RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0922-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT C. GRILLO, a/k/a CARLOS C. GRILLO, ROBERTO GRILLO, ROBERTO C. GRILLOPIMIENTA, ROBERTO C. PIMIENTA, ROBERT G. PRIMIENTA, and ROBERT GRILLO-PIMIENTA,

Defendant-Appellant.

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Submitted May 9, 2023 – Decided August 11, 2023

Before Judges Messano and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 16-01-0278.

Joseph E. Krakora, Public Defender, attorney for appellant (Lauren S. Michaels, Assistant Deputy Public Defender, of counsel and on the briefs).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

A jury convicted defendant Robert C. Grillo of four counts of first-degree aggravated sexual assault of F.R., N.J.S.A. 2C:14-2(a)(1) and (a)(2); two counts of second-degree sexual assault of F.R., N.J.S.A. 2C:14-2(c)(3); and six counts of second-degree endangering the welfare of F.R., N.J.S.A. 2C:24-4(a).[1] The judge imposed an aggregate sentence of twenty-five-years' imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, to be served consecutively to a fifty-five-year term of imprisonment, also subject to NERA, that defendant was serving for a prior murder conviction in Union County.

Defendant raises the following points for our consideration on appeal:

POINT I

DEFENDANT'S RIGHTS TO CONFRONT WITNESSES, DUE PROCESS, AND A FAIR TRIAL WERE VIOLATED BY THE ADMISSION OF A NON-TESTIFYING SEROLOGIST'S REPORT, AS WELL AS SURROGATE TESTIMONY BY ANOTHER SEROLOGIST WHO DID NOT TEST

[1] We use initials and pseudonyms for the victim and her family pursuant to Rule 1:38-3(c)(12).

THE SAMPLES, SUPERVISE OR REVIEW THE TESTING, UNDERTAKE ANY INDEPENDENT ANALYSIS, OR AUTHOR ANY INDEPENDENT CERTIFICATION OR REPORT. (NOT RAISED BELOW)

POINT II

THE COURT VIOLATED DEFENDANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, AND TO PRESENT A DEFENSE BY PRECLUDING HIM FROM PRESENTING EVIDENCE [. . .] THAT THE COMPLAINING WITNESS HAD FALSELY ACCUSED HER FATHER OF SEXUAL ABUSE.

POINT III

THE CUMULATIVE EFFECTS OF THE AFOREMENTIONED ERRORS DENIED DEFENDANT A FAIR TRIAL.

POINT IV

THE SENTENCE OF [TWENTY-FIVE] YEARS, [TWENTY-ONE] YEARS AND THREE MONTHS WITHOUT PAROLE, IS BASED ON FLAWED FINDINGS OF AGGRAVATING AND MITIGATING FACTORS AND A FAILURE TO CONSIDER THE FARINESS OF THE CONSECUTIVE, AGGREGATE TERM, AND IS EXCESSIVE. THE CASE MUST ALSO BE REMANDED TO CORRECT THE NUMBER OF JAIL CREDITS AWARDED, MERGE SEVERAL OFFENSES, AND REMOVE FROM THE JUDGMENT OF CONVICTION A $17,000 SCVTF PENALTY NOT IMPOSED AT SENTENCING.[2]

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[2] We have eliminated the subpoints in defendant's brief.

In a pro se supplemental filing, defendant also argues:

> POINT I
>
> TRIAL COURT ERRED IN SUA SPONTE CHANGING ITS PREVIOUS DECISION TO NOT ADMIT CONSCIOUSNESS OF GUILT EVIDENCE INTO TRIAL AFTER HEARING DEFENDANT'S TESTIMONY[] ABSENT A RENEWAL FROM THE PROSECUTOR (Not raised below)
>
> POINT II
>
> DEFENDANT IS EXONERATED BY DNA EXPERT WITNESS TESTIMONY RESULTING TO ACTUAL INNOCENCE[.] EVIDENCE OF TRIAL RECORD WHICH REBUTS WHEN THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING INTO EVIDENCE EXHIBIT (S-6A & S-6A-1) UNDERWEAR STAINED WITH DEFENDANT'S DNA AS, UNDER THE CIRCUMSTANCES, THIS UNDERWEAR SHOULD HAVE BEEN EXCLUDED AS NONVERBAL CONDUCT UNDER N.J.R.E. 801(a)(2) (Not raised below)
>
> POINT III
>
> FULL REVERSAL IS WARRANTED SINCE THE SENTENCING COURT ABUSED ITS DISCRETION BY IMPOSING ARBITRARY SENTENCES NOT IN ACCORDANCE WITH ANY SENTENCE AUTHORIZED BY LAW, WHICH NOW REVEALS "VOID JUDGMENTS[.]" THE JURY VERDICT MUST BE OVERTURNED WITH DIRECTIONS TO

MAKE A NEW ENTRY FOR A JUDGMENT OF ACQUITTAL (Partially raised below)[3]

We have considered these arguments in light of the record and applicable legal standards. We affirm defendant's convictions. However, the judge failed to merge certain convictions, defendant is entitled to additional jail credits, and the judge failed to explain his reasons for imposing the Sex Crime Victim Treatment Fund (SCVTF) penalties as required by State v. Bolvito, 217 N.J. 221 (2014). We therefore remand the matter for further proceedings consistent with this opinion.

I.

F.R. (Fiona) was born in 1998. Her mother, C.R. (Carla), became romantically involved with defendant around 2009, and, shortly thereafter, Carla, Fiona, and Carla's other children began living with defendant. Defendant was a father figure to the children, and defendant and Carla had a son together shortly thereafter.

[3] Defendant attempted to directly file another brief with the Clerk's Office, which, given the Office of the Public Defender's (OPD) representation of defendant, was rejected and forwarded to that office. Defendant then served the Clerk with a letter challenging OPD's refusal to file a motion to unseal the record and file another supplemental pro se brief. The Clerk has properly refused to file the documents.

Fiona was twenty-one-years old when she testified at trial. She described the first time defendant sexually assaulted her when she was twelve-years old, and she testified in detail about other incidents of vaginal, anal, and oral sexual assault over ensuing years. Fiona never told anyone because she was "terrified" and believed her "mom would go against" her. Defendant kept threatening Fiona and told her he would commit suicide if she told anyone, sending her pictures of "deep cuts" he made on his forearms with a razor.

Defendant also physically assaulted Fiona and exhibited controlling behaviors. Shortly after her fifteenth birthday, Fiona attempted suicide. She estimated that defendant had sexually assaulted her "a little less" than 100 times, with the last assault occurring in early February 2015, in a McDonald's parking lot when defendant anally penetrated Fiona and ejaculated.

By then, Carla, Fiona and the other children had moved out of the apartment they had been sharing with defendant in Bloomfield and moved in with Carla's sister in Rahway. Carla explained why.

One night, after finishing dinner, Carla walked into the living room and saw defendant and Fiona hugging and kissing. She confronted them. Although Fiona denied anything was "going on," defendant physically assaulted Carla in front of the children. Carla and the family moved to her sister's house in

Rahway, but defendant remained close to the children, frequently driving them to and from school.

Fiona and her brother stayed with defendant on the night of February 2, 2015, because both were scheduled to take school entrance examinations in Newark the next morning. Fiona testified that defendant took her to a McDonald's restaurant and sexually assaulted her in the parking lot. Fiona wore the same clothing to take the exam the next morning, and defendant drove her and her brother to Rahway after school. Fiona tossed her clothing, including her panties, in the hamper.

Carla testified she had attempted to contact Fiona or defendant for hours on the evening of February 2 without success. Carla's suspicions about defendant's behavior were confirmed on February 4, 2015, when she demanded to see Fiona's cell phone. Fiona at first objected; she was scared and nervous because she knew defendant's "very intimate and explicit" text messages would be revealed. The jury saw these text messages at trial.

After seeing the contents of Fiona's phone, Carla contacted law enforcement, gathered Fiona's clothes and underwear from the hamper, and accompanied her daughter to the hospital, where Fiona was examined. Vaginal, cervical and anal swabs taken during the examination were analyzed with

negative results for the presence of semen. As we explain in more detail below, however, semen and defendant's DNA were found on Fiona's panties.

Formal charges were lodged against defendant the next day, but police could not locate him. Defendant's sister filed a missing persons' report, concerned over text messages defendant had sent their father in which he threatened to commit suicide. Ultimately, local police found defendant in Tampa, Florida, on March 5, 2015, asleep in his car.

Defendant testified and denied ever sexually assaulting Fiona. He admitted taking her to McDonalds on the evening of February 2, 2015, but claimed the two just talked about problems Fiona was having at school. Defendant said his relationship with Carla was in trouble at this time because she wanted to move out of state and deny defendant his ability to see their son.

Nevertheless, defendant said he and Carla had had sex in his Bloomfield apartment a few days before February 2. Defendant did not deny his DNA was on Fiona's panties, but rather explained that as he ejaculated during sex with Carla, he wiped himself on something indiscriminately picked from a pile of laundry in the room. Defendant said Carla saw him do this, must have taken the item a few days later when she came back to the apartment to get the laundry, and given it to police. Defendant also denied sending Fiona the text messages,

which were allegedly sent through an app on his computer, asserting that some unknown person had hacked the computer.

II.

In the second point of his counseled brief, defendant contends the judge committed reversible error by barring him from introducing evidence that Fiona had falsely accused her biological father of sexual abuse. The issue arose pre-trial in the following context.

Using the transcript of Carla's February 5, 2015 statement to police, defendant brought the following exchange to the trial judge's attention:

> [CARLA]: And I said, "Okay. Is there anything you want to tell me?" [Fiona] said, "Mom, there's two things I want to tell you." At first I was catching on—you know, she was trying to lie to me. She told me that her father in Florida—which he abandoned her when she was [four] years old. Her brother was [five].[4]
>
> [DETECTIVE]: Okay.
>
> [CARLA]: Okay? [Fiona] said that her father in Florida raped her. And I looked at her. And I said, "That's not true." And then she said, "Mom, yes it is." "[Fiona], you w[ere four-]years old, okay? You w[ere] always with me. He wouldn't even pick you up[] because he was constantly going out to different places, and he left to Florida, changed his name, everything."

[4] In an obvious error, the transcript attributes this statement to the detective.

> And then she was like, "I'm telling you the truth. One time I was with him and he raped me." I was like, "[Fiona], you w[ere] never in the house with him. Never."
>
> [DETECTIVE]: Uh-huh.
>
> [CARLA]: "I know for a fact because I never allowed you and your brother. He had criminal charges. That's how I know you're lying." Then she took a deep breath, and I was like, "What's the second one?" "The second one is that [defendant], he kissed me." "When did this happen?" She started hesitating, she started putting her head down. I said, "Listen, I'm trying to help you."

Defendant argued the accusation was admissible to impeach Fiona's credibility pursuant to N.J.R.E. 608(b)(1).

The judge denied defendant's request after hearing argument and without conducting an evidentiary hearing. Noting State v. Guenther, 181 N.J. 129 (2004), was controlling precedent, the judge explained there were "several grounds" supporting his decision to deny defendant's motion. He reasoned Fiona's accusation was "not a prior accusation as [it was] a contemporaneous statement made at the same time as the disclosure regarding the conduct involving [defendant]." Second, "under Guenther," Fiona's accusation was "not proven to be false," since Carla's opinion was "a far cry from proof that it [wa]s false." Lastly, the judge concluded determining whether the accusation was

false "would inject a collateral issue into the case," and likely become a "mini trial regarding the prior father. And Guenther caution[ed] against doing that."

Defendant argues the judge erred by not conducting a N.J.R.E. 104(a) hearing and by concluding N.J.R.E. 608(a) did not apply because Fiona's accusation was made contemporaneous with her disclosure about defendant's sexual abuse. The State counters that the judge's analysis was correct, and his decision to exclude the evidence was not a mistaken exercise of discretion.

"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)). "We do 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)). "Every mistaken evidentiary ruling, however, will not 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.

Pursuant to N.J.R.E. 608(b)(1),

> In a criminal case, a witness' character for truthfulness may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing

> pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.

The rule codifies the Guenther Court's "creat[ion of] a narrow exception to N.J.R.E. 608" as it then existed, and its holding "that 'in limited circumstances and under very strict controls a defendant has the right to show that a victim-witness has made a prior false criminal accusation for the purpose of challenging that witness's credibility." State v. A.O., 198 N.J. 69, 93 (2009) (quoting Guenther, 181 N.J. at 154).

The Guenther Court outlined five factors that the trial judge should consider in deciding whether to admit testimony of a witness's false accusation. 181 N.J. at 157. These included: "whether the credibility of the victim-witness is the central issue in the case"; "similarity of the prior false criminal accusation to the crime charged"; proximity of the false accusation to the crime charged; "the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial"; and if the probative value of the evidence is outweighed "by undue prejudice, confusion of the issues, and waste of time." Ibid.

In A.O., the Court modified Guenther in one important respect by concluding its logic "applie[d] with equal force to false criminal allegations

made soon after the primary allegation." 198 N.J. at 93 (emphasis added). Nevertheless, the Court emphasized that judges

> should continue to apply the factors [Guenther] sets forth in deciding the question of admissibility and be mindful of its concerns to avoid distracting mini-trials. Only "in limited circumstances and under very strict controls," does a defendant have the right to challenge a witness's credibility regarding a later false criminal accusation.
>
> [Id. at 94 (quoting Guenther, 181 N.J. at 154).]

In this case, one of the judge's reasons for excluding the evidence was that Fiona's allegations were not "prior" allegations but rather were made contemporaneously with her report to Carla of defendant's abuse. Although Fiona's allegations against her biological father were made neither prior to nor after her disclosure of defendant's abuse, that distinction does not matter. We agree with defendant and the State essentially concedes that after the Court's holding in A.O., the judge's reasoning in this regard was flawed. We also conclude the judge should have conducted a N.J.R.E. 104(a) hearing as required by Guenther and its progeny, as well as by the text of N.J.R.E. 608(b)(1).

Nevertheless, we do not conclude these missteps undermine the judge's conclusion that defendant failed to carry his burden of showing by a preponderance of the evidence that Fiona's accusation was false. Guenther, 181

N.J. at 157. The only proffer defendant made, both that the accusation was made in the first instance and that it was false, was Carla's statement. More importantly, as the judge recognized, proving the falsity of Fiona's accusation about conduct that allegedly took place more than a decade earlier would require the production of additional witnesses, such as her biological father, take additional time away from the trial itself, and "become a second trial, eclipsing the trial of the crimes charged." Ibid. The judge's evidentiary decision was not a mistaken exercise of his discretion.

III.

For the first time on appeal, defendant argues the testimony of Allison Lane, a forensic scientist working in the Forensic Serology Unit of the New Jersey State Police Laboratory, and the admission of notes and a report prepared by a different serologist, Annette Escillow, violated the Confrontation Clause of the Sixth Amendment of the United States Constitution and the rule against hearsay. We summarize some of the trial testimony and evidence concerning these arguments.

Lane was qualified as an expert and testified generally about procedures in the laboratory and serologic testing in general. Escillow had examined the evidence in this case but had since retired. Lane had familiarized herself with

Escillow's work and testified utilizing Escillow's notes and report, but she was neither Escillow's supervisor nor did Lane author a separate report.

Lane testified that Fiona's rectal swabs were presumptively positive for blood and her underwear was presumptively positive for blood and semen. Escillow's laboratory notes, showing that a portion of the underwear was cut out and sent for DNA testing, were admitted into evidence without objection. On cross-examination, using Escillow's report, defense counsel had Lane acknowledge that semen was not detected on the rectal swabs, and the test for semen performed on the rectal swabs was inconclusive.

Kimberly Michelik, a forensic scientist with the New Jersey State Police DNA laboratory testified as an expert in DNA analysis without objection. She received the samples from the Serology Unit, including Fiona's underwear. Michelik described how she generated two DNA profiles from the underwear; one was Fiona's, the other Michelik initially described as a "non[-]victim" DNA profile. After Michelik had compared that profile to a sample of defendant's DNA, she concluded that defendant was the source of the non-victim DNA on Fiona's underwear.

On cross-examination, defense counsel asked Michelik about DNA transfer, and Michelik affirmed that it was possible if "everyone's clothes were

comingled" in the family's hamper that DNA could be transferred from one item to another. Michelik also explained she could not definitively say "whether there was sperm" in the sample she examined. Defense counsel asked Michelik questions about the findings in Escillow's report that she had detected no semen on Fiona's rectal swabs. Escillow's report was admitted into evidence, without objection, after Lane and Michelik had both testified.

Citing Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and other authority, defendant contends Lane's testimony and the admission of Escillow's notes and report violated the Confrontation Clause and the hearsay rule, N.J.R.E. 802. In his pro se supplemental brief, defendant also challenges the admission of Escillow's notes and report, as well as the weight of the DNA evidence.[5]

The State contends defendant waived any challenge to the evidence based on the Confrontation Clause or as hearsay and used it during cross-examination as part of his overall strategy in the case. It also argues the evidence was not

[5] Defendant also contends that pursuant to our holding in State v. Mauti, 448 N.J. Super. 275, 308–09 (App. Div. 2017), Carla's tender of Fiona's panties to police was non-verbal conduct that amounted to hearsay pursuant to N.J.R.E. 801(c)(2). Unlike in Mauti, the witness who supplied the panties here, Carla, testified and was cross-examined. Moreover, in Mauti, "the State failed to present any evidence linking the towel to the sexual assault described by" the alleged victim. Id. at 311. Here, Fiona testified and identified the panties as those she wore on the night of defendant's February 2, 2015 sexual assault.

"testimonial," the sine qua non of a Confrontation Clause violation, nor was it hearsay. Alternatively, the State contends the report and notes fell within the business records exception to the hearsay rule, N.J.R.E. 803(c)(6).

As the Court has made clear, "[b]efore addressing the law applicable to the parties' arguments, we must first decide whether defendant waived his Confrontation Clause objection." State v. Wilson, 227 N.J. 534, 542 (2017). "The right of confrontation, like other constitutional rights, may be waived by the accused." State v. Williams, 219 N.J. 89, 98 (2014).

> As part of a reasonable defense strategy, [a defendant] may waive his right of confrontation and choose not to object to testimony or choose not to cross-examine a witness. Therefore, generally, a defendant must attempt to exercise his confrontation right and object when necessary, if he wishes later to claim that he was denied that right.
>
> [Id. at 93.]

However, "a defendant does not waive a Confrontation Clause objection merely because he waits until a witness's testimony is underway to object, 'particularly where . . . the objection is premised on the form and content of the witness's testimony.'" Wilson, 227 N.J. at 543 (quoting State v. Bass, 224 N.J. 285, 311–12 (2016)). Furthermore, a defendant does not have to "specifically

use the terms 'Confrontation Clause' or 'Sixth Amendment' . . . to preserve a Confrontation Clause challenge." Ibid. (citing Bass, 224 N.J. at 312).

Here, defendant lodged a continuing objection, first made during the testimony of one of the officers who responded to Carla's initial report of Fiona's disclosure, that the State had failed to establish the "chain of custody" of the panties. The judge overruled the objection, reasoning it went to the weight, but not the admissibility, of Fiona's panties in evidence. Defendant never challenged the admissibility of Lane's testimony or the admission of Escillow's notes or report on any grounds.

Moreover, counsel used the results of Escillow's report to support the defense case. He highlighted in summation that Lane confirmed swabs taken from Fiona were negative for the presence of sperm, despite the State's claim that the panties she wore on the night of February 2, 2015, contained defendant's DNA. Counsel then cross-examined Michelik about the potential for transfer of DNA from clothing to clothing in an effort to support defendant's explanation how his DNA was recovered from the panties. We therefore conclude defendant waived an objection on Confrontation Clause and hearsay grounds.

More importantly, neither Escillow's notes and report, nor Lane's testimony, did anything more than establish that the swatch of panties Michelik

examined came from the clothing Carla provided to law enforcement. Defendant had a full and fair opportunity to cross-examine Michelik, the critical witness who performed the DNA analysis of the swatch of panties and compared it to defendant's DNA sample.

To the extent we have not discussed the other arguments defendant raises in his pro se supplemental brief regarding the DNA evidence, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

IV.

Given our disposition of the non-sentencing arguments in defendant's counseled brief, we reject without discussion the contention that defendant's convictions should be reversed based on cumulative errors. R. 2:11-3(e)(2). We turn to the other non-sentencing argument defendant raises in his pro se submission.

Before trial began, the judge considered the State's proffer regarding defendant's attempted suicide when he was arrested in Florida. Essentially, when confronted by police in Tampa, defendant unsuccessfully attempted to drive away and then slit his wrists and resisted the officers' attempts to subdue him. He was treated at a local hospital. The State contended the evidence was admissible because it demonstrated defendant's consciousness of guilt.

The judge concluded "the graphic nature . . . and the graphic descriptions as reflected in the hospital records as . . . defendant [wa]s being treated for self-inflicted wounds [wa]s . . . unduly prejudicial." He excluded the evidence pursuant to N.J.R.E. 403.

During cross-examination, defendant denied that he fled to Florida knowing these charges had been filed on February 5, 2015. Defendant claimed he was drunk when he sent his father a suicidal text message that day, and said he was unaware of the charges until arrested in Tampa in March.

Outside the presence of the jury, the prosecutor asked the judge to reconsider his prior ruling, arguing defendant had now denied under oath any knowledge of the outstanding warrant. The prosecutor sought to introduce medical records from the hospital in Tampa following defendant's attempted suicide containing medical staff's recording of defendant's statement: "He wants to be dead due to his criminal charges."

Over defendant's objection, the judge reconsidered his prior ruling:

> The Court had initially ruled that it was not admissible in the State's case and this additional attempt would not have otherwise come before the jury. However, the defendant elected to testify . . . with his eyes wide open, exercised his constitutional right to testify, provided information in his account that is directly contradicted by statements made in the hospital and this additional attempt as closely connected to the

> pendency of the charges supports the logical inference of consciousness of guilt, and in applying that [N.J.R.E.]403 balancing to the facts as they exist now, having heard the defendant's direct testimony and portions of cross, the [c]ourt will adjust it based upon the emerging evidence and rule that the inquiry during cross-examination as to the . . . incidents surrounding his arrest in Tampa is admissible as is any discussions with health professionals . . . [. S]o for the reasons set forth in the record and incorporated herein, it's admissible.

The prosecutor was permitted to cross-examine defendant about the Tampa arrest, his attempted suicide, and his statements at the hospital. Defendant continued to deny any knowledge of the charges until he was arrested in Tampa. The certified hospital records were admitted into evidence. The State also produced Tampa Police Officer Anthony Skolarus on rebuttal. He testified in detail about defendant's arrest and attempted suicide.

As best we can discern, defendant contends the judge's reconsideration of his earlier ruling punished him for exercising his constitutional right to testify in his own defense. It is axiomatic, however, that "[t]he right to testify comes with a reciprocal obligation to tell the truth. A defendant who testifies swears or avers to tell the truth like all other witnesses. The defendant always retains the right to testify; however, he simply is not permitted to lie without fear of

contradiction." State v. Burris, 145 N.J. 509, 530 (1996). Defendant's argument requires no further discussion. R. 2:11-3(e)(2).

V.

A.

Defendant contends in his counseled and pro se briefs that his sentence is excessive. Specifically, defendant contends the judge mistakenly exercised his discretion in finding and weighing the aggravating and mitigating sentencing factors, and in imposing a sentence to run consecutively to the Union County sentence imposed on his murder conviction without considering the overall fairness of the sentence, and consecutive sentences within this indictment.

The judge found aggravating factors three and nine. N.J.S.A. 2C:44-1(a)(3) (the risk of re-offense); -1(a)(9) (the need to deter defendant and others). Defendant had no prior convictions before the commission of these offenses, so the judge also found mitigating factor seven, N.J.S.A. 2C:44-1(b)(7) (lack of prior criminal history).[6] He then considered whether to impose the sentences consecutively or concurrently to defendant's murder sentence. In doing so, the

[6] Defendant was convicted or murder in Union County in 2018. The victim in that case was Carla's sister, and the homicide occurred in December 2015, in the Rahway home that Carla and her children were sharing with her sister when Fiona made her disclosures. See State v. Grillo, No. A-1995-18 (App. Div. May 7, 2021).

judge considered the factors outlined in State v. Yarbough, 100 N.J. 627, 644 (1985), and determined any sentence he imposed should run consecutively to the Union County sentence defendant was serving.

The judge then considered whether to impose concurrent or consecutive sentences for the convictions resulting from trial. He again considered the Yarbough factors. The judge noted that counts eleven and twelve alleged second-degree sexual assault and endangering for the February 2, 2015 McDonald's crime. He observed the passage of time from the first count, charging defendant with crimes in 2010, and found that although the victim was the same and had been subjected to "continuous sexual assault," the jury found defendant had assaulted Fiona both vaginally and anally on February 2, 2015. He decided a consecutive sentence on count eleven was warranted under Yarbough.

The first eight counts of the indictment were arranged in couplets of crimes, each charging defendant with first-degree aggravated assault and second-degree endangering in specific places during specific timeframes. The judge sentenced defendant to the maximum twenty-year sentence on count one, which charged him with first-degree aggravated sexual assault, and a concurrent ten-year maximum sentence for second-degree endangering on count two. He

did the same for the pairs of crimes alleged in counts three and four, five and six, and seven and eight, making all those sentences concurrent to the first count. On count nine, the judge erroneously imposed a twenty-year sentence for second-degree sexual assault, and a concurrent ten-year term for the endangering conviction during the same time frame, and also ran those sentences concurrent to count one.

Based on his prior Yarbough analysis, the judge imposed a consecutive five-year sentence on the second-degree sexual assault conviction and a concurrent five-year sentence on the second-degree endangering conviction in counts eleven and twelve. The aggregate sentence imposed on this indictment was therefore twenty-five years, subject to NERA, to be served consecutively to defendant's fifty-five-year sentence for the Union County murder conviction.

"Appellate review of a sentence is generally guided by the abuse of discretion standard." State v. Miller, 237 N.J. 15, 28 (2019) (quoting State v. Robinson, 217 N.J. 594, 603 (2014)).

> The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).]

"The general deference to sentencing decisions includes application of the factors set forth in N.J.S.A. 2C:44-1(a) and (b): appellate courts do not '"substitute [their] assessment of aggravating and mitigating factors' for the trial court's judgment."'" Miller, 237 N.J. at 28–29 (alteration in original) (quoting State v. Miller, 205 N.J. 109, 127 (2011)).

Similarly, "[w]hen a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." Miller, 205 N.J. at 129. "A sentencing court must explain its decision to impose concurrent or consecutive sentences in a given case; '[a] statement of reasons is a necessary prerequisite for adequate appellate review of sentencing decisions.'" State v. Cuff, 239 N.J. 321, 348 (2019) (alteration in original) (quoting State v. Miller, 108 N.J. 112, 122 (1987)).

Defendant contends neither aggravating factor was supported by the record, and the judge failed to give appropriate weight to mitigating factor seven. We disagree.

The judge concluded that defendant remained "unrepentant" for his crimes. Although sentencing courts sometimes support a finding of this

aggravating factor based on an offender's prior criminal history, the Court has held "a sentencing judge may reasonably find aggravating factor three when presented with evidence of a defendant's lack of remorse or pride in the crime." State v. Rivera, 249 N.J. 285, 300 (2021) (citing State v. O'Donnell, 117 N.J. 210, 216 (1989)). In Fuentes, the Court reiterated the importance of deterrence in the sentencing calculus, and further noted that "[d]emands for deterrence are strengthened in direct proportion to the gravity and harmfulness of the offense." Id. at 79 (quoting State in the Int. of C.A.H. and B.A.R., 89 N.J. 326, 337 (1982)). Additionally, we will not substitute our judgment for the weight that the sentencing judge gave to mitigating factor seven.

We also conclude the judge did not abuse his discretion in imposing the aggregate sentence consecutively to defendant's Union County murder conviction. That was obviously a different crime with a different victim and involved separate violent conduct committed at a different time. See Yarbough, 100 N.J. at 643–44.

We also find no mistaken exercise of the judge's discretion in imposing a consecutive custodial term for the February 2, 2015 crimes. As the judge explained, unlike the other findings made by the jury that all of defendant's

earlier sexual assaults involved vaginal penetration, the jury in this instance concluded defendant had penetrated Fiona both vaginally and anally.

However, the sentence imposed by the judge on count nine exceeded the permissible range for a second-degree offense. We must therefore remand for the judge to impose a legal sentence on count nine.

After the sentencing in this case, the Court decided State v.Torres, in which it said, "An explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding . . . is essential to a proper Yarbough sentencing assessment." 246 N.J. 246, 268 (2021). We might assume that by imposing the minimum five-year consecutive sentence on count eleven the judge was implicitly considering the overall fairness of the sentence imposed. However, because we otherwise must remand for the judge to impose a legal sentence on count nine, in an abundance of caution, we vacate the sentences imposed and remand for resentencing consistent with the Court's guidance in Torres. The judge shall consider defendant as he stands before the court at resentencing. State v. Randolph, 210 N.J. 330, 354 (2012). We express no opinion regarding the sentence the judge chooses to impose.

B.

Turning to defendant's remaining sentencing arguments, he argues the judge failed to merge each endangering conviction into the parallel sexual assault conviction that preceded it in the indictment, in other words, count two should have been merged into count one, count four should have been merged into count three, etcetera. We largely agree with defendant.

"The failure to merge convictions results in an illegal sentence for which there is no procedural time limit for correction." State v. Romero, 191 N.J. 59, 80 (2007). "At its core, merger's substantial purpose 'is to avoid double punishment for a single wrongdoing.'" Ibid. (quoting State v. Diaz, 144 N.J. 628, 637 (1996)).

The State concedes that a conviction for endangering the welfare of a child merges into the accompanying sexual assault when "the record suggests no basis for the endangering conviction beyond the sexual assault." State v. Still, 257 N.J. Super. 255, 259 (1992). However, endangering the welfare of a child and sexual assault do not merge when the counts relate to "parental endangering." Ibid. (citing State v. Miller, 108 N.J. 112, 120–21 (1987)). In other words, a "defendant's convictions for aggravated sexual assault and endangering the welfare of a child do not merge" when "the latter offense is also directed at the defendant's violation of . . . parental duty." Miller, 108 N.J. at 120–21.

Here, in count one defendant was charged with the sexual assault of a child less than thirteen years old, N.J.S.A. 2C:14-2(a)(1). A parental or guardian relationship between the defendant and the victim is not an element of the offense. Count two, which charged defendant with endangering the welfare of a child, specifically cited the sexual assault charged in the first count. The State concedes, count two should have been merged into count one, but we disagree.

In Miller, the defendant was convicted of aggravated sexual assault pursuant to N.J.S.A. 2C:14-2(a)(1) because the victim, his five-year-old daughter, was less than thirteen-years old and endangering the child by performing sexual acts with her over the course of a weekend. 108 N.J. at 114. The Court considered that "merger of these two offenses would not adequately redress the profound injury to a five-year-old child caused by a father's perversion of the parent-child relationship." Id. at 120. The Court held: "[T]he defendant's convictions for aggravated sexual assault and endangering the welfare of a child do not merge. Although both convictions are based on the same general conduct, the latter offense is also directed at the defendant's violation of his parental duty." 108 N.J. 120–21.

We see no principled distinction between the facts of this case as alleged and proven in counts one and two, and those in Miller. We conclude separate sentences on counts one and two are required.

The State maintains the remaining endangering convictions do not merge into the accompanying sexual assault convictions. Each of the remaining aggravated sexual assault and sexual assault counts, i.e., three, five, seven, nine, and eleven, include as one of its elements defendant's status as Fiona's "guardian, or stand[ing] in loco parentis within [Fiona's] household." N.J.S.A. 2C:14-2(a)(2)(c); -2(c)(3)(c). The parallel endangering counts, i.e., four, six, eight, ten and twelve, cite the endangering event or events as the sexual conduct charged in the count immediately preceding.

The State contends these endangering convictions do not merge because defendant's conduct was premised on "his loco parentis status." It cites the same language from Miller we cited above for support: "[W]e hold that the defendant's convictions for aggravated sexual assault and endangering the welfare of a child do not merge. Although both convictions are based on the same general conduct, the latter offense is also directed at the defendant's violation of his parental duty." Id. at 120–21.

However, what the State misapprehends is that the sexual assault in Miller did not have as one of its elements an in loco parentis relationship between the victim and her perpetrator. See N.J.S.A. 2C:14-2(a)(1) (the victim must be less than thirteen-years old). In other words, the Court's rationale for concluding the convictions did not merge was premised on the "different interests protected by the statutes violated." Id. at 118. Here, all the remaining aggravated sexual assault and sexual assault convictions had, as an element of the offense, defendant's in loco parentis status with Fiona. Each of the accompanying endangerment convictions cited the same sexual conduct and, of course, required defendant to have been in loco parentis to Fiona. See N.J.S.A. 2C:24-4(a)(1) ("Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree." (emphasis added)).

On re-sentencing, for the convictions on counts three through twelve, the judge shall merge every endangering conviction with the accompanying aggravated sexual assault or sexual assault count that immediately preceded it in the indictment.

C.

"In 2005, the Legislature established the [SCVTF] to defray the cost of counseling and treatment services for the victims of certain sex offenses and their families." State v. Bolvito, 217 N.J. 221, 223 (2014) (citing N.J.S.A. 52:4B-43.2). To fund these services, the Legislature enacted N.J.S.A. 2C:14-10, which imposes certain monetary penalties upon those convicted of enumerated sex offenses. Ibid. The imposition of the penalties is "mandatory," but a sentencing court has "substantial discretion with respect to the amount of the SCVTF penalty" imposed. Id. at 230–31. In that regard, the court must provide a statement of reasons as to the amount of any penalty imposed under N.J.S.A. 2C:14-10(a). Id. at 235.

Defendant argues the SCVTF penalties of $17,000 imposed on him must be vacated because although the judge included them on the judgment of conviction, he did not mention imposition of the penalties at all during the sentencing hearing. We view that as most likely an oversight by the judge.

But we agree with defendant that the judge's failure to provide a statement of reasons for imposing the amount of penalties that he did requires us to remand the matter for resentencing on this ground. The judge should impose SCVTF penalties for each count that survives merger and explain his or her reasons for the imposition of each penalty as required by Bolvito.

D.

The State agrees that defendant is entitled to an additional 365 days of jail credit for the period from December 7, 2017, to December 6, 2018. Accordingly, following defendant's resentencing, the judgment of conviction should reflect these additional jail credits.

* * * *

In conclusion, we affirm defendant's convictions in all respects. We vacate the sentences imposed and remand the matter for resentencing, at which time the judge shall: impose a legal sentence on the conviction in count nine; merge the convictions on counts four, six, eight, ten and twelve with the convictions for counts three, five, seven, nine and eleven respectively; impose appropriate SCVTF penalties and explain his or her reasons for the imposition of each penalty as required by Bolvito; award defendant an additional 365 days of jail credits; and, should the judge again impose a sentence to run consecutive to defendant's Union County murder conviction, or impose consecutive sentences within the counts of this indictment, he or she shall comply with the Court's command in Torres, and provide an explicit statement regarding the overall fairness of the sentence imposed. 246 N.J. at 268.

Affirmed in part; reversed and vacated in part; we do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION