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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4341-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALLAN MATTOCKS, a/k/a ALLAN D.
MATTOCKS, ALLEN MATTOCK, and
ALLEN MATTOCKS,

Defendant-Appellant.

Submitted March 12, 2018 – Decided April 12, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
15-06-1698.

Joseph E. Krakora, Public Defender, attorney
for appellant (Daniel V. Gautieri, Assistant
Deputy Public Defender, of counsel and on the
brief).

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Patrick D. Isbill,
Assistant Prosecutor, of counsel and on the
briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

This prosecution arose out of two successive criminal episodes involving the same victim. According to the State's proofs, defendant Allan Mattocks attacked and repeatedly struck the victim in a violent manner in April 2012, fracturing her nose. The victim reported that initial assault to the police and identified defendant as her assailant. About a year later, with the assistance of accomplices named Jonathan Kearney and Joshua Sloan, defendant kidnapped and shot the victim, attempting to kill her in order to silence her.

The victim became severely and permanently disabled as a consequence of the second attack, leaving her unable to speak. Her statements to the police incriminating defendant were deemed admissible by the court under the "forfeiture-by-wrongdoing" hearsay exception, N.J.R.E. 804(b)(9).

Tried by a jury in 2016,¹ defendant was found guilty of five distinct first-degree crimes: attempted murder, N.J.S.A. 2C:5-1 and 11-3(a)(1) (count six); tampering with a witness or informant, N.J.S.A. 2C:28-5(a) (count seven); kidnapping, N.J.S.A. 2C:13-1(b)(2) (count five); conspiracy to commit kidnapping, N.J.S.A.

¹ The superseding indictment also charged Kearney as a codefendant for his participation in the second attack, but defendant was tried alone.

2C:5-1 and 13-1(b)(2) (count fifteen); and conspiracy to commit murder, N.J.S.A. 2C:5-2 and 11-3(a)(1) (count fourteen).

In addition, the jury found defendant guilty of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count nine); second-degree retaliation against a witness or informant, N.J.S.A. 2C:28-5(b) (count eight); third-degree criminal restraint, N.J.S.A. 2C:13-2(a) (count two); two charges of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) and (7) (counts ten and four); and fourth-degree aggravated assault. N.J.S.A. 2C:12-1(b)(4) (count eleven).

Lastly, defendant was found guilty of two weapons charges, consisting of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count twelve); and, after an additional trial phase, a second-degree "certain persons not to have weapons" offense, N.J.S.A. 2C:39-7(b) (count sixteen). The jury found defendant not guilty of a separate kidnapping offense charged in count one, as well as a separate aggravated assault charged in count three.²

² There is a discrepancy in the submissions as to whether defendant was convicted or acquitted of count thirteen, charging him with second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). Although the State's brief states defendant was found not guilty of count thirteen, defense counsel's brief states to the contrary. The trial transcript reflects the jury foreperson announced that the jury found defendant not guilty of count

After orally announcing a sentence, the trial court extemporaneously increased it, in response to a comment by the prosecutor reminding the court of the legal need to make the term for witness tampering consecutive to the other charges. Upon making that adjustment, the court ultimately imposed upon defendant five consecutive prison terms, plus various concurrent sentences. The aggregate custodial sentence consists of seventy-four years, with a parole ineligibility period of forty-one years, six months, and eighteen days, as mandated by the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2.

Defendant now appeals his convictions and sentence on numerous grounds. In his counsel's brief, he raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURORS ON AN ALIBI DEFENSE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST AN ALIBI INSTRUCTION. (Not Raised Below).

POINT II

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO LIMIT USE OF A CO-CONSPIRATOR'S GUILTY PLEA TO ASSESSING CREDIBILITY AND TO BAR ITS USE AS SUBSTANTIVE EVIDENCE OF THE DEFENDANT'S

thirteen, but the appendix shows the jurors marked the verdict sheet on that count as guilty. This discrepancy, which appellate counsel have not identified as an issue for our consideration, should be resolved by the trial court on remand.

GUILT VIOLATED MATTOCKS'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW. (Not Raised Below).

POINT III

THE COURT ERRED IN FINDING [THE VICTIM]'S UNSWORN STATEMENT TO THE POLICE ADMISSIBLE UNDER THE FORFEITURE-BY-WRONGDOING EXCEPTION TO THE HEARSAY RULE BECAUSE [THE VICTIM], HAVING PREVIOUSLY BEEN CONVICTED OF PROVIDING FALSE INFORMATION TO THE POLICE, WAS NOT A SUFFICIENTLY RELIABLE WITNESS.

POINT IV

THE CASE MUST BE REMANDED FOR RESENTENCING BECAUSE THE COURT ERRED IN: (1) FAILING TO ADJUST THE AGGREGATE SENTENCE AFTER REALIZING THAT ONE OF THE SENTENCES WAS REQUIRED TO RUN CONSECUTIVE TO ANOTHER ONE; (2) FAILING TO PROVIDE ADEQUATE REASONS FOR RUNNING THE LEAST RESTRICTIVE SENTENCE FIRST; (3) FAILING TO PROVIDE A STATEMENT OF REASONS FOR RUNNING THE CERTAIN-PERSONS SENTENCE CONSECUTIVE TO THE OTHERS; AND (4) IMPOSING MULTIPLE CONSECUTIVE SENTENCES. (Not Raised Below).

A. Although the Prosecutor Was Correct in Noting that the Sentence for Witness Tampering had to Run Consecutive with that for the Aggravated Assault, the Court Erred in Increasing the Aggregate Sentence After It had Determined that a 41.55 Year Parole-Ineligibility Term Was Appropriate.

B. The Judge Failed to Provide Adequate Reasons for Running the Various Sentences with Parole-Ineligibility Terms Consecutive to the Least Restrictive Sentence.

C. The Judge Failed to Provide a Statement of Reasons for Running the Sentence for the Certain-Persons Offense Consecutive to Those Imposed on Other Charges.

D. The Imposition of Five Consecutive Sentences Resulted in an Excessive Sentence.

Additionally, defendant advances the following points in a pro se supplemental brief:

PRO SE POINT I

THE STATE FAILED TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY BY WITHHOLDING THREE WITNESS STATEMENTS, VIOLATING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF THE LAW (U.S. CONST. AMENDS.VI, XIV; N. J CONST. (1947) ART. I, PARAS.1, 10).

PRO SE POINT II

THE PROSECUTOR FAILED TO PROPERLY PRESENT INFORMATION TO THE GRAND JURY, MISLEADING THE MEMBERS WITH ALTERED STATEMENTS, VIOLATING THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF THE LAW (U.S CONST. AMEND. XIV; N.J. CONST. (1947 ART. I, PARAS. 1, 10).

PRO SE POINT III

THE LEAD DETECTIVE MISREPRESENTED SEVERAL IMPORTANT STATEMENTS DURING THE PRESENTATION [SIC] OR A SUPERSEDED INDICTMENT BEFORE THE GRAND JURY, THE MENDACITY OF THE DETECTIVE VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS CONTRARY TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION (U.S. CONST.AMEND. XIV N.J. CONST. (1947) [SIC]).

PRO SE POINT IV

THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT, CONOTRARY [SIC] TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND NEW JERSEY STATE CONSTITUTION (U.S. CONST. AMEND. XIV; N.J. CONST. ART.1, 10 (1947) [SIC].

PRO SE POINT V

DURING THE PROSECUTOR'S SUMMATION THE DEFENDANT WAS DEPRIVED OF HIS SIX [SIC] AMENDEMENT [SIC] RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL; THE PROSECUTOR I) MISTATED THE EVIDENCE AND ENGAGED IN IMPROPER SPECULATIONS; II) IMPROPERLY INTERJECTED HER PERSONAL BELIEFS, OTHER THAN ACTUAL FACTS OF [SIC] EVIDENCE.

I) THE PROSECUTOR IMPROPERLY MISSTATED THE EVIDENCE AND ENGAGED IN IMPROPER SPECULATIONS, DURING HER SUMMATION THAT WAS NOT BASED ON THE EVIDENCE ADDUUCED [SIC] AT TRIAL.

II) THE PROSECUTOR IMPROPERLY INTERJECTED HER PERSONAL BELIEFS, BY SUGGESTING A BAG WAS PLACED OVER THE VICTEM'S [SIC] HEAD, AND THEN SHOT; WITHOUT SUFFICIENT EVIDENCE TO TRULY AND FULLY SUPPORT HER THERORY [SIC].

PRO SE POINT VI

THE TESTIMONYOY [SIC] OF THE STATE'S EXPERT WITNESS DETECTIVE RUMMEL, BASING THE HOLES IN THE BAG WERE FROM A BULLET, WERE CONCLUDED BY HIS PERSONAL OPINION AND NOT FORENSIC FACTS; DEPRIVED THE DEFENDANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL PURSUANT TO THE SIX [SIC], AND FOURTEENTH AMENDMENT, AND THE NEW JERSEY STATE CONSTIYTUTION [SIC]. (U.S.

CONST. AMENDS. IV, XIV; N.J. CONST ART. 1, 1,
10.) [SIC].

Having considered these arguments in light of the record and the applicable law, we affirm defendant's convictions, but remand for resentencing.

I.

On April 13, 2012, the victim, S.B.W.,³ reported to the Camden County Police Department that defendant had assaulted and beaten her three days earlier at approximately 10:00 p.m. Camden County Police Detective John Waida interviewed S.B.W., and took a recorded statement from her describing the attack. Detective Waida observed bruises on the victim's face, which the police photographed.

S.B.W. told the police she had been at a residence on Boyd Street in the City of Camden on April 10 visiting a friend. While she was there, defendant's father-in-law walked by and accused her of stealing defendant's trash cans. In response to that accusation, S.B.W. walked down the street to defendant's residence, and knocked on his door. Christina Rivera, who is the mother of defendant's children, answered the door. Rivera told S.B.W. she did not know anything about the trash can accusation.⁴

³ We refer to the victim by her initials in order to protect her identity and her status as a disabled individual.

⁴ Defendant did admit at trial to having a previous disagreement with S.B.W. regarding some work that he hired her to complete.

According to S.B.W., defendant then approached her from behind, grabbed her, and dragged her into his residence. He shoved S.B.W. onto the couch and threatened to assault her unless she told him the truth about the trash cans. After S.B.W. denied stealing the cans, defendant accused her of lying and punched her in the face multiple times.

As described by S.B.W., defendant then opened his basement door and threw her down the stairs. After S.B.W. stood up, defendant "beat [her] some more" and then threatened to "finish the job" with a pipe. After S.B.W. got up again, defendant kicked her in the face, and she lost consciousness. S.B.W. was unable to say whether or not defendant actually hit her with a pipe.

According to S.B.W., she did not regain consciousness until she found herself outside of defendant's residence with her bag. A man named "John" then kicked her possessions down the street.

After defendant assaulted her, S.B.W. made her way to the house of a friend, Jeremiah Davis. Davis encouraged her to go to the hospital, and he photographed her injuries. According to Davis, he first became aware that S.B.W. had been beaten when he noticed her lying on his front steps around midnight. Davis had been walking home and spotted a trail of blood on the sidewalk near his residence. According to Davis, S.B.W. told him she had been beaten up after being accused of stealing trash cans.

Davis took S.B.W. to the hospital. She was diagnosed with facial swelling and nasal bone fractures, which are documented in her medical records. Davis thereafter took S.B.W. to the police station, where, as we have already noted, she was interviewed and identified defendant as her assailant.

About a year later, on April 12, 2013, at approximately 10:00 p.m., Sergeant Allen Williams of the Camden Metro Police Department was sent to the area of Midvale Avenue and Rand Street in Camden City because gunfire had been reported. When Sergeant Williams arrived at the scene, he walked behind an abandoned house. He saw S.B.W. sitting on the building's rear steps "bleeding profusely from her face, [and] her head" leading him to believe she had been the victim of a shooting. Williams perceived that S.B.W. had sustained a gunshot wound to her head, because "her eyes were swelled up" and "blood [was] coming down from her face, all over her clothes." She appeared conscious and coherent to Williams, but seemed to be suffering and in considerable pain.

Sergeant Williams saw tire marks in the area where he found the victim, as well as a jacket next to the steps. Williams was told by his supervisor to be on the look-out for a silver (or similarly colored) minivan. After driving around the vicinity, Williams noticed smoke emanating from a wooded area near the

Centennial Village Apartments, where he discovered "car mats, jeans[,] and some other clothing that was burning."

A civilian witness, Elmis Mateo, testified that he had been walking his dog on the night of the shooting. According to Mateo, he saw a light-colored van, which could have been silver or gray, drive behind an abandoned house off of Midvale Avenue. As Mateo approached the corner, he heard what sounded like a gunshot. Once Mateo saw the van drive away, he walked to the back of the abandoned house where he had heard the gunshot originate. There he saw a woman on the ground. Mateo testified that, although it was dark, he saw blood and what he thought was a piece of flesh hanging from her face. Mateo called 9-1-1 and obtained assistance for the victim. He provided a statement to the police.

Sharon Busan, codefendant Kearney's mother, also testified as a fact witness for the State. Busan had observed S.B.W.'s injuries from the 2012 initial assault. At the time of the 2013 shooting, Busan was living with her mother on Rand Street at the intersection of Midvale Avenue. While sitting on the stairs of her mother's house that night, Busan saw defendant parked outside in a minivan with Sloan and Busan's son, Kearney. According to Busan, the three men stayed there for about five minutes. Busan remained outside for about two minutes more, before she went into the house to lie down.

According to Busan, she heard what she thought was a "firecracker sound" going off in the backyard next to hers or in another neighboring backyard, approximately fifteen minutes after defendant had driven the van away from her mother's house. Busan testified that at a wedding several days later on April 21, 2013, defendant told her "to keep [her] mouth shut," and that "[she] kn[e]w what [he was] talking about."

Pursuant to a cooperation agreement, codefendant Sloan testified for the State at defendant's trial. Sloan had pled guilty to conspiracy to commit aggravated assault in connection with the shooting of S.B.W. He had been sentenced to an eight-year prison term, eighty-five percent of which was to be served without parole.

Sloan testified he had last seen the victim when she was thrown into the minivan and shot in the head. Sloan recounted that he had been in the van that day with Kearney and defendant, with defendant acting as the driver. Sloan testified that defendant pulled over and forced S.B.W. into the van. S.B.W. was screaming and pleading for her life, while defendant demanded to know why she had pressed charges against him and told her to shut up.

According to Sloan, Kearney switched places with defendant behind the wheel, and drove for about thirty seconds to Midvale

Avenue, while defendant was in the van trying to choke S.B.W. with both of his hands. Kearney stopped behind an abandoned house. Defendant grabbed the victim by her legs and pulled her out of the van. He then pointed a gun at her and shot her in the head.

As described by Sloan, defendant then drove the van to a wooded area near an apartment building on East State Street. Once there, defendant, Sloan, and Kearney removed the van's mats and put them and defendant's clothing in trash bags before setting them on fire in an attempt to destroy the evidence. Defendant then drove the van close to his residence. Kearney got out of the van and defendant threatened Sloan, demanding him to burn the van.

Thereafter, Sloan drove the van and picked up another individual named Carie Curtis. Sloan told Curtis about the shooting. Sloan and Curtis drove to Philadelphia in the van, parked it in an alleyway, and set it on fire.

According to Sloan, he and Curtis returned to Camden City and Sloan met defendant later that night. Defendant instructed Sloan not to say anything about the shooting. Nevertheless, after Sloan was arrested in August 2013 and charged, he told police detectives about what had occurred the night of the shooting.

Defendant testified in his own defense. He claimed that on April 10, 2012, he had been home with Rivera, their children, and

some friends, with whom he had dinner. He denied assaulting S.B.W. on that day or accusing her of stealing trash cans.

Defendant further denied kidnapping or shooting the victim. He testified that on April 12, 2013, he dropped Sloan off in his gray van around 6:30 p.m. He then continued to run errands for his catering business until 8:00 p.m., when he arrived home, allegedly remaining there for the rest of the night.

Rivera testified as a witness for the defense. She recounted that on April 10, 2012, she had been home with defendant cooking, and that their children and some friends were there. Rivera asserted that defendant never left the house at any time that evening. Rivera denied that S.B.W. had come into the home at approximately 10:00 p.m. She further denied ever observing defendant assault S.B.W.

With regard to the kidnapping and shooting incident, Rivera testified that on April 12, 2013, she had been home all day cooking. She stated that defendant came into the house at approximately 8:00 p.m. Rivera testified on direct examination that defendant was home with her at the time when S.B.W. was shot. However, when pressed on cross examination, Rivera expressed uncertainty about whether she actually knew of defendant's whereabouts that night.

II.

Defendant's first point in his counsel's brief alleges trial error concerning what he characterizes as the "alibi" testimony of Rivera. Specifically, he contends the trial court was obligated to have issued to the jury the model charge concerning alibi proof, a charge which his trial counsel did not request. We disagree.

We approach this issue, as well as the other jury charge issue we address in Part III, infra, mindful of well-established legal principles. In general, "[j]ury charges must provide a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find. The charge as a whole must be accurate." State v. Singleton, 211 N.J. 157, 181-82 (2012) (citations omitted).

That said, if a jury charge was not requested by trial counsel, the "plain error" standard of appellate review under Rule 2:10-2 applies to a claim on appeal for a new trial arising from the omission of that charge. "If the defendant does not object to the charge at the time it is given, there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." Id. at 182 (citation omitted). We recognize this presumption is not unassailable. "Because proper jury instructions are essential to a fair trial," erroneous

instructions on material points ordinarily are "poor candidates for rehabilitation as harmless" State v. McKinney, 223 N.J. 475, 495-96 (2015) (citations omitted).

Defendant argues that the trial court, sua sponte, was required in this case to issue Model Jury Charges (Criminal) "Alibi" (rev. May 12, 2008). That model charge, in essence, explains to the jurors the legal concept of an alibi, and further clarifies that a defendant who presents alibi evidence does not assume the burden of proof in the criminal prosecution. Ibid. Although we recognize such an instruction might have been appropriate solely with respect to Rivera's testimony about defendant's whereabouts during the April 2013 shooting, that unrequested charge was not essential in this case. Moreover, the absence of the instruction was not clearly capable of producing an unjust verdict, given the circumstances presented.

"Alibi deals with physical absence and involves the physical impossibility of guilt." State v. Searles, 82 N.J. Super. 210, 213 (App. Div. 1964). An alibi is not equivalent to a defendant offering an affirmative defense. Ibid. Rather, it is simply "a showing of facts inconsistent with an essential element of the criminal charge," which thus "break[s] the force of the State's prima facie case by testimony that the accused was elsewhere [at the time the offenses was committed]." Ibid. (citation omitted).

"Since alibi is not strictly an affirmative defense, failure to give the jury an alibi charge has been held not to constitute plain error." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.4 on R. 3:12-2 (2018) (citing State v. Swint, 364 N.J. Super. 236, 246 (App. Div. 2003) (in which a trial court's failure to give an alibi instruction was held not reversible error); see also State v. Echols, 199 N.J. 344, 363-65 (2009) (likewise finding no reversible error stemming from the charge's omission).

Fundamentally, the concept of an alibi encompasses a defendant's absence from a crime scene or the physical impossibility of his commission of an offense. The testimony of defendant and Rivera, asserting they were home together on the night of the April 2012 assault upon S.B.W., even if believed by a jury, does not amount to a true "alibi."

Defendant and Rivera did not testify that he was somewhere other than at the scene of the assault that night. The difference between their accounts of the evening and the victim's account was their claim that nothing happened at the premises. Their evidence did not show that it was physically impossible for defendant, as S.B.W. told the police, to have beaten her up at his residence. In sum, no jury charge for alibi was warranted with respect to the April 2012 incident, even if such a charge had been requested.

Nor do we detect any reversible error stemming from the omission of an alibi instruction concerning the April 2013 kidnapping and shooting incident. We recognize this second brutal episode occurred outdoors and inside of defendant's minivan, and not at his home. Unfortunately for defendant, Rivera was equivocal in her testimony about exactly where defendant had been that night. Her testimony about his whereabouts was not flatly contrary to the narratives of the victim and Sloan, who clearly identified defendant not only as being present at the crime scene, but as the person who orchestrated and led the vicious attack.

Viewing the trial record and the jury charge as a whole objectively, we are unpersuaded that the jurors were likely to have mistakenly thought that defendant bore the burden of proving an alibi. The trial court repeatedly explained to the jurors, albeit in more general terms, that the State, not defendant, bore the burden of proof in the case, that he enjoyed the presumption of innocence, and that his guilt must be established beyond a reasonable doubt.

Defense counsel did not discuss alibi or defendant's whereabouts in summation. In her own closing argument, the prosecutor did not suggest that defendant had any burden to prove where he was on the nights of the 2012 assault or the 2013 kidnapping and attempted murder. In fact, the prosecutor argued

that Rivera did not lie to the police when they interviewed her about defendant's whereabouts, and she told them he had been home cooking dinner on the night of the shooting. Rather than portraying Rivera's statement as a concocted false alibi, the prosecutor suggested that Rivera likely was unaware of the precise day on which the victim had been shot, and that her memory was uncertain.

For these reasons, we are unpersuaded that the model charge on alibi was essential at this trial, or that its omission was sufficiently prejudicial to compel a new trial.

III.

Defendant next contends that the court erred by failing to issue, again without a request, the model jury instruction for a cooperating State's witness, specifically Sloan. See Model Jury Charges (Criminal) "Testimony of a Cooperating Co-defendant or Witness" n.1 (rev. Feb. 6, 2006). Defendant argues the instruction was necessary so that the jurors would understand the biased motivation of Sloan to shape his testimony so as to support the State's theory of guilt. This unmeritorious claim requires little discussion.

A footnote accompanying the model instruction on this subject explicitly warns trial judges and lawyers "[t]his charge should not be given except upon the request of defense counsel." In that

vein, the footnote further explains, "While a defendant is entitled to such a charge if requested and a judge may give it on his own motion if he thinks it advisable under the circumstances, it is generally not wise to do so absent a request, because of the possible prejudice to the defendant." Id. at n.1 (citations omitted) (emphasis added).

Here, defendant's trial counsel did not request the judge to issue this model instruction. She clearly would have had solid tactical grounds for withholding such a request. The charge could have readily backfired by reminding the jurors that defendant was associated with an admitted criminal. Moreover, the background facts about Sloan's plea bargain and his cooperation with the prosecution were disclosed to the jury during his examination. The court had no sua sponte duty to give the optional cooperating witness charge. Indeed, had it done so, and had defendant still been found guilty, he no doubt would be claiming error on appeal arising from the prejudice caused by such an instruction.

IV.

The last point in defendant's brief attacking his conviction relates to the trial court's pretrial ruling to admit S.B.W.'s hearsay statements incriminating him, under the forfeiture-by-wrongdoing hearsay exception, N.J.R.E. 804(b)(9). This issue likewise deserves little comment.

Adopted as a result of the Supreme Court's seminal 2009 opinion in State v. Byrd, 198 N.J. 319 (2009), N.J.R.E. 804(b)(9) establishes a special hearsay exception to admit a declarant's statements against a party who has "forfeited" the right to object to their admission, by wrongful conduct attempting to prevent that declarant from testifying in court. The hearsay exception covers:

A statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[N.J.R.E. 804(b)(9).]

In order to be admitted under this pathway, the unavailable declarant's statement must be found by the trial court to have sufficient "indicia of reliability." Byrd, 198 N.J. at 352. For instance, a statement given by a crime victim or eyewitness to police in the manner described by N.J.R.E. 803(a)(1)(A) or (B) may provide such indicia of reliability. Id. at 352-53. See also State v. Gross, 121 N.J. 1, 10 (1990) (delineating such factors of reliability for prior statements by a testifying witness).

In the present case, S.B.W. provided a detailed, recorded narrative to the police about her April 2012 assault after it occurred. She exhibited and was diagnosed with physical injuries consistent with her narrative. The trial judge reasonably determined her police statement was trustworthy and admissible

after conducting a pretrial hearing and considering the pertinent factors.

Defendant points out that S.B.W. had prior "disorderly person type offenses" and had a past history of making false statements. But that limited past involvement with the criminal justice system and other background did not require the judge to find her police statement inherently untrustworthy. Nor are we persuaded defendant was prejudicially deprived of fair notice of the pretrial hearing.

We note the application of the forfeiture-by-wrongdoing exception was especially appropriate in this case, given the strong evidence showing that defendant attempted to intimidate S.B.W. and others to refrain from incriminating him. We affirm the court's wise ruling under N.J.R.E. 804(b)(9).

V.

We turn to defendant's challenge to his very lengthy sentence, which includes an aggregate parole ineligibility period of more than forty-one years. In doing so, we are mindful that, in general, a reviewing court should defer to a sentencing court's factual findings, rather than "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). Thus, if a sentencing court is found to have followed "the [Criminal] Code and the basic precepts that channel sentencing discretion," this court should affirm the

sentence, so long as the sentence fails to "shock the judicial conscience." Ibid.; see also State v. Roth, 95 N.J. 334, 363-65 (1984).

We are generally satisfied that the trial court adhered to the basic substantive precepts of the Code at the sentencing proceeding, including its imposition of several consecutive sentences that we agree are justified under State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014 (1986). We also find no error in the court's sequencing of the terms. The problem instead is a procedural one: how the ultimate sentence was determined, i.e., after an initial shorter sentence was announced and the reminder of an important statutory requirement was interjected.

In its oral ruling, the trial court originally imposed a sixteen-year sentence, with a corresponding eight-year parole disqualifier, for witness tampering and ran this sentence concurrent with those imposed on counts two, four, and five. After the prosecutor alerted the court to the fact that the witness-tampering charge was statutorily mandated by N.J.S.A. 2C:28-5(e) to be served consecutively to the sentence imposed for defendant's conviction on the underlying assault, the court ran the witness-tampering sentence consecutive to all other sentences imposed.

The original aggregate sentence the court announced was fifty-eight years of New Jersey State Prison, with a thirty-six-year, six-month, and eighteen-day period of parole ineligibility subject to NERA, followed by a five-year stipulated term imposed under the certain-persons offense. The court changed this outcome to an aggregate sentence of seventy-four years, with a thirty-six-year, six-month, and eighteen-day period of parole ineligibility under NERA, followed by the thirteen-year stipulated term. (Emphasis added).

After the prosecutor brought to the judge's attention the need to run the witness-tampering sentence consecutive to that for the underlying assault, the judge stated at sidebar, "Okay. That's fine, then I'll just make it consecutive." (Emphasis added). The judge then explained that, "The State has pointed out that under the tampering sentence, that is required to be served consecutive to any other penalties. Accordingly, rather than imposing a concurrent sentence . . . that will be a consecutive sentence." (Emphasis added). The sentence for witness-tampering itself remained the same, i.e., a sixteen-year term, with eight-year period of parole ineligibility. However, this ad hoc change increased defendant's overall aggregate sentence by sixteen years and the stipulated term of parole ineligibility by eight years.

We concur with defendant that the trial court did not provide adequate reasons for the substantial increase in the aggregate sentence and the related "real time" consequences of converting the witness-tampering sentence from concurrent to consecutive. The record does not explain why the original sentence announced by the court was not sufficient punishment. The matter must be remanded for resentencing for this purpose. On remand, the court is free, as may be appropriate, to make other adjustments in the components of the sentence to arrive at an overall fair and adequately-supported disposition. We intimate no views on the appropriate terms.

VI.

The arguments in defendant's pro se supplemental brief, which were ably refuted by the State's responding supplemental brief, lack sufficient merit to warrant discussion. R. 2:11-3(e)(2). We simply add that defendant has not surmounted his heavy burden under State v. Hogan, 144 N.J. 216, 228-29 (1996), to set aside the indictment; has not shown the prosecutor's appropriate summation deprived him of a fair trial; and has failed to prove reversible error arising out of Detective Rummel's brief reference to holes he observed in the bag he removed from the crime scene.

Affirmed as to the convictions; remanded for resentencing.
We do not retain jurisdiction.

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

