SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0122-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Atlantic County.
MAXIMO SANTIAGO,	:	
		Indictment No. 21-07-00790-I
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Bernard E. Delury, Jr., J.S.C., Hon. Dorothy M. Incarvito-Garrabrant, J.S.C., and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: September 13, 2024
DEFENDANT IS CONFINED.

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PROCEDURAL HISTORY

On July 8, 2021, an Atlantic County grand jury returned Indictment No. 21-07-00790-I, indicting Mr. Maximo Santiago for offenses arising from the shooting death of Ms. Marketa Thorpe on September 12, 2020. (Da 1-5)[1] The charges against Santiago were:

1. Murder - purposely, first degree, N.J.S.A. 2C:11-3(a)(1);
2. Possession of a weapon for an unlawful purpose – firearm, second degree, N.J.S.A. 2C:39-4(a)(1); and
3. Certain persons not to have weapons, second degree, N.J.S.A. 2C:39-7(b). (Da 1-5)

On April 25, 2022, the Hon. Bernard E. Delury, J.S.C., heard argument on defendant's motion to suppress statements he made to police. (1T) On May 19, 2022, the court denied defendant's motion. (Da 6-29)

A jury trial on the first two counts was conducted before the Hon. Dorothy M. Incarvito-Garrabrant, J.S.C., beginning on March 7, 2023. (3T 7-13 to 8-8)

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[1] Da – Defendant's appendix
1T – Transcript of April 25, 2022 motion hearing
2T – Transcript of March 6, 2023 motion hearing
3T – Transcript of March 7, 2023 trial
4T – Transcript of March 8, 2023 trial
5T – Transcript of March 9, 2023 trial
6T – Transcript of March 10, 2023 trial
7T – Transcript of June 23, 2023 sentencing
PSR – Presentence Report

On March 10, the jury returned its verdict, finding Santiago guilty of murder and unlawful possession. (6T 7-6 to 8-6; Da 172-174) Following the jury verdict, Santiago waived his right to a jury trial on the certain persons offense and was found guilty by a bench trial the same day. (6T 16-8 to 22-3, 24-16 to 29-4; Da 175-178)

On June 23, 2023, Judge Incarvito-Garrabrant sentenced Santiago. (7T) The court found aggravating factors 3 (risk of reoffense), 6 (defendant's prior record and seriousness of the offenses), and 9 (deterrence). N.J.S.A. 2C:44-1(a)(3), (6), (9). (7T 31-22 to 33-5; Da 178) The court found mitigating factor 7 (substantial period of law-abiding life). N.J.S.A. 2C:44-1(b)(7). (7T 33-14 to 18) The aggravating factors were found to outweigh the mitigating factor. (7T 33-19 to 21)

On the murder count, Santiago was sentenced to 40 years of incarceration subject to an 85% parole disqualifier pursuant to NERA, N.J.S.A. 2C:43-7.2. (7T 34-2 to 36-24) Count two, possession of a weapon for an unlawful purpose, merged with the murder. (7T 34-17 to 19) For count three, the certain persons offense, Santiago was sentenced to a concurrent five-year prison term with a five-year parole disqualifier subject to the Graves Act. (7T 34-20 to 25)

A notice of appeal was filed on September 14, 2023. (Da 179-181)

STATEMENT OF FACTS

This case arises from the September 12, 2020 shooting death of Ms. Marketa Thorpe. The State's theory was that Mr. Maximo Santiago shot Ms. Thorpe, without justification, while she stood on the sidewalk outside of his home. (5T 74-15 to 25) The defense's theory was that Santiago was acting in defense of himself and his disabled wife, who was inside the home. (5T 61-13 to 17) At the time of the shooting, Thorpe was 33 years old and Santiago was 69 years old. (PSR at 1, 15) All the information the State presented about Santiago and Thorpe's history comes from Santiago's Miranda[2] statement made after his arrest. Because the State focused its argument on Santiago's statement, and because the statement has been misinterpreted, it is discussed in detail in subpart B. below.

A. Events of September 12, 2020

On the morning of September 12, Thorpe had been sleeping on the porch of 1511 Belfield Avenue, Santiago's home. (1T 126-10 to 23) Santiago had been living at that address for nearly 30 years with Ms. Rella Thomas, his wife.[3] (Da 159; PSR at 9, 13) Ms. Thomas is disabled and has a hard time using the

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

[3] Santiago and Thomas refer to one another as husband and wife, but Thomas said in her statement that the two were never formally married. (Da 154; 5T 58-13 to 18)

staircase in the house; she was sleeping on the third floor of the house on the morning of the 20th. (Da 157, 162) Santiago had slept on the second floor. (Da 158) He had brought breakfast up to Thomas before she went back to sleep. (Da 161-162)

Surveillance cameras covering a nearby parking lot captured a partial view of the street and the sidewalk immediately outside of Santiago's porch; a motion-sensor camera on a nearby business filmed the parking lot at the rear of 30 South New York Avenue, pointing towards Belfield Avenue. (4T 77-3 to 22) A cropped version of this video, focused on the area in front of Santiago's house, was played for the jury. (4T 80-3 to 81-19) The events were summarized by the defense in closing: on camera, Thorpe and Santiago can be seen interacting in front of the house for about fifteen minutes leading up to the shooting. (5T 62-5 to 15) Both individuals can be seen walking away from, and back towards, the porch, appearing to argue. (5T 16-2 to 12) Thorpe can be seen on the video following Santiago, seemingly striking out at him with a broom. (5T 62-16 to 63-6) Santiago eventually goes back in the house and Thorpe seems to walk away. (5T 63-6 to 15) When Santiago comes back outside to go to his car, Thorpe reappears, still brandishing the broom and running up on the porch. (5T 63-12 to 18)

At approximately 11:22 a.m., Thorpe can be seen on the video standing on the sidewalk outside of the house before suddenly collapsing; Santiago had shot her one time from the porch while Thorpe was on the sidewalk, apparently refusing to leave. (4T 82-20 to 83-1, 84-1 to 88-16, 100-8 to 18; 5T 63-23 to 64-1) Within moments, a neighbor called 911 and reported that a Hispanic male wearing a red shirt had shot a woman with a rifle on Belfield Avenue. (3T 102-14 to 103-13)

A patrol car was parked just about a block away and arrived on Belfield Avenue in "[a] matter of seconds." (4T 21-22 to 22-24) The officer parked the patrol car in front of a gray SUV parked on Belfield that appeared to be starting its engine, blocking it in. (4T 22-25 to 23-13, 38-18 to 24) One officer performed CPR on Thorpe until EMTs arrived. (4T 26-15 to 27-7) Officers entered Santiago's residence and found a hunting rifle on the floor of one of the ground-floor rooms. (4T 123-15 to 125-12) The rifle, a Winchester Model 70 bolt-action rifle, contained one empty shell. (4T 129-9 to 16, 130-1 to 131-19) There were additional rounds of ammunition in the rifle and in Santiago's bedroom. (4T 137-6 to 138-14) The officers also found some bullet fragments in the gas tank door of a Cadillac parked outside of the residence. (4T 115-21 to 119-20)

Officer Peter Calabrese testified that bystanders on the street pointed him towards a male in a red shirt who was getting into, or had just entered, a vehicle. (4T 23-2 to 6, 45-21 to 47-6) Officer Calabrese found Santiago in the driver's seat of the blocked-in SUV and ordered him to exit the vehicle; Santiago complied and was taken into custody. (4T 38-1 to 24, 47-12 to 48-6)

Thorpe's autopsy also confirmed the presence of fentanyl in her system, as well as metabolites for both fentanyl and cocaine. (3T 81-17 to 82-7) At trial, the parties stipulated to admitting Thorpe's more recent criminal convictions: one charge of resisting arrest by physical force or violence in 2015, and one fourth-degree charge of throwing bodily fluid at a law enforcement officer in 2013. (5T 25-23 to 26-19)

After his arrest, officers transported Santiago to the Atlantic City Police Department headquarters. (4T 201-24 to 203-1) Sergeant Joseph Rauch led the interview with Santiago after giving the Miranda warnings. (4T 206-9 to 12) The redacted interview,[4] close to 90 minutes in length, was played at trial. (4T 209-5 to 333-3)

[4] The parties agreed to redact a portion of Santiago's statement referencing a prior stay in jail. (4T 168-12 to 170-16, 207-1 to 16)

B. Santiago's Miranda statement, history with Thorpe, and transcription errors

Santiago did not immediately waive his rights and begin talking about the shooting. Although he spoke to the officers in English, he also said that he could not read English and that he was having difficulty reading the Spanish waiver form. (4T 206-13 to 20, 225-5 to 226-6) Before signing the waiver, Santiago also told officers that he needed to use the restroom. (4T 225-12 to 19) After hearing this, Sergeant Rauch continued his efforts to have Santiago read the form and sign the waiver. (4T 225-16 to 227-15) After Santiago signed the form, Sergeant Rauch said he would try to get someone to take him to the restroom and did so. (4T 227-18 to 228-18)

History with Thorpe: Santiago and Thorpe had known each other for many years. Santiago told police that he first met Thorpe and her family as neighbors around 20 years ago; he estimated that she was 13 years old at the time he met her family. (1T 102-10 to 104-22) Santiago also disclosed that he and Thorpe had had a sexual relationship at some point in the past. (1T 90-25 to 91-13) Santiago told officers that the sexual relationship had ended a long time ago. (4T 273-18 to 274-11) The officers asked Santiago how old she was when the sexual relationship started, and he said he did not know. (4T 285-24 to 286-7) Santiago said that he knew Thorpe's family and that he had spoken about this relationship with Thorpe's father. (1T 103-10 to 22; 4T 285-24 to

286-11) According to Santiago, Thorpe had started using drugs at an early age, prompting her father to ask him why he wanted to be with "somebody like that." (1T 103-16 to 17) Santiago recounted that he told her father that he was going to help Thorpe. After she started taking heroin, Santiago did not want to let Thorpe come inside his house. (1T 104-1 to 2; 4T 286-19 to 20)

Transcription errors: Santiago speaks heavily accented English, leading to some recurring errors in the transcriptions of his Miranda statement. One of the most significant errors in both court transcriptions occurs when Santiago is discussing his conversation with Thorpe's father about their relationship:

> Because I talking to her father before, you know. And her father told me himself. The father say why you want to be with somebody like that? I said, I go to hell. [sic] You know.
>
> [1T 103-14 to 17; 4T 286-7 to 11 (emphasis added).]

The recording of the interview is included for this Court's reference. (Da 185) The underlined part of the quoted passage starts when the video's timestamp reads 14:41:20. Santiago is saying "I am going to help." The transcriptions do not capture his next statement, but it is to the effect of: "But before what she was doing was smoking weed. You know? But now she take the heroin." (Timestamp 14:41:30 to 14:41:45). This context shows that Santiago was talking about his belief that he could help Thorpe with her drug problem. Santiago does not talk about hell or other religious themes at any point in his

statement, but within a minute of the above remark, he tells the police: "Because all the time she need help, I help her."[5] (1T 104-19 to 20; 4T 287-12 to 13; Timestamp 14:42:15 to 14:42:30)

Santiago's account of September 12, 2020: In the interview, Santiago said that Thorpe had threatened to burn his house down and kill him. (4T 238-10 to 15, 309-20 to 25; 5T 60-6 to 21) He also said that Thorpe was "beating [him] up" with a broom. (4T 231-4 to 5; 5T 60-1 to 10) Santiago told officers that the threats and physical attacks from Thorpe were what led to the shooting. For context, Santiago elaborated on his history with Thorpe and told officers that she had previously threatened him and beaten him more than once. (1T 104-20 to 21; 4T 287-13 to 15) He also said that Thorpe had stolen money from him. (4T 233-1 to 3) He recounted an incident from several months prior where she pushed her way into his house, hit him while he was on the floor, and took the money—eight dollars—out of his wallet. (4T 272-13 to 273-12) He said the day of the shooting was different from the other times Thorpe has threatened him because she was hitting him with a broom or a piece of metal. (4T 303-15 to 304-18) Officers found a thin red broom close to the scene of the shooting. (4T 110-6 to 22, 112-11 to 114-21)

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[5] As an additional reference point, a transcript prepared by the Prosecutor's Office is included in the appendix. (Da 30-152) That transcript captures more than the court transcripts, but it also contains the "hell" error. (Da 101)

Santiago said that he initially found Thorpe asleep on his house's front porch and believed she was there because of drugs; he told her to leave or else he would call the police, but she responded "fuck the police" and then "[she] hit me with the broom."[6] (4T 231-7 to 15) Santiago said he tried taking the broom away from her, but she ran away from him down the street. (4T 235-7 to 22) Thorpe soon returned to the front of the house; Santiago said she then threatened to burn the house down and kill him. (4T 236-4 to 13, 238-8 to 23) Santiago told police he was also concerned that Thorpe could possibly kill his disabled wife, since Thomas could not easily leave the house. (5T 60-18 to 25) At this point, Santiago said he felt "I have to shoot her in the leg." (4T 236-4 to 13) Santiago explained that he intended to shoot Thorpe in the leg because he did not want to kill her. (4T 238-20 to 25, 279-15 to 18) He did not believe there was a possibility of Thorpe dying if he shot her; he thought that, at most, she would end up in a wheelchair. (4T 279-15 to 21, 280-1 to 17) Santiago told officers that he had shot Thorpe in the leg, as he intended. (4T 279-15 to 280-8) The doctor who performed Thorpe's autopsy, however, concluded that she had died because of a gunshot wound to the torso. (3T 82-8 to 18)

[6] Santiago frequently refers to Ms. Thorpe with masculine (he/him) pronouns throughout the interview, adding to the difficulty in understanding his statement. (4T 231-24 to 232-25; 5T 58-23 to 59-2)

Santiago went inside to retrieve the rifle, which he had previously used for deer hunting. (4T 236-16 to 25) When he came back outside, he said he told Thorpe to leave again, but she refused. (4T 242-10 to 21) Santiago says that he then shot Thorpe in the leg. (4T 242-22 to 243-21) After Thorpe fell to the ground, Santiago said that he set the rifle down on the porch or inside the house.[7] (4T 246-2 to 248-21) Santiago said that he started to leave to go to Pep Boys because he needed supplies to fix the brakes on his Jeep. (4T 248-3 to 249-22) He said that he did not call the police because he knew his neighbors were calling the police. (4T 256-17 to 257-5)

During the interview, Santiago realized that he had an additional unfired rifle round in his back pocket, which he handed over to police. (4T 142-2 to 17, 237-1 to 8) Beyond giving the statement, Santiago was cooperative with police and consented to searches of his vehicles and a DNA swab. (5T 57-14 to 58-7)

[7] Officers found the rifle inside the house. (4T 123-15 to 125-12)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED WHEN IT DID NOT GIVE A CURATIVE INSTRUCTION OR STRIKE THE PROSECUTOR'S SUMMATION REMARK—WHICH WAS WITHOUT A BASIS IN THE RECORD—THAT SANTIAGO WAS A "PREDATOR" WHO HAD VICTIMIZED THE DECEDENT "FOR MANY, MANY YEARS." (5T 96-18 to 24; 7T 9-19 to 15-24)

Mr. Santiago's history with Ms. Thorpe was potentially critical motive evidence. The jury had the difficult task of dispassionately evaluating the evidence and determining if the State had met its burden to prove all the elements of purposeful murder, given Santiago's argument for self-defense and defense of others. While the State had a right to forcefully argue in closing for inferences that could be drawn from the evidence presented, the prosecution went far beyond that limit when it argued that Santiago had been molesting Thorpe since she was a child.

The prosecutor's remark started as a valid argument for the inference that Santiago was not truly afraid of Thorpe, but it soon veered into the territory of extreme prejudice:

> He has known her for over twenty years since she was thirteen. And I know some of you noticed that in the interview in the confession that he gave. When detectives asked him, how long have you known her, he said, oh a long time. And then he said, probably -- and they kept exploring, well how long? What do you mean? What's a long time? And he said, probably since she was about thirteen. And then

> he said, I knew her father. He smirked and said, I'm going to hell. The detectives immediately realized what he was saying and they followed up with, well how long have you been having sex with her? And he said, I don't know, a long time. And they said well how old was she? And he said, I don't know, I really don't know, and he wouldn't answer their question. **Ladies and gentlemen, I suggest that this defendant has been victimizing Marketa for many, many years. He was not afraid of her. He is the predator in this relationship. Now he wants you to think that he's the victim. But he knew exactly what he was doing.** He provided a sense of safety.
>
> [5T 80-5 to 25 (emphasis added).]

Defense counsel objected, noting that there were no admissions in Santiago's statement to anything of this nature. (5T 97-4 to 6) A curative instruction would have had to be especially sharp and decisive to steer the jury's deliberations away from such a pointed accusation. The trial court, however, did not attempt to cure at all; it concluded that calling Santiago a long-time "predator" was a fair comment on the evidence. (5T 97-7 to 98-4) Accusing a criminal defendant of being a child predator in a case on completely unrelated charges is one of the most inflammatory attacks imaginable. This extreme remark is all the worse where it has no basis in the evidence. Our law safeguards a defendant's right to have a jury decide their case based on the evidence, not uncharged past behavior. The prosecutor's closing argument produced an intolerable risk that the jury could not fairly consider the evidence. As a result, Santiago was deprived of due process, requiring a reversal of his convictions. U.S. Const. amends. V, VI

and XIV; N.J. Const. art. 1, pars. 1, 9, 10; Moore v. Morton, 255 F.3d 95, 105 (3d Cir. 2001).

Prosecutors have a "double calling" to both vigorously represent the state's interests and to assure the defendant is treated fairly. State v. McNeil-Thomas, 238 N.J. 256, 274 (2019). This duty to uphold fairness and justice gives rise to an obligation to refrain from using improper methods. State v. Frost, 158 N.J. 76, 83 (1999). Reversal is justified where the prosecutor's conduct was "clearly and unmistakably improper," and substantially prejudiced the defendant's fundamental right to have a jury fairly evaluate his case. State v. Timmendequas, 161 N.J. 515, 575 (1999) (quoting State v. Roach, 146 N.J. 208, 219 (1996)). Prosecutorial misconduct may "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." Moore, F.3d at 105 (alteration in original) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

In closing, a prosecutor should not "argue in terms of counsel's personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility." ABA Criminal Justice Standards for the Prosecution Function § 3-6.8(b) (4th Ed. 2017). Thus, a prosecutor should not introduce personal speculation—especially speculation that attacks a witness' character. A closing argument must be limited to evidence admitted at trial and reasonable

inferences drawn from that evidence. See State v. Williams, 244 N.J. 592, 610 (2021) (finding error in prosecutor's comparison of the defendant to a horror movie villain in summation).

Although prosecutors are afforded "considerable leeway" in terms of the forcefulness of their argument, everything said in summation must be "reasonably related to the scope of the evidence presented." Frost, 158 N.J. at 82. A prosecutor may not accuse the defendant of a crime for which there is no evidence during closing argument. See State v. Farrell, 61 N.J. 99, 103-05 (1972) (finding error in prosecutor's unsupported claim that the defendant hired men to threaten the state's witnesses). A prosecutor also may not employ personal speculation to add details not supported by evidence on the record. See State v. Spano, 69 N.J. 231, 236 n.1 (1976) (finding the unsupported statement that the defendant sold drugs "to our children" to be inflammatory and improper).

The prosecutor is asking the jury to infer that Santiago had molested Thorpe when she was a child. This inference is not supported by the evidence, only the prosecutor's misstatement of the evidence. Even if there was a case to be made for the prosecutor's interpretation of Santiago's words, they described the key events backwards: Santiago did not say "I'm going to hell [sic]" before the police asked how old she was when they had a sexual relationship. (4T 286-

6) First, Santiago said he didn't know how old she was when they were in a sexual relationship. (4T 286-7 to 12) Then, he said that Thorpe's father asked why he wanted to be with her—in the context of Thorpe's drug problem—and he said, "I [am] going to help." (4T 286-8 to 12) It is hard to make out on the video, but saying he's "going to help" coheres with his statement a minute later: "Because all the time she need help, I help her." (4T 287-12 to 13) It would have been problematic if the prosecutor's misrepresentation only risked altering and skewing the jury's recollection of Santiago's 90-minute interview, but it also introduced a sex predator narrative that has no factual basis.

Moreover, had the State sought to present evidence of an underage sexual relationship, it would have been inadmissible for being unfairly prejudicial. Evidence of prior bad acts can only be introduced at trial if it is relevant to a material issue. N.J.R.E. 404(b). Prior bad acts that do not fit these criteria must be excluded in order to prevent unfair prejudice against the defendant. State v. Rose, 206 N.J. 141, 179-80 (2011). In State v. Cofield, 127 N.J. 328 (1992), the Court established a four-prong test for admissibility under N.J.R.E. 404(b): (1) the evidence of another crime is relevant to a material issue, (2) the crime is similar in kind and close in time to the current offense, (3) the evidence of the other crime is clear and convincing, and (4) its probative value is not outweighed

by its apparent prejudice. 127 N.J. at 338. All four prongs must be satisfied for character evidence to be admitted.

Referring to prior bad acts in summation to characterize the defendant as a violent person is impermissible. See State v. Eason, 138 N.J. Super. 249 (App. Div. 1975) (where reference to the defendant's prior record in summation to suggest the defendant was "compulsive" in his violence was a reversible error); State v. Sims, 140 N.J. Super. 164 (App. Div. 1976) (where the prosecutor asserted without evidence the defendant also mugged an old man on the night of the offense). Any time prior acts are only brought up only to argue for the accused's propensity for crime, suggesting the defendant is just the kind of person who would commit the offense at issue, the evidence is inadmissible. These references are not the sort of character evidence N.J.R.E. 404(b) permits.

The statements made in this case fail every prong of the Cofield analysis. First, alleging the defendant was a sexual predator was not relevant to any material issue. The only matter in genuine dispute was whether the defendant acted in self-defense. The State did not argue that any prior sexual relationship was connected to motive for the current offense. Instead, the prosecutor argued that "[h]e was not afraid of her. He is the predator in this relationship." (5T 80-22 to 23). This is not factual evidence—it is an inference based on a misrepresentation of the evidence, with no bearing on whether he was acting out

of reasonable fear during the incident at issue. Second, an alleged history of sexual abuse is entirely different in nature from the shooting-related charges that Santiago faced at trial. It was also not at all close in time to the current offense. Thorpe turned 18 in 2006, and was 13 in 2001; the alleged abuse therefore would have occurred between 14 and 20 years prior to the incident at issue. Third—and perhaps most importantly—there is no clear and convincing evidence that the alleged sexual abuse ever took place. The State presented no evidence that a sexual relationship occurred between Santiago and Thorpe while she was a minor. As discussed above, the prosecutor misstated the actual content of the interview to make this argument possible. Fourth, the prejudicial effect outweighs the nonexistent probative value of these statements. The prosecutor's remarks had no relevance to the matter at hand. Depicting a defendant as a child predator, outside of a trial for alleged sex offenses, is likely to inflame even the most dispassionate jurors.

The statements at issue only served the purpose of painting the defendant as a "predator," the sort of person who was looking to cause harm. Had the State attempted to introduce these allegations at trial through a witness's testimony, they would not have been admissible under 404(b). However, a Cofield analysis was never conducted by the trial court because the prosecutor did not introduce evidence supporting the "predator" label—evidence that would have to be

carefully assessed for its probative and prejudicial value. Rather, they made these prejudicial claims for the first time in closing.

The prosecutor's statements were not harmless. Rather, the improper characterization of Santiago and his statement was so prejudicial as to be a reversible error.

To determine whether prosecutorial misconduct substantially prejudiced the defendant's right to a fair trial, the court must weigh the misconduct's severity. State v. Wakefield, 190 N.J. 397, 437 (2007). There are three factors to consider when evaluating this: (1) whether defense counsel made a timely and proper objection, (2) whether the statements were withdrawn, and (3) whether the court ordered the statements stricken from the record and instructed the jury to disregard them. Williams, 244 N.J. at 608.

Where the prosecutor has engaged in misconduct, the trial court can diminish its prejudicial effect through a curative instruction. For example, inn Timmendequas, the court instructed the jury to disregard the emotional and inflammatory statements made in summation, and to only base their judgment on the actual evidence presented at trial. 161 N.J. at 586. A judge's failure to properly address prejudice resulting from prosecutorial misconduct has been deemed sufficient grounds for reversal. See State v. Rivera, 437 N.J. Super. 434, 453-56 (App. Div. 2014) (finding that although the trial court addressed

prosecutor's misconduct by telling him to get out of the jury box, a curative jury instruction was also needed). Even if the effect of a prosecutor's misconduct on the jury is unclear, if the misconduct had the clear potential to generate prejudice, then it must be addressed and corrected. Id. at 456.

Here, defense counsel made a timely and proper objection to the statements at issue immediately after summation. (5T 97-4 to 6) The trial court, however, did not strike the remarks or instruct the jury not to infer bad acts beyond the scope of the evidence presented. (5T 96-18 to 98-4) Defense counsel gave the trial court another chance to consider and address this in a motion for a new trial, citing the prosecutor's remarks as one of two points supporting the motion. The court again refused to find error. (7T 14-2 to 15-8) The trial court's refusal to recognize the prosecutor's statements as improper and give a curative instruction to the jury prejudiced the defendant's right to a fair evaluation of his case because this misconduct had the clear capacity to bring about an unjust result.

Although the unsupported narrative of sexual abuse is the truly damaging aspect of the misconduct at issue, Santiago's right to be judged on the evidence alone was also compromised by calling him a "predator." Name-calling by the prosecution has sometimes been found to be severe enough to warrant reversal. See State v. Gregg, 278 N.J. Super. 182 (App. Div. 1994) (calling the defendant

"nasty and violent" and "a buffoon" was so prejudicial as to warrant reversal); State v. Van Atzinger, 81 N.J. Super. 509 (App. Div. 1963) (calling the defendants "bums" "hoods" and "punks" invited the jury to speculate on prior record, and therefore was a reversible error); see also State v. Smith, 471 N.J Super. 548, 584 (App. Div. 2022) (referring to the defendant as a "career criminal" was improper); State v. Clausell, 121 N.J. 298, 341-42 (1990) (describing the defendant as a "maniac" was improper). Improperly characterizing the defendant to prejudice the jury against a specific affirmative defense is also sufficient to warrant reversal. See State v. Adames, 409 N.J. Super. 40, 59-60 (App. Div. 2009) (defendant's right to fair trial denied by unwarranted remarks in summation that defendant's behavior at trial discredited his insanity defense).

The "predator" label suggests a pattern of bad acts, similar to the "career criminal" label that was deemed improper in Smith. 471 N.J Super. at 584. In fact, the prosecutor directly invited the jury to infer that the defendant had a history of seriously and repeatedly abusing others. Inviting this sort of speculation was grounds for reversal in Van Atzinger. See 81 N.J. Super. at 516. In Spano, as well, the court made it clear that suggesting the defendant was a threat to the children of the community was particularly inflammatory. 69 N.J. at 236. But while the prosecutor's remark in Spano suggested that the defendant

sold marijuana to children, suggesting that Santiago was a child predator has even greater inflammatory potential. Calling a defendant a child predator has a tremendous capacity to prejudice the jury compared to the relatively tame labels of "buffoon," "maniac," or "punk."[8] The prosecutor's statements in this case might well represent a new low in baseless, prejudicial name-calling.

This Court has ruled that far more ambiguous instances of misconduct than the statements here were likely to prejudice the jury. In Rivera, the prosecutor climbed into the jury box when the defendant helped set up a video at the State's table. 437 N.J. Super. at 453-56. The Court found that this strange gesture may imply to the jury that the prosecutor was afraid of the defendant and that the defendant is dangerous; the inflammatory potential was enough to contribute to their finding of reversible error. Ibid. Where even ambiguous messages can create a substantial likelihood of prejudicing the jury, then accusing the defendant of sexually abusing a child is certainly a step too far. The likelihood that the prosecutor's statements would lead the jury to infer the

[8] There do not appear to be any published cases in New Jersey specifically addressing the term "predator." In 2000, a Kansas intermediate appellate court reviewed nationwide opinions about the label. State v. Maybin, 2 P.3d 179, 187-88 (Kan. Ct. App. 2000) (collecting cases). Nearly every court found the "predator" label insufficient to warrant reversal. Ibid. The collected cases, however, fell into one of two categories: 1) the defendant was accused of a non-sexual crime and "predator" referred to general criminal behavior, or 2) prosecution called the defendant a sexual predator in a case where the jury was asked to determine their guilt for charged sex offenses.

predatory character they improperly suggested is high because the prosecutor directly asked them to make that inference.

The prejudicial effect of these statements was directly connected to the crucial element at issue in this case. Asking the jury to infer that Santiago had a predatory past is akin to the State's attempt to claim the defendant was not the sort of person for whom the insanity defense could apply in Adames. 409 N.J. Super. at 59-60. The prosecutor's illicit argument here challenged the self-defense claim by saying the defendant was not the sort of person who would fear Thorpe, because he is a "predator." (5T 80-23 to 25) Characterizing Santiago as a predator to convince the jury he lacked the fear necessary for self-defense is to rely on mere bias to disprove an essential element. This violates the defendant's right to a fair evaluation of the State's case to overcome the presumption of innocence.

This misconduct substantially prejudiced the defendant's fundamental right to a fair evaluation of his case by the jury. The prosecutor breached their duty to fairness by claiming, without the support of any facts on the record, that the defendant was a sexual predator. The severity of this misconduct justifies reversal.

Criminal proceedings are often emotionally charged, and it is understandable that there will be forceful language in closing arguments. But

due process requires that the comments made in summation still be fairly based on the evidence presented. The prosecutor's statements in this case were impermissible, both due to their highly prejudicial allegation of prior bad acts and the lack of basis in any evidence on the record. Simply put, it is hard to imagine a more provocative accusation. This is the kind of statement that could be expected to lead a jury to make their decision based on inflamed passions and not the evidence. The State could argue for permissible inferences based on the security camera footage capturing the shooting and the testimony of the officers who arrived just two minutes after the shooting occurred. But dropping this bomb in closing argument created a serious and substantial risk that the jury would not be able to fairly assess the evidence presented. This Court should reverse Santiago's convictions and order a new trial.

POINT II

THE TRIAL COURT ERRED IN ITS MIRANDA WAIVER DETERMINATION WHERE THE STATE DID NOT PROVE VOLUNTARINESS BEYOND A REASONABLE DOUBT. (Da 6-29)

The State made extensive use of Mr. Santiago's Miranda statement at trial. The trial court erred, however, when it determined that the State had proven beyond a reasonable doubt that Santiago's waiver of his rights was knowingly, intelligently, and voluntarily given. Santiago's difficulty with English and his struggle to read the Miranda forms are apparent from the interrogation transcripts and the recording. An additional fact, which was not given due weight by the motion court, was that Santiago requested to use the restroom before he had waived his rights. Officers heard his request and continued trying to obtain his waiver, potentially creating an impression that he was going to be deprived of basic needs unless and until he waived his constitutional rights. Consequently, the trial court's decision to admit his Miranda statement was error that harmed Santiago's right to a fair trial, requiring reversal. U.S. Const. amends. V and XIV; N.J. Const. art. 1, pars. 1, 9, 10.

"The 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." State v. Sims, 250 N.J. 189, 211 (2022) (quoting State v. Presha, 163 N.J. 304, 312 (2000)). In New Jersey, the State

must "prove beyond a reasonable doubt that the individual knowingly, intelligently, and voluntarily waived those rights 'in light of all the circumstances.'" State v. O.D.A.-C., 250 N.J. 408, 420 (2022) (quoting Sims, 250 N.J. at 211). Under the totality-of-the-circumstances test, courts commonly consider a suspect's education and intelligence, age, familiarity with the criminal justice system, physical and mental condition, how explicit the waiver was, and the amount of time between the reading of the rights and any admissions. Id. at 421. The purpose of Miranda warnings is "[t]o counteract the inherent psychological pressures in a police-dominated atmosphere that might compel a person 'to speak where he would not otherwise do so freely.'" State v. S.S., 229 N.J. 360, 382 (2017) (quoting State v. Nyhammer, 197 N.J. 383, 400 (2009)).

"When 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. L.H., 239 N.J. 22, 47 (2019) (quoting State v. Hreha, 217 N.J. 368, 381-82 (2014)). Reviewing courts "give deference to the trial court's factual findings so long as they are supported by sufficient credible evidence in the record." O.D.A.-C., 250 N.J. at 425 (citing State v. S.S., 229 N.J. 360, 379-81 (2017)). Appellate

courts are "not bound by the trial court's determination of the validity of the waiver, which is a legal, not a factual, question." Ibid.

A Miranda statement cannot be valid if it is not voluntarily given. "Due process requires the State to 'prove beyond a reasonable doubt that a defendant's confession was voluntary and was not made because the defendant's will was overborne.'" O.D.A.-C., 250 N.J. at 421 (quoting L.H., 239 N.J. at 42). Voluntariness, however, is not the only factor that the State is obligated to prove beyond a reasonable doubt to show the waiver was valid. "A recording of the interrogation showing a suspect's willingness to talk to police—while highly relevant—may not tell the whole tale because the video may not reveal an interrogee's underlying deficits that inhibit an adequate understanding of constitutional rights." State in Interest of M.P., 476 N.J. Super. 242, 289 (App. Div. 2023). The caselaw is replete with instances where a suspect's access to food or bathroom breaks supported an ultimate finding that their statement was made voluntarily and without coercion. See, e.g., State v. Erazo, 254 N.J. 277, 302 (2023) (defendant allowed cigarette breaks and restroom access).

The recording of the Miranda interrogation showed here that the police did not allow Santiago to use the restroom before he signed the waiver. (4T 225-12 to 19) Sergeant Rauch heard Santiago say he needed to use the restroom, but he nonetheless continued his efforts to have Santiago read the form and sign

the waiver. (4T 225-16 to 227-15) It was only after he signed the form that Sergeant Rauch said he would try to get someone to take Santiago to the restroom. (4T 227-18 to 228-18) The State did not prove, beyond a reasonable doubt, that the officers ignoring Santiago's request did not place undue pressure on him to waive his constitutional rights. Under the circumstances, the State failed to meet its high burden of proof in establishing that Santiago felt free to decline the waiver.

The dangers entailed by law enforcement ignoring an interrogee's reasonable requests is most obvious in cases where a suspect is invoking their right to remain silent. "[W]here the police fail to halt the questioning even temporarily, the ensuing danger of coercion and compulsion to confess is great, for the suspect perceives their conduct as an indication that the rights he has just been read mean nothing, and that he is going to be subjected to ongoing interrogation by the police until he talks." State v. Bey, 112 N.J. 45, 72 (1988). Refusing to let a suspect address a basic human need implicates the same dangers. The decision by law enforcement to press ahead without giving Santiago a chance to attend to his needs was the exact type of pressure that could lead a suspect to believe they are helpless in an overwhelmingly coercive environment—undermining the core purpose of the Miranda warnings.

Finally, law enforcement's decision to ignore Santiago's request needs to be considered along with the language barrier, which gives added reason to doubt his waiver was sufficiently knowing and voluntary. Officers knew that Santiago's command of English was imperfect: before giving the waiver, he made clear that he could not read English. (4T 225-7 to 20) Santiago's repeated references to Thorpe with male pronouns, although he knew she was a woman, shows difficulty with the fundamentals of English. (4T 231-24 to 232-25; 5T 58-23 to 59-2) It was apparent from his remarks before and after waiver that there was a risk that Santiago might not have understood the officers' explanation of the rights he was giving up.

These circumstances cast reasonable doubt on the voluntary and knowing nature of Santiago's waiver. Accordingly, this court should reverse the convictions and allow for a new trial without the statement.

POINT III

THE SENTENCE IS EXCESSIVE. (7T 34-2 to 36-24)

The trial court sentenced Mr. Santiago to 40 years of incarceration with an 85% parole disqualifier. (Da 175-178) This means Santiago would not be eligible for parole until he is 103 years and 8 months of age. (Da 182-184) Even the minimum required for a murder conviction—30 years of imprisonment with 30 years of parole ineligibility—would have guaranteed Santiago's incarceration until he is nearly 100 years old. The realities of advanced age meant that the standard justifications for longer sentences needed to be scrutinized when weighing how to satisfy the Code's objectives of deterrence and incapacitation. Here, however, Santiago's advanced age was not given the substantial weight it deserved. Consequently, the sentencing court erred when it improperly balanced the aggravating and mitigating factors. Because the sentencing court's error resulted in an excessive sentence, this Court should remand for resentencing. N.J.S.A. 2C:44-7; State v. Roth, 95 N.J. 334, 363-66 (1984); Torres, 246 N.J. at 274; U.S. Const. amend. XIV; N.J. Const. art. 1, pars. 1, 9, 10.

Our Supreme Court provided clear guidance in Torres as to what considerations go into evaluating the overall fairness: "the stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's

fairness." Id. at 272. In particular, the sentencing goals of deterrence, incapacitation, and proportionality, spelled out in subsections (3) and (4) of N.J.S.A. 2C:1-2(b) are highly relevant. The overall fairness evaluation must contextualize the length of a sentence, as well as the sentence's "deterrent value, . . . incapacitation purpose and need," and "must take into account the single person being subjected to the sentence imposed" "in the interest of promoting proportionality for the individual who will serve the punishment." Id. at 271, 273.

Additionally, a sentencing court must consider social science relevant to sentencing, as one of the purposes of the Code is "[t]o advance the use of generally accepted scientific methods and knowledge in sentencing offenders." N.J.S.A. 2C:1-2(b)(7). There is now robust social science showing that extending an already lengthy sentence would serve no deterrent purpose, and the declining risk of recidivism with age shows that the goal of incapacitation does not support extending the sentence in cases like this beyond the mandatory minimum.

Accordingly, the court should have more carefully considered the fairness of such a long sentence in the context of the compelling mitigating factors. Consequently, the court should have given Santiago a lower sentence with a focus on maximizing his rehabilitative efforts.

"Aggravating and mitigating factors . . . insure that the sentence imposed is tailored to the individual offender and to the particular crime he or she committed." State v. Sainz, 107 N.J. 283, 288 (1987). Aggravating factors justify imposing a longer sentence—i.e. one at or toward the higher end of the relevant sentencing range for that offense, State v. Natale, 184 N.J. 458, 488 (2005)—because a longer sentence is necessary to achieve the goal of sentencing embodied by the relevant aggravating factors in that case. For example, aggravating factor three ("[t]he risk that the defendant will commit another offense") is tethered to the sentencing goal of incapacitation—"the confinement of offenders when required in the interest of public protection." N.J.S.A. 2C:44-1(a)(3); N.J.S.A. 2C:1-2(b)(3). Aggravating factor nine ("[t]he need for deterring the defendant and others from violating the law") is tethered to the sentencing goal of deterrence. N.J.S.A. 2C:44-1(a)(6); N.J.S.A. 2C:1-2(b)(3) (stating that another goal of sentencing is "[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of sentences imposed"). Thus, aggravating factor three justifies a longer sentence when the risk that the defendant will reoffend is such that a longer sentence is necessary to protect the public by incapacitating the defendant for a longer period. Likewise, aggravating factor nine justifies a longer sentence when a

longer sentence is necessary to deter the defendant or others from committing future crimes.

Because the circumstances to be considered for each offender can be so complex, the Court in Torres said that "sentencing is a holistic endeavor" and that "aggravating and mitigating factors . . . as well as the stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's fairness." 246 N.J. at 272. The Court's guidance in Torres also echoes the American Law Institute's mandate, from the Proposed Final Draft of its revised Model Penal Code, that "[t]he length of the term of incarceration shall be no longer than needed to serve the purposes for which it is imposed." American Law Institute, Model Penal Code: Sentencing, sec. 6.06, p. 155 (Proposed Final Draft 2017).

If a sentence is given without being mindful of the ends to be served by the term of incarceration, then the sentencing court risks severing the connection between the aggravating factors and the Code's purposes of sentencing. As explained in Torres, the ultimate goal of fairness in sentencing requires courts not to unmoor the aggravating factors from the sentencing goals that they aim to further.

Advanced age: Empirical evidence suggests that incarceration of inmates into old age, which would certainly include Santiago, generally results in

overburdened prisons while offering little in terms of public safety. The Pew Charitable Trusts & the John D. and Catherine T. MacArthur Foundation, State Prison Health Care Spending: An Examination, 9 (Jul. 2014), https://www.pewtrusts.org/~/media/assets/2014/07/stateprisonhealthcarespendingreport.pdf. Similarly, "studies demonstrate that the risk of recidivism is inversely related to an inmate's age." United States v. Howard, 773 F.3d 519, 532-33 (4th Cir. 2014) (citing Tina Chiu, It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release, Vera Inst. of Justice (Apr. 2010), https://storage.googleapis.com/vera-web-assets/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf).

While the Supreme Court did not address the age-crime curve in Torres, it embraced and adopted the age-crime curve in Acoli v. New Jersey State Parole Bd., 250 N.J. 431, 469 (2022). There, the Court held that "Studies have shown that as individuals age, their propensity to commit crime decreases and, in particular, that elderly individuals released from prison tend to recidivate at extremely low rates." Ibid. Looking specifically at Mr. Acoli's likelihood of recidivism through the lens of the age-crime curve, the Court held that "a 4.1 percent rate of reincarceration [the rate for inmates released at age sixty-five or

older]—without regard to any other factors that might militate toward denying parole—can hardly equate to a substantial likelihood of reoffending." Id. at 470.

The court needed to consider Santiago's age and the real-time consequences of the sentence. In that regard, the requirements imposed by NERA should have been a central consideration. See State v. Marinez, 370 N.J. Super. 49, 58 (App. Div. 2004) (courts "must … be mindful of the real-time consequences of NERA and the role that it customarily plays in the fashioning of an appropriate sentence"). But the sentencing court did not say how it had weighed the real-time consequences in determining to keep Santiago imprisoned beyond the 30-year minimum. The court's lack of discussion raises a fairness issue when it means Santiago will be incarcerated for what is almost certain to be the rest of his life.

In short, the court's brief discussion of Torres and fairness failed to account for how Santiago's advanced age is a factor that weighs on all other factors: his risk of recidivism, the need to incapacitate him, and the sentence's overall fairness. See Torres, 246 N.J. at 272.

Deterrence: Deterrence "has been repeatedly identified in all facets of the criminal justice system as one of the most important factors in sentencing" and "is the key to the proper understanding of protecting the public." State v. Megargel, 143 N.J. 484, 501 (1996) (citing State in the Interest of C.A.H. &

B.A.R., 89 N.J. 326, 334 (1982)); accord State v. Fuentes, 217 N.J. 57, 78-79 (2014). Deterrence incorporates two "interrelated but distinguishable concepts": the sentence's "general deterrent effect on the public [and] its personal deterrent effect on the defendant." State v. Jarbath, 114 N.J. 394, 405 (1989) (citing C.A.H., 89 N.J. at 334-45)); accord Fuentes, 217 N.J. at 79. On its own, general deterrence "has relatively insignificant penal value," Jarbath, 114 N.J. at 405 (citing State v. Gardner, 113 N.J. 510, 520 (1989)), and so sentencing courts should focus on specific deterrence. Fuentes, 217 N.J. at 79.

The upshot of numerous studies on the deterrent effect of various sentencing regimes, as outlined by the heralded National Academies of Sciences report on mass incarceration, is that the relationship between sentence length and crime rate is nonlinear, but rather decreases in slope as the sentence length increases. National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 138-39 (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014). That means that as sentences get longer, the deterrent effect of extending the sentence decreases; for each additional month or year added to a long sentence, the marginal increased deterrent value of that additional month or year becomes less and less, approaching zero. Id. at 139. The report concluded that "increasing already long sentences has no material deterrent effect." Id. at 140.

While the social science presented above does not yield a formula for determining the marginal increase in deterrence for each additional year, depending on the length of the initial sentence, the social science does lead to the conclusion that a 30-year sentence qualifies as a long sentence and increasing it would have no material deterrent effect. The Growth of Incarceration in the United States at 140. Applied here, the sentencing goal of deterrence does not support the imposition of a sentence ten years over the already substantial 30-year minimum.

Incapacitation: The sentencing goal of incapacitation is held to further public safety by reducing crime through the physical separation of convicted offenders from the rest of society. National Research Council, The Growth of Incarceration at 131, 140. While measuring the precise impact of increased incarceration on the reduction of crime is an area with significant disagreement, see id. at 140-41, this Court need not resolve that disagreement here. Instead, this Court should look at whether the goal of incapacitation is furthered by keeping Santiago incarcerated for what is likely to be the rest of his life, bearing in mind the compelling mitigating factors, including the sentencing court's finding of his long law-abiding life outside of the present offense. (PSR at 13-14)

To conclude, Santiago's sentence for the homicide should not be greater than the 30-year mandatory minimum. Even a shorter sentence would still guarantee Santiago's incarceration until a very advanced age, and such a reduction is supported by the compelling mitigating factors. For these reasons, Santiago's sentence is excessive and should be vacated so his case may be remanded for resentencing.

CONCLUSION

For the reasons set forth in Points I and II, the convictions should be reversed and Maximo Santiago should be granted a new trial. For the reasons set forth in Point III, the sentence should be vacated and the case should be remanded for resentencing.

Respectfully submitted,

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Dated: September 13, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000122-23T2

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff-Respondent,	:	**On Appeal from a Judgment of Conviction Superior Court of New Jersey, Law Division, Atlantic**
v.	:	**County.**
		Indictment No. 21-07-00790
MAXIMO SANTIAGO	:	
Defendant-Appellant.		**Sat Below:**
	:	**Hon. Bernard E. DeLury, Jr., P.J. Cr. (Miranda motion)**
		Hon. Dorothy M. Incarvito-Garrabrant, J.S.C., and a jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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December 30, 2024

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PRELIMINARY STATEMENT

Defendant, Maximo Santiago, confessed to murdering his unarmed neighbor, Marketa Thorpe, in broad daylight before witnesses and captured on surveillance video. Following conviction on all counts at his jury trial, defendant raises three issues on appeal, challenging: 1) a remark in the prosecutor's summation, 2) the voluntariness of his Miranda waiver, and 3) a sentence excessively above the thirty-year mandatory minimum.

First, the trial court properly denied the lone objection to the prosecutor's summation comment refuting the defense theme that the victim was the aggressor by arguing that defendant was the predator in that twenty-year relationship. The prosecutor's comments constituted fair inference and were directly responsive to defense counsel's salvo, but nevertheless, any error in the prosecutor's summation was fleeting and harmless, given the overwhelming evidence of guilt. Defendant's claim on appeal lacks merit, as it is incorrectly based on misstating the "predator" response as somehow having accused defendant of being a child sexual predator.

Second, the presiding judge's well-supported observations and factual findings establish that defendant's Miranda waiver was voluntary, knowing, and intelligent. Contrary to defendant's speculation on appeal that defendant's alleged difficulty with English "might" have meant that he did not understand his rights, defendant was provided his rights in his native Spanish written language prior to

waiving them, and the confession video showed that the thirty-year Atlantic City resident and government employee retiree defendant spoke English fluently and with ease, eagerly telling officers his exculpatory version of events.

Finally, defendant presents no basis to disturb the trial court's reasonable exercise of discretion in imposing an aggregate forty-year term. The trial court duly considered the real-time consequences of this NERA sentence on someone defendant's age, properly determining that the total sentence was warranted and necessary to protect the public from "this dangerous and violent recidivist." The court properly considered the escalating nature of defendant's three serious prior convictions reflecting violence against women, and the callous nature of this crime. Nothing in the "age-crime curve" social science research defendant relies upon on appeal has any application here. To the extent that defendant was already at an "advanced age" of 69-years-old when he committed the most violent of crimes, any speculation as to the likelihood of defendant ceasing to offend with age is patently spurious.

Defendant received a fair trial.

COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

On or about July 8, 2021, the Atlantic County Grand Jury charged defendant, Maximo Santiago, under Indictment No. 21-07-00790, with the first-degree murder of Marketa Thorpe, contrary to N.J.S.A. 2C:11-3(a)(1) (Count One); second-degree possession of a weapon (Winchester Rifle) for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a)(1) (Count Two); and, second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7(b)(1) (Count Three). (Da1-5; Da175).

Following a hearing conducted on April 25, 2022, the Honorable Bernard E. DeLury, Jr., P.J. Cr., issued a comprehensive written opinion denying defendant's motion to suppress defendant's statement, under Miranda v. Arizona, 384 U.S. 436 (1966), finding that defendant's waiver was voluntary, knowing, and intelligent. (1T1, et seq.; Da6-29).

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[1] "Db" refers to defendant's brief.
"Da" refers to the appendix to defendant's brief.
"Pa" refers to the appendix to the State's brief.
"PSR" refers to the pre-sentence report.
"1T" refers to the Miranda hearing transcript, dated April 25, 2022.
"2T" refers to the pre-trial motions transcript, dated March 6, 2023.
"3T" refers to the trial transcript, dated March 7, 2023.
"4T" refers to the trial transcript, dated March 8, 2023.
"5T" refers to the trial transcript, dated March 9, 2023.
"6T" refers to the trial transcript, dated March 10, 2023.
"7T" refers to new trial motion and sentencing transcript, dated June 23, 2023.

Beginning on March 6, 2023, defendant was tried before the Honorable Dorothy M. Incarvito-Garrabrant, J.S.C., and a jury, which found defendant guilty on all counts in a bifurcated proceeding. (2T1, et seq.; Da175-78).

On June 23, 2023, Judge Incarvito-Garrabrant denied defendant's motion for a new trial, and then imposed an aggregate NERA term of forty years' imprisonment. (7T9-19 to 15-24; 7T29-9 to 36-10; Da175-78). Specifically, the judge merged Count Two (possession of a weapon for an unlawful purpose) into Count One (first-degree murder) for purposes of sentencing, and imposed a NERA term of forty years' imprisonment, with a concurrent five-year Graves Act term with five years of parole ineligibility on Count Three (certain persons). (7T29-9 to 36-10; Da175-78). Defendant received 950 days of jail credit. (Da177).

On or about September 14, 2023, defendant filed a notice of appeal with this Court. (Da179-81).

This appeal follows.

COUNTERSTATEMENT OF FACTS

On September 12, 2020, in broad daylight, sixty-nine-year-old defendant, Maximo Santiago, shot the unarmed thirty-two-year-old Marketa Thorpe in her chest while standing on an Atlantic City sidewalk. Marketa stood entirely still as defendant trained his unlicensed Winchester hunting rifle through its scope from mere feet away, on the porch of his own townhouse. Marketa instantly dropped to the ground like a ragdoll. Defendant calmly turned away to stash the rifle in his home, and then walked across the street to his truck, pausing momentarily to look down at Marketa as she bled out alone, stepping past her dying frame. After the police impeded defendant's exit, defendant confessed that he intentionally shot his neighbor he had known since she was thirteen years old, because he got mad. The entire murder was captured on surveillance video. Following two days of testimony, the jury convicted defendant on all charges within hours.

At 11:22 a.m. on September 12, 2020, an unidentified person called 9-1-1, reporting, "Hey yo, this man just shot this lady over here at 1507 Belfield Avenue. Shot her with a rifle." (3T102-17 to 19). The caller repeated, "Just listen to me. He shot her with a rifle." (3T102-22 to 23). The caller then described the shooter as an "Hispanic dude that lives in that house right there…it's either 1511 or 1507….He got on a red shirt and blue pants." (3T103-1 to 10).

Officers were dispatched to the 1500 block of Belfield Avenue for a report of shots fired and a person down. (3T100-1 to 7; 4T21-4 to 22-3). Two officers actually heard the shot from a block away, and arrived within "a matter of seconds." (4T22-21 to 24; 4T44-2 to 24). When officers arrived, bystanders pointed them toward a male in a red shirt that was getting into a gray SUV just starting its engine. (4T23-2 to 6; 4T45- to 46-7). The officers blocked the vehicle in with a patrol car, and commanded the driver at gunpoint to exit the vehicle; the driver was later identified as defendant. (4T23-5 to 6; 4T38-18 to 23; 4T46-8 to 47-25). Defendant complied, and was taken into custody. (4T47-24 to 48-3). Defendant told officers that his disabled wife was in the house, and provided his keys. (4T57-10 to 11).

Officers recovered a Winchester bolt-action hunting rifle from the front room of defendant's three-story townhouse at 1511 Belfield Avenue. (4T102-6 to 12; 4T121-23; 4T129-11 to 16; 4T155; 4T239-1 to 241-7). The rifle had a scope and a discharged cartridge inside. (4T121- 23; 4T130-13 to 18). In addition, a bullet defect was detected on the gas tank door of a gold-colored Cadillac parked in front of 1511 Belfield Avenue, along with blood stains and skin tissue. (4T116-5 to 117-9). Finally, a red plastic broom was retrieved lying across the north edge of the sidewalk directly in front of the steps of 1511 Belfield Avenue. (4T109-1 to 110-12; 4T112-11 to 113-2).

An officer observed a person, later identified as Marketa Thorpe, laying down, "unresponsive," on the sidewalk across the street. (4T23-13 to 17). The victim had a "very faint" pulse, with an injury to her lower abdomen area. (4T23-22 to 23; 4T26-6 to 7). The officer began CPR until the EMTs took over, and she was transported to the hospital where she was pronounced deceased. (4T26-22 to 27-4; 4T108-3).

An autopsy revealed that the victim suffered a gunshot wound that entered the left side of her torso, hit her left lung, and went through her heart; the bullet then went through her diaphragm into the abdomen, hit her liver and the right side of her diaphragm and chest, exiting on the right lower chest. (3T74-19 to 75-4). The forensic pathologist opined that the absence of soot or gunpowder stippling indicated that the victim was shot from more than six feet away. (3T75-5 to 77-1). While a postmortem toxicology analysis revealed the presence of cocaine and fentanyl in the victim's system, the forensic pathologist confirmed that the cause of her death was homicide by the gunshot wound to her torso. (3T81-17 to 83-10).

Defendant was transported to the Atlantic City Police Department, waived his Miranda rights, and spoke freely to detectives about the homicide for approximately an hour, despite knowing that he was going to jail. (4T335-17; Da30-152; Da185). In his detailed confession, defendant admitted that he shot Marketa, but claimed that he was not trying to kill her; rather, he claimed that he

only sought to leave her wheelchair-bound such that she could not bother him anymore. (Da96; Da119-20; Da129).

Defendant said he came out of his house, and found Marketa sleeping on his porch. (Da50-52). He woke her up and told her to leave, but she wanted to fight. (Da52-53). Defendant said that he got into a verbal dispute with Marketa, claiming that she then repeatedly struck him with a plastic broom. (4T231-7 to 235-23; Da50-52). He admitted that he was not injured. (Da53-54). Defendant claimed that when he tried to take the broom, Marketa ran away, saying she would burn down his house and kill him. (Da50-57).

At one point, defendant went into his home and shut the door, remaining there for approximately eleven minutes. (Da57; Pa1). While inside, he went upstairs and retrieved bullets, loaded his Winchester rifle with five bullets, and returned to the porch with it. (Da75). Marketa was on the sidewalk, and remained still as defendant trained the rifle on her. (Da57-58). Within two minutes, defendant shot her from the porch, and placed the rifle in his residence. (Pa1). He then attempted to leave the scene in his vehicle, claiming he needed to go to Pep Boys to get items to fix his car. (4T248-3 to 249-22; Da66-67; Da112; Da119).

Defendant told the officers that, during the twenty years that he knew Marketa, he used to have a sexual relationship with her, and also gave her money sometimes as she was addicted to drugs. (Da90; Da101; Da118). Defendant

claimed he also knew Marketa's father, who asked him why he wanted to be with someone like her. (Da101). Defendant claimed that Marketa was probably jealous. (Da90).

Officers located surveillance and motion-sensor video from a nearby business that captured the murder, and a cropped version without audio was played for the jury. (4T80-3 to 83-2; Pa1). The video started at 11:09 a.m., thirty-two seconds, and ended at approximately 11:20 a.m., nine seconds. (4T82-10 to 25; Pa1—chapter 2). At the start, Marketa is seen walking in the street by herself, at one point talking to someone else, then crossing the street and hanging on the opposite sidewalk. (Pa1). At approximately 11:20:04 a.m., defendant walks out his front door and down the steps, crosses the street, but then immediately walks back inside his home; Marketa appears to follow slowly. (Pa1). After defendant goes inside his house, Marketa walks onto the porch briefly, and then returns to the street, mulling around. (Pa1).

In summation, the prosecutor described the final scene: At approximately 11:21 a.m., defendant emerges from his house, and appears to call Marketa over, "waving that large rifle at her." (5T82-5 to 7; Pa1). Marketa stood still on the sidewalk, not holding a weapon: "She did not move." (5T82-7 to 10; Pa1). "It looked like they were talking. She turned her head and suddenly he shot her [at 11:22:09]." (5T82-11 to 12; Pa1).

Defendant then immediately went inside to stash the rifle, without calling for help or checking on Marketa; at approximately 11:23:43, defendant exits his porch, briefly standing over Marketa's lifeless body without even bending down, and then continuing to his car across the street. (Pa1, 11:23:43 to 51).

Defendant elected not to testify or present any witnesses. (5T21-3 to 4; 5T23-5 to 25; 5T26-18 to 19). However, the defense presented a stipulation between the State and defendant that the victim had a 2015 third-degree conviction for resisting arrest, and a fourth-degree 2013 conviction for throwing bodily fluid at law enforcement officers. (5T25-25 to 26-6).

LEGAL ARGUMENT

POINT I

DEFENDANT MISSTATES THE PROSECUTOR'S SUMMATION COMMENT; THERE WAS NO ERROR IN THE ACTUAL STATEMENT, BUT EVEN IF IT CONSTITUTED ERROR, IT WAS FLEETING AND HARMLESS, GIVEN THE OVERWHELMING EVIDENCE OF GUILT (5T96-18 to 24; 7T9-19 to 15-24). [Raised Below.]

Defendant renews his complaint that the trial court erred by failing to issue a curative instruction for, or strike, an alleged summation comment by the prosecutor that was allegedly not supported by the evidence, unfairly prejudicial, and not harmless. (Db12-24). Without support, defendant incorrectly asserts that the prosecutor argued that defendant "had been molesting [the victim] since she was a child." (Db12). Conflating the prosecutor's direct response to the defense summation theme that the victim was "the aggressor," defendant claims that the prosecutor's reference to defendant as "the predator" somehow meant that the prosecutor was accusing defendant of being a child sexual predator amounting to improper 404(b) evidence. (Db13).

The State asserts that defendant's claim is patently belied by the record. The prosecutor's comments constituted fair inference and were directly responsive to defense counsel's salvo, but nevertheless, any error in the prosecutor's summation was fleeting and harmless, given the overwhelming evidence of guilt.

To begin, nothing in the prosecutor's summation argued that defendant had been molesting the victim since she was a child, contrary to defendant's claim on appeal. (Db12). Acknowledging that defendant was the "predator" in that relationship between defendant and the victim was an entirely fair inference based on the record. During his confession, defendant disclosed details about his relationship to the victim with the purpose to portray the victim as jealous and dangerous, but those disclosures fully supported the inference that defendant was actually the "predator" in that twenty-year relationship between defendant and the victim, where the married defendant admitted to having had sex with the vulnerable, drug-addicted, homeless victim, with a thirty-seven-year age difference between them. By merely describing the relationship defendant disclosed, the prosecutor neither stated nor implied that defendant had been sexually abusing the victim since she was a child. As the trial judge properly recognized, the comments constituted fair inference supported by the record.

Furthermore, the prosecutor's summation fairly rebutted the defense summation theme that Marketa was "the aggressor," refuting self-defense. At trial, the defense summation theme was that Marketa "was the aggressor," with her convictions for two "violent crimes," justifying defendant's reasonable belief that he had to use deadly force against the unarmed Marketa. (5T71-12 to 72-11). Defense counsel challenged the jury that it was "important for you to

consider…who is Marketa Thorpe." (5T59-3 to 4). Defense counsel emphasized the "near lethal" amount of drugs in her system, and the bullet lodged in her body from another event, to paint her as dangerous. (5T59-3 to 15; 5T71-12 to 72-11). On the other hand, defense counsel portrayed defendant as an elderly, infirm, retired, devoted caretaker of a disabled wife, living in a drug-activity area. (5T58-10 to 20; 5T71-1 to 9). Defense counsel argued all of the factors supporting defendant's decision to use the gun in self-defense:

> Also consider that what is he faced with? What is coming at him? Well it's Marketa Thorpe. Thirty-two years old, half his age, a convicted felon for violent crimes….consider that for the fact that that could establish that she was the aggressor in this situation, making it more likely that she was, in fact, using unlawful force….This is a woman that's half of [defendant]'s age who has an old bullet lodged in her body from who knows what and has a pretty high amount of fentanyl in her system.
>
> [5T71-12 to 72-6.]

In response, the prosecutor primarily refuted any notion that defendant was afraid and that Marketa was the threat, by painstakingly reviewing the surveillance video with the jury: "Watch him. And again, I'll play [the video] momentarily. He does not appear injured. Does he look scared? Of course not….I suggest to you he's not afraid of her. It doesn't make sense. If he were he wouldn't have come back outside." (5T79-10 to 22). It was in that context of refuting the defense summation theme that the "harmless," elderly, infirm defendant was frightened of Marketa "the aggressor," that the prosecutor referenced the context of

the relationship defendant, himself, described in his self-serving statement to the police:

> He doesn't look frightened. And she walks after him. Neither one of them is running. I suggest to you here, he doesn't run away from her. He doesn't spring back to his house, because again, he is not afraid of her. He has known her for over twenty years, since she was thirteen. And I know some of you noticed that in the interview in the confession that he gave. When detectives asked him, how long have you known her, he said, oh a long time….probably since she was about thirteen. And then he said, I knew her father. He smirked and said, I'm going to hell.
>
> The detectives immediately realized what he was saying and they followed up with, well how long have you been having sex with her? And he said, I don't know, a long time….
>
> Ladies and gentlemen, I suggest that this defendant has been victimizing Marketa for many, many years. He was not afraid of her. He is the predator in this relationship. Now he wants you to think that he's the victim. But he knew exactly what he was doing.
>
> [5T80-1 to 25.]

The prosecutor refuted the self-defense portrait of Marketa as the aggressor, and used defendant's own description of his relationship with Marketa to prove motive: "I suggest to you that these excuses he gives [in his statement] are motive. They are the motive for why he murdered Marketa. The past history that they have is the motive for why he murdered her." (5T86-18 to 22.) "His wife was home and he didn't want to deal with Marketa in this moment. At this time, in this moment, on this day he had no use for her." (5T81-14 to 17).

Following summations, defense counsel objected at sidebar to the prosecutor's comment that "my client has been victimizing Marketa for many years. Judge, that's completely inappropriate. It's 404(b) evidence, if that even, and I'm going to object to that for record." (5T96-18 to 24). The prosecutor explained that "the purpose for the comment is against the backdrop of the defense here which is self-defense. She's violent. They wanted the convictions and she's the aggressor. And my point here is that she is not the aggressive, violent one and that it's simply my response to that defense." (5T98-7 to 12).

The trial judge denied the objection, saying the comment was a fair inference from the relationship defendant described in his statement. (5T97-7 to 98-4). The judge noted that the jury "could infer that there was a relationship, that she was a vulnerable person and over the years he may have engaged in a sexual relationship, would buy drugs, and he's known her since she was a young girl, and you know, that she may have been a victim." (5T97-14 to 98-4). The judge rejected the notion that this was 404(b) evidence, rather than fair inference from the record. (5T97-13 to 23).

In denying defendant's same claim raised in his new trial motion, the trial judge, again, recognized that the prosecutor's comments were proper, citing defendant's admissions in his statement that "he and the victim had been sleeping together for a long time." (7T14-7 to 12). The court concluded that the prosecutor

"did not commit misconduct in her characterization that the defendant had been victimizing Marketa Thorpe for many years. The Court notes that the victim was a vulnerable person by virtue of her substance abuse issues and homelessness and her—her relative youth in comparison to the defendant." (7T14-19 to 15-1). The judge continued, "Those…facts…place the defendant in an empowered position over this victim. The inferences from the totality of the evidence and facts in the record support the statement made by the state which was not evidence and the jury was instructed that her closing summations were not to be considered evidence." (7T15-2 to 8). The judge denied the motion, additionally citing the weight of the evidence presented at trial. (7T15-9 to 24).

As the New Jersey Supreme Court has reminded, "a trial is not a perfectly scripted and choreographed theatrical presentation...." State v. Yough, 208 N.J. 385, 397 (2011). The standard for reversal based upon prosecutorial misconduct is well-settled: Prosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct is so egregious as to deprive defendant of a fair trial. State v. Timmendequas, 161 N.J. 515, 575 (1999); State v. Chew, 150 N.J. 30, 84 (1997) (Chew I); State v. Ribalta, 277 N.J. Super. 277, 294 (App. Div. 1994), certif. denied, 139 N.J. 442 (1995); State v. Ramseur, 106 N.J. 123, 322 (1987). To justify reversal, the prosecutor's conduct must have been "clearly and unmistakably improper," and must have substantially prejudiced defendant's

fundamental right to have a jury fairly evaluate the merits of his defense. Timmendequas, 161 N.J. at 575. This standard is observed out of a recognition that "public security should not suffer because of a prosecutor's blunder." State v. Watson, 224 N.J. Super. 354, 362 (App. Div.), certif. denied, 111 N.J. 620, cert. denied, 488 U.S. 983 (1988).

And, as this Court has reaffirmed, "[p]rosecutors are entitled to forcefully advocate the State's position." State v. Ates, 426 N.J. Super. 521, 535 (App. Div. 2012). Likewise, the New Jersey Supreme Court has recognized, "It is but a truism that prosecutors, as lawyers, are engaged in an oratorical profession. As such, and in consonance with our adversarial method of ascertaining the truth, we properly afford counsel on both sides latitude for forceful and graphic advocacy." State v. Reddish, 181 N.J. 553, 640-41 (2004) (employing heightened scrutiny in capital case) (citing State v. Smith, 167 N.J. 158, 177 (2001)); State v. Lazo, 209 N.J. 9, 29 (2012); State v. Harris, 141 N.J. 525, 559 (1995); see also State v. Frost, 158 N.J. 76, 82 (1999); State v. Williams, 113 N.J. 393, 447 (1988); State v. Johnson, 31 N.J. 489, 510-11 (1960) ("A prosecutor cannot be expected to present the State's case in a manner appropriate to a lecture hall"). In fact, it is well-accepted that prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented, and

the legitimate inferences therefrom. Frost, 158 N.J. at 76 (citing Harris, 141 N.J. at 525); Williams, 113 N.J. at 447.

Prosecutors may comment on facts in the record as well as urge the jury to draw reasonable inferences from them. Lazo, 209 N.J. at 29 (citing Smith, 167 N.J. at 177). This Court has also recognized that a prosecutor is likewise permitted to respond to an argument raised by the defense "so long as it does not constitute a foray beyond the evidence adduced at trial." State v. Munoz, 340 N.J. Super. 204, 216 (App. Div.), certif. denied sub nom. State v. Pantoja, 169 N.J. 610 (2001).

Indeed, our courts recognize that a prosecutor's summation should not be viewed in a vacuum. Rather, a prosecutor is permitted to respond to arguments raised by defense counsel in summation. State v. Hawk, 327 N.J. Super. 276, 284 (App. Div. 2000); State v. Engel, 249 N.J. Super. 336, 379 (App. Div.), certif. denied, 130 N.J. 393 (1991). Therefore, in reviewing a prosecutor's summation, it must be considered within the context in which the challenged statement was made. Ibid. Our courts have recognized that criminal trials create a "charged atmosphere" that often makes it difficult for the prosecuting attorney to stay within the orbit of strict propriety. Ramseur, 106 N.J. at 320.

For instance, comments that might otherwise be inappropriate, can be acceptable when supported by the evidence. See, e.g., State v. Bauman, 298 N.J. Super. 176, 209-10 (App. Div. 1997). In Bauman, this Court rejected an appellate

challenge to the prosecutor's summation comments that the defense of insanity had been "'concocted.'" Ibid. The Bauman court found that the comment did not improperly denigrate the defense in that context because it was focused on defendant's testimony, rather than on any actions of defense counsel. Id. at 209. Similarly, summation comments that the defense of insanity was a "carefully contrived fabrication" to avoid defendant's criminal responsibility did not prejudice the defendant's right to a fair trial where the prosecutor was simply attempting to meet the defense contention that defendant's criminal conduct was a manifestation of his insanity. State v. DiPaglia, 64 N.J. 288, 295-97 (1974). See also State v. Merritt, 247 N.J. Super. 425, 434-35 (App. Div. 1991) (finding harmless prosecutor's summation characterization of the defense as an "Alice in Wonderland" story).

Moreover, particular remarks during the prosecutor's summation must be evaluated in the setting of the entire trial, as well as against the remarks by defense counsel. State v. Ortisi, 308 N.J. Super. 573, 595 (App. Div. 1998); Engel, 249 N.J. Super. at 379. In determining whether the prosecutor's comments were sufficiently egregious to deny defendant a fair trial, a court must consider the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred. State v. Scherzer, 301 N.J. Super. 363, 433 (App. Div.), certif. denied, 151 N.J. 466 (1997). Not every instance of misconduct in a

prosecutor's summation will require a reversal of a conviction. "There must be a palpable impact." State v. Roach, 146 N.J. 208, 219, cert. denied, 519 U.S. 1021 (1996).

Here, the trial court properly denied a request to strike or issue a curative instruction regarding the prosecutor's responsive summation comments as they amounted to fair inference from the record, but any error was nevertheless harmless given the overwhelming evidence of defendant's guilt. The comments made by the prosecutor were entirely proper. The remarks were clearly based on rebutting the defense summation theme that Marketa was the aggressor by drawing on defendant's own description of his twenty-year relationship with Marketa, in which he painted her as jealous and dangerous.

In his confession, defendant attempted to capitalize on what a good man he was to care for his disabled wife, and give money to the drug-addict neighbor on occasion. Defendant purposely disclosed the sexual relationship to the officers to support his claim that the victim was jealous, and therefore dangerous, as a motive for her allegedly wanting to kill him and burn his house down. Defendant described an alleged robbery a few months earlier, claiming he was "with a girl inside the house," and the victim came in, assaulted him, and took his money. (4T272-16 to 22; Da89). Defendant admitted he had had a sexual relationship with the victim in the past, and that the victim was probably jealous:

Sgt. Rauch:	Wait, so she – was she mad at you that you were with another woman?
Mr. Santiago:	Probably, because I don't know why she have to get mad because she not my wife.
Sgt. Rauch:	Okay. But so do you and Marketa mess around? Do you—
Mr. Santiago:	Not for a long time, I stopped.
Sgt. Rauch:	Yeah, so you guys used to have sex?
Mr. Santiago:	Yeah, before.
* * *	
Det. Popper:	So she was jealous?
Mr. Santiago:	Probably, if she want – she want to kill me for this.

[4T273-14 to 274-6; Da90.]

Defendant told the officers that he had known the victim since she was thirteen, and knew her whole family; but while he did not say when the sexual part of the relationship began, it was clearly after she was already doing drugs, as her father allegedly asked defendant, "[W]hy you want to be with somebody like that?" (4T285-3 to 286-5; 4T286-9 to 10; Da100-101).

It was a fair inference that a thirty-year age difference, where the victim called him, "Poppy," and the victim was a homeless, vulnerable, drug addict, was imbalanced. (4T287-8; Da102). The prosecutor was entitled to refute the defense summation portrayal of the victim as jealous and dangerous, posing a continuing threat to an allegedly frightened elderly defendant, and instead, argue that it was defendant who held the power in that twenty-year relationship.

Finally, of course the trial judge properly recognized that nothing the prosecutor said in summation constituted evidence, as the jury was duly instructed. See, e.g., State v. Miller, 205 N.J. 109, 126 (2011) (recognizing that it is presumed that the jury faithfully follows its instructions). Moreover, the overwhelming evidence of guilt, including the surveillance video and defendant's own confession, rendered any potential error harmless. Defendant received a fair trial.

POINT II

DEFENDANT'S STATEMENT WAS PROPERLY ADMITTED AS VOLUNTARILY MADE (1T; Da6-29). [Raised Below.]

Defendant submits that the trial court erred by finding defendant's waiver of his Miranda[2] rights was voluntary. (Db25-30). Defendant relies upon his alleged difficulty with English, as a native Spanish speaker, to speculate that he "might not have understood" his rights, and his need to use the restroom as supposedly applying "undue pressure" to waive his rights. (Db25-30). The State asserts that defendant's claim is meritless. The presiding judge's well-supported observations and factual findings establish that defendant's waiver was voluntary, knowing, and intelligent. (Da6-29). There is no indication that defendant did not understand his warnings which were provided in writing in Spanish prior to his waiver, or that his waiver was coerced in any way. To the contrary, defendant's overall demeanor indicated he was more than willing and eager to speak to the police to provide his version of the incident.

Review of a trial court's decision in a motion to suppress is circumscribed. "Generally, on appellate review, a trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 379-81 (2017)). Therefore, a

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

trial court's findings should not be disturbed unless they are "so clearly mistaken 'that the interests of justice demand intervention and correction.'" A.M., 237 N.J. at 395-96 (quoting State v. Elders, 192 N.J. 224, 244 (2007)(internal quotations and citations omitted)). In S.S., the New Jersey Supreme Court extended that deferential standard of appellate review to "factual findings based on a video recording or documentary evidence" to ensure that New Jersey's trial courts remain "the finder of the facts." 229 N.J. at 381.

A knowing, intelligent, and voluntary waiver is determined by "the totality of the circumstances surrounding the custodial interrogation based on the fact-based assessments of the trial court." A.M., 237 N.J. at 398. "The criterion is not solely the language employed but a combination of that articulation and the surrounding facts and circumstances." State v. Tillery, 238 N.J. 293, 316 (2019). Courts generally rely on factors such as "'the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved.'" A.M., 237 N.J. at 398 (quoting State v. Miller, 76 N.J. 392, 402 (1978)). And where, as here, a video-recorded interrogation is presented, our courts recognize that a judge is better able to assess a defendant's "overall deportment and conduct as well as the officers' demeanor and conduct throughout the custodial interrogation." A.M., 237 N.J. at 401.

Finally, while our courts have recognized "[t]he problem of communicating Miranda rights to non-English-speaking defendants is important, particularly in a state with so diverse a population," State v. Mejia, 141 N.J. 475, 503 (1995), the standard remains whether the defendant can comprehend the rights and knowingly waive them, as assessed under the totality of the circumstances. See A.M., 237 N.J. at 384 (Spanish-speaking defendant who read Miranda form to himself was not confused under the totality of the circumstances). In Mejia, where a Spanish-speaking defendant maintained that he understood "very little" English and so was provided his rights from a Spanish language Miranda card, the Court ultimately found his waiver was knowing and voluntary: "The record is devoid…of any suggestion that Mejia was confused or did not fully appreciate his rights….Mejia does not claim that the police coerced, intimidated, or tricked him into giving the statement. Our reading of the record persuades us that the police, confronted with the practical problem of advising a Spanish-speaking suspect, adequately administered the Miranda warnings." Mejia, 141 N.J. at 503.

Here, the presiding judge reviewed the video, forms, and testimony presented, and properly concluded that the State met its burden to show beyond a reasonable doubt that defendant made a knowing, intelligent, and voluntary waiver, and that defendant understood the English language. (Da6-29; Da26). In the judge's comprehensive written opinion, the judge found Sergeant Rauch to be "an

extremely competent and experienced officer who testified credibly, thoroughly, and earnestly" concerning his involvement in the interview of defendant. (Da28).

Specifically, in analyzing the totality of the circumstances surrounding the custodial interrogation, the trial judge considered the following factors:

> (1) Defendant's age of sixty-nine at the time of the interview, his status as a retiree from the Atlantic City Public Works and a resident of Atlantic City for over thirty years;
> (2) Defendant is a native Spanish speaker from Puerto Rico;
> (3) Sgt. Rauch having read Defendant his Miranda warnings directly from the Miranda card;
> (4) Sgt. Rauch having asked Defendant numerous times whether he understood his rights as were read to him and received affirmative responses from Defendant;
> (5) Defendant's comments concerning jail prior to the substantive interview;
> (6) the questioning was not repeated in nature and was generally open- ended;
> (7) Defendant having been placed alone in the interview room handcuffed for approximately an hour-and-a-half prior to the detective's introduction during which time he napped;
> (8) the interview's length of two-and-a-half-hours;
> (9) Defendant having been brought to the restroom prior to the substantive interview;
> (10) the interview room was cold [citation omitted];
> (11) Defendant only spoke Spanish, or an interpretive of Spanish, twice throughout the two-and-a-half-hour interview; and
> (12) Defendant's prior interactions with law enforcement, including multiple indictable convictions.
>
> [Da27.]

The judge noted that, although the sergeant failed to inquire as to defendant's education or intelligence, the sergeant read aloud directly from the Miranda card, and additionally asked defendant multiple times if he understood his rights as read to him, and if he would like them to be read again, "to which Defendant insisted he understood and that 'it's okay.'" (Da27). Indeed, while the sergeant did not specifically ask about defendant's education or intelligence, it was clear to the sergeant that defendant was literate as he could read in Spanish, and that defendant had the requisite education to maintain a government job for thirty years.

Based upon the totality of the circumstances, the presiding judge further found that defendant spoke in English virtually the entire interview. (Da27). The judge determined that "Defendant's use of English appeared to be fluent and colloquial. His choice of words was appropriate to the context. Although Defendant's English [wa]s accented, he was coherent and straightforward in his statements." (Da27).

Furthermore, based upon the judge's viewing of the video-recorded interview, the judge found that "Defendant was effectively communicating with the detectives" throughout the statement. (Da27-28). The judge expressly found that "Defendant appeared to be at relative ease speaking with detectives and provided a detailed discussion regarding the events leading up to the shooting on

Belfield Avenue and his lengthy history with the deceased." (Da27). Regarding defendant's use of masculine and feminine pronouns, the court concluded, "from the context of Defendant's speech and the total circumstances that Defendant understood what he was saying and that he was referring to the deceased victim [when using the traditionally masculine pronoun]." (Da28).

Finally, the judge found that "Defendant made a free and deliberate choice to waive his Miranda rights, as the record is devoid of any intimidation, coercion, or deception on behalf of the detectives." (Da28). The judge explained, "Quite the opposite occurred during the interview, with Sgt. Rauch extending the courtesy of providing Defendant reading glasses to assist him in reading and writing and Defendant answering any and all questions without periods of prolonged silence or unresponsiveness." (Da28). Moreover, the judge found and concluded that "Defendant's waiver was made with full awareness that Defendant was facing criminal charges and detention; Defendant discusses this throughout the first half of the interview as he makes mention of going to jail and guilt." (Da28). Accordingly, the presiding judge ruled beyond a reasonable doubt that defendant made a knowing, intelligent, and voluntary waiver of his rights. (Da28).

The judge's findings are well-supported by the record, and entitled to deference on appeal. At the outset, what distinguishes this case is precisely that defendant in fact spoke English fluently, and was nevertheless provided his rights

in his native Spanish written language prior to waiving them. That alone ensures that defendant understood his rights without any risk of a potential language barrier. Indeed, this is not a language barrier case; rather, it is an accent case. In fact, even at sentencing, while defendant elected to use an interpreter, he nevertheless spoke on the record in English several times. (7T24-25 to 25-1; 7T28-13; 7T36-21 to 23). This supports the presiding judge's conclusion that defendant spoke English fluently. (Da27).

But additionally, the record clearly establishes that defendant understood his rights, despite his accent. As the judge found, defendant effectively communicated with the detectives in English throughout the entirety of the interview. As the sergeant testified, defendant never asked for an interpreter or expressed a preference to communicate in Spanish, never appeared confused, meaning there was no impression of a language barrier, and the sergeant had no trouble understanding defendant as he spoke English. (Da19). Again, as the trial judge noted, "[w]hen asked what he would have done had he thought, at any point during the interview, that there was a language barrier, Sgt. Rauch responded that he would have stopped the interview to obtain an interpreter." (Da19).

Notably, when defendant did not understand something, he immediately said so. After the detective read the warnings to defendant in English, defendant said, "Yeah, I understand that." (Da43). But before the detective had defendant sign the

waiver form confirming his understanding, he asked defendant to read it out loud, and defendant replied definitively, "No I can't read no English." (Da45). When defendant was shown that it was provided in Spanish, defendant again spoke up to say, "I don't see too good." (Da45). At that point, the sergeant directed defendant to use the eyeglasses the sergeant had provided for defendant. (Da38-39; Da45). As defendant signed, he declined the officers' offer to read the warnings again to him, and repeatedly told the officers he understood his rights. (Da46-47). Defendant effectively communicated in English throughout, expressing his needs and having his needs met.

Likewise, the judge's fact-finding regarding the video support the voluntariness of defendant's waiver, and is entitled to deference. This mid-day interview was not very long, and the atmosphere was relaxed and solicitous. The officers initially asked defendant, "You need anything you need some water or something?" (Da31). Given that it was during the early part of the pandemic, the officers asked defendant, "Are you comfortable talking to us like this or would you like a mask?" (Da31). They checked on his medicine needs, and as noted above, when defendant indicated he "can't see too well," the sergeant immediately jumped up, saying, "I'll give you some reading glasses anyway just in case…." (Da38). The entirety of the waiver process and interview was respectful, conversational, and communicative.

Defendant's concern about defendant's need to use the bathroom as exerting "undue pressure" is belied by the record. (Db27). At the time defendant expressed a need to use the bathroom, he had already initialed his understanding of the rights and waiver. (Da44-45). It was only just before the defendant was being asked for a signature that defendant indicated he had to use the restroom; defendant's request was accommodated merely three transcript pages later (actually within 104 seconds, Da185, 1:20-50 to 1:22-34). (Da48). And during that time, defendant raised other topics indicating his need was not dire, as he engaged the officers: "You gonna put me in jail put me in jail." (Da46).

Specifically, the judge's impressions from the video-recording were consistent with the finding that defendant's waiver was voluntary, in that the judge found that "Defendant appeared to be…communicative, at his ease, relaxed, frank, and forthcoming while speaking with detectives." (Da24). The judge observed that defendant never refused to talk with detectives, and "remained open and agreeable to providing detectives with his recitation of the day's events." (Da24). Post-Miranda, the judge observed that the conversation remained "fluid and coherent." (Da26). The judge observed that the fact that defendant discussed various topics "displayed his competency with the English language," including defendant's familiarity with government licensure for the use of a weapon, and the modifications to the weapon. (Da26). The judge also highlighted defendant's

criminal history and familiarity with the criminal system, as well as defendant's continued cooperation at the end of the interview in terms of voluntarily executing three consent forms authorizing the search of his vehicles, and taking a buccal swab. (Da11; Da24).

In particular, the voluntary nature of the interview was further evident as the judge found that defendant "spoke nonchalantly about shooting the deceased, clarifying that he meant to shoot the deceased in the leg rather than the chest so as not to kill her." (Da26). Amid the open-ended questioning, defendant was relaxed and even joking—as defendant pulled out a bullet from his pocket upon returning from the bathroom, he essentially was thinking out loud in English, saying, "What I got over here?" (Da48). Moreover, the majority of the interview was actually self-serving to defendant's interest to talk, attempt to elicit sympathy, and set up his potential self-defense claim. Indeed, defendant ended the interview by acknowledging that he had been treated fairly, saying, "I had to defend myself." (Da129-30).

Finally, the fact that the statement was largely exculpatory and self-serving, and given the overwhelming evidence of guilt which included video surveillance of the shooting, even an improper admission was harmless in this case. Defendant received a fair trial.

POINT III

THERE IS NO BASIS TO DISTURB THE TRIAL COURT'S REASONABLE EXERCISE OF DISCRETION IN IMPOSING A SENTENCE SUPPORTED BY THE RECORD AND CONSISTENT WITH ALL SENTENCING GUIDELINES (7T; Da175-78). [Partially Raised Below.[3]]

Finally, defendant maintains simply that his murder sentence beyond the mandatory 30-year NERA minimum was excessive because defendant's 72-year-old "advanced age was not given the substantial weight it deserved," as a factor that "weighs on all other factors…." (Db30-38; Db30; Db35). Defendant attempts to extend application of the age-crime curve to argue that the trial court should have given defendant "a lower sentence with a focus on maximizing his rehabilitative efforts." (Db31; Db34-35).

The State asserts that defendant's claim is specious. The trial judge properly considered and weighed the aggravating and mitigating factors, including the escalating nature of defendant's three prior indictable convictions, and the very serious and callous nature of this crime. Moreover, contrary to defendant's claim on appeal, the trial court duly considered the real-time consequences of this NERA sentence, expressly concluding that "the total sentence imposed is warranted and necessary to protect the public from this dangerous and violent recidivist." (7T34-

[3] While trial counsel sought consideration of defendant's age, the State is unable to confirm whether defendant raised the novel application of the age-crime curve below. (7T17-2 to 3).

2 to 8). While there is no basis to extend the age-crime curve beyond the parole scenario, to the extent that defendant was already arguably at an "advanced age" of 69 years old when he committed the most violent of crimes, any speculation as to the likelihood of defendant ceasing to offend with age is patently defeated.

As the New Jersey Supreme Court continues to reaffirm, appellate review of sentencing is "deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). See also State v. Grate, 220 N.J. 317, 337 (2015); State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Miller, 205 N.J. 109, 127 (2011); State v. Cassady, 198 N.J. 165, 180 (2009). Indeed, if there is such adherence to the Code's sentencing scheme by a trial court, "its discretion should be immune from second-guessing." State v. Bieniek, 200 N.J. 601, 612 (2010). See also State v. Jabbour, 118 N.J. 1, 5 (1990) (holding that, if a trial court follows the sentencing guidelines, an appellate court ought not second-guess the sentencing court's decision); State v. Roth, 95 N.J. 334 (1984).

In clarifying the limitations of appellate review, the Cassady Court maintained, "If a sentencing court observes the procedural protections imposed as part of the sentencing process, its exercise of sentencing discretion must be sustained unless the sentence imposed 'shocks the judicial conscience.'" Cassady, 198 N.J. at 183-84. Thus, the standard of review is one of deference; the test on

appeal is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review. State v. Ghertler, 114 N.J. 383, 388 (1989); see also State v. Ball, 268 N.J. Super. 72, 145 (App. Div. 1993), aff'd, 141 N.J. 142 (1995), cert. denied, 516 U.S. 1075 (1996).

Sitting both as the trial judge and the sentencing judge, the judge adhered to all Code and sentencing guidelines when imposing the aggregate NERA sentence of 40 years. (7T29-9 to 35-14; Da175-78). In setting the term of imprisonment, the judge identified three relevant aggravating factors which she accorded "substantial weight," including a(3) (the risk that defendant will commit another offense), a(6) (prior criminal record), and a(9) (deterrence of defendant and others), and assigned "moderate weight" to mitigating factor b(7) (the defendant led a law-abiding life for a substantial period of time prior to committing the present offense). (7T31-6 to 33-18). The sentencing court's finding of applicable aggravating and mitigating factors was eminently reasonable. These findings are well-supported by substantial evidence and should not be disturbed. Roth, 95 N.J. at 363-65.

On appeal, defendant challenges only the balancing of the factors with respect to the weight accorded to defendant's "advanced age." (Db30-38). The

"age-crime curve" relied upon by defendant is inapposite here. The studies relating to that theory state that as an inmate approaches later stages of life, the likelihood of committing a crime greatly diminishes. Acoli v. N.J. State Parole Bd, 250 N.J. 431, 460 (2022). The idea that defendant's "advanced age" should be seen as making him less likely to recidivate is belied by logic and the facts of this record, given the age he was when he committed the instant offense. The seriousness of the offense, and the danger defendant presents, is not lessened by how old he will be when he is eligible for parole. To the extent that the theory considers that individuals may age out of crime, that ship has sailed for defendant.

Defendant was not a first-time offender. In fact, his record included an escalating history of first-degree offenses, reflecting violence against women, for which he was already sentenced to 30 years' incarceration with a 25-year period of parole ineligibility. As the trial judge observed based upon defendant's criminal history, "The defendant's conduct escalated abruptly and dangerously. It is a virtual certainty that he will re-offend if given the opportunity." (7T32-16 to 18). This is particularly true in light of defendant's lack of accountability and remorse.

Finally, defendant's reliance on State v. Marinez, 370 N.J. Super. 49, 58 (App. Div.), certif. denied, 182 N.J. 142 (2004) to argue that the trial court erred by allegedly failing to consider the real-time consequences of NERA sentencing is equally unavailing. (Db35). In Marinez, this Court considered NERA's

substantial and inconsistent effect on the manner in which trial judges exercised their sentencing discretion. Id. at 58–59. But the Marinez court was focused on ensuring that trial courts consider the severity of NERA sentencing "where the combination of defendant's personal circumstances and the circumstances attending the crime compel the sense that the sentence would otherwise be too severe." Id. at 58. Nothing in defendant's personal circumstances, which barely supported a single mitigating factor, nor the circumstances of this most violent of crimes, could support a finding that even a NERA life term could be considered "too severe." Moreover, the Marinez court was reviewing a NERA sentence which was premised on questionable aggravating factors and additional mitigating factors not recognized by the trial court, neither of which exists here. Id. at 58-59.

Nevertheless, the record amply demonstrates that the trial judge was properly cognizant of the real-time consequences of the sentence imposed on someone defendant's age. In imposing sentence, the trial judge expressly stated: "The Court has considered the real time consequences of a sentence to be imposed under the No Early Release Act and has concluded…the total sentence imposed is warranted and necessary to protect the public from this dangerous and violent recidivist." (7T34-2 to 8). Rather than imposing the maximum sentence of life surely justified here where the significant aggravating factors of "substantial weight" legitimately outweighed the lone moderately-weighted mitigating factor,

the trial judge imposed a term significantly less than the maximum, and ten years below the term sought by the State for murder alone. In addition, the trial judge did not impose a consecutive term for the certain persons count, despite justification by the legislative policies that could be served by a consecutive term. There can be no doubt that the trial judge considered the real-time consequences of NERA when imposing this sentence.

The sentencing record revealed competent, credible evidence in support of defendant's sentence. The sentence was neither manifestly excessive nor unduly harsh. This is not one of those rare cases where the sentencing court suffered a clear error of judgment, or that the application of the sentencing guidelines was so unreasonable as to "shock the judicial conscience," particularly in light of the senseless loss of a young mother's life defendant caused without so much as expressing a hint of remorse. Roth, 95 N.J. at 363-64. As it was properly supported by the record, there is no basis to disturb defendant's sentence on appeal.

CONCLUSION

For the reasons expressed, the State respectfully requests that this Court affirm defendant's conviction and sentence.

Respectfully submitted,

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