SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5558-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL MITCHELL,
a/k/a MICHAEL SMITH,
and MICHAEL WILKINS,

Defendant-Appellant.

———————————————

Submitted November 15, 2022 – Decided February 9, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 18-03-0293.

Scurato Law LLC, attorneys for appellant (Joseph E. Krakora, Public Defender, attorney; Amira R. Scurato, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Steven A. Yomtov, Deputy Attorney General, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant, Michael Mitchell, appeals from his jury trial convictions for attempted murder, aggravated assault, terroristic threats, and related weapons offenses. The victim, defendant's former girlfriend, identified defendant as her attacker, and defendant confessed during a post-arrest interrogation. The crimes were witnessed by a sheriff's officer and captured on video. Defendant raises numerous contentions on appeal in his counselled and pro se briefs, arguing his videorecorded stationhouse confession should have been suppressed; the trial court erred in admitting evidence of a prior domestic violence incident and text messages extracted from defendant's cell phone; the trial court should have dismissed a juror who was remotely acquainted with a witness; and the sentencing court "double counted" his criminal record and erred in imposing a discretionary extended term as a persistent offender. After carefully reviewing the record in light of the governing law and arguments of the parties, we affirm.

I.

We discern the following facts and procedural history from the record. Defendant dated the victim on-and-off for about six years. In December 2014, during one of their break-ups, defendant entered the victim's apartment while she was not home and attacked her when she arrived. He put her in a chokehold

and whispered in her ear, "[i]f I can't have you, no one else can." The victim filed a police report, and the matter resulted in a criminal conviction. She nonetheless reunited with defendant a few days after the incident.

Defendant and the victim broke up again in September 2017, but they continued to communicate. According to the victim, defendant did not accept the break-up, and he repeatedly asked to get back together.

On January 3, 2018, as the victim was driving near her home, she noticed defendant's car parked on the street. She saw defendant crossing the street. He walked through traffic towards her car, saying he wanted to talk to her, so she pulled over. When she put the car in park, the doors automatically unlocked, and defendant jumped in the car uninvited.

The victim drove in the direction of the Haledon police station, where she believed she could find an officer. However, she did not see any officers. When she made a U-turn on Belmont Avenue, defendant disconnected the victim's phone call, pulled out a gun, pointed it at her, and said "[b]itch, I'm about to kill you."

The victim pulled diagonally into traffic, blocking both lanes, trying to draw attention to her car. As she was trying to release her seat belt, defendant fired the gun, striking her in her right arm.

The victim managed to open the door and roll out of the car onto the ground. Defendant got out of the car and stood over her. She got up and tried to talk to him. Defendant pushed the victim away, pointed the gun at her, and resumed shooting. He shot her two times in the left arm, at which point she fell to the ground. He then shot her in the jaw and began hitting her in the face with the handle of the gun as she laid on the ground. He shot her again before he ran off. The victim was shot a total of five times.

At the time of the incident, Captain Edward Akins of the Passaic County Sheriff's Office was patrolling the area and observed the victim's car in the middle of Belmont Avenue. Thinking the vehicle was disabled, he pulled over to see if the driver needed assistance. Before he got out of his vehicle, he saw the victim fall out of her driver's side door and her car began to roll backward in his direction. He put his vehicle in reverse to block oncoming traffic and to avoid a collision. As he did so, he heard a bang.

Looking back toward the victim's car, Captain Akins observed a man in dark clothing standing outside the vehicle and firing a gun at the victim, who was lying on the ground. He positioned his vehicle as a barricade and called headquarters for additional police units and an ambulance. He then exited his

vehicle with his weapon drawn and yelled verbal commands to the man to drop the gun. At that point, defendant stopped hitting the victim and ran away.

The victim told Captain Akins that she had been shot by her ex-boyfriend, Michael Mitchell. The incident was captured on the dashboard camera of Captain Akins's patrol vehicle. The incident was also captured by a local business's surveillance camera. Both video recordings were played for the jury.

Police found a cell phone in the victim's vehicle that defendant later identified as belonging to him. In and around the victim's vehicle, they also found spent bullet casings, one spent projectile, and suspected tooth fragments. In a nearby yard, police found a semi-automatic .380 handgun containing an un-ejected casing, which had jammed the gun, and one live cartridge still in the magazine. The gun's serial number had been removed. When tested, it matched the spent shell casings and the projectile recovered from the crime scene.

In the days that followed, the police continued to search for defendant. On the afternoon of January 4, 2018, police spoke with defendant's boxing coach, Barry Porter, and he allowed them to use his phone to call defendant. Passaic County Prosecutor's Office Lieutenant Marco Aliano spoke with defendant on Porter's phone. Lieutenant Aliano told defendant that the police were looking for him and that there was a warrant for his arrest for attempted

murder. The lieutenant asked defendant to turn himself in. Defendant said he was sorry for what had happened and indicated that he planned to turn himself in to police. However, defendant did not turn himself in, nor were the police able to find and arrest him that day.

On January 5, 2018, police located defendant at a hotel in Elmwood Park, where he had checked in under a false name. They arrested him pursuant to a warrant that had been issued earlier that day. Defendant gave a videorecorded statement at the police station in which he confessed to the shooting.

In March 2018, a grand jury returned a nine-count indictment charging defendant with: first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1) and 2C:11-3(a); 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 handgun without a permit, N.J.S.A. 2C:39-5(b)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2(a); third-degree terroristic threats, N.J.S.A. 2C:12-3(a); fourth-degree possession of a defaced firearm, N.J.S.A. 2C:39-3(d); third-degree criminal restraint, N.J.S.A. 2C:13-2(a); and second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7(b)(1). On motion by the State

before trial, Judge Marilyn C. Clark dismissed the endangering an injured victim and criminal restraint counts.

Judge Clark convened a Miranda[1] hearing and in limine evidentiary hearings on the State's motion to admit N.J.R.E. 404(b) evidence of the 2014 domestic violence incident and on whether to admit text messages sent from defendant's phone. Judge Clark ruled that defendant's statement to the police was admissible, subject to redactions. The judge also granted the State's motion to admit N.J.R.E. 404(b) evidence, subject to a limiting instruction, and ruled that defendant's text messages were admissible.

The trial was held between April 4 and 15, 2019. The jury found defendant guilty on all remaining counts. Judge Clark denied defendant's motion for a judgment of acquittal or, alternatively, a new trial.

At the sentencing hearing, Judge Clark granted the State's motion to impose a discretionary extended term as a persistent offender under N.J.S.A. 2C:44-3(a). On attempted murder, Judge Clark sentenced defendant to a discretionary extended term of life, with an eighty-five percent period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2. On unlawful possession of a weapon, the judge sentenced defendant to a concurrent ten-year

[1] Miranda v. Arizona, 384 U.S. 436, 479 (1966).

term with a five-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c). The remaining counts were merged.

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

> POINT I
>
> THE TRIAL JUDGE ERRED IN ADMITTING DEFENDANT'S INTERROGATION.
>
> A. DEFENDANT INVOKED HIS RIGHT TO SILENCE.
>
> B. DEFENDANT WAS NOT ADVISED OF THE CHARGES AGAINST HIM BEFORE HE CONFESSED.
>
> C. DEFENDANT WAS IN SEVERE PAIN AND THE AMBULANCE WAS DELAYED UNTIL AFTER HE CONFESSED.
>
> POINT II
>
> THE TRIAL JUDGE ERRED IN ADMITTING [N.J.R.E.] 404(b) EVIDENCE REGARDING A PRIOR DOMESTIC VIOLENCE INCIDENT.
>
> POINT III
>
> THE TRIAL JUDGE ERRED IN ADMITTING TEXT MESSAGES PURPORTING TO BE FROM DEFENDANT.
>
> POINT IV
>
> THE DISCRETIONARY EXTENDED TERM SENTENCE AS A PERSISTENT OFFENDER WAS

AN ABUSE OF DISCRETION AND THE SENTENCE OF LIFE WITHIN THE EXTENDED TERM RANGE WAS REACHED ONLY BY IMPERMISSSIBLE DOUBLE-COUNTING AND IS MANIFESTLY EXCESSIVE.

A. THE SENTENCING JUDGE ABUSED HER DISCRETION IN GRANTING THE DISCRETIONARY EXTENDED TERM SENTENCE.

B. THE JUDGE ENGAGED IN IMPERMISSIBLE DOUBLE-COUNTING IN ARRIVING AT THE FINAL SENTENCE.

Additionally, defendant raises the following contentions in his pro se brief:

POINT I

THE TRIAL JUDGE ERRED IN ADMITTING DEFENDANT'S INTERROGATION.

A. DEFENDANT INVOKED HIS RIGHT TO SILENCE.

B. DEFENDANT WAS NOT ADVISED OF THE CHARGES AGAINST HIM BEFORE HE CONFESSED.

C. DEFENDANT WAS IN SEVERE PAIN AND THE AMBULANCE WAS DELAYED UNTIL AFTER HE CONFESSED.

POINT II

THE COURT ERRED WHEN HE DID NOT REMOVE JUROR #1 AFTER SHE ADMITTED TO KNOWING

STATE'S WITNESS EDWARD AKINS. THUS VIOLATING DEFENDANT'S RIGHT TO A FAIR TRIAL BY A FAIR AND IMPARTTAL JURY. U.S. CONST. AMEND. VI; ART. 1 PARA 10 OF THE NEW JERSEY STATE CONSTITUTION.

II.

We first address defendant's contention that the trial court erred in admitting the electronically recorded statement he gave to police following his arrest. He argues the stationhouse statement should have been suppressed because: (1) he was not advised of the charges against him before he confessed; (2) he invoked his right to silence at the end of his statement, after which the police continued to speak with him; and (3) he was in severe pain and police delayed calling an ambulance until after he confessed. We address each contention in turn.

We begin our analysis by acknowledging certain foundational principles. In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings when those findings are supported by sufficient credible evidence in the record. State v. Sims, 250 N.J. 189, 210 (2022). This deferential standard of review applies regardless of the existence of a videotape of defendant's statement or other recordings or documentary evidence. State v. Tillery, 238 N.J. 293, 314 (2019); State v. S.S., 229 N.J. 360, 380-81 (2017).

However, we review the trial court's legal conclusions de novo. State v. Hubbard, 222 N.J. 249, 263 (2015). This includes the court's conclusions as to the validity of a defendant's waiver of the right to self-incrimination and the voluntariness of a defendant's statement. State v. O.D.A.-C., 250 N.J. 408, 425 (2022).

The State bears the burden of proving beyond a reasonable doubt that a suspect's waiver of the right against self-incrimination was "knowing, intelligent, and voluntary" under the totality of the circumstances. O.D.A.-C., 250 N.J. at 413; State v. Vincenty, 237 N.J. 122, 132–33 (2019). "That burden of proof is higher than under federal law, which requires the government to 'prove waiver only by a preponderance of the evidence.'" O.D.A.-C., 250 N.J. at 420 (quoting Colorado v. Connelly, 479 U.S.157, 168 (1986)).

"Beyond the issue of waiver, there are separate due process concerns related to the voluntariness of a confession. Due process requires the State to 'prove beyond a reasonable doubt that a defendant's confession was voluntary and was not made because the defendant's will was overborne.'" Id. at 421 (quoting State v. L.H., 239 N.J. 22, 42 (2019)). This also entails a consideration of the totality of the circumstances. Ibid.; Tillery, 238 N.J. at 316.

A.

We first address defendant's contention that he was not apprised of the charges against him before he confessed. We discern the following pertinent facts from record of the suppression hearing.

On January 4, 2018, Lieutenant Aliano used the phone of defendant's boxing coach to speak with defendant. During the phone call, which occurred in the late afternoon, Lieutenant Aliano advised defendant that he was "wanted for the shooting of his girlfriend," and they "had a warrant for his arrest for the attempted murder of his girlfriend." He told defendant that "the charges are serious" and "[p]eople are looking for you." Lieutenant Aliano asked defendant "to please turn [him]self in so that . . . nobody else gets hurt." According to Lieutenant Aliano, upon being told there was a warrant for his arrest, defendant responded "'[o]h, I know, I know,' something to [that] effect."

At the time of this phone call, Lieutenant Aliano assumed that a complaint had been generated and that there was a warrant for defendant's arrest. However, that was not yet true—something Lieutenant Aliano did not learn until the Miranda hearing. In fact, Haledon Police Officer Christian Clavo did not draft the complaint until after Lieutenant Aliano's phone call with defendant. The

complaint was filed at 9:06 p.m. on January 4. Computer records show that the warrant for defendant's arrest was signed at 12:26 a.m. on January 5, 2018.

The investigation determined that defendant was at a hotel in Elmwood Park. Officers responded to the hotel, arriving between 5:00 and 5:30 p.m. on January 5. According to Officer Clavo, defendant did not appear to be in any distress, nor did he appear to be under the influence of any drugs or alcohol. Officer Clavo did not find any pills or alcohol in the hotel room.

The officers placed defendant under arrest pursuant to the arrest warrant. Haledon Police Lieutenant Christopher Lemay did not show defendant the warrant. However, he told defendant that he was under arrest for "shooting his girlfriend five times."

The record further shows that at the end of the recorded statement, the following exchange took place:

> DETECTIVE: . . . What's going to happen now is I'm going to contact the [p]rosecutor who has the case assigned to him. I'm going to explain to him that you talked to us, that you were honest with us and explained to us what happened.
>
> The charges — obviously, you know — you knew you were charged, right? You knew that you were wanted, right?
>
> [DEFENDANT]: Yeah.

DETECTIVE: You knew that there were warrants for your arrest already. You knew that, right?

[DEFENDANT]: Yeah.

DETECTIVE: Okay, you knew that the whole time we talked to you, right, that you had a warrant for your arrest, that you were being arrested for the shooting?

[DEFENDANT]: [Y]eah.

DETECTIVE: You knew that the whole time, right?

[DEFENDANT]: Yeah.

DETECTIVE: And when you were at the hotel, you knew that you were being arrested and not being let go, right?

[DEFENDANT]: Yeah.

DETECTIVE: Okay, I just want to make sure we're understanding and that you know that and in the beginning of the interview I should have explained to you that you had a warrant for your arrest, but obviously you knew that.

[DEFENDANT]: Yeah.

DETECTIVE: And I explained to you that you had an arrest warrant yesterday on the phone, right?

[DEFENDANT]: Yeah.

DETECTIVE: And that [when] you turned yourself in, you were going to be charged with that shooting?

[DEFENDANT]: Yeah.

> DETECTIVE: Okay, I just want to make sure that you were aware of it even before I came in, talked to you today, that you were wanted for her shooting, right?
>
> [DEFENDANT]: Yeah.

In State v. A.G.D., our Supreme Court held that in determining the admissibility of a suspect's statement, a reviewing court must consider the defendant's state of knowledge about the criminal charges pending against him. 178 N.J. 56, 58, 68 (2003). The Court explained:

> The government's failure to inform a suspect that a criminal complaint or arrest warrant has been filed or issued deprives that person of information indispensable to a knowing and intelligent waiver of rights. . . . [A] criminal complaint and arrest warrant signify that a veil of suspicion is about to be draped on the person, heightening his risk of criminal liability.
>
> [Id. at 68.]

The Court held that "[w]ithout advising the suspect of his true status when he does not otherwise know it, the State cannot sustain its burden to the Court's satisfaction that the suspect has exercised an informed waiver of rights, regardless of other factors that might support his confession's admission." Ibid. (emphasis added). Stated somewhat differently: "[T]he suspect's waiver of his right against self-incrimination is [invalid] when the police fail to inform him

that a criminal complaint or arrest warrant has been filed or issued against him and he otherwise does not know that fact." Id. at 58 (emphasis added).

In Vincenty, the Court amplified the rule established in A.G.D., noting:

> A.G.D. thus calls for law enforcement officials to make a simple declaratory statement at the outset of an interrogation that informs a defendant of the essence of the charges filed against him. That information should not be woven into accusatory questions posed during the interview. The State may choose to notify defendant immediately before or after administering Miranda warnings, so long as defendants are aware of the charges pending against them before they are asked to waive the right to self-incrimination.
>
> [237 N.J. at 134 (emphasis added).]

Judge Clark carefully considered, and rejected, defendant's contention that his statement to the police should have been suppressed because he was not advised of the charges against him before he confessed. The judge found "beyond a reasonable doubt" that defendant was aware of the warrant for his arrest, specifically finding: (1) Lieutenant Aliano informed him about the warrant on January 4, 2018, albeit before the warrant was actually issued; (2) Lieutenant Lemay told him about the warrant at the time of his arrest on January 5, 2018; and (3) defendant acknowledged at the end of his statement that he knew of the warrant. Moreover, Judge Clark stressed that defendant "knew he

was on the run from an attempted murder and that the police were actively looking for him and urging him to turn himself in."

We conclude the record amply supports the judge's conclusion that defendant "otherwise" knew of the charges. See A.G.D., 178 N.J. at 58; see also State v. Henderson, 397 N.J. Super. 398, 403–04 (App. Div. 2008), aff'd in part and modified in part on other grounds, 208 N.J. 208 (2011) (affirming admissibility of defendant's statement where defendant was told police had a warrant for his arrest and he responded "I know what it's all about. I've been waiting for this to happen."). Accordingly, defendant had the information necessary to make a knowing and intelligent waiver of his rights consistent with the Supreme Court's holdings in A.G.D. and Vincenty.

B.

We next turn to defendant's contention that the trial court erred in admitting the portion of the stationhouse interrogation following defendant's alleged invocation of his right to remain silent, during which defendant admitted knowledge of the charges against him. We note the issue was not raised below. Therefore, Judge Clark was deprived of the opportunity to make findings of fact on the issue. See Witt, 223 N.J. at 419. We nonetheless address defendant's

contention, applying the plain error standard of review. R. 2:10-2; Sims, 250 N.J. at 210.

Under New Jersey law, when a defendant is in custody, any request to terminate questioning, however ambiguous, is sufficient to invoke the right to remain silent. State v. Maltese, 222 N.J. 525, 545 (2015); State v. P.Z., 152 N.J. 86, 105 (1997); State v. Johnson, 120 N.J. 263, 281–82 (1990). "Whether a suspect has invoked his right to remain silent requires analysis of the totality of the circumstances, including consideration of the suspect's words and conduct." Maltese, 222 N.J. at 545.

"Once the right to remain silent has been invoked it must be 'scrupulously honored.'" Johnson, 120 N.J. at 282 (quoting Michigan v. Mosley, 423 U.S. 96, 102–03 (1975)). All questioning must cease, unless the police are unsure about whether the defendant intended to invoke his right to silence, in which event they may ask questions to resolve the uncertainty and clarify the defendant's intentions. Id. at 282–83; State v. Burno-Taylor, 400 N.J. Super. 581, 590 (App. Div. 2008).

Contrary to defendant's argument, the record does not reflect that defendant made an ambiguous request to terminate questioning. At most, the transcript of the interrogation reflects that after the EMTs had finished with

defendant, a detective asked defendant, "[y]ou all right?," with defendant's response reflected on the transcript as "([i]ndiscernible)." The detective then asks, "[w]hat's the matter?," and again defendant's response is reflected as "([i]ndiscernible)." The detective then says: "We'll stop talking to you then, don't feel like if you feel you can't answer the questions without medications bothering?" and, again, defendant's response is reflected as "([i]ndiscernible)." The detective thereupon concluded the interrogation with a few questions confirming that defendant was aware of the charges against him, and he had been aware of those charges during the entire interrogation.

Even were we to assume for the sake of argument that the indiscernible remarks were a request to stop the interrogation, any error in admitting the questions and answers that followed, which related solely to defendant's knowledge of the charges filed against him, was harmless beyond a reasonable doubt. State v. Carrion, 249 N.J. 253, 284 (2021); Tillery, 238 N.J. at 302, 319–23; Maltese, 222 N.J. at 543–44. The earlier part of the statement remains admissible, and that earlier portion of the statement was the part during which defendant explicitly and unequivocally confessed to shooting his former girlfriend.

C.

Finally, we address defendant's contention that he was impaired by medication during the custodial interrogation. At the end of the interrogation, defendant claimed that he had taken Tramadol and Percocet before questioning commenced and expressed to the officers that he was tired. Defendant testified at the Miranda hearing that when he checked into the hotel on January 4, 2018, he had Tramadol and Percocet that had been prescribed after a surgery on December 20, 2017, as well as Naproxen and sleeping pills. He said he had been taking the pain medication "about four, five times a day" since he left the hospital, and he took the medication "a couple of hours before the detectives came inside the hotel room."

Defendant testified that the last thing he remembered from January 4, 2018 was getting into a cab to go to the hotel and being at the hotel, though, even those memories were not clear. He testified he did not remember the police coming to the hotel or being taken to the police station and questioned. The next thing he remembered, after getting to the hotel, was waking up in the county jail.

Defendant further testified that he was slurring his words on the video and stated, "I don't sound like myself in the video." He also testified that his

signature on a consent to search form looked like "chicken scratch," and "I don't write like that as my signature."

Lieutenant Lemay testified that defendant appeared to understand what was said and did not appear to be under the influence of any drugs or alcohol. Lieutenant Lemay further testified that did not observe any drugs or alcohol in the hotel room.

Judge Clark found that Aliano, Clavo, and Lemay were credible witnesses and that their testimony was corroborated both by the video recording of defendant's statement and documentary evidence. The judge "found virtually all of [defendant]'s testimony to be incredible, not at all believable, and almost completely contradicted by the video." Judge Clark also "totally reject[ed] [defendant]'s testimony that he does not remember the arrest or the video statement."

Based on these factual findings, Judge Clark ultimately rejected defendant's assertion that he was impaired by medications during the interrogation, citing to the lack of evidence of pills or alcohol in his hotel room, and finding "no evidence whatsoever of impairment on the video," on which defendant gave a "very detailed" statement. We defer to the trial judge's factual

findings, see Tillery, 238 N.J. at 314, and, on that basis, affirm her conclusion that defendant was not impaired as to render his confession inadmissible.

Relatedly, defendant argues that his statement should have been suppressed because he was in severe pain and that police delayed in calling for an ambulance until after he confessed. See State v. Pickles, 46 N.J. 542, 577–78 (1966) (holding statement taken from defendant should have been suppressed where defendant was visibly unwell). He claims the officers "purposely delayed the EMTs from attending to him," "falsely led [him] to believe that an ambulance was on the way," and "tricked [him] into believing that [the officers] were only going to ask a few questions before providing him medical help." He argues that "[s]uch treatment . . . caused him to involuntarily waive his rights in order to have medical attention."

Judge Clark rejected defendant's claims. Her ruling is supported by the record. Prior to confessing, defendant did not express that he was in pain or in need of pain medication. Moreover, the minute defendant appeared to be in some pain, the officers questioned him about it. Specifically, when defendant was being taken to the restroom, he stood from the table and placed his hand on the wall to stabilize himself. An officer immediately questioned whether there

was anything wrong with defendant's leg. Defendant denied anything was wrong with it.

The end of the videorecording explains why an ambulance had been called. Emergency medical personnel checked defendant's surgical incision due to his concern that the incision might have opened up because of the handcuffs. The EMTs assured him that his incision had not opened and was not bleeding. There is no evidence that defendant was in any medical distress at the time of his statement. Nor is there evidence to support defendant's claim that the officers tricked him and intentionally delayed the arrival of the ambulance, which he asserts for the first time on appeal. Cf. R. 2:10-2; State v. Witt, 223 N.J. 409, 419 (2015) (declining to address issue not raised at trial level).

III.

We turn next to defendant's contention that the trial judge erred in admitting evidence of the 2014 domestic violence incident pursuant to N.J.R.E. 404(b). That rule provides:

> (b) Other Crimes, Wrongs, or Acts.
>
> (1) Prohibited Uses. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition.

> (2) Permitted Uses. This evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.[2]

N.J.R.E. 404(b) is viewed restrictively as a rule of exclusion rather than inclusion. State v. Willis, 225 N.J. 85, 100 (2016); State v. Darby, 174 N.J. 509, 520 (2002); State v. Marrero, 148 N.J. 469, 482–83 (1997). A four-pronged test is used to determine the admissibility of 404(b) evidence:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [State v. Cofield, 127 N.J. 328, 338 (1992) (quoting Abraham P. Ordover, Balancing the Presumption of Guilt and Innocence: Rules 404(b), 608(b), and 609(a), 38 Emory L.J. 135, 160 (1989) (footnote omitted)).]

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[2] This is the current version of N.J.R.E. 404(b), which was amended on September 16, 2019, to be effective July 1, 2020. Defendant was tried in April 2019, prior to the amendment. The amendment did not change the substance of the rule.

In State v. Barden, our Supreme Court explained that "whether the probative value of the evidence is outweighed by its apparent prejudice, is generally the most difficult part of the test. Because of the damaging nature of such evidence, the trial court must engage in a 'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice." 195 N.J. 375, 389 (2008) (quoting State v. Stevens, 115 N.J. 289, 303 (1989)). In State v. Green, the Court added,

> [t]hat prong requires an inquiry distinct from the familiar balancing required under N.J.R.E. 403: the trial court must determine only whether the probative value of such evidence is outweighed by its potential for undue prejudice, not whether it is substantially outweighed by that potential as in the application of Rule 403.
>
> [Green, 236 N.J. 71, 83–84 (2018) (internal citation omitted).]

The party seeking admission of the evidence bears the burden of establishing that the probative value outweighs the potential for prejudice. Willis, 225 N.J. at 100. Furthermore, in performing its analysis under prong four, the trial court must consider whether the other-crimes evidence is necessary to prove the fact in dispute or whether less prejudicial evidence could be used to prove the same fact. Green, 236 N.J. at 84; Barden, 195 N.J. at 389;

Marrero, 148 N.J. at 482; Stevens, 115 N.J. at 303. "Nevertheless, some types of evidence, such as evidence of motive or intent, 'require a very strong showing of prejudice to justify exclusion.'" Green, 236 N.J. at 84 (quoting State v. Garrison, 228 N.J. 182, 197 (2017)); accord State v. Castagna, 400 N.J. Super. 164, 180 (App. Div. 2007) ("[G]reater leeway is given when the evidence is proffered on the issue of motive . . . .").

Where other-crimes evidence is deemed admissible, the trial court should issue a limiting instruction to the jury, both when the evidence is first presented and in the final charge. Green, 236 N.J. at 84; Garrison, 228 N.J. at 200; Barden, 195 N.J. at 390. "[T]he court must not only caution against a consideration of [the 404(b)] evidence for improper purposes, it must through specific instruction direct and focus the jury's attention on the permissible purposes for which the evidence is to be considered." State v. G.S., 145 N.J. 460, 472 (1996); accord Cofield, 127 N.J. at 340–41; Stevens, 115 N.J. at 304.

Because Judge Clark correctly applied the Cofield test in determining the admissibility of the 404(b) evidence, we review her ruling for an abuse of discretion. Green, 236 N.J. at 80–81; Darby, 174 N.J. at 518. The test for admissibility under N.J.R.E. 404(b) involves a careful balancing of interests, and we may not overturn a trial court's ruling unless there has been a clear error

of judgment. Green, 236 N.J. at 81; State v. Rose, 206 N.J. 141, 157–58 (2011); Barden, 195 N.J. at 391.

Judge Clark found under the first Cofield factor that evidence of the December 2014 incident was relevant to proving defendant's state of mind, that is, his intent to kill the victim during the January 2018 shooting and beating episode. As for factor two—whether the incidents were "similar in kind" and "reasonably close in time"—the judge found that the 2014 incident was similar in kind to the 2018 shooting because they both involved acts of violence and defendant's infliction of significant bodily injury to the same victim. She also found that the incidents were reasonably close in time when considered in the context of the parties' six-year, on-and-off relationship.

As for factor three—that evidence of the 2014 incident was "clear and convincing"—Judge Clark found the victim "to be a very credible witness" and found her testimony to be clear and convincing evidence that the 2014 incident happened in the way she described, including defendant's verbal threat. Judge Clark also noted that the 2014 incident "is corroborated by the fact that there is a conviction." Finally, as to factor four, Judge Clark found that evidence of the 2014 incident was "highly probative" of defendant's intent to kill the victim during the 2018 shooting and the probative value was not outweighed by its

apparent prejudice. The judge thereupon admitted the 404(b) evidence subject to a limiting instruction, which was issued both at the time of the victim's testimony about the 2014 incident and in the final jury charge.

We are satisfied the trial judge carefully considered the N.J.R.E. 404(b) evidence, found that all factors of the Cofield test had been established, and correctly and adequately instructed the jury on the limited use of the evidence. We see no abuse of discretion in the judge's admission of the evidence. We add that the caselaw strongly supports admission of defendant's prior assault and threat to kill the victim as relevant to his motive, intent, and state of mind on the attempted murder count. See State v. Vargas, 463 N.J. Super. 598, 609–10, 612–18 (App. Div. 2020) (holding defendant's prior threat that "if you can't be with me, then you can't be with anyone," was admissible under N.J.R.E. 404(b) as relevant to his state of mind, motive, and intent to kill victim); State v. Baluch, 341 N.J. Super. 141, 191–93 (App. Div. 2001) (finding evidence of past domestic abuse of victim was relevant to establish motive, intent, and state of mind to harm victim and negate defense theory). We are satisfied, moreover, that no other evidence of defendant's intent to kill the victim was as valuable as his own prior threat to do so. See Vargas, 463 N.J. Super. at 617.

IV.

Defendant contends the trial court erred in admitting text messages purporting to be from him on two separate grounds: (1) the messages were extracted from his cell phone pursuant to consent that was invalid because it was given during the course of his statement to police that defendant claims to have been taken in violation of A.G.D., and (2) the text messages were not properly authenticated at trial. We address each argument in turn.

A.

During his stationhouse interrogation, the police asked defendant to execute consent search forms permitting them to extract data from two cell phones—one seized from Jackson's car and a second seized during the course of defendant's arrest at the hotel. Defendant signed both forms.

We have already rejected defendant's argument that the custodial interrogation was unlawful because police failed to advise him of the charges he was facing. Accordingly, the consent to search requests were not a fruit of unlawful police conduct. Furthermore, Judge Clark specifically ruled, "I also find by clear and convincing evidence, which is the standard, but I also find by beyond a reasonable doubt, that his consents to search the phone . . . were made voluntarily and with full knowledge of his right to refuse." We agree.

B.

We turn to defendant's contention "that there was insufficient evidence that the two phones were actually defendant's and that he was in fact the one who sent the texts, as opposed to someone else who may have used the phone." Writings must be authenticated before they are admitted into evidence. State v. Marrocelli, 448 N.J. Super. 349, 364 (App. Div. 2017). "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims." N.J.R.E. 901. The authentication burden under N.J.R.E. 901 is not onerous. Marrocelli, 448 N.J. Super. at 364; State v. Hockett, 443 N.J. Super. 605, 613 (App. Div. 2016). "The rule does not require absolute certainty or conclusive proof. The proponent of the evidence is only required to make a prima facie showing of authenticity." State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999). "Once a prima facie showing is made, the writing or statement is admissible, and the ultimate question of authenticity of the evidence is left to the jury." Ibid.; accord State v. Brown, 463 N.J. Super. 33, 51–52 (App. Div. 2020). We add that we review a trial court's authentication rulings for an abuse of discretion. See State v. Garcia, 245 N.J. 412, 430 (2021).

At an in limine hearing, Judge Clark considered the admissibility of the text messages and rejected defense counsel's argument that they were inadmissible because they had not been authenticated as having been sent by defendant. Defendant identified the phones as belonging to him, and he provided the police with access to the phones, one by using his fingerprint, and the second by providing a password. The record amply supports Judge Clark's evidentiary ruling.

V.

Defendant contends in his pro se brief that the court erred by not removing a juror after she admitted to knowing a State's witness, Captain Akins. We note that defendant did not object to the trial court's handling of this issue during the trial. We therefore review defendant's contention for plain error, that is, error "clearly capable of producing an unjust result." R. 2:10-2; State v. Robinson, 200 N.J. 1, 20 (2009).

Both the federal and state constitutions protect a defendant's right to a fair and impartial jury. U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶ 10. Trial judges have a duty to ensure that sworn jurors are able to fulfill their obligation to reach a verdict based solely upon the evidence developed at trial and not any preconceived notions or external influences. Irvin v. Dowd, 366

U.S. 717, 722–23 (1961); State v. R.D., 169 N.J. 551, 557–59 (2001); State v. Bey, 112 N.J. 45, 75–78 (1988).

Upon learning "that a juror may have been exposed to extraneous information, the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." R.D., 169 N.J. at 557–58 (citing Bey, 112 N.J. at 83–84). "The trial court must use appropriate discretion to determine whether the individual juror, or jurors, 'are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner, based strictly on the evidence presented in court.'" Id. at 558 (quoting Bey, 112 N.J. at 87). This requires the court "to interrogate the juror, in the presence of counsel, to determine if there is a taint," and "if so, the inquiry must expand to determine whether any other jurors have been tainted thereby." Ibid.

> A new trial, however, is not necessary in every instance where it appears an individual juror has been exposed to outside influence. Ultimately, the trial court is in the best position to determine whether the jury has been tainted. That determination requires the trial court to consider the gravity of the extraneous information in relation to the case, the demeanor and credibility of the juror or jurors who were exposed to the extraneous information, and the overall impact of the matter on the fairness of the proceedings. The inquiry about whether extraneous information had the capacity to influence the result of the jury requires an examination of whether there was at least an opportunity for the extraneous information to reach the remaining jurors when that

> extraneous information is knowledge unique to one juror who is excused mid-trial.
>
> The abuse of discretion standard of review should pertain when reviewing such determinations of a trial court. Application of that standard respects the trial court's unique perspective. We traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury.
>
> [Id. at 559–60 (internal citations omitted).]

The State presented Captain Akins as its first witness. After direct examination, Judge Clark took a break at which time juror number one advised the court that she might recognize Captain Akins, "if it's him," from a time "more than [ten] years" earlier, when their children "used to play soccer together." The juror stated that she had never spoken with Captain Akins other than to say "hi" or "bye," and she had not recognized his name on the witness list. It was only upon seeing his face that she thought he might be the person she recalled from soccer games. When Judge Clark asked whether those prior interactions with Captain Akins would affect the juror's ability to assess his credibility, she responded "[a]bsolutely not."

The court permitted counsel to ask the juror questions, and defense counsel only clarified that the juror knew the witness by face and not by name. Judge Clark then asked counsel whether they had any issue proceeding with the

juror on the panel. Both the prosecutor and defense counsel responded "no." Defense counsel also commented that the connection between the juror and witness "seems very remote."

We conclude that Judge Clark acted appropriately by questioning the juror in the presence of counsel in order to assess the juror's ability to proceed in an impartial manner. Nothing in the record suggests that the juror was unable to fulfill her obligation to reach a verdict based solely upon the evidence presented. The juror had only a remote, passing acquaintance with one of the State's witnesses, and she indicated that she could be impartial. Accordingly, the record does not support defendant's newly asserted argument that permitting juror number one to continue on the jury deprived him of his right to a fair and impartial jury. See State v. Pomianek, 429 N.J. Super. 339, 364 (App. Div. 2013), rev'd in part on other grounds, 221 N.J. 66 (2015) (finding no abuse of discretion in the trial court "declining to dismiss a juror who had a passing acquaintance with the victim's brother").

VI.

Finally, we address defendant's sentencing arguments. He contends the trial court erred in imposing a discretionary extended term as a persistent offender, impermissibly double counted his criminal record as a basis for both

the extended term and multiple aggravating factors, and imposed a manifestly excessive sentence.

"Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014); accord State v. Liepe, 239 N.J. 359, 370–71 (2019). The abuse of discretion standard applies when reviewing sentencing decisions. State v. Miller, 237 N.J. 15, 28 (2019). A sentence must be affirmed unless:

> (1) [T]he sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.
>
> [Ibid. (alteration in original) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)).]

In imposing a sentence, the trial court must identify the relevant aggravating and mitigating factors and determine the appropriate sentence within the range specified by the Legislature. Case, 220 N.J. at 63–64. Here, the court found six aggravating factors: "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner," N.J.S.A.

2C:44-1(a)(1); "[t]he gravity and seriousness of harm inflicted on the victim," N.J.S.A. 2C:44-1(a)(2); "[t]he risk that the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(3); "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted," N.J.S.A. 2C:44-1(a)(6); the need for deterrence, N.J.S.A. 2C:44-1(a)(9); and "[t]he offense involved an act of domestic violence, . . . and the defendant committed at least one act of domestic violence on more than one occasion," N.J.S.A. 2C:44-1(a)(15). We discern no abuse of discretion. The record fully supports the application of those aggravating factors.

The court further found that the aggravating factors "qualitatively and enormously" outweighed the non-statutory mitigating factors that defendant had an arm injury and was taking medication for his heart. The court rejected defendant's request to find mitigating factor three, N.J.S.A. 2C:44-1(b)(3), that defendant acted under a strong provocation, which was premised upon the victim's disparaging comments about defendant. We find no abuse of discretion in Judge Clark's rejection of that mitigating factor. See State v. Francisco, 471 N.J. Super. 386, 425–28 (App. Div. 2022).

With respect to the extended term sentence, N.J.S.A. 2C:44-3(a) provides:

> The court may, upon application of the prosecuting attorney, sentence a person . . . to an extended term of imprisonment if it finds . . .
>
> (a) The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.
>
> [N.J.S.A. 2C:44-3(a).]

Defendant met the statutory definition of a persistent offender based upon his age and his extensive adult criminal history. He has ten prior adult convictions between 1997 and 2015. Thus, on the State's motion, the trial court was within its discretion in imposing an extended term sentence under N.J.S.A. 2C:44-3(a). See Tillery, 238 N.J. at 323–24; State v. Pierce, 188 N.J. 155, 161–63 (2006).

Contrary to defendant's argument, the court did not err by considering defendant's criminal history in connection with its finding of aggravating factors three, six, nine, and fifteen, and also in connection with its determination of defendant's eligibility for an extended term as a persistent offender. Tillery, 238

N.J. at 327–28. Defendant's criminal record was relevant to both stages of the sentencing determination. Ibid.; accord Pierce, 188 N.J. at 168–69; State v. McDuffie, 450 N.J. Super. 554, 576–77 (App. Div. 2017). Moreover, Judge Clark did not engage in impermissible "double-counting" by considering defendant's criminal record with respect to the multiple aggravating factors. Tillery, 238 N.J. at 328.

In sum, the sentence is within the statutorily authorized sentencing range, is consistent with the trial court's weighing of the aggravating and mitigating factors, and does not shock the judicial conscience.

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

Affirmed.