issue of the validity of the indictment. Brian argues that the trial judge should have granted his motion to dismiss the indictment because the prosecutor failed to provide the grand jury with testimony concerning Brian's moves from one residence to another and also failed to advise the grand jury that there were exemptions to the weapons offenses that might be applicable to Brian.

The decision to dismiss an indictment rests with "the discretion of the trial court." State v. McCrary, 97 N.J. 132, 144 (1984). Consequently, a trial judge's exercise of discretion should not "be disturbed on appeal unless it has been clearly abused." State v. Hogan, 144 N.J. 216, 229 (1996) (citing State v. Weleck, 10 N.J. 355, 364 (1952)).

A grand jury indictment is presumed valid and should only be disturbed if "manifestly deficient or palpably defective," State v. Ramseur, 106 N.J. 123, 232 (1987) (citations omitted), cert. denied, 508 U.S. 947, 113 S. Ct. 2433, 124 L. Ed. 2d 653 (1993), under the "'clearest and plainest ground.'" State v.

Perry, 124 N.J. 128, 168-69 (1991) (quoting State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 18-19 (1984)). "[A]n indictment should not be dismissed unless the prosecutor's error was clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error." State v. Hogan, 336 N.J. Super. 319, 334 (App. Div.), certif. denied, 167 N.J. 635 (2001).

The State's "sole evidential obligation" in a grand jury proceeding "is to present a prima facie case that the accused has committed a crime." Hogan, supra, 144 N.J. at 236. The role of the grand jury is "to investigate potential defendants and decide whether a criminal proceeding should be commenced. Credibility determinations and resolution of factual disputes are reserved almost exclusively for the petit jury." Id. at 235 (internal citations omitted). "Nevertheless, . . . the State may not deceive the grand jury or present its evidence in a way that is tantamount to telling the grand jury a 'half-truth.'" Id. at 236. Hence, the State has a "limited duty . . . that is triggered only in the rare case" where evidence "directly negates the guilt of the accused and is clearly exculpatory." Id. at 237.

"[A] prosecutor's obligation to instruct the grand jury on possible defenses is a corollary to his responsibility to present exculpatory evidence." Hogan, supra, 336 N.J. Super. at 341. The State's obligation to provide an exculpatory defense arises "only when the facts known to the prosecutor clearly indicate or clearly establish the appropriateness of an instruction." Id. at 343. This duty does not require the State to "meticulously" examine "the entire record of investigative files to see if some combination of facts and inferences might rationally sustain a defense or justification." Ibid. (citing State v. Choice, 98 N.J. 295, 299 (1985)).

In presenting this case to the grand jury, the prosecutor did not offer testimony regarding Brian's moves or instruct the grand jury with respect to the exemptions. The trial judge found that the State did not violate its obligations under the law cited above. The record reflects that there were conflicting facts regarding Brian's then current residence and whether he was in fact moving from one to the other. We are satisfied that there was no evidence that clearly and directly negated Brian's guilt or was clearly exculpatory, such that the prosecutor's failure to put it before the grand jury amounted to the presentation of "half-truths" warranting dismissal of the indictment. Hogan, supra, 144 N.J. at 236. Similarly, the

facts known to the prosecutor did not "clearly indicate or clearly establish the appropriateness" of the exemption. Hogan, supra, 336 N.J. Super. at 343 (citations omitted).

We find no abuse of the trial judge's discretion in denying Brian's motion to dismiss the indictment.

B.

Brian next argues that the trial judge erred in denying his motion to suppress the evidence and the statements he made to the police prior to his formal arrest.

The Supreme Court has explained the standard of review applicable to an appellate court's consideration of a trial judge's fact-finding on a motion to suppress as follows:

> [A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." [State v. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006)] (citing State v. Locurto, 157 N.J. 463, 474 (1999)); see also State v. Slockbower, 79 N.J. 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the . . . investigatory search [was] not based on probable cause"); State v. Alvarez, 238 N.J. Super. 560, 562-64 (App. Div. 1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present in the record" (citing State v. Johnson, 42 N.J. 146, 164 (1964))).

> An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, supra, 42 N.J. at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. Id. at 162. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." Ibid. In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." Ibid.
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> [State v. Elders, 192 N.J. 224, 243-44 (2007).]

However, our review of the trial judge's legal conclusions is plenary. State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010) (citing State v. Handy, 412 N.J. Super. 492, 498 (App. Div. 2010), aff'd, 206 N.J. 39 (2011)), certif. denied, 205 N.J. 78 (2011).

The following additional facts, developed at the suppression hearing, are relevant to our decision.

Although Brian was not immediately placed under arrest when he returned to Mount Laurel, Joy conceded that, if Brian had made an attempt to leave, he would have stopped him and told him

that he was "not free to leave until we're through with the matter." Joy conceded that he had no basis to arrest Brian at that time, but testified that he could have placed him in protective custody in order to bring him to a crisis center.

Because Joy was still unsure whether Brian was suicidal, Joy requested permission to search Brian's car for "community caretaking" purposes and informed him of his right to refuse or stop the search at any time. Joy saw Brian read and sign the Consent to Search Form.

Joy asked Brian to stand with another police officer approximately six feet from the vehicle. He conducted the search of Brian's car and discovered the weapons, bullets, and magazines. Joy asked Brian if he had a firearms purchaser identification card or if he had registered the weapons in New Jersey. Brian answered that he did not.

Joy then placed Brian in handcuffs, secured him in the back of the police vehicle, and orally administered the Miranda warnings. Brian said he understood his rights. At this point, Brian told Joy that "there [was] a party going on [at his Hoboken apartment] and he wanted to take the weapons out of the party scene, so that way, nobody got injured there." Brian also stated that he had forgotten the weapons and bullets were in his vehicle.

i.

Brian first contends that Joy's request for his consent to search the car was not supported by reasonable and articulable suspicion of criminal activity as required by Carty, supra, 170 N.J. at 647.

We conclude that Joy had a reasonable basis to question Brian about his mental state and access to guns under the community caretaking doctrine. The "community caretaking" doctrine "applies when the 'police are engaged in functions, [which are] totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a [criminal] statute.'" State v. Diloreto, 180 N.J. 264, 275 (2004) (alterations in original) (quoting State v. Cassidy, 179 N.J. 150, 161 n.4 (2004)).

Joy was responding to a dropped 9-1-1 call, and had learned that Brian was possibly suicidal, had threatened suicide in the past, had recently lost his job, and was going through a divorce. Most significantly, Susan also informed Joy that she knew that Brian owned weapons but did not know if he had them with him at the time.

Susan's concerns provided a reasonable and articulable basis for Joy's request under the community caretaking doctrine. Because we conclude that the disposition of this issue is

governed by the community caretaking doctrine, we hold that the State was not obligated to demonstrate reasonable and articulable suspicion of criminal activity, as required by Carty, supra, 170 N.J. at 647.

Consent searches are constitutional only if consent was voluntarily given and were "not the result of duress or coercion, express or implied." See State v. Johnson, 68 N.J. 349, 353-54 (1975). "'Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.'" Id. at 360 (footnote omitted) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2059, 36 L. Ed. 2d 854, 875 (1973)). The facts in the record support a finding that the consent was voluntary.

ii.

Brian next contends that his statements to Joy should have been suppressed because Joy's actions when he returned to Mount Laurel and spoke with Joy were more intrusive than necessary under the existing circumstances, thereby constituting a "de facto" arrest, warranting immediate administration of his Miranda rights.

In reviewing a trial judge's denial of a Miranda motion, we analyze police-obtained confessions using a "searching and critical" standard of review to ensure that constitutional rights have not been trampled upon. State v. Patton, 362 N.J. Super. 16, 43 (App. Div.) (citations and internal quotation marks omitted), certif. denied, 178 N.J. 35 (2003). Nevertheless, we will not engage in an independent assessment of the evidence as if we were the court of first instance, Locurto, supra, 157 N.J. at 471, nor will we make conclusions regarding witness credibility, State v. Barone, 147 N.J. 599, 615 (1997), but we instead defer to the trial judge's credibility findings. Elders, supra, 192 N.J. at 243-44 (citations omitted); State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000).

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966), the United States Supreme Court held that the prosecution may only use statements derived from custodial interrogation if certain procedural safeguards are met. These procedural safeguards, known as Miranda warnings, advise the detainee of his "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Ibid. Custodial interrogation is defined as "questioning initiated by law enforcement officers

after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Ibid. (footnote omitted).

Interrogation includes express questioning from police as well as "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Rhode Island. v. Innis, 446 U.S. 291, 302, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297, 308 (1980) (footnote omitted). An incriminating response is "any response . . . that the prosecution may seek to introduce." Id. at 301 n.5, 100 S. Ct. at 1689 n.5, 64 L. Ed. 2d at 308 n.5.

New Jersey applies a totality of the circumstances test to determine whether a detainee is in custody. State v. Pierson, 223 N.J. Super. 62, 67 (App. Div. 1988). It is an objective test that examines "the duration of the detention, the nature and degree of the pressure applied to detain the individual, the physical surroundings of the questioning and the language used by the officer in summoning the individual." Ibid. (citing United States v. Booth, 669 F.2d 1231, 1235 (9th Cir. 1981); State v. Godfrey, 131 N.J. Super. 168, 175-77 (App. Div. 1974), aff'd, 67 N.J. 267 (1975); State v. Cunningham, 153 N.J. Super. 350, 352-53 (App. Div. 1977)). However, "[t]he determinative consideration is whether a reasonable innocent person in such

circumstances would conclude that after brief questioning he or she would or would not be free to leave." Ibid. (citing Booth, supra, 669 F.2d at 1235).

"However, Miranda is not implicated when the detention and questioning is part of an investigatory procedure rather than a custodial interrogation . . . ." Id. at 66 (citations omitted). Police are not required to administer Miranda warnings for "general questioning of citizens in the fact-finding process." Miranda, supra, 384 U.S. at 477, 86 S. Ct. at 1629, 16 L. Ed. 2d at 725.

A Terry,[6] or investigative, stop occurs when a "person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest." State v. Adubato, 420 N.J. Super. 167, 177 (App. Div. 2011) (citing State v. Stovall, 170 N.J. 346, 355-56 (2002)), certif. denied, ___ N.J. ___ (2012). "The standard of reasonable suspicion required to uphold an investigative detention is lower than the standard of probable cause necessary to justify an arrest." State v. Nishina, 175 N.J. 502, 511 (2003) (citing Stovall, supra, 170 N.J. at 356). A Terry stop is constitutional only if the officer has a "'particularized

[6] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

suspicion' based upon an objective observation" and the totality of the circumstances, that the detainee has committed or is about to commit a crime. State v. Davis, 104 N.J. 490, 504 (1986).

A "de facto" arrest occurs when an investigative stop is "'more intrusive than necessary.'" State v. Dickey, 152 N.J. 468, 478-79 (1998) (quoting United State v. Jones, 759 F.2d 633, 636 (8th Cir.), cert. denied, 474 U.S. 837, 106 S. Ct. 113, 88 L. Ed. 2d 92 (1985)). Dickey provides four non-exhaustive factors that a court may consider in its analysis: (1) unnecessary delay in the length detained; (2) the level of fear or humiliation caused by the stop; (3) isolation or transportation of the suspect to a different location; and (4) handcuffing or placing the suspect in a police vehicle. Ibid. (citations omitted).

Brian argues that his interaction with Joy amounted to a "de facto arrest" as described by Dickey. We disagree. Our review of the record convinces us that Joy's interaction with Brian was not a Terry stop.

Brian was not subject to a custodial interrogation because he was not a suspect of criminal activity until after Joy discovered the illicit weapons, bullets, and magazines. That Joy would not have allowed Brian to leave prior to the search

does not change that result, because Joy was investigating the dropped 9-1-1 call and Susan's concerns that Brian was suicidal and might have weapons. That was a community caretaking function rather than a criminal investigation. Any incriminating statements made by Brian up to that point were admissible at trial in the absence of Miranda warnings.

Brian was subjected to a custodial interrogation once he was arrested. However, Joy orally administered Miranda warnings and Brian orally acknowledged to Joy that he understood them. The trial judge found that the warnings were administered to and understood by Brian, and that finding is supported by the evidence adduced at the hearing.

For the reasons outlined above, the denial of the motion to suppress the evidence and statements was not error.

C.

We next address the issue of the exemptions, starting with the State exemption. Brian asserts that the trial judge erred in denying his request to charge the State exemption because the evidence produced at trial provided a sufficient rational basis for the jury to conclude that he was moving between residences at the time of his arrest.

"Erroneous [jury] instructions on matters or issues that are material to the jury's deliberation are presumed to be

reversible error in criminal prosecutions." State v. Jordan, 147 N.J. 409, 422 (1997) (citing State v. Warren, 104 N.J. 571, 579 (1986)); see also State v. Vick, 117 N.J. 288, 289 (1989) ("[E]rroneous instructions are almost invariably regarded as prejudicial."); State v. Simon, 79 N.J. 191, 206 (1979) (Such errors "are poor candidates for rehabilitation under the harmless error philosophy."). Hence, "the rule of harmless error should be summoned only with great caution in dealing with the breach of fundamental procedural safeguards 'designed to assure a fair trial.'" Simon, supra, 79 N.J. at 206-07 (quoting Roger J. Traynor, The Riddle of Harmless Error 81 (1970)).

An improper instruction is harmless if it does "not demonstrably impair[] the ability of the jury to deliberate impartially upon its verdict" or if it "does not deflect the jury from a fair consideration of the competent evidence of record and from reaching a verdict of guilt which is supported overwhelmingly by properly admitted evidence." Id. at 207 (citations omitted). In those circumstances, "a conviction should not be reversed." See ibid. (citations omitted).

In count one of the indictment, Brian was charged with violating N.J.S.A. 2C:39-5(b), which provides in relevant part:

> Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as

> provided in N.J.S.[A.] 2C:58-4, is guilty of a crime of the third degree if the handgun is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person. Otherwise it is a crime of the second degree.

At the time of his arrest, Brian did not have the required permit to carry the three guns he had purchased in Colorado.

However, N.J.S.A. 2C:39-6(e) contains exemptions to the permit requirement:

> Nothing in subsections b., c. and d. of N.J.S.[A.] 2C:39-5 shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm, or from carrying the same, in the manner specified in subsection g. of this section, . . . between one place of business or residence and other when moving . . . .

Because N.J.S.A. 2C:39-6(e) does not explicitly place the burden of producing evidence on the defendant, it is an ordinary defense. State v. Moultrie, 357 N.J. Super. 547, 555-56 (App. Div. 2003). A defendant offering such a defense, however, is required to show a "'rational basis in the facts before [such] a defense will be charged to the jury.'" Id. at 556 (quoting

Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:1-13 (2002)).

"[I]n deciding whether a basis has been presented to support a jury instruction on a defense theory, defendant is entitled to have [the court] accept his version of the events." Id. at 559; see also State v. Martin, 119 N.J. 2, 18 (1990) (If "the trial projects conflicting versions of the facts, the court should mold its instructions to the factual hypotheses of the parties." (citing State v. Concepcion, 111 N.J. 373, 380 (1980))); State v. Jumpp, 261 N.J. Super. 514, 523 (App. Div.) (stating the evidence should be "viewed most favorably to [the] defendant"), certif. denied, 134 N.J. 474 (1993). The persuasiveness of the State's evidence "is not determinative of the content of the judge's charge." See State v. Singleton, 418 N.J. Super. 177, 202 (App. Div.), certif. granted, 207 N.J. 188 (2011). Rather, such determinations are for the jury alone. Ibid. "Indeed, the [Supreme] Court has counseled that jury instructions on an alternative defense theory should be given even when that theory is supported only by '[v]ery slight evidence.'" Id. at 203 (quoting State v. Powell, 84 N.J. 305, 317 (1980)) (citing Moultrie, supra, 357 N.J. Super. at 556).

Based upon our review of the record in the light most favorable to Brian, we conclude that there was a rational

factual basis to instruct the jury about the State exemption. According to the defense, Brian was residing at both the Mount Laurel and Hoboken locations at the time of his arrest. That evidence was introduced at trial through several witnesses. Susan and Torrice testified that Brian was living at both the Mount Laurel and Hoboken locations during the period leading up to his arrest. They were unsure where Brian would reside permanently because of his uncertain job prospects and visitation with his son. Torrice testified that each time Brian moved, he would transfer his belongings by car.

Joy testified that Brian's car was packed with his possessions, including clothes, a briefcase, one or two duffle bags, and a backpack. Although Joy testified that Brian had the weapons in the car because he wanted to take them out of his Hoboken apartment where a party was to be held, that testimony was subject to evaluation by the jury and was not necessarily inconsistent with the defense. The same is true of Joy's testimony that Brian told him he was in Philadelphia.

Although not determinative, we note that the jury requested information about the exemptions three times during its deliberations. The third request, which specifically referenced the moving exception at issue, reflects the jury's understanding

that there was evidence indicative of the weapons being in transit between residences. The note read:

> Why did you make us aware at the start of the trial that the law allows a person to carry a weapon if the person is moving or going to a shooting range, and during the trial both defense and prosecution presented testimony as to whether or not the defendant was in the process of moving, and then in your charge for us to deliberate we are not permitted to take into consideration whether or not we believe the defendant was moving.

We hold that the judge should have instructed the jury on the exemptions and that his failure to do so was "capable of producing an unjust result." Consequently, we reverse the conviction on count one.[7]

D.

We now turn to the issues raised with respect to possession of the two large capacity magazines in violation of N.J.S.A. 2C:39-3(j). Brian argues that the statute violates the ex post facto clauses of the Unites States and New Jersey Constitutions.

[7] Because we reverse on the basis of the judge's refusal to charge the State exemption, we need not reach the issue of whether he should also have charged the federal exemption found at 18 U.S.C.A. § 926A (2011). For the federal exemption to apply, a defendant must point to some evidence that he or she was involved in interstate travel at the time of arrest. Although it is not clear that there was sufficient evidence to warrant the charge at the trial, we cannot predict what evidence will be produced if the State seeks a second trial on count one.

He also argues that the State failed to prove the elements of that offense beyond a reasonable doubt.

N.J.S.A. 2C:39-3(j), which was enacted in 1990, provides:

> Any person who knowingly has in his possession a large capacity ammunition magazine is guilty of a crime of the fourth degree unless the person has registered an assault firearm pursuant to section 11 of []L. 1990, c. 32 (C. 2C:58-12) and the magazine is maintained and used in connection with participation in competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army.

A large capacity ammunition magazine is defined as "a box, drum, tube or other container which is capable of holding more than 15 rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm." N.J.S.A. 2C:39-1(y).

i.

We start with Brian's assertion that it is unconstitutional because it is an ex post facto law.

The United States Constitution, article I, section 10 states that "no State shall . . . pass any . . . ex post facto law." The New Jersey Constitution contains a similar provision, which states that "[t]he Legislature shall not pass any . . . ex post facto law." N.J. Const. art. IV, § 7, ¶ 3. The ex post facto clauses prohibit the prosecution of a crime if the law had

not been enacted at the time the act was committed. State v. Fortin, 178 N.J. 540, 608 (2004).

In order to successfully challenge a law as violating the ex post facto clause, the law (1) "must be retrospective" and (2) "must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17, 29 (1981) (citations omitted); State v. Natale, 184 N.J. 458, 491 (2005) (citations omitted). Consequently, a defendant "to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529 (1960) (citations omitted).

Brian concedes that he acquired the magazines and brought them into New Jersey after enactment of N.J.S.A. 2C:39-3(j). Consequently, the statute is not ex post facto as to him. Brian lacks standing to challenge the statute on behalf of a class of citizens who possessed large capacity ammunition magazines prior to the enactment of the ban. Raines, supra, 362 U.S. at 21, 80 S. Ct. at 522, 4 L. Ed. 2d at 529.

ii.

Brian also argues that the State failed to prove beyond a reasonable doubt that he violated N.J.S.A. 2C:39-3(j) because there was no evidence that the large capacity magazines were operable.

The State provided evidence at trial that both magazines had the capacity to hold sixteen bullets, which comports with the definition of a "large capacity ammunition magazine" in N.J.S.A. 2C:39-1(y). Joy testified that both magazine's were marked as capable of holding sixteen bullets and that he had taken sixteen bullets out of each on the night they were seized. He also loaded one of the magazines with sixteen rounds of ammunition in front of the jury.

However, as Brian points out, there was no proof that the magazines were capable of feeding ammunition "continuously and directly therefrom into a semi-automatic firearm" as required by N.J.S.A. 2C:39-1(y). Joy conceded that he did not insert the magazines into any firearms, test them for operability, or send them to the State Police Lab for testing.

In State v. Elrose, 277 N.J. Super. 548, 559 (App. Div. 1994), we upheld a conviction under N.J.S.A. 2C:39-3(j), "even though the State's expert did not test-fire the magazines, [because] there were sufficient inferences based on his

testimony that they were operable, assuming proof of operability was required." Here, however, the State's witness, Joy, was not qualified as an expert.

Brian argues that the State had an obligation to prove that the magazines were actually operable. We need not reach that issue because we find that the State failed to prove that the magazines satisfied the second prong of the definition of a "large capacity ammunition magazine" in N.J.S.A. 2C:39-1(y). Although Joy was qualified to testify that they held sixteen rounds based upon his having unloaded both magazines and reloaded one of them at trial, he was not qualified to testify that the magazines were capable of feeding ammunition "continuously and directly therefrom into a semi-automatic firearm" because he was not qualified as an expert and had not actually used them for that purpose.

Consequently, we find that the State failed to prove all of the elements of a violation of N.J.S.A. 2C:39-3(j). For that reason, the trial judge should have granted the motion for a judgment of acquittal on count two.

E.

Brian next contends that N.J.S.A. 2C:39-3(f)(l), which prohibits the possession of hollow nose bullets, is unconstitutionally vague. He further contends that the moving

exemption found in N.J.S.A. 2C:39-6(e) should be read into N.J.S.A. 2C:39-3(g)(2)(a) and applied to possession of hollow nose bullets while moving, despite the fact that the wording of N.J.S.A. 2C:39-3(g)(2)(a) does not include it.

i.

N.J.S.A. 2C:39-3(f)(l) specifically prohibits possession of "hollow nose or dum-dum bullet[s]." Neither term is defined in N.J.S.A. 2C:39-1, which is the definitional section of the Title 2C chapter concerning firearms. Brian contends that the Legislature's failure to define the term "hollow nose" bullet renders the prohibition unconstitutionally vague.

The constitutional doctrine of vagueness "'is essentially a procedural due process concept grounded in notions of fair play.'" State v. Emmons, 397 N.J. Super. 112, 124 (App. Div. 2007) (quoting State v. Lee, 96 N.J. 156, 165 (1984)), certif. denied, 195 N.J. 421 (2008). The Supreme Court summarized the underlying concerns as follows:

> Clear and comprehensible legislation is a fundamental prerequisite of due process of law, especially where criminal responsibility is involved. Vague laws are unconstitutional even if they fail to touch constitutionally protected conduct, because unclear or incomprehensible legislation places both citizens and law enforcement officials in an untenable position. Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide

> officials with guidelines sufficient to prevent arbitrary and erratic enforcement.
>
> [State v. Mortimer, 135 N.J. 517, 532 (quoting State v. Afanador, 134 N.J. 162, 170 (1993)), cert. denied, 513 U.S. 970, 115 S. Ct. 440, 130 L. Ed. 2d 351 (1994).]

We have noted that "[a] criminal statute is not impermissibly vague so long as a person of ordinary intelligence may reasonably determine what conduct is prohibited so that he or she may act in conformity with the law." State v. Saunders, 302 N.J. Super. 509, 520-21 (App. Div.) (citing Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983)), certif. denied, 151 N.J. 470 (1997). The test for vagueness hinges on whether "persons of common intelligence must necessarily guess at [the statute's] meaning and differ as to its application." Mortimer, supra, 135 N.J. at 532 (citations and internal quotation marks omitted). Further, analysis under this standard is not "'a linguistic analysis conducted in a vacuum,' but requires consideration of the questioned provision itself, related provisions, and the reality in which the provision is to be applied." Saunders, supra, 302 N.J. Super. at 521 (citing In re Suspension of DeMarco, 83 N.J. 25, 37 (1980)).

Unless the statutory framework suggests otherwise, "'the words used in a statute carry their ordinary and well-understood meanings.'" Mortimer, supra, 135 N.J. at 532 (quoting Afandor,

supra, 134 N.J. at 171); see also State v. Lashinsky, 81 N.J. 1, 18 (1979) (adding common intelligence, coupled with "ordinary human experience," to the assessment of "vagueness"). N.J.S.A. 1:1-1 provides:

> In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.

In Mortimer, supra, 135 N.J. at 532, the Supreme Court analyzed the challenged statute by referencing Webster's New Collegiate Dictionary. In Webster's Ninth New Collegiate Dictionary 388 (1985), "dum-dum" is defined as "a bullet (as one with a hollow point) that expands more than usual upon hitting an object." Webster's defines "hollow" as "an unfilled space" or "a depressed or low part of a surface," and "nose," in relevant part, as "the forward end or projection of something." Id. at 576, 807.

We are satisfied that the statutory language at issue is not unconstitutionally vague and cannot be interpreted to include a bullet that has been dented after it has been dropped,

as Brian argues. The language is sufficient to notify "a person of ordinary intelligence . . . what conduct is prohibited so that he or she may act in conformity with the law." Saunders, supra, 302 N.J. Super. at 520-21 (citing Town Tobacconist, 94 N.J. at 118). Consequently, the statute is not void for vagueness.

ii.

Brian also argues that, using the rule of lenity, we should interpret N.J.S.A. 2C:39-3(g)(2)(a) as including an exception for moving hollow nose bullets between residences, even though it is not included in the statutory language.

N.J.S.A. 2C:39-3(g)(2)(a) provides as follows: "Nothing in subsection [(f)](1) shall be construed to prevent a person from keeping such ammunition at his dwelling, premises or other land owned or possessed by him, or from carrying such ammunition from the place of purchase to said dwelling or land . . . ." In contrast to N.J.S.A. 2C:39-6(e), which concerns exemptions with respect to the possession of weapons, N.J.S.A. 2C:39-3(g)(2)(a) does not contain a specific exemption for possession while moving between residences. Citing the concept of lenity, Brian argues that we should read that exemption into the statute.

In State v. Shelley, 205 N.J. 320, 324 (2011), the Supreme Court described the doctrine of lenity as follows:

> When interpreting penal statutes, the doctrines of strict construction and lenity also provide guidance. [State v.] D.A., 191 N.J. [158,] 164 [(2007)]. The doctrine of lenity, a corollary to the doctrine of strict construction, dictates that when ambiguities "cannot be resolved by either the statute's text or extrinsic aids," a criminal statute must be interpreted in favor of the defendant. State v. Gelman, 195 N.J. 475, 482 (2008) (citations omitted).

It is an exception to the general rule that "penal statutes are strictly construed." D.A., supra, 191 N.J. at 164 (citing State v. Valentin, 105 N.J. 14, 17 (1987)). We must conclude, however, that the rule of lenity is not applicable here because there is no ambiguity in N.J.S.A. 2C:39-3(g)(2)(a). There simply is no exception for moving between residences in the statute. We cannot go beyond the language of the statute if the language "leads to a clearly understood result." State v. Hudson, ___ N.J. ___, ___ (2012) (slip op. at 20) (citing Shelley, supra, 205 N.J. at 323). The rule of lenity is not broad enough to allow us to add to the language of one statute on the theory that the Legislature forgot to provide the desired language. In addition, "[a] court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488 (2002) (citations omitted).

Consequently, we affirm the conviction on count three.

F.

Finally, Brian contends that New Jersey's overall statutory scheme with respect to the regulation of guns and related items violates his rights under the Second Amendment to the United States Constitution.

Having reviewed Brian's arguments, we find them to be without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2)(1)(E). We add only the following.

Brian relies primarily on McDonald v. City of Chicago, 561 U.S. ____, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) and Heller, neither of which are applicable here. New Jersey law does not prohibit the possession of the guns at issue in the home or when moving between residences. In addition, N.J.S.A. 2C:58-4 provides a reasonable mechanism for obtaining a permit to carry guns outside the home.

G.

In summary, we affirm the denial of Brian's motion to suppress the evidence and the statements made to Joy, as well as the denial of the motion to dismiss the indictment. We reverse his conviction on count one because the trial judge erred by

refusing to charge the state exemption.[8] As to count two, we reverse the judge's denial of the motion for a judgment of acquittal, having determined that the State did not prove all the elements of the offense. Consequently, we reverse that conviction and order entry of a judgment of acquittal. Finally, we affirm the conviction on count three.

Affirmed in part, reversed in part.

[8] Although the State may elect to pursue a retrial, we note that the State has conceded that the gubernatorial commutation of the custodial sentence precludes imposition of any custodial sentence following such a retrial.