SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0496-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES C. OLBERT,

Defendant-Appellant.

Argued January 8, 2018 – Decided February 7, 2018

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 12-08-2165.

Stephen W. Kirsch, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Stephen W. Kirsch, of counsel and on the briefs).

Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Robert D. Laurino, Acting Essex County Prosecutor, attorney; Frank J. Ducoat, of counsel and on the briefs; Camila A. Garces, Special Deputy Attorney General/Acting Assistant Prosecutor, on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

After a 2015 jury trial, defendant James Olbert was found guilty of committing numerous crimes, including the murder and robbery of a store owner, the robbery and felony murder of a pedestrian, the robberies of two other persons, a carjacking, the theft of another victim's credit and debit cards, weapons offenses, and other crimes. The trial court imposed on defendant an aggregate custodial sentence of 123 years, subject to an eighty-five percent period of parole ineligibility.

Through his counsel on appeal, defendant argues that the trial court erred by denying his motion to sever the charges related to the store owner's murder and robbery from the other charged crimes. He asserts that even if joinder of the offenses was proper, the court should have issued an unrequested limiting instruction on other-crimes evidence to ensure that the jury would not assume his guilt on all counts from the evidence concerning the store owner's death.

Defendant also contends that the court erred by declining to instruct jurors that a spectator who spoke briefly to a juror during a break in deliberations was not affiliated with him. In addition, he challenges his sentence as excessive, arguing that the court misapplied an aggravating factor and failed to give

sufficient weight to the fact that he was sixteen when the crimes were committed. Lastly, in a pro se supplemental brief, defendant argues that the court erred in admitting incriminating statements he made when he and his mother were questioned by investigating police.

For the reasons that follow, we affirm defendant's convictions but remand for resentencing in light of recent developments in the law concerning the constitutional limitations on imposing lengthy sentences on juvenile offenders that have the practical effect of comprising life without parole.

I.

The twenty-four-count indictment charged defendant[1] with offenses related to six incidents with six different victims that occurred between December 15, 2011 and January 17, 2012. We present relevant details of each incident in chronological sequence.[2]

Incident #1: A.S.'s Credit Card (Count Twenty-Four)

On December 15, 2011, A.S. reported the theft of a debit card and two credit cards. She learned that the cards had been used

[1] Two co-defendants, Azil Ellington and Isiah Adams, were also each charged in several counts of the indictment. The trial court severed defendant's trial from that of the co-defendants.

[2] We use initials for the living victims, to protect their privacy interests.

to buy prepaid cell phones for $179.70, and to make purchases totaling $164.37 at Cooper's Liquors & Deli in Newark ("Cooper's") and a purchase of $86.95 at a nearby McDonald's fast-food restaurant. A.S. had not made those purchases herself, and did not give anyone else permission to use her cards.

Defendant's girlfriend, Nadirah Johnson, testified that she received credit cards from defendant on December 15, 2011. He told her he found them outside. Johnson admitted that she used one of the cards to buy phones. She recounted that she, defendant, and some friends then went in a taxi to McDonald's and purchased food there. Later that night, Johnson and two friends bought alcohol at Cooper's.

Incident #2: B.C.'s Carjacking (Counts One through Four)

At around 10:00 p.m. on December 23, 2011, B.C. went to New York Fried Chicken in Newark to buy a pizza. She was driving a light blue Honda CRV. B.C. noticed two young men standing outside the restaurant. While she was waiting for her food, one of them came inside, reportedly said, "This is taking too long," and left.

B.C. left the restaurant and started to get into her car, when both men approached and stood on either side of the vehicle. The man on the driver's side of the car pointed a gun at B.C. and told her to give him her keys and wallet. He patted her down and

put his hands in her coat pockets to find her wallet. The two men then got into her car and drove away.

B.C. went back into the restaurant to call the police. She told officers the man with the gun was "thin" and had "dreads." However, B.C. said that she could not see the men's faces clearly because a streetlight behind them was shining into her eyes. She was asked by police to identify the carjackers in photo arrays, but was unable to do so.

Incident #3: Jennifer R.'s Robbery (Counts Five through Seven)

At around 11:30 a.m. on December 26, 2011, Jennifer R.[3] was walking her dog on South 12th Street in Newark. A Honda stopped in the middle of the road near her. A young man jumped out of the car and told her to give him her purse. Jennifer R. refused, and she and the man "scuffl[ed]." The man pulled out a gun and struck Jennifer R. in the elbow with it, and she handed over her purse. The man then got back in the Honda and drove away.

On January 10, 2012, Jennifer R. identified defendant as the robber to police during a photo array. At trial, Jennifer R. described the Honda the robber got out of as a silver SUV. She said that her attacker had "dreads" and a tattoo next to his eye.

Incident #4: Campos Robbery and Murder (Counts Eight through Thirteen)

[3] We use this victim's first name to distinguish her from "Juan R.," the victim in Incident #5.

At 6:47 p.m. on December 28, 2011, paramedics responded to a call outside Cooper's, where they found a man, later identified as Wilfredo Campos, lying face down in the street and surrounded by blood. One of the paramedics testified that Campos had suffered a gunshot injury to the left side of the back of his neck. The paramedic and her partner dressed the wound and loaded Campos into an ambulance.

Meanwhile, Officer Jacquenetta Moton of the Newark Police Department investigated the crime scene. Moton took photographs and found a shell casing and cell phone on the street.

On December 29, 2011, police obtained surveillance videos from cameras outside Cooper's. The videos showed Campos walking down the street on December 28 in front of Cooper's carrying a white bag. A light blue Honda CRV double-parked near him, and a man holding a gun got out of the passenger side and approached Campos. According to Detective Joseph Hadley Jr., Campos and the gunman "tussl[ed]," and the gunman reached into Campos' pocket. Campos dropped his bag and turned to walk away. The gunman then shot Campos once from behind and ran back to the car.

Campos died less than a week later on January 3, 2012. An autopsy confirmed that he had died of a gunshot to the back of the neck, which severed the left carotid artery and cut off blood flow to his brain. Dr. Abraham Philip, who peer reviewed the autopsy

report, testified that in his opinion the manner of death was homicide. The State's theory at trial was that defendant was the driver of the SUV and his companion was the gunman.

Incident #5: Juan R.'s Robbery (Counts Fourteen through Seventeen)

On December 29, 2011, Juan R. was working behind the counter at Rosario Supermarket, a bodega on Springfield Avenue in Newark. At around 12:30 p.m., a man wearing a scarf covering his face came into the store. The man pointed a gun at Juan R. and demanded money and cigarettes. Juan R. took the drawer out of the cash register and handed him all of the bills inside. The man then grabbed coins out of the register drawer and threw the drawer on the floor. He also demanded a laptop computer and charger Juan R. had on the counter. The man left the store and got into a blue Honda CRV parked outside.

Juan R. called the police. When officers asked if he could identify the robber, he said this would be "impossible, because [the man was] covered up." The police did obtain surveillance videos showing the inside and outside of the building during the robbery.

Incident #6: Torres Robbery and Murder (Counts Eighteen through Twenty-Three)

At around 6:15 p.m. on January 17, 2012, Newark police officers responded to a call from a "holdup alarm" system at JNC

Mini Market ("JNC"), a bodega on the corner of 14th Avenue and South 18th Street. They found the victim, Miguel Torres, lying behind the counter, shot. Paramedics loaded Torres into an ambulance and began resuscitation procedures.

An EMT testified that Torres had sustained four gunshots wounds, two in the chest and two in the abdomen, and that he had no pulse and was not breathing. Torres was pronounced dead upon arrival at the hospital. Dr. Philip, who performed an autopsy, testified that the gunshot wounds had collapsed both of Torres' lungs and caused extensive internal and external bleeding that led to death. Dr. Philip opined that the manner of death was homicide.

Back at the JNC bodega, Officer Frank Ricci retrieved bullets and shell casings. Ricci also observed that the cash register drawer was open and had some change in it, but no paper money. Ricci and other officers obtained consent to view surveillance videos taken by the store's cameras.

Detective Paul Ranges of the Essex County Prosecutor's Office, the lead detective investigating the Torres homicide, testified about a surveillance video taken at the scene. The video showed that a car pulled over next to JNC and two individuals got out. One went inside and the other stayed outside and blocked others from entering. Detective Ranges testified that this "lookout" placed an object in the path of the store's automatic

door to prop it open. He explained that doing this would stop anyone in the store from locking the door to prevent someone from leaving.

A video taken from inside the store showed that the first individual, who was wearing a black Adidas jacket, a mask, and a North Face hat, went directly to the counter and pointed a gun at Torres. Torres retrieved some bills from the register and gave them to the gunman. The gunman demanded more, and Torres handed him more bills.

Then, the gunman raised his firearm and shot Torres. He climbed over the counter, took more money from the cash register, and fled the store. Ranges testified that when the gunman left, he dropped some money and went back to pick it up before running toward the waiting car.

The Investigation

While investigating the Campos homicide, Detective Joseph Hadley of the Essex County Prosecutor's Office reviewed other recent case files, including the A.S. credit card theft. Detective Hadley found it significant that the street address from which the unauthorized card users had departed in a taxi to go to McDonald's was only one block away from where Campos was killed.

Detective Hadley learned that defendant's girlfriend Johnson lived at that address. He went with another detective to speak

to her about the credit and debit cards on January 5, 2012. They asked Johnson to come with them, and then took a statement from her at the Prosecutor's Office. Johnson told Hadley that defendant had been in her house when they arrived, but that he "was hiding." Hadley read her Miranda[4] rights, and she answered questions about the use of the cards.

Hadley testified that because Johnson said she had used a card at Cooper's and "[knew] people from the area," he thought she may have known the identities of the perpetrators of the Campos homicide, the B.C. carjacking, and the Jennifer R. and Juan R. robberies, which had all occurred close to her home. Hadley showed Johnson photographs taken from surveillance videos of the B.C. carjacking. Johnson identified defendant and another man, Azil Ellington, in them. She referred to defendant by name and also by a nickname, "QA." Johnson identified defendant in photos related to the Juan R. robbery, because she recognized the clothing worn by the masked perpetrator. In addition, Hadley testified that Johnson "introduced" defendant's identity to him. Evidently, this was a turning point in his investigation.

In addition to speaking with Johnson, Hadley interviewed B.C., Juan R., and Jennifer R., because he had begun to suspect

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

that the crimes committed against them, as well as the Campos homicide, had all been perpetrated by the same person or persons. In particular, Hadley noted similarities in the descriptions they gave of the perpetrators, and the use of the same make and essentially the same color of Honda.

Detective Sergeant Miguel Arroyo, who was working with Detective Ranges on the Torres homicide, told Hadley that they "may have the same suspect in common," namely "QA" or defendant. According to Arroyo, at that point, the Torres investigation became "intertwined with" Hadley's investigation of the Campos homicide and other crimes. Detective Ranges similarly testified that he "joined forces" with Hadley on the morning of January 20, 2012.

Hadley and Ranges decided to interview defendant together, in pursuit of their now-combined investigation. On January 20, 2012, Hadley and Arroyo went with a group of officers to defendant's address on South 15th Street in Newark. Defendant's mother, Kesha Buchuse, answered the door and invited the officers inside. Hadley told her that they were looking for her son, to "question him about . . . the homicides and the robberies and the carjacking." Arroyo recalled that Buchuse was "nervous" but "cooperative."

Buchuse led Arroyo and two other officers upstairs to look for defendant. They found him hiding under a bed. Defendant and

Buchuse were brought downstairs and then transported to the Essex County Prosecutor's Office for questioning.

Meanwhile, Arroyo received word that a search warrant for defendant's address had been granted, so he began looking for evidence there. Arroyo found an Adidas jacket, burgundy Nike ACG boots, and a North Face hat — all of which were consistent with clothing worn by Torres' killer — in defendant's bedroom and under a couch in the living room.

Incriminating Statements Given to Police By Defendant and His Mother[5]

According to Arroyo and Hadley, when defendant was taken by police from his house he was not handcuffed or placed under arrest. Arroyo testified that both defendant and his mother, Buchuse, were "calm." Hadley explained that defendant and Buchuse were transported to the Prosecutor's Office in the same car because defendant was then only sixteen years old.

Ranges and Hadley testified they placed defendant and Buchuse in separate interview rooms at the Prosecutor's Office. They did so because they wanted to speak to Buchuse first and let her know that they wanted to talk to her son about the Torres homicide and

[5] We have derived the details in this section from the testimony at the pretrial suppression hearing, as well as the investigating officers' subsequent testimony at trial, which was substantially consistent.

other crimes. They also wanted to ask for her consent to speak to defendant, because he was a minor. Buchuse consented.

According to Hadley, during their interview of Buchuse, the detectives showed her still photographs from the Torres homicide surveillance videos. She stated that the person in the photos "look[ed] like her son." She wrote defendant's name on the photographs and signed them. Hadley testified that Buchuse said she had seen a television news report about the crime, and thought the suspect in the report looked like defendant. Buchuse told Hadley and Ranges that family members called her after the report aired, to say they also thought the perpetrator "looked like James [Olbert]."

Both Ranges and Hadley testified that, while they interviewed Buchuse, defendant was left alone in his own interview room, without any handcuffs or other restraints. They explained that this arrangement was because defendant was not under arrest, a fact Ranges also told Buchuse. Defendant was given water, potato chips, and a cigarette during his mother's interview. Ranges stated that neither he nor anyone else spoke to or "pre-interviewed" defendant at any time before his interview began, and that all conversations the officers had with defendant were recorded.

According to Ranges, while he and Hadley were in the hallway preparing to start recording in the room where defendant was, he heard "some type of ruckus" coming from that room. Hadley and Ranges both recalled they heard banging and yelling sounds. Hadley opened the door and went in the room with Buchuse. Inside, he saw defendant "screaming, and yelling, and banging his head" on the interview table and a wall. Hadley testified that defendant was "blurting out the fact that he had shot someone." Hadley left the room, leaving defendant alone with Buchuse. Hadley told Ranges to start recording in the room, because he did not want defendant "to later on [falsely] suggest that [police] may have assaulted him."

Ranges did not go into the room, but later viewed the video recording of defendant and Buchuse. He testified that defendant "[made] some outbursts," exclaiming that people were "out here telling on [him]" and that he was "in deep." Hadley likewise heard defendant make these spontaneous statements. Hadley testified that Buchuse pointed out a knot on defendant's head. Defendant said to her that the injury was from "when [he] was in the room trying to hurt [him]self."

When he came back into the interview room, Hadley explained to defendant that he was not under arrest. Hadley asked defendant if he wanted anything to eat, and took his order of a cheeseburger.

Ranges then stated that he was going to read defendant a Miranda form out loud, but Hadley interrupted and asked Ranges to leave the room with him. While the two detectives were outside, Buchuse reminded her son that he had not been arrested. Defendant replied, "No. Not yet. But if I tell them that I did that murder, they're going to -- they're going to take me. I know they going to take me."

Hadley returned and told defendant and Buchuse that they were going to change interrogation rooms. The room change occurred because of a recording problem in the first room, and because defendant's smoking had caused Hadley to cough continuously.

After the group settled in another room and recording was begun anew, Ranges again stated that defendant was not under arrest. Ranges read defendant his Miranda rights and asked if he understood them. Defendant replied that he did. Buchuse also acknowledged that she understood what was occurring, and that she was comfortable with the detectives talking to her son. Defendant and Buchuse both signed the Miranda form.

Having obtained the written waivers, Hadley began to question defendant about the Torres robbery and homicide. Defendant stated that his friend "Izzy" was involved in that crime. Hadley said that it was important for defendant to be "completely honest," and Buchuse urged him to "get it out." Hadley showed defendant a

picture taken from surveillance video of the Torres robbery, and asked him who the person in the picture was. Defendant replied, "[T]hat's me." Both he and Buchuse signed multiple photographs from various crime scenes throughout the interview, indicating that they depicted defendant.

When asked what he had been doing at JNC, defendant admitted, "I was robbing the store." Defendant then explained that he asked his driver, Isiah Adams, to pull up to the side of the store that was out of the sight of the cameras he knew were there. Defendant went into the store and pointed his gun at "the old man that was . . . behind the counter," Torres.

Defendant specifically told the officers, "I'm telling him to give me the money. He was—he was scared. I -- I saw the fear in the man['s] face or whatever." Torres began to retrieve money from the cash register in small amounts, and defendant ordered, "[G]ive me the money before I take your life." Defendant then shot Torres.

Defendant told Hadley and Ranges, "I hit him [Torres] one time and he -- he started to stumble around. I hit him, again. He fell on his back. While he was on his back, I hit him, again. He got up. I think I hit him, again, because I was angry." When Hadley asked why he was angry, defendant said, "Because he was

taking too long . . . [.] [H]onestly, if he would just give me the money, I wouldn't even did nothing to him [sic]."

Defendant admitted that he climbed over the counter to take more money from the register, then ran out to get back in the car with Adams. Defendant said that the car was a Volkswagen Passat. He told Hadley that after the shooting, he "buried" the gun. When asked where, defendant said that he "threw it away in the water" by "downtown Newark." When pressed further, defendant claimed he sold the gun to "a friend." Defendant said he only obtained about $400 from the robbery, and that this "wasn't even worth it." He and his friends used the money to "g[e]t high."

Hadley then asked defendant what he had been doing on December 23, 2011. Defendant replied that he and a friend he knew as "Grimy" were sitting in front of a chicken restaurant when they saw an older woman pull up in a Honda CRV and go inside. Defendant said that when the woman got out of the restaurant, Grimy "[ran] down behind her with the pistol or whatever." Defendant claimed that Grimy got into the woman's car while he walked away, and that the two men later met up a few streets away. Defendant identified a photograph of Ellington as "Grimy."

Hadley then said to defendant that another crime had been committed nearby using the stolen Honda, but provided no details. Defendant immediately responded that he had been the driver "when

this incident happened or whatever." Defendant said that he and Ellington were driving around when they saw a man carrying a white bag walking down the street. Defendant told Ellington the man must have "just [come] from work" and "got mad money." Defendant did a u-turn and double-parked a few car lengths away from the man, and Ellington got out. Defendant said that about two minutes later, he "heard a shot," and Ellington came running back to the car. Defendant asked Ellington why he had shot the man, because the "plan" was only to rob him. After talking about this crime, defendant and Buchuse were given a bathroom break.

Following the break, Hadley showed defendant photos from December 29, 2011 of someone getting out of a car at Rosario Supermarket and going inside. Defendant acknowledged that he was the person in the photos. Hadley asked defendant what he did in the store, to which defendant replied, "I robbed him," and described the gun he used. Defendant explained that he took money and a laptop. Defendant stated that Ellington was driving the car they rode in, and that it was the same stolen Honda.

Hadley next asked defendant about his girlfriend, Johnson, using a stolen credit card at McDonald's. On this subject, defendant said Johnson had told him she obtained the credit card herself, but admitted that the two took a group to McDonald's and ordered $90 worth of food. After further questioning, defendant

admitted that he got the credit cards from a purse that Ellington had stolen from "this lady walking."

Hadley next questioned defendant about the Jennifer R. robbery, which involved the same Honda. Defendant denied any knowledge of this incident, and said "a lot of people [were] driving that car." Defendant then asked to use the bathroom and was given another break.

After the break, Hadley asked defendant about the clothing he wore during the Torres robbery, and eventually asked what defendant was wearing on his left hand at the time. Hadley explained at trial that in the surveillance video of the crime, the perpetrator was wearing a bracelet. Defendant told Hadley he had not been wearing anything.

Hadley asked to see defendant's left hand, and defendant said that he was currently wearing a bracelet given to him by Johnson. Hadley asked defendant if he was wearing that bracelet when he shot Torres. Defendant denied this, and stated he was "getting aggravated, sort of." Hadley asked whether defendant was denying he wore the bracelet because it had "sentimental value" and he wanted to keep it away from the police. Defendant eventually admitted he was wearing the bracelet during the robbery, but contended he was saying that because Hadley was "forcing" him.

Defendant then said, "I wish I had a lawyer, I swear to God." Hadley immediately responded, "[A]t this point, we're just going to stop everything. Okay. Because [that's] the same thing as saying [you] want a lawyer." Defendant was not questioned any further. The entire interrogation lasted from approximately 1:45 p.m. to 4:22 p.m.

Buchuse was present in the room with defendant for this entire period. Ranges testified that she was "cooperative." Ranges perceived it was "obvious that she . . . wanted her son to do the right thing" and "tell the truth." Ranges further stated that defendant was "fine" and "calm" during the interview. Hadley likewise stated that defendant was cooperative until his bracelet was brought up. Neither defendant nor Buchuse hesitated in answering any questions. Ranges and Hadley testified that they never made any promises or threats toward defendant or Buchuse.

In sum, defendant admitted to the detectives that he had committed or participated in crimes involving five of the six victims,[6] including the two homicides. Additionally, as we have noted, Buchuse provided corroborating information that implicated her son in the Torres homicide.

[6] The exception was the robbery of Jennifer R.

Ranges testified that after completing the interviews, he went back to his desk to type up an arrest warrant for defendant. Shortly thereafter, Ranges learned that defendant had left the building. He, Hadley, and other officers searched for defendant for the rest of the day. On January 21, 2012, defendant was found hiding at his aunt's home and was arrested.

The Indictment and Pretrial Proceedings

The indictment charged defendant with: conspiracy to commit carjacking, N.J.S.A. 2C:5-2 (Count One); carjacking, N.J.S.A. 2C:15-2 (Count Two); five counts of unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (Counts Three, Six, Twelve, Sixteen, and Twenty-Two); five counts of possessing a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Counts Four, Seven, Thirteen, Seventeen, and Twenty-Three); four counts of robbery, N.J.S.A. 2C:15-1 (Counts Five, Nine, Fifteen, and Nineteen); three counts of conspiracy to commit robbery, N.J.S.A. 2C:5-2 (Counts Eight, Fourteen, and Eighteen); two counts of felony murder, N.J.S.A. 2C:11-3(a)(3) (Counts Ten and Twenty); two counts of murder, N.J.S.A. 2C:11-3(a)(1) (Counts Eleven and Twenty-One), and possession of a stolen credit card, N.J.S.A. 2C:21-6(c)(1) (Count Twenty-Four).

Defendant moved before trial to suppress the statements he had made to police. After an evidentiary hearing in November

2013, the trial court denied the suppression motion, finding that defendant's self-incriminating statements to the police during his custodial interrogation in the company of his mother were voluntary and not coerced.

On the brink of trial, defendant moved pro se to sever Counts Eighteen through Twenty-Three, concerning the Torres murder and robbery, from the other charges. The trial judge orally denied the severance motion. Later, the judge issued a detailed written opinion on July 2, 2015 amplifying his reasons for denying severance.

The Trial

The trial took place over numerous days in February, March, and April 2015. The State's witnesses presented the facts we have already described. In the defense case, defendant and his mother testified and attempted to repudiate the incriminating statements made during the police interrogation. Defendant contended that the officers had "told [him] what to say" and that he had complied with their demands after they physically abused him. Defendant denied any involvement in the crimes inflicted against the six victims. His mother, Buchuse, recanted her identification of defendant from the photos and surveillance video that the police had shown to her at the station.

The jury found defendant guilty of all counts of the indictment. The trial court sentenced defendant in July 2015. This appeal followed.

II.

On appeal, defendant raises the following points for our consideration:

> POINT I
>
> REVERSIBLE ERROR WAS COMMITTED WHEN THE JUDGE DENIED DEFENDANT'S SEVERANCE MOTION WITH RESPECT TO THE JANUARY 2017 MURDER/ROBBERY OF MR. TORRES. ALTERNATIVELY, IF THOSE OFFENSES WERE PROPERLY ALL TRIED TOGETHER, THE TRIAL JUDGE NEEDED TO GIVE A LIMITING INSTRUCTION REGARDING THE PERMITTED AND PROHIBITED USES OF ONE INCIDENT TO PROVE ANOTHER. WITHOUT SUCH AN INSTRUCTION, THE DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL. (SEVERANCE RAISED BELOW; INSTRUCTIONAL ERROR NOT RAISED BELOW).
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> POINT II
>
> DEFENDANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND AN IMPARTIAL JURY WHEN: A MALE AUDIENCE MEMBER IN THE COURTROOM IMPROPERLY MADE A SEXUAL/ROMANTIC ADVANCE TO A FEMALE JUROR THAT SHE FOUND TO BE "CREEPY"; VOIR DIRE OF THE OFFENDING PERSON AND OF THE JURY REVEALED THAT WHILE THE MAN WAS NOT RELATED TO DEFENDANT, THE OFFENDED JUROR EXPRESSED CONCERN THAT HE WAS AND MORE THAN ONE JUROR EXPRESSED CONCERN ABOUT THE SITUATION; DEFENSE COUNSEL ASKED MULTIPLE TIMES FOR THE JUDGE TO SPECIFICALLY INSTRUCT THE JURY THAT THE MAN HAD NO CONNECTION TO DEFENDANT; AND THE JUDGE DENIED THAT INSTRUCTION, COMPLAINING THAT TO SO INSTRUCT THE JURY WOULD REQUIRE HIM TO MAKE A FACT FINDING.

POINT III

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE AND VIOLATIVE OF THE DEFENDANT'S RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT.

PRO SE POINT I

THE TRIAL COURT ERRED WHEN USING THE INADMISSIBLE CONFESSION OF DEFENDANT, WHICH WAS ILLEGALLY OBTAINED FROM PROSECUTOR'S INVESTIGATORS ON GROUNDS HIS RIGHT TO COUNSEL UNDER U.S. CONSTITUTION AMENDMENT V AND VI WAS VIOLATED. THE RESULT OF A CUSTODIAL INTERROGATION WITHOUT A KNOWING WAIVER OF HIS RIGHT AGAINST SELF INCRIMINATION AND STATEMENT SHOULD NOT HAVE BEEN USED DURING TRIAL, IT DEPRIVED DEFENDANT DUE PROCESS.

A.

As his primary argument on appeal, defendant contends the trial court erred in denying his motion to sever the counts of his indictment related to the Torres crimes from the others. More specifically, he argues the court should have granted severance of the Torres counts because that incident was unrelated to his other actions. He asserts that there were "glaring differences" between the Torres incident and the others, such as a different car and a different codefendant. He also argues that the evidence concerning the Torres killing created undue prejudice, because it "paint[ed] an awful picture" of him that "made it impossible to get a fair trial" as to the other charges against him.

Defendant further argues, for the first time on appeal that, alternatively, the court erred in failing to issue a "comprehensive N.J.R.E. 404(b) instruction" to the jury to explain the permissible and impermissible uses for which it could consider evidence of the Torres crimes when evaluating his guilt as to the charges concerning the five other victims.

We reject these related arguments and are unpersuaded that defendant is entitled to a new trial on any of the charges.

Generally, in deciding a motion for severance, the trial court enjoys "a wide range of discretion[.]" State v. Coruzzi, 189 N.J. Super. 273, 297 (App. Div. 1983). A denial of a motion for severance should not be reversed "absent a mistaken exercise of that discretion." Ibid. (citations omitted).

"[W]here the evidence establishes that multiple offenses are linked as part of the same transaction or series of transactions, a court should grant a motion for severance only when [a] defendant has satisfied the court that prejudice would result." State v. Moore, 113 N.J. 239, 273 (1988) (citations omitted). The courts have recognized that any trial involving several charges "probably will involve some potential of [prejudice], since the multiplicity alone may suggest to the jury a propensity to criminal conduct." Coruzzi, 189 N.J. Super. at 297. However, "other considerations, such as economy and judicial expediency, must be weighed" when

deciding a severance motion. Ibid. These interests may require that charges remain joined, "so long as the defendant's right to a fair trial remains unprejudiced." Id. at 298 (citations omitted).

The proper inquiry when deciding a motion for severance is whether, if the crimes were tried separately, evidence of the severed offenses would be admissible at the trial of the remaining charges. State v. Chenique-Puey, 145 N.J. 334, 341 (1996). If the evidence would be admissible at both trials, the trial court should not sever the charges, because the defendant "will not suffer any more prejudice in a joint trial than he would in separate trials." Coruzzi, 189 N.J. Super. at 299. To evaluate whether evidence of each crime would be admissible at the trial of the others, and thus whether severance should be denied, the trial court must utilize the same standard used to determine whether other-crime evidence is admissible under N.J.R.E. 404(b). Chenique-Puey, 145 N.J. at 341.

The Supreme Court's opinion in State v. Cofield, 127 N.J. 328, 338 (1992), sets forth the well-established test for deciding whether evidence is admissible under this rule:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;

> 2. It must be similar in kind and reasonably close in time to the offense charged;[7]
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [(quoting Abraham P. Ordover, Balancing the Presumption of Guilt and Innocence: Rules 404(b), 608(b), and 609(a), 38 Emory L.J. 135, 160 (1989)).]

The party seeking to admit other-crime evidence bears the burden to establish each of the four prongs. See State v. J.M., 225 N.J. 146, 158-59 (2016). A court's determination on the admissibility of other-crime evidence is "entitled to deference" and is "reviewed under an abuse of discretion standard." State v. Ramseur, 106 N.J. 123, 266 (1987). "Only where there is a 'clear error of judgment' should the 'trial court's conclusion with respect to [the] balancing test' be disturbed." State v. Marrero, 148 N.J. 469, 483 (1997) (quoting State v. DiFrisco, 137 N.J. 434, 496-497 (1994)).

When weighing the probative value of N.J.R.E. 404(b) evidence against its prejudicial nature under the fourth prong of Cofield, a court must focus on "the specific context in which the evidence

[7] In subsequent case law, the Supreme Court has indicated this second prong of Cofield does not always need to be satisfied. See State v. Williams, 190 N.J. 114, 131-34 (2007).

is offered[.]" State v. Stevens, 115 N.J. 289, 303 (1989). The court should also consider whether the fact the other-crime evidence is offered to prove "cannot be proved by less prejudicial evidence." State v. Hardaway, 269 N.J. Super. 627, 631 (App. Div. 1994). Further, judicial economy in some circumstances may justify denying a severance motion where many of the same witnesses would need to testify in each trial if the counts were separated. Moore, 113 N.J. at 276.

Here, in its written decision denying defendant's motion to sever the Torres counts, the court addressed each of the four Cofield factors in detail. As to Prong One, it found that the evidence of each crime was "relevant to the material issue of establishing [d]efendant's identity" during all of the other crimes. The court reasoned that detectives traced the use of A.S.'s credit cards to Johnson, who in turn identified defendant in surveillance footage and thus introduced him as a suspect in all six crimes. It also found that Johnson's identifications of and familiarity with defendant, Jennifer R.'s identification of him in a photo array, and the videos of the B.C. carjacking showing his unmasked face assisted detectives in "establish[ing his] identity when compared to the physical characteristics of the suspect" captured in surveillance footage of the Juan R. and Torres robberies. The court found that evidence of each crime helped to

"establish[] a chain of events showing how detectives learned of [d]efendant's identity." Therefore, that evidence was "relevant to [a] material issue" and Prong One was established.

For Prong Two, the court found that all six criminal incidents occurred in a relatively short period of time and within the same neighborhood. It also found that all six crimes involved the same motive, theft. Therefore, it concluded that Prong Two "strongly favor[ed]" keeping all of the charges together. The court also found that Prong Three had been satisfied, because "there was clear and convincing evidence of [d]efendant's culpability" in each of the charged crimes. This evidence included surveillance videos, eyewitness identifications, and his own confession.

In addressing Prong Four, the court first considered whether the evidence of each crime was necessary to establish defendant's identity for the others, or whether other evidence could have been used to prove the same point. The court noted that defendant confessed to all but one of the crimes in the same statement to law enforcement, and that he had challenged the admissibility of his confession in a suppression motion and had planned to continue challenging its veracity at trial. It also stated that defendant provided information during his statement that only the perpetrator of the crimes would know. It found that "the totality of all these facts," which were elicited as to several crimes

including the Torres homicide, were material to determining the credibility of the statement.

The trial court thus found that even if the counts of the indictment were severed, the jury in each trial would need to consider the entire statement and "all of the State's corroborating evidence" in order to properly assess the credibility of the confession and defendant's trial testimony. The court additionally found that other evidence, such as Johnson's identifications and the comparison of photos from the B.C. carjacking where defendant was unmasked to photos from the Torres robbery where he was hooded, was necessary to establish defendant's identity in the latter crime.

The trial court also duly addressed whether the potential prejudice resulting from a single trial substantially outweighed the evidence's probative value. It found that although trying all of the charges against defendant together was "potentially prejudicial," it was no more so than any other damaging evidence. The court concluded that the potential prejudice was outweighed by the evidence's value in establishing defendant's identity.

Finally, the court found that judicial economy favored trying the charges together. It explained that the testimony of several witnesses was "inextricably connected to many, if not all, of the six incidents and would have been similar if not identical at each

individual trial." These witnesses included Hadley and Ranges, who took defendant's statement; Buchuse, who testified that the statement was involuntary; Johnson, whose identifications of defendant introduced defendant as a suspect in all of the crimes; B.C., who identified her blue Honda CRV as the vehicle used in most of the incidents, and others. The court determined that if there were multiple trials, these witnesses' testimony "would have been unnecessarily duplicative and unduly burdensome for the State," and "confusing and compartmentalized in a way that may have been difficult for the jury to understand." Also, because defendant was "questioned in a fluid manner regarding all six incidents," his confession would have been "fragmented" and "confus[ing]" if some counts were severed.

Because judicial economy favored a single trial and the probative value of the evidence of each crime outweighed the potential for prejudice inherent in any multiple-count trial, the court found that the fourth Cofield factor weighed "moderately" against severance. Ultimately, the court concluded that defendant had "failed to meet his burden of demonstrating 'substantial' prejudice" and denied his motion to sever.

We discern no legal error, nor any abuse of discretion, in the trial court's comprehensive analysis of the severance issue. To be sure, we are mindful that the Torres homicide was

particularly brutal because of the abrupt, impatient manner in which defendant shot the victim as he was slowly complying with defendant's demands for money. We also recognize the evidence shows defendant was not accompanied by Ellington at the bodega, and did not use the Honda CRV as a getaway vehicle. Even so, the nexus between this January 2012 crime and the five other crimes in December 2011 preceding it was more than sufficient to warrant the cases all being tried together.

We also reject defendant's new argument that the trial judge should have, sua sponte, issued a limiting instruction to the jurors specifying the N.J.R.E. 404(b) uses of the other-crime evidence. The failure of defendant's trial counsel to request such a jury charge is indicative of a perception that no such special instruction was necessary. We discern no plain error in this regard that was "clearly capable of bringing about an unjust result." R. 2:10-2; see also State v. Adams, 194 N.J. 186, 206-08 (2008).

We do not read State v. Krivacska, 341 N.J. Super. 1, 42 (App. Div. 2001), to compel a new trial in the present circumstances. Here, as in Krivacska, the trial judge duly instructed the jurors to consider each of the charges separately. Ibid. Likewise here, as in Krivacska, trial counsel did not request a Rule 404(b) instruction regarding the joined charges.

Ibid. As we observed in Krivacska, to "rerun a trial when the [alleged] mistake could easily have been cured on request, would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." Id. at 43. We are unpersuaded that the absence of a more pointed instruction in this case was so egregious to require a new trial on all twenty-four counts of the indictment.

Even if, for the sake of argument, we were to agree with defendant that the Torres offenses should have been severed from the rest of the tried charges, or that alternatively a Rule 404(b) instruction was necessary, we are not convinced those arguments would mandate a new trial. See, e.g., State v. Sterling, 215 N.J. 65, 72 (2013) (in which the Court recognized the improper joinder of certain offenses had occurred at trial but nevertheless upheld a defendant's multiple convictions because the error was harmless in light of the strength of the State's proofs of guilt). The State presented detailed and compelling evidence of defendant's guilt of all of the charged crimes, including the testimony of law enforcement and lay witnesses, the video surveillance footage, the forensic evidence, and the incriminating statements of defendant and his mother. Defendant's claims of error associated with joinder and Rule 404(b), even if they were analytically correct, were harmless in the context presented.

B.

Defendant next argues that he was denied a fair trial because, during deliberations, a man in the audience approached a female juror during a break and spoke to her. Defendant contends that the court erred by failing to instruct the jury that this man was not affiliated with him. We are satisfied that the trial judge appropriately applied his discretion in handling this impromptu situation.

"An appellate court reviews the trial court's jury-related decisions under the abuse of discretion standard." State v. Brown, 442 N.J. Super. 154, 182 (App. Div. 2015) (citation omitted). This standard "respects the trial court's unique perspective," while showing traditional deference to the court in "exercising control over matters pertaining to the jury." Ibid.

"A defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007) (citation omitted). A court therefore must take action to ensure that a jury's verdict will be "entirely free from the taint of extraneous considerations and influences." Panko v. Flintkote, Co., 7 N.J. 55, 61 (1951). The test for determining whether any alleged outside influence on a jury merits a new trial is whether it had the capacity to

"influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Ibid.

Here, on the second day of deliberations, a court officer reported to the judge that a juror told him a man in the audience "told [her he] loved her" as she was leaving for a break. The officer identified the man, Andrew Cappel, and the court questioned him. Cappel said that he was not in the courtroom to watch defendant's trial, but was there for "[his] own proceeding." The court explained that there was a jury deliberating, and admonished Cappel not to communicate with jurors.

The court next spoke with Juror Twelve, who reported the communication. She stated that Cappel approached her closely and said, "I love you," as she exited the courtroom for lunch. She said she could feel Cappel's breath on her face, and that she replied, "What the fuck[.]"

Juror Twelve called the interaction "creepy" and said, "I don't know if he was, like, family of the defendant, like, what's your purpose of talking to me, you know. It's just, I guess, where it occurred. If I'm on the street, I'm just walking, wouldn't pay it any mind." Juror Twelve then said she thought Cappel was "just being a fool." The court asked whether the communication would affect her deliberations, and she said, "Not at all." The court excused her to the jury room.

Defense counsel expressed concern that Juror Twelve believed Cappel was associated with defendant, and requested that the court advise her that he was not. The court declined, saying that it did not "want to get into a point where the court is making an affirmative statement of fact as to association or not[.]"

However, the court did speak to Juror Twelve again, to determine whether she told any other jurors about the incident. Because she had, the court questioned every juror to learn what they had heard. For jurors who stated that they knew someone spoke to Juror Twelve, the court asked whether this would affect their deliberations. For jurors who said that they were not aware of any communication, the court asked whether its own questions about such an incident would affect them. All of the jurors said that they would not be affected. Defense counsel again requested an instruction that Cappel had no affiliation with defendant, and the court denied the request "for reasons previously set forth on the record[.]"

We find no error in the court's actions. The court engaged in exactly the type of inquiry described in State v. R.D., 169 N.J. 551, 559 (2001); it questioned Juror Twelve about the incident and whether any other jurors had heard about it, and conducted a voir dire of the full panel. Each juror said that he or she was

unaffected by Cappel's communication with Juror Twelve, which was brief and unrelated to defendant or the trial.

Further, the court did not err in deciding not to instruct the jury that Cappel was unaffiliated with defendant. As the court stated, such an instruction would have required an express finding of fact that Cappel indeed had no relation to or association with defendant. There was no evidence before the court to support such a finding beyond Cappel's statement that he was not in the courtroom to watch defendant's trial. Further, while Juror Twelve stated that she didn't know whether Cappel was a family member of defendant's, she attested that regardless, his behavior would not affect her deliberations.

C.

Defendant argues in his pro se supplemental brief that the court erred in denying his motion to suppress his confession. He asserts that under N.J.S.A. 2A:4A-39(b)(1), he could not as a juvenile have effectively waived his right to counsel and given a voluntary statement to law enforcement in the circumstances presented. We disagree, and affirm the trial court's admission of defendant's confession substantially for the reasons articulated by the trial court. We discern no merit to defendant's contentions of error or coercion. R. 2:10-2. We add only a few comments.

In State ex rel. P.M.P., 200 N.J. 166, 168-69 (2009), the Court held that the Prosecutor's Office's filing of a juvenile complaint and obtaining of a judicially approved arrest warrant against the juvenile defendant was a "critical stage in the proceedings" triggering the right to counsel under N.J.S.A. 2A:4A-39(b). In reaching its conclusion, the Court cited cases involving adults, for whom the right to counsel attaches at the initiation of adversary proceedings, including proceedings initiated by a formal charge or indictment. Id. at 174.

Here, no arrest warrant or juvenile complaint had been filed against defendant when Hadley and Ranges questioned him. The detectives testified that they had only recently begun to think of defendant as a possible suspect in the crimes that were eventually charged. Although Johnson had already identified him in some crime scene photos, it was not until after defendant gave a statement implicating himself in all of the crimes (except the Jennifer R. robbery) and identified himself in surveillance photos that Ranges began to prepare a request for an arrest warrant.

Under the standard set by P.M.P., the detectives' interview with defendant was not a "critical stage" in a proceeding for which defendant could not waive his right to counsel without first consulting with counsel under N.J.S.A. 2A:4A-39(b). The trial

court did not err in finding that defendant's statement, despite his juvenile status, was admissible.

We also find ample support for the trial court's finding that defendant's confession was voluntary. To be sure, our State has "long accorded juveniles special protections when they are subjected to interrogation." State ex rel. A.W., 212 N.J. 114, 128 (2012). In particular, a juvenile "must be questioned in the 'presence of [his or her] parents or guardians, even if [he or she] waives the Miranda rights.'" State v. Belliard, 415 N.J. Super. 51, 80 (App. Div. 2010) (quoting State ex rel. J.F., 286 N.J. Super. 89, 97 (App. Div. 1995)). This is because a parent may serve as an advisor and "can offer a measure of support in the unfamiliar setting of the police station." State v. Presha, 163 N.J. 304, 314 (2000). If an adult is unavailable or declines to be present, police must conduct an interrogation "'in accordance with the highest standards of due process and fundamental fairness.'" Id. at 317 (quoting State ex rel. S.H., 61 N.J. 108, 115 (2004)).

Ultimately, the State must show that, considering the totality of the circumstances, a juvenile's will was not "overborne by police conduct," State ex rel. Q.N., 179 N.J. 165, 172 (2004) (quoting Presha, 163 N.J. at 313), and his or her statement was "the product of a free choice." J.F., 286 N.J. Super. at 98. For

example, the Court in Presha, 163 N.J. at 308-10, found no error in the trial court's admission of a statement where the defendant was sixteen, had been arrested before, was not handcuffed, remained unguarded in an interview room during breaks in the interrogation, and decided after consultation with his mother that he did not want her in the room during his confession.

Here, the trial court reasonably found that Hadley's testimony at the Miranda hearing, in which he described his and Ranges' interview of defendant, was credible. The judge found that the detectives properly read defendant his Miranda rights and that defendant stated that he understood them and signed the waiver form. The court acknowledged that there were times when defendant "appear[ed] distraught," but found that this was a result of "his realization of the extent of his possible criminal liability" and not of the detectives' conduct. The court also noted that Hadley ended the interview immediately after defendant mentioned wanting a lawyer.

The court concluded that Hadley's testimony, and its own review of the video recording of the interview, established "beyond a reasonable doubt [. . .] that [. . .] there was a knowing, voluntary waiver of [defendant's] rights under Miranda[.]" It also found that there was no suggestion that defendant's statements were a product of coercion or duress, or that his will was

overborne. The court based this finding upon defendant's "demeanor during the video."

We discern no error in the court's denial of defendant's motion to suppress. Defendant was interviewed by Hadley and Ranges with his mother present, and she remained with him throughout his entire statement. The court found that Buchuse was "quite supportive of [defendant's] continued participation in an interview regarding his criminal activities." Later at sentencing, the court reiterated that it had rejected defendant's allegations that he was coerced or manipulated by law enforcement when deciding the suppression motion.

Further, after defendant testified at trial and claimed that his confession was the product of coercion and prompting by detectives, the court instructed the jury to evaluate whether his statement was credible, taking into account his, Hadley's, and Ranges' testimony. It also told the jury to consider the inconsistencies between defendant's statement and his trial testimony and to determine whether defendant's stated reasons for alleging that he confessed falsely were "believable and logical." Finally, the court instructed the jurors to give the confession the weight they felt was appropriate when deciding defendant's guilt or innocence. The jury found defendant guilty of all charges, demonstrating that they did not find defendant's

testimony credible, or felt that the evidence even without the confession established his guilt beyond a reasonable doubt.

Moreover, aside from defendant's and Buchuse's bald assertions, the record contains no evidence that defendant's will was overborne by Hadley and Ranges during their interview. The recording, and the detectives' testimony, showed that defendant and Buchuse were "cooperative" and at no point stated that they did not want to speak. Similar to Presha, defendant was age sixteen, had prior encounters with law enforcement, was not handcuffed or otherwise restrained, and was given breaks during the interview. Additionally, the interview was not especially long, and defendant was provided with food, drink, and cigarettes. There is no evidence beyond defendant's assertions that he was subjected to any form of coercion.

In sum, the trial court's conclusion that defendant's statement to police was voluntary was supported by sufficient credible evidence in the record, and the court did not err in denying his motion to suppress that statement.

D.

Finally, defendant argues that his aggregate 123-year sentence with a parole disqualifier exceeding a full century is excessive and unconstitutional. On statutory grounds, he asserts that the trial court erred by applying aggravating factor six,

N.J.S.A. 2C:44-1(a)(6). He further contends that the court unconstitutionally failed to adequately consider his youth, as required by recent United States Supreme Court and New Jersey Supreme Court precedent restricting lengthy custodial terms for juvenile-aged offenders that have the practical impact of imposing a life sentence without a realistic prospect of parole. Having considered these arguments of unconstitutionality in light of the most recent Supreme Court case law, some of which was decided after the sentence was imposed by the trial court in this case, we are constrained to remand for reconsideration of the aggregate sentence.[8]

With respect to defendant's non-constitutional arguments, we are mindful that appellate review of sentencing decisions generally is "relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). A trial court enjoys "considerable discretion in sentencing." State v. Blann, 429 N.J. Super. 220, 226 (App. Div. 2013) (citation omitted), rev'd on other grounds, 217 N.J. 517 (2014).

An appellate court first "must determine whether the sentencing court followed the applicable [statutory] sentencing

[8] At our request, counsel supplied us with helpful supplemental memoranda addressing recent case law and statutory developments about juvenile-aged offender sentencing that emerged after the main briefs on appeal had been filed.

guidelines." State v. Natale, 184 N.J. 458, 489 (2005) (citation omitted). The Code of Criminal Justice categorizes crimes by degree, and "each degree contains a range within which a defendant may be sentenced." State v. Case, 220 N.J. 49, 63 (2014). Here, defendant's sentences were within the statutory ranges for each of his discrete offenses.

Defendant was convicted of two purposeful murders under N.J.S.A. 2C:11-3(a)(1) and (2). Under N.J.S.A. 2C:11-3(b)(1), a person convicted of murder shall be sentenced to a term of 30 years without parole, or to "a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole."[9]

The court sentenced defendant to consecutive terms of forty-two years for the Campos felony murder and sixty-two years for the Torres murder, both with eighty-five percent periods of parole ineligibility. Each of defendant's felony murder convictions merged with its respective purposeful murder.

[9] In July 2017, the Legislature amended the murder statute to expressly disallow life-without-parole sentences for juvenile-aged murderers, and to confine the sentencing options for such convicted young persons to the terms of N.J.S.A. 2C:11-3(b)(1), eliminating the more stringent possible sentences available for certain adult murderers under N.J.S.A. 2C:11-3(b)(2), (3), and (4). See L. 2017, c. 150 (eff. July 21, 2017). We agree with the State that the amended statute remains subject to the parole ineligibility terms of the No Early Release Act, N.J.S.A. 2C:43-7.2(b) and -7.2(d)(1).

Defendant was also convicted of multiple other first-degree crimes, for which the sentencing range is between ten and twenty years. N.J.S.A. 2C:43-6(a)(1). He was sentenced to sixteen years for the B.C. carjacking, seventeen years for the Jennifer R. robbery, twenty years for the Campos robbery, nineteen years for the Juan R. robbery, and twenty years for the Torres robbery, all with eighty-five percent periods of parole ineligibility. N.J.S.A. 2C:15-2; N.J.S.A. 2C:15-1.

Lastly, defendant was convicted of five counts of unlawful possession of a weapon, a second-degree crime with a range of between five and ten years. N.J.S.A. 2C:39-5(b); N.J.S.A. 2C:39-4(a); N.J.S.A. 2C:43-6(a)(2). He was sentenced to six, seven, eight, nine, and nine and a half years for each of these offenses, respectively. Finally, defendant was sentenced to eighteen months for possessing stolen credit cards, the maximum sentence for such a fourth-degree crime. N.J.S.A. 2C:21-6(c)(1); N.J.S.A. 2C:43-6(a)(4). Defendant's convictions for conspiracy and possession of a weapon for an unlawful purpose merged with their associated crimes.

1.

We first address defendant's statutory argument respecting the application of aggravating factor six. A reviewing court must ensure that any aggravating factors found by the trial judge under

N.J.S.A. 2C:44-1 are based upon sufficient credible evidence in the record. State v. Miller, 205 N.J. 109, 127 (2011) (citation omitted). If the factors found by the trial court are so grounded, the sentence must be affirmed even if the reviewing court would have reached another result. State v. O'Donnell, 117 N.J. 210, 215 (1989) (citation omitted).

Whether a sentence will "gravitate toward the upper or lower end of the [statutory] range depends on a balancing of the relevant factors." Case, 220 N.J. at 64. A court "must qualitatively assess" the factors it finds, and assign each an "appropriate weight." Id. at 65. An appellate court may remand for resentencing where the trial court fails to provide a qualitative analysis of the relevant factors, or if the trial court "considers an aggravating factor that is inappropriate to a particular defendant or to the offense at issue." State v. Fuentes, 217 N.J. 57, 70 (2014).

Here, although the court found several aggravating factors, defendant challenges only the finding of factor six. This factor references "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted[.]" N.J.S.A. 2C:44-1(a)(6).

When discussing the aggravating factors it had found, the trial court reasoned in its oral ruling:

> Factor [six], the seriousness of offenses for which he is convicted, . . . this factor applies to all counts here. It's clearly applicable to the carjacking [and] robbery, as they are serious offenses, and criminal homicide is the most serious of offenses, and credit card fraud, while it pales in relative significance, is still prohibited by criminal statutes.

In evaluating possible mitigating factors, the court rejected factor seven, that "the defendant has no history of prior delinquency" or criminal activity. It stated that this mitigating factor did not apply because of defendant's "four juvenile petitions, two of which were adjudicated delinquent." It recounted defendant's history, including petitions for drug charges, trespassing, and violations of probation. The court also noted that defendant's second adjudication, for terroristic threats, occurred while he was awaiting trial in this matter in a "youth house." The court sensibly concluded that this adverse history was too significant for mitigating factor seven to apply.

Nevertheless, when asked to clarify its findings after pronouncing the sentence, the court stated that defendant's juvenile record was "not such to . . . independently support" a finding of aggravating factor six. However, it noted that the current offenses "were committed while [defendant] was on probation."

The judge therefore based his finding of aggravating factor six erroneously upon the seriousness of the crimes for which defendant was currently being sentenced, and not the seriousness of any prior offenses. However, despite the judge's finding that defendant's juvenile record did not, by itself, support a finding of aggravating factor six, we are satisfied that it did and thus no abuse of discretion occurred. Defendant had a significant juvenile history that continued and escalated even after he was arrested for the current crimes and placed in a juvenile facility. Aggravating factor six therefore was not "inappropriate to [this] particular defendant." Fuentes, 217 N.J. at 70.

2.

We now turn to the troublesome constitutional issues, guided by the series of opinions by the United States Supreme Court and, most recently, the New Jersey Supreme Court.

In Graham v. Florida, 560 U.S. 48, 82 (2010), the United States Supreme Court held that the Eighth Amendment of the United States Constitution prohibits the imposition of a life without parole ("LWOP") sentence "on a juvenile offender who did not commit homicide." The Court observed that juveniles generally have lessened culpability and are "less deserving of the most severe punishments." Id. at 68. The Court recognized in Graham that a LWOP sentence is "especially harsh" for a juvenile, who will "on

average serve more years and a greater percentage of his life in prison than an adult offender." Id. at 70. The Court noted that LWOP gives no chance for true rehabilitation, since a juvenile who knows that he or she will never leave prison has "little incentive to become a responsible individual." Id. at 79.

However, Graham recognized that "[t]here is a line 'between homicide and other serious violent offenses against the individual.'" Id. at 69 (quoting Kennedy v. Louisiana, 554 U.S. 407, 438 (2008)). The Court repeatedly referred to "juvenile nonhomicide offenders" and juveniles "who did not commit homicide" when stating its findings. Id. at 71-75. Indeed, later in Miller v. Alabama, 567 U.S. 460, 473 (2012), the Court clarified that Graham's holding "applied only to nonhomicide crimes."

Additionally, the Court held in Graham that the State was not required to "guarantee eventual freedom" to a juvenile nonhomicide offender, and need not "release that offender during his natural life[,]" and that, instead, the State must only give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75 (emphasis added). The Court further stated that "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Ibid.

Subsequently, in Miller, 567 U.S. at 465, the United States Supreme Court held that the Constitution prohibits the imposition of statutory mandatory LWOP sentences upon minors, even in homicide cases. The Court stated that the "mandatory penalty schemes" at issue, which required an LWOP sentence for anyone convicted of murder regardless of age, improperly prevented the sentencing court from taking account of the mitigating qualities of youth as required by Graham. Id. at 473-77. Specifically, the Court found that sentencing a juvenile to LWOP under a mandatory sentencing statute

> precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.
>
> [Id. at 477-78.]

Despite holding that mandatory LWOP statutes should not be applied to juveniles, the Supreme Court nevertheless made clear

in Miller that it had not "foreclose[d] a sentencer's ability to make [the] judgment in homicide cases" on a case-by-case discretionary basis, that a juvenile offender's crime "'reflects irreparable corruption'" warranting an LWOP sentence. Id. at 479-80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)). However, the Court stressed that appropriate occasions for imposing this degree of penalty would be "uncommon." Id. at 479.

Subsequently, in Montgomery v. Louisiana 577 U.S. __, 136 S. Ct. 718, 736 (2016), the United States Supreme Court made clear that the principles of Graham and Miller apply retroactively. The Court also reaffirmed the "meaningful opportunity" concept it previously expressed in Miller. Id. at 736-37.

Our own Supreme Court very recently addressed these juvenile offender sentencing concerns in State v. Zuber, 227 N.J. 422, 446-47, cert. denied, 583 U.S. __, 138 S. Ct. 152 (2017), and a companion appeal in State v. Comer, 227 N.J. 422, 433-34, cert. denied, 583 U.S. __, 138 S. Ct. 152 (2017). Our Supreme Court held in Zuber that "Miller's command that a sentencing judge 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison' [. . .] applies with equal strength to a sentence that is the practical equivalent of [LWOP]." Id. at 446-47 (quoting Miller, 567 U.S. at 480). The Court explained that the "proper

focus" under the Eighth Amendment is "the amount of real time a juvenile will spend in jail and not the formal label attached to his sentence." Id. at 429.

Factually, the Court reviewed the sentences of two offenders who were juveniles when they committed their crimes: Zuber, who was convicted of two rapes and sentenced to an aggregate of 110 years with fifty-five years of parole ineligibility, and Comer, who was convicted of four armed robberies and sentenced to an aggregate of seventy-five years with just over sixty-eight years of parole ineligibility. Id. at 430-33. The trial courts that had sentenced these defendants did not consider their "age or related circumstances[.]" Id. at 429.

The Court held in Zuber that a sentencing judge must consider the Miller factors when sentencing a juvenile to a lengthy period of parole ineligibility. Id. at 447. It also held that a judge must consider the Miller factors, along with the state-law sentencing principles set forth in State v. Yarbough, 100 N.J. 627, 643-44 (1985), when imposing consecutive sentences upon juvenile offenders. Id. at 450. Notably for the present appeal, the Court also recognized that the aggregate impact of consecutively-imposed sentences must be considered when applying the Miller factors, bearing in mind the real-world practical

expectation of when such an offender with consecutive aggregate sentences might be eligible for parole. Id. at 449-50.

In short, the Court held in Zuber that a judge must "do an individualized assessment of the juvenile about to be sentenced—with the principles of Graham and Miller in mind." Id. at 450. In reworded form, the Court distilled the "Miller factors" as entailing "[the] defendant's 'immaturity, impetuosity, and failure to appreciate risks and consequences'; 'family and home environment'; family and peer pressures; 'inability to deal with police officers or prosecutors' or his own attorney; and 'the possibility of rehabilitation.'" Id. at 453 (quoting Miller, 567 U.S. at 478).

As in Graham and Miller, our Supreme Court in Zuber did not categorically prohibit the imposition of sentences on juvenile-aged offenders that are the functional equivalent of LWOP. Id. at 450-52. Instead, the Court stated that "even when judges begin to use the Miller factors at sentencing," some juveniles may appropriately receive long sentences with substantial periods of parole ineligibility, "particularly in cases that involve multiple offenses on different occasions or multiple victims." Id. at 451.

Here, the trial court decided that the sentences for the Campos and Torres homicides, plus the Juan R. robbery, would run consecutive to one another, for an aggregate sentence of 123 years

with an eighty-five percent period of parole ineligibility. All of the other sentences were to be concurrent to these three. In reaching this conclusion, the court explicitly referenced Miller and Graham, as well as Yarbough. The Court did not have the benefit of our Supreme Court's 2017 opinion in Zuber. Nor did it have the benefit of the legislation enacted in July 2017 aimed at implementing the constitutional policies underlying Graham, Miller, and Zuber. See L. 2017, c. 150; Senate Budget and Appropriations Comm. Statement to A. 373 (June 1, 2017).

In a prescient manner, the trial judge recognized that although youth is not "an identified mitigating factor under [New Jersey's] sentencing scheme," it would, nevertheless, "consider relative youth in fashioning a sentence" for defendant. The judge observed that, here, an LWOP sentence was "not a possibility." As a result, the judge concluded that Miller and Graham did not "specifically control" its decision, but that the principles discussed in those cases "in terms . . . of the development of a juvenile's appreciation for the consequences of their conduct [did] apply . . . to [defendant] specifically in view of his conduct in this case and his prior conduct as a juvenile."

The trial judge went on to address the Miller factors when analyzing potential mitigating factors of each discrete sentence he imposed. The judge discussed defendant's home life and

childhood, finding that they were "unremarkable" because there was "no abuse and neglect" and both defendant's parents were in his life. With regard to impetuosity, the judge found that, particularly as to the Torres robbery-homicide, defendant's actions were planned and cold-blooded rather than childish or immature.

The judge also found significant that, as defendant continued to commit crimes, and particularly after participating in the Campos homicide, he was "placed . . . on notice of the potential lethal consequences" to his actions. He therefore found that defendant's "relative youth diminish[ed] as a mitigating factor over time after he[was] engaged in successive criminal acts." The judge additionally found that while rehabilitation was possible for defendant, it was "not controlling in this case."

The judge went on to consider the factors for cumulative sentences, as set forth in Yarbough, 100 N.J. at 643-44. Defendant does not challenge the court's findings as to these Yarbough factors.

Ultimately, the sentencing judge concluded that the Campos murder was the turning point in defendant's actions after which he should have recognized the consequences of his conduct and stopped committing crimes. As a result, the judge decided that the sentences for the Campos murder and the offenses committed

after that — i.e. the Juan R. robbery and the Torres murder — should run consecutively. In explaining this conclusion, the judge said that it "[didn't] find that youth mitigat[ed] against imposition of consecutive terms of imprisonment."

With all due deference to the sentencing judge, and with admiration for his prescient assumption that the Miller constitutional factors of youthfulness do apply here, we are persuaded that the matter must be remanded for sentencing in light of the most recent United States Supreme Court case law in Montgomery and New Jersey precedent in Zuber. To be sure, the judge discussed the Miller factors, albeit sometimes rather briefly, in discussing each of the discrete sentences that was consecutively added to attain the 123-year aggregate total and the 102-year accumulated parole disqualifier.

What is critically missing is an explicit recognition and analysis by the judge that the aggregate sentence here spans more than a hundred years and that, like the very lengthy terms the trial court imposed upon Ricky Zuber and James Comer, the total sentence is the practical equivalent of life without parole. The judge correctly stated that this is not literally an LWOP sentence, but the practical reality is to the contrary. The Supreme Court case law does not constitutionally prohibit such a very long sentence for a juvenile convicted of murder. But the discrete

justifications set forth by the judge, tied to the Miller factors, for each incremental component of the sentence do not explain why the aggregate term – which assures that defendant will die in prison – passes constitutional muster. The aggregate sentence must be revisited on remand for such an evaluation, this time with the beneficial guidance of Montgomery, Zuber, and the new statutory amendment.

Affirmed as to defendant's convictions, remanded for resentencing. We do not retain jurisdiction.