SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5468-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAIR RAMIREZ,

Defendant-Appellant.

Submitted March 30, 2022 – Decided May 31, 2022

Before Judges Hoffman, Whipple and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 17-02-0140.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Designated Counsel, on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Amanda G. Schwartz, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Jair Ramirez of second-degree sexual assault, third-degree endangering the welfare of a child, second-degree luring, and fourth-degree lewdness. The victim was a ten-year-old girl. Following merger of the lewdness count, he was sentenced to an aggregate twenty-year prison term, with ten of those years subject to the eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, with two terms running consecutively. Defendant appeals from his conviction and sentence. We affirm in part, reverse in part, and remand for resentencing.

We take the following facts from the record. On September 30, 2016, A.G.[1] was walking to school on Orchard Street in Elizabeth. She walked to school every day, first towards Orchard Street and then towards Magie Avenue and Baker Place, where her school was located. When A.G. reached the corner of Orchard and Chilton Street, she "saw a suspicious man" in an alleyway. She thought he was suspicious because he was wearing all black clothing and had his hood up. A.G. started walking fast to get away from him because she thought she "would just like get over it, and I wouldn't like, see him again." She was scared and nervous because she thought "he was gonna do something to me."

[1] We refer to the victim by initials to protect her identity and privacy. R. 1:38-3(c)(12).

A.G. believed that the man "sped up when he saw her to catch up with [her]." A.G. described the man as dark skinned, with bushy eyebrows and a wide nose. She recognized that he spoke English with an accent but could not place what kind of accent it was.

When the man got closer, he grabbed her from behind and started pushing her towards the alleyway. A.G. stated he was "forcing me to go where he wants me to go." She tried to escape from the man, and he was saying: "Come on let's go over there." A.G. started yelling when she saw a woman, Barbara Fernandez, come outside. A.G. looked at Fernandez and "knew" Fernandez was going to "save" her. Fernandez screamed: "Do you know her?" at the man and A.G. replied: "No." When Fernandez called out to A.G., the man loosened his grip on her, and she was able to run across the street to Fernandez. While she was with Fernandez, the man ran away. One of Fernandez's neighbors, Rosendo Zuniga, put roller skates on to chase the man down but was unsuccessful.

Fernandez testified that she lived in an apartment on Orchard across the street from where A.G. was that morning. The previous night she parked illegally, so she was looking out the window to see if there was a free parking spot for her car. Fernandez saw a spot and decided to go outside. While she was walking down the stairs she saw a man across the street, dressed in all black,

masturbating between two buildings. She saw a "small girl," A.G., and observed the man grab her and take her between the two buildings. She came down the steps and started yelling "Do you know her?" and "Come here" loudly so that neighbors would hear and help her. Fernandez was worried for A.G. and believed that the man might kill her if he had sex with her; he was strongly holding onto A.G., his pants were still open while he was grabbing her, and his genitals were exposed. After Fernandez yelled, A.G. was able to free herself and ran to her and gave her a hug. A.G. was shaking and crying. The man continued to ask A.G. to go over to him while she was with Fernandez, while pointing at his crotch area.

Fernandez called the police and Elizabeth Police Department (EPD) Detective Michael Gonzalez was placed in charge of the investigation. He retrieved video footage from three locations on Orchard Street. The videos revealed the man A.G. described in the area, dressed in black clothing. Through investigation, Gonzalez learned that EPD Detective Barrios suspected defendant in a case she was investigating, and he matched A.G.'s description of him. Gonzalez also learned that defendant wore a GPS monitoring device and obtained that data for September 30.

Defendant had an outstanding arrest warrant issued in Detective Barros's case and was arrested the same day. At the time of his arrest, defendant was wearing a black hoodie and an ankle bracelet. Based on the surveillance footage and information gleaned at the time of arrest, Gonzalez believed that defendant was the man who attempted to sexually assault A.G. When Gonzalez interviewed defendant that day, there were no pending charges or arrest warrants against defendant in this case; he was only charged in the other case.

EPD Detectives Gonzalez, Carratela, and Vallidares took defendant's statement and interrogated him on the day of the incident. The arrest related to the other investigation that was being conducted by Detective Barrios. Defendant remained an uncharged suspect in this matter. No criminal complaints had been filed and no warrants had been issued in this case.

Detective Gonzalez read defendant his Miranda[2] rights in Spanish after asking defendant whether he would be more comfortable proceeding in English or Spanish. Defendant read the Miranda form as he was advised of his rights. Defendant stated that he understood each of his Miranda rights. Each time that defendant asked whether he would be allowed to leave after the questioning,

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

Gonzalez responded that he could not tell him and that he was not making any promises to him about release or the results of the interview.

Gonzalez told defendant that if he asked for a lawyer, "we cannot speak, we cannot ask anything." Defendant replied, "about the lawyer, how long does it take?" Gonzalez responded: "They can apply for you, for free but that is what I am saying. If you do not want, you want a lawyer . . . we cannot talk." Defendant was informed that if he could not afford an attorney, he could apply for free representation. Defendant signed the Miranda form indicating that he understood his rights and wished to waive them in speaking to the detectives.

The detectives mentioned "assault" only once, and not sexual assault. They told defendant that a "little girl got scared. Nothing more, nothing more, that she got scared." They also said, "I am not saying that something happened. [I]t could be that there was a conversation and the girl got scared." Gonzalez added, "I am not talking about a crime[.]" Defendant continued to say he did not remember being present on Orchard Street that morning. He claimed that he was walking without paying attention to his surroundings and maintained that he did not touch anyone. He confirmed that he was wearing a black hoodie.

Multiple times throughout the interview defendant inquired about a lawyer that he had who was connected to another case. He said, "there is my

lawyer to talk about those cases" and "my lawyer told me that if I have any questions about a case, because the cases were paid for, [] speak with him[.]" He could not remember the lawyer's name. When the detectives suggested a polygraph test, defendant indicated he wanted his lawyer to be there for it.

A grand jury returned an indictment charging defendant with second-degree sexual assault, N.J.S.A. 14-2(b) (count one); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count two); second-degree luring, N.J.S.A. 2C:13-6(a) (count three); and fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1) (count four).

The State moved to admit defendant's statement to police. On January 10, 2019, the trial court issued an order and oral decision granting the motion. The judge found defendant's waiver of his Miranda rights and his statements to the detectives were made knowingly, voluntarily, and intelligently. The judge reasoned:

> Detective Gonzalez repeated twice that no promises had been made and that this interview was conducted for purposes of investigating an alleged incident from earlier that morning, September 30, 2016.
>
> Detective Gonzalez carefully, []patiently and fully addressed any of defendant's questions or colloquy specifically as to how agreeing to speak at the interview would not mean he would go free and that he

had the right to apply for an appointed public defender lawyer if he could not afford a lawyer.

Prior to beginning any questioning of defendant Detective Gonzalez advised him of his Miranda rights, both in English and Spanish. Defendant verbally acknowledged his right to remain silent and as well responded to each of the five questions on the Miranda form, both verbally, and as indicated in the video, on the Miranda form itself, and as testified to by Detective Gonzalez, at the conclusion of having read and the signature having been provided, Detective Gonzalez gave a credible and what the court finds as accurate recounting. Like the play-by-play of a sports game he indicated all questions had been answered, all questions had been initialed, and that the signature had been actually witnessed by him. And he talked about in further discussions, as indicated on the record, what he said when he made the acknowledgment of that signature in his presence.

Here, neither defendant's words nor his actions could have reasonably conveyed an intention to remain silent. Defendant's words did not reference silence or any unwillingness to speak with the detectives. Similar, defendant's actions and body language did not suggest any unwillingness to speak with detectives. At all times defendant's answers to questions were responsive always providing information that made sense as being consistent and/or logically in keeping with the focus, point or words of the question.

Defendant gave an unhesitating, unambiguous, unequivocal waive[r] of his Miranda rights. Defendant then proceeded to speak openly with Detective Gonzalez and then subsequently his colleague in light of the warnings immediately and without equivocation or hesitation. Clearly, defendant's words and conduct

> are not the sort that could have conveyed his intention to invoke his right to remain silent.

The judge found Detective Gonzalez was "a highly credible witness." Considering the circumstances, the judge found "beyond any reasonable doubt that defendant knowingly, voluntarily and intelligently waived his privilege."

Defendant is an undocumented noncitizen. At the time of the incident, defendant was already subject to an order for removal from the United States due to other pending criminal charges. Paul Silva, a federal agent with Immigration and Customs Enforcement (ICE), testified at the motion hearing that defendant was released on an order of supervision and required to meet with ICE every three months. Defendant was not allowed to travel outside of a designated area without authorization from ICE. One of the conditions of his release under ICE's Intensive Supervision and Appearance Program (ISAP) was wearing a GPS monitoring device contained in an ankle bracelet.

On September 30, 2016, Silva was contacted in writing by an EPD detective asking for defendant's GPS coordinates from the day of the incident. Silva obtained the coordinates from BI Geo Group Company, the contractor that collects the GPS data, and provided the data to the detective.

Defendant moved to suppress the GPS data that ICE provided to the EPD. Defendant argued that obtaining the GPS evidence amounted to a warrantless

search under the Fourth Amendment, and that defendant did not consent to ICE giving the information to the EPD. The State argued that the silver platter doctrine would apply, or in the alternative, the inevitable discovery doctrine applied.

On January 10, 2019, the trial court issued an order and oral decision denying the motion to suppress the GPS evidence.[3] The judge found Silva's testimony to be credible. The judge explained:

> Silva testified that pursuant to 5 [U.S.C. §] 552[,] ICE can provide information usually protected under privacy act for law enforcement officials.
>
> . . . .
>
> Together the statutory, judicial and legislative history heavily suggests and supports that ICE did not violate the U.S. Constitution by placing an ankle monitor on defendant and observing his whereabouts.
>
> For these reasons the court holds that the GPS evidence from defendant's ankle monitor which was later provided to the [EPD] would be admissible subject to further arguments raised by the defendant . . . including chain of custody or authentication that may still be unaddressed . . . .
>
> . . . .

[3] At trial, the jury was told that defendant was wearing a monitoring device, but not that it related to ICE.

> Here, defendant's GPS location information was obtained by federal agents from ICE who were acting consistently with federal standards and procedures. ICE's authority to seize defendant's GPS information is uncontroverted in this record and as constrained by jurisdictional limitations. Once ICE legally seizes information ICE was not barred from inter-jurisdictionally transferring this information to the [EPD]. The [EPD] was unaware of defendant's GPS ankle monitor until defendant waived his rights and provided a sworn video statement to [the EPD].
>
> At that time the [EPD] contacted ICE and asked for defendant's location data. [EPD] and ICE acted independently with respect to the seizure of defendant's location data. ICE automatically seized the defendant's GPS data by virtue of having the GPS ankle monitor on the defendant. [EPD], after the incident occurred and after the GPS ankle monitor had captured defendant's location information, requested this evidence from ICE.
>
> Further, even if the [EPD] requested this evidence from ICE the record [uncontrovertibly] demonstrates that ICE "acted independently and without the cooperation or assistance of New Jersey state officers with respect to the seizure of such evidence." See State v. Mollica, 114 N.J. [329, 358 (1989)].

The case proceeded to trial. Randy Molineaux from BI Geo Group testified at trial as an expert in the field of GPS technology. His testimony established that the GPS device was properly functioning on September 30, 2016. The device recorded defendant's location and speed in real-time on that

date. He testified to a reasonable degree of scientific certainty that on September 30, 2016, defendant was in the area where A.G. was at the time of the offense.

The jury convicted defendant on all counts. Defendant was sentenced on May 22, 2019. The record reflects that defendant, who was then forty-three years old, had several prior adult convictions and no known juvenile record. Defendant had two prior indictable convictions in New Jersey, two criminal convictions in Connecticut, and an ordinance violation. One of his prior convictions was for lewdness. He had served two terms of probation and two prison terms. Defendant was born in Venezuela and moved to the United States at age seven.

As to each of the counts, the judge found aggravating factors three (risk of reoffending), six (extent of criminal record and seriousness of convicted offenses), and nine (need to deter defendant and others from violating the law). N.J.S.A. 2C:44-1(a)(3), (6), (9). The judge gave heavy weight to aggravating factor two. Regarding aggravating factor three, the judge noted defendant knew he was being monitored by ICE and continued to commit crimes. The judge found aggravating factor three "overwhelmingly" present given the "indisputable risk" that defendant would "commit[] another offense." As to aggravating factor six, the judge noted defendant's prior criminal acts and gave

this factor less weight than aggravating factors two and three. Regarding aggravating factor nine, the judge noted these crimes took place while the young victim was walking to school in broad daylight. The judge commented that children need to be able to walk freely on the street, and no mother should have to worry about their young child being assaulted. The judge gave aggravating factor nine substantial weight.

The judge rejected mitigating factor eleven (imprisonment would entail excessive hardship), N.J.S.A. 2C:44-1(b)(11), noting defendant's daughter did not live with defendant and there was no evidence she was his dependent. The judge also rejected mitigating factor four (substantial grounds tended to excuse or justify defendant's conduct), noting that the allegation that defendant was sexually abused as a child did not justify his conduct in this case. The judge found no mitigating factors and that the aggravating factors "substantially, significantly outweigh[ed] the non-existing mitigating factors."

On the second-degree sexual assault (count one), defendant received a ten-year NERA term. On this count only, the judge also found aggravating factor two (the gravity and seriousness of the harm inflicted on victim), N.J.S.A. 2C:44-1(b)(2), and gave it heavy weight.

The judge declined to merge the third-degree endangering (count two) and the second-degree luring (count three) into count one. The judge explained that the sexual assault and endangering were comprised of different elements and count one did not include "ever touching the child, ever moving the child, ever physically pulling and further causing the child to move physically and to incur the risk of possibly having additional harm, additional fear, additional psychological or bodily damage injury." As to count three, he explained that the sexual assault was over before the luring began, and that they were separate and distinct acts. Defendant received a concurrent five-year term on count two and a consecutive ten-year term on count three.

Defendant was subjected to the reporting and requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23, and parole supervision for life, N.J.S.A. 2C:43-6.4. The fourth-degree lewdness (count four) was merged with count two.

This appeal followed. Defendant argues:

> POINT I
>
> THE TRIAL JUDGE ERRED IN ADMITTING DEFENDANT'S INTERROGATION.
>
> A. Defendant Invoked his Right to Counsel.
>
> B. Defendant was Not Advised of the Charges Against Him Before He Made His Statement.

POINT II

THE TRIAL JUDGE ERRED IN ADMITTING GPS LOCATION EVIDENCE.

POINT III

THE SENTENCING JUDGE ERRED IN FAILING TO MERGE COUNTS AND IN IMPOSING CONSECUTIVE SENTENCES.

I.

"When faced with a trial court's admission of police-obtained statements, an appellate court should engage in a 'searching and critical' review of the record to ensure protection of a defendant's constitutional rights." State v. Hreha, 217 N.J. 368, 381-82 (2014) (citing State v. Pickles, 46 N.J. 542, 577 (1966)). This does not involve "'an independent assessment of the evidence as if [the appellate court] were the court of first instance.'" Id. at 382 (quoting State v. Locurto, 157 N.J. 463, 471 (1999)).

"[A] finding of compliance with Miranda and voluntariness turn[s] on 'factual and credibility determinations[.]'" State v. Faucette, 439 N.J. Super. 241, 255 (App. Div. 2015) (alterations in original) (quoting State v. W.B., 205 N.J. 588, 603 n.4 (2011)). An appellate court determines "whether there is 'sufficient credible evidence in the record to sustain the trial judge's findings and conclusions.'" Ibid. (quoting W.B., 205 N.J. at 603). If so, the court does not

disturb the result. Ibid. We defer to the trial judge's factual findings that are "substantially influenced by his [or her] opportunity to hear and see the witnesses and [develop a] feel of the case, which a reviewing court cannot enjoy." Ibid. (alterations in original) (quoting State v. Davila, 203 N.J. 97, 109-10 (2010); State v. Johnson, 42 N.J. 146, 161 (1964)). "[A] trial court's factual findings should not be overturned merely because an appellate court disagrees with the inferences drawn and the evidence accepted by the trial court or because it would have reached a different conclusion." State v. S.S., 229 N.J. 360, 374 (2017).

The State has the burden of proving beyond a reasonable doubt that defendant's confession was voluntary and that police did not overpower defendant's will. Hreha, 217 N.J. at 383. Appellate courts should consider the totality of circumstances to determine whether a confession was voluntary, such as defendant's age, education, intelligence, the length of detention, and whether physical punishment or mental exhaustion were involved. Ibid. (quoting State v. Galloway, 133 N.J. 631, 654 (1993)). During interrogation, a police officer may "make misrepresentations of fact or suggest that evidence in the form of reports or witnesses exist that will implicate a suspect." State v. Patton, 362 N.J. Super. 16, 32 (App. Div. 2003). "[M]isrepresentations alone are usually

insufficient to justify a determination of involuntariness or lack of knowledge." State v. Pillar, 359 N.J. Super. 249, 269 (App. Div. 2003) (quoting State v. Cooper, 151 N.J. 326, 355 (1997)). However, promises of leniency may be unduly coercive when they are so enticing that they overbear defendant's will. Hreha, 217 N.J. at 383-84.

Where an "individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 473-74. Similarly, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Id. at 474. "The United States Supreme Court has drawn a strict line to identify what will qualify as a request for counsel." State v. Alston, 204 N.J. 614, 620 (2011). Under the federal rule, officers must stop questioning a suspect only when the suspect's request for counsel is "unambiguous or unequivocal." Davis v. United States, 512 U.S. 452, 461-62 (1994). However, if a suspect makes an ambiguous or equivocal statement regarding the right to counsel, officers are under no obligation to stop questioning him. Id. at 462. In State v. Reed, our Supreme Court held that "a suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel." 133 N.J. 237, 253 (1993). A suspect,

therefore, does not need to express their desire to terminate an interrogation "with the utmost of legal precision." State v. Bey, 112 N.J. 45, 65 (1988).

In situations where "a suspect's statement 'arguably' amount[s] to an assertion of Miranda rights," conducting a follow-up inquiry is the only way to ensure that a suspect's waiver of their right was knowing and voluntary. Alston, 204 N.J. at 621-22. The Court explained that where a suspect's "statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed." Id. at 624. In situations where clarification is required, substantive questioning should resume only after "the suspect makes clear that he is not invoking his Miranda rights . . . ." State v. Johnson, 120 N.J. 263, 283 (1990) (quoting State v. Wright, 97 N.J. 113, 120 n.4 (1984)). In Alston, the Court ultimately concluded that a suspect's statement: "Should I not have a lawyer in here with me?" was a request for advice on seeking counsel rather than an "assertion of a right, ambiguous or otherwise." 204 N.J. at 618, 625-26.

Defendant argues that his interrogation was inadmissible because the police ignored him when he invoked his right to an attorney. We disagree. Here, like in Alston, defendant was merely questioning the officers about the availability of a lawyer, which Gonzalez answered appropriately every time.

Defendant's statements indicated that he had an attorney that represented him in another case, but he could not remember the attorney's name. Gonzalez told defendant that he could apply for a lawyer if he could not afford one, and told him if he wanted one then they would have to stop talking.

Gonzalez reaffirmed defendant's waiver of Miranda rights by reading the form out loud and asking defendant to sign it. Similarly, when defendant asked if he would be let go if he spoke to the detectives, Gonzalez told him he could not make that promise. When the detectives suggested a polygraph test, defendant indicated that he wanted a lawyer present for that. One of the detectives said: "Give me the name of the lawyer, let me call him now." Defendant responded "No, because . . . you guys have the papers."

This was the only time defendant indicated he wanted a lawyer to be present. It was clearly limited to counsel being present for a polygraph test, which was not administered. Defendant did not otherwise indicate he wanted counsel present or that he wanted to speak to an attorney before answering any more questions.

After reviewing the submissions and considering the testimony, the judge made factual findings and credibility determinations. The judge found that defendant understood his Miranda rights as read to him aloud in Spanish, and

verbally answered questions indicating his understanding of those rights. He found that Gonzalez told defendant that he was not promising him anything. The judge found beyond a reasonable doubt that defendant voluntarily waived his right to remain silent and to have counsel present during the interview.

Sufficient, credible evidence in the record supports the finding that defendant's waiver of his Miranda rights was knowing, intelligent, and voluntary and that he did not exercise his right to remain silent, to have an attorney present, or to stop the questioning. We discern no basis to overturn the denial of defendant's motion to suppress his statement to police.

II.

We next address the admission in evidence of the GPS location evidence. Defendant contends that his agreement to wear the GPS monitoring device as a prehearing condition of his release did not waive his Fourth Amendment rights as to the use of the GPS data in a criminal investigation and state court prosecution. Defendant maintains that the transfer of GPS coordinates from ICE to EPD was a violation of his right to privacy. We are unpersuaded.

Under federal law, ICE has the authority to place noncitizens subject to an order of removal under electronic location monitoring via GPS. Disclosure of the GPS data is governed by 5 U.S.C. § 552a(b)(7), which provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought[.]

In Mollica, the Court addressed the constitutionality of interagency cooperation between federal and state law enforcement agencies involving the transfer of evidence gained by federal officers through search and seizure. 114 N.J. at 334-35. "With regard to law-enforcement activities, a state constitution ordinarily governs only the conduct of the state's own agents or others acting under color of state law." Id. at 345. The Court determined that for purposes of analysis, federal agents are treated as officers from a foreign jurisdiction. Id. at 351. The Court explained that our state constitution is not violated when federal agents obtain evidence through "exercising federal authority in a manner that was in conformity with federal standards and consistent with federal procedures." Id. at 354. The Court elaborated:

> We endorse the principle that federal officers acting lawfully and in conformity to federal authority are unconstrained by the State Constitution, and may turn over to state law enforcement officers incriminating evidence, the seizure of which would have violated state constitutional standards. This holding, however, is subject to a vital, significant condition. When such evidence is sought to be used in the state, it is essential that the federal action deemed lawful under federal standards not be alloyed by any state action or responsibility. We are required therefore to determine whether in any legally significant degree the federal action can or should be considered state action.
>
> . . . .
>
> An important aspect of this determination is whether for constitutional purposes the federal agent's actions can be said to acting under the "color of state law." The assessment of the agency issue necessarily requires an examination of the entire relationship between the two sets of government actors no matter how obvious or obscure, plain or subtle, brief or prolonged their interactions may be. The reasons and the motives for making any search must be examined as well as the actions taken by the respective officers and the process used to find, select, and seize the evidence.
>
> [Id. at 355-56.]

Considering these principles, the Court held:

> [O]ur state-constitutional protections against unreasonable searches and seizures do not govern the legality of the actions of federal officers with respect to their search and seizure of evidence, provided that their conduct is pursuant to federal authority and consistent

> with applicable federal law, and provided further they have acted independently and without the cooperation or assistance of our own state officers with respect to the seizure of such evidence.
>
> [Id. at 358.]

Applying those principles to the uncontroverted facts in this matter, we hold that the trial court correctly denied suppression of the GPS evidence. Defendant's right to be free from unreasonable search and seizure was not violated.

Defendant does not dispute that pursuant to 8 U.S.C. § 1226 based on his removal order, ICE had the authority to monitor defendant's location through a GPS monitoring device installed in an ankle bracelet that he wore, to determine compliance with ISAP requirements restricting his travel outside of a designated area without prior approval. The use of the GPS monitoring device, which was already in place and operational, was wholly unconnected to any EPD actions.

In accordance with statutory requirements, EPD made a written request to ICE for GPS data showing defendant's locations on September 30, 2016. Silva testified that under 5 U.S.C. § 552(b)(7), "the Federal Government is authorized to provide law enforcement with information protested under the Privacy Act for the use of law enforcement purposes." The judge found Silva's testimony to be credible and accurate. The judge also found that "defendant's GPS location

information was obtained by federal agents from ICE who were acting consistently with federal standards and procedures."

The judge concluded that ICE "acted independently with respect to the seizure of defendant's location data." It did so "without the cooperation or assistance of New Jersey state officers with respect to the seizure of such evidence." ICE had already obtained the GPS location data that was shared with EPD. The GPS data was recorded and stored in real-time, independently and without the assistance of EPD officers. The record demonstrates that the GPS data was collected and stored regardless of EPD's investigation. Put simply, ICE and EPD did not work together to detect and seize this evidence. ICE was already tracking defendant and collecting the GPS data when the crimes were committed. The EPD merely requested the already recorded location data.

Under these circumstances, ICE was not a state actor, nor acting under the color of state law in obtaining the GPS data, and as a federal agency, was not subject to the New Jersey State Constitution. The EPD's warrantless acquisition of the GPS data was not an unconstitutional search and seizure. Therefore, the GPS data was not fruit of the poisonous tree. Consequently, upon proper authentication and finding of scientific reliability, the trial court correctly ruled that under the silver platter doctrine, the GPS evidence was admissible at trial.

III.

For the first time on appeal, defendant argues that disclosure of the GPS data to EPD violated his right against self-incrimination under the Fifth Amendment to the United States Constitution.[4] Rather than declining to consider this issue because it was "not properly presented to the trial court[,]" State v. Witt, 223 N.J. 409, 419 (2015), for sake of completeness, we briefly address defendant's argument, which lacks sufficient merit to warrant extended discussion. R. 2:11-3(e)(2).

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege against self-incrimination is circumscribed. The "right against

[4] Defendant does not argue that the acquisition and use of the GPS data at trial violated his right to privacy under the Fifth Amendment or Article 1, paragraph 1 of the New Jersey Constitution. We note that the GPS data used at trial did not "capture[] a movement of [defendant] into a secluded location that was not in public view . . . ." Villanova v. Innovative Investigations, Inc., 420 N.J. Super. 353, 361 (App. Div. 2011). Just as "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another[,]" United States v. Knotts, 460 U.S. 276, 281 (1983), a person walking on a public highway or sidewalk "is not then in seclusion, and his appearance is public and open to the public eye[,]" Restatement (Second) of Torts § 652B cmt. c (Am. Law Inst. 1977). Therefore, there was no "wrongful intrusion into his private life" that violated defendant's right of privacy. Knotts, 460 U.S. at 360 (quoting Burnett v. Cnty. of Bergen, 402 N.J. Super. 319, 332 (App. Div. 2008)).

self-incrimination 'applies only when the accused is compelled to make a testimonial communication that is incriminating.'" State v. Andrews, 243 N.J. 447, 465 (2020) (quoting Fisher v. United States, 425 U.S. 391, 408 (1976)). Accordingly, compelling an individual "'to disclose the contents of his own mind' . . . implicates the Fifth Amendment privilege against self-incrimination." Id. at 467 (quoting Doe v. United States, 487 U.S. 201, 211 (1988)). However, "actions that do not require an individual 'to disclose any knowledge he might have' or 'to speak his guilt' are nontestimonial and therefore not protected by the Fifth Amendment." Id. at 465-66 (quoting Doe, 487 U.S. at 211). Thus, "a court order requiring a criminal defendant to disclose the passcodes to his passcode-protected cellphones" does not violate the privilege against self-incrimination. Id. at 456.

Defendant did not personally disclose any GPS data to EPD. The GPS data was lawfully obtained electronically by a GPS device worn by defendant to monitor his location as one of the conditions of his release under ISAP. The device also records speed. Defendant did not own the device. It was owned and monitored by BI Geo Group pursuant to its contract with ICE. The data is stored in real-time on proprietary software. Once the data is stored, BI Geo Group can retrieve the location data, including defendant's location at specific times and

dates. The monitoring device did not record defendant's statements or videotape his actions. The GPS data was provided to EPD by ICE. Defendant's Fifth Amendment right against self-incrimination was not violated when the GPS data that had already been lawfully collected was shared with EPD and used at trial to show his location when the crimes occurred.

IV.

Finally, we address defendant's sentence. Our review of a sentence is limited and subject to an abuse of discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). "[A]ppellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Therefore, we must affirm a sentence "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). 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) (quoting Case, 220 N.J. at 65); accord State v. Trinidad, 241 N.J. 425, 453 (2020).

Defendant claims his sentence is excessive. Defendant also argues that count three should have been merged into count one. He argues alternatively that the judge erred by running counts one and three consecutively. He further claims that certain aggravating factors were double counted and failed to consider the overall fairness of the aggregate sentence.

The State acknowledges that the third-degree endangering count (count three) should have been merged into the second-degree sexual assault count (count one). We agree. We reverse defendant's sentence on count two and remand, directing the trial court to issue a corrected judgment merging count two into count one.

We reject defendant's argument that count three should be merged into count one. "[A] court considering whether to merge convictions should focus on elements of the crime, the Legislature's intent in enacting the statutes, and the specific facts of each case." State v. Dillihay, 127 N.J. 42, 47 (1992). In examining merger, the court may consider factors such as:

> the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of

> a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.
>
> [State v. Allison, 208 N.J. Super. 9, 23-24 (App. Div. 1985).]

The elements of sexual assault and luring are different. So too was the conduct of the defendant proving each of those elements. In addition, the conduct satisfying the elements occurred at different times during the incident. We discern no factual or legal basis to merge count three into count one.

We also reject defendant's argument that the judge double counted aggravating factors and erred by not finding mitigating factors four and eleven. The record amply supports the finding of aggravating factors two, three, six, and nine and the rejection of mitigating factors four and six. The record also supports the finding that the aggravating factors substantially outweigh the nonexistent mitigating factors. We further find no impermissible double counting of aggravating factors.

The State acknowledges that a remand is necessary for the trial court to address the fairness of the aggregate sentence imposed. We again agree. The trial court imposed maximum ten-year terms on counts one and three. It also ran count three consecutive to count one, yielding an aggregate twenty-year term, with the first ten years subject to an eighty-five percent period of parole

ineligibility under NERA. This requires defendant to serve approximately nine and one-half years before being eligible for parole.

"A sentencing court's decision between imposing consecutive or concurrent sentences on a defendant for multiple offenses has the potential to drastically alter aggregate sentencing length." State v. Torres, 246 N.J. 246, 251 (2021). In Torres, the court "instruct[ed] that a sentencing court's decision whether to impose consecutive sentences should retain focus on 'the fairness of the overall sentence.'" Id. at 270 (quoting State v. Miller, 108 N.J. 112, 122 (1987)). The Court held that "an explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses . . . is essential to a proper Yarbough[5] sentencing assessment." Id. at 268; accord State v. Cuff, 239 N.J. 321, 352 (2019). A sentencing court must also "be mindful of the real-time consequences of NERA" and its impact on "the fashioning of an appropriate sentence." State v. Marinez, 370 N.J. Super. 49, 58 (App. Div. 2004). The trial judge did not discuss or make findings regarding the real-time consequences of the NERA term coupled with running counts one and three consecutively. Nor did he discuss or make findings of the overall fairness of the aggregate sentence imposed.

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

We recognize that trial judges have discretion to determine if a prison term should be concurrent or consecutive. Cuff, 239 N.J. at 350. We further recognize that "[w]hether 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 State v. Fuentes, 217 N.J. 57, 72 (2014)). "[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)).

Here, the lack of an assessment of the real-time consequences and overall fairness of the sentence constrains us to vacate defendant's sentence on counts one and three and remand for resentencing of those counts. See Torres, 246 N.J. at 270. On remand, the judge shall fully express his findings and reasoning regarding the length of the terms, the basis for a consecutive term, and the real-time consequences and overall fairness of the aggregate sentence imposed.

In sum, we affirm the order denying defendant's motion to suppress the GPS data provided to EPD by ICE and the order granting the State's motion to admit defendant's statements to police. We reverse defendant's sentence on count two and direct the trial court on remand to issue a corrected judgment

merging count two into count one. We vacate the sentence imposed on counts one and three and remand for resentencing on those counts.

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