SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2571-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TROY C. DEMBY, a/k/a
TROY DEMBY,

Defendant-Appellant.

Argued January 8, 2024 - Decided June 18, 2024

Before Judges DeAlmeida, Berdote Byrne, and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 18-05-0749.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Kevin S. Finckenauer, of counsel and on the briefs).

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

Appellant filed a supplemental pro se brief.

PER CURIAM

In this direct appeal, defendant challenges his conviction for the first-degree murder of Raphael Terrigino, first-degree possession of cocaine with intent to distribute, and third-degree possession of cocaine. We affirm.

In May 2018, an Atlantic County grand jury returned an indictment charging defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1), first-degree felony murder, N.J.S.A. 2C:11-3(a)(3), first-degree robbery, N.J.S.A. 2C:15-1(a)(2), second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1), second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), first-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(1), and third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1). The count of first-degree possession of a handgun without a permit after having previously been convicted of robbery, N.J.S.A. 2C:39-5(j), was severed and ultimately dismissed without prejudice.

The trial court denied defendant's omnibus pre-trial motion to dismiss the indictment, suppress the physical evidence seized from his home, suppress the cellphone data obtained from Verizon and AT&T pursuant to communication data warrants (CDWs), and sever the drug counts from the trial.

I.

We provide the relevant facts developed during the multiple-day trial. On January 27, 2018, defendant rented a car from a rental company. Three days later, in the late afternoon, defendant purchased and activated a prepaid "burner" phone from a national retail store in Egg Habor Township. Defendant called Raphael[1] and the burner phone number was saved in Raphael's cellphone as "2018 Gunner Feb." AT&T was later identified as the service provider for the burner phone.

Rocco testified that in the early evening of February 1, 2018, he visited Raphael at his residence in Atlantic City. Raphael told Rocco that he was waiting for a phone call to pick up $25,000 worth of cocaine. Rocco, however, did not know the identity of Raphael's drug connection although he knew Raphael had bought cocaine from defendant on prior occasions.

A Pleasantville resident of Stenton Place testified that on the evening of February 1, he thought he heard a gunshot and shattered glass while watching television. The resident saw two cars from his window: a parked red Cadillac where the driver appeared to be on his phone and a "sedan" that drove off. The

[1] We refer to Raphael Terrigino and Rocco Terrigino, his brother, who will be named later in this opinion, by their first names due to the common surname. No disrespect is intended.

next morning, the resident saw Raphael dead in the driver's seat and contacted police.

The entire shooting was captured on the home surveillance camera from the resident's home, which was recovered by Atlantic City Prosecutor's Office (ACPO) Lieutenant Kevin Ruga. Raphael's car arrived on Stenton Place around 9:44 p.m. and another car pulled up behind him around 9:47 p.m. Both Raphael and the other driver exited their cars and greeted each other. Raphael reentered the driver's side, and the "person believed to be the suspect" entered the passenger's side of Raphael's vehicle. According to Ruga, the video showed a "change of color" in the car at the driver's window. The other driver then exited Raphael's car, returned to his car, and drove away. Ruga was unable to see any distinguishable features of the person because of the car's distance from the home camera and the "grainy" video footage. The other car's description was limited to a "dark-colored sedan" and no other significant details were discerned. No bullet or the shell casing and no significant fingerprint or DNA evidence was collected from Raphael's car.

At trial, the State admitted data extracted from the burner phone, a cellphone recovered from Raphael's jacket pocket, and a cellphone recovered from the coffee table in Raphael's residence. Screenshots of the call and text

message logs from the cellphone found in Raphael's left jacket pocket showed an outgoing call from the burner phone on January 30, 2018 at 4:34 p.m. and two calls on February 1, 2018: an incoming call from the burner phone at 7:07 p.m., and an outgoing call from Raphael to the burner phone at 9:36 p.m. Text messages exchanged between Raphael's phone and the burner phone on the night of February 1 showed: (1) an incoming text was sent at 7:39 p.m. from the burner phone with the message: "Here"; (2) Raphael replied at 7:40 p.m.: "Come in"; (3) another incoming text from the burner phone at 9:20 p.m.: "Go now"; and (4) Raphael responded at 9:22 p.m.: "OMW" ("on my way").

The data extracted from Raphael's phone found in his living room depicted various text messages exchanged between Raphael and different Gunner contacts. The iterations included, but were not limited to, "Gunna," "Gunner," "Gunner different months, possibly a year with them," "Gunner 12 newest one," and "Gunner November 2017." The cellphone data lies at the heart of one of the issues raised on appeal.

Later that week, investigators executed a search warrant on defendant's residence in Egg Harbor Township and recovered a little over eight ounces of cocaine, over $27,000 in cash, car rental documents, and his personal cellphone.

Thereafter, the investigation confirmed that defendant rented, and exchanged rental cars, from January 30 to February 2.

In his defense, defendant called Grecia Arellano, a cocaine "tester" for Raphael, as a witness. Arellano's testimony was consistent with the telephone and in-person taped interviews conducted by Detective Natasha Alvarado. Arellano testified she had been friends with Ralphael for years and knew he sold drugs in Atlantic County and other parts of the state but denied knowing his day-to-day drug activity or his drug connection. Nor did she know who Raphael was going to meet on the night he was shot.

Defendant also presented testimony from Alvarado confirming she conducted and authored reports regarding a phone interview with Arellano on February 2 and an in-person taped interview on February 6.

Defendant testified that he had known Raphael for "over twenty years." Defendant admitted that he previously sold cocaine to Raphael. Defendant also admitted that he bought the burner phone at Raphael's request, called Raphael from the parking lot, and gave the phone to Raphael the same day at his residence. He claimed that was the last time he saw Raphael and denied being with him the night of the shooting; though defendant did not recall where he was at the time of the shooting.

Defendant claimed ownership of the cash and cocaine found in his apartment pursuant to the search warrant but said the quality of the cocaine was "too bad" for him to sell. As to the rental car exchange, defendant claimed that he had a rental car after an accident and wanted a "bigger car."

After defendant's testimony that no one called him "Gunner" was contradicted by various Facebook posts, he later testified that some individuals called him "Gunna" or "Gunner," but he preferred "Cutter." Defendant stated Raphael called him "Troy" or "Cutter."

On March 19, 2020, the jury convicted defendant of first-degree murder and the two drug counts. The jury acquitted defendant of felony murder and robbery but was unable to reach a verdict on the two weapons offenses.

Defendant was then sentenced to an aggregate term of forty-five years in prison for first-degree murder, with an eighty-five-percent parole disqualifier pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, and to a concurrent fifteen-year term for third-degree possession of cocaine merged with the first-degree possession of cocaine with intent to distribute.

II.

On appeal, defendant's counsel articulates the following arguments:

POINT I

THE STATE'S FAILURE TO PROVIDE HANDWRITTEN NOTES FROM AN OFFICER'S INTERVIEW SHOWING THAT A TESTIFYING WITNESS HAD PREVIOUSLY SAID THAT THE VICTIM WAS PLANNING ON MEETING WITH SOMEONE OTHER THAN THE DEFENDANT THE NIGHT OF THE KILLING WAS A BRADY[2] VIOLATION AND REVERSIBLE ERROR.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO PROVIDE THE MODEL "STATEMENTS OF DEFENDANT" CHARGE WITH RESPECT TO THE CONTESTED TEXT MESSAGE SENT TO THE VICTIM'S PHONE ON THE NIGHT OF THE KILLING. (NOT RAISED BELOW).

POINT III

THE FBI AGENT'S TESTIMONY REGARDING CELL PHONE LOCATION DATA AND HIS ACCOMPANYING MAPS SHOWN TO THE JURY WERE SUBSTANTIALLY UNRELIABLE AND INADMISSIBLE NET OPINION. (NOT RAISED BELOW).

POINT IV

A RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT DOUBLE-COUNTED THE ELEMENTS OF PURPOSEFUL MURDER IN AFFORDING AGGRAVATING FACTORS THREE AND NINE HEAVY WEIGHT AND OTHERWISE

[2] Brady v. Maryland, 373 U.S. 83 (1963).

GAVE INAPPROPRIATE WEIGHT TO THE GENERAL DETERRENCE FACTOR.

In a supplemental self-represented brief, defendant argues:

POINT I

THE TRIAL COURT ERRED WHEN IT DENIED [DEFENDANT'S] MOTION TO DISMISS THE INDICTMENT WHICH VIOLATED THE DEFENDANT'S FUNDAMENTAL RIGHTS TO DUE PROCESS.

POINT II

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SEVER COUNTS SIX [AND] SEVEN.

POINT III

THE TRIAL COURT ERRED WHEN IT ALLOWED THE PROSECUTOR TO NARRATE INSCRUTABLE SURVEILLANCE VIDEO FOOTAGE WHICH VIOLATED THE DEFENDANT'S FUNDAMENTAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT IV

THE COURT'S FAILURE TO CHARGE THE JURY ON THE ISSUE OF IDENTIFICATION ACTED TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

III.

A. Testimony of FBI Special Agent Hauger.

The net opinion rule is a corollary of N.J.R.E. 703 and precludes "the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)). The rule "requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." Ibid. (quoting Townsend, 186 N.J. at 494).

Where expert testimony fails to meet this standard, our courts "forbid[] the admission into evidence of an expert's conclusions," called net opinions, "that are not supported by factual evidence or other data." Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (citations and internal quotation marks omitted).

After this appeal was briefed, the Supreme Court decided State v. Burney, 255 N.J. 1 (2023), addressing expert testimony and the use of historical cell site analysis in the context of N.J.R.E. 702 and N.J.R.E. 703. Burney does not apply retroactively because it involves the application of the net opinion rule and does not set forth a new rule. See State v. Cummings, 184 N.J. 84, 97-98 (2005) (If a decision does not announce a new rule of law, retroactivity is not at issue, the reason being new rules tend to "disrupt[] a practice long accepted and widely

relied upon . . . ." and therefore have the potential to create confusion and disruption.). State v. Chirokoskcic, 373 N.J. Super. 125, 130 (App. Div. 2004) (alteration in original) (quoting State v. Lark, 117 N.J. 331 338 (1989)). Nevertheless, we are guided by Burney in our consideration of this issue.

In Burney, the FBI special agent testified that based on his training and experience, a one-mile radius for a cell tower was a "good approximation regarding the coverage area." The Court concluded the "'rule of thumb' testimony constitute[d] an improper net opinion because it was unsupported by any factual evidence or other data." Id. at 25. The Court also noted its prior rulings "that when an expert grounds testimony in personal views, rather than objective facts, the net opinion rule requires the exclusion of such unsupported views." Id. at 23. (internal citations omitted). Significantly, the Court did not find analysis of historical cellphone tower data inherently unreliable, and expressly noted expert testimony need not necessarily "consider all of the factors" discussed in its summary of law and the agent's testimony. Ibid. Rather, "because the testimony was based on nothing more than . . . [the agent's] personal experience, the trial court erred in allowing the jury to hear [the] testimony." Ibid.

Both parties provided us with supplemental briefing addressing Burney. Defendant argues this case is factually similar to Burney because: there was no testimony or evidence as to the specifications of the towers relied on by Special Agent John Hauger; there was no testimony about the height, strength, or any other specific quality of the cell towers; and he did not review the terrain to determine whether the range coverage was affected or perform any tests to determine the range coverage. In opposition, the State argues defendant's reliance on Burney is misplaced because there was no objection to Special Agent Hauger's testimony, these facts are distinguishable from Burney, and the testimony was not clearly capable of an unjust result.

CDWs were executed, and the ACPO obtained cell service location data from both defendant's personal cellphone from Verizon and the burner phone from AT&T. At trial, the State presented testimony from Special Agent Hauger, a member of the FBI's Cellular Analysis Survey Team (CAST), as a qualified expert on historical cellular data analysis without objection. Special Agent Hauger's testimony was offered by the State to place defendant within the vicinity of Raphael's murder on Stenton Place in Pleasantville.

If a defendant, as here, does not object or otherwise preserve an issue for appeal at trial, we review the issue for plain error. R. 2:10-2; State v. Singh,

245 N.J. 1, 13 (2021). We must disregard any unchallenged errors or omissions unless they are "clearly capable of producing an unjust result." Ibid. Plain error is a high bar and constitutes "error not properly preserved for appeal but of a magnitude dictating appellate consideration." State v. Bueso, 225 N.J. 193, 202 (2016) (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 2:10-2 (2016)). The "high standard" used in plain error analysis "provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." Id. at 203.

1. Verizon Data.

Special Agent Hauger explained his methodology employed in analyzing the call detail records from defendant's cell phone. He used Verizon's "real time tool" (RTT) and explained RTT is "an engineering system which calculates the distance from the phone to the tower [and] sector based on 'round trip delay' obtained from Verizon. Round trip delay is an engineering algorithm which calculates the distance based on the timing of the signals to [and] from the phone." He explained that Verizon has a "disclaimer that the measurements are 'best estimates,' rather than 'precise data.'" Special Agent Hauger testified that CAST "always find[s] the phone within a tenth of a mile of the distance that

Verizon provides," with an error radius of "plus or minus a tenth of a mile," using the RTT.

Special Agent Hauger analyzed the cellphone records from Verizon for defendant's personal cell phone in February 2018 and created a report that provided a "general geographic area" – the "particular coverage area" of the cellphone's location at the time of the connection based on the RTT, the cell tower locations provided by the carrier, and the addresses provided by the ACPO. The maps depicted the cell tower locations that "pinged" defendant's cellphone and illustrated a "band" which measured the cellphone's approximate distance from the cell towers.

According to Special Agent Hauger, the bands showed the "general geographic area" of cell connections on February 1. Six voice calls were made between 4:19 p.m. and 6:31 p.m. "somewhere" near defendant's home in Egg Harbor. At 7:19 p.m., there was a "signaling event," explained as "probably a data transaction at some point" that was "somewhere along" or "very close" to the band "at or near" Stenton Place in Pleasantville, the scene of the murder. Hauger testified that a single voice call was made at 9:10 p.m., "if [the phone] was located at defendant's home in Egg Harbor" would most likely be the tower to which the phone would have connected. Another single voice call at 9:38

p.m. that connected to the tower "just off" the toll plaza on the Atlantic City Expressway, "somewhere" north of the expressway around 21 Stenton Place in Pleasantville. Defendant's cellphone then reconnected to the tower closest to his home in Egg Harbor at 10:05 p.m. and 11:59 p.m. Special Agent Hauger also testified that three calls were made on February 7 between 7:55 p.m. and 7:58 p.m., "somewhere" in the vicinity of defendant's residence in Egg Harbor.

2. AT&T Data.

Nearly a year after the shooting, in December 2019, Special Agent Hauger analyzed only the call detail records from AT&T for the burner phone from January 1 to February 1, 2018, and not the "radio frequency footprint." Special Agent Hauger testified that AT&T, unlike Verizon, did not have RTT or calculated distance. So, he used the cell tower list provided by AT&T, and the longitude, latitude, and the direction the tower was facing to determine the location of the cell tower for transmissions to and from the burner phone.

Special Agent Hauger testified the AT&T call records show three connections on February 1: two text messages at 9:00 p.m. and 9:22 p.m. transmitted in the general area of Egg Harbor, near defendant's residence, and an incoming voice call at 9:36 p.m. that connected to the tower to the toll plaza on the Atlantic City Expressway, facing "anywhere" north of the tower which

provides service to 21 Stenton Place in Pleasantville. He was not asked to obtain information regarding the originating number. The burner phone was not used again or recovered by the police.

On cross-examination, Special Agent Hauger explained that the "actual cloud of radio frequencies" could be obtained from a "drive test" by "us[ing] scanning equipment that [] tells what the actual footprint is." He further explained that the drive test is "useless" if not performed "very close" to the time the cell records were created.

Without distinguishing between the Verizon and AT&T cell towers, Special Agent Hauger testified that the distances between the cell towers were "somewhere in the neighborhood of a mile and a half to two miles" in South Jersey. He also testified that there were not any factors that would cause the connection to switch to another cell tower in South Jersey because the terrain is "pretty flat."

We reject defendant's argument that Special Agent Hauger's entire testimony is a net opinion. We are satisfied that Special Agent Hauger's testimony regarding defendant's cellphone records were based on specific data provided by Verizon. The testimony regarding the voice calls and the signaling event on February 1, 2018 was supported by factual evidence and the RTT. We

are also satisfied that Special Agent Hauger addressed the distance and effect of the terrain in Egg Harbor and Pleasantville concerning the cell towers. Accordingly, Special Agent Hauger's testimony concerning Verizon's historical cell site analysis of February 1 based on a reliable scientific tool was not a net opinion, and that portion of his testimony was properly admitted.

We disagree with the State's contention that the historical site analysis for February 7 and AT&T was admissible. Special Agent Hauger conceded that there was no scientific support for the AT&T data because no drive test was performed, and the actual footprint of the AT&T cell towers was not determined. Thus, Special Agent Hauger's report and testimony, unsupported by any data, was a net opinion and should not have been heard by a jury.

Even if the admission of Special Agent Hauger's testimony regarding the February 7 calls and the data obtained from AT&T was an error, it did not rise to the level of plain error, considering as we must the testimony and evidence as a whole and not in isolation. As noted above, there was sufficient evidence from the February 1 Verizon data that had defendant within the vicinity of Pleasantville near the time of the murder and the flatness South Jersey terrain would not cause tower switching. Moreover, defendant's murder conviction was supported by screenshots of the call and text message logs exchanged between

the burner phone and the phone found in Raphael's jacket pocket, the call logs from the Raphael's phone in his living room with "Gunner" iterations, car rental documents, and defendant's lack of an alibi. Thus, defendant cannot establish the admission of the AT&T testimony constituted reversible error. See Burney, 255 N.J. at 33 (Justice Solomon, dissenting) ("When, as here, the error is the improper admission of evidence, an error is harmless 'if the untainted evidence. . . . is so overwhelming that in the judgment of the reviewing court conviction was overwhelming.'") (internal citations omitted).

We also note the court gave the jury appropriate instructions regarding the jury's role as the ultimate factfinder and the ability of the jury to accept or reject any expert opinion. See State v. Derry, 250 N.J. 611, 634 (2022) (referencing importance of jury instructions that "convey[] to the jury its absolute prerogative to reject both the expert's opinion and the version of the facts consistent with that opinion." (quoting State v. Torres, 183 N.J. 554, 580 (2005))). On this record, Special Agent Hauger's testimony was not "clearly capable of producing an unjust result," and thus, there was no plain error.

B. Jury Instructions.

We next address defendant's assertion, also raised for the first time on appeal, that the trial court erred in failing to charge the jury with the model jury

instruction on statements of defendant regarding the text messages on the night of the shooting. Defendant argues that the trial court erred when it failed to give a jury charge under State v. Hampton, 61 N.J. 250, 272 (1972), and State v. Kociolek, 23 N.J. 400, 421 (1957) and this "significant error" warrants reversal. We disagree.

There was no objection to the jury charge during the charge conference or any instructions proposed by defendant; thus, we evaluate the perceived omission of the charge under the plain error standard. In the context of a jury charge, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Montalvo, 229 N.J. 300, 321 (2017) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). "The error must be evaluated 'in light of the overall strength of the State's case.'" State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)).

When a defendant's oral statements have been introduced against him, the trial court must instruct the jury that it "'should receive, weigh[,] and consider such evidence with caution,' in view of the generally recognized risk of

inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer." Kociolek, 23 N.J. at 421. Defendant contends for the first time that the "meager circumstantial evidence" of the text messages to Raphael warranted the specific instruction. Defendant's argument is unpersuasive. Nonetheless, "[w]here such a charge has not been given, its absence must be viewed within the factual context of the case and the charge as a whole to determine whether its omission was capable of producing an unjust result." State v. Crumb, 307 N.J. Super. 204, 251 (App. Div. 1997).

Extensive credibility instructions were given, at the outset and close of trial, as well as the thorough examination and cross-examination of defendant, and as such, the court therefore placed the issue of the reliability of defendant's testimony regarding the burner phone and his nickname "thoroughly and sufficiently . . . before the jury." State v. Feaster, 156 N.J. 1, 73 (1998). We discern no error.

In his self-represented supplemental brief, defendant also argues the trial court erred in not giving the model jury charges on in-court or out-of-court identification. He argues that identification was "hotly disputed" because there was no in-court or out-of-court identification, no witnesses, no DNA, no forensic evidence, and no weapon that linked him to the shooting.

It is undisputed that at the charge conference there was no discussion of an identification instruction. We evaluate the omission of a charge "in the context of the State's entire case against defendant." State v. Harris, 156 N.J. 122, 183 (1998). A trial court must provide an identification instruction if "identification is a 'key issue.'" State v. Cotto, 182 N.J. 316, 325 (2005) (quoting State v. Green, 86 N.J. 281, 291 (1981)). Identification is "a key issue" if "[i]t [is] the major . . . thrust of the defense," especially if "the State relies on a single victim-eyewitness." Ibid. (alterations in original). Accordingly, we review the absence of the instruction on identification as plain error.

Here, the thrust of the defense's theory was the lack of credibility of the State's witnesses and that defendant was "nowhere" near Pleasantville. Defendant misconstrues the purpose and utility of the identification instruction which is designed to address eyewitness identification; however, there was no eyewitness to the shooting. We are, however, satisfied that there was sufficient corroborating circumstantial evidence, as noted above, to relieve that omission. Therefore, "the strength and quality of the State's corroborative evidence rendered harmless any deficiency in the instruction and preclude[d] a finding of plain error." Cotto, 182 N.J. at 327. Furthermore, the trial court instructed the

jury that the State had to prove that defendant committed the offenses even though the term identification was not used.

C. Brady Violation and the Motion to Dismiss Indictment.

Defendant renews the argument raised in his motion for a new trial. He reasserts a Brady violation was committed because the State failed to produce Detective Nancy Alvarez's handwritten notes of her interview with Arellanos: "NEW PRODUCT NOT GUNNA NOT ANSWERING." Defendant asserts the handwritten notes was the only avenue to "concretely" explore who Raphael was meeting that night and he could have impeached Arellanos with them. Again, we disagree.

To prevail on a Brady claim, defendant must prove (1) the evidence at issue was favorable to the accused as exculpatory or impeachment evidence; (2) the State suppressed the evidence, whether purposely or inadvertently; and (3) the evidence was material to the defendant's case. State v. Brown, 236 N.J. 497, 518 (2019) (citing State v. Nelson, 155 N.J. 487, 497 (1998)). Exculpatory and impeachment evidence is governed by the Brady rule. United States v. Bagley, 473 U.S. 667, 676 (1985); State v. Hyppolite, 236 N.J. 154, 165 (2018).

Our Supreme Court has determined a Brady violation constitutes an abuse of the discovery process, and the remedy should be designed to protect the

defendant's due process rights. Brown, 236 N.J. at 518 (2019) (citing Nelson, 155 N.J. at 497); see also State v. Scherzer, 301 N.J. Super. 363, 432 (App. Div. 1997) (noting the trial court "properly handled" each of the alleged Brady violations and "fashioned remedies sufficient to ensure that defendant's due process rights were not contravened"). The remedy for a Brady violation is a new trial because the violation usually comes to light at or after trial in most cases. See Brown, 236 N.J. at 520.

The trial court analyzed Brady and concluded defendant failed to establish the evidence was favorable and therefore exculpatory because (1) defendant called Arellano who gave the statement, (2) defendant called Alvarez who took the statement accompanying the notes, and (3) the handwritten notes did not offer anything beyond their testimony. We agree and hold defendant has not demonstrated an abuse of the discovery process nor a reasonable probability that the disclosure would have changed the result.

In Point I of defendant's self-represented brief, he claims the court erred in denying his motion to dismiss the indictment. Defendant asserts for the first time on appeal, Detective Alvarado failed to disclose to the grand jury that she obtained screen shots and text messages between Raphael and Arellano on the night of the shooting from Raphael's phone, a "direct" Brady violation. He

further argues the State withheld exculpatory evidence from the grand jury that Alvarado also obtained information from Raphael's phone that he was meeting someone other than defendant. We address this argument for the sake of completeness although it was not raised before the trial court.

A prosecutor has limited duty to disclose evidence that "both directly negates the guilt of the accused and is clearly exculpatory." State v. Hogan, 144 N.J. 216, 237 (1996). Evidence that directly negates the guilt of the accused is defined as evidence that "squarely refutes an element of the crime in question." Ibid. Nevertheless, "the decision whether to dismiss an indictment lies within the discretion of the trial court." Hogan, 144 N.J. at 229; see also Brown, 236 N.J. at 521 (applying an abuse of discretion standard to the trial court's evidentiary ruling following a Brady violation).

The second requirement, that evidence be clearly exculpatory, "requires an evaluation of the quality and reliability of the evidence." Ibid. The evidence "must be sufficiently reliable[,] bear some indicia of credibility in its own right[, and] cannot require the grand jury to engage in significant credibility determinations." State v. Evans, 352 N.J. Super. 178, 197 (App. Div. 2001). Evidence which "requir[es] the grand jury to make a credibility judgment" is not clearly exculpatory. Scherzer, 301 N.J. Super. at 427.

Defendant's newly fashioned argument fails to show the handwritten notes negates his guilt concerning the murder and drugs and is clearly exculpatory. There is no cause to reverse defendant's conviction based on the perceived lack of evidence presented to the grand jury, given defendant's subsequent conviction on the far greater evidence presented to the jury at trial.

D. Motion to Sever Counts Six and Seven.

In Point II of his supplemental brief, defendant contends that the motion judge erred in denying his motion to sever the two drug counts from the other counts because they were "factually and legally distinct." We disagree.

Generally, the trial court enjoys "a wide range of discretion" in deciding a motion to sever. State v. Coruzzi, 189 N.J. Super. 273, 297 (App. Div. 1983). Therefore, we must "defer to the trial court's decision, absent an abuse of discretion." State v. Chenique-Puey, 145 N.J. 334, 341 (1996).

"The test is whether the evidence from one offense would have been admissible N.J.R.E. 404(b) evidence in the trial of the other offense, because '[i]f the evidence would be admissible at both trials, then . . . a defendant will not suffer any more prejudice in a joint trial than he would in separate trials.'" State v. Sterling, 215 N.J. 65, 98 (2013) (quoting Chenique-Puey, 145 N.J. at 341). In considering the admissibility of the evidence concerning all the

charges, we are guided by the well-established four-prong test articulated in State v. Cofield, 127 N.J. 328, 338 (1992):

> 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;
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> 3. The evidence of the other crime must be clear and convincing; and
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> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
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> [Id. at 338 (citation omitted).]

The trial court conducted an analysis to determine whether proof of the drug counts would be admissible in a separate trial of the murder charges. The court determined: (1) the cocaine in defendant's possession at the time of the arrest were proceeds from the robbery; (2) defendant had an ongoing relationship with Raphael based on the "illegal sale of narcotics"; (3) the parties met for a drug transaction where Raphael was robbed and murdered during the transaction; and (4) because of the factual connection evidence of the cocaine possession would be admissible at a separate murder and robbery trial. Thus, under Cofield, the court ruled that severance was not warranted.

We discern no basis for disturbing the trial court's well-reasoned determination. As the court noted, the State's theory of the case was predicated upon defendant's on-going relationship with Raphel as a drug connection and the interaction between defendant and Raphael the day of the shooting. Under those circumstances, the court did not abuse its discretion in denying defendant's severance motion. We, therefore, affirm defendant's conviction on the two drug counts.

E. Prosecutor's Summation.

In Point III of his supplemental brief, defendant argues that the trial court committed reversible error by permitting the prosecutor to offer a "lay opinion" in "narrating inscrutable" surveillance video footage during closing argument, requiring reversal of his convictions. The home surveillance video was played again during the prosecutor's summation and the prosecutor remarked:

> Now, we saw that on the video that the victim is in his car for about two minutes and right around here . . . the defendant's car pulls up, the Camry.
>
> You can't tell that from the video. You can't even tell that this is Raphael Terrigino on the video. It's a home surveillance footage from across the street. But what we see is the defendant get out of the car, the victim get out of the car.
>
> A brief interaction. I'd suggest, let's get in the car. The defendant walks to the passenger side, the victim walks

> back to his driver's side. The door[s] are closed. Twenty-three seconds later at the [eighteen] second mark, we're going to see a flash in the car.
>
> It's right there. I'd suggest to you that that's the gunshot. A mere matter of seconds later, the defendant exits, returns to his car[,] and drives away.

Defendant's sole objection to the remarks was overruled by the trial court as "fair comment."

Nevertheless, we must address whether the prosecutor's remarks placing defendant inside of Raphael's car on the surveillance video constituted harmless error. Whether a given error is harmless "must be evaluated in light of the overall strength of the State's case." Galicia, 210 N.J. at 388 (internal quotation marks omitted) (quoting State v. Walker, 203 N.J. 73, 90 (2010)); accord State v. Trinidad, 241 N.J. 425, 451 (2020); Sanchez-Medina, 231 N.J. at 468.

"The standard for reversal based upon prosecutorial misconduct is well-settled" and "requires an evaluation of the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999). "To warrant reversal on appeal, the prosecutor's misconduct must be 'clearly and unmistakably improper' and 'so egregious' that it deprived defendant of the 'right to have a jury fairly evaluate the merits of his

defense.'" State v. Pressley, 232 N.J. 587, 593 (2018) (quoting State v. Wakefield, 190 N.J. 397, 437-38 (2007)).

Prosecutors "are afforded considerable leeway in making opening statements and [closing arguments]." State v. Gorthy, 226 N.J. 516, 539-40 (2016) (quoting Wakefield, 190 N.J. at 443). Here, the prosecutor's remarks placed defendant in Raphael's car at the time of the shooting which was not supported by the surveillance video. But "as long as the prosecutor 'stays within the evidence and the legitimate inferences therefrom,'" State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. R.B., 183 N.J. 308, 330 (2005)), "[t]here is no error." Ibid. (alteration in original) (quoting State v. Carter, 91 N.J. 86, 125 (1982)). The prosecutor's closing statement here presented no such risk to defendant. The prosecutor asked the jury to consider the evidence and find certain inferences, via the phrase: "I suggest." The prosecutor also connected defendant to the rental car, the type of sedan identified by the resident, and the video. There was also evidence that text messages had been exchanged between Raphael and 2018 Gunner Feb, another iteration of Gunner. Thus, the prosecutor's summation was "within the evidence" and drew from the "legitimate inferences therefrom." McNeil-Thomas, 238 N.J. at 275

(quoting R.B., 183 N.J. at 330). We, therefore, conclude the prosecutor's remark identifying defendant as the shooter was harmless error.

F. Resentencing.

Lastly, defendant argues that his sentences must be vacated and remanded because the trial court engaged in improper double-counting when weighing the aggravating factors and gave an improper amount of weight to the general deterrence factors.

It is well established that we review a trial court's sentencing decision under an abuse of discretion standard. State v. Konecny, 250 N.J. 321, 334 (2022). A reviewing court is "deferential to sentencing determinations and 'must not substitute [its] judgment for that of the sentencing court.'" State v. Rivera, 249 N.J. 285, 297 (2021) (quoting State v. Fuentes, 217 N.J. 57, 703 (2014)). We affirm a sentence "unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent 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.'" Id. at 297-98 (2021) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Here, the trial court determined aggravating factor three, the risk that defendant would commit another risk, applied because he had a "significant violent criminal history" based on two robbery convictions, prison sentences, and the possibility that he would "violently" offend again given the "severely violent, callous nature of this crime." In evaluating aggravating factor six, the extent of the defendant's prior criminal record and the seriousness of the offense of which he had been convicted, the court again considered the two prior robbery convictions, the "continuing and escalating criminality," and no deterrence given his prior parole. Finally, in considering aggravating factor nine, the need for deterring the defendant and others from violating the law, the court stated the crime was "senseless and calculated." Those aggravating factors were given "substantial" weight.

In contrast, the court concluded that mitigating factor seven did not apply because of defendant's criminal history and he was in State prison before he was paroled. The court did not find any mitigating factors applied. The court concluded "in balancing the factors, given their quality and nature and not just the number, the aggravating factors clearly and substantially outweigh the non-existing mitigating factors."

Defendant's argument is unavailing. Defendant was convicted of first-degree murder. As noted above, the trial court correctly noted that defendant had two prior convictions for robbery and served state prison sentences. We are satisfied that court did not engage in double-counting when it considered facts showing defendant did more than the minimum the State is required to prove to establish the elements of first-degree murder. See State v. A.T.C., 454 N.J. Super. 235, 254-55 (App. Div. 2018); see also Fuentes, 217 N.J. at 75. We find support for the trial court's findings and perceive no abuse of discretion or legal error in the sentencing regarding aggravating factors three, six, and nine and "non-existent" mitigating factors, no "double-counting," and therefore, there is no basis to disturb the sentence imposed by the trial court.

Affirmed.