NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3840-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NESTOR FRANCISCO,
a/k/a CANELA LOPEZ,

Defendant-Appellant.

APPROVED FOR PUBLICATION

April 8, 2022

APPELLATE DIVISION

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Argued March 9, 2022 – Decided April 8, 2022

Before Judges Whipple, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 18-05-1376.

Stefan Van Jura, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Stefan Van Jura, of counsel and on the brief).

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

Alexander Shalom, Senior Supervising Attorney and Director of Supreme Court Advocacy, argued the

cause for amicus curiae American Civil Liberties Union of New Jersey Foundation (American Civil Liberties Union of New Jersey Foundation, attorneys; Alexander Shalom and Joanne LoCicero, on the brief).

Barry Evenchick argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, PC, attorneys; CJ Griffin, of counsel; Joshua P. Law, on the brief).

Amanda Frankel, Deputy Attorney General, argued the cause for amicus curiae Office of the Attorney General (Matthew J. Platkin, Acting Attorney General, attorney; Amanda Frankel, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

The opinion of the court was delivered by

GEIGER, J.A.D.

This case presents the issue whether law enforcement officers are required to advise undocumented noncitizen suspects of the potential immigration consequences of giving a statement relating to possible criminal charges that have not been filed. It also presents the issue of the appropriate test to be used by trial courts when deciding whether to admit or suppress a statement following inaccurate immigration advice by an interrogating law enforcement officer.

Defendant Nestor Francisco was convicted of murder, related weapons offenses, and tampering with evidence. He appeals his conviction and

sentence and challenges the admission of his statement, evidence of impecuniosity, and evidence of other crimes. We affirm.

I.

We take the following facts from the record. Defendant is from the Dominican Republic, lived with his parents in the Bronx, and was thirty-seven years old at the time of the incident. He entered the United States undocumented in or around 2006.

Defendant worked in construction. In 2014, Patricia Valecia hired defendant to do construction work on her home. According to Valecia, he was initially hired to do clean-up work at her home in the aftermath of Hurricane Katrina. When he asked her for more work, she hired him to do demolition in her basement. Valecia acted as the translator between defendant and her partner, Charles Jeffrey[1] (Jeffrey or the victim), because defendant only spoke Spanish. Jeffrey was often home when defendant was working, and they worked on the basement together. Since defendant lived in New York, he would take the train into Newark and Jeffrey would pick him up. He always contacted either Jeffrey or Valecia before he came to work.

[1] The two were not formally married but considered each other husband and wife.

A few months into his work, Valecia's son Pablo and his wife noticed jewelry and shoes were missing and suspected defendant of theft. Valecia explained her concerns to defendant and provided an opportunity for him to return the missing items, but they were never returned. In his statement to police, defendant acknowledged that these accusations caused the breakdown of his working relationship with Jeffrey and Valecia.

On November 19, 2015, the Essex County Prosecutor's Office Crime Scene Unit met Newark Police at a residence in Newark, following reports of a homicide. The first floor of the building was occupied by Elisa Pires and her son Steven. The second floor was occupied by the building's owners, Jeffrey and Valecia. Earlier that day, Elisa entered the building and found blood on the walls. She described the scene "as if [the walls] were painted in red." When she realized that it was blood, and not paint, she called her son Steven. She saw Jeffrey's body at the bottom of the basement staircase. Eliza waited for Steven to arrive; her other son called 911 to report what she had found.

Newark Police found Jeffrey's body in the basement with a hammer embedded in the left side of his skull and puncture wounds on his abdomen. They found blood spatter on the basement walls, the hallway leading to the basement door, and on the door leading to the staircase. During a walkthrough of the house, officers found a wallet and cell phone on the coffee table, a paint

mixer attachment for a drill, two towels in the foyer, and black hair in the blood spatter. The kitchen stove was still on. A basket of quarters that was usually full was missing. Tools were scattered on the basement floor. Blood spatter was also present on the floor leading from the bathroom to the bedroom and there were bloody handprints on the walls leading down to the basement. The blood found throughout the scene was analyzed and determined to be the victim's. No useable fingerprints were recovered.

An autopsy revealed the victim suffered blunt force trauma to the head, neck, torso, arms, and legs, multiple forehead lacerations, a skull fracture consistent with the injury caused by the embedded hammer, blood in the left upper eyelid, other facial lacerations, and injuries consistent with defensive wounds on the arms.

Detective Mario Suarez of the Essex County Prosecutor's Office interviewed Valecia at the scene. Valecia informed him that defendant had been working on the home and gave Suarez his phone number. Using that phone number, Suarez found defendant's Facebook page and his Bronx address.

Suarez and other officers went to defendant's address the next day. When defendant came to the door, he was wearing a bandage on his finger. When he noticed Suarez looking at the bandage, defendant fainted.

There were no eyewitnesses, but surveillance videos were recovered from an address near the victim's residence and defendant's residence. The first video showed defendant leaving his home at 10:15 a.m. on November 19, wearing jeans, a black coat, and carrying a bag of tools. Suarez compared this footage with the footage from Newark, which showed defendant leaving the victim's building at around 1:00 p.m. in grey sweatpants, a grey hoodie, and carrying a backpack of tools. Defendant returned to his home around 3:40 p.m., without the backpack but carrying something. At 3:56 p.m., defendant exited his home carrying a white trash bag. A different camera angle showed defendant throw the bag into a nearby trash bin.

Defendant was transported to the hospital after he fainted. While there, Suarez administered Miranda[2] warnings to defendant in Spanish. Defendant initialed each of the Miranda warnings on the Miranda form and signed it, indicating he was willing to make a statement. Suarez also signed the card. Defendant had not yet been charged with any offenses and a warrant had not been issued for his arrest. The entire interrogation was conducted in Spanish.

Early in the questioning, defendant expressed concern about his undocumented immigrant status during the following brief exchange:

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[2] Miranda v. Arizona, 384 U.S. 436 (1996).

> Defendant: And, and, and, and this thing will not cause me problems with my record, because I do not have papers. I am undocumented.
>
> Suarez: No. No.
>
> Defendant: I have not; I have not gotten into a stupid mess.
>
> Suarez: No. Your status has nothing to do with this. I am not going to ask questions on your status, or how you got here to this country. Absolutely nothing.
>
> Defendant: I mean I did not get myself into a mess.
>
> . . . .
>
> Suarez: You understand everything I said before, correct?
>
> Defendant: Yes.[3]

Following that exchange, defendant made incriminating statements about the incident that occurred between him and Jeffrey. Initially, defendant said that he was not in Newark at all that day, and claimed that he had a job in Brooklyn with his friend Raphael. Defendant said he injured his fingers at work. Suarez asked defendant if he had Raphael's number. Defendant claimed he did not, and that Raphael usually found him on the street for jobs. However, after Suarez revealed that cameras caught defendant in Newark, defendant explained his version of what happened. He stated that Jeffrey

[3] The quoted language is a translation. There is no dispute as to its accuracy.

insulted him when he went to Jeffrey's house to pick up some tools. Jeffrey began insulting him, then threw a mixing cone at him, and they started to fight. Jeffrey lunged at him, cut him with a knife, and they fell into the basement tangled up. Defendant also hit Jeffrey with Channellock pliers. In the basement, defendant threw a can of paint at Jeffrey, and the two threw screwdrivers at each other. Jeffrey tried to cut defendant with a knife, which injured his fingers. Defendant hit Jeffrey with a hammer one time, changed into clothes he kept in the basement, and left. He discarded his bloody clothes in a white garbage bag and threw it out near his Bronx home. Defendant insisted he acted in self-defense because Jeffrey attacked him.

A grand jury returned a twelve-count indictment charging defendant with: first-degree knowing or purposeful murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); first-degree robbery, N.J.S.A. 2C:15-1 (count three); fourth-degree possession unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (counts four, six, eight, and ten); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (counts five, seven, nine, and eleven); and fourth-degree tampering with evidence, N.J.S.A. 2C:28-6(1) (count twelve).

The State filed a motion to admit defendant's statements to Detective Suarez. On March 22, 2017, the court conducted an evidentiary hearing.

Suarez was the sole witness. Suarez testified to his first meeting with defendant and the circumstances of defendant's interrogation. He also took a statement from defendant's father at the hospital.

Suarez testified that he read defendant's rights from the Miranda card in Spanish, and that the card is printed in English and Spanish. Defendant initialed next to each warning on the card. Defendant indicated that he was willing to waive his rights and make a statement.

Suarez acknowledged that he was aware that defendant was undocumented, that a criminal conviction could impact defendant's immigration status, and that he did not tell defendant to speak with an immigration attorney about his concerns.

The judge granted the State's motion in an oral decision and accompanying order. The judge noted that he had reviewed the exhibits and transcript of the recorded statement. The judge found Suarez had been a police officer for twenty-four years and his testimony to be credible.

The judge made the following additional findings. Defendant was thirty-seven years old at the time of the incident. Miranda warnings were "meticulously administered" to defendant verbally in his native language. Defendant initialed a copy of each warning and signed the back of the Miranda warning card. Defendant was advised of his right to consult with an attorney

and to have an attorney present during questioning. The judge noted the right to an attorney included the right to an immigration attorney, although it was not delineated on the Miranda form. The judge commented that a suspect's "immigration status doesn't provide them with any greater Miranda warnings than someone who's a citizen of this country." The judge explained that it is not a police officer's duty to advise a suspect that he has the right to consult with immigration lawyer.

The judge noted that the interview began at 10:17 a.m. Following a hour-long break to allow hospital staff to treat defendant, the questioning resumed. A second break for staff to attend to defendant also occurred. The questioning lasted about an hour and ended at 12:24 p.m.

The judge found that Detective Suarez made no threats or inducements to defendant. Nor was any trickery used. No physical or psychological pressure was exerted. Both Detective Suarez and defendant exhibited a "calm" demeanor. "There was no screaming. There [were] no raised voices." At one point, after making certain admissions, defendant cried, but no undue pressure was put on defendant to give the statement. Detective Suarez testified that defendant appeared to be calm, alert, and coherent. His speech was clear, not slurred.

The judge found the interrogation "was properly conducted[,] and the State had proven beyond a reasonable doubt that the Miranda requirements were met and the requisite warnings were given." He further found that defendant knowingly, intelligently, and voluntarily waived each of his Miranda rights before making the statement, and had "neither invoked nor attempted to invoke any of those rights thereafter." Considering the totality of the circumstances, the judge concluded the statement was voluntary.

The State also filed a motion to admit evidence concerning defendant's financial status, including theft allegations, under N.J.R.E. 404(b)(1). The judge conducted a testimonial hearing. Valecia testified that defendant was "always asking for money." She and Jeffrey had previously loaned him approximately $1,000 that he never paid back. In September of 2015, she went on vacation and her son Pablo offered defendant work while she was away. While defendant was working for Pablo, Pablo's wife reported missing jewelry. In addition, Pablo's bracelet, chain, ring, and a pair of his shoes were missing from Jeffrey's home.

Jeffrey and Valecia suspected that defendant stole the jewelry. Valecia gave defendant an opportunity to return the jewelry. Defendant was upset by the accusation. They did not find the jewelry, Valecia paid defendant for the day, and she wanted that to be the end of their relationship. However, the two

kept in contact electronically and she told defendant that she believed he took the jewelry, but she did not see him again. Defendant kept asking to finish his work at the house, but the couple no longer trusted him. Valecia further testified that defendant did not keep any tools at the house, just a plastic bag with a few miscellaneous items in it.

The judge granted the State's motion, ruling the evidence admissible. Defense counsel stated defendant would assert self-defense.

A three-week jury trial commenced on January 3, 2019. The judge gave the following limiting instruction to the jury regarding the evidence of defendant's impecuniosity and alleged theft:

> Now, member[s] of the jury also with regard to this case, the State is introducing evidence that the defendant is alleged to have stolen items from the victim in this case. And that he was under severe financial pressure in the weeks leading up to the murder and robbery.
>
> Normally such evidence is not permitted under our rules of court. Our rules specifically exclude evidence the defendant has committed other crimes, wrongs or acts when it is offered only to show that he has disposition or tendency to do wrong and therefore must be guilty of the charged offenses.
>
> Before you can give any weight to this evidence, you must . . . be satisfied . . . that the defendant committed the other crime, wrong or act. If you are not so satisfied, you may not . . . consider it for any purpose.

However, our court rule[s] do permit evidence of other crimes, wrongs or acts when the evidence is used for certain specific narrow purposes.

In this case, the State contends that the victim and his wife believed that the defendant stole from the victim and his family. And was consequently terminated from his employment approximately a week before the murder.

The State submits that this is relevant to the defendant's motive and intent to murder and rob the victim. In addition, the State is contending that the defendant was under severe financial pressure in the immediate time frame leading up to the incident.

The State contends that this too, is relevant to the defendant's motive and intent to murder and rob the victim. Whether this evidence does in fact demonstrate motive and intent is for you to decide. You may decide that the evidence does not demonstrate motive and intent and is not helpful to you at all. In that case, you must disregard the evidence.

On the other hand, you may decide that this evidence does demonstrate motive and intent and use it for that specific purpose.

However, . . . you may not use this evidence to decide if the defendant has a tendency to commit crimes or that he is a bad person. That is, you may not decide just because the defendant has committed any other crimes or wrongs or acts that he must be guilty of the present crimes.

I have admitted this evidence only to help you decide the specific question of motive and intent. You may not consider it for any other purpose. And you may not find the defendant guilty now simply because

> the State has offered evidence that he may have committed other crimes, wrongs or acts.

Defendant testified at the trial. Despite what he said to Suarez, defendant maintained that he only went to see Jeffrey to pick up tools for a job he had in Brooklyn with Raphael. The State, in contrast, argued that defendant needed money and went to Jeffrey's home to kill and rob him. It introduced evidence that defendant was under pressure to provide money to friends and family.

The State contended that if defendant truly had a job with Raphael, he would have had his phone number and been able to contact him; instead, defendant did not know where the job was or have any details about it. He also lied and withheld Raphael's phone number. The State argued that defendant "chose not to provide the number, because there was no job in Brooklyn. . . . The job was a fiction. There was no job."

Dr. Arielle Lyon Langer testified about treating defendant at the hospital after he fainted. Defendant had injuries to the fourth and fifth fingers of his left hand. Defendant told her the injury was from plasterboard falling on his hand. Dr. Langer testified that defendant was given antibiotics due to risk of infection from bacteria, because she believed that his finger injuries were consistent with a human bite.

Dr. Andrew Falzon, a forensic pathologist who reviewed the autopsy report, testified about the victim's injuries. He used the words "incised looking" to describe the victim's head and face wounds caused from sharp force injury, as opposed to blunt force injury, despite most of Jeffrey's injuries being from blunt force. Defense counsel objected because the phrase "incised looking" was not stated in Dr. Falzon's report—it was used in the report of the pathologist that performed the autopsy. The judge ruled that Dr. Falzon could give his independent opinion about the wounds.

During closing remarks, defense counsel moved for a mistrial based on prosecutorial misconduct, because of the prosecutor's continued use of the word "incised." The judge denied the motion. The next day, the judge explained that Dr. Falzon used the term "incise-like wounds" when commenting on another medical report, but did not opine that the wounds were incised.

During the trial, the recording of defendant's statement to Suarez was played, revealing his concerns about his immigration status. Those portions of the tape were supposed to be removed but were not. The court issued the following curative instruction and question to the jury:

> [Defendant] expressed some concern whether the incident could affect his legal status in the country. [Defendant's] expression of concern regarding his legal status has absolutely no bearing on his guilt or

> innocence on the charges. This portion of the statement is being stricken from the record and [should] not be considered by you in any manner or at any time in arriving at your verdict. Whether someone is a citizen, a legal visitor, or legal resident they are entitled to the same constitutional protections. If any juror would have any difficulty following this instruction raise your hand.

No juror raised their hand.

Defense counsel did not object to the proposed instruction but moved for a mistrial based on the failure to delete the statements from the recording. The judge denied the motion.

In his closing argument, defense counsel argued that although not a "complete defense," defendant's actions were "a passion provocation" and that he did not intend "to take Jeffrey's life." The judge instructed the jury on the lesser included offenses of voluntary passion/provocation manslaughter, aggravated manslaughter, reckless manslaughter, and theft. he also instructed the jury on self-defense.

The jury found defendant guilty of murder (count one), three counts of unlawful possession of a weapon (hammer, screwdriver, and pliers) (counts four, eight, and ten), three counts of possession of a weapon for an unlawful purpose (hammer, screwdriver, and pliers) (counts five, nine, and eleven), and tampering with evidence (count twelve). The jury found defendant not guilty of felony murder (count two), robbery and the lesser included offense of theft

(count three), unlawful possession of a weapon (knife) (count six), and possession of a weapon for an unlawful purpose (knife) (count seven).

Defendant was sentenced on March 1, 2019. He was born in the Dominican Republic in June 1978. Defendant completed high school in the Dominican Republican and is fluent in Spanish but not English. Defendant relocated to the United States around 2006, and is undocumented. An I.C.E. detainer is lodged against him. At the time of sentencing, defendant was forty years old. He is single and the father of two children, who were then seventeen and nineteen years old.

This incident resulted in defendant's only known arrest. He has no prior convictions or adjudications of juvenile delinquency. Defendant was self-employed as a construction worker.

Defendant was sentenced on March 1, 2019. Despite the verdict, defense counsel requested the court to consider the mitigating circumstances of passion/provocation and self-defense. Defendant elected not to allocute.

The State emphasized that defendant knew the victim and his compromised physical condition. Jeffrey was sixty-four years old and suffered from serious medical conditions, including amputated toes, a bad back and heart, and poor vision.

The judge applied aggravating factors one ("[t]he nature and circumstances of the offense, . . . including whether or not it was committed in an especially heinous, cruel, or depraved manner"), nine (need for deterrence); and twelve (defendant knew or should have known the victim was at least sixty years old). N.J.S.A. 2C:44-1(a)(1), (9), and (12). The judge declined to apply aggravating factor two ("[t]he gravity and seriousness of harm inflicted on the victim"), N.J.S.A. 2C:44-1(a)(2), concluding it would be double counting.

As to aggravating factor one, the judge noted the jury categorically rejected defendant's claim of self-defense. The judge described the crime as "a brutal murder" and "absolutely horrific." "The victim suffered dozens of wounds with various weapons." During this "violent frenzy" "the victim was trying to escape with his life" with the crime scene stretching from the front hallway to the basement, where defendant ultimately "embedded a hammer in his skull." The judge rejected defendant's claim that the victim was the instigator and concluded that the murder was committed in an especially cruel and depraved manner. He placed "great weight" on the need for deterrence.

The judge applied mitigating factors seven ("defendant has no history of prior delinquency or criminal activity"); eight ("defendant's conduct was the result of circumstances unlikely to recur"); and eleven (imprisonment "would entail excessive hardship to the defendant or [his] dependents"). N.J.S.A.

2C:44-1(b)(7), (8), and (11). The judge placed great weight on mitigating factor seven, noting it was defendant's first conviction.

The judge declined to apply mitigating factors three ("defendant acted under a strong provocation"); four ("substantial grounds tend[ed] to excuse or justify the defendant's conduct, though failing to establish a defense"); and five (the victim "induced or facilitated" defendant's conduct). N.J.S.A. 2C:44-1(b)(3), (4), and (5).

The judge found the aggravating and mitigating factors were in equipoise. Considering the real-time consequences under NERA, the judge sentenced defendant to a fifty-year term for the murder, subject to the parole ineligibility consequences of the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant received concurrent eighteen-month terms on counts four, eight, ten, and twelve. Counts five, nine, and eleven merged into count one. This yielded an aggregate fifty-year term, subject to forty-two and one-half years of parole ineligibility. Defendant was awarded 1,197 days of jail credit. This appeal followed.

We invited the American Civil Liberties Union (ACLU), the Association of Criminal Defense Lawyers of New Jersey (ACDL), and the Acting Attorney General of New Jersey (AG) to appear as amicus curiae and to submit briefs focused on whether defendant executed a knowing and voluntary Miranda

waiver considering his concern about the impact of giving a statement on his undocumented status and the detective's response to defendant's concern.

Defendant raises the following points for our consideration:

> POINT I
>
> DEFENDANT DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS MIRANDA RIGHTS BECAUSE THE INTERROGATING DETECTIVE FALSELY RESPONDED TO DEFENDANT'S CONCERNS ABOUT HIS IMMIGRATION STATUS BY INFORMING HIM THAT THE HOMICIDE INVESTIGATION WOULD HAVE NO BEARING ON THAT STATUS.
>
> POINT II
>
> THE STATE IMPROPERLY SHIFTED THE BURDEN OF PROOF TO DEFENDANT TO PRODUCE A WITNESS WHO WOULD CORROBORATE A CENTRAL FACET OF HIS DEFENSE.
>
> POINT III
>
> THE INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE ABOUT DEFENDANT'S PURPORTED IMPECUNIOSITY DENIED HIM DUE PROCESS AND A FAIR TRIAL.
>
> POINT IV
>
> THE 50-YEAR NERA SENTENCE IS MANIFESTLY EXCESSIVE FOR A FIRST-TIME OFFENDER WHO ASSERTED A COLORABLE CLAIM OF SELF-DEFENSE.

In a pro se supplemental brief, defendant raises three additional points:

POINT I

THE TRIAL COURT SHOULD HAVE ORDERED A MISTRIAL BECAUSE THE COURT'S LIMITED CURATIVE INSTRUCTIONS WERE INSUFFICIENT TO OVERCOME THE RESULTING PREJUDICE DEFENDANT SUFFERED WHEN DISCLOSURE OF DEFENDANT'S CONCERN REGARDING HIS IMMIGRATION STATUS TO THE JURY DENIED DEFENDANT'S RIGHT TO A FAIR TRIAL AND N.J.R.E. 104, 403, AND 404(b).

POINT II

[DEFENDANT'S] CONVICTION MUST BE VACATED BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A MURDER CONVICTION. (Not raised below).

POINT III

THE TRIAL COURT ERRONEOUSLY AND BIASEDLY DENIED [DEFENDANT'S] MOTION FOR PROSECUTORIAL MISCONDUCT DEPRIV[ING HIM] OF A FAIR TRIAL AND WARRANT[ING] REVERSAL. (Not raised below).

II.

We first address defendant's argument that he did not knowingly and voluntarily waive his Miranda rights because Detective Suarez misrepresented the impact of the statement on his immigration status. Recent Supreme Court opinions inform our analysis.

Our scope of review of a trial court's decision on a motion to suppress a defendant's custodial statement to police is limited. When reviewing the grant

or denial of a motion to suppress a custodial statement, "we defer to the factual findings of the trial court if those findings are supported by sufficient credible evidence in the record." State v. Sims, ___ N.J. ___, ___ (2022) (slip op. at 23) (citing State v. S.S., 229 N.J. 360, 374 (2017)). In contrast, we review the trial court's legal conclusions de novo, S.S., 229 N.J. at 380, and "are not bound by a trial court's interpretation of the legal consequences that flow from established facts." State v. Diaz, ___ N.J. Super. ___, ___ (App. Div. 2022) (slip op. at 19); accord State v. Handy, 206 N.J. 39, 45 (2011) (noting that whether established facts warrant suppression is a "purely . . . legal question" subject to de novo review).

"The privilege against self-incrimination, as set forth in the Fifth Amendment to the United States Constitution, is one of the most important protections of the criminal law." State v. Presha, 163 N.J. 304, 312 (2000) (citing U.S. Const. amend. V; State v. Hartley, 103 N.J. 252, 262 (1986)). Although the New Jersey Constitution contains no privilege against self-incrimination, our common law has recognized an individual's "right against self-incrimination since colonial times." State v. Vincenty, 237 N.J. 122, 132 (2019) (quoting State v. A.G.D., 178 N.J. 56, 66 (2003)).

"A confession obtained during a custodial interrogation may not be admitted in evidence unless law enforcement officers first informed the

defendant of his or her constitutional rights." State v. Hreha, 217 N.J. 368, 382 (2014) (citing Miranda, 384 U.S. at 444). The State must prove beyond a reasonable doubt that a suspect's waiver of the privilege against self-incrimination prior to making an inculpatory statement "was knowing, intelligent, and voluntary in light of all the circumstances." State v. A.M., 237 N.J. 384, 397 (2019) (quoting Presha, 163 N.J. at 313); accord State v. Tillery, 238 N.J. 293, 315 (2019) (quoting Miranda, 384 U.S. at 444).

The trial court found that defendant was fully advised of his Miranda rights in Spanish, his native language. He acknowledged he understood those rights and waived them. Defendant did not invoke any of those rights during the interrogation. Each of these findings is fully supported by the record.

A.

Generally, a court considers the totality of the circumstances when deciding whether an interrogee has knowingly, intelligently, and voluntarily waived his right against self-incrimination while in custody. State v. Nyhammer, 197 N.J. 383, 402-03 (2009). "Only in the most limited circumstances have we applied a per se rule to decide whether a defendant knowingly and voluntarily waived Miranda rights." Id. at 403. However, "'evidence that the accused was threatened, tricked, or cajoled into a waiver' of his [or her] privilege will render the waiver involuntary." Id. at 407 (quoting

Miranda, 384 U.S. at 476); see also Moran v. Burbine, 475 U.S. 412, 421 (1986) (noting that a waiver is voluntary when it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception").

In A.G.D., the Court "departed from the totality-of-the-circumstances rule and required police officers to inform a suspect that a criminal complaint has been filed or an arrest warrant has been issued before interrogating him." Sims, ___ N.J. at ___ (slip op. at 25) (citing A.G.D., 178 N.J. at 68-69). The Court explained that law enforcement's "failure to inform a suspect that a criminal complaint or arrest warrant has been filed or issued deprives that person of information indispensable to a knowing and intelligent waiver of rights." Id. at ___ (slip op. at 25-26) (citing A.G.D., 178 N.J. at 68). In Nyhammer, the Court made clear that its holding in A.G.D. was limited to those facts and did not apply, for example, where law enforcement officers questioned the defendant about his uncle's role in alleged child abuse without disclosing that the defendant was also a suspect. 197 N.J. at 404-05. The Court observed that "[t]he issuance of a criminal complaint and arrest warrant by a judge is an objectively verifiable and distinct step . . . ." Id. at 404. The Court declined to apply a bright-line rule and concluded the officers' failure to disclose to the defendant that he was a suspect before questioning him was "a factor in the totality-of-the-circumstances test." Id. at 405.

In Vincenty, police officers failed to inform a suspect of formal charges filed against him prior to questioning, during which he made self-incriminating statements. 237 N.J. at 126-29. Applying A.G.D.'s mandate that law enforcement officers "make a simple declaratory statement at the outset of an interrogation that informs a defendant of the essence of the charges filed against him[,]" the Court reversed the trial court's denial of the defendant's motion to suppress his statement and vacated his conviction. Id. at 134, 136.

Most recently, the Court explained that "[t]he rule announced in A.G.D. is clear and circumscribed." Sims, ___ N.J. at ___ (slip op. at 27). "The officers need not speculate about additional charges that may later be brought or the potential amendment of pending charges." Id. at ___ (slip op. at 28) (citing Nyhammer, 197 N.J. at 404-05; A.G.D., 178 N.J. at 68-69). The Court noted that "[a] complaint-warrant or arrest warrant notifies an interrogating police officer that a judge, or other judicial officer, has found probable cause with respect to one or more charges, and enables a police officer to make the 'simple declaratory statement' that A.G.D. requires." Id. at ___ (slip op. at 29) (quoting Vincenty, 237 N.J. at 134). "So informed, the arrestee knows his 'true status' before waiving his Miranda rights, and may knowingly, intelligently, and voluntarily waive those rights." Id. at ___ (slip op. at 29) (quoting A.G.D., 178 N.J. at 68).

The Court declined to adopt a rule that requires police to inform a suspect, "based on information learned to date in a developing investigation, of what charges may be filed" against him in the future. Id. at ___ (slip op. 30).

B.

Defendant argues that Detective Suarez gave him false legal advice in response to his concerns about his immigration status by informing him that the homicide investigation would have no bearing on that status. He argues that police officers are not permitted to make affirmative misrepresentations to induce suspects to provide statements. Defendant contends his primary concern was whether the criminal investigation would impact his immigration status.

Amicus ACLU acknowledges that "police officers are not required to provide immigration advice to suspects prior to an interrogation, [but] when immigration consequences are top-of-mind for a suspect, officers cannot provide affirmative misinformation." It contends that "[w]hen officers mislead suspects about critical issues, they render the statement involuntary." The ACLU claims that "[b]efore he spoke to police, [defendant] made clear that he was most concerned about how his actions would impact his immigration status[.]" And had Detective Suarez "been forthright (or silent) about the

inevitable removal that would flow from a conviction for murder, [defendant] would likely not have provided a statement."

Amicus ACDL contends that avoiding deportation was of paramount importance to defendant, so that he could live with and support his family. It argues that Detective Suarez "took advantage of defendant's vulnerability while he was receiving medical treatment and gave him erroneous legal advice that impermissibly burdened the ability to assert his right to counsel." Namely, that what he said would not have an adverse effect on his immigration status. The ACDL asserts that Detective Suarez "undercut and contradicted the Miranda warnings." Therefore, defendant's waiver thereof was not knowing, voluntary, and intelligent.

In response, the State argues that defendant's waiver of his right against incrimination was knowing, intelligent, and voluntary. It further argues that even if Detective Suarez made a misrepresentation when responding to defendant's inquiry about his immigration status, the misrepresentation did not directly contradict defendant's rights and did not actually induce the confession. The State also argues that Detective Suarez was not required to explicitly inform defendant of his right to consult an immigration attorney.

Amicus AG argues that police officers do not have an affirmative obligation to advise a suspect on the potential immigration consequences of

their custodial statement, but misrepresentations must be evaluated under the totality-of-the-circumstances standard.

C.

To provide relevant immigration law context, we briefly explain the nexus between criminal convictions and removal from this country. Deportation is a potential consequence of certain criminal convictions. See 8 U.S.C. § 1227(a)(2)(A)(II). In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, Div. C., 110 Stat. 3009-546 (codified in various sections of 8 U.S.C.), "which expanded the offenses for which an immigrant could be removed from this country and eliminated the traditional judicial review of final removal orders." State v. Nuñez-Valdez, 200 N.J. 129, 140 (2009). Under the IIRIRA, conviction of an aggravated felony generally results in the maximum punishment under immigration laws—deportability—and bars eligibility for nearly every form of relief or waiver that would avoid deportation. See IMMIGRANT LEGAL RESOURCES CENTER §N.6 (Jan. 2013). "There are some immigration remedies for persons convicted of an aggravated felony, but they are limited and determining eligibility is highly complex." Ibid.

"Aggravated felony" is defined as murder, rape, or sexual abuse of a minor[,] 8 U.S.C. § 1101(a)(43)(A), and also includes "a crime of violence" as

defined in 18 U.S.C. § 16 "for which the term of imprisonment [is] at least one year[,]" if it was not a "purely political offense[.]" 8 U.S.C. § 1101(a)(43)(F). In turn, 18 U.S.C. § 16 defines "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Aggravated manslaughter, N.J.S.A. 2C:11-4(a), and manslaughter, N.J.S.A. 2C:11-4(b), clearly meet that definition.

"Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Even a legal permanent resident convicted of an aggravated felony is subject to "mandatory deportation." Nuñez-Valdez, 200 N.J. at 140; see also Susan L. Pilcher, Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant, 50 ARK. L. REV. 269, 287-300 (1997) (describing voluntary departure as one of few remaining options for relief from deportation for defendants accused of "aggravated felonies").

In addition, a noncitizen who is "convicted of a crime for which a sentence of one year or longer may be imposed, is deportable." 8 U.S.C. § 1227(a)(2)(A)(i)(II). More generally, "[a]ny alien who is present in the United

States in violation of this Act or any other law of the United States," including undocumented individuals like defendant, are deportable even if they have not been convicted of a crime. 8 U.S.C. § 1227(a)(1)(B).[4]

D.

Applied here, the clear import of Sims is that police officers need not speculate about the possible immigration consequences of charges that may be brought in the future. Requiring police officers to disclose the possible immigration consequences of a conviction of a criminal charge that has not yet been filed is unwarranted, impractical, and contrary to the holding in Sims.

We decline to adopt a bright-line rule requiring officers to engage in such speculation and to inform an interrogee that their statements could result in deportation or other immigration consequences.[5] Nor do we adopt a bright-

[4] Obviously, an undocumented individual like defendant, who enters and remains in the country illegally and commits a crime, has less substantive and procedural protection against removal than a permanent resident alien.

[5] We view this situation as fundamentally different from entering a guilty plea. Procedural safeguards protect noncitizens who are pleading guilty, including informing defendants of their right to seek legal advice regarding the impact of their plea on their immigration status in plea forms and during plea hearings. A guilty plea to a criminal offense involves a filed complaint-warrant; indictment by a grand jury unless waived; representation by counsel; an arraignment; standardized plea forms that include a six-part question regarding immigration status, potential immigration consequences of the plea, and consultation with an attorney on those immigration consequences, that are reviewed with counsel, answered, and executed by the defendant; and a

line rule requiring suppression of a statement to police following inaccurate advice regarding the potential immigration consequences of a statement, even where the officer knowingly provides affirmative misadvice (e.g., making false assurances to a suspect that that they will not be deported even if they admit to committing the offense). "In a case in which there is evidence of . . . bad-faith conduct on the part of law enforcement officers, the trial court should consider such conduct as part of the totality-of-the-circumstances test."[6] Sims, ___ N.J. at ___ (slip op. at 31).

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subsequent plea hearing, at which the defendant must acknowledge being aware of his right to consult with an immigration attorney regarding possible immigration impacts; and, of course, active participation and oversight by a Superior Court judge, who "shall not accept such plea" unless "the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with the understanding of . . . the consequences of the plea." R. 3:9-2.

[6] In the event of such affirmative misadvice on deportation consequences, the State would be hard pressed to prove beyond a reasonable doubt that an interrogee had knowingly and voluntarily waived their Fifth Amendment rights. Cf. State v. Diaz, __ N.J. __, __ (App. Div. 2022) (slip op. at 37, 40) (holding that under the totality-of-the-circumstances test, the State failed to prove a knowing and voluntary waiver beyond a reasonable doubt in view of an affirmative misleading interrogation strategy to deliberately withhold information about the uncharged crime defendant was facing, noting "[w]e have little tolerance for the form of deception that occurred in this case"). So too, there should be little tolerance for affirmatively misleading an interrogee about the immigration consequences of giving a statement to police; any such misadvice would weigh heavily – and perhaps dispositively – in favor of suppressing an otherwise voluntary confession. But those are not these facts.

We further decline to expand Miranda warnings to include advising interrogees of the right to consult with an immigration attorney regarding the potential impact of their statement on their immigration status. Instead, we hold that the traditional totality-of-the-circumstances standard applies.

Applying the prescribed deference to the trial court's findings of fact, we affirm the court's application of the totality-of-the-circumstances standard and the admission of defendant's statement.

That standard requires that we "consider such factors as the defendant's 'age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved.'" Nyhammer, 197 N.J. at 402 (quoting Presha, 163 N.J. at 313). "The interrogee's 'previous encounters with the law' may also be a relevant factor." Sims, ___ N.J. at ___ (slip. op. at 32) (quoting Presha, 163 N.J. at 313). "In short, 'the root of the inquiry is whether a suspect's will has been overborne by police conduct.'" Id. ___ (slip op. at 32) (quoting Presha, 163 N.J. at 313).

The trial court found, and the record makes clear, that defendant was read each of his Miranda rights and waived those rights both verbally and in writing. Defendant was not threatened, subjected to mental exhaustion or physical stress, denied a request to leave, or treated in a manner that overcame

his will. At no time did defendant ask for the questioning to stop, invoke his right to counsel, or otherwise exercise his right to remain silent. Nor was the interrogation unduly lengthy or conducted in the middle of the night—the questioning lasted approximately one hour and took place during daytime.

Moreover, Detective Suarez did not engage in trickery, misrepresent the evidence, or make improper promises to defendant. Detective Suarez's response: "No, no" to defendant's comment about his undocumented status and Suarez's response that defendant's statement "has nothing to do with this" appear to be aimed at assuring defendant that he would not be questioned about his immigration status and the statement would not be provided to immigration authorities, rather than an attempt to mislead defendant into believing that inculpatory statements would not affect his ability to remain in the country.

As to defendant's concerns about the impact on his immigration status, we do not view Detective Suarez's responses to defendant's inquiry as willfully misleading. Detective Suarez truthfully stated that he was not going to ask any questions about defendant's status or how he entered the United States. There is no evidence that Detective Suarez reported that defendant was a suspect in a homicide or defendant's immigration status to federal immigration authorities.

We add the following comments. Immigration law is controlled by federal statutes and case law. We view the inclusion of immigration status questions on the standard plea forms as a tacit recognition that because many attorneys are not knowledgeable in immigration law, it may be prudent for a defendant to consult with an immigration attorney to receive accurate legal advice about the impact of a plea on the defendant's immigration status.

Law enforcement officers do not receive much, if any, training on substantive immigration law.[7] The absence of such training is perhaps best explained by the directive issued by the Attorney General that significantly limit the role of State, county, and local law enforcement agencies and officers in federal immigration enforcement. Off. of the Att'y Gen., Law Enforcement Directive No. 2018-6, Directive Strengthening Trust Between Law Enforcement and Immigrant Communities (rev. Sept. 2019). The Directive imposes numerous limitations on law enforcement agencies and officers

[7] Excepting for "identify[ing] the main functions of . . . Immigration and Customs Enforcement (ICE)" and "the manner in which local, county, and State law enforcement agencies and officers shall interact with federal immigration authorities" pursuant to Attorney General Directives, immigration law is not part of the required curriculum of the Basic Training Course for police officers and sheriff's officers in New Jersey promulgated by the New Jersey Police Training Commission. N.J. Police Training Comm'n, Basic Course for Police Officers §§ 2.2.3(I), 2.2.5 (rev. Jan. 1, 2016); see also N.J.S.A. 52:17B-66 to -77.18.

assisting federal immigration authorities in enforcing federal immigration law.[8] In short, law enforcement agencies and officers are not to assist federal immigration authorities unless required by law to do so.

Law enforcement officers cannot and should not be expected to accurately predict the immigration impact of a suspect's statement on potential charges that have not yet been filed. Immigration law is a technical field largely practiced by specialists in federal immigration courts. Given the inherent unpredictability of immigration enforcement decisions, especially in view of the shifting vicissitudes of federal immigration policy, a state or local law enforcement officer would act at his or her peril – and might needlessly endanger the admissibility of an otherwise knowing and voluntary confession – by offering a prediction or otherwise comment on whether an interrogee may be deported.

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[8] The Directive was aimed at "strengthening trust between law enforcement and immigrant communities[,]" and repealed and superseded Attorney General Directive 2007-3. The Directive prohibits state, county, and local enforcement agencies from stopping, questioning, searching, or detaining any individual "based solely on . . . actual or suspected citizenship or immigration status" or "actual or suspected violations of federal immigration law[.]" Law enforcement is prohibited from even inquiring "about the immigration status of any individual, unless doing so is . . . necessary to the ongoing investigation of an indictable offense by that individual[,] and relevant to the offense under investigation."

Law enforcement officers should not engage in speculation and potentially misadvise an interrogee. The only sure way to avoid giving incorrect information or advice is to give no advice at all concerning immigration status or consequences. The point simply is that the best way to safeguard an interrogee's constitutional right to remain silent is for police interrogators to remain silent as to federal immigration law and enforcement practices. To that end, if an interrogee asks about the immigration impact of their statement, the officer can merely state that they cannot give any legal advice, and reiterate that the interrogee has the right to consult with an attorney and to have an attorney present during questioning.

Defendant claims he did not knowingly and voluntarily waive his right to remain silent. The record reflects defendant's willingness to speak to the detective. For a substantial part of the questioning, defendant maintained that on the date of the homicide, he had worked a construction job with Raphael at an unknown location in Brooklyn, where he injured his hand raising a slab. He then described working on a house in New Jersey owned by a woman named Annabel, and stated he was permitted to stay in the basement without paying rent. He also described working in Newark, Jersey City, Patterson, and Elizabeth. He stated that Annabel recommended him to Valecia. He worked

for Valecia for a year. Defendant indicated the limited areas of the building that he worked on, which included the basement.

Defendant stated that the last time he had been to Valecia's house was about a month earlier. He claimed he kept "many tools there" but did not talk to her about picking his tools up. Defendant denied being in New Jersey the previous day, and instead claimed he was in Brooklyn. He described the clothes he was wearing when he left his house.

It was not until page forty-six of the seventy-two-page transcript that Suarez began to focus on the homicide and informed defendant what the surveillance footage captured. Suarez told defendant he knew he was lying. He asked defendant what he was doing in Newark the day before. At that point, Suarez informed defendant that the video footage captured him at Valecia's house. On page forty-seven through forty-eight of the transcript, defendant admitted he went there to pick up his tools, and wore the same clothes he left home in.

It was not until page forty-nine of the transcript that questioning focused on defendant's interaction with Jeffrey on the day of the homicide. Defendant gave the following version of the incident. Jeffrey made him angry by insulting him. Jeffrey threw a cone at him, and they began fist fighting, and went into the basement. Jeffrey lunged at him and cut him with a knife.

Defendant threw a can of paint at Jeffrey and "hit him with a hammer." Defendant then changed clothes and left.

The transcript of the statement provides amply supports the trial court's finding that defendant knowingly, voluntarily, and intelligently waived his right to remain silent and belies any claim that defendant's will was overborne. For much of the statement, defendant fabricated his activities and location on the day of the homicide. When told he was captured on video footage, he gave a version of the altercation portraying Jeffrey as the aggressor, to support a claim that he acted in self-defense. We discern no basis to overturn the trial court's determination that the totality of the circumstances warranted the denial of defendant's motion to suppress his statement.

III.

Defendant contends the State improperly shifted the burden of proof to him to produce Raphael as a witness to corroborate a central facet of his defense—that he went to the victim's residence to pick up the tools he needed for a job with Raphael in Brooklyn. We are unpersuaded.

In criminal cases, the State bears the burden of proving each element of the crime beyond a reasonable doubt. State v. Fierro, 438 N.J. Super. 517, 525-26 (App. Div. 2015). The defendant is not obligated to present any witnesses or to testify himself to establish his defense. Ibid. (citing In re

Winship, 397 U.S. 358, 364 (1970)); see also State v. Hill, 199 N.J. 545, 559 (2009) (explaining that a defendant may "choos[e] instead to rely on the presumption of innocence").

During defendant's cross-examination, the prosecutor inquired about defendant's statement to Detective Suarez that he did not have Raphael's phone number. However, analysis of defendant's cell phone revealed that he had Raphael's phone number and spoke to him on November 9, 2015. When the prosecutor asked defendant if he had Raphael's phone number, he replied in the affirmative. There were no further cell phone conversations with Raphael between November 9, 2015 and the day of the murder.

The State contends it elicited this testimony to demonstrate that defendant's statement to Detective Suarez and on direct that he went to the victim's home to retrieve his tools for his job with Raphael was fabricated. Defense counsel objected to only one question on cross-examination. We discern no abuse of discretion. The objection was properly overruled. This attack on defendant's credibility was permissible cross-examination that did not violate defendant's rights.

During summation, the prosecutor pointed out defendant's misstatements and argued that defendant "chose not to provide the number, because there was no job in Brooklyn. Raphael wasn't going to give the detectives what the

defendant wanted him to give them. The job was a fiction. There was no job. No discussion about any job. Nothing." Defendant did not object to the State's summation. We therefore review for plain error. State v. G.E.P., 243 N.J. 362, 389 (2020). We discern no error, much less plain error. The State's closing argument did not shift the burden of proof to defendant. The references to defendant's testimony during summation was permissible fair comment.

IV.

Defendant next argues that "irrelevant and highly prejudicial evidence" about his impecuniosity denied him due process and a fair trial. We disagree.

Prior to trial, the State moved to admit evidence of defendant's impecuniosity and prior thefts to provide the motive for the murder. The trial court found that the four-part test adopted in State v. Cofield, 127 N.J. 328, 338 (1992), was satisfied. The court permitted the evidence, noting that it went "hand in hand with his firing and his motive" and was "directly relevant to the issues in the case." The court further found that its probative value far outweighed any prejudice. The court agreed to provide a limiting instruction as to this evidence and did so.

We review a trial court's evidentiary rulings for abuse of discretion. State v. Green, 236 N.J. 71, 80-81 (2018). "Evidence is relevant under

N.J.R.E. 401 if it has 'a tendency in reason to prove or disprove any fact of consequence to the determination of the action.'" State v. Trinidad, 241 N.J. 425, 449 (2020). Relevant evidence is generally admissible, N.J.R.E. 402, but "may be excluded if its probative value is substantially outweighed by the risk of . . . [u]ndue prejudice, confusion of issues, or misleading the jury[,]" N.J.R.E. 403.

Generally, evidence of a defendant's financial state "should not be admitted nor commented on." State v. Martini, 131 N.J. 176, 266 (1993) (citing State v. Farr, 183 N.J. Super. 463, 468 (App. Div. 1982)). Such evidence is improper when used to "establish[] 'that defendant had no apparent means of income and hence was likely to commit a crime for dollar gain[.]'" Ibid. (citing State v. Mathis, 47 N.J. 455, 472 (1966); State v. Robinson, 139 N.J. Super. 58, 63 (App. Div. 1976)). However, when the defendant places his financial status at issue in the case (for example, claiming he had a job and therefore an alibi, as well as lack of a motive to rob a store), a prosecutor's questioning of defendant's employment and financial status is not improper. Mathis, 47 N.J. at 469. The facts in this case fit within that exception. Defendant asserted the alibi that he was working a job with Raphael in Brooklyn and was not in New Jersey on the day of the homicide. The evidence of defendant's impecuniosity was also relevant to the disputed issue of

defendant's motive for the murder of the person who ended his income stream. We discern no abuse of discretion.

N.J.R.E. 404(b)(1) prohibits the use of other crimes, wrongs, or acts "to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." Such evidence may be admitted as proof of motive and intent "when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(2).

In Cofield, the Court adopted a four-part test to determine the admissibility of other bad acts and crimes evidence against a criminal defendant. 127 N.J. at 338. To be admissible under Rule 404(b), the evidence: (1) "must be admissible as relevant to a material issue" which is genuinely disputed; (2) the other conduct "must be similar in kind" and must have occurred "reasonably close in time to offense charged"; (3) "the evidence of the other crime must be clear and convincing"; and (4) its probative value "must not be outweighed by its apparent prejudice" to the defendant. Ibid.; accord Green, 236 N.J. at 81-82. Trial courts must apply the test on a case-by-case basis. Green, 236 N.J. at 82 (citing Cofield, 127 N.J. at 338).

We concur with the trial court that the evidence of defendant's thefts and related impecuniosity satisfied the four-part Cofield test for admission in evidence. As we have noted, defendant's impecuniosity was relevant to

whether defendant had a motive for the murder of the person who ended his income stream. Valecia's testimony that defendant stole her son's jewelry was relevant to establish defendant's relationship to her family, the events that led to the breakdown of that relationship, and his firing. The alleged thefts were close in time to the murder. The court found the evidence was clear and convincing. Defendant does not dispute that Valecia accused him of stealing her son's jewelry and the accusation was the reason defendant's employment was terminated. Finally, the court found the probative value of the evidence outweighed the risk of unfair prejudice to the defendant.

Evidence of motive or intent "requires[s] a very strong showing of prejudice to justify exclusion." Green, 236 N.J. at 84 (quoting State v. Garrison, 228 N.J. 182, 197 (2017)). Defendant made no such showing. The evidence had significant probative value in establishing the relationship of the parties and the events that led up to the murder.

The jury was reminded several times that the State was not alleging that defendant stole Pablo's jewelry. The jury was instructed that there must be something more than a mere need of money to tie a defendant to a particular crime. Notably, defendant was found not guilty of robbery and theft.

In addition, there was the extensive other evidence of defendant's guilt. See Mathis, 47 N.J. at 471-72 (explaining "there must be something more than

poverty to tie a defendant into a criminal milieu"). Video surveillance footage showed defendant going to and from the victim's home on the day of the murder. Additional evidence included defendant's hand injury, defendant's DNA detected on multiple swabs from the victim's home, defendant's statement to Detective Suarez, and his trial testimony, where he admitted to causing the victim's death.

V.

In his supplemental brief, defendant claims the court erred by denying his motion for a mistrial based on prosecutorial misconduct during summation for describing the wounds on the victim's body as "incised," a term used in the autopsy report and referred to in Dr. Falzon's testimony. The prosecutor's comments during summation were not improper, did not render the trial unfair, or lead to an unjust result. The trial court properly denied a mistrial.

Defendant also argues that disclosure of his immigration status during the playback of his statement denied him a fair trial. We disagree. The court provided a thorough and detailed curative instruction to the jury to disregard the portions of the audio regarding defendant's legal status. When the judge directed any juror who would have any difficulty following this instruction to raise their hand, none did so. This fleeting, inadvertent reference to defendant's undocumented status did not deny him a fair trial.

VI.

Lastly, we address defendant's sentencing arguments. He contends that aggravating factor one should not have been applied and the court should have found mitigating factors three, four, and five, claiming "these factors find support in defendant's colorable claim of self-defense and passion/provocation manslaughter." Defendant argues that the fifty-year NERA term is manifestly excessive for a first-time offender who asserted a colorable claim of self-defense. He asserts that it was error to impose a sentence far greater than the thirty-year minimum for murder despite the finding that the aggravating and mitigating factors were in equipoise. He also argues the court undervalued mitigating factor seven, considering that defendant was forty years old and had never been previously arrested. Defendant will be nearly eighty years old when first eligible for parole.

Appellate courts review sentencing determinations deferentially and do not substitute their judgment for that of the sentencing court. State v. Fuentes, 217 N.J. 57, 70 (2014). A sentence will be affirmed 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."

> [Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

In imposing a sentence, the court must make an individualized assessment of the defendant based on the facts of the case and the aggravating and mitigating sentencing factors. State v. Jaffe, 220 N.J. 114, 121-22 (2014). To facilitate appellate review, the sentencing court must "state reasons for imposing such sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting [the] sentence . . . ." R. 3:21-4(h); accord Fuentes, 217 N.J. at 73; see also N.J.S.A. 2C:43-2(e) (requiring the sentencing court to state the "factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence."). Generally, an appellate court should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). However, deferential review of a sentence "presupposes and depends upon the proper application of sentencing considerations." State v. Melvin, 248 N.J. 321, 341 (2021) (alteration in original) (quoting Case, 220 N.J. at 65); accord Trinidad, 241 N.J. at 453.

"[A]ggravating factor one must be premised upon factors independent of the elements of the crime and firmly grounded in the record." Fuentes, 217 N.J. at 63; see also State v. O'Donnell, 117 N.J. 210, 217-18 (1989) (factor one applied in a manslaughter case because the defendant intentionally inflicted

pain and suffering in addition to causing death); State v. Locane, 454 N.J. Super. 98, 123-24 (App. Div. 2018) (factor one applied to a vehicular homicide where the defendant's reckless driving went beyond that required to prove the crime); State v. Soto, 340 N.J. Super. 47, 71-72 (App. Div. 2001) (factor one applied in an aggravated manslaughter and felony murder case were the defendant brutally and viciously attacked the victim); State v. Mara, 253 N.J. Super. 204, 214 (App. Div. 1992) (in an aggravated assault case, factor one applied based on the victim's serious and excessive injuries). Crimes committed with extreme brutality are considered heinous and depraved. Fuentes, 217 N.J. at 75.

Competent, credible evidence supports the application of aggravating factor one. Using multiple weapons, defendant inflicted numerous wounds on the victim, chased the victim when he tried to escape, and fatally struck him in the head with such force that the hammer penetrated his skull. As was found by the court, this "absolutely horrific" and "brutal" homicide "was committed in an especially cruel[] and[] depraved manner[.]"

The record also supports the application of aggravating factors nine and twelve and mitigating factors seven, eight, and eleven. Aggravating factor twelve applied as it is undisputed as the victim was at least sixty years old.

Regarding aggravating factor nine, we recognize this was defendant's first crime. Nevertheless, there is a strong need to deter others from committing murder, the most serious crime. "The need for public safety and deterrence increase proportionally with the degree of the offense." State v. Carey, 168 N.J. 413, 426 (2001) (citing State v. Megargel, 143 N.J. 484, 500 (1996)). In addition, aggravating factor nine may be applied to deter the defendant from future violations of the law even though he has no prior criminal convictions. See Fuentes, 217 N.J. at 80.

The record likewise supports the rejection of mitigating factors three, four, and five. The same credible evidence that supports aggravating factor one completely undermines defendant's argument that these mitigating factors applied. Moreover, the jury found defendant guilty of murder and rejected the lesser-included offenses of aggravated manslaughter, voluntary passion/provocation manslaughter, and reckless manslaughter, and defendant's claim that he acted in self-defense.

The court found the aggravating and mitigating factors were in equipoise. We discern no mistaken exercise of discretion in the court's weighing of the aggravating and mitigating factors.

The sentencing range for knowing or purposeful murder is thirty years to life imprisonment, subject to a minimum thirty-year period of parole

ineligibility, N.J.S.A. 2C:11-3(b)(1), or an eighty-five percent period of parole ineligibility, N.J.S.A. 2C:43-7.2(a), (d), whichever is greater, N.J.S.A. 2C:43-7.2(b).

"Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors." Case, 220 N.J. at 64 (citing Fuentes, 217 N.J. at 72). "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." Id. at 64-65 (alteration in original) (quoting State v. Natale, 184 N.J. 458, 488 (2005)). "[I]f the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence." Fuentes, 217 N.J. at 73 (quoting Natale, 184 N.J. at 488). The court must also "be mindful of the real-time consequences of NERA" and its impact in "the fashioning of an appropriate sentence." State v. Marinez, 370 N.J. Super. 49, 58 (App. Div. 2004).

Defendant's aggregate fifty-year NERA term is slightly lower than midpoint in the sentencing range for murder as to both the length of the term and the resulting period of parole ineligibility.[9] Because the properly weighted

[9] We note that "for the purpose of calculating the minimum term of parole ineligibility" under NERA, "a sentence of life imprisonment shall be deemed

aggravating and mitigating factors were in equipoise, a midpoint sentence was appropriate. We discern no basis to overturn it. The sentence is not manifestly excessive or unduly punitive and does not shock the judicial conscience.

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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to be 75 years." N.J.S.A. 2C:43-7.2(b). The midpoint between 30 and 75 years is 52.5 years. Using that scale, a 50-year NERA term is slightly lower than midpoint. Focusing on the real-time consequences of the sentence, the 42.5-year period of parole ineligibility is significantly lower than the 46.875-year midpoint between the 30-year minimum period of parole ineligibility, N.J.S.A. 2C:11-3(b)(1), and the 63.75-year maximum period of parole ineligibility, N.J.S.A. 2C:43-7.2(b), for murder.