RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3143-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.C.,

Defendant-Appellant.

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Submitted February 14, 2022 – Decided June 13, 2022

Before Judges Sabatino and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 18-03-0310.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant J.C.[1] appeals from a January 9, 2020 judgment of conviction that the trial court entered after a jury convicted him of committing one count of second-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(a)(1); two counts of second-degree sexual assault, N.J.S.A. 2C:14-2(b); and three counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1). After his conviction, the trial court sentenced him to an aggregate twelve-year sentence subject to an eighty-five percent parole disqualifier under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On appeal, defendant argues the following points:

> POINT I
>
> THE PROSECUTOR COMMITTED GROSS MISCONDUCT WHEN, WITHOUT NOTICE TO DEFENSE COUNSEL, HE GRATUITOUSLY COMMENTED IN HIS SUMMATION ON ALLEGED EVIDENCE OF "OTHER CRIMES, WRONGS OR ACTS" COMMITTED BY DEFENDANT, THUS VIOLATING THE RULES OF EVIDENCE AND ESTABLISHED CASE LAW, AND THE TRIAL COURT COMPOUNDED THIS MISCONDUCT BY FAILING TO TAKE ANY REMEDIAL ACTION, BY EITHER DECLARING A MISTRIAL, OR BY

[1] We use initials and pseudonyms to protect the privacy of the victim and preserve the confidentiality of these proceedings. R. 1:38-3(c)(9).

GIVING AN IMMEDIATE CURATIVE INSTRUCTION.

POINT II

THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO INTRODUCE HEARSAY TESTIMONY THAT INVESTIGATORS FROM THE PROSECUTOR'S OFFICE FAILED TO OBTAIN EVIDENCE FROM DEFENDANT'S XBOX, LEAVING THE JURY WITH IMPRESSION THAT EITHER DEFENDANT HAD DONE SOMETHING TO THE XBOX TO PREVENT IT FROM BEING EXAMINED, THE STATE WAS INCAPABLE OF OBTAINING INCRIMINATING EVIDENCE FROM THE XBOX, OR BOTH.

POINT III

THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO INTRODUCE IRRELEVANT EVIDENCE OF DEFENDANT'S POST OFFENSE CONDUCT, SPECIFICALLY, TEXT MESSAGES HE SENT TO HIS SISTER, WHICH IMPROPERLY PUT DEFENDANT'S CHARACTER BEFORE THE JURY AND HAD ZERO PROBATIVE VALUE.

POINT IV

THE TRIAL COURT ERRED WHEN IT ALLOWED TESTIMONY REGARDING THE VICTIM'S HEARSAY STATEMENT TO HIS BROTHER TO BE ADMITTED AS FRESH COMPLAINT EVIDENCE AND FAILED TO INSTRUCT THE JURY ON THE PROPER USE OF SUCH EVIDENCE (PARTIALLY RAISED BELOW).

POINT V

THE USE OF SUGGESTIVE QUESTIONS BY CHILD INTERVIEW SPECIALIST HENRIQUEZ DURING THE VIDEO RECORDED INTERVIEW OF THE VICTIM RENDERED THE VICTIM'S STATEMENTS IN THAT INTERVIEW UNTRUSTWORTHY AND THEREFORE THE TRIAL COURT ERRED BY ADMITTING THESE STATEMENTS.

POINT VI

THE SENTENCING COURT VIOLATED THE PARAMETERS OF STATE V. YARBOUGH[2] WHEN IT IMPOSED CONSECUTIVE SENTENCES FOR CRIMES THAT HAD THE SAME OBJECTIVE AND THE SAME VICTIM.

We are not persuaded by these contentions. We affirm defendant's conviction, but we are constrained to vacate his sentence and remand for resentencing under State v. Torres, 246 N.J. 246 (2021).

I.

The facts leading to defendant's arrest and conviction as developed at trial are summarized as follows. Defendant is the uncle of his victim, D.W. (Daniel), who on February 4, 2018, was nine years old. On that day, after leaving defendant's home, Daniel told his brother, fifteen-year-old E.W. (Edward), that

[2] State v. Yarbough,100 N.J. 627 (1985).

defendant "made him touch his private part." According to Edward, Daniel was "sad and scared" when he explained that defendant had ejaculated "white stuff" after defendant's penis got "bigger." Edward also testified that Daniel told him that defendant "tr[ied]to force his head" on defendant's penis.

On the same day, as soon as the siblings arrived at their home, Edward informed his parents about his conversation with Daniel. Daniel repeated what he told Edward, and thereafter, the parents immediately reported the allegations to the Passaic Police Department, which referred the matter to the Passaic County Prosecutor's Office (PCPO), which began its investigation on February 6, 2018.

Detectives interviewed the family members, and PCPO Child Interview Specialist, Giselle Henriquez, interviewed Daniel. PCPO detectives also obtained and executed search warrants to search defendant's apartment and confiscate and search for various electronic devices—iPhone, laptop, iPad, and Xbox—which Daniel said was in defendant's possession. However, the detectives were only able to recover defendant's Xbox. Detective Joseph Pezzuti of the PCPO Technology Unit attempted to access and download the contents of the Xbox's hard drive using specialized software (Cellebrite) to do a forensic sweep, but his attempts failed.

In the meantime, from February 8, 2018, at 6:06 p.m. to February 9, 2018, at 7:19 p.m., defendant sent to his sister, M.W., who is Daniel's mother, five text messages regarding Daniel's allegations. Daniel's mother informed PCPO detectives, and they took photographs of the text messages.

On February 9, 2018, PCPO detectives arrested defendant. The next month a grand jury charged defendant in an indictment with the crimes a jury would later convict him of having committed.[3]

Prior to defendant's trial, the judge entered pretrial orders after, where appropriate, the judge conducted hearings. After conducting one hearing over two days, the judge ruled that Daniel's statements to his brother and Henriquez were admissible under Rule 803(c)(27). He also denied defendant's Rule 403 motion to bar the same two statements and to exclude the word "forensic" when describing Henriquez's interview of Daniel. On June 7, 2019, the judge entered an order consistent with his rulings.

In July 2019, the trial judge held a hearing on the State's motion seeking the admission of the text messages defendant sent to M.W. Afterward, the trial

[3] In the indictment's first count, defendant was charged with having committed attempted first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1). The jury convicted him of the lesser offense of second-degree attempted sexual assault under N.J.S.A. 2C:14-2(b).

judge determined the messages were relevant and authentic but held that if defendant had any other objection to the text messages' admission, he would consider those challenges at the time the prosecutor offered them into evidence.

Defendant's ensuing trial lasted four days. Before charging the jury, the trial judge held a charge conference. Defendant did not raise any objection to the proposed charges, nor did he seek any specific charge that the judge refused to accept. The jury reached its verdict on July 26, 2019, convicting defendant on all six counts. On December 6, 2019, the trial judge denied defendant's motion for a judgment of acquittal or a new trial. The next month, the judge sentenced defendant. This appeal followed.

II.

We begin our review by considering defendant's argument in Point I of his brief about the prosecutor's comments during summation.

A.

During the trial, the State elicited testimony from PCPO Detective John Gray, Supervisor of the Forensic Tech Unit, about his unit's unsuccessful search of the X-Box's hard drive recovered from defendant's residence. Later, during his closing argument, defense counsel stated, in pertinent part, as follows:

> Now the trial is over and we're exactly where I said we needed to be. No evidence. No corroboration

> because this never happened. At every turn where a fact could have been corroborated by evidence or a witness, there was none because it didn't happen. . . .
>
> . . . .
>
> Well, what about evidence? You haven't heard about any evidence that was recovered to support this allegation. And that wasn't for a lack[] of trying, right. You heard about an extensive police investigation for [eighteen] months involving two law enforcement agencies. Witness statements were collected. [Defendant's] apartment was searched. It was searched thoroughly. It was searched by a team of five experienced detectives. Nothing was collected that supports this allegation because it didn't happen. You did hear briefly about this Xbox.
>
> You heard yesterday from Sergeant Gray. Sergeant Gray testified that the lead detective in this case wrote a report saying that the Xbox was indeed examined and nothing was found. But we couldn't learn much else from Sergeant Gray, who was the chief of the Forensic Technology Unit, because he said he wasn't the one who examined it. He wasn't sure when I asked him if the Xbox was ever turned on.
>
> [(Emphasis added).]

In response, the prosecutor made the following remarks during his closing statement:

> [Defendant] tells you . . . nothing was collected, no evidence was collected. Well, you heard there was a search warrant prepared. [Detectives] went to the house. And what were they looking for in the search warrant [was] an [iP]hone, a laptop, a tablet, [and] the Xbox. . . .

They went there, five detectives went there. They searched the apartment. And the only item that was recovered was the Xbox. Now, think about that. They get a search warrant based upon what the detective observed in the forensic interview, where the child talked about those things [but] only the camera being used.

Now, they only got the Xbox. It's hard to put an Xbox in your backpack or your pocket. Well, what can you put in your pocket[?] A cell phone, a camera. What can you put in a backpack or some kind of a satchel[?] A laptop, a tablet. Those things are mobile devices. They're built, they're created to be mobile, to be brought places very easily.

It's not like they were trying to search a [sixty-five] inch 4K high definition t.v. or a Por[s]che 911, things that can't be easily moved around. And we heard testimony that those items were located in [defendant's] bedroom through [Daniel's] forensic interview. In fact, the camera was kept on top of the closet. We then know that when they executed the search warrant on February the 12th, none of those items were there.

And we also know that [defendant] was ultimately located and taken into custody not in his apartment, but at the hospital. So it's fair to[,] you can assume and you can make the inference. You're allowed to do that[. T]hat it's possible that he took those items with him. Again, they are mobile pieces of equipment . . . .

[(Emphasis added).]

Defendant immediately objected. Outside the jury's presence, defendant argued that the prosecutor's remarks disparaged him and shifted the burden of

proof when the prosecutor told the jury that "it's possible that [he] purposely removed [the electronics] to hide them." He asked that the judge declare a mistrial or instruct the jury to "disregard any remarks that the State makes about items missing."

The prosecutor argued that the State was allowed to argue to the jury that it can make an inference "just like the snow example" in the judge's jury instructions. In addition, he noted that Daniel, in the video statement heard by the jury, said that the electronics were in defendant's home, and "[s]o it's conceivable for a jury to reasonably deduce and logically come to the conclusion, if they wish," "that those items were not there because [defendant] took them with him." The prosecutor noted, contrary to defendant's assertion, that he did not say that he took them to hide the items, "but just that he took them with him."

After noting that defense counsel "very forcefully argued to the jury that there [was] no evidence," the judge concluded the prosecutor responded directly in kind, The trial judge overruled defendant's objection and denied his motion for mistrial or to provide the jury with curative instructions. He reasoned that his instructions to the jury that "testimony is evidence" and that "closing statements are not evidence," as well as reminding them that they should rely on

their own understanding and recollection, and "not simply comments that are made by counsel," was sufficient to support his finding that a mistrial or a curative instruction was unnecessary.

B.

On appeal, defendant argues that the prosecutor committed two instances of prosecutorial misconduct during his closing arguments: (1) making prejudicial comments about facts not in evidence and (2) circumventing Rule 404(b). He contends that despite his timely objection, the trial judge "gave [his] stamp of approval to the [S]tate's misconduct" by overruling defendant's objection and allowing the comments to stand without striking them or providing the jury with curative instructions.

Specifically, defendant contends during his summation, "the prosecutor noted the detectives executed a search warrant for 'an [iP]hone, a laptop, a tablet, [and] the Xbox,'" which he concedes is "fair enough and accurately based on the testimony." However, he takes issue with "the prosecutor . . . making things up and accusing defendant of hiding evidence," which he claims was a "comment[] on a matter not in evidence[.]" He argues that it was improper to direct the jury that it can make "an inference from an inference from an inference"—the electronic devices existed or contained incriminating evidence or defendant hid

these items from detectives—without providing any evidence that any of these scenarios occurred and shifted the burden of proof to defendant. Defendant also argues that the prosecutor did more than provide the usual snow analogy for circumstantial evidence. Instead, he notes "the prosecutor asked the jury . . . to infer that if they went to sleep and there was no snow on the ground and woke up and there was a foot of snow on the ground, then the jury could infer it snowed in 1988." According to defendant, "[w]hile the [State] is allowed great latitude in summing up [its] case before the jury, [it] is only permitted to comment only on facts in evidence and reasonable inferences which could be drawn from them."

For the first time on appeal, defendant also argues that the inference raised by the prosecutor allowed the State to deliberately circumvent Rule 404(b) "and its requirement that [it] give notice to the defendant and the court of [its] intention [to introduce] evidence" of other wrongful acts "and prove its admissibility at a [Rule] 104 hearing." He contends that if a Rule 104 hearing had been conducted, as required to introduce this type of evidence, the request would have been denied. He argues that the State, among other things, would have been unable to prove clearly and convincingly that defendant committed the act. Defendant also asserts that even if the State met this burden, the

evidence would have been nonetheless inadmissible under Rule 403 because its low probative value would not have outweighed the prejudicial effect. He also contends that the accusation attacked his credibility, even though he did not testify. The comment, according to defendant, warranted at least a curative instruction, which the trial judge failed to give to the jury, giving rise to a reversible error.

After considering the totality of the circumstances, including the context of the challenged remarks, we find no merit to defendant's contention in this regard.

"Prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries" and are afforded "considerable leeway in closing arguments so long as their comments are reasonably related to the scope of the evidence presented." State v. Timmendequas, 161 N.J. 515, 587 (1999). Consequently, prosecutors can "strike hard blows . . . [but not] foul ones." State v. Echols, 199 N.J. 344, 359 (2009) (alterations in original) (quoting State v. Wakefield, 190 N.J. 397, 436 (2007)). "[R]eferences to matters extraneous to the evidence" may constitute prosecutorial misconduct. State v. Jackson, 211 N.J. 394, 408 (2012). "In other words, as long as the prosecutor 'stays within the evidence and the legitimate inferences therefrom,'" State v. McNeil-Thomas,

238 N.J. 256, 275 (2019) (quoting State v. R.B., 183 N.J. 308, 330 (2005)), "[t]here is no error," ibid. (quoting State v. Carter, 91 N.J. 86, 125 (1982)).

"The standard for reversal based upon prosecutorial misconduct is well-settled in the law. It requires an evaluation of the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial." Timmendequas, 161 N.J. at 575. "[P]rosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct was so egregious as to deprive defendant of a fair trial." Ibid.; see also Wakefield, 190 N.J. at 438 ("[T]o warrant a new trial 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." (quoting State v. Smith, 167 N.J. 158, 181 (2001))).

A prosecutor's closing argument is not viewed in a vacuum. Rather, it is juxtaposed against defendant's closing argument and the totality of dueling inferences are considered. "When reviewing the State's response, 'we must not only weigh the impact of the prosecutor's remarks, but also take into account defense counsel's opening salvo.'" State v. Munoz, 340 N.J. Super. 204, 216 (App. Div. 2001).

In this case, defendant's arguments of prejudice and circumvention of N.J.R.E. 404(b) by the prosecutor during summation are unpersuasive and unsupported by the record. The prosecutor's remarks to the jury regarding the inference that it could make were fair, and directly in response to defense counsel's closing argument that the victim's allegations were false because there was no corroborating witness testimony or physical evidence to support a guilty verdict.

Contrary to defendant's argument, the prosecutor did not fabricate evidence or directly accuse defendant of hiding or destroying evidence. Instead, he provided a counter-inference: the possibility that "he took those items with him" when he left the residence, which is why detectives' diligent search did not uncover them in response to defendant's suggestion that if no items were recovered defendant could not be guilty.

Moreover, also contrary to defendant's arguments, the prosecutor's remarks did not invoke Rule 404(b). Under that rule, "evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." N.J.R.E. 404(b). As already discussed, the remarks by the prosecutor, "[I]t's possible that he took those items with him," do not suggest or

directly accuse defendant of "crimes, wrongs, or acts" because they are merely an inference as to the possibility of what could have happened to defendant's electronics.

Finally, defendant's argument that the trial judge failed to gatekeep or recognize the prejudicial effect of the prosecutor's comments is meritless when considering that the judge had the opportunity to hear the prosecutor's closing argument firsthand and carefully reconsider it immediately after defendant's objection. Thus, he was able to evaluate its impact on the jury. Wakefield, 190 N.J. at 485-86 (acknowledging that trial judges "ha[ve] the feel of the case and [are] best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting" (quoting State v. Winter, 96 N.J. 640, 647 (1984))). Under these circumstances there was no prosecutorial misconduct.

III.

In Point II of his brief, defendant challenges the admission of Gray's testimony and contends that the testimony adduced at trial from Gray about his unit's unsuccessful search of the X-Box's hard drive should not have been admitted over his objection. We disagree.

A.

Over defendant's objections, in pertinent part, Gray testified on direct about the search for the Xbox found in defendant's home that was conducted by a different detective, who was not available to testify at trial. Specifically, Gray testified on direct that Pezzuti "attempted" to read the device's hard drive. Gray also confirmed that he was "familiar with the manner in which electronic devices are searched in [his] unit." He explained that the X-Box, found in defendant's home, was "opened up," its hard drive was removed, and Pezzuti "attach[ed] to a workstation that has write blocking on it, and then [attempted to conduct] a forensic sweep to examine the contents." However, according to Gray, Pezzuti was unsuccessful in that effort, even after Pezzuti received technical support from the software's vendor. Thereafter, defense counsel conducted his cross-examination and Gray was excused from the trial.

B.

On appeal, defendant contends the "critical failure" here is "allowing the [S]tate to present hearsay evidence inferring that the Xbox was tampered[,] . . . mak[ing] it impossible to search." He contends that allowing Gray to testify as to what Pezzuti did or told Gray was a violation of the Confrontation Clause of both the New Jersey and the United States constitutions, see U.S. Const. amend.

VI; see also N.J. Const. art. I, ¶ 10, because he was not allowed to cross-examine Pezzuti, "the declarant of the incriminating statements."

Additionally, citing State v. Cain, 224 N.J. 410 (2016) and State v. Alvarez, 318 N.J. Super. 137 (App. Div. 1999), defendant argues that "because the credibility of the officers was not an issue in this case there was no reason to inject hearsay." He notes that the Appellate Division has previously "recognized that [a] defendant is prejudiced when references to a warrant have a capacity to mislead the jury into believing the State has evidence of defendant's guilt beyond what was presented at trial." He concedes that while references to search warrants are allowed "to dispel any preconceived notion that the police acted arbitrarily[,]" defendant in this case "never claimed investigators acted arbitrarily in examining the Xbox." We find no merit to these contentions.

"Because defendant did, in fact, object to" Gray's testimony, "we . . . employ the abuse of discretion standard as we do for all evidentiary rulings[.]" State v. Medina, 242 N.J. 397, 411-12 (2020). "Under [our] deferential standard, we review a trial court's evidentiary ruling only for a 'clear error in judgment.'" Id. at 412 (quoting State v. Scott, 229 N.J. 469, 479 (2017)). "We do not substitute our own judgment for the trial court's unless its 'ruling was so wide of

the mark that a manifest denial of justice resulted.'" Ibid. (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

At the outset, we acknowledge the important rights to be protected under the Confrontation Clause. These rights were recently reviewed by the New Jersey Supreme Court in its opinion in State v. Sims, 250 N.J. 189 (2022). There, in pertinent part, the Court stated the following:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; see also N.J. Const. art. I, ¶ 10 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him . . . .").
>
> Our confrontation jurisprudence "traditionally has relied on federal case law to ensure that the two provisions provide equivalent protection." State v. Roach, 219 N.J. 58, 74 (2014); see also State v. Miller, 170 N.J. 417, 425 (2002) (explaining that "[t]he New Jersey Constitution contains a cognate guarantee" to that of the Sixth Amendment); [State v.]Cabbell, 207 N.J. [311,] 328 n.11 [(2011)] (noting that for purposes of the Court's discussion in that case, "references to the Sixth Amendment are interchangeable with Article I, Paragraph 10 of our State Constitution").
>
> In Crawford v. Washington, the United States Supreme Court held that the framers of the Constitution intended the Confrontation Clause to bar the admission of "testimonial statements of a witness who did not appear at trial unless [the declarant is] unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." 541 U.S. 36, 53-54 (2004).

[Sims, 250 N.J. at 222-23 (alterations in original).]

In this case, however, defendant's argument that Gray's testimony violated his constitutional rights under the Confrontation Clause is unpersuasive. Our courts have consistently held that a supervisor may testify so long as his responsibility includes supervisory duties. See State v. Michaels, 219 N.J. 1, 44-45 (2014) ("reject[ing] the argument that defendant's confrontation rights could only be satisfied by testimony from all analysts involved in the testing"). Indeed, our "current Confrontation Clause jurisprudence does not hold that the testimony of the original person to have performed forensic testing is required in all instances, regardless of the type of testing and the knowledge and independence of review and judgment of the testifying witness." Roach, 219 N.J. at 60-61.

Further, Gray's testimony did not establish anything more than the failed attempt by law enforcement to find evidence on the X-Box's hard drive. Here, contrary to defendant's argument before us, the trial court judge did not permit a police officer to "imply to the jury that he posess[ed] superior knowledge, outside the record, that incriminate[d] defendant." State v. Branch, 182 N.J. 338, 351 (2005); see also State v. Bankston, 63 N.J. 263, 271 (1973) ("When the logical implication to be drawn from the testimony leads the jury to believe that

a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay."). Here, there was nothing incriminating about the undisputed fact that the police seized the X-Box but could not find any incriminating or corroborating evidence to use against defendant at trial.

Moreover, neither Cain nor Alvarez are applicable here. In Cain, the prosecutor mentioned the issuance of a search warrant by a judge at least fifteen times during opening statement, summary, and direct examination, which "went well beyond what was necessary to inform the jury that the officers were acting with lawful authority." 224 N.J. at 436. And, although the Court did not reach the issue as to "whether the search-warrant references constituted plain error[,]" it noted that "[t]he constant drumbeat that a judicial officer issued a warrant to search defendant's home had little probative value, but did have the capacity to lead the jury to draw an impermissible inference that the court issuing the warrant found the State's evidence credible." Ibid.

Similarly, in Alvarez, the prosecutor made six references to issuance and execution of a search warrant issued by a judge during his direct examination of several police officers. 318 N.J. Super. at 147. In reversing the defendant's conviction, we found that defendant did not receive a fair trial, in part, because

the "numerous" references to the search warrant were "damaging" and allowed "the prosecutor . . . to insert into his questions the fact that a judge issued the search warrant, thus suggesting that a judicial officer with knowledge of the law and the facts believed the evidence of criminality would be found . . . ." Id. at 148.

At the outset, we note that defendant's argument is not that the prosecutor mentioned the judicially-issued warrant on numerous occasions. Rather, defendant seems to complain of the "inject[ion of] hearsay" through Gray's testimony. Neither Cain nor Alvarez support defendant's argument and the mere mention of the search warrant—on its own—is not improper. Here, the prosecutor did not refer to the issuance of a search warrant by a judge on numerous occasions. Rather, his examination of one witness referred to the investigative steps that the officer took in executing and searching for data within the Xbox. The testimony by the officer indicated that the search warrant was issued by judge only once. Thus, unlike Cain and Alvarez, there was no risk that the jury made improper inferences. See Cain, 224 N.J. at 435 ("A search warrant can be referenced to show that the police had lawful authority in carrying out a search to dispel any preconceived notion that the police acted arbitrarily.").

Regardless, under these circumstances, even if the testimony was admitted in error, and it was not, any error would have been harmless. See R. 2:10-2 ("Any error . . . shall be disregarded by the appellate court unless it is of such nature as to have been clearly capable of producing an unjust result[.]"). Here, we discern no abuse in the trial judge's discretion by admitting Gray's testimony.

IV.

A.

We apply the same abuse of discretion standard, instead of plain error, R. 2:10-2, to defendant's challenge in Point III of his brief to the admission of the text messages he sent to his sister M.W., even though he did not object during the trial, because he objected pretrial to their admission.

It was undisputed that defendant sent the challenged text messages after Daniel's disclosure to his brother and then his parents. In those messages, defendant stated the following:

> I didn't do nothing to him. I didn't try to touch him in any way, whatsoever. And it hurts me that he would say that I forced him or forced myself on him. Whatever you want me to do I will do because this is killing me. I love you.
>
> . . . .
>
> Sometimes I wish I was never born and everybody would be better off without me.

. . . .

> My heart is hurt and I need to know . . . what you want me to do.
>
> . . . .
>
> Please answer me.
>
> . . . .
>
> I'll pray for you all. I'm going [to] my cousin Benny [in Georgia] for a few weeks. Need a change in scenery. Going crazy here, but I'll be back next month.

The State originally sought to offer the text messages as a statement by a party opponent reflecting consciousness-of-guilt. The trial judge conducted a pretrial Rule 104 hearing and found that the messages were relevant and authentic. N.J.R.E. 104. In addition, the judge believed that the statements were admissible under Rule 803(b)(1), a statement by a party opponent. Nevertheless, the judge ruled that if they were offered during the trial, he would consider any objection at that time, other than as to the message's relevancy and authenticity. According to the judge, although he was "saying that [the messages] appear[ed] to be a party admission," presumably under Rule 803(b)(1), their ultimate admissions at trial would depend on defendant's objections at trial, except as to authentication, which had already been established. The judge reiterated, "When the witness [testifies], obviously at that time, if you have any basis for an objection[,] you will raise the objection."

After the judge rendered his decision, the prosecutor explained that it was his intention at that time to offer the statements as proof of flight and he asked that the judge instruct the jury accordingly but recognized that they would have to see "how it plays out as to whether or not [the judge] would be inclined to give the flight charge."

Despite the judge reserving on the text messages' admission at trial, defendant never objected to their admission, stating in fact that he had "[n]o objection" to their being admitted. Moreover, defense counsel cross-examined M.W., the witness who introduced the messages, discussed the text messages in his own closing arguments, and never objected to the prosecutor's use of the text messages during his closing arguments. Notably, neither party sought a final jury charge as to flight.

B.

On appeal, defendant argues that the trial judge abused his discretion when he allowed the State to admit the text messages because their admission "improperly put [his] character before the jury and had zero probative value." He "contends the admission of this irrelevant evidence violated his constitutional right to a fair trial."

Citing State v. Mann, 132 N.J. 410, 418 (1993), defendant argues that our Supreme Court has held that "[e]vidence of conduct of an accused subsequent to the offense charged is admissible only if probative of guilt." He also argues that "[w]hen the post offense conduct is irrelevant to [defendant's] consciousness of guilt[,] it is not admissible." According to defendant, "the text messages sent by [him] to his sister had absolutely no probative value because the trial court concluded they did not demonstrate consciousness of guilt." Thus, also ruling that the messages "were relevant because [his sister] knew [him] . . . was absurd." He notes that the text "messages showed [him] to be upset and that he denied his guilt" and concludes that "the messages were admitted for the sole purpose of tarnishing [his] character because they were not probative of any of the elements of the crimes charged."

We find defendant's contention in this regard to be without merit. Suffice it to say, defendant stated on the record at trial he had "[n]o objection" to the evidence being admitted into evidence, and as such, consented to its admission. See N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 341 (2010) (noting that where a litigant does not object to the admission of relevant evidence, the litigant effectively consents to the admission of the evidence).

In any event, we conclude that contrary to defendant's contentions, the messages were relevant and admissible under Rule 803(b)(1), which defendant apparently also agreed to as he never interposed an objection at trial to their admission. N.J.R.E. 803(b)(1). Moreover, we conclude the text messages can be read to infer a consciousness of guilt that would further support the text messages' admission.

The Supreme Court has recognized the relevance of post-crime conduct where it demonstrates consciousness of guilt. State v. Williams, 190 N.J. 114, 125-26 (2007). In Williams, the court "acknowledged generally that a defendant's post-crime conduct evidencing a guilty conscience provided a sound basis from which a jury logically could infer that a defendant was acting consistent with an admission of guilt or that the conduct was illuminating on a defendant's earlier state of mind." Id. at 126. Here, defendant's text messages progressed from denial ("I didn't do nothing to him"), to remorse ("Sometimes I wish I was never born"), and to finally expressing a desire to leave town for a while ("I'll pray for you all. I'm going [to] my cousin Benny [in Georgia] for a few weeks . . . but I'll be back next month."). Thus, under Williams, the trial judge would not have abused his discretion had he ruled that the text messages were admissible. Ibid.

We are not persuaded otherwise by defendant's reliance on Mann. In that case, the Court held that a defendant's post-offense attempted suicide should not have been admitted into evidence as consciousness of guilt because

> the court should [have] determine[d], after a . . . hearing, whether the jury reasonably could infer from the evidence that there was an actual suicide attempt and that defendant attempted to commit suicide because of his unwillingness to endure prosecution and punishment. If the trial court admits the attempted-suicide evidence, the jury should be charged on the findings it must make to support any inference regarding defendant's consciousness of guilt.
>
> [Mann, 132 N.J. at 425.]

Moreover, even if it was error to admit the text messages in this case, and it was not, such error was harmless. Defendant offered no proof from the record that the text messages in which he also explicitly denied culpability and expressed his being distraught by the allegations against him caused him any prejudice. Such error was not "of such nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

V.

Next, we consider defendant's appeal from the trial judge's June 7, 2019 order permitting the introduction of Daniel's out-of-court statements to his brother under Rule 803(c)(27), the "tender years exception." He contends in

Point IV of his brief that the statements should not have been admitted as fresh complaint evidence, but once they were, the judge erred by not properly instructing the jury about their consideration of those statements.

A.

As already noted, prior to trial, the judge conducted a hearing to determine whether the challenged statements should be admitted. After considering Edward's testimony and the parties' arguments, he concluded they were admissible under the tender years exception to hearsay's inadmissibility.

In a detailed oral opinion, the trial judge first considered the trustworthiness of both siblings. As to Daniel's trustworthiness, he considered "the nature of the disclosure," its spontaneity, and any motive to fabricate. In particular, the trial judge noted that the disclosure appeared to be "very natural" and "initiated [by Daniel and] not the other way around." He also noted that the "siblings had a rather strong relationship between them." He observed, despite defendant's argument to the contrary, "there is no specific incident [that] either [sibling] can recall or the [c]ourt can connect . . . which may have prompted either or both of them [to] give them the motive to fabricate because of some unpleasant incident that may have occurred." He also found that Daniel's "statements were not prompted or suggested by anyone."

As to Edward, the reporter of Daniel's disclosure, he considered his demeanor, "power of observation, lack of motive to fabricate, [his] mental state . . . when he heard what he heard, and the terminology" used in describing what Daniel told him. He specifically noted his demeanor in the courtroom was very age-appropriate: "[a]t times he was a bit nervous . . . but [it] did not appear that [he] was trying to mislead or make things up."

The judge observed that during his testimony on direct and cross, Edward "clarified" the words he used when he was interviewed by detectives "versus [the] actual words" used by Daniel. By way of example, he noted that Edward clarified that Daniel said the word "wee-wee" instead of the words he used ("dick [or] penis"). The judge noted that the inconsistency in word usage by children of Edward's age is understandable because they use words they interpret, rather than what was actually reported to them. As such, he was satisfied with Edward's explanation, clarification, and use of age-appropriate terminology.

The judge also found that Edward's observation and his expression of those observations were very clear. For example, the judge noted that Edward described the height of items in defendant's room, "in his own way rather than giving feet and inches," by comparing his own height with the item or raising his hand to mimic the relevant height. Finally, he found that there was no

"suggestiveness" on Edward's part "concerning the statements that were made to him."

B.

On appeal, defendant argues that the trial judge erred when he allowed Edward, "to testify regarding a hearsay statement made by the victim [because] it constituted a fresh complaint." He contends that Edward's fresh complaint testimony was "untrustworthy and inadmissible" because "every time [he] testified about what [Daniel] told him" he used his own words instead of Daniel's words. In particular, he complains that Edward used the word "penis" instead of Daniel's word, "wee-wee," when testifying about what Daniel told him. He also argues, for the first time on appeal, that it was plain error for the trial judge not to provide the jury with instructions on the proper use of the fresh complaint testimony. Therefore, he asserts, "[t]hese errors compel reversal of defendant's convictions."

We conclude there is no merit to defendant's contentions because Daniel's statements to Edward were not admitted as fresh complaint evidence, but as admissible testimony under the tender years doctrine under Rule 803(c)(27). The two are not the same.

Under the fresh complaint rule, the State can present "evidence of a victim's complaint of sexual abuse, [which is] otherwise inadmissible as hearsay, to negate the inference that the victim's initial silence or delay [in disclosing] indicates that the charge is fabricated." State v. R.K., 220 N.J. 444, 455 (2015). When admitted as fresh complaint evidence, "the trial court is required to charge the jury that fresh-complaint testimony is not to be considered as substantive evidence of guilt, or as bolstering the credibility of the victim; it may only be considered for the limited purpose of confirming that a complaint was made." Id. at 456 (citing State v. Bethune, 121 N.J. 137, 147-48 (1990)).

"In order to qualify as fresh-complaint evidence, the victim's statement must have been made spontaneously and voluntarily, within a reasonable time after the alleged assault, to a person the victim would ordinarily turn to for support." Id. at 455 (citing State v. W.B., 205 N.J. 588, 616 (2011)). In determining whether a complaint was made within a reasonable time after the act(s) occurred, the lapse of time between the incident(s) and the reporting does not bar the statement if explainable by the youth of the victim and the statement's attendant circumstances, such as "being cajoled and coerced into remaining silent by their abusers." Bethune, 121 N.J. at 143. Stated differently, the reasonable time component of the fresh complaint rule must be applied flexibly

"in light of the reluctance of children to report a sexual assault and their limited understanding of what was done to them." W.B., 205 N.J. at 618 (quoting State v. P.H., 178 N.J. 378, 393 (2004)).

Admission of a child's disclosure under Rule 803(c)(27) is, as noted, different. N.J.R.E. 803(c)(27). That rule addresses an out-of-court statement made by a child victim. It is generally admissible if the trial court determines in advance that (1) the proponent of evidence gave notice to the opponent of the intent to use the evidence, (2) the court determined at Rule 104 hearing that the statement was trustworthy under the totality of the circumstances, and (3) the child was present to testify at trial. N.J.R.E. 803(c)(27).

When determining the rule's second requirement about the reliability of a statement, a court must consider "the totality of the circumstances." In re State Interest of A.R., 234 N.J. 82, 103 (2018) (quoting State v. P.S., 202 N.J. 232, 249 (2010)). In doing so, the court considers "a non-exclusive list of factors relevant to evaluating the reliability of out-of-court statements made by child victims of sexual abuse, including spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." Ibid. (emphasis omitted) (quoting P.S., 202 N.J. at 249).

In this case, defendant's arguments regarding Edward's fresh complaint testimony and the lack of jury instruction are unpersuasive for several reasons. First, again, the trial judge did not admit Edward's testimony under the fresh complaint rule.[4] Rather, the trial judge clearly ruled and, as the State correctly points out, defendant's counsel requested a "[Rule] 803(c)(27) hearing"—referring to the tender years exception, and not the fresh complaint rule. Second, defendant's quarrel about nine-year-old's use of the word "wee-wee" versus the fifteen-year-old's use of the word "penis" is illogical. As the trial judge noted during the Rule 104 hearing, it is understandable and expected that children of different ages will use different words to describe the same thing. Regardless of that, however, Edward in his testimony clearly clarified when he was using his own words and when he was using his brother's words.

Finally, because Edward's testimony was not admitted under the fresh complaint rule, no fresh complaint jury instruction was necessary. Despite that, however, defendant had an opportunity to object to the jury instructions and never did so. We will presume the instructions were adequate and that by

[4] Defendant may be hinging his argument on a single reference in the judge's order stating, "Defendant's motion to preclude fresh complaint/tender years testimony is denied." However, there is no other indication in the record and, defendant does not clearly explain when, if ever, the judge made a decision under the fresh complaint rule.

silence, defendant waived the right to contest them on appeal. R. 1:7-2; State v. Adams, 194 N.J. 186, 206-07 (2008) ("Generally, a defendant waives the right to contest an instruction on appeal if he does not object to the instructions as required by Rule 1:7-2."); see also State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div. 2003) ("The absence of an objection to a charge is also indicative that trial counsel perceived no prejudice would result.").

VI.

As already noted, in Point V of his brief, defendant argues that the trial judge erred by also admitting under the tender years exception found in Rule 803(c)(27), the video tape of Henriquez's interview of Daniel. According to defendant, the testimony should not have been admitted because Henriquez used "suggestive questions" on three occasions during the interview that "rendered [Daniel's] statements in that interview untrustworthy." We discern no error in the tape's admission.

A.

After conducting a pretrial hearing to determine the tape's admissibility, the judge placed his oral decision on the record in which he set forth his reasons for allowing the tape to be played to the jury. In his decision, the judge considered the trustworthiness of Daniel's recorded statement to Henriquez and

her interview technique. With regard to Daniel's recorded statement, the trial judge found that Daniel appeared to be very intelligent, initially nervous, and understandably "very shy" when talking about sex. He observed that Daniel felt more comfortable writing the word sex than saying it out loud. The judge also observed Daniel's demeanor and behavior were age-appropriate and consistent. In terms of his maturity, ability to recall, and ability to observe, he noted that there is no question as to his capabilities because Daniel provided detailed information regarding his family members.

The judge explained that during the interview, Daniel remarkably provided detailed descriptions and observations about his uncle's anatomy, defendant offering him money, people who were present at defendant's house, where his brother was sleeping, defendant telling him not to tell anyone, and what he would do at defendant's house, such as play Xbox and watch scary movies. Finally, as to Daniel's mental state, he found to be of "sound mind [and] his observations clearly pointed in that direction."

In addressing Henriquez's interview technique, the judge noted that the "State . . . conceded that this [was] not a perfect interview." The judge stated that considering Daniel's age, shyness, and use of written expression instead of verbal, "the line of questioning switched from a very broad questioning . . . in a

non-leading manner" to a leading inquiry. However, despite Henriquez using a few leading questions, the judge found that "the instances where she [used leading questions] d[id] not affect the overall interview." He observed that in the context of the sexual allegations that the leading questions were used to "get more information" and give Daniel "additional words to encourage [him] to choose or to reject." Nevertheless, the judge noted that "[t]here were instances where the child . . . corrected her," which indicated that Daniel "was paying attention to the question, was able to respond, . . . and correct at times when he did not agree with the question or certain words from the question."

Ultimately, after considering the "three instances" where Henriquez used leading questions, which "may appear in a vacuum . . . to be somewhat suggestive or somewhat leading," the judge concluded that when juxtaposed against the "totality of this [almost hour long] interview[, those questions did] not amount to a concerted effort on her part [to] put words in the child's mouth as to the incident relating to the defendant."

B.

Defendant contends on appeal that the trial judge "minimized the effect of Henriquez'[s] suggestive questioning had on [Daniel's] statement" because it was "Henriquez [that] supplied the word 'mouth', showed [Daniel] the mouth on

the anatomical drawing, and suggested he had to touch defendant's penis with his mouth." In addition, he maintains that "it was Henriquez who brought up the idea of defendant taking photographs of [Daniel]" and showing Daniel pornographic movies. "Finally," he asserts, "it was Henriquez who introduced the idea that defendant had ejaculated, not [Daniel]." As such, defendant concludes, "[Daniel's] interview by Henriquez [was] untrustworthy and the [trial judge] committed reversible error by allowing the jury to hear that interview."

We conclude that the judge did not abuse discretion by admitting the taped interview. First, we observe that several of defendant's factual contentions in support of his argument are incorrect. For example, contrary to defendant's claim, while Henriquez used leading questions to discuss acts of oral sexual assault, Daniel's initial disclosure to his brother included such allegations. It was not a topic that Henriquez suggested without any basis. Henriquez used that information to attempt through a leading question to determine if more information existed. There was nothing improper about her doing so. State v. Smith, 158 N.J. 376, 390 (1999).

One issue that Henriquez brought up for the first time was whether defendant had taken any photographs or videos of Daniel. However, Daniel denied that defendant did either, so there was no prejudice to defendant.

With those factual contentions clarified, we turn to whether the trial judge properly allowed the admission of the taped interview. As already discussed, a child victim's out-of-court video statement is generally admissible under Rule 803(c)(27) so long as the trial judge makes a finding that the statement is trustworthy. An "improper interrogation" conducted by the interview specialist may taint the reliability or trustworthiness of the child's statement. State v. Michaels, 136 N.J. 299, 311 (1994); see also State v. D.G., 157 N.J. 112, 130-34 (1999) (applying the Michaels principles to assessing the reliability of a videotaped statement for admission under Rule 803(c)(27)). "If a child[victim]'s recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events." Michaels, 136 N.J. at 309. "A variety of factors bear on the kinds of interrogation that can affect the reliability of a child's statements concerning sexual abuse." Ibid.

"[A]mong the factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers."

Ibid. These factors are in addition to those considered in general under the tender years exception in Rule 803(c)(27). As described by the Court in D.G., they include: "spontaneity, consistency of repetition, lack of motive to fabricate, the mental state of the declarant, use of terminology unexpected of a child of similar age; interrogation, and manipulation by adults." 157 N.J. at 125. The Court went on to note that the "list of factors is not exhaustive, and 'courts have considerable leeway in their consideration of appropriate factors.' The factors must, however, relate to 'whether the child declarant was particularly likely to be telling the truth when the statement was made.'" Ibid. (quoting Idaho v. Wright, 497 U.S. 805, 822 (1990)).

In this case, the judge's findings reflected thoughtful consideration of all applicable factors, including the use by Henriquez of leading questions during moments that Daniel appeared shy or embarrassed about answering. "Indeed, the use of leading questions to facilitate an examination of [a] child witness[] who [is] hesitant, evasive or reluctant is not improper." Smith, 158 N.J. at 390. "Due to a child's natural hesitancy around strangers and authority figures, leading questions by an investigating officer are not necessarily inappropriate; [thus,] the presence of leading questions in an interview may be necessary and does not automatically make the child's statement untrustworthy." State v.

Delgado, 327 N.J. Super. 137, 147-48 (App. Div. 2000). The trial judge therefore did not abuse his discretion by admitting the videotaped interview.

VII.

Last, we address defendant's argument in Point VI of his brief that the trial judge erred in imposing consecutive sentences because the court failed to perform the required analysis of the factors set forth in Yarbough. According to defendant, his sentence must be vacated because the trial judge erred by imposing consecutive sentences on counts one, as amended to second-degree attempted sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(a)(1), and count two, second-degree sexual assault, N.J.S.A. 2C:14-2(b). According to defendant the trial judge "justif[ied the] consecutive sentence" by "incorrectly appl[ying] aggravating factors and the facts of [his] crimes" that did not support the imposition of consecutive sentences. We disagree.

A.

In his sentencing of defendant, the trial judge considered the statutory aggravating and mitigating factors under N.J.S.A. 2C:44-1(a) and (b), as well as the factors under Yarbough for the imposition of consecutive sentences. In doing so, the judge explicitly acknowledged under Yarbough, "there should be no double counting."

Addressing the other applicable Yarbough factors, the judge found defendant's criminal actions were committed over a period of two-and-one-half years, and they involved separate instances of prohibited sexual contact and related actions, including touching the victim at different times in different areas, attempting penetration and exposing the victim to pornography. The judge concluded that each of defendant's crimes' objectives "were predominantly independent of each other," "involved separate acts of violence," and "were committed at different times and separate places [within defendant's home] rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."

Thereafter, the judge sentenced defendant on count one to a seven-year sentence, subject to a NERA period of parole ineligibility, and a consecutive five-year term, also subject to NERA, on count two, with concurrent five-year terms on counts three through six, all separate counts of second-degree endangering.

B.

We review a judge's sentencing decision for abuse of discretion. State v. Jones, 232 N.J. 308, 318 (2018). We "may disturb a sentence imposed by the trial court in only three situations: (1) the trial court failed to follow the

sentencing guidelines, (2) the aggravating and mitigating factors found by the trial court are not supported by the record, or (3) application of the guidelines renders a specific sentence clearly unreasonable." State v. Carey, 168 N.J. 413, 430 (2001) (citing State v. Roth, 95 N.J. 335, 365-66 (1984)).

"[O]ur [Criminal] Code does not contain a presumption in favor of either concurrent or consecutive sentences. The five extant Yarbough factors . . . guide courts on whether to impose concurrent or consecutive sentences for multiple offenses . . . ." Torres, 246 N.J. at 266 (citing Yarbough, 100 N.J. at 643-44). When reviewing "consecutive-versus-concurrent sentencing," we "employ the general shock-the-conscience standard for review of the exercise of sentencing discretion . . . ." Id. at 272.

In Torres, the Court reiterated that Yarbough identified the now well-established guidelines that govern a trial court's decision to impose consecutive sentences. Id. at 264. These considerations are as follows:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;
> >
> > (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors; [and]
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]
>
> [Ibid.]

When a trial court imposes a consecutive sentence, "[t]he focus should be on the fairness of the overall sentence." State v. Abdullah, 184 N.J. 497, 515 (2005) (alteration in original) (quoting State v. Miller, 108 N.J. 112, 122 (1987)). "Overall fairness has long been a necessary consideration to the imposition of consecutive versus concurrent sentencing." Torres, 246 N.J. at

274. "[C]ourts [must] explain and make a thorough record of their findings to ensure fairness and facilitate review." State v. Comer, 249 N.J. 359, 404 (2022) (citing Torres, 246 N.J. at 272).

Where a sentencing court properly considered the required Yarbough factors and the overall fairness of the sentence, it "may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences." Carey, 168 N.J. at 427-28. "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011).

"However, if the court does not explain why consecutive sentences are warranted, a remand is ordinarily needed for the judge to place reasons on the record." Ibid. "[A]n explanation for the overall fairness of a sentence by the sentencing court is required in this setting, as in other discretionary sentencing settings, to 'foster[] consistency in . . . sentencing in that arbitrary or irrational sentencing can be curtailed and, if necessary, corrected through appellate review.'" Torres, 246 N.J. at 272 (alterations in original) (quoting State v. Pierce, 188 N.J. 155, 166-67 (2006)).

In this case, we are satisfied that the trial judge correctly determined under Yarbough that consecutive sentences were warranted because of the facts relied

upon by the judge. His determination that two separate crimes were committed at different times upon the victim at different locations within the house over an extended period of time was supported by his application of the Yarbough factors. See State v. Mejia, 141 N.J. 475, 504 (1995) (explaining that the trial court properly sentenced defendant to consecutive terms of imprisonment as the offenses were separate, even though they occurred around the same time and involved the same victim), overruled on other grounds, State v. Cooper, 151 N.J. 326 (1997); State v. Bauman, 298 N.J. Super. 176, 211-12 (App. Div. 1997) (affirming an extended term and consecutive sentences because the crimes were separate and occurred over a three-day period).

As our courts have consistently held "there should be no free crimes in a system for which the punishment shall fit the crime." State v. Swint, 328 N.J. Super. 236, 264 (App. Div. 2000). The two second-degree sexual assaults stated in count one (as amended) and count two of the indictment were two separate crimes that involved multiple acts committed in different ways over a period of two-and-one-half years. The fact that consecutive sentences were imposed under these circumstances does not "shock [our] judicial conscience." Roth, 95 N.J. at 364-65; see also Swint, 328 N.J. Super. at 264 (holding "judicial conscience is not the least bit shocked by the imposition of consecutive

sentences" on a defendant who committed three violent crimes against the same victim in an hour and a half).

However, we conclude that our review is impeded by a lack of an explicit statement about the "overall fairness" of the sentence imposed as required under Torres, 246 N.J. at 268.[5] For that reason alone, we are constrained to vacate the sentence and remand for resentencing.

Affirmed in part; vacated and remanded in part for further proceedings consistent with our opinion. We do not retain jurisdiction.

[5] We note again that at the time of defendant's sentence, Torres had not been decided by the Court.