NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4063-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVE COTTO,
a/k/a STEVEN SOSA,

Defendant-Appellant.

APPROVED FOR PUBLICATION

April 18, 2022

APPELLATE DIVISION

Argued January 26, 2022 – Decided April 18, 2022

Before Judges Hoffman, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 16-12-3213.

Marc M. Yenicag, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Marc M. Yenicag, on the briefs).

Caitlinn Raimo, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Caitlinn Raimo, of counsel and on the brief).

The opinion of the court was delivered by

SUSSWEIN, J.A.D.

Defendant appeals from his jury trial conviction for aggravated arson. He contends the trial court erred in denying his motion to suppress statements he made during a custodial interrogation because the interrogating officers did not inform him that he would be charged with aggravated arson when they administered the Miranda[1] warnings. He also contends the court committed errors during the trial that individually and collectively require us to vacate his conviction and remand for a new trial. After carefully reviewing the record in view of the applicable principles of law, we affirm.

I.

We discern the following facts from the trial record. At approximately 4:30 a.m., on July 17, 2016, Irvington Police Officer Rhoniel Edwards responded to a fire at a nightclub on Clinton Avenue in Irvington. The building housing the nightclub is comprised of three stories with private residences on the second and third floors. Police found pieces of burnt cloth, pieces of a broken glass bottle, and a plastic fuel canister on the sidewalk in front of the nightclub.

Officer Edwards testified that when he arrived on the scene, the awning of the first-floor business was on fire. As he waited for the fire department to

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

arrive, the fire "became more aggressive" and "started making its way to the second floor." Edwards used the fire extinguisher in his police car to put out the fire.

After the fire department arrived, Edwards canvassed the neighborhood to locate any surveillance cameras and any possible witnesses or suspects. He did not find any witnesses or suspects, but located four security cameras from businesses nearby, as well as a security camera at the building that housed the nightclub.

Essex County Prosecutor's Office (ECPO) Detectives Joseph Davis and Lance Nero responded at approximately 7:40 a.m. Davis observed soot damage on the front door and window, and fire damage to a wooden sign for the nightclub on the front of the building. Davis testified that he smelled gasoline, and also observed and photographed a "burnt spot on the sidewalk in front" of the nightclub.

The manager of the nightclub, Frandsen Clervoyant, arrived and played video surveillance recordings for the detectives. The exterior camera recording showed an individual starting the fire. Davis also reviewed surveillance footage from inside the nightclub that had been recorded while it was still open for business the night before. Davis determined that an

individual shown in the interior video recording appeared to be the same person who was shown setting the fire in the exterior-view recording.

Based on the video recordings, Davis issued a "be on the lookout" (BOLO) alert for an "adult male approximately [forty] to [fifty] years of age, . . . thin to medium build, wearing a tee shirt, [and] what appeared to be dark pants, possibly jeans, and sneakers." The alert also included a description of a vehicle, specifically, "a dark colored older model four door sedan with a different colored hood."

Clervoyant testified at trial that he closed the club a little later than normal on the night of the fire, around 2:00 or 2:05 a.m., because a man who he recognized from the neighborhood had come in and bought two or three drinks. Clervoyant did not know the man's name. Although Clervoyant testified that he would be able to recognize that individual, he answered "[n]o" when asked if that person was in the courtroom.

During the investigation and again at trial, the State showed Clervoyant a series of photographs taken from security cameras both inside and outside the nightclub to help identify the man in the surveillance video seen setting the fire. The first was a photograph that depicted the man who Clervoyant identified as the final customer who was in the club and who Clervoyant knew was from the neighborhood. The prosecutor also showed him a screenshot

photograph taken inside the nightclub that depicted a woman and two men near a pool table. Clervoyant identified the woman as a dancer at the nightclub. Clervoyant identified one of the men as a custodian at the nightclub. Clervoyant did not know the other man in the photograph. A third screenshot photograph showed the dancer and the unidentified man from the second photograph standing outside of the club.

Detective Davis testified that he knew which direction the car described in the BOLO was travelling based on surveillance video recordings obtained from the surrounding businesses. Because Clervoyant had reported that the unidentified man was from the neighborhood, the detectives examined open-source tax records pertaining to properties located approximately within a block of the nightclub. The detectives obtained the names of the people associated with those properties and then obtained photographs of those people from the Division of Motor Vehicles (DMV) database to determine whether any of them matched the description of the person who started the fire.

Davis, Nero, and ECPO Sergeant Christopher Smith also canvassed the area surrounding the nightclub to look for the car in the video. They observed a car parked in a driveway on Howard Street that fit the description of the car in the BOLO. They were able to view the license plate number from the street and ran it through the DMV computer system. Davis testified that they also

examined the property records for the address where the car was parked and determined that defendant lived there. Upon determining defendant's identity, they checked whether he had any outstanding arrest warrants. They discovered that he had open traffic warrants.[2]

On August 5, 2016, Davis, Nero, Smith, and other law enforcement officers executed the open traffic warrants and arrested defendant at his workplace in Paterson. Defendant was handcuffed and transported to the ECPO Major Crimes Bureau headquarters for questioning.[3] The ensuing stationhouse interrogation was electronically recorded pursuant to Rule 3:17.

In December 2016, an Essex County Grand Jury returned a one-count indictment charging defendant with second-degree aggravated arson, N.J.S.A. 2C:17-1(a)(2).

Defendant moved to suppress statements he made during the August 5 stationhouse interrogation. On November 6, 2017, the trial court convened a suppression hearing at which the State presented testimony from the lead detective who conducted the interrogation. On December 1, 2017, the court

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[2] The record does not indicate why the traffic warrants had been issued. It is not disputed that they were valid arrest warrants and that defendant was lawfully taken into custody.

[3] We describe the interrogation in detail in our consideration of defendant's Miranda-related arguments in section II of this opinion.

issued an oral opinion, concluding that defendant had knowingly, voluntarily, and intelligently waived his Miranda rights. The judge thereupon denied defendant's motion to suppress.

A jury trial was held on January 23, 24, 29, and 30, 2019. On February 1, 2019, the jury found defendant guilty of aggravated arson. On April 12, 2019, the trial judge sentenced defendant to a term of seven years imprisonment. This appeal followed.

Defendant raises the following contentions for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED WHEN IT FOUND THAT MR. COTTO KNOWINGLY AND VOLUNTARILY WAIVED HIS MIRANDA RIGHTS BECAUSE THE INVESTIGATING OFFICERS DID NOT, BUT WERE OBLIGATED TO, INFORM MR. COTTO OF THE POTENTIAL CHARGES FOR ARSON AGAINST HIM PRIOR TO ANY REQUEST THAT HE WAIVE HIS MIRANDA RIGHTS. (Partially Raised).
>
> POINT II
>
> THE TRIAL COURT ERRED IN PERMITTING, OVER DEFENSE COUNSEL'S OBJECTION, DET. DAVIS TO TESTIFY AS AN EXPERT. DET. DAVIS' EXPERT TESTIMONY WAS UNESSENTIAL TO THE STATE'S CASE AND SERVED ONLY TO ENHANCE DAVIS' CREDIBILITY AS THE STATE'S CHIEF INVESTIGATOR AND PRIMARY FACT WITNESS. ANY PROBATIVE VALUE OF DAVIS' EXPERT

TESTIMONY CLEARLY WAS OUTWEIGHED BY THE RISK OF UNDUE PREJUDICE.

POINT III

THE TRIAL COURT ERRED IN NOT EXCISING FROM DEFENDANT'S RECORDED STATEMENT NUMEROUS PREJUDICIAL COMMENTS BY THE INVESTIGATING OFFICERS EXPRESSING LAY OPINION TESTIMONY THAT DEFENDANT WAS THE INDIVIDUAL DEPICTED ON VIDEOS SETTING FIRE TO THE CLUB. (Not Raised Below).

POINT IV

THE JURY CHARGE WAS FUNDAMENTALLY FLAWED. IN CHARGING THE JURY, THE TRIAL COURT FAILED TO ALERT THE JURY TO EVIDENCE IN THE RECORD STRONGLY SUGGESTING THAT DEFENDANT'S INTENT WAS MERELY TO BURN THE SIGN ON THE BUILDING'S FRONT FAÇADE, NOT TO "DESTROY THE BUILDING," AN ESSENTIAL ELEMENT OF AGGRAVATED ARSON, THEREBY DEPRIVING DEFENDANT OF A FAIR TRIAL. (Not Raised Below).

II.

A.

We first address defendant's contention that the statements he made during the August 5, 2017 custodial interrogation should have been suppressed. We begin by summarizing the facts pertinent to this appeal that were elicited at the suppression hearing.

The State presented Detective Davis as its only witness at the hearing. Davis explained that he and Detective Nero conducted the interrogation, which began at approximately 9:05 a.m. and concluded at approximately 10:52 a.m. Defendant had been arrested on the authority of the outstanding traffic warrants. Davis acknowledged, however, that defendant was a suspect in the nightclub arson and that the purpose for questioning him was to investigate that crime.

Prior to the start of the interrogation, defendant was secured and checked for weapons. Davis testified that defendant was "relatively calm" but "became a little more agitated" when the detectives started to speak with him about the nightclub fire. Davis also testified that defendant did not appear intoxicated, did not appear exhausted, did not explicitly ask to stop the questioning. Nor did defendant ask for an attorney.

According to the transcript of the electronically-recorded interrogation, Davis told defendant that he was "under arrest for the traffic summonses." Davis proceeded to read defendant his Miranda rights. After defendant verbally waived his rights and signed the waiver form, Davis asked defendant if he knew why he was there. Defendant answered, "[t]he warrants." One of the detectives responded, "traffic warrants out of . . . Irvington," and that, "[y]ou're under arrest for those warrants."

Immediately after that initial exchange, Nero told defendant, "Detective Davis wants to talk to you about something else." Davis then asked defendant if he was familiar with the nightclub. After telling the detectives that he occasionally patronized the nightclub and was "friendly" with the owners, a detective started to ask defendant about "the last time [he was] there." Defendant interrupted the question and said, "I heard what happened." The detective asked what defendant had heard, and defendant asked, "[a]re you questioning me about that?" The detective asked again what had happened, and defendant answered, "they said some Mexican dude threw . . . some gasoline on (indiscernible)."

Defendant told detectives that the last time he had been at the nightclub was the month before, in July. They asked defendant for details about his last visit there. Defendant told the detectives that he had left the nightclub with a female employee to go to a motel. The following exchange occurred between defendant and one of the detectives:

> DEFENDANT: Maybe the girls took his money. Maybe he came back, he threw a little f[**]king gasoline on the f[**]king thing. Everybody says, Hey man, they must have did something. They say, Yeah, but oh, did you see what they did to the sign? I said, Yeah. But yous [sic] be robbing people up in there. I said, Yous [sic] be robbing people.

DETECTIVE: What do you mean robbing? Like—like beating them for drinks or robbing them—

DEFENDANT: They . . . take their money.

. . . .

DEFENDANT: They steal from them.

DETECTIVE: Who, the chicks or the—or—

DEFENDANT: Yeah, the chicks.

Defendant continued to tell the detectives how he did not like how the nightclub treated some customers and how it "robs" its customers:

DEFENDANT: Some of them they—after they spend all their money, sometimes the girls, when they don't want a—a lap dance or stuff like that, they get the kid thrown out. Sometimes they get the guy thrown out for nothing, man,—

DETECTIVE: Right.

DEFENDANT: —after he spends 2 or 300 f[**]king dollars. They get him thrown out for nothing. Come on. You . . . you know that's not good karma, man. You know, you can't be doing them things. And then that's why things like that happen. You know. Lucky . . . whoever it was. All right? It had to be something that they did. And there's no question about it.

> DETECTIVE: Something that the bar did? That's—that's why—
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> DEFENDANT: The girls or . . . something in it. You know. The gir [sic]—not—not the bouncers and stuff 'cause . . . maybe they're rough, whatever, maybe, whatever. You know. But the things that they do, you know, there's always going to be backlash, and the f[**]king guy that f[**]king come in there with a f[**]king pistol.

Defendant also told the detectives that he saw a dancer ask a customer if he wanted a lap dance, and the customer declined. The dancer went over to a bouncer and the bouncer made the customer pay and then kicked him out. Defendant speculated that the dancer told the bouncer that the customer had received a lap dance but did not pay. Defendant told the detectives that it had never happened to him but that "one day you're going to do that to the wrong person." Defendant told the detectives that it had never happened to him because the nightclub's employees respect him, and that "if somebody would do something to me like that and I had to retaliate, I won't throw gasoline." One of the detectives asked defendant what he would do, and defendant answered:

> I'd buy me the biggest f[**]king gun . . . and you won't be sitting here telling me how I threw a little gasoline upside the f[**]king wall. You'd be ready to kill me out in the f[**]king streets. Because at that

> time, I would have went in there and raked everybody. I'm not throwing f[**]king gasoline . . . . If somebody does something to me, I will take care of it. Not like that.

At that point, Davis told defendant that they had video recordings and still photographs taken from those videos. They first showed defendant a screenshot photo of a man they alleged was him, taken from inside the nightclub. They then showed defendant a photo of the same man leaving the club with a woman. After defendant again told the detectives that he had nothing to do with the fire, they showed him more screenshot photos and said, "[y]ou got that same hat on, the same white sneakers, same blue t-shirt, and the jeans walking with a gas can, walking across the street." Defendant denied that he was the person depicted in the exterior photos. The detectives told defendant that the person in the exterior screenshot was wearing the same clothing that defendant was wearing in the photos of him inside the club from earlier that night, but defendant continued to deny that he was the person depicted with the gasoline can.

The detectives told defendant, "[w]e know you did it 'cause we got you on video. It's not like we made this up, bro. We got you on video going into the . . . [motor lodge] with the same chick with your car. We just want to know why." Defendant replied, "I don't know . . . . [Maybe] she stole some

money from the dude." Defendant then posited that "maybe she stole $2,000 from the guy. Maybe the guy got mad." The detectives responded:

> No, no. The guy is you on the video setting the fire. That's . . . without question . . . . We got you on video. We have you going into the Irvington Motor Lodge. We have the girl, who said, Yeah, I left with him. How do you think we . . . figured all this shit out? There's four cameras—five cameras outside.
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> . . . .
>
> And there's a camera right across the street. It shows you walking up [on] Augusta [Street]. You threw a Molotov cocktail first. That didn't work. Then you come back with the gas can. We . . . already know the deal. We already know the rest of the fire. You did the fire. We're—that's not the question. We want to know why. Were you pissed off at the owner?

Defendant again denied that he was the person shown in the video and said that he was "just saying that maybe the guy . . . got mad. . . . [M]aybe they stole $2,000 from him." After defendant repeated that $2,000 might have been stolen, Davis asked him why he chose $2,000 as the number. Defendant replied, "I'm just making . . . a rough estimate what . . . they probably stole from him. I . . . I don't know."

One of the detectives next told defendant that they had an "entire video of [defendant] walking across the street . . . splashing the gasoline, everything" and that they had been showing him screenshots from that video. Defendant denied splashing gasoline or setting the fire. The detectives again told

defendant that the video shows him "really, really clear" and that he left in a "distinct" car and returned later that night in the same car. The detectives continued to tell defendant that the video showed it was him and asking why he did it, and defendant repeatedly denied that he was the person in the video.

At one point, defendant said, "This is a f[**]king nightmare . . . . You know what I mean? It was a f[**]king nightmare, bro." He also said, "I'm not saying I did it . . ." and that he was "going to lose [his] wife regardless" because he was going to jail. Defendant again suggested that the nightclub had robbed someone of their money and that was why the robbery victim burned the sign. He also repeated that he was going to lose his wife and "lose everything."

Toward the end of the interrogation session, the detectives told defendant he was going to be charged with aggravated arson. While imploring the detectives not to charge him, defendant indicated that he was willing to continue to talk about the arson charge, saying "All right then. Let—let's talk." The detective explained that he had already been under arrest for the traffic warrants but that he would now be charged with aggravated arson. He told defendant that the paperwork for the arson charge had not been prepared yet but they were going to re-administer the Miranda warnings. The detectives

then read defendant his Miranda rights anew. Defendant confirmed that he understood those rights and signed the waiver form.

After being read his rights a second time, defendant kept asking the detectives if they were still going to charge him, imploring them not to do so. The detectives, meanwhile, tried to get an explanation from defendant for his alleged actions. Defendant told them that there was no one else involved. He continued to ask the detectives if he was still going to be charged with arson and when the detectives told him yes, defendant replied that they were "killing [him]," and that they were "killing [his] life."

During a break when the detectives briefly left the room, defendant said to himself, "God, what did I do that for? That was f[**]king arson, man. What the f[**]k did I do? My dogs. Losing everybody." [4] When the detectives returned, defendant repeated his concerns about losing his wife and job but did not say anything further regarding the arson.

B.

[4] The interrogation was electronically recorded in accordance with Rule 3:17. The transcript indicates that the electronic recording system remained active when the detectives exited the interrogation room, leaving defendant alone. It is not disputed that defendant was talking to himself when he made the incriminating admissions. Defendant does not contend that it was unlawful for police to record him when he was left alone in the interrogation room.

On December 1, 2017, the trial court issued a detailed oral decision. The court found Detective Davis to be a credible witness, noting that he "maintained his composure and offered reasonable interpretations which were supported by the transcript in evidence."

The court found that at the time of the custodial interrogation, defendant was sixty years old and showed no signs of mental or cognitive impairment. The court found that the detectives "properly and thoroughly advised defendant of his rights and assured he understood." The court noted that they read defendant his rights twice, that defendant read the rights aloud himself, initialed the form acknowledging his rights, and signed the Miranda warning statement.

The court found that defendant never requested an attorney, expressed an unwillingness to speak with the detectives, or demonstrated a lack of understanding as to his rights or the consequences of waiving those rights, noting that to "the contrary, [he] affirmatively answered yes . . . when asked whether he understood each right."

The court rejected defendant's argument that he did not knowingly and intelligently waive his rights because he thought at the start of the interrogation that the questioning would be about the traffic warrants for which he had been arrested. The court found that the transcript "negated" that

argument because immediately after the detectives read defendant his Miranda rights, they explained to him that they wanted to talk about something other than the warrants. The court noted that when the detectives told defendant that they wanted to ask him about the nightclub, defendant did not ask to stop the interrogation, but "rather willingly expanded upon his connection to the establishment and his awareness of the fire." The court concluded that "[b]y no means was defendant misled or unaware of the nature of the questions." The court further found that defendant's statements regarding the nightclub and the fire were not induced by questions about the traffic warrants, noting "the two [subjects] were mutually exclusive."

The court also found that the record did not support defendant's argument that he was "mentally exhausted." The court addressed defense counsel's argument that defendant had described the interrogation as "an F'ing nightmare." The court found that defendant was not describing the interrogation, but rather was talking about how "his . . . affair may have a significant negative impact on his life." The court thus concluded that it was "clear that . . . defendant was expressing his sentiments about the overall predicament of possibly getting a divorce and being incriminated by the crimes, not his thoughts about the interrogation process."

Considering the totality of the circumstances, the court found it was "clear . . . defendant understood his rights and made a deliberate choice to waive those rights knowing the consequences of such a decision." The court thus concluded that defendant voluntarily, knowingly, and intelligently waived his rights, the waiver was valid, and the statement was admissible.

C.

The gravamen of defendant's argument on appeal is that the detectives who conducted the custodial interrogation violated his Fifth Amendment rights by failing to inform him during the Miranda waiver colloquy that he was suspected of and would eventually be charged with aggravated arson. We begin our analysis by acknowledging the legal principles governing this appeal. As our Supreme Court recently reiterated in State v. Sims, "[t]he privilege against self-incrimination, as set forth in the Fifth Amendment to the United States Constitution, is one of the most important protections of the criminal law." __ N.J. __, __ (2022) (slip op. at 23) (quoting State v. Presha, 163 N.J. 304, 312 (2000)). The Court explained that New Jersey law "maintains 'an unyielding commitment to ensure the proper admissibility of confessions.'" Id. at __ (slip op. at 24) (quoting State v. Vincenty, 237 N.J. 122, 132 (2019)). Accordingly, "[w]hen faced with a trial court's admission of police-obtained statements, an appellate court should engage in a 'searching

and critical' review of the record to ensure protection of a defendant's constitutional rights." State v. Hreha, 217 N.J. 368, 381–82 (2014) (quoting State v. Pickles, 46 N.J. 542, 577 (1966)).

An appellate court's review of a trial court's factual findings at an evidentiary hearing is limited. State v. Hubbard, 222 N.J. 249, 269 (2015). As the Court reaffirmed in Sims, "[w]hen we review a trial court's decision on a motion to suppress . . ., we defer to the factual findings of the trial court if those findings are supported by sufficient credible evidence in the record." __ N.J. at __ (slip op. at 23) (citing State v. S.S., 229 N.J. 360, 374 (2017)). In contrast to the deference we owe to a trial court's factual findings, a trial court's interpretation of the law and "the consequences that flow from established facts are not entitled to any special deference." State v. Gamble, 218 N.J. 412, 425 (2014).

The law is well-settled that "[a] confession obtained during a custodial interrogation may not be admitted in evidence unless law enforcement officers first informed the defendant of his or her constitutional rights." Sims, __ N.J. at __ (slip op. at 24) (alteration in original). For a defendant's waiver of Miranda rights to be valid, moreover, under New Jersey law, the State must prove beyond a reasonable doubt that the waiver was given knowingly,

voluntarily, and intelligently in light of all the circumstances. Ibid.; see also Presha, 163 N.J. at 313; State v. Nyhammer, 197 N.J. 383, 400–01 (2009).

Aside from the requirement to comply with the per se prophylactic rule established in Miranda and its progeny, "[d]ue process also requires that the State 'prove beyond a reasonable doubt that a defendant's [statement] was voluntary and was not made because the defendant's will was overborne.'" State v. L.H., 239 N.J. 22, 42 (2019) (quoting State v. Knight, 183 N.J. 449, 462 (2005)). "There is substantial overlap between the factors that govern a court's determination of whether a Miranda waiver is valid and the factors that a court considers in its separate assessment of the voluntariness of a confession." State v. Tillery, 238 N.J. 293, 316–17 (2019).

As a general matter, a statement is deemed to be voluntary if it is "the product of an essentially free and unconstrained choice by its maker." State v. P.Z., 152 N.J. 86, 113 (1997) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973)). When determining whether a statement is voluntary, the court examines "the totality of the circumstances to assess whether the waiver of rights was the product of a free will or police coercion." Nyhammer, 197 N.J. at 402. Factors to consider include the defendant's "age, education and intelligence, advice concerning constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, and whether

physical punishment and mental exhaustion were involved." Hreha, 217 N.J. at 383 (quoting State v. Galloway, 133 N.J. 631, 654 (1993)). Additional considerations include whether the defendant had previous encounters with law enforcement and the amount of time that elapsed between the Miranda warnings and the defendant's confession. Ibid. As we will explain, the breadth and scope of relevant circumstances is expansive and includes the information police provide to, or withhold from, the interrogee.

In Nyhammer, our Supreme Court firmly embraced the principle that police are not required to "'supply a suspect with a flow of information to help him [or her] calibrate his [or her] self-interest in deciding whether to speak or stand by his [or her] rights' because 'the additional information could affect only the wisdom of a Miranda waiver, not its essentially voluntary and knowing nature.'" 197 N.J. at 407 (quoting Colorado v. Spring, 479 U.S. 564, 576–77 (1987)). The Court reiterated that principle in State v. A.M., holding that "a valid waiver does not require that an individual be informed of all information useful in making his [or her] decision." 237 N.J. 384, 398 (2019) (quoting Nyhammer, 197 N.J. at 407).

Recently, our Supreme Court considered whether to expand the Miranda warnings/advisements concerning criminal charges that have not yet been filed. In Sims, the majority of the Court declined to adopt a new rule that

would require "police officers, prior to interrogation, to inform an arrestee of the charges that will be filed against him [or her]." __ N.J. at __ (slip op. at 2) (emphasis added). In that case, the defendant asserted that his Miranda rights were violated because the police did not tell him why he was arrested. Id. at __ (slip op. at 13). The majority confirmed that under New Jersey's police interrogation jurisprudence, if a complaint-warrant or an arrest warrant has been issued against a suspect whom law enforcement seeks to interrogate, the officers must disclose that fact to the interrogee and inform him or her in a simple declaratory statement of the charges filed against him or her before any interrogation. Id. at __ (slip op. at 23–28) (relying on the rules announced in Vincenty, Nyhammer, and A.G.D.[5]).

The majority in Sims declined to expand that categorical rule to require officers to tell an arrestee, not subject to a complaint-warrant or an arrest warrant, what charges he or she faces before interrogating him or her. Id. at __ (slip op. at 32). The majority thus reaffirmed that police are not required to advise an interrogee that he or she is a suspect of a particular crime when administering Miranda warnings. The majority explained, "[a]s we noted in Nyhammer, 'we are not aware of any case in any jurisdiction that commands

[5] State v. A.G.D., 178 N.J. 56 (2003).

that a person be informed of his suspect status in addition to the Miranda warnings or that requires automatic suppression of a statement in the absence of a suspect warning.'" Id. at __, n.2 (slip op. at 28, n.2) (quoting Nyhammer, 197 N.J. at 406).

Importantly for purposes of this appeal, the Sims majority emphasized that "[g]enerally, when a court determines whether an interrogee has knowingly, intelligently, and voluntarily waived his [or her] right against self-incrimination in the setting of a custodial interrogation, it considers the totality of the circumstances." Id. at__ (slip op. at 24). The majority reaffirmed, "[o]nly in the most limited circumstances have we applied a per se rule to decide whether a defendant knowingly and voluntarily waived Miranda rights." Id. at __ (slip op. at 25) (quoting Nyhammer, 197 N.J. at 403). The Court explained that A.G.D. was one of those rare circumstances in which it had "departed from the totality-of-the-circumstances rule and required police officers to inform a suspect that a criminal complaint has been filed or an arrest warrant has been issued before interrogating him [or her]." Id. at __ (slip op. at 25) (citing A.G.D., 178 N.J. at 68–69).

In practical effect, in A.G.D. and Vincenty the Court established new Miranda warnings/advisements,[6] creating a "bright-line rule" automatically requiring suppression if police interrogators fail to advise an interrogee that a complaint-warrant or arrest warrant has been issued (the A.G.D. rule), or fail to provide a simple declaratory statement of the essential nature of those filed charges (the Vincenty rule). The Sims majority stressed that "[t]he rule announced in A.G.D. is clear and circumscribed." Id. at __ (slip op. at 27)

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[6] As the Court explained in Tillery,

> In Miranda, the United States Supreme Court held that before law enforcement subjects a suspect to custodial interrogation, the suspect must be advised: (1) "that he [or she] has the right to remain silent"; (2) "that anything he [or she] says can be used against him [or her] in a court of law", (3) "that he [or she] has the right to the presence of an attorney"; and (4) "that if he [or she] cannot afford an attorney one will be appointed for him [or her] prior to any questioning if he [or she] so desires." Miranda imposes a fifth requirement: "that a person must be told that he [or she] can exercise his [or her] rights at any time during the interrogation."
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> [238 N.J. at 315 (internal citations omitted).]

We add that our Supreme Court expanded the list of per se required advisements in State v. Reed, holding that, "[w]hen, to the knowledge of the police, . . . an attorney is present or available, and the attorney has communicated a desire to confer with the suspect, the police must make that information known to the suspect before custodial interrogation can proceed or continue." 133 N.J. 237, 261–62 (1993).

(emphasis added). As we have noted, the majority expressly declined to expand the reach of the A.G.D./Vincenty bright-line rules by requiring police to inform an interrogee of charges that have not yet been filed, regardless of whether the interrogee was a suspect or whether police had probable cause to apply for a complaint-warrant or arrest warrant. See infra note 7. The majority expressly rejected a suspect-notification rule that "relies not on an objective statement of the charges pending against the arrestee, but on an officer's prediction, based on information learned to date in a developing investigation, of what charges may be filed." Id. at __ (slip op. at 29–30). Instead, the majority drew the line for requiring notification at the moment a complaint-warrant or arrest warrant is issued by a judge or other judicial officer, quoting Nyhammer for the proposition that "[t]he issuance of a criminal complaint and arrest warrant by a judge is an objectively verifiable and distinctive step, a bright line, when the forces of the state stand arrayed against the individual." Id. at __ (slip op. at 26) (quoting Nyhammer, 197 N.J. at 404–05).

Relatedly, the majority in Sims explicitly rejected the defendant's argument that unless the Court expanded the Miranda warnings to require police to inform an interrogee of possible charges not yet filed, officers will "deliberately delay seeking a complaint-warrant or arrest warrant in order to

avoid disclosing to an arrestee the charges that he [or she] faces." Id. at __ (slip op. at 30–31). In rejecting that argument, the majority explained, "[i]n a case in which there is evidence of such bad-faith conduct on the part of law enforcement officers, the trial court should consider such conduct as part of the totality-of-the-circumstances test." Id. at __ (slip op. at 31). The Court, in other words, rejected a categorical rule requiring suppression even in the event of such "bad-faith" interrogation tactics, holding instead that such police conduct is a circumstance to be considered in context with all other relevant circumstances.[7] Id. at __ (slip op. at 30–32).

Importantly, however, the majority in Sims did not hold that a tactical decision by police to withhold information from an interrogee concerning suspect status is irrelevant when determining whether he or she knowingly and voluntarily waived Fifth Amendment rights. To the contrary, although the majority rejected a per se notification rule, such as the one it had embraced in A.G.D., it expressly retained and reinforced the principle announced in Nyhammer that "failure to disclose to the defendant his [or her] status as a suspect before interrogating him [or her] should instead 'be a factor in the

[7] The Court's reasoning supports our conclusion that the bright-line notification requirement announced in A.G.D. is triggered only by the actual issuance of an arrest warrant or complaint-warrant, and not by the fact that police have probable cause to support an application for such a warrant.

totality-of-the-circumstances test.'" Id. at __ (slip op. at 26–27) (quoting Nyhammer, 197 N.J. at 405). This establishes quite clearly that while the per se notification rule first announced in A.G.D. and later amplified in Vincenty is both exceptional and "circumscribed," id. at __ (slip op. at 27), the "totality-of-the-circumstances" analytical approach, in contrast, is universal and expansive; it encompasses all facts that bear not only on the interrogation tactics used by police, but also the interrogee's awareness of his or her predicament and ability to make an informed as well as voluntary decision about whether to speak to police or instead remain silent.

We add that the totality-of-the-circumstances paradigm is rigorous when used as part of the "'searching and critical' review of the record to ensure protection of a defendant's constitutional rights." See Hreha, 217 N.J. at 381–82. Notably, the totality-of-the-circumstances analytical paradigm must be applied in the context of the State's burden to prove beyond a reasonable doubt that the defendant knowingly and voluntarily waived Fifth Amendment rights.[8] As we recently observed in State v. Diaz,

[8] We note that under federal law, in stark contrast, the government need only prove a knowing and voluntary waiver of Fifth Amendment rights by a preponderance of the evidence. See Colorado v. Connelly, 479 U.S. 157, 168–69 (1986). The significantly higher proof standard imposed under New Jersey law is an important example of how this State guarantees greater protection of defendants' constitutional rights than is afforded under federal law.

> Under New Jersey's custodial interrogation jurisprudence, and consistent with our Supreme Court's commitment to afford protections beyond those guaranteed under federal law, for an incriminating statement obtained during a custodial interrogation to be admissible, "the prosecution [must] 'prove beyond a reasonable doubt that the suspect's waiver [of his or her Miranda rights] was knowing, intelligent, and voluntary in light of all the circumstances.'" A.M., 237 N.J. at 397 (quoting Presha, 163 N.J. at 313).
>
> [__ N.J. Super. __, __ (App. Div. 2022) (slip op. at 22) (alteration in original).]

As our decision in Diaz makes clear, the totality-of-the-circumstances analytical paradigm is by no means a paper tiger when used to determine whether police interrogation tactics deprived a suspect of the ability to make a knowing and voluntary waiver of Fifth Amendment rights. Ultimately, under New Jersey law, it is the formidable proof-beyond-a-reasonable-doubt standard, rather than a bright-line suspect notification requirement, that safeguards the constitutional rights of interrogees who have not been formally charged with the crime that is the subject-matter of the custodial interrogation.

D.

We next apply these foundational legal principles to the facts in the matter before us. Here, police complied with A.G.D.'s per se rule by telling defendant he was arrested for outstanding traffic warrants. We note that

defendant's constitutional rights were not violated by the fact that police executed those warrants because they wanted to talk to him about the nightclub arson. See State v. Bruzzese, 94 N.J. 210, 214, 228–30 (1983) (execution of municipal court arrest warrants for contempt of court at defendant's home was objectively reasonable under the Fourth Amendment notwithstanding that the true reason for arresting defendant at his house was because he was a suspect in a burglary unrelated to the arrest warrants and the detective wanted an opportunity to investigate the burglary). As Sims makes clear, moreover, although defendant indisputably was a suspect in the arson investigation, because charges had not been filed concerning that crime, the detectives were not required pursuant to a bright-line rule to alert defendant as to his suspect status during the initial Miranda waiver colloquy. __ N.J. at __ (slip op. at 23–28).

Defendant argues that "the investigating officers strategically chose to instead arrest [defendant] for the outstanding traffic warrants, without mentioning the arson investigation, to obtain [defendant's] Miranda waiver and evade the dictates of the New Jersey Supreme Court's decision[] in A.G.D." But even accepting for the sake of argument that the detectives had probable cause to believe defendant committed aggravated arson before the interrogation commenced, and thus expected and intended to apply for a

complaint-warrant charging aggravated arson, we do not see evidence of bad-faith interrogation tactics that violated defendant's constitutional rights.[9] At the outset of substantive questioning, the detectives explained that they wanted to talk to defendant about something other than the traffic warrants and then immediately directed defendant's attention to the nightclub. Indeed, defendant acknowledges in his appeal brief that "[d]uring the interrogation, not a single question was asked about the traffic warrant." Clearly, the substance of the interrogation, from start to finish, focused on the nightclub fire and related circumstances.

This is not a situation as in Diaz, where police interrogators deliberately withheld information that a person had died from a drug overdose until after the defendant had admitted to police that he distributed a controlled dangerous substance (CDS) to the victim's roommate on the day of the overdose death. __ N.J. Super. at __ (slip op. at 2–3). We held that the circumstances of the "carefully orchestrated" custodial interrogation in that case were designed to affirmatively mislead the defendant into believing that he had been arrested for a less serious crime (distribution of a small amount of CDS) than the one he

[9] We are satisfied that there is no need to remand for the trial court to determine whether the officers acted in bad faith within the meaning of Sims. As we have noted, the court expressly found that the detectives never misled defendant.

actually was facing (first-degree strict liability for drug-induced death). Id. at __ (slip op. at 40).[10] We explained that "[w]e have little tolerance for the form of deception that occurred in [that] case." Id. at ___ (slip op. at 37). We do not read the majority opinion in Sims to suggest otherwise.[11]

In the matter before us, the trial court expressly found that "[b]y no means was defendant misled or unaware of the nature of the questions." We agree. In stark contrast to the situation in Diaz, here, defendant was told before he answered any substantive questions that the subject matter of the

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[10] We add that in Diaz, which was decided before Sims was announced, we did not rule that the misleading police conduct was a per se violation of defendant's Miranda rights, automatically requiring suppression. Rather, we held that the investigative stratagem to withhold information about the overdose death at the outset of substantive questioning was a relevant factor in determining whether, considering the totality of the circumstances, the State had met its burden to prove beyond a reasonable doubt that the defendant knowingly and voluntarily waived his Fifth Amendment rights. __ N.J. Super. at ___ (slip op. at 40).

[11] Although we did not use the phrase "bad faith" to describe the investigative stratagem in Diaz, we believe that affirmatively and deliberately misleading an interrogee as to why he or she is being interrogated, as occurred in Diaz, would fall under the rubric of bad faith conduct as contemplated in Sims. We emphasize, moreover, that the majority in Sims did not limit the scope of the totality-of-the-circumstances paradigm to bad-faith police tactics. Rather, as we have already noted, the majority in Sims stated more broadly that that "failure to disclose to the defendant his [or her] status as a suspect before interrogating him [or her] should . . . 'be a factor in the totality-of-the circumstances test.'" __ N.J. at __ (slip op. at 27) (quoting Nyhammer, 197 N.J. at 405).

interrogation would not focus on the traffic warrants for which he was arrested. Before asking any substantive questions, the detectives made clear that they wanted to talk to defendant about "something else," and then asked him whether he was familiar with the nightclub and when he had last visited it. Defendant, now apprised of the true reason for the interrogation, did not ask to stop the questioning or to speak to a lawyer.[12] It was defendant, moreover, who first brought up the fire and asked the detectives if they were questioning him about that incident.

Furthermore, after the detectives told defendant he would be charged with aggravated arson, defendant told them that he was still willing to talk with them about the nightclub fire, ostensibly because he hoped to convince them to refrain from applying for a complaint-warrant charging aggravated arson. The detectives re-read the Miranda warnings, and defendant again waived his right to remain silent.

In sum, we conclude that the trial court's commendably detailed factual findings are supported by sufficient, indeed ample credible evidence in the record. Accordingly, we afford deference to those findings. See Sims, __ N.J. at __ (slip op. at 32). Considering the totality of the relevant circumstances,

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[12] Defendant on appeal does not contend that the detectives violated his Miranda rights by failing to honor a request to stop the interrogation.

we concur with the trial court's legal conclusion that the State met its burden to prove beyond a reasonable doubt that defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights.

We conclude our discussion of defendant's Fifth Amendment contention by underscoring that this was not a situation where an individual was held for hours without being told the true reason why he had been taken into custody. In the poignant preface to his dissenting opinion in Sims, Justice Albin remarked,

> [i]n a free society that values individual liberty, no person should be taken from his home or off the streets by the police, placed in handcuffs and kept in custody, and not told the reason for his [or her] arrest. Most people will be surprised to learn that they can be detained without explanation for a period of hours, if not longer, as the majority now holds.
>
> [__ N.J. at __ (slip op. at 1) (Albin, J., dissenting).]

Here, defendant was told not only the lawful basis for his arrest when he was first taken into custody—valid outstanding traffic warrants—but also was quickly informed as to the true reason why the detectives wanted to question him. Defendant learned that the interrogation would focus on the nightclub fire incident before he was asked any substantive questions and before he made any incriminating statements. Applying a "'searching and critical' review of the record to ensure protection of a defendant's constitutional rights," Hreha,

217 N.J. at 381–82, and accounting for all relevant circumstances militating for and against suppression, we are satisfied that the manner in which this custodial interrogation was conducted was lawful and does not offend contemporary notions of justice and fair play.

III.

A.

We next address defendant's contention that the trial court erred in allowing ECPO Detective Davis to testify both as an expert on arson and as a fact witness as lead investigating officer. This contention was raised to the trial court as part of a series of in limine motions that were heard shortly before the start of the jury trial. We discern the following facts from the Rule 104[13] hearing conducted before trial:

Davis testified at the hearing that he had served for four years as a detective with the ECPO and was presently assigned to the crime scene investigations bureau. He explained that he had previously been assigned to the crash and fire investigations unit for approximately two and a half years. That unit investigates motor vehicle collisions that involve serious injury or death and fires that are deemed to be suspicious.

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[13] See N.J.R.E. 104.

Davis testified that as part of his training for that unit, in 2016, he attended the Basic Course for Arson Investigators presented by the Division of Criminal Justice. He explained this was a two and a half-week course that provided a "basic overview of fire investigation in general." In particular, the course entailed "responding to fire scenes, identifying fire patterns, identifying ignition sources and ignition temperatures," as well as "[d]ocumenting fire scenes" and taking statements. He further explained that the course involved "investigating fire scenes, specifically . . . in Newark, where the class participants would meet with experienced arson investigators in the county, and . . . would go to separate houses of recent fires and . . . determine the cause of those fires."

Davis testified that he was member of the International Association of Arson Investigators and that he completed online training modules presented by that organization. He also attended training classes on vehicular fires hosted by the "police agency training counsel."

In addition, Davis testified that he received on-the-job training as part of his duties with the crash and fire investigations unit. He explained that he "shadowed" highly experienced lead detectives on investigations, learning about fire patterns, ignition sources, pour patterns, and various fuels that are used to start fires. He stated that he investigated fifteen to twenty fires while

he was assigned to the crash and fire unit and that he served as the lead investigator on approximately seven to ten of those cases.

He testified that after serving for a few months in the Adult Trial Section, he was transferred to his current assignment to the ECPO crime scene investigation bureau, which had merged with the crash and fire investigations unit. He explained that in addition to performing "regular crime scene duties," he was presently performing the same job functions as he did during his tenure in the crash and fire investigations unit.

Davis acknowledged that he had never previously testified regarding a fire investigation and that he had never before testified as an expert.

Davis then testified as to the role he played in the investigation of the nightclub fire. He explained that he was tasked "to investigate the individual that was observed on video setting [the] fire." Davis noted that this case "was a little bit different because early on [they] had a video of the fire being set," which showed that it was intentional.

At a sidebar conference, defense counsel raised concern that Davis' expert report was "essentially the lead detective's report in this case." Counsel argued there were portions of Davis' report that were not appropriate to present as expert testimony, such as the portion concerning the execution of the search warrant. To separate Davis's trial testimony as a fact witness from his

testimony as an expert witness, the judge suggested that Davis first testify on direct- and cross-examination about the investigation, and then be qualified and questioned as an expert on arson.

At the conclusion of Davis's testimony at the hearing, defense counsel objected to Davis's qualification as an expert in arson investigation because he had never before been qualified as an expert witness. Counsel also raised concerns about Davis's training and education. Counsel noted that Davis did not have a college degree in a science field, that his continuing education had been "primarily online and has dealt with things like ethics and professional development, not actually with the science of arson," and that his only recent in-person training pertained to vehicle fires and not to "structural fires or house fires." Defense counsel further argued that Davis should not be permitted to testify as an expert because he was the lead detective in the case.

The trial court rejected those arguments. The court first found that expert testimony was needed because "as far as what is outside the [ken] of the normal juror," Davis "will testify pertaining to the use of . . . things . . . that jurors just don't know." The court noted that while Davis would not need to explain, for example, that a Molotov cocktail will ignite when thrown, he could explain to the jury "the stages of how it ignites" or why it did not ignite and then why "[whomever] went back and got other materials."

The court acknowledged that Davis had never been qualified as an expert in this field and did not have a science degree. The court nonetheless found that Davis "had quite an extensive bit of on-the-job training." The court added that while Davis had not written any academic papers, the court had "never had an expert in arson testify in front of [it] that's written anything." The court also reiterated that there was "a way to separate" the "investigative end from the expert end," as the court had explained during the sidebar discussion. The court therefore determined that Davis could testify as an expert in arson investigation.

B.

Because defendant contends on appeal not only that Davis was not qualified to testify as an expert but also that it was improper for him to testify as both an expert and fact witness, we recount in detail the bifurcated manner in which the State presented his testimony to the jury. The State called Davis as a witness on the second day of the trial. At the start of his testimony, the court instructed the jury:

> Detective Davis, I believe at this part of the questioning, is testifying as a lay witness. If and when the State chooses to have . . . Detective Davis qualified as an expert, that will be a separate portion of the testimony but now he is testifying as a lay witness.

Davis's direct-examination testimony as a fact witness continued into the next trial day. Defense counsel then cross-examined Davis. At the completion of his cross examination as a fact witness, the court dismissed Davis from the courtroom.

At sidebar, defense counsel renewed her objection to Davis testifying as an expert, arguing again that expert testimony was not needed in this case, and that Davis was not qualified to render an expert opinion. Specifically, counsel argued that the surveillance video clearly showed that the nightclub fire had been set intentionally, as distinct from accidently or from natural causes. Expert testimony, counsel reasoned, therefore was not necessary. Counsel added that defendant's purposeful mental state—a material element of the aggravated arson offense—was not a subject upon which an expert could opine.

The judge noted that the purpose for starting the fire was disputed, remarking "that's what the Jury is to determine." The judge also agreed with defense counsel that the "expert cannot testify as to what he thinks the defendant's state of mind was . . . ." The judge added, "[b]ut the expert certainly has information pertaining to arson, and fires, and [other] things . . . that [the court has] gone over [at] length." The court thereupon overruled defendant's objection and permitted Davis to offer an expert opinion.

Davis was then recalled to the witness stand. He testified in voir dire as to his experience with the crash and fire investigation unit; the course he took on arson investigation presented by the Division of Criminal Justice; his online courses; and his on-the-job training experience. At the completion of the preliminary phase of his expert testimony, the State moved to have Davis qualified as an expert in the field of arson investigations. The defense objected, resting on its prior arguments. The court granted the State's motion for the reasons it had previously articulated at the pretrial Rule 104 hearing.

The court at that juncture provided preliminary instructions to the jury on how to consider expert testimony, tracking the pertinent model jury charge. The judge instructed the jury that it was "always within the special function of the Jury to determine whether the facts on which the answer or testimony of an expert is based actually exists," and that the "value or weight of the opinion of the expert is dependent upon and no stronger than the facts on which it is based." The judge further instructed the jury that it "should consider each opinion and give it the weight to which you deem it is entitled. Whether that be great, or slight, or you may reject it."

Davis then testified that fire requires "oxygen, a fuel source, and the application of heat," and that fires are classified as accidental, natural, or intentional during investigations. He explained that arson investigators look

for the origin of the fire, and that when he arrived at the nightclub on July 17, 2016, he looked "for anything that would indicate that there's an intentionally set fire." He noted for the jury that he observed only one side of the building, the front, had contained fire damage, while the other three sides contained no fire damage.

The prosecutor showed Davis a photograph of the nightclub sign and asked, "as an arson investigator," if there was anything to note regarding the sign. Davis testified that "the front sign displayed fire patterns, fire damage to the lettering," and that there was a "pretty distinct pattern below the letter O and to the right of the O." He explained that was relevant to an arson investigation because the fire pattern is "typically defined as the physical and measurable, physical changes that are caused by fire," and when "ignitable liquid fluid is used, there's usually a unique but characteristic pattern." Davis testified that to the right of the letter O, there was a "very jagged pattern surrounding the lettering," and "to the right of that there's small droplets." Davis also explained the flammability of gasoline and the temperatures that different materials such as vinyl, wood, glass, and stone, would need to reach in order to catch fire. He testified that he observed at the scene "heavy soot damage" on the front door and front window. Davis also described how the damage to the door was "typical with (indiscernible) ignitable liquid being

thrown on the surface, and not catching the surface, but [the] liquid itself burning and deforming the paint."

C.

We begin our legal analysis of defendant's contentions regarding Davis' testimony by summarizing the relevant principles of law that govern this portion of defendant's appeal. In State v. Covil, our Supreme Court held that "the trial court must act as a gatekeeper to determine 'whether there exists a reasonable need for an expert's testimony.'" 240 N.J. 448, 465 (2020) (quoting State v. Nesbitt, 185 N.J. 504, 507–08 (2006)). In State v. Doriguzzi, we held that "[a] factfinder should not be allowed to speculate without the assistance of expert testimony in an area where the average person could not be expected to have sufficient knowledge or experience." 334 N.J. Super. 530, 538 (App. Div. 2000) (citing Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997)). Unlike lay opinion testimony, expert testimony is given by an individual who possesses specialized knowledge about a particular subject. That specialized expertise is then used to "address matters outside a juror's understanding." State v. Hyman, 451 N.J. Super. 429, 443 (App. Div. 2017).

N.J.R.E. 702, which governs expert testimony, states "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as

an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Additionally, N.J.R.E. 703 prescribes the foundation for expert testimony, requiring that expert opinions be based on "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts." Townsend v. Pierre, 221 N.J. 36, 53 (2015) (internal quotations omitted) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)).

Furthermore, a witness "offered as an expert must . . . be suitably qualified and possessed of sufficient specialized knowledge to be able to express such an opinion and to explain the basis of that opinion." State v. Odom, 116 N.J. 65, 71 (1989) (citing State v. Kelly, 97 N.J. 178, 208 (1984)). The expert must have specialized knowledge and expertise through education, experience, formal or informal training, or any combination thereof. See State v. Smith, 21 N.J. 326, 334 (1956).

In sum, the party offering expert testimony must establish three foundational requirements:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror;

> (2) the subject of the testimony must be at a state of the art such that an expert's testimony could be sufficiently reliable; and
>
> (3) the witness must have sufficient expertise to explain the intended testimony.
>
> [State v. Harvey, 151 N.J. 117, 169 (1997) (quoting Kelly, 97 N.J. at 208).]

"Those requirements are construed liberally in light of [N.J.R.E.] 702's tilt in favor of the admissibility of expert testimony." State v. Jenewicz, 193 N.J. 440, 454 (2008) (citing State v. Berry, 140 N.J. 286, 290–93 (1995)). The Supreme Court has emphasized, however, that while a "trial court may find a witness qualified to give an expert opinion, the court should carefully weigh whether the prejudicial effect of that evidence outweighs its probative value." State v. Torres, 183 N.J. 554, 580 (2005); see also N.J.R.E. 403 ("[R]elevant evidence may be excluded if its probative value is substantially outweighed by the risk of[] . . . undue prejudice, confusion of issues, or misleading the jury[.]"). Importantly for purposes of this appeal, the Court in Torres observed that "when the expert witness is an investigating officer, the expert opinion may present significant danger of undue prejudice because the qualification of the officer as an expert may lend credibility to the officer's fact testimony regarding the investigation." 183 N.J. at 580. In such a "delicate situation," the trial court is required to "carefully weigh the testimony and determine

whether it may be unduly prejudicial." Ibid. The Court further instructed that trial courts should exercise their discretion to limit the scope of the testimony when appropriate. Ibid. "In all cases where expert testimony is allowed, the trial court . . . should give a limiting instruction to the jury 'that conveys to the jury its absolute prerogative to reject both the expert's opinion and the version of the facts consistent with that opinion . . . ." Ibid. (quoting Berry, 140 N.J. at 304).

Finally, we remain mindful that appellate courts must afford substantial deference to the trial court's evidentiary rulings and may only reverse for abuse of discretion. State v. Cole, 229 N.J. 430, 449 (2017). Even if objected to, "[t]he admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend, 221 N.J. at 52 (citing Berry, 140 N.J. at 293). When reviewing decisions under that deferential standard, an appellate court "should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.'" State v. Kuropchak, 221 N.J. 368, 385–86 (2015) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

D.

We next apply these principles to each of defendant's contentions regarding Davis' trial testimony. Defendant argues that because the

surveillance video shows the perpetrator starting the fire, Davis's expert testimony was "superfluous" and not helpful to the jury. We see no abuse of discretion in the trial court's ruling that expert testimony concerning fire patterns and how different materials catch fire and spread would assist the jury. Such testimony helped to explain, for example, why the fire only damaged the sign and did not spread to the entire building. That circumstance, in turn, was relevant in this case because the State bore the burden of proving that defendant started the fire "[w]ith the purpose of destroying a building or structure of another." N.J.S.A. 2C:17-1(a)(2) (emphasis added).

We also reject defendant's argument that Davis lacked the experience, education, and credentials to qualify as an expert on arson. It is true, of course, that prior qualification as an expert witness is a relevant consideration. Defendant cites no authority, however, for the proposition that a person cannot render an expert opinion unless he or she has been qualified and testified as an expert witness at least once before. For all things there must be a first time. Were we to embrace defendant's argument and carry it to its logical extreme, the pool of experts could never expand.

Nor do we believe the trial court abused its discretion in finding that Davis was qualified to testify as an expert based on his live and on-line training and on-the-job experience as an arson investigator. The trial court

carefully considered those professional qualifications—which Davis testified to in detail—and we decline to second-guess the court's assessment of them given the deferential standard of appellate review. While it is true that Davis lacks an undergraduate degree in a scientific field, such academic credentials are not a prerequisite to qualifying as an expert. We note that N.J.R.E. 702 expressly provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education." (emphasis added). As our Supreme Court recognized in Smith, "an expert may be qualified by study without practice or practice without study . . . ." 21 N.J. at 334.

So, too, we reject defendant's contention that he suffered substantial prejudice because Davis was the lead investigator and "primary fact witness" as well as the expert in this case. We believe the trial court carefully addressed this "delicate situation," Torres, 183 N.J. at 580, taking reasonable precautions to minimize the potential for unfair prejudice. For example, the court ensured that Davis left the witness stand in between his lay and expert testimony, underscoring the delineation between the different roles he played, first as a fact witness, and then as an expert witness. Davis was subject to distinct cross-examinations at each separate phase of his testimony. Furthermore, the court provided the jury with appropriate instructions prior to Davis's lay testimony and then again prior to his testimony as an expert. Those

instructions appropriately informed the jury that they were free to reject his opinion. See ibid.

IV.

Defendant argues for the first time on appeal that the trial court erred by allowing the State to play for the jury a portion of the audio/video recording of defendant's custodial interrogation without redacting assertions made by the interrogating detectives to defendant that he was the person depicted in the surveillance video setting the fire. Defendant now argues that the recording that was played to the jury, while redacted in other respects, presented the functional equivalent of impermissible lay opinion testimony as to the identity of the person shown in the surveillance video. Defendant also contends the recording improperly presented the officers' opinion on the ultimate question of whether defendant is guilty of aggravated arson. Defendant argues the trial court compounded the error by failing to sua sponte provide an instruction to the jury to disregard the interrogating officers' accusatory comments and opinions as to defendant's guilt.

The record shows that at the in limine hearing, the trial judge, defense counsel, and prosecutor carefully went through the transcript of the electronically-recorded interrogation to identify portions that needed to be redacted from the version that was to be played to the jury. Defendant now

contends for the first time on appeal that the following additional excerpts should have been redacted:

> DETECTIVE: Here you are splashing gas (indiscernible).
>
> . . . .
>
> DETECTIVE: But this is you, this is the same person.
>
> . . . .
>
> DETECTIVE: . . . We know you did it. We got you on video, it's not like we made this up, bro . . . .
>
> . . . .
>
> DETECTIVE: The video shows you. It's clear the video shows you doing it.
>
> . . . .
>
> DETECTIVE: You [sic] busted, really (indiscernible) we already know that, but we just want to know why. Because the video got you clearly . . . .
>
> . . . .
>
> DETECTIVE: There's no reason to lie to me. You are clearly on video. No question.
>
> . . . .

DETECTIVE: We're very clear on that. We don't need you to tell us. We have that. We know that's you.

. . . .

DETECTIVE: Like we explained to you, we have it on video . . . it's clear. You're walking across the street. You've got that Molotov cocktail. You've got the gas can, you got the clothes, the hat, the car. We have you. Clear as day. . . . It is what is [sic]. Second Degree Aggravated Arson.

A.

We first address the State's argument that defendant is procedurally barred from raising this contention on appeal under the doctrine of invited error because defense counsel did not request the trial court to redact those portions of the recorded interrogation while requesting that other portions be redacted. As we have already noted, the trial court convened an in limine hearing precisely for the purpose of determining what portions of the stationhouse interrogation recording needed to be redacted before it could be played to the jury. The State thus urges us to refuse to consider defendant's newly-minted contention rather than apply a plain error standard of review.

The fact that defendant failed to request redaction of the portions of the interrogation now claimed to be prejudicial on appeal is relevant to our

resolution of defendant's contention. We do not believe, however, that the invited error doctrine applies in these circumstances.

Under that doctrine,

> a "defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his [or her] chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he [or she] sought and urged, claiming it to be error and prejudicial."
>
> [State v. Jenkins, 178 N.J. 347, 358 (2004) (quoting State v. Pontery, 19 N.J. 457, 471 (1955)).]

The Court in Jenkins added,

> when a defendant asks the court to take his [or her] proffered approach and the court does so, we have held that relief will not be forthcoming on a claim of error by that defendant. On another occasion, we characterized invited error as error that defense counsel has "induced." State v. Corsaro, 107 N.J. 339, 346 (1987). However, we have not decided whether actual reliance by the court is necessary to trigger the doctrine.
>
> [Ibid.]

The Court further explained that the doctrine of invited error as applied in criminal cases "is designed to prevent defendants from manipulating the system." Id. at 359. As a result,

> the invited-error doctrine . . . is implicated only when a defendant in some way has led the court into error. Conversely, when there is no evidence that the court in any way relied on a defendant's position, it cannot

> be said that a defendant has manipulated the system. Some measure of reliance by the court is necessary for the invited-error doctrine to come into play.
>
> [Ibid.].

As we recently explained in State v. Canfield, the Supreme Court's analysis and holding in Jenkins provides important instruction on the restrictive boundaries of the invited-error doctrine. __ N.J. Super.__, __ (App. Div. 2022) (slip op. at 42–47). In Jenkins, the defendant on appeal "reversed positions," arguing that "notwithstanding [the defendant's] request at trial, the court erred in failing to instruct on [specified] lesser-included offenses . . . ." 178 N.J. at 357. The Court narrowly framed the invited-error issue, explaining, we focus on "whether the court actually must rely on the defendant's position [at the trial court level] in reaching a result." Id. at 358. The Court ultimately held that such reliance is required to invoke the invited-error doctrine, and in that case, although the trial judge had acceded to the defendant's request, the trial court's explanation for its decision made clear that it had arrived at the decision not to instruct on lesser-included offenses "independently of any invitation or encouragement by defendant." Id. at 360. In those circumstances, the Court declined to invoke the invited-error doctrine and instead considered the defendant's appellate contention applying the plain-error standard of review. Ibid.

In Canfield, the defendant, who was tried for murder, argued for the first time on appeal that the trial court erred by not instructing the jury on the lesser offense of passion-provocation manslaughter sua sponte. __ N.J. Super. at __ (slip op. at 3). At the charge conference, the parties and the court considered whether the jury should be instructed on certain lesser-included offenses. Id. at __ n.6 (slip op. at 19 n.6). The defendant urged the trial court not to charge any lesser-included offenses, but made no specific mention of passion/provocation manslaughter. Ibid. We determined that defendant had not explicitly requested the trial court not to charge the jury on passion/provocation manslaughter, and therefore we "decline[d] to assume that [the] defendant's generic argument not to charge on [other] lesser-included offenses . . . somehow influenced the trial court's decision whether to charge on passion-provocation manslaughter." Id. at __ (slip op. at 45). We noted that the defendant "did not expressly argue against a passion/provocation instruction" and that "[h]is silence with respect to any such instruction [was] at best a tacit objection that must be extrapolated inferentially from his objection to other lesser-included charges." Id. at __ (slip op. at 46). We therefore declined to invoke the invited-error doctrine and, as in Jenkins, we instead applied the plain-error standard of review to the defendant's newly-minted contention on appeal. Id. at __ (slip op. at 46–47).

In the present case, our review of the transcript of the in limine redaction hearing shows that neither party mentioned the detectives' accusatory statements/opinions that are now at issue on appeal. As we explain in subsection B, infra, we acknowledge that defendant's failure to request redaction of those statements/opinions appears to have been a strategic decision. Even so, following the approach we took in Canfield, we decline to interpret defendant's failure to ask for redaction of those statements/opinions as tantamount to an affirmative request that the jury be allowed to hear them.

The fact remains that the State introduced a version of the interrogation recording as trial evidence, and thus the State bore responsibility for its content. We thus conclude that for purposes of the invited-error doctrine, defendant did not advocate an erroneous approach, much less induce the court to admit the portions of the interrogation recording that were played to the jury during the State's case-in-chief. Cf. Jenkins, 178 N.J. at 358. Accordingly, we chose to address defendant's contention on its merits, applying the plain error standard of review.

B.

Under the plain error standard, an appellate court should reverse a defendant's trial conviction only if the error is "clearly capable of producing an unjust result." R. 2:10-2. "An evidentiary error will not be found 'harmless' if

there is a reasonable doubt as to whether the error contributed to the verdict." State v. J.R., 227 N.J. 393, 417 (2017). Moreover, "the prospect that the error gave rise to an unjust result 'must be real [and] sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" Ibid. (alterations in original) (quoting State v. Lazo, 209 N.J. 9, 26 (2012)). However, a guilty verdict following a fair trial and "based on strong evidence proving guilt beyond a reasonable doubt[] should not be reversed because of a technical or evidentiary error that cannot have truly prejudiced the defendant or affected the end result." Ibid. (quoting State v. W.B., 205 N.J. 588, 614 (2011)).

We are especially mindful of the general principle that the failure to object to testimony permits an inference that any error in admitting the testimony was not prejudicial. See State v. Nelson, 173 N.J. 417, 471 (2002); State v. Frost, 158 N.J. 76, 84 (1999) ("The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made."). This principle seems particularly apt here. In this instance, counsel's decision to seek redaction of some portions of the interrogation recording but not others strongly suggests that, in the environment of the trial, the unredacted portions were not prejudicial. Indeed, as we have noted, defense counsel's failure to seek redaction or otherwise object to the jury

hearing the detectives' accusatory statements/opinion appears to have been a strategic decision, as shown by counsel's closing arguments to the jury.

A major theme of the defense summation was that the detectives "decided so early in this case that [defendant] was guilty that they closed their eyes to other possible leads." Defense counsel argued forcefully that the detectives targeted and then charged an innocent man because they were "overzealous." Counsel at the start of her summation argued, "[o]verzealous and overcharged, that is what this case is about, that is why we are here, <u>that is what you saw during this trial</u>." (emphasis added). In support of that defense theory, counsel highlighted that the detectives employed an aggressive interrogation technique by "telling the person [defendant], I know you're guilty, I know you did this." In this way, defense counsel in summation relied upon the very portions of the interrogation recording now claimed to be prejudicial to show that the detectives were so firmly convinced of defendant's guilt that they stopped investigating the crime prematurely and thus failed to find the true culprit. In view of that defense strategy, defendant is hard pressed to argue on appeal the jury should not have heard the detectives' repeated accusations and declarations as to defendant's guilt.

Relatedly, in gauging the potential for unfair prejudice, we also note that the detectives' remarks during the interrogation were not presented to the jury

as lay opinion testimony, but rather as statements that were made to defendant to induce him to admit that he was the person depicted in the surveillance video starting the fire. The cases defendant relies upon are, thus, distinguishable, because they involve instances where an officer during live testimony at trial identified a defendant from surveillance video or photographs.

In State v. Singh, for example, our Supreme Court recently held that a police officer could not offer his lay opinion testimony identifying a defendant on a surveillance video. 245 N.J. 1 (2021). In that case, the defendant was tried and convicted of first-degree robbery and other offenses. Id. at 7. At trial, the State introduced video surveillance of the incident. Id. The State presented the testimony of a detective who narrated the footage depicted on the surveillance video. Id. During the narration, the detective referred to the individual depicted on the video surveillance as "defendant." Id. at 10. The Supreme Court held that the detective's identification testimony was an improper lay-witness opinion, but nonetheless affirmed his convictions, noting that any error was harmless. Id. at 17; see also State v. Lazo, 209 N.J. 9, 24 (2012) (in which a detective testified at trial he included the defendant's photograph in a photo array because he thought it resembled the sketch drawn from the victim's description). In contrast, in the matter now before us,

Detective Davis did not identify defendant as the perpetrator depicted in the surveillance video during his live testimony at trial. The fact that he was not asked to do so at trial clearly distinguished the role he was playing during the stationhouse interrogation—police interrogator—from the role he played as a fact witness at trial.

For the same reason, we are not persuaded by defendant's reliance on cases that hold that trial witnesses may not opine on an ultimate issue that is to be decided by the jury, including especially whether a defendant is guilty of the crime charged. See e.g., State v. Cain, 224 N.J. 410, 427 (2016) (noting that an expert's testimony on the ultimate issue of a defendant's state-of-mind "may be viewed as an expert's quasi-pronouncement of guilt that intrudes on the exclusive domain of the jury as factfinder . . ."); State v. Mclean, 205 N.J. 438, 461–63 (2011) (holding that neither expert nor lay opinion police testimony may be used to express a view on the ultimate question of guilt or innocence); State v. Landeros, 20 N.J. 69, 74–75 (1955) (reversing conviction because of police officer's prejudicial testimony regarding the defendant's guilt). Those cases focus on live trial expert or lay opinion testimony. Here, the detectives were not expressing their opinion in the guise of assisting the

jury, but rather expressing their opinion to defendant to prompt him to reply in the course of the stationhouse interrogation.[14]

Even so, we believe the better practice in these circumstances would have been for the court at the in limine redaction hearing to confirm on the record that defense counsel had no objection to playing portions of the interrogation recording in which the detectives claimed that defendant was the person in the surveillance video and that defendant was clearly guilty of aggravated arson.[15] At a minimum, the jury should have been instructed that the detective's statements made during the stationhouse interrogation should not be deemed testimony and may be considered only in the context of understanding how the interrogation was conducted and how defendant responded to the forceful accusations that were made against him during the

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[14] We add that defendant does not assert—and the record does not show—that the detectives' statements during the recorded interrogation suggest that they were aware of incriminating facts outside the record. Cf. State v. Branch, 182 N.J. 338, 351 (2005) (reviewing Confrontation Clause cases and discerning that "a police officer [when testifying] may not imply to the jury that he [or she] possesses superior knowledge, outside the record, that incriminates the defendant"). Here, it is clear that the detectives' repeated assertions to defendant that he was guilty were based on their interpretation of the surveillance video that captured the arsonist in flagrante delicto. That video was shown to the jury.

[15] We note that had the court, or prosecutor, raised the topic at the in limine redaction hearing, defense counsel's response might well have laid the foundation for an invited-error argument on appeal if defendant were later to "reverse" the position advocated to and relied upon by the trial court.

course of the interrogation. We thus are constrained to conclude that the trial court's failure to issue such a limiting instruction sua sponte was error. However, considering the strong admissible evidence proving guilt beyond a reasonable doubt, see J.R., 227 N.J. at 417, we do not believe the failure to issue a limiting instruction was capable of producing an unjust result, and thus does not rise to the level of plain error requiring reversal of the jury verdict.

V.

We turn next to defendant's contention, raised for the first time on appeal, that the trial court improperly instructed the jury on aggravated arson. Specifically, defendant contends that the trial court erred by "not including in its charge a reference to defendant's frequent hypothetical explanations that whomever it was that started the fire intended only to burn the sign." Contrary to the position defendant took at trial, defendant in his appeal brief now acknowledges that he may have been referring to himself when he offered "hypothetical" explanations to the interrogating detectives.[16] Because the State was required to prove that the actor's purpose was to destroy a building or structure of another, see N.J.S.A. 2C:17-1(a)(2), defendant now asserts that the judge should have instructed the jury that "it could consider [defendant's]

[16] Defendant's appeal brief reads, "[a]lthough hypothetical, the context made it clear that [defendant] may have been referring to himself."

comments about the sign in its deliberations" sua sponte. We conclude the trial court did not abuse its discretion by not tailoring the jury instructions in the manner that defendant now suggests for the first time on appeal. Indeed, because the defense maintained that defendant was not the person shown in the surveillance video starting the fire, we believe that it would have been inappropriate for the trial court to call attention to evidence that suggested that defendant had started the fire as retaliation against the nightclub, albeit with the intention to burn only the nightclub sign and not the entire building.

The court's instructions to the jury tracked the model jury instructions for aggravated arson. Those instructions informed the jury that the first element that the State needed to prove beyond a reasonable doubt was that defendant "purposely started a fire at or near the premises known as [nightclub address on] Clinton Avenue, Irvington, New Jersey." The court instructed the jury on the definition of "purposely," and also explained that it is "not necessary that any significant damage be done. It is only necessary that a fire be started for the purpose . . . to be described. The lack of success of the perpetrator is immaterial."

The court next instructed that "the second element the State must prove beyond a reasonable doubt is that at the time the defendant started the fire . . . his purpose was to destroy [the nightclub]." The judge defined "destroy" to

mean "to demolish and/or render useless and/or to render completely ineffective for its intended use."

Defendant at the charge conference, see R. 1:8-7(b), did not request the court to tailor the model jury charge. Nor did defendant object to the charge that was delivered.

We once again begin our analysis by acknowledging certain governing legal principles, this time regarding jury instructions. "Appropriate and proper charges to a jury are essential for a fair trial." State v. Carrero, 229 N.J. 118, 127 (2017) (quoting State v. Daniels, 224 N.J. 168, 180 (2016)). Proper jury instructions are "crucial to the jury's deliberations on the guilt of a criminal defendant." State v. Jordan, 147 N.J. 409, 422 (1997). In its jury instructions, a "trial court must give 'a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Green, 86 N.J. 281, 287–88 (1981)). "[B]ecause correct jury charges are especially critical in guiding deliberations in criminal matters, improper instructions on material issues are presumed to constitute reversible error." Jenkins, 178 N.J. at 361 (citing Jordan, 147 N.J. at 421–22).

"The test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of

law." Baum, 224 N.J. at 159 (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997)). Model jury charges are often helpful to trial judges in performing the important function of charging a jury. State v. Concepcion, 111 N.J. 373, 379 (1988). Indeed, a jury charge is presumed to be proper when it tracks the model jury charge because the process to adopt model jury charges is "comprehensive and thorough." State v. R.B., 183 N.J. 308, 325 (2005); see also State v. Whitaker, 402 N.J. Super. 495, 513–14 (App. Div. 2008) (quoting State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000)) (explaining that "[w]hen a jury instruction follows the model jury charge, although not determinative, 'it is a persuasive argument in favor of the charge as delivered'"); cf. Mogull v. CB Com. Real Est. Grp., Inc., 162 N.J. 449, 466 (2000) ("It is difficult to find that a charge that follows the Model Charge so closely constitutes plain error.").

The Court in Concepcion recognized that while model jury charges are often useful, "[a]n instruction that is appropriate in one case may not be sufficient for another case. Ordinarily, the better practice is to mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case." 111 N.J. at 379. "That requirement [to mold the instruction] has been imposed in various contexts in which the statement of relevant law, when divorced from the facts, was potentially confusing or

misleading to the jury." State v. Robinson, 165 N.J. 32, 42 (2000). In such instances, "the trial court was required to explain an abstract issue of law in view of the facts of the case." Id. at 43. In Concepcion, the Court added that "[i]ncorporating specific evidentiary facts into a jury charge is especially helpful in a protracted trial with conflicting testimony." 111 N.J. at 380 (citing State v. Parker, 33 N.J. 79, 94 (1960)).

We emphasize, "[h]owever, [that] there is no principle requiring that in every case a court must deliver a specifically tailored instruction relating to the facts of the case to the applicable law." State v. T.C., 347 N.J. Super. 219, 240 (App. Div. 2002). Accordingly, "not every failure [to tailor jury instructions] is fatal." State v. Tierney, 356 N.J. Super. 468, 482 (App. Div. 2003) (quoting State v. Bilek, 308 N.J. Super. 1, 10 (App. Div. 1998)). When the facts are neither complex nor confusing, a court does not have to provide an intricate discussion of the facts in the jury charge. Ibid. (citing State v. Morton, 155 N.J. 383, 422 (1998)); see also State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999) (holding that although a more precise molding of the jury instructions to the facts would have been preferable, the charge given was sufficient because "as a whole, [it] was consistent with the factual theories advanced by the parties.").

Importantly, when, as in this case, a defendant does not object to the instructions at trial, we review the jury charge under the plain error standard, which, as we have already noted, requires reversal only for errors "of such a nature as to have been clearly capable of producing an unjust result." State v. Trinidad, 241 N.J. 425, 451 (2020) (quoting R. 2:10-2). More specifically, when reviewing jury instructions for plain error, there must be "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and 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. Montalvo, 229 N.J. 300, 321 (2017) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). The Court in Montalvo added that when a defendant does not object to the charge, "there is a presumption that the charge was not error and was unlikely to prejudice . . . defendant's case." Id. at 320 (quoting State v. Singleton, 211 N.J. 157, 182 (2012)).

Furthermore, an "alleged error is viewed in the totality of the entire charge, not in isolation," and "any finding of plain error depends on an evaluation of the overall strength of the State's case." State v. Nero, 195 N.J. 397, 407 (2008) (quoting Chapland, 187 N.J. at 288–89). "The mere possibility of an unjust result is not enough." State v. Alexander, 233 N.J. 132, 142 (2018) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)).

"Rather, '[t]he 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.'" Ibid. (alteration in original) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

In this instance, defendant now argues the trial court should have commented on defendant's remarks during the stationhouse interrogation when he hypothesized, literally, about the arsonist's intent and whether it was to destroy the building that housed the nightclub. It is well established that "[t]rial courts have broad discretion when commenting on the evidence during jury instruction." State v. Brims, 168 N.J. 297, 307 (2001) (citing Robinson, 165 N.J. at 45). Moreover, "summarizing the strengths and weaknesses of the evidence is [generally] more appropriately left for counsel." Robinson, 165 N.J. at 45. Thus, it is within the trial court's "sound discretion" to "decide on a case-by-case basis when and how to comment on the evidence . . . ." Ibid.

Here, the predominant defense theory at trial was that defendant was not the man depicted on the video starting the fire. During closing arguments, defense counsel argued to the jury that it was not clear from the video who started the fire and highlighted the differences between the person shown in the video starting the fire and the clothing that defendant was wearing that night. Counsel, it bears emphasis, did not concede that defendant set the fire

and then argue that he meant only to burn the sign and not the entire building. In light of the defense theory of misidentification, it is not surprising that counsel did not ask the trial court to comment on the hypothetical explanation that defendant posited to the detectives during the stationhouse interrogation. Indeed, any such commentary by the judge might have undermined the predominant defense theory that defendant had been misidentified by overzealous investigators. Cf. White, 326 N.J. Super. at 315 (suggesting that molded jury instructions should be consistent with the factual theories advanced by the parties).

We add that we could discern nothing in the trial court's instruction to intimate that the jury could not consider the hypothetical explanation defendant offered during the interrogation in determining whether the State had proved all of the material elements of second-degree arson, including the purpose to destroy a building or structure. Defendant argues in his appeals brief that "the jury may well have been uncertain about their authority to consider it [defendant's hypothetical explanation] because it was posed as a hypothetical." We believe that argument is unfounded speculation. We have no doubt that the jury understood that it could consider everything the defendant said during the portions of the interrogation session that were played for them. If the defense for some reason wanted to highlight for the jury that

defendant was really talking about himself when he was referring to the hypothetical arsonist—which is what the prosecutor argued—defense counsel was free to do so at the charge conference or during closing argument.

We add that this case does not involve such complex or confusing facts as to require the court to tailor the instruction as he now suggests. See Tierney, 356 N.J. Super. at 482; see also State v. Berry, __ N.J. Super. __, __ (App. Div. 2022) (slip op. at 42–43) (finding that a multi-level leader of a narcotics trafficking network trial of three alleged leaders was complex and confusing, necessitating a tailored jury instruction as to each defendant's supervisory role in the network). We thus conclude that in charging the jury the trial court did not commit error, much less plain error. This is especially so given the overall strength of the State's case. See Nero, 195 N.J. at 407.

VI.

Finally, we address defendant's contention that the cumulative effect of the errors he asserts on appeal warrant a new trial. The law is well-settled in this regard that "even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." Jenewicz, 193 N.J. at 473. "Where the aggregation of legal errors renders a trial unfair, a new trial is required." State v. T.J.M., 220 N.J. 220, 238 (2015). However, this

principle does not apply "where no error was prejudicial and the trial was fair." Ibid. (quoting State v. Weaver, 219 N.J. 131, 155 (2014)).

In this case, we find only one error that might be considered as part of a cumulative-error analysis—the failure to instruct the jury as to the limited relevance of the detectives' accusations and opinions expressed during the recorded interrogation. See supra section IV. Accordingly, we conclude that no error was prejudicial and the trial was fair.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION