RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2723-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

G.T.C.,

Defendant-Appellant.

Argued October 2, 2017 – Decided March 13, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 14-05-0052.

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

Sarah Lichter, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Sarah Lichter, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant G.T.C.[1] appeals his conviction and sentence for conspiracy, two counts of aggravated sexual assault and multiple counts of endangering the welfare of a child. Having reviewed the record in light of the applicable law, we affirm defendant's convictions, vacate his sentence and remand for resentencing.

I.

The charges in this matter arise from allegations defendant and his codefendant R.B. conspired to sexually assault and endanger the welfare of R.B.'s thirteen-year-old nephew, Scott, and eight-year old niece, Alice. The State alleged defendant and R.B. conspired to sexually assault the children and have the children perform sex acts upon each other. Defendant did not physically participate in the sexual assaults and sexual activity between the children, but he encouraged and planned the assaults and activity, listened to the assaults and activity over the phone, and requested and obtained photographs of the assaults and activity from R.B.

Defendant and R.B. were charged in an indictment with committing offenses occurring during two overlapping timeframes. The indictment charged defendant and R.B. with the following eleven offenses "between on or about November 28, 2010, and on or about January 22, 2011": second-degree conspiracy to commit aggravated

[1] We employ initials and pseudonyms to protect the victims' privacy. See N.J.S.A. 2A:82-46(a).

sexual assault and endangering the welfare of a child, N.J.S.A. 2C:5-2, N.J.S.A. 2C:14-2 and N.J.S.A. 2C:24-4 (count one); two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) and N.J.S.A. 2C:14-2(a)(2)(a) (counts two and three respectively); six counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4 (count four, five, seven, nine, ten and twelve); and two counts of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4 (counts six and eleven). The indictment alleged the following two offenses were committed "between on or about November 28, 2010, and on or about February 16, 2011:" two counts of fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b) (counts eight and thirteen).

R.B. pleaded guilty to some of the charges pursuant to a negotiated plea agreement. Defendant's trial was scheduled for May 2014. On May 13, 2014, a grand jury returned a superseding indictment charging defendant with the identical thirteen criminal offenses alleged in the original indictment. The superseding indictment, however, modified the timeframe during which the crimes were allegedly committed to also include the period between August 5, 2010, and November 27, 2010.

At a May 13, 2014 pretrial conference, the court addressed the superseding indictment. The State asserted defendant was not prejudiced by the expansion of the indictment's timeframe because

it provided defendant with all of the discovery pertinent to the modified timeframe with the discovery materials related to the original indictment. Defense counsel acknowledged defendant had been previously provided with the discovery materials relating to the events occurring during the modified timeframe, but observed the superseding indictment expanded the allegations beyond those he anticipated would be at issue at trial. The court was not asked to decide any issues regarding the superseding indictment, and scheduled a hearing on pretrial issues, including the State's request to admit evidence under N.J.R.E. 404(b).

At the hearing three days later, the court considered whether to proceed to trial on the superseding indictment.[2] The State explained it intended to introduce evidence showing that during the expanded timeframe, August 5, 2010, to November 27, 2010, defendant: communicated with R.B. about her participation in sex acts with the children; obtained a photograph in August 2010 from R.B. showing her engaged in oral sex with Scott; and spoke with Scott on the phone in September 2010, persuaded Scott to have sexual intercourse with R.B., and listened on the phone as R.B. and Scott had sexual intercourse.

[2] At the hearing, the court also determined the admissibility of certain evidence under N.J.R.E. 404(b). The court's determination on the admission of the evidence is not an issue on appeal.

The court found, and defense counsel acknowledged, that the discovery materials concerning the events were provided to defendant in connection with the original indictment. The court further found counsel should have reasonably anticipated the State would seek to introduce the evidence concerning the events under N.J.R.E. 404(b) in the trial on the original indictment. The court determined that permitting the trial to proceed under the revised timeframe did not violate defendant's due process rights "because all of the acts and the parties and the evidence and the images . . . that are utilized to prove the State's case in the superseding indictment are the same as in the original indictment." The court concluded the matter would proceed to trial on the superseding indictment. Defendant did not request an adjournment.

The trial evidence showed defendant and R.B. met on an online dating service in August 2010, and began an intimate relationship. At the time, R.B. lived with her mother, and brother and sister-in-law and their children, Scott and Alice.[3] Defendant visited their home on occasions when R.B., Scott and Alice were present.

During an August 2010 sexual encounter between defendant and R.B., he asked R.B. if she would let Scott join them. R.B. told defendant she would let Scott join them, but never did. She

[3] Scott and Alice are step-brother and sister.

perceived the discussion as "role-playing," but later defendant asked R.B. if she would have sex with Scott while defendant watched. R.B. told defendant she would not have sex with Scott, and explained she only said Scott could join their sexual encounters for defendant's entertainment. Defendant responded that R.B. made him feel guilty. Defendant sent R.B. a picture of his penis and asked her to compare it to Scott's penis.

The following day, on August 20 or 21, 2010, R.B. exchanged text messages with defendant. Defendant told R.B. to "have some fun" with Scott. She understood the message directed her "to do something sexual with Scott." She took a picture of Scott's penis and took a photograph of herself performing oral sex on Scott. She sent the photo to defendant, and he responded by stating it was "hot" and "he was turned on by it."

In September 2010, R.B. spoke to defendant over the telephone and said she was home alone with Scott. Defendant told her "it was a perfect time to do it, because nobody was home." She said Scott was nervous, and she gave the phone to him. Scott testified defendant bribed him into having sex with R.B. R.B. explained Scott gave the phone back to her and he appeared "more comfortable with doing what [they] were gonna do." R.B. and Scott then had sex while defendant listened over the telephone. After R.B. had

sex with Scott, defendant texted her a picture of his penis and said what she and Scott had done was "hot."

The following month, defendant planned to sleep over at R.B.'s brother's home. Defendant said he wanted to give Alice Benadryl[4] and have her lay in bed with them. On the evening defendant slept over, he asked R.B. to bring Alice to the bed, but R.B. made excuses. R.B. testified defendant became aggravated because she said she "was gonna do stuff and . . . never did it." During the following few weeks, R.B. and defendant stopped talking. R.B., however, continued to send daily text messages to defendant saying she loved him.

R.B. and defendant rekindled their relationship on Thanksgiving. By early December 2010, at defendant's request R.B. began sending defendant pictures showing Alice with her leg behind her head wearing no underwear, masturbating, and playing dress-up naked in stockings. R.B. testified defendant "liked them," and "would say that's hot, or he would be like — like can I have some more," and asked R.B to take sexual photos of Alice.

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[4] Benadryl is a brand name for diphenhydramine, an antihistamine, used to treat symptoms of allergies, hay fever or the common cold. See *Diphenhydramine*, MEDLINEPLUS.GOV, https://medlineplus.gov/druginfo/meds/a682539.html (last visited Feb. 20, 2018). "Diphenhydramine should not be used to cause sleepiness in children." Ibid.

On January 22, 2011, R.B. photographed eight-year old Alice engaging in oral sex with thirteen year-old Scott, and sent it to defendant. Defendant responded in a text message asking if they "were having fun." The following day, R.B. and defendant were arrested. R.B. testified that during the course of her six-month relationship with defendant, she sent defendant "like 40" sexually explicit pictures of Scott and Alice.

During the police investigation, data was retrieved from defendant's phone showing 1123 text messages sent by defendant. The compact disc containing the messages was introduced into evidence without objection as exhibit P-2. The State also introduced without objection a compact disc, exhibit P-3, that included outgoing text messages from defendant's phone to R.B.'s phone.

Some of defendant's text messages to R.B. were read to the jury during the testimony of the police officer who recovered the messages from defendant's phone. For example, the officer testified that during the period from November 10 to November 28, 2010, defendant asked R.B. if she "mess[ed] with little man anymore?," if "he love[d] [her] sucking him?," and defendant "want[ed] to see."

The officer testified that on November 28, 2010, defendant sent R.B. messages stating, "Play with Scott or Alice and let me

see," "Think Alice will let you lick her," and "I want to show them love. I'll eat [Alice] and suck [Scott]." The officer explained defendant also asked R.B. if her brother "would let the kids stay with us in [Atlantic City]" and stated, "[t]hey will drink with us that night. I'll get a room, and they can sleep with us. I can watch Scott cum in you. We can take turns," and he and Scott could have sexual intercourse with Alice. The officer testified that on November 28, 2010, defendant also sent messages asking R.B. to "do [him] a favor" when she got home by taking pictures of Alice while she was "half asleep and [] won't remember," describing the performance of sex acts on the children, and asking if R.B. liked touching Alice's genitalia while taking pictures for him.

Another officer testified about a text message exchange between defendant and R.B. during which R.B. recalled defendant saying that he permitted a dog to have anal intercourse with him. The officer testified about text messages in which R.B. repeatedly asked defendant if he would let "him," referring to Scott, do the same to defendant. In messages exchanged a few days later, R.B. tells defendant, "[T]hat whole [Scott] thing we were talking about the other day, he said he would do it as long as I was watching. He asked if I would like it."

Defendant did not present any witnesses at trial. The jury found defendant guilty of all of the charges in the indictment. The court imposed an aggregate fifty-five-year sentence, with forty-five years subject to the requirements of the No Early Release Act (N.E.R.A.), N.J.S.A. 2C:43-7.2. Defendant was ordered to comply with the requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23, and to serve the special sentence of parole supervision for life, N.J.S.A. 2C:43-6.4. This appeal followed.

On appeal, defendant's counsel makes the following arguments:

> POINT I
>
> THE COURT'S FAILURE TO EITHER DISMISS THE STATE'S SURPRISE SUPERSEDING INDICTMENT OR ADJOURN THE CASE TO PERMIT DEFENSE COUNSEL AN OPPORTUNITY TO PREPARE A COMPLETE DEFENSE DEPRIVED THE DEFENDANT OF A FAIR TRIAL. U.S. Const. Amends. V, VI and XIV; N.J. Const. (1947), art. I, ¶¶ 1, 9 and 10.
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> POINT II
>
> THE EXTENDED-TERM SENTENCE OF FIFTY-FIVE YEARS IN PRISON, FORTY-FIVE YEARS WITH AN 85% PAROLE DISQUALIFIER, WAS MANIFESTLY EXCESSIVE.
>
> POINT III
>
> THE UNITED STATES SUPREME COURT SHOULD HOLD THAT DEFENDANT'S SENTENCE HERE TO EXTENDED TERMS AND PAROLE DISQUALIFIERS BASED ON FINDINGS OF FACT OF PRIOR CONVICTIONS MADE BY A JUDGE VIOLATE APPRENDI [v.] NEW JERSEY, 530 U.S. 466 (2000). U.S. Const. Amend. VI, XIV.

In his pro se supplement brief, defendant makes the following argument:

> POINT I
>
> THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING THE PERMITTED AND PROHIBITED USES OF OTHER-CRIME EVIDENCE REQUIRES THE REVERSAL OF DEFENDANT'S CONVICTIONS.

II.

A.

Defendant argues the court erred by permitting the matter to proceed to trial on the superseding indictment. He contends the return of the indictment two weeks prior to the commencement of trial deprived his counsel of an opportunity to investigate the events alleged during the modified timeframe and violated his right to compulsory process. Defendant asserts the court's decision permitting the matter to proceed to trial effectively denied his right to an adjournment to prepare for the additional allegations contained in the superseding indictment.

Defendant never requested a trial adjournment. Instead, he objected to the superseding indictment claiming its modified timeframe required him to defend allegations outside of the time-periods alleged in the original indictment. Counsel argued that although defendant received the discovery concerning all of the events encompassed by the modified timeframe at the outset of the

case, counsel did not anticipate he would have to address the events at the trial on the original indictment.

The court rejected defendant's objection, finding defense counsel "had [the] information the whole time" and the "only difference" was the State would have used the information in a trial on the original indictment to show "the development of the plan and the motive and the intent." The court determined that proceeding to trial on the superseding indictment did not violate defendant's due process rights because all of the evidence the State would "utilize[] to prove [its] case in the superseding indictment are the same as in the original indictment." The court also expressed concern that delaying the trial would extend defendant's already lengthy pretrial incarceration. The court, however, barred admission of any evidence concerning events occurring during the modified timeframe that had not been revealed in the discovery materials provided in connection with the original indictment.

On appeal, defendant does not challenge the State's right to have obtained the superseding indictment. See State v. Zembreski, 445 N.J. Super. 412, 425, 426 (App. Div. 2016) (finding the State has an "unfettered" discretionary right to obtain a superseding indictment "until a jury is empaneled" where there is "probable cause to believe the accused has committed an offense"). He

contends, however, that the court's rejection of his objection to proceeding to trial on the superseding indictment constituted a denial of his right to an adjournment to permit his counsel to adequately prepare to defend the allegations included in the modified timeframe.

A trial court's decision denying a request for an adjournment does not constitute "reversible error absent a showing of an abuse of discretion which caused defendant a 'manifest wrong or injury.'" State v. Hayes, 205 N.J. 522, 537 (2011) (quoting State v. McLaughlin, 310 N.J. Super. 242, 259 (App. Div. 1998) (citation omitted)). A court abuses its discretion when its "decision [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." U.S. v. Scurry, 193 N.J. 492, 504 (2008) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

To the extent defendant's objection to proceeding to trial on the superseding indictment constituted a request for an adjournment, we discern no abuse of the court's discretion and find no evidence the court's decision resulted in a manifest wrong or injustice. The allegations concerning defendant's actions during the modified timeframe, and all of the evidence about them, were not a surprise to defendant. As the trial judge aptly noted, defendant had the discovery materials related to the events from

the outset of the case, and defendant reasonably should have anticipated the State would otherwise attempt to introduce the evidence under N.J.R.E. 404(b). Although "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" may result in a violation of a defendant's rights, State v. Martinez, 440 N.J. Super. 537, 544 (App. Div. 2015) (citation omitted), defendant makes no showing that occurred here.

At no time during the trial did defendant assert that late notice of the modified timeframe hampered his ability to confront the witnesses against him or present witnesses or evidence on his own behalf. Moreover, on appeal, defendant makes no showing that proceeding to trial on the superseding indictment resulted in any prejudice or interfered with his ability to present a defense. Due process "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" State v. Garron, 177 N.J. 147, 168 (2003) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). Defendant fails to demonstrate any denial of that right here.

Defendant also argues the court's rejection of his objection to proceeding to trial on the superseding indictment violated his right to compulsory process. To be sure, defendant had "the right 'to have compulsory process for obtaining witnesses in his favor.'

That guarantee provides a criminal defendant with nothing less than 'a meaningful opportunity to present a complete defense.'" State v. Garcia, 195 N.J. 192, 201-02 (2008) (citation omitted). Defendant's right to present "witnesses in his own defense 'is a fundamental element of due process of law.'" Id. at 202 (citation omitted).

Defendant's argument finds no support in the record. Defendant did not present any witnesses at trial, and the court never denied a request to call a witness or compel a witness to testify at trial. No such requests were made. Moreover, defendant fails to demonstrate the court's rejection of his objection to proceeding to trial on the superseding indictment precluded him from calling a witness, compelling a witness to testify, or presenting any evidence supporting his defense.

The trial court was appropriately "troubled" by the late return of the superseding indictment. Under other circumstances, the return of a superseding indictment two weeks prior to a long-awaited trial might require an adjournment or other remedy to protect a defendant's due process and compulsory process rights. Not so here. The record does not support a reversal of defendant's convictions because although defense counsel may have been inconvenienced, there is no showing defendant suffered any prejudice, his due process and compulsory process rights were

violated, or the late return of the superseding indictment resulted in any manifest injury.

B.

We next consider defendant's pro se argument the court erred by failing to instruct the jury on the proper and prohibited uses of other-crimes evidence under N.J.R.E. 404(b). More particularly, defendant contends he was charged only with the commission of an offense on January 22, 2011, and the evidence showing his communications with R.B. prior to that date, and his actions preceding that date, constitute evidence of prior bad acts under N.J.R.E. 404(b). In his pro se brief, defendant does not challenge the admissibility of the evidence concerning his communications with R.B. and actions prior to January 22, 2011.[5] Defendant argues only that the court failed to properly instruct the jury on the permissible and prohibited uses of the evidence. See State v. Garrison, 228 N.J. 182, 200 (2017) (citation omitted) (finding that where N.J.R.E. 404(b) evidence is presented the court must provide a limiting instructing when the evidence is presented and in the final charge concerning the purposes for

[5] An argument not briefed is deemed waived. Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008); Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001).

which the evidence "may, and . . . may not be used"); accord State v. Rose, 206 N.J. 141, 180 (2011).

We find no merit in defendant's argument in part because it is based on the false premise that he was charged only with an offense occurring on January 22, 2011. In fact, defendant was charged in the superseding indictment with committing eleven offenses between August 5, 2010 and January 23, 2011, and two offenses between August 5, 2010 and February 16, 2011.[6] N.J.R.E. 404(b) applies to uncharged crimes, wrongs or acts. See Rose, 206 N.J. at 179-80. "The threshold determination under [N.J.R.E. 404(b)] is whether the evidence relates to 'other crimes' and thus is subject to continued analysis under the [Rule], or whether it is evidence intrinsic to the charged crime[s]" at trial. Id. at 179. "[E]vidence that is intrinsic to the charged crime[s] is exempt from the strictures of [N.J.R.E. 404(b)] even if it constitutes evidence of uncharged misconduct that would normally fall under [N.J.R.E. 404(b)] because it is not 'evidence of other crimes, wrongs, or acts.'" Id. at 177 (fourth alteration in original). Evidence is intrinsic if it "'directly proves' the

[6] Similarly, and as noted, the original indictment charged defendant with offenses occurring on dates including, but not limited to, January 22, 2011.

charged offense[s]." Id. at 180 (quoting United States v. Green, 617 F.3d 233, 248 (3d Cir. 2010)).

Defendant argues that an instruction on proper and permissible uses of other crimes evidence was required concerning: R.B.'s and Scott's testimony about defendant encouraging Scott to have sexual intercourse with R.B.; R.B.'s testimony that during an August 2010 sexual encounter, defendant expressed an interest in having Scott "join in;" evidence showing text message communications between defendant and R.B. sent during the months prior to January 22, 2011; and evidence showing text messages from defendant discussing bestiality.[7] Defendant's contention lacks merit because the evidence directly proved defendant's commission

[7] The only evidence of a communication between R.B. and defendant about bestiality was the officer's testimony about text messages between defendant and R.B. during which R.B. asked defendant if he wanted to have anal intercourse with Scott in the same manner as defendant indicated he had intercourse with a dog. The text messages related to this discussion constituted direct evidence of defendant and R.B.'s ongoing conspiracy prior to January 22, 2011, to engage in sex acts with thirteen-year-old Scott. Defendant also argues in his pro se brief the court permitted the introduction of testimony concerning text messages between defendant and another woman, S.B., about S.B.'s performance of oral sex upon her child. Prior to trial, however, the court ruled the text messages were not admissible. No testimony concerning the messages was presented at trial. We reject defendant's contention that his text messages with S.B. were published to the jury because they were included on the CD, exhibit P-2, that was admitted in evidence. The record shows that other than the text messages read during the trial testimony, none of the other messages on the CD were disclosed to, or accessed by, the jury.

of the offenses charged in the superseding indictment, including his ongoing conspiracy with R.B. to commit the crimes of sexual assault and endangering the welfare of the children. The evidence did not constitute "other crimes" evidence under N.J.R.E. 404(b), and therefore the court did not err by not providing a jury instruction concerning the uses of the evidence. Id. at 179.

In defense counsel's reply brief, it is argued for the first time that the court erred by failing to provide N.J.R.E. 404(b) instructions concerning text messages sent by defendant to R.B., that may not have directly related to Scott or Alice. It is improper to raise an issue for the first time in a reply brief. State v. Lenihan, 219 N.J. 251, 265 (2014). We choose to address defendant's belated argument, however, because of "the importance of the issue . . . [and] the absence of objection by the State . . . ." State v. Federico, 414 N.J. Super. 321, 328 n.5 (App. Div. 2010).

Defendant challenges the court's failure to instruct the jury under N.J.R.E. 404(b) concerning the proper and prohibited uses of testimony that defendant texted the following six messages to R.B.: "Hell, yeah. I made my boy's daughter lick it. Jealous," "long story for both," "She's a real thick Spanish eight-year old," "No, For Real, Babe," "She did. And the best part was she asked why daddy doesn't do it anymore. I was like, oh, shit," and

"I can try next time. I have to babysit his three daughters next week."

The testimony was limited to a recitation of the messages unaccompanied by any explanation of the context within which each was separately made. Defendant did not object to the testimony about the messages, and never requested a N.J.R.E. 404(b) instruction concerning them. We are satisfied that two of the messages, "Long story for both" and "No, For Real, Babe," do not refer to any prior wrongs, bad acts or crimes requiring instructions under N.J.R.E. 404(b). Fairly read, however, the remaining four messages appear to indirectly show defendant's sexual interest in, and interactions with, children other than Scott and Alice, and thus vaguely suggest he engaged in other bad acts.

The record lacks sufficient evidence permitting a de novo determination of the admissibility of the testimony concerning the text messages under N.J.R.E. 404(b). See generally State v. Cofield, 127 N.J. 328, 338 (1992) (describing the standard for admission of N.J.R.E. 404(b) evidence); see also Garrison, 228 N.J. at 194 (finding appellate courts may conduct a de novo determination on the admissibility of evidence under N.J.R.E. 404(b) where the trial court does not conduct the requisite analysis). However, even assuming the text messages were otherwise

inadmissible under N.J.R.E. 404(b), we are not convinced the fleeting testimony concerning the messages, or the court's failure to provide limiting instructions, were clearly capable of producing an unjust result. R. 2:10-2.

Defendant's failure to object to the testimony at trial supports the conclusion that the evidence was not perceived as prejudicial. See State v. Macon, 57 N.J. 325, 333 (1971) (finding that failure to object constituted recognition by counsel that the alleged error was of "no moment" or was a tactical decision); cf. State v. Wilson, 57 N.J. 39, 50-51 (1970) (finding that a timely and proper objection by trial counsel signifies that the defense believes it has been prejudiced). Similarly, defendant's failure to request a limiting instruction concerning the testimony or object to the court's final instruction that did not include such an instruction "signifies that the error belatedly claimed was actually of no moment." State v. Krivacska, 341 N.J. Super. 1, 43 (App. Div. 2001). "If defense counsel believed that the jury had been exposed to . . . other-crimes evidence in violation of N.J.R.E. 404(b), he could have asked for a curative or limiting instruction. The failure to do so suggests that defense counsel believed that . . . any possible error 'was actually of no moment.'" State v. Yough, 208 N.J. 385, 400-01 (2011) (citation omitted).

Our independent review of the record reveals no support for defendant's contention that admission of the testimony and the lack of any limiting instructions constituted plain error. The testimony concerned vague messages that did not directly describe any bad acts or crimes committed by defendant. We reject defendant's assertion that the prosecutor relied on the testimony during his summation to support his argument defendant committed the crimes to "satisfy his . . . addiction to child pornography." The prosecutor never referred to the testimony concerning the four text messages and none of the messages refer to child pornography. The prosecutor's argument was based solely and properly on the interactions between defendant and R.B., the evidence showing defendant repeatedly asked R.B. to provide sexually explicit photographs of Alice and of the children engaged in sex acts, and R.B.'s testimony that she provided about forty such photographs to defendant at his request.

Beyond the single and fleeting recitation of the four text messages, there were no further references to them during the trial. To the extent the four text messages vaguely suggested defendant had a sexual interest in children, they were incapable of producing an unjust result because of the overwhelming and direct evidence of defendant's sexual interest in the two children against whom he committed the crimes charged in the indictment.

In addition to R.B.'s and Scott's testimony describing defendant's involvement in the crimes for which he was convicted, the evidence included numerous text messages in which defendant directly and explicitly expressed his sexual interest in Scott and Alice, and otherwise established his involvement in the crimes he and R.B. conspired to commit against them. We are satisfied that when viewed in the context of the totality of the evidence, neither the admission of the testimony concerning the four text messages or the court's failure to sua sponte charge the jury under N.J.R.E. 404(b), presents a possibility "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Macon, 57 N.J. at 336.

C.

Defendant argues his fifty-five year aggregate sentence is excessive. He contends the court erred by failing to consider the real-time consequences of the sentence, forty-five years of which is subject to the eighty-five percent period of parole ineligibility under N.E.R.A.[8] He further asserts the court erred

[8] Defendant's convictions for first-degree aggravated sexual assault under counts two and three, for which he received an aggregate term of forty-five years, are subject to N.E.R.A.'s requirements. See N.J.S.A. 2C:43-7.2(d)(7). The balance of defendant's aggregate fifty-five year sentence was imposed for defendant's convictions for second-degree endangering the welfare of a child, which are not subject to N.E.R.A.'s requirements and for which the court did not impose periods of parole ineligibility.

by finding aggravating factor six, the extent of defendant's prior record and the seriousness of the crimes of which he has been convicted, N.J.S.A. 2C:44-1(a)(6), and incorrectly based its sentencing decision on a factual finding that was exclusively within the province of the jury - that defendant manipulated R.B. Defendant also claims the court imposed four consecutive sentences without making the findings required for imposition of consecutive sentences under State v. Yarbough, 100 N.J. 627, 643-44 (1985). Defendant last argues the court's imposition of the extended term sentence was improperly based on the court's finding of fact as to his prior convictions.

We review a "trial court's 'sentencing determination under a deferential standard of review.'" State v. Grate, 220 N.J. 317, 337 (2015) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)). We may "not substitute [our] judgment for the judgment of the sentencing court." Lawless, 214 N.J. at 606. We must affirm a sentence if: (1) the trial court followed the sentencing guidelines; (2) its findings of fact and application of aggravating and mitigating factors were based on competent, credible evidence in the record; and (3) the application of the law to the facts does not "shock[] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)); see also State v. Case, 220 N.J. 49, 65 (2014).

We first address defendant's claim the court's imposition of the extended term sentence and parole ineligibility periods was impermissibly based on judicial fact-finding in violation of his rights under the Sixth Amendment to the United States Constitution, as interpreted by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). More particularly, defendant argues the court's imposition of the extended term and periods of parole ineligibility are founded on its finding that he has prior convictions. He contends the court's findings concerning the convictions impermissibly increased the penal consequences of his conviction and therefore violated his Sixth Amendment rights.[9]

Apprendi requires "[a]ny fact (other than a prior conviction), which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." United States v. Booker, 543

[9] Defendant raises his constitutional challenge for the first time on appeal. Generally, we will not consider an argument that was not presented at trial unless it concerns the trial court's jurisdiction or matters of substantial public interest. State v. Robinson, 200 N.J. 1, 20 (2009). This limitation on appellate review "is not limitless." Id. at 19. Because defendant raises a constitutional issue, we exercise our discretion to address the merits of his argument.

U.S. 220, 244 (2005). "In deciding the question of what facts must be subject to a jury finding, 'the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?'" State v. Natale, 184 N.J. 458, 473 (2005) (quoting Apprendi, 530 U.S. at 494).

As explained by our Supreme Court, Blakely defined "the 'statutory maximum' for Apprendi purposes [as] the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 476 (emphasis in original) (quoting Blakely, 542 U.S. at 303). Under Blakely, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely, 542 U.S. at 303-04.

In State v. Pierce, 188 N.J. 155 (2006), the Court addressed the issue presented by defendant here — whether a court may rely on a defendant's prior convictions to support imposition of a discretionary extended term sentence under N.J.S.A. 2C:44-3(a). The Court determined that imposition of an extended term under the standard that had been established in State v. Dunbar, 108 N.J. 80 (1987), was no longer constitutionally viable under the principles in Apprendi. Pierce, 188 N.J. at 168-69. Under Dunbar,

the imposition of a sentence within the extended term range was dependent upon a court finding there was a need to protect the public. Dunbar, 108 N.J. at 91. The Pierce Court determined such fact-finding went beyond the mere finding of a defendant's prior conviction and therefore violated the Sixth Amendment. Pierce, 188 N.J. at 167-68.

To remedy the constitutional infirmities inherent in the Dunbar paradigm, the Court established a different standard for the imposition of a discretionary extended term sentence. Id. at 169-70. The Court found that where a defendant's prior convictions permit the imposition of a discretionary extended term sentence under N.J.S.A. 2C:44-3(a), the convictions alone expose the defendant to the maximum sentence within the extended term range. Id. at 168. The Court concluded that because there is no finding of fact required to expose defendant to the maximum sentence within the extended term sentencing range, the discretionary extended term statute was constitutional under Apprendi and Blakely. Id. at 169.

Here, defendant does not dispute that the court properly determined he was qualified for an extended term sentence under N.J.S.A. 2C:44-3(a), and we are satisfied the record supports the court's determination defendant was eligible for imposition of an extended term sentence based solely on his prior convictions.

We also discern no error in the court's finding of aggravating factor six, the extent and seriousness of defendant's prior record - three prior third-degree convictions for endangering the welfare of a child. We are not persuaded by defendant's contention that the court erred by finding defendant's conduct inflicted harm on the two young victims or that he cajoled, encouraged and persuaded R.B. to commit the crimes against the children. The court's findings were supported by R.B.'s trial testimony and made in response to defense counsel's assertion that defendant did not cause harm to the children because he did not directly physically sexually assault them.

Defendant's contention that the court neither considered the base term for its imposition of the extended term sentence nor the real-time consequences of the sentence on defendant's conviction for first-degree sexual assault under count three is undermined by the record. The court considered and weighed the statutory sentencing factors, recognized that the extended term range was between ten years and life imprisonment, and sentenced defendant to a mid-range extended term sentence of thirty years subject to N.E.R.A. The sentence is supported by the court's determination that the aggravating factors substantially outweighed the non-existent mitigating factors. We discern no abuse of discretion

in the court's imposition of the extended term sentence on count three.

We similarly are satisfied the sentences imposed on each of the remaining counts are supported by the court's findings and weighing of the aggravating and mitigating factors. The judge imposed a mid-range fifteen-year sentence for defendant's other first-degree sexual assault conviction, and minimum five-year terms on defendant's convictions for second-degree endangering. The court followed the sentencing guidelines, its findings are supported by the record, and the sentences do not shock the judicial conscience. See Bolvito, 217 N.J. at 228.

We agree, however, with defendant's claim the court failed to conduct the analysis and make the findings required for the imposition of consecutive sentences under Yarbough, 100 N.J. at 643-44. In Yarbough, the Court adopted the following "criteria as general sentencing guidelines for concurrent or consecutive-sentencing decisions (including any parole ineligibility features)":

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;
> >
> > (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors;
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and
>
> (6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.
>
> [Ibid. (footnotes omitted).]

"The Court also specifically directed that 'the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision.'" State v. Miller, 205 N.J. 109, 129 (2011) (quoting Yarbough, 100 N.J. at 643).

Where a court does not explain its reasoning for imposition of consecutive sentences, "a remand is ordinarily needed for the judge to place reasons on the record." Ibid.

Although a remand for the trial court to make findings concerning the Yarbough factors may be unnecessary where the sentencing transcript "makes it possible to 'readily deduce' the judge's reasoning[,]" such "cases are the exception and not the rule." Id. at 129-30 (quoting State v. Bieniek, 200 N.J. 601, 609 (2010)). Here, the court did not address any of the Yarbough factors, make any findings supporting the imposition of the consecutive sentences, or explain the basis for its imposition of consecutive sentences. We therefore vacate the court's imposition of the consecutive sentences and remand for resentencing in accordance with the Yarbough standard.[10]

We affirm defendant's conviction, vacate the sentence imposed and remand for resentencing. We do not retain jurisdiction.

[10] Our disposition should not be interpreted as expressing an opinion on the appropriateness of consecutive sentences under the circumstances presented. We decide only that the court on remand must decide whether to impose consecutive sentences under the applicable legal standards and make the necessary findings supporting its decision.