SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4848-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARQUISE HAWKINS,

Defendant-Appellant.

Submitted March 13, 2018 - Decided April 9, 2018

Before Judges Carroll, Mawla and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-01-0200.

Joseph E. Krakora, Public Defender, attorney for appellant (Jay L. Wilensky, Assistant Deputy Public Defender, of counsel and on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Sarah D. Brigham, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Marquise Hawkins appeals his conviction and sentence stemming from his involvement in the armed robbery of

four teenage boys that culminated in the shooting death of sixteen-year-old Khalil Williams in Irvington on February 17, 2012. Defendant was seventeen years old when the crimes were committed. While in police custody, accompanied by his mother, defendant gave a statement admitting his involvement in the fatal series of events. On the State's motion, juvenile jurisdiction was waived, and defendant and two cohorts, Azim Brogsdale and Haroon Perry, were indicted and charged with knowing or purposeful murder, felony murder, conspiracy to commit murder, armed robbery, conspiracy to commit robbery, unlawful possession of two handguns, and possession of a handgun for an unlawful purpose.

Prior to trial, defendant moved to suppress his uncounseled statement. On June 20, 2015, following a hearing, the trial court ruled the statement admissible.

Defendant was tried separately. His jury trial lasted seven days and concluded on March 30, 2015, when the jury convicted him of all charges except for possession of one of the two handguns. On May 8, 2015, following certain mergers, defendant was sentenced to an aggregate fifty-five year prison term, with an eighty-five percent parole ineligibility period under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On appeal, defendant challenges the Family Part order waiving jurisdiction, the denial of his suppression motion, the admission

of certain purported hearsay testimony, and various aspects of his sentence. For the reasons that follow, we affirm defendant's convictions but remand for merger of offenses and reconsideration of defendant's sentence.

I.

On September 17, 2012, defendant and his co-defendants were driving through Irvington looking for someone to rob when they saw a group of boys "coming down Orange Ave[nue]." After parking their car "around the corner," Brogsdale and Perry robbed the four boys at gunpoint while defendant waited in the back seat of the car. When one of the victims attempted to flee, defendant yelled to his co-defendants to "get the one in the yellow coat." Brogsdale and Perry then fired their weapons, and defendant witnessed one of the boys "fall on the ground" before they drove off. The victim was sixteen-year-old Williams, who was later pronounced dead as the result of a gunshot wound to his back.

Cash and two cell phones were taken from the robbery victims. Defendant kept one of the phones, and when he returned to his Newark home he "put the phone in [his] top drawer . . . ." Upon suspecting the police might be tracking the stolen phone, defendant hid it in the backyard of a nearby home.

Detective Kevin Green of the Essex County Prosecutor's Office was assigned to investigate the shooting. Before interviewing

defendant, Green obtained permission from defendant's mother, Stephanie Hawkins, who accompanied Green to pick defendant up from school after police first questioned his sister about the stolen phone. Defendant, his mother, and Green then proceeded to an interview room at the Essex County Prosecutor's Office. Both defendant and his mother read and signed a form waiving defendant's Miranda[1] rights before defendant was questioned by Green.

In his recorded statement, defendant confessed that he and his accomplices planned to "go robbing" and rode around for approximately six hours before encountering the group of boys on Orange Avenue. Defendant remained in the car while his two accomplices, with guns, robbed the four boys. When one of the victims attempted to run, defendant stuck his head out the car and yelled: "Get the one in the yellow coat." One of defendant's accomplices then began shooting at the victim in yellow. Defendant admitted receiving a cell phone that was taken from one of the victims, and he subsequently led police to the location where it was hidden. Defendant's arrest followed.

Defendant was initially charged as a juvenile in a complaint alleging acts of delinquency that, if committed by an adult, would constitute first-degree felony murder, N.J.S.A. 2C:11-3(a)(3);

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

second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); second-degree robbery, N.J.S.A. 2C:15-1; and first-degree conspiracy, N.J.S.A. 2C:5-2(a)(1).

The State thereafter moved for an order waiving jurisdiction of the Family Part and transferring the case to the Law Division. In support of its motion, the State relied on the following factors under the Attorney General's Guidelines: (1) the nature of the offense committed; (2) the need to deter defendant and other juveniles from committing crimes; (3) the maximum sentence exposure as a juvenile as compared to an adult; and (4) the likelihood of success at trial.

Applying these factors to the present case, the State noted: (1) the offense was death by gunshot wound from a handgun, which was "cruel, heinous, [and] depraved" insofar as the victim "was shot after he was robbed . . . [and] did not resist in any way;" (2) the specific need to deter defendant, as well as the general need to deter other juveniles, from committing such offenses; (3) defendant's estimated maximum sentence exposure as a juvenile would be an aggregate seventeen-year term of confinement, as opposed to defendant's sentence as an adult, a fifty-five year term of imprisonment subject to NERA; and (4) the State's

likelihood of success at trial was sustained by defendant's confession and related police reports.

Following the waiver hearing, in an oral opinion issued on June 25, 2012, the Family Part judge found the State established probable cause with respect to the felony murder and weapons offenses. The judge then entered a memorializing order granting the waiver application.

On January 25, 2013, an Essex County grand jury returned an indictment jointly charging defendant, Brogsdale, and Perry with second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1 (count one); four counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts two through five); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count six); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a)(1)-(2) (count seven); first-degree knowing or purposeful murder, N.J.S.A. 2C:11-3(a)(1)-(2) (count eight); two counts of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (counts nine and ten); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count eleven).

The judge conducted a pre-trial hearing on defendant's motion to suppress his statement. The State presented the testimony of Detective Green, while defendant's mother testified on his behalf.

In an oral opinion, the judge found Green "credible and reliable." In contrast, the judge found the testimony of defendant's mother "was in fact not credible and certainly not reliable as to what occurred . . . [and] that some of her own testimony even bolstered and supported the testimony of Detective Green and confirmed by" defendant's statement. The judge denied the motion, concluding:

> defendant knowingly, freely and voluntarily waived his Miranda [r]ights in the presence of and with the consent of his mother[,] Stephanie Hawkins. It is abundantly clear from the recorded statement, the video of the statement as well as the testimony provided to this [c]ourt during the [e]videntiary [h]earing, that both the defendant and his mother were advised of his rights, were given the appropriate waiver, were given an opportunity to read the waiver, were given [an] opportunity to ask any questions concerning the waiver or the consequences of the waiver and, thereafter, acknowledge[d] their understanding of their rights as well as [the] consequences of their waiver and signed the waiver knowingly, intelligently and voluntarily as testified again by Detective Green and confirmed by the videotape recording of [defendant's] statement.

The judge further found no coercive or threatening tactics were used by law enforcement in obtaining the waiver; defendant's statement was given during the middle of the day when he was not subject to exhaustion or physical punishment; neither defendant nor his mother had a problem reading or understanding the waiver form; and both defendant and his mother appeared "calm and

cooperative" throughout the interview. Based on the totality of the circumstances, the judge concluded defendant and his mother had the "requisite level of comprehension" to understand defendant's Miranda rights and made the "uncoerced choice" to waive them. Consequently, defendant's statement was admitted in evidence at the ensuing trial.

The State presented the testimony of numerous witnesses at trial, including various law enforcement officials, forensic specialists, the surviving robbery victims, and Detective Green. Defendant did not testify or present any witnesses.

Pertinent to this appeal, on cross-examination, Irvington Police Officer Tonya Marino, who was first to respond to the shooting scene, was questioned by defense counsel as follows:

> Q: How many individuals did the witnesses say they saw? [Do y]ou recall?
>
> Prosecutor: Objection . . . hearsay, your Honor.
>
> The Court: Okay. I'll permit it. Overruled. Again, it's all part of her investigation as a police officer on the scene.
>
> A: Looks like they were reporting . . . two suspects.
>
> . . . .
>
> Q: When the [victims] were approached, in your report you wrote . . . "give me your money." Why did you put that in quotes?

Prosecutor: Objection, hearsay.

Court: Well, again, it's not offered for the truth. It's offered as a result of her investigation, counsel, as all of her testimony refers to.

Q: [Why did] you put that statement in quotation marks?

A: That is what the witness stated . . . .

Q: And you wrote in your report "give me your money" as the statement told [to you by the witness?]

A: Right. . . .

On redirect, the prosecutor questioned Marino further about statements made by the two suspects that were included in Marino's police report.

Q: [D]id you write down in quotes what that individual that [the victims] could not see in the car stated?

A: Yes.

Q: What did the witness say in quotes that you wrote down?

A: "Get the one with the yellow jacket."

Q: Now, you have a different paragraph for another witness that you spoke to . . . ?

A: Yes.

Q: [W]hat did this witness say the individual in the car yelled out? Second to last sentence.

A: "Get the one with the yellow jacket."

Defense counsel did not object to Marino's redirect testimony.

Additionally, Detective Green testified as follows on direct examination:

> Q: [D]id [the surviving robbery victims] tell you what they heard from a car at th[e] location of Orange Avenue and Orange Place?
>
> A: Yes, they did.
>
> Q: What did they tell you?

Defense counsel objected to this questioning, noting it sought to elicit "classic hearsay." The court disagreed, finding the State's question was not offered to "prove the truth of the statement, but rather just to show what the investigation of this police [officer] revealed at the time of the investigation." Green then responded that the surviving victims told him someone in the car said "get the one in the yellow."

Additionally, Green testified that each surviving victim heard something about "yellow" or "yellow jacket" come from the suspects' car. He further testified that the surviving victims stated the gunshots were "definitely" fired following this comment by the individual in the car.

The jury convicted defendant of all charges except for possession of one of the handguns that was the subject of count nine. On May 8, 2015, defendant was sentenced to a forty-year

prison term for felony murder and a concurrent forty-year term for first-degree murder. The court also imposed concurrent fifteen-year prison terms for each of the four counts of first-degree robbery, and a concurrent eight-year prison term for second-degree unlawful possession of a weapon. The court merged defendant's convictions for conspiracy to commit robbery and conspiracy to commit murder with the substantive offenses, and also merged the unlawful possession of a weapon conviction with the conviction for possession of a weapon for an unlawful purpose. In sum, defendant was sentenced to an aggregate fifty-five-year term of imprisonment with an eighty-five percent parole ineligibility period pursuant to NERA. Defendant was also awarded 1169 days of jail credit.

II.

In this appeal, defendant raises the following issues for our consideration:

> POINT I
>
> BY IMPROPERLY ANALYZING FACTORS SET FORTH IN THE JUVENILE WAIVER GUIDELINES, AND FAILING TO CONSIDER OTHERS, THE STATE ABUSED ITS DISCRETION BY SEEKING WAIVER IN THIS CASE, AND THE JUVENILE COURT'S GRANT OF WAIVER ALSO CONSTITUTED AN ABUSE.
>
> POINT II
>
> THE DEFENDANT'S STATEMENT WAS RENDERED INVOLUNTARY BY THE CONFLICT OF INTEREST OF HIS MOTHER, NECESSITATING SUPPRESSION AND

REVERSAL. U.S. CONST., AMENDS. V. XIV; N.J. CONST. (1947), ART. 1[,] PAR. 10.

POINT III

THE TRIAL COURT, OVER OBJECTION, PERMITTED EXTENSIVE AND HIGHLY PREJUDICIAL HEARSAY TESTIMONY BY A KEY STATE'S WITNESS, NECESSITATING REVERSAL. U.S. CONST., AMEND. VI; N.J. CONST. ART. I, PAR. 10.

POINT IV

THE SENTENCE IMPOSED, AMOUNTING TO A DE FACTO LIFE SENTENCE FOR A JUVENILE, WAS UNSUPPORTED, AND VIOLATED THE PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS. U.S. CONST., AMENDS VIII, XIV; N.J. CONST. (1947), ART. 1, PAR. 12.

A. The Court Erred in Imposing Consecutive Sentences for Murder and Robbery.

B. The Sentence Was Based on Unsupported Findings Concerning Statutory Factors.

C. The Sentence Amounted to a De Facto Life Sentence Upon a Juvenile, and Accordingly Constitutes Cruel and Unusual Punishment.

We address each of these arguments in turn.

A.

Defendant first contends the State's "cursory statement of reasons in support of its application to waive jurisdiction . . . and even more cursory summation to the waiver court . . . failed to comply with well-established standards governing a prosecutor's decision to seek waiver." Defendant further contends the Family

Part erred by "essential[ly] rubber stamping" the State's waiver application. We disagree.

N.J.S.A. 2A:4A-24 confers jurisdiction over offenses committed by juveniles to the Family Part. N.J.S.A. 2A:4A-26(a)[2] vests the prosecutor with discretion to seek a waiver of this jurisdiction for certain specified offenses committed by a juvenile fourteen years of age or older. These offenses are referred to as "Chart 1" offenses, and include criminal homicide (other than death by auto) and first-degree robbery, N.J.S.A. 2A:4A-26(a)(2)(a), possession of a weapon with a purpose to use it unlawfully against another, N.J.S.A. 2A:4A-26(a)(2)(i), and offenses committed in "an aggressive, violent and willful manner." N.J.S.A. 2A:4A-26(a)(2)(d).

We consider the Family Part judge's decision in juvenile waiver cases under an abuse of discretion standard, which requires that "findings of fact be grounded in competent, reasonably credible evidence" and "correct legal principles be applied . . . ." In re State ex rel. A.D., 212 N.J. 200, 214-15 (2012) (citation omitted). Only where the Family Part judge exercises a "clear

[2] We note that the waiver application in this case was adjudicated long before N.J.S.A. 2A:4A-26 was repealed and replaced by N.J.S.A. 2A:4A-26.1, which went into effect on March 1, 2016. L. 2015, c. 89, § 1. Accordingly, all references to the waiver statute are to the prior law.

error of judgment that shocks the judicial conscience" will we substitute our own discretion for that of the waiver court. Id. at 215 (quoting State v. R.G.D., 108 N.J. 1, 15 (1987)).

In the case of a juvenile sixteen years or older charged with a Chart 1 offense, the only issue to be determined by the Family Part judge at the waiver hearing is whether there is probable cause to believe the juvenile committed the delinquent act. "Probable cause is a well-grounded suspicion or belief that the juvenile committed the alleged crime." State v. J.M., 182 N.J. 402, 417 (2005) (citing State v. Moore, 181 N.J. 40, 45 (2004)). "Probable cause may be established on the basis of hearsay evidence alone, because a probable cause hearing 'does not have the finality of trial' . . . and 'need not be based solely on evidence admissible in the courtroom.'" State ex rel. B.G., 247 N.J. Super. 403, 409 (App. Div. 1991) (citations omitted). Moreover, the nature of a probable cause determination "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations [will] seldom [be] crucial in deciding whether the evidence supports a reasonable belief in guilt." J.M., 182 N.J. at 417 (alterations in original) (quoting Gerstein v. Pugh, 420 U.S. 103, 122 (1975)).

"On a finding of probable cause for any of [the] enumerated offenses, no additional showing is required for waiver to occur. Jurisdiction of the case shall be transferred immediately." R. 5:22-2(c)(3)[3]. "Simply stated, when a sixteen-year old or above is charged with an enumerated offense, the prosecutor need only establish probable cause for the court to waive the juvenile to adult court." J.M., 182 N.J. at 412. That being said, "a juvenile seeking to avoid the 'norm' of waiver . . . when probable cause is found to exist, must carry a heavy burden to clearly and convincingly show that the prosecutor was arbitrary or committed an abuse of his or her considerable discretionary authority to compel waiver." State in re V.A., 212 N.J. 1, 29 (2012).

To ensure uniform application of the waiver statute, pursuant to N.J.S.A. 2A:4A-26(f), the Attorney General has promulgated guidelines that prosecutors must follow in making the waiver decision. Attorney General's Juvenile Waiver Guidelines (Mar. 14, 2000) (Guidelines), available at http://www.nj.gov/oag/dcj/agguide/pdfs/AG-Juvenile-Waiver-Guidelines.pdf. The Guidelines, in turn, "require preparation of a written statement of reasons for waiver, in which the prosecutor must 'include an account of

[3] R. 5:22-2(c)(3) refers to the Rule in effect at the time of defendant's waiver hearing in June 2012. The Rule was since amended effective September 1, 2016. See Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 5:22-2(c)(3) (2018).

all factors considered and deemed applicable.'" V.A., 212 N.J. at 12 (quoting Guidelines at 7). The factors to be considered by the prosecutor are: the nature of the offense; deterrence; the effect of waiver on co-defendants; the maximum sentence and length of time to be served if prosecuted as an adult or as a juvenile; the juvenile's prior record, if any; trial considerations; and the victim's input. Guidelines at 5-6.

The prosecutor's statement of reasons must reflect an individualized consideration of the evidence, taking into account all applicable factors. See V.A. 212 N.J. at 26-27. If the statement "is a mere regurgitation of the Guidelines' language, that will not show that the prosecutor engaged in an individualized decision, rendering the overall decision susceptible to the claim that it is arbitrary and constitutes an abuse of discretion." Id. at 28. The burden of proof rests with the juvenile to show "clearly and convincingly that a prosecutor abused his or her discretion . . . ." Id. at 26.

Guided by these standards, we agree with the Family Part judge that the prosecutor established probable cause that defendant committed acts of delinquency that would constitute felony murder and possession of a weapon for an unlawful purpose if committed by an adult. Further, defendant failed to carry his heavy burden to show that the prosecutor's decision to seek waiver

constituted an abuse of discretion. The prosecutor's statement of reasons discussed in sufficient detail all of the Guidelines' factors that were relevant to the waiver decision and made a reasoned, qualitative evaluation of those factors. We therefore conclude the Family Part judge's findings of fact were "grounded in competent, reasonably credible evidence," he applied the "correct legal principles[,]" and there was no "clear error of judgment that shocks the judicial conscience." R.G.D., 108 N.J. at 15.

B.

Defendant next argues the trial court erred in denying his motion to suppress his uncounseled statement. He contends the statement was involuntary because his mother, who was present throughout, had a conflict of interest created by concerns over her daughter's possible involvement with the stolen phone, and the threat of her own arrest.

In reviewing a trial court's decision on a motion to suppress for an alleged violation of Miranda, we use a "searching and critical" standard of review to protect a defendant's constitutional rights. State v. Maltese, 222 N.J. 525, 543 (2015) (quoting State v. Hreha, 217 N.J. 368, 382 (2014)). We defer to a trial court's fact findings on a Miranda motion, if supported by sufficient credible evidence. Hreha, 217 N.J. at 381-82 (citing

State v. Johnson, 42 N.J. 146, 161 (1964)). Our deference is required even where the court's "factfindings [are] based solely on video or documentary evidence," such as recordings of custodial interrogations by the police. State v. S.S., 229 N.J. 360, 379 (2017). We do not, however, defer to a trial court's legal conclusions, which we review de novo. State v. Rockford, 213 N.J. 424, 440 (2013).

"The requirement of voluntariness applies equally to adult and juvenile confessions." State v. Presha, 163 N.J. 304, 313 (2000) (citing N.J.S.A. 2A:4A-40, which states "[a]ll rights guaranteed to criminal defendants by the Constitution of the United States and the Constitution of this State . . . shall be applicable to cases arising under [the New Jersey Code of Juvenile Justice]"). Our main inquiry is whether the suspect's will was overborne by police conduct. Ibid. We consider the totality of the circumstances, including "the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved." Ibid. (quoting State v. Miller, 76 N.J. 392, 402 (1978)). We also consider whether the suspect had previous encounters with the law. Ibid.

In determining whether a confession was knowing, intelligent, and voluntary, in a juvenile case, a parent's presence is a "highly significant factor," to be given more weight when balancing it against the other factors. State ex rel. A.S., 203 N.J. 131, 147 (2010) (quoting Presha, 163 N.J. at 315). The parent is to serve as a "buffer" between the juvenile and police and is there to act in the best interest of the juvenile. Ibid. However, a parent can "advise his or her child to cooperate with the police or even to confess to the crime if the parent believes that the child in fact committed the criminal act." Id. at 148 (citing State ex rel. Q.N., 179 N.J. 165, 177-78 (2004)). While it may be atypical for a parent to encourage a child to confess, a "mother's 'urgings [are] consistent with her right as a parent to so advise her son.'" Ibid. (quoting Q.N., 179 N.J. at 177).

We reject defendant's assertion that his statement to the police was involuntary. As noted, he contends his mother's conflict of interest effectively prevented her from providing adult aid or serving as a buffer between him and the police.

Defendant erroneously compares his interrogation to what occurred in A.S. Id. at 154-55. In that case, A.S., F.D.'s fourteen-year-old adopted daughter, was accused of sexually assaulting F.D.'s four-year-old biological grandson. Id. at 135. The Court found F.D. had a conflict of interest because the victim

was her grandson and she could not provide the adult aid contemplated in Presha, but this was just one factor in finding A.S.'s statement was involuntary. Id. at 148.

Here, defendant candidly concedes that his mother "did not, in the manner of the responsible adult in A.S., assume the interrogator's role." Additionally, although police originally questioned defendant's sister after tracking the stolen cell phone to the family's residence, there is no credible evidence in the record that either the police or defendant's mother considered the sister a suspect in the crimes the police were investigating. Moreover, to the extent defendant's mother claims that she herself was threatened with arrest, we note the trial judge essentially rejected her testimony as incredible and unreliable. We defer to the trial judge's credibility determinations, in light of his "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

The trial judge properly considered the totality of the circumstances and found no evidence to suggest that defendant's Miranda waiver was not the product of his own free will. Defendant was read his Miranda rights, in the presence of his mother, prior to the police questioning. Both defendant and his mother indicated

they understood those rights before defendant signed the waiver form and gave his statement. The circumstances surrounding the waiver give no indication that defendant's mother, or her mere presence in the interrogation room, had a coercive effect on defendant. In short, the trial court's denial of defendant's suppression motion was supported by substantial credible evidence in the record and we discern no basis to disturb it.

C.

Defendant next argues the trial court erred in permitting Detective Green, over defense objection, to testify to highly prejudicial hearsay information he purportedly learned during his investigation. Although not objected to at trial, defendant raises a similar argument with respect to Officer Marino's testimony on redirect examination that two witnesses told her the person in the car yelled out, "Get the one with the yellow jacket." In addition to constituting inadmissible hearsay, defendant contends the officers' testimony violated his confrontation rights. We are not persuaded.

Our standard of review on evidentiary rulings is abuse of discretion. We only reverse those that "undermine confidence in the validity of the conviction or misapply the law . . . ." State v. Weaver, 219 N.J. 131, 149 (2014); see also State v. J.A.C., 210 N.J. 281, 295 (2012). Simply stated, we do "not substitute [our]

own judgment for that of the trial court, unless 'the trial court's ruling is so wide of the mark that a manifest denial of justice resulted.'" J.A.C., 210 N.J. at 295.

Here, with respect to Officer Marino's testimony, the trial court permitted defense counsel to question Marino about statements made by the victims that she recorded in her report. Specifically, on cross-examination, Marino testified the victims told her there were two suspects who demanded their money. On redirect, without objection, Marino testified she was also told a third person in the car yelled, "Get the one in the yellow jacket."

We conclude that Marino's testimony on redirect examination was properly admitted because defense counsel "opened the door" to this testimony during cross-examination. "The doctrine of opening the door allows a party to elicit otherwise inadmissible evidence when the opposing party has made unfair prejudicial use of related evidence." State v. James, 144 N.J. 538, 554 (1996) (citation omitted); see also State v. Rucki, 367 N.J. Super. 200, 207 (App. Div. 2004). The doctrine also "provides an adverse party the opportunity to place evidence into its proper context." Alves v. Rosenberg, 400 N.J. Super. 553, 564 (App. Div. 2008). Here, because defense counsel introduced witness testimony that there were two suspects, the prosecutor properly elicited

testimony on redirect with respect to the presence of a third suspect who remained in the car.

Additionally, defendant's failure to object to Marino's 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).

Defendant similarly argues that Green's testimony regarding statements made by the surviving robbery victims that someone in the car instructed the two robbers to "get the one in yellow" was highly prejudicial hearsay that warrants reversal of his convictions. The State in turn contends Green's testimony is not hearsay because it was not offered "to prove the truth of the matter asserted." Rather, the State asserts Green's testimony was admitted for a permissible non-hearsay purpose to show how defendant became a suspect in the robberies and homicide.

We agree with the State's argument. N.J.R.E. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See also Carmona v.

Resorts Int'l Hotel, Inc., 189 N.J. 354, 376 (2007) ("[W]here statements are offered, not for the truthfulness of their contents, but only to show that they were in fact made and that the listener took certain action as a result thereof, the statements are not deemed inadmissible hearsay.").

Defendant also contends the admission of Marino and Green's testimony violates the Confrontation Clause. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The text of our state constitution contains identical language. N.J. Const. art. I, ¶ 10; State v. Kent, 391 N.J. Super. 352, 375 (App. Div. 2007). The clause has been interpreted to bar "the admission of '[t]estimonial statements of witnesses absent from trial' except 'where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" State v. Rehmann, 419 N.J. Super. 451, 454-55 (App. Div. 2011) (alteration in original) (quoting Crawford v. Washington, 541 U.S. 36, 59 (2004)).

We conclude defendant's argument is meritless. All three surviving robbery victims testified and were subject to cross-examination. Accordingly, the officers' references to their statements did not violate defendant's confrontation rights.

We also agree with the State that, given the testimony of the victims, Arrington, White, and Nesbeth, and defendant's own admission that he told his cohorts to "get the guy in the yellow jacket," Marino and Green's challenged testimony was of little significance to the State's strong case. As a result, we conclude that, to the extent the admission of the challenged testimony was erroneous, it was harmless. An error is not grounds for reversal if it is "harmless," and will be disregarded by the appellate court. State v. Macon, 57 N.J. 325, 337-38 (1971); see also R. 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .").

D.

Finally, we address defendant's sentencing arguments. Defendant first contends the trial court erred in imposing consecutive sentences for murder and robbery. Defendant posits "the homicide was inextricably intertwined with the robber[ies]" and that these crimes were committed so closely in time, and at the same location, as to "indicate a single period of aberrant behavior."

In State v. Yarbough, 100 N.J. 627, 643-44 (1985), the Court adopted the following "criteria as general sentencing guidelines

for concurrent or consecutive-sentencing decisions (including any parole ineligibility feature)":

> (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 . . . .[4]
>
> [(footnote omitted).]

The Yarbough factors essentially focus upon "the nature and number of offenses for which the defendant is being sentenced, whether the offenses occurred at different times or places, and whether they involve numerous or separate victims." Carey, 168 N.J. at 423 (quoting State v. Baylass, 114 N.J. 169, 180 (1989)). They should be applied qualitatively, not quantitatively. Id. at 427. A court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences. Id. at 427-28; see also State v. Swint, 328 N.J. Super. 236, 264 (App. Div. 2000) (even when "offenses are connected by a 'unity of specific purpose,'" "somewhat interdependent of one another," and "committed within a short period of time," concurrent sentences need not be imposed) (citation omitted).

Concurrent or consecutive sentences are at the discretion of the sentencing judge. See Carey, 168 N.J. at 422 (citing N.J.S.A. 2C:44-5(a)). "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will

[4] A sixth guideline was later superseded by statute. State v. Carey, 168 N.J. 413, 423 n.1 (2001).

not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011).

Here, as defendant candidly concedes, the crimes involved multiple victims, factor (3)(c), and "separate acts of violence or threats of violence," factor 3(b), in that four victims were robbed at gunpoint, and one was fatally shot. Also, given the multiple victims of the robbery, the homicide, and the unlawful use of weapons, the convictions were necessarily "numerous," factor 3(e). Factor 3(a) is also implicated because although the crimes were committed close in place and time, the objective of the robbery, to obtain the four victims' property, was independent of the purpose behind defendant's homicide conviction, which was to wound or kill Nesbeth, who wore the yellow jacket. Accordingly, we conclude the record amply supports the imposition of consecutive sentences for murder and robbery consistent with the Yarbough guidelines.[5]

Next, we reject defendant's contention that his sentence was based on unsupported findings concerning the applicable statutory aggravating and mitigating factors.

[5] The State does, however, agree that defendant's felony murder conviction should merge with his conviction for purposeful and knowing murder. Accordingly, we remand the matter to the trial court for the purpose of merging these offenses.

Our review of sentencing determinations is limited. State v. Roth, 95 N.J. 334, 363 (1984). We will not ordinarily disturb a sentence imposed which is not manifestly excessive or unduly punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16 (1989). In sentencing, the trial court "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014) (citation omitted). The court must then "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." O'Donnell, 117 N.J. at 215 (citation omitted). We are "bound to affirm a sentence, even if [we] would have arrived at a different result, as long as the trial court properly identifie[d] and balance[d] aggravating and mitigating factors that [were] supported by competent credible evidence in the record." Ibid. (citations omitted).

In sentencing defendant, the court found the following aggravating factors: (1) the nature and circumstances of the offense, and the role of the actor therein, including whether it was committed in an especially heinous, cruel, or depraved manner (factor one), N.J.S.A. 2C:44-1(a)(1); (2) the risk of re-offense (factor three), N.J.S.A. 2C:44-1(a)(3); and (3) the need for

deterrence (factor nine), N.J.S.A. 2C:44-1(a)(9).[6] The court found no mitigating factors. The court then "conducted a qualitative and quantitative analysis of the aggravating and mitigating factors" and concluded the aggravating factors substantially outweighed the mitigating factors.

Having reviewed the record, we are satisfied the judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record. The application of the factors to the law, including the imposition of consecutive sentences, do not constitute such clear error of judgment as to shock our judicial conscience. Accordingly, we discern no basis to second-guess the court's findings with respect to the statutory aggravating and mitigating factors.

Finally, defendant argues that his aggregate fifty-five year sentence with forty-six years and nine months of parole ineligibility is unconstitutional. Specifically, he contends the court unconstitutionally failed to adequately consider his youth, as required by recent United States Supreme Court and New Jersey

[6] Although the judgment of conviction (JOC) also lists aggravating factor six, the extent of defendant's prior criminal record and the severity of those offenses, N.J.S.A. 2C:44-1(a)(6), the court did not find this aggravating factor at sentencing. The court shall delete this mistaken reference to aggravating factor six in the JOC on remand.

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.

Our analysis is guided by a 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." 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 a 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 474-77. 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.
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> [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 a 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 Yarbough, 100 N.J. at 643-44, 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. Stated differently, 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 sentencing judge did "take[] into consideration [defendant's] age, as well as [his] lack of any significant previous criminal and juvenile history." However, the judge did not address the Miller factors when analyzing potential mitigating factors of each discrete sentence he imposed.

In fairness to the judge, he did not have the benefit of our Supreme Court's 2017 opinion in Zuber when he imposed sentence on defendant in 2015. Nor did he 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).

Here, defendant was seventeen years old when these crimes were committed. We recognize that defendant's aggregate fifty-five year sentence with forty-six years and nine months of parole ineligibility is not literally a LWOP sentence. However, as a practical matter, it closely approaches it. Accordingly, we conclude the aggregate sentence must be revisited on remand for an evaluation taking into account the Miller constitutional factors of youthfulness, this time with the beneficial guidance of Montgomery, Zuber, and the new statutory amendment.

Affirmed as to defendant's convictions. Remanded for reconsideration of the sentence. On remand, the court shall also merge the felony murder conviction with the conviction for knowing or purposeful murder, and enter an amended JOC that also deletes aggravating factor six. We do not retain jurisdiction.