SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0332-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRIAN SHEPPARD,

Defendant-Appellant.

Submitted November 10, 2022 – Decided August 29, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 17-07-0378.

Joseph E. Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Ryan William Sundstrom, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant was convicted of murder, eluding, and related weapons offenses. He was sentenced to an aggregate term of sixty-two years of imprisonment, fifty-five years of which were subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The convictions stemmed from the murder of Laura Perez, whose bludgeoned body was found in defendant's bedroom on April 25, 2017, as well as two separate incidents in the days following the murder during which defendant engaged police officers in a high-speed vehicular pursuit. The State's proofs at trial included video surveillance footage of the victim in proximity to the pickup truck defendant was driving on the day of the murder, eyewitness testimony of individuals matching the victim's and defendant's descriptions arriving at the murder scene, clothing depicted in the surveillance footage that was recovered from defendant's bedroom soaked in the victim's blood, and defendant's DNA under the victim's fingernails.

On appeal, defendant raises the following points for our consideration:

> POINT I
>
> DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO THE DENIAL OF THE MOTION FOR SEVERANCE; THE ELUDING COUNTS SHOULD HAVE BEEN SEVERED FROM THE REMAINING COUNTS IN THE INDICTMENT.

(1) The First Prong Under Cofield[1] Was Not Met.

(2) The Fourth Prong Under Cofield Was Not Met.

POINT II

DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO THE INADMISSIBLE LAY OPINION TESTIMONY BY THE INVESTIGATING DETECTIVE THAT . . . DEFENDANT WAS THE PERSON DEPICTED ON THE SURVEILLANCE VIDEOS, THEREBY INVADING THE PROVINCE OF THE JURY AS THE FACTFINDER.

POINT III

. . . DEFENDANT'S RIGHT TO REMAIN SILENT WAS VIOLATED WHEN HE WAS ASKED SPECIFIC QUESTIONS DESIGNED TO ELICIT INCRIMINATING EVIDENCE PRIOR TO BEING ADVISED OF HIS MIRANDA[2] RIGHTS.

POINT IV

. . . DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL WHEN THE COURT INSTRUCTED THE JURY ON FLIGHT.

POINT V

THE SENTENCE IMPOSED WAS EXCESSIVE BECAUSE THE COURT IMPROPERLY COUNTED

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[1] State v. Cofield, 127 N.J. 328, 338 (1992).

[2] Miranda v. Arizona, 396 U.S. 868 (1969).

AGGRAVATING FACTOR [ONE].

POINT VI

. . . DEFENDANT MUST BE RESENTENCED BECAUSE THE COURT DID NOT ADDRESS THE OVERALL FAIRNESS OF THE CONSECUTIVE SENTENCES.

We have considered the arguments in light of the record and applicable legal principles. Based on our review, we affirm the convictions but remand the sentence for the limited purpose of providing "[a]n explicit statement, explaining the overall fairness of [the] sentence," in accordance with State v. Torres, 246 N.J. 246, 268 (2021).

I.

Following the adjudication of a severance motion and various in limine applications, a nine-day jury trial was conducted in November 2018, during which the State produced nineteen civilian and law enforcement witnesses, including several expert witnesses. We glean these facts from the trial record.

On the evening of April 25, 2017, Hopewell Township police officers discovered the body of Laura Perez inside a first-floor bedroom in the home of Anthony Olswfski. At the time of the discovery, the bedroom was in "complete disarray." Specifically, the window blinds "were broken," there were "scratches on the floor" suggesting that furniture had been moved, the bed was in the

middle of the room and "off the frame," and the head of the bed appeared to be propped on something. There was also blood on "the doorjamb" to the bedroom, "three out of . . . four walls," "the mattress," the bed "linens," and the "pillow." An inspection of the adjacent bathroom revealed more blood on "the bath mat" and "bloody footprints" in the bathtub. There was also blood in the basement, directly beneath the bedroom, that had apparently "seeped through the [bedroom] floorboards."

Members of the Mercer County Prosecutor's Office (MCPO) Homicide Task Force took over the investigation and requested assistance from the New Jersey State Police Homicide Forensic Squad in processing the evidence collected from the bedroom. As a result, State Police detectives photographed "the victim lying on the floor" of the bedroom, "partially underneath the mattress and box spring." Detectives also recovered "a pair of gray sweat pants," "a blue fleece" pullover "with a gray sweatshirt . . . inside," and a "tan or olive-colored baseball cap" from a pile of clothing on the floor. The sweatpants and the pullover both had numerous bloodstains on them, likely the result of "direct contact with a blood source that was producing a significant amount of blood." Detectives also recovered a "black and yellow hammer with a claw on the back

end" near the victim's body. The hammer's claw appeared to have loose strands of hair and other biological material on it.

A postmortem examination by the medical examiner revealed that the victim had sustained at least twenty-four separate blows to the head, bruising around and about her face and jaw, a ruptured right eyeball, and lacerations inside her mouth. The victim had also sustained fractures to the skull as well as significant hemorrhaging under the scalp. At the time of the examination, "a large portion of the skull was . . . missing," and "[m]ost of the left side of the brain was . . . not present within the skull cavity." Additionally, the victim sustained several abrasions and bruises on her neck, some consistent with the jewelry found on her at the scene, as well as hemorrhaging in her neck muscles consistent with "external pressure . . . being applied," though not necessarily indicative of "a strangulation case."

At trial, the medical examiner opined that the victim's head injuries were "very consistent" with injuries caused by a hammer and concluded that "the cause of death" was "blunt force trauma of the head." The medical examiner collected fingernail clippings from the victim during the examination to analyze for DNA evidence, and a toxicology report showed that the victim had cocaine and associated metabolites in her system at the time of death.

Surveillance footage from April 25, 2017, was collected from various businesses in West Trenton, where the victim lived. The videos were admitted into evidence. Detective Scott Peterson of the Trenton Police Department narrated the surveillance footage in detail as it was played for the jury. The footage showed that between 8:00 a.m. and 9:00 a.m., a pickup truck that Peterson identified as Olswfski's pickup truck parked at a local deli. Peterson highlighted the distinctive markings on the truck. The footage also showed an individual Peterson identified as the victim walking towards the deli. The identification of the victim was later corroborated by her boyfriend, Dan Jones, both in an interview with Peterson and in Jones's trial testimony.

According to Peterson, while the pickup truck was parked, an individual got out of the truck and entered the deli. Based on Peterson's familiarity with defendant from the investigation, Peterson identified the individual exiting the pickup truck as defendant and continued to use defendant's name to refer to that individual throughout his testimony. The individual was wearing "an orange-colored hat, a blue fleece, . . . [and] light-colored cargo pants." According to Peterson's narration, the victim approached the pickup truck at about 8:38 a.m. and stopped "at the passenger[-side] window." About ten minutes later, the truck left the view of the security cameras, with the victim following on foot,

disappearing out of view of the cameras. At no point did the security footage ever depict the individual identified as defendant and the victim together, nor did it ever show a clear view inside the pickup truck. Additionally, the footage never showed the victim getting into the pickup truck. At 8:56 a.m., the truck was captured on surveillance cameras making a right turn onto Washington Crossing-Pennington Road, where the Olswfski home was located.

The Olswfskis' next-door neighbor testified that at about 9:00 a.m. that morning, April 25, 2017, she observed a large black pickup truck pull into the Olswfskis' driveway. The neighbor watched two people get out of the truck, a man and a woman, neither of which was Olswfski. She noted that neither person "seemed to be smiling or talking with each other" as they moved towards the house. The neighbor's description of each truck occupant matched general descriptions of defendant and the victim. Although the neighbor did not recognize the man "at the time," at trial, she "believe[d]" it was defendant she saw exit the pickup truck.

In April 2017, defendant had been living in the first-floor bedroom of the Olswfski home for about two years. Defendant had been a close friend of the family for over twenty-five years and had periodically worked with Olswfski's brother, Theodore, on various jobs. On April 25, 2017, defendant was scheduled

to accompany Theodore to a power-washing job in Florence. When Theodore called defendant in the morning to let him know he was on his way, defendant tried to call off the job. However, Theodore convinced defendant otherwise and arrived at the Olswfski house to pick defendant up at 11:30 a.m., thirty minutes ahead of their pre-arranged pickup time.

Upon his arrival, Theodore noted that Olswfski's pickup truck was the only car in the driveway. After pulling into the driveway, Theodore texted defendant to let him know that he was outside. Theodore waited in his truck for defendant for about twenty or thirty minutes. When defendant failed to appear or respond to his text, Theodore became frustrated and left the house around noon. As he was leaving, Theodore noticed that the shades to defendant's room were "disheveled" and "kind of mangled."

Olswfski owned two vehicles—a van that he used for his business, and a black 2010 Chevrolet Silverado pickup truck for personal use. Defendant did not own any vehicles and was not permitted to use the pickup truck. According to Olswfski's two children, Olswfski left the house in his work van the morning of April 25, 2017, before 6:30 a.m.[3] The children left around 7:00 a.m. to go to

[3] Anthony Olswfski died in a work-related accident in May 2017. His activities on April 25, 2017, were recounted by other witnesses.

school. When the children left for school, the pickup truck was in the driveway. Olswfski returned home at around 3:20 p.m., which was about the same time as the children. Upon their return, they noticed the pickup truck was not in the driveway. Upon entering the house, Olswfski and the children discovered that no one was home and noticed a small amount of blood on defendant's bedroom door. Out of concern for defendant's welfare, they set out in the van to search for defendant and the truck, stopping at multiple places, including a local hospital, Theodore's house, and defendant's father's house. However, they found neither defendant nor the pickup truck. As a result, Olswfski reported the truck stolen later that evening, and a Hopewell Township police officer was dispatched to the home shortly thereafter. Upon the officer's arrival, Olswfski brought the officer to defendant's bedroom and opened the bedroom door, leading to the discovery of the body.

The following morning, April 26, 2017, members of the MCPO Homicide Task Force put out a "Be [O]n [T]he Lookout" (BOLO) bulletin to all police departments in the area identifying Olswfski's truck as stolen and defendant as a possible operator. That same day, at about 2:00 p.m., defendant encountered Andre Brown, a childhood friend, at Brown's place of business in Chesterfield. Brown testified that defendant was driving a black pickup truck that matched

descriptions of Olswfski's truck. Brown further testified that defendant "had a little limp" and some bruising underneath his left eye. Brown and defendant conversed briefly before parting ways.

Around 9:00 p.m. the following evening, April 27, 2017, officers in the Hamilton Township Police Department received a dispatch alert that the pickup truck had been spotted in Hamilton Township. Officers responding to the dispatch observed the truck disregard a stop sign, prompting them to attempt a motor vehicle stop. After the officers activated their overhead emergency lights and siren, the truck accelerated to at least eighty miles per hour, crossing double-yellow lines and disregarding the posted speed limits and traffic signals. Although the pursuing officers were unable to identify the driver, another Hamilton police officer observing the chase was able to identify defendant as the truck disregarded a red light. After about a mile and a half, the officers were ordered to terminate the pursuit for safety reasons.

About fifteen minutes later, the pickup truck passed a Lawrenceville Township Police Department police car equipped with an automatic license plate reader, which triggered a stolen vehicle alert to the officer inside. After verifying that the truck was stolen, the officer engaged his vehicle's overhead lights and siren to initiate a motor vehicle stop. In response, the truck

accelerated and proceeded to cut across three lanes of traffic despite there being "cars in every lane." The truck eventually reached speeds of roughly eighty miles per hour, in excess of posted speed limits. Like the Hamilton Township pursuit, the Lawrenceville Township pursuit was ultimately terminated for safety reasons.

The following day, April 28, 2017, defendant voluntarily surrendered to the Hamilton Township Police Department in Olswfski's pickup truck. Defendant was arrested on eluding complaints. Peterson observed defendant when he turned himself in at the police station. After taking defendant into custody, the arresting officer proceeded to fill out the department's standard booking form, which required the officer to conduct "a health screening and visual assessment" of defendant in accordance with the department's routine booking policies.

In responding to the officer's questions, defendant disclosed that his "[right] hand was hurt." The officer observed that defendant's hand "appeared swollen and bruised." After the officer completed the forms, defendant was turned over to members of the MCPO for questioning. MCPO investigators subsequently collected a buccal swab from defendant, which was later subjected to Y-STR DNA testing and compared to DNA evidence recovered from the

crime scene. The analysis revealed that defendant's DNA profile matched the DNA found under the victim's fingernails, albeit not to the exclusion of defendant's male relatives.[4] Additionally, the victim was determined to be the source of the blood found on the sweatpants, fleece pullover, and hammer recovered at the crime scene.

On July 19, 2017, defendant was charged in a five-count Mercer County indictment with: first-degree murder, N.J.S.A. 2C:11-3(a)(1) to (2) (count one); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count two); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count three); and two counts of second-degree eluding, N.J.S.A. 2C:29-2(b) (counts four and five). On November 20, 2018, the jury found defendant guilty on all counts. On March 5, 2019, the trial judge

[4] Y-STR stands for short tandem repeat on the Y-chromosome. Y-STR testing is often employed when, as here, "forensic scientists are confronted with a mixed DNA sample," because it allows scientists to isolate male DNA from that of any female contributors. State v. Calleia, 414 N.J. Super. 125, 146 (App. Div. 2010) rev'd on other grounds, 206 N.J. 274 (2011). However, because "[t]he DNA sequence on the Y chromosome is passed in complete form from grandfather, to father, to son," in general, "all men in a paternal lineage will possess the same Y-STR DNA profile," and "fathers, sons, brothers, uncles, and paternal cousins cannot be distinguished from one another through a Y-STR DNA profile." Id. at 146-47.

sentenced defendant, which sentence was memorialized in a March 6, 2019 judgment of conviction. This appeal followed.

II.

In Point I, defendant argues the judge erred in denying his motion to sever the eluding counts (counts four and five) from the murder-related counts (counts one through three). According to defendant, the eluding was not sufficiently related to the murder to support joining them under Rule 3:7-6, and joinder did not satisfy at least two of the Cofield factors.

"Joinder is permitted when two or more offenses 'are of the same or similar character or are based on . . . [two] or more acts or transactions connected together or constituting parts of a common scheme or plan.'" State v. Morton, 155 N.J. 383, 451 (1998) (first alteration in original) (quoting R. 3:7-6).

> Mandatory joinder is required when multiple criminal offenses charged are "based on the same conduct or aris[e] from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction and venue of a single court."
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> Notwithstanding the preference for joinder, Rule 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would prejudice unfairly a defendant. The rule provides:

> If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses . . . in an indictment or accusation the court may order an election or separate trials of counts . . . or direct any other appropriate relief.
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> [State v. Chenique-Puey, 145 N.J. 334, 340-41 (1996) (alterations in original) (citations omitted) (first quoting R. 3:15-1(b); then citing State v. Oliver, 133 N.J. 141, 150 (1993); and then quoting R. 3:15-2(b)).]

"The decision whether to sever an indictment rests in the sound discretion of the trial court," and "[a]n appellate court will defer to the trial court's decision, absent an abuse of discretion." Id. at 341. An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Where offenses are properly joined, "[the] defendant bears the burden of demonstrating prejudice" to warrant severance. State v. Lado, 275 N.J. Super. 140, 149 (App. Div. 1994). However, "the potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial." State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985). Instead, in deciding a severance motion, the trial court must "weigh the interests

of judicial economy and efficiency against the right of every accused to have the merits of his [or her] case fairly decided." Id. at 43.

While judicial economy and efficiency are important considerations, the "key factor in determining whether prejudice exists from joinder of multiple offenses 'is whether the evidence of [those] other acts would be admissible in separate trials under [N.J.R.E. 404(b)].'" State v. Krivacska, 341 N.J. Super. 1, 38 (App. Div. 2001) (alterations in original) (quoting State v. Moore, 113 N.J. 239, 274 (1988)). "If the evidence would be admissible at both trials, then the trial court may consolidate the charges because 'a defendant will not suffer any more prejudice in a joint trial than he [or she] would in separate trials.'" Chenique-Puey, 145 N.J. at 341 (quoting State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div. 1983)).

Under N.J.R.E. 404(b), other-crime evidence "is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." N.J.R.E. 404(b)(1). "The purpose of the rule is to ensure that juries do not convict defendants . . . because the defendants' [other] crimes make the jury perceive them to be bad people in general." State v. DiFrisco, 137 N.J. 434, 498 (1994) (citing Cofield, 127 N.J. at 336). However, N.J.R.E. 404(b) "permits admission of [other-crime]

evidence when relevant to prove some fact genuinely in issue." Krivacska, 341 N.J. Super. at 39. To that end, such evidence may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(2).

> Our Supreme Court has adopted a four-part test in determining the admissibility of other crime . . . evidence. Specifically, the evidence must be: (1) admissible as relevant to a material issue, (2) similar in kind and reasonably close in time to the act alleged, (3) clear and convincing, and (4) of sufficient probative value not to be outweighed by its apparent prejudice.
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> [Krivacska, 341 N.J. Super. at 39-40 (citation omitted) (citing Cofield, 127 N.J. at 338).]

Prior to trial, defendant moved for severance. In an oral decision rendered on February 9, 2018, the judge denied the motion. In denying the motion, the judge found that there was "a sufficient nexus" between the eluding counts and the murder-related counts. The judge also found that "if the offenses were tried separately, evidence of the [eluding] would be admissible at the murder trial under [N.J.R.E.] 404(b) and the Cofield analysis." The judge explained:

> A nexus indeed exists between eviden[ce] of defendant [eluding] police in the same truck that [the victim] had contact with when last seen alive on video two days earlier when that truck was also videotaped traveling around, from and to defendant's residence where her

> deceased body was found, the same truck that he was seen with the next day after her death and the same truck in which he surrendered himself to police on the day after the [eluding].

In rejecting defendant's contention that prong one of the Cofield analysis was not met, the judge stated:

> The first Cofield prong as to relevance is met by the facts presented. Defendant's possession of the same truck that the victim had contact with when last seen alive on video during the days immediately after the homicide and particularly his flight from police in that truck is relevant to the material issues of identity and consciousness of guilt as to the alleged murder.

In rejecting defendant's argument that prong four of the Cofield analysis was not met, the judge reasoned:

> Regarding the fourth prong, ... [t]hough the evidence inherently carries some degree of prejudice, that prejudice does not substantially outweigh the probative [value] of the evidence. Here, it is undisputed that the issue at trial of the murder charge would be identification. Although there is blood and DNA forensic evidence regarding identification, the State's homicide case is entirely circumstantial as to the identity of the killer. Considering defendant's possession of the truck with which the victim had contact the day she [was] killed, both on the day after the homicide and two days after the homicide when he fled police, the probative value of the evidence far outweighs any prejudicial effect. Further, this [c]ourt does not view evidence that defendant sped away from police two days after the homicide as being so inflammatory that it would distract the jury either from

> a reasonable and fair evaluation of the issues or to render any unsubstantiated verdict as to the alleged murder.

We agree with the judge's well-reasoned oral decision and discern no abuse of discretion. "Charges need not be identical to qualify as 'similar' for purposes of joinder under Rule 3:7-6." State v. Sterling, 215 N.J. 65, 91 (2013) (citing State v. Baker, 49 N.J. 103, 105 (1967)). Rather, the Rule "expressly permits joinder when there is some connection between separate counts rendering the evidence probative of a material issue in another charge." Ibid. As the judge pointed out, "[i]t was, after all, defendant who placed the two incidents in the same time frame," State v. Pierro, 355 N.J. Super. 109, 118 (App. Div. 2002), by his "continued use of the black pickup truck . . . in close temporal proximity to the homicide."

On appeal, defendant renews his contention that prong one of the Cofield test was not met. However, evidence of eluding by virtue of defendant's possession and use of the black pickup truck linked to the murder was highly probative on the issue of identity in the murder trial. See State v. Gillispie, 208 N.J. 59, 88 (2011) (admitting evidence of prior crime on the issue of identity where the defendant used same gun); State v. Loftin, 146 N.J. 295, 321, 393-94 (1996) (holding evidence of the defendant's separate credit card fraud admissible

in his trial on a murder charge because the defendant had used the credit card belonging to the murder victim); Pierro, 355 N.J. Super. at 117 (upholding joinder of two separate burglaries for purposes of proving identity where the defendant was caught near the scene of the second burglary with a social security card and credit cards obtained from the home of the first burglary); State v. Hardaway, 269 N.J. Super. 627, 630 (App. Div. 1994) (allowing limited evidence of later robbery to prove defendant's presence at killing because same gun was used in both crimes).

Likewise, we reject defendant's contention that prong four of the Cofield test was not met for the reasons stated by the judge. Indeed, "all highly probative evidence is prejudicial: because it tends to prove a material issue in dispute." State v. Rose, 206 N.J. 141, 164 (2011). For that reason, "[t]he determinative question is whether the evidence was unfairly prejudicial, that is whether it created a significant likelihood that the jury would convict [the] defendant on the basis of the [other-crime evidence] because he [or she] was a bad person, and not on the basis of the actual evidence adduced against him [or her]." Ibid. (emphasis omitted). The judge correctly ruled that the evidence was not unfairly prejudicial.

III.

In Point II, defendant argues the judge erred in allowing Detective Peterson to testify "as to his opinion that [defendant] was depicted on the surveillance video[s]" because it was "unduly prejudicial" and "invad[ed] the province of the jury as the factfinder." Defendant asserts the narration was improper because "Peterson did not previously know either . . . defendant or the victim and was not present at the scenes depicted in the videos." Moreover, there was no reason to believe the jury would require special help in identifying defendant on the videos as "[t]here was no evidence that . . . defendant changed his appearance."

"[T]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Scott, 229 N.J. 469, 479 (2017) (alteration in original) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). "We defer to a trial court's evidentiary ruling absent an abuse of discretion," State v. Garcia, 245 N.J. 412, 430 (2021) (citing State v. Nantambu, 221 N.J. 390, 402 (2015)), and will "not substitute our own judgment for the trial court's unless its 'ruling "was so wide of the mark that a manifest denial of justice resulted,"'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). Still, not every 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.

We now turn to the legal principles that govern lay opinion testimony and narration evidence by a witness who did not observe events depicted in surveillance videos in real time. Lay opinion testimony is admissible subject to two conditions set forth in N.J.R.E 701. First, the lay witness's opinion must be "rationally based on the witness' perception"; second, the opinion must "assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. To satisfy the first condition, the "witness must have actual knowledge, acquired through his or her senses, of the matter to which he or she testifies." State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting State v. LaBrutto, 114 N.J. 187, 197 (1989)). The second condition limits lay testimony only to that which will "assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 469 (quoting State v. Singh, 245 N.J. 1, 15 (2021)); see also State v. Higgs, 253 N.J. 333, 363 (2023). The second condition therefore precludes "lay opinion on a matter 'as to which the jury is as competent as [the witness] to form a conclusion.'" Sanchez, 247 N.J. at 469-70 (alteration in original) (quoting State v. McLean, 205 N.J. 438, 459 (2011)).

Recently, our Supreme Court considered how our case law has applied N.J.R.E. 701 to law enforcement officers narrating video recordings or identifying the defendant as the individual depicted in a photograph or video relating to the offense charged:

> In State v. Lazo, we excluded the opinion testimony of a law enforcement officer unacquainted with a defendant who stated that he included a photo of the defendant in a photo array "[b]ecause of his similarities to the suspects that were described by the victim." 209 N.J. 9, 19 (2012) (alteration in original). We held that "[n]either a police officer nor another witness may improperly bolster or vouch for an eyewitness' credibility and thus invade the jury's province." Id. at 24.
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> In State v. Singh, however, we affirmed the admission of an arresting officer's lay opinion that the sneakers worn by the suspect in surveillance video looked similar to sneakers worn by the defendant at the time of his arrest, given the officer's direct observation of the defendant's sneakers. 245 N.J. at 17-18. We held in Singh that the officer's reference to the suspect in the video as "the defendant" was improper in light of the dispute about the identity of the suspect, but that the reference was "fleeting" and did not amount to plain error. Ibid.
>
> In Sanchez, we reversed the trial court's exclusion of the defendant's parole officer's identification of the defendant in a photograph taken from surveillance video, given the parole officer's many in-person meetings with the defendant and the capacity of her identification testimony to assist the jury. 247 N.J. at 469-75. There, the parole officer's identification

derived from her personal perception, which enabled her to identify the defendant in the surveillance photograph "more accurately than a jury could." Id. at 474.

. . . .

In Higgs, we barred the lay opinion of a law enforcement officer who was not present at a shooting and testified that an object depicted in a surveillance video appeared to be a firearm. 253 N.J. at 365-67. Applying N.J.R.E. 701's "perception" prong, we noted that the detective "had no prior interaction or familiarity with either defendant or the firearm in question" and that "[h]is testimony was based entirely on his lay opinion from watching the video." Id. at 365. We reasoned that "[t]he video was in evidence and the jury should have been permitted to view it slowly, frame by frame, to determine for themselves what they saw on screen, without the influence of opinion testimony by an officer who was not there at the time." Id. at 367. We held that the officer's testimony had invaded the jury's province. Id. at 366-67. We did not, however, "rule out the possibility of allowing a law enforcement officer to testify about a sequence in a video that is complex or particularly difficult to perceive." Id. at 367.

In State v. Watson, . . . we addressed the admissibility of a police officer's narration of a video of a bank robbery at which the officer was not present, and held that the narration exceeded the bounds of proper lay opinion testimony under N.J.R.E. 701 and N.J.R.E. 602[5] when the officer provided commentary about the suspect's actions during the robbery. Watson,

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[5] "Rule 602 requires that a lay witness have 'personal knowledge' to be allowed to testify." State v. Watson, ___ N.J. ___, ___ (2023) (slip op. at 36).

> ___ N.J. ___ (2023) (slip op. at 57-60). We disapproved of portions of the officer's narration testimony that reflected his subjective belief of what occurred in the surveillance video, including observations about alleged efforts by the suspect not to touch surfaces during the robbery and a comment that "the suspect was very careful in . . . not attempting to leave any type of evidence behind." Id. at ___ (slip op. at 58-59).
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> [State v. Allen, ___ N.J. ___, ___ (2023) (slip op. at 17-20) (all but last alteration in original).]

After reviewing other jurisdictions' handling of the subject, in Watson, the Court held that "Rules 701, 602, and 403 provide a framework for the admission of narration evidence" by "a witness who did not observe events in real time." Watson, ___ N.J. at ___ (slip op. at 49, 52). The Court stated:

> [W]hether narration evidence is helpful turns on the facts of each case. Rule 701's helpfulness prong can be satisfied when an investigator draws attention to key details that might be missed, or helps jurors follow potentially confusing, complex, or unclear videos that may otherwise be difficult to grasp. Counsel may offer other reasons to allow limited narration testimony, which courts should evaluate with care.
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> Narration testimony must also comply with N.J.R.E. 403. The rule guards against the risk of "[u]ndue prejudice, confusion of issues, . . . misleading the jury, . . . [and] needless presentation of cumulative evidence." Placing appropriate limits on narration testimony can help avoid those problems.
>
> [Id. at ___ (slip op. at 51) (alterations in original).]

The Court added that such testimony "must accord with specific limits." Id. at ___ (slip op. at 52). First, "continuous commentary during a video by an investigator whose knowledge is based only on viewing the recording" must be avoided. Ibid. Second, an investigator may "describe what appears on a recording but may not offer opinions about the content. In other words, they can present objective, factual comments, but not subjective interpretations." Id. at ___ (slip op. at 53). "Third, investigators may not offer their views on factual issues that are reasonably disputed," as "[t]hose issues are for the jury to decide." Ibid. Finally, while "lay witnesses generally may offer opinion testimony under Rule 701 based on inferences, investigators should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence. That type of comment is appropriate only for closing argument." Id. at ___ (slip op. at 53-54). The Court explained that, "[c]onsistent with those principles, an investigator who carefully reviewed a video in advance could draw attention to a distinctive shirt or a particular style of car that appear in different frames, which a jury might otherwise overlook," if those issues are not in dispute. Id. at ___ (slip op. at 54).

Here, defendant objected to Detective Peterson narrating the videos "without showing the videos." The judge sustained the objection and directed

the prosecutor to lay a proper foundation, which he did. Thereafter, while the detective narrated the surveillance footage for the jury, defense counsel only objected when the detective testified that the victim stopped walking "abruptly as if something got her attention," and that he "believe[d the victim was] going to reappear" in the video frame. Both objections were sustained by the judge and the testimony was stricken.

Critically, defense counsel never objected to Peterson identifying defendant in the surveillance footage nor continually referring to the individual in the footage as defendant. Instead, during cross-examination, defense counsel highlighted the weaknesses in Peterson's identification testimony as follows:

> [DEFENSE COUNSEL:] You were not actually at any of these locations when these recordings were made?
>
> [PETERSON:] No.
>
> [DEFENSE COUNSEL:] . . . You were not present at any time when the alleged truck goes through the video or we see the figure that you believe to be [the victim]. You're obviously not present for any of that, right?
>
> [PETERSON:] No, I'm not there.
>
> [DEFENSE COUNSEL:] This is you conducting an investigation and looking at timings and frames in order to piece together what you . . . have in front of you which is a homicide case, right?
>
> [PETERSON:] That's correct.

. . . .

[DEFENSE COUNSEL:] Okay. Now, in the video . . . , you testified on direct at no time do you actually see the individual that you identify as [the victim] getting into what you have identified as Tony Olswfski's truck, correct?

[PETERSON:] Yes.

[DEFENSE COUNSEL:] At no time do we actually see who you have identified as [defendant] walking with who you have identified as [the victim], correct?

[PETERSON:] No.

[DEFENSE COUNSEL:] No. At no time are we able to see into the inside of what you have identified as [T]ony Olswfski's truck, correct?

[PETERSON:] Yes.

[DEFENSE COUNSEL:] So you are going through these videos and these camera shots conducting your investigation in an effort to identify who you believe to be [defendant], right?

. . . .

[PETERSON:] It's [defendant] on the video inside the . . . [d]eli.

[DEFENSE COUNSEL:] . . . That's your determination, right?

. . . .

[PETERSON:] . . . I know it's him, yes.

. . . .

> [DEFENSE COUNSEL:] You absolutely one[-]hundred percent know that . . . is [defendant]?
>
> [PETERSON:] Yes.

Because defendant challenges Peterson's identification of defendant for the first time on appeal, we review for plain error. State v. Clark, 251 N.J. 266, 286-87 (2022); R. 2:10-2. "This is a 'high bar,' requiring reversal 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) (citations omitted) (first quoting State v. Santamaria, 236 N.J. 390, 404 (2019); and then quoting State v. Macon, 57 N.J. 325, 336 (1971)). As such, the alleged error "must be evaluated 'in light of the overall strength of the State's case.'" Clark, 251 N.J. at 287 (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)). As we have cautioned, "a guilty verdict following a fair trial and 'based on strong evidence proving guilt beyond a reasonable doubt[] should not be reversed because of a technical or evidentiary error that cannot have truly prejudiced the defendant or affected the end result.'" State v. Cotto, 471 N.J. Super. 489, 537 (App. Div. 2022) (alteration in original) (quoting State v. J.R., 227 N.J. 393, 417 (2017)).

Peterson's identification of defendant in the surveillance footage was clearly error. See Sanchez, 247 N.J. at 469-73 (discussing a range of factors relevant to determining the admissibility of a law enforcement officer's identification of the defendant under N.J.R.E. 701, including the witness's prior familiarity with the defendant, the defendant's change in appearance since the alleged offense, the availability of identification testimony from other witnesses, and the quality of the video recording at issue). Further, unlike Singh, Peterson's references to defendant were not "fleeting" or made in "passing." 245 N.J. at 17-18. Instead, Peterson explicitly identified defendant and repeatedly referred to the individual in the video as defendant. Nonetheless, we are satisfied the references do not amount to plain error because there was substantial circumstantial evidence in the case establishing defendant's guilt. Further, whereas the surveillance video in Singh purportedly depicted the defendant actually committing the robbery, id. at 5-6, this video built upon other evidence placing defendant and the victim together on the day in question.

Even without Peterson's testimony, the video showed a truck matching the description of Olswfski's truck operated by an individual wearing clothing that matched the clothing recovered from the crime scene. The neighbor saw two people matching defendant's and the victim's descriptions exit the truck and

enter the Olswfski home the morning of the murder. The victim's bruised, beaten, and bludgeoned body was found in defendant's bedroom. Critically, defendant's DNA matched the DNA found under the victim's fingernails, and the victim's blood was found on the blood-soaked clothing found at the crime scene and depicted in the surveillance footage. Given the volume of incriminating evidence, we therefore conclude that the evidentiary error did not "'truly prejudice[] the defendant or affect[] the end result.'" Cotto, 471 N.J. Super. at 537 (quoting J.R., 227 N.J. at 417).

IV.

In Point III, defendant argues the judge erred in admitting his statement that "[he] injured his right hand," elicited by police during the booking process. Defendant asserts that although "police are not required to administer Miranda warnings when questioning an arrestee to obtain pedigree information," the questions police asked defendant were "investigative" in nature and his responses "should have been suppressed."

> The safeguards of Miranda "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Clearly, however, not all statements obtained by the police after taking a person into custody must be considered the product of interrogation. The definition of interrogation has been held to extend only to a police officer's words or actions that the officer "should know

> are reasonably likely to elicit an incriminating response from the suspect."
>
> [State v. Mallozzi, 246 N.J. Super. 509, 514-15 (App. Div. 1991) (citations omitted) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)).]

"Thus, booking procedures and the routine questions associated therewith are ministerial in nature and beyond the right to remain silent." Id. at 515 (citing United States ex rel. Hines v. Lavallee, 521 F.2d 1109, 1112-13 (2d Cir. 1975)). Pursuant to the so-called "'routine booking question' exception," questions designed to secure the biographical data "reasonably related to the police's administrative concerns" and necessary to complete the booking process "fall outside the protections of Miranda and the answers thereto need not be suppressed." Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990).

In reviewing a Miranda ruling, we "give deference to the trial court's factual findings so long as they are supported by sufficient credible evidence in the record." State v. O.D.A.-C., 250 N.J. 408, 425 (2022) (citing State v. S.S., 229 N.J. 360, 379-81 (2017)). "A trial court's interpretation of the law, however, and the consequences that flow from established facts are not entitled to special deference" and "are reviewed de novo." State v. Hubbard, 222 N.J. 249, 263 (2015) (citing State v. Gandhi, 201 N.J. 161, 176 (2010)).

At trial, defendant challenged the admission of statements he made in response to questions asked by the arresting officer during the booking process. Following a Rule 104 hearing, during which the arresting officer testified, the judge made the following factual findings:

> The [c]ourt finds as fact that on April 28[], 2017, approximately 3:39 p.m. at the Hamilton Township Police Headquarters, defendant presented himself and Hamilton Officer Michael Stefanelli was assigned to meet . . . defendant . . . .
>
> At that time there was a . . . BOLO alert for an eluding offense, which is alleged to have occurred the prior day. There also was a BOLO relative to a homicide, and the [c]ourt further finds that Officer Stefanelli did not have the details of the alleged eluding or the alleged homicide, but was aware that defendant was wanted for questioning in connection with those alleged offenses, and that when he encountered [defendant] in the station he placed him under arrest.
>
> So he did take him into custody and then he began to process him, including the obtaining of pedigree information. In that circumstance he handcuffed [defendant] by one hand . . . in the secure area in the police station, and Officer Stefanelli was seated, and there was a table between them.
>
> And Officer Stefanelli made use of the form which is the . . . pedigree form, . . . which records pedigree information, a date, date of birth, name, address, and it has a health screening and visual assessment section wherein . . . "bruises" is checked off, and to the right hand.

> The [c]ourt finds that Officer Stefanelli, once defendant was in custody, did not read him his Miranda rights, and did not read him or describe to him any rights relative to self-incrimination, including when he was cuffed to the bar for purposes of getting the pedigree information.
>
> And it was at this time that there was an inquiry with regard to what was visibly an injured right hand, and defendant made a statement that his hand was injured. And then there was a follow-up question by Officer Stefanelli with regard to how the injury occurred.

The judge ruled that defendant's first response that his hand was injured was admissible under the routine booking question exception to the Miranda rule, but concluded that the second question regarding the manner of injury was outside the scope of the exception. See State v. M.L., 253 N.J. Super. 13, 21-22 (App. Div. 1991) (finding Miranda warnings unnecessary where "the police did not conduct an interrogation" in connection with the ultimately charged offense and police questions were premised on unrelated concerns). As to the latter inquiry, the judge reasoned that given the circumstances, the officer should have known that such a question was "reasonably likely to elicit an incriminating response."

On appeal, defendant renews his objection to the admission of the first response, arguing any question regarding "the physical condition of an arrestee

who was a homicide suspect at the time of the questioning" was impermissible as inherently "designed to elicit incriminating information," particularly in defendant's case, where "it was believed that the victim died violently." We disagree. We are satisfied the judge's determination – that defendant's statement was well within the scope of the routine booking question exception to the Miranda rule, and therefore admissible – is supported by the record and legally sound. See State v. Bohuk, 269 N.J. Super. 581, 594 (App. Div. 1994) ("Miranda's protection extends only to acts of police officers 'reasonably calculated to elicit an incriminating response.'" (quoting State v. Lozada, 257 N.J. Super. 260, 268 (App. Div. 1992))); State v. Sanchez, 224 N.J. Super. 231, 249 (App. Div. 1988) (explaining that where a police question is "open-ended," "not directed solely to [the] defendant," "unrelated to the arrest," "not an essential part of the investigation," and "[does] not call for an admission of guilt," a responding statement is generally admissible); State v. Cunningham, 153 N.J. Super. 350, 352-54 (App. Div. 1977) (holding that even though an officer deliberately asked routine booking questions with the intent to use the response in furtherance of his investigation, the defendant's response was still admissible, as was the resulting evidence obtained, because "[t]he intent or purpose of the detective in asking the questions of a defendant . . . is only one

of the factors to be considered in analyzing the total situation surrounding the questioning").

V.

In Point IV, defendant argues the judge erred in granting the State's application and "giving the flight instruction to the jury" over his objection. Defendant asserts "[t]he instruction was unduly prejudicial against [him]."

Whether there exists a sufficient evidentiary basis to support a flight charge is within the trial judge's discretion. State v. Long, 119 N.J. 439, 499 (1990). In determining whether to instruct a jury on flight, a judge "must cautiously consider whether, given the peculiar facts in th[e] case, a flight charge is appropriate." State v. Randolph, 228 N.J. 566, 595 (2017), aff'g in part, rev'g in part 441 N.J. Super. 533 (App. Div. 2015). An instruction on flight "is appropriate when there are 'circumstances present and unexplained which . . . reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt.'" State v. Latney, 415 N.J. Super. 169, 175-76 (App. Div. 2010) (quoting State v. Mann, 132 N.J. 410, 418-19 (1993)). "The jury must be able to find departure and 'the motive which would turn the departure into flight.'" Id. at 176 (quoting State v. Wilson, 57 N.J. 39, 49 (1970)).

Although evidence presented to support a flight charge must be "intrinsically indicative of a consciousness of guilt," it need not "unequivocally support a reasonable inference of the defendant's guilt." Randolph, 228 N.J. at 595 (emphasis omitted) (quoting Randolph, 441 N.J. Super. at 562-63) (internal quotation marks omitted). For example, in State v. Wilson, our Supreme Court held that even when evidence could lend itself to multiple interpretations, a flight charge is still appropriate so long as the evidence presented could allow a jury to "readily infer that [a defendant] fled to avoid apprehension by the police and thereby exhibited consciousness of guilt." 57 N.J. at 49. As such, the Wilson Court determined that although the jurors could have attributed an innocent motive to the defendant's abrupt departure, the flight instruction was proper because the evidence could support a finding that defendant sought to avoid apprehension for the particular crime. Ibid.

Still, in determining whether a flight charge is appropriate in any given case, a judge must consider "whether the probative value of evidence of flight is 'substantially outweighed by the risk of . . . undue prejudice, confusion of issues, or misleading the jury.'" Randolph, 228 N.J. at 595 (quoting N.J.R.E. 403(a)). The judge should also consider "whether a carefully crafted limiting instruction could ameliorate any potential prejudice." Ibid.

During the charge conference, over defendant's objection, the judge granted the State's application for a flight charge in relation to the murder-related offenses. To support his ruling, the judge recounted the evidence that the victim was discovered the night of April 25, 2017, in defendant's bedroom at Olswfski's residence. Earlier that day, Olswfski's truck had been discovered "missing," presumably in defendant's possession, and there was "no evidence" that defendant ever "returned to the scene." Instead, defendant "took . . . Olswfski's truck" and "left town," encountering Andre Brown "[t]he next day" in a different town. Two days after the discovery of the victim, defendant "was involved in the police pursuit" in the truck and ultimately voluntarily surrendered himself to police with the truck. However, defendant never returned to Olswfski's residence.

The judge concluded there was "sufficient circumstantial evidence that defendant departed [the scene of the crime]." Further, "[t]here c[ould] be an inference of motive for departure to avoid . . . apprehension for the [murder-related] charges." In considering the prejudice to defendant, the judge stated:

> The probative value here is with regard to consciousness of guilt. So, there is probative value. And though there may be a risk of some prejudice, the probative value is not substantially outweighed by the risk in this [c]ourt's view of any undue prejudice, confusion of issues or misleading the jury.

The judge agreed, however, that because the eluding charges were "separate and distinct" offenses to which the flight charge did not apply, a modification of the flight charge was needed to highlight the distinction.

Thereafter, consistent with the model jury instruction, Model Jury Charges (Criminal), "Flight" (rev. May 10, 2010), the judge instructed the jury as follows:

> There has been some testimony in the case from which you may infer that the defendant fled shortly after the alleged commission of the homicide. Defendant denies this contention and denies flight. The question of whether the defendant fled after the commission of the crime is another question of fact for your determination. Mere departure from a place where a crime has been committed does not constitute flight. If you find that . . . defendant, fearing that an accusation or arrest would be made against him on the charge of murder and the weapons offenses as alleged in the indictment, took refuge in flight for the purpose of evading the accusation or arrest on that or those charges, then you may consider such flight in connection with all the evidence in the case, as an indication or proof of consciousness of guilt.
>
> Flight may only be considered as evidence of consciousness of guilt if you should determine that . . . defendant's purpose in leaving was to evade accusation or arrest for the offense of murder, possession of a weapon for unlawful purpose, or unlawful possession of a weapon.

Based on our careful consideration of the record, we are satisfied the judge did not err in providing the flight charge. Moreover, the charge as given substantially tracked the language in the model instruction. See State v. Whitaker, 402 N.J. Super. 495, 513-14 (App. Div. 2008) ("When a jury instruction follows the model jury charge . . . 'it is a persuasive argument in favor of the charge as delivered.'" (quoting State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000))). We reject defendant's contention that the judge permitted the jury "to apply flight to the eluding count[s]" as unsupported by the record. We also reject defendant's contention that the judge mischaracterized the evidence by "stating that . . . defendant fled 'shortly after' the alleged homicide when, in fact, it was more than two days later that he allegedly eluded the police." See Long, 119 N.J. at 499-500 (upholding flight charge where "[k]nowing he was wanted, [the defendant] failed to turn himself in for two weeks"). Although other evidence may contradict an inference of flight, "[s]uch evidence does not necessarily require omission of a flight charge, but does require reflection in the charge that flight is just a circumstance tending to show consciousness of guilt," as occurred here. Id. at 500.

VI.

In Point V, defendant asserts the judge erred in applying aggravating factor one in sentencing defendant on the murder charge, arguing doing so constituted "[i]mpermissible double-counting." In Point VI, defendant argues the judge failed to provide an explicit statement explaining the overall fairness of the sentence in accordance with State v. Torres, 246 N.J. at 271. We agree that a limited remand is necessary for the judge to comply with Torres, decided two years after defendant was sentenced. Otherwise, we discern no abuse of the judge's sentencing authority.

We review sentences "in accordance with a deferential standard," State v. Fuentes, 217 N.J. 57, 70 (2014), and are mindful that we "should not 'substitute [our] judgment for those of our sentencing courts,'" State v. Cuff, 239 N.J. 321, 347 (2019) (quoting State v. Case, 220 N.J. 49, 65 (2014)). Thus, we will

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

In State v. Yarbough, 100 N.J. 627 (1985), our Supreme Court set forth the following guidelines for evaluating the threshold question of whether to impose concurrent or consecutive sentences for multiple offenses pursuant to N.J.S.A. 2C:44-5(a):

> (3) [S]ome reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;
> >
> > (e) the convictions for which the sentences are to be imposed are numerous . . . .
>
> [Yarbough, 100 N.J. at 643-44.]

"The Yarbough factors serve much the same purpose that aggravating and mitigating factors do in guiding the court toward a sentence within the statutory range." State v. Abdullah, 184 N.J. 497, 514 (2005). "[T]he five 'facts relating to the crimes' contained in Yarbough's third guideline should be applied

qualitatively, not quantitatively," and consecutive sentences may be imposed "even though a majority of the Yarbough factors support concurrent sentences." State v. Carey, 168 N.J. 413, 427-28 (2001); see also State v. Molina, 168 N.J. 436, 442 (2001) (affirming consecutive sentences although "the only factor that support[ed] consecutive sentences [was] the presence of multiple victims").

In Abdullah, the Court reminded trial judges "that when imposing either consecutive or concurrent sentences, '[t]he focus should be on the fairness of the overall sentence,' and that they should articulate the reasons for their decisions with specific reference to the Yarbough factors." 184 N.J. at 515 (alteration in original) (quoting State v. Miller, 108 N.J. 112, 122 (1987)). In Torres, the Court directed that when imposing lengthy consecutive sentences, "an explanation for the overall fairness of a sentence by the sentencing court is required" in order to curtail and, if necessary, correct "'arbitrary or irrational sentencing.'" 246 N.J. at 272 (quoting State v. Pierce, 188 N.J. 155, 166-67 (2006)). Thus, consideration of the fairness of the overall sentence is "a necessary feature in any Yarbough analysis" and, ordinarily, a limited remand is required when such an explanation is not provided. Cuff, 239 N.J. at 352.

Here, the judge found aggravating factors one, three, six, and nine, and mitigating factor seven. See N.J.S.A. 2C:44-1(a)(1) ("nature and circumstances

of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner"); N.J.S.A. 2C:44-1(a)(3) ("risk that the defendant will commit another offense"); N.J.S.A. 2C:44-1(a)(6) ("extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted"); N.J.S.A. 2C:44-1(a)(9) ("need for deterring the defendant and others from violating the law"); N.J.S.A. 2C:44-1(b)(7) ("defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense").

The judge determined "the aggravating factors substantially outweigh[ed] the mitigating factor[]." As to the Yarbough factors, the judge determined consecutive sentences were appropriate because the eluding charges were "predominantly independent of the crime of murder two days earlier, and [the eluding] was a separate act at a different time and in separate places." As a result, the judge merged the weapons offenses into the murder charge and sentenced defendant to fifty-five years in prison, subject to NERA, for murder. The judge also imposed a seven-year term for each eluding charge, to run concurrent with each other but consecutive to the murder charge.

We reject defendant's specious argument that the judge engaged in impermissible double counting by applying aggravating factor one to the murder charge. To support his finding, the judge stated:

> The [c]ourt finds that factor because the blunt force trauma that caused the victim's death was inflicted by [d]efendant in an especially cruel or heinous manner. As for severity, it was quite extreme and constituted an extraordinary degree of brutality beyond killing her with a hammer. [The medical examiner] testified that the victim was struck in the head over [twenty] times, such that a whole portion of her skull was destroyed and parts of her brain were expelled. The extent of damage was the worst she had ever seen as a medical examiner. The excess damage inflicted clearly extends way beyond the elements that are required for murder.
>
> And the [c]ourt does not engage in double counting here . . . .

"[A]ggravating factor one must be premised upon factors independent of the elements of the crime and firmly grounded in the record." Fuentes, 217 N.J. at 63. The prohibition against double counting will not apply when there are "'aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.'" State v. Miller, 237 N.J. 15, 25 (2019) (alteration in original) (quoting Fuentes, 217 N.J. at 75). Moreover, "[i]n appropriate cases, a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality

involved in an offense." Fuentes, 217 N.J. at 75 (citing State v. O'Donnell, 117 N.J. 210, 217 (1989)). Such a finding must be "clearly explained" in sentencing "so that an appellate court may be certain that the sentencing court has refrained from double-counting the elements of the offense." Id. at 76; see also State v. Francisco, 471 N.J. Super. 386, 426 (App. Div. 2022) (collecting cases).

We are satisfied the judge meticulously adhered to these principles in applying aggravating factor one. Because the judge's explanation was clear, detailed, and supported by competent, credible evidence in the record, there is no basis to disturb the judge's findings. In sum, we affirm the convictions and remand for the limited purpose of allowing the judge to provide "an explanation for the overall fairness of [the] sentence" as required by Torres. 246 N.J. at 272; see also State v. Amer, 471 N.J. Super. 331, 358-59 (App. Div. 2022) (vacating and remanding sentence entered in 2019 in light of Torres), aff'd as modified on other grounds, 254 N.J. 405 (2023).

Affirmed. Remanded solely for the limited purpose of addressing the sentencing issue consistent with this opinion. We do not retain jurisdiction.