SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0130-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DENNIS J. MUNOZ,
a/k/a DENNID J. MUNOZ
and WOLF MUNOZ,

Defendant-Appellant.

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Argued November 30, 2022 – Decided September 14, 2023

Before Judges Vernoia, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 19-02-0260.

Stefan Van Jura, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Yael Lerer, Assistant Deputy Public Defender, of counsel and on the briefs).

Kaili E. Matthews, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Valeria Dominguez, Deputy Attorney General, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

In the early evening hours of November 9, 2015, Michael Black was at home with his three children, ages seven, four, and three, on Elmhurst Avenue in Hamilton Township's Cloverleaf residential development. According to reports the children later made to the police, the family dog "was barking at someone" outside, where the seven-year-old child saw "a flashlight." Black brandished a sword and went outside but, as the children explained, "someone had [a] gun outside and [shot]" their father with it. The seven-year-old child also stated Black re-entered the home, "opened the door really fast and . . . then he wanted us in the room for a little bit so the bad guy couldn't get us." The child reported his father still possessed the sword when he returned inside, "was bleeding" as he did so, and "then . . . was lying down on the floor because he got shot."

At 7:39 p.m., after he had re-entered the home, Black called 9-1-1. When asked by the operator "where is your emergency?", Black provided his street address. The operator asked "[w]hat's going on, sir," and Black stated, "I've just been shot." The operator then asked, "[w]ho shot you?" and Black responded,

"I'm not sure, some man named Wolf." Black told the operator he had been shot in the back and urged the operator to "[p]lease hurry."

In response to the operator's request for his name, he said, "[m]y name is Michael Black." The operator asked Black for a description of the person who shot him. Black responded, "I know exactly who it is." The operator said, "Who is it?" and Black said, "His name is Wolf." The operator asked, "[w]hat's his first name? What's his first name?" In the last words he uttered that could be heard over the phone before he died, Black said "don't know . . . ."

The police officers who were dispatched to the scene found Black lying on the kitchen floor of his home barely breathing, and one of the responding officers, who was also an emergency medical technician, believed defendant was dead. Emergency medical personnel who arrived determined Black had a faint heartbeat. They transferred Black to the hospital where he was pronounced dead.

The medical examiner who later performed Black's autopsy testified Black's cause of death was a "[g]unshot wound to the chest." The medical examiner explained a single bullet entered Black's chest and perforated his heart. The bleeding in Black's chest cavity caused him to drown in his own blood resulting in his death. The medical examiner also testified Black had no

gunpowder residue on his body, which indicated the gunshot was a "distant wound."

During the morning following Black's death, police arrested and charged defendant Dennis Munoz with Black's murder. As defendant explained to the police, he has been known his entire life as "Wolf." Indeed, when he first spoke to the police following his arrest, defendant introduced himself as "Dennis Munoz AKA Wolf."

A jury later convicted defendant of knowing and purposeful murder, witness tampering, and possessory weapons offenses. Following its merger of offenses, the court imposed a life sentence without parole on the murder charge and a consecutive twenty-year sentence with a ten-year period of parole ineligibility on defendant's conviction for first-degree witness tampering.

Defendant appeals from his conviction and sentence. He argues the trial court made erroneous evidentiary rulings, failed to provide identification and unanimity instructions to the jury, and erred by determining he was subject to a mandatory life sentence on the murder charge. Defendant claims the court's purported errors, individually and cumulatively, warrant reversal of his convictions and sentence. For the reasons we explain, we affirm defendant's convictions, vacate his sentence, and remand for resentencing.

I.

We glean the facts from the trial record. In the spring of 2015, defendant and his wife, Courtney Sciaretto, had a child. Within days of the child's birth, Sciaretto and the child moved in with Sciaretto's family and then, during the summer months, Sciaretto and the child moved into the home of Sciaretto's friend, Heather Wyckliff (Heather), in Mays Landing.[1] Heather shared the home with her husband, Keith Wyckliff (Keith), and their children.

At that time, Heather used and sold drugs — methamphetamine — from her home. Sciaretto, who also used methamphetamine and opiate pills, assisted Heather in distributing methamphetamine to Heather's customers when she was unavailable. Black was one of Heather's customers — he bought methamphetamine from her. Black was also Keith's best friend.

Defendant was also Heather's customer, and he additionally received opiate pills from Heather. Heather distributed opiate pills she obtained through a doctor's prescription.

Defendant and Black were frequent visitors to the Wyckliffs' home. That is where they bought or obtained the drugs they both used on a daily basis.

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[1] Because Heather Wyckliff shares the same surname as her husband Keith Wyckliff, we refer to each by their first names for ease of reference and to avoid confusion. We intend no disrespect in doing so.

After moving into the Wyckliffs' home, Sciaretto became friendly with Black. Defendant became aware of the relationship and did not like it. He communicated his dissatisfaction to both Sciaretto and Black at various times and in various ways. In fact, he often threatened to "smoke" Black if the relationship continued. Nonetheless, Sciaretto and Black did not end their relationship.

Defendant also made efforts to convince Sciaretto to move into his newly acquired Absecon apartment, so the two could live together as a family with their newborn child. Sciaretto rebuffed defendant's efforts, preferring to remain at the Wyckliffs' home.

Defendant paid for Sciaretto's cellphone and had the ability to monitor the phone numbers she called or texted and from which she received calls. The evidence showed he frequently did so.

During the summer of 2015, defendant requested Black's phone number, and Sciaretto provided it to him. Defendant saw a Facebook post on Sciaretto's account asking Black to call her "as soon as he" could, and defendant sent her a text message to Sciaretto stating in part: "I can't trust you at all" and referring to Black as Sciaretto's "broke ass boyfriend."

In another message to Sciaretto, defendant, who referred to Black variously as Mike, M, MB, Mike Black, and old boy, stated:

> I am damn sure [I] don't want anyone hollering at my wife unless they're ready to fucking die man, and by the last conversation with old boy, people are far, far, away from wanting to die. Not me. It's been drilled in my mind lately but I have too much stress and not little to live for.

In a July 31, 2015 text message threatening Black and his family, and referring to Sciaretto, defendant wrote to Black:

> Ok home boy this [M]ike? Listen man for your own good! Ever since she found more cheating stories on me, she's been trying to make me feel jealous, and definitely not just with w u! She's contacting ex boyfriends on Facebook commenting on their post etc . . . . I don't think you fucked her, in fact, told u u could! But don't feed back (acting tuff on the phone bro). I told her I'll fuck up all of them if she wants to keep going down that this route! But u texted talking tuff, that'll get you smoked with me! Listen if u love your wife your kids and your life, don't fucking contact me like that ever! Because doing that gave me your address your job info etc . . . Not over my fucking wife over texting me like that! Your No beef and your No treat! Your [sic] only a tool my wife is using to get me mad! When she's been doing since I got her when she was a teen! I'm gonna ignore that dumb shit u said like u didn't say it! But I will promise u that'll never happen again with real drama popping off behind those comments! Enjoy your day with your family kiss your kids and realize how much you love them please!! Peace Big Wolf ACG Ryder AKA Wolf Killer aka Ibrahim.

[(Emphases added).]

Keith recalled that in August 2015, he overheard a phone call between Sciaretto and defendant during which defendant said, "you need to talk to old boy and tell him to back off. He's got his own family." Keith also heard Black tell defendant that he should take care of his family and not worry about Black's family, and defendant told Black, "I'll show you I'm going to take care of something alright. You . . . motherfuckers think I'm soft and I'm going to smoke your ass."

At the end of the summer, Sciaretto stopped seeing Black and moved in with defendant in an effort to work out their relationship. After a short time, however, she and the child returned to live with the Wyckliffs and she resumed her relationship with Black. According to Sciaretto, this angered defendant because it appeared she had left him for Black. She thereafter continued to tell defendant she did not have a relationship with Black even though she did.

On October 3, 2015, defendant texted Sciaretto in part, "Okay, obviously your [sic] dying to F that gay assed kid. Listen, you're a fucking rat ass snitch bitch. Go F Mike Black you whore."

On October 14, Sciaretto sent defendant a text message, referring to Black, stating "leave him the f alone." Sciaretto sent the message because she

understood defendant had texted and called Black. In response, defendant sent a text message to Sciaretto stating, "you did it to him. You know exactly what the fuck would happen. Even Nuck said [you] got old boy in a hell of a position."[2] Sciaretto responded, stating "leave me alone." In response, defendant sent her a text stating, "I am going to have to kill him now you understand."

Sciaretto testified that on October 29, 2015, she sent a text message to Black, relaying that defendant said she and Black were "playing" him like he was a "joke." Sciaretto also explained defendant arrived at the Wyckliffs' home that day, called her outside, and demanded to see her cellphone. According to Sciaretto, defendant asked for the phone's passcode and then said, "y'all done, you all are done." Sciaretto understood defendant to say she must stop talking to Black.

One day later, defendant texted Sciaretto: "U been talking to Mike all fucking week . . . and you f'd him. That's W [sic] straight up violation and I wont take that shit . . . . Your disrespect and mine has to end now." Sciaretto responds in a text message accusing defendant of talking to his alleged girlfriend "all week," and defendant responded, "Funny how you want her number but I

[2] Nuck is the nickname of a friend of defendant.

don't want to talk to old boy at all. Already said my peace [sic] and Allah knows best what it is."

The following day, the text messages, and the threats, continued. Defendant sent Sciaretto a text message on October 31, 2015, stating in part, "You crossed me, you hurt me, you played me by my so-called partner did this to me instead of getting a divorce." Sciaretto responded, stating: "[L]isten to me right the F now threatening me with my life yet again because u are too pathetic and desperate to get me back that you have to resort of trying to put fear in me to get back with you." Defendant responded: "I won[']t tolerate it and please don't beg me when it's too late because I will not stop my mission" and "Lol, yeah, no is right no[t] too late stop begging . . . you did this, no one else."

On November 2, 2015, defendant texted Sciaretto, stating: "Here's my rules . . . absolutely no talking to old boy at all for the little bit more you'll know him for. Please try to work with me while I go hard for my family. Love you and the baby very much." (Emphasis added). Three days later, in a November 5, 2015 text message, defendant wrote to Black, "don't talk tough, you'll get smoked."

On November 9, 2015, the day he was murdered, Black visited Sciaretto in the morning to first pick up methamphetamine he purchased from Heather

and later to "hook up." At around 3:02 p.m., Sciaretto sent a text message to Black stating, "Wolf here don't text me."

Sciaretto and defendant had an argument while defendant was at the Wyckliffs' home that afternoon. According to Sciaretto, she was scheduled to see the doctor who prescribed the opiate pills the following day and told defendant she would not share any pills with him. In response, defendant became angry and said, "you ain't going to try to play me with these pills tomorrow because you'll start a fucking war." Sciaretto testified defendant then hit her in the face before leaving the Wyckliffs' home upset and angry.

Sciaretto reported the incident to Black and Michael Robinson, who she described was a friend at that time.[3] Robinson was also a frequent visitor to the Wyckliffs' home, where he purchased drugs. Sciaretto testified Black and Robinson "want[ed] to kind of fight" defendant, and, at 7:23 p.m. on November 9, 2015, Black sent her a text stating he knew "a guy who would do it cheap." Sciaretto understood Black meant he had found someone who would "beat [defendant] up." And Sciaretto agreed with Black's plan to have someone beat up defendant.

[3] Following Black's murder, Sciaretto and Robinson became romantically involved.

Meanwhile, at about 7:30 p.m. on November 9, 2015, Sciaretto brought her son upstairs at the Wyckliffs' home to put him to sleep, and later fell asleep herself. At 7:39 p.m., Sciaretto texted Black, stating that when Heather and Keith returned home, she planned to obtain a restraining order against defendant at the police station. At the precise time Sciaretto sent that text, Black was on the phone with the 9-1-1 operator reporting he had been shot. Sciaretto never spoke to, or heard from, Black again.

Following the officers' arrival at Black's home, and the discovery of his body on the kitchen floor, a search of his cellular phone revealed threatening text messages from an individual named Wolf. The police quickly identified defendant as the subscriber of the phone from which the messages had been sent. In short order, police identified defendant as a suspect in Black's murder.

At around 9:30 p.m., Sciaretto awoke and soon thereafter was advised by a friend there had been a shooting in the Cloverleaf residential development where Black lived. After 10:00 p.m., Sciaretto sent Black three text messages requesting that he phone or respond to her.

At some point during the evening following the murder, defendant wrote Sciaretto: "[Y]ou have more feelings for him than your damn husband," and

"[w]e're going to stop this right here . . . . Stop mentioning it."[4] Defendant further stated, "[i]t's something very serious to me, but nothing to talk about sweetie. And you know what you are to me so don't you dare play like you don't know how jealous and how much pride and honor I took in you." He ended the text message with a request; "[P]lease please just give me my wife and son back, that's all I want."

Sciaretto testified defendant also spoke with her late in the evening on November 9, 2015, or in the early morning hours of November 10, 2015. During the conversation, which Sciaretto recorded, defendant complained that Sciaretto had earlier in the day told him he would have to pay for opiate pills. In part, defendant said he would not give her "fucking money for [her] to talk to another guy" on his phone. When Sciaretto denied speaking to any other men on the phone, defendant said: "[Y]ou text him, you're texting in the morning, you call him all the time." Defendant also said: "I'm getting tired of that."

Defendant then disclosed his knowledge of Sciaretto's use of the phone he paid for. Defendant stated, "[a]lmost every other morning you text that dude that you talking to." Sciaretto told defendant to say the name of the person to

[4] The precise time of the text message is unclear from the record. Based on Sciaretto's trial testimony, we discern that the message was sent at some point after she awoke at around 9:30 p.m.

whom defendant referred, and defendant responded, "Mike Black motherfucker. Come on." Defendant then said, "I know you text him a lot."

More particularly, defendant told Sciaretto that she "texted him at 8 something in the morning." Defendant explained: "I know who it is. I know who texted who. That shit got to stop." Defendant also told Sciaretto: "You're crazier than fucking me thinking that you're going to keep on texting other dudes. I don't give a fuck who it is, okay, and I don't give a fuck."

Defendant also admitted his anger over Sciaretto's refusal to give him opiate pills earlier that day. Sciaretto said defendant "put [his] hands on [her]." Defendant responded, telling Sciaretto she "ripped [his] shirt" and "put scratches on [him]" during their physical alteration at the Wyckliffs' home earlier that day. Defendant also said Sciaretto's refusal to provide him with free opiate pills was "crossing the line to fucking fool with" him. Defendant admitted Sciaretto's refusal had "put [his] mind in another zone" and then reiterated and swore "to God" the refusal "puts [his] mind in another zone."

During the telephone call, defendant also made clear he had monitored Sciaretto's use of her phone during the evening of the November 9, 2015. Defendant said Sciaretto called Black "again just a few hours ago" and noted

she called Black, "daytime, nighttime[.]" Defendant precisely knew Sciaretto had tried calling Black at "10:38."

Defendant also stated that Black violated him, and that he had told Black "twice in the conversation like let her the fuck go," but Black did not. Defendant told Sciaretto her actions showed him she thought he was "soft[,]" but he "was not." Defendant explained: "I told you a million times, stop it, leave it alone with dudes, but you keep on, you keep on. Like you're violating me every single fucking time you do."

At that point, the call was interrupted because the police arrived at the Wyckliffs' home. Sciaretto turned her phone over to the police and accompanied them to the police station where she provided a statement and recorded phone conversations with defendant. It was later that morning Sciaretto first learned Black was dead.

On the morning of November 10, 2015, police surveilled defendant for a short period after, as noted, investigators identified defendant's phone number through references and communications involving the name Wolf on Black's phones. Detective Larry Fernan was one of the officers conducting the surveillance and recalled at trial he observed defendant "exit his residence" and "eyeball[]" he and his partner. Detective Fernan also testified that when

defendant was "walking in [their] direction staring at" them, he observed defendant "was kind of manipulating his hand in his pocket consistent with maybe having a weapon or holding a weapon." Detective Fernan recalled his "reaction" to observing defendant's conduct caused him and his partner "an anxious few minutes for sure."

Later that morning, law enforcement officers arrested defendant. According to Sciaretto's testimony, following his arrest, defendant continued to speak with her. On one occasion defendant asked Sciaretto if Black had surveillance cameras at his home.

Following his arrest on the morning of November 10, 2015, two detectives interrogated defendant following the administration of his Miranda[5] rights. A recording of the interrogation was admitted in evidence and played for the jury. At the outset of the audio recording of the interrogation, defendant can be heard requesting that the officers retrieve two pills from a prescription bottle found on him at the time of his arrest. The officers accommodated his request.

During the interrogation, defendant identifies himself as Wolf and first said he knew Black "vaguely" and not "too personally." Defendant explained

[5] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

he "dealt with" Black a few times and knew him through their use of drugs. Defendant claimed Black sold a "lot of weight" of marijuana.

Defendant explained his relationship with Black, stating that when he saw Black, they always shook hands and talked for a few minutes and "maybe a few drugs were involved." Defendant also said he "wasn't into [Black's] personal life." Defendant told the detectives he could not recall the last time he saw Black and explained it may have been four or five months earlier.

Defendant further acknowledged Black knew him and would call him "Wolf." Defendant told the officers he was not aware of anyone having a "beef" with Black and suggested someone might have tried to rob him. When asked if he had any disputes with Black, defendant stated: "Nah, I ain't have no beef with him like never had an argument with that kid or nothing."[6]

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[6] The State introduced as evidence at trial numerous text message between defendant and Sciaretto demonstrating defendant's "beef" with Black. The texts contain vulgar and profane language we have left unedited to accurately reflect defendant's intent. The texts include: a July 29, 2015 text message in which defendant stated, "have Mike Black buy all your shit for you. Since you want his dick so bad. See how much you get off a married man [with] 4 kids"; a September 4, 2015 text message from defendant to Sciaretto stating in part, "[I] [t]old you I refused to let you play me with good old boy. That means anything necessary," and "I'm jealous. I'm furious. We all know how Wolf gets over his pussy, it's my honor and my property that I tossed around like nothing"; an October 3, 2015 text message in which defendant told Sciaretto, "I love you babe. I'm so sorry I fucked up . . . You're the best in my life facts. I'll kill over

When confronted with a text message from Heather to Black stating, "don't come here cause Wolf's here[,]" defendant first told the officers Black has a relationship with his wife, Sciaretto. Defendant explained: "They have something going on like I guess they mess around." Defendant denied giving Black any reason to be scared of him. Concerning his interactions with Black, defendant told the officers: "So we don't talk so like I don't send him threats or anything. I don't send him nothing."

The officers then showed defendant a threatening text message defendant had sent to Black's phone in which defendant stated he would "smoke" Black. Defendant explained the text message "stem[med] from" the fact that Black and Sciaretto had been romantically involved while defendant and Sciaretto were married but separated.

Defendant also explained that when he used the term "smoke" he meant he would "smoke" someone with his hands because he had "hurt a lot of people . . . on the streets fighting." Defendant said he had forgotten about that text message because it was "a while back." Defendant then for the first time admitted calling and texting Black.

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that pussy. You and everyone else knows"; and a November 9, 2015 text sent prior to Black's murder in which defendant advises Sciaretto, "[d]on't fucking play me like that and start me on a warpath right now."

During the interrogation, the officers also asked defendant about where he was the previous evening, the night of Black's murder. Defendant stated that following a meeting on the morning of the previous day, he spent the rest of the day and evening alone at his Absecon home. Defendant advised the officers he was "[d]efinitely in [his] house the entire night."

Defendant invoked his right to remain silent, terminated the interrogation, and was taken to another area of the Atlantic County Prosecutor's Officer for processing. The detectives who were present during the processing testified that after advising defendant he was being charged with Black's murder, defendant said: "How can you do that[?] I didn't say anything to incriminate myself and besides that you don't have any witnesses." In response to defendant's statement, one of the detectives asked "a question" to the effect of, "how do you know that we don't have any witnesses[?]," but defendant did not respond.

At trial, the State presented evidence undermining defendant's claim he was at home in Absecon on the evening of Black's murder. Photographs from video recordings show defendant at a McDonald's at 5:40 p.m. on the night of Black's murder. The photographs also showed that, at 6:38 p.m., defendant and Edwin Velazquez, his cousin and co-defendant, were in a Walmart store located a few miles east of Black's residence on the evening of Black's murder. Another

photo shows defendant standing outside the Walmart store and Velazquez's old silver van. Velazquez later told law enforcement officers the van was in disrepair, made a significant amount of noise when driven, and required frequently stopping to fill with water to ensure it did not overheat. The recordings show the van leaving the Walmart parking lot at 7:13 p.m. and driving westward, the general direction of Black's residence. Velazquez's van is later seen at 8:48 p.m. at a CVS in Absecon.

The State also presented evidence concerning the location of defendant's cellphone. The evidence established the phone pinged off the cellphone tower closest to Black's home at 2:47 p.m., less than five hours before Black's murder. Defendant's phone later pinged off cellphone towers in Egg Harbor City between 4:03 p.m. and 6:04 p.m., and a cellphone tower in downtown Mays Landing, a three-to-five-minute drive from Black's residence, between 7:25 p.m. and 7:30 p.m. Following the final ping off the cellphone tower in Mays Landing at 7:30 p.m., defendant's phone showed no more activity until 8:12 p.m.

The State also produced evidence showing an exchange of phone calls between defendant and Velazquez between 5:00 p.m. and 5:52 p.m. Velazquez's phone was not again powered on until 9:02 p.m.

In the hours following Black's murder, defendant and Velazquez communicated via their cellular phones twenty times. The communications included texts during the early morning hours, including a 2:22 a.m. text from defendant stating, "if you can't sleep, call me" and a 2:53 a.m. text from defendant stating, "call me real quick." Between midnight and 6:00 a.m., defendant and Velazquez spoke on the phone fourteen times. In an 8:39 a.m. text to Velazquez, defendant wrote: "Since I prayed and asked Allah, the King of Kings, for what I wanted, I truly know he's the best planner. See how I forgot my phone and had to double back. That decided everything. It worked out for the better."

An Atlantic County grand jury later charged defendant in a seven-count indictment[7] with: first-degree murder, N.J.S.A. 2C:11-3(a)(1), N.J.S.A. 2C:11-3(a)(2), and N.J.S.A. 2C:11-3(b)(4) (count one); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:11-3(a)(1) (count two); second-degree unlawful possession of a weapon, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:39-5(b)(1) (count four); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:39-4(a)(1) (count

[7] We refer to the superseding indictment returned by the grand jury against defendant and Velazquez.

five); first-degree witness tampering, N.J.S.A. 2C:28-5(a)(1) (count six); and second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1).[8]

Following defendant's arrest, police searched his home and seized "two spiral notebooks" one of which contained a poem written by defendant. In the poem, defendant writes:

> Talking the king of drilling South Jersey get down dirty our thing is killing. Then the bottom is you rocking with a fool goon. Big Wolf, I'll smoke that and light you like a full moon. I don't be on Facebook or Instagram. When I see you it will be lethal. Hope you n[] is bland.

At trial, defense counsel objected to admission of the poem on relevancy grounds. The State argued

> defendant in his statement to investigators when he was presented with that threat to smoke Mike Black, he said smoking is just using my hands, and he said that a couple of times in the jail calls as well, so on that very day his house was searched[,] and this notebook was obtained and he's clearly referring to smoking as shooting.

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[8] The indictment also charged defendant's co-defendant, Velazquez, with first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:11-3(a)(1) (count two); first-degree accomplice liability for murder, N.J.S.A. 2C:5-2(a)(1), N.J.S.A. 2C:11-3(a)(1), and N.J.S.A. 2C:2-6(b)(3) (count three); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) and N.J.S.A. 2C:5-2(a)(1) (count four); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). The jury acquitted Velazquez of all charges following the joint trial.

The judge overruled defense counsel's objection and found the poem "appears to be relevant."

While incarcerated pre-trial, defendant made phone calls to Sciaretto, his father, and another individual. In one call, defendant told Sciaretto to "tell [his] parents [he] said I'm sorry" and that he "had nothing to do with it . . . ." He also said he did not know if Black said anything before he died and stated "I don't know . . . like how could they know[,] how could they[?]" Although there is no evidence defendant knew of the State's evidence against him at the time of the call, and during various calls from the jail he stated the police showed him only two text messages tying him Black during the interrogation, defendant told Sciaretto: "[T]hey don't have no weapon. I don't know but they're telling me I did it." Later during the call, defendant reiterated law enforcement "ha[d] no weapon." Similarly, in a recorded call with his father, defendant stated law enforcement does not have a weapon and requested his father tell Velazquez "they don't know anything about a weapon."

In another call with Sciaretto, defendant said the State's case is based on what Sciaretto, Heather, and Keith know, and the State did not have a gun. He also said the State had shown him an old text where he said he was going to smoke Black, "[b]ut [he] told them that's when I use my hands." Defendant

further stated the State might have "a dying testament meaning that when old boy got shot he said that I shot him."

During a call four days after his arrest, defendant explained to Sciaretto he had only been shown the two text messages by the police, including the one in which he said he would smoke Black. Sciaretto informed him at that time that Black did not die right away and had called 9-1-1.

The State also introduced a recorded call between defendant and another individual. Referring to his interrogation by the police, defendant said: "The only thing I said is I lied because this is [a] very important thing [—] where were you? I was like nowhere knowing damn well I was everywhere and they had my phone records."

Defendant also "sent . . . several letters in the mail" while he was incarcerated pre-trial. Heather testified he sent letters to her stating she "need[s] to not show up [to the trial], that [she] need[s] to change what [she] said to the detectives, and . . . [if she does] show up to court . . . his gang is going to be looking at [her] . . . ." Heather testified she "stopped reading the letters after awhile" because they "ma[d]e her afraid[.]" At that point, Heather's husband, Keith, "would just take [the letters]" because she "was scared and stopped reading them."

Kayla O'Brien, then-a resident of a home next to Black's, testified that, on the night of the murder, she "was in [her] house" and stepped outside "around from 7:30 to 7:45 that night." O'Brien explained her "mom told [her] that [she] left [her] headlights on, so [she] went outside to turn them off, and when [she] was in [her] car," a "minivan passed [her]" which "was making a lot of noise" and "turned around in front of Black's house and then . . . passed her again and parked next to [her] house . . . ."

Before she went back into her house, O'Brien observed that "two guys got out" of the van after it parked and "one opened the hood and one started walking[.]" O'Brien said the minivan "looked old" and "was making a lot of noise like something was wrong with it[.]" Detective Paul Micheletti of the Atlantic County Prosecutor's Office (ACPO) Crime Scenes Unit testified at trial he examined co-defendant Velazquez's van, which police recovered "in Atlantic City . . . on the night of the homicide," and after "hear[ing] the engine of the minivan in action[,]" he concluded "it didn't purr like a car would typically run." Micheletti also testified a rear taillight on the van was "damaged" because "half the lens [wa]s missing" from the taillight.[9]

[9] Velazquez's van was identified in the recordings and photographs admitted at trial in part based on its broken taillight.

Defendant did not present any witnesses at trial. Velazquez presented a series of character witnesses.

Following the parties' closing arguments, the court instructed the jury on the elements of the offenses charged in the indictment against defendant, "murder by his own conduct, conspiracy to commit murder, unlawful possession of a handgun, possession of a handgun for an unlawful purpose, and witness tampering." The trial court explained "[t]he burden of proving each element of the charge beyond a reasonable doubt rests upon the State and the burden never shifts to . . . defendant." The trial court also instructed "[t]he verdict must represent the considered judgment of each juror and must be unanimous as to each charge. This means that all of you must agree if the defendant is guilty or not guilty on each charge." The trial court later stressed in the same vein that "[y]our verdict, whatever it may be as to each crime charged, must be unanimous, that is, each of the [twelve] members on the deliberating jury must agree as to the verdict."

The court then instructed the jury on the murder charge, stating:

> In order for you to find the defendant guilty of murder, the State is required to prove each of the following elements beyond a reasonable doubt: (1) that the defendant caused Michael Black's death or serious bodily injury that then resulted in Michael Black's death

> and (2) that the defendant did so purposely or knowingly.
>
> [(Emphases added).]

The court further emphasized that "all jurors must agree that the defendant either knowingly or purposely caused the death or serious bodily injury resulting in the death of Michael Black" and if, "after consideration of all the evidence, you find the State has failed to prove any element of an offense beyond a reasonable doubt, your verdict must be not guilty."

The trial court did not provide a specific identification instruction as to Black's identification of Wolf as the shooter during the 9-1-1 call. Defendant did not object to the court's instructions or request an identification charge at the time.

The trial court also instructed the jury on the witness tampering charge, stating:

> In order for you to find the defendant guilty of violating the [witness tampering] statute, the State must prove beyond a reasonable doubt each and every[ ]one of the following elements: (1) that the defendant believed that an official proceeding or investigation was pending, or about to be instituted, or has been instituted; and (2) that defendant knowingly engaged in conduct which a reasonable person would believe and cause a witness or informant to testify or inform falsely.

The court instructed that the State contended defendant "threatened the use of force . . . against Heather, . . . Keith, . . . and . . . Sciaretto by written and oral communications." (Emphasis added). The court also instructed that if the jurors found defendant guilty of witness tampering, they had "to answer the additional questions about force or threat of force . . . ." Again, defendant did not object to the charge or request any revisions to it.

As noted, the jury found defendant guilty of first-degree murder of Black by his own conduct (count one), second-degree possession of a weapon (count four), second-degree possession of a weapon for an unlawful purpose (count five), and first-degree witness tampering by threatening use of force (count six). The jury determined defendant committed the murder of Black by his own conduct. The jury acquitted defendant of conspiracy to commit murder (count two).

The trial court asked the foreperson whether the jurors "are unanimous as to all counts and all questions?" and the foreperson responded, "[y]es." The court then polled the jury. All jurors indicated they joined in the verdict announced by the foreperson.

Defendant waived his right to a jury trial on count seven, which charged second-degree certain persons not to possess weapons. The court found defendant guilty on that charge.

At sentencing, the court first denied defendant's motion for a new trial.[10] After hearing the arguments of counsel and a statement from defendant concerning sentencing, the court found aggravating factor three — the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3) — based on defendant's extensive prior juvenile and criminal record and his previous violations of the conditions of probation and parole. The court also found aggravating factor six — the extent and seriousness of defendant's record, N.J.S.A. 2C:44-1(a)(3) — which included prior convictions for "assaultive and dangerous conduct," including convictions for weapons offenses, applied. The court also found aggravating factor nine — the need for deterring defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9) — applied. The court did not find any mitigating factors. See N.J.S.A. 2C:44-1(b)(1) to (14).[11] The court

[10] Defendant does not appeal from the court's denial of his new trial motion.

[11] We observe that when the court sentenced defendant on July 12, 2019, N.J.S.A. 2C:44-1(b) did not include mitigating factor fourteen — the defendant was under twenty-six years of age when the crimes for which he was convicted were committed, N.J.S.A. 2C:44-1(b)(14). Mitigating factor fourteen was not adopted until 2020. L. 2020, c. 110, § 1, eff. Oct. 19, 2020.

determined the aggravating factors clearly and substantially preponderated over the mitigating factors.

The court imposed a life sentence without parole on the murder charge. The court imposed the sentence "pursuant to N.J.S.A. 2C:11-3(b)(4)," which, in pertinent part, mandates a sentence of life without parole for individuals who are convicted of knowing and purposeful murder by their own conduct where the "jury finds beyond a reasonable doubt that any of" twelve separately defined "aggravating factors exist." N.J.S.A. 2C:11-3(b)(4)(a) to (l). The court merged defendant's convictions of the weapons offenses in counts four and five with the murder conviction for purposes of sentencing. The court imposed a concurrent ten-year sentence on defendant's conviction for certain persons not to have weapons under count seven.

The court also imposed a mandatory consecutive twenty-year sentence with a ten-year period of parole ineligibility on the first-degree witness tampering charge. See N.J.S.A. 2C:28-5(e). Thus, defendant's aggregate sentence is "life without parole plus [twenty] years" with a ten-year period of parole ineligibility. This appeal followed.

II.

Defendant's counsel presents the following arguments for our consideration:

> POINT I
>
> THE DYING DECLARATION SHOULD NOT HAVE BEEN ADMITTED BECAUSE THERE WAS NO EVIDENCE IN THE RECORD ESTABLISHING THAT THE DECLARANT SPOKE UNDER THE BELIEF OF IMMINENT DEATH. FURTHER, THE FAILURE TO ISSUE AN IDENTIFICATION INSTRUCTION IN ORDER TO GUIDE THE JURY IN ASSESSING THAT DECLARATION, WHICH CONSTITUTED AN IDENTIFICATION, WAS HARMFUL ERROR. FOR EITHER REASON, THE CONVICTIONS MUST BE REVERSED.
>
> > A. Because No Evidence Was Put Forth To Demonstrate That The Victim Spoke Under Belief Of His Imminent Death, The Dying Declaration Should Not Have Been Admitted.
> >
> > B. The Failure To Instruct The Jury On How To Assess The Alleged Dying Declaration Requires Reversal.
>
> POINT II
>
> DEFENDANT'S INCULPATORY STATEMENT TO THE POLICE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE POLICE IMPROPERLY INTERROGATED HIM AFTER HE HAD INVOKED HIS RIGHT TO REMAIN SILENT.

POINT III

THE ADMISSION OF AN IRRELEVANT AND INFLAMMATORY POEM THAT DEPICTED DEFENDANT AS A KILLER REQUIRES REVERSAL OF HIS CONVICTIONS.

POINT IV

THE IMPROPER ADMISSION OF A DETECTIVE'S TESTIMONY THAT HE BELIEVED DEFENDANT WAS CARRYING A GUN REQUIRES REVERSAL OF HIS CONVICTIONS.

POINT V

THE ADMISSION OF VOLUMINOUS INADMISSIBLE HEARSAY WAS PREJUDICIAL AND REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

POINT VI

EVEN IF ANY ONE OF THE COMPLAINED-OF ERRORS WOULD BE INSUFFICIENT TO WARRANT REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS WAS TO DENY DEFENDANT DUE PROCESS AND A FAIR TRIAL.

POINT VII

THE FAILURE TO INSTRUCT THE JURY THAT IT HAD TO BE UNANIMOUS IN REGARD TO THE TARGET OF THE WITNESS TAMPERING AS WELL AS THE CONDUCT THAT CONSTITUTED WITNESS TAMPERING REQUIRES REVERSAL OF THAT CONVICTION.

POINT VIII

THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT DEFENDANT WAS SUBJECT TO A MANDATORY TERM OF LIFE WITHOUT PAROLE. BECAUSE HE IS NOT[;] THE SENTENCE MUST BE VACATED AND THE MATTER REMANDED FOR RESENTENCING.

In defendant's pro se brief, he presents the following arguments:

POINT I

THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS DEFENDANT'S STATEMENT TO POLICE ON MIRANDA AND FIFTH AMENDMENT GROUNDS, WHILE DEFENDANT WAS CLEARLY IN A DRUG INDUCED STATE OF MIND, DUE TO MORPHINE PILLS GIVEN TO HIM BY POLICE, WHICH IMPAIRED HIS ABILITY TO GIVE A KNOWING[], INTELLINGENT[], AND VOLUNTARY STATEMENT . . . AT INTERROGATION WITH POLICE.

POINT II

THE TRIAL COURT ERRED AND VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS BY NOT PERMITTING AN EXPERT WITNESS TO RELAY EFFECTS OF MORPHINE TO JURY.

POINT III

PROSECUTORIAL MISCONDUCT CAUSED AN UNFAIR TRIAL DUE TO IMPROPER REMARKS DURING CLOSING ARGUMENTS.

III.

Our well-established standard of review applicable to defendant's claims the court made evidentiary errors may be simply stated. We defer to a trial court's evidentiary rulings unless the record reveals the trial court abused its discretion. State v. Garcia, 245 N.J. 412, 430 (2021). Our deference is rooted in the understanding "the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Thus, not "[e]very mistaken evidentiary ruling" will "lead to a reversal of a conviction. Only those that have the clear capacity to cause an unjust result will do so." Garcia, 245 N.J. at 430. Under this standard, to reverse a court's evidentiary ruling, "we must be convinced that 'the trial court's ruling is so wide of the mark that a manifest denial of justice resulted.'" Prall, 231 N.J. at 580 (quoting State v. J.A.C., 210 N.J. 281, 295 (2012)); see also Garcia, 245 N.J. at 430 (same).

A.

Defendant first argues the trial court erred by overruling his objection to the admission of Black's statements made during the 9-1-1 call. The court conducted a N.J.R.E. 104 hearing on the admissibility of the statements and

determined they were admissible as excited utterances under N.J.S.A. 803(c)(2) and, separately, as dying declarations under N.J.R.E. 804(b)(2).

Defendant challenges only the court's determination the statements were admissible as dying declarations. Defendant does not claim the court erred by finding Black's statements during the 9-1-1 call were admissible as excited utterances under N.J.R.E 803(c)(2).[12] By opting not to challenge the court's

[12] In pertinent part, N.J.R.E. 803(c) provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> . . . .
>
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.
>
> [N.J.R.E. 803(c)(2).]

"The rationale for the excited utterance exception lies in the notion that 'excitement suspends the declarant's powers of reflection and fabrication,' consequently minimizing the possibility that the utterance will be influenced by self[-]interest and therefore rendered unreliable." State v. Long, 173 N.J. 138, 158 (2001) (quoting 2 McCormick on Evidence § 272, at 204-05 (5th ed. 1999)). Courts evaluating excited utterance offers consider "the element of time, the circumstances of the incident, the mental and physical condition of the

determination the statements were admissible under N.J.R.E. 803(c)(2), defendant waived and abandoned any claim the court's evidentiary ruling was in error. See State v. L.D., 444 N.J. Super. 45, 46 n.7 (App. Div. 2016) ("[A]n issue not briefed is waived."). In addition, based on our review of the record, we discern no basis to conclude the court abused its discretion by finding Black's statements constituted admissible excited utterances under N.J.R.E. 803(c)(2). We therefore affirm the court's determination Black's statements were admissible as excited utterances and, for that reason alone, we find admission of the statements in evidence at trial did not constitute error.

Because we determine, and defendant effectively concedes, Black's statements during the 9-1-1 call were properly admitted at trial as excited utterances, it is unnecessary to consider defendant's claim the court erred by separately finding the statements were admissible as dying declarations under N.J.R.E. 804(b)(2). Nonetheless, for purposes of completeness, we address defendant's claim the court erred by finding the statements admissible under N.J.R.E. 804(b)(2).

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declarant[,] and the nature of the utterance." Id. at 159 (quoting State v. Williams, 106 N.J. Super. 170, 172 (App. Div. 1969)).

Black's statements during the 9-1-1 call, including his identification of defendant — Wolf — as the person who shot him, constitute hearsay under N.J.R.E. 801. The statements were not made while the declarant provided testimony at trial and the State offered the statements for the truth of the matters asserted. N.J.S.A. 801(c). Such out-of-court statements offered for the truth of the matter asserted are inadmissible unless they are subject to a specific exception under our Rules of Evidence. N.J.R.E. 801(c); N.J.R.E. 802.

Under N.J.R.E. 804(b)(2), a dying declaration constitutes admissible hearsay. The Rule provides that, "[i]n a criminal proceeding, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death." See N.J.R.E. 804(b)(2) (Statement Under Belief of Imminent Death). As the proponent of the hearsay statement, the State bore the burden of demonstrating the admissibility Black's statements as dying declarations. State v. Stubbs, 433 N.J. Super. 273, 285-86 (App. Div. 2013).

Defendant argues Black's 9-1-1 call did not qualify as a dying declaration under N.J.R.E. 804(b)(2) because the State failed to present evidence establishing Black believed in the imminence of his impending death when he spoke to the operator. We disagree.

To satisfy the "belief of imminent death" requirement of N.J.R.E. 804(b)(2), the proponent of a dying declaration must establish the declarant had "a settled hopeless expectation that death is near at hand, and what is said must have been spoken in the hush of its impending presence.'" State v. Williamson, 246 N.J. 185, 201 (2021) (quoting Shepherd v. United States, 290 U.S. 96, 100 (1933)). A declarant's "state of mind" is the "decisive" factor in the analysis. Ibid. (quoting Shepherd, 290 U.S. at 100). Contrary to defendant's suggestion, however, establishing the declarant's belief there is an imminence of death does not require a direct expression of that belief. Instead, a declarant's belief of the imminence of death may be established by the circumstances.

"[D]etermining the declarant's state of mind at the time of the statement is made requires consideration of 'all the attendant circumstances,' including the words spoken to and by the declarant, the weapon used, and the declarant's injuries, physical condition[,] and demeanor." Ibid. (quoting State v. Hegel, 113 N.J. Super. 193, 201 (App. Div. 1971)). "Despair of recovery may . . . be gathered from the circumstances if the facts support the inference." Prall, 231 N.J. at 585 (quoting Shepherd, 290 U.S. at 100).

Here, the court determined Black's statements to the 9-1-1 operator constituted admissible dying declarations because it could be "infer[red] from

the totality of the facts and circumstances that [Black] believed his death to be imminent having received what proved to be a fatal wound." The court's finding is supported by the evidence presented at the N.J.R.E. 104 hearing and at trial.

Defendant's demeanor, as evidenced by his strained, agonal tone of voice, supports the conclusion defendant believed his death was imminent. His injury — a "single gunshot wound to the center of his chest area"— and physical condition — as evidenced by the "large pool of blood" beside him and "all over the walls" and "all over the floor" and the medical examiner's testimony at trial he was drowning in his own blood — support an inference that he was despair of recovery at the time. Prall, 231 N.J. at 585 (quoting Shepherd, 290 U.S. at 100).

Moreover, Black knew he suffered from a gunshot wound, he called 9-1-1 to request medical attention, and he requested the 9-1-1 operator "please hurry" in obtaining that attention. During the call, Black can be heard gasping for each breath, and as Black spoke to the operator he was losing, and then lost, consciousness as result of his injuries.

Those circumstances amply support the trial court's reasoned inference Black had a belief in the imminence of his death while he spoke to the 9-1-1 operator. See, e.g., State v. Brown, 236 N.J. 497, 523 (2019) (finding a

declarant's statement identifying the individual who shot him admissible as a dying declaration in part because the declarant "would have known he was dying when he made the purported statement"). The court therefore did not abuse its discretion by finding Black's statements during the call constituted admissible dying declarations under N.J.R.E. 804(b)(2). Garcia, 245 N.J. at 430.

Defendant also contends the court erred by failing to instruct the jury that it should consider Black's statements during the 9-1-1 call only if it believed he made them under the fear of the imminence of death, a condition of their admission under N.J.R.E. 804(b)(2). More particularly, defendant claims the instruction was required under N.J.R.E. 104(b). The version of N.J.R.E. 104(b) in effect at defendant's trial provided:

> Where evidence is otherwise admissible if relevant and its relevance is subject to a condition, the judge shall admit it upon or subject to the introduction of sufficient evidence to support a finding of the condition. In such cases the judge shall instruct the jury to consider the issue of the fulfillment of the condition and to disregard the evidence if it finds that the condition was not fulfilled. The jury shall be instructed to disregard the evidence if the judge subsequently determines that a jury could not reasonably find that the condition was fulfilled.
>
> [N.J.R.E. 104(b) (2019).][13]

[13] N.J.R.E. 104(b) has since been amended to provide:

We reject defendant's argument, raised for the first time on appeal, because it confuses the issue of the admissibility of the 9-1-1 call, which is in the province of the court, with the relevancy of the call. Where, as here, the admissibility of evidence "is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge." N.J.R.E. 104(a). In contrast, where the relevancy of the evidence is "subject to a condition . . . and the fulfillment of the condition is an issue," the judge must admit the evidence and "instruct the jury to consider the issue of the fulfillment of the condition and to disregard the evidence if it finds that the condition was not fulfilled." N.J.S.A. 104(b). See generally State v. Phelps, 96 N.J. 500, 509-

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> (1) When the relevance of evidence depends on whether a fact or condition exists, proof must be introduced sufficient to support a finding that the fact or condition does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
>
> (2) In such cases the court shall instruct the jury to consider the issue of the existence of the fact and to disregard the evidence if it finds that fact does not exist. The jury shall be instructed to disregard the evidence if the court subsequently determines that a jury could not reasonably find the existence of the fact.
>
> [N.J.R.E. 104(b) (2022).]

10 (1984) (discussing admission of evidence where its relevance is subject to a condition under New Jersey Evidence Rule 8, the predecessor to N.J.R.E. 104).

As we have explained, the court correctly determined the 9-1-1 call satisfied all conditions for its admissibility as a dying declaration. The court did not find the relevancy of the call was otherwise dependent on the fulfillment of any conditions. The court therefore did not have an obligation to instruct the jury it could only consider the 9-1-1 call, or was required to disregard the call, only if it found the State satisfied the conditions for its admissibility under N.J.R.E. 804(b)(2). The court did not err by failing to provide such instructions.[14]

Defendant also argues that because the identity of the individual who shot Black was the key issue in the case, and his defense was founded on the State's failure to prove he was the shooter, the court erred by failing to provide the jury with an identification instruction under State v. Henderson, 208 N.J. 208 (2011). Defendant did not request the instruction and did not object to the court's instructions that did not include it. We consider the absence of the charge for plain error.

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[14] Of course, even if the court erred by failing to give such an instruction, it is of no moment because the 9-1-1 call was otherwise admissible as an excited utterance. N.J.R.E. 803(c)(2).

Under the plain error standard, we reverse "only where the possibility of an injustice is 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Trinidad, 241 N.J. 425, 445 (2020) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). In the context of claim of error in a jury instruction raised for the first time on appeal, "'plain error requires demonstration of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result."'" State v. Singleton, 211 N.J. 157, 182-83 (2012) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). The "determination of plain error depends on the strength and quality of the State's corroborative evidence rather than on whether defendant's misidentification argument is convincing." State v. Cotto, 182 N.J. 316, 326 (2005); see also State v. Singh, 245 N.J. 1, 13-14 (2021).

There is no dispute Black was murdered and his cause of death was a single gunshot wound. The identity of the perpetrator was the primary issue at the trial and the defense was based on a claim the State failed to prove it was defendant who shot and killed Black. Under those circumstances, the court erred by failing to provide an identification instruction addressing pertinent issues

related to the identification, even in the absence of a request by defendant. See Cotto, 182 N.J. at 325.

The court's error does not, however, constitute plain error requiring reversal of defendant's convictions. Based on our careful review of the record, we conclude the error did not "possess[] a clear capacity to bring about an unjust result," State v. Singleton, 211 N.J. 157, 182 (2012) (citation omitted), because "the strength and quality of the State's corroborative evidence" otherwise convincingly establishes defendant identity as the shooter, Cotto, 182 N.J. at 326.

The State presented compelling evidence of defendant's guilt, including his identity as the shooter, independent of Black's identification on the 9-1-1 call. The evidence established defendant had a motive to kill Black borne of jealously and anger in response to Sciaretto's ongoing relationship with Black.[15] Defendant viewed Sciaretto as his property, considered Black's ongoing relationship with her as a sign of disrespect to him personally, and often suggested the relationship affronted his self-proclaimed toughness and would make him look "soft." Sciaretto's involvement with Black also interfered with

[15] Indeed, in his counsel's brief on appeal, defendant concedes "the State had many text messages . . . in which defendant displayed his hatred of Black and threatened him with violence."

defendant's desire to reunite with Sciaretto and their child as a family.

The evidence also shows defendant's motive to harm Black was the product of his loss of control over Sciaretto, whose phone he monitored and who told defendant on November 9, 2015, hours before Black's murder, she would no longer supply defendant with the free methamphetamines she previously supplied. As defendant detailed in text messages and calls to Sciaretto following Black's murder, he had monitored her phone communications with Black on November 9, 2015, noted the precise times they communicated, told her she is "crazier" than him if she thought she was going to "keep on texting other dudes," and said, "[t]his shit [has] got to stop." Defendant also complained to Sciaretto about her refusal to provide him with pills, stating her refusal "put his mind in another zone."

The evidence, when fairly considered in context, establishes defendant had motives to kill Black, including to end Sciaretto's relationship with him, regain control over Sciaretto, reunite his family, and obtain access to the opiate pills Sciaretto had previously supplied. Those motives are consistent with defendant's numerous and ongoing threats directed against Black, all of which were all made in the context of defendant's dissatisfaction and anger over Sciaretto's relationship with Black.

The evidence establishing defendant's motives also provides an "aid to the jury, particularly in a case resting upon circumstantial evidence, in determining who the person was who committed the crime." State v. Carter, 91 N.J. 86, 102 (1982). Further, "motive evidence can 'establish the identity of the defendant as the person who committed the offense' and . . . 'is often of great importance, particularly in a case," like this one, "based largely on circumstantial evidence.'" State v. Calleia, 206 N.J. 274, 293 (2011) (quoting 1 Wharton on Criminal Evidence, § 4:45, at 479 (15th ed. 1997)).

Defendant's identity as the person who shot Black is therefore not dependent on Black's 9-1-1 call and, contrary to defendant's claim, the 9-1-1 call is not the only evidence establishing defendant's identity as the shooter. The substantial unrefuted evidence — most of which is from defendant's own words — establish his many motives for bringing Black's life to an end. That evidence, coupled with the other circumstantial evidence presented at trial, established defendant's identity as the perpetrator of Black's murder. See ibid. Thus, contrary to defendant's contention, there is substantial and compelling evidence establishing defendant's identity as the shooter even if in the absence of Black's 9-1-1 identification of him.

There is more. "[A] defendant's post-crime conduct evidencing a guilty

conscience" also allows a jury to "logically . . . infer that a defendant was acting consistent with an admission of guilt." State v. Williams, 190 N.J. 114, 126 (2007). Here, the record is replete with evidence of defendant's conduct and statements following Black's murder establishing consciousness of guilt.

For example, defendant told the police he was home all afternoon and evening on November 9, 2015, but the evidence showed that statement was false. The evidence included: records showing defendant's cellphone was located in Mays Landing, minutes from Black's home, between 7:25 p.m. and 7:30 p.m.; a recording showing defendant at a Walmart located minutes from Black's home shortly before the murder; a record showing defendant's cellphone was located near Black's home at 2:47 p.m., less than five hours before the murder; and the recordings showing Velazquez's van, in which he and defendant were seen at the Walmart, traveling from that store in the direction of Black's home less than an hour before the murder. Further, during a recorded call, defendant admitted he "lied" to the police about his whereabouts on the evening of the murder, and said he did so "because this is [a] very important thing [—] where were you?" Defendant's admittedly false statement about his whereabouts at the time of the murder demonstrates a consciousness of guilt for Black's murder. See generally Williams, 190 N.J. at 125-26 (noting "consciousness of guilt, and thus guilt

itself" may be established by an accused's "concealment, assumption of a false name, and related conduct" (citation omitted)).

Similarly, there is evidence defendant sent letters to Heather and Keith's home, and communicated with Sciaretto directly, posing direct and veiled threats of force against them if they testified against him. "Our courts have long held that threats made by a defendant to intimidate or induce a witness not to testify are relevant . . . because it illuminates a consciousness of guilt." State v. Young, 435 N.J. Super. 434, 445 (Law Div. 2013); see also State v. Rechtschaffer, 70 N.J. 395, 414 (1976); State v. Thompson, 59 N.J. 396, 408-09 (1971). So too here, defendant's threats to the witnesses against him properly establish a consciousness of guilt of the crimes charged.

Defendant also made statements during his interrogation by the detectives and his recorded phone calls while in custody demonstrating knowledge of Black's murder that would only be known by law enforcement or an individual involved in the commission of the crime. On November 10, 2015, defendant expressed wonder at why he was being charged with Black's murder, telling the detectives they didn't "have any witnesses." During various recorded telephone conversations, defendant repeatedly stated the police did not have a gun. Defendant's statements were accurate and support the conclusion he possessed

that knowledge because he was present when Black was shot, and he knew where the gun had been disposed. There is simply no other logical explanation for defendant's statements.

In addition to defendant's conduct and statements before and after the murder, the State also present substantial circumstantial evidence establishing defendant's guilt. The evidence included the tracking of defendant's cellphone on the evening of the murder toward Black's home, the phone's location minutes away from Black's home a short time before the murder, and the fact that the defendant's phone could not be tracked from around 7:30 p.m., minutes before the murder, until after 8:00 p.m. following the murder. The evidence also included defendant's presence in the Walmart within in an hour of the murder and defendant leaving the Walmart in Velaquez's van and traveling in the direction of Black's home.

The evidence further showed defendant used his phone through the hours after the murder and into the early morning hours of November 10, 2015, to variously call a crime reporter at a local newspaper, another local newspaper, and to several hospitals. In one of the calls to a hospital, he used a feature on his phone to block the recipient from know he was calling. During those same hours defendant communicated with twenty-two times with Velazquez and,

during a phone call after he was arrested, defendant told his father to tell Velazquez the police do not have a gun.

Moreover, as noted, Kayla O'Brien testified she saw an old van that made a lot of noise with occupants in it drive up to Black's home, turn around, and park two homes away. She also saw one of the occupants get out of van and lift the hood and look at the engine, while the other first walked back in the direction of Black's home until they may have seen her, at which point they turned around and walked back toward the parked van. She then went back into her home and, moments later, Black was shot and killed.

O'Brien could not provide a description of the two occupants, and she said the van was "gold" and not the silver color of Velazquez's van, but Velazquez told the police his old van made a lot of noise when it was driven and he frequently had to check the engine to see if was overheating. And O'Brien described an old noisy van that stopped while one of its occupants checked under the hood. Moreover, she described the second occupant of the vehicle walking toward Black's home and abruptly turning around in apparent response to her presence. Those observations, coupled with all the other evidence, are consistent with a finding that defendant and Velazquez were in the van, and defendant went to Black's home while Velazquez checked the engine.

Although the evidence establishing defendant's guilt is circumstantial, in our view, it is compelling and overwhelmingly established defendant's identity as the individual who murdered Black. State v. Lodzinski, 249 N.J. 116, 146-47 (2021) ("[C]ircumstantial evidence often can be as persuasive and powerful as direct evidence and sufficient to support a conviction."); see also State v. Mayberry, 52 N.J. 413, 437 (1968) (citation omitted) ("[I]ndeed in many situations circumstantial evidence may be 'more forceful and more persuasive than direct evidence.'").

Moreover, Black knew defendant and there is no evidence he would not have recognized him if he saw him. The court's instructions to the jury also made clear the State bore the burden of proving beyond a reasonable doubt that defendant committed the charged crimes. See Cotto, 182 N.J. at 326-27 (noting that although the court did not use the word identification in its charge, it "instructed the jury on the State's burden of proving beyond a reasonable doubt that defendant was the individual that committed the crime"); State v. Gaines, 377 N.J. Super. 612, 626 (App. Div. 2005) (finding no error in the lack of an identification charge where the two witness who identified the defendant as the shooter in a homicide knew the defendant).

This case is unlike State v. Sanchez-Medina, where the Court found the

failure to provide an identification charge constituted a plain error requiring reversal of the defendant's convictions for the sexual assaults of four victims. 231 N.J. 452, 468-69 (2018). In its plain error analysis, the Court noted: the defendant was unknown to the victims; the victims' descriptions of the perpetrator differed; only one of the victims identified the defendant and that victim told the police she was only seventy-five percent sure of her identification; and there was no other evidence of the crimes charged. Id. at 468. The Court found it was plain error to fail to give the identification charge because, "[l]ooking at the proofs together, the evidence against defendant was not overwhelming." Id. at 469.

That is not the case here. Defendant admitted in his statement, and the evidence otherwise established, Black knew defendant. In Cotto, the Court found the failure to provide an identification instruction did not constitute plain error warranting a reversal because the victim knew the defendant based on a prior relationship, and the strength and quality of the State's corroborative evidence rendered harmless the absence of the instruction. 182 N.J. at 316, 326-27. We therefore reject defendant's argument that the court's error in failing to sua sponte provide the jury with an identification instruction constitutes plain error warranting reversal of his convictions.

B.

Next, we consider defendant's challenge to the court's admission of the statements made by defendant during his November 10, 2015 interrogation, and those he made while being processed following his invocation of his right to terminate the interrogation. We are unpersuaded by defendant's arguments.

Our review of an order on a motion to suppress evidence is deferential. State v. Cohen, 254 N.J. 308, 318 (2023). "[W]e 'uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record.'" Ibid. (quoting State v. Ahmad, 246 N.J. 592, 609 (2014)). We should reverse only where the court's determination is "so clearly mistaken that the interests of justice demand intervention and correction." Id. at 319 (quoting State v. Gamble, 218 N.J. 412, 425 (2014)). "A trial court's interpretation of the law . . . and the consequences that flow from established facts are not entitled to any special deference" and are reviewed de novo. Gamble, 218 N.J. at 425.

In his pro se brief on appeal, defendant claims the court erred by denying his motion to suppress the statements he made to the detectives during the interrogation because, at the outset of the interrogation and at his request, he ingested two pills that had been prescribed for him. The pills were identified as

thirty milligram morphine sulfate. He argues he was "in a drug induced state of mind," and the pills "impaired his ability to give a knowing[], intelligent[], and voluntary statement" to the detectives.

In a supplemental submission, defendant's counsel argues our decision in State v. Burney, 471 N.J. Super. 297 (App. Div. 2022), supports a finding the court erred by finding defendant voluntarily waived his Miranda rights.[16] Counsel argues the State did not satisfy its burden of establishing defendant voluntarily waived his rights because it failed to present expert testimony that his ingestion of the medication did not interfere with his ability to voluntarily do so.

In our review of a court's determination to admit "police-obtained statements," we must "engage in a 'searching and critical' review of the record to ensure protection of a defendant's constitutional rights." State v. Hreha, 217 N.J. 368, 381-82 (2014). To determine whether a defendant made "a knowing, intelligent, and voluntary waiver" of Miranda rights, we must consider "the totality of the circumstances surrounding the custodial interrogation based on

[16] The Supreme Court reversed our decision in Burney but on grounds unrelated to our determination on the issue of the voluntariness of the defendant's statement. State v. Burney, __ N.J. __ (2023) (slip op. at 52).

the fact-based assessment of the trial court." State v. A.M., 237 N.J. 384, 398 (2019).

Pertinent to defendant's arguments on appeal, the trial court must have properly determined defendant's statements were "voluntary beyond a reasonable doubt." Burney, 471 N.J. at 315. Thus, it was the State's burden to "prove beyond reasonable doubt" that defendant's statements during the interrogation were "not made because his will was overborne." State v. O.D.A.-C., 250 N.J. 408, 421 (2022) (quoting State v. L.H., 239 N.J. 22, 42 (2019)).

The court conducted an N.J.R.E. 104 hearing on the admissibility of defendant's statements during the interrogation. One of the detectives who participated in the interrogations testified concerning defendant's request to be provided with two thirty milligram morphine sulfate pills from a prescription bottle that was in defendant's possession when he was arrested. The detective described his observations of defendant during the interrogation, testified defendant was "alert" and "very engaged" and did not exhibit any signs of impairment or intoxication, and explained defendant did not give any indication he had difficulty understanding or communicating during the investigation. As noted, a recording of the interrogation was introduced into evidence and considered by the court.

Following the hearing, the court issued a detailed written opinion finding the State proved "beyond a reasonable doubt . . . [d]efendant was not" intoxicated after ingesting the pills. The court found the medicine "defendant ingested was . . . prescribed to him and thus unlikely to strip him of his 'rational intellect and free will.'" The court also noted defendant's invocation of his right to remain silent at a time when the investigator's questions "became more pressing" as evidence defendant "possessed the presence of mind" to stop the interview at any time.

The court further found defendant "remained responsive" during the interrogation and spoke with, and provided responsive answers to, the detectives' questions "without any difficulty." The court determined defendant was "in complete possession of his faculties," "oriented to time, place[,] and circumstances," and "knew and understood what was occurring as he was familiar with the criminal justice system" through his prior "numerous convictions and arrests." preceding the interview. The court concluded defendant "made a knowing, voluntary[,] and intelligent waiver of his [Miranda] rights."

We are satisfied the court's finding defendant voluntarily waived his Miranda rights is based on a consideration of the totality of the circumstances,

A.M., 237 N.J. at 398, and is supported by sufficient evidence the court found credible, see Cohen, 254 N.J. at 318. Defendant's conclusory assertion that ingestion of his prescribed drug may have overborne his will, O.D.A.-C., 250 N.J. at 420, or "critically impaired" "his . . . capacity for self-determination," State v. P.Z., 152 N.J. 86, 113 (1997), such that the State was required to present expert testimony the medication had no such effect is unsupported by any evidence in the motion record and is otherwise undermined by the evidence the court found credible. The record is bereft of any evidence the prescription medication had any effect on the exercise of defendant's will or capacity for self-determination. We therefore discern no basis to reverse the court's denial of defendant's motion to suppress his statements during the interrogation.

We also reject defendant's reliance on our decision in Burney as support for his claim the State failed to sustain its burden of proving a voluntary waiver of his Miranda rights because the State did not present expert testimony the prescription medication did not interfere with his ability to voluntarily waive his rights. In Burney, police questioned the defendant in the intensive care unit (ICU) of a hospital as he prepared to receive overdue kidney dialysis. Id. at 310. The interrogation was not recorded, the officers did not obtain a written record of the defendant's waiver of Miranda warnings, and the detective who testified

at the suppression hearing said he could not recall the words used to advise the defendant of the Miranda warnings. Id. at 310-11.

The trial court granted the defendant's motion to suppress his statements to the police, finding the State failed to prove the defendant was properly advised of his Miranda rights. Id. at 312. The trial court determined defendant's statements could be used for impeachment purposes if he chose to testify at trial because the statements were made voluntarily. Ibid.; see State v. Burns, 145 N.J. 509, 535 (1996) (explaining statements obtained in violation of a defendant's Miranda rights may be admissible for the limited purposes of impeaching the defendant's testimony).

We reversed the trial court's determination the defendant's statements were made voluntarily because the court did not "adequately consider all of the information in the record concerning defendant's medical condition," including a hospital report detailing numerous diagnoses the court acknowledged it did not understand. Id. at 316. We found the detectives' lay opinion testimony concerning the defendant's condition was not "an adequate substitute for expert testimony to explain the significance" of one the diagnoses in the hospital report—toxic/metabolic derangement—"and its possible impact on defendant's cognitive function," and explained that determination was "especially true

because . . . the interrogation was not electronically recorded." Id. at 317. We concluded the trial court's failed to "adequately explore[] . . . whether and to what extend the underlying acute medical condition that precipitated [the] defendant's admission to ICU impacted his capacity for self-determination." Id. at 318.

Here, defendant was not hospitalized during the interrogation, he did not suffer from an acute medical condition, and there is no evidence he suffered from any condition that interfered with his ability to voluntarily waive his Miranda rights or that his prescription medication might have done so. Unlike in Burney, defendant's interrogation was recorded. As such, there is no basis to dispute defendant was fully informed of his Miranda rights which, during the interrogation, he exercised by terminating the interrogation. Additionally, the court reviewed the recording and therefore had the ability to observe defendant's actions and demeanor during the interrogation. We find none of the circumstances supporting our decision in Burney extant in the record before the motion court. See State v. Burris, 145 N.J. 509, 527 (1996) (explaining "the inquiry into whether a suspect's will is overborne, rendering . . . a statement involuntary, is essentially factual").

Moreover, we are unconvinced Burney may be fairly read to require that for the State to sustain its burden in a Miranda hearing, it must present expert testimony establishing a defendant's ingestion of a prescribed medication did not impair the defendant's ability to voluntarily waive Miranda rights in the absence of some other admissible medical or other evidence that may have been the case. There was no such evidence before the motion court. We therefore affirm the court's denial of defendant's motion to suppress his statements during the interrogation.

Defendant also challenges the admission of his statement — following his invocation of his right to terminate the interrogation — the State did not have any witnesses to Black's murder. At the N.J.R.E. 104 hearing on defendant's motion to suppress his statements, a detective testified as to the circumstances under which defendant made the post-invocation statement, "I know for a fact you have no witnesses."

In its decision denying defendant's motion to suppress his pre- and post-invocation statements, the court did not rule on defendant's request for the suppression of the post-invocation statement to the detectives. Instead, the court found it was not required to address that portion of the motion because the State

did not seek to introduce testimony concerning the post-invocation statement at trial.[17]

Nonetheless, at trial, the State presented testimony about the statement and the circumstances under which it was made. More particularly, a detective testified that following defendant's invocation of his right to remain silent, he was brought to the "processing area" of the Atlantic County Prosecutor's Office and told "he was being charged with the murder of" Black. The detective further testified that in response, defendant said, "how can you do that[?]. I didn't say anything to incriminate myself, and beside[s] that you don't have any witnesses."

Defense counsel did not object to the testimony. We therefore review its admission for plain error and must determine whether it was "clearly capable of producing an unjust result." Trinidad, 241 N.J. at 445 (quoting Rule 2:10-2). Under the plain error standard, we reverse "only where the possibility of an injustice is 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (quoting Macon, 57 N.J. at 336).

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[17] The record does not reveal the basis for the court's finding the State indicated it would not introduce the post-invocation statement at trial. The record also does not show that either the State or defendant requested the court to decide the issue after the court indicated it had opted not to do so. On appeal, defendant does not challenge the court's decision not to address and decide the issue.

A defendant's decision to remain silent must be "scrupulously honored" by law enforcement. State v. Hartley, 103 N.J. 252, 261 (1986) (citations omitted); see also Michigan v. Mosley, 423 U.S. 96, 103 (1975). The "failure [to] scrupulously honor a previously-invoked right to silence renders unconstitutionally compelled any resultant incriminating statement made in response to custodial interrogation." Ibid. Thus, "once a defendant clearly and unambiguously invokes his right to remain silent, interrogation must cease." State v. Maltese, 222 N.J. 525, 545 (2015).

To scrupulously honor defendant's invocation of his right to remain silent, the detectives could not properly interrogate him without readministering Miranda warnings. Hartley, 103 N.J. at 278-79; see State v. Faucette, 439 N.J. Super. 241, 264 (App. Div. 2015) (explaining "[a] suspect is always free to waive the '"right to remain silent"' and confess to committing crimes, so long as the waiver is not the product of police coercion") (quoting State v. Presha, 163 N.J. 304, 313 (2000)). Defendant argues the detectives failed to scrupulously honor the invocation of his right to remain silent by engaging in the functional equivalent of an interrogation by informing him he would be charged with Black's murder. Defendant contends that "[a]lthough in some situations

informing someone of the charges might not be interrogation, in this case it was." We disagree.

"Miranda safeguards come into play whenever someone is subject to either express questioning 'or its functional equivalent.'" State v. Hubbard, 222 N.J. 249, 267 (2015) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)). An "interrogation under Miranda . . . includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" State ex rel. A.A., 455 N.J. Super. 492, 502 (App. Div. 2018) (quoting Innis, 466 U.S. at 301).

Defendant argues the detective's statement in the processing area — that defendant was being charged with Black's murder — as such that the detective should have known it would be reasonably likely to elicit an incriminating response. Defendant relies on State v. Wright, where we found an officer engaged in the functional equivalent of an interrogation without administering Miranda warnings by providing a suspect in custody information three separate times concerning: the status of the investigation, including that defendant fit the description of the perpetrator; the victim was being brought over to see if the victim could identify defendant; and the officers had located the gun used in

the robbery for which defendant was being held. 444 N.J. Super. 347, 366 (App. Div. 2016).

We determined that under those circumstances, the officer's delivery of the information was not inadvertent, was tantamount to a tightening of the proverbial noose, and supported a finding the "officer should surely have known that his meting out of the information in the way he did was reasonably likely to evoke an incriminating response, and thus it amounted to an interrogation." Id. at 366. We also viewed the officer's initial statements to "defendant about why he was being detained" differently, noting those statements did not constitute an interrogation. Ibid.

Defendant also relies on State v. Ward, where we found an officer who told a detained defendant about the robbery for which he was being charged and showed evidence related to the investigations violated a defendant's Miranda rights such that statements made by the defendant following the officer's actions should have been suppressed. 240 N.J. Super. 412, 419 (App. Div. 1990). We explained, however, statements that are "voluntarily blurted out by an accused in custody where the police had not subjected him [or her] to an interrogative technique" are not violative of the accused's Miranda rights. Ibid.

Here, unlike in Wright and Ward, the detective did not provide defendant with any information concerning the investigation or any facts related to the commission of the crime in a manner reasonably likely to elicit an incriminating response concerning Black's murder. The detective merely informed defendant there was a change in defendant's status—he was being charged with Black's murder. And, in response to the detective's simple advisement, defendant responded by making the incriminating statement he knew there were no witnesses to the murder. We find no basis in the record to conclude the detective's statement constituted an interrogative technique or that in informing defendant he was being charged with murder, the detective knew or had reason to know it would elicit the incriminating statement defendant about the facts of the case, including that defendant knew there were no witnesses to the murder.

Defendant's statement was not the result of the functional equivalent of an interrogation and not the product of a violation of his Miranda rights. C.f., Wright, 444 N.J. Super. at 366; Ward, 240 N.J. Super. at 419; see also State v. Camacho, 218 N.J. 533, 543 (2014) (stating the right to remain silent is not violated where the defendant "chooses to speak in the unfettered exercise of his own free will"); State .v M.L., 253 N.J. Super. 13, 21 (App. Div. 1991) (finding "unexpected incriminating statement made by in-custody defendants in response

to non-investigative questions by the police without prior Miranda warnings are admissible"). We find no error in the admission of the testimony concerning defendant's post-invocation statement at trial.[18]

C.

At trial, defendant objected on relevancy grounds to the admission of the poem found in the spiral notebook in defendant's home following the murder. As noted, the poem included the following:

> Talking the king of drilling South Jersey get down dirty our thing is killing. Then the bottom is you rocking with a fool goon. Big Wolf, I'll smoke that and light you like a full moon. I don't be on Facebook or

[18] Even if evidence concerning defendant's statement was admitted in error, we do not find it requires reversal of defendant's conviction under the plain error standard. Admission of the statement was not clearly capable of producing an unjust result, R. 2:10-2, and is not "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached," Trinidad, 241 N.J. at 445 (quoting Macon, 57 N.J. at 336). Defendant's statement is inculpatory because it supports the inference he knew information about the murder—the absence of any witnesses—only a person who committed the murder would know. The statement, however, provides only cumulative evidence of defendant's commission of the crime because he made other statements displaying his unique knowledge of the crime. On a number of occasions during recorded phone calls with Sciaretto and his father, defendant stated the police did not have the gun used to shoot Black. As we have explained, those phone calls were made in the days following his arrest at a time he had not been informed of the State's evidence. Thus, defendant's statements concerning the absence of the gun provide compelling evidence, independent of his single post-invocation statement to the detectives that there were no witnesses, establishing defendant possessed information concerning the murder that would be known only to someone involved with the murder.

> Instagram. When I see you it will be lethal. Hope you n[] is bland.

The court overruled the objection, finding it relevant based on the State's claim it contradicted defendant's statement to the police that in a text message he sent to Black, stating he would "smoke" Black, defendant referred only to using his hands in a fight with Black.

For the first time on appeal, defendant claims the court erred by admitting the poem. Defendant argues the poem constituted evidence subject to the requirements of N.J.R.E. 404(b), as interpreted by our Supreme Court in State v. Skinner, 218 N.J. 496, 517-18 (2014). In Skinner, the Court found that although a defendant's writing of "disturbingly graphic lyrics . . . is not a crime" or a bad act or wrong, admission of the lyrics in evidence is subject to the requirements of N.J.R.E. 404(b). Id. at 517. The Court reasoned "N.J.R.E. 404(b) serves as a safeguard against propensity evidence that may poison the jury against a defendant." Ibid.

We agree with defendant Skinner required the trial court determine the admissibility of the poem under N.J.R.E. 404(b) based on an application of the four-prong standard set forth in State v. Cofield, 127 N.J. 328, 338 (1992). Because the trial court did not engage in the requisite analysis, we accord "no

deference" to "the trial court's decision to admit the evidence; nor is that decision entitled to be reviewed under an abuse of discretion standard." State v. Reddish, 181 N.J. 553, 609 (2004) (quoting State v. Darby, 174 N.J. 509, 518 (2002)). We therefore "undertake a plenary review of whether the other-crimes evidence was admissible." Ibid.; see also State v. Green, 236 N.J. 71, 81 (2018) (explaining appellate review is de novo when the trial court "should have, but did not perform a Cofield analysis"); State v. Koskovich, 168 N.J. 448, 483-87 (2001) (reviewing on appeal the admission of song lyrics under the Cofield standard where the trial court determined the admissibility of the lyrics only on relevancy grounds).

N.J.R.E. 404(b) allows for the admission of evidence of other crimes or wrongs for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but not "to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." "[T]he proponent of evidence of other crimes, wrongs or acts must satisfy a four-prong test." State v. Carlucci, 217 N.J. 129, 140 (2014) (quoting State v. P.S., 202 N.J. 232, 255 (2010)). Under the Cofield standard, to be admissible under N.J.R.E. 404(b), the evidence of the other crime, wrong or act: (1) "must be admissible as relevant to a material

issue"; (2) "must be similar in kind and reasonably close in time to the offense charged"; (3) "must be clear and convincing"; and (4) its probative value "must not be outweighed by its apparent prejudice." 127 N.J. 328, 338 (1992).

Defendant argues the poem was inadmissible because the State did not satisfy the first and fourth prongs of the Cofield standard. Although not characterized expressly as such, defendant also argues the State did not satisfy the third prong of the standard.[19] Thus, defendant argues the State failed to demonstrate the poem was relevant to a material issue at trial, evidence concerning the poem was not clear and convincing, and the poem's probative value was outweighed by its apparent prejudice.

The State's justifies admission of the poem on the theory it establishes that when defendant threatened to smoke Black, he meant he would use lethal force against Black. The argues the poem may be properly employed as an interpretive guide to defendant's use of the term "smoke" in his various threats

[19] As we will explain, citing Skinner, defendant argues the poem was inadmissible under N.J.R.E. 404(b) because the specific details of the poem lack a sufficient nexus with the circumstances of the offense. The Court in Skinner found the absence of such a nexus required a finding the State failed to satisfy its burden under the third prong of the Cofield standard. 218 N.J. at 521-22. We therefore address defendant's argument there was an insufficient nexus under the third prong. Since defendant does not argue the State failed to satisfy its burden under prong two of the standard, we do not address it.

against Black. The State further argues that because the perpetrator used lethal force against Black, the meaning the poem provides to defendant's threats supports defendant's identity as the perpetrator and establishes his "motive and intent."[20]

The Court has cautioned that "[s]elf expressive fictional, poetic, lyrical, and like writings about bad acts, wrongful acts, or crimes generally should not be deemed evidential," and they should be admitted only when have "probative value to the underlying offense for which the person is charged and the probative value of that evidence outweighs its prejudicial impact." Skinner, 218 N.J. at 525. Thus, "fictional material[] may not be used as evidence of motive and intent except when such material has a direct connection to the specifics of the offense for which it is offered in evidence and the evidence's probative value is not outweighed by its apparent prejudice." Ibid. The Court "reject[ed] the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of

[20] The State does not argue the poem is admissible "as direct proof against . . . defendant—such as admission or details that are generally not known and dovetail with the facts of the case" and, for that reason, "should be analyzed for relevance under N.J.R.E. 401 and evaluated under N.J.R.E. 403's standard for prejudice." Skinner, 218 N.J. at 518 n.5. We therefore do not consider or decide the issue.

the artistic composition and the circumstances of the offense for which the evidence is being adduced." Id. at 522.

We reject defendant's claim the State failed to demonstrate any nexus between Black's murder and the poem. Although the State presented no evidence the subject of the poem specifically related to Black or his murder, defendant created the opportunity for the State to establish the nexus, and an appropriate need to do so, by claiming his use of the term smoke in his threats to and about Black related solely to the use of his hands in a fight. Thus, to the extent the poem, or any other evidence, might have established defendant had previously used the term smoke to refer to the use of lethal force, and not the use of his hands in a fight, such evidence would have a strong nexus to the crime charged. That is because such evidence, if accepted and otherwise found admissible under N.J.R.E. 404(b), would support a reasonable inference that defendant's threats to smoke Black were threats to use lethal force.

Nonetheless, the poem is inadmissible under N.J.R.E. 404(b) because the State failed to satisfy the third and fourth prongs of the Cofield standard. Under Cofield's third prong, the limited purposes for which N.J.R.E. 404(b) may be introduced must "be demonstrated by clear and convincing evidence." Skinner, 218 N.J. at 521; Cofield, 127 N.J. at 338. Here, the N.J.R.E. 404(b) evidence

consists of defendant's use of the word "smoke" in the poem for the purpose of demonstrating defendant intended to threaten the use of lethal force when he threatened to smoke Black.

In our view, the poem is not sufficiently clear, is subject to interpretation, and does not clearly and convincingly establish that defendant threatened Black with lethal force when he used the terms smoke and smoked in his various threats. Although the term "smoke" in the poem is surrounded by statements about killing and the use of lethal force, smoke is not used plainly or directly to convey the use of lethal force. The poem uses the term in a limited manner, stating, "I'll smoke that and light you up like the moon," suggesting there is a difference between the "that" and the "you." The poem does not say, "I'll smoke you," or "I'll smoke you by shooting you," or "By smoking you, I will use lethal force." It says only, "I'll smoke that."

We appreciate that "I'll smoke that" language might be properly interpreted as a component of the lethal force otherwise referred to in the poem, but the poem's language is subject to interpretation as an artistic work and, in our view, does not clearly and convincingly establish defendant used the term smoke to refer to the use of lethal force such that it animates his use of the term in his threats against Black. See generally Skinner, 218 N.J. at 520-21. It

therefore does not constitute clear and convincing evidence of defendant's use of the term smoke under Cofield's third prong for the purposes offered by the State. For that reason alone, the poem is inadmissible under N.J.R.E. 404(b).

Admission of the poem is also not supported under Cofield's fourth prong, which requires that a court engage in a "'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice." State v. Barden, 195 N.J. 375, 389 (2008) (quoting State v. Stevens, 115 N.J. 289, 300 (1989)). The analysis requires a balancing of prejudice versus probative value under N.J.R.E. 403, but does not require, as does N.J.R.E. 403, that the prejudice substantially outweigh the probative value of the evidence. State v. Reddish, 181 N.J. 553, 608 (2004). Rather, the risk of undue prejudice must merely outweigh the probative value. Ibid.

Additionally, even if it had some probative value in establishing defendant's intended use of the term smoke in his threats concerning Black, the poem's prejudicial effect outweighs its probative value. The poem includes the statements "our thing is killing," and a threat, "[w]hen I see you it will be lethal." Those statements suggest a propensity to violence generally and also in a manner

similar to the threats defendant made to and about Black such that the prejudice attendant to the poem's admission outweighed its putative probative value.

Thus, because the record does not support admission of the poem as N.J.R.E. 404(b) evidence under the Cofield standard, the court erred by admitting the poem at trial. Defendant did not object to the poem's admission as violation of N.J.R.E. 404(b), nor did he request a jury charge concerning the proper and limited use of N.J.R.E. 404(b) evidence. See State v. Green, 236 N.J. 71, 84 (2018) (explaining a "carefully crafted limiting instruction 'must be provided to inform the jury of the purposes for which," N.J.R.E. 404(b) evidence, "may, and for which it may not, consider the evidence . . . both when the evidence is first presented and again as part of the jury charge"). (quoting State v. Rose, 206 N.J. 141 161 (2011)). We therefore consider whether admission of the evidence and the lack of a jury charge concerning its use constitute plain error. Prall, 231 N.J. at 587-88.

"[T]he 'very purpose of [N.J.R.E.] 404(b) is simply to keep away from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn't worry overmuch about the strength of the government's evidence.'" Skinner, 218 N.J. at 517 (quoting Rose, 206 N.J. 180). Rule 404(b) is intended to prevent defendant from being "prejudiced by evidence

of other acts such that a jury will convict because he or she is a bad person to commit a crime." State v. Moore, 113 N.J. 239, 275 (1988). The Rule "serves as a safeguard against propensity evidence that may poison the jury against a defendant." Skinner, 218 N.J. at 517.

In Skinner, the defendant was charged with, and convicted of, attempted murder, aggravated assault with a deadly weapon, a handgun, and other charges. Id. at 506. At trial, the State presented the testimony of the victim, who identified defendant as the assailant, as well as other evidence. Id. at 505. The State also presented thirteen pages of lyrics to a rap song written by defendant that depicted "violence, bloodshed, death, maiming, and dismemberment." Id. at 504. The State relied on the lyrics to establish defendant's motive and intent in allegedly shooting the victim.

In its determination of defendant's challenge to the admission of the lyrics, the Court applied a Cofield analysis, finding the State failed to satisfy the first, third, and fourth prongs of the standard. Id. 519-24. The Court did not engage in an analysis of the other evidence presented at trial but nonetheless determined the lyrics alone constituted "highly prejudicial evidence that bore little or no probative value" and admission of the lyrics "bore a high likelihood of poisoning the jury against defendant, notwithstanding the trial court's limiting

instructions." Id. at 525. C.f. Koskovich, 168 N.J. at 487 (affirming the admission of song lyrics under N.J.R.E. 404(b) and finding even if there was error in the admission of the lyrics, "it was not clearly capable of producing an unjust result because, absent those items, there remained strong and overwhelming evidence of defendant's guilt").

Although the poem was admitted in error, we are unconvinced it was clearly capable of producing an unjust result. The other admissible evidence here—including defendant's continuous threats of violence against Black and his declaration he "had to kill" Black—established a wholly separate basis to conclude defendant was a violent person intent on taking Black's life. In Skinner, there is no indication there was evidence of similar conduct by the defendant directly related to the commission of the crime charged and, as a result, the thirteen pages of lyrics portrayed the defendant as a violent person that no separate evidence otherwise established. Skinner, 218 N.J. at 517. Here, defendant's poem offered little to a conclusion defendant was a person who threatened violence; his text messages and continuous threats otherwise established him as such. For those reasons, and unlike in Skinner, we do not find the poem "bore a high likelihood of poisoning the jury against defendant." 218 N.J. at 525.

Moreover, and as we have explained, the circumstantial evidence presented by the State overwhelmingly establishes defendant's guilt such that we cannot conclude admission of the poem was clearly capable of producing an unjust result. Koskovich, 168 N.J. at 486. We therefore reject defendant's argument admission of the poem warrants reversal of his conviction.

D.

Defendant argues, and the State agrees, the court erred in imposing the life sentence without eligibility for parole on his conviction for purposeful and knowing murder. The court imposed the sentence "pursuant to N.J.S.A. 2C:11-3(b)(4)" based on the apparent misunderstanding the defendant's conviction of the offense alone mandated imposition of a life sentence without eligibility for parole. The statute requires more.

A life sentence without eligibility for parole is mandated under N.J.S.A. 2C:11-3(b)(4)(b) where a defendant is convicted of knowing and purposeful murder under N.J.S.A. 2C:11-3(a)(1) or (2), and "a jury finds beyond a reasonable doubt that any" of the twelve "aggravating factors" set forth in N.J.S.A. 2C:11-3(b)(4)(a) to (l) "exist." Here, the jury convicted defendant of knowing and purposeful murder under N.J.S.A. 2C:11-3(a)(1) and (2), but the jury was not asked to make any findings required under N.J.S.A. 2C:3(b)(4)(a)

to (l) for the imposition of a mandatory life sentence parole under the statute. The court therefore lacked the requisite jury finding supporting imposition of a mandatory sentence of life without parole on the murder charge "pursuant to N.J.S.A. 2C:11-3(b)(4)." The court erred by implicitly finding otherwise. We therefore vacate defendant's sentence and remand for resentencing.

E.

We have considered defendant's remaining arguments and find they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We offer only the following brief comments.

We reject defendant's claim he is entitled to a reversal based on cumulative error. Based on our review of the record and our assessment of the overall strength of the State's evidence establishing defendant's guilt, we are unconvinced the "combined effect" of the two trial errors we have discussed, resulted in a deprivation of defendant's right to a fair trial. Burney, __ N.J. __ (2023) (slip op. at 49) (quoting Torres v. Pabon, 225 N.J. 167, 191 (2016)).

We are similarly unpersuaded the court erred by not providing a specific unanimity instruction on the witness tampering charge. Defendant argues the instruction was required because the jury was not instructed it had to be unanimous as to whether defendant violated the statute by directing his conduct

to Heather, Keith, or Sciaretto. The argument ignores the court instructed the jury that the State charged defendant with directing the conduct, which constituted the alleged witness tampering, against Heather, Keith, and Sciaretto. The court further provided a general unanimity charge that the jury's verdict must be unanimous as to all the charges.

We presume the jurors followed the court's clearly stated instructions, State v. Herbert, 457 N.J. Super. 490, 490 (App. Div. 2019), and the jury expressed no confusion concerning the charge during its deliberations. The jury was polled and confirmed it returned a unanimous verdict in accordance with the court's instructions, and defendant does not argue there was insufficient evidence supporting the guilty verdict on the witness tampering charged based on defendant's threats of force as to Heather, Keith, and Sciaretto. We therefore discern no basis supporting defendant's unanimity challenge to the witness tampering instruction. See generally State v. Macchia, 253 N.J. 232, 252-260 (2023) (addressing unanimity principles applicable to criminal trial verdicts).

We need not address the merits of defendant's claim Detective Fernan's testimony — that he saw defendant walking toward him on the morning of November 10, 2015, while defendant manipulated his hand in his pocket as if he had a gun — constituted impermissible lay testimony under N.J.R.E. 701.

Defendant did challenge the admission of the testimony at trial. See generally State v. Galicia, 210 N.J. 364, 383 (2012) (explaining an appellate court will not consider issue, even constitutional issues, that are not raised in the trial court). Moreover, even if the testimony was admitted in error, defendant did not suffer any prejudice as a result because during his statement to the police, defendant boasted that he did exactly what Detective Fernan had described during his testimony. We note defendant did not seek a redaction of that portion of his statement in the recording of the interrogation presented at trial.

Last, for the first time on appeal, defendant argues the court erred by permitting the admission of various hearsay statements and text messages. We need not parse through the various statements for the first time on appeal, ibid., other than to note most of the statements did not constitute inadmissible hearsay because they were not introduced for the truth of the matter asserted, N.J.R.E. 801(c)(2). Others were addressed and discussed without objection by the individuals who made them during their testimony at trial, and the remaining statements or messages are so few and of such insignificance that their admission, even if erroneous, was not clearly capable of producing an unjust result. R. 2:11-3(e)(2).

To the extent we have not expressly addressed any additional arguments supporting defendant's appeal, we find them without sufficient merit to warrant any further discussion. Ibid.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.