RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1162-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

S.J.C.,[1]

Defendant-Appellant.

APPROVED FOR PUBLICATION
April 28, 2022
APPELLATE DIVISION

Argued April 4, 2022 – Decided April 28, 2022

Before Judges Messano, Rose, and Marczyk.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 21-06-1120.

Austin J. Howard, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Austin J. Howard, of counsel and on the briefs).

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

[1] We use initials and pseudonyms to protect the privacy of the alleged victim. See R. 1:38-3(c)(12).

The opinion of the court was delivered by

ROSE, J.A.D.

On leave granted, defendant S.J.C. appeals from a trial court order, denying his pretrial motion to dismiss an Essex County indictment that charges him with two counts of first-degree aggravated sexual assault by penile-vaginal penetration, N.J.S.A. 2C:14-2(a)(1), and two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1). The indictment was returned four months after the East Orange Police Department (EOPD) issued complaint-warrants; seven years after the alleged victim, I.C. (Inna), reported the crimes to the EOPD; and fourteen years after the last incident allegedly occurred. Inna, who was five and six years old at the time of the two alleged incidents, is defendant's biological daughter.

Defendant moved to dismiss the indictment, asserting the State's delay in bringing the case before the grand jury violated his right to due process under the Fourteenth Amendment, and his Sixth Amendment right to a speedy trial. Defendant also claimed the indictment, and the State's ensuing response to his bill of particulars, failed to provide sufficient notice of the dates and locations of the sexual assaults under the criteria established in State in the Interest of K.A.W., 104 N.J. 112 (1986).

Following oral argument, the motion judge reserved decision and thereafter issued a written opinion, rejecting defendant's arguments. The judge then stayed his accompanying November 4, 2021 order, pending defendant's application for interlocutory relief.

On appeal, defendant abandons his speedy trial argument, focusing instead on his remaining claims. More particularly, defendant presents the following points for our consideration:

POINT I

THE SEVEN-YEAR-OLD PROSECUTION OF DEFENDANT VIOLATES DUE PROCESS UNDER STATE V. TOWNSEND[, 186 N.J. 473 (2006),] BECAUSE THE STATE'S DELAY WAS RECKLESS AND CAUSED ACTUAL PREJUDICE TO THE DEFENSE. U.S. Const. amend. XIV; N.J. Const. art. I, ¶ 1.

A. Defendant Satisfies Townsend's First Prong Because the State's Delay Was Reckless; the Trial Court Erred by Requiring Proof of Bad Faith.

B. Defendant Has Established Actual Prejudice Under Townsend's Second Prong; the Trial Court Erred by Requiring Defendant to Document Specific Testimony from the Very Witnesses Who Can No Longer Be Found Because of the State's Delay.

POINT II

THE INDICTMENT MUST BE DISMISSED FOR FAILURE TO PROVIDE FAIR NOTICE OF WHEN AND WHERE THE OFFENSES ALLEGEDLY

OCCURRED. U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 10.

POINT III

FUNDAMENTAL FAIRNESS REQUIRES DISMISSAL BECAUSE THE CUMULATIVE EFFECT OF THE DELAYED PROSECUTION AND VAGUE INDICTMENT HAS SUBSTANTIALLY PREJUDICED DEFENDANT'S ABILITY TO MOUNT A FAIR DEFENSE. N.J. Const. art. I, ¶ 1.

Because we conclude defendant failed to shoulder the heavy burden of demonstrating "actual prejudice" under the second Townsend prong, we conclude his due process rights were not violated by the State's delay in seeking the indictment and affirm the motion judge's decision in that regard. Accordingly, we need not address defendant's assertion under the first Townsend prong that the judge erred in requiring him to establish the State acted in bad faith. We nonetheless clarify the burden of proof required under the first Townsend prong.

Further, while we otherwise agree with the motion judge's analysis under K.A.W., we cannot discern from the record provided on appeal that the State discharged its obligation under K.A.W. We therefore remand the matter for further proceedings to address the contentions raised in point II.

Lastly, we decline – at this time – to address defendant's fundamental fairness argument raised in point III. Resolution of these contentions shall abide the results of our remand order.

Accordingly, we affirm in part, and reverse and remand in part.

I.

We summarize the pertinent facts from the limited record before us. On the evening of November 11, 2013, fourteen-year-old Inna accompanied her mother, K.K. (Kim), to the EOPD. Inna told police defendant had sexually assaulted her on multiple occasions when she was between the ages of five and nine or ten. That same evening, the lead detective contacted the Essex County Prosecutor's Office (ECPO) and was instructed "to obtain audio/video statements from [Inna and Kim]."[2]

Inna could not recall all the details of every incident but said the first sexual assault occurred when she was five years old at "Mr. Billy's Mechanic Shop," where her father had been employed as a mechanic. The shop "w[as] located between 404 and 406 Central Avenue in the rear of this location." Inna stated defendant "walked her upstairs from the mechanic shop to an isolated area" comprised of "a small room with a bed and a small bathroom with a window." Inna described the acts, including forceful vaginal-penile

[2] We have reviewed the recorded statements provided by the State on appeal.

penetration that caused her pain and made her cry. She claimed defendant ejaculated "but not inside her." Defendant cleaned and dressed Inna after the assaults occurred and "told her not to tell anyone about what happened, especially her mother."

Inna also reported defendant sexually assaulted her at his friend's apartment located at 94 Linden Avenue. Inna said defendant "removed her pants and underwear, pulled a blanket over them to cover them from view, and penetrated her vagina with his penis." She described the apartment's residents as "an older female, her teenage son, and a younger female in her [twenties]." Inna did not recall their names "or any other information regarding these persons," but claimed they neither witnessed nor were aware of the incidents. The younger woman bathed Inna after the sexual assaults, but "never witnessed the incidents." Inna told police she was six years old when the abuse occurred at this apartment.

Kim reported she always had legal custody of Inna and confirmed she had driven Inna to the mechanic shop and 94 Linden Avenue to spend time with defendant when the child was between the ages of five and ten. As of the date of Kim's interview, the mechanic shop "[wa]s no longer owned by the same proprietor, who[m] she only knew as 'Billy.'" Kim claimed defendant's grandmother resided at 94 Linden Avenue. Kim had no contact with defendant

since January 2010; "later that year she read an article on the internet" that defendant had been "arrested in Pennsylvania for sexually assaulting seven children."[3]

The following day, on November 12, 2013, the lead detective faxed the incident reports and related documents to the ECPO Special Victim's Unit (SVU). The EOPD closed its case "[p]ending ECPO [r]eview." According to the motion judge: "At the time, [the] ECPO was investigating [d]efendant for separate sexual assault offenses that allegedly occurred in Newark in 1996. On February 7, 2014, [the] ECPO authorized both Newark and East Orange municipalities to file charges against [d]efendant based on the allegations." However, the record on appeal does not contain any documentary evidence memorializing the prosecutor's February 7, 2014 authorization of charges.[4]

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[3] The motion judge's decision states defendant was incarcerated in Pennsylvania "after pleading guilty to a felony and several misdemeanors in November 2011." The record on appeal does not contain defendant's judgment of conviction for those charges.

[4] According to the judge, the Newark Police Department (NPD) filed a complaint-warrant against defendant on September 10, 2014 regarding the Newark incidents. Defendant was extradited to New Jersey on those charges in July 2020, after having served a term of imprisonment in Pennsylvania for "a felony and several misdemeanors." The judge's opinion also reflects "while [d]efendant was being processed on the Newark complaint, [the] ECPO realized that [he] was a juvenile at the time of the commission of the alleged offenses," administratively dismissed the complaint, and refiled the charges in Family Court. Ultimately, the charges were dismissed on the prosecutor's

Rather, the EOPD reports contained in the record indicate it was not until February 5, 2021 that the SVU authorized the EOPD to file aggravated sexual assault and child endangerment charges against defendant, and February 12, 2021 that the EOPD filed the complaint-warrants. Later that month, defendant was arrested in Pennsylvania and thereafter extradited to New Jersey.

In June 2021, the State presented the charges to the grand jury through the SVU detective, who essentially summarized the statements made by Inna and Kim to the EOPD in November 2013.[5] Neither Kim nor Inna testified before the grand jury, and the State did not introduce into evidence their recorded statements. The State limited the time frame of the allegations to 2004 through 2006, when Inna was five and six years old. The grand jury returned an indictment reflecting "various" incidents of abuse that had occurred during that two-year time frame.

Shortly thereafter, defendant moved for a bill of particulars pursuant to Rule 3:7-5, seeking information from the State concerning "the dates, times, and alleged circumstances of the charges . . . to enable [him] to prepare a

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motion. The record on appeal does not contain the NPD complaint-warrants, police reports, or ECPO reports pertaining to the charges.

[5] The State provided to us the audio recording of the grand jury proceedings, which we have reviewed.

defense."[6] The State responded by narrowing the multiple incidents referenced in the indictment to two acts, which allegedly occurred at: (1) Mr. Billy's Mechanic Shop, sometime when Inna was five years old (counts one and two); and (2) 94 Linden Avenue, another time when Inna was age six (counts three and four).

At oral argument before the motion judge, defense counsel argued the locations of the alleged incidents no longer existed. Counsel explained a church, located at either the 404 or 406 address, existed at the time the alleged acts were committed and when Inna reported them. He presumed church staff, parishioners, or missioners "possibly" could have verified whether the mechanic shop existed at the location or provided information about other potential witnesses associated with the shop. Counsel also argued had defendant known about the incidents that allegedly occurred at 94 Linden Avenue at the time Inna reported the crimes, he could have obtained a certification from a City of East Orange employee, verifying that the address "did not exist." Counsel acknowledged, "everything is speculative, at this point, given the delay."

[6] The record on appeal does not include the bill of particulars, but the State's responses were provided by the parties.

The State's responses to defendant's bill of particulars cited the SVU detective's grand jury testimony and Inna's November 11, 2013 statement to the EOPD detective, which had been provided to defendant in discovery. Citing K.A.W., the State asserted: "The victim came forward with these allegations when she was fourteen years old. At that time, she was reporting incidents that took place when she was five and six years old, so eight or nine years earlier. A narrower time[]frame of occurrence cannot be provided."

By the time the charges were presented to the grand jury, Inna was twenty-one years old. The State's responses did not indicate whether there was any post-indictment attempt to narrow the time frame as to when the crimes allegedly occurred. At oral argument before us, the prosecutor indicated the victim had been reinterviewed in that regard; appellate counsel countered he was unaware of any such statements or memorializing reports.

II.

We first consider defendant's due process argument. Contending this is not a case in which the State needed time "to gather additional evidence against the accused or to broaden the investigation" pursuant to State v. Aguirre, 287 N.J. Super. 128, 132 (App. Div. 1996), defendant argues the State proffered no legitimate reason for delaying presentation of this case to the grand jury. Defendant also contends the motion judge misinterpreted our

Supreme Court's decision in Townsend by requiring him to show "the State intentionally delayed seeking an indictment in order to gain a strategic or tactical advantage." Defendant maintains he sustained his burden under Townsend by demonstrating the State acted recklessly and he suffered actual prejudice. Because defendant's due process contentions implicate the motion judge's legal conclusions, our review is de novo. See State v. S.S., 229 N.J. 360, 380 (2017). Cf. State v. Saavedra, 222 N.J. 39, 55 (2015) (recognizing appellate courts review a trial judge's decision deciding the sufficiency of a grand jury indictment for abuse of discretion); State v. Hogan, 144 N.J. 216, 229 (1996).

A.

In Townsend, the defendant was convicted of murder twenty years after the bludgeoning death of his girlfriend. 186 N.J. at 479. On direct appeal, we reversed the trial court's evidentiary ruling, holding the trial court erroneously admitted testimony concerning battered women's syndrome. Ibid. But we rejected defendant's due process argument, which was based on the twenty-year delay in seeking an indictment. Ibid. Although the Supreme Court reinstated the jury's verdict, thereby partially reversing our order, the Court agreed defendant failed to demonstrate a violation of his due process rights. Id. at 479-80.

Most of the Court's twenty-eight-page opinion, including Justice Rivera-Soto's partial dissent, addresses the battered women's syndrome issue. Id. at 479-507. In the five pages dedicated to the defendant's due process argument, the Court noted it "ha[d] not previously addressed the standard our courts should apply when evaluating a request to dismiss an indictment based on unreasonable delay between the date of the crime and the date the charge is presented to a grand jury." Id. at 486.

Citing United States v. Lovasco, 431 U.S. 783, 789 (1977), the Court recognized "the Due Process Clause of the United States Constitution provides an overlay to protect against oppressive pre-indictment delay." Id. at 487. Thus, "a due process violation occurs if the delay in prosecution violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions, . . . and which define the community's sense of fair play and decency.'" Id. at 487-88 (quoting Lovasco, 431 U.S. at 790).

In Lovasco, the Government attributed its delayed indictment to its "efforts to identify persons in addition to [the defendant,] who may have participated in the offenses." 431 U.S. at 796. Quoting its decision in United States v. Marion, 404 U.S. 307, 324 (1971), the federal high court distinguished investigative delay from "delay undertaken by the Government

solely 'to gain tactical advantage over the accused.'"[7] Id. at 795. However, the Lovasco Court also noted the Government's brief in Marion acknowledged: "A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." Id. at 795 n.17. Declining to adopt a rule that would circumscribe a prosecutor's ability to continue its investigation after the Government "assembled sufficient evidence to prove guilt beyond a reasonable doubt," the Court held prosecution "following investigative delay does not deprive [a defendant] of due process, even if [the] defense might have been somewhat prejudiced by the lapse of time." Id. at 792-96.

In Townsend, our Supreme Court summarized the two seemingly disparate standards articulated by the United States Supreme Court in separate decisions decided after it issued its decision in Lovasco:

> "[T]he Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage and that it caused the defendant actual prejudice in presenting his defense." United States v. Gouveia, 467 U.S. 180,

[7] Marion was decided on speedy trial grounds. 404 U.S. at 325-26.

> 192 . . . (1984); accord United States v. $8,850, 461 U.S. 555, 563 . . . (1983) (noting due process claims for delay in instituting criminal prosecutions "can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant, or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges").
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> [186 N.J. at 488 (alteration in original) (emphasis added).]

Turning to the due process argument at issue in Townsend, the Court noted the defendant acknowledged the Gouveia standard, i.e., that a defendant must demonstrate "the indictment was deliberately delayed for tactical reasons before a due process violation will be found," but the defendant urged the Court to "adopt a 'sliding scale standard' that the longer the delay the less the burden on defendant to show prejudice." Ibid. The Court rejected the defendant's invitation, and "appl[ied] the federal standard in determining whether a due process violation resulted from excessive pre-indictment delay." Ibid. (emphasis added). Citing Gouveia, the Court held: "That standard requires the defendant to show: (1) the State's delay in seeking the indictment was a deliberate attempt to gain an advantage over him, and (2) the delay caused defendant actual prejudice in his ability to defend the charge." Id. at 489.

Unlike defendant in the present matter, the defendant in Townsend did not assert he should be held to the less stringent standard set forth in $8,850, i.e., that the State acted "in reckless disregard of [the delayed indictment's] probable prejudicial impact upon the defendant's ability to defend against the charges." 461 U.S. at 563. Thus, our Supreme Court was not called upon to decide whether the prosecutor's reasons for delaying indictment were governed by the "deliberate" standard stated in Gouveia, 467 U.S. at 192, or the "reckless" standard, set forth in $8,850, 461 U.S. at 563.[8] Nor did the Court explain its rationale for adopting the Gouveia standard and implicitly rejecting the $8,850 standard.

Several years earlier, when we decided State v. Alexander, 310 N.J. Super. 348, 353-54 (App. Div. 1998), we observed the standards mentioned in Gouveia and $8,850 were dicta, although "a majority of federal circuit courts of appeal" were in line with the Gouveia standard at that time. We stated, "the Supreme Court of the United States ha[d] never resolved the conflict among the circuit courts of appeal and the Supreme Court of New Jersey ha[d] never

[8] The United States Supreme Court in Gouveia addressed the inmate-defendants' claims that the right to counsel attached while they were held in administrative detention before their indictments were returned. 467 U.S. at 182-83. $8,850 involved a civil forfeiture matter, wherein "the Government urge[d] that the standard for assessing the timeliness of the suit be the same as that employed for due process challenges to delay in instituting criminal prosecutions." 461 U.S. at 563.

addressed the issue." Id. at 355 (footnote omitted). We therefore assumed, "without deciding the issue, that a due process violation may be established by undue pre-indictment delay even though the cause of the delay [wa]s solely the negligence of the police or the prosecutor," as argued by the defendant in Alexander, "and proceed[ed] to the issue of prejudice." Ibid.

Ten years after our Supreme Court's decision in Townsend, Justice Ginsberg, writing for a unanimous Court, parenthetically stated in dictum the "Due Process Clause may be violated, for instance, by prosecutorial delay that is 'tactical' or 'reckless.'" Betterman v. Montana, 578 U.S. 437, 441 (2016) (emphasis added) (quoting Lovasco, 431 U.S. at 795 n.17).[9] Thus, it appears the United States Supreme Court continues to recognize – albeit in dicta – that a defendant need only demonstrate the State acted "in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges." $8,850, 461 U.S. at 563.

Because our Supreme Court has not revisited the standard since its decision in Townsend, we discern no reason not to adopt the reckless standard,

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[9] In Betterman, the sole issue presented to the Court was whether a defendant's right to a speedy trial was implicated between conviction and sentencing. 578 U.S. at 439. The Court rejected the defendant's Sixth Amendment claim, but recognized "a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteen Amendments." Ibid.

cited again with approval in Betterman – after Townsend was decided. Our courts are bound by United States Supreme Court precedent. See Battaglia v. Union Cnty. Welfare Bd., 88 N.J. 48, 60 (1981) (stating our Supreme Court is "bound by the [United States] Supreme Court's interpretation and application of the First Amendment and its impact upon the states under the Fourteenth Amendment"); see also Townsend, 186 N.J. at 488 (recognizing the Court "'endeavor[s] to harmonize [its] interpretation of the State Constitution with federal law'" (quoting State v. Tucker, 137 N.J. 259, 291 (1994))). Further, our Supreme Court has recognized "the legal findings and determinations of a high court's considered analysis must be accorded conclusive weight by lower courts," even if, arguably, they are dicta. State v. Rose, 206 N.J. 141, 182-84 (2011). We are therefore convinced a defendant's right to due process may be violated where the State's reason for delay in seeking an indictment is reckless or deliberate. See Gouveia, 467 U.S. at 192; $8,850, 461 U.S. at 563.

However, we decline to consider the legitimacy of the State's reasons for delay without first addressing the second Townsend prong, which requires the defendant demonstrate actual prejudice. Framed another way, whether the State acted deliberately or recklessly is of no moment, unless the defendant can show the delay impacted his "ability to defend against the charges." See $8,850, 461 U.S. at 563; see also United States v. Sowa, 34 F.3d 447, 451 (7th

Cir. 1994) (interpreting Lovasco to require a defendant to "prove[] actual and substantial prejudice" before the Government is required "to come forward and provide its reasons for the delay"); Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) ("Assuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's justification for delay.").

We have repeatedly recognized "actual prejudice, not possible or presumed prejudice, is required to support a due process claim." Aguirre, 287 N.J. Super. at 133. The demonstration of "actual prejudice" is a heavy lift. "[T]he defendant must show the delay caused actual and substantial prejudice endangering his right to a fair trial and must present concrete evidence showing material harm." Alexander, 310 N.J. Super. at 355 (internal quotation marks omitted). Prejudice is not presumed. See Aguirre, 287 N.J. Super. at 132 (comparing the speedy trial analysis, "under which prejudice to the defense is presumed from an unusually long delay between indictment and trial" with the "far more rigorous standard" for due process claims "arising from undue pre-indictment or pre-arrest delay").

In Alexander, we surveyed the decisions of various federal circuit courts and cited examples of circumstances that did not meet the high burden of establishing actual prejudice, including: (1) "[v]ague assertions of lost

witnesses, faded memories, or misplaced documents"; (2) "[a] mere loss of potential witnesses . . . absent a showing that their testimony would have actually aided the defense"; and (3) "the death of some six potential defense witnesses" where the "defendant's assertions concerning the testimony these witnesses could have given was speculative." 310 N.J. Super. at 355-56 (internal quotation marks omitted). Thus, when "the claim of prejudice involves the unavailability of witnesses, the courts have consistently required the defendant to specify with particularity and to provide some evidence of how the witnesses' testimony would have benefitted the defense." Aguirre, 287 N.J. Super. at 134.

B.

Against this legal backdrop, we review defendant's assertions of prejudice in the present matter. Defendant casts a wide net of blame on the State, generally claiming the State's delay rendered him unable to "locate exculpatory witnesses and evidence, assert an alibi, and even conduct basic fact investigation." He contends the locations where the incidents allegedly occurred no longer exist, rendering it impossible to find witnesses. Defendant urges us to adopt the less stringent standard for assessing prejudice in the context of motions to withdraw guilty pleas under State v. Slater, 198 N.J. 145, 161 (2009) (recognizing "[c]ertain facts readily demonstrate prejudice, such as

the loss of or inability to locate a needed witness, a witness's faded memory on a contested point, or the loss or deterioration of key evidence"). Defendant's contentions are misplaced.

Actual prejudice requires more than possibilities and presumptions. The defendant's burden is not akin to his burden under Slater. In Slater, the Court established a four-pronged test for plea withdrawals, where the defendant has claimed innocence: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." Id. at 157-58. Prejudice under the fourth Slater factor thus is viewed through the prism of the State's proofs. Even then, prejudice is not presumed. "No factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief." Id. at 162. Indeed, courts view Slater motions – prior to sentencing – with liberality. Id. at 156.

In any event, defendant's argument is grounded in generalities and vague assumptions. He failed to proffer names of potential witnesses, notwithstanding Inna's allegations that he worked at the mechanic shop, and her description of three people who resided at 94 Linden Avenue. Nor did he "specify with particularity" or provide any evidence as to how the testimony of

the purported witnesses would have benefited his defense. Aguirre, 287 N.J. Super. at 134. Also absent from the record is a sworn statement of a municipal worker or certified document from the town addressing the nonexistence of the 94 Linden Avenue address. We therefore conclude, as did the motion judge, defendant failed to sustain his burden of demonstrating actual prejudice.

Because defendant failed to satisfy the second Townsend prong, we need not address the State's reasons for the delay in seeking an indictment under the first prong. We would be remiss, however, if we did not briefly comment on the State's purported reasons for the seven-year delay. Those reasons changed substantially between the time the matter was presented to the trial court and this court.

Before the motion judge, the State asserted defendant failed to demonstrate "material harm." According to the State's trial brief:

> [D]efendant was in Pennsylvania serving a custodial sentence at the time the allegations in this case first came to light in 2013. He remained in custody there until 2020. We know what would have happened had East Orange filed charges in 2013 or 2014 because we saw what happened with Newark's charges that were filed in September 2014. . . . Those charges could not be prosecuted until 2020, when . . . defendant was finally released from custody in Pennsylvania and extradited to New Jersey. . . . [D]efendant was a wildcat on that complaint[-]warrant and the charges could not proceed until he came to New Jersey to answer for them.

On appeal, however, the State backpedals from its earlier position, claiming "the delay was strictly inadvertent," due in large part to the resignation of the SVU assistant prosecutor, who had spoken with the lead EOPD detective in November 2013. Acknowledging those circumstances did not relieve the ECPO of its "obligation to follow up with [the EOPD]," the State submits the charges were inadvertently "overlooked." Notably, the State does not contend the investigation was ongoing during the seven-year interim. Nor is there any indication in the record that DNA or forensic evidence was submitted for evaluation.

The State's initial rationale finds no support in the law. There was no reason preventing the State from filing charges in 2013, when Inna reported the crimes and defendant was incarcerated in Pennsylvania. As defendant correctly asserts, the State could have sought an indictment, acquired custody of defendant, and brought him to trial under the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15. "The IAD's purpose is 'to encourage the expeditious and orderly disposition of such [outstanding] charges and determinations of the proper status of any and all detainers based on untried indictments, informations[,] or complaints' and to provide 'cooperative procedures' for making such determinations." State v. Perry, 430 N.J. Super. 419, 424-25 (2013) (first alteration in original) (quoting 18

U.S.C.A. app. 2, § 2, art. I; N.J.S.A. 2A:159A-1). Thus, had the State charged defendant in 2013, the matter could have proceeded to trial at that time.

Nonetheless, the State's apparent ignorance of the law does not necessarily suggest it delayed prosecution to gain a tactical advantage over defendant or that it acted in reckless disregard of his ability to defend against the charges. Indeed, allegations of a sexual nature, in the absence of DNA or other forensic evidence, do not generally strengthen over time. Most often, these crimes are committed in secrecy, outside the presence of eyewitnesses, as Inna alleged in this matter. The same can be said for the State's belated claim that the matter essentially fell through the proverbial cracks. As stated, however, we conclude, without deciding the first Townsend prong, defendant failed to demonstrate actual prejudice by the State's delay.

III.

We turn to defendant's remaining due process argument. Defendant maintains the indictment, and the State's responses to his bill of particulars, failed to provide adequate notice of the time frame and locations of the alleged crimes. The motion judge rejected defendant's arguments, finding the State satisfied the factors established by the Court in K.A.W. In doing so, the judge accepted the State's conclusory representation that Inna was unable to "provide

any further information." On this record, however, it is unclear what, if any, effort the State made to narrow the time frames alleged in the indictment.

Well-established principles guide our review. A "primary purpose of an indictment is to inform the defendant of the nature of the offense charged against him so he may adequately prepare his defense." State v. Rios, 17 N.J. 572, 603 (1955). As we recently observed in a case that did not involve child sexual assault allegations:

> [I]t has traditionally been the rule that time and place have been viewed as not requiring great specificity, as they typically are not elements of the crime; [t]hus, the time allegation can refer to the event as having occurred "on or about" a certain date and, within reasonable limits, proof of a date before or after that specified will be sufficient, provided it is within the statute of limitations.
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> [State v. Jeannotte-Rodriguez, 469 N.J. Super. 69, 103 (App. Div. 2021) (second alteration in original) (emphasis added) (internal quotation marks omitted).]

Moreover, when the indictment charges a sexual offense against a minor, the specificity of dates need not be "exacting." State v. C.H., 264 N.J. Super. 112, 125 (App. Div. 1993); see also State v. Salter, 425 N.J. Super. 504, 514 (App. Div. 2012). Fair notice, for purposes of constitutional due process, can best be assessed by considering the circumstances of the crime. Jeannotte-Rodriguez, 469 N.J. Super. at 104; see also K.A.W., 104 N.J. at 121-22.

In K.A.W., the juvenile complaint originally alleged the acts of sexual assault occurred "in midyear 1984," but was amended to "divers dates from January 1983 through August 1984." 104 N.J. at 115. The juvenile argued the time frame prevented him from constructing a defense, prejudicing him in two ways: (1) having visited his mother in Virginia during the summer, he had an alibi for at least part of the time frame, but without specific dates could not assert the defense; and (2) if an alibi defense were asserted, the State could "design its case to fall outside the bounds of the period that he was in Virginia." Id. at 115-16. We affirmed the trial judge's dismissal of the amended complaint. Id. at 117.

The Court considered, as a matter of first impression, "whether a complaint in a juvenile delinquency action, charging sexual assault on a victim younger than thirteen years of age, must specify an exact date of occurrence." Id. at 113. Notably, the victim in K.A.W. was seven years old when she alleged the juvenile had sexually abused her between the ages of five and seven. Id. at 114, 118. Answering the certified question in the negative, the Court established a flexible framework for addressing a defendant's claim of inadequate notice:

> "[T]he length of the alleged period of time in relation to the number of individual criminal acts alleged; the passage of time between the alleged period for the crime and defendant's arrest; the duration between the

> date of the indictment and the alleged offense; and the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense."
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> [Id. at 122 (emphasis added) (quoting People v. Morris, 461 N.E.2d 1256, 1260 (N.Y. 1984)).]

The Court also adopted the Attorney General's suggestions, including: "the age and intelligence of the victim, the extent and thoroughness of the prosecutor's investigative efforts to narrow the time frame of the alleged offense, and whether there was a continuous course of conduct." Id. at 122 (emphasis added). The Court reasoned:

> The list is simply illustrative. As the cases surface, other considerations doubtless will come to mind, and the weight to be accorded the factors will vary according to the circumstances of the case. We do not insist on adherence to any particular formula. Rather, what is required is an especially diligent scrutiny of the facts of the incident as they may be disclosed. The aim is to narrow the time frame of the occurrence as complained of – if not to the extent of an exact date or dates, then possibly in respect of seasons of the year, or incidents in the victim's life such as a death in the family, or a change in a family member's job routine, or the beginning of the school year or of vacation time or of extracurricular activities. When the trial court is satisfied that these sources of information have been exhausted, it will then be in a position to strike the necessary balance to determine whether "fair notice" has been given.
>
> [Id. at 122-23 (emphasis added).]

Finally, the Court considered the impact of a defendant's potential alibi defense:

> The fact, if such it be, that an alibi defense might suffer in the face of an extended time frame does not constitute a sufficient basis for dismissal of a complaint in this context, where a "number of occasions" of misconduct are alleged. It may be pertinent in this regard that whereas the opportunity to victimize an infant is enhanced by a degree of family relationship or sharing of living quarters or frequency of contact, by the same token the likelihood of the victim being able to recount a specific time of the offenses is reduced. The events blur.[10]
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> [Id. at 123.]

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[10] Earlier in its decision, the Court mentioned Dr. Ronald Summit's 1983 article, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 (1983), to support its finding that expert testimony was not necessary "to establish the proposition that children frequently suppress the trauma of sexual molestation or encounter difficulty in isolating the experience, particularly when . . . that experience involves one with whom the victim shares living quarters, or when the offender is an authority figure or relative who takes advantage of his close relationship with the victim." K.A.W., 104 N.J. at 118-19. In his article, Dr. Summit also "identified five categories of behavior that were reportedly common in victims of child sexual abuse," comprising the Child Sexual Abuse Accommodation Syndrome (CSAAS), "which paved the way for experts to testify about the syndrome in criminal sex abuse trials." State v. J.L.G., 234 N.J. 265, 271 (2018). In J.L.G., the Court significantly limited CSAAS expert testimony. Id. at 272.

Citing the K.A.W. factors and an unpublished decision of this court,[11] the motion judge accepted the State's representation "that no narrower time[]frame c[ould] be provided." The judge considered Inna "was only five and six years old at the time of the [alleged] incidents and at that young age, she was unable to particularize the time and date of the alleged incidents." The judge also was persuaded Inna "was able to disclose many other details about the incidents," including some locations that were not included in the time frames alleged in the indictment.

On appeal, defendant maintains the K.A.W. factors support dismissal of the indictment, asserting the indeterminate date ranges and the nonexistence of the alleged locations impinge on his ability to assert an alibi defense or conduct a meaningful investigation. Noting the State's responses to his bill of particulars reduced the number of alleged incidents from a continuous course of conduct over several years to two acts in two years, he argues the following K.A.W. factors, among others, weigh in his favor: "the length of the alleged period of time in relation to the number of individual criminal acts alleged"; and "whether there was a continuous course of conduct." Defendant also contends the record is devoid of the State's efforts to narrow the two acts

[11] With limited exceptions that are not relevant here, "no unpublished opinion shall be cited by any court." R. 1:36-3.

further by, for example, reference to the seasons, a life event, or school activity.

We are not persuaded that, by reducing the number of incidents alleged in the indictment to two imprecise dates, defendant's inability to assert an alibi defense warrants dismissal of the indictment. Notably, the Court in K.A.W. not only considered the victim's allegation of multiple incidents, but also the family relationship between the juvenile and victim. 104 N.J. at 123. Here, Inna alleged abuse by her biological father. Further, unlike the juvenile-defendant in K.A.W., defendant has not asserted he was out of state for any portion of the two years charged in the indictment. And as stated, defendant has not proffered the names of potential witnesses who could aid in his defense.

Nor are we persuaded that the "nonexistent" Linden Avenue location, alleged in counts three and four of the indictment, requires dismissal of those counts. As defendant acknowledges, the K.A.W. factors do not include the location of the offense. Indeed, the parties have not cited, nor are we aware of, any authority mandating the indictment include the street address of an incident. As the motion judge found, location is not an element of the crimes charged. See Jeannotte-Rodriguez, 469 N.J. Super. at 103; see also N.J.S.A. 2C:35-7 (wherein location is a material element of the school-zone charge). In

any event, defendant has not explained his present-day efforts to obtain documentation from the municipality about the nonexistent 94 Linden Avenue. Nor has defendant explained how the victim's claim of sexual assault at a specific, allegedly non-existent address is prejudicial.

However, defendant also contends the record is devoid of the State's efforts to narrow the two acts further by, for example, reference to the seasons, a life event, or school activity. At oral argument before us, the prosecutor implied those efforts were made; appellate counsel countered he was unaware of any memorializing reports or statements in that regard. The appellate record contains no such documents.

Accordingly, the record on appeal does not evince the State's efforts to narrow the two remaining dates of the incident pursuant to the K.A.W. criteria. See 104 N.J. at 122-23. The State's responses to defendant's bill of particulars suggest, without elaboration, it relied on Inna's age at the time of the alleged incidents. Absent from the State's responses – or any report provided on appeal – is evidence that the State questioned Inna, for example, about life events that occurred around the time of the two incidents. See ibid.[12]

[12] As stated, Inna was fourteen years old when she reported the incidents, which allegedly occurred when she was between the ages of five and at least nine, and twenty-one years old at the time of the grand jury presentation. The victim in K.A.W. was between the ages five and seven when she was allegedly

Also unclear from the record is the State's reason for reducing the number of incidents from "various" as alleged in the indictment to "a singular event" as set forth in its responses to defendant's bill of particulars. We do not suggest a nefarious motive. There is nothing in the record to indicate Inna recanted her 2013 statement, and the reason very well may be attributed to the prosecutor's charging discretion. Nonetheless, the State's efforts may disclose additional information about the two events selected for prosecution. That information may be meaningful in view of "the passage of time between the alleged period for the crime and defendant's arrest." See id. at 122 (internal quotation marks omitted).

Therefore, we remand the matter for the State to furnish the judge and defendant with documentary evidence of its efforts, if any, to narrow the time frame alleged in its responses to defendant's bill of particulars. The parties also shall provide the judge with their appellate briefs. We leave to the judge's discretion whether further briefing or argument is necessary. The judge shall

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abused and seven years old when she reported the abuse, and the juvenile was charged. Id. at 114, 118. The Court has not since considered the State's attempts to narrow the time frame when an adult alleges child sexual abuse and, absent expert evidence suggesting otherwise, we discern no reason why the K.A.W. framework would not apply when an adult victim attempts to recount the time frame of sexual assaults allegedly committed when the victim was "younger than thirteen years of age." See id. at 113.

then issue a decision and order, which either party may appeal without leave of this court.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION