SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1659-19

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ISLAM GAD, a/k/a
ISLAM MOHAMAND,
ESLAM GAS, and
ESLAM M. GAD,

Defendant-Respondent.

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Submitted November 10, 2022 – Decided August 16, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 17-12-0824 and 18-11-0666.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Valeria Dominguez, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Following a jury trial, defendant was convicted of murder, two counts of attempted murder, and related weapons offenses. He was sentenced to an aggregate term of sixty years' imprisonment, 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 charges stemmed from a drive-by shooting that resulted in the death of one person. Two other individuals escaped without injury. The State's theory was that defendant was either the triggerman or the driver of the suspect vehicle, a red Ford Mustang. Two days before the shooting, defendant had purchased a car identified as the red Mustang captured on surveillance video at the crime scene. Defendant also sent incriminating text and Facebook messages admitting to the shooting. Eight days after the shooting, defendant fled to Egypt where he remained for over four years before he was apprehended in the United Kingdom and extradited back to the United States.

In his counseled brief, defendant raises the following points for our consideration:

POINT I

THE STATE USED, AND THE TRIAL JUDGE PERMITTED, IMPROPER OPINION TESTIMONY OF OFFICERS AND A SO-CALLED EXPERT WITNESS TO BOLSTER ITS THEORY OF THE CASE REGARDING AN ULTIMATE ISSUE FOR THE JURY TO DECIDE, AND ON A MATTER CLEARLY NOT BEYOND THE KEN OF THE AVERAGE JUROR.

POINT II

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL; EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE DID NOT ESTABLISH BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED ANY OF THE OFFENSES FOR WHICH HE WAS CHARGED, AND HIS MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

POINT III

RESENTENCING IS REQUIRED BECAUSE THE COURT PENALIZED . . . DEFENDANT FOR EXERCISING HIS RIGHTS TO REMAIN SILENT AND PROCEED TO TRIAL, INCORRECTLY IMPOSED CONSECUTIVE SENTENCES, AND IMPOSED A MANIFESTLY EXCESSIVE SENTENCE. FINALLY, THE JUDGMENT OF CONVICTION MUST BE CORRECTED TO MATCH THE SPOKEN SENTENCE.

A. Merger [W]as Found [B]y [T]he Trial Judge [A]nd Needs [T]o Be

Expressed [O]n [T]he Judgment [O]f Conviction.

B. The Trial Judge's Finding That Defendant "[H]as [N]ot Shown [A]ny Remorse [F]or [H]is Actions" Penalized . . . Defendant [F]or Maintaining [H]is Innocence [A]nd Exercising [H]is Constitutional Right [T]o [A] Trial.

C. The Offenses Occurred Within "[T]en Seconds" [O]f Each Other [A]nd Thus Constituted [O]ne Course [O]f Conduct Calling [F]or Concurrent Sentences.

D. The Trial Judge [D]id [N]ot Address [T]he Overall Fairness [O]f [T]he Sentences.

In his pro se brief, defendant makes the following arguments:

POINT I

THE TRIAL COURT ERRED IN NOT AUTHENTICATE [SIC] A TEXT MESSAGE THAT WAS PROVIDED AND READ TO THE JURY IN WHICH IT CLAIMS THAT DEFENDANT WAS THE SENDER OF SAID TEXT MESSAGE IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS.

POINT II

THE TRIAL COURT [FAILED] TO INSTRUCT THE JURY ON THIRD[-]PARTY GUILT IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHT

GUARANTEED BY THE UNITED STATES CONSTITUTION.

POINT III

THE COURT PROVIDED THE JURY WITH AN INSTRUCTION ON IDENTIFICATION TESTIMONY GENERALLY, BUT NO SPECIAL CROSS-ETHNIC IDENTIFICATION CHARGE WAS GIVEN.

POINT IV

DUE TO CUMULATIVE EFFECT OF THE ERRORS COMMITTED BY THE TRIAL COURT IN THIS MATTER, DEFENDANT'S RIGHTS TO HAVING A FAIR TRIAL, AND TO DUE PROCESS OF LAW, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND NEW JERSEY CONSTITUTION [SIC].

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 correcting the judgment of conviction (JOC) and 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.

We glean these facts from the month-long trial conducted in June 2019, during which the State produced thirty civilian and law enforcement witnesses, including the two surviving victims.

On August 8, 2012, twenty-one-year-old Anthony Holmes spent the day with his cousin, D.W., his friend, Damien Hall, and his "intimate" friend, T.D.[1] That evening, the group decided to get Percocet from a "guy . . . downtown" named Garret Crockett. Although D.W. did not use drugs, sometime after 11:00 p.m., she drove the group to downtown Elizabeth in her silver Ford Taurus. After driving through the intersection of Third and Pine Streets, D.W. made a K-turn in a nearby driveway to get back to the intersection to meet with Crockett and noticed a "red car" pass by slowly and make a similar K-turn. As D.W. arrived at the intersection, she saw the red car "double-parked behind [her]," about "six or seven cars" away. D.W. stopped in the intersection to let Holmes and Hall out of the car to talk to Crockett. She then proceeded to make a right turn onto Third Street and "parked in front of the gas station . . . across the street." T.D. remained in the car and was seated directly behind D.W.

While Hall and Crockett were standing on Pine Street discussing the pills and other subjects, Crockett "heard [six] gunshots go off" that sounded like they

[1] We use initials for the victims to protect their privacy interests.

were "coming from the corner." Hall said "it sound[ed] like fireworks." Crockett stated that upon hearing the gunshots, he and Hall "took flight down Pine Street." Although D.W. and T.D. were listening to music with the windows up in the car, they also "heard [a] loud popping noise." D.W. "looked in [her] rearview mirror" and saw "somebody['s] hand out the [passenger side] window" of the "red car" and "a lot of smoke" that "look[ed] like firecrackers." She quickly realized that someone in the red car was shooting in the direction "where [Holmes] was standing," and instinctively "put [her] head down and . . . told [T.D.] to put hers down too."

D.W. stated that after about "six or seven shots," the firing ceased but she waited to lift her head "until after [she] heard [the shooter] speed off." However, before "they sped off," she "heard [her] window shatter" as the shooter "shot at [her] car." After hearing the "car speed off," D.W. lifted her head and saw the "red car" drive down Third Street, "towards the mall" in Elizabeth. When the coast was clear, D.W. drove around until she came across Hall and Crockett running. D.W. asked Hall where Holmes was, but Hall did not know. After Hall got into D.W.'s car, the three "went around the corner again" and "came down Third Street" to find Holmes laying "on the ground." D.W. exited her car and "dropped to [her] knees" until the police arrived.

D.W. testified that the shooter's vehicle had "tinted [windows]" and was "red." Although D.W. did not see the occupants of the car, she testified that she saw the hand of the shooter and that "the person was black." When pressed for more details about the shooter's skin color, D.W. stated that the shooter "wasn't dark skin[ned]." T.D. never saw the shooter but saw "a reddish burgundy" car speed away after the shooting. Crockett testified that a "[c]ouple hours prior" to the shooting, a "reddish burgundy" car with "two[]door[s]" was "riding around." After seeing the car about "four times" that day, Crockett became suspicious. Crockett testified there were "two people" in the car but he "couldn't see nobody's face" because they had "[d]reads over their face[s]." However, he described the passenger as "light skinned" and the driver as "darked skinned." Hall did not see the shooter or a car.

At approximately 11:55 p.m., police responded after receiving numerous 9-1-1 calls of shots fired in the area of Third and Pine Streets. Officer James Heller of the Elizbeth Police Department (EPD) and his partner were the first to arrive at the scene. Upon arrival, Heller found Holmes "laying . . . on his back with a single bullet wound to his head" and a "slight pulse." Holmes was transported to University Hospital in Newark, where he was later pronounced

dead at around 8:30 a.m. the following morning. The medical examiner concluded that Holmes's cause of death was "the gunshot wound to [his] head."

After securing the crime scene, police recovered "[t]welve [0].9 millimeter shell casings" and five bullet fragments. After testing the twelve shell casings, Lieutenant Michael Sandford, the State's firearms expert, concluded that all twelve "were fired from the same . . . firearm." Members of the Union County Sheriff's Office's Crime Scene Unit processed D.W.'s Ford Taurus and confirmed that it was struck by two bullets. One bullet struck "the metal frame" just below "[t]he rear driver's side window" and blew out the window. The other bullet struck the "driver's door." Detective Edward Suter testified that based on the bullets' impact sites on D.W.'s car, one of the cars was moving when the shots were fired.

Investigators quickly obtained surveillance footage of the crime scene for August 8 and 9, 2012, from "five private surveillance camera systems" in the area. Based on the footage, members of the Union County Prosecutor's Office Homicide Task Force advised local law enforcement officers to "be on the look-out" (BOLO) for "a red two-door Ford Mustang" with "possible temporary registration in the back window" believed to be involved in Holmes's homicide. If local officers came across any vehicle matching that description, they were

asked to "[s]top and hold" the vehicle "and notify the Homicide Task Force." The Homicide Task Force's lead detective on the case, Michael Gorman, was involved in the creation of the BOLO bulletin. Subsequently, a more detailed description of the suspect vehicle was sent to local law enforcement agencies, describing the car "as a mid[-]1990 to 2000 red[-]colored Ford Mustang" with "an old[-]style temporary registration tag attached to the right side of the rear glass of the vehicle."

At approximately 2:00 a.m. on August 14, 2012, EPD Sergeant Scott Pevonis "stopped a red Ford Mustang bearing [a] New Jersey temporary tag" on Newark Avenue. Defendant was identified as the driver, and Franceau Belizaire was identified as the front-seat passenger. Pevonis testified that both men "had dreadlocks." He described Belizaire as "African-American" and defendant as "African-American but lighter skinned." Defendant told Pevonis that his "girlfriend," Carmen Molina, "was the owner of the vehicle." The "[v]ehicle['s] temp tag . . . [had] an expiration date of [September 9, 2012]," and "was issued" to Molina. Pevonis issued defendant "[t]wo motor vehicle summonses" for "unclear plates" and "failure to produce a driver's license." After identifying the occupants of the vehicle and obtaining the VIN number, Pevonis allowed defendant and Belizaire to leave to avoid raising suspicions about the stop.

The following day, August 15, 2012, investigators from the Homicide Task Force interviewed Molina at the Union County Prosecutor's Office (UCPO). Initially, Molina told investigators that on August 6, 2012, she had purchased and insured the Mustang after "sav[ing] up money from bartending." When asked whether defendant had ever driven the car, Molina responded that she "had let . . . [defendant] use it [the] one time when he got pulled over." Molina also told police that she thought her brother might have borrowed the Mustang on the day of the shooting.

Molina subsequently admitted that it was defendant who had purchased the car and asked her to insure it under her name, which she did on August 6, 2012. Molina testified that defendant "had [the car] most of the time" and she only drove it "[o]nce." She also testified that her brother had nothing to do with the car. During the interview, Molina provided defendant's phone number, ending in "7426," and agreed "[t]o call [defendant]" in a recorded call in the presence of the investigators. Because her phone had been "broken for . . . a few days," she borrowed her brother's phone when he came to the UCPO to pick up her son. When defendant answered Molina's phone call, Molina asked defendant "what he [had] put [her] in" and told him "to come to the police station

and try to get [her] out." Defendant agreed to "come [and] get [her]," but never did.

After the interview, Molina was arrested and charged with third-degree hindering apprehension for "g[iving] false information to law enforcement." She was detained in the county jail until she was released on bail. While Molina's charges were pending,[2] she agreed to cooperate with law enforcement in apprehending defendant. To that end, she provided her attorney, Natalia Diaz, with a "Facebook exchange that [she] had had with [defendant]," which Diaz "printed . . . out" and provided to investigators. The Facebook exchange was between Molina's Facebook account, under the name "Jannie Olivalez," and defendant's Facebook account, under the name "Biggz Jean."

In a message sent from "Jannie Olivalez" to "Biggz Jean,"[3] Molina asked, "[W]hat the fuck did you d[o] to get me all on this bullshit? Why did you st[eal] my car and d[o] some bullshit with it?" Defendant responded that "[he] didn't mean to" and that "[he] didn't know they was going to see the car." A few

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[2] Molina was indicted in January 2013, and ultimately pled guilty on January 6, 2014. She was sentenced to two years' probation. After she was released from the county jail, she learned she was pregnant with defendant's child.

[3] The Facebook messages introduced at trial were not dated. However, Molina testified she received them after defendant flew to Egypt but before Molina provided them to her attorney on November 20, 2012.

minutes later, Molina wrote, "They [said] you killed someone with my car," and defendant responded, "Yes, I used your car doing a drive-by." While continuing to cooperate with law enforcement, Molina went to the UCPO on five different dates in August 2012, and, as directed by the investigators, sent Facebook messages to defendant using the same accounts. However, defendant never responded to the messages.

On August 17, 2012, Homicide Task Force investigators interviewed Molina's brother, Carlos Molina. Carlos denied any involvement in the shooting and provided Gorman with incriminating text messages he had received from defendant. Specifically, beginning at 5:04 p.m. on August 16, 2012, defendant had texted Carlos the following messages:

> Tell Carmen I love her. Please don't change your number and tell her I will never forget her. I swear I can't go to sleep without her on my mind. I'm sorry for anything I did to hurt her. I love you, Carmen. Don't change number until she come out, please, because this is the only number I got for her. I miss her so much. This is [defendant]. I'm the one that killed that n***** and my girl Carmen had nothing to do with it. I took her car. Show them that. I love you, Carmen. I'm so sorry. I will do my best to help.

Susan Johnson, a T-Mobile manager "within the law enforcement relations group," testified that the text messages were sent on August 16, 2012, from defendant's phone to Carlos's phone.

After interviewing the Molinas, Homicide Task Force members spoke to Edgar Peralta, the owner of an auto wrecking yard in Elizabeth, who sold defendant the red Mustang. Peralta told police that he recalled selling the red Mustang on August 5 or 6, 2012, but could not recall the buyer's name and only had the buyer's phone number, which ended in "7426," like defendant's. Peralta recalled that the buyer was a "young guy with dreads" and that "[h]e was [by] himself" when he made the purchase. When UCPO Detective Andrew Dellaquila administered a video recorded photographic identification procedure, Peralta identified defendant's photograph and stated that he was "[ninety] percent" certain that the man in the photograph was the buyer.

At trial, Peralta recalled that he offered defendant "$350" for his Ford Blazer to put towards the purchase price of the red Mustang, which was priced at "[a]round $1[,]700." After some negotiations, defendant paid the outstanding balance. According to Peralta, because he could not provide defendant with temporary plates, defendant "took the title" and returned about one and one-half hours later with "a temporary plate," which defendant "put . . . on the rear window" of the Mustang with Peralta's assistance.

During his testimony, over defense counsel's objection, Peralta was qualified "as an expert in the field of mechanics and models of cars." After

reviewing the surveillance video of the suspect car as well as photos of the Mustang that Peralta had taken prior to selling it to defendant, Peralta testified that in his opinion, the two cars were "the same car." Although Peralta could not tell the color of the car in the black-and-white surveillance footage, he opined that "[i]t [was] the same car" he sold to defendant because it had "the same wheels, the same style, [and a] spoiler in the back." Peralta also clarified at trial that "[he] was mistaken" when he told investigators during his interview that he thought the car in the surveillance video had "different rims."

Investigators subsequently recovered a red Mustang that Juan Gomez Grullon had acquired between August 13 and 16, 2012, in exchange for his Isuzu Rodeo. The previous owner of the red Mustang was identified as defendant. The car was recovered when Grullon reported to police that the car had been vandalized. Subsequent forensic analysis revealed defendant's fingerprint on the rearview mirror of the Mustang. At trial, the State introduced a reenactment of the crime scene as a demonstrative aid using the recovered Mustang.

On August 16, 2012, police obtained a communications data warrant (CDW) for defendant's phone number ending in "7426" in order to obtain call detail records and track the cell phone's location. At 7:35 p.m., investigators were advised that the last available location tracking information for defendant's

cell phone was in the vicinity of John F. Kennedy International Airport (JFK Airport). Members of the Homicide Task Force later learned from Special Agent Eric Gallagher of the Department of Homeland Security that defendant "was listed on Egypt Air flight MS-986 which was scheduled to leave JFK [Airport] at 6:30 [p.m.] going to Cairo, Egypt." Gallagher further advised that the flight's actual departure time was delayed until "6:56 [p.m.] and that [defendant] used [an] Egyptian passport . . . to board the flight."

Defendant's brother, Karim Gad, testified that earlier that day, August 16, 2012, he and his mother took the train to New York City and assisted defendant in obtaining a passport from the Egyptian Embassy so that defendant could travel to Egypt. Karim stated that after obtaining the passport, defendant took a cab to JFK Airport with a one-way ticket to Egypt that his mother had purchased for him. According to Karim, the family had an uncle and an apartment in Egypt.

Special Agent Ajit David of the Federal Bureau of Investigation's Cellular Analysis Survey Team (CAST) testified as an "expert in cellular telephone technology, specifically historical cell[-]site analysis including geo[-]spatial mapping." David testified about the cell-site activities of defendant's cell phone on August 8, 9, 15, and 16, 2012. Based on defendant's cell phone data, David

created maps of Third Street and Pine Street; Jefferson Park, where defendant reportedly frequented; 66 Erie Street, where Carmen resided; and JFK Airport.

Although David could not provide defendant's exact location, he identified "which towers within the[] network" defendant's cell phone connected to at a given time. David testified that based on his review of the data, he could not place defendant "within half a mile of the crime scene" when he made calls on the day of the shooting. However, David testified that on August 16, 2012, defendant made an "outgoing call at 4:27 . . . p.m." which connected to a cell phone tower "located at JFK Airport." David also stated that a "series of outgoing calls . . . handled by a cell tower in [the] Far Rockaway section of Queens . . . occur[ed] at 5:59 . . . p.m." The last call in the series was an incoming call "at 6:34 . . . p.m." and "was handled by a[] . . . cell site just to the northeast of JFK Airport." Based on the data, David concluded that to access those towers at JFK Airport, the cell phone "would have to be at the far eastern portion of the airport."

Karim confirmed David's testimony by identifying defendant on surveillance video at JFK Airport around the same time. After reviewing the JFK Airport footage from August 16, 2012, Karim identified defendant standing "[u]nder the A4 sign," which was time stamped at 5:08 p.m., and "[t]alking to

[an] agent" near a flight boarding area, which was time stamped at 5:32 p.m. Lynn Luehrs, an employee of Egypt Airlines, confirmed that defendant flew to Cairo, Egypt, with a one-way ticket on August 16, 2012.

Defendant was charged by complaint-warrant with Holmes's murder on August 21, 2012. The case remained stagnant while defendant remained abroad. In the interim, on January 13, 2014, in an unrelated matter, Javier Cespedes was arrested and charged with possession of a firearm. The firearm found in Cespedes's possession was later confirmed by the State's firearms expert to be the same gun used to kill Holmes. At trial, the parties stipulated that "Cespedes was . . . charged with possession of the weapon used in [Holmes's] homicide," and, on the day of the shooting, defendant "had not been issued a permit to carry a handgun."

On June 22, 2016, Karim informed UCPO Lieutenant Jose Vendas that defendant had called him on May 6 and 7, 2016. Karim provided Vendas with a "printout . . . indicating the phone calls that he had received from his brother." Based on the call information, Vendas obtained a CDW and determined that defendant's calls "[o]riginated out of the United Kingdom." With the assistance of local authorities, defendant was subsequently apprehended in November 2016

and extradited to the United States, where he was taken into custody at Newark Airport in January 2017.

On November 7, 2018, defendant was charged in a five-count Union County indictment with: first-degree murder of Holmes, N.J.S.A. 2C:11-3(a)(1) (count one); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count three); first-degree attempted murder of T.D., N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:11-3(a)(1) (count four); and first-degree attempted murder of D.W., N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:11-3(a)(1) (count five). On June 27, 2019, the jury found defendant guilty on all counts. On September 12, 2019, the trial judge sentenced defendant on the murder-related charges as well as an unrelated first-degree robbery charge to which defendant had pled guilty on August 14, 2019, pursuant to a plea agreement that called for a concurrent sentence. This appeal followed.[4]

II.

In Point I of his counseled brief, defendant argues the judge erred in qualifying Peralta as an expert because he "possessed no specialized knowledge"

[4] Defendant does not challenge the robbery conviction or sentence on appeal.

and his opinion improperly addressed "the ultimate issue in the case" and "addressed a matter that was not beyond the ken of the average juror."[5]

We review a trial judge's evidentiary ruling that a witness is qualified to present expert testimony under N.J.R.E. 702 for abuse of discretion. State v. Rosales, 202 N.J. 549, 562-63 (2010). As such, we will not substitute our own judgment for that of the trial judge "unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

N.J.R.E. 702 allows an expert who is qualified "by knowledge, skill, experience, training, or education" to testify in the form of an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact" in understanding the evidence. Our Supreme Court has explained that expert testimony is admissible under N.J.R.E. 702 when:

> (1) the intended testimony . . . concern[s] a subject matter that is beyond the ken of the average juror; (2)

[5] Defendant also challenges Gorman's lay opinion testimony that the investigative team determined the suspect vehicle was a red, 1995 to 2000 Ford Mustang. Because the judge struck the testimony and instructed the jury that it was their function to determine the make, model, and color of the suspect vehicle depicted in the surveillance footage, we conclude defendant's contention is without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2). See State v. Burns, 192 N.J. 312, 335 (2007) ("One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions.").

> the field testified to . . . [is] at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness . . . [has] sufficient expertise to offer the intended testimony.
>
> [Rosales, 202 N.J. at 562 (quoting State v. Jenewicz, 193 N.J. 440, 454 (2008)).]

The Court expounded that these requirements are to be construed "liberally in light of [N.J.R.E.] 702's tilt in favor of the admissibility of expert testimony." Ibid. (quoting Jenewicz, 193 N.J. at 454).

On appeal, defendant challenges the judge's findings in connection with Rosales's first and third prongs. To support his decision to qualify Peralta as an expert witness, the judge considered: Peralta's twenty-two years of professional experience as a "certified . . . mechanic" and "buy[er] and sell[er]" of cars; his formal training at "Lincoln Tech Institute"; the fact that he had worked on about 600 cars over the years, including 100 Ford Mustangs; his familiarity with car styles; his knowledge of Mustang "models from [19]95 to [19]99"; and his ability to "identify different models of cars" and "distinguish what looks like a Mustang" from "what looks like a Lexus." Although Peralta had never worked for Ford, the judge concluded that given Peralta's training and experience, he was qualified to identify Ford Mustangs, distinguish different Mustang models

from 1995 to 1999, and distinguish Mustangs from different makes or types of cars.

Defendant argues that Peralta's testimony revealed that he was "an ordinary citizen who buys and sells used cars" and was "no different from any used car salesman." Defendant points out that Peralta was unable to distinguish Mustangs from 1994 to 1997, that he was unable to recall when the "shape of the Mustang change[d] from the 1995 model," and that he was unaware that the 1996 model was "available in bright red." However, we have held that "vulnerabilities in an expert's background" should be "explored in cross-examination" and should not be used "as a reason to exclude a party's choice of expert witness." Jenewicz, 193 N.J. at 455.

For example, in State v. Krivacska, 341 N.J. Super. 1, 32-33 (App. Div. 2001), we upheld a trial judge's decision to permit a psychologist to give an expert opinion about a "mentally handicapped" person, even though the psychologist did not specialize in evaluating mentally handicapped people and had no experience with cognitive impairment issues. Although we "recognize[d] the deficiencies in [the psychologist's] qualifications," we "perceive[d] no abuse of the judge's discretionary powers." Id. at 33.

Likewise, here, although we recognize Peralta's lack of familiarity with the nuances of Mustang models from the mid- to late-1990s, "[w]e are nevertheless satisfied that the trial judge properly exercised his discretion in determining that [Peralta] was qualified to testify as an expert witness." Ibid. Rather than evincing an abuse of discretion, Peralta's deficiencies were fodder for defense counsel to highlight during cross-examination to discredit Peralta's opinion, as occurred. Further, the judge repeatedly charged the jury that it was "not bound" by the expert's opinion, was free to "reject it," and was to consider the expert's qualifications in assessing credibility. See Burns, 192 N.J. at 335.

Defendant argues that even if Peralta's testimony was permissible under N.J.R.E. 702, his testimony was impermissible as "'an expression of a belief in defendant's guilt'" and "'an opinion on matters that were not beyond the understanding of the jury.'" See State v. McLean, 205 N.J. 438, 463 (2011). We disagree.

In State v. Cain, 224 N.J. 410, 426 (2016), our Supreme Court declared that an expert witness "should not express an opinion on matters that fall within the ken of the average juror or offer an opinion about the defendant's guilt." Neither occurred here. Rather than offering an opinion on defendant's guilt, Peralta opined that the car in the surveillance video was "the same car" he had

sold to defendant. It was for the jury to determine whether defendant ultimately committed the offenses he was accused of committing.

Further, Peralta's testimony was helpful to the jury because the black-and-white surveillance video prevented the jury from comparing the color of the car sold to defendant to the color of the car in the video. Cf. State v. Sanchez, 247 N.J. 450, 474-75 (2021) (permitting under N.J.R.E. 701 a lay opinion identification of the defendant from a surveillance photograph by a parole officer who had met with the defendant more than thirty times where there was no other identification and the photograph was not crystal clear). In any event, Peralta's testimony was also admissible as lay opinion testimony under N.J.R.E. 701. See State v. Singh, 245 N.J. 1, 14 (2021) ("[L]ay opinion testimony can be admitted only 'if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function.'" (quoting McLean, 205 N.J. at 456)).

III.

In Point II of his counseled brief, defendant argues the judge erred in denying his motion for a judgment of acquittal at the close of the State's case because "[i]nsufficient evidence tied defendant . . . to the shootings" and the State failed "to investigate key witnesses."

Rule 3:18-1 provides in part:

> At the close of the State's case . . . , the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment . . . if the evidence is insufficient to warrant a conviction.

However,

> a trial court must deny the defendant's motion if "'viewing the State's evidence in its entirety . . . and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt . . . beyond a reasonable doubt.'"
>
> [State v. Ellis, 424 N.J. Super. 267, 273 (App. Div. 2012) (alterations in original) (quoting State v. Wilder, 193 N.J. 398, 406 (2008)).]

See also State v. Reyes, 50 N.J. 454, 458-59 (1967) (articulating the seminal standard of review for acquittal motions).

"On appeal, we utilize the same standard as the trial court in determining whether a judgment of acquittal was warranted." Ellis, 424 N.J. Super. at 273. However, "we apply a de novo standard of review," State v. Williams, 218 N.J. 576, 594 (2014), and "owe no deference to the findings of . . . the trial court," State v. Lodzinski, 249 N.J. 116, 145 (2021).

At the close of the State's case, defendant moved for judgment of acquittal on all charges. After applying the Reyes standard, the judge denied the motion. The judge recounted the evidence as follows:

> [T]here is a text message . . . which makes an admission allegedly from [defendant] indicating that not only did he commit the murder but that he also had . . . possession of the car while he committed this alleged murder. There is also information . . . in the case that the car that was used on the night as far as color, as far as style, as far as wheels, the jury could find this was the car that was, in fact, used [on] the night of the murder. So, . . . there is sufficient circumstantial evidence to go before this jury . . . and . . . , if they believe it, [they] could find [defendant] guilty of the charges.

Based on our de novo review of the evidence, we agree with the judge. The State presented extensive circumstantial evidence from which a reasonable jury could find guilt beyond a reasonable doubt. There was eyewitness testimony about a red car following D.W.'s car at the intersection of Third and Pine Streets, a hand protruding out of the passenger-side window of the red car holding a gun and shooting in Holmes's direction as well as at D.W.'s car, and surveillance footage depicting a red car at the crime scene. Holmes's death was caused by a gunshot wound to the head, and the twelve shell casings recovered from the crime scene were all fired from the same gun, which was subsequently recovered. There was also testimony identifying the red Ford Mustang that

Peralta sold to defendant two days prior to the shooting as the same car depicted in the surveillance footage and testimony that defendant was issued motor vehicle summonses while driving the Mustang one week after the shooting. Critically, defendant admitted in text and Facebook messages that he killed Holmes in "a drive-by" in Molina's car.

To support his argument that there was insufficient evidence, defendant highlights discrepancies in the testimony of various witnesses. However, "[t]he jury is free to believe or disbelieve a witness's testimony." State v. Saunders, 302 N.J. Super. 509, 524 (App. Div. 1997). Defendant also presents a list of alleged "glaring errors in the State's proof." Specifically, defendant points out that "the eyewitnesses at the scene, who were all black men and women," described the assailants "as black males," and defendant, who is Egyptian, "is not black." Defendant also points out that the expiration date on the Mustang's temporary tags showed that defendant purchased the vehicle from Peralta on "approximately August 10[, 2012], which was two days after" the shooting. In addition, defendant notes the phone records "clearly establish[ed] that he was not within a half-mile of the shooting site at the time of the shootings." According to defendant, these factual deficiencies, "[c]oupled with the failure

of the State" to investigate other potential suspects and interview key witnesses "provided sufficient doubt to justify an acquittal of all charges against [him]."

However, "'view[ing] the totality of the evidence, be it direct or circumstantial, in a light most favorable to the State,'" there was sufficient evidence that a jury could find defendant guilty beyond a reasonable doubt on all counts. State v. Jones, 242 N.J. 156, 168 (2020) (emphasis omitted) (quoting State v. Perez, 177 N.J. 540, 549-50 (2003)). "In considering circumstantial evidence, we follow an approach 'of logic and common sense. When each of the interconnected inferences [necessary to support a finding of guilt beyond a reasonable doubt] is reasonable on the evidence as a whole, judgment of acquittal is not warranted.'" Ibid. (alteration in original) (quoting State v. Samuels, 189 N.J. 236, 246 (2007)).

IV.

In Point III of his counseled brief, defendant challenges his sentence on various grounds. Defendant argues the judge failed to provide an explicit statement explaining the overall fairness of the sentence in accordance with Torres, did not appropriately apply the Yarbough[6] factors in imposing consecutive sentences, and found aggravating factor three in error. Defendant

[6] State v. Yarbough, 100 N.J. 627 (1985).

also argues that although the judge correctly merged count three into count one at the sentencing hearing, the JOC does not reflect the merger. The State concedes that a limited remand is necessary for the judge to comply with Torres, decided two years after defendant was sentenced, and to correct the JOC to reflect the merger of count three. Otherwise, the State asserts the sentence is "fair and reasonable." We agree.

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 Yarbough, 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, 442-43 (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." Abdullah, 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 350-52.

Here, the judge found aggravating factors three, six, and nine, and no mitigating factors. See 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"). The judge determined the aggravating factors substantially outweighed the non-existent mitigating factors. In support, the judge pointed to defendant's "history and . . . actions in each case," defendant's failure to "show[] any remorse for his actions," defendant's "extensive juvenile record," and defendant's "history of failing to appear in court," prompting the issuance of "several bench warrants."

The judge found Yarbough factors (a), (b), (c), and (d) applied. In that regard, the judge reasoned that defendant's actions in firing into the vehicle "occupied by D.W. and T.D. were independent and separate acts of violence" from Holmes's murder, "and not a single . . . period of aberrant behavior." According to the judge,

> [Defendant] could have easily made that left turn instead of that right turn. He made a conscious decision to make that right turn and as a result of doing that [defendant] stopped his vehicle occupied by the young ladies and again commenced a new series of . . . gunshots at the vehicle. . . .
>
> Even though the crimes were committed close in time and place, I do not find that it was a single period of aberrant behavior . . . . [O]f course, they . . . involved . . . different victims.

As a result, the judge imposed a forty-five-year term of imprisonment, subject to NERA, on count one; a concurrent seven-year term, with a forty-two-

month period of parole ineligibility, on count two; a consecutive fifteen-year term, subject to NERA, on count four; and a concurrent fifteen-year term, subject to NERA, on count five. The judge merged count three into count one.

Defendant objects to the judge's finding that he failed to show remorse, arguing the judge "penalized [him] for exercising his constitutional right to remain silent and not make an inculpatory statement prior to or at sentencing." "[A] defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in the sentencing decision." State v. Marks, 201 N.J. Super. 514, 540 (App. Div. 1985). However, aggravating factor three "include[s] an evaluation and judgment about the individual in light of his or her history." State v. Thomas, 188 N.J. 137, 153 (2006). "For example, 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).

At sentencing, defendant stated he "fe[lt] sorry for the victim['s] family" and "for their loss," but maintained that he was "still pursuing [his] innocen[ce]." Because defendant's lack of remorse was not the sole justification for the judge's application of aggravating factor three and there was ample record support for the judge's finding that defendant was likely to reoffend, defendant's argument

falls short. See Marks, 201 N.J. Super. at 540 ("[T]he trial judge's brief allusion to [the] defendant's failure to candidly admit his guilt does not require a reversal."); Carey, 168 N.J. at 427 (holding that the sentencing judge's finding "that [the] defendant denied responsibility for the crash and did not acknowledge that he had an alcohol problem" supported application of aggravating factor three in sentencing the defendant on two counts of vehicular homicide).

Defendant also claims his sentence for attempted murder should run concurrently with his murder sentence because all the offenses occurred "within an extremely short span of time" and "should be assessed as occurring in a single period of aberrant behavior." However, we discern no abuse of discretion in the judge's assessment of the Yarbough factors and find ample record support for the judge's decision. See Molina, 168 N.J. at 442-43 ("[T]he multiple-victims factor under the Yarbough sentencing guidelines is entitled to great weight and should ordinarily result in the imposition of at least two consecutive sentences.").

V.

Defendant's contentions raised in his pro se brief are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). Defendant argues that the text messages allegedly sent from his phone should

not have been admitted into evidence because they were not properly authenticated. However, the messages were adequately authenticated through, among other things, the testimonies of Gorman and Johnson, T-Mobile's manager. See State v. Hannah, 448 N.J. Super. 78, 89 (App. Div. 2016) ("Authentication does not require absolute certainty or conclusive proof—only a prima facie showing of authenticity is required . . . leaving to the jury more intense review of the documents." (internal quotation marks omitted) (first quoting State v. Tormasi, 443 N.J. Super. 146, 155 (App. Div. 2015); and then quoting Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012))).

Defendant also argues the judge erred in failing to instruct the jury on third-party guilt and the shortcomings of cross-racial identifications.[7] However, defendant neither objected to nor requested the jury instructions, and, given the entire charge and the strength of the State's case, their omission does not rise to the level of plain error. See State v. Alexander, 233 N.J. 132, 141-42 (2018) ("We review for plain error the trial court's obligation to sua sponte deliver a jury instruction when a defendant does not request it and fails to object at trial to its omission," and "[t]o warrant reversal, the unchallenged error must have

[7] See State v. Cromedy, 158 N.J. 112, 132-33 (1999) (establishing when a jury should receive instructions warning about the potential shortcomings of cross-racial identification testimony).

been 'clearly capable of producing an unjust result.'" (quoting R. 2:10-2)); State v. Walker, 203 N.J. 73, 90 (2010) ("The error must be considered in light of the entire charge and must be evaluated in light 'of the overall strength of the State's case.'" (quoting State v. Chapland, 187 N.J. 275, 289 (2006))); State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div. 2003) ("Where there is a failure to object, it may be presumed that the instructions were adequate," and "[t]he absence of an objection to a charge is also indicative that trial counsel perceived no prejudice would result.").

Moreover, because there was no identification of defendant as the shooter, cross-racial identification was not an issue in the case. See State v. Cotto, 182 N.J. 316, 325 (2005) ("When identification is a 'key issue,' the trial court must instruct the jury on identification," and "[i]dentification becomes a key issue when '[i]t [is] the major . . . thrust of the defense,' particularly in cases where the State relies on a single victim-eyewitness." (second, third, and fourth alterations in original) (citation omitted) (quoting State v. Green, 86 N.J. 281, 291 (1981))). Finally, because there was no error and the trial was fair, defendant's cumulative error argument fails. See State v. Weaver, 219 N.J. 131, 155 (2014) ("If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair.").

VI.

In sum, we affirm the convictions and remand for the limited purpose of correcting the JOC to reflect the merger enunciated at the sentencing hearing and for "an explanation for the overall fairness of [the] sentence" as required by Torres, 246 N.J. at 272. See State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016) ("In the event of a discrepancy between the court's oral pronouncement of sentence and the sentence described in the [JOC], the sentencing transcript controls and a corrective judgment is to be entered.").

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