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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3777-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CURTIS W. MILLER,
a/k/a CURTIS WILLIAM,

Defendant-Appellant.

Submitted March 21, 2023 – Decided July 26, 2023

Before Judges Geiger and Susswein.

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

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

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

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Curtis W. Miller appeals from his jury trial convictions for murder, conspiracy to commit murder, and related weapons offenses. He also appeals his sentence. Defendant was tried with his brother, Ryan D. Wilkins, who was convicted of murder, as defendant's accomplice, and conspiracy to commit murder.¹ Defendant alleges several trial errors. After carefully reviewing the record in view of the governing legal principles, we affirm his convictions. However, we remand for the trial court to conduct a new sentencing hearing to account for the new youth mitigating circumstance, N.J.S.A. 2C:44-1(b)(14), to make findings with respect to defendant's criminal history, and to make additional findings with respect to the overall fairness of the imposition of consecutive sentences as required by State v. Torres, 246 N.J. 246 (2021).²

I.

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

² Torres was decided after defendant was sentenced. The State acknowledges that a remand is necessary to address the requirements established in that case.

A.

Defendant was charged by indictment with: first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3(a)(1) and (2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); and second-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7(b). Between January 28 and February 12, 2020, Miller and Wilkins were tried together. Both were convicted on all counts.

In October 2020, the trial court sentenced defendant to a forty-five-year term of imprisonment, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. It imposed a concurrent sentence of ten years with a five-year period of parole ineligibility for the possession of a firearm conviction and a consecutive sentence of ten years with a five-year period of parole ineligibility for the certain persons conviction.

B.

In view of the numerous issues defendant raises on appeal, we deem it appropriate to recount the evidence presented by the State at trial in considerable

detail.³ On November 20, 2018, around 4:29 p.m., the victim was standing on the corner of Carl Miller Boulevard and Tioga Street in Camden. Around this time, brothers Miller and Wilkins left their home wearing black jackets, black pants, and black shoes. They got into a dark blue Buick Terraza, with Wilkins in the driver's seat and Miller in the passenger's seat.

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

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

³ Our recitation of the relevant facts is identical to our recitation in our opinion in codefendant Wilkins's appeal.

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

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

After abandoning the Buick and fleeing on foot, Miller called his cousin, Kenia Miller, at 5:14 p.m. from his personal phone. Kenia⁴ had lent the Buick to Miller. He told her to report the vehicle as stolen. After she hung up with Miller, Kenia called police to file the report but was unable to give police specifics about the purported theft. About fifteen minutes after the first call to Kenia, Miller called again from a different number and asked her to pick him up. Kenia testified that she did not go pick him up.

⁴ Because she shares the same surname as defendant, we refer to her as Kenia to avoid confusion. We mean no disrespect in doing so.

Camden County Police Department (CCPD) Officer Matthew Marshall received a ShotSpotter⁵ notification in the area of Carl Miller Boulevard. He immediately got in his patrol car and drove to the location, arriving in about five to ten seconds. When he arrived, he saw a man lying face down on the ground. Officer Marshall approached the victim and realized that he had been shot. Officer Marshall and two other officers then loaded the victim into the patrol car and drove to Cooper University Hospital.

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

The victim died later that day at the hospital. He had a total of four gunshot wounds: two to the right side of his chest, one at the top of his right buttock, and one on his right arm. The medical examiner testified that the gunshot wounds were the cause of death and that the manner of death was

⁵ ShotSpotter is a system used in Camden that detects the sound of gunfire and alerts police as to the location of the source of the sound.

homicide. The police officer who processed the scene of the shooting testified that he did not locate any ballistics evidence.

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

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

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

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

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

CCPD Sergeant Gordon Harvey canvassed the area around the scene of the shooting for surveillance videos. He recovered eight video recordings. Another video recording was found by someone else. Some of the videos showed the Buick driving from the direction of defendants' home towards the area of the shooting, and others showed two men matching the descriptions of Wilkins and Miller remove a clothing item and discard it in a trash can.

Detective Patty retrieved the clothing item—a black jacket—from the trash can and took samples that were sent for testing. While DNA could not be recovered from the jacket, the swabs did test positive for gunshot residue.

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

Police spoke with Kevin,⁶ defendant's younger brother. During his recorded statement to police, Kevin watched surveillance footage law enforcement recovered along the perpetrators' flight route. Kevin identified both Miller and Wilkins on the footage and confirmed that they were wearing the same clothes they had been wearing on the day of the murder.

Kevin also told police he saw Wilkins and Miller at their mother's house on the day of the shooting when he got home from school, that the two left at some point during the afternoon, and that both brothers drive a blue van. At trial, Kevin testified that he did not see where Miller or Wilkins went that day, did not see them get into a vehicle, and did not hear them say anything. The

⁶ Because he shares the same surname as codefendant Wilkins, we refer to him as Kevin to avoid confusion. We mean no disrespect in doing so.

State also played Kevin's recorded statement to police for the jury, as Kevin claimed that he could not remember his statement because he was under the influence during the interview.

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

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

C.

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

POINT I

THE TRIAL COURT ERRED BY ADMITTING A
STATEMENT CONTAINED IN A HIGHLY

PREJUDICIAL VIDEO AS A DYING DECLARATION OR AN EXCITED UTTERANCE, AND FURTHER ERRED BY ALLOWING THE VIDEO TO BE PLAYED BEFORE THE JURY.

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

B. The Video Was Cumulative And Unduly Prejudicial.

POINT II

THE TRIAL COURT'S FAILURE TO APPROPRIATELY INSTRUCT THE JURY ON THE DELETED SEARCHES FROM THE CO-DEFENDANT'S PHONE AND ON IDENTIFICATION REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

A. The Failure To Instruct The Jury That Evidence Of The Co-Defendant's Consciousness of Guilt Could Not Be Used Against Defendant Was Harmful Error, Requiring Reversal Of Defendant's Convictions.

B. The Failure To Issue Any Identification Instruction Requires Reversal Of Defendant's Convictions.

POINT III

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

POINT IV

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.

POINT V

THE COURT ERRED IN ITS FINDING AND WEIGHING OF AGGRAVATING AND MITIGATING FACTORS, ERRED IN IMPOSING CONSECUTIVE SENTENCES, AND IMPOSED AN EXCESSIVE SENTENCE.

A. The Court Erred In Failing To Find Mitigating Factors.

B. The Court Erred In Weighing Aggravating Factors.

C. The Court Improperly Imposed A Consecutive Sentence For The Certain Persons Charge.

Defendant raises the following contentions in his pro se supplemental brief:

POINT I

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PRIOR STATEMENT OF KEVIN WILKINS AS THE STATE FAILED TO SATISFY THE STANDARD OF STATE V. GROSS, 216 N.J. SUPER. 98 (APP. DIV. 1987), AFF'D, 121 N.J. 1

(1990)[;] U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. 1, ¶ 10.

POINT II

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

II.

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

We begin our analysis by acknowledging that "[w]e defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "We will not substitute our judgment unless the evidentiary ruling

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

is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Ibid. (quoting State v. Medina, 242 N.J. 397, 412 (2020)). "However, we accord no deference to the trial court's legal conclusions." State v. Nantambu, 221 N.J. 390, 402 (2015).

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

After convening an N.J.R.E. 104 hearing on its admissibility, the trial court allowed the State to introduce the video that depicted Officer Marshall transporting the victim to the hospital and asking the victim questions. The

body-worn camera recording was played to the jury during Officer Marshall's testimony and again during the prosecutor's summation. The victim did not identify the perpetrators but stated that a "car drove up on [him]," which supported the State's theory that defendant and his brother used a car to approach the victim and to flee the scene.

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

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

Unlike Prall, there is no indication that the victim was asleep or otherwise unperceptive when he was attacked. As the trial court aptly noted during the Rule 104 hearing, "there's nothing before the [c]ourt that suggests the victim . . . did not know that a car rolled up[]on him." Additionally, the radio transmission in question was made almost immediately before the victim's statement, so there was little opportunity for the victim to tailor his responses to what he heard on the transmission. Indeed, due to the ongoing shock experienced by the victim, the trial court stated, "I find nothing that's before the [c]ourt that shows that the victim had time to or any opportunity to fabricate his responses."

We add the mere possibility the victim based his statement on an overheard police radio transmission does not preclude a finding that the statement was made upon personal knowledge. Cf. N.J.R.E. 104(a) to (b) ("The court shall decide any preliminary question about whether . . . evidence is admissible. . . . When the relevance of evidence depends on whether a fact or condition exists, proof must be introduced sufficient to support a finding that the fact or condition does exist."). Such findings of fact are left to the trial court's discretion and should not be reversed on appeal unless that discretion is abused. Garcia, 245 N.J. at 430.

Our analysis under N.J.R.E. 403 also hinges on whether the trial court abused its discretion in determining whether the probative value of the challenged evidence is substantially outweighed by the risk of undue prejudice or needless presentation of cumulative evidence. Defendant claims the video was "inflammatory," "cumulative and highly unfairly prejudicial." He argues that "[b]ecause there was more than enough testimony to establish that a vehicle was used during the course of the crime, this graphic video should have been excluded from trial." Defendant points to Officer Marshall's testimony and the testimony of Byrd and Fisher as less-prejudicial evidence to establish that the attackers used a car.

The State counters that the probative value of the video is significant because it corroborates the testimony that a car was involved in the shooting, which, in turn, is critical to the identification of defendant and Miller by means of surveillance camera images of the car's path of travel. We deem it significant, moreover, that the testimony from Byrd and Fisher was limited to seeing a vehicle fleeing shortly after the shooting. Neither testified that they saw a vehicle arrive and stop at the scene of the shooting. Without the victim's recorded statement that the subject vehicle drove up on him, the jury could infer that the vehicle observed by Byrd and Fisher was merely escaping a dangerous

environment and was not directly involved in the shooting as the victim's statement suggested. Accordingly, the victim's statement was not cumulative as defendant claims but rather provided supplemental probative information beyond that provided by Byrd, Fisher, or any other evidence presented by the State. We deem it especially important that at the Rule 104 hearing, the trial court found the relevant portion of the video was "certainly probative of identification." We see no abuse of discretion and have no basis upon which to discount that finding.

Regarding his claim the video was unduly prejudicial, defendant argues it is "dramatic and inflammatory" as the victim's "eyes can be seen rolling back in his head" and his "hands can be seen twitching." Further, defendant points out that the video includes the officer's description of the victim's injuries put out over the radio. However, the trial court found that there were "no blood scenes," and the viewer "cannot see an injury to the victim at all." Further, it noted that "there is no damage to his jacket," and "no blood[-]soaked clothes" are visible. We note that a trial court's fact-finding based on a video is entitled to deference. State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). When the trial court hears testimony in addition to reviewing an audio/video recording of the encounter, an appellate court's own review of the video recording must not be elevated over

the factual findings of the trial court. State v. S.S., 229 N.J. 360, 374–76 (2017); State v. Elders, 192 N.J. 224, 244–45 (2007).

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

III.

We next address defendant's contention the trial court improperly instructed the jury on how to consider the internet search history revealed by the forensic examination of Wilkins's phone. We begin by acknowledging the governing legal principles. It is axiomatic that "[a]ppropriate and proper jury instructions are essential to a fair trial." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Green, 86 N.J. 281, 287 (1981)). "[J]ury charges 'must outline the function of the jury, set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them.'" Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015) (quoting Velazquez v. Portadin, 163

N.J. 677, 688 (2000)). "Erroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." State v. Afanador, 151 N.J. 41, 54 (1997) (citing State v. Brown, 138 N.J. 481, 522 (1994)).

"Nonetheless, not every improper jury charge warrants reversal and a new trial." Prioleau, 223 N.J. at 257. "As a general matter, [appellate courts] will not reverse if an erroneous jury instruction was 'incapable of producing an unjust result or prejudicing substantial rights.'" Ibid. (alteration in original) (quoting Mandal v. Port Auth. of N.Y. & N.J., 430 N.J. Super. 287, 296 (App. Div. 2013)). Reviewing courts, moreover, must read the charge "as a whole" to determine its overall effect rather than reading the challenged portions in isolation. State v. Garrison, 228 N.J. 182, 201 (2017). Further, in "assessing the soundness of a jury instruction," a reviewing court considers how ordinary jurors would "understand the instructions as a whole," based upon "the evidence before them, and the circumstances of the trial." State v. Savage, 172 N.J. 374, 387 (2002) (quoting Crego v. Carp, 295 N.J. Super. 565, 573 (App. Div. 1996)). Importantly, the "overall strength of the State's case" is relevant to the sufficiency of jury charges. State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)).

During trial, defense counsel expressed concern regarding internet search history revealed by the forensic examination of Wilkins's phone. Counsel requested either a severance of the codefendants' trials⁸ or a limiting instruction. The court was amenable to a limiting instruction and asked defense counsel to submit a proposed instruction for its review. Defendant's request to charge read:

You have heard testimony and evidence was admitted that a phone owned by and subscribed to defendant Ryan Wilkins was utilized to search the internet using certain internet search terms, and that this occurred after the date set forth in the indictment.

The defendants, although being tried together in one trial, are each entitled to your consideration of the evidence against each of them separately.

What one defendant may or may not have done after the date set forth in the indictment is up to you to determine as the judges of the facts. You may accept or reject the evidence in your discretion or give it whatever weight you wish.

However, I instruct you that what one defendant does after the date set forth in the indictment cannot be considered by you as evidence against the other defendant if, . . . in your sole determination, he did not engage in the alleged activity.

⁸ After the trial began, defendant filed a motion to sever, which the trial court denied. Defendant does not contend on appeal that he should have been tried separately from his brother. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) ("An issue not briefed on appeal is deemed waived." (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017))).

The court ultimately denied the request for that proposed curative instruction, concluding it was "erroneous." It rejected the contention that what "one defendant does . . . after the date set forth in the indictment cannot be considered by you as evidence against the other defendant, if in your sole determination he did not engage in the alleged activity." The court said that was incorrect in light of the conspiracy and accomplice charges.

The court instead gave the standard instruction used when codefendants are tried together, which tells the jury to consider the evidence against each defendant and for each charge separately.⁹

⁹ The trial court instructed the jury in accordance with the model jury charge for conspiracy, Model Jury Charges (Criminal), "Conspiracy (N.J.S.A. 2C:5-2)" (rev. Apr. 12, 2010):

Now, each offense and each defendant in this indictment should be considered by you separately. The fact that you may find a particular defendant guilty or not guilty of a particular crime should not control your verdict as to any other offense charged against that defendant and it should not control your verdict as to the charges against any other defendant.

The court further explained, in accordance with the model jury charges for multiple charges and multiple defendants, Model Jury Charges (Criminal), "Criminal Final Charge" (rev. Sept. 1, 2022):

Depending on the circumstances, a defendant may be liable for the acts of co-conspirators even though he or she lacks knowledge of those acts. See State v. Jones, 445 N.J. Super. 555, 570–71 (App. Div. 2016) (quoting State v. Taccetta, 301 N.J. Super. 227, 253 (App. Div. 1997)). So too, actions taken by a co-conspirator to conceal the planned crime—sometimes referred to as the "coverup"—may be deemed to be in furtherance of the conspiracy. See Grunewald v. United States, 353 U.S. 391, 401–02, 405 (1957); State v. Twiggs, 233 N.J. 513, 543–44 (2018). Thus, for example, the actions taken after the

When considering the instructions that I've just given each of you, you must return separate verdicts for each defendant as to each of the charges being tried.

In other words, you have to decide each case individually. Whether the verdicts as to each defendant are the same, depends on the evidence and your determination as judges of the facts.

Now, there are five offenses charged in the indictment. There are separate offenses by separate counts in the indictment. In your determination of whether the State has proven a defendant's guilt of a crime charged in the indictment beyond a reasonable doubt, each defendant is entitled to have each count considered separately by the evidence which is relevant and material to that particular charge based on the law which I have already provided to you.

murder to fabricate a stolen vehicle report were clearly in furtherance of the conspiracy and thus attributable to both codefendants.

It is not as certain that Wilkins's internet search for news coverage of the shooting, and the ensuing act of deleting those searches from the phone's search history cache, were actions in furtherance of the conspiracy. It is certainly conceivable the internet searches were an attempt to determine what police knew about the crime. But even were we to accept defendant's argument that the jury should have been instructed that internet searches ostensibly conducted by Wilkins on his phone after the murder could not be considered as evidence against defendant, we do not believe the jury instruction that was given by the court was harmful error warranting reversal. It is well-established "a party is not entitled to have the jury charged in their own words." State v. LaBrutto, 114 N.J. 187, 204 (1989). The court's charge that "each defendant's case is to be looked at separately" was not incorrect or erroneous; it simply was not as specific as the charge defendant requested.

We reiterate, moreover, that the "overall strength of the State's case" is relevant to the sufficiency of jury charges. Sanchez-Medina, 231 N.J. at 468. In this instance, considering the substantial corroborative evidence defendant participated in the shooting, including DNA and gunpowder residue evidence,

we conclude that the instructions that were given, viewed in their entirety, were not "clearly capable of producing an unjust result." State v. Mohammed, 226 N.J. 71, 87 (2016) (quoting R. 2:10-1).

IV.

We next address defendant's contention, raised for the first time on appeal, that the trial court erred by not instructing the jury sua sponte regarding the identification made by his younger brother, Kevin. Defendant argues that the court should have specifically instructed the jury on the State's burden to identify defendant as the perpetrator of the crime. He also argues that the trial court should have tailored the jury instructions to address Moss and Kevin's "non-eyewitness identifications" of defendant from the surveillance still.

Defendant misconstrues the purpose and utility of the eyewitness identification model jury instructions he now contends should have been given. Those charges address the system and estimator variables described in State v. Henderson, 208 N.J. 208, 289–292 (2011), which in turn address the frailties of human perception and memory that pose a risk of misidentification. Those jury instructions are designed to address eyewitness identifications. Kevin, however, was not an eyewitness to the homicide. Rather, he was asked to identify his own brothers from surveillance video recordings. Accordingly, the model charges

on eyewitness identifications are inapposite and would only have confused the jury.

We likewise reject defendant's argument that the trial court committed plain error by failing to instruct the jury sua sponte that the State bore the burden to identify defendant as one of the perpetrators. Absent a request to charge or an objection, "there is a presumption that the charge . . . was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012) (citing State v. Macon, 57 N.J. 325, 333–34 (1971)). Furthermore, reviewing courts must read the charge "as a whole" to determine its overall effect. State v. Garrison, 228 N.J. 182, 201 (2017).

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

The present facts are closely analogous to those in State v. Cotto, 182 N.J. 316 (2005). In that case, the trial court did not "provide a detailed identification instruction." Id. at 326. Our Supreme Court concluded that "[a]lthough the court . . . did not use the word 'identification' in charging the jury, and could have given a more detailed instruction, it nonetheless clearly explained the State's burden to the jury." Id. at 327. The Court stressed that the trial court "specifically explain[ed] to the jury that the State bears the burden of proving beyond a reasonable doubt 'each and every element of the offense, including that of the defendant's presence at the scene of the crime and his participation in the crime.'" Id. at 326. Combined with the strength of the State's case, the Court found that instruction to be adequate. Id. at 326–27.

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

V.

We next address defendant's contention that the trial court erred in admitting Kevin's prior statement to police after he claimed memory loss during his trial testimony. N.J.R.E. 803(a) provides that a statement previously made by a "declarant witness [who] testifies and is subject to cross-examination" is

not excluded by the hearsay rule if it is an otherwise admissible statement and "inconsistent with the declarant-witness' testimony at the trial or hearing." When the statement is offered by the party calling the witness, the statement is admissible only if it was recorded or contained in a writing made or signed by the witness "in circumstances establishing its reliability." N.J.R.E. 803(a)(1).

When in dispute, a prior inconsistent statement sought to be admitted for substantive purposes under N.J.R.E. 803(a) must be the subject of a preliminary hearing to establish its reliability as a condition to its admissibility. See State v. Gross (Gross II), 121 N.J. 1, 15, 17 (1990); State v. Gross (Gross I), 216 N.J. Super. 98, 110 (App. Div. 1987). In determining the reliability of pre-trial statements, our Supreme Court in Gross II enumerated fifteen factors to be considered:

- (1) the declarant's connection to and interest in the matter reported in the out-of-court statement, (2) the person or persons to whom the statement was given, (3) the place and occasion for giving the statement, (4) whether the declarant was then in custody or otherwise the target of investigation, (5) the physical and mental condition of the declarant at the time, (6) the presence or absence of other persons, (7) whether the declarant incriminated himself or sought to exculpate himself by his statement, (8) the extent to which the writing is in the declarants hand, (9) the presence or absence, and the nature of, any interrogation, (10) whether the offered sound recording or recording contains the entirety, or only a portion of the summary, of the

communication, (11) the presence or absence of any motive to fabricate, (12) the presence or absence of any express or implicit pressures, inducement or coercion for making of the statement, (13) whether the anticipated use of the statement was apparent or made known to the declarant, (14) the inherent believability or lack of believability of the statement, and (15) the presence or absence of corroborating evidence.

[Gross II, 121 N.J. at 10 (quoting Gross I, 216 N.J. Super. at 109–10).]

The State must establish the reliability of the statement by a preponderance of the evidence in light of all surrounding relevant circumstances. Id. at 15–16; State v. Spruell, 121 N.J. 32, 41–42 (1990). We review the trial court's decision for an abuse of discretion. State v. Williamson, 246 N.J. 185, 198–99 (2021).

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

under the influence" during the interview. Kevin admitted that he did not want to testify against his brothers.

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

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

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

interview, Detective Brining believed it was because Kevin "just realized what he did."

The trial court thoroughly analyzed the fifteen factors enumerated in Gross II. As to his connection and interest in the matter reported in his out-of-court statement, the trial court noted that Kevin "is in a unique situation" because the testimony being elicited concerns two of his older brothers. The court determined that that the statement was given to Detective Brining of the CCPO—who testified he has taken over hundreds of statements—and in the presence of a second detective. As to Kevin's mental and physical condition at the time, the trial court noted that Kevin was not in custody, in handcuffs, or the target of the investigation. It acknowledged that Kevin was an eighteen-year-old high school student at the time of the statement and that the statement was given on a school night beginning at 11:12 p.m. and ending at 11:27 p.m. The court did not find the statement to be "inherently long." The court explained that it "looked at this interview very carefully," and based on its observations, "there [was] nothing that suggests . . . that this witness was under the influence of any type of alcohol or drugs or anything that would affect his ability to understand." It further found that Kevin was "responsive to the officers who

[were] presenting questions to him" and was able to provide detailed information.

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

Given its findings, the trial court reasoned that the overwhelming majority of the Gross factors weighed in favor of reliability. The court stressed that the video did not suggest that Kevin was "under the influence of any type of alcohol

or drugs or anything that would affect his ability to understand," nor did it suggest he was "tired or overwhelmed."

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

VI.

Defendant next contends the trial court erred in admitting Sergeant Gordon Harvey's testimony as to the "most logical route" the defendants would have taken based on his review of multiple surveillance video recordings. He used a demonstrative evidence map showing the area surrounding the crime with a red line showing that route. Defendant argues this was improper lay opinion testimony under N.J.R.E. 701 and was harmful in that "the [S]tate was able to literally draw a line between Wilkin[s's] and Miller's home and the scene of the shooting." Because defendant objected to this testimony at trial, we review for harmful error. State v. G.E.P., 243 N.J. 362, 389 (2020).

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

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

N.J.R.E. 701 "does not require the lay witness to offer something that the jury does not possess," the Rule "does not permit a witness to offer a lay opinion on a matter not within [the witness's] direct ken . . . and as to which the jury is as competent as he to form a conclusion."

[Id. at 366 (alterations in original) (internal quotation marks omitted) (first quoting State v. Singh, 245 N.J. 1, 19 (2021); and then quoting State v. McLean, 205 N.J. 438, 459 (2011)).]

The Court added, however, "we do not rule out the possibility of allowing a law enforcement officer to testify about a sequence in a video that is complex or particularly difficult to perceive." Id. at 367; see also United States v. Torralba-Mendia, 784 F.3d 652, 659–60 (9th Cir. 2015) (holding that an officer's

narration of a sequence of videos was helpful to the jury because the angle of the recordings and the use of several nonconsecutive clips made the "import of the videos" hard to understand).

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

During his testimony, Sergeant Harvey used a demonstrative evidence map showing the area surrounding the crime with a red line demarking "the travel as to how you would get to those surveillance footage" locations based on his knowledge of the area and of the footage collected. We are satisfied the map and the related testimony were based on Sergeant Harvey's personal knowledge. Furthermore, given the complex nature of piecing together roughly twenty separate video clips, his testimony was helpful to the jury and did not invade its province. We thus conclude the trial court did not abuse its discretion in

admitting Sergeant Harvey's testimony and demonstrative map over defendant's objection. See Garcia, 245 N.J. at 430 (we review evidentiary rulings applying an abuse of discretion standard).

VII.

Defendant next argues that even if no individual errors warrant reversal, the cumulative effect of the errors he asserts denied him due process and a fair trial. "A defendant is entitled to a fair trial but not a perfect one." State v. Weaver, 219 N.J. 131, 155 (App. Div. 2014) (quoting State v. Wakefield, 190 N.J. 397, 537 (2007)). However, "[w]hen legal errors cumulatively render a trial unfair, the Constitution requires a new trial." Ibid.

"In some circumstances, it is difficult to identify a single error that deprives defendant of a fair trial." Id. at 160. "[W]here any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet all of them taken together justify the conclusion that [the] defendant was not accorded a fair trial, it becomes the duty of this Court to reverse." Id. at 155 (quoting State v. Orecchio, 16 N.J. 125, 134 (1954)).

In this instance, defendant has failed to demonstrate that the trial court or prosecutor committed any errors, much less multiple ones, rendering defendant's cumulative error argument academic. But even were we to assume for the sake

of argument that any of defendant's trial error contentions have merit, we are satisfied that he received a fair trial and just verdict. See *ibid.*

VIII.

We turn next to defendant's contentions regarding the sentence imposed. In his counseled brief, defendant argues that the court erred by not finding certain mitigating factors, by considering arrests that did not lead to convictions in finding aggravating factors, and by placing undue weight on the deterrence factor. Defendant further contends in his counseled brief that the court failed to make required findings for imposing consecutive sentences.

The scope of our review of sentencing decisions is limited. Appellate courts review sentencing decisions for abuse of discretion. Torres, 246 N.J. at 272. "When the aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced, we must affirm the sentence and not second-guess the sentencing court, provided that the sentence does not 'shock the judicial conscience.'" State v. Case, 220 N.J. 49, 65 (2014) (internal citations omitted) (quoting State v. Roth, 95 N.J. 334, 365 (1984)). That deferential standard will not apply, however, "if the trial court fails to identify relevant aggravating and mitigating factors, or merely enumerates them, or forgoes a qualitative analysis, or provides little insight into

the sentencing decision." Ibid. (internal quotation marks omitted). Importantly, "where mitigating factors are amply based in the record before the sentencing judge, they must be found." State v. Dalziel, 182 N.J. 494, 504 (2005).

We first address defendant's contentions regarding the trial court's weighing of aggravating and mitigating factors. He contends that the court should have found mitigating factor four, N.J.S.A. 2C:44-1(b)(4) (existence of "substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"); mitigating factor eight, N.J.S.A. 2C:44-1(b)(8) (the "defendant's conduct was the result of circumstances unlikely to recur"); and mitigating factor nine, N.J.S.A. 2C:44-1(b)(9) (the "character and attitude of the defendant indicate that he is unlikely to commit another offense"). Defendant also contends the trial court should not have given significant weight to aggravating factor three, N.J.S.A. 2C:44-1(a)(3) (the "risk that the defendant will commit another offense"); aggravating factor six, N.J.S.A. 2C:44-1(a)(6) (the "extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted"); and aggravating factor nine, N.J.S.A. 2C:44-1(a)(9) (the "need for deterring the defendant and others from violating the law"). We are satisfied the trial court's findings with respect to the applicability and weight to be given to these factors is supported by competent

credible evidence in the record, and we see no abuse of discretion with respect to these specific statutory factors. See Roth, 95 N.J. at 365; Case, 220 N.J. at 65.

We turn our attention to whether the trial court improperly considered arrests that did not result in convictions when determining aggravating factors three and six. The court stated, "under the law, the [c]ourt can consider arrests, and I'm looking at it as an arrest." In State v. K.S., however, our Supreme Court overruled its prior precedents and explicitly prohibited sentencing courts from considering past arrests for any reason. 220 N.J. 190, 199 (2015). The Court expressly held "prior dismissed charges may not be considered for any purpose." Id. at 199–200. We thus conclude it was improper for the trial court to consider these arrests in its analysis of aggravating factors three and six. We note that the court also acknowledged defendant's convictions in the weighing of these two aggravating factors. Because it is necessary for us to remand for resentencing for other reasons, discussed momentarily, we instruct the court on remand to reconsider the weight to be afforded to aggravating factors three and six without accounting for arrests that did not result in a conviction.

We turn next to defendant's contention the trial court did not consider the new youth mitigating factor that applies when "[t]he defendant was under

[twenty-six] years of age at the time of the commission of the offense." N.J.S.A. 2C:44-1(b)(14). Defendant was a few days shy of twenty-five years old when he committed the offenses. Mitigating factor fourteen took effect on October 19, 2020, about a week before defendant's sentencing hearing on October 27, 2020. L. 2020, c. 110; State v. Lane, 251 N.J. 84, 97 (2022) (construing the new mitigating factor to apply prospectively with an effective date of October 19, 2020). Accordingly, mitigating factor fourteen applied to defendant and should have been found by the trial court. See Dalziel, 182 N.J. at 504.

We deem it necessary to remand for a new sentencing hearing. See State v. Pascucci, 463 N.J. Super. 203, 206 (App. Div. 2020) (remanding for resentencing where sentencing court did not analyze all relevant sentencing factors on the record). Importantly, defendant, unlike codefendant Wilkins, did not receive the minimum sentence for his murder conviction required by N.J.S.A. 2C:11-3(b)(1).¹⁰ Defendant also received a sentence at the top end of the second-degree range for the "certain persons" weapon offense, N.J.S.A. 2C:43-6(a)(2). In these circumstances, a rebalancing of all applicable aggravating and

¹⁰ N.J.S.A. 2C:11-3(b)(1) mandates that a person convicted of murder either "be sentenced . . . to a term of [thirty] years, during which the person shall not be eligible for parole," or "be sentenced to a specific term of years between [thirty] years and life imprisonment of which the person shall serve [thirty] years before becoming eligible for parole."

mitigating factors could potentially result in a shorter sentence than the one originally imposed. We offer no opinion on whether shorter sentences should be imposed on either or both convictions.

Furthermore, the State acknowledges that because the trial court imposed consecutive sentences, a remand is also necessary for the court to provide "an explanation for the overall fairness of a sentence." Torres, 246 N.J. at 272; see supra note 2.

IX.

Finally, we address the novel argument raised in defendant's pro se supplemental brief that because he was only twenty-four years old at the time of the murder, he is entitled to be resentenced under the rule established in Comer. That contention lacks sufficient merit to warrant extensive discussion. See R. 2:11-3(e)(2).

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

based on a demonstration of maturity and rehabilitation.¹¹ 249 N.J. at 370. Comer involved defendants who were fourteen and seventeen but were tried as adults and subject to the adult statutory mandatory minimum. The Court's reasoning relied on articles about brain science that explain why many youths do not reach maturity until years after they turn eighteen. The Court's holding, however, was plainly limited to juvenile offenders tried in adult court.

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

¹¹ Defendant appears to suggest that he is entitled to immediate resentencing under Comer. However, Comer clearly requires that the defendant serve twenty years before petitioning for a resentencing. 249 N.J. at 401. Thus, even if Comer applied to defendant, which it clearly does not because he was an adult at the time of the murder, he would still not be entitled to any relief at this juncture as he has not yet served twenty years of his sentence.

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

We affirm defendant's convictions but remand for resentencing. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION