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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2589-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IVAN FIGUEROA,

Defendant-Appellant.

Submitted April 19, 2023 – Decided July 6, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No. 19-
08-1328.

Joseph E. Krakora, Public Defender, attorney for
appellant (Frank M. Gennaro, Designated Counsel, on
the brief).

Yolanda Ciccone, Middlesex County Prosecutor,
attorney for respondent (David M. Liston, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Ivan Figueroa of two counts of second-degree burglary, two counts of third-degree aggravated assault, fourth-degree aggravated assault, terroristic threats, unlawful possession of a weapon, possession of a weapon for unlawful purposes, and certain persons not to have weapons. The court imposed an aggregate twenty-six-year sentence, eighteen years of which is subject to the requirements of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant appeals from his judgment of conviction and his sentence. Having considered the record presented, the parties' arguments, and the guiding legal principles, we affirm defendant's convictions and sentence, and remand for the limited purpose of correcting errors in the judgment of conviction.

I.

The charges against defendant arise from a December 21, 2007 incident at the second-floor apartment defendant's former girlfriend, D.P., shared with her mother, X.D.; brother, O.P.; and another tenant, J.P.S.¹ On May 13, 2008, a grand jury returned an indictment charging defendant with the following seven offenses: second-degree burglary, N.J.S.A. 2C:18-2; third-degree

¹ We employ initials to identify the victims of the crimes to protect the victims' privacy and because the identity of victims of alleged domestic abuse, such as D.P., are not subject to public disclosure under Rule 1:38-3(c)(12).

aggravated assault with a deadly weapon of D.P., N.J.S.A. 2C:12-1(b)(2); third-degree aggravated assault with a deadly weapon of X.D., N.J.S.A. 2C:12-1(b)(2); fourth-degree aggravated assault by pointing a firearm at D.P., N.J.S.A. 2C:12-1(b)(4); fourth-degree aggravated assault by pointing a firearm at J.P.S., N.J.S.A. 2C:12-1(b)(4); third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and second-degree possession of a handgun with a purpose to use it unlawfully, N.J.S.A. 2C:39-4(a).

Defendant left New Jersey following the incident and was arrested in Florida more than eight years later in August 2016. Defendant was extradited to New Jersey in November 2016. The court subsequently scheduled defendant's trial for September 10, 2019.

Two weeks before defendant's scheduled trial, a grand jury returned a superseding indictment charging defendant with the following twelve offenses arising from the December 21, 2007 incident: second-degree burglary, N.J.S.A. 2C:18-2(a) and N.J.S.A. 2C:18-2(b)(1) (count one); second-degree burglary, N.J.S.A. 2C:18-2(a) and N.J.S.A. 2C:18-2(b)(2) (count two); second-degree aggravated assault by causing or attempting to cause serious bodily injury to D.P., N.J.S.A. 2C:12-1(b)(1) (count three); second-degree aggravated assault by causing or attempting to cause serious bodily injury to X.D.,

N.J.S.A. 2C:12-1(b)(1) (count four); third-degree aggravated assault by causing or attempting to cause bodily injury to D.P. with a deadly weapon, N.J.S.A. 2C:12-1(b)(2) (count five); third-degree aggravated assault by causing or attempting to cause bodily injury to X.D. with a deadly weapon, N.J.S.A. 2C:12-1(b)(2) (count six); fourth-degree aggravated assault by pointing a firearm at or in the direction of D.P. with a deadly weapon, N.J.S.A. 2C:12-1(b)(4) (count seven); fourth-degree aggravated assault by pointing a firearm at or in the direction of J.P.S., N.J.S.A. 2C:12-1(b)(4) (count eight); third-degree terroristic threats upon D.P., N.J.S.A. 2C:12-3(a) (count nine); third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count ten)²; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count eleven); and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1) (count twelve).³

² As we explain, the judgment of conviction entered by the court incorrectly states that count ten charged, and the jury convicted defendant of, second-degree unlawful possession of a weapon. In fact, the indictment charged defendant with third-degree unlawful possession of a weapon and the jury convicted defendant of that offense.

³ In charging defendant with certain persons not to have weapons, the indictment alleged defendant had, prior to the commission of the charged offenses, been convicted of sexual assault in violation of N.J.S.A. 2C:14-2(b).

In the superseding indictment, the burglary, assault, and possession of a weapon for unlawful purpose charges included an allegation defendant's commission of the charged offenses also violated N.J.S.A. 2C:43-6.4(e). In pertinent part, the statute provides that individuals who commit certain specified offenses, including second-degree burglary, aggravated assault under N.J.S.A. 2C:12-1(b), and second-degree weapons offenses under N.J.S.A. 2C:39-4, "shall be sentenced to an extended term of imprisonment as set forth in N.J.S.A. 2C:43-7."

Defendant moved to dismiss the superseding indictment, arguing the State sought and obtained the indictment in a vindictive response to defendant's requests for the criminal records of the State's trial witnesses and because defendant rejected the State's plea offer and opted to proceed to trial. After hearing argument, the trial court found defendant failed to demonstrate the superseding indictment was the product of any vindictiveness. The court also noted the superseding indictment was not founded on new information and defendant did not argue the charges in the superseding indictment required a change in trial strategy or additional preparation time. The court denied defendant's motion and the matter proceeded to trial before a jury on September 24, 2019.

The trial evidence showed defendant was seventeen-year-old D.P.'s boyfriend and roommate until their "short" relationship concluded just prior to the December 21, 2007 incident. D.P. ended the relationship and returned to live with her mother, X.D.; twenty-two-year-old brother, O.P.; and J.P.S. X.D. forbade defendant from visiting her home.

Defendant's sister, Veronica Perez, testified defendant stayed overnight in her apartment sometime in December 2007. The next day, he borrowed her car. Rather than return the car, however, he called in the "[e]arly morning" to tell her "he wasn't coming back" because "he got into a fight with his girlfriend." Perez called the police to report both the theft of her car and the alleged fight.

X.D. testified that at about 6:00 a.m. on December 21, 2007, an intruder entered her house with a gun and proceeded to her second-floor apartment. X.D. rose from her bed to investigate and went to the locked entry door to the apartment. The intruder "slammed" the door "very hard," causing it to break in, knocking X.D. down, and ripping two toenails from her feet. X.D. identified defendant as the intruder and explained she knew him from D.P.'s prior dating relationship with him.

According to X.D., after defendant entered the apartment, he "pointed" the gun at O.P. before seeking out D.P., who was preparing for work. X.D. explained that when D.P. saw defendant, D.P. ran to her bedroom but defendant followed her, "threw her . . . on the floor," and struck her "[b]etween five and seven times" in the head with the butt of a gun.

X.D. testified she then "threw [her]self" onto defendant to wrestle the gun from him while O.P. went "into shock." According to X.D., defendant then hit her twice with the gun, which "broke [her] head and . . . shoulder."

Defendant also pointed the gun at D.P. as she "remained lying on the floor," unmoving. X.D. acknowledged defendant "didn't pull the trigger" of the gun, and she did not hear gunfire. However, she saw cartridges discharge from the gun as she wrestled with defendant. O.P. called the police while X.D. tended to D.P.'s injuries.

J.P.S. testified he "woke up to yelling and screaming" during the incident and left his bedroom to find "a melee . . . going on." He left X.D.'s home to find help. When he returned, he passed a man with "a gun in his hand" on the staircase. Although "it was pitch dark," J.P.S. testified he "could see the shape of a gun in [the man's] hand," and the man "pointed the gun at" him as the man descended the staircase.

Woodbridge Township Police Department Detective Dean Janowski testified that at "7:40 a.m." on December 21, 2007, he was dispatched to X.D.'s home and spoke with X.D. and D.P. Detective Janowski testified X.D. and D.P. were bleeding from the tops of their heads and "had blood on their clothing." He also explained J.P.S. and O.P. were present in X.D.'s home. On cross-examination, Janowski testified he was not "aware of anybody who . . . collect[ed] . . . evidence from the scene."

According to X.D., she and D.P. each received "about ten stitches" to their heads following the incident. X.D. further testified she and D.P. left New Jersey by the end of December 2007: X.D. went to North Carolina, and D.P. went to Mexico. O.P. was later deported to Mexico. X.D. testified she did not know D.P.'s whereabouts but also said she knew D.P. was "sick right now" and she knew how to contact D.P.

New Jersey State Police Detective James Hearne testified defendant does not have "a permit to purchase a handgun" or "a firearm purchase or identification card." On cross-examination, Hearne testified he did not "interview any witnesses" and his investigation included a search for firearm permits for defendant in "the State of New Jersey."

The defense rested without presenting any witnesses. As noted, the jury found defendant guilty of two counts of second-degree burglary, two counts of third-degree aggravated assault, fourth-degree aggravated assault, third-degree terroristic threats, third-degree unlawful possession of a weapon, second-degree possession of a weapon for unlawful purposes, and second-degree certain persons not to have weapons.

At sentencing, the trial court denied defendant's motion for judgment notwithstanding the verdicts on the unlawful possession of a weapon, possession of a weapon for unlawful purposes, and certain persons not to have weapons charges. Following the merger for purposes of sentencing of certain of the offenses for which defendant was convicted, the court imposed concurrent extended term eighteen-year sentences subject to NERA on the second-degree burglary convictions, and a consecutive eight-year sentence, subject to a five-year period of parole ineligibility, on defendant's conviction for the certain persons not to have weapons offense.

This appeal followed. On appeal, defendant presents the following arguments for our consideration:

POINT ONE

THE BELATED SUPERCEDING INDICTMENT WAS THE RESULT OF PROSECUTORIAL VINDICTIVENESS[.]

POINT TWO

THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION DUE TO THE STATE'S FAILURE TO PRODUCE D.P. AS A WITNESS[.]

POINT THREE

DEFENDANT WAS ENTITLED TO JUDGMENTS OF ACQUITTAL ON THE FIREARMS COUNTS OF THE INDICTMENT[.]

POINT FOUR

THE STATE'S CHARGING OF MULTIPLICI[T]OUS SECOND[-]DEGREE BURGLARY COUNTS WHICH RESULTED IN AN IMPROPER SECOND[-]DEGREE CONVICTION, AND AN ILLEGAL EXTENDED TERM OF IMPRISONMENT, DENIED DEFENDANT A FAIR TRIAL[.]

POINT FIVE

THE SENTENCE IMPOSED FOR UNLAWFUL POSSESSION OF A HANDGUN IS ILLEGAL, AND THE AGGREGATE TERM OF [TWENTY-SIX] YEARS WITH A PAROLE DISQUALIFIER OF [TWENTY] YEARS, FOUR MONTHS IS EXCESSIVE[.]

II.

Prior to trial, defendant moved to dismiss the superseding indictment. He argued the return of the indictment "on the eve of trial" constituted the assistant prosecutor's vindictive response to defendant's "requests for [the] criminal case histories" of the anticipated trial witnesses, refusal to accept the State's plea offer, and decision to proceed to trial. On appeal, defendant reprises his claim the superseding indictment is a product of prosecutorial vindictiveness and, for that reason, the court erred by denying his dismissal motion.

Before the motion court, the assistant prosecutor represented that the State sought the superseding indictment because it was "the easiest way to" correct "numerous errors in the old indictment," which had been the product of the efforts of a different assistant prosecutor years earlier. The assistant prosecutor rebuked defendant's claim the State sought the superseding indictment in response to defendant's request for the criminal histories of the State's proposed trial witnesses, explaining that other than a very old — that is, "from the nineties" — pretrial intervention record from Texas for one of the witnesses, none of the witnesses had criminal records and therefore there were no records to produce.

The court denied defendant's motion, explaining defendant's fugitive status over many years explained in part the delay between indictments, the original indictment did not fully charge defendant under the applicable law, and the superseding indictment corrected what appeared to be "under charged" offenses in the original indictment. The court also found the superseding indictment's new charges did not require any change in defendant's trial strategy, which was to assert the State could not prove he committed any offenses at all. The court further observed the law otherwise permitted the State to modify the indictment at any time before the jury was sworn at trial.

The court also rejected defendant's claim the superseding indictment was obtained in response to defendant's request for the criminal records of the State's witnesses. The court observed defendant is entitled to such records, the State had advised that all but one of its witnesses did not have a prior record, and the one witness that had a record had only a decades-old pretrial intervention program involvement in Texas that was "irrelevant." The court concluded defendant failed to demonstrate the superseding indictment was the product of prosecutorial vindictiveness and, as noted, denied defendant's dismissal motion.

"The essence of . . . prosecutorial vindictiveness is a violation of due process by retaliating against a defendant for exercising a legal right." State v. Gomez, 341 N.J. Super. 560, 571 (App. Div. 2001) (citing Blackledge v. Perry, 417 U.S. 21, 27-28 (1974)). It is not enough to show the prosecutor "add[ed] or substitut[ed] charges" before trial began, id. at 574, even if the prosecutor did so on "the eve of trial," State v. Zembreski, 445 N.J. Super. 412, 424 (App. Div. 2016). Indeed, "so long as the prosecutor has probable cause to believe that the accused committed an offense," the decision to bring charges "before a grand jury[] generally rests entirely in [the prosecutor's] discretion." Gomez, 341 N.J. Super. at 573 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

"As 'the initial charges filed . . . may not reflect the extent to which an individual is legitimately subject to prosecution,' a prosecutor 'remain[s] free before trial to exercise the broad discretion entrusted to [prosecutors]' and seek a superseding indictment when supported by the facts." Zembreski, 445 N.J. Super. at 425 (omission and first alteration in original) (quoting State v. Bauman, 298 N.J. Super. 176, 205 (App. Div. 1997)). This discretion permits prosecutors to "resubmit[] a case to a grand jury," so long as the prosecutor does not seek to "undermine" its purpose "to shield the innocent from

prosecution" by resubmitting a case the grand jury has repeatedly refused to indict. State v. Shaw, 241 N.J. 223, 242-43 (2020).

Prosecutors have broad discretion to file additional charges before a jury is empaneled. Zembreski, 445 N.J. Super. at 426. Thus, "a defendant claiming prosecutorial vindictiveness must present 'affirmative proof of actual vindictiveness,'" State v. Jeannotte-Rodriguez, 469 N.J. Super. 69, 105 (App. Div. 2021) (quoting Gomez, 341 N.J. Super. at 578), or rather, proof showing "the prosecutor's action was solely retaliation against [the] defendant for the exercise of a legal right," Gomez, 341 N.J. Super. at 575 (citing United States v. Goodwin, 457 U.S. 368, 380 (1982)).

Defendant presented no such evidence here. His conclusory arguments supporting his claim are founded on the premise that "actual vindictiveness may be found based upon the timing of and the greatly enhanced penal exposure visited upon him by the superseding indictment." That is, defendant argues the superseding indictment, sought and obtained by a new assistant prosecutor eleven years after the original indictment, was improper simply because it included new charges.

The addition of new charges in a superseding indictment is not "affirmative proof of actual vindictiveness." Jeannotte-Rodriguez, 469 N.J.

Super. at 105 (quoting Gomez, 341 N.J. Super. at 578). As noted, a prosecutor may properly "add[] or substitut[e] charges" before trial begins, Gomez, 341 N.J. Super. at 574, even where the new charges are added or substituted on "the eve of trial," Zembreski, 445 N.J. Super. at 424. Further, the assistant prosecutor represented to the court the superseding indictment was sought to correct "numerous errors in the old indictment," and the court found the explanation credible and that the original indictment under-charged defendant. See Bauman, 298 N.J. Super. at 205 (explaining a prosecutor may properly seek a superseding indictment supported by the facts because the initial charges against a defendant may not fully reflect the extent to which the defendant is legitimately subject to punishment).

Defendant does not challenge the assistant prosecutor's representations to the motion court or the court's reliance on those representations. He also offers no evidence establishing the State acted vindictively in seeking the superseding indictment and the record otherwise lacks any evidence establishing the superseding indictment was the product of any vindictiveness. "[D]ismissal of an indictment is a draconian remedy and should not be exercised except on the clearest and plainest ground." Zembreski, 445 N.J. Super. at 424-25 (quoting State v. Williams, 441 N.J. Super. 266, 271 (App.

Div. 2015)). Lacking any evidence the State acted with actual vindictiveness in obtaining the superseding indictment, Jeannotte-Rodriguez, 469 N.J. Super. at 105, the motion court correctly concluded defendant failed to sustain his burden of establishing any grounds warranting or permitting dismissal of the superseding indictment.

III.

Defendant also contends he is entitled to a reversal of his convictions because the court erred by denying his request for a Clawans⁴ adverse inference charge based on the State's failure to produce or call D.P. as a trial witness. Defendant claims X.D.'s identification of him at trial as the intruder was "tainted" because "she had no personal relationship" with him and forbade him from visiting her home. He also asserts D.P. had "the superior ability" to identify the intruder, and "the State's star witness X.D. purposely obstructed the defense by refusing to disclose [D.P.'s] whereabouts," ensuring "her version, and thus the State's version, of the incident could not be tested against" D.P.'s superior ability to identify her assailant.

⁴ State v. Clawans, 38 N.J. 162 (1962). In general, a Clawans charge is "an adverse inference jury [instruction] when a party fails to call a witness at trial." Washington v. Perez, 219 N.J. 338, 342 (2014); see also Model Jury Charges (Criminal), "Witness — Failure of the State to Produce" (rev. June 14, 2010).

In response to defendant's request for a Clawans charge, the State explained D.P. was not "physically and practically" within the State's control because she was sick, pregnant, and in Mexico. The assistant prosecutor asserted the State tried to contact D.P., but X.D. refused to divulge the information necessary to contact her. The State also argued D.P. would not have provided superior testimony because she did not have information that could not be provided by the other witnesses presented at trial.

In its decision denying defendant's request, the court found D.P. was equally "unavailable to everybody" because X.D.'s testimony established she was "adamant" in her refusal to reveal D.P.'s whereabouts to both the State and defendant. The court accepted as credible the assistant prosecutor's representation the State "asked [X.D.] numerous times" for D.P.'s contact information.

We review a court's determination rejecting a request for a Clawans charge for an abuse of discretion. State v. Dabas, 215 N.J. 114, 132 (2013). A court abuses its discretion when its "decision [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." U.S. ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (citing Flagg, 171 N.J. at 571).

Under Clawans, a court may permit the jury to draw an adverse inference against a party that fails to call a witness within its power to produce, if the witness's testimony would have been superior to that already utilized in respect to the fact to be proved. 38 N.J. at 170-71. The adverse inference charge is appropriate where a party likely refuses to call a witness because doing so could reveal facts unfavorable to that party. Id. at 170.

A Clawans charge "is not available whenever a party declines to call a witness who has knowledge of the relevant facts." State v. Velasquez, 391 N.J. Super. 291, 306 (App. Div. 2007) (citing Wild v. Roman, 91 N.J. Super. 410, 414 (App. Div. 1966)). "[W]hen it is more reasonable to infer that the litigant's decision to do without the testimony is explained by factors other than the litigant's fear of its content, the inference is not properly drawn." Ibid. Thus, the charge is inappropriate when the missing witness is equally available or unavailable to both parties. Clawans, 38 N.J. at 171; see also State v. Casey, 157 N.J. Super. 311, 316 (App. Div. 1978) (refusing charge where witness "was equally . . . unavailable to" both parties and "the State unsuccessfully endeavored to secure his attendance").

We are satisfied the court did not abuse its discretion by denying defendant's request for a Clawans charge based on the State's failure to call

D.P. as a witness at trial. The record establishes the State did not have control over D.P. and, indeed, the State's attempts to find D.P. were rebuffed by X.D. A Clawans charge may be appropriate where the missing witness "was within the power of the party to produce," 38 N.J. at 171 (emphasis added), not within the power of another witness to perhaps contact, and in his brief on appeal defendant acknowledges "X.D. repeatedly refused to provide the State . . . with a means of contacting D.P." See ibid.; see also Casey, 157 N.J. Super. at 316. Thus, the trial court correctly determined a Clawans charge was inappropriate because the State's failure to call D.P. as a witness was "explained by factors" unrelated to any fear of the content of D.P.'s putative testimony, Velasquez, 391 N.J. Super. at 306. The record does not support any finding to the contrary.

IV.

Defendant also challenges the court's denial of his Rule 3:18-2 motion for a judgment of acquittal following the return of the jury's verdict finding him guilty of the offenses charged in counts seven, ten, eleven, and twelve of the indictment. Those counts charged defendant with: fourth-degree aggravated assault by pointing a weapon, a firearm, at D.P., N.J.S.A. 2C:12-1(b)(4) (count seven); third-degree unlawful possession of a weapon, a

handgun, N.J.S.A. 2C:39-5(b)(1) (count ten); second-degree possession of a weapon, a firearm, for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count eleven); and second-degree certain persons not to have a weapon, a handgun, N.J.S.A. 2C:39-7(b)(1) (count twelve). As noted, the jury found the State established defendant's guilt on each of the charges beyond a reasonable doubt.

Defendant moved for a judgment of acquittal on each of the offenses based on the singular claim the State failed to present sufficient evidence of an essential element each of the crimes shared — that he possessed a "firearm." In pertinent part, our Criminal Code defines a firearm as any "handgun . . . or any gun . . . in the nature of a weapon from which may be fired or ejected any solid projectable ball, slug, pellet, missile, or bullet . . . by means of a cartridge or shell" N.J.S.A. 2C:39-1(f).

Defendant argued before the motion court that the State did not present evidence establishing the intruder possessed a firearm and, for that reason, he was entitled to a judgment of acquittal on counts seven, ten, eleven, and twelve. He claimed "there is no evidence that a firearm was even present during the" incident because neither X.D. nor J.P.S. described the gun; "[n]o gun was ever entered into evidence"; there was "no evidence . . . a gun had been in the home"; there were no "bullets found" at the scene; there was "no

evidence [he] ever possessed a weapon . . . or purchased one before the incident"; there was no testimony he "was ever[] violent with [D.P.] before the incident"; and he "never made application for a firearm" permit.

The court rejected defendant's arguments and determined there was sufficient evidence supporting the jury's determination defendant possessed a firearm during the incident. The court entered an order denying defendant's dismissal motion.

We conduct a de novo review of a trial court's determination of a motion for a judgment of acquittal under Rule 3:18-2. State v. Lodzinski, 249 N.J. 116, 145 (App. Div. 2021). We must consider "the entirety of the direct and circumstantial evidence presented by the State and the defendant and give the State the benefit of all the favorable evidence and all the favorable inferences drawn from that evidence, and then determine whether a reasonable jury could find guilt beyond a reasonable doubt." Id. at 144 (citing State v. Williams, 218 N.J. 576, 594 (2014)). "[W]e must determine whether the entirety of the evidence, both direct and circumstantial, when viewed in the light most favorable to the prosecution, rationally supported the jury's finding beyond a reasonable doubt that" defendant possessed a firearm. Id. at 145 (citing State v. Mayberry, 52 N.J. 413, 436-37 (1968)).

The evidence at trial included X.D.'s and J.P.S.'s testimony the intruder possessed a weapon they described as a gun and the intruder brandished the weapon in a manner supporting a reasonable inference the weapon was a gun. That is, both X.D. and J.P.S. testified the intruder held the gun and at different times pointed it in a manner that guns are pointed at victims of crimes. X.D. testified defendant pointed a gun at D.P. during the incident and J.P.S. testified the intruder pointed a gun at him as the intruder fled from the apartment down the stairs.

Moreover, X.D. testified that when she wrestled with defendant, "cartridges" fell from the gun he held onto the floor. Further, as the trial court observed, the nature of the injuries suffered by D.P. and X.D. after being struck with a gun, as X.D. described, are consistent with those that would be caused by the butt of a gun striking a victim in the head.

Defendant correctly recognizes the State was not required to prove the gun was operable to satisfy its burden of proving it was a firearm under N.J.S.A. 2C:39-1(f). State v. Gantt, 101 N.J. 573, 582-84 (1986). The State was required only to present evidence the gun was a "'firearm' in terms of its original design." State v. Orlando, 269 N.J. Super. 116, 129 (App. Div. 1993) (quoting Gantt, 101 N.J. at 584-85). To satisfy that burden, the gun's

"authentic design may be inferred from appearance or based on lay testimony, but in no case is it dependent upon empirical examination of the weapon." Id. at 130 (quoting Gantt, 101 N.J. at 589-90). The Court in Gantt explained that "[i]nferring the authenticity of a weapon from its appearance or from the testimony of lay witnesses is entirely consistent with prior law in New Jersey and with a number of holdings from other jurisdictions." 101 N.J. at 590 n.8; see also ibid. (collecting cases).

In Gantt, the Court found that although the gun used during a robbery was never recovered and the evidence was "scant," the victim's "credible" testimony the defendant's accomplice "had 'a small gun in his hand'" and he saw the barrel and handle of the weapon was, in the absence of any evidence to the contrary, "sufficient to justify an inference by the factfinder that the weapon involved was a 'firearm' in the sense of an instrument designed to fire a projectile" under N.J.S.A. 2C:39-1(f). Id. at 591. So too here, X.D.'s and J.P.S.'s consistent lay testimony defendant held a gun and brandished it in a manner consistent with the use of a gun by pointing it at others during the commission of crimes, and X.D.'s testimony defendant struck D.P. and herself with the "butt" of the gun and "cartridges" fell from the gun and onto the floor,

was sufficient to support a reasonable inference the gun constituted a firearm under N.J.S.A. 2C:39-1(f).

In sum, based on our review of the trial record, and viewing the evidence in the light most favorable to the State, we are satisfied the evidence rationally supported the jury's finding beyond a reasonable doubt that defendant possessed a firearm during his commission of the offenses for which proof of his possession of a firearm was an essential element. Lodzinski, 249 N.J. at 145. We therefore affirm the court's order denying defendant's Rule 3:18-2 motion for judgment of acquittal on counts seven, ten, eleven, and twelve of the superseding indictment. Id. at 145.

V.

Counts one and two of the superseding indictment charged second-degree burglary arising from the same unlawful entry into X.D.'s home. Count one alleged defendant unlawfully entered X.D.'s home intending "to commit an offense therein, and in the course of committing the offense purposely, knowingly, or recklessly inflicted bodily injury on X.D. and/or D.P.[,] contrary to the provisions of N.J.S.A. 2C:18-2(a), N.J.S.A. 2C:18-2(b)(1) and N.J.S.A. 2C:43-6.4(e)." Count two alleged defendant unlawfully entered X.D.'s home intending "to commit an offense therein, and in the course of committing the

offense was armed with and/or displayed what appeared to be a deadly weapon[,] contrary to the provisions of N.J.S.A. 2C:18-2a, N.J.S.A. 2C:18-2b(2), and N.J.S.A. 2C:43-6.4e." The difference between the counts is that count one alleges defendant "inflicted bodily injury on" a victim, and count two alleges defendant "was armed with and/or displayed what appeared to be a deadly weapon." Moreover, count one cites to N.J.S.A. 2C:18-2(b)(1), whereas count two cites to N.J.S.A. 2C:18-2(b)(2).

The jury determined the State proved beyond a reasonable doubt that defendant committed the burglary of X.D.'s home in two separate and different ways constituting second-degree burglary under N.J.S.A. 2C:18-2. As reflected on the verdict sheet, the jury found defendant guilty of unlawfully entering X.D.'s home with a purpose to commit an offense therein, and then separately found defendant both: "purposefully, knowingly, or recklessly inflicted bodily injury on X.D. and/or D.P.[,]" and "was armed with and/or displayed what appeared to be a deadly weapon[.]"

In its judgment of conviction, the trial court noted the jury's verdicts on counts one and two reflected determinations of defendant's guilt on "alternate theories of liability, but one incident." The court then sentenced defendant for

his commission of the separate crimes charged in counts one and two and imposed concurrent eighteen-year custodial sentences on each.

For the first time on appeal, defendant argues that charging him with two separate counts of burglary based on "the same entry" into X.D.'s home rendered the indictment impermissibly "multiplici[t]ous." The State contends we should not address the issue because it was not raised before the trial court. In the alternative, the State asserts the burglary charges in the superseding indictment are not multiplicitous because the indictment properly averred defendant committed the burglary in a manner that violated separate provisions of the Criminal Code.

We reject defendant's argument because it was not raised before the trial court. "Appellate review is not limitless." State v. Robinson, 200 N.J. 1, 19 (2009). "[T]he points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review," ibid., and so "[g]enerally, an appellate court will not consider issues, even constitutional ones, which were not raised below," State v. Galicia, 210 N.J. 364, 383 (2012). This court therefore "will decline to consider . . . issues not properly presented to the trial court when an opportunity for such a presentation is available" unless those issues "go to the jurisdiction of the trial court or concern matters

of great public interest." State v. Legette, 227 N.J. 460, 467 n.1 (2017) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

Moreover, Rule 3:10-2(c) provides:

[A]ll . . . defenses and objections based on defects in the . . . indictment . . . , except as otherwise provided by R[ule] 3:10-2(d) (defenses which may be raised only before or after trial) and R[ule] 3:10-2(e) (lack of jurisdiction), must be raised by motion before trial. Failure to so present any such defense constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver.

"The Supreme Court has held that the failure to timely assert defenses or objections based on defects in the indictment may constitute a waiver under R[ule] 3:10-2, even if 'constitutional rights' are involved." State v. Lee, 211 N.J. Super. 590, 596 (App. Div. 1986) (emphasis omitted) (quoting State v. Del Fino, 100 N.J. 154, 160 (1985)).

Defendant's failure to raise the multiplicity claim before the trial court is particularly noteworthy because we have explained "the better approach" in addressing multiplicity challenges is "to address the issue before trial by dismissing the improperly duplicative counts of the indictment." State v. Hill-White, 456 N.J. Super. 1, 12 (App. Div. 2018) (citing State v. Evans, 189 N.J. Super. 28, 32 (Law Div. 1983)). Defendant did not address the issue at trial or sentencing and makes no showing on appeal the issue pertains to the court's

jurisdiction or concerns a matter of "great public interest" such that consideration of the issue for the first time on appeal is warranted. Legette, 227 N.J. at 467 n.1 (quoting Nieder, 62 N.J. at 234). For those reasons alone, we reject defendant's argument on appeal that the superseding indictment impermissibly included two charges of burglary based on the same unlawful entry into X.D.'s apartment.

Although unnecessary to our disposition of the issue, we address principles related to multiplicity because we deem it appropriate to consider and decide defendant's claim — made as part of his arguments concerning multiplicity — that the court erred by failing to merge for purposes of sentencing the two counts of burglary for which he was convicted. For reasons we explain, we agree the court erred by failing to merge the two convictions for burglary for purposes of sentencing and by imposing separate concurrent sentences on those charges.

Defendant's claim that indicting him for two separate burglary offenses arising from the same entry into X.D.'s apartment constitutes impermissible multiplicity is meritless. "[M]ultiplicity occurs when a single offense is charged in several counts of an indictment." Hill-White, 456 N.J. Super. at 11-12 (quoting Evans, 189 N.J. Super. at 31). In contrast, the State is entitled to

charge a defendant with multiple crimes arising from the same course of conduct. Stated differently, "a single act or transaction may be charged in several counts where a number of criminal statutes may reach it." State v. La Fera, 35 N.J. 75, 91 (1961). The State is permitted "to charge [a] defendant in the alternative or with the greater and lesser degree of the same cognate offenses." State v. Muhammad, 182 N.J. 551, 574 (2005) (citing N.J.S.A. 2C:1-8(a)).

"The bar against multiplicity relates to the Double Jeopardy principle prohibiting 'multiple punishments for the same offense.'" Hill-White, 456 N.J. Super. at 12 (quoting State v. Salter, 425 N.J. Super. 504, 515-16 (App. Div. 2012)). To determine whether offenses are the same for purposes of analyzing a claimed violation of the Double Jeopardy Clause, we employ the same-elements test adopted by our Supreme Court in State v. Miles, 229 N.J. 83, 96 (2017). The same-elements test requires an analysis of "the elements of the competing statutes to determine if each contains an element the other does not. If each statute contains at least one unique element" the offenses are not deemed the same and a defendant may be prosecuted and punished for both. Ibid.

Here, application of the same-elements test to the two counts of second-degree burglary charged in the indictment establishes the offenses are not the same. In count one, defendant was charged and convicted of burglary under N.J.S.A. 2C:18-2(a) and N.J.S.A. 2C:18-2(b)(1). In count two, defendant was charged and convicted of second-degree burglary under N.J.S.A. 2C:18-2(a) and N.J.S.A. 2C:18-2(b)(2). As charged here, the crimes have essential elements in common; they both require the State prove a burglary under N.J.S.A. 2C:18-2(a). That is, the crimes charged in counts one and two require proof establishing defendant, "with purpose to commit an offense therein or thereon . . . [e]nter[ed] a . . . structure . . . unless the structure was at the time open to the public or the actor [was] licensed or privileged to enter." N.J.S.A. 2C:18-2(a)(1).

Although the crimes charged in counts one and two of the indictment share common elements, they allege different crimes with different elements. The second-degree burglary charged in count one under N.J.S.A. 2C:18-2(b)(1) includes an element essential to the grading of the offense — that the actor "[p]urposely, knowingly[,] or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone" — that is not an element of the second-degree burglary charged in count two under N.J.S.A. 2C:18-2(b)(2).

See generally State v. Lawless, 214 N.J. 594, 608 (2013) (noting "[e]lements of a crime . . . includ[e] those that establish its grade"); State v. Tringali, 451 N.J. Super. 18, 31 (App. Div. 2017) (noting monetary harm to victim that establishes the grading of a theft offense is an "element" of the crime). Similarly, the burglary charged in count two under N.J.S.A. 2C:18-2(b)(2) includes an element essential to the grading of the offense — that the actor "[i]s armed with or displays what appear to be explosives or a deadly weapon" — that is not an element of the burglary charged in count one under N.J.S.A. 2C:18-2(b)(1). Thus, under the same-elements standard, the crimes charged in counts one and two are separate and distinct, and defendant's conviction of the crimes does not violate double jeopardy principles. Miles, 229 N.J. at 96.

For the same reasons, charging defendant with those separate offenses in the same indictment did not result in impermissible multiplicity. "[T]he rule against multiplicity prohibits the State from charging a defendant with multiple counts of the same crime, when defendant's alleged conduct would only support a conviction for one count of that crime." Hill-White, 456 N.J. Super. at 11. Here, counts one and two charged different crimes with different elements, and defendant's conduct, as established by the evidence and

determined by the jury, supported a conviction of each of the separate offenses.

We recognize "[m]ultiplicity may also implicate a defendant's right to a fair trial, because trying a defendant for multiple counts of the same offense, when only one offense was committed, may prejudice the jury." Id. at 12 (citing Evans, 189 N.J. Super. at 31-32). However, defendant was not denied a fair trial by the indictment's inclusion of the two counts of burglary because, as noted, each count charged a wholly separate and distinct offense.

Defendant claims the inclusion of the two counts of burglary in the indictment "served to prejudice the jury against [him] and thereby denied him a fair trial," but he offers no basis for the claim and does not cite to any evidential support for it. Indeed, the evidence presented supported defendant's conviction of both offenses — the testimony established defendant possessed a firearm and actually caused bodily injury to D.P. and X.D. — and acceptance of defendant's argument the State could not charge both offenses would require the illogical and unsupportable conclusion the State was required to prosecute defendant on only one of the two offenses — each with different elements. Defendant cites to no legal authority supporting such a conclusion and, as noted, the State is permitted to charge a defendant with any and all separate

offenses — with different elements — that are supported by the evidence. See Miles, 229 N.J. at 96; Muhammad, 182 N.J. at 574; La Fera, 35 N.J. at 91.

Although defendant's primary contention that the indictment violated his right to a fair trial based on impermissible multiplicity is bereft of merit, we are persuaded the court erred by imposing separate, but concurrent, sentences on defendant's two convictions for burglary arising from the same entry into X.D.'s home. For the following reasons, we conclude defendant's convictions on the two offenses should be merged for purposes of sentencing.

"[T]he doctrine of merger is based on the precept that 'an accused [who] committed only one offense . . . cannot be punished as if for two.'" State v. Herrera, 469 N.J. Super. 559, 565 (App. Div. 2022) (omission and second alteration in original) (quoting State v. Davis, 68 N.J. 69, 77 (1975)). In determining whether a defendant's convictions merge, we apply a flexible approach requiring a focus on the "elements of the crimes and the Legislature's intent in creating them." Id. at 567 (quoting State v. Tate, 216 N.J. 300, 306 (2013)). Under the flexible approach, "offenses that merely offer an alternative basis for punishing the same criminal conduct will merge." Ibid. (quoting State v. Miller, 237 N.J. 15, 33 (2019)).

The flexible approach to merger requires an

analysis of the evidence in terms of, among other things, the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.

[Ibid. (quoting Miller, 237 N.J. at 33).]

Applying these standards, we are persuaded defendant's convictions for the two burglaries should be merged for purposes of sentencing. As we have explained, the elements of the burglaries charged in counts one and two are different and, under the mechanical approach to merger employed under N.J.S.A. 2C:1-8, the offenses would not merge. See id. at 570; see also State v. Hill, 182 N.J. 532, 542 (2005) (quoting State v. Diaz, 144 N.J. 628, 637-38 (1996)) (observing the standard for merger under N.J.S.A. 2C:1-8 "has been characterized as 'mechanical.'").

However, the charged offenses were committed simultaneously during a singular incident, the proofs submitted as to counts one and two were in great part necessary to establish both offenses, and the crimes were committed during the identical scheme and episode. See Miller, 237 N.J. at 33. Moreover, the evidence established defendant's intent was to commit a single burglary by simultaneously arming himself with a firearm and employing

physical force to cause bodily injury with it. See ibid. Additionally, the consequences of the separate crimes committed by defendant during his single unlawful entry into X.D.'s apartment were the same. Indeed, defendant used the firearm for which he was convicted of second-degree burglary under count two to inflict the bodily injury for which he was convicted of burglary under count one. Defendant's crimes served the same purpose: the burglary of X.D.'s apartment in a single episode during which he both inflicted bodily injury and possessed a firearm. In sum, the pertinent factors support our conclusion defendant's convictions for the separate offenses charged under counts one and two permit, and require a merger of, the offenses for purposes of sentencing. See generally Herrera, 469 N.J. Super. at 573-74.

We therefore vacate the court's imposition of concurrent sentences on counts one and two and remand for the court to correct the judgment of conviction to reflect a merger of defendant's conviction for second-degree burglary by attempting to cause or causing bodily injury under count one with defendant's conviction under count two for second-degree burglary while armed with a firearm.⁵

⁵ We merge the burglary charged in count one under N.J.S.A. 2C:18-2(b)(1) with the burglary charged in count two under N.J.S.A. 2C:18-2(b)(2) because the remaining charges the court merged into counts one and two — including

VI.

Defendant also challenges his sentence. He contends the court imposed an illegal sentence on count ten, which charged third-degree unlawful possession of a handgun in violation of N.J.S.A. 2C:39-5(b)(1), because the judgment of conviction erroneously lists the offense as a second-degree crime and, although the court merged count ten into counts one and two, the court also indicated it would impose an eight-year custodial term with a four-year period of parole ineligibility if it were required to impose a sentence on that merged offense. Defendant also argues the court erred by imposing a consecutive sentence on his conviction of the certain persons not to possess weapons offense, his sentence is excessive, and the court failed to consider the overall fairness of the twenty-six-year aggregate sentence, with a more-than-twenty-year period of parole eligibility, imposed.

"[Our] review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). A reviewing court is "deferential to sentencing determinations and 'must not substitute [its] judgment for that of the

the assaults defendant committed with the firearm and the possessory weapons offenses — may be properly merged into count two.

sentencing court.'" State v. Rivera, 249 N.J. 285, 297 (2021) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)). We must affirm a sentence "unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent 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.'" Id. at 297-98 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1985)).

Defendant correctly argues the judgment of conviction erroneously states he was convicted of second-degree unlawful possession of a weapon, a firearm, under N.J.S.A. 2C:39-5(b)(1). When defendant committed the offense on December 21, 2007, a violation of N.J.S.A. 2C:39-5(b)(1) constituted a third-degree offense and the crime was not then subject to the Graves Act, N.J.S.A. 2C:43-6(c).⁶ The superseding indictment properly charged as such, and the jury returned a guilty verdict on the third-degree offense charged in count ten of the superseding indictment.

⁶ Effective January 13, 2008, following defendant's commission of the crimes for which he was convicted and sentenced, the Legislature amended N.J.S.A. 2C:39-5 to increase the grading of the offense for unlawful possession of a handgun from a third-degree to a second-degree offense, N.J.S.A. 2C:39-5(b). L. 2007, c. 284, § 1. The Legislature also amended N.J.S.A. 2C:43-6(c) to require a person convicted of unlawful possession of a handgun under N.J.S.A. 2C:39-5(b) to serve a minimum period of parole ineligibility. L. 2007, c. 341, § 5.

As the State concedes, the judgment of conviction erroneously identifies the crime charged in count ten as a second-degree offense. We therefore remand for the court to amend the judgment of conviction to reflect that defendant's conviction under count ten was for a third-degree crime.

We are not persuaded by defendant's claim we should remand for resentencing on the third-degree offense in count ten because, as a matter of fact, defendant was not sentenced on that offense because the court merged it with counts one and two. We recognize the court stated in the judgment of conviction that it would impose an eight-year sentence with a four-year period of parole ineligibility if it were to sentence defendant on the second-degree offense, but there is no evidence the court's prediction of what it would have done if it imposed sentence on count ten as a second-degree offense otherwise affected the sentence it imposed on counts one and two. In any event, on remand, the judgment of conviction shall be amended to delete the reference to the sentence the court would have imposed on count ten if had been required to impose a sentence on that count.

Defendant also argues "the aggregate sentence imposed is excessive" because the trial court imposed a consecutive, rather than a concurrent, sentence for the certain persons not to carry weapons charge. He contends "the

consecutive sentence imposed was inappropriate" because "all the crimes stemmed from the same one incident," and the consecutive sentence extending from defendant's "legal[] prohibit[ion] from having a weapon constitutes an improper . . . double counting" because the "mandatory extended term on" defendant's "armed . . . robbery" conviction already accounted for "the possession and use of a weapon."

When a defendant receives multiple sentences of imprisonment "for more than one offense, . . . such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence" N.J.S.A. 2C:44-5(a). The following well-established guidelines govern a court's determination of whether to impose concurrent or consecutive sentences:

- (1) [T]here can be no free crimes in a system for which the punishment shall fit the crime;
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
 - (a) [T]he 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;

(4) there should be no double counting of aggravating factors; [and]

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.

[State v. Cuff, 239 N.J. 321, 347-48 (2019) (quoting State v. Yarbough, 100 N.J. 627, 643-44 (1985)).]

The guidelines leave "a fair degree of discretion in the sentencing courts." State v. Carey, 168 N.J. 413, 427 (2001). "[A] sentencing court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences," id. at 427-28, but a court imposing consecutive sentences is required to state its reasons for the decision, State v. Miller, 205 N.J. 109, 129 (2011), and "focus . . . on the fairness of the overall sentence," State v. Abdullah, 184 N.J. 497, 515 (2005) (quoting State v. Miller, 108 N.J. 112, 122 (1987)).

Here, the court sentenced defendant to concurrent terms of eighteen years on each of the second-degree burglary counts, and a consecutive eight-year term on his conviction for certain persons not to have a weapon. The court explained it imposed a consecutive sentence on the certain persons offense because it is "a separate crime" distinct from the burglary offense for which the court imposed the other custodial sentence. The court further determined a consecutive sentence was appropriate because "there could be no free crimes in a system for which the punishment should fit the crime," and it would be "counterintuitive" for a defendant who has a criminal record that prevents him from possessing a weapon to "be treated the same way" as "someone who . . . is not subject to that" limitation.

We discern no abuse of discretion in the court's determination because the requisite analysis of the Yarbough factors is "qualitative, not quantitative," and application of the factors "involves more than merely counting the factors favoring each alternative outcome." Cuff, 239 N.J. at 348. The court provided the reasons supporting its determination, Miller, 205 N.J. at 129, and reasonably concluded a consecutive sentence was appropriate for the certain persons offense because it constituted a distinctly different offense from the others for which defendant was sentenced and imposition of a concurrent

sentence would therefore have been inconsistent with the principle there should be no free crimes. Yarbough, 100 N.J. at 643; see also State v. Sutton, 132 N.J. 471, 485 (1993) (noting the "Yarbough principle that, ordinarily, separate crimes deserve separate punishment").

The court also correctly considered and applied the aggravating and mitigating factors under N.J.S.A. 2C:44-1, and defendant does not argue otherwise. See State v. Torres, 246 N.J. 246, 272 (2021) (explaining sentencing judges should "be mindful that aggravating and mitigating factors and Yarbough factors, as well as the stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's fairness"). The court found aggravating factor three, "[t]he risk that the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(3), because defendant had "numerous" "violations of" "domestic violence restraining orders" in his past, evidencing "serious problems controlling his temper with women."

The court further found aggravating factor six, "[t]he 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)(6), because defendant has "a horrendous criminal record" of "crimes against women." The court explained aggravating factor nine, "[t]he need for deterring the defendant and

others from violating the law," N.J.S.A. 2C:44-1(a)(9), applied because defendant "needs to be deterred" by "a heavy sentence" to protect the "female members of our public." The court found no mitigating factors and, accordingly, found the aggravating factors substantially outweighed the mitigating factors.

Defendant argues the court did not make sufficient findings supporting the overall fairness of the sentence imposed. We disagree.

In Torres, the Court held "that an explanation for the overall fairness of a sentence by the sentencing court" where "lengthy consecutive sentences" are imposed is required to "foster[] consistency in . . . sentencing in that arbitrary or irrational sentencing can be curtailed and, if necessary, corrected through appellate review." 246 N.J. at 272 (alteration and omission in original) (quoting State v. Pierce, 188 N.J. 155, 166-67 (2006)). Here, although the court did not expressly refer to the overall fairness of defendant's sentence, the court nonetheless made findings supporting its determination the sentence — including the aggregate consecutive terms imposed — was fair overall.

The court explained it imposed defendant's sentence because: there were multiple victims; there was a need to protect others — especially women — in the community based on defendant's history and the commission of the

offenses for which he was convicted; defendant had a "horrendous criminal record"; defendant had been convicted of serious crimes; and defendant was subject to a mandatory extended term under N.J.S.A. 2C:43-6.4(e). The court was clearly aware of the overall length of the sentence imposed, explaining to defendant the sentence consisted of an aggregate twenty-six years of which defendant would serve twenty years, three months, and nineteen days in prison owing to NERA and the five-year parole disqualifier on the certain persons charge.

In our view, the court's findings reflect its reasoning and determination that the overall length of the sentenced imposed is fair. The findings further permit appellate review of the overall fairness of the sentence based on the circumstances presented to the sentencing court. Ibid. Moreover, the sentence imposed does not shock the judicial conscience. Rivera, 249 N.J. at 297-98. We therefore conclude the court did not abuse its discretion by imposing either consecutive sentences or in the aggregate length of the sentence imposed.

To the extent we have not expressly addressed any of defendant's remaining arguments, we find they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We affirm defendant's convictions and sentence. We remand for the court to correct the judgment of conviction in accordance with this opinion. 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