SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3204-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDRE D. WESLEY, a/k/a
DREW ANDREW WESLEY,

Defendant-Appellant.

Submitted September 28, 2022 – Decided November 1, 2022

Before Judges Messano, Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 18-05-1066.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Adam. D. Klein, Deputy Attorney General, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

A jury convicted defendant Andre D. Wesley of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(2)[1]; first-degree attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3(a)(1); three counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3); three counts of first-degree aggravated sexual assault while armed with deadly weapon, N.J.S.A. 2C:14-2(a)(4); three counts of first-degree sexual assault, N.J.S.A. 2C:14-2(a)(6); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); second-degree aggravated assault causing serious bodily injury, N.J.S.A. 2C:12-1(b)(1); third-degree aggravated assault, causing bodily injury with a deadly weapon, N.J.S.A. 2C:12-1(b)(2); third-degree terroristic threats, N.J.S.A. 2C:12-3(b); and first-degree witness tampering, N.J.S.A. 2C:28-5(a)(1) and (4). The jury acquitted defendant of two counts charging him with robbery.

---

[1] Count one of the indictment identified the relevant statute as N.J.S.A. 2C:13-1(b)(1), the unlawful removal or confinement of a person "[t]o facilitate commission of any crime or flight thereafter." However, the language of count one alleged defendant unlawfully removed or confined the victim K.S. "with the purpose to inflict bodily injury on or terrorize" her, subsection (b)(2) of the kidnapping statute. The trial court's instruction to the jury and the verdict sheet both stated defendant was charged with unlawfully removing or confining K.S. "with the purpose to inflict bodily injury on or to terrorize her."

The judge determined defendant committed the crimes while serving a sentence of parole supervision for life, which, pursuant to N.J.S.A. 2C:43-6.4(e), required the imposition of an extended term of imprisonment for the kidnapping and sexual assault convictions to "be served in [their] entirety." After appropriate mergers, the judge sentenced defendant to a term of forty-years' imprisonment with forty-years of parole ineligibility on the kidnapping conviction; a consecutive eighteen-year term with an eighty-five percent parole disqualifier pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the attempted murder conviction; and a consecutive eighteen-year term on the witness tampering conviction. The judge imposed concurrent sentences on the remaining counts.

On appeal, defendant raises the following issues for our consideration:

> POINT I
>
> AS THERE WAS GENUINE ISSUE WHETHER THE VICTIM HAD BEEN IMPERMISSIBLY INFLUENCED BEFORE SHE IDENTIFIED DEFENDANT AS THE MAN WHO SLASHED HER THROAT, THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A WADE[2] HEARING.

---

[2] United States v. Wade, 388 U.S. 218 (1967).

POINT II

THE TRIAL COURT ERRED WHEN IT ALLOWED JEVRON WATKINS TO TESTIFY THAT DEFENDANT HAD ORDERED A HIT ON JOHN BEST'S SON AS WATKINS' TESTIMONY WAS IRRELEVEANT AND UNDULY PREJUDICIAL.

POINT III

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AS TO THE KIDNAPPING CHARGE.

POINT IV

THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO ASK DEFENDANT WHETHER HE HAD PREVIOUSLY SOLICITED PROSTITUTES.

POINT V

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST FOR AN INDENTIFICATION INSTRUCTION TO THE JURY.

POINT VI

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST FOR A CURATIVE INSTRUCTION AFTER THE STATE IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE DEF[]ENSE DURING CLOSING REMARKS.

POINT VII

THE TRIAL COURT'S CUMULATIVE ERRORS DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL. (Not raised below).

POINT VIII

THE IMPOSITION OF MULTIPLE CONSECUTIVE SENTENCES AGGREGATING SEVENTY-SIX YEARS IN STATE PRISON WAS MANIFESTLY UNFAIR AND EXCESSIVE.

In a pro se supplemental brief, defendant also contends:

POINT I

TRIAL PROSECUTOR . . . CREATED A PREJUDICIAL [E]FFECT ON THE JURORS DURING OPENING REMA[RK]S AND STATEMENT DURING DEFENDANT ANDRE D. WESLEY[']S TRIAL. DEFENDANT WAS PREJUDICED BY REMARKS BEFORE HIS TRIAL JURORS. (Raised Below).[3]

POINT II

TRIAL COURT ERRED BY ALLOWING TWO STATE WITNESSES TO TESTIFY AT DEFENDANT'S TRIAL KNOWING THE TESTIMONY WAS F[AL]SE AND FABRICATED BY THESE TWO WITNES[S]ES[].

---

[3] We omit subpoints contained in defendant's pro se filing.

Having considered the record and applicable legal standards, we affirm defendant's convictions, vacate the sentences imposed, and remand for resentencing in accordance with the Court's guidance in State v. Torres, 246 N.J. 246 (2021).

I.

We summarize the testimony at trial. K.S. (Kate) testified that in November 2016, she was homeless, addicted to heroin, and engaging in sex work to survive.[4] On the evening of November 27, 2016, while Kate was walking the streets of Camden, defendant pulled his white van over to the side of the street and nodded to her. "[D]esperate" and suffering from heroin withdrawal, Kate approached hoping defendant would give her money. When defendant asked her "what [she] was doing," Kate said she "was on the streets," and defendant "told [her] to get in," which she did.

Kate saw "a bunch of . . . tools and metal objects" in the back of the van, and defendant said that "he had been on a roof all day." Kate asked where they were going, and defendant "just told [her] to go with it, we'll be there." Kate grew concerned after she became aware that defendant had a knife.

[4] We use the victim's initials and a pseudonym pursuant to Rule 1:38-3(c)(12).

Defendant drove to a parking lot across the street from a "very hidden" fenced-in area "with really tall grass." Defendant had the knife, and Kate followed him across the street because she "was scared . . . [and] didn't want to try to run at th[at] point." Defendant also carried a flashlight. While holding the knife to her throat, defendant told Kate to remove all her clothing, which she did. Defendant then forced Kate to perform oral sex on him while he threatened her with the knife. He vaginally penetrated Kate with his penis, and, using a condom, penetrated her anally with his penis. Kate said defendant cut her throat "right before he . . . ejaculated."

Kate lay there acting as if she were dead before defendant vaginally penetrated her again and slashed her throat a second time. She heard defendant saying, "Where's the condom? Where's the f***ing condom?" Defendant wrapped a hoodie around her neck, "threw [her] over his shoulder[,]" walked a few feet toward some tall grass, and threw her body to the ground. Kate landed on her head but remained conscious.

Kate waited a couple of minutes, and, when she no longer heard defendant, ran from the vacant lot to the first house she saw. A "couple outside" brought her into their home, gave her clothing, and called the police. The jury heard

Kate's 9-1-1 call made from the couple's home. Kate was taken to the hospital and underwent surgery.

Police followed a blood trail from the couple's house to where the attack occurred and found a pool of blood, a used condom, and a knife. Police later recovered surveillance footage from outside a store in Camden on the night of the attack. It showed the van and its driver, who was wearing tan cargo pants and an "Omega Property Services" sweatshirt.

Police interviewed Arthur Burns, the owner of Omega Property Services, as a possible suspect and placed his picture in a photographic array to see if Kate could identify him as her assailant.[5] She did not. Burns testified as a State's witness at trial and said defendant worked for him in November 2016.

Police conducted a second photographic identification procedure with Kate on December 2, 2016. Kate identified defendant as her assailant, telling the detective she was "95 percent sure" it was him. Kate also identified defendant in court as her attacker.

Also on December 2, police went to defendant's residence to execute a search warrant. They seized an Omega Property Services sweatshirt and tan cargo pants inside the home. Defendant was outside and approached the

[5] The array did not contain a photograph of defendant.

officers. After someone yelled "[h]e's got a knife," and defendant failed to comply with an order to drop the knife, one of the officers subdued defendant with a taser. Another officer kicked the knife out of defendant's hand. Body-cam footage of the incident and defendant's subsequent arrest were played for the jury. In the video, defendant can be heard saying, "I didn't do shit[,]" "I didn't do anything," and "You locking me up for something I didn't do."

DNA analysis of the condom found at the scene and vaginal swabs taken from Kate revealed the presence of defendant's DNA. Both Kate and defendant were excluded as possible contributors to DNA on the knife. The State established through expert testimony that stains on the cargo pants seized from defendant's residence tested positive for the presence of blood, although no further analysis or DNA analysis was performed "due to [the lab's] case management and case load."

In March 2018, while incarcerated at the Camden County Jail awaiting trial, defendant spoke to fellow inmate John Best about the charges. Best testified defendant said he encountered Kate while driving and tried to "pay for sex." Defendant asked Best if he knew Kate; Best knew her "a little bit," but not by name. Defendant asked Best "if there was anyone out there that [he] could find to see if she was out there. Still out there on the streets." Best

responded that he "could possibly ask [his] son . . . if he could find her." Defendant said if Best's son found Kate, he should "tell her don't show up for court." Best believed defendant wanted his son to tell Kate that "something would happen" to her "if she showed up to court," and Best never conveyed defendant's request to his son.

During his testimony, Best said "he needed to make a comment" to the court. After the judge excused the jury, Best stated that Jevon Watkins, a fellow inmate, told him that defendant had ordered a hit on his son. Best had not previously disclosed that information to the prosecutor. Over defendant's objection, the judge permitted the State to call Watkins as a witness.

Watkins testified that he overheard defendant speak with Best about his case in March 2018. Although defendant "never admitted" sexually assaulting Kate, Watkins heard defendant ask Best to have his son tell Kate not to come to court. After Best left the jail to begin his prison sentence, defendant told Watkins he was mad at Best because "he made a statement to the detectives," and defendant "might get someone to hurt [Best's] son or do something to his son."

Defendant testified that he and Kate had consensual sex on the night in question, denied having a knife, and said he never slashed Kate's throat.

Defendant claimed that he paid Kate to have sex with him. When they finished, defendant saw two people walking toward them, and, believing he had been "set . . . up," he quickly left. Over defense counsel's objection, the court permitted the prosecutor to ask defendant if he "previously had dates with prostitutes." Defendant admitted he "[h]ad a date with a prostitute" on one prior occasion.

Defendant said he was drinking and preparing for a party when police came to execute the search warrant. Defendant's brother informed him that police wanted to speak to him and had been to the house earlier in the day. Defendant testified that the knife in his hand came "from the person . . . [he] was with down the street from [his] house," but defendant had "no clue" what he was doing with it at the time.

Defendant admitted asking Best if he knew Kate but denied discussing his case with Best. Defendant also denied asking Best to contact Kate or that he spoke to Watkins about Best's son. Daryl Townsend, defendant's cellmate at the Camden County Jail, testified he never heard defendant speak about his case to anyone.

II.

In Point I of his counseled brief, defendant contends the judge erred by denying his pre-trial request for a Wade hearing regarding Kate's out-of-court

identification of defendant; he alleges the procedure was unduly suggestive. In Point V, defendant argues the judge erroneously denied his request for an identification charge. Neither argument is persuasive.

In State v. Henderson, the Court made clear that "[p]rocedurally, a defendant must first 'proffer . . . some evidence of impermissible suggestiveness' to be entitled to a Wade hearing" on the admissibility of an out-of-court identification. 208 N.J. 208, 238 (2011) (citing State v. Rodriquez, 264 N.J. Super. 261, 269 (App. Div. 1993)). The Court subsequently modified its holding in Henderson. A defendant still "must present some evidence of suggestiveness tied to a system variable which could lead to a mistaken identification," State v. Anthony, 237 N.J. 213, 233 (2019) (citing Henderson, 208 N.J. 288–89).[6] However,

> a defendant will be entitled to a pretrial hearing on the admissibility of identification evidence if Delgado and Rule 3:11 are not followed and no electronic or contemporaneous, verbatim written recording of the identification procedure is prepared. In such cases, defendants will not need to offer proof of suggestive behavior tied to a system variable to get a pretrial hearing.

[6] "[S]ystem variables" are "[t]hose factors . . . like lineup procedures, which are within the control of the criminal justice system." Henderson, 208 N.J. at 218.

[Id. at 233–34.][7]

In her initial statement to police, which was provided to defendant in discovery, Kate described her attacker as "Hispanic and black, maybe white and black." This exchange between Kate and the detective followed:

> Question: "What about facial hair?"
>
> Answer: "He was clean-shaven, he definitely was clean-shaven."
>
> Question: "What about the hair?"
>
> Answer: "He might have had like a tiny—I don't—I don't even remember, but I know it wasn't no big beard or mustache or nothing like that."
>
> Question: "Okay. What about the hair on his head?"
>
> Answer: "Uh, it was just short and dark."

[7] In State v. Delgado, 188 N.J. 48, 63 (2006), the Court held "as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." Rule 3:11, first adopted in 2012, requires recordation of out-of-court identification procedures and explains the method for doing so and details of the record's contents. Defendant has never asserted that police failed to properly record Kate's out-of-court identification.

Defense counsel moved for a Wade hearing, arguing the detective's questions were impermissibly suggestive because they prompted Kate to say defendant may have had some facial hair. In fact, defendant had a full beard.

Counsel argued the detective's questions suggested to Kate her assailant had facial hair, which then led police to place photos of bearded men, including defendant, in the photo array, and which impermissibly tainted Kate's identification. In denying the motion, the judge reasoned that the detective's "open-ended questions" did not suggest defendant had facial hair, and defendant "failed to show any level of suggestiveness in the taking of [Kate's] statement."

Defendant reiterates the argument before us. We agree with the trial judge. The point lacks sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

At the charge conference, the judge discussed whether to include Model Jury Charges (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 18, 2020). She properly noted that defendant admitted he was with Kate and, although he claimed any sexual encounter was consensual and he did not possess a knife or slash Kate, identification was not in issue. The prosecutor agreed. Defense counsel, however, argued some third party or parties were responsible for the knife attack. He contended

identification as to those counts in the indictment was in dispute and the charge was appropriate. The judge denied the request, explaining "[i]n essence, [defendant did] not challenge[] his identification[,] . . . [h]e said it didn't happen the way [the victim] said it happened." In her final instructions, the judge provided the general identification charge, i.e., Model Jury Charges (Criminal), "Identification: No In- or Out-of-Court Identification" (approved Oct. 26, 2015).[8]

In Point V, defendant argues the judge committed reversible error by denying his request to provide "an identification instruction" to the jury. We disagree.

---

[8] The judge told the jury:

> The burden of proving the identity of the person who committed the crime is upon the State. For you to find the defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that person.
>
> You must determine, therefore, not only whether the State has proven each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this defendant is the person who committed it.

The Court explained in State v. Cotto, "When identification is a 'key issue,' the trial court must instruct the jury on identification, even if a defendant does not make that request." 182 N.J. 316, 325 (2005) (citing State v. Green, 86 N.J. 281, 291 (1981); State v. Davis, 363 N.J. Super. 556, 561 (App. Div. 2003)). "Identification becomes a key issue when ""[i]t [is] the major . . . thrust of the defense." Ibid. (alterations in original) (quoting Green, 86 N.J. at 291). However, a trial court does "not commit error, much less plain error," if it fails "to provide a detailed identification instruction" but explains to the jury that "the State bears the burden of proving beyond a reasonable doubt that the defendant is the wrongdoer." Id. at 326–27.

Under the particular circumstances of this case, the judge did not err by declining to give a more detailed identification charge.

III.

We consider the alleged trial errors defendant raises in Points II, IV and VI.

A.

Defendant contends it was error to permit Watkins to testify that defendant ordered a "hit" on Best's son for not contacting Kate and suggesting she not testify. At trial, defense counsel argued the testimony was irrelevant and

otherwise should be excluded under N.J.R.E. 403. The judge rejected the arguments, finding Watkins' testimony went to defendant's "consciousness of guilt," and its "probative value" outweighed "any prejudicial impact." Although the judge initially concluded the anticipated testimony did not implicate N.J.R.E. 404(b), because defendant's statements were not "prior bad acts," she revisited the issue before Watkins took the stand. The judge concluded the testimony was admissible as a "prior bad act" to prove defendant's consciousness of guilt. After Watkins testified, the judge provided proper jury instructions regarding the limited permissible use and the impermissible use of the testimony.

Defendant reiterates the same arguments before us, contending the evidence was "irrelevant and unduly prejudicial."[9] We again disagree.

Our Supreme Court has "recognized the relevance of post-crime conduct to a defendant's mental state when the conduct demonstrates consciousness of guilt." State v. Williams, 190 N.J. 114, 125 (2007). For example, "evidence of [a] defendant's post-crime threats made against a witness [can be] admitted

[9] In his reply brief, defendant specifically argues Watkins' testimony "has nothing to do with prior bad acts," and therefore the four-prong analysis required under State v. Cofield, 127 N.J. 328, 338 (1992), to determine admissibility under N.J.R.E. 404(b) is "irrelevant." We therefore do not address the issue further.

because they demonstrate[] a consciousness of guilt, which could support an inference that was inconsistent with innocence or could tend to establish [a] defendant's intent." Ibid. (citing State v. Rechtschaffer, 70 N.J. 395, 413–15 (1976)).

Defendant was indicted for witness tampering, and the State relied on Best's testimony to prove its case. Defendant's statements to Watkins were clearly relevant to demonstrate a consciousness of guilt as to that charge. Moreover, the evidence of defendant's witness tampering—soliciting Best's son to dissuade Kate from appearing at trial—demonstrated a consciousness of guilt on the substantive charges arising from Kate's assault. Lastly, the probative value of Watkins' testimony far outweighed the prejudicial effect, which was tempered by the judge's limiting instructions.

B.

In Point IV, defendant contends the judge abused her discretion by permitting the prosecutor, over defendant's objection, to ask during cross-examination, whether defendant previously had been with a prostitute. Defendant acknowledged that he had a date with a prostitute "one time." We agree with defendant that the questioning was improper, and the judge's reasons for overruling the objection were erroneous. But reversal is not warranted.

Rule 2:10-2 provides: "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." An error is clearly capable of producing an unjust result if it is "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." State v. Daniels, 182 N.J. 80, 95 (2004) (alteration in original) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). "Therefore, [an] 'error must be evaluated "in light of the overall strength of the State's case."'" State v. Trinidad, 241 N.J. 425, 451 (2020) (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

Defendant testified on direct examination that he paid Kate to have sex with him. Given the substantial evidence of defendant's guilt, eliciting that he had done so on a prior occasion with someone else did not lead the jury to a result it otherwise would not have reached had the objection been sustained.

C.

In summation, defense counsel questioned why the State had not submitted the blood stains on defendant's cargo pants for further analysis, including DNA analysis. During her summation, the prosecutor pointed out that "if counsel wanted to get things tested on his own," there was "a procedure in place. [Defendant has] the same right to test evidence that we do." Defense

counsel objected after the prosecutor completed her summation, arguing the comment "unconstitutionally shift[ed] the burden to the defense." The judge refused defendant's request for a curative instruction, noting "the defense did argue in their closing . . . about what was not done."

Defendant reiterates the argument on appeal and further claims the State's witnesses testified a defendant could have DNA testing performed only if the prosecutor permitted it. We are again unpersuaded.

Initially, the State's DNA expert said that "if there is a special request from defense, . . . they are asked to go through the prosecution or the submitting agency." She did not testify that the State could or would necessarily block such a request. More importantly, the prosecutor's comment did not shift the burden of proof to defendant, but rather was fair rebuttal to defense counsel's summation. "A prosecutor is not forced to idly sit as a defense attorney attacks the credibility of the State's witnesses; a response is permitted." State v. Hawk, 327 N.J. Super. 276, 284 (App. Div. 2000) (citing State v. C.H., 264 N.J. Super. 112, 135 (App. Div. 1993)). Even "[a] prosecutor's otherwise prejudicial arguments may be deemed harmless if made in response to defense arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div. 2011). The prosecutor's summation comment provides no basis for reversal.

IV.

Defendant was charged with first-degree kidnapping in violation of N.J.S.A. 2C:13-1(b)(2). The statute provides in relevant part:

> b. Holding for other purposes. A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes:
>
> . . . .
>
> (2) To inflict bodily injury on or to terrorize the victim or another.

Defendant moved for a judgment of acquittal at the conclusion of the State's case, arguing that defendant had not "unlawfully" removed or confined Kate because she admitted to voluntarily entering his van. The judge denied the motion, reasoning the jury could find beyond a reasonable doubt that Kate was unlawfully removed or confined because defendant told her she would not be hurt if she went with him into the deserted lot.

In Point III, defendant argues the judge erred because it was undisputed that Kate entered the van willingly in expectation of getting some money. Defendant also argues the evidence failed to prove he "confined" Kate for a substantial period of time because "the period of confinement solely related to

the period of sexual assault and attempted murder." We reject both aspects of the argument.

"A judgment of acquittal shall be entered '[a]t the close of the State's case . . . if the evidence is insufficient to warrant a conviction.'" State v. Jones, 242 N.J. 156, 168 (2020) (alteration in original) (quoting R. 3:18-1). "In assessing the sufficiency of the evidence on an acquittal motion, we apply a de novo standard of review." Ibid. (quoting State v. Williams, 218 N.J. 576, 593–94 (2014)).

> [W]e must give the government in this setting "the benefit of all its favorable testimony as well as of the favorable inferences [that] reasonably could be drawn therefrom[.]" Within that framework, the applicable standard is whether such evidence would enable a reasonable jury to find that the accused is guilty beyond a reasonable doubt of the crime or crimes charged.
>
> [Ibid. (second alteration in original) (quoting State v. Perez, 177 N.J. 540, 549–50 (2003)).]

Under the kidnapping provisions of our Criminal Code, "[a] removal or confinement is unlawful . . . if it is accomplished by force, threat or deception." N.J.S.A. 2C:13-1(d). "[W]here an offender entices a victim into a car by deception, transports the victim to a remote place without opportunity for the victim's escape and commits sexual assault, all of the elements of kidnapping may be established." State v. Brent, 137 N.J. 107, 125 (1994) (alteration in

original) (quoting State v. Tronchin, 223 N.J. Super. 586, 594 (App. Div. 1988)). Here, Kate voluntarily entered the van and did not try to escape; however, she testified that while in the van and questioning defendant about their destination, she became aware that defendant had a knife and grew concerned. When defendant told her to follow him into the deserted lot, Kate reasonably believed that for her own safety, she had to go.

In State v. La France, the Court held,

> [O]ne is confined for a substantial period if that confinement "is criminally significant in the sense of being more than merely incidental to the underlying crime," and that determination is made with reference not only to the duration of the confinement, but also to the "enhanced risk of harm resulting from the [confinement] [or removal] and isolation of the victim . . . . That enhanced risk must not be trivial."
>
> [117 N.J. 583, 594 (1990) (second alteration in original) (quoting State v. Masino, 94 N.J. 436, 447 (1983)).]

"A kidnapping is criminal conduct that is 'not ordinarily inherent in the underlying criminal conduct itself' or 'merely incidental to the underlying crimes.'" State v. Cruz-Pena, 243 N.J. 342, 356 (2020) (quoting La France, 117 N.J. at 589, 590). Defendant contends Kate's confinement was incidental to the sexual and aggravated assaults and not sufficient to satisfy the elements of the kidnapping statute. We disagree.

The substantiality of the confinement is measured both quantitively and qualitatively and "not susceptible to a neat mathematical formulation." Ibid. (citing LaFrance, 117 N.J. at 590–91). The Court has "upheld a conviction where the period of confinement was not relatively long, but where the terror and depraved acts committed against the victims combined with their isolation and helplessness have been severe." Id. at 357 (citing La France, 117 N.J. at 592–94).

In this case, on a cold night, defendant held Kate naked at knifepoint in a vacant, deserted lot. He sexually assaulted her multiple times, slashed her throat, and left her for dead. Kate had to wait until defendant left the area before she could summon help from a nearby couple. The evidence was clearly sufficient to support the jury's finding of defendant's guilt on the kidnapping count.

V.

Given our above reasoning, defendant's Point VII—cumulative trial errors require reversal—is without sufficient merit to warrant discussion. R. 2:11-3(c)(2).

In his pro se supplemental brief, defendant argues that the prosecutor's comments in her opening statement were prejudicial error. The prosecutor told

jurors about the circumstances of defendant's arrest and that he "pull[ed] out a knife and approach[ed] the police." She told jurors they would see the video recording of the incident. There was no objection from defense counsel, either to the comment or the admission of the evidence.

When making opening statements, "prosecutors should limit comments . . . to the 'facts [they] intend[] in good faith to prove by competent evidence.'" State v. Echols, 199 N.J. 344, 360 (2009) (alterations in original) (quoting State v. Hipplewith, 33 N.J. 300, 309 (1960)). The prosecutor in this case did not stray from permissible comment in her opening.

Defense counsel did not object to the admission of the video recording, and during colloquy with the court, counsel acknowledged admission of the recording was a strategic decision. Under the invited-error doctrine, "trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.'" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). "[A] party cannot strategically withhold its objection to risky or unsavory evidence at trial only to raise the issue on appeal when the tactic does not pan out." State v. Santamaria, 236 N.J. 390, 409 (2019). In any event, admission of this evidence was not clearly capable of causing an unjust result. R. 2:10-2.

In the second point of his supplemental brief, defendant argues the judge erred in permitting Best and Watkins to testify "knowing the testimony was false and fabricated by these two witnesses," and because the witness tampering charge should not have been presented to the jury. These contentions lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

VI.

At sentencing, the judge found aggravating factors one, three, six and nine. See N.J.S.A. 2C:44-1(a)(1) (the crimes were "committed in an especially heinous, cruel, or depraved manner"); (a)(3) ("[t]he risk that the defendant will commit another offense"); (a)(6) ("[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he/she has been convicted"); and (a)(9) ("[t]he need for deterring the defendant and others from violating the law"). The judge found no mitigating factors.

Defendant contends his sentence was excessive. Specifically, defendant argues that in finding aggravating factor one, the judge engaged in "double counting." He also contends the judge erred in imposing consecutive sentences on the kidnapping, attempted murder, and witness tampering convictions.

We start by recognizing "[a]ppellate review of a sentence is generally guided by the abuse of discretion standard." State v. Miller, 237 N.J. 15, 28 (2019) (quoting State v. Robinson, 217 N.J. 594, 603 (2014)).

> The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).]

"The general deference to sentencing decisions includes application of the factors set forth in N.J.S.A. 2C:44-1(a) and (b): appellate courts do not '"substitute [their] assessment of aggravating and mitigating factors" for the trial court's judgment.'" Miller, 237 N.J. at 28–29 (alteration in original) (quoting State v. Miller, 205 N.J. 109, 127 (2011)).

"When applying factor one, 'the sentencing court reviews the severity of the defendant's crime, "the single most important factor in the sentencing process," assessing the degree to which [the] defendant's conduct has threatened the safety of its direct victims and the public.'" Id. at 29 (quoting State v. Lawless, 214 N.J. 594, 609 (2013)). "When it assesses whether a defendant's

conduct was especially 'heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Ibid. (quoting Fuentes, 217 N.J. at 74–75). "In appropriate cases, a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense," and "that [a] 'defendant's behavior extended to the extreme reaches of the prohibited behavior.'" Fuentes, 217 N.J. at 75 (alteration in original) (quoting State v. Henry, 418 N.J. Super. 481, 493 (Law Div. 2010)). The judge here did just that, and we find no abuse of her discretion and no "double counting."

In challenging the judge's imposition of consecutive sentences, defendant mainly argues that "the knife attack was intertwined with the kidnapping offense," and that "[t]he knife attack, which the victim said occurred as . . . defendant ejaculated, was either to aid his escape or was part of the sexual assault." In essence, defendant claims the kidnapping and attempted murder were not "separate acts of violence." State v. Yarbough, 100 N.J. 627, 644 (1985).

We reject the factual underpinning of the argument. As the Court famously said in Yarbough, "there can be no free crimes in a system for which

the punishment shall fit the crime." Id. at 643. This "tilts in the direction of consecutive sentences because the Code focuses on the crime, not the criminal." State v. Carey, 168 N.J. 413, 423 (2001) (citing Yarbough, 100 N.J. at 630). There was no inexorable progression of the vicious, repetitive crimes committed by defendant, and the judge fully explained her decision to impose consecutive sentences.

In a third argument, defendant contends the judge abused her discretion by imposing a consecutive sentence on the witness tampering conviction. However, N.J.S.A. 2C:28-5(e) states in relevant part: "a conviction arising under this section shall not merge with a conviction of an offense that was the subject of the official proceeding or investigation and the sentence imposed pursuant to this section shall be ordered to be served consecutively to that imposed for any such conviction." Defendant argues the judge should have imposed a sentence on the witness tampering charge consecutively to the kidnapping charge but should not have imposed consecutive sentences on all three. The argument seems like a variation of the earlier one and lacks sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

Defendant's aggregate sentence, while long, does not shock our judicial conscience. State v. Tillery, 238 N.J. 293, 323 (2019) (citing Fuentes, 217 N.J.

at 70). However, after defendant's brief was filed, the Court decided Torres, in which it said, "An explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding . . . , is essential to a proper Yarbough sentencing assessment." 246 N.J. at 268. In an abundance of caution, we vacate the sentences and remand for resentencing, consistent with the Court's guidance in Torres.

We affirm defendant's convictions, vacate the sentences imposed, and remand to the trial court for resentencing.