SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4838-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARYEL L. RAWLS,

Defendant-Appellant.

Argued October 6, 2022 – Decided February 2, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 11-06-1109.

Robert Carter Pierce argued the cause for appellant.

William Kyle Meighan, Supervising Assistant Prosecutor, argued the cause for respondent (Bradley D. Billhimer, Ocean County Prosecutor, attorney; Samuel Marzarella, Chief Appellate Attorney, of counsel; William Kyle Meighan, on the brief).

PER CURIAM

Following a jury trial, defendant Daryel L. Rawls was convicted of second-degree conspiracy to possess with intent to distribute heroin, N.J.S.A. 2C:35-5(a)(1) and 2C:5-2 (count one); first-degree leading a narcotics trafficking network, N.J.S.A. 2C:35-3 (count two); second-degree possession of cocaine with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2) (count three); and second-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2) (count four).

The court sentenced defendant on counts one, three and four to a concurrent ten-year custodial term with five years of parole ineligibility, and a life term with twenty-five years of parole ineligibility on count two. The court further ordered counts one, three and four to run consecutive to count two resulting in an aggregate life sentence, with thirty years of parole ineligibility.

On appeal, defendant raises the following points for our consideration:

> POINT I
>
> THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE ALLEGED TRAFFICKING NETWORK TO BE PROVEN BY INVESTIGATIVE HEARSAY.
>
> POINT II
>
> THE SUPREME ALPHABET AND SUPREME MATHEMATICS ARE AREAS OF KNOWLEDGE DISTINCT FROM LAW ENFORCEMENT

"PRACTICES, METHODS AND TECHNIQUES"; THE ADMISSION OF DETECTIVE LONG'S EXPERT OPINION EVIDENCE WAS ERRONEOUS AND PREJUDICIAL.

POINT III

THE TRIAL COURT COMMITTED PLAIN ERROR BY ADMITTING OUT OF COURT STATEMENTS OF NON-TESTIFYING CO-DEFENDANTS.

POINT IV

THE "KINGPIN" INSTRUCTIONS WERE CONFUSING AND DENIED [DEFENDANT] THE RIGHT TO THE ASSURANCE OF JUROR UNANIMITY.

POINT V

THE SENTENCING WAS AN ABUSE OF DISCRETION.

POINT VI

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT, IN IMPOSING CONSECUTIVE TERMS, FAILED TO ASSESS THE FAIRNESS OF THE OVERALL SENTENCE.

POINT VII

A JOINT MOTION TO REDUCE [DEFENDANT]'S MINIMUM MANDATORY SENTENCE IS REQUIRED, PURSUANT TO THE ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2021-4, TO RESENTENCE [DEFENDANT] WITHOUT THE MINIMUM MANDATORY

PAROLE DISQUALIFIERS BECAUSE HE WAS CONVICTED OF ONE OF THE ENUMERATED NON-VIOLENT DRUG OFFENSES.

For the reasons that follow, we reject all of defendant's challenges to his convictions but remand for the court to supplement its findings under State v. Yarbough, 100 N.J. 627 (1985), including an explicit statement regarding the overall fairness of defendant's consecutive sentences consistent with State v. Torres, 246 N.J. 246 (2021).

I.

Defendant was arrested on October 17, 2010 following a large-scale narcotics investigation conducted by the Ocean County Prosecutor's Office (OCPO). The investigation originated based on information received from a confidential informant that defendant was transporting large quantities of heroin into the County for distribution. In September 2010, the OCPO obtained wiretap warrants for two cellular phones belonging to defendant.

Pursuant to the warrants, officers recorded and reviewed calls and text messages from defendant's phones. During these communications, officers determined defendant, at times, used coded language later identified as the "Supreme Alphabet" or "Supreme Mathematics," to discuss the sale and distribution of drugs.

On October 16, 2010, defendant and a former co-defendant, Tyleek Boyce, spoke on the phone regarding an imminent sale of thirty bricks of heroin from Boyce to defendant, as well as future sales between the two. Defendant coordinated with Boyce for the exchange to occur the following day, and supplied him with his address, 726 Albert Avenue in Lakewood.

On the morning of October 17, 2010, defendant and Boyce communicated via text messages to coordinate the previously discussed sale and delivery of heroin. Specifically, defendant texted Boyce, "make sure it[']s all [C.O.D.]," to which Boyce responded "Yup20?" At around 11:00 a.m., defendant communicated with another former co-defendant, Jafar Lewis, and informed Lewis he had just been supplied with C.O.D. brand heroin.

Also on that day, due to the ongoing investigation, 726 Albert Avenue was under surveillance by members of the OCPO. An OCPO detective sergeant observed a Nissan Ultima leave 726 Albert Avenue and drive onto the Garden State Parkway around the time of defendant and Lewis' communication. The detective sergeant contacted the New Jersey State Police to conduct a motor vehicle stop of the Nissan. At approximately 11:20 a.m., a state trooper stopped the Nissan and identified its occupants as Charmyne Bull and Boyce. Bull consented to a search of the vehicle which resulted in the seizure of telephones,

a small amount of marijuana, Boyce's driver's license, and $2,980 in cash. Meanwhile, the OCPO sought and obtained search warrants for defendant's residence and vehicle, which were executed approximately an hour later resulting in the seizure of a scale, $4,593 in cash, twenty bricks of heroin stamped "C.O.D.", one ounce of cocaine, and his wallet.

Defendant was arrested and later indicted along with twenty-three other individuals, including Boyce and Lewis. At a plea cutoff hearing on May 16, 2016, defendant rejected the State's final plea offer and stated he intended to proceed to trial. The court accordingly informed defendant of the trial date, both verbally and in writing, and stated it would proceed "whether [defendant] [was] here or not."

In July 2016, defendant was erroneously released from the State's custody after reaching his maximum sentence related to a prior indictment, despite a detainer related to this matter. Following his release, defendant fled the State. Accordingly, from July 2016, until his apprehension on November 12, 2018, defendant was absent from the remaining pretrial proceedings, as well as trial. Defendant's counsel filed an application to be relieved as his counsel in February 2017 based on defendant's nonappearance and counsel's health issues, which the

court denied. In the weeks leading up to trial, all remaining co-defendants pled guilty.

On March 2 and March 8, 2017, the court conducted Driver[1] hearings to address the admissibility and content of the wiretapped calls. Defendant's counsel raised minimal objections to the content of the calls, only requesting deletions of references to defendant wearing an ankle bracelet. Following the parties' agreement on this point, the court determined the fifty-one recorded sessions could be admitted into evidence at trial, subject to the State laying a proper foundation. At trial, the State introduced the fifty-one recorded sessions and their accompanying transcripts into evidence during the testimony of several of the State's witnesses, including lead investigator Detective Anthony Sgro, and

[1] In State v. Driver, 38 N.J. 255, 287 (1962) the Court outlined the applicable standards for admissibility of an audio recording in a criminal trial and held to be admissible all individuals on the recording should be identified and it should be further established: "(1) the device was capable of taking the conversation or statement, (2) its operator was competent, (3) the recording is authentic and correct, (4) no changes, additions or deletions have been made, and (5) in instances of alleged confessions, that the statements were elicited voluntarily and without any inducement." The Court further determined the trial judge "should listen to the recording out of the presence of the jury before allowing it to be used," enabling him or her to determine "whether it is sufficiently audible, intelligible, not obviously fragmented, and, also of considerable importance, whether it contains any improper and prejudicial matter which ought to be deleted." Id. at 288.

former co-defendants Richard Corry, Edward Nivison, Natasha Story, and Joseph Noumair, all without objection.

Detective Sgro testified at trial regarding the underlying investigation and stated as a result of the wiretap investigations, the OCPO identified other individuals "involved in the [controlled dangerous substance (CDS)] conspiracy." In conjunction with a chart, identified as S-44, Detective Sgro described those individuals and their roles in the trafficking network. He explained Boyce, "was identified as one of the suppliers of heroin to [defendant]"; Wesley Walker "was identified as a distributor of cocaine and heroin to [defendant]"; Lewis and Jimmy Reed "[worked] for [defendant]" as he would "supply both with heroin and then they would return the profits to [defendant]"; Natasha Story and Fadiya Story "were provided with heroin by [defendant] to distribute to other people"; Joseph Noumair "was provided with heroin by [defendant], and then would return profits to [defendant]"; Eddie Nivison "purchase[d] quantities of heroin and then distribute[d] to other people"; Adalberto Vega was "suppl[ied] heroin [from defendant]" and he would "supply [to] other people"; Carroll Hill "would purchase heroin and distribute to others"; Richard Corry "would [purchase heroin and distribute to others]"; and Russell Dunn "was a customer of [defendant]."

Further, Detective Sgro testified he and other OCPO members identified those individuals through "law enforcement databases, surveillance during the investigation, in conjunction with telephone calls and text messages that would put a particular subject at a place and time." Throughout the detective's testimony, recordings of the intercepted calls were played for the jury with Detective Sgro identifying the aforementioned individuals on each respective call.

During cross-examination, defense counsel questioned Detective Sgro regarding the Supreme Alphabet and Supreme Mathematics. Specifically, defendant's counsel inquired into his experience deciphering coded messages while monitoring intercepted calls. The detective maintained he was "not an expert," in either the Supreme Alphabet or Supreme Mathematics, but to his knowledge its use originated from a prison gang, for the purpose of "thwart[ing] law enforcement."

The State also called Detective Casey Long as an expert witness. During the State's voir dire, the following exchange occurred:

> [STATE]: Based upon your training and experience, have you become familiar with various types of terminology and cryptic coded language that are used by those who sell and distribute narcotics?
>
> [DET. LONG]: Yes, I am, sir.

[STATE]: Are you familiar with the terminology Supreme Mathematics and Supreme Alphabet?

[DET. LONG]: Yes, I am, sir.

[STATE]: And, generally, and I say that in the context of their use in narcotics-related investigations.

[DET. LONG]: Yes.

[STATE]: Can you give me a general explanation as to what those terms mean?

[DET. LONG]: Sure. Both the Supreme Mathematics and Supreme Alphabet are, it's basically a way of communicating cryptically in an effort to thwart law enforcement's ability to monitor those types of language. So in the terms of Supreme Mathematics, each number from [zero] to [nine] has a word that correlates with that number, and basically somebody who's looking to either purchase or resupply quantities of narcotics or some type of controlled dangerous substance would often use those types of cryptic language when speaking to other individuals so that they would know what they were looking for. In terms of the Supreme Alphabet, each letter in and of itself of the alphabet, all [twenty-six] letters, also has a specific word that correlates with that. I will say that the Supreme Alphabet is not used as frequently. As a matter of fact, I've personally never really heard it being used during the course of an investigation, whereas the Supreme Mathematics is used very often in terms of communications.

[STATE]: So with regard to those terminologies, have you in the course of your career been involved in

> narcotics-related distribution investigations wherein Supreme Mathematics was used?
>
> [DET. LONG]: Yes, I have.
>
> [STATE]: And when those investigations occurred and you used the terminology, is there something that you refer to in order to help decipher the terms that they're using in Supreme Mathematics?
>
> [DET. LONG]: Correct. As, as we spoke about before, as a monitor, part of my duty is to understand the language that they're speaking and so forth the best I can. What we do is we'll take a chart that actually has the Supreme Mathematics on it and we put it above each terminal so this way those individuals who aren't familiar with it can refer to it very quickly. In, in every wire case — or, excuse me, every Title III investigation that I've ever been involved in where it might be used, it's always placed above the monitor so that it's a very quick reference point for any monitor so they can basically decipher what's going on.

The State moved to qualify Detective Long as an expert in the "means, methods, and practices in narcotics-related investigations of [the] distribution of narcotics." Defendant's counsel objected, asserting Detective Long did not have the "education or the prerequisite" to be an expert in the "Supreme Language." In response, the State represented his testimony regarding Supreme Mathematics would be general and based on his prior involvement in narcotics investigations.

The court qualified Detective Long as proffered by the State and during his substantive testimony, he opined on the purchasing, pricing, and packaging

of heroin and addressed the procedures employed when monitoring wiretapped calls. He also testified regarding his experience with the use of Supreme Mathematics during wiretapped narcotics investigations and explained the coded messages as follows:

> The number 1, if I was discussing number 1, I would refer to 1 as knowledge, and so on and so forth. 2 would be wisdom, 3 would be understanding, . . . 4 would be culture and freedom, 5 would be justice or power, 6 would be equality, 7, God, 8, build or destroy, 9 is born, and 0 is cipher.

Additionally, Detective Long testified, consistent with Detective Sgro, coded language is used at times to describe drug quantity, and to "thwart law enforcement." He explained a buyer attempting to purchase bricks of heroin may say to a seller, "I'm looking to pick up power cipher," and the seller would accordingly understand the buyer is "looking to buy [fifty] bricks of heroin." Defendant's counsel did not cross-examine Detective Long with respect to his testimony concerning Supreme Mathematics or the Supreme Alphabet.

The State also called former co-defendants Corry, Nivison, Story, and Noumair to detail defendant's role in the drug trafficking ring and played their relevant wiretapped phone calls during their testimony. Corry explained he bought heroin from defendant "four or five times," and would use or sometimes sell the drug, and noted he did not purchase heroin from anyone other than

defendant. Nivison stated his relationship to defendant was "drug related," and also identified other individuals as "runners" for defendant. Defendant's former girlfriend, Story, stated defendant "sold narcotics" "cocaine or heroin . . . as his job," and at times, directed her to retrieve money on his behalf. Noumair testified he was a "runner" for defendant and received instructions from him on a daily basis. He also explained several exchanges between him and defendant where defendant threatened to "lower [Noumair's] account" because he was not abiding by defendant's sale schedule.

Finally, to illustrate further defendant's role as a leader of a narcotics ring, the State also entered as evidence the cocaine and heroin found in defendant's possession on October 17, 2010, and elicited testimony from law enforcement officers regarding the investigation, specifically the search of defendant's home and car in relation to the exchange of heroin and money between Boyce and defendant that day.

After the State rested, defendant's counsel moved for a judgment of acquittal arguing the State failed to meet its burden of showing that two or more individuals worked for defendant as required by N.J.S.A. 2C:35-3. The court denied the motion, determining a reasonable jury could find guilt beyond a

reasonable doubt based on the entirety of the State's evidence and giving the State the benefit of all favorable inferences.

Defendant's counsel recalled Detective Long as his sole witness. He testified regarding the pricing, packaging, and purchasing of cocaine and heroin and specifically discussed the typical amount of glassine envelopes contained in a brick of heroin within Ocean County, the terminology used when purchasing drugs, as well as the typical costs associated with the purchase of certain amounts of heroin.

Both parties agreed to modified jury instructions. As relevant to the issues before us, defendant's counsel did not object to the instruction related to count two. As noted, defendant was found guilty on all counts in the indictment. On November 12, 2018, defendant was apprehended in Connecticut and returned to New Jersey.

In January 2019, prior to his sentencing, defendant filed a motion for a new trial, and raised four principal issues: (1) the State's use of the pronoun "we" in its closing inappropriately grouped the prosecution and the court together; (2) Detective Long's expert testimony regarding the Supreme Alphabet and Supreme Mathematics was improper as he was not an expert in the field; (3) the court incorrectly denied his motion for a judgment of acquittal as to count

two; (4) the court erred in trying him in absentia and in denying defendant's attorney's request to be relieved as counsel.

After reviewing the parties' submissions and following oral arguments, the court denied defendant's motion in a detailed oral opinion. The court concluded the State did not improperly use "we" as it was clearly referring to the prosecution. Next, the court determined Detective Long's testimony was within his purview as an expert witness, his statements regarding the coded conversations were helpful to the jury, and he properly confined his discussion of the Supreme Alphabet and Supreme Mathematics to their use in narcotics investigations. Finally, the court found the weight of the evidence at trial "provided devastating proof of defendant's guilt on all counts."

The court also determined defendant had adequate notice of his trial, as illustrated through the court's verbal and written notices. Finally, the court concluded despite his trial attorney's initial request to be relieved as counsel, he nonetheless "mounted a vigorous defense" and was "extremely professional, knowledgeable and competent." This appeal followed.

II.

In his first point, defendant argues portions of Detective Sgro's testimony "constituted a 'usurpation of the jury's role by essentially telling the jurors how

to resolve [the] case,'" quoting State v. Reeds, 197 N.J. 280, 292 (2009). He also argues, relying on State v. Bankston, 63 N.J. 263, 268 (1973), Detective Sgro improperly implied he possessed information from non-testifying confidential informants suggestive of defendant's guilt, contrary to defendant's Sixth Amendment confrontation rights, when Detective Sgro stated he "developed information" regarding defendant's role as a heroin distributor. Defendant further maintains Detective Sgro's discussion of Boyce, Walker, Lewis, Reed, Natasha and Fadiya Story, Noumair, Nivison, Vega, Hill, Corry, and Dunn, was improper for the same reasons. He also challenges the court's initial decision to admit Exhibit S-44, a chart containing photographs of the aforementioned individuals, into evidence.

As defendant did not raise an objection to the challenged testimony and evidence during trial, we apply a plain error standard of review. R. 2:10-2; State v. Montalvo, 229 N.J. 300, 321 (2017). Under this standard, we will not disrupt the trial court's determination "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. The "unjust result" must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Williams, 244 N.J. 592, 608 (2021) (quoting Bankston, 63 N.J. at 273).

Both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution grant the defendant in a criminal trial the right to confront the witnesses against him. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. "[T]he Confrontation Clause of the United States Constitution bars the 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" State v. Slaughter, 219 N.J. 104, 116-17 (2014) (quoting Crawford v. Washington, 541 U.S. 36, 53-54 (2004)). The Confrontation Clause generally bars the admission of testimony derived from a non-testifying witness, either directly or indirectly, that incriminates a defendant. State v. Branch, 182 N.J. 338, 351-52 (2005).

A statement is considered to be "testimonial" when "the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis v. Washington, 547 U.S. 813, 822 (2006). Conversely, "[s]tatements are non[-]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. at 813-14. The primary purpose test is "a fact-

specific analysis . . . based on the circumstances presented . . . ." State v. Bass, 224 N.J. 285, 317 n.9 (2016).

The "admission of an out-of-court testimonial statement violates the Confrontation Clause unless the witness is unavailable, and the defendant had an opportunity to cross-examine that witness." State v. Wilson, 442 N.J. Super. 224, 239 (App. Div. 2015); see also U.S. Const. amend. VI; Crawford, 541 U.S. at 58. In New Jersey, "a declarant's narrative to a law enforcement officer about a crime, which once completed has ended any 'imminent danger' to the declarant or some other identifiable person, is testimonial." State v. ex rel. J.A., 195 N.J. 324, 348 (2008) (quoting Davis, 547 U.S. at 827).

Therefore, when officers testify regarding their role in a particular investigation, the court must ensure their statements both do not amount to hearsay and do not run afoul of the Confrontation Clause. See Bankston, 63 N.J. at 268-69. If the "logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." Bankston, 63 N.J. at 271. In Bankston, ibid., the Court concluded an officer's testimony violates both the hearsay rule and the Confrontation Clause when he conveys,

by inference or directly, information obtained from a non-testifying declarant which incriminates the defendant in the crime charged.

To avoid running afoul of the Confrontation Clause in such circumstances, our Supreme Court has placed restrictions on this type of testimony. For example, an officer may explain he went to a crime scene or approached a suspect based "upon information received." Id. at 268. The officer may not, however, "repeat specific details," or imply he received evidence of the defendant's guilt by a non-testifying witness. State v. Luna, 193 N.J. 202, 216-17 (2007).

The Court affirmed and reinforced its holding of Bankston in Branch, 182 N.J. at 342. In that case, the Court determined an officer's testimony was inadmissible hearsay when he explained his inclusion of the defendant's photograph in an array "because he had developed defendant as a suspect 'based on information received.'" Ibid. The Court concluded his statements caused the jury "to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime," and noted "[b]ecause the [informant] . . . was not called as a witness, the jury never learned the basis of [the informant's] knowledge regarding defendant's guilt, whether he was a credible source, or whether he had a peculiar interest in the case." Id. at 348.

The Court further stated the introduction of the hearsay "violated defendant's federal and state rights to confrontation," warranting reversal as plain error. Id. at 354.

We further examine defendant's claims against the holding in State v. Irving, 114 N.J. 427, 447-48 (1989), where the Court held the admission of hearsay from a detective's testimony did not amount to plain error, as substantial credible evidence existed in the record to support the verdict. In that case, the Court rejected defendant's argument that the testimony produced an "inescapable inference . . . that an unidentified informant, who was not . . . subject to cross-examination, had told [the detective] that [defendant] had committed the crime," id. at 445, as the record contained evidence of two eyewitness identifications of defendant, both in and out of court. Id. at 448.

As noted, defendant's counsel did not object to Detective Sgro's testimony when he stated he "developed information around June of 2010 that [defendant] was bringing [] large quantities of heroin into the [county] . . . to distribute to other people." Even if we indulge defendant's argument that the admission of Detective Sgro's statement was in error, as it may have implied information received from a non-testifying confidential informant which directly implicated defendant in the distribution of drugs, we are satisfied the court's actions did not

amount to plain error as there was substantial and credible admissible evidence in the record to support defendant's guilty verdicts, including the wiretapped phone calls and text messages, the physical evidence obtained from defendant's home and car, and the live testimony from four former co-defendants.

We further conclude the court did not commit error, let alone reversible error, when it admitted Detective Sgro's statements regarding Boyce, Walker, Lewis, Reed, both Natasha and Fadiya Story, Noumair, Nivison, Vega, Hill, Corry, and Dunn. First, Corry, Nivison, Natasha Story, and Noumair testified at trial, and were therefore subject to cross-examination. Further, any statements or descriptions provided by Detective Sgro regarding the remaining individuals were obtained from his role as lead investigator. In this regard, Detective Sgro specifically stated identification of the callers and their particular role in the network was accomplished through "law enforcement databases, surveillance during the investigation, in conjunction with telephone calls and text messages that would put a particular subject at a place and time." In no way did he imply the use of non-testifying confidential informants, and the jury heard the wiretapped communications between these witnesses and defendant. Consequently, any statement Detective Sgro made regarding Boyce, Walker,

Lewis, Reed, Fadiya Story, Vega, Hill, and Dunn did not run afoul of Bankston and its progeny.

Defendant also argues the court erred when it initially admitted S-44, into evidence and when it re-marked the exhibit for identification only, maintaining it improperly did so in the absence of the jury. We disagree.

We defer to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). "Rulings on the admission of demonstrative evidence are within the discretion of the trial judge." State v. Scherzer, 301 N.J. Super. 363, 434 (App. Div. 1997).

Further, "there is nothing inherently improper in the use of demonstrative evidence." Ibid. Such evidence can consist of models, diagrams, or charts used by a witness to help illustrate the witness' testimony and aid jury understanding. Macaluso v. Pleskin, 329 N.J. Super. 346, 350 (App. Div. 2000). "In general, the trial court enjoys wide latitude in admitting or rejecting such replicas, illustrations and demonstrations and in controlling the manner of presentation and whether or not particular items are merely exhibited in court or actually received into evidence." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on R. 611(a) (2022-2023); State v. Feaster, 156 N.J. 1, 82 (1998). However, such evidence must be authenticated pursuant to N.J.R.E.

901, as well as relevant, pursuant to N.J.R.E. 401. Further, its probative value must "not be offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters." Balian v. General Motors, 121 N.J. Super. 118, 127 (App. Div. 1972).

We conclude the court did not abuse its discretion when it moved the chart into evidence as it depicted "individuals that [Detective Sgro] identified as being part of this investigation." Additionally, it was properly authenticated and relevant as it pertained to this drug network and defendant's role in it. Further, there is no support in the record to indicate the chart caused any type of "undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters," as it showed those individuals who were identified through live testimony, and others heard on the wiretapped calls played for the jury.

In any event, the State later re-marked the chart for identification purposes only, meaning the court did not allow the chart to be taken back with the jury during deliberations. Further, the court properly instructed the jury that "[a]ny exhibit that has not been admitted into evidence cannot be given to you in the jury room even though it may have been marked for identification. Only those items admitted into evidence can be given to you." Under the circumstances,

we conclude the court did not abuse its discretion in its initial ruling admitting the chart into evidence and its subsequent decision limiting the State's use of the exhibit for identification purposes only. We further conclude the court's referenced instruction cured any error which may have resulted from S-44 being remarked outside of the jury's presence.

III.

In his second point, defendant relies principally on State v. Hyman, 451 N.J. Super. 429, 444 (App. Div. 2017), to argue the admission of Detective Long's expert testimony deprived him of a fair trial, as he was not qualified to opine on the Supreme Alphabet or Supreme Mathematics. Defendant specifically points to Detective Long's testimony when he translated "'power cypher' as [fifty]." He further asserts the court erred when it characterized Detective Long's testimony as "an explanation of what Supreme Mathematics [was]" and that it "was unquestionably helpful to the jury." We disagree with these arguments.

A trial court's evidentiary determination regarding the qualification of an expert is reviewed under an abuse of discretion standard, and reversal is only warranted for "manifest error and injustice." State v. Rosales, 202 N.J. 549, 562-63 (2010). "[I]f scientific, technical, or other specialized knowledge will

assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise." N.J.R.E. 702. Further, expert testimony is admissible when: (1) the subject matter is beyond the knowledge of the average juror; (2) the field testified to is at a present state that the expert's testimony can be reliable; and (3) the witness possesses adequate expertise to offer the testimony. State v. Kelly, 97 N.J. 178, 208 (1984).

It is not uncommon for expert testimony from a law enforcement officer to be utilized at trial in a narcotics investigation, as it "provides necessary [] insight to matters that are not commonly understood by the average juror," such as language used in the purchase and sale of drugs. Hyman, 451 N.J. Super. at 444 (quoting State v. Cain, 224 N.J. 410, 413 (2016)). It remains the court's responsibility, however, to "guard against opinions that stray from interpreting drug code words, and pertain to the meaning of conversations in general and the interpretation of 'ambiguous statements that were patently not drug code.'" Id. at 447.

Further, our Supreme Court has noted, "when [an] expert witness is [also] an investigating officer, the expert opinion may present significant danger of

undue prejudice because the qualification of the officer as an expert may lend credibility to the officer's fact testimony regarding the investigation." State v. Torres, 183 N.J. 554, 580 (2005). The State is permitted, however, to pose a hypothetical to an expert in a narcotics prosecution which mimics the facts of the case. See State v. Nesbitt, 185 N.J. 504, 518-19 (2006) (finding a hypothetical posed to a narcotics expert in which the word "complicit" was used was permissible even though it appeared in the relevant statute).

Against these legal principles, we conclude the court did not abuse its discretion when it accepted Detective Long as an expert in the "means, methods, and practices in narcotics-related investigations of [the] distribution of narcotics," nor did it err by accepting his testimony regarding the Supreme Alphabet or Supreme Mathematics. Detective Long clearly met the requirements of N.J.R.E. 702, and he testified regarding information which would not be within the average knowledge of a juror such as the appropriate practices and procedures of a narcotics investigation and the methods employed when distributing CDS, including the use of coded language.

We also conclude defendant's reliance on Hyman, 451 N.J. Super. at 429, is misplaced. In that case, we held the trial court improperly admitted a detective as a lay witness rather than an expert, when his testimony included the

interpretation of drug slang and because he "render[ed] opinions based on 'his training and experience and knowledge of th[e] investigation,'" and not on his sense perceptions or observations. Id. at 448-49. Although the court erred, we concluded any error to be harmless because the witness had sufficient experience, training, and education to have been qualified as an expert. Id. at 459. Here, Detective Long was properly admitted as an expert. He further opined on narcotics investigations generally based on his own training and experiences and not on his own perceptions or observations related to this particular investigation.

Even assuming Detective Long's statements about the Supreme Alphabet or Supreme Mathematics exceeded his qualifications, his statements on those topics were a minor portion of his testimony and did not amount to a "manifest error and injustice," Rosales, 202 N.J. at 562-63, in light of the other record evidence, such as the cocaine and heroin seized, the recorded phone calls, as well as testimony from former co-defendants, all of which overwhelmingly supported defendant's guilt.

IV.

Defendant next challenges the court's admission of some of the intercepted telephone calls and related transcripts.[2] Defendant does not, however, engage in any discussion, let alone meaningful analysis, of a specific intercepted call. Instead, he summarily argues it was error for the court to admit certain unidentified calls because "the vast majority of the conversations involved alleged individuals whom [defendant] could not cross-examine" thereby affecting his "right to confrontation and a fair trial." Without further specificity, defendant's summary description of the challenged evidence impedes our appellate review. R. 2:6-2(a)(6); See Spinks v. Township of Clinton, 402 N.J. Super. 465, 474 (App. Div. 2008) ("[I]t is [the party's] responsibility to refer [the court] to specific parts of the record to support their argument."). Despite this procedural infirmity, we address defendant's arguments on the merits and reject them.

As stated previously, criminal defendants enjoy coextensive federal and state constitutional rights to confrontation of any witnesses called to testify against them. State v. Roach, 219 N.J. 58, 74 (2014). This constitutional

[2] We note defendant has not appealed any of the court's rulings resulting from the Driver hearings.

protection, however, excludes only those out-of-court statements that are testimonial, Crawford, 541 U.S. at 68. Non-testimonial hearsay, on the other hand, may be admitted without running afoul of these constitutional principles to the extent the statements fit a recognized exception to the hearsay rule. State v. Weaver, 219 N.J. 131, 151 (2014).

Statements made by a co-conspirator are admissible against all conspiracy members via N.J.R.E. 803(b)(5) if the prosecution establishes: "(1) the statement was 'made in furtherance of the conspiracy'; (2) the statement was 'made during the course of the conspiracy'; and (3) there is 'evidence, independent of the hearsay, of the existence of the conspiracy and [the] defendant's relationship to it.'" State v. Cagno, 211 N.J. 488, 530 (2012) (quoting State v. Taccetta, 301 N.J. Super. 227, 251 (App. Div. 1997)). Completion of the criminal act does not preclude a statement made after the act, State v. James, 346 N.J. Super. 441, 458-59 (App. Div. 2002), if the statement serves a "current purpose, such as to promote cohesiveness, provide reassurance to a co-conspirator, or prompt one not a member of the conspiracy to respond in a way that furthers the goals of the conspiracy," Taccetta, 301 N.J. Super. at 253.

Relying solely on State v. Harris, 298 N.J. Super. 478 (App. Div. 1997), defendant argues some of the fifty-one calls are inadmissible under N.J.R.E. 803(b)(5) as the State failed to establish the third prong of the Taccetta test, existence of the conspiracy independent of the hearsay. He is demonstrably mistaken. Viewed in context, there is no question the statements here, many made by witnesses who testified at trial, were made during and in furtherance of the conspiracy and therefore fall within N.J.R.E. 803(b)(5). Defendant advances no more than bald assertions to the contrary.

As to defendant's confrontation argument, we first note any recorded calls between defendant and Corry, Nivison, Story, and Noumair are fully admissible as those individuals testified at trial and were therefore subject to cross-examination. Regarding the remaining recorded phone calls and text messages from additional co-conspirators, our Supreme Court has concluded the admission of evidence through the co-conspirator exception does not transgress the Confrontation Clause. State v. Savage, 172 N.J. 374, 402 (2002); Bourjaily v. United States, 483 U.S. 171, 183-84 (1987). In Bourjaily, 483 U.S. at 183-84, the Supreme Court determined statements of a co-conspirator, made in furtherance of the conspiracy, did not implicate the Confrontation Clause.

We acknowledge, however, Savage predated Crawford. At least one federal district court has held to the "extent that the Crawford decision may conflict with Bourjilay, [we] [are] obligated to follow the Supreme Court's more recent decision in Crawford," where statements which are both testimonial and in furtherance of a conspiracy must satisfy the Confrontation Clause to be properly admitted. United States v. Baines, 486 F. Supp. 2d 1288, 1300-01 (D.N.M. 2007).

In light of the facts of this case, we need not determine whether admissible, testimonial statements of co-conspirators must also satisfy the Confrontation Clause, for even if we accept the testimonial nature of these statements, any violation of defendant's confrontation right is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). To establish that the error was harmless, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 680 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

We are convinced that even if the court erred in admitting any of the out-of-court statements, the error was harmless under this standard. As we have explained, the evidence of defendant's guilt was overwhelming. That evidence includes defendant's own statements during the calls implicating himself in the

offenses, as well as the testimony of Corry, Nivison, Story, and Noumair, and the seized drugs and cash from defendant's home and vehicle, all of which corroborated his role in the crimes. Finally, in light of our decision, we need not address the State's argument that the recorded phone calls are admissible under N.J.R.E. 803(b)(1), as a statement of a party-opponent.

V.

In his fourth point, defendant argues there are several "and potentially contradictory ways" he could have been found guilty of N.J.S.A. 2C:35-3, and as such "specific instructions were necessary to avoid a possible 'non-unanimous patchwork verdict,'" quoting State v. Frisby, 174 N.J. 583, 599 (2002). On this point, he notes when defense counsel moved for a judgment of acquittal, the prosecution acknowledged, "the jury's heard at least five different people [testify] that [defendant] was directing, organizing, supervising or managing." Under the circumstances, he asserts it was necessary for the court to give specific unanimous instructions as to which individuals in the network defendant was "directing, organizing, supervising or managing." Additionally, pursuant to Rule 2:6-11(d), defendant relies upon State v. Berry, 471 N.J. Super. 76 (App. Div. 2022), certif. denied, 252 N.J. 80 (2022), arguing that case "discusses the need for clarity on the definition of 'high level' for the king pin conviction" and

"refined" jury instructions are, "appropriate in certain cases." We are unpersuaded by these arguments.

Under the plain error standard, "the issue is whether the failure of the trial court to give specific unanimity instruction sua sponte was clearly capable of producing an unjust result." Frisby, 174 N.J. at 598. Our State Constitution requires a jury's verdict to be unanimous in criminal cases. State v. Parker, 124 N.J. 628, 633 (1991). This is because jury unanimity "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." Ibid. (quoting United States v. Gibson, 553 F.2d 453, 457 (5th Cir. 1977)). Usually, a general instruction on unanimity will be sufficient to inform the jury "that it must be unanimous on whatever specifications it finds to be the predicate of the guilty verdict." Parker, 124 N.J. at 641. For example, when a single theory of the case is offered and the alleged acts are "conceptually similar," such specifics on unanimity are not required. Frisby, 174 N.J. at 600.

To avoid a fragmented verdict, however, "more specific instruction" as to jury unanimity may be required. Ibid. Courts should be cognizant of requiring a "specific unanimity charge" where the possibility of a "fragmented verdict is even reasonably debatable," and while evidence of jury confusion is not required, it is an "important factor in determining whether the absence of a

specific unanimity charge caused defendant to be prejudiced." Ibid. When "different theories [are] advanced based on different acts and entirely different evidence," id. at 599, specific unanimity instruction is required.

We are satisfied such instructions were not warranted here. First, the State did not offer distinct theories of defendant's role in the drug trafficking ring, nor was another individual on trial as its possible leader. Rather, the State's sole theory was that defendant acted as the leader of a "network that distributed heroin throughout Ocean and Monmouth County," and it offered compelling proof establishing he managed and organized numerous individuals in that role.

Further, a thorough review of the record offers no evidence of jury confusion as to the State's theory, defendant's involvement in the drug trafficking network, or the instructions given. Finally, the acts of conspiracy such as directing various individuals to sell heroin, or to pick up money for him, were not "conceptually distinct" to require specific unanimity instructions. Id. at 600.

We also find defendant's reliance on Berry, 471 N.J. Super. at 104, misplaced. In that case, we concluded the court erred in its jury instructions on a material element of N.J.S.A. 2C:35-3 when it failed to include explanatory language of what "constitute[d] a 'high-level' member of the conspiracy." Ibid.

We reasoned because three individuals were all charged as leaders in the conspiracy, additional clarification was needed due to the "distinctive circumstances," of the case, including the lack of cooperating witnesses to testify to the operation of the network or the defendants' specific roles. Id. at 110, 114. We further supported our holding based on apparent confusion among the jurors regarding the elements of the charge. Id. at 110-11.

Here, as noted and unlike in Berry, defendant was the only person on trial as a "leader of a narcotics trafficking network" under N.J.S.A. 2C:35-3. Further, there was no evidence of any confusion among the jurors and the State provided testimony from four individuals who discussed the workings of the alleged trafficking network, as well as fifty-one wiretapped phone calls and text messages between defendant and members of the network. These calls and text messages illustrated defendant's extensive, driving role in the drug distribution network.

VI.

In his fifth and sixth points, defendant advances a series of arguments contending the court's sentence was contrary to the Code of Criminal Justice. Specifically, he claims the court improperly applied aggravating factors three (risk of re-offense), N.J.S.A. 2C:44-1(a)(3), and six (prior criminal record),

N.J.S.A. 2C:44-1(a)(6). He further asserts the court improperly "double-counted" when applying aggravating factor nine (need to deter), N.J.S.A. 2C:44-1(a)(9), when it stated defendant's actions took "a certain amount of organization, skill and intelligence."

With respect to the mitigating factors, defendant maintains the court failed to apply mitigating factor eight, (conduct was the result of circumstances unlikely to recur), N.J.S.A. 2C:44-1(b)(8), improperly used his substance abuse problem against him, and ignored defendant's advanced age in setting parole eligibility. Further, he asserts the court erroneously omitted from its evaluation mitigating factor ten (likely to respond to probationary treatment), N.J.S.A. 2C:44-1(b)(10), and eleven, (imprisonment would entail excessive hardship to dependents), N.J.S.A. 2C:44-1(b)(11). Defendant also argues as to mitigating factor eleven the court inappropriately commented on the circumstances under which his girlfriend became pregnant when it stated, "[y]ou didn't have to get your girlfriend pregnant, you didn't have to get involved in relationships knowing that you were on the lamb."

Relying on "dictum" in State v. Williams, 81 N.J. 498, 500-01 (1980), defendant further claims he is entitled to more jail credits during the period he was inadvertently released from custody in July 2016 until his apprehension in

Connecticut on November 12, 2018 because this error occurred "through no fault of his own."

In addition, defendant maintains the court committed procedural and substantive errors when it imposed a consecutive sentence. Procedurally, he contends the court erroneously concluded a consecutive sentence was appropriate prior to addressing the Yarbough factors.

Substantively, defendant further argues the court incorrectly found separate, "independent acts," when "none of the charged acts was completely independent of [defendant] (allegedly) being a 'kingpin.'" Second, he contends the court's finding he committed "separate acts of violence" was unclear and "contradict[s] Attorney General Law Enforcement Directive No. 2021-4, which deems offenses under N.J.S.A. 2C:35-3 and N.J.S.A. 2C:35-5 to be 'nonviolent drug activity.'" Third, he argues his possession of heroin with intent to distribute was used as evidence to convict him on the first-degree N.J.S.A. 2C:35-3 charge and was therefore "inextricably linked" to that offense. Fourth, defendant states though the court found merger impermissible under N.J.S.A. 2C:35-3, it was not precluded from sentencing him concurrently "in the interest of overall fairness." Finally, in a related argument, defendant contends a remand is warranted for reconsideration of the consecutive sentences because

the court "did not explicitly find that the aggregate sentence was fair," as required by Torres, 246 N.J. at 268.

We disagree with defendant's challenges to the court's findings related to the aggravating and mitigating factors but agree a remand is necessary for the limited purpose for the court to clarify its Yarbough findings and to consider and explicitly address the overall fairness of defendant's sentence in accordance with Torres.

When reviewing a trial court's sentencing decision, we employ a deferential standard. State v. Grate, 220 N.J. 317, 337 (2015); State v. Fuentes, 217 N.J. 57, 70 (2014). We must affirm a sentence unless: (1) the trial court failed to follow the sentencing guidelines; (2) the court's findings of aggravating and mitigating factors were not based on competent and credible evidence in the record; or (3) "the [court's] application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience." Fuentes, 217 N.J. at 70 (second alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

We assess a trial court's finding of "aggravating and mitigating factors to determine whether they 'were based upon competent credible evidence in the record.'" State v. Bieniek, 200 N.J. 601, 608 (2010) (quoting Roth, 95 N.J. at

364-65). We are "not to substitute [our] assessment of aggravating and mitigating factors for that of the trial court." Ibid. "Elements of a crime, including those that establish its grade, may not be used as aggravating factors for sentencing of that particular crime." State v. Lawless, 214 N.J. 594, 608 (2013). To use those elements in formulating the aggravating factors would result in impermissible double-counting. State v. Kromphold, 162 N.J. 345, 353 (2000); see also Fuentes, 217 N.J. at 74-75 (holding sentencing courts "must scrupulously avoid 'double[-]counting' facts that establish the elements of the relevant offense"). "A court, however, does not engage in double-counting when it considers facts showing defendant did more than the minimum the State is required to prove to establish the elements of an offense." State v. A.T.C., 454 N.J. Super. 235, 254-55 (App. Div. 2018); see also Fuentes, 217 N.J. at 75 ("A sentencing court may consider 'aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.'") (alteration in original) (quoting State v. Henry, 418 N.J. Super. 481, 495 (Law. Div. 2010)).

Guided by these standards, we are satisfied the court properly applied the aggravating and mitigating factors. The court correctly determined aggravating factors three, six and nine applied based on competent evidence of defendant's

repeated contacts with the criminal justice system, his escalating criminal behavior, and the threat he posed to the public in general. We disagree the court "double-counted," or otherwise contravened the holding in Fuentes, 217 N.J. at 74-75, in assigning those aggravating factors.

We are further satisfied the court did not abuse its discretion when it found the absence of any mitigating factors, nor in its specific rejection of mitigating factors eight, ten, and eleven, and further conclude defendant's arguments are of insufficient merit to warrant extended discussion. R. 2:11-3(e)(2). We reach a similar conclusion with respect to defendant's argument that the court erred in failing to award additional jail credits. Ibid.

Defendant's extensive criminal history of six prior felony convictions clearly supported the rejection of mitigating factors eight and ten. While we agree the court's comment regarding the timing of defendant's girlfriend's impregnation was unnecessary and extraneous, mitigating factor eleven was clearly inapplicable as defendant failed to illustrate or articulate how his children would experience "excessive" hardship during his time in prison. See State v. Dalziel, 182 N.J. 494, 505 (2005) (stating the mere fact a defendant has children does not require a finding of mitigating factor eleven); State v. Locane, 454 N.J. Super. 98, 129 (App. Div. 2018) (holding a defendant must demonstrate

their dependents will suffer circumstances "different in nature than the suffering unfortunately inflicted upon all young children whose parents are incarcerated"). Similarly, the court was well within its discretion to reject defendant's substance abuse problems in light of the circumstances of the offenses to which he was convicted, see State v. Ghertler, 114 N.J. 383, 389-90 (1989) (stating the defendant's drug addiction was not itself a mitigating factor). We also reject defendant's argument regarding his age upon his release warrants application of any mitigating factor.

Finally, under the circumstances, defendant was not entitled to additional jail credits for that period when he left the state with full knowledge of the trial date in the case, and his reliance on Williams, 81 N.J. at 498, is misplaced. In Williams, the Supreme Court credited the defendant with three years of his sentence when the court erred in placing him on probation. Id. at 500-01. During that time, however, the defendant successfully completed a drug rehabilitation program and complied with his probationary terms. Ibid. Here, though defendant was released, his charges for this case were never dismissed, nor was he ever instructed they were prior to his flight from New Jersey.

VII.

Turning to defendant's challenge to the consecutive sentences, it is well settled "judges have discretion to decide if sentences should run concurrently or consecutively." State v. Miller, 205 N.J. 109, 128 (2011); see N.J.S.A. 2C:44-5(a). Judges are permitted to impose consecutive sentences where multiple sentences of imprisonment are imposed and after considering the Yarbough factors. See Yarbough, 100 N.J. at 643-44. "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." Miller, 205 N.J. at 129.

When deciding whether to impose a consecutive sentence, trial courts are to consider the following factors:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;

> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors;
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and
>
> (6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest term (including an extending term, if eligible) that could be imposed for the two most serious offenses.
>
> [Yarbough, 100 N.J. at 643-44.]

"[T]he reasons for imposing either consecutive or concurrent sentences should be separately stated in the sentencing decision[.]" Id. at 643. Our Supreme Court recently held it is "essential to a proper Yarbough sentencing assessment" the sentencing court provide "[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding." Torres, 246 N.J. at 268. Sentencing judges should be

"mindful that aggravating and mitigating factors and Yarbough factors, as well as the stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's fairness." Id. at 272.

Prior to the court's imposition of consecutive sentences, it first inquired on the record if a Yarbough analysis was even necessary based on the anti-merger language in N.J.S.A. 2C:35-3. When the court turned to its evaluation of the factors, the court determined defendant's actions were sufficiently independent, involved multiple victims, included separate acts of violence, and occurred at different times, places and events.

As to defendant's independent acts, the court concluded defendant's actions for distribution were "separate and apart from the acts [he] . . . undertook with respect to the supervision and management of others," and specifically referenced when defendant "was driving," he was "stopped" and found with "drugs in [his] car for [his] distribution." In its discussion of different times, places, and events, however, the court only noted, "the events that formed the network" occurred "in Toms River, in Jackson, in Lakewood, in Asbury Park, Plainfield and Piscataway. And, therefore, there were different times and places where the offenses all kind of spidered out to."

As a preliminary matter, we note the concept of merger and the imposition of consecutive sentences are distinct, and the presence of anti-merger language in a statute does not obviate the need for a comprehensive Yarbough analysis.[3] Further, the court's evaluation of independent acts appears to have been animated, in part, by the circumstances surrounding the execution of the warrants on defendant's home and car, and the October 17, 2010 motor vehicle stop of Bull and Boyce.

As the record reflects, the charge under N.J.S.A. 2C:35-3 stemmed from the large-scale wiretap investigation which occurred from September 2010 to October 2010, focusing on defendant as the leader of a narcotics ring. The events on October 17, 2010, however, formed the basis for the additional charges against defendant of conspiracy, distribution and possession of heroin and cocaine. To ensure the court did not conflate the overlapping facts with respect to each charge when considering the Yarbough factors, the record would benefit from further explanation by the court. We also agree with defendant that a

[3] "[M]erger is rooted in the established principle that 'an accused [who] has committed only one offense . . . cannot be punished as if for two,'" State v. Dillihay, 127 N.J. 42, 46 (1992) (quoting State v. Cole, 120 N.J. 321, 325-26 (1990)), whereas the requirement of a Yarbough analysis, "underscore[s] [the] concepts of uniformity, predictability, and proportionality," which our courts strive to achieve when sentencing a defendant for multiple offenses. Torres, 246 N.J. at 252.

remand is necessary because in its decision to impose consecutive sentences the court failed to make an "explicit statement explaining the overall fairness" of defendant's aggregate sentence as required under Torres, 246 N.J. at 268.

VIII.

In his final point, defendant states he is placing the State "on notice" he will be making a request for a joint motion to modify his sentence. He asserts the State is required to comply as described in Section D, of the Attorney General Law Enforcement Directive No. 2021-4. Att'y Gen. Law Enf't Directive No. 2021-4, Revising Statewide Guidelines Concerning Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12 8 (Apr. 19, 2021). Defendant argues because he was convicted of two of the "nonviolent drug offenses," listed in the Directive, the State is "required to file a joint application to modify." Defendant concedes, however, that such a motion has not been properly filed or addressed by the court and we accordingly decline to address the argument at this time.

IX.

In sum, we affirm defendant's convictions but remand for further findings regarding the court's imposition of consecutive sentences. As noted, on remand the court should reevaluate the Yarbough factors and provide further explanation

for its findings. In the event the court determines consecutive sentences are appropriate, it should also explicitly address the overall fairness of the aggregate sentence imposed. See State v. Randolph, 210 N.J. 330, 353 (2012). We stress, however, nothing in our opinion should be interpreted as an expression of our view of the outcome of the remanded proceedings, including whether a consecutive or a concurrent sentence is appropriate.

To the extent we have not specifically addressed any of defendant's arguments, it is because we have concluded they are of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in part and remanded in part. We do not retain jurisdiction.