SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2118-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILDEMAR A. DANGCIL,

Defendant-Appellant.

Argued December 21, 2022 – Decided February 10, 2023

Before Judges Mayer, Enright, and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 19-08-1020.

Brian J. Neary argued the cause for appellant (Law Offices of Brian J. Neary, attorneys; Brian J. Neary, of counsel and on the brief; Lois De Julio, on the brief).

Jaimee M. Chasmer, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; Jaimee M. Chasmer, of counsel and on the brief).

PER CURIAM

Defendant Wildemar A. Dangcil appeals from his convictions and eighteen-year aggregate sentence following a jury trial. We affirm.

I.

Defendant and his estranged wife, Riley,[1] were married in 2016. The parties separated in October 2018 and their attempts to reconcile thereafter failed. On May 7, 2019, Riley spoke with defendant, told him their relationship was over, and asked him to "leave [her] alone" and "respect [her] decision." According to Riley, defendant verbally and physically abused her, and threatened her multiple times before she ended the relationship.

Between May 7 and June 6, 2019, defendant repeatedly attempted to contact Riley by calling her "at least five times to ten times a day" and sending her approximately 250 text messages. Riley did not respond to defendant's calls or texts.

Defendant also tried to contact Riley in person. On May 9, he and his mother drove to Riley's home, uninvited. Riley was at home with other family members when defendant's mother began ringing her doorbell. While defendant's mother continued to ring the doorbell, defendant sent Riley multiple

[1] We use a pseudonym for the victim to protect her identity. R. 1:38-3(d)(9)-(10).

text messages, one of which read, "I saw someone peek out. Don't disrespect Mama like that." Because defendant and his mother refused to leave the property, Riley called the police. Officers escorted defendant and his mother off the property. Later that evening and over the next couple of days, defendant continued calling and texting Riley.

On May 11, Riley spent the night at a friend's home. While she was falling asleep on a couch after midnight, she heard defendant say through an open window, "I'm outside." She also received a text message from defendant at 12:32 a.m., which stated, "I'm outside. Not here for trouble." Riley had not told defendant where she would be that night. She did not respond to him or his text.

On May 18, defendant approached Riley while she was sitting in her car with her father in a Home Depot parking lot. Defendant asked if she was going to speak with him. Riley's father told defendant "to go away" and soon after, defendant left the area.

The next day, defendant repeatedly texted Riley. On the evening of May 19, after Riley was given a ride home, she received a text from defendant which read, "[f]uck you in a car with him for . . . ." and accused Riley of "treating [him] like shit . . . ." Closer to midnight, Riley received additional texts from defendant, one of which read, "[w]hose Jeep, [Riley], I'm [going] to set it on fire

. . . tell me now." The text was accompanied by a photo of a Jeep and its license plate. Riley later testified she did not answer defendant's texts and the Jeep pictured in defendant's text belonged to a neighbor who parked the car near Riley's driveway.

Defendant's texts and calls to Riley continued over the next couple of weeks. For example, he texted her messages such as, "[w]e see you, baby" and "[w]hy don't you take the proper blame on this for once?" Defendant also sent an image of his location showing he was "right around the corner from" Riley's home. Again, Riley did not respond to these messages.

At approximately 5:00 p.m. on June 6, as Riley was sitting in her car in her driveway, she noticed defendant's car parked near the end of her driveway. Riley immediately called 9-1-1 to notify police her estranged husband was at her residence, in violation of a restraining order.[2] Defendant approached Riley's car with a "red gasoline container" in his hands. While her car doors were locked and her windows were closed, defendant asked Riley if she would ever speak to him again. Riley did not respond. Defendant tilted the gas can toward Riley's car and said, "I will fucking burn this car down." Riley immediately shifted her

[2] Although Riley had an active domestic violence restraining order against defendant at the time of this incident, this fact was not disclosed to the jury during defendant's trial.

car into "park" and shut it off, fearing the car "was going to go on fire and explode if it was still running." Riley then exited her car and walked toward her house. Defendant asked Riley if she "called the cops on him" and she responded, "they're coming."

Once inside her home, Riley tried to communicate with her brother "to see if all of the [surveillance] cameras around the house were working." She did not observe defendant do anything else with the gasoline container nor see if he attempted to light a fire before he drove away from her home.

Officer Pedro Dominguez arrived on the scene and Riley ran outside to meet him. Dominguez noted Riley was "nervous" and "frantic." Riley told the officer defendant had just left and she gave the officer a description of defendant's car. Officer Dominguez realized he had just passed defendant's car. While speaking with Riley, Officer Dominguez smelled gasoline through the open passenger side window of his patrol car. Riley also detected a "strong smell of gasoline" as she spoke to Dominguez.

Shortly after Officer Dominguez left the scene to locate defendant, he spotted defendant's car in a line of traffic on Polifly Road in Hackensack. Once Dominguez turned on his emergency lights, he saw defendant's car make a U-turn and proceed northbound on Polifly Road. The officer immediately

activated his emergency sirens and began pursuing defendant's car. As he tried to catch up to defendant's car, defendant made another U-turn. The officer left his vehicle, drew his service weapon, and shouted at defendant to stop. Defendant did not stop. Instead, he continued past Officer Dominguez's patrol car. The officer holstered his weapon, returned to his vehicle, and resumed pursuit but lost sight of defendant's car.

Officer Dominguez returned to Riley's home after the chase ended. By that point, investigators from the Arson Task force in the Bergen County Prosecutor's Office, the fire department, and other officers were at the home to process the scene. Michael Blondin, an arson investigator, found discoloration on the ground near Riley's car, a nearby grassy area, and an area along a "vinyl fence, which me[t] the foundation of the house." Blondin collected a "soil sample within the discolored [grassy] area," which later tested positive for gasoline. Blondin recalled that when he used a shovel to retrieve a sample from the ground, "the smell [of gasoline] became more overwhelming." Although Blondin used a gauze pad to secure another sample from a discolored area on Riley's driveway, the sample produced no results.

Detective Michael Venezia from the Bergen County Prosecutor's Office also investigated the incident. When he arrived at Riley's home on June 6, he

"detected the odor of gasoline" and observed discoloration around the "perimeter of the house . . . as well as [Riley's] vehicle."

That same evening, at approximately 5:25 p.m., defendant called Detective Kley Peralta at the Hackensack Police Department. Defendant was previously acquainted with Peralta and told him, "yo, I fucked up, I need your help . . . I just poured gas . . . around my girl's car" and "took off from your bros." Peralta told defendant to "say nothing else" and ended the call. After notifying his supervisors about the call and verifying what occurred at Riley's home, Peralta called defendant back, found out he was "at a dead end street in Little Ferry," and told defendant to "stay there" because the detective was "on [his] way" to meet him.

Detective Peralta found defendant's car in a parking lot in Little Ferry, but defendant was not in it. As he stood next to defendant's car, Peralta saw gas containers inside the vehicle "in plain view." Shortly thereafter, defendant was located in Teterboro and arrested.

The police obtained a search warrant for defendant's car and recovered a pack of cigarettes, a matchbook, a spark lighter, a neon red lighter, a blue lighter, and two butane lighters described as "mini blow torch[es]." The police also discovered a gas container containing liquid. The liquid was tested and found

to be gasoline.

In August 2019, a grand jury indicted defendant, charging him with second-degree resisting arrest/eluding, N.J.S.A. 2C:29-2(b) (count one); fourth-degree contempt for violating a domestic violence restraining order, N.J.S.A. 2C:29-9(b) (count two); third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (count three); second-degree attempted aggravated arson, N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:17-1(a)(1) (count four); and first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (count five).

In anticipation of trial, the State moved to admit evidence of defendant's conduct toward Riley following the couple's separation. The motion judge conducted an extensive evidentiary hearing, during which Riley testified, and granted the State's motion, in part. The judge found that to the extent defendant's crimes or acts predated May 2019, they were not "relevant to . . . whether in June of 2019, [defendant] violated a restraining order, attempted to kill [Riley], attempted to commit aggravated arson and whether he eluded the police." However, the judge concluded certain acts by defendant toward Riley during May and June 2019 were relevant and the probative value of defendant's conduct was not outweighed by its prejudicial effect. Accordingly, the judge allowed the State to admit evidence at trial regarding when defendant: appeared with his

mother at Riley's home uninvited and required a police escort to be removed; found Riley at her friend's home and spoke to her around midnight through an open window to let her know he was "outside"; approached Riley at a local Home Depot and asked if she would speak to him; and threatened to set a Jeep parked in front of Riley's home on fire after asking whose Jeep it was. The judge also deemed admissible various text messages defendant sent Riley in conjunction with these incidents.

In October 2020, defendant was tried on all pending charges, except for the contempt charge, which was severed[3] and voluntarily dismissed by the State at defendant's sentencing. Due to the ongoing COVID-19 pandemic, the trial judge utilized a hybrid virtual and in-person jury selection format.[4]

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[3] "Prosecutions for contempt of a domestic violence restraining order and for the substantive offense underlying the contempt charge . . . must be tried separately; this is because evidence that a restraining order had been issued against the defendant previously arising from conduct towards the same victim could unduly prejudice him." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 7 on N.J.R.E. 404 (2015).

[4] Defendant unsuccessfully challenged the jury selection process at trial. Following his conviction and sentence, he moved for direct certification under Rule 2:12-2 and renewed his objection to the hybrid virtual/in-person jury selection procedure. The Supreme Court granted certification "limited to defendant's challenge to the hybrid virtual/in-person jury selection procedure"; all remaining issues were "severed" for our consideration "in the ordinary course." State v. Dangcil, 246 N.J. 212 (2021). On August 15, 2021, the Court

During the trial, the State called the following witnesses to testify: Riley; Officer Dominguez; Investigator Blondin; Detectives Peralta and Venezia; and Matthew Marino, a forensic scientist with the New Jersey State Police Office of Forensic Sciences who testified as the State's expert witness. Riley provided testimony consistent with statements she made during the evidentiary hearing on the State's motion to admit, and also testified about the June 6 incident. After the remaining law enforcement witnesses testified about their investigation of the June 6 incident, Marino testified he found gasoline in the soil sample obtained from Riley's lawn, as well as the liquid retrieved from defendant's gasoline container, and characterized the gasoline as "highly flammable." Further, he stated he found no gasoline on the gauze pad submitted for testing.

Following the close of the State's case, defendant moved for a judgment of acquittal on the attempted aggravated arson and attempted murder charges. The judge denied the motion. He found that by affording the State "all of the favorable inferences which could reasonably be drawn" from the evidence it presented, including: testimony from Riley and Detective Peralta; photos "of what looks like a liquid poured around the house and running in the grass in

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affirmed the validity of the hybrid jury selection process utilized during defendant's trial. State v. Dangcil, 248 N.J. 114 (2021).

front of the house"; lab testing done by the New Jersey State Police; and "the video . . . of the defendant getting the gas can out of his car and then walking up to the area where [Riley] was in her car and then around the house after she went in the house," a reasonable jury could find defendant guilty of the two challenged charges. The judge explained:

> I do think that pouring gasoline in the manner that he poured it is a substantial step toward . . . either purposely starting a fire with the purpose of placing another person in danger of death or bodily injury or done with the purpose of destroying a building or a structure and a structure could include a vehicle and I also think that the pouring gasoline around the car and pouring gasoline around the house is a substantial step toward purposely causing the death of the victim.

When the trial resumed, John Lightbody testified for the defense as an "expert in fire origin and cause." Lightbody did not contest Marino's conclusion that the liquid poured on the grass near Riley's car on June 6 was gasoline. Lightbody also acknowledged various heat sources that could contribute to the cause of a fire, including "lighters, spark lighters, butane lighters, matches and cigarettes."

During closing arguments, defense counsel referred to defendant's pending charge of terroristic threats. Counsel stated, "we're not hiding from that, that's what he did, and he has asked me to make sure I tell you that's what

he did because he's sorry for what he did."

The next day, the judge instructed the jury regarding the elements the State needed to prove to convict defendant of his pending charges. Regarding the terroristic threats charge, the judge informed the jury the State had to prove: "One, . . . the defendant threatened to commit a crime of violence and, two, . . . the threat was made with the purpose to terrorize another or in reckless disregard of the risk of causing such terror." The judge continued, explaining, "the State alleges . . . defendant intended to terrorize [Riley]." (Emphasis added).

Later that day, the jury found defendant guilty of second-degree resisting arrest/eluding, third-degree terroristic threats, second-degree attempted aggravated arson, and third-degree attempted aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2), a lesser-included offense to attempted murder.

At defendant's March 2021 sentencing, the judge found aggravating factors three (risk of re-offense), six (criminal history), and nine (need to deter), N.J.S.A. 2C:44-1(a)(3), (6) and (9), and mitigating factor eleven (excessive hardship due to imprisonment), N.J.S.A. 2C:44-1(b)(11). The judge imposed a nine-year prison term on the eluding charge (count one). Additionally, he sentenced defendant to a nine-year term for attempted aggravated arson (count four), subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7, and four-

year terms for terroristic threats and attempted aggravated assault (counts three and five, respectively). The judge ordered the term on count four to run consecutive to the term on count one, so that the eluding sentence would be served first. Further, he directed the four-year terms on counts three and five to run concurrent to count four.

II.

On appeal, defendant argues: (1) the trial judge erred in denying his motion for acquittal on the charges of attempted aggravated arson and attempted murder; (2) the judge mistakenly admitted "other crimes and bad acts evidence in violation of N.J.R.E. 404(b)"; (3) defendant is entitled to a new trial on the charge of terroristic threats "because the guilty verdict on count [three] did not distinguish between the constitutional and unconstitutional portions of N.J.S.A. 2C:12-3"; and (4) defendant should be resentenced because the judge "failed to follow the requirements of the Code of Criminal Justice when imposing sentence," improperly identified and weighed aggravating and mitigating factors, erred in imposing consecutive sentences on counts one and four, and abused his discretion when ordering the "less restrictive" eluding sentence to be served before the attempted aggravated arson sentence. None of these arguments are persuasive.

Regarding Point I, we review a trial court's denial of a motion for acquittal de novo. State v. Williams, 218 N.J. 576, 593-94 (2014). Therefore, we look to "whether, based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt." Id. at 594 (citing State v. Reyes, 50 N.J. 454, 458-59 (1967)).

Here, we disagree the judge should have granted defendant's motion for acquittal on the charges of attempted aggravated arson and attempted murder. As our Supreme Court recently held,

> [a] person is guilty of criminal attempt "if, acting with the kind of culpability otherwise required for the commission of the crime," the person "[p]urposely does . . . anything which, under the circumstances as a reasonable person would believe them to be, is an act . . . constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." N.J.S.A. 2C:5-1. The State is tasked with proving both a criminal purpose and a substantial step toward the commission of the crime.
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> [State v. Jones, 242 N.J. 156, 168-69 (2020) (citation omitted).]

"The criminal purpose element focuses 'on the intent of the actor to cause a criminal result rather than on the resulting harm.'" Id. at 169 (quoting State v. Robinson, 136 N.J. 476, 483 (1994)). "An attempt is purposeful 'not only

because it is so defined by statute, but because one cannot logically attempt to cause a particular result unless causing that result is one's "conscious object," the distinguishing feature of a purposeful mental state. N.J.S.A. 2C:2-2(b)(1).'" State v. McCoy, 116 N.J. 293, 304 (1989) (quoting State v. McAllister, 211 N.J. Super. 355, 362 (App. Div. 1986)). The "statute requires proof of a defendant's criminal purpose, as well as evidence that he or she had taken a 'substantial step' toward the commission of an object crime." State v. Perez, 177 N.J. 540, 553 (2003) (quoting N.J.S.A. 2C:5-1(a)(3)).

"Conduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose." N.J.S.A. 2C:5-1(b). "And the conduct is not considered in isolation; rather 'we consider [a] defendant's words and acts in tandem as part of the whole picture from which the jury could have drawn its inferences.'" Jones, 242 N.J. at 169.

Consistent with these standards, for the State to establish a defendant is guilty of attempted murder, it must prove beyond a reasonable doubt the defendant "purposely did or omitted to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in . . . causing the death of the victim." Model Jury Charges

(Criminal), "Attempted Murder (N.J.S.A. 2C:5-1; N.J.S.A. 2C:11-3(a)(1))" (approved Dec. 7, 1992). To prove a defendant is guilty of attempted aggravated arson, the State must establish beyond a reasonable doubt the defendant purposely attempted to start a fire or cause an explosion on his own property or another's property and purposely attempted to place "another person in danger of death or bodily injury" or purposely attempted to destroy "a building or structure of another," and did or omitted "to do anything under the circumstances as a reasonable person would believe them to be was an act constituting a substantial step in the course planned to culminate in his commission of the crime." N.J.S.A. 2C:5-1(a)(3); N.J.S.A. 2C:17-1(a)(1) and (2).

Given the compelling evidence adduced during the State's case in chief, we agree with the trial judge that a reasonable jury could find defendant guilty of attempted aggravated arson and attempted murder. Indeed, the testimony from the State's fact and expert witnesses, along with other evidence, such as the surveillance video Riley produced from the June 6 incident, reflected that defendant went to Riley's home, approached her as she prepared to back out of her driveway, and told her, "I will fucking burn this car down." He then tilted the gasoline container toward the car before Riley exited her car and retreated into her home. And as she walked away, defendant asked Riley if she called the

police, to which she responded, "they're coming."

Moreover, although Riley did not see defendant pour gasoline around her car and home, she and Officer Dominguez detected a strong smell of gasoline shortly after defendant left the scene. Likewise, Investigator Blondin and Detective Venezia detected the same odor, and investigators found discoloration on the ground and near the foundation of Riley's home where gasoline was believed to be poured. Lab testing later confirmed gasoline was present in a soil sample taken from Riley's lawn and the gas container recovered from defendant's car. Also, less than a half hour after defendant left Riley's home, he called Detective Peralta and stated, "I fucked up, I need your help . . . I just poured gas . . . around my girl's car and I just took off."

This evidence, along with the incendiary items recovered from defendant's car and his text message from May 2019 threatening to set fire to a Jeep parked in front of Riley's home, convinces us the judge properly denied defendant's motion for acquittal.

Regarding Point II, defendant contends it was error for the motion judge to admit "other crimes and bad acts evidence in violation of N.J.R.E. 404(b)." Again, we disagree.

"[T]he admissibility of evidence at trial is left to the 'the sound discretion

of the trial court.'" State v. Green, 236 N.J. 71, 80-81 (2018) (quoting State v. Willis, 225 N.J. 85, 96 (2016)). Accordingly, we review evidentiary rulings for an "abuse of discretion." Id. at 81 (citation omitted). Even "sensitive admissibility rulings made pursuant to the weighing process demanded by Rule 404(b)" will not be disturbed absent "a clear error of judgment." State v. Rose, 206 N.J. 141, 157-58 (2011) (quoting State v. Barden, 195 N.J. 375, 391(2008)).

Rule 404(b) provides, in part:

> evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition. . . . [Such] evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

"'Because . . . Rule 404(b) is a rule of exclusion rather than a rule of inclusion,' the proponent of evidence of other crimes, wrongs or acts must satisfy a four-prong test." State v. Carlucci, 217 N.J. 129, 140 (2014) (quoting State v. P.S., 202 N.J. 232, 255 (2010)). Under this test, commonly known as the Cofield test, to be admissible under N.J.R.E. 404(b), the evidence of the other crime, wrong or act:

(1) "must be admissible as relevant to a material issue;"

> (2) "must be similar in kind and reasonably close in time to the offense charged;"
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> (3) "must be clear and convincing;" and
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> (4) its probative value "must not be outweighed by its apparent prejudice."
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> [State v. Cofield, 127 N.J. 328, 338 (1992) (citations omitted).]

To satisfy the first prong, the evidence must have "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401; see Cofield, 127 N.J. at 338. "Consequently, to be relevant, the other-crimes evidence must bear on a subject that is at issue at the trial, for example, an element of the offense or some other factor such as motive, opportunity, intent, or plan." P.S., 202 N.J. at 255 (citations omitted).

"Generally, in 'motive' cases under . . . Rule 404(b) . . . the evidence in question is designed to show why a defendant engaged in a particular, specific criminal act." State v. Mazowski, 337 N.J. Super. 275, 283 (App. Div. 2001). Motive evidence has been held admissible even when it does "no more than raise an inference of why a defendant may have engaged in criminal conduct, and even in the face of a certain degree of potential prejudice stemming from the evidence." State v. Calleia, 206 N.J. 274, 294 (2011). A "'wider range of evidence' is permitted to prove motive, so long as it remains a material issue in

a case." Id. at 293-94 (citation omitted). Thus, a defendant's prior threat to the victim is admissible to show motive for committing the crime with which the defendant was charged. State v. Schubert, 235 N.J. Super. 212, 224 (App. Div. 1989). Additionally, other crimes evidence may be admissible under Rule 404(b) if it discloses the defendant's mental intention or purpose when committing the offense or to negate the existence of innocent intent. State v. J.M., Jr., 438 N.J. Super. 215, 223 (App. Div. 2014).

Regarding the second Cofield prong, "[t]emporality and similarity of conduct is not always applicable, and thus not required in all cases." Rose, 206 N.J. at 160 (citation omitted). Instead, proof of the second prong is required in cases that replicate the facts in Cofield, where "evidence of drug possession that occurred subsequent to the drug incident that was the subject of the prosecution was relevant to prove possession of the drugs in the charged offense." Barden, 195 N.J. at 389 (citing State v. Williams, 190 N.J. 114, 131 (2007)).

As noted, the third Cofield prong requires clear and convincing proof that the person against whom the evidence is being used committed the other crime or wrong. Carlucci, 217 N.J. at 143; Cofield, 127 N.J. at 338.

The fourth prong is "generally the most difficult part of the test." Barden, 195 N.J. at 389. "Because of the damaging nature of such evidence, the trial

court must engage in a 'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice." Ibid. (citation omitted). The analysis incorporates balancing prejudice against the probative value of the evidence required by N.J.R.E. 403, but does not require, as does Rule 403, the prejudice substantially outweigh the probative value of the evidence. State v. Reddish, 181 N.J. 553, 608 (2004). Instead, the risk of undue prejudice must merely outweigh the probative value. Ibid. (citations omitted).

Notwithstanding this higher standard for admission, a "very strong" showing of prejudice is required to exclude motive evidence under this prong. State v. Castagna, 400 N.J. Super. 164, 180 (App. Div. 2008) (citation omitted). "A wide range of motive evidence is generally permitted, and even where prejudicial, its admission has been allowed in recognition that it may have 'extremely high probative value.'" Rose, 206 N.J. at 165 (quoting State v. Long, 173 N.J. 138, 164-65 (2002)).

Here, we are satisfied the motion judge carefully considered the four-prong standard enunciated in Cofield and conducted the appropriate Rule 404(b) analysis before partially granting the State's motion to admit. First, she found defendant's misconduct toward Riley prior to May 2019 was neither relevant nor

close in time to the offenses charged. Moreover, she concluded "the probative value of that evidence would have been outweighed by the prejudice." But the judge found the "prior bad act evidence" "beginning in May of 2019 . . . and continuing" to the beginning of June 2019 was relevant because it "provide[d] background . . . to complete the story between the victim and the defendant." Specifically, the judge found "there is this overarching theme of [defendant] trying to . . . get in touch with [Riley] and all of that is relevant to his motive and his intention on the day in question."

The judge also determined the second Cofield prong was satisfied because defendant's "repeated behavior" in May and June 2019 was "similar in kind and reasonably close in time to the offense[s] charged." Turning to prong three, the judge credited Riley's testimony about defendant's "other crimes or other bad acts" from May and June 2019. The judge also considered defendant's text messages to Riley from this timeframe before stating she was "clearly convinced . . . these events did occur."

Finally, under prong four, the judge determined "the probative value of the evidence outweighs its apparent prejudice." She noted defendant's "repetitive behavior" was "clearly unwanted by" Riley and she was "not reciprocating . . . it." Additionally, the judge stated,

> the most prejudicial thing that is alleged is the [threat] to burn the Jeep and some may argue that that is also the most relevant to establishing [defendant's] motive or intent on the day of the event, so I find that the prejudicial value of these events is minimal and the probative value to be great.

The judge also engaged in a painstaking analysis of various text messages defendant sent Riley in May and June 2019. To the extent the judge found any of these texts were not connected to the other crimes or bad acts the judge deemed admissible under Rule 404(b), she precluded the State from introducing them at trial. Under these circumstances, we perceive no basis to disturb the judge's determinations under Rule 404(b).

Regarding Point III, defendant argues it was "plain error" for the trial judge to refer to "reckless disregard" when instructing the jury on the terroristic threats charge under count three, and it was "plain error" for the verdict sheet to include the phrase, "reckless disregard," without distinguishing "between the constitutional and unconstitutional portions of N.J.S.A. 2C:12-3." Defendant contends "it is impossible to determine which mental state the jurors found to support their guilty verdict," and given our recent decision in State v. Fair, 469 N.J. Super. 538, 558 (App. Div. 2021),[5] he is entitled to a new trial on count

[5] In Fair, we concluded the "reckless disregard of the risk of causing such terror

three. Defendant's argument is unavailing.

"[A]n unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result.'" State v. Singh, 245 N.J. 1, 13 (2021) (quoting R. 2:10-2). "To determine whether an alleged error rises to the level of plain error, it must be evaluated in light of the overall strength of the State's case." Id. at 13-14 (internal quotation marks omitted) (citation omitted). Governed by these principles, we find no plain error in the judge's charge to the jury on terroristic threats, nor in the wording of the verdict sheet.

As a threshold matter, we note N.J.S.A. 2C:12-3(a) is written in the disjunctive and states:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.
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> [(emphasis added).]

Where a provision of a statute is declared unconstitutional, the remaining

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or inconvenience" portion of N.J.S.A. 2C:12-3(a) was unconstitutionally overbroad, in violation of the First Amendment of the United States Constitution, U.S. Const. amend. I. 469 N.J. Super. at 558. Fair was decided after defendant was convicted.

"provision shall, to the extent . . . it is not unconstitutional . . . be enforced and effectuated." N.J.S.A. 1:1-10. In Fair, we did not invalidate the entire statute. Thus, N.J.S.A. 2C:12-3(a) remains enforceable to the extent it proscribes a complete act within itself, i.e., "threaten[ing] to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience." (emphasis added).

Accordingly, here we find it significant that in his summation, defense counsel specifically referred to the terroristic threats charge and stated, "we're not hiding from that, that's what he did and he has asked me to make sure I tell you that's what he did because he's sorry for what he did." Also, when describing the June 6 incident, defense counsel stated in summation that defendant did not go to Riley's home "to torch the house, . . . [and] didn't do it to torch the car. He did it to . . . get answers and that's a terroristic threat but that's not murder and it's not aggravated arson." (emphasis added). Following these statements, the judge charged the jury on terroristic threats, and confirmed the State had to prove "defendant threatened to commit a crime of violence and . . . the threat was made with the purpose to terrorize another or in reckless disregard of the risk of causing such terror." But the judge also clarified, "the State alleges . . .

defendant intended to terrorize [Riley]."

Jurors are presumed to follow a judge's instructions. State v. Gonzalez, 249 N.J. 612, 635 (2022). Thus, considering: the judge's adherence to the model jury charge when instructing the jury on terroristic threats;[6] his explanation of the State's theory that defendant "intended to terrorize" Riley when threatening to commit crimes of violence; the strength of the State's case; and defendant's specific concessions regarding the terroristic threats charge, we decline to conclude it was plain error to include language from the unconstitutionally overbroad portion of N.J.S.A. 2C:12-3 in the jury charge or verdict sheet.

Finally, defendant argues he should be resentenced, contending the trial judge: did not follow the requirements of the Code of Criminal Justice when imposing sentence; failed to properly identify and weigh aggravating and mitigating factors; erred in imposing consecutive sentences on counts one and four (for the eluding and attempted aggravated arson charges); and mistakenly ordered defendant to serve his eluding sentence before serving a NERA sentence for attempted aggravated arson. We are not convinced.

"An appellate court's review of a sentencing court's imposition of sentence

[6] See Model Jury Charges (Criminal), "Terroristic Threats (N.J.S.A. 2C:12-3(a))" (rev. Sept. 12, 2016).

is guided by an abuse of discretion standard." State v. Jones, 232 N.J. 308, 318 (2018) (citations omitted). In reviewing sentencing determinations, we "must not substitute [our] judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)).

Our review is limited to considering:

> (1) whether guidelines for sentencing established by the Legislature or by the courts were violated; (2) whether the aggravating and mitigating factors found by the sentencing court were based on competent credible evidence in the record; and (3) whether the sentence was nevertheless "clearly unreasonable so as to shock the judicial conscience."
>
> [State v. Liepe, 239 N.J. 359, 371 (2019) (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)).]

In imposing a sentence, a judge "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014) (citation omitted). A trial court must then "balance the relevant factors, and explain how it arrives at the appropriate sentence." O'Donnell, 117 N.J. at 215 (citations omitted).

As our Supreme Court observed long ago, "[t]he Code does not define with . . . precision the standards that shall guide sentencing courts in imposing sentences of imprisonment for more than one offense." Liepe, 239 N.J. at 371

(quoting State v. Yarbough, 100 N.J. 627, 636 (1985)). Instead, "[w]ith certain narrow exceptions, . . . [t]he Code simply states that multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." Ibid. (second alteration in the original) (internal quotation marks omitted) (citations omitted). Thus, the Court instructed trial judges to consider the following factors when deciding whether to impose a concurrent or consecutive sentence:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;

> (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors; [and]
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.[7]
>
> [Yarbough,100 N.J. at 643-44.]

The Court subsequently held that when a trial court ordered a defendant to serve a consecutive sentence, and "impos[ed] a least restrictive or flat prison term preceding a more restrictive prison term, the [trial] court is directed to explain the consequence of any sequencing and to justify its exercise of discretion to impose the specific real-time consequence based on the court's finding and weighing of aggravating factors." State v. Pierce, 220 N.J. 205, 206 (2014) (citing State v. Ellis, 346 N.J. Super. 583, 597 (App. Div. 2002)). Mindful of these standards, we perceive no basis to disturb defendant's aggregate sentence.

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[7] "A sixth factor, which imposed 'an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms,' was eliminated by the Legislature in a 1993 amendment to the statute addressing concurrent and consecutive terms. L. 1993, c. 223, § 1; see N.J.S.A. 2C:44-5(a)." Liepe, 239 N.J. at 372 n.4 (citation omitted).

Here, the judge began his sentencing decision by noting he had reviewed the presentence report, sentencing memos from the parties, and statements from defendant's family members and friends. The judge also acknowledged defendant was divorced with two children and employed at the time of his current offenses. Further, the judge summarized the facts involving the June 6 incident, addressed the sentencing ranges for defendant's convictions and calculated defendant was entitled to 658 days of jail credit.

When the judge engaged in an aggravating and mitigating factor analysis, he found aggravating factors three, six and nine, stating defendant had a "substantial prior criminal record," including "two prior indictable convictions" and a "history of substance abuse" dating back to his teenage years. The judge gave "very heavy weight" to aggravating factor three, "based on defendant's prior history, the alleged substance abuse that would exacerbate the risk of re-offense and most importantly, . . . his conduct[, which] demonstrate[s] no respect for the rules of law." The judge also stated defendant's "prior period of probation and incarceration didn't prevent future offenses." The judge further observed defendant committed his offenses "while he was subject to an active . . . restraining order, indicating that there is no way short of incarceration from preventing the defendant from engaging in this type of conduct."

Additionally, the judge gave "very heavy weight" to aggravating factor nine, observing that when defendant eluded Officer Dominguez, he did so "in an extremely busy crowded area," "placing the public in danger," including pedestrians, and "other drivers [were] placed in grave danger." Moreover, the judge reiterated aggravating factor nine should be given "very heavy weight" considering Officer Dominguez "could have actually been hit by [defendant]" when he pursued defendant on June 6.

Further, after finding defendant "was upset about the breakdown of the [marital] relationship and he repeatedly called, texted, sent pictures and followed [Riley] in a way that is fairly characterized as threatening and frightening behavior," the judge found aggravating factor nine and gave it heavy weight as to the remaining charges of attempted aggravated arson, terroristic threats and aggravated assault. The judge explained:

> [y]ou could see in the video that there was just what I would describe as unbridled rage as the defendant stormed around the property, pouring gasoline around, threatening [Riley,]. . . all in a way to cause her to be terrified, really terrified for her life because the message being communicated was that he was going to light this gasoline and burn her alive in her car and also burn her house with her in it. . . .
>
> In addition, [there was] the brazen violation of the restraining order. [T]o know that this restraining order was in place and completely ignore it has to be taken

> into account on the need to deter. Domestic violence is a problem that needs to be deterred both general and specifically as to this defendant, so I give extremely heavy weight to aggravating factor nine.

Finally, the judge rejected the bulk of defendant's arguments in favor of mitigation, declining to find mitigating factors one (defendant's conduct neither caused nor threatened serious harm), two (defendant did not contemplate his conduct would cause or threaten serious harm) and nine (the character and attitude of defendant indicate he is unlikely to commit another offense), N.J.S.A. 2C:44-1(b)(1), (2), and (9). The judge explained defendant's conduct "did, in fact, cause . . . severe emotional trauma," so "mitigating factor one does not apply." Further, he found defendant "was pouring gasoline around [Riley's] car and house" and threatening to "light the car with her in it," so mitigating factor two was not applicable. Additionally, the judge reiterated the reasons he found defendant posed a "substantial risk of re-offense," and concluded mitigating factor nine did not apply. Nonetheless, the judge determined mitigating factor eleven applied because defendant had an "elderly mother" and "a young child and a college-age daughter who would benefit from his support." Finally, the judge stated he was "clearly convinced . . . the aggravating factors substantially outweigh[ed] the mitigating factor[]."

We discern no basis to second-guess the judge's aggravating and mitigating factor analysis. Indeed, his findings are well supported on this record. Moreover, despite defendant's arguments to the contrary, we decline to conclude the judge "double-counted" defendant's prior record to support aggravating factors three and nine, or that the judge improperly utilized elements of defendant's offenses as aggravating factors.

"A court . . . does not engage in double-counting when it considers facts showing defendant did more than the minimum the State is required to prove to establish the elements of an offense." State v. A.T.C., 454 N.J. Super. 235, 254-55 (App. Div. 2018). Also, as our Supreme Court held in State v. Tillery, a "defendant's criminal record may be relevant in [all] stages of the sentencing determination" as "defendant's prior record is central to aggravating factor six, N.J.S.A. 2C:44-1(a)(6), and may be relevant to other aggravating and mitigating factors as well." 238 N.J. 293, 327-28 (2019). And a trial judge is not "required to ignore the extent of [a defendant's] criminal history when considering applicable aggravating factors." State v. McDuffie, 450 N.J. Super. 554, 577 (App. Div. 2017).

We also disagree with defendant's contentions the judge erred in imposing consecutive sentences on the eluding and attempted aggravated arson

convictions, and mistakenly required defendant to serve the less restrictive sentence for eluding first.

"[T]rial judges have discretion to decide if sentences should run concurrently or consecutively." State v. Miller, 205 N.J. 109, 128 (2011) (citing N.J.S.A. 2C:44-5(a)). "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." Id. at 129 (citation omitted). Also, as mentioned, a sentencing court may require a defendant to serve a less restrictive sentence before a more restrictive sentence so long as it "explain[s] the consequence of any sequencing and . . . justif[ies] its exercise of discretion to impose the specific real-time consequence based on the court's finding and weighing of aggravating factors." Pierce, 220 N.J. at 205 (citing Ellis, 346 N.J. Super. at 597).

Although defendant now contends his sentences for eluding and attempted aggravated arson should have run concurrent to one another because these offenses were "committed closely in time and place" and were part of a "single period of aberrant behavior . . . committed with the same objective," the judge rejected this same argument at sentencing, reasoning:

> [t]hese are distinct offenses. They involve distinct types of conduct committed at different times involving different victims. The victim of the attempted aggravated arson was [Riley]. The eluding implicated

> danger to Officer Dominguez and the public generally. . . . [D]efendant placed Officer Dominguez in grave danger when he fled and drove off, forcing Officer Dominguez to move out of the way as the defendant drove around him. The defendant also placed other motorists and pedestrians in danger as he fled at high speed and committed motor vehicle violations as he attempted to evade pursuit, so . . . applying the Yarbough factors, . . . count four, the attempted aggravated arson, will run consecutive to count one, the eluding.

However, the judge also found defendant's convictions for terroristic threats and aggravated assault "involve[d] the same victim" and "arose out of really the same incident of aberrant behavior at [Riley's] residence." Thus, he concluded the sentences for these charges should "run concurrent to each other and also concurrent to count four, the . . . attempted aggravated arson" charge.

Because the judge's factual findings are amply supported by competent, credible evidence, and his analysis is consistent with the principles outlined in Yarbough, we find no basis to disturb his imposition of consecutive sentences for defendant's second-degree offenses.

Similarly, we find no reason to conclude the judge abused his discretion in requiring defendant to serve a nine-year term for eluding before serving another nine-year term on the attempted aggravated arson conviction. Here, after finding defendant was entitled to 658 jail credits and imposing the two

nine-year terms, the judge noted the attempted aggravated arson offense was "a NERA offense," so defendant would have to "serve 85 percent of that sentence before being eligible for parole." Further, the judge calculated, "[t]hat's a period of seven years, seven months and twenty-seven days." The judge then cited Pierce and Ellis immediately before stating:

> I want to make clear . . . it is my intention that the more restrictive sentence on the attempted aggravated [arson], the NERA sentence, will run consecutive to the lesser sentence on the eluding, which is a flat sentence. I'm imposing this sentence based on my balancing of the aggravating and mitigating factors and my finding that the aggravating factors substantially outweigh the mitigating factors, and . . . because I'm running the terroristic threats and aggravated assault conviction concurrent to the attempted aggravated arson charge.

Accordingly, we are convinced the judge carefully considered and understood the "real-time consequences" of defendant serving a nine-year "flat" sentence before serving the NERA sentence. And because the judge structured defendant's consecutive sentences after engaging in a thorough analysis of the applicable aggravating and mitigating factors, we discern no abuse of discretion in his sentencing determinations.

To the extent we have not addressed defendant's remaining arguments, they lack sufficient merit to warrant written discussion. R. 2:11-3(e)(2).

Affirmed.