RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4098-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.M.S.,[1]

Defendant-Appellant.

Submitted October 26, 2022 – Decided August 14, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 19-06-0343.

Joseph E. Krakora, Public Defender, attorney for appellant (Christopher W. Hsieh, Designated Counsel, on the brief).

John P. McDonald, Somerset County Prosecutor, attorney for respondent (Lauren E. Bland, Assistant Prosecutor, of counsel and on the brief).

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[1] We use initials to protect the confidentiality of the victims. R.1:38-3(c)(10) and (12).

PER CURIAM

Following a bifurcated jury trial, defendant was convicted of three counts of third-degree aggravated assault, one of which involved a domestic violence victim; fourth-degree endangering another; third-degree criminal mischief; fourth-degree violating a restraining order (RO); third-degree stalking in violation of a RO; and third-degree terroristic threats. He was sentenced to an aggregate five-year term of imprisonment, with a two-and-one-half-year period of parole ineligibility.

The convictions stemmed from a turbulent relationship between defendant and the victim, which led to defendant stalking and terrorizing the victim over the course of a year-and-a-half and culminated with a car chase, during which defendant repeatedly rammed the victim's vehicle while she and a second victim ("second victim") were the sole occupants. While confined on the charges awaiting trial, defendant confided in a fellow inmate that he wanted to kill both victims, a threat he had also communicated to his former attorney ("the Attorney").

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

POINT I

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY FAILED TO SEVER THE STALKING AND TERRORISTIC THREATS OFFENSES.

POINT II

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED 1) ATTORNEY-CLIENT TEXT MESSAGE COMMUNICATIONS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND 2) THE ATTORNEY'S LAY OPINION TESTIMONY REGARDING THE TEXT MESSAGES.

POINT III

DEFENDANT'S CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION WAS VIOLATED BECAUSE THE TRIAL COURT FAILED TO ENGAGE IN THE REQUISITE INQUIRY WITH DEFENDANT AFTER HE CLEARLY INDICATED THAT HE WISHED TO REPRESENT HIMSELF.

POINT IV

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE TRIAL COURT PERMITTED THE PROSECUTOR TO COMMENT IN SUMMATION REGARDING DEFENDANT'S CONDUCT DURING THE TRIAL.

POINT V

THE PROSECUTOR'S MISCONDUCT IN SUMMATION DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT VI

THE TRIAL COURT IMPOSED A MANIFESTLY EXCESSIVE SENTENCE.

We have considered the arguments in light of the record and applicable legal principles. We reject each of the points raised and affirm.

I.

We discern these facts from both trials. Between 2013 and 2017, the victim "g[ave defendant] money" on "[m]ultiple" occasions totaling about "$15,000." In addition to providing financial assistance, the victim "helped [defendant] find an attorney" for a civil dispute unrelated to this matter. The Attorney agreed to represent defendant pro bono in the civil case and testified that "over the course of several months," he "spoke to [defendant for] countless hours" and "[m]et with [defendant] countless times" "for free."

In August 2017, defendant asked the victim for more money. The victim refused and told defendant over the phone to never "bother [her]" or "call [her] again." Although the victim made it clear to defendant that she wanted to "end contact" with him, defendant continued to call and leave "voicemails." In September 2017, defendant unexpectedly visited the victim's workplace which left the victim "panicked, terrified, anxious, [and] nervous." The victim did not meet with defendant.

Around 7:00 p.m. later that evening, defendant arrived unexpectedly at the victim's home and rang the doorbell. After the victim answered the door and stepped outside to speak with defendant, defendant demanded "$3,000" by the following day as well as "two new lawyers." Defendant was apparently under the impression that the victim was responsible for his payment of legal fees totaling $30,000 to two separate lawyers referred by the victim, both of whom had allegedly absconded with defendant's money. Defendant threatened that "he was going to have a . . . bullet put in [the victim's] head" if the victim did not comply. In response, the victim starting "yelling," and the police were called.

Police officers responded to the victim's home. After speaking with the parties at the scene, an officer instructed defendant to "stay away from the victim]" and "to leave the area and not . . . return." Defendant left without incident. The following morning, the victim discovered that all "four tires [of her car] were slashed" and called the police. At around 11:00 a.m. that morning, a detective responded to the home and, after speaking with the victim, observed a vehicle with "[a]ll four of the tires . . . flattened." The detective observed that "[t]he tires appeared to be punctured," and determined that the vehicle "was not [drivable]."

Later that same day, the detective reviewed footage taken from a surveillance camera outside the victim's home. The detective testified that at "about 7:09 p.m." the previous night, the surveillance video captured "someone approach[ing] th[e] vehicle, walk[ing] around it, . . . and punctur[ing] all four of the tires." The video also showed the same person walking up the stairs to the residence and ringing the doorbell.

About two months later, in December 2017, defendant began sending "a torrent of text messages" to the Attorney about the victim. At first, "[the Attorney] did nothing." However, after "the text messages continued to come[,] . . . the volume and tone alarmed [the Attorney]" and led him to reach out to law enforcement. The Attorney sent the text messages to law enforcement because he considered them to be "threatening." He also informed the victim about the text messages "after the fact." According to the Attorney, when he received the text messages and reported them to law enforcement and the victim, he did not believe he was still representing defendant in the civil matter.

The parties stipulated that a month later, in January 2018, "a domestic violence final restraining order [(FRO)]" was issued on behalf of the victim

against defendant. Defendant "was served with th[e FRO in January 2018]," and "was aware of the [FRO] after that date."[2]

In March 2019, the victim's friend ("the friend") received several phone calls on his cell phone from an unknown number. The friend testified that upon answering the first call, "a male voice ask[ed] for [the victim]." The friend told the caller he "ha[d] the wrong phone number and . . . hung up." After the initial call, "several other phone calls . . . came in" from the same number, but the friend "ignored them," called the police, and gave a statement regarding the suspicious phone calls.

At about 10:00 a.m. the following day, a police sergeant called defendant to advise him to stop calling the victim and her friend. Defendant, however, denied calling either. The sergeant made the call over a taped line to record the conversation. The recording was played for the jury during the trial.

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[2] In September 2017, after defendant's unannounced visits and the tire slashing incident, the victim obtained a temporary restraining order against defendant. In addition to threatening the victim in September 2017, defendant had also "forcefully entered" the victim's residence and "struck [the victim] on [the] face twice." The trial judge, however, precluded the parties from mentioning during the trial that defendant had "str[uck the victim] multiple times" because it was "too prejudicial." Although not introduced at trial, these facts shed light on the victim's motivation for obtaining a restraining order against defendant, and ultimately resulted in disorderly persons convictions against defendant for simple assault and criminal mischief.

While driving around 4:00 p.m. later the same day in March 2019, the victim and the second victim noticed a minivan parked across the street from the victim's new home. Defendant approached the victim's vehicle, reached through the passenger side front window, and grabbed onto the second victim. The second victim yelled to the victim, "[G]et in the car. It's [defendant]."

Fearing defendant "was going to kill" them, the victim quickly "got in the car" and began to drive away in an attempt to shake defendant loose from the car. Ultimately, defendant fell from the vehicle, returned to the minivan, and raced to catch up with the victim's vehicle. A witness to the car chase testified that he observed defendant "pass[him] on the left" at a "[h]igh rate of speed." Defendant continued to drive against traffic in the left lane in an effort to catch up with the victim's vehicle.

After nearly colliding with oncoming traffic, defendant "pulled behind [the victim]." Defendant then passed the victim, stopped his car in front of the victim's, "reversed and . . . crashed into [the victim's] car." After the first collision, defendant rammed into the victim's vehicle multiple times on the driver's side, ultimately causing the victim to lose control of the vehicle and crash into a rock wall. The victim reversed, veered the car towards the shoulder of the road to avoid hitting pedestrians, and "hit a pole." Defendant continued

his pursuit and again crashed his minivan into the victim's car, this time "sandwich[ing]" the vehicle between defendant's minivan and the pole and totaling the victim's vehicle. The victim exited her vehicle and ran for help.

After receiving multiple 9-1-1 calls from the victim, the witness, and other citizens, police promptly arrived at the scene. The first responding officer observed "debris in the roadway" and "two vehicles that appeared to have crashed into each other." He also observed defendant "standing in the middle of the roadway," barefoot and "bleeding from his arms and his feet." According to the officer, defendant was "aggressively [waving] his hands up and down," and "yelling" at the second. An ambulance was dispatched to transport defendant for medical treatment, while both victims refused medical treatment.[3]

Subsequently, law enforcement officers executed a search warrant for defendant's minivan. A detective testified that he "seized a lot of paperwork" from defendant's minivan. The seized paperwork included "a printout of an . . . online search for public records." One of the documents was "created by

[3] The second victim was called as a defense witness. Her account of the car chase was consistent with the victim's. She stated that when defendant first approached, she told the victim to leave because they were afraid that "he might hurt [them]." According to the second victim, defendant hit their car "[h]ard" on "[the victim's] side" "about four or five times" before the police arrived. After the chase ended, defendant was yelling at her.

[defendant in March 2019]," and named the victim as "the subject of th[e] report." The report listed "a number of addresses" for the victim.

While awaiting trial, defendant was held in jail where he "befriended" a fellow inmate, ("the Inmate"). Between March and April 2019, the Inmate, who had an extensive criminal record, was confined at the jail "[f]or a disorderly persons offense." The Inmate testified that defendant "ask[ed him] for [legal] advice" about his charges and confided in him that he was "angry" at the victims because "he felt he was entitled to money they were "preventing him from receiving."

Defendant told the Inmate that he had "track[ed] [the victims] down." Defendant said "when he found them, he was chasing them down," "ended up running them off the road[,] and . . . got arrested for it." According to the Inmate, defendant stated "multiple times" that he "would kill them if [he got] the chance" and would "choke them to death." Defendant specifically "glorified the fact of putting his hands around their neck[s] . . . the most." The Inmate admitted that he reported the information to the authorities with the hope of obtaining some benefit "for [his] own stuff" but "ha[d not] gotten anything out of it."

Defendant was charged in an eight-count indictment with second-degree attempt to cause serious bodily injury to both victims in March 2019, contrary

to N.J.S.A. 2C:12-1(b)(1) (count one); third-degree attempt to cause bodily injury to both victims with a deadly weapon, to wit, his vehicle, in March 2019, contrary to N.J.S.A. 2C:12-1(b)(2) (count two); third-degree attempt to cause significant bodily injury to a victim of domestic violence pursuant to N.J.S.A. 2C:25-19(d), contrary to N.J.S.A. 2C:12-1(b)(12) (count three); third-degree endangering another person by engaging in conduct which created a substantial risk of death to both victims in March 2019, contrary to N.J.S.A. 2C:24-7.1(a)(3) (count four); third-degree criminal mischief by damaging the personal property of the victim in March 2019, contrary to N.J.S.A. 2C:17-3(a)(1) (count five); fourth-degree violation of an RO by disobeying a domestic violence FRO, contrary to N.J.S.A. 2C:29-9(b)(1) (count six); third-degree stalking by engaging in a course of conduct directed at the victim between September 2017 and April 2019, that would cause a reasonable person to fear for their safety or the safety of a third person or suffer emotional distress in violation of an existing court order prohibiting the behavior, contrary to N.J.S.A. 2C:12-10(c) (count seven)[4]; and third-degree terroristic threats to commit murder between March and April 2019, contrary to N.J.S.A. 2C:12-3(a) (count eight). In connection

[4] Count seven was amended before trial from subsection "10[(b)]" to "10[(c)]" due to a typo.

with the March 2019, allegations, defendant was also issued several motor vehicle summonses.

During a pretrial conference conducted in February 2020, with the consent of the parties, the trial judge severed counts three and six as well as the element in count seven elevating the crime of stalking to a third-degree offense. The judge ordered a separate trial to follow the trial on the remaining counts due to the potential prejudice from the domestic violence references. See State v. Chenique-Puey, 145 N.J. 334, 343 (1996) ("In the future, trial courts should sever and try sequentially charges of contempt of a domestic-violence restraining order and of an underlying criminal offense when the charges arise from the same criminal episode.").

In February 2020, following the first trial on counts one, two, four, five, seven, and eight, the jury found defendant guilty of counts two, five, and eight. On counts one and four, defendant was convicted of the lesser-included offenses of third-degree aggravated assault and fourth-degree endangering, respectively. On count seven, the jury found defendant committed the crime of stalking without reference to the FRO. On the same date in February 2020, after the second trial on counts three, six, and seven before the same jury, defendant was

convicted of all three counts, with a finding that in committing the crime of stalking, defendant violated an existing court order.

In April 2020, defendant appeared for sentencing on the indictable offenses as well as adjudication of the motor vehicle summonses. The judge found defendant guilty of reckless driving, N.J.S.A. 39:4-96 and careless driving, N.J.S.A. 39:4-97, merged the latter into the former, and sentenced defendant to sixty days in jail, concurrent to his indictable offenses, along with various fines. This appeal followed.

II.

In Point I, defendant argues the judge "should have granted defendant's request for severance" and tried the stalking and terroristic threats counts in the second trial because the charge involved "2017 and 2018 bad acts which were unrelated to the 2019 motor vehicle incident." Defendant argues that "[a]llowing the jury to hear the prior bad act evidence" served "no evidential purpose but to portray [him] as a bad person predisposed to commit crimes" and "deprived [him] of a fair trial on all of the charges related to the motor vehicle incident." Further, defendant argues that the judge "improperly characterized

the prior bad act evidence as 'intrinsic' and failed to apply a complete Cofield[5] analysis."

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

> Mandatory joinder is required when multiple criminal offenses charged are "based on the same conduct or aris[e] from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction and venue of a single court."
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> Notwithstanding the preference for joinder, Rule 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would prejudice unfairly a defendant. The rule provides:
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> > If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses . . . in an indictment or accusation the court may order an election or separate trials of counts . . . or direct any other appropriate relief.
>
> [Chenique-Puey, 145 N.J. at 340-41 (alterations in original) (citations omitted) (first quoting R. 3:15-1(b);

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

then citing State v. Oliver, 133 N.J. 141, 150 (1993); and then quoting R. 3:15-2(b)).]

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

Where offenses are properly joined, "[the] defendant bears the burden of demonstrating prejudice" to warrant severance. State v. Lado, 275 N.J. Super. 140, 149 (App. Div. 1994). However, "the potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial." State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985). Instead, in deciding a severance motion, the trial court must "weigh the interests of judicial economy and efficiency against the right of every accused to have the merits of his [or her] case fairly decided." Id. at 43.

While judicial economy and efficiency are important considerations, the "key factor in determining whether prejudice exists from joinder of multiple offenses 'is whether the evidence of [those] other acts would be admissible in

separate trials under [N.J.R.E. 404(b)].'" State v. Krivacska, 341 N.J. Super. 1, 38 (App. Div. 2001) (alterations in original) (quoting State v. Moore, 113 N.J. 239, 274 (1988)). "If the evidence would be admissible at both trials, then the trial court may consolidate the charges because 'a defendant will not suffer any more prejudice in a joint trial than he [or she] would in separate trials.'" Chenique-Puey, 145 N.J. at 341 (quoting State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div. 1983)).

N.J.R.E. 404(b) "permits admission of [other crime or civil wrong] evidence when relevant to prove some fact genuinely in issue." Krivacska, 341 N.J. Super. at 39.

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

Although a Cofield analysis is generally required when deciding if other crime or civil wrong evidence is admissible under N.J.R.E. 404(b), our Supreme Court in State v. Rose, 206 N.J. 141 (2011), held that:

> [E]vidence that is intrinsic to the charged crime is exempt from the strictures of [N.J.R.E.] 404(b) even if it constitutes evidence of uncharged misconduct that would normally fall under [N.J.R.E.] 404(b) because it is not "evidence of other crimes, wrongs, or acts."
>
> Thus, evidence that is intrinsic to a charged crime need only satisfy the evidence rules relating to relevancy, most importantly the [N.J.R.E.] 403 balancing test.
>
> [Rose, 206 N.J. at 177-78 (citations omitted).]

To determine what is intrinsic, the Court adopted the test outlined in United States v. Green, 617 F.3d 233, 248-49 (3d Cir. 2010), and held that evidence is considered intrinsic if it "directly proves" the crime charged or if the acts in question are performed contemporaneously with, and facilitate, the commission of the crime charged. Rose, 206 N.J. at 180 (quoting Green, 617 F.3d at 248-49). In addition, the Court broadened the intrinsic evidence exception by noting "that other crimes evidence may be admissible if offered for any non-propensity purpose, [including] the need 'to provide necessary background information' about the relationships among the players as a proper purpose." Id. at 180-81 (alteration in original) (quoting Green, 617 F.3d at 249).

The Court held that such background evidence is admissible "'outside the framework of [N.J.R.E.] 404(b),'" id. at 181 (quoting Green, 617 F.3d at 249), and when offered for this purpose, the evidence is subject to the probative

value/prejudice balancing test under N.J.R.E. 403 rather than prong four of Cofield's N.J.R.E. 404(b) analysis. Id. at 177-78. Under N.J.R.E. 403, relevant evidence "'is excluded only when its "probative value is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation" of the issues in the case.'" State v. Long, 173 N.J. 138, 163-64 (2002) (alteration in original) (quoting State v. Koskovich, 168 N.J. 448, 486 (2001)). "The mere possibility that evidence could be prejudicial does not justify its exclusion." Morton, 155 N.J. at 453-54.

During the February 2020 pretrial conference, defense counsel requested a separate trial on the stalking charge because of the prejudicial effect of the threatening conduct spanning from September 2017 to April 2019. Defense counsel did not request severance of the terroristic threats charge, which was specific to the threats defendant communicated to the Inmate while confined in jail from March to April 2019. The judge denied defendant's request for severance of the stalking count, ruling that the evidence was admissible "as intrinsic evidence" and "the prejudicial effect of th[e] evidence [was] outweighed by its probative value."

We discern no abuse of discretion in the judge's ruling. The evidence of defendant's conduct from 2017 to 2019 was intrinsic because it was part-and-parcel of the crimes charged and provided necessary background information about the relationship between the parties. Defendant's misconduct began with his unannounced visits to the victim's workplace and home, which included the death threats and tire-slashing incident, followed by the threatening texts to the Attorney and the attempt to run the victim off the road near her new home. It ended with defendant communicating threats to kill both victims while he was detained in jail.

In criminal prosecutions, whenever motive or intent of the accused is important and material, as here, "a strong showing of prejudice is necessary to exclude [such] evidence under the balancing test of N.J.R.E. 403." State v. Calleia, 206 N.J. 274, 294 (2011). Because defendant failed to meet his burden of demonstrating prejudice, neither severance of the stalking charge nor of the terroristic threats charge, which we review for plain error, was warranted. See R. 2:10-2 (compelling appellate courts to disregard any error "not brought to the attention of the trial . . . court" unless it was "clearly capable of producing an unjust result").

III.

In Point II, defendant contends the judge erroneously admitted the threatening text messages to the Attorney "because they were protected by the attorney-client privilege." Defendant further argues that "[p]ermitting . . . [the Attorney] to testify that he believed his own client's texts contained threats" violated N.J.R.E. 701 as improper lay opinion testimony "on the ultimate issue of guilt, and deprived defendant of a fair trial."

"It is well-settled under New Jersey law that communications between lawyers and clients 'in the course of that relationship and in professional confidence' are privileged and therefore protected from disclosure." Hedden v. Kean Univ., 434 N.J. Super. 1, 10 (App. Div. 2013) (quoting N.J.S.A. 2A:84A-20(1); N.J.R.E. 504(1)). The privilege "generally applies to communications (1) in which legal advice is sought, (2) from an attorney acting in his [or her] capacity as a legal advisor, (3) and the communication is made in confidence, (4) by the client." Ibid. The privilege may be claimed by either the client or the lawyer. N.J.S.A. 2A:84A-20(1); N.J.R.E. 504(1). However, the privilege is "neither absolute nor sacrosanct." Hedden, 434 N.J. Super. at 11.

Indeed, testimonial privileges are construed narrowly "because they prevent the trier of fact from hearing relevant evidence and thereby undermine the search for truth[,] . . . [and] courts sensibly accommodate privileges to the

aim of a just result, and accept them to the extent they outweigh the public interest in full disclosure." State v. Mauti, 208 N.J. 519, 531-32 (2012) (internal quotation marks omitted) (quoting State v. J.G., 201 N.J. 369, 383 (2010)). As such, the attorney-client privilege "has never been held to attach to communications which the client intends to be divulged to third persons." In re Gonnella, 238 N.J. Super. 509, 514 (Law Div. 1989). Additionally, the privilege does not extend "to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud." N.J.S.A. 2A:84A-20(2); N.J.R.E. 504(2); see also RPC 1.6(b)(1) (requiring an attorney to reveal information "to the proper authorities . . . to prevent the client . . . from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another"). "[W]e review the applicability of the attorney-client privilege, and its potential waiver . . . , de novo." Hedden, 434 N.J. Super. at 10.

Defendant's text messages to the Attorney were not related to obtaining legal advice. Instead, the texts contained various threats and explicit messages about the Attorney and the victims. For example, in the texts, defendant stated, "I suffer and you jerk me off. All you will pay. Watch." Therefore, the privilege

did not apply. Further, the text messages included multiple statements instructing the Attorney to disclose information to third parties. Specifically, within the texts, defendant directed the Attorney to "[t]ell [the victim] to own it," "[g]o to the police," and "[c]all the cops." Thus, the texts were intended to be communicated to third parties. This, in and of itself, operates as a waiver of the privilege.

Further, based on the texts, the Attorney became concerned for the victim's safety because defendant was texting "some alarming things about [the victim]." Therefore, even if the texts were privileged and there was no waiver, the Attorney was obligated to report them to the authorities, as he did, to prevent defendant from committing a criminal act that the Attorney "reasonably believe[d was] likely to result in death or substantial bodily harm or substantial injury to the financial interest or property" of the victim. RPC 1.6(b)(1).[6]

Defendant's argument that the Attorney provided impermissible lay opinion testimony is raised for the first time on appeal. When a defendant does

[6] Because we review the applicability of the attorney-client privilege and its potential waiver de novo, we need not address defendant's contention that the judge erred in admitting the evidence without conducting an evidentiary hearing. We note only that defendant raised the issue for the first time as part of his severance motion, just prior to jury selection, and long after the Attorney's disclosure of the text messages to law enforcement. Moreover, the record provides a sufficient evidentiary foundation for our de novo review.

not "object to . . . trial court rulings that he [or she] contends were error, we review the issues presented for plain error." State v. Clark, 251 N.J. 266, 286-87 (2022). "This is a 'high bar,' requiring reversal only where the possibility of an injustice is 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Trinidad, 241 N.J. 425, 445 (2020) (citations omitted) (first quoting State v. Santamaria, 236 N.J. 390, 404 (2019); and then quoting State v. Macon, 57 N.J. 325, 336 (1971)); see also R. 2:10-2.

Lay opinion testimony is admissible subject to two conditions set forth in N.J.R.E 701. First, the lay witness's opinion must be "rationally based on the witness' perception"; second, the opinion must "assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. To satisfy the first condition, the "witness must have actual knowledge, acquired through his or her senses, of the matter to which he or she testifies." State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting State v. LaBrutto, 114 N.J. 187, 197 (1989)).

The second condition limits lay testimony only to that which will "assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 469 (quoting State v. Singh, 245 N.J. 1, 15 (2021)). The second element therefore

precludes "lay opinion on a matter 'as to which the jury is as competent as [the witness] to form a conclusion.'" Id. at 469-70 (alteration in original) (quoting State v. McLean, 205 N.J. 438, 459 (2011)).

Applying these principles, we are satisfied that the Attorney's testimony characterizing defendant's texts as "threatening" satisfied both requirements of N.J.R.E. 701 because it was based on his perceptions of the content, tenor, and volume of the texts, and assisted the jury in understanding why he felt legally obligated to disclose the texts to law enforcement and the victim. The fact that a jury can evaluate evidence for itself does not render testimony about that evidence categorically "unhelpful," nor does the lay witness "usurp[] the jury's role" in offering the testimony. Singh, 245 N.J. at 20. Instead, the testimony is admissible because the jury remains "free to discredit" the witness's opinion. Ibid. We therefore reject defendant's contention that the Attorney's testimony either usurped the jury's function or opined about defendant's guilt. Cf. McLean, 205 N.J. at 453 ("[E]xperts may not, in the guise of offering opinions, usurp the jury's function by, for example, opining about [a] defendant's guilt or innocence, or in a manner that otherwise invades the province of the jury to decide the ultimate question." (citation omitted)).

IV.

In Point III, defendant argues that the judge's "failure to conduct the requisite inquiry resulted in the wrongful denial of defendant's right to self-representation . . . [and] requires reversal." Specifically, defendant asserts the judge's inquiry "focus[ed] on whether [defendant] possessed technical knowledge, rather than ascertaining whether he was knowingly and voluntarily waiving his right to counsel."

"The corollary to the right of a criminal defendant to be represented by an attorney is the defendant's right to represent himself [or herself]." State v. King, 210 N.J. 2, 16 (2012) (citing Faretta v. California, 422 U.S. 806, 814 (1975)). "[T]he Sixth Amendment affords defendants the right to represent themselves when the decision to do so is made knowingly and intelligently." State v. Outland, 245 N.J. 494, 505 (2021) (citing Faretta, 422 U.S. at 819, 835). To that end, "[a] two-step process has emerged. First, a defendant must assert the right of self-representation 'in a timely fashion' so as not to 'disrupt the criminal calendar, or a trial in progress.'" State v. Rose, 458 N.J. Super. 610, 626 (App. Div. 2019) (quoting State v. Buhl, 269 N.J. Super. 344, 362 (App. Div. 1994)).

Second, to ensure that a defendant's waiver of counsel is knowing and intelligent, trial courts must conduct a searching inquiry to inform defendants seeking to proceed pro se about:

> (1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that [the] defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that the lack of knowledge of the law may impair [the] defendant's ability to defend himself or herself; (5) the impact that the dual role of counsel and defendant may have; (6) the reality that it would be unwise not to accept the assistance of counsel; (7) the need for an open-ended discussion so that the defendant may express an understanding in his or her own words; (8) the fact that, if [the] defendant proceeds pro se, he or she will be unable to assert an ineffective assistance of counsel claim; and (9) the ramifications that self-representation will have on the right to remain silent and the privilege against self-incrimination.
>
> [State v. DuBois, 189 N.J. 454, 468-69 (2007) (synthesizing the requirements set forth in State v. Crisafi, 128 N.J. 499, 511-12 (1992), and State v. Reddish, 181 N.J. 553, 594-95 (2004)).]

When the trial court "analyzes a defendant's responses" to this inquiry, "it should '"indulge [in] every reasonable presumption against waiver."'" King, 210 N.J. at 19 (alteration in original) (quoting State v. Gallagher, 274 N.J. Super. 285, 295 (App. Div. 1994)). "Caselaw makes clear that the goal of the colloquy is not to ascertain whether a defendant possesses technical legal knowledge." Outland, 245 N.J. at 506; see also Faretta, 422 U.S. at 836 ("[The defendant's] technical legal knowledge . . . was not relevant to an assessment of his knowing

exercise of the right to defend himself."). Rather, "[t]he purpose of the extensive and detailed inquiry is to apprise the defendant 'of the dangers and disadvantages of self-representation, so that the record will establish that [the defendant] knows what he [or she] is doing and [the defendant's] choice is made with eyes open.'" Outland, 245 N.J. at 506 (quoting Faretta, 422 U.S. at 835).

"[A] defendant's decision to proceed pro se may be fraught with risk but . . . the existence of such risk provides no basis to deny a defendant the right to make that choice." King, 210 N.J. at 17 (citing Faretta, 422 U.S. at 834). Still, we "review a trial court's denial of a defendant's motion to represent himself [or herself] for abuse of discretion," and "[w]hen a defendant's right of self-representation is violated, reversal of the defendant's conviction is warranted." Outland, 245 N.J. at 507.

Here, the judge engaged defendant in an extensive and painstaking inquiry regarding his desire to represent himself at trial. The inquiry culminated with the following exchange:

> [COURT:] Do you feel that you have the necessary qualifications, based on any training and experience, to represent yourself?
>
> [DEFENDANT:] I can honestly say no.
>
> [COURT:] All right. That being said[,] the fact that you have said no, I do find that you would actually be

> hindering yourself by representing yourself. That your motion to represent yourself will be denied. That . . . it would[not] be a . . . voluntary and knowing waiver of your right to an attorney.

Defendant is correct that the judge's inquiry erroneously focused on defendant's "technical legal knowledge as opposed to determining whether he was knowingly and intelligently waiving his right to counsel." Id. at 508. Such an inquiry was condemned in Outland as falling "short of that required by our jurisprudence." Id. at 507.

Nevertheless, the judge also denied the request on the ground that defendant's right to self-representation "was[not] exercised in a timely fashion." In support, the judge pointed out that "defendant's application to proceed pro se was made right before the selection of [the] jury." The judge correctly reasoned that "[t]he right of self-representation is not a license to disrupt the criminal calendar or a trial in progress." We discern no abuse of discretion in the judge's ruling.

Indeed, "a request for self-representation must be made before meaningful trial proceedings have begun," and "[t]he right of self-representation cannot be insisted upon in a manner that will obstruct the orderly disposition of criminal cases." Buhl, 269 N.J. Super. at 363. Instead, "[a] defendant desiring to exercise the right must do so with reasonable diligence." Ibid. As here, in Buhl, we

determined the defendant's request to proceed pro se made "immediately before the jury was impaneled . . . was untimely." Id. at 364; see also State v. Pessolano, 343 N.J. Super. 464, 473 (App. Div. 2001) (determining a request to proceed pro se made "after jury selection was completed" was untimely). Similarly, in State v. Roth, 289 N.J. Super. 152, 163-64 (App. Div. 1996), we held that a defendant's request to proceed pro se was untimely when the defendant, "one day before his scheduled . . . trial date . . . , for the first time articulated his reasons for discharging his attorney." In contrast, pro se requests made "well in advance of trial," Rose, 458 N.J. Super. at 628, and "about six weeks prior to trial," State v. Thomas, 362 N.J. Super. 229, 240 (App. Div. 2003), were deemed timely.

Because the "searching inquiry" required by Crisafi and Reddish is the second step of the two-step process, Rose, 458 N.J. Super. at 627, once the judge determined defendant's untimely request failed to satisfy the first step, the judge was not obligated to satisfy the requirements of step two. See Pessolano, 343 N.J. Super. at 473 (affirming denial of untimely request without addressing the Crisafi requirements). Thus, we affirm the denial of defendant's request to proceed pro se based on the untimeliness of the request.

V.

In Point IV, defendant argues "the prosecutor's summation comments" on defendant's courtroom outbursts "deprived [him] of a fair trial." Defendant asserts the judge inappropriately applied this court's narrow holding in State v. Rivera, 253 N.J. Super. 598, 605 (App. Div. 1992), instead of instructing the jury to disregard defendant's comments.

In Rivera, "we held that a prosecutor should not ordinarily be permitted to comment on a non-testifying defendant's demeanor or behavior during trial." State v. Adames, 409 N.J. Super. 40, 57 (App. Div. 2009) (citing Rivera, 253 N.J. Super. at 604). "We then set forth a fairly narrow exception with attendant safeguards . . . ." Ibid. We stated:

> Where the evidence of a [defendant's] display of emotion is active, the trial judge is faced with a difficult decision. . . . The better rule in such cases is to prohibit any comment by the State unless the demeanor evidence is clearly injected as an unsworn attempt to influence the jury. A pleading type of crying directed at the jury may be a clear appeal for compassion or sympathy, and might justify some appropriate comment. A tearful sob during adverse testimony may not justify any comment.
>
> An absolute rule of prohibition might hamstring the State in the presentation of its case, giving a defendant free access to the jury without comment by the State. There is a difference, however, between commenting upon the fact of the behavior . . . , and casting aspersions on the defendant's choice not to testify. We direct, therefore, that in each situation a

> record be made of the behavior or statement by [the] defendant before the State's comment, State v. Farrell, 61 N.J. 99, 102 n.1 (1972), and that the court pass upon the State's intended comment before it is made. Cf. R. 1:7-3. In most cases a simple charge to the jury that it should disregard the defendant's comments or demeanor will suffice. Only in the clearest cases should the State be permitted some responsive comment, and then the comment must not infringe upon [the] defendant's right not to testify.
>
> [Rivera, 253 N.J. Super. at 604-05.]

Here, defendant's repeated outbursts were made in the presence of the jury as the victim was testifying. When the victim was asked about her relationship with defendant, defendant interjected, saying to the victim: "[T]ell the truth," and "I'm going to put you in jail." Both the judge and defense counsel directed defendant to refrain from making outbursts. Defendant apologized to the jury for his comments, saying, "Sorry, jury." A few moments later, defendant again interjected, telling the victim: "[n]o more acting," and "[p]lease answer [the prosecutor's] question." The judge excused the jury and reprimanded defendant. While the jury was excused, defendant told the victim to "pull [it] together," accused the victim of "lying" and "acting," and commented that he found the victim's testimony "comical." After the jury returned to the courtroom, the judge instructed them that "any comments made by . . . defendant . . . should not be considered . . . in regards to whether or not the State has met its burden."

Nonetheless, defendant continued to make non-verbal gestures during the victim's testimony.

During the charge conference, the prosecutor advised the judge that during his summation, he intended to comment on defendant's outbursts in accordance with Rivera. Over defendant's objection, the judge permitted the prosecutor "to make brief and limited comment about the explicit statements made by . . . defendant, but not to comment on any demeanor of . . . defendant" or "on [d]efendant's election not to testify." In support, the judge found "defendant's unsworn statements made to [the victim], for whom he ha[d] a [f]inal [r]estraining [o]rder . . . , was an attempt to undermine [the victim's] credibility and an attempt to influence the jury, as well as to exhibit power and control over [the victim] before the jury." The judge also found that defendant's "statements were made voluntarily and willfully, not merely [as] an involuntary showing of emotions."

In accordance with the judge's ruling, during summations, the prosecutor commented:

> You also have what you saw and heard with your own eyes in this courtroom. When [the victim] took the stand to testify, what did . . . defendant do? He yelled out to [the victim]. Do you remember when I opened initially I said . . . this case is about power and control. And [the victim] came in here to talk, just to tell what

> happened. And what did . . . defendant do? Tell the truth, . . . or they'll throw you in jail; no more acting. Controlling [the victim] or attempting to control [the victim] from that table in this very courtroom; couldn't even let [the victim] have a moment here.
>
> That shows you what's on his mind and his feelings with regard to [the victim].

We discern no error in the judge's ruling or in the prosecutor's related comments. Both comported with the exception and required safeguards enunciated in Rivera. See Adames, 409 N.J. Super. at 59 (explaining that "the prosecutor never sought to make a record of the incident . . . and never cleared her summation comment with the trial judge before it was made, as required by Rivera."). Although the judge had given a curative instruction, by noting defendant "continued to do it" despite her order to desist, the judge impliedly determined that the outbursts were impactful and could not be cured with a simple limiting instruction, prompting the judge to grant the prosecutor's request. See ibid. ("[O]ur opinion in Rivera permits prosecutorial comment only in the 'clearest cases' and only when a simple jury instruction would not be sufficient." (citation omitted) (quoting Rivera, 253 N.J. Super. at 605)).

Indeed, defendant's outbursts were affirmative acts, rather than "display[s] of emotion," and evidenced a clear attempt to undermine the victim's credibility and "influence the jury." Rivera, 253 N.J. Super. at 604. By telling the victim

to "tell the truth," defendant implied to the jury that the victim was not credible. Likewise, defendant's apology directed to the jury was an "'unsworn attempt to influence the jury.'" Adames, 409 N.J. Super. at 58 (quoting Rivera, 253 N.J. Super. at 604-05). If the judge had denied the prosecutor's request to comment on defendant's outbursts, then defendant would have had "free access to the jury without comment by the State," contrary to our holding in Rivera, 253 N.J. Super. at 605. Critically, the record reflects that the prosecutor did not "cast[] aspersions on . . . defendant's choice not to testify." Ibid. Thus, the prosecutor's comment was confined to "the fact of the behavior" and did not result in a violation of defendant's Fifth Amendment privilege against self-incrimination. Ibid.

VI.

In Point V, defendant argues the prosecutor committed misconduct during summations by "highlight[ing] . . . inadmissible opinion evidence of . . . [the Attorney] and also misstat[ing] evidence." Specifically, defendant asserts the prosecutor: (1) referred to the Attorney as "the Princeton and Harvard lawyer" in an "attempt[] to use the witness's status to enhance his credibility"; and (2) misstated that defendant drove his "'van from Pennsylvania . . . '" in order to

suggest the long distance that defendant traveled "was a substantial step toward committing an aggravated assault."

"[P]rosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries . . . ." State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. Frost, 158 N.J. 76, 82 (1999)). As such, prosecutors are "'afforded considerable leeway in closing arguments'" so long as their comments "stay[] within the evidence and the legitimate inferences [drawn] therefrom." Ibid. (first quoting Frost, 158 N.J. at 82; and then quoting State v. R.B., 183 N.J. 308, 330 (2005)). In contrast, making "'[r]eferences to matters extraneous to the evidence' may constitute prosecutorial misconduct," State v. Williams, 244 N.J. 592, 607 (2021) (quoting State v. Jackson, 211 N.J. 394, 408 (2012)), as would "making inaccurate [legal or] factual assertions to the jury," State v. Garcia, 245 N.J. 412, 435 (2021); State v. Smith, 167 N.J. 158, 178 (2001).

Nonetheless,

> even when a prosecutor's remarks stray over the line of permissible commentary, our inquiry does not end. Rather, we weigh "the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial," and we reverse a conviction on the basis of prosecutorial misconduct only if "the conduct was so egregious as to deprive [the] defendant of a fair trial."

> [McNeil-Thomas, 238 N.J. at 275 (quoting State v. Wakefield, 190 N.J. 397, 437 (2007)).]

Stated differently, we will not reverse a conviction based on prosecutorial misconduct during the State's summation unless it "substantially prejudice[d] the defendant's fundamental right to have the jury fairly evaluate the merits of his [or her] defense." Garcia, 245 N.J. at 436 (quoting State v. Bucanis, 26 N.J. 45, 56 (1958)).

In making that determination, "an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred." Williams, 244 N.J. at 608 (quoting Frost, 158 N.J. at 83). "Factors to be considered in making that decision include, '(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them.'" Ibid. (quoting Frost, 158 N.J. at 83).

Defendant takes issue with the following comment made by the prosecutor during summation:

> I only have to prove one substantial step. So let's talk about that. Running an [i]nternet search . . . to find [the victim]. Is that enough? Is that a substantial step? Honestly probably not. That is not enough. How about

> getting in a van from Pennsylvania and driving all the way to [the victim] . . . .

Defense counsel immediately objected, arguing there was no "evidence of [defendant] coming from Pennsylvania" presented during the trial. Counsel acknowledged, however, that defendant's car displayed "a Pennsylvania plate." In response, the judge instructed the jury that "summations [were] argument of the attorneys, but [the jury's] recollection [of the evidence] control[led]."

Defense counsel's objection was proper, as the evidence presented at trial was limited to the fact that defendant's van had Pennsylvania license plates. However, the prosecutor's error was harmless. "[W]hether an error is harmless depends upon some degree of possibility that it led to an unjust verdict. The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Bankston, 63 N.J. 263, 273 (1973). Although the judge did not strike the objectionable comment from the record, viewing the prosecutor's summation in its entirety, there is no possibility that the fleeting comment led to an unjust verdict. See State v. Gorthy, 226 N.J. 516, 540 (2016) ("[A] 'fleeting and isolated' remark is not grounds for reversal." (quoting State v. Watson, 224 N.J. Super. 354, 362 (App. Div. 1988))).

Defendant also takes issue with the prosecutor's assessment of the threats defendant made against both victims:

> [L]ook [at] what [the Inmate] said, . . . judge his words. . . . [D]efendant said he wanted to kill [both victims] and he wanted to choke them to death. Where else did you hear that from? You heard that from [the Attorney], the Princeton and Harvard lawyer. So is [the Inmate] an opportunist? Absolutely, he wants something in exchange for his testimony. Does he have an ax[e] to grind against . . . defendant? He does. But he told you the exact same thing as the Princeton and Harvard lawyer; no shocker here.

Defense counsel objected, arguing that "[the Attorney] never said that." The judge again instructed the jury that the prosecutor's remarks in summation were "argument[s]," and "[i]f [their] recollection differ[ed], . . . [their] recollection w[ould] control in regards to the evidence."

The prosecutor's comment was a "reasonable inference[] . . . drawn from th[e] evidence" presented to the jury that both the Attorney and the Inmate testified defendant threatened the victims' lives. McNeil-Thomas, 238 N.J. at 283 (LaVecchia, J., dissenting). Further, the judge's instruction reduced the potential for any prejudice. For the first time on appeal, defendant argues that the prosecutor's "two references to [the Attorney] as 'the Princeton and Harvard lawyer' were . . . improper attempts to use the witness's status to enhance his credibility." It is well-settled that "a prosecutor may not express a personal

belief or opinion as to the truthfulness of his or her witness's testimony." State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993). However, a prosecutor may argue that a witness is credible based on evidence adduced at trial. See State v. Scherzer, 301 N.J. Super. 363, 445 (App. Div. 1997).

Here, the prosecutor's reference to the Attorney's prestigious background conformed with the governing principles and was supported by the record. During cross-examination, the victim confirmed that the Attorney was "a very distinguished lawyer" who attended "Harvard Law School." During redirect, the victim testified that the Attorney attended "Princeton [University]." Because defendant failed to object to the prosecutor's reference, the remarks "will not be deemed prejudicial." State v. Kane, 449 N.J. Super. 119, 141 (App. Div. 2017) (quoting Frost, 158 N.J. at 83); Frost, 158 N.J. at 84 ("The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made."). Nevertheless, "[h]aving reviewed the statements carefully, we are unconvinced that there was error, let alone plain error, warranting a new trial." Kane, 449 N.J. Super. at 141.

VII.

Finally, in Point VI, defendant argues the judge imposed an excessive sentence by finding "aggravating factors that were not based on sufficient

credible evidence in the record[] and fail[ing] to find mitigating factors that were supported by the record." Specifically, defendant asserts the judge erred in finding aggravating factors one, three, and nine, and failing to find mitigating factors one, two, eight, and nine.

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 th[at] 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)).]

Here, the judge found the following aggravating factors: one, as to counts one through four, N.J.S.A. 2C:44-1(a)(1) ("nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner"); three, N.J.S.A. 2C:44-1(a)(3) ("risk that the defendant will commit another offense"), six, 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"), nine, N.J.S.A. 2C:44-1(a)(9) ("need for deterring the defendant and others from violating the law"), and fifteen, N.J.S.A. 2C:44-1(a)(15) ("offense involved an act of domestic violence, as that term is defined in [N.J.S.A. 2C:25-19(a)] and the defendant committed at least one act of domestic violence on more than one occasion") as to all counts; and twelve as to counts one, two, and four, N.J.S.A. 2C:44-1(a)(12) ("[t]he defendant committed the offense against a person who the defendant knew or should have known was [sixty] years of age or older"). The judge found no mitigating factors, and found "by clear and convincing evidence that the aggravating factors substantially outweigh[ed] the non-existent mitigating factors."

On counts one, two, three, seven, and eight, defendant was sentenced to concurrent five-year terms of imprisonment, each with a two-and-one-half-year period of parole ineligibility. On count five, defendant was sentenced to a flat five-year term, to run concurrent with the other counts. On both fourth-degree convictions (counts four and six), defendant was sentenced to concurrent eighteen-month terms of imprisonment, to run concurrent with the other counts. The judge rejected the State's request for consecutive sentences.

The judge conducted a thorough and careful analysis of all the aggravating and mitigating factors and provided comprehensive findings to support the sentence, which findings are amply supported by the record. Contrary to defendant's contentions, the judge neither engaged in impermissible double counting nor imposed an unduly severe sentence. See Fuentes, 217 N.J. at 75 ("In appropriate cases, a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense."); State v. A.T.C., 454 N.J. Super. 235, 254-55 (App. Div. 2018) ("A [sentencing] court . . . does not engage in double-counting when it considers facts showing [the] defendant did more than the minimum the State is required to prove to establish the elements of an offense."); see also State v. Kiriakakis, 235 N.J. 420, 436 (2018) ("'[W]hen the aggravating factors preponderate, sentences will tend toward the higher end of the range.'" (quoting State v. Natale, 184 N.J. 458, 488 (2005))).

Specifically, as to aggravating factor one, the judge stated:

> [Defendant's] behavior demonstrates an escalating pattern of anger and violence against [the victim], that escalated to the point where [defendant was] not concerned as to the outcome. [Defendant] merely wanted to cause as much havoc as [defendant] could by running [the victims] down, using [a] vehicle, and causing great fear and potential injury above and beyond the factor of significant bodily injury.

> [Defendant] had no concern for the public. The [c]ourt will find factor [one] as to counts one through four, but afford it little weight to insure no interpretation of double counting by this [c]ourt.

As to aggravating factor three, the judge explained:

> The [c]ourt finds that [defendant's] actions have resulted in a guilty verdict, as well as [his] prior charges, indicate a pattern of violent behavior involving [the victims] and an inability to control [his] anger. [Defendant's] inability to control [his] outbursts towards [the victim] during the trial, despite multiple warnings, reinforces the [c]ourt's belief that [defendant is] likely to commit another offense until [his] anger is properly managed.
>
> Further[, defendant] ignored the provisions of a domestic violence restraining order to track down and commit an act of violence against the victim, illustrating the difficulties the justice system has had in curbing [his] violent behavior. The [c]ourt finds that [defendant is] extremely likely to commit another offense unless [his] mental health concerns and anger issues are adequately addressed. And therefore the [c]ourt will find aggravating factor [three] and afford it great weight against [defendant]. This factor is applied to all counts.

Regarding aggravating factor nine, the judge expounded:

> [T]he [c]ourt finds a great need for deterring [defendant] and others from violating the law. The [c]ourt finds that driving at high speeds against the flow of traffic while attempting to ram another car off the [road] created an extreme risk of death or injury to [defendant], the victims, and the public.

. . . .

> The [c]ourt finds a specific need to deter [defendant] from violating the law. [Defendant was] previously sentenced for simple assault and criminal mischief for action taken against [the victim]. Further[,] the [c]ourt ordered [defendant] not to contact [the victim]. Thereafter [defendant] committed additional acts of domestic violence against the victim, despite the intervention of the justice system. [Defendant's] recent actions also included violence.
>
> Therefore the [c]ourt finds that [defendant's] aggression and acts of violence have increased and there is an immediate need to deter [him] from using violence . . . . The [c]ourt weighs aggravating factor [nine] strongly against [defendant] as to all counts.

As to mitigating factors one, two, eight, and nine, the judge rejected each one, finding them unsupported by the credible evidence in the record. See N.J.S.A. 2C:44-1(b)(1) ("defendant's conduct neither caused nor threatened serious harm"); N.J.S.A. 2C:44-1(b)(2) ("defendant did not contemplate that the defendant's conduct would cause or threaten serious harm"); N.J.S.A. 2C:44-1(b)(8) ("defendant's conduct was the result of circumstances unlikely to recur"); N.J.S.A. 2C:44-1(b)(9) ("character and attitude of the defendant indicate that the defendant is unlikely to commit another offense").

In sum, based on our review of the record, we are satisfied the judge set forth reasons for defendant's sentence with sufficient clarity and particularity,

made findings that are amply supported by competent and credible evidence in the record, correctly applied the sentencing guidelines in the Code, and did not abuse her sentencing discretion. The sentence does not shock our judicial conscience, and we reject defendant's specious contentions to the contrary.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION