SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1144-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM M. GENNETT,

Defendant-Appellant.

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Argued November 15, 2021 – Decided June 2, 2022

Before Judges Messano, Accurso and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 17-05-0428.

Andrew R. Burroughs, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Andrew R. Burroughs, on the briefs).

Sarah D. Brigham, Deputy Attorney General, argued the cause for respondent (Andrew J. Bruck, Acting Attorney General, attorney; Sarah D. Brigham, of counsel and on the brief).

PER CURIAM

A Burlington County grand jury returned an indictment charging defendant William M. Gennett with first-degree murder in the death of his female friend, Shannon O'Rourke, N.J.S.A. 2C:11-3(a)(1) and (a)(2), and fourth-degree stalking, N.J.S.A. 2C:12-10(b). The judge denied defendant's pre-trial motions to sever the two counts and to dismiss the stalking count.

After the State rested at trial, defendant moved pursuant to Rule 3:18-1 for a judgment of acquittal; the judge denied the motion. The jury convicted defendant of both counts, and the judge denied his motions for judgment notwithstanding the verdict, Rule 3:18-2, or, alternatively, for a new trial, Rule 3:20-1. The judge sentenced defendant to a thirty-year term of imprisonment, with a thirty-year period of parole ineligibility on the murder conviction, and a concurrent eighteen-month term of imprisonment on the stalking charge.

Before us, defendant raises the following points for our consideration:

> POINT I
>
> GIVEN THE WEAKNESS OF THE STATE'S CASE AS TO THE MURDER CHARGE, IT WAS PREJUDICAL ERROR WHEN THE TRIAL COURT DENIED DEFENDANT'S MOTION TO SEVER THE STALKING CHARGE FOR A SEPARATE TRIAL.
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> POINT II
>
> AS THERE WAS RATIONAL BASIS TO SUPPORT THE LESSER INCLUDED CHARGE OF PASSION

PROVOCATION MANSLAUGHTER, THE TRIAL COURT['S] FAILURE TO SO INSTRUCT THE JURY DENIED DEFENDANT A FAIR TRIAL.

POINT III

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL AND A NEW TRIAL AS THE EVIDENCE THAT DEFENDANT COMMITTED PURPOSEFUL MURDER WAS TENUOUS AND THE INCLUSION OF THE STALKING CHARGE PREJUDICED THE JURY AGAINST DEFENDANT.

POINT IV

THE TRIAL COURT'S CUMULATIVE ERRORS DENIED DEFENDANT A FAIR AND RELIABLE TRIAL. (Not Raised Below)

POINT V

GIVEN THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE IMPOSITION OF A THIRTY-YEAR SENTENCE WITH A THIRTY-YEAR PERIOD OF PAROLE INELIGIBILITY WAS MANIFESTLY EXCESSIVE AND UNFAIR AS IT IS EFFECTIVELY A LIFE SENTENCE GIVEN DEFENDANT'S ADVANCED AGE.

We have considered these arguments in light of the record and applicable legal standards and affirm.

I.

The State's case was largely circumstantial. At approximately 9:05 a.m. on the morning of July 6, 2016, the Burlington County communications center received a 9-1-1 call from defendant who said his friend — O'Rourke — was unresponsive on the floor of her home in Lumberton. Defendant said he went there to "let the dog out," and discovered the body, which was cold. The operator told defendant to wait outside for the ambulance.

When emergency medical technicians (EMTs) arrived, defendant was on the front steps of O'Rourke's home. As they approached, defendant entered the house and emerged with a large dog in his arms and took the dog to the backyard. Defendant's demeanor was "[v]ery oddly calm." Inside the remarkably neat and clean home, EMTs found O'Rourke's lifeless body close to the front door, "in an unusual position, perfectly laid there." They noticed her hair was "messy," and the lividity in her face was on "the wrong side." They also observed a small amount of blood coming from one of her ears, a small amount of vomit, and a spilled beer bottle on the floor nearby.

Defendant spoke extensively with the EMTs. He requested oxygen but exhibited no signs of distress or emotion and remained quite calm. Defendant said he and O'Rourke were friends, and he provided the EMTs with a steady

stream of information about himself and his family, and O'Rourke and her family. He told EMTs that he and O'Rourke were at a local bar the night before, had a couple of beers, and returned to O'Rourke's house. Defendant said O'Rourke was not intoxicated, and he left and returned the next morning to let the dog out because O'Rourke needed to go to work.

Detectives from the Burlington County Prosecutor's Office arrived to process the scene. They noted the home was extremely neat, with nothing appearing out-of-place. They observed a security camera facing the front door of the property, and another near the rear of the house. That camera captured some of the backyard, but not the door that led into the house from the side deck near the rear. Investigators subsequently discovered the front camera was unplugged from the inside wall socket and, therefore, "off line."

The front door showed no sign of damage, and the windows were all secured. The door leading to the deck had damage to "the door trim area from the inside of the house," "as if someone yanked" on the interior door handle "from the inside." O'Rourke's wallet containing some money was in the house, and her jewelry was undisturbed. Her cell phone, however, was missing and was never found throughout the investigation.

The medical examiner, Dr. Ian Hood, arrived on scene, and, when he moved O'Rourke's head, investigators saw some blood on her face. Dr. Hood found O'Rourke's head was "intensely purple" from lividity, unusual for a body lying on its back. Her body showed evidence of manual strangulation, with bruises on her forearm. The "deep hemorrhages" inside O'Rourke's neck observed at autopsy were "classically" indicative of someone pressing against O'Rourke's neck with force. Dr. Hood testified O'Rourke had bruising on the lower back of her skull, indicating her head was most likely banged "up and down" against the floor while she was being strangled. O'Rourke had a blood alcohol content of .162, well over the legal limit.

O'Rourke had been convicted of driving while impaired and had lost her license for three months in 2015. During that time, defendant, who first met O'Rourke online in April 2014, began driving her to work every day. After O'Rourke's license was restored, her friends testified that she would not have "a drop of alcohol" if she were driving and limited herself to one or two beers even if she were not driving. O'Rourke, however, began to complain to her friends that police were frequently stopping her in different municipalities while she was driving, sometimes explaining they were responding to 9-1-1 calls complaining about an erratic, possibly impaired, driver.

Investigators extracted call records and data from defendant's cell phone, documenting he made numerous calls to 9-1-1 from October 2015 to June 2016; police records reflected the calls came from defendant's phone, even though, on some occasions, the caller gave a different name. Investigators secured audio copies of two 9-1-1 calls and identified the voice as defendant's. The calls were played for the jury. Defendant provided O'Rourke's vehicle's license plate number, told authorities the car was driven erratically, and suggested the driver might be intoxicated. None of the traffic stops resulted in the issuance of summonses to O'Rourke. O'Rourke told her friends that she feared someone was following her.

In February 2016, O'Rourke found either sugar or salt near the fuel line door of her car. She reported the incident to police and installed cameras and a home security system as a result. Defendant was present in O'Rourke's home when the system was installed.

On another occasion, when she was out to dinner with friends, O'Rourke said her Facebook account had been "hacked," and she lost all her contacts and information as a result. Investigators determined that only defendant remained on O'Rourke's Facebook account as a "friend."

Defendant provided two formal statements to investigators detailing his whereabouts on July 5, 2016, which was his birthday. As he told EMT's at the scene, defendant said O'Rourke took him to a local tavern and treated him to dinner; they had some drinks. Defendant insisted he and O'Rourke had a beer on the deck of her home and then he left and went directly home.

However, a local police officer who was routinely monitoring vehicles and running their license plates through his computer on the night of July 5, logged defendant's car proceeding away from O'Rourke's home at approximately 9:21 p.m., much later than defendant told police he left O'Rourke's home.

O'Rourke let defendant live in her home for a short time when she discovered he was living in his car. She made a connection through a friend that ultimately led to defendant's new residence, a single room he rented in a nearby home. Defendant told his landlady on July 5 that he was going to be staying with O'Rourke for the next week and would not be using the room. The landlady testified, however, that later in the evening of July 5, she awoke, noticing the lights were on in defendant's bedroom. She found defendant in the room stuffing clothing into a laundry bag. He said, O'Rourke "wanted her alone time," so he came back.

Investigators never found O'Rourke's cell phone, but data extracted from defendant's phone revealed he purchased "spyware" and loaded it onto O'Rourke's phone. The application ran in the background and did not appear as an icon on her phone's screen. The spyware allowed defendant to monitor all of O'Rourke's phone calls, text messages and internet searches. He was also able to use its GPS monitoring capabilities to know wherever the phone was, presumably in O'Rourke's possession.

Investigators also recovered an exchange of text messages between defendant's phone and O'Rourke's phone at 9:15 p.m. on the evening of July 5. Defendant thanked O'Rourke for the birthday dinner, and O'Rourke seemingly responded wishing defendant a good night's rest. However, investigators compared previous text exchanges between defendant and O'Rourke for the jury. They highlighted defendant's distinctive use of abbreviations and clipped style, as compared to that used by O'Rourke. The State argued that in an effort to create a false alibi, defendant actually sent the alleged text from O'Rourke using O'Rourke's phone after she was already dead. The State again emphasized the only thing missing from O'Rourke's home and never found was her cell phone.

Investigators also were able to access the records of O'Rourke's home security system, which allowed them to ascertain when the front and back doors

of the home were opened, and when, critically, the kitchen glass-break sensor registered an alert, at approximately 8:52 p.m. on July 5. The alert was shortly before the front camera went offline. In his statements to police, and in a consensual phone call with O'Rourke's father that investigators recorded, defendant insisted he left O'Rourke's home well before that time. The State argued defendant strangled O'Rourke shortly before the sensor registered an alert. It contended defendant staged the scene to appear as if someone broke in through the rear door, before defendant unplugged the front door camera and exited through that door.

The State contended defendant was obsessed with O'Rourke. Several of O'Rourke's friends testified she described defendant as a friend, not a boyfriend. Most never met him. Defendant claimed the two had a brief romantic relationship, but he admitted O'Rourke did not want to have a long-term, serious relationship with him. Defendant insisted he and the victim had "casual sex" as recently as a week before her death. In his second statement to investigators, defendant admitted being in love with O'Rourke, wanting to be with her, and that "maybe" he had stronger feelings for her than she had for him.

The State produced copies of text messages between defendant and others extending him birthday wishes. It suffices to say defendant claimed sexual

prowess and anticipated celebrating his birthday sexually, presumably, with O'Rourke. The State argued when O'Rourke spurned defendant's advances on the night of July 5, 2016, he "snapped" and killed her.

Defendant testified before the jury. He admitted calling 9-1-1 on occasion out of concern for O'Rourke, who he insisted contrary to the testimony of her closest friends, continued to drink and drive after her license was restored. Defendant admitted installing the spyware on O'Rourke's phone, asserting she asked him to do so. According to defendant, O'Rourke was concerned about her adult niece who sometimes stayed with O'Rourke, and her niece's access to, and inappropriate use of, the internet.

Defendant never adequately explained how installing spyware on O'Rourke's cell phone addressed this alleged concern. Defendant maintained his innocence, asserting he left O'Rourke's home while she was still alive, returned to his rented room, and innocently discovered her lifeless body the following morning when he went to care for her dog.

After a playback of a portion of defendant's statements and deliberating for only a matter of hours, the jury returned guilty verdicts on both counts of the indictment.

II.

Defendant contends the judge erred by denying his pre-trial motion to sever the stalking count from the murder count. He argues "the stronger stalking case was used . . . to convict [him] of the weaker murder charge." According to defendant, the State failed to demonstrate that evidence regarding his alleged stalking of O'Rourke motivated the murder.

Rule 3:7-6 permits the State to charge multiple offenses in a single indictment "if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together." (emphasis added). "Although joinder is favored, economy and efficiency interests do not override a defendant's right to a fair trial." State v. Sterling, 215 N.J. 65, 72 (2013) (citing State v. Chenique-Puey, 145 N.J. 334, 341 (1996)). "Relief from prejudicial joinder shall be afforded as provided by Rule 3:15-2." R. 3:7-6. In considering a severance motion, "[a] court must assess whether prejudice is present, and its judgment is reviewed for an abuse of discretion." Sterling, 215 N.J. at 73 (citing Chenique-Puey, 145 N.J. at 341).

"The test is whether the evidence from one offense would have been admissible N.J.R.E. 404(b) evidence in the trial of the other offense . . . ." Id. at 98. "If the evidence would be admissible at both trials, then the trial court

may consolidate the charges because 'a defendant will not suffer any more prejudice in a joint trial than he would in separate trials.'" Chenique-Puey, 145 N.J. at 341 (quoting State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div. 1983)).

> To avoid prejudicial joinder, the court must conclude the proffered evidence for each set of charges would be admissible in a separate trial on the other set of charges because the "N.J.R.E. 404(b) requirements [are] met, and the evidence of other crimes or bad acts [is] 'relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue.'"
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> [State v. Smith, ___ N.J. Super. ___, ___ (App. Div. 2022) (slip op. at 20) (alterations in original) (quoting Sterling, 215 N.J. at 73).]

Here, the judge conducted the required N.J.R.E. 404(b) analysis applying the four-prong standard enunciated in State v. Cofield, 127 N.J. 328, 338 (1992). He concluded the evidence of defendant's stalking was relevant to prove "motive . . . intent, opportunity and identity," all exceptions to the rule's general exclusion of other crime evidence. The judge also determined the State's proffer satisfied the balance of Cofield's requirements.

"Case law and treatises have recognized the special role of motive evidence and its unique capacity to provide a jury with an overarching narrative, permitting inferences for why a defendant might have engaged in the alleged

criminal conduct." State v. Calleia, 206 N.J. 274, 293 (2011) (emphasis added). "Time and again, courts have admitted motive evidence even when it did no more than raise an inference of why a defendant may have engaged in criminal conduct, and even in the face of a certain degree of potential prejudice stemming from the evidence." Id. at 294.

Here, evidence of defendant's stalking behavior, i.e., his need to know where O'Rourke was, whom she was with, and what she was doing at all times, supports the State's contention that he was obsessed with her. Defendant expected to spend a celebratory, romantic evening with O'Rourke on his birthday, but, as he later admitted, she did not want that kind of relationship with him. We agree that evidence of defendant's stalking of O'Rourke was relevant to prove that his unrequited desire to be with her was his motive for killing her, and the evidence further identified him as her killer.

The judge did not consider whether evidence of the homicide was admissible to prove the stalking count. As a result, we apply Cofield's standards and conduct our review de novo. See, e.g., State v. Rose, 206 N.J. 141, 158 (2011) (noting an appellate court conducts its own plenary review when the trial court fails to conduct a Cofield analysis).

Our courts have recognized the use of modern technology to track a victim's whereabouts as behavior that our anti-stalking statute was intended to proscribe. See, e.g., State v. Gandhi, 201 N.J. 161, 185 n.12 (2010) (noting legislative amendments intended to broaden the statute's reach to include new technologies); State v. B.A., 458 N.J. Super. 391, 406 (App. Div. 2019) (discussing new technology used in stalking). In this case, O'Rourke grew suspicious over the random, unjustified, motor vehicle stops and vandalism of her car, but she did not know who was responsible. The identity of the stalker only came to light through the homicide investigation. "As exemplified in different circumstances, evidence of a later crime may be admitted on the issue of identity when [a] defendant's connection to the first crime was established by specific evidence discovered during the second crime." Sterling, 215 N.J. at 92. Evidence revealed in the homicide investigation would have been admitted in prosecuting the stalking charge if the two charges were tried separately.

In short, defendant suffered no prejudice by the joinder of the murder and stalking counts in a single trial, and the judge's denial of defendant's motion to sever the counts was not a mistaken exercise of discretion.[1]

[1] In brief fashion, defendant argues severance was required because of his need to testify regarding the murder count, where the State had no forensic evidence

III.

The remaining assertions of trial error raised in Points II and III require little discussion. Citing the prosecution's contention that he "snapped" when O'Rourke rebuffed his sexual overtures, defendant contends the judge erred by refusing to instruct the jury on the lesser-included charge of passion/provocation manslaughter. We disagree.

"[I]ntentional homicide that would otherwise be murder may be mitigated to manslaughter when it is 'committed in the heat of passion resulting from a reasonable provocation.'" State v. Funderburg, 225 N.J. 66, 80 (2016) (quoting N.J.S.A. 2C:11-4(b)(2)). Passion/provocation manslaughter is comprised of four elements:

> [1] the provocation must be adequate; [2] the defendant must not have had time to cool off between the provocation and the slaying; [3] the provocation must have actually impassioned the defendant; and [4] the defendant must not have actually cooled off before the slaying.

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or direct evidence of his guilt, but he would not necessarily have testified in the stalking trial if the charge was tried separately. We have rejected similar arguments. See State v. Pierro, 355 N.J. Super. 109, 121 (App. Div. 2002) (holding that when joinder is otherwise justified, "no case has held that severance must be granted solely because defendant claims that he would not testify in the weaker case to avoid exposure of his criminal record"). The Court has held severance is not justified simply to serve defendant's trial strategy. State v. Handy, 215 N.J. 334, 354 (2013).

> [Ibid. (quoting State v. Mauricio, 117 N.J. 402, 411 (1990)) (citations omitted).]

"The first two elements are 'objective; thus, if they are supported by the evidence, the trial court should instruct the jury on passion/provocation manslaughter, leaving the determination of the remaining elements to the jury.'" State v. Galicia, 210 N.J. 364, 380 (2012) (quoting State v. Josephs, 174 N.J. 44, 103 (2002)).

Putting aside defendant's denial of having anything to do with O'Rourke's homicide, much less that he killed her after a reasonable provocation and without a reasonable cooling off period, O'Rourke's denial of defendant's sexual overtures are insufficient provocation as a matter of law. See, e.g., Funderburg, 225 N.J. at 80 (noting words alone, "no matter how offensive or insulting, do not constitute adequate provocation" (quoting State v. Crisantos, 102 N.J. 265, 274 (1986))); Mauricio, 117 N.J. at 414 (noting "conduct that is alleged to have been sexually frustrating" is not adequate provocation (citing State v. Hollander, 201 N.J. Super. 453, 474 (App. Div. 1985))). Defendant's argument requires no further discussion.

Defendant also argues the judge should have granted his motions for acquittal and a new trial. He contends there was a lack of evidence as to both

counts of the indictment, and admission of the stalking evidence unfairly prejudiced the jury's consideration of the murder charge.

Whether made at the conclusion of trial or after the verdict is received, the standard for evaluating a motion for acquittal is the same.

> In assessing a motion for a judgment of acquittal . . . , a reviewing court must view the entirety of the direct and circumstantial evidence presented by the State and the defendant and give the State the benefit of all the favorable evidence and all the favorable inferences drawn from that evidence, and then determine whether a reasonable jury could find guilt beyond a reasonable doubt.
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> [State v. Lodzinski, 249 N.J. 116, 144 (2021).]

We apply the same legal standard as the trial judge and review the denial of a motion for acquittal de novo. State v. Fuqua, 234 N.J. 583, 590 (2018) (citing State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990)). A motion for a new trial may be granted "if required in the interest of justice." R. 3:20-1. When the motion was premised on an alleged lack of evidence, as it was here, "[t]he trial court's ruling . . . shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1.

Defendant claims the evidence of stalking was insufficient because the State failed to prove O'Rourke was fearful. However, N.J.S.A. 2C:12-10(b) only requires the State prove that defendant "purposefully or knowingly engage[d] in

a course of conduct directed at [O'Rourke] that would cause a reasonable person to . . . suffer other emotional distress." The evidence from O'Rourke's friends permitted the jury to conclude beyond a reasonable doubt she suffered emotional distress as a result of defendant's malicious 9-1-1 calls to police.

Defendant contends the evidence was insufficient to prove beyond a reasonable doubt that he purposely or knowingly murdered O'Rourke. The Court long ago recognized that circumstantial evidence alone may be sufficient to sustain a conviction if it enables the jury to find beyond a reasonable doubt defendant's guilt of the charge. See State v. Mayberry, 52 N.J. 413, 437 (1968) ("The approach is the same though the testimony is circumstantial rather than direct; indeed in many situations circumstantial evidence may be 'more forceful and more persuasive than direct evidence.'" (quoting State v. Corby, 28 N.J. 106, 119 (1958))). Here, there was sufficient circumstantial evidence demonstrating defendant's state of mind on the night of the murder. See State v. Williams, 190 N.J. 114, 128 (2007) (citing cases that "reflect the broad sweep given to 'relevance' in respect of circumstantial evidence probative on a disputed issue involving state of mind").

The judge properly denied defendant's motions for acquittal and a new trial. Concluding there was no trial error, defendant's claim of cumulative error raised in Point IV requires no discussion in a written opinion. R. 2:11-3(e)(2).

IV.

At sentencing, the judge found aggravating factors three and nine "substantially preponderated" over mitigating factor seven. See N.J.S.A. 2C:44-1(a)(3) (the risk of re-offense); (a)(9) (the need to deter defendant and others); (b)(7) (defendant's lack of prior criminal history). He imposed the minimum sentence of thirty-years' imprisonment with thirty-years of parole ineligibility on defendant's murder conviction, see N.J.S.A. 2C:11-3(b)(1), and a concurrent sentence on the fourth-degree stalking conviction.

Defendant contends the judge erred by declining to find mitigating factors seven, eight, nine, and twelve. See N.J.S.A. 2C:44-1(b)(7) (defendant's lack of prior criminal history); (b)(8) (defendant's conduct was the result of circumstances unlikely to recur); (b)(9) (defendant's character and attitude indicate it is unlikely he will commit another offense); (b)(12) (defendant's willingness to cooperate with law enforcement authorities). As already noted, the judge found mitigating factor seven. Further, defendant contends had the judge properly found and weighed these mitigating factors, he should have

sentenced defendant as a second-degree offender pursuant to N.J.S.A. 2C:44-1(f)(2).

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011).

> The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).]

The judge considered and rejected the cited mitigating factors, and we find no reason otherwise to conclude they applied. More importantly, nothing in this record satisfies the demanding standard justifying the downgrade of a vicious murder to a second-degree offense. State v. Megargel, 143 N.J. 484, 504 (1996). We affirm defendant's sentence.

Affirmed.