SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0924-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RYAN D. WILKINS,

Defendant-Appellant.

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Submitted March 21, 2023 – Decided July 26, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 19-02-0402.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Denny, Assistant Deputy Public Defender, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Kaili E. Matthews, Deputy Attorney General, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Ryan D. Wilkins appeals from his jury trial convictions for murder as an accomplice and conspiracy to commit murder. He also appeals his thirty-year parole ineligibility term—the mandatory minimum sentence for murder. Defendant was tried with his brother, Curtis Miller, who was convicted of murder, conspiracy to commit murder, and related weapons offenses.[1] Defendant alleges numerous trial errors. After carefully reviewing the record in view of the governing legal principles, we affirm the convictions and sentence.

I.

A.

Defendant was charged by indictment with conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3(a)(1) and (2); and being an accomplice to murder, N.J.S.A. 2C:2-6(c) and 2C:11-3(a)(1) and (2). Between January 28 and February 12, 2020, Wilkins and Miller were tried together. Both were convicted on all counts. In October 2020, the trial court merged Wilkins's convictions for murder and conspiracy to commit murder and sentenced him to a thirty-year

[1] We decided codefendant Miller's appeal back-to-back with defendant's appeal. Although we have not consolidated the appeals for purposes of issuing a single opinion, the relevant facts are essentially the same, and Wilkins's briefs raise several issues also raised by Miller.

term of imprisonment with a thirty-year period of parole ineligibility pursuant to N.J.S.A 2C:11-3(b)(1).

B.

In view of the numerous issues defendant raises on appeal, we deem it appropriate to recount the evidence presented by the State at trial in considerable detail.[2] On November 20, 2018, around 4:29 p.m., the victim was standing on the corner of Carl Miller Boulevard and Tioga Street in Camden. Around this time, brothers Miller and Wilkins left their home wearing black jackets, black pants, and black shoes. They got into a dark blue Buick Terraza, with Wilkins in the driver's seat and Miller in the passenger's seat.

At 4:33 p.m., Wilkins turned onto Carl Miller Boulevard where the victim was standing. As Wilkins pulled up to the intersection of Carl Miller Boulevard and Tioga Street, he stopped in the middle of the street at which point Miller got out wearing a black ski mask and wielding a gun. Miller shot the victim twice in the chest. The victim tried to flee, but Miller pursued him and shot him again in the right buttock and back of the arm. The victim fell to the ground with his arms tucked underneath him.

[2] Our recitation of the relevant facts is identical to our recitation in our opinion in codefendant Miller's appeal.

Miller then ran back to the Buick. The vehicle fled down Tioga Street until it reached the intersection with Budd Street. Wilkins made an illegal left-hand turn onto Bud Street and then a quick turn onto Charles Street, traveling the wrong way on the one-way gravel road. About halfway up the street, Wilkins parked the car along a fence by a preschool.

Both Wilkins and Miller exited the vehicle, still wearing all black and masks. They ran down the road on foot towards Ferry Avenue. At the corner of Charles and Ferry, they discarded one of the masks in a resident's trash can on Ferry Avenue. Police later found the mask when searching the area.

When Wilkins and Miller reached the intersection of Ferry and Mt. Ephraim Avenue, they continued home down Mt. Ephraim behind the businesses located on this street. As they reached A&A Liquors & Tavern, Miller removed his black jacket and placed it in a trash can.

After abandoning the Buick and fleeing on foot, Miller called his cousin, Kenia Miller, at 5:14 p.m. from his personal phone. Kenia[3] had lent the Buick to Miller. He told her to report the vehicle as stolen. After she hung up with Miller, Kenia called police to file the report but was unable to give police

[3] Because she shares the same surname as codefendant Miller, we refer to her as Kenia to avoid confusion. We mean no disrespect in doing so.

specifics about the purported theft. About fifteen minutes after the first call to Kenia, Miller called again from a different number and asked her to pick him up. Kenia testified that she did not go pick him up.

Camden County Police Department (CCPD) Officer Matthew Marshall received a ShotSpotter[4] notification in the area of Carl Miller Boulevard. He immediately got in his patrol car and drove to the location, arriving in about five to ten seconds. When he arrived, he saw a man lying face down on the ground. Officer Marshall approached the victim and realized that he had been shot. Officer Marshall and two other officers then loaded the victim into the patrol car and drove to Cooper University Hospital.

Officer Marshall testified that during the ride to the hospital, the victim was conscious and able to answer questions. Officer Marshall was able to determine that the victim could not identify who shot him but stated that a car "drove up" on him. Officer Marshall was wearing a body camera and recorded the conversation with the victim.

The victim died later that day at the hospital. He had a total of four gunshot wounds: two to the right side of his chest, one at the top of his right

[4] ShotSpotter is a system used in Camden that detects the sound of gunfire and alerts police as to the location of the source of the sound.

buttock, and one on his right arm. The medical examiner testified that the gunshot wounds were the cause of death and that the manner of death was homicide. The police officer who processed the scene of the shooting testified that he did not locate any ballistics evidence.

The State presented testimony from two people who heard gunshots that afternoon. Vance Byrd testified that he was inside his house on Tioga Street, about five houses away from the intersection of Tioga and Carl Miller Boulevard. He heard about three gunshots, and when he looked out of his peephole, he saw a black SUV "speeding down the street" from the direction of Carl Miller Boulevard. He did not see where the car went.

Robert Fisher also lived nearby and testified that he heard about five gunshots that afternoon. He testified that after hearing the gunshots, he saw a black Buick drive down Charles Street, park against the fence, and saw two men get out and start running towards Ferry Avenue. Fisher testified that he saw the car and the men "[r]oughly a minute" after hearing the gunshots. He could not describe what the men looked like because they "had masks on and they were dressed in black." Fisher believed the men were Black from their hands but acknowledged they might have been wearing black gloves. He said he did not see either man carrying anything. After hearing the gunshots, Fisher called 911

and told the dispatcher everything he had seen. The 911 call was played for the jury.

After the shooting, CCPD officers found the Buick parked on Charles Street. Police determined it was registered to Kenia. The crime scene unit processed the vehicle before it was towed away.

In a search of the area around the Buick, Camden County Prosecutor's Office (CCPO) Detective James Brining found a black ski mask in a resident's trash can on Ferry Avenue. A DNA expert from the State Police's DNA Laboratory testified that the recovered mask had a mixture of DNA from three contributors, with the major contributor being consistent with Wilkins.

CCPO Detective Victoria Patty searched the interior of the Buick in the tow lot and found a New Jersey identification card belonging to Miller and a black ski mask in the front passenger side door. The DNA expert testified the mask found in the Buick had a mixture of DNA from two contributors, with Wilkins as the major contributor and Miller as the minor contributor.

CCPD Sergeant Gordon Harvey canvassed the area around the scene of the shooting for surveillance videos. He recovered eight video recordings. Another video recording was found by someone else. Some of the videos showed the Buick driving from the direction of defendants' home towards the

area of the shooting, and others showed two men matching the descriptions of Wilkins and Miller remove a clothing item and discard it in a trash can. Detective Patty retrieved the clothing item—a black jacket—from the trash can and took samples that were sent for testing. While DNA could not be recovered from the jacket, the swabs did test positive for gunshot residue.

As part of the investigation, police officers showed stills from the surveillance videos to Chelsea Moss, a friend of Miller and Wilkins's brother, Kevin Wilkins. Moss identified Miller in a still taken from the liquor store's surveillance footage.

Police spoke with Kevin,[5] defendant's younger brother. During his recorded statement to police, Kevin watched surveillance footage law enforcement recovered along the perpetrators' flight route. Kevin identified both Miller and Wilkins on the footage and confirmed that they were wearing the same clothes they had been wearing on the day of the murder.

Kevin also told police he saw Wilkins and Miller at their mother's house on the day of the shooting when he got home from school, that the two left at some point during the afternoon, and that both brothers drive a blue van. At

[5] Because he shares the same surname as defendant, we refer to him as Kevin to avoid confusion. We mean no disrespect in doing so.

trial, Kevin testified that he did not see where Miller or Wilkins went that day, did not see them get into a vehicle, and did not hear them say anything. The State also played Kevin's recorded statement to police for the jury, as Kevin claimed that he could not remember his statement because he was under the influence during the interview.

The State also presented expert testimony from Special Agent William Shute from the FBI Cellular Analysis Survey Team. Agent Shute testified that the phone registered to Miller made multiple calls using a cell site covering his mother's house between 4:38 p.m. and 5:09 p.m. At 5:14 p.m., Miller's phone connected with a cell site that covered the crime scene.

Following their investigation, police arrested Wilkins and Miller on December 7, 2018. Police seized a cell phone from Wilkins when they arrested him. A CCPO detective conducted a forensic examination of the cell phone and extracted search history from around the time of the shooting. The search history revealed searches for "Camden, N.J., shooting" and similar searches. Those searches were later deleted.

C.

Defendant raises the following contentions for our consideration in his counseled appeal brief:

POINT I

THE TRIAL COURT ERRED BY ADMITTING A STATEMENT CONTAINED IN A HIGHLY PREJUDICIAL VIDEO AS A DYING DECLARATION OR AN EXCITED UTTERANCE, AND FURTHER ERRED BY ALLOWING THE VIDEO TO BE PLAYED BEFORE THE JURY.

A. The Statement Included in the Video Should Not Have Been Admitted as a Dying Declaration or as an Excited Utterance.

B. The Video Was Unduly Prejudicial and Cumulative of Other Evidence.

POINT II

THE COURT FAILED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED CRIMES OF AGGRAVATED ASSAULT, ASSAULT, RECKLESS BODILY INJURY WITH A FIREARM AND POINTING A FIREARM AS INCLUDED OFFENSES OF CONSPIRACY AND MURDER.

Defendant raises the following additional contentions[6] in his pro se brief:

POINT I

THE FAILURE TO ISSUE ANY IDENTIFICATION INSTRUCTION REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

[6] See supra note 1.

POINT II

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PRIOR STATEMENT OF KEVIN WILKINS AS THE STATE FAILED TO SATISFY THE STANDARD OF STATE V. GROSS, 216 N.J. SUPER. 98 (APP. DIV. 1987), AFF'D, 121 N.J. 1 (1990); U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. 1, ¶ 10.

POINT III

A RESENTENCING SHOULD OCCUR BECAUSE THE LANDMARK COMER[][7] DECISION WHICH ENTITLES DEFENDANT TO A RESENTENCING WHOM WHICH RYAN WILKINS SHARE THE SAME CHARACTERISTICS AS JUVENILES, U.S. CONST. AMENDS. VIII, XIV; N.J. CONST. ART. 1, ¶¶ 11, 12.

POINT IV

THE IMPROPER ADMISSION OF A POLICE SERGEANT'S LAY OPINION ABOUT THE SUSPECTS MOST LIKELY PATH WAS HIGHLY PREJUDICIAL AND REQUIRES REVERSAL OF DEFENDANT[']S CONVICTIONS.

POINT V

THE STATE[']S PROSECUTOR . . . VIOLATED DEFENDANT['S] AND CO-DEFENDANT CURTIS W. MILLER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS U.S. CONST. AMENDS. VI, XIV.

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7 State v. Comer, 249 N.J. 359 (2002).

POINT VI

EVEN IF ANY ONE OF THE COMPLAINED OF ERRORS WOULD BE INSUFFICIENT TO WARRANT REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS WAS TO DENY DEFENDANT DUE PROCESS AND A FAIR TRIAL.

II.

We first address defendant's contention the trial court erred in allowing the admission of Officer Marshall's body-worn camera recording of his conversation with the victim as he was being taken to the hospital. Defendant contends the victim's statements were inadmissible hearsay not subject to the dying declaration or excited utterance exceptions. Defendant also contends the recording was unduly prejudicial and should have been excluded under N.J.R.E. 403.

We begin our analysis by acknowledging that "[w]e defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "We will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Ibid. (quoting State v. Medina, 242 N.J. 397, 412 (2020)). "However, we accord no deference to the trial court's legal conclusions." State v. Nantambu, 221 N.J. 390, 402 (2015).

Out-of-court statements offered for the truth of the matter asserted are inadmissible unless they are subject to a specific exception. N.J.R.E. 801(c) and 802. One such exception applies to excited utterances, which are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate for fabricate." N.J.R.E. 803(c)(2). Another exception, only applicable when the declarant is unavailable, applies to dying declarations, which are "statement[s] made by a victim . . . voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death." N.J.R.E. 804(b)(2). Under both exceptions, the declarant must have had personal knowledge of the statement's basis. State v. Prall, 231 N.J. 567, 585 (2018).

After convening an N.J.R.E. 104 hearing on its admissibility, the trial court allowed the State to introduce the video that depicted Officer Marshall transporting the victim to the hospital and asking the victim questions. The body-worn camera recording was played to the jury during Officer Marshall's testimony and again during the prosecutor's summation. The victim did not identify the perpetrators but stated that a "car drove up on [him]," which

supported the State's theory that defendant and his brother used a car to approach the victim and to flee the scene.

Defendant argues the State did not sufficiently demonstrate the victim had personal knowledge of how his attacker approached him. That argument is predicated on a police radio transmission, heard on the video prior to the victim's statement, that "[t]here was a vehicle that fled the scene." Defendant claims that radio transmission, rather than personal knowledge, may have led the victim to state that a car had driven up on him just prior to the shooting.

Defendant relies on Prall, wherein the deceased declarant awoke "engulfed in flames" and began to make statements blaming the fire on his brother. 231 N.J. at 585. Our Supreme Court held that because the declarant was asleep when the fire started, he had no personal knowledge of how the fire started, rendering the statement inadmissible. Id. at 585–86. The circumstances in Prall are markedly different from what happened in this case, leading us to a different conclusion.

Unlike Prall, there is no indication that the victim was asleep or otherwise unperceptive when he was attacked. As the trial court aptly noted during the Rule 104 hearing, "there's nothing before the [c]ourt that suggests the victim . . . did not know that a car rolled up[ ]on him." Additionally, the radio

transmission in question was made almost immediately before the victim's statement, so there was little opportunity for the victim to tailor his responses to what he heard on the transmission. Indeed, due to the ongoing shock experienced by the victim, the trial court stated, "I find nothing that's before the [c]ourt that shows that the victim had time to or any opportunity to fabricate his responses." We add the mere possibility the victim based his statement on an overheard police radio transmission does not preclude a finding that the statement was made upon personal knowledge. Cf. N.J.R.E. 104(a) to (b) ("The court shall decide any preliminary question about whether . . . evidence is admissible. . . . When the relevance of evidence depends on whether a fact or condition exists, proof must be introduced sufficient to support a finding that the fact or condition does exist."). Such findings of fact are left to the trial court's discretion and should not be reversed on appeal unless that discretion is abused. Garcia, 245 N.J. at 430.

Our analysis under N.J.R.E. 403 also hinges on whether the trial court abused its discretion in determining whether the probative value of the challenged evidence is substantially outweighed by the risk of undue prejudice or needless presentation of cumulative evidence. Defendant claims the video was "inflammatory," "cumulative," and "highly prejudicial." He argues that

"[b]ecause there was more than enough testimony to establish that a vehicle was used during the course of the crime, this graphic video should have been excluded from trial." Defendant points to Officer Marshall's testimony and the testimony of Byrd and Fisher as less-prejudicial evidence to establish that the attackers used a car.

The State counters that the probative value of the video is significant because it corroborates the testimony that a car was involved in the shooting, which, in turn, is critical to the identification of defendant and Miller by means of surveillance camera images of the car's path of travel both before and after the shooting. We deem it significant, moreover, that the testimony from Byrd and Fisher was limited to seeing a vehicle fleeing shortly after the shooting. Neither testified that they saw a vehicle arrive and stop at the scene of the shooting. Without the victim's recorded statement that the subject vehicle drove up on him, the jury could infer that the vehicle observed by Byrd and Fisher was merely escaping a dangerous environment and was not directly involved in the shooting as the victim's statement suggested. Accordingly, the victim's statement provided supplemental probative information beyond that provided by Byrd, Fisher, or any other evidence presented by the State. We deem it especially important that at the Rule 104 hearing, the trial court found the

relevant portion of the video was "certainly probative of identification." We see no abuse of discretion and have no basis upon which to disregard that finding.

Regarding his claim the video was unduly prejudicial, defendant argues the video is "graphic" and that the victim's "eyes can be seen rolling back in his head." However, the trial court found that there were "no blood scenes," and the viewer "cannot see an injury to the victim at all." Further, it noted that "there is no damage to [the victim's] jacket," and "no blood[-]soaked clothes" visible. We note that a trial court's fact-finding based on a video is entitled to deference. State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). When the trial court hears testimony in addition to reviewing an audio/video recording of the encounter, an appellate court's own review of the video recording must not be elevated over the factual findings of the trial court. State v. S.S., 229 N.J. 360, 374–76 (2017); State v. Elders, 192 N.J. 224, 244–45 (2007).

Based on its review of the video, the trial court ruled that the prejudicial effect did not substantially outweigh its probative value. We add that the court limited the admitted portion of the video to the victim's statements inside the police car, excluding the later portion where the victim is taken out of the vehicle and placed on a gurney. We find no abuse of discretion in the trial court's well-articulated ruling. See Garcia, 245 N.J. at 430.

III.

We next address defendant's contention the trial court erred by failing to instruct the jury on the lesser-included crimes of aggravated assault, assault, causing reckless bodily injury with a firearm, and pointing a firearm. At the charge conference conducted pursuant to Rule 1:8-7(b), defendant asked for the lesser-included charges of aggravated manslaughter and reckless manslaughter. The trial court granted that request. Defendant subsequently requested that the jury be instructed on the lesser-included charges of conspiracy to commit second-degree aggravated assault, third-degree aggravated assault, causing reckless bodily injury with a firearm, and pointing a firearm.[8] Defendant argued the facts supported these lesser-included conspiracy offenses because the driver could have acted with a purpose other than to commit murder.

N.J.S.A. 2C:1-8(d) provides that a defendant may be convicted of an offense of which he or she was not indicted if the offense is a lesser-included offense. An offense is a lesser-included offense if "[i]t differs from the offense

[8] At trial, defendant requested the lesser-included charges only with respect to the conspiracy count, not the substantive murder count. On appeal, defendant argues the lesser-included charges should have been given for both counts. As we explain, the standard of our review depends on whether the defendant requested the trial court to give the jury the option to convict for a lesser-included offense.

charged only in the respect that a less serious injury or risk of injury to the same person . . . or a lesser kind of culpability suffices to establish its commission." N.J.S.A. 2C:1-8(d)(3). A trial court cannot charge a jury on "an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." N.J.S.A. 2C:1-8(e).

Upon a defendant's request for a lesser-included offense, "the trial court is obligated . . . to examine the record thoroughly to determine if there is a rational basis in the evidence for finding that the defendant was not guilty of the higher offense charged but that the defendant was guilty of a lesser-included offense." State v. Dunbrack, 245 N.J. 531, 545 (2021) (quoting State v. Sloane, 111 N.J. 293, 299 (1988)). However, "[s]heer speculation does not constitute a rational basis." State v. Reddish, 181 N.J. 553, 626 (2004) (quoting State v. Brent, 137 N.J. 107, 118 (1994)). "The failure to instruct the jury on a lesser[-]included offense that a defendant has requested and for which the evidence provides a rational basis warrants reversal of a defendant's conviction." Dunbrack, 245 N.J. at 545 (quoting State v. Savage, 172 N.J. 374, 397–98 (2002)).

The standard is markedly different when a defendant does not request a lesser-included charge or does not object to the omission of a charge to a lesser-

included offense. See supra note 8. In that event, "instead of reviewing the record to determine if a rational basis existed, our appellate review assesses whether the record 'clearly indicated' the charge, such that the trial court was obligated to give it sua sponte." Dunbrack, 245 N.J. at 545 (quoting State v. Denofa, 187 N.J. 24, 41–42 (2006)). A record "clearly indicates" a lesser-included offense if the evidence for the offense is "jumping off the page." Ibid. (quoting Denofa, 187 N.J. at 42). Put another way, a trial court is required to instruct a lesser-included charge not requested by the defense only when the charge is "obvious from the record." Ibid.

Because defendant requested lesser-included jury charges on the conspiracy count, we apply the "rational basis" test. N.J.S.A. 2C:1-8(e). With respect to the substantive murder count, however, the court would have been required to give the lesser-include charge only if it was "clearly indicated" by the record. Dunbrack, 245 N.J. at 545. As we explained in State v. Canfield, the clearly-indicated standard is significantly more onerous that the rational-basis test. 470 N.J. Super. 234, 271–72 (App. Div. 2022), aff'd as modified, 252 N.J. 497 (2023).

A person is guilty of second-degree aggravated assault if he "[a]ttempts to cause serious bodily injury to another or causes such injury purposely or

knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury." N.J.S.A. 2C:12-1(b)(1). A person is guilty of third-degree aggravated assault if he "[a]ttempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon," N.J.S.A. 2C:12-1(b)(2); or "[a]ttempts to cause significant bodily injury to another or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury," N.J.S.A. 2C:12-1(b)(7). A person is guilty of fourth-degree aggravated assault if he "[r]ecklessly causes bodily injury to another with a deadly weapon," N.J.S.A. 2C:12-1(b)(3); or "[k]nowingly under circumstances manifesting extreme indifference to the value of human life points a firearm . . . at or in the direction of another, whether or not the actor believes it to be loaded," N.J.S.A. 2C:12-1(b)(4).

The trial court denied defendant's request for the lesser-included charges, concluding that "[t]here's nothing in this case that's before me that suggested any type of . . . facts to support that request." We concur with the trial court's assessment. The facts show Miller used a gun to shoot the victim multiple times from close range. The first two shots struck the victim in the chest. Miller pursued the victim as he attempted to flee and fired two more shots. Nothing in

the trial record supports defendants' contention that that object of the conspiracy was something other than to kill the victim.[9] We thus conclude there was no rational basis for lesser-included assault-related instructions with respect to the object of the conspiracy.

Because defendant has not shown a rational basis for the lesser-included offense instructions he requested at trial, he cannot possibly meet the more rigorous clearly-indicated standard that applies to the lesser-included instructions defendant did not request at trial but rather for the first time on appeal. See Canfield, 470 N.J. Super. at 271–72 (comparing the rational-basis and clearly-indicated standards).

IV.

Defendant argues for the first time on appeal that the trial court erred by not instructing the jury sua sponte regarding the identification made by his brother, Kevin. Defendant misconstrues the purpose and utility of the eyewitness identification model jury instructions he now contends should have

[9] We note the gravamen of defendant's defense is that neither he nor his brother participated in the shooting. He alternatively argued that the State could not prove that the object of the conspiracy was murder, as opposed to a causing substantial bodily injury or merely threatening the victim. However, no evidence was presented at trial that defendants meant only to frighten the victim or cause serious bodily injury rather than death.

been given. Those jury instructions explain how to apply the system and estimator variables described in State v. Henderson, 208 N.J. 208, 289–292 (2011), which in turn address the frailties of human perception and memory that pose the risk of misidentification. Those jury instructions are designed to address eyewitness identifications. Kevin, however, was not an eyewitness to the homicide. Rather, he was asked to identify his own brothers from still photograph taken from surveillance video recordings. Accordingly, the model charges on eyewitness identifications are inapposite and would only have confused the jury.

We likewise reject defendant's argument the trial court committed plain error by failing to instruct the jury sua sponte that the State bore the burden to identify defendant as one of the perpetrators. "Appropriate and proper jury instructions are essential to a fair trial." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Green, 86 N.J. 281, 287 (1981)). Importantly, absent a request to charge or an objection, "there is a presumption that the charge . . . was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012) (citing State v. Macon, 57 N.J. 325, 333–34 (1971)). Furthermore, reviewing courts must read the charge "as a whole" to determine its overall effect. State v. Garrison, 228 N.J. 182, 201 (2017).

Applying those basic principles, we are satisfied the jury was adequately instructed that it must find that defendant participated in the crime. The trial court instructed the jury that "[a] defendant on trial is presumed to be innocent and unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the defendant must be found not guilty of that charge." The court continued, "the burden of proving each element or charge beyond a reasonable doubt rests upon the State." Notably, it also told the jury that "[t]o constitute guilt, there must exist a continuity of purpose and actual participation in the crime committed." (Emphasis added).

The present facts are analogous to those in State v. Cotto, 182 N.J. 316 (2005). In that case, the trial court did not "provide a detailed identification instruction." Id. at 326. Our Supreme Court concluded that "[a]lthough the court . . . did not use the word 'identification' in charging the jury, and could have given a more detailed instruction, it nonetheless clearly explained the State's burden to the jury." Id. at 327. The Court stressed that the trial court "specifically explain[ed] to the jury that the State bears the burden of proving beyond a reasonable doubt 'each and every element of the offense, including that of the defendant's presence at the scene of the crime and his participation in the

crime.'" Id. at 326. Combined with the strength of the State's case, the Court found that instruction to be adequate. Id. at 326–27.

As in Cotto, the State had a very strong case and the court's instructions—despite lacking a formal identification charge—were sufficient to guide the jury in its deliberations.

V.

We next address defendant's contention that the trial court erred in admitting Kevin's prior statement to police after he claimed memory loss during his trial testimony. N.J.R.E. 803(a) provides that a statement previously made by a "declarant witness [who] testifies and is subject to cross-examination" is not excluded by the hearsay rule if it is an otherwise admissible statement and "inconsistent with the declarant-witness' testimony at the trial or hearing." When the statement is offered by the party calling the witness, the statement is admissible only if it was recorded or contained in a writing made or signed by the witness "in circumstances establishing its reliability." N.J.R.E. 803(a)(1).

When in dispute, a prior inconsistent statement sought to be admitted for substantive purposes under N.J.R.E. 803(a) must be the subject of a preliminary hearing to establish its reliability as a condition to its admissibility. See State v. Gross (Gross II), 121 N.J. 1, 15–17 (1990); State v. Gross (Gross I), 216 N.J.

Super. 98, 110 (App. Div. 1987). In determining the reliability of pre-trial statements, our Supreme Court in Gross II enumerated fifteen factors to be considered:

> (1) the declarant's connection to and interest in the matter reported in the out-of-court statement, (2) the person or persons to whom the statement was given, (3) the place and occasion for giving the statement, (4) whether the declarant was then in custody or otherwise the target of investigation, (5) the physical and mental condition of the declarant at the time, (6) the presence or absence of other persons, (7) whether the declarant incriminated himself or sought to exculpate himself by his statement, (8) the extent to which the writing is in the declarants hand, (9) the presence or absence, and the nature of, any interrogation, (10) whether the offered sound recording or recording contains the entirety, or only a portion of the summary, of the communication, (11) the presence or absence of any motive to fabricate, (12) the presence or absence of any express or implicit pressures, inducement or coercion for making of the statement, (13) whether the anticipated use of the statement was apparent or made known to the declarant, (14) the inherent believability or lack of believability of the statement, and (15) the presence or absence of corroborating evidence.
>
> [Gross II, 121 N.J. at 10 (quoting Gross I, 216 N.J. Super. at 109–10).]

The State must establish the reliability of the statement by a preponderance of the evidence in light of all surrounding relevant circumstances. Id. at 15–16; State v. Spruell, 121 N.J. 32, 41–42 (1990). We

review the trial court's decision for an abuse of discretion. State v. Williamson, 246 N.J. 185, 198–99 (2021).

During his testimony, Kevin claimed defendant and Miller did not live at their mother's house, he did not know if Miller drove on the day of the homicide, defendant drove a Ford Crown Vic, and he did not remember what vehicle he told police his brothers drove in November of 2018. Kevin testified he remembered talking to CCPO detectives but could not recall what he was asked. After being shown a transcript from his statement to police, Kevin claimed for the first time that he did not remember what he told police because he "was under the influence" during the interview. Kevin admitted that he did not want to testify against his brothers.

At sidebar, the court found Kevin testified that he remembered some details—such as that there were two officers who took his statement—notwithstanding his assertion he did not remember details because he was under the influence. Accordingly, the court determined a Gross hearing outside the presence of the jury was required to determine the admissibility of Kevin's prior statement.

At that hearing, Detective James Brining testified that he and Detective Sean Donlon of the CCPD Homicide Unit conducted the interview at the CCPO.

That interview was electronically recorded. Detective Brining testified that Kevin was attentive, coherent, respectful, and willing to speak with the detectives. Kevin did not appear to have difficulty understanding the detectives' questions and at no point expressed disinterest in speaking with them. The video and audio recording of Kevin's interview was then played for the court.

Detective Brining further testified he would not interview someone under the influence and that he did not think Kevin was under the influence or tired. Rather, when Kevin placed his head down on the table towards the end of the interview, Detective Brining believed it was because Kevin "just realized what he did."

The trial court thoroughly analyzed the fifteen factors enumerated in Gross II. As to his connection and interest in the matter reported in his out-of-court statement, the trial court noted that Kevin "is in a unique situation" because the testimony being elicited concerns two of his older brothers. The court determined that that the statement was given to Detective Brining of the CCPO—who testified he has taken over hundreds of statements—and in the presence of a second detective. As to Kevin's mental and physical condition at the time, the trial court noted that Kevin was not in custody, in handcuffs, or the target of the investigation. It acknowledged that Kevin was an eighteen-year-

old high school student at the time of the statement and that the statement was given on a school night beginning at 11:12 p.m. and ending at 11:27 p.m. The court did not find the statement to be "inherently long." The court explained that it "looked at this interview very carefully," and based on its observations, "there [was] nothing that suggests . . . that this witness was under the influence of any type of alcohol or drugs or anything that would affect his ability to understand." It further found that Kevin was "responsive to the officers who [were] presenting questions to him" and was able to provide detailed information.

The court found that Kevin's statement did not incriminate or exculpate him. The statement was not the product of an interrogation. The entire statement was memorialized in a video and audio recorded DVD, and thus did not raise questions regarding who wrote the statement. The trial court found that there was no motive or reason for Kevin to fabricate his statement. It also found that there were no express or implicit pressures, inducement, or coercion to make the statement. As to the apparent anticipated use of the statement, the court acknowledged that Detective Brining did not tell Kevin the statement could be used later. As to the inherent believability of the statement, the trial court found Kevin's statement identifying his brothers to be believable. It

further noted the presence of corroborating evidence in that Kevin's statement identified defendants as his brothers and he was able to provide specific details about parentage and living arrangements.

Given its findings, the trial court reasoned that the overwhelming majority of the Gross factors weighed in favor of reliability. The court stressed that the video did not suggest that Kevin was "under the influence of any type of alcohol or drugs or anything that would affect his ability to understand," nor did it suggest he was "tired or overwhelmed."

We are satisfied the trial court conducted a thorough and cogent analysis of the applicable Gross factors and conclude that substantial credible evidence in the record supports its finding that Kevin's recorded statement is reliable. In light of Kevin's claimed memory loss during his trial testimony, the trial court properly exercised its discretion in admitting the statement under N.J.R.E. 803 (a)(1).

VI.

Defendant next contends the trial court erred in admitting Sergeant Gordon Harvey's testimony as to the "most logical route" the defendants would have taken based on his review of multiple surveillance video recordings. He used a demonstrative evidence map showing the area surrounding the crime with

a red line showing that route. Defendant argues this was improper lay opinion testimony under N.J.R.E. 701 and was harmful in that "the [S]tate was able to literally draw a line between Wilkin[s's] and Miller's home and the scene of the shooting." Because defendant objected to this testimony at trial, we review for harmful error. State v. G.E.P., 243 N.J. 362, 389 (2020).

As we have already noted, N.J.R.E. 701 ensures lay opinion testimony is based on an adequate foundation, setting two requirements for admissibility. State v. Bealor, 187 N.J. 574, 586 (2006) (quoting N.J.R.E. 701). First, such testimony must be "rationally based on the witness' perception." N.J.R.E. 701(a). Second, it must "assist [the jury] in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701(b).

Recently, our Supreme Court in State v. Higgs addressed the admissibility of a police officer's testimony concerning surveillance video played to the jury. 253 N.J. 333, 366–67 (2023). The Court explained that although

> N.J.R.E. 701 "does not require the lay witness to offer something that the jury does not possess," the Rule "does not permit a witness to offer a lay opinion on a matter not within [the witness's] direct ken . . . and as to which the jury is as competent as he to form a conclusion."
>
> [Id. at 366 (alterations in original) (internal quotation marks omitted) (first quoting State v. Singh, 245 N.J. 1,

19 (2021); and then quoting State v. McLean, 205 N.J. 438, 459 (2011)).]

The Court added, however, "we do not rule out the possibility of allowing a law enforcement officer to testify about a sequence in a video that is complex or particularly difficult to perceive." Id. at 367; see also United States v. Torralba-Mendia, 784 F.3d 652, 659–60 (9th Cir. 2015) (holding that an officer's narration of a sequence of videos was helpful to the jury because the angle of the recordings and the use of several nonconsecutive clips made the "import of the videos" hard to understand).

Here, Sergeant Harvey was the officer responsible for collecting and reviewing the video evidence from the relevant area. Thus, he was aware of where the surveillance videos came from, the footage contained in the videos, and the pertinent time stamps. He also was familiar with the area from patrolling it "numerous times" and handling "multiple investigations in the area." His personal knowledge allowed him to give a detailed description of what the numerous surveillance recordings showed and how they related to each other.

During his testimony, Sergeant Harvey used a demonstrative evidence map showing the area surrounding the crime with a red line demarking "the travel as to how you would get to those surveillance footage" locations based on his knowledge of the area and of the footage collected. We are satisfied the map

and the related testimony were based on Sergeant Harvey's personal knowledge. Furthermore, given the complex nature of piecing together roughly twenty separate video clips, his testimony was helpful to the jury and did not invade its province. We thus conclude the trial court did not abuse its discretion in admitting Sergeant Harvey's testimony and demonstrative map over defendant's objection. See State v. Sanchez, 247 N.J. 450, 465–66 (2021) (we review evidentiary rulings applying an abuse of discretion standard).

VII.

We turn next to defendant's contention, raised for the first time on appeal, that the prosecutor violated his constitutional rights by "allowing fraudulent testimony by the state's witness which prejudiced the defendant's fair trial and due process rights." Defendant also argues for the first time on appeal that the prosecutor's repeated use of the word "murder" in his opening statement and his categorization of the defendants going on a "kill drive" "inflamed the jurors and prejudiced the defendants."

"The standard for reversal based upon prosecutorial misconduct is well-settled" and "requires an evaluation of the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999). "To warrant reversal on appeal, the prosecutor's

misconduct must be 'clearly and unmistakably improper' and 'so egregious' that it deprived defendant of the 'right to have a jury fairly evaluate the merits of his defense.'" State v. Pressley, 232 N.J. 587, 593 (2018) (quoting State v. Wakefield, 190 N.J. 397, 437–38 (2007)). "In determining whether a prosecutor's misconduct was sufficiently egregious, an appellate court 'must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.'" State v. Frost, 158 N.J. 76, 83 (1999) (quoting State v. Marshall, 123 N.J. 1, 153 (1991)).

Furthermore, where, as in this case, "a defendant fails to object to the challenged statements and thus deprives the trial judge of the opportunity to ameliorate any perceived errors, he [or she] must establish that the comments constitute plain error under Rule 2:10-2." State v. Feal, 194 N.J. 293, 312 (2008). Under that standard, an appellate court can reverse only if it finds that the alleged misconduct was "clearly capable of producing an unjust result." R. 2:10-2; State v. Cole, 229 N.J. 430, 458 (2017).

Although defendant argues in his pro se brief that the prosecutor presented knowingly fraudulent testimony, he fails to specify why that testimony is fraudulent. It appears the gravamen of defendant's argument is that the State's witnesses were not credible and thus should not have been allowed to testify.

But of course, whether a witness is credible is for the jury to decide. The jury was properly instructed on how to make credibility findings, and they are presumed to follow those instructions. See State v. Ross, 229 N.J. 389, 415 (2017); State v. Loftin, 146 N.J. 295, 390 (1996).

Defendant's prosecutorial misconduct argument likewise lacks merit as it proceeds from a false premise; defendant misquotes the prosecutor's opening statement. The prosecutor never said "MURDER, MURDER" as defendant alleges in his pro se brief. Rather, the prosecutor began his opening by stating:

> Murder. Knowingly and purposely causing the death of another. That's what this case is about, whether or not on November 20th, 2018, this defendant, [Miller], knowingly and purposely caused the death of [eighteen]-year-old Tommy Reyes.
>
> And whether or not on November 20th, 2018[,] [Miller's] brother, [defendant], knew what [Miller] was going to do when [defendant] drove him to the scene of that homicide and drove him away.

Thereafter, the prosecutor twice repeated the statement: "Murder. That's what this case is about and nothing else."

Relatedly, the prosecutor never used the term "kill ride" as defendant asserts. When explaining the State's theory of the case, the prosecutor stated:

> Right around 4:30[,] [Miller] and [defendant] leave their mom's house wearing a black jacket, black pants,

> black shoes and go off to the parking lot that's behind the house and get in a dark blue Buick Terraza.
>
> It was at that time they began their drive to kill. Their plan, agreed upon, drive to kill. [Defendant] in the driver's seat, [Miller] in the front passenger seat.

"Prosecutors 'are afforded considerable leeway in making opening statements and summations.'" State v. Echols, 199 N.J. 344, 359–60 (2009) (quoting State v. Williams, 113 N.J. 393, 447 (1988)). "A prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence." State v. Carter, 91 N.J. 86, 125 (1982). In this instance, the prosecutor's remarks that "this case is about [murder]" was proper considering the charges facing defendants and the State's theory of the case. Regarding the phrase "drive to kill," the evidence presented at trial established that defendant drove his brother to the victim's location; Miller exited the vehicle and shot the victim multiple times, causing the victim's death; the codefendants fled from the scene in the vehicle, abandoned it, and arranged to have someone falsely report that it had been stolen. In view of this evidence, there was nothing improper in the prosecutor referring to codefendants' conduct as a "drive to kill."

We add in the interest of completeness that when, as in this case, defense counsel does not "object contemporaneously to the prosecutor's comments, 'the reviewing court may infer that counsel did not consider the remarks to be

inappropriate.'" State v. Clark, 251 N.J. 266, 290, 276 (2022) (quoting State v. Vasquez, 265 N.J. Super. 528, 560 (App. Div. 1993)); accord Frost, 158 N.J. at 83–84 ("Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made.").

In sum, defendant has failed to demonstrate any improper conduct on the part of the prosecutor, much less misconduct that would be "clearly capable of producing an unjust result." R. 2:10-2.

VIII.

Defendant next argues that even if no individual errors warrant reversal, the cumulative effect of the errors he asserts denied him due process and a fair trial. "A defendant is entitled to a fair trial but not a perfect one." State v. Weaver, 219 N.J. 131, 155 (App. Div. 2014) (quoting Wakefield, 190 N.J. at 537). However, "[w]hen legal errors cumulatively render a trial unfair, the Constitution requires a new trial." Ibid.

"In some circumstances, it is difficult to identify a single error that deprives defendant of a fair trial." Id. at 160. "[W]here any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet all of them

taken together justify the conclusion that [the] defendant was not accorded a fair trial, it becomes the duty of this Court to reverse." Id. at 155 (quoting State v. Orecchio, 16 N.J. 125, 134 (1954)).

In this instance, defendant has failed to demonstrate that the trial court or prosecutor committed any errors, much less multiple ones, rendering defendant's cumulative error argument academic. But even were we to assume for the sake of argument that any of defendant's trial error contentions have merit, we are satisfied that he received a fair trial and just verdict. See ibid.

IX.

We turn next to defendant's sentencing arguments, starting with his novel assertion that he is entitled to be resentenced by virtue of his age under the rule established in Comer. 249 N.J. at 401. That claim lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(2).

In Comer, our Supreme Court held that juvenile offenders waived to adult court, convicted of murder, and sentenced to a mandatory thirty-year parole disqualifier should—after serving twenty years—have the opportunity to argue for a reduction of that parole-ineligibility period, as well as the total sentence,

based on a demonstration of maturity and rehabilitation.[10] 249 N.J. at 370. Comer involved defendants who were fourteen and seventeen but were tried as adults and subject to the adult statutory mandatory minimum. The Court's reasoning relied on articles about brain science that explain why many youths do not reach maturity until years after their eighteenth birthdays. The Court's holding, however, was plainly limited to juvenile offenders tried in adult court.

We add that in State v. Ryan, the Court noted that "[t]he Legislature has chosen eighteen as the threshold age for adulthood in criminal sentencing. Although this choice may seem arbitrary, 'a line must be drawn,' and '[t]he age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood.'" 249 N.J. 581, 600 n.10 (2022) (second and third alterations in original) (quoting Roper v. Simmons, 543 U.S. 551, 574 (2005)); accord Graham v. Florida, 560 U.S. 48, 74–75 (2010).

Defendant was an adult—not a juvenile—when the victim was murdered. Accordingly, Comer does not apply to him.

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[10] Defendant appears to suggest that he is entitled to immediate resentencing under Comer. However, Comer clearly requires that the defendant serve twenty years before petitioning for a resentencing. 249 N.J. at 401. Thus, even if Comer applied to defendant, which it clearly does not because he was an adult at the time of the murder, he would still not be entitled to any relief at this juncture as he has not yet served twenty years of his sentence.

X.

Finally, we address defendant's argument that the sentencing court should have considered the new mitigating factor that applies to adult defendants who are "under [twenty-six] years of age at the time of the commission of the offense." N.J.S.A. 2C:44-1(b)(14). Defendant was twenty-three years old at the time of the present murder.

In State v. Lane, our Supreme Court held that "N.J.S.A. 2C:44-1(b) now provides that a sentencing judge 'may properly consider' that '[t]he defendant was under [twenty-six] years of age at the time of the commission of the offense.'" 251 N.J. 84, 93 (2022) (first alteration in original). The Court construed the new mitigating factor to be prospective only with an effective date of October 19, 2020. Id. at 97. Because defendant's sentencing occurred on October 27, 2020—roughly one week after the new mitigating factor became effective—that circumstance should have been considered by the trial court.

In this this instance, however, we see no point in remanding the case for a new sentencing hearing. We recognize that a sentencing court is required to carefully consider and make findings as to all applicable aggravating and mitigating factors. See State v. Dalziel, 182 N.J. 494, 504 (2005) ("[W]here mitigating factors are amply based in the record before the sentencing judge,

they must be found."). A careful balancing of aggravating and mitigating circumstances is needed, despite any such mandatory minimum term, because the trial court often has the option to impose a sentence greater than the statutorily prescribed minimum term of imprisonment and parole ineligibility. We note in this regard that Miller was sentenced on his murder conviction to a longer term than defendant.

As our Supreme Court recently reaffirmed, "[r]emand may be necessary when 'a sentencing court failed to find mitigating factors that clearly were supported by the record.'" State v. Rivera, 249 N.J. 285, 300 (2021) (emphasis added) (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)). But in this instance, had mitigating factor fourteen been requested and applied, it would not have changed the outcome in defendant's favor. Even without applying the new mitigating factor, defendant received the absolute minimum sentence on his conviction for murder as required by N.J.S.A 2C:11-3(b)(1).[11] Furthermore, the record clearly shows that the trial court was well aware of and gave due consideration to defendant's age, emphasizing the "heavy burden" of sentencing

[11] N.J.S.A 2C:11-3(b)(1) mandates that a person convicted of murder either "be sentenced . . . to a term of [thirty] years, during which the person shall not be eligible for parole," or "be sentenced to a specific term of years between [thirty] years and life imprisonment of which the person shall serve [thirty] years before becoming eligible for parole."

a twenty-four-year-old to thirty years in prison. Because the trial court on remand could not impose a lesser prison term and period of parole ineligibility than the one defendant is now serving, we decline to remand the case for the court to explicitly account for mitigating factor fourteen.

To the extent we have not specifically addressed them, any additional arguments raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.