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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5228-18**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELLIOT P. NOCK, a/k/a  
ELLIOT P. KNOCK,

Defendant-Appellant.

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Submitted February 7, 2023 – Decided June 12, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law  
Division, Camden County, Indictment No. 15-10-3018.

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

Grace C. MacAulay, Camden County Prosecutor,  
attorney for respondent (Kevin J. Hein, Assistant  
Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Elliot Nock of the first-degree murder of N.J. (Nick Johnson), N.J.S.A. 2C:11-3(a)(1) and (2).<sup>1</sup> The jury also convicted defendant of related weapons offenses of second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a), and second-degree unlawful possession of a firearm without a permit, N.J.S.A. 2C:39-5(b). Following his jury convictions, defendant pled guilty to second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b).

The court granted the State's motion to sentence defendant to a mandatory extended term because he had previously been convicted of attempted murder. Defendant was then sentenced to life in prison subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appeals from his convictions and sentence. Concerning his convictions, defendant argues that (1) the trial court erred in admitting evidence of a second shooting under N.J.R.E. 404(b); (2) the court erred in instructing the jury on the Rule 404(b) evidence; (3) the prosecutor engaged in misconduct by misstating the findings of the State's ballistics expert; and (4) the court erred in

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<sup>1</sup> Because we believe that the safety interests of the victims' families and witnesses outweigh the Judiciary's commitment to transparency in this opinion, we use initials and fictitious names for the victims and witnesses.

admitting pretrial statements given by a recanting witness. Having reviewed the record and applicable law, we reject defendant's arguments concerning his convictions. His argument concerning the Rule 404(b) evidence and the prosecutor's alleged misconduct are based on mischaracterizations of the record. In addition, we find no abuse of discretion or error in the admission of the prior statement by the recanting witness. Therefore, we affirm defendant's convictions.

In challenging his sentence, defendant argues that the court erred in (1) finding that he was subject to an extended term; (2) failing to accord him certain jail credits; (3) running his sentence consecutively to a federal sentence he was serving; and (4) imposing an excessive sentence. Because the record does not support certain findings the court made in sentencing defendant, we remand for resentencing.

## I.

We summarize the facts from the record, including the evidence presented at trial. The jury heard testimony from twenty-one witnesses and considered more than 165 documents and items admitted into evidence.

At approximately 6:00 p.m. on November 10, 2014, Johnson was shot multiple times while standing on Haddon Avenue in Camden. Just over two

hours later, around 8:30 p.m., D.D. (David Dixon) was shot multiple times while standing on Morgan Boulevard in Camden. Johnson and Dixon both died from their gunshot wounds.

As will be explained, defendant was indicted for the murders of Johnson and Dixon, but the charges were severed. This appeal involves defendant's convictions and sentence related to the murder of Johnson. At trial, three witnesses testified that they saw defendant shoot Johnson. Another witness gave a statement to the police that he saw defendant shoot Dixon on Morgan Boulevard. The State also presented ballistics evidence that bullets recovered from the shooting of Johnson and from Morgan Boulevard were fired from the same gun.

A. The Haddon Avenue Shooting.

S.F. (Susan Fletcher) testified that on the evening of November 10, 2014, she and a group of three friends, including K.H. (Kyle Hobart), were "chillin'" on a front porch of a building on Haddon Avenue. Fletcher explained that at approximately 6:00 p.m., defendant approached the group and started arguing with Hobart. Fletcher had known defendant for approximately nine to ten years and had seen him many times.

While defendant was arguing with Hobart, Johnson came by and intervened in the argument. Fletcher then heard defendant curse at Johnson and saw defendant pull out a gun and shoot Johnson several times. Johnson stumbled and eventually collapsed on the street.

Fletcher then saw defendant run away and put the gun in his back pocket. She described the gun as "silver" and "like one of the[] guns that you play Russian roulette with." According to Fletcher, the gun had a "flickery thingy" "[w]here the bullets go." Fletcher went on to testify that she did not see anyone else with a gun. She also testified that she went to the police station that same night, was shown a photograph of defendant, and identified him as Johnson's shooter.

Approximately a week after Johnson was shot, Hobart gave a statement to the police. He stated that on the night of the shooting, he was hanging out on the front steps of a building on Haddon Avenue. Defendant came by and had a "heated conversation" with Hobart because defendant had previously been in a fight and Hobart had not helped him. Johnson then "walked up" as Hobart and defendant were speaking, and defendant began arguing with Johnson. While Hobart was paying attention to Johnson, defendant pulled out a gun and started

shooting. Hobart stated that he did not see the gun, but he heard it, and it sounded like a "little gun" or "small gun."

According to Hobart, after Johnson was shot, defendant "just walked off" and Hobart ran over to help Johnson. Shortly thereafter, Hobart went to a liquor store to get a drink. Hobart also explained that he did not see anyone else with defendant when Johnson was shot.

After giving his statement to the police, Hobart was shown a photo array consisting of eight photographs. Hobart identified a photograph of defendant as the shooter and stated he was "positive" about his identification.

At trial, Hobart testified differently from his statement to the police. Hobart testified that an unknown person ran up to him and Johnson, fired multiple shots at Johnson, and then ran away. Hobart denied seeing defendant on the night of the shooting or seeing defendant shoot Johnson.

Following that testimony, the trial court conducted a Gross hearing outside the presence of the jury.<sup>2</sup> The court granted the State's application to admit into evidence Hobart's prior video-recorded statement to the police. After the jury heard Hobart's prior statement, Hobart acknowledged that he had been

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<sup>2</sup> State v. Gross, 121 N.J. 1 (1990). A Gross hearing is a Rule 104 hearing conducted by the court to determine the admissibility of a prior inconsistent statement by assessing whether the statement is reliable.

present on the night of the shooting and that he had identified defendant as the shooter. He testified, however, that he had "lied" to the police, and that defendant was "not the shooter." When asked why he had changed his statement, Hobart responded: "[Defendant is] not the killer. Simple as that." Hobart also testified that he had heard from the police beforehand that defendant was the suspect, so when he identified defendant's picture, he selected it "[b]ecause it was Elliot Nock." Hobart claimed that he did not know the identity of the shooter and he asserted that he went along with identifying defendant because the police had identified defendant as the suspect.

D.F. (Dan Frank) also testified at trial and stated that he saw defendant shoot a man on Haddon Avenue. Frank did not come forward to tell what he claimed he saw until July 2016, ten months after he had been arrested on federal drug and weapons charges.

At trial, Frank testified that on November 10, 2014, he was on Haddon Avenue around 6:00 p.m. helping his grandmother empty out her home for a renovation. While on his grandmother's porch, Frank heard a commotion about a block away. He saw a group of people "scattering, dodging, getting out [of] the way." Frank then saw two men, one with his back towards Frank, who was

backing up, and another "guy approaching him." Frank later identified the "guy approaching" as defendant.

According to Frank, the man who was backing up "had his hands in the air," "[l]ike in a defensive position." The "guy approaching" gestured towards his jacket as if he was going "[t]o pull a weapon out" from "his waistband." Frank could not tell what type of handgun it was but stated it was "dark" in color, and he did not think it was silver. The "guy approaching" pointed the gun towards the other man and fired three or four shots. The victim tried to flee but fell, and the gunman shot him "two or three more times." The victim eventually collapsed in the middle of the street on Haddon Avenue and the shooter fled.

Frank went on to explain that he had lived in the area his entire life and had seen the shooter around the area several times before the shooting. Frank knew the shooter as "Elliot Nock" and identified him at trial, stating that he was "100 percent sure" defendant was the shooter. Frank also had identified defendant as the shooter prior to trial in a photo array. On cross-examination, Frank admitted that he was testifying against defendant as part of a cooperating plea agreement.

At trial, the State called several other witnesses to testify about what they saw on the evening of November 10, 2014, on Haddon Avenue. Those witnesses



explained that they had seen a group of people on the street. Two of the witnesses thereafter heard gunshots. None of the witnesses, however, saw the actual shooting or identified defendant as the shooter.

After the shooting, Johnson was taken to Cooper Hospital where he was pronounced dead. A medical examiner later performed an autopsy and found five gunshot wounds on Johnson's body. Several bullet specimens were collected and saved for analysis. One bullet was also found in the body bag used to transport Johnson's body.

B. The Morgan Boulevard Shooting.

Approximately two and one-half hours after Johnson was shot, a shooting occurred on Morgan Boulevard in Camden. The shooting on Morgan Boulevard took place approximately two miles from the shooting of Johnson on Haddon Avenue.

T.M. (Tom Murray) gave a statement to the police telling them that he had witnessed the shooting. Murray informed the police that on November 10, 2014, he and a friend arrived on Morgan Boulevard at around 7:00 p.m. and parked next to a store. He explained that they had come to Morgan Boulevard to buy drugs and they were parked "for a long time." While parked, Murray saw defendant fire a handgun. Murray called the shooter a "Spanish boy" and stated

that he had seen the shooter before "quite a few times" but "never knew who he was." When asked if he knew the shooter's name, Murray responded: "I think it's Elliot. I don't know, I ain't going to lie, I – first they say Elliot is his brother, I just know he say he got [sic] a twin brother and I don't know if his name is Elliot or that's his brother." Murray then added: "But I know what he looked like."

The police showed Murray a photo array with eight photographs. Murray was shown the photographs one by one in random order. When Murray saw defendant's photograph, he stated: "This is him." He then added: "I seen [sic] him shoot . . . ." When asked if he was sure, Murray responded: "[100] percent. [100] percent."

At trial, Murray testified differently. Initially, he agreed that he was at Morgan Boulevard on the night of the shooting around 8:30 p.m., but testified that he did not recall speaking to the police about the shooting. He then stated that he remembered talking to an officer but did not remember giving a statement. When shown his prior statement, Murray responded: "[O]kay, I gave this statement[,] but I don't remember nothing else." After reviewing portions of his prior statement, Murray stated that he did not remember seeing anyone

shoot a gun, nor did he remember identifying the shooter. He claimed the only thing he could remember was that he had heard "the gunshot."

The trial court then conducted a Gross hearing outside the presence of the jury and permitted the State to present redacted portions of Murray's statement to the police and his out-of-court identification of defendant from the photo array. After the redacted portions of the statement were played for the jury, Murray continued his testimony. He acknowledged that he had been on Morgan Boulevard that evening and had heard a shot fired. He claimed, however, that the shooting occurred "around the corner," and he "didn't see anyone with a handgun" and that he "didn't see anyone firing."

Murray also claimed that he did not remember anything because he "was getting high all the time" on heroin and other drugs. He also stated that he was high at the time that he was questioned by the police.

#### C. The Ballistics Evidence.

A detective from the Camden County Prosecutor's Office had collected five bullets from the scene of the Morgan Boulevard shooting. Those bullets were preserved for testing and comparison to the bullets from the Haddon Avenue shooting.

Thereafter, Detective Christopher Clayton of the New Jersey State Police Ballistics Unit conducted ballistics tests on the bullets from the two shootings. Qualified as an expert in the field of firearms identification at trial without objection, Clayton examined the five bullets obtained from Johnson's body and his body bag. Clayton explained that four of those bullets were .38 caliber lead bullets and the other was a .38 caliber metal-jacket bullet. Clayton went on to explain that all bullets are made of lead, but metal-jacket bullets have a metal or copper plating around the lead to make them harder. He further explained that revolvers can use both plain lead and metal-jacket bullets.

After conducting testing, Clayton concluded that the four lead bullets were fired from the same handgun. His comparison of the metal-jacket bullet to the lead bullets was "inconclusive," meaning that the plating around the lead prevented markings with sufficient detail that could be used for comparison to the markings on the softer, plain lead bullets.

Clayton also tested the bullets from the Morgan Boulevard shooting. Those bullets consisted of three .38 caliber lead bullets and two .38 caliber metal-jacket bullets. After cross comparing the bullets from both shootings, Clayton determined that two of the lead bullets from the Morgan Boulevard shooting matched the four lead bullets from the shooting of Johnson and were

shot from the same gun. He explained that the third lead bullet from the Morgan Boulevard shooting was "deformed," meaning the "bullet was wiped, it was damaged, [and] you [could not] see . . . marks on [it]." Accordingly, his comparisons regarding that bullet were inconclusive. He also concluded that the metal-jacket bullets from both shootings matched and were fired from the same gun.

In summary, Clayton opined that all the lead bullets recovered from the shooting of Johnson matched two of the lead bullets recovered from the Morgan Boulevard shooting and all those bullets were fired from the same gun. Clayton also opined that the metal-jacket bullet recovered from the shooting of Johnson matched the two metal-jacket bullets recovered from the Morgan Boulevard shooting and that all those bullets were fired from the same gun. Clayton could not conclude that the lead bullets and the metal-jacket bullets were fired from the same gun because those bullets could not be conclusively compared.

On cross-examination, Clayton acknowledged that he could not determine that only one gun was used at each of the shootings. In that regard, although he had testified that a revolver was capable of shooting both types of bullets, he explained he was unable to conclude that the lead bullets were fired from the

same gun as the metal-jacket bullets. Law enforcement officers never recovered any handgun connected with the shootings.

D. Defendant's Arrest and Charges.

On November 19, 2014, defendant was arrested at a home in Long Branch. Thereafter, defendant was indicted for crimes related to the murders of Johnson and Dixon. Specifically, a grand jury indicted defendant with two counts of first-degree murder; two counts of second-degree possession of a weapon for an unlawful purpose; and two counts of second-degree unlawful possession of a handgun without a permit.

In June 2016, defendant moved to sever the counts related to the charges involving Johnson from those related to the charges involving Dixon. After hearing argument, the trial court granted that motion. In making its ruling, the court reasoned that the State had not shown that there was a common intent, scheme, or plan between the two shootings. The court did note, however, that the ballistics evidence might be relevant to identify defendant as the shooter, but the court explained that that was not a sufficient reason to try the two murder charges together. In making its decision to sever the charges, the court reasoned that the probative value of trying the cases together was outweighed by the potential prejudice under N.J.R.E. 403.

In March 2017, the State moved to admit certain evidence from the Morgan Boulevard shooting at defendant's trial for the murder of Johnson. Relying on Rule 404(b), the State sought to introduce testimony from Murray and Clayton, the ballistics expert. After hearing argument, the trial court granted the State's motion but precluded any evidence or reference to the murder of Dixon. The court allowed certain testimony from Murray limited to his witnessing defendant shooting a handgun on Morgan Boulevard. The court also permitted Clayton to testify concerning his analysis, comparison, and opinions concerning the bullets recovered from the shootings.

The jury trial on the charges related to the shooting and murder of Johnson was conducted over eight days in May and June 2017. After hearing all the evidence, the jury convicted defendant of the murder of Johnson. The jury also convicted defendant of the two related weapons offenses.

Defendant moved for a new trial, but the trial court denied that motion. The trial court then granted the State's motion for a mandatory extended term based on defendant's prior conviction for attempted murder. Thereafter, the court sentenced defendant on the murder conviction to life in prison subject to NERA. The court merged the conviction for possession of a firearm for an unlawful purpose with the murder conviction. On the conviction for unlawful

possession of a firearm without a permit, the court sentenced defendant to seven years in prison with three years of parole ineligibility and ran that sentence concurrently to the life sentence. Finally, the court ruled that the sentences would run consecutively to the federal sentence defendant was serving.

Thereafter, defendant pled guilty to certain persons not to possess a weapon. Under the plea agreement, the State agreed to recommend dismissal of the charges related to the shooting and murder of Dixon and a concurrent five-year prison term, with five years of parole ineligibility, for the certain persons offense. The court thereafter imposed that recommended sentence and dismissed the remaining charges.

Defendant now appeals from his convictions and sentence.

## II.

On appeal, defendant makes four arguments challenging his convictions and two arguments challenging his sentence. He articulates those arguments as follows:

POINT I – OTHER-CRIMES EVIDENCE OF A SUBSEQUENT SHOOTING WAS ERRONEOUSLY ADMITTED, WHERE (1) [THE] COURT FAILED TO CONDUCT [AN] N.J.R.E. 104 HEARING, (2) BALLISTICS EVIDENCE FAILED TO CONNECT THE TWO SHOOTINGS TO A COMMON WEAPON[,] (3) NO WEAPON WAS RECOVERED IN EITHER SHOOTING, AND (4) TESTIMONY OF



[A] RECANING WITNESS FAILED TO CREDIBLY IDENTIFY DEFENDANT IN THE OTHER CRIME.

POINT II – [THE] TRIAL COURT'S N.J.R.E. 404B LIMITING INSTRUCTIONS MISSTATED THE PURPOSE OF THE OTHER-CRIME[] EVIDENCE AND SUBSTANTIALLY EXAGGERATED THE BALLISTICS EXPERT'S FINDINGS.

POINT III – [THE] TRIAL COURT ERRED IN ADMITTING [KYLE HOBART'S] PRIOR STATEMENT UNDER N.J.R.E. 803(a)(1) BECAUSE IT WAS UNRELIABLE AND CONTRADICTED BY OTHER EVIDENCE IN THE CASE.

POINT IV – THE PROSECUTOR'S SUMMATION MISCHARACTERIZED THE BALLISTICS EXPERT'S FINDINGS, DEPRIVING DEFENDANT OF A FAIR TRIAL.

POINT V – [THE] TRIAL COURT ERRED IN IMPOSING AN EXTENDED TERM SENTENCE ABSENT THE REQUIRED SHOWING THAT THE PREDICATE CRIME, ATTEMPTED MURDER, INVOLVED THE POSSESSION OR USE OF A WEAPON.

POINT VI – [THE] TRIAL COURT IMPOSED A MANIFESTLY EXCESSIVE SENTENCE OF LIFE IMPRISONMENT SUBJECT TO AN 85% PAROLE INELIGIBILITY PERIOD.

A. The Rule 404(b) Other-Crime Evidence.

Defendant's first, second, and fourth arguments all concern the evidence related to the shooting on Morgan Boulevard. Defendant argues that the

ballistics expert did not conclusively opine that all the bullets from the two shootings matched, and he conceded that there might have been two guns involved in both shootings. Based on that view of the ballistics evidence, defendant argues that the State misled the trial court into admitting the other-crime evidence, the trial court thereafter committed reversible error in instructing the jury on the other-crime evidence, and the prosecutor engaged in misconduct in his closing argument by misstating what the ballistics expert had found. We reject all those arguments because they are based on a mischaracterization of the ballistics expert's testimony.

1. The Admission of the Rule 404(b) Evidence.

Generally, evidence of "other crimes, wrongs, or acts" is not admissible, unless used for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(1) and (2). Accordingly, the rule is one of "exclusion rather than a rule of inclusion." State v. J.M., 225 N.J. 146, 161 (2016) (quoting State v. Willis, 225 N.J. 85, 100 (2016)). Courts must, therefore, exercise caution when deciding whether to admit other-crime evidence because it "'has a unique tendency' to prejudice a

jury." Willis, 225 N.J. at 97 (quoting State v. Reddish, 181 N.J. 553, 608 (2004)).

The party seeking to admit other-crime evidence must show that the probative value of the evidence is not outweighed by its apparent prejudice. Reddish, 181 N.J. at 608-09. To meet that burden, the moving party must show that the evidence passes a four-prong test. State v. Cofield, 127 N.J. 328, 338 (1992). In Cofield, the Court set forth the test for admission of evidence under Rule 404(b):

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[Ibid. (quoting Abraham P. Ordovery, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a), 38 Emory L. J. 135, 160 (1989)).]

If the evidence is admitted, the trial court must also sanitize the other-crime evidence and give a limiting instruction to the jury. State v. Skinner, 218 N.J. 496, 516 (2014); State v. Barden, 195 N.J. 375, 390 (2008). Sanitizing

evidence "accommodates the right of the proponent to present relevant evidence and the right of the objecting party to avoid undue prejudice." Barden, 195 N.J. at 390 (quoting State v. Collier, 316 N.J. Super. 181, 195 (App. Div. 1998)). Courts sanitize other-crime evidence by "confining its admissibility to those facts reasonably necessary for the probative purpose." State v. Fortin, 318 N.J. Super. 577, 598 (App. Div. 1999).

In moving to admit the other-crime evidence related to the shooting on Morgan Boulevard, the State represented that it would rely on (1) the eyewitness testimony from Murray; and (2) ballistics evidence that the bullets from both shootings matched and came from the same handgun. The trial court made findings on each of the Cofield factors and found that (1) the evidence sought to be admitted was relevant to the material issue of identity; (2) the two shootings were "similar in kind and reasonably close in time;" (3) there was clear and convincing evidence of the second shooting because there was a witness and ballistics evidence that would link defendant to the second shooting; and (4) the probative value of identification outweighed any prejudicial impact.

Appellate courts accord considerable deference to the trial court's admission of other-crime evidence. State v. Gillispie, 208 N.J. 59, 84 (2011). We only disturb the trial court's decision "where there is a clear error of

judgment." State v. Rose, 206 N.J. 141, 157-58 (2011) (quoting Barden, 195 N.J. at 391). "The admissibility of such evidence is left to the sound discretion of the trial court, as that court is in the best position to conduct the balancing required under Cofield due to its 'intimate knowledge of the case.'" Gillispie, 208 N.J. at 84 (quoting State v. Covell, 157 N.J. 554, 564 (1999)).

Evidence is relevant to a material issue if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Rose, 206 N.J. at 160 (quoting N.J.R.E. 401). The trial court found that the State's proffered evidence was relevant to the material issue of the identification of the person who shot Johnson. Identification was clearly a material issue at trial, and we discern no error or abuse of discretion in the trial court's decision concerning the first prong of the Cofield test.

The second prong "requires that the other-crime evidence be similar in kind and reasonably close in time to the alleged crime, [but it] is implicated only in circumstances factually similar to Cofield." Skinner, 218 N.J. at 515. The trial court found that the evidence of the second shooting on Morgan Boulevard was similar to the shooting on Haddon Avenue given that the shootings occurred on the same evening and in the same city, approximately two miles apart. We discern no error or abuse of discretion in that finding.

The third prong requires the evidence of the other crime to be clear and convincing. Cofield, 127 N.J. at 338. The clear and convincing standard may be satisfied by uncorroborated testimonial evidence. State v. Hernandez, 170 N.J. 106, 127 (2001). Additionally, the trial court can consider the surrounding circumstances to find adequate "support that the third prong of Cofield was satisfied." Rose, 206 N.J. at 163. The trial court relied on the proffered eyewitness testimony from Murray and ballistics evidence to find that there was clear and convincing evidence that defendant participated in the second shooting.

At trial, the State presented Murray's recorded statement to the police and his photo-array identification of defendant as the Morgan Boulevard shooter. The State also called Clayton who testified that he matched the lead bullets recovered from both shootings and that they came from the same gun. Clayton also testified that the metal-jacket bullets recovered from Johnson's body and Morgan Boulevard also matched and came from the same gun.

Defendant argues that the State misled the trial court at the Rule 404(b) motion because the State had represented that all the bullets matched. Defendant also argues that, at trial, Clayton conceded that not all the bullets matched and

there might have been a second gun. We reject defendant's arguments as a mischaracterization of Clayton's testimony.

As already described, Clayton conceded that he could not opine that the lead bullets matched the metal-jacket bullets because the metal jacket caused the markings on those bullets to be different. That concession, however, does not undercut his very clear testimony that all the lead bullets recovered from the shooting of Johnson matched two of the lead bullets recovered from Morgan Boulevard. It also does not undercut Clayton's testimony that the metal-jacket bullet recovered from Johnson's body matched the metal-jacket bullets recovered from Morgan Boulevard.

Clayton was also clear in testifying that, although he could not rule out that there were two guns involved, each type of bullet recovered from both shootings came from the same gun. The State's eyewitness testimony was consistent in that only one shooter was at both Haddon Avenue and Morgan Boulevard.

Given the testimony from Murray and Clayton, we discern no error or abuse of discretion in the trial court's conclusion concerning the third prong of Cofield. Although we agree that it would have been the better practice to conduct a Rule 104 hearing, the trial testimony supported the representations the

State made at the Rule 404(b) motion and provided clear and convincing evidence that defendant was the shooter at the Morgan Boulevard incident.

The final prong is the balancing between the risk of prejudice and probative value of the evidence. The trial court must consider "[i]f other less prejudicial evidence may be presented to establish the same issue." Rose, 206 N.J. at 161 (alteration in original) (quoting Barden, 195 N.J. at 392). The court should exclude the evidence if there is another way to establish the same issue. Ibid. While the fourth prong is a stringent balancing test, "our courts have not frequently excluded highly prejudicial evidence under the fourth prong of Cofield." State v. Garrison, 228 N.J. 182, 198 (2017) (quoting State v. Long, 173 N.J. 138, 162 (2002)).

The trial court concluded that the evidence concerning the Morgan Boulevard shooting was probative to defendant's identification as the person who shot Johnson and that the highly relevant evidence was not outweighed by any potential prejudice. The court also reasoned that the prejudice could be cured by limiting the evidence and by giving an appropriate limiting instruction. Accordingly, the court allowed only evidence of the shooting and not of the death of Dixon. We discern no error or abuse of discretion in the court's balancing of the fourth prong of the Cofield test.



## 2. The Limiting Instruction to the Jury.

A "court's [limiting] instruction [concerning other-crime evidence] 'should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" Barden, 195 N.J. at 390 (quoting State v. Fortin, 162 N.J. 517, 534 (2000)). The limiting instruction "should be given when the evidence is presented and in the final charge to the jury." Ibid. (citing Fortin, 162 N.J. at 534-35).

The trial judge gave a limiting instruction three times: after the jury heard testimony from Murray; after it heard testimony from both Clayton and a detective that investigated the Morgan Boulevard shooting; and in the final charge. Each time, the trial judge told the jury that the evidence related to the shooting on Morgan Boulevard was introduced for the limited purpose of determining who shot Johnson and it could not use the evidence to decide that defendant has a tendency to commit crimes or that he is a bad person. In that regard, the trial court repeatedly told the jury that "you may not decide that just because the defendant has committed other crimes, wrongs, or acts, he must be guilty of the present crimes." Each time, the jury was also instructed that it had

to decide if the same person was involved in both shootings and that if the jury was not convinced, it should disregard the other alleged bad act.

Those instructions were consistent with, and were based on, the model jury charge. See Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts (N.J.R.E. 404(b))" (rev. Sept. 12, 2016). The instructions were also tailored to the facts of the case and included references to the proofs.

Defendant did not object to the instructions or charge at trial. Accordingly, we review his argument on appeal under the plain error rule. See R. 2:10-2; State v. Weston, 222 N.J. 277, 294-95 (2015). In the context of a jury charge, "[p]lain error . . . is '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Afanador, 151 N.J. 41, 54 (1997) (second alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). Nevertheless, if the error in a jury instruction is "crucial to the jury's deliberations on the guilt of a criminal defendant," then it may be a "poor candidate[] for rehabilitation" under the plain error rule. State v. Torres, 183 N.J. 554, 564 (2005) (alteration in original) (quoting Jordan, 147 N.J. at 422).

Defendant argues that, when instructing the jury on the other-crime evidence, the trial court misstated the purpose of the evidence, misrepresented the ballistics expert's testimony, and failed to note the rebuttal evidence offered by defendant. We are not persuaded by any of these arguments.

Read in full context, the jury instructions were clear, comprehensive, and balanced. The jury was told the limited purpose of the evidence concerning the shooting on Morgan Boulevard, was told that it could use that evidence only as it related to identifying who shot Johnson, and was told that it could use that evidence only if it found the evidence convincing.

We reject defendant's contention that the instructions were biased towards the State's position. The trial judge referenced the evidence presented by the State but also instructed the jury that "before you can give any weight to this evidence, you must be satisfied that the defendant committed the other crime, wrong or act. If you're not so satisfied, you may not consider it for any purpose."

We also reject defendant's contention that the court should have "advised the jury of the defense's position that there was no 'ballistics match,' and that defendant was not involved in the other crime." After the jury heard testimony from both Clayton and the detective that investigated the Morgan Boulevard shooting, the court instructed the jury that "the State has introduced evidence

that bullets collected from the 700 Block of Morgan Boulevard are allegedly a ballistic match to the bullets found from the homicide of [Johnson]." The court then went on to instruct the jury that they had to decide if they were convinced by that evidence stating:

Now, whether the evidence does, in fact, demonstrate the identity of the shooter of [Johnson] is for you to decide. You may decide that the evidence does not demonstrate the identity of the shooter of [Johnson] and is not helpful to you at all. In that case, you must disregard the evidence.

In short, the trial judge's jury instructions concerning the Morgan Boulevard shooting were consistent with Rule 404(b) and the caselaw advising trial courts on how to instruct the jury. Accordingly, we find no error, let alone plain error possessing a capacity to bring about an unjust result.

### 3. The Prosecutor's Comments in Closing Argument.

"[P]rosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). Consequently, prosecutors are "afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." Ibid. Prosecutors "may comment on facts in the record and draw reasonable inferences from them." State v. Lazo, 209 N.J. 9, 29 (2012) (citing State v.

Smith, 167 N.J. 158, 178 (2001)). Nevertheless, "prosecutors should not make inaccurate legal or factual assertions during a trial." Reddish, 181 N.J. at 641 (quoting Smith, 167 N.J. at 178).

In reviewing prosecutors' comments, appellate courts "consider the 'fair import' of the State's summation in its entirety." State v. Jackson, 211 N.J. 394, 409 (2012) (quoting State v. Wakefield, 190 N.J. 397, 457 (2007)). To warrant reversal, "the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" Smith, 167 N.J. at 181 (quoting Frost, 158 N.J. at 83).

Before us, defendant asserts that the prosecutor "egregiously exaggerated" the ballistics evidence by telling the jury that the bullets from both shootings matched and established "definitive proof the same handgun was used." At trial, however, defense counsel made no objection to the prosecutor's comments. Accordingly, we review this issue for plain error. See R. 2:10-2.

The prosecutor's remarks were within the bounds of proper advocacy and did not misstate the ballistics evidence. Instead, the prosecutor accurately summarized Clayton's testimony, reminding the jury that the expert had tested bullets from both shootings. He then accurately summarized that Clayton had testified that the lead bullets from each shooting matched and the metal-jacket bullets from each shooting also matched. The prosecutor then argued that there

was only one gun because that is what the witnesses had testified and pointed out to the jury that there was no evidence of a second shooter or second gun. In that regard, the prosecutor explained Fletcher testified that defendant had shot Johnson with what appeared to be a revolver, and that that testimony was corroborated by other eyewitness testimony and physical evidence.

Having reviewed the prosecutor's arguments in full context, we are satisfied that they were fair arguments based on the evidence and to the extent that the prosecutor argued that there was "[d]efinitive, [100] percent proof" that the same handgun was used in both incidents, that comment did not go beyond the bounds of a zealous closing argument. Indeed, to the extent that there was an argument that two guns were involved, defense counsel was free to make that argument and, in fact, did make that argument in his closing.

B. The Testimony and Statement Given by Hobart.

In his third argument, defendant contends that the trial court erred in admitting Hobart's prior inconsistent statement under N.J.R.E. 803(a)(1). Defendant argues that Hobart's pretrial statement was not reliable because he was forced to speak to the police and thought he was going to jail.

Under Rule 803(a)(1)(a) a prior inconsistent statement may be admitted as substantive evidence if it is inconsistent with a witness's testimony and, if

offered by the party calling the witness, the statement was sound-recorded or memorialized in writing and signed by the witness. Testimony can be deemed inconsistent if it is evasive or reflects an inability to recall. State v. Bryant, 217 N.J. Super. 72, 78 (App. Div. 1987). Consequently, a feigned lack of memory can render a witness's trial testimony as inconsistent with a prior statement. See State v. Savage, 172 N.J. 374, 405 n.1 (2002) (explaining that a witness's prior statement to the police would be admissible after the witness disavowed the statement at trial and denied parts of the statement by claiming he could not recall them).

The admissibility of a prior inconsistent statement should be determined at a Rule 104 hearing outside the presence of the jury. Gross, 121 N.J. at 10; State v. Baluch, 341 N.J. Super. 141, 179 (App. Div. 2001). "[T]he purpose of the [Rule 104] inquiry 'is not to determine the credibility of the out-of-court statements' but 'whether the prior statement was made or signed under circumstances establishing sufficient reliability that the factfinder may fairly consider it as substantive evidence.'" State v. Spruell, 121 N.J. 32, 46 (1990) (quoting State v. Gross, 216 N.J. Super. 98, 110 (App. Div. 1987)). The party offering the statement must prove "by a fair preponderance of the evidence" that the statement is reliable. Id. at 42.

We accord substantial deference to a trial court's evidentiary rulings and uphold such rulings absent a showing of abuse of discretion. See State v. Weaver, 219 N.J. 131, 149 (2014) (explaining that appellate courts only reverse an evidentiary ruling that "undermine[s] confidence in the validity of the conviction or misappl[ies] the law"). In applying this standard, an appellate court "should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling is so wide of the mark that a manifest denial of justice resulted.'" State v. J.A.C., 210 N.J. 281, 295 (2012) (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

At trial, Hobart initially denied that he had seen defendant on the night of Johnson's murder and denied that he had seen defendant shoot Johnson. Accordingly, the court conducted a Rule 104 hearing outside the presence of the jury, considered the factors identified in Gross, and concluded that Hobart's prior statement given to the police was reliable. In that regard, the detective who had spoken with Hobart eight days after the shooting testified at the Rule 104 hearing that he never made any promises or threats to Hobart and that Hobart was not under arrest or a target of the investigation.

Hobart also testified at the Rule 104 hearing. He asserted that he did not feel he had a choice when he gave the statement. He also claimed that he was



high and drunk at the time, but he conceded that he understood the questions. Nevertheless, Hobart ultimately claimed that he did not remember giving the statement and he did not remember identifying defendant in the photo array.

After hearing that testimony and watching the videotaped statement, the trial court concluded that the statement was reliable, finding that the detective's testimony was credible but Hobart's testimony at the Rule 104 hearing not credible. The court then considered all the appropriate factors identified in Gross and found that Hobart's statement was admissible as a prior inconsistent statement.

Defendant concedes that the trial court appropriately considered the Gross factors but argues that there were "other highly relevant circumstances" that the trial court failed to consider. In that regard, defendant questions the voluntariness of Hobart's statement, arguing that Hobart was picked up from the street in a police vehicle and taken to police headquarters and told that defendant was the murder suspect. Defendant also points to Hobart's question during the photo array of whether "he would be going to jail" and argues that Hobart was so concerned about his own freedom that his statement was not voluntary.

Having reviewed the record, we discern nothing that would cause us to conclude that the trial court abused its discretion in finding that Hobart's prior

statement was inconsistent with his trial testimony and in admitting that prior statement under Rule 803. In short, the record supports the trial court's findings, including the credibility findings. In that regard, we note that the court heard and assessed the credibility of Hobart both during the trial and the Rule 104 hearing. We also note that the court considered the entirety of the circumstances of the questioning of Hobart, including how the interview was set up, where it took place, the specificity of Hobart's statements, his willingness to speak, and the court's own observations regarding Hobart's demeanor. Those findings warrant our deference. See Weaver, 219 N.J. at 149.

C. The Sentence.

An appellate court reviews sentencing determinations using a deferential standard. State v. Grate, 220 N.J. 317, 337 (2015). We "do[] not substitute [our] judgment for the judgment of the sentencing court." State v. Lawless, 214 N.J. 594, 606 (2013). Instead, a sentence will be affirmed unless

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

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

Because the record does not support certain findings made by the sentencing court, we remand for a resentencing.

1. The Extended Term.

Before sentencing, the State moved to impose a mandatory extended term under N.J.S.A. 2C:44-3(d), based on defendant's prior conviction for attempted murder. At sentencing, the State presented the court with a judgment of conviction (JOC) showing that in January 2003, defendant had pled guilty to attempted murder in violation of N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a). The JOC also reflected that defendant had been charged with related weapons offenses, including unlawful possession of a handgun. Those weapons offenses, however, were dismissed.

Defendant argues that the State did not establish that the attempted murder conviction involved the use of a firearm. We agree.

N.J.S.A. 2C:44-3(d) directs that a defendant convicted of certain offenses while using or possessing a firearm is subject to a mandatory extended term. Attempted murder is one of the enumerated crimes making a defendant eligible for an extended term if convicted of that crime and there is evidence that the

conviction involved the use or possession of a firearm. Our Supreme Court has explained that "where the underlying record is unclear with respect to the nature of a prior conviction, a hearing is required at which the basis for an extended Graves Act term must be established." State v. Jefimowicz, 119 N.J. 152, 156 (1990) (citing State v. Martin, 110 N.J. 10, 17 (1988)).

In seeking the extended term, the State relied on the 2003 JOC for attempted murder. On its face, that judgment, however, does not establish that the attempted murder conviction involved a firearm. The State and the sentencing court relied on the related weapons charges and assumed that the attempted murder conviction involved the use of a firearm. While that assumption may have been logical, because the weapons offenses were dismissed, there was no factual record establishing that the attempted murder conviction involved the use or possession of a firearm. Therefore, we remand the matter for a hearing on the imposition of the extended term.

The State argues that defendant failed to object to the imposition of an extended term before the sentencing. We reject that argument because the State had the burden to establish that defendant was subject to the extended term. See State v. Irrizary, 328 N.J. Super. 198, 202 (App. Div. 2000).

## 2. The Jail Credits.

Defendant argues that he is entitled to 587 days of jail credits from February 1, 2016 to September 12, 2017. Although the record reflects he was arrested on the charges that resulted in his convictions in this matter on November 19, 2014, defendant contends that he was arrested on November 20, 2014. Thereafter, he was charged with federal weapons offenses and held in a federal detention center. On January 26, 2016, defendant was sentenced to seventy-eight months in prison following his conviction on the federal weapons offenses. On February 1, 2016, defendant was then transferred from federal custody to state custody to be tried in this matter. He was sentenced on his convictions in this matter on September 12, 2017.

At sentencing, defendant contended that he was not accorded federal credit for the time that he was in state custody. The State concedes that defendant would be entitled to jail credits if he had not received any credit on his federal sentence for the time that he was held in state custody. Nevertheless, the State contends that defendant did not adequately prove that he did not receive federal credit for the time that he was held by the State.

Rule 3:21-8 provides that a "defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital

between arrest and the imposition of sentence." That credit for pre-sentence custody is commonly called "jail credits." State v. Hernandez, 208 N.J. 24, 36 (2011). When Rule 3:21-8 applies, the award of jail credits is "mandatory, not discretionary." Id. at 37.

The amended JOC did not accord defendant any jail credits or gap-time credits. The sentencing court reasoned that defendant was not entitled to jail credits because he was serving a federal sentence.

We remand for a hearing on whether defendant is entitled to any time credits, including jail or gap-time credits. There is no explanation in the current record of why defendant received no credit between his arrest on November 19, 2014, and the imposition of his federal sentence on January 26, 2016. In addition, the State concedes that defendant would be entitled to jail credits from February 1, 2016, when he was transferred to state custody, until September 12, 2017, when he was sentenced on these charges, if he was not accorded federal credit for that time. Given that concession, at the resentencing there should be a hearing to determine whether defendant is entitled to time credits, either for jail credits or gap-time credits.

### 3. The Consecutive Sentence.

Defendant also argues that the sentencing court erred by ordering his state sentence on the murder conviction to run consecutively to his federal sentence. In that regard, defendant points out that the sentencing court did not expressly review the factors for imposing a consecutive sentence. See State v. Yarbough, 100 N.J. 627 (1985); N.J.S.A. 2C:44-5.

The sentencing court did not address the factors for imposing the consecutive sentence. Moreover, the sentencing court did not address the overall fairness of the sentence imposed. See State v. Torres, 246 N.J. 246 (2021). Accordingly, at the resentencing, the court will need to expressly address and explain the factors supporting a consecutive sentence. See State v. Cuff, 239 N.J. 321, 348 (2019); State v. Chavarria, 464 N.J. Super. 1, 19 (App. Div. 2020). The court will also need to address the overall fairness of the sentence imposed as required by the Court in Torres. 246 N.J. at 272.

### 4. The Alleged Excessive Sentence.

Finally, defendant argues that the life sentence imposed was excessive. Because we are remanding for resentencing, this issue is moot. At the resentencing, the sentencing court will have to reconsider the aggravating and mitigating factors, as well as other appropriate issues and impose a new

sentence. Nevertheless, we note that a life sentence is within the statutory range for defendant's conviction of first-degree murder. N.J.S.A. 2C:11-3(b).

### III.

In summary, we affirm defendant's convictions. We remand, however, for resentencing. The sentencing court shall hold a hearing on whether defendant is subject to a mandatory extended term and address whether defendant is entitled to jail or gap-time credits. The sentencing court shall then impose a new sentence and make all necessary findings, including findings on aggravating and mitigating factors, consecutive sentences, and the overall fairness of defendant's sentence. See State v. Randolph, 210 N.J. 330, 354 (2012) (requiring the court on resentencing to "view [the] defendant as he stands before the court on that day").

Convictions affirmed and remanded for resentencing. 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