SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3409-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZAMAIRE BARDEN, a/k/a TWEEK, ZA, and ZAMIRE M. BARDEN,

Defendant-Appellant.

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Argued December 5, 2022 – Decided January 25, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 16-05-0484.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, Assistant Deputy Public Defender, of counsel and on the briefs).

Lauren Bonfiglio, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Valeria Dominguez, Deputy Attorney General, of counsel and on the brief).

Tyler Elizabeth Dougherty argued the cause for amici curiae Rutgers Criminal and Youth Justice Clinic and The Gault Center (Rutgers Criminal and Youth Justice Clinic, and The Gault Center, attorneys; Laura Cohen, Tyler Elizabeth Dougherty and Kristina Catherine Kersey, on the joint brief).

PER CURIAM

Defendant Zamaire Barden appeals after a jury convicted him of first-degree murder and other offenses connected to the 2015 murder of Dennis Gillespie, and the attempted murder of Rachel Knight. We affirm.

Defendant raises the following arguments on appeal.

> POINT I
> DEFENDANT WAS INAPPROPRIATELY WAIVED TO ADULT COURT [ELEVEN] DAYS BEFORE THE EFFECTIVE DATE OF THE REVISED WAIVER STATUTE. THE MATTER MUST BE REMANDED FOR A NEW WAIVER HEARING UNDER THE REVISED STATUTE.
>
> A. The Statement Of Reasons To Support Waiver Was Insufficient To Justify Waiver Under The Prior Waiver Statute.
>
> B. The Ameliorative Statute Must Retroactively Apply To Defendant, Who Was Treated As An Adult After The Effective Date Of The Statute Without The Benefit Of The Enhanced Protections Of The New Statute.
>
> C. The Failure To Request An Adjournment Of The Waiver Hearing And Decision Such That The New, Ameliorative Statute Would Apply Was Per Se Ineffective Assistance Of Counsel.

D. For Each And All Of These Reasons, A New Waiver Hearing, To Be Governed By The Revised Statute, Is Required.

POINT II

THE FAILURE TO INSTRUCT THE JURY ON THE PROPER, LIMITED PURPOSES OF THE OTHER-BAD-ACT EVIDENCE REQUIRES REVERSAL. (Not Raised Below).

POINT III

THE FAILURE TO INSTRUCT THE JURY ON THE RISK THAT A FAMILIAR IDENTIFICATION IS INCORRECT REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. (Not Raised Below).

POINT IV

THE FAILURE TO INSTRUCT THE JURY ON LESSER-INCLUDED OFFENSES REQUESTED BY THE DEFENSE REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

POINT V

THE ERRONEOUS INSTRUCTION ON ATTEMPT REQUIRES REVERSAL OF DEFENDANT'S ATTEMPTED MURDER CONVICTION. (Not Raised Below).

POINT VI

EVEN IF ANY ONE OF THE COMPLAINED-OF ERRORS WOULD BE INSUFFICIENT TO WARRANT REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS WAS TO DENY DEFENDANT DUE PROCESS AND A FAIR TRIAL. (Not Raised Below).

POINT VII

THE TRIAL COURT ERRONEOUSLY FOUND AN AGGRAVATING FACTOR THAT DID NOT APPLY AND INAPPROPRIATELY RAN THE TWO COUNTS THAT SURVIVED MERGER CONSECUTIVELY, RESULTING IN AN EXCESSIVE SENTENCE.

Additionally, we consider the following arguments raised by the Rutgers Criminal and Youth Justice Clinic and The Gault Center, on leave granted to appear as amicus curiae:

POINT I

THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS THE BEDROCK OF DUE PROCESS FOR CHILDREN THREATENED WITH WAIVER TO ADULT COURT.

A. The Consequences Of Waiver Are Far-Reaching And Profound.

B. Racial And Geographic Disparities Warp Waiver Decision-Making In New Jersey.

C. The Lifelong Harms Of Waiver Compel Robust Legal Advocacy At Transfer Hearings.

1. Children's Right To Effective Assistance Of Counsel Mirrors That Of Adults.

POINT II

COUNSEL FOR YOUTH HAVE SPECIALIZED REPRESENTATIONAL OBLIGATIONS IN WAIVER HEARINGS.

A. National Juvenile Defense Standards Define the Contours of Effective Assistance Of Counsel For Youth Threatened With Waiver.

1. "Counsel must, when in the client's expressed interests, endeavor to prevent adult prosecution of the client." ([National Juvenile Defense Center] Standard 8.4).

2. "Counsel should be knowledgeable about the key aspects of developmental science and other research that informs specific legal questions regarding capacities in legal proceedings, amenability to treatment, and culpability." ([National Juvenile Defense Center] Standard 1.3(b)). Counsel must use child development research and case law supporting the lessened culpability of adolescent offenders in arguing intent, capacity, and the appropriateness of rehabilitative sentencing options. ([National Juvenile Defense Center] Standard 8.1 (d)).

3. "Counsel must be familiar with relevant statutes and case law regarding the interplay between adult and juvenile prosecution . . . [and] must be aware of the timing and process of transfer hearings and required findings for transfer of jurisdiction to adult court." ([National Juvenile Defense Center] Standard 8.1(a)). "A proceeding to transfer a respondent from the jurisdiction of the juvenile court to a criminal court is a critical stage in both juvenile and criminal justice processes. Competent representation by counsel is essential to the protection of the juvenile's rights in such a proceeding." ([American Bar Association] Standard 8.1).

4. "Counsel must present all facts, mitigating evidence, and testimony that may convince the court to keep the client in juvenile court, including the client's

amenability to treatment and the availability of tailored treatment options in juvenile court . . . and [c]onsider use of expert witnesses to raise . . . amenability to rehabilitation in juvenile court, and related developmental issues." ([National Juvenile Defense Center] Standard 8.4(e)).

POINT III
[DEFENDANT] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE WAIVER HEARING.

A. Counsel's Performance Was Deficient And Failed To Comport With Professional Standards And Norms.

B. Counsel's Failure To Make Essential Legal Arguments And Gather And Present Mitigation Evidence Prejudiced [Defendant].

POINT IV
THE UNIQUE VULNERABILITIES OF COURT-INVOLVED YOUNG PEOPLE AND THE PROFOUND HARMS OF WAIVER COMPEL ADOPTION OF DEVELOPMENTALLY APPROPRIATE, YOUTH SPECIFIC STANDARD[S] FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

The record informs our decision. On April 30, 2015, defendant was charged in a juvenile complaint with first-degree murder, N.J.S.A. 2C:11-3, and two second-degree counts of possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). Defendant was three months shy of his eighteenth birthday at the time of these offenses. The State moved to waive defendant to the Criminal Division. Hearings were held before Judge Greta Gooden Brown, who

granted the motion. Judge Gooden Brown made extensive findings to support her decision, concluding the State's decision to seek waiver was premised upon the consideration of all relevant factors under waiver statute as it existed at that time, and did not amount to an abuse of discretion. Certain amendments to the waiver statute went into effect eleven days later and their application to this case is central to this appeal.

On May 31, 2016, defendant was charged in a Passaic County indictment with first-degree murder, N.J.S.A. 2C:11-3; two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); and first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1) and 2C:11-3(a)(1).

Defendant was tried before a jury. The following witnesses testified for the State: Rachel Knight; Paterson Police Department Detective Rafael Fermin; Officer John Gray; Officer Benny Ramos; and Medical Examiner Eddy Lilavois. We summarize the testimony that is relevant to the arguments on appeal.

Knight and Gillespie drove from New York to New Jersey to help Gillespie's aunt move. While traveling in New Jersey, Gillespie stopped in Paterson to buy heroin from a dealer, who called himself "Tweak," to whom he had been referred. The first time the pair drove to meet Tweak in Paterson and

bought a "bundle" of heroin from him, Knight had an opportunity to look at Tweak's face from inside Gillespie's car. However, neither she nor Gillespie knew Tweak before that week. Gillespie went back to Paterson later that day, without Knight. Knight was unaware of any problems between Tweak and Gillespie.

The next day, Knight and Gillespie drove together from New York to Paterson, arriving by 9:15 a.m., with the intention to buy more heroin from Tweak. When they got there, Gillespie spoke with Tweak on his cell phone, then drove his Honda Civic to a side street, parked the car, and called Tweak. Tweak approached the Civic with another man while on the phone with Gillespie. While Tweak was walking outside the car, Knight was able to see him clearly through Gillespie's open window. Tweak and the other man went down the street and around the corner while the phone conversation with Gillespie continued.

Tweak asked Gillespie to drive around the block, out of concern that there were "jump out boys," or undercover police officers, in the area. Gillespie complied, moved the car around the corner, and drove forward to the next intersection. He then called Tweak again. Tweak, who was walking toward the car from the intersection and motioning with his hands, told Gillespie to reverse

down the street towards the next block, and Gillespie did so. Tweak and the same man walked toward the car again while Tweak remained on the phone with Gillespie. Tweak told Gillespie, "I got you," and asked Gillespie and Knight to wait while he made sure there were no police around. Tweak and the other man walked away toward the rear of the car.

Knight testified she thought something was wrong because Tweak had told Gillespie to move the car so many times. She pulled down the visor in front of her so she could use the mirror on the back to watch the rear of the car. She said that after two or three minutes, she saw Tweak and the same man return from behind the car. Tweak went to Gillespie's door while the other man came to Knight's. When the unknown man attempted to open her car door, Knight turned to face him and resist this action. She heard Gillespie say, "don't do that, she has nothing to do with this," followed by a gunshot.

Knight turned toward the driver's seat and saw Gillespie slumped over with his head in his lap and blood coming from his ear. She testified she saw Tweak through Gillespie's window, standing about a foot from the car. Tweak "look[ed] at [her]" and then "fired off multiple shots." Knight "hugged [Gillespie] and just counted to ten" before looking up again; she saw Tweak and the other man running away behind the car. Knight, who did not realize that

three bullets had hit her, yelled for help to a passing pedestrian, who called 9-1-1.

EMTs arrived, followed by police. Paterson Police Department Detective Rafael Fermin got to the scene at 9:55 a.m. with his partner, Detective Matos. Fermin approached the Civic and noted its New York license plates, and other officers on the scene informed him Gillespie was dead in the front seat and a passenger, Knight, was in a nearby ambulance.

At the scene, Knight told officers the shooter was Tweak, the drug dealer, and that Tweak and the other man had run in the direction of a nearby housing complex. Later, while being treated at a hospital, she again told police the gunman was Tweak. She also gave Fermin the PIN code to unlock Gillespie's cell phone, which was retrieved from the car.

Knight told Fermin Tweak looked "barely . . . even eighteen." At the Paterson police station, officers searched juvenile databases and learned that "Tweak" was an alias used by defendant. They created a photo array including defendant's photograph and five fillers. Back at the hospital, a detective not involved with the investigation, Officer Ramos, showed Knight the photographs after reviewing appropriate array instructions with her. Ramos testified Knight was coherent during the procedure and did not seem to be impaired. Knight

herself said she did not feel she had any impairments that prevented her from looking at or talking about the photos she was shown.

Knight identified defendant as the shooter. She wrote, "[T]his is the guy that shot me and Dennis" on his photo. On an identification form, she wrote, "Photo number three that was shown to me was the man that shot me. I know this one hundred percent. I also know photo number three is the man who shot Dennis Gillespie. I know this a hundred percent as well." Later in the evening on April 29, 2015, after Knight was released from the hospital, she gave a formal statement about the shooting at the police station. Knight also identified defendant at trial.

Meanwhile, police went to defendant's address in Paterson to search for him. Defendant was not home at the time, but was found around midnight sitting in a car with friends on a Paterson street. Police brought him to the station for questioning, which began after his aunt, Sabrina Whitaker, arrived. During the interview, Fermin saw a tattoo with the word "Tweak" on defendant's arm. After the questioning, defendant was arrested.[1]

[1] The trial court suppressed his statement to police under Miranda v. Arizona, 384 U.S. 436 (1966).

Police examined Gillespie's phone and found a contact with the name "Tweak." The phone number was defendant's. Police also found a text message conversation between Gillespie and defendant, and records of phone calls between the two. Notably, on the day before the shooting, Gillespie texted defendant, "that was [five] and they are weak," likely referring to drugs he had bought, and "I'm coming back down, you around?" On the morning of the shooting, Gillespie texted, "be there in twenty." In the "recent calls" section of the phone, police saw five outgoing calls to Tweak at 9:16 a.m., 9:26 a.m., 9:29 a.m., 9:34 a.m., and 9:39 a.m. that day, which corroborated Knight's testimony that Gillespie called defendant repeatedly while moving his car around. In total, there were forty-one calls between Gillespie and defendant from April 26 to April 29, 2015.

Police did not locate any eyewitnesses to the shooting other than Knight herself. The gun used was never recovered.

During cross-examination, Fermin testified a K-9 officer tracked a scent from Gillespie's car to an apartment in the nearby development, but that police did not investigate who lived there. He also said crime scene investigators did not look for fingerprints or other physical evidence to link defendant or any other suspect to the Civic.

Police conducted a photo array with Knight to possibly identify the other man she said was involved. She was shown six photographs, one of a potential suspect and five fillers. Knight identified a filler photo as the second participant and told police she was "certain" the photo was of that person. Defense counsel drew attention to this misidentification in her cross-examination of Knight and recalled Fermin to give additional testimony on the subject during defendant's case.

Gillespie died from two gunshot wounds, one in the left side of his neck and the other on the back of his head. Medical examiner Lilavois stated there was gunpowder stippling around the wound on Gillespie's neck, and opined the victim's injuries resulted from close-contact gunshots fired from six inches to one foot away. The trajectory of the bullets had been from left to right, consistent with a gun fired through the driver side window of a car. Knight testified that she received three gunshot wounds in her shoulder—two in the back of it and one on the top—and one wound in the back of her head. Doctors could not remove the bullet from her head safely, and she said its presence led to a lot of discomfort and pain.

The jury found defendant guilty on all counts. In preparation for sentencing, defendant's trial counsel obtained records from the Division of Child

Protection and Permanency (Division) concerning defendant's childhood. The documents themselves are not part of the record on appeal but were discussed in defense counsel's sentencing memorandum dated March 6, 2020.

Post-conviction, defendant also underwent a psychological evaluation with Maureen Santina, Ph.D., in preparation for sentencing. The doctor's report was submitted to the court. Following an interview and testing, Santina diagnosed defendant with severe post-traumatic stress disorder, arising from the maltreatment he suffered throughout his childhood. Santina stated defendant reported feeling anxious and depressed, experiencing suicidal ideation, and "feeling angry at everyone except his younger brother," of whom he was very protective. Santina opined defendant suffered from "chronic hypervigilance, hyperarousal, and dysphoric emotion." She also suggested defendant might have developed a dissociative identity disorder, citing defendant's self-reports that he "heard voices" and had an "imaginary friend," and reports from Division workers he sometimes seemed "disconnected from his surroundings." Santina noted that as a pre-adolescent, defendant began to turn to adult drug dealers to protect himself and his brother in exchange for delivering "packages," and he had "little to no family support."

Defendant argued the sentencing court should consider his history of abuse, mental illness, and substance use when deciding his sentence. He sought the minimum statutory sentences for all of his offenses and for the non-murder offenses to run concurrent to his murder sentence.

The court made extensive findings on the record concerning the youth-related factors set forth in Miller v. Alabama, 567 U.S. 460, 476 (2012), and adopted in New Jersey in State v. Zuber, 227 N.J. 422, 446-47 (2017). First, the court recited and accepted as true the facts about defendant's upbringing and psychological evaluation described above, remarking that defendant had "experienced devastating adverse childhood stresses, physical neglect, [and] emotional, physical, and sexual abuse." It found that defendant showed "immaturity, impetuosity, and failure to appreciate risks and consequences." The court also found the Miller factor concerning defendant's "family and home environment" applied, based on defendant's "terrible, terrible childhood" demonstrated in the record.

The court did not find the third Miller factor, the "extent of [defendant's] participation in the conduct and the way familial and peer pressures may have affected him," because there was no evidence he was pressured by anyone into a course of action. It also did not find the fourth factor, that defendant might

have been charged and convicted of a lesser offense "if not for incompetence associated with youth," because defendant had "worked very closely, hand in hand" with his trial attorney and did not show any "inability to deal with police officers or prosecutors." Finally, the court found defendant showed a possibility of rehabilitation while incarcerated. The court sentenced him to thirty years imprisonment for murder, a consecutive term of ten years with an eighty-five percent parole disqualifier for attempted murder under N.J.S.A. 2C:43-7.2, and a concurrent term of five years with forty-two months of parole ineligibility for unlawful possession of a weapon.

This appeal followed.

THE WAIVER HEARING

I.

Defendant first argues he should not have been waived from the Family Part to the Criminal Division, and this matter should be remanded for a new hearing on the subject. We disagree.

We review a waiver decision to determine "whether the correct legal standard has been applied, whether inappropriate factors have been considered, and whether the [court's] exercise of discretion constituted a 'clear error of judgment' in all of the circumstances." State v. R.G.D., 108 N.J. 1, 15 (1987)

(quoting State v. Humphreys, 89 N.J. 4, 13 (1982)). The court's factual findings must also be reviewed to ensure they are "grounded in competent, reasonably credible evidence." Ibid. If the correct legal standards are followed and sufficient evidence exists in the record, the decision "should not be subjected to second-guessing in the appellate process." Ibid.

Waiver of a juvenile to adult court "is the single most serious act that the juvenile court can perform." Id. at 4-5. "[O]nce waiver occurs, the child loses the protections and opportunities for rehabilitation which the Family Part affords," and "faces the real possibility of a stiffer adult sentence." State in Interest of N.H., 226 N.J. 242, 252 (2016). A juvenile convicted in the Criminal Division, upon release from incarceration, also "will have an adult record and will have a more difficult time reintegrating into society." Id. at 255.

Our Supreme Court has recognized juveniles "are typically less mature, often lack judgment, and are generally more vulnerable to pressure than adults." State in Interest of A.A., 240 N.J. 341, 354 (2020). Juveniles' "emotional, mental, and judgmental capacities are still developing," and "their immaturity makes them more susceptible to act impulsively and rashly without consideration of the long-term consequences of their conduct." State in Re C.K., 233 N.J. 44, 48 (2018). Thus, "children bear a special status," and "a unique

approach must be taken in dealing with juvenile offenders, both in measuring culpability and setting an appropriate disposition." Id. at 67. One of the purposes of the Juvenile Code, N.J.S.A. 2A:4A-20 to -92, is to remove from children "certain statutory consequences of criminal behavior" and substitute "an adequate program of supervision, care and rehabilitation . . . ." N.J.S.A. 2A:4A-21(b).

However, despite the concern juvenile offenders be treated differently from adults, and the "primary" focus of the juvenile justice system on rehabilitation, the Court in C.K. noted that "a second purpose—increasingly so in recent times—is protection of the public." 233 N.J. at 67. Thus, N.J.S.A. 2A:4A-26[2] provided that on the prosecutor's motion, the Family Part would waive jurisdiction and refer the case to the Criminal Division if it found, after a hearing, that the juvenile was fourteen years of age or older at the time of the charged delinquent act, and "there was probable cause to believe that the juvenile committed a delinquent act or acts which if committed by an adult would constitute" one or more of an enumerated list of crimes. Relevant here, this list included most types of homicide, attempts to commit those types of homicide, unlawful possession of a firearm, and possession of a firearm with a

[2] See P.L. 2007, c. 341 § 3.

purpose to use it unlawfully against the person of another. N.J.S.A. 2A:4A-26(a)(2)(a), (d), (g), and (i).

To oppose waiver, a juvenile bore the burden to "show that the probability of his [or her] rehabilitation by the use of the procedures, services and facilities available to the court prior to . . . reaching the age of [nineteen] substantially outweighs the reasons for waiver." N.J.S.A. 2A:4A-26(e). This opportunity to demonstrate the possibility of rehabilitation was not available to any person sixteen years of age or older who was charged with committing certain of the enumerated crimes, including criminal homicide and possession of a firearm for an unlawful purpose. Ibid.; State in re V.A., 212 N.J. 1, 10 (2012). If those age and offense prerequisites were met, the prosecutor need only establish probable cause that the juvenile committed the offense for the court to waive the case to the Criminal Division. State v. J.M., 182 N.J. 402, 412 (2005). Thus, under N.J.S.A. 2A:4A-26, "the Legislature vested the prosecutor's office with the primary responsibility for juvenile waiver decisions" in such cases. J.M., 182 N.J. at 412. This statute reflected the fact that "the Legislature had . . . placed a heavier burden on the juvenile who committed an enumerated offense," id. at 411, by "creating a 'presumption' in favor of waiver." R.G.D., 108 N.J. at 12 (citing State in Interest of A.B., 214 N.J. Super 558, 566 (App. Div. 1987)).

On August 10, 2015, the Legislature passed P.L. 2015, c. 89 § 1, which codified and expanded the Attorney General Guidelines concerning the statement of reasons that must accompany a motion for waiver and changed some of the waiver requirements. The newer N.J.S.A. 2A:4A-26.1 created by this enactment maintains the requirement that the Family Part judge shall waive jurisdiction if it finds probable cause to believe a juvenile committed an act which would constitute one of a number of crimes that still include criminal homicide, attempted homicide, and possession of a firearm with a purpose to use it unlawfully against the person of another. N.J.S.A. 2A:4A-26.1(c)(2)(a), (j), and (n). However, the amendment raised the age for which waiver may be granted from fourteen to fifteen years at the time of the offense. N.J.S.A. 2A:4A-26.1(c)(1).

N.J.S.A. 2A:4A-26.1(a) provides that a prosecutor seeking waiver shall file a motion within sixty days of receiving the complaint, accompanied by a written statement of reasons "clearly setting forth the facts used in assessing all factors contained in" N.J.S.A. 2A:4A-26.1(c)(3), "together with an explanation as to how evaluation of those facts support waiver for each particular juvenile." The eleven factors the prosecutor must address in the statement of reasons are:

> (a) The nature and circumstances of the offense charged;

(b) Whether the offense was against a person or property, allocating more weight for crimes against the person;

(c) Degree of the juvenile's culpability;

(d) Age and maturity of the juvenile;

(e) Any classification that the juvenile is eligible for special education to the extent this information is provided to the prosecution by the juvenile or by the court;

(f) Degree of criminal sophistication exhibited by the juvenile;

(g) Nature and extent of any prior history of delinquency of the juvenile and dispositions imposed for those adjudications;

(h) If the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, and the response of the juvenile to the programs provided at the facility to the extent this information is provided to the prosecution by the Juvenile Justice Commission;

(i) Current or prior involvement of the juvenile with child welfare agencies;

(j) Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the prosecution by the juvenile or by the court; and

(k) If there is an identifiable victim, the input of the victim or victim's family.

[N.J.S.A. 2A:4A-26.1(c)(3).]

At the hearing, the court shall receive evidence from both the State and the juvenile, the State must provide proof to satisfy the age and probable cause requirements, and the court "shall review whether the State considered" the eleven factors. N.J.S.A. 2A:4A-26.1(b). The court may deny waiver "if it is clearly convinced that the prosecutor abused his [or her] discretion in considering" the factors. N.J.S.A. 2A:4A-26.1(c)(3). The Legislature stated that N.J.S.A. 2A:4A-26.1 would "take effect on the first day of the seventh month following enactment," meaning March 1, 2016. See P.L. 2015, c. 89 § 7.

Defendant argues the new statute governing waiver, N.J.S.A. 2A:4A-26.1, should have been applied to him. He asserts that although his waiver hearing was held and the court rendered its decision prior to the statute's effective date, the new law should have been applied retroactively to allow him to receive its ameliorative effects, especially so because he was not indicted in the adult Criminal Division until after the effective date.

Our task in statutory interpretation "is to determine as best we can the intent of the Legislature, and to give effect to that intent." State v. Robinson, 217 N.J. 594, 604 (2014). Newly enacted criminal statutes are generally "presumed to have solely prospective application." State v. J.V., 242 N.J. 432,

443 (2020). We consider silence on the question of retroactivity "akin to a legislative flare, signaling to the judiciary that prospective application is intended." Olkusz v. Brown, 401 N.J. Super. 496, 502 (App. Div. 2008).

To overcome the presumption of prospective-only application, we must "find the 'Legislature clearly intended a retrospective application' of the statute through its use of words 'so clear, strong, and imperative that no . . . meaning can be ascribed to them' other than to apply the statute retroactively." J.V., 242 N.J. at 443 (quoting Weinstein v. Inv'rs Sav. & Loan Ass'n, 154 N.J. Super. 164 (App. Div. 1977)). We will apply a newly enacted statute retroactively only if "the Legislature intended to give the statute retroactive application" and "retroactive application of that statute will [not] result in either an unconstitutional interference with vested rights or a manifest injustice." James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014).

Just months after the effective date of N.J.S.A. 2A:4A-26.1, we issued our decision in State in Re J.F., 446 N.J. Super. 39, 55 (App. Div. 2016). There, the Family Part judge rendered his decision on the State's waiver application three days after the enactment of N.J.S.A. 2A:4A-26.1 but before its stated effective date. The judge denied waiver, finding the defendant had met his burden under N.J.S.A. 2A:4A-26(e) to show a probability of his rehabilitation before age

nineteen, and the State appealed. Id. at 41-42. Noting that the judge had applied "the settled waiver law" of N.J.S.A. 2A:4A-26, we affirmed "on the basis of his thorough opinion." Id. at 52.

In J.V., the defendant was seventeen years old at the time of his offenses in 2013, was waived, and pled guilty in June 2015, two months prior to the enactment of N.J.S.A. 2A:4A-26.1. 242 N.J. at 437-38. The defendant was sentenced in September 2015, "well before" the statute's effective date. Id. at 438. On appeal, he argued if the State had considered the new waiver factors under N.J.S.A. 2A:4A-26.1, it may not have decided to seek waiver. Id. at 439. We agreed, based on J.F., reasoning that the factors were "ameliorative and thus subject to retroactive application" because defendant was sentenced after their enactment. Ibid.

The Supreme Court reversed our decision because the "plain and unambiguous language" of N.J.S.A. 2A:4A-26.1 demonstrated the Legislature intended to afford it "only prospective application to those juvenile waiver proceedings conducted after the statute's effective date." Id. at 444. In so finding, the Court stated that Legislature had made the statute effective seven months after its enactment "in deliberate terms," and that if it had intended an earlier date for the law to take effect, "that intention could have been made plain

in the very section directing when the law would become effective." Id. at 444-45 (quoting James, 216 N.J. at 568). The Court stated that because it had found the Legislature "clearly" intended prospective application only, there was no need to consider the exceptions to the presumption of such application, such as whether the statute was "ameliorative." Ibid.

The Court distinguished J.F. Id. at 446-48. It noted that all of the juvenile and adult court proceedings for J.V. concluded before N.J.S.A. 2A:4A-26.1's effective date, while J.F. "was never waived to adult court and had pending proceedings in the juvenile court both before and after" that date. Id. at 448. It held that "a juvenile who was waived to adult court, pled guilty, and was sentenced long before Section 26.1 became effective cannot claim the benefit of the new juvenile waiver statute." Ibid.

Here, defendant was charged in the initial juvenile complaint and the State submitted its application for waiver before the enactment of N.J.S.A. 2A:4A-26.1. The Family Part judge held a hearing and issued her decision granting waiver after the statute's enactment, but prior to its effective date. Defendant was indicted, convicted, and sentenced after the effective date. Although defendant here is situated in a position between those of the defendants in J.F.

and J.V., we conclude J.F. only covers cases where the juvenile had pending proceedings in the Family Part after the effective date.

II.

Defendant also argues the prosecutor submitted a deficient statement of reasons with the motion for waiver that did not contain sufficiently detailed discussion of all seven factors the prosecutor needed to consider when making the decision to move for waiver under N.J.S.A. 2A:4A-26. More specifically, he contends the State abused its discretion by failing to provide "the requisite individualized assessment of how waiver [was] more likely to deter [him] than remaining in the Family Part" and that the State "simply cit[ed] the existence of" the factors in favor of waiver and "add[ed] them up," rather than conducting a "holistic, individualized analysis."

On February 19, 2016, the Family Part judge issued her decision on the record. The judge first found the prosecutor had established probable cause that defendant committed the charged offenses. She recounted the evidence supporting this conclusion, specifically Knight's eyewitness identification, the surveillance footage, Gillespie's phone records, and defendant's "Tweak" tattoo.

Next, the judge found the prosecutor's statement of reasons "clearly denote[d] an individualized explanation for [her] decision to seek waiver" rather

than a "series of cursory conclusions." The judge stated the prosecutor had considered that both victims "were shot multiple times and at close range" resulting in Gillespie's death and Knight's serious wounding, defendant's central role in the incident as the shooter, the potential for harm to the community caused by a deadly shooting in a residential neighborhood, defendant's prior record, the strength of the State's evidence, and Knight's and Gillespie's family's input. She stated the prosecutor had also "compared" defendant's potential exposure to penalties in the adult and juvenile systems, including the applicability of the No Early Release Act[3] and the Graves Act[4] in the former, and determined that the "harsher penalties available in the adult system were appropriate given the fact that [a] prior attempt to rehabilitate [him] in the juvenile justice system had apparently failed." The judge concluded the prosecutor's decision to seek waiver was "premised upon the consideration of all relevant factors and [did] not amount to an abuse of discretion or clear error in judgment." She therefore granted the waiver application and transferred jurisdiction to the Criminal Division.

[3] N.J.S.A. 2C:43-7.2.

[4] N.J.S.A. 2C:43-6.

We discern no error in Judge Gooden Brown's determination that the prosecutor's statement of reasons in this case was sufficiently detailed, it was not "arbitrary" or an abuse of discretion under V.A., 212 N.J. at 26-28. While the prosecutor's discussions of each of the seven factors were relatively brief, they contained facts and considerations particular to defendant rather than simply parroting the guidelines. The prosecutor referenced the specific harms done to the victims, the time and place of the shooting and attendant danger to the neighborhood, and the facts and procedural history surrounding defendant's prior record.

III.

Defendant alternatively argues if N.J.S.A. 2A:4A-26.1 does not apply retroactively, his counsel was ineffective by failing to investigate whether any of the new factors could have helped him avoid waiver. Defendant contends a "reasonably competent attorney" would have searched for "mitigation materials" related to the newer factors, particularly information about his mental health issues, drug addiction, poor home life, and involvement with child welfare services. He asserts that if such an investigation had been performed, effective counsel would have then requested an adjournment of the waiver hearing until after the effective date of the new statute, so the discovered evidence could be

presented. Defendant avers the result of the waiver hearing would have been different if this had been done, citing the fact that information pertinent to the new factors favorably influenced the trial judge's sentencing decision.

Amici curiae join defendant in arguing that his waiver counsel was ineffective. They state counsel for a juvenile must endeavor to prevent adult prosecution, including presenting "all facts, mitigating evidence, and testimony that may convince the court to keep the client in juvenile court." Amici argue defendant's counsel was ineffective by failing to advocate for the pipeline application of N.J.S.A. 2A:4A-26.1, and failing to present mitigating evidence concerning defendant's mental health and history of abuse.

Our courts "have expressed a general policy against entertaining ineffective assistance of counsel claims on direct appeal." State v. Preciose, 129 N.J. 451, 460 (1992). This is because "such claims involve allegations and evidence that lie outside the trial record," making them "particularly suited" for review in a PCR proceeding. Ibid. As a result, we decline to consider defendant's argument under this point in this appeal.

THE TRIAL

I.

Defendant argues the court erred in giving inadequate instructions to the jury. We disagree.

"It is axiomatic that appropriate jury instructions are essential for a fair trial." State v. Ball, 268 N.J. Super. 72, 112 (App. Div. 1993) (citing State v. Clausell, 121 N.J. 298, 330 (1990)). Incorrect instructions are "poor candidates for rehabilitation under a harmless-error analysis," State v. Rhett, 127 N.J. 3, 7 (1992), and are "excusable only if they are harmless beyond a reasonable doubt." State v. Vick, 117 N.J. 288, 292 (1989) (citing State v. Collier, 90 N.J. 117, 122-23 (1982)). However, reversal is not warranted unless an error in an instruction is sufficient to raise a reasonable doubt as to whether it "led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

Additionally, where a defendant does not request an instruction or object to the lack of one, we review the trial court's actions under a plain error standard. State v. Cole, 229 N.J. 430, 455 (2017); R. 1:7-2; R. 1:8-7. As a result, "the trial court's decision not to charge the jury sua sponte" on an issue does not merit reversal unless it was "clearly capable of producing an unjust result." Id. at 456 (quoting R. 2:10-2).

Defendant argues, for the first time on appeal, the court's instruction on eyewitness identification was deficient because the court should have sua sponte instructed the jury about the risks a "familiar identification," that is, an identification of a person the witness has met or seen before, may be incorrect. Defendant asserts Knight's identification may have been subject to a "phenomenon" called "unconscious transference," where a witness identifies a person as the perpetrator of a crime simply because the witness has seen that person before. Because of this phenomenon, the witness may incorrectly choose an innocent person in a lineup procedure because that person is the only one he or she recognizes at all. Defendant cites social science articles supporting his contentions that a passing familiarity with a person does not improve the accuracy of an eyewitness's identification of that person, and may actually lead to a greater risk of misidentification. Defendant asserts the failure to do so was plain error, because the jury "lacked the tools to assess" Knight's identification properly.

"[W]hen identification is a critical issue in the case," the trial court must "give the jury a discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." State v. Cromedy, 158 N.J. 112,

128 (1999). In State v. Henderson, 208 N.J. 208 (2011), the Supreme Court ordered that "enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification." Id. at 296. The Henderson factors do not include the risk of unconscious transference stemming from an eyewitness viewing a photo of a "familiar" person.

In cases where eyewitness identification is a "key" issue, a conviction may be reversed if the court does not instruct the jury on relevant Henderson factors. State v. Sanchez-Medina, 231 N.J. 452, 467-69 (2018). However, we discern no error here in the trial court's failure to instruct the jury on the risk of unconscious transference when an eyewitness identifies a person familiar to them.

The concept that Knight may have misidentified defendant as the gunman because she expected to see him was presented to the jury by counsel repeatedly, along with other challenges to Knight's credibility. The jury was instructed it needed to evaluate that credibility and could take into account "any matters" it felt relevant to bolster or discredit Knight's testimony. The court's instruction on eyewitness identification was sufficient, and the omission of any mention of unconscious transference did not constitute plain error. R. 2:10-2.

II.

Defendant also argues for the first time on appeal the trial court erred by failing to instruct the jury on the appropriate purposes for which it could consider evidence that he engaged in drug dealing. Prior to trial, defense counsel moved to bar evidence related to prior drug sales between defendant and Gillespie. However, at a hearing on August 21, 2018, counsel withdrew the motion and stated that she would not object to any testimony that Gillespie bought drugs from defendant. The evidence concerning defendant's drug dealing does not appear to be "other bad acts" evidence encompassed by N.J.R.E. 404(b), but instead is "intrinsic" or "background" evidence as described in State v. Rose, 206 N.J. 141, 177-182 (2011). Defendant's role as a drug dealer constituted uncharged conduct that occurred contemporaneously with the charged crimes. Rose, 206 N.J. at 180. It was offered to explain why defendant interacted with Gillespie in the first place, why Gillespie drove to Paterson on April 29, 2015, and called defendant multiple times while moving his car around the streets, why Gillespie and Knight were seated in the car when the gunman shot them, and why Knight was able to recognize defendant as that gunman.

Defendant, through counsel, did not object to the use of the evidence for these purposes. Instead, he admitted he was Tweak the drug dealer, and tried to

use these facts to his advantage by arguing that Knight misidentified him as the shooter because she expected to see him come back to the car with drugs.

We discern no error in the court's failure to sua sponte provide an instruction informing the jury in detail of the proper and improper purposes for which it could consider the evidence under that rule.

III.

Defendant also argues the court erred by denying his request the jury be instructed on the lesser-included offenses of aggravated and reckless manslaughter and aggravated assault. He asserts the distinction between the greater offenses charged and these lesser offenses was "simply one of intent, a quintessential jury question." He argues there was a rational basis in the record to support convictions of the lesser offenses, because the jury "easily could have doubted" that he intended to kill Gillespie and Knight and could have instead found he intended to "scare" them "by firing shots in [their] direction [while] not believing it was highly probable that death would result." Defendant argues it was "total[ly] senseless[]" to think he would have intended to kill "a person he had a fruitful drug-dealing relationship with," but that there may have been "some utility" to be gained from threatening Gillespie. He therefore contends the court's refusal to instruct on aggravated and reckless manslaughter and

aggravated assault left the jury with "an untenable all-or-nothing choice between the State's murder theory and acquittal." We reject the argument.

N.J.S.A. 2C:1-8(e) provides that a trial court must not instruct the jury it may find a defendant guilty of a lesser-included offense unless there is a rational basis for a verdict convicting the defendant of that offense, and also a rational basis to acquit the defendant of the charged offense. State v. Brent, 137 N.J. 107, 113-14 (1994). The rational basis test "'sets a low threshold' for a lesser-included-offense instruction." State v. Alexander, 233 N.J. 132, 142 (2018) (quoting State v. Carrero, 229 N.J. 118, 128 (2017)). Nevertheless, "sheer speculation does not constitute a rational basis." Brent, 137 N.J. at 118.

If a party requests a charge on a lesser-included offense, the trial court "is obligated, in view of [the] defendant's interest, to examine the record thoroughly" to determine if the test has been satisfied. State v. Crisantos, 102 N.J. 265, 278 (1986). Failure to instruct the jury at the defendant's request on a lesser offense for which the evidence provides a rational basis warrants reversal. Brent, 137 N.J. at 118.

Criminal homicide constitutes aggravated manslaughter under N.J.S.A. 2C:11-4(a)(1) when the actor "recklessly causes death under circumstances manifesting extreme indifference to human life." It constitutes reckless

manslaughter under N.J.S.A. 2C:11-4(b)(1) when it is committed "recklessly." A person acts recklessly if he or she "consciously disregards a substantial and unjustifiable risk" that death will result from his or her conduct. N.J.S.A. 2C:2-2(b)(3). Relevant here, a person commits aggravated assault if he or she

> (1) Attempts to cause serious bodily injury to another, or causes injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury; or
>
> (2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon; or
>
> (3) Recklessly causes bodily injury to another with a deadly weapon[.]
>
> [N.J.S.A. 2C:12-1(a).]

In State v. Simon, 161 N.J. 416, 450 (1999), the Court called it "common sense" to conclude that when someone shoots another person in the neck and head, "the shooter's purpose is either to cause serious bodily injury that results in death or to actually cause death, especially where no other plausible explanation is given."

Here, during the charge conference, defendant asked the court to instruct the jury on aggravated and reckless manslaughter as well as murder. The court denied the request, and we discern no error in doing so. There was no rational basis to support defendant's claim that this behavior could have been construed

by the jury as "reckless" or intended to "scare" the victims without seriously injuring or killing them.

IV.

We also reject defendant's newly minted argument the court improperly instructed the jury on the category of attempt described in N.J.S.A. 2C:5-1(a)(1). He contends the "impossibility" theory of attempt covered by that subsection does not match the evidence in this case, because Knight "was shot at with an actual weapon"; he contends that murder was "possible but simply did not occur." He argues instead, the court should have charged the jury on attempt under N.J.S.A. 2C:5-1(a)(2) or (a)(3) and that because the court's instruction on attempt was legally incorrect, it constituted plain error.

Under N.J.S.A. 2C:5-1(a), a person is guilty of attempt to commit a crime if, acting with the type of culpability otherwise required, he or she:

> (1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;
>
> (2) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his [or her] part; or
>
> (3) Purposely does or omits 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 his [or her] commission of the crime.

The court in State v. Condon, 391 N.J. Super. 609, 615 (App. Div. 2007), explained the first category occurs where the criminal act was complete, but attendant circumstances did not coincide with the actor's reasonable belief prevented the intended outcome. The second category occurs where the criminal act is very nearly complete but requires one more step either beyond the actor's control or not requiring his or her control for completion. Id. at 615-16. The third occurs where the actor has taken a substantial step toward committing the crime. Id. at 616

In Condon, the defendant was charged with attempted sexual assault of a victim he believed was a thirteen-year-old girl, but who was actually an investigator who communicated with him over the internet. Id. at 611-13. The indictment charged him under N.J.S.A. 2C:5-1 without specifying which subsection(s). Id. at 611-612. The defendant arranged to meet the "girl" at a mall, but was arrested upon arriving. Id. at 613. The trial court instructed the jury that it could find the defendant guilty of attempted sexual assault under either N.J.S.A. 2C:5-1(a)(1) or (3). Ibid. On appeal, the defendant argued that the instruction was erroneous because while his behavior was a "substantial step" under N.J.S.A. 2C:5-1(a)(3), it did not constitute a complete-but-for-the-

attendant-circumstances sexual assault as required for a conviction under N.J.S.A. 2C:5-1(a)(1). We agreed, finding that "defendant did not complete the criminal act, nor under the circumstances, could he have done so" because the intended victim did not exist. Id. at 617-18. We explained that if a defendant has completed the crime but-for circumstances not being as expected, he or she may be charged under either subsection (a)(1) or (a)(3), because conduct constituting a completed crime would necessarily also constitute a substantial step toward committing that crime. Id. at 617. However, the reverse is not true; a substantial step under subsection (a)(3) does not always constitute a completed crime under subsection (a)(1). Ibid. Because there was no way to determine whether the jury convicted the defendant under subsection (a)(3) or the improper subsection (a)(1), since the court instructed on both, we reversed his conviction. Ibid.

Here, defendant was charged only with attempted murder under N.J.S.A. 2C:5-1(a)(1). Defendant did not challenge his indictment under that subsection, and did not request the court instruct the jury on all three categories of attempt during the charge conference. When describing attempted murder in its instructions, the court stated the State had the burden to prove beyond a reasonable doubt that defendant "purposely engaged in conduct which was

intended to cause the death of the victim if the attendant circumstances were as a reasonable person would believe them to be." It explained to find purpose and intent to kill, the jury could consider "[s]uch things as the place where the acts occurred, the weapon used, the location, number and nature of wounds inflicted, and all that was done or said by the defendant preceding, connected with, and immediately succeeding the events." The court further stated "[i]f the defendant's conduct would have caused the death of the victim had the facts been as a reasonable person would have believed them to be," the jury "should consider that conduct as evidence" of guilt. It told the jury it "[did] not matter that the defendant was frustrated in accomplishing his . . . objective because the facts were not as a reasonable person would believe them to be," and it was "no defense that the defendant could not succeed in reaching his . . . goal because of circumstances unknown to [him]."

We discern no error in the court's instruction. First, defendant was on notice he was charged only under subsection (a)(1), but made no argument that this was incorrect. Second, an instruction as to subsection (a)(1) was not incorrect in this case. Unlike in Condon, where the defendant did not complete a sexual act with a person that would have been a crime if that person was a young girl, here defendant took all actions ordinarily required to effectuate

Knight's murder. As discussed, nothing about defendant's actions evinced any intent other than to kill her. He acted in accordance with this intent by shooting toward her head, hitting her in the skull and shoulder.

Finally, unlike in Condon, there is no doubt here as to which theory of attempt the jury applied to convict defendant, because the court instructed only on subsection (a)(1). Because, as the Condon court stated, a finding that a person has otherwise completed the crime under that subsection necessarily means that he has taken a substantial step under subsection (a)(3) or has taken all but the final step under subsection (a)(2), defendant's conviction under subsection (a)(1) means that the jury would have also convicted him under the other two subsections, if they were charged.

We do not find the court's failure to sua sponte instruct the jurors on all three types of intent to be clearly capable of producing an unjust result. Cole, 229 N.J. at 456.

THE SENTENCE

Defendant argues his aggregate sentence of forty years imprisonment is excessive. First, he asserts the court erred by finding aggravating factor one, that the offense was "committed in an especially heinous, cruel, or depraved manner." He argues there was "nothing extraordinary about this case, as

compared to other murders and attempted murders." Second, defendant argues the court's imposition of consecutive sentences for murder and attempted murder was improper. He asserts the court's analysis of the factors set forth in State v. Yarbough, 100 N.J. 627 (1985), "over-emphasized the presence of multiple victims and misunderstood that the crime was part of a single act of violence." Finally, defendant argues his sentence "is longer than necessary to serve [as] a deterrent or incapacitative purpose," asserting that because young offenders like himself are "much less likely" to commit further crimes as they age, additional years of incarceration have no impact on deterrence. He asserts a thirty-year aggregate sentence "would be more than sufficient" to further the State's penal goals.

"Appellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). A trial court enjoys "considerable discretion in sentencing." State v. Blann, 429 N.J. Super. 220, 226 (App. Div. 2013), rev'd on other grounds, 217 N.J. 517 (2014).

Here, defendant was sentenced to thirty years without parole for murder, ten years with an eighty-five percent parole disqualifier for attempted murder, and five years with forty-two months of parole ineligibility for unlawful

possession of a weapon. N.J.S.A. 2C:11-3(b)(1) provides that a sentence for murder may be a term of thirty years without parole or a specific term of years between thirty and life, of which the person must serve at least thirty years before being eligible for parole. N.J.S.A. 2C:43-6(a) dictates that sentences for first-degree offenses shall be between ten and twenty years, and those for second-degree offenses shall be between five and ten years. Defendant's sentences for all of the offenses for which he was convicted fell within the permitted ranges.

Whether a sentence will "gravitate toward the upper or lower end of the [statutory] range depends on a balancing of the relevant factors." State v. Case, 220 N.J. 49, 64 (2014) (citing State v. Fuentes, 217 N.J. 57, 72 (2014)). A court "must qualitatively assess" the factors it finds and assign each an "appropriate weight." Id. at 65. The sentencing judge must explain its findings about each factor presented by the parties and how the factors were balanced to arrive at the sentence. Id. at 66.

When assessing aggravating factor one—the nature and circumstances of the offense—including whether or not it was committed in an especially heinous, cruel, or depraved manner, a court "must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Fuentes, 217

N.J. at 74-75. It is not an aggravating factor in a homicide case that a life was lost or in a robbery case that property was taken. State v. Martelli, 201 N.J. Super. 378, 386 (App. Div. 1985). By contrast, a court may find aggravating factor one "by refer[ring] to the extraordinary brutality involved in an offense." Fuentes, 217 N.J. at 75. For example, it may apply this factor if it finds that a defendant harmed a victim "in a particular manner" that "maximized the victim's pain." State v. O'Donnell, 117 N.J. 210, 217-18 (1989). Additionally, because a conviction of attempted murder does not require proof that any injury be inflicted, a sentencing court may properly apply aggravating factor one to such an offense based on the extent of any injury the victim actually suffered. State v. Noble, 398 N.J. Super. 574, 599 (App. Div. 2008).

We discern no error. The judge adequately explained his reasoning on the record, and that reasoning was appropriately based on the record. The finding of the aggravating factor did not constitute "double-counting" as to defendant's conviction of attempted murder under Noble, 398 N.J. Super. at 599; the court could consider the fact that Knight was seriously injured and still had a bullet lodged in her head due to the attempt on her life. As to the murder conviction, the court did not consider merely the fact that Gillespie died when finding aggravating factor one, but the brutal circumstances surrounding his death.

We also observe that even if the trial court did erroneously double count an element of murder in considering aggravating factors, this error was demonstrably harmless, since defendant ultimately received the lowest sentence for that crime.

N.J.S.A. 2C:44-5(a) provides that when multiple sentences are imposed, these sentences "shall run concurrently or consecutively as the court determines at the time of sentence . . . ." There is "no overall outer limit on the cumulation of consecutive sentences for multiple offenses." Ibid.; State v. Abdullah, 184 N.J. 497, 513 (2005).

We discern no error in the court's imposition of consecutive sentences for murder and attempted murder. The judge set forth his reasoning as to the Yarbough factors on the record and explained the weight given to each. The fact that he gave the most significant weight to the "multiple victims" and "separate acts of violence" factors was not an abuse of discretion. Although defendant committed the crimes close in time and as part of the same course of conduct, the harms done to Gillespie and Knight were different in degree and type. It was appropriate to consider these harms as separate wrongs requiring separate consequences. E.g., State v. Molina, 168 N.J. 436, 442 (2001); State v. Carey, 168 N.J. 413, 427 (2001).

We also note, because defendant received the minimum penalties for each crime, imposing consecutive terms did not result in an aggregate sentence that should "shock[] the judicial conscience." O'Donnell, 117 N.J. at 216.

We find no merit in defendant's argument he should have received no more than a thirty-year sentence because he was a juvenile offender and thus less likely to commit more crimes if released. In its recent State v. Comer, 249 N.J. 359, 369 (2022) decision, the Court declined to find that the mandatory minimum penalty of thirty years without parole for murder was unconstitutional as applied to juveniles.[5]

Here, the trial court made detailed findings concerning the Miller factors. While setting forth its sentences for each of defendant's crimes, it commented that an aggregate term of forty years with thirty-eight-and-a-half years of parole ineligibility was "substantially" less than what it "could have" imposed under the statutory guidelines. The court found that its sentence complied with Zuber, because despite the consecutive sentences, defendant would have a possibility of parole as a "middle-aged person." Indeed, under Comer, 249 N.J. at 371, after serving twenty years of his thirty-year sentence for murder, defendant, if

[5] Instead, the Court held that after a juvenile convicted of murder serves twenty years in prison, they may petition for a review of their sentence at which time a judge will reassess the Miller factors. Id. at 370.

he petitions for review and successfully demonstrates that he is "rehabilitated and . . . now fit to reenter society," may become eligible for parole even sooner.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION