SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2566-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JONATHAN WEATHERS, a/k/a JONATHON WEATHERS, JONATHAN TAPIA, JONNY TAPIA, MATTHEW WEATHERS, and BASHAUN WILLIAMS,

Defendant-Appellant.

Argued May 10, 2023 – Decided August 25, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 17-06-0350.

Rochelle Watson, Deputy Public Defender II, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; James K. Smith, Jr., Assistant Deputy Public Defender, of counsel and on the briefs).

Kyle A. Petit, Assistant Prosecutor, argued the cause for respondent (Angelo J. Onofri, Mercer County

Prosecutor, attorney; Kyle A. Petit, of counsel and on the brief).

PER CURIAM

A grand jury returned an indictment charging defendant Jonathan Weathers with purposeful murder, N.J.S.A. 2C:11-3(a)(1); felony murder, N.J.S.A. 2C:11-3(a)(3); first-degree robbery, N.J.S.A. 2C:15-1; and third-degree witness tampering, N.J.S.A. 2C:28-5(a)(1). After the court denied defendant's motion to suppress his recorded statement, a jury convicted him of felony murder, and the lesser included offense of second-degree robbery, N.J.S.A. 2C:15-1(a)(1), and acquitted him of the murder, first-degree robbery and witness tampering charges, as well as the lesser included offenses of aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1) and reckless manslaughter, N.J.S.A. 2C:11-4(b)(1). The court, after merger, sentenced defendant to an aggregate fifty-year prison term with an eighty-five percent period of parole ineligibility and assessed applicable fines and penalties.

In addition to challenging the court's decision to deny his suppression application, defendant argues he was deprived of a trial by an impartial jury when the State unconstitutionally exercised a peremptory challenge to exclude a prospective black juror. Finally, he argues the court's sentence is excessive and contrary to the Code of Criminal Justice.

Defendant specifically contends:

POINT I

DEFENDANT'S STATEMENT TO THE POLICE SHOULD HAVE BEEN SUPPRESSED BECAUSE (1) . . . DEFENDANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHTS; (2) THE POLICE CONTINUED TO INTERROGATE DEFENDANT EVEN AFTER HE HAD MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL, AND (3) THEY FAILED TO SCRUPULOUSLY HONOR HIS UNEQUIVOCAL ASSERTION OF THE RIGHT TO SILENCE.

A. Defendant's Statement.

B. The State Failed To Meet Its Burden Of Showing That Defendant Knowingly And Intelligently Waived His Rights, Especially Given That The Detective Intentionally Misled Him About The Nature Of The Interrogation.

C. The Interrogation Should Never Have Gone Forward After Defendant Made An Unequivocal Assertion Of The Right To Have Counsel Present.

D. The Detective Failed To Honor Defendant's Unequivocal Assertions Of His Right To Remain Silent.

POINT II

DEFENDANT WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY AND EQUAL PROTECTION OF THE LAW WHEN THE PROSECUTOR USED A PEREMPTORY CHALLENGE TO EXCLUDE A[]

[BLACK] JUROR WHO HAD QUALIFIED FOR JURY SERVICE.

POINT III

THE JUDGE IMPROPERLY IMPOSED SENTENCE BASED UPON HIS BELIEF THAT DEFENDANT HAD "BRUTALLY ATTACKED" THE VICTIM DESPITE THE JURY'S VERDICTS FINDING THAT HE DID NOT PURPOSELY, KNOWINGLY, OR RECKLESSLY INFLICT, OR ATTEMPT TO INFLICT, SERIOUS BODILY INJURY ON THE VICTIM.

After reviewing the record in light of these contentions and the applicable law, we reject defendant's arguments in Point I.B. and I.C., but remand for the court to address in the first instance defendant's argument detailed in Point I.D. and make necessary factual findings and legal conclusion. We also remand for further factual findings required to address defendant's contentions in Point II. Finally, we have considered defendant's sentencing arguments detailed in Point III and conclude they are without merit.

I.

We detail only those portions of the record necessary for our resolution of the issues raised by the parties. Shortly after midnight on August 2, 2016, while driving around Trenton with his girlfriend, Nishelle Dowling, in her Nissan Maxima, defendant spotted the victim, Stephen Merrill, walking home from a

bar. Nishelle and defendant followed Merrill as he walked home. While Nishelle was driving, defendant exited the car and directed her to drive with the headlights off. He approached Merrill and violently assaulted him, causing him to fall to the ground. He also robbed Merrill of his cell phone and wallet. Merrill, who defendant left in street before fleeing, was discovered approximately two hours later, and rushed to the hospital where he lapsed into a coma and died weeks later.

The Trenton police later obtained surveillance videos which showed the Nissan Maxima and defendant in the vicinity where Merrill was walking, and Detective Brian Jones requested officers look out for a gold 1999 Nissan Maxima with a sunroof and broken taillights. At Detective Jones' instruction, on August 5, 2016, The Trentonian published a press release about the crime, which stated "the victim was assaulted and robbed, the date and the location, and . . . a cell phone and wallet was taken." Detective Jones included his contact information with the release. He then received a message on his answering machine the following day from a woman who stated that "she believed her daughter's boyfriend was the one responsible for the incident and that he had a wallet and cell phone." The message cut off without any contact information, and the woman never called back.

On the evening of August 9, 2016, the police spotted a parked car matching the description of the Nissan Maxima and saw it again in the early hours of August 10, 2016, when they observed defendant driving the vehicle without a seatbelt. After confirming that the car matched the description in the bulletin, the police pulled the vehicle over for the seatbelt infraction. They then discovered defendant did not have a proper driver's license and arrested him. Defendant was handcuffed, placed in the police car, and transported to the police station for questioning.

Detective Jones interviewed defendant commencing at 11:00 a.m. on August 10, 2016. Detective Jones' interview with defendant started with defendant asking if he was arrested for "anything else" and Detective Jones responded, "Not right now, no." The detective then showed defendant a Miranda[1] rights form, and the following exchange occurred:

> [Defendant]: So whadda you mean, Miranda [r]ights form if I'm not gettin[g] arrested for nothin[g]?
>
> [Jones]: Cause I'd like [to] speak to you about somethin[g].
>
> [Defendant]: Alright, so I'm not signin[g] no, I'm not signin[g] that wit[h] you. I'm not gettin[g] arrested, so what am I signin[g] somethin[g] for?

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

[Jones]: This is if you wanna talk [to] me.

[Defendant]: So what, I'm talkin[g] [to] you for, whadda, whadda am I being questioned for?

[Jones]: I'm gonna talk [to] ya about that, but I have [to] read ya your rights first.

[Defendant]: I'm not, I'm not signin[g] nothing though man. I don't need [to] know my Miranda [r]ights, that's for gettin[g] arrested. I'm not, I'm not gettin[g] arrested for nothin[g]. Ya just told me that.

[Jones]: Ok, but I'd like [to] speak to ya about somethin[g].

[Defendant]: Alright, you can speak [to] me, I'm tellin[g] [you], you can speak [to] me, but I'm not signin[g] that. You talkin[g] about Miranda [r]ights, you could speak [to] me, I'm not signin[g].

[Jones]: Ok, well, let me read; let me read the [r]ights form first, ok? Right now, it's 11 o'clock, alright. And it says, before we ask you any questions, you must understand your rights. You have the right to remain silent.

[Defendant]: Hold on, so what did you . . . you readin[g] me Miranda [r]ights, which means you arrested me for somethin[g]?

[Jones]: No, it's not.

[Defendant]: Yes, it is!

[Jones]: No, it's not. Just cause I'm reading your Miranda [r]ights doesn't mean you're being charged wit[h] anything.

[Defendant]: So, I'm gettin[g] charged or I'm bein[g] questioned, which one?

[Jones]: You're being questioned.

[(Emphasis added).]

Following this exchange, Detective Jones read the form to defendant, and asked if he understood it, to which defendant responded "Um, hum." After Detective Jones asked if defendant had any questions, they discussed whether defendant was willing to speak to Detective Jones without a lawyer present:

[Defendant]: Yeah, so as far as a lawyer, whatcha' you mean by a lawyer? Like for, so if I, if I gotta pick, if I don't have a lawyer, a lawyer would come here?

[Jones]: If you wanna speak [to] me without a lawyer present, you can. At any time during . . .

[Defendant]: So, if I wanna speak [to] you, I could have a lawyer here too?

[Jones]: If you wanna speak [to] me wit[h] a lawyer present, then I will walk outta' this room and this interview is over.

[Defendant]: So why can't I speak [to] you wit[h] a lawyer present?

[Jones]: You can.

[Defendant]: So why?

[Jones]: Just not right this immediate moment.

[Defendant]: So why then? You said, you said I can speak to you.

[Jones]: You can. If you wanna get a lawyer, you can get a lawyer; when you get a lawyer . . .

[Defendant]: I got a lawyer already . . .

[Jones]: . . . we can talk.

[Defendant]: . . . his name [is] Cleveland.

[Jones]: Ok.

[Defendant]: Yeah.

[Jones]: Is he gonna come down here right now and sit with you during questioning?

[Defendant]: I'm pretty sure, if I make a phone call.

[Jones]: Ok. So, you're requesting a lawyer then?

[Defendant]: I'm not requesting a lawyer, but I just wanna know what I'm bein[g] questioned for.

[Jones]: Well, listen. You have [to] be very clear on what you want.

[Defendant]: I'm clear on what I want! I wanna know what the fuck I'm in here for dog.

[Jones]: Do you wanna answer questions now without a lawyer present?

[Defendant]: I don't care! I wanna know what I'm in here for.

[Jones]: I need a yes or a no.

[Defendant]: A yes . . .

[Jones]: Ok.

[Defendant]: I don't care man.

[Jones]: I acknowledge that I have been advised of my [r]ights listed above. I understand my [r]ights and I am willing to waive them and speak to the police. Correct?

[Defendant]: Whatcha' you mean waive them? I'm not waivin' nothin[g], you asked [to] speak wit[h] me, I don't mind speakin[g] to you, whatcha' ya mean?

[(Emphasis added).]

Defendant then requested more information about why he was arrested, and continued to refuse to sign the waiver form:

[Defendant]: So you're tellin[g] me I'm not gettin[g] arrested?

[Jones]: You're not bein[g] charged with anything right now, no.

[Defendant]: Whatcha' you mean right now? Like it . . . somethin[g] could [be] happenin[g] later, but.

[Jones]: Somethin[g] may happen later.

[Defendant]: Whatcha' you mean somethin[g] may happen [to] me, for what?

[Jones]: Do you wanna speak [to] me?

[Defendant]: Yeah! I wanna know what the fuck is goin[g] on! You keep like beatin[g] around the bush dog!

[Jones]: No, I'm not beatin[g] around the bush, we have to do this form first.

[Defendant]: Alright, you could do whatever you want, I'm not signin[g] nothin[g] man.

[Jones]: Ok, so you're refusing [to] sign the form?

[Defendant]: I'm not signin[g] the form.

[Jones]: Ok. But, you're willing [to] speak . . .

[Defendant]: Yeah!

[Jones]: . . . [to] me [without] a lawyer present?

[Defendant]: I'm not signin[g] no form, yeah!

[Jones]: But, you're willing [to] speak [to] me without a lawyer . . .

[Defendant]: Yeah!

[Jones]: . . . at this time?

[Defendant]: Yeah!

[Jones]: And you're waiving your [r]ights, correct?

[Defendant]: Waivin[g] my [r]ights for what?

[Jones]: [To] speak [to] me without a lawyer.

[Defendant]: Yeah!

[(Emphasis added).]

Detective Jones then commenced with the interview, first asking about the Nissan Maxima. Defendant was skeptical of this line of questioning and asked, "why you ask me that" and directed Detective Jones not to "beat around the bush." He then confirmed that the car belonged to Nishelle—whom he referred to as his "girl"—and that both he and Nishelle drove it. He did not recall what they did "last Monday"—which would have been the night of the incident—but generally stated that sometimes they drove to the gas station, went to get cigarettes, or went to Nishelle's godmother's home.

Defendant continued to question the detective regarding the circumstances surrounding his arrest, and the bases for it. For example, he rejected Detective Jones' claim he was being arrested for not wearing a seatbelt or for outstanding warrants and said that one of the arresting officers admitted that he was pulled over because "the detectives wanted [you] here man." After Detective Jones confirmed there were three warrants for defendant's arrest,[2] defendant asked the following questions with respect to his interrogation:

[Defendant]: So why ain't I in [c]ourt today then[?]

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[2] The three warrants are not included in the record. As best we can discern from the record, one of the warrants was from Trenton and was unrelated to the August 2, 2016 robbery and assault. The other two warrants were from Hamilton Township and Lawrence Township.

[Jones]: Cause you're here talkin[g] [to] me.

[Defendant]: Yeah, so I supposed [to] be in [c]ourt, fuck talkin[g] [to] you! You, you missin[g] my point, what do I gotta wait till tomorrow [to] go to [c]ourt?

[Jones]: You'll go [to] [c]ourt.

[Defendant]: Today or tomorrow?

[Jones]: Today.

[Defendant]: No man, like that's bullshit, you talk about talkin[g] [to] you, fuck talkin[g] [to] you! I wanna know . . . what fuck I got warrants for dog! You talk about talkin[g] [to] you . . .

[Jones]: . . . I was gonna . . .

[Defendant]: . . . some bullshit you ain't tryin[g] [to] tell me like.

[Jones]: . . . I was gonna tell, give ya the answer [to] that question, but you told me not to.

[Defendant]: What?

[Jones]: What your warrants were.

[Defendant]: Yea, but I wanna go [to] [c]ourt though! I don't wanna talk to you about no fuckin[g] shit, they, they got me in, in handcuffs for warrants or somethin[g], like man what the fuck man? I'm aggravated as hell! You talk some bullshit, beatin[g] around the bush, say what happened or say, you could say [to] the point, like I'm not a fuckin[g] kid man! I ain't got all day [to] be sittin[g] here.

[(Emphasis added).]

Detective Jones responded by changing the subject, and asking about defendant's hands, which apparently had marks on them, and which defendant stated were due to his eczema. Detective Jones eventually asked defendant why the Nissan Maxima and defendant were spotted "on video in South Trenton on Monday night." Defendant disputed that claim, and repeatedly pressed Detective Jones for details about what happened on Monday. Defendant again asked the detective why he had not been arrested already, given that he was apparently caught on video in the area. Detective Jones responded, because "I'm not, I'm doin[g] what I'm doin[g]." In response to defendant's questioning, Detective Jones repeated that he was not under arrest for the events on Monday night, but rather based on the outstanding "warrants."

After defendant continued to ask what he was being questioned for, Detective Jones told defendant that he had used the Nissan Maxima to "commit a robbery" Monday night, which defendant denied. Defendant again asked, at two separate points, why he had not been charged on the robbery, and Detective Jones again responded the police had not yet finished their investigation.

After being told that he was recorded "all over South Trenton," and being questioned about whether he drove on certain streets, defendant commented that

he did not "doubt that [he] was at them areas." He added, however, that it would have been "impossible" for him to have been spotted because he and Nishelle had been staying home the past few weeks.

The police also interviewed Nishelle on August 10, 2016, and her mother Tara. After Nishelle's interview, in which she made several extremely inculpatory statements against defendant, the detectives issued a complaint-warrant for defendant's arrest for robbery and attempted murder. Additionally, based on information provided during those interviews, Detective Jones obtained surveillance footage from a Lukoil gas station, 7-Eleven, and Dunkin' Donuts located near where the assault and robbery occurred.

The police also learned from Merrill's family that he was missing an American Express card and subpoenaed records of the card's usage during the relevant time frame from American Express. The records indicated the card was used at the Lukoil and the 7-Eleven and the video surveillance from the 7-Eleven established it was defendant who used Merrill's card, to purchase gasoline and cigarettes. On August 16, 2016, six days after defendant's interview, Merrill was placed in hospice care. He passed away two days later.

After defendant was indicted in connection with the assault and robbery, he moved to suppress his interview with Detective Jones, which was admitted

into evidence at the suppression hearing along with the corresponding transcript,[3] on two bases. He first argued he invoked his right to counsel when he mentioned that he had an attorney. Second, he contended he unequivocally asserted "his right to silence" when he told Detective Jones that he "don't want to talk . . . about no fuckin[g] shit."

After conducting an evidentiary hearing in which only Detective Jones testified, the court issued a written decision denying defendant's application. The court concluded that defendant's statement, "I got a lawyer already" was not an invocation of his right to counsel. Rather, the court found it was a factual assertion that he had an attorney, as opposed to a request that his attorney be present. Relying on defendant's subsequent statements, the court found that Detective Jones properly clarified whether defendant was willing to speak to him without an attorney present. The court's written opinion did not address defendant's argument that Detective Jones violated his right to remain silent.

Defendant's second appellate argument relates to alleged improprieties committed during jury selection. He specifically contends two black jurors,

[3] We have watched the recording and note the transcription incorrectly modified certain of the language used by defendant and Detective Jones, such as changing the word "to" to "ta" repeatedly. We have corrected those errors, and others of a non-substantive nature, in our opinion.

T.H.[4] and K.M., were excluded from the panel.[5] T.H. was the first juror to whom the court posed all of its initial questions and was the second juror against whom the State utilized a preemptory challenge. Defendant did not object to his removal at the time.

There were two purported issues with T.H.'s testimony, according to the State: first, he had trouble answering the court's questioning; and second, he stated he followed conspiracy theories. There appears ample support in the record for the State's concerns. For example, during its initial questioning, the court found it necessary to repeat and rephrase three questions. And when the court later engaged in a second round of questioning with all prospective jurors—asking questions about their education, career, family, hobbies, and media habits—T.H.'s notable response was that "[s]ometimes I follow conspiracy theories."

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[4] We use initials to protect the privacy of the jurors. We also note during initial questioning, juror T.H. stated his first name started with a T, but during the second round of questioning, he stated his name began with a C. This discrepancy was never clarified. We accordingly we use the initials T.H. to identify him, intending no disrespect.

[5] Before us, defendant only objects to the exclusion of K.M. contending as to her there was no plausible explanation for her exclusion, aside from her race.

K.M., on the other hand, had no issues answering the initial round of questions. She informed the court and the parties she had family members who worked in law enforcement and corrections, and a friend who was a judge "in Norfolk"; she had a "childhood friend that committed minor brushes with the law"; her car had been broken into in the past; and she was a "lifelong resident" of the area where the incident occurred.

In addition, when asked why she would make a good juror, K.M. candidly responded, "It's my civic duty as an American citizen, so. People need to be judged by their peers and justice for all." Later on, during the court's second round of questioning, K.M. responded that she worked as a supervisor for bus operations with New Jersey Transit, had a Bachelor of Arts "from William Patterson University in Africana studies and political science," and she "listen[ed] to NPR radio stations, BBC and Sirius radio."

Following a series of peremptory challenges by both sides—during which T.H. was excluded—the State said the current panel was "acceptable." After the defense excused a different juror immediately after, however, the State used one of its peremptory challenges to strike K.M. At that point, defense counsel raised

a "Gilmore[6] challenge to the pattern of the State's excusal of jurors," stating that there were "three [black] jurors," and the State had excused two of them.

The State responded that it had removed T.H. because he had trouble answering questions and followed "conspiracies." As for K.M., the prosecutor said she had initially confirmed the panel without consulting her co-counsel, and when her co-counsel returned from a break, she had indicated K.M. should be removed as well. The State's entire stated rationale for K.M.'s removal was because she "said something about" believing "in justice for all" and she "listens to NPR to get news," and not because she was "a black female."

The court denied defendant's application. In rendering its decision, the court explained T.H. was "the first individual . . . questioned" and it had "encountered significant difficulty in eliciting responses to the very first question on the questionnaire," forcing the court to "literally read each and every question to him." The court added it then continued reading every question to each prospective juror, "in large part based on the problems associated with going through the questionnaire initially with [T.H.]." Thus, based upon its assessment of T.H.'s removal, the court said that it could not "conclude that the State has exercised a pattern designed to exclude [black] jurors systematically

[6] State v. Gilmore, 103 N.J. 508 (1986).

from participating in this trial." The court did not otherwise specifically address the State's challenge to K.M., generally stating that "[t]he rationale the State has employed in the exercise of their challenges at this point cannot be characterized or concluded to be consistent to that which the Gilmore case addressed."

At sentencing, both Merrill's daughter and defendant addressed the court. Merrill's daughter described the "incomprehensible pain and loss" she and her family experienced as a result of defendant's actions and detailed how their "li[ves] . . . will never be the same." Although defendant claimed to understand "where the family [was] coming from," he also stated he did not "feel sorry" for them but rather for himself, as he maintained he was innocent and not responsible for Merrill's death. He also asked the court and the family to "understand" he was a "black man in jail for something [he] didn't do."

The State requested a seventy-year sentence. It argued such a lengthy custodial term was warranted based on the circumstances of the crimes to which defendant was found guilty and was supported by the application of aggravating factors three, the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); six, the extent of defendant's prior criminal record and the seriousness of those offenses, N.J.S.A. 2C:44-1(a)(6); and nine, the need to deter, N.J.S.A. 2C:44-1(a)(9), and the absence of any mitigating factors.

Defendant's counsel requested the court impose the minimum sentence—thirty-years with a thirty-year period of parole ineligibility—and argued for the application of mitigating factor two, defendant did not contemplate his conduct would cause or threaten serious harm, N.J.S.A. 2C:44-1(b)(2). Defendant also emphasized in acquitting defendant of most of the serious first-degree charges, the jury rejected the State's argument he acted recklessly or acted with an intent to cause serious harm, and maintained the court was "bound" by their verdict.

After considering the parties' arguments, the presentence report, and the aforementioned statements, the court merged defendant's robbery conviction with his felony murder conviction, and sentenced him to fifty years, subject to an eighty-five percent period of parole ineligibility, as noted. In support of its sentence, the court relied on defendant's criminal history, which included three prior convictions of assault, possession of a controlled dangerous substance on school property, and burglary. It also noted defendant was previously arrested on thirteen separate occasions and had "numerous juvenile adjudications, dating back to . . . him being [fourteen] years old," which involved "[a]ssault, robbery, drugs, crimes of violence."

In its evaluation of the aggravating and mitigating factors, the court found aggravating factor three to be applicable based on its review of defendant's

criminal history which supported the conclusion he "doesn't live by the rules of society." The court also noted defendant's "lack of respect for others" based on that same criminal history. It also applied aggravating factor six based on defendant's "recurrent acts of delinquency" as a youth which escalated "to criminal behavior as an adult," and found defendant was not amenable to rehabilitation. Finally, the court applied aggravating factor nine, based on the "substantial need to deter . . . defendant from engaging in conduct of the nature that he has continually engaged in throughout his life." The court also noted a need to "protect the public," based on the "nature and the facts surrounding this case and this defendant."[7] The court found no mitigating factors applicable.

Prior to sentencing, the court made the following comments, which are central to defendant's challenge to his sentence:

> This is and was as senseless of a crime as could possibly be imag[ined]. For the sake of a couple cartons of cigarettes, this innocent victim is brutally attacked [in] the shadows of darkness, close to the safety of his own home, and left in a pool of blood in his own body fluids on the sidewalk, helpless and unconscious, while the defendant went shopping with the victim's credit cards. This brutal, heartless, callous and cowardly act resulted in injuries that allowed [the victim] to linger for several weeks, never improving, and ultimately dying. It is an

[7] The court did not apply aggravating factor two, the gravity and seriousness of harm inflicted on the victim, N.J.S.A. 2C:44-1(a)(2).

> understatement to characterize this as senseless and cruel. It is profoundly sad.
>
> But it is profoundly sad, and it's profoundly tragic from a number of perspectives. Obviously, it's tragic for the victim and his family, the loss of life, the loss of family, the impact that was so profoundly expressed by this daughter here today, the other family members who loyally attended this trial on an almost daily basis throughout the weeks that it was tried.
>
> It's tragic for the loss of the future of the victim. It's a loss of the community for the contributions that. . . Merrill made to the community, to his neighbors, to his friends, for [t]he positive things that he did with the life that he was given.
>
> But this is also … truly tragic for [defendant] as well. Because . . . the loss represents a loss of what [he] was capable of achieving lawfully. [Defendant] testified during the course of this trial, he's an articulate, intelligent man, he's capable of working. He's capable of achieving something. But he literally never gave himself a chance. His record of conduct dating back to a juvenile reflects that he never gave himself a chance.
>
> [(Emphasis added).]

This appeal followed.

II.

In Point I, defendant argues his statement to police should have been suppressed on three separate but related bases. He initially contends his waiver was neither knowing nor intelligent, in part because the interviewing officer,

Detective Jones, failed to notify him that he was a suspect in what was, at the time, a robbery and assault investigation. Second, defendant maintains he invoked his right to counsel when he told Detective Jones he had an attorney, yet the detective impermissibly continued to question him. Third, he argues he invoked his right to remain silent when he told Detective Jones, "I don't wanna talk to you about no fuckin[g] shit," yet the detective persisted in his interrogation.

When reviewing a motion to suppress, we generally "defer to the factual findings of the trial court if those findings are supported by sufficient credible evidence in the record." State v. Sims, 250 N.J. 189, 210 (2022). Deference to a trial court's factual findings is appropriate because the trial court had the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). Thus, "[a]n appellate court should not disturb a trial court's factual findings unless those findings are 'so clearly mistaken that the interests of justice demand intervention and correction.'" Ibid. (quoting State v. Gamble, 218 N.J. 412, 425 (2014)). Moreover, "[t]o warrant reversal, defendant must show not only that admission of his statement was error, but that it was error 'of such nature to have been

clearly capable of producing an unjust result.'" State v. Maltese, 222 N.J. 525, 543 (2015) (quoting R. 2:10-2). The trial court's legal conclusions, however, are reviewed de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

A. Failure To Advise Defendant Of His Status As A Suspect In The Robbery/Assault

In Point I.B., defendant contends, for the first time on appeal, that the State failed to establish he knowingly and intelligently waived his Miranda rights, "especially given that the detective intentionally misled him about the nature of the interrogation." Relying primarily on State v. Sims, 466 N.J. Super. 346, 360 (App. Div. 2021), rev'd and remanded, 250 N.J. at 189, he argues Detective Jones clearly "did not want defendant to know why he was being questioned, and without that knowledge, defendant could not make a knowing and intelligent waiver of his rights." On this point, he asserts "nothing about the interrogation related to defendant's outstanding warrants in the Hamilton, Lawrence, or Trenton municipal courts[,] [n]or did the police question defendant about not wearing a seatbelt or not having a driver's license."

Defendant also relies upon State v. Diaz, 470 N.J. Super. 495, 522 (App. Div. 2022), and argues Detective Jones' interview strategy "was designed to keep defendant from realizing that he faced possible prosecution for homicide . . . until after he had waived his right against self-incrimination and made

incriminating admissions that would support a homicide prosecution." (alteration in original). He similarly asserts "the police deliberately delayed filing charges against [him] so that they would not have to tell him that he had been charged with a robbery." Accordingly, defendant asserts his "statement to Det[ective] Jones should be suppressed in its entirety." We disagree.

We initially note defendant never raised this argument before the trial court.[8] It is well settled that "[p]arties must make known their positions at [a] suppression hearing so that the trial court can rule on the issues before it," State v. Witt, 223 N.J. 409, 419 (2015), and when the State or defendant fails to do so, we "decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest," State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins., 62 N.J. 229, 234 (1973)). This is so

[8] Defendant contends he raised the issue before the trial court when he argued he did not knowingly and intentionally waive his Miranda rights. We disagree. It is clear from the record before us defendant only raised that argument in the context of his contentions regarding his invocation of his right to counsel. Specifically, defense counsel argued at the motion hearing, "[t]here could not have been a knowing, intelligent, or voluntary waiver of his rights at that time when he's telling a detective that he is represented by an attorney, and the detective essentially disregards it completely."

because, "the points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review." Id. at 19; see also State v. Andujar, 462 N.J. Super. 537, 550 (App. Div. 2020).

These principles are especially applicable where, as here, defendant's failure "denied the State the opportunity to confront the claim head-on; it denied the [motion] court the opportunity to evaluate the claim in an informed and deliberate manner; and it denied [this] court the benefit of a robust record within which the claim could be considered." Robinson, 200 N.J. at 21. It was thus unnecessary for the court to make the credibility determinations and fact findings necessary for resolution of the newly-minted claim his exculpatory statement was involuntary because the police did not advise him they suspected him in the assault and robbery.

In any event, we are satisfied based on the record before us defendant's argument fails on the merits. Since the initial briefing in this case, the Supreme Court has reversed our decision in Sims. 250 N.J. at 197. The Court in Sims instructed "[t]he rule announced in A.G.D. is clear and circumscribed. If a complaint-warrant has been filed or an arrest warrant has been issued against a suspect whom law enforcement officers seek to interrogate, the officers must disclose that fact to the interrogee" before beginning their questioning. Id. at

213 (citing State v. A.G.D., 178 N.J. 56, 134 (2003)). "The officers need not speculate about additional charges that may later be brought or the potential amendment of pending charges." Id. at 214. The Court directed that trial judges are to consider a defendant's claim that police delayed lodging charges in order to avoid having to advise him of the charges he faced "as part of the totality-of-the-circumstances test." Id. at 216.

We are satisfied after applying the Court's ruling in Sims to the record before us, defendant's statement was freely volunteered, and the detectives did not overbear defendant's will in the course of their interrogation. State v. Hreha, 217 N.J. 368, 383 (2014). While the detectives did not advise defendant he was a suspect in the robbery/assault, there was no obligation on them to do so as defendant had not been charged with that or any crime related to those events when he was questioned by the detectives. See Sims, 250 N.J. at 214.

Additionally, applying the totality-of-the-circumstances test—in other words, assessing defendant as well as the character of the questioning, considering such factors as "the suspect's age, education and intelligence, advice concerning constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, and whether physical punishment and mental exhaustion were involved," Hreha, 217 N.J. at 383 (quoting State v.

Galloway, 133 N.J. 631, 654 (1993))—we have no doubt defendant's waiver was knowing and voluntary.

After the police pulled him over for driving without a seatbelt, defendant was arrested for driving without a license, handcuffed, and transported to the police station for questioning. Although police told defendant he was arrested, it is not disputed they did not initially tell him they were investigating the armed robbery and assault of Merrill. But the circumstances of defendant's arrest and the interrogation make it impossible to conclude he was misled into believing Detective Jones was interviewing him solely about his motor vehicle violation or the outstanding warrants. See State v. Nyhammer, 197 N.J. 383, 407 (2009) (acknowledging "the reality that in many, if not most, cases the person being questioned knows he is in custody on a criminal charge").

First, Detective Jones began his substantive questioning by inquiring about the Nissan Maxima and defendant's whereabouts on the night of the robbery and assault. Additionally, both before and after his Miranda waiver, defendant aggressively questioned the detective, at times combatively, about the circumstances surrounding his arrest, such as questioning how the police would have known he was driving the car when they pulled him over, as it was not registered in his name. Specifically, defendant repeatedly asked Detective Jones

to stop "beat[ing] around the bush," and asked him to be more "specific." Although a defendant is not required to be complacent or passive in the face of perceived police impropriety, defendant's active, forceful, engagement with the police informs, in part, our totality of the circumstances analysis.

Defendant's reliance on Diaz, 470 N.J. Super. at 495, is also misplaced as it is clearly distinguishable from the matter before us. In that case, the defendant was suspected of first-degree strict liability for drug-induced death, N.J.S.A. 2C:35-9, due to his sale of heroin to a woman who subsequently overdosed and died. Id. at 502, 504. The police requested that the victim's roommate contact defendant and ask for "the same stuff" that he provided previously and arrested the defendant when he left his apartment. Id. at 505. After the arresting detective recited the Miranda rights to the defendant, the defendant asked what his arrest "was about," and the detective responded "we [are] conducting an investigation involving narcotics." Id. at 506.

Upon arriving at the police station, another detective questioned the defendant and he admitted to supplying the heroin. Id. at 507. After obtaining that admission, the detective alerted the defendant for the first time that the victim had died and that he was being questioned in connection with her death. Id. at 507-08. On appeal, we determined "the decision to withhold information

about the overdose death . . . was part of a deliberate and designed investigative plan to induce defendant to waive his right against self-incrimination." Id. at 524. We concluded that, viewed under the totality of the circumstances, the detective's misleading statement regarding the reason the defendant was taken into custody undermined the voluntary nature of his Miranda waiver. Id. at 519-20, 525.

Unlike in Diaz, Detective Jones did not mislead defendant by using a related lesser crime to elicit information about a significantly more serious crime. Further, even though Detective Jones testified he was aware as early as August 5, 2016, that Merrill's condition "was grave" and he was going to be taken off life support, unlike the police in Diaz, the record does not support the conclusion Detective Jones was aware defendant would be facing homicide charges, as Merrill was still undergoing testing on August 10, 2016, and he was not transported to a hospice facility until August 16, 2016.

A more accurate characterization of the interrogation is that defendant was clearly suspicious of the police from the outset of the interview, undoubtedly because, as he later admitted, the circumstances surrounding his arrest, being handcuffed, taken into custody and Mirandized, suggested a greater crime than a seatbelt infraction or having outstanding warrants. See State v. Cotto, 471 N.J.

Super. 489, 521-22 (App. Div. 2022) (distinguishing Diaz because the defendant was aware "before he answered any substantive questions that the subject matter of the interrogation would not focus on the traffic warrants for which he was arrested" and the defendant did not stop the interrogation upon discovering its true purpose). Further, as noted, he continuously and aggressively pushed back on questions about the Nissan Maxima, wondering why Detective Jones needed this information from him, and why the detective could not ask Nishelle directly, given that the car belonged to her.

Further, the record fully supports the conclusion the police were still conducting their investigation prior to charging defendant. On this point, it is not disputed that the police had yet to receive some of the more directly incriminating evidence through Nishelle and Tara and had yet to gather the bank records and the additional surveillance videos establishing defendant used Merrill's credit card. Thus, this case is unlike Sims, where law enforcement engaged in "bad-faith conduct" because they delayed "seeking a complaint-warrant or arrest warrant in order to avoid disclosing to an arrestee the charges that he faces." 250 N.J. at 216. Simply put, the record does not support defendant's argument the police intentionally delayed charging defendant.

B. Right To Counsel

In Point I.C., defendant argues the interrogation should have ceased when he "made an unequivocal assertion of the right to have counsel present" by stating, "I got a lawyer already . . . his name [is] Cleveland" and he was "pretty sure" his lawyer would come to the interrogation "if I make a call." Further, he claims "Det[ective] Jones did not attempt to clarify defendant's position by asking if he wanted to call Mr. Cleveland."

In Miranda, "[t]he United States Supreme Court set forth the framework for our analysis[,] . . . establishing the now-familiar warnings designed to safeguard the Fifth Amendment's guarantee of the privilege against self-incrimination." State v. Alston, 204 N.J. 614, 619 (2011) (citing Miranda, 384 U.S. at 444, 468-72). "[I]f the accused 'indicates in any manner and at any stage of the process that [t]he[y] wish[] to consult with an attorney before speaking there can be no questioning.'" Id. at 619-20 (quoting Miranda, 384 U.S. at 444-45). And "once a request for counsel has been made, an interrogation may not continue until either counsel is made available or the suspect initiates further communication sufficient to waive the right to counsel." Id. at 620 (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

Our courts "interpret equivocal requests for counsel in the light most favorable to the defendant." State v. McCloskey, 90 N.J. 18, 26 n.1 (1982). Further, if "a suspect's statement 'arguably' amounted to an assertion of Miranda rights, . . . the officer must clarify with the suspect in order to correctly interpret the statement." Alston, 204 N.J. at 621-22. The officer must make "additional neutral inquiries that clarify that the suspect desires to waive the presence of counsel." State v. Rivas, 251 N.J. 132, 154 (2022). "[C]onducting a follow-up inquiry is the only way to ensure that a suspect's waiver of their right was knowing and voluntary." State v. Gonzalez, 249 N.J. 612, 630 (2022). Then, "substantive questioning should resume only after 'the suspect makes clear that [they are] not invoking [their] Miranda rights." Ibid.

Here, we discern no abuse of the court's discretion in concluding defendant's statement "I got a lawyer already" was ambiguous and Detective Jones properly clarified whether defendant was willing to speak to him without an attorney present. Indeed, after defendant stated he had a lawyer, Detective Jones specifically asked, "So, you're requesting a lawyer then?" and defendant responded, "I'm not requesting a lawyer, but I just wanna know what I'm bein[g] questioned for."

Detective Jones then told defendant "[y]ou have to be very clear on what you want" and again asked "[d]o you wanna answer questions now without a lawyer present?" Additionally, after defendant refused to sign the waiver form, Detective Jones twice clarified whether defendant was willing speak to him without a lawyer present, and defendant responded "yeah!" both times. It was then that Detective Jones began his substantive questioning. Accordingly, we are satisfied the record contains "sufficient credible evidence" supporting the court's findings. Sims, 250 N.J. at 210.

C. Right To Remain Silent

In Point I.D., defendant argues he unequivocally invoked his right to remain silent when he told Detective Jones, "I don't wanna talk to you about no fuckin[g] shit," and that the continued interrogation violated this right. Further, according to defendant, "even if the State were to argue that the words 'I don't wanna talk to you' were somehow equivocal, the fact is that Det[ective] Jones just ignored them and continued with the questioning as if nothing had happened."

The right against self-incrimination is "[o]ne of the most fundamental rights protected by both the Federal Constitution and state law." State v. O'Neill, 193 N.J. 148, 167 (2007). Among those rights is the right to remain silent.

Miranda, 384 U.S. at 444. Under federal law, police must halt a custodial interrogation when the suspect "unambiguously asserts his right to remain silent." S.S., 229 N.J. at 382 (citing Berghuis v. Thompkins, 560 U.S. 370, 381-82 (2010)). By contrast, New Jersey's privilege against self-incrimination requires that a defendant's invocation of the right to remain silent "however ambiguous . . . must be diligently honored." Ibid. (quoting State v. Bey, 112 N.J. 123, 142 (1988)). Accordingly, "[w]ords used by a suspect are not to be viewed in a vacuum, but rather in 'the full context in which they were spoken.'" Ibid. (quoting State v. Roman, 382 N.J. Super. 44, 64 (App. Div. 2005)).

Consistent with this principle, a defendant need not use any "talismanic words" or phrases to invoke the right to remain silent. Id. at 383. In fact, "[a]ny words or conduct that reasonably appear to be inconsistent with [the suspect's] willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination." Bey, 112 N.J. at 136. When a "statement is susceptible to two different meanings, the interrogating officer must cease the interrogation and 'inquire of the suspect as to the correct interpretation.'" S.S., 229 N.J. at 383 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)). As the Court held in Johnson, police may clarify whether a suspect

intended to invoke the right to remain silent if they are "reasonably unsure" the suspect's response was equivocal. 120 N.J. at 283.

"If the police are uncertain whether a suspect has invoked his right to remain silent, two alternatives are presented: (1) terminate the interrogation or (2) ask only those questions necessary to clarify whether the defendant intended to invoke his right to silence." S.S., 229 N.J. at 383. A defendant who has "'nothing else to say'" or "'does not want to talk about the crime'" has asserted the right to remain silent, requiring the police immediately to stop questioning. Johnson, 120 N.J. at 281 (first quoting Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987); and then quoting State v. Bishop, 49 Or. App. 1023, 1025 (1980)).

However, police are not required to accept "any words or conduct, no matter how ambiguous, as a conclusive indication that a suspect desires to terminate questioning." Bey, 112 N.J. at 136-37. "When the defendant's statement or conduct do not indicate that he is invoking his right to silence, that statement or conduct does not constitute an invocation of the right." Id. at 137.

Defendant argued at the suppression hearing that his statement, "I don't wanna talk to you about no fuckin[g] shit" was an assertion of his right to remain silent. The court questioned this assertion, asking if this statement was about

"the warrants or the interrogation," and defense counsel responded that defendant was "referring to anything that's being discussed between him and this detective." In its written opinion, the court summarized defendant's arguments—including his claim that he had invoked his right to remain silent—and acknowledged defendant's "clear" hesitance to speak with Detective Jones, but did not make factual findings or a legal conclusion with respect to whether defendant had indeed invoked his right to remain silent.

Because the court did not address this particular argument, it is unclear how the court interpreted defendant's statement—whether it rejected the statement as an invocation of the right to be silent outright or concluded that, while ambiguous, under the totality of the circumstances, defendant had not invoked his right to silence. Under these circumstances, we elect not to exercise original jurisdiction over defendant's claim pursuant to Rule 2:10-5. See State v. Micelli, 215 N.J. 284, 293 (2013) (Rule 2:10-5 "permits appellate courts to exercise original jurisdiction . . . 'only with great frugality.'" (quoting Tomaino v. Burman, 364 N.J. Super. 224, 234-35 (App. Div. 2003))); State v. Santos, 210 N.J. 129, 142 (2012) (Rule 2:10-5 discourages appellate courts from exercising original jurisdiction "if factfinding is involved."). Instead, we conclude a

remand is appropriate for the court to squarely address this issue and make required factual findings and legal conclusions.

III.

In Point II, defendant argues the State improperly used a peremptory challenge to exclude a black juror from the panel, in violation of his rights to an impartial jury and equal protection of the law. He further contends the court incorrectly viewed the standard as requiring a "pattern," when even a single instance of race-based discrimination was impermissible and maintains the State failed to provide a sufficient race-neutral reason for K.M.'s removal.

We review a trial court's decision regarding the State's use of its peremptory challenges for abuse of discretion and will extend substantial deference to a court's findings regarding peremptory challenges if it has applied the appropriate analysis set forth in State v. Osorio, 199 N.J. 486, 492 (2009). State v. Pruitt, 438 N.J. Super. 337, 343 (App. Div. 2014). "[W]e also owe some deference to [the court's] ability to gauge the credibility of the explanation." Ibid. Therefore, we will uphold the trial court's ruling on whether peremptory challenges were made on a constitutionally impermissible basis unless it is clearly erroneous. State v. Thompson, 224 N.J. 324, 344 (2016).

The State's ability to exercise peremptory challenges is not absolute. The United States and New Jersey Constitutions prohibit discrimination based on race in the jury selection process. Batson v. Kentucky, 476 U.S. 79, 96 (1986); Andujar, 247 N.J. at 297; Gilmore, 103 N.J. at 524-27. In Batson, the United States Supreme Court established a three-part test to determine whether an alleged discriminatory peremptory challenge violates the Equal Protection Clause. 476 U.S. at 93-94, 96-98. Our Supreme Court outlined a similar three-step analysis for trial courts to follow when adjudicating a claim of unconstitutional discrimination in the use of peremptory challenges in Gilmore, 103 N.J. at 533-39, and "slightly" refined the methodology in Osorio, 199 N.J. at 492.

"That analysis begins with the 'rebuttable presumption that the prosecution has exercised its peremptory challenges on' constitutionally permissible grounds." Thompson, 224 N.J. at 340 (quoting Gilmore, 103 N.J. at 535). Defendant must first make a "prima facie showing that the prosecution exercised its peremptory challenges on constitutionally[] impermissible grounds." Gilmore, 103 N.J. at 535. "That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination." Osorio, 199 N.J. at 492.

If the court determines a prima facie case has been made, "[t]he burden shifts to the prosecution to come forward with evidence that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias." Gilmore, 103 N.J. at 537. To satisfy this burden, "the State must articulate 'clear and reasonably specific' explanations of its 'legitimate reasons' for exercising each of the peremptory challenges." Ibid. (quoting Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 258 (1981)). Further, the reasons provided by the State must be reasonably relevant to the case or the parties and witnesses. State v. Clark, 316 N.J. Super. 462, 469 (App. Div. 1998). The court "must make specific findings with respect to the prosecution's proffered reasons for exercising any disputed challenges." Id. at 473.

If the party exercising the peremptory strike satisfies its burden under the second prong of the analysis, then the trial court must weigh the prima facie case against the striking party's rebuttal "to determine whether the [opposing party] has carried the ultimate burden of proving, by a preponderance of the evidence, that the [striking party] exercised its peremptory challenges on constitutionally[] impermissible grounds of presumed group bias." Gilmore, 103 N.J. at 539; Osorio 199 N.J. at 492-93, 506. Courts should look to "whether the [exercising party] has applied the proffered reasons . . . even-handedly to all prospective

jurors"; "the overall pattern of the [exercising party]'s use of its peremptory challenges," examining whether a disproportionate number of peremptory challenges were used on a cognizable group; and "the composition of the jury ultimately selected to try the case." Osorio, 199 N.J. at 506 (quoting Clark, 316 N.J. Super. at 473-74). "This analysis presumes that a defendant will present information beyond the racial makeup of the excused jurors." Thompson, 224 N.J. at 348.

We initially note the court did not specifically address whether defendant made a "prima facie showing that the prosecution exercised its peremptory challenges on constitutionally[] impermissible grounds." Gilmore, 103 N.J. at 535. Based on the record before us, however, we are satisfied defendant satisfied his "slight" burden to do so, as the State's use of peremptory challenges to exclude two of the three [black] jurors from the panel is sufficient to "raise an inference of discrimination." Osorio, 199 N.J. at 492.

We conclude, however, that the court abused its discretion in denying defendant's Gilmore challenge based solely on the State's explanation as to why it excluded T.H. As noted, the State justified its removal of T.H. primarily due his trouble in answering the court's questions, and also because he stated he follows conspiracy theories, and K.M. because she stated "she believed in justice

for all" and "listens to NPR to get her news." After the State proffered race-neutral reasons for its challenges to T.H. and K.M., the court articulated findings only with respect to the State's challenge to T.H. and never addressed the State's purported reasons for striking K.M. Instead, because it concluded the State's reasons for challenging T.H. were constitutionally permissible, it determined the State had not "exercised a pattern designed to exclude [black] jurors systematically from participating in this trial."

Although "the overall pattern of the [exercising party]'s use of its peremptory challenges" is a factor to consider under the third prong of the Osorio framework, 199 N.J. at 506, a pattern is not required for a peremptory challenge to be overruled. For example, in Snyder v. Louisiana, 552 U.S. 472, 478 (2008), the United States Supreme Court found that there was a Batson violation involving the removal of a single juror, and remanded the matter on that ground, without also considering the petitioner's claim about the removal of a second juror. See also U.S. v. Vasquez–Lopez, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose"). Our Supreme Court in Andujar, 247 N.J. at 299, also considered a peremptory challenge against a single individual, albeit in a different context. There, the Court reiterated that "[n]o party in a criminal or

civil case can use peremptory challenges to remove a juror on the basis of race or gender." Id. at 301.

In light of the court's failure to "make specific findings with respect to the prosecution's proffered reasons" for striking K.M., Clark, 316 N.J. Super. at 473, we determine a remand is necessary for the court to make findings and a legal conclusion as to whether the State exercised its peremptory challenge for constitutionally permissible reasons. See Pruitt, 438 N.J. Super. at 343 ("[T]he trial court must make specific findings as to each allegedly improper challenge, to determine whether the State's explanation is relevant to the specific case, and whether there is any evidence that the explanation is nonetheless apparently pretextual."). Specifically, the court never required the State to explain how its purported reasons for striking K.M. supported a reasonable belief that a "situation-specific bias" warranted her excusal. See Gilmore, 103 N.J. at 538. And, because the court never addressed the State's reasons for removing K.M., we can only speculate as to whether the court accepted the State's reasoning. Absent the court's findings, there is simply insufficient evidence in the record before us to discern whether the State struck K.M. on constitutionally permissible grounds.

IV.

In his final point, defendant relies on State v. Melvin, 248 N.J. 321 (2021), and our decision in State v. Morente-Dubon, 474 N.J. Super. 197 (App. Div. 2022), and argues we should vacate his sentence and remand for a new sentencing proceeding because the court's sentence was "fundamentally unfair" and contrary to the Code of Criminal Justice. He maintains the court improperly based the fifty-year custodial term on its "own personal views of what occurred," rather than the jury's verdict.[9] He specifically argues the court's determinations that defendant "brutally attacked" Merrill which resulted in injuries causing him to "linger" in the hospital "and ultimately d[ie]," are contradicted by the jury's finding he did not act "purposely, knowingly, or even recklessly" in causing Merrill's death, or that he inflicted "serious bodily injury." We are unpersuaded by these arguments.

We generally defer to the sentencing court's factual findings and appellate judges "are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014). That deference, of course, "presupposes and depends upon the proper application of sentencing

[9] Defendant does not specifically challenge the application of any particular aggravating or mitigating factor.

considerations." Melvin, 248 N.J. at 341. We therefore affirm a sentence "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record'; or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). Where an appeal "challenges not the application of permissible considerations, but rather the permissibility of the considerations the sentencing court applied," then it is a question of law that we review de novo. Melvin, 248 N.J. at 341.

Before us, neither party disputes that defendant was found guilty of inflicting "bodily injury" or using "force" in the course of the robbery, nor do they dispute the jury found defendant did not cause serious bodily injury or purposeful death in the commission of his crimes. Rather, defendant argues the court's comments during sentencing regarding the brutality of the crime and the connection to Merrill's death resulted in improper judicial fact finding, contrary to Melvin, 248 N.J. at 349, and Morente-Dubon, 474 N.J. Super. at 211-12.

In Melvin, the Court addressed "whether a trial judge can consider at sentencing a defendant's alleged conduct for crimes for which a jury returned a

not guilty verdict." 248 N.J. at 325. In that case, a jury found Melvin guilty of second-degree unlawful possession of a handgun but not guilty of murder or attempted murder. Ibid. At sentencing, the trial court "determined that the evidence at trial supported the conclusion that Melvin shot the victims" despite the jury's not-guilty verdicts on the murder charges. Id. at 326. In challenging this sentence, Melvin "argue[d] that sentencing based on acquitted conduct violated [his] federal and state constitutional rights to due process and fundamental fairness. [He] assert[ed] that punishing a person for conduct of which a jury acquitted them violates the protection afforded by acquittal and undermines the purpose of a jury trial." Id. at 339.

The Court reversed and remanded our decision affirming Melvin's sentence, and in doing so held that in "order to protect the integrity of our Constitution's right to a criminal trial by jury, we simply cannot allow a jury's verdict to be ignored through judicial fact[]finding at sentencing. Such a practice defies the principles of due process and fundamental fairness." Id. at 349. The Court explained "[t]o convict Melvin of unlawful possession, the jury did not make any finding as to whether he used the handgun he possessed." Id. at 350. Similarly, "in acquitting Melvin of any offenses that involved using the weapon—or even of having had the 'purpose to use the firearm unlawfully,' . . .

the jury's verdict should have ensured that Melvin retained the presumption of innocence for any offenses of which he was acquitted." Ibid. Finally, the Court concluded "that fundamental fairness prohibits courts from subjecting a defendant to enhanced sentencing for conduct as to which a jury found that defendant not guilty." Id. at 326.

We applied these principles in our recent decision, Morente-Dubon, 474 N.J. Super. at 211-12. There, we vacated defendant's sentence for his conviction of the lesser-included offense of second-degree passion provocation manslaughter, because the sentencing court determined defendant was not "reasonably provoked to passion" and possessed "sufficient intervening time for reason to intercede before he brutally killed [the victim]." Id. at 212. We concluded this characterization "constituted impermissible judicial fact[]finding at sentencing," as it was inconsistent with the elements of second-degree passion provocation manslaughter. Ibid. Specifically, we reasoned that if the jury found there was "inadequate provocation or sufficient time to cool off," then the defendant would have been convicted of murder. Ibid. Therefore, it was "improper for the trial court to engage in judicial fact finding to reach a different conclusion and to consider those facts in sentencing defendant." Ibid.

Defendant's reliance on Melvin and Morente-Dubon is misplaced, as the improper fact finding present in those cases simply did not occur here. Nothing in the court's findings remotely resembles the court's fact finding in Melvin, where, despite the jury's decision acquitting defendant of murder and attempted murder, it nevertheless determined Melvin used a firearm "to shoot upon three other human beings." 248 N.J. at 351. Similarly, in Morente-Dubon, the court's finding defendant did not commit heat of passion killing, and possessed adequate time to cool-off, was tantamount to a rejection of the jury's conviction of second-degree manslaughter. 474 N.J. Super. at 211-12.

In arguing the court engaged in improper fact finding, defendant applies too narrow of an interpretation of the crimes to which he was convicted and similarly applies a crabbed interpretation of certain language used by the sentencing court. We reach this conclusion, with full recognition that defendant was acquitted of purposeful murder, and the related lesser-included offenses, along with the tampering charge. We also acknowledge, as do the parties, that by finding defendant not guilty of first-degree robbery, the jury determined he did not purposely inflict or attempted to inflict serious bodily injury.

Although they did not conclude defendant purposely caused serious bodily injury or death, the jury did convict defendant of second-degree robbery and the

trial evidence fully supported that charge, and specifically that defendant "inflict[ed] bodily injury or use[d] force" when robbing Merrill. See N.J.S.A. 2C:15-1(a)(1). And, in convicting him of felony murder, the jury believed as a result of robbing Merrill, defendant bore responsibility for his death. See N.J.S.A. 2C:11-3(a)(3).

As noted, there was ample support for the jury's finding on these two charges. For example, defendant's then-girlfriend testified to the facts of the robbery and physical assault. She specifically stated while she and defendant drove around Trenton, they saw Merrill and started following him. After defendant told her he intended to rob Merrill, he exited the vehicle. He then casually walked up to Merrill, and hit him, resulting in both men falling to the ground. Defendant returned to the car with Merrill's wallet and phone, told his girlfriend to flee the scene and acknowledged he should not have robbed Merrill. Those facts described a planned robbery and a physical attack which resulted in defendant leaving Merrill in the street wounded. Moreover, after the assault and robbery, defendant used Merrill's credit cards to purchase cigarettes and gasoline.

Thus, the court's use of the words "brutal" and "callous," while perhaps gratuitous, certainly do not warrant a resentencing. Contrary to defendant's

claims that those terms suggest the court determined defendant intentionally inflicted serious bodily injury on Merrill, they, in fact, have various, alternative meanings, including "grossly ruthless or unfeeling," "cruel," "very bad or unpleasant," or "feeling or showing no sympathy for others." See Merriam-Webster's Collegiate Dictionary 159, 176 (11th ed. 2020) (defining "brutal" and "callous"). In reviewing the entirety of the transcript from the sentencing proceeding, we discern the court's statements were not used to describe the type of force inflicted on Merrill or the injuries he sustained. Instead, read in context, we are satisfied the court used the terms "brutal" and "callous" to reference the circumstances of the robbery and subsequent events, including the manner in which defendant robbed Merrill and his decision to flee while leaving him wounded in the street.

Similarly, we disagree the court's statement that the attack on Merrill caused him to "to linger for several weeks, never improving, and ultimately dying" constituted improper fact finding. That statement is not inconsistent with defendant's involvement in Merrill's death, particularly absent any third-party involvement, and further, is not contrary to the jury's guilty verdict on the felony murder charge.

At bottom, we conclude the court's comments at defendant's sentencing did not violate our constitutional principles of fundamental fairness. Melvin, 248 N.J. at 326. Further, the court's factual findings supporting the aggravating and mitigating factors are amply supported by the record and the court's sentence does not shock our judicial conscience. See Bolvito, 217 N.J. at 228.

To the extent we have not expressly addressed any of the parties' arguments, we have determined they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

To sum up, we remand for the court to address whether defendant invoked his right to remain silent and to determine whether the State used its peremptory challenges in a discriminatory fashion. In the event the court rules for defendant on either issue, it should order a new trial. If the State prevails on both issues, defendant's conviction and sentence are affirmed. We do not retain jurisdiction. Affirmed, subject to decision on remand.