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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0382-12T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL CAWLEY,

Defendant-Appellant.

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Argued February 24, 2015 – Decided April 7, 2015

Before Judges Yannotti, Fasciale and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 08-12-2127.

Rochelle Watson, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Watson, of counsel and on the brief).

Catherine A. Foddai, Senior Assistant Prosecutor, argued the cause for respondent (John L. Molinelli, Bergen County Prosecutor, attorney; Ms. Foddai, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

After a jury trial, defendant Michael Cawley appeals from his August 1, 2012 judgment of conviction. Defendant argues

that the trial court erred by denying his suppression motion, permitting prosecutorial misconduct, admitting the victim's prior statements, and imposing an excessive sentence. We affirm defendant's convictions but remand for resentencing consistent with this opinion.

I.

Defendant was charged under Bergen County Indictment No. 08-12-2127, with first-degree kidnapping, N.J.S.A. 2C:2-6 and N.J.S.A. 13-1b (Count One); first-degree aggravated sexual assault during a kidnapping, N.J.S.A. 2C:2-6 and N.J.S.A. 14-2a(3) (Count Two); first-degree aggravated sexual assault by physical force or coercion, N.J.S.A. 2C:2-6 and N.J.S.A. 14-2a(5) (Count Three); first-degree aggravated sexual assault upon a helpless victim, N.J.S.A. 2C:2-6 and N.J.S.A. 14-2a(7) (Count Four); third-degree theft, N.J.S.A. 2C:2-6 and N.J.S.A. 20-3a (Count Five); second-degree conspiracy to commit kidnapping and aggravated sexual assault, N.J.S.A. 2C:5-2, N.J.S.A. 13-1b, and N.J.S.A. 14-2a (Counts Six and Seven); and second-degree sexual assault, N.J.S.A. 2C:14-2c(1) (Count Eight).[1]

Before trial, defendant moved to suppress all statements he made in a police interview, and a resulting buccal specimen. On

[1] Co-defendant Byron Chica was tried with defendant, but was acquitted of all charges.

October 21, 2011, the trial court granted the motion in part, suppressing the statements made by defendant "following his request for an attorney during the April 17, 2007 interview," but denied it in respect to the buccal swab, reasoning that the physical evidence was admissible under the inevitable discovery exception to the exclusionary rule.

We discern the following facts from the record. On August 20, 2005, M.L. ("Maria")[2] met with D.L. ("Dawn"), G.F. ("Gia"), N.M. ("Noelle"), and two other friends for a bachelorette party celebrating the upcoming wedding of Dawn and Maria's brother. After a night of heavy drinking in Manhattan, the group returned to Hoboken by train. Maria and Gia were particularly inebriated. Maria was almost incoherent, and passed out on the train.

The group split up into two cabs, with Noelle intending to drop Maria and Gia off at Noelle's apartment. Maria and Gia became sick and vomited during the trip, and they exited the cab at a street corner a short distance from the apartment. Maria and Gia fell to the sidewalk, and refused to follow Noelle. Noelle left to get them some water from her apartment, and, on her way back, met Gia at the entrance to her building. Noelle

[2] We use pseudonyms to protect the privacy of the victim and her friends.

returned to the street corner, and found that Maria had disappeared. Noelle estimated that only five to seven minutes had elapsed since she left Maria.

Having reconnected with the friends in the other cab, the group searched the area for more than one hour. Calls to Maria's cell phone went directly to her voicemail. Eventually, the group returned to Noelle's apartment, called Maria's brother, and fell asleep.

Maria could not remember how she left the street corner, and did not know whether she had been abducted or left voluntarily. Her memories of that morning began with her standing in a strange house with two male strangers. She wore only a tank top, and gripped her cellphone tightly in her left hand. She testified that the men forcefully pulled her out of the house and into the back door of a blue Eddie Bauer model Ford Expedition.[3] The rear seat had been folded down, forming a bed, and the first man laid down next to Maria. The second man got in the driver's seat and drove the car away from the house.

While driving around, the first man raped Maria two times. When she tried to look outside of the car to see where they were, the first man became angry and choked her. When she tried

[3] Maria was familiar with the Eddie Bauer model because her mother owned that same model with similar trim.

to use her cell phone, he took it and tossed it aside. Reaching to retrieve her cell phone, Maria discovered her bra near the front seat.

The two men began to converse in Spanish, which Maria did not understand. Eventually, Maria heard one of them say "let's get rid of her[,]" which Maria believed to mean they were going to kill her. After traveling a little while longer, the car came to a stop, and the man in the back of the car shoved Maria out onto the pavement.

By that point, the sun had risen, and Maria observed railroad tracks, industrial buildings, and an apartment complex. Unable to rouse anyone at the apartment complex, she dropped to the ground at a street corner, and curled up in a fetal position. Eventually, a delivery man noticed Maria laying on the street corner, and summoned the police.

Video surveillance from the apartment complex showed a blue Ford Expedition traveling in one direction at approximately 6:40 a.m., and then returning in the other direction about one minute later, but did not reveal the car's license plate number. A few moments later, the recording showed Maria, clothed in only a bra, running through the complex's parking lot.

Maria was transported to a hospital, where, beginning at approximately 8:20 a.m. on August 21, 2005, she gave two

statements, one to Det. Ronnie Petzinger, and one to Sexual Assault Nurse Examiner Beryl Skog. During both statements, Maria appeared fearful, extremely upset and cried uncontrollably at times.

Nurse Skog then performed a forensic sexual assault medical examination at 8:50 a.m., and retrieved samples of the first man's semen. Testing also showed that Maria had a blood-alcohol reading of .105, and her urine tested positive for Vicodin, which was consistent with a prescription she had received following surgery earlier that week.

The police investigation stalled for more than one year until, in 2007, officials from the Jersey City Fire Department discovered Maria's driver's license in the center console of co-defendant's car while investigating a possible arson. Records indicated that co-defendant had owned a Ford Expedition in August 2005. Police interviewed co-defendant, and took a buccal swab, but his DNA was not a match for the samples recovered from Maria.

Police then showed a sketch of Maria's assailant to co-defendant's ex-wife, who directed them to defendant. Motor vehicle records showed that defendant had also owned a blue Ford Expedition in August 2005.

On April 18, 2007, police interviewed defendant.

Detectives read defendant his Miranda[4] rights, and he waived his right to an attorney. Approximately twenty-five minutes into the interview, detectives asked whether defendant would provide a DNA sample. Defendant replied, "[A]t this point, I think I want a lawyer." Nevertheless, the detectives continued with the interview, repeatedly requesting a DNA sample, while defendant continued to ask for an attorney. Eventually, defendant relented and agreed to provide a buccal swab. Subsequent analysis showed that defendant's DNA matched the semen obtained from Maria.

Police next obtained defendant's EZ Pass records, which showed that defendant had three EZ Pass transponders on his account, and that one of the vehicles registered to use the transponders was a Ford Expedition. One of the transponders exited the turnpike at 6:33 a.m. on August 21, 2005, at a toll booth about one and one-third miles from the spot where Maria was thrown from the car. Then, at 6:46 a.m., the same transponder entered the same toll booth traveling in the opposite direction. Police also determined that defendant had traded in his Ford Expedition on August 22, 2005, one day after the crimes under investigation.

[4] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

According to defendant's trial testimony, he lived with co-defendant and one other roommate in August 2005. Defendant owned three vehicles, including a blue Eddie Bauer model Ford Expedition. He had three EZ Pass transponders which he kept in a bowl at the house for co-defendant and another roommate to use as needed.

Defendant testified that on August 20, 2005, he, co-defendant, and their roommate went out to a nightclub in Hoboken, traveling in co-defendant's Expedition. While outside talking, they saw Maria walking down the block, and struck up a conversation with her. According to defendant, Maria "was not drunk at all," and voluntarily returned to defendant's house, where they had consensual sex. Defendant said that when he awoke at about 10:00 a.m., Maria was gone. He claimed that co-defendant later told him that Maria had wanted to go home, so co-defendant and the roommate took her back to Hoboken.

At the conclusion of a fifteen-day trial, the jury found defendant guilty of Counts One through Five and Eight. The jury found defendant not guilty on Counts Six and Seven, the two conspiracy counts.

The trial court sentenced defendant on July 26, 2012. The court found aggravating factors N.J.S.A. 2C:44-1a(1) (nature and circumstances of the offense), (3) (risk that defendant will

commit another offense), (6) (extent of defendant's prior criminal record and seriousness of the offenses of which he was convicted), and (9) (need for deterrence). The court found only one mitigating factor, N.J.S.A. 2C:44-1(b)(7) (no history of prior delinquency or criminal activity). In his written judgment of conviction, the judge added two more aggravating factors, N.J.S.A. 2C:44-1a(2) (gravity and seriousness of the harm inflicted upon the victim), and (12) (defendant committed the offense upon a person that he knew was disabled).

The court sentenced defendant to consecutive sentences of thirty years on Count One, twenty years on Count Four, and ten years on Count Eight, all subject to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2, for a net sentence of sixty years of incarceration with fifty-one years of parole ineligibility. All other sentences ran concurrent to Count One. The court also sentenced defendant to parole supervision for life under Megan's Law and ordered him to pay various mandatory monetary assessments.[5] The court filed defendant's judgment of conviction on August 1, 2012.

On appeal, defendant raises the following points:

[5] Among those assessments was the Statewide Sexual Assault Nurse Examiner Program ("SANE") penalty, which the court determined to be $1600. As defendant was convicted of four sexual offenses, this amount should have been $3200. See N.J.S.A. 2C:43-3.6 (imposing an $800 penalty for each conviction of a sex offense).

POINT I

BECAUSE THE BUCCAL SWAB AND THE DNA EVIDENCE OBTAINED FROM IT WERE THE FRUIT OF A VIOLATION OF DEFENDANT'S RIGHT TO COUNSEL, THEY MUST BE SUPPRESSED. ADDITIONALLY, THE INEVITABLE DISCOVERY DOCTRINE CANNOT EXCUSE THE ILLEGAL SEARCH, RESULTING IN THE BUCCAL SWABS BECAUSE AT THE TIME OF THE SEARCH, THE POLICE LACKED PROBABLE CAUSE AND WOULD NOT HAVE DEVELOPED PROBABLE CAUSE THROUGH PROPER AND NORMAL INVESTIGATIVE PROCEDURES.

POINT II

PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL, CALCULATED TO ELICIT SYMPATHY FOR THE VICTIM AND ANTIPATHY TOWARD DEFENDANT, DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

POINT III

INADMISSIBLE HEARSAY EVIDENCE, UNDER THE GUISE OF FRESH COMPLAINT AND EXCITED UTTERANCE, INFECTED THE JURY'S ASSESSMENT OF A CRITICAL COMPONENT OF DEFENDANT'S TESTIMONY.

POINT IV

DEFENDANT'S [SIXTY] YEAR NERA SENTENCE, CONSISTING OF THE MAXIMUM TERM ON EACH CONVICTION, AND THREE CONSECUTIVE SENTENCES, IS MANIFESTLY EXCESSIVE.

A. The Trial Court Failed To Merge the Three First-Degree Aggravated Sexual Assault Convictions and the Second-degree Aggravated Sexual Assault Conviction into the Remaining First-degree Conviction.

B. [Yarbough] Does Not Support Consecutive Sentences On First-Degree Kidnapping

and First-Degree Aggravated Sexual Assault.

C. Defendant's Sentence Is Excessive.

In a pro se supplemental brief, defendant raises these additional issues:

POINT I

DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO BE FREE FROM SELF-INCRIMINATION AND RIGHT TO COUNSEL, GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF U.S. CONSTITUTION, PLAIN ERROR, WHEREAS, HE WAS COMPELLED BY THE COURT, WHILE TESTIFYING, TO READ CONTENT OF PREVIOUSLY "SUPPRESSED ORAL STATEMENT" WITHOUT PRIOR WARNING FROM THE COURT NOR COUNSEL THAT TAKING [THE] STAND WOULD EXPOSE HIM TO IMPEACHMENT BASED ON SUPPRESSED STATEMENT CONTENT. ADDITIONALLY, COURT ARBITRARILY DENIED APPELLANT'S MOTION FOR SUPPRESSION OF ILLEGALLY OBTAINED BUCCAL SWAB TEST (FRUIT OF THE POISONOUS TREE).

POINT II, Supplementing Point II of counsel's brief

THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT BY KNOWINGLY WITHHOLDING IMPEACHMENT EVIDENCE AND BY KNOWINGLY USING FALSE AND PERJURED TESTIMONY AT THE SUPPRESSION HEARING AND AT TRIAL, THUS CREATING A [BRADY-BAGLEY][6] ISSUE IN VIOLATION OF THE PETITIONER'S, FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE, AND FIFTH, SIXTH AND FOURTEENTH AMENDMENTS DUE PROCESS AND FAIR TRIAL RIGHTS REQUIRED A REVERSAL OF PETITIONER'S CONVICTION.

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[6] United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

POINT III

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF U.S. CONSTITUTION

II.

We first address defendant's suppression motion. In reviewing a decision on a motion to suppress, we will "uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014). We only reverse if the decision was "so clearly mistaken that the interests of justice demand intervention and correction." Id. at 425 (citations and internal quotations omitted). The "trial court's interpretation of the law, however, and the consequences that flow from established facts are not entitled to any special deference[,]" and are therefore "reviewed de novo." Ibid.

Evidence or statements that derive from a constitutional violation are suppressed under the exclusionary rule as fruits of the poisonous tree. State v. O'Neill, 193 N.J. 148, 171 n.13 (2007). However, under our State Constitution, such evidence is admissible under the inevitable discovery doctrine if the State can show by clear and convincing evidence that:

> (1) [P]roper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
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> [State v. Sugar, 100 N.J. 214, 236-38 (1985).]

The Federal Constitution calls for a similar analysis under a preponderance of the evidence standard. See Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377, 387 (1984).

Here, the record supports the trial court's conclusion that police would have inevitably discovered defendant's DNA. Such evidence is routine in sexual assault cases, and defendant was clearly a prime suspect. Moreover, given the other independent evidence, including the presence of Maria's license in co-defendants car, the matching description of defendant's car, and defendant's EZ Pass records, police would have obtained an order for investigative detention pursuant to Rule 3:5A if defendant had not consented. Accordingly, we affirm the trial court's October 21, 2011 partial denial of defendant's motion to suppress.

We summarily reject defendant's pro se argument that the suppressed portion of his statement should not have been admitted to impeach his testimony. R. 2:11-3(e)(2). Statements suppressed under Miranda are nevertheless admissible to impeach a defendant's credibility. State v. Burris, 145 N.J. 509, 524 (1996). The record clearly indicates that defendant understood the statement would be introduced if he chose to testify.

III.

We next address defendant's claim of prosecutorial misconduct. We only reverse for prosecutorial misconduct if it "was so egregious as to deprive defendant of a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). The prosecutor's conduct must have been "clearly and unmistakably improper[.]" Ibid. (citation and internal quotations omitted). In addition to the severity of the misconduct and its prejudicial effect, we consider "whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court gave a limiting instruction." State v. Chew, 150 N.J. 30, 84 (1997). Generally, if defendant failed to object, we will not deem the conduct to be prejudicial. Timmendequas, supra, 161 N.J. at 576.

In our review of the record, we discern no misconduct, let alone egregious misconduct that denied defendant of his right to a fair trial. Defendant failed to object to several instances of alleged misconduct, and others were properly allowed at trial or cured by jury instruction. Specifically, testimony regarding Maria's background and family was brief and did not improperly emphasize her good character. Testimony regarding the impact of the assault on Maria was relevant given defendant's defense of consent. The emotion present in the State's summation was not out of line for the emotional nature of the case, and arguments regarding defendant's lack of credibility constituted a "measured response" to defendant's attempts to discredit Maria. State v. Murray, 338 N.J. Super. 80, 88 (App. Div.), certif. denied, 169 N.J. 608 (2001).

Moreover, the trial court issued an instruction with the jury charge, requiring the jurors to "weigh the evidence calmly and without passion, prejudice or sympathy[,]" and warning that "[a]ny influence caused by these emotions has the potential to deprive both the State and the defendants of what you promised them; a fair and impartial trial by fair and impartial jurors." Defendant did not object to these jury instructions, and we "must rely upon the juror's ability and willingness to follow . . . limiting instruction without cavil or question." State v.

Manley, 54 N.J. 259, 270 (1969); accord State v. Miller, 205 N.J. 109, 126 (2011).

As we discern no prosecutorial misconduct, or any misconduct that deprived defendant of a fair trial, we reject defendant's argument without further discussion. R. 2:11-3(e)(2).

IV.

We turn to defendant's evidentiary arguments regarding Maria's prior hearsay statements. We afford substantial deference to a trial court's evidentiary rulings, and only reverse for clear error or abuse of discretion. State v. Harvey, 151 N.J. 117, 184 (1997), cert. denied, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). Hearsay is only admissible under certain exceptions. N.J.R.E. 802.

Fresh complaints demonstrate the victim's search for sympathy and guidance, and negate "the inference that the victim was not sexually assaulted because of her [or his] silence." State v. Hill, 121 N.J. 150, 163 (1990). As they are not admitted for the truth of the matter asserted, they are

admissible as an exception to the hearsay rule. See State v. Williams, 377 N.J. Super. 130, 151 (App. Div.) ("'The purpose of the fresh-complaint rule is to prove only that the alleged victim complained, not to corroborate the victim's allegations concerning the crime.'" (quoting State v. Bethune, 121 N.J. 137, 146 (1990)), certif. denied, 185 N.J. 297 (2005).

To qualify as a fresh complaint, "the victim's statements to someone [he or] she would ordinarily turn to for support must have been made within a reasonable time after the alleged assault and must have been spontaneous and voluntary." Hill, supra, 121 N.J. at 163. Additionally, the victim must testify, and "[o]nly the fact of the complaint, and not the details, is admissible." Ibid.

Here, Maria confided in Dawn, her brother's fiancé, "within a day or two" of the assault. The time elapsed falls well within a reasonable time after the assault. See State v. Buscham, 360 N.J. Super. 346, 357-58 (App. Div. 2003) (concluding that an approximate one-month delay was "sufficiently close in time for purposes of the fresh complaint rule"). Over defendant's objection, Dawn briefly summarized their conversation at trial. The details of the conversation were "confined to those minimally necessary to identify the" topic of conversation. State v. J.S., 222 N.J. Super. 247, 257

(App. Div.), certif. denied, 111 N.J. 588 (1988). Moreover, the trial court gave jury instructions regarding the limited use of the testimony, and emphasized that "[p]roof that a complaint was made is neither proof that the sexual offense occurred nor proof that [Maria] was truthful." As the testimony falls squarely within the fresh-complaint exception, and as the court gave the appropriate limiting jury instructions, we discern no abuse of discretion in the admission of Dawn's testimony.

In contrast to the fresh-complaint exception, the excited-utterance exception to the hearsay rule allows broader admission of the content of hearsay statements, as the stress of the circumstances negates the declarant's opportunity to fabricate. Cestero v. Ferrara, 57 N.J. 497, 502-03 (1971). Under N.J.R.E. 803(c)(2), hearsay statements are admissible if "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate."

Several factors are relevant to the declarant's opportunity to fabricate, including:

> (1) [T]he amount of time that transpired between the initial observation of the event and the subsequent declaration of the statement; (2) the circumstances of the event; (3) the mental or physical condition of the declarant; (4) the shock produced; (5) nature of the statement; and (6) whether

> the statement was made voluntarily or in response to a question.
>
> [State v. Buda, 195 N.J. 278, 294 (2008) (citation and internal quotations omitted).]

However, while there are numerous factors, the essential issue "is the presence of a continuing state of excitement that contraindicates fabrication and provides trustworthiness." State v. Cotto, 182 N.J. 316, 328 (2005) (citation and internal quotations omitted).

Here, the ordeal Maria faced was clearly sufficiently stressful to invoke the excited-utterance exception. Maria recounted the events to Det. Petzinger and Nurse Skog approximately ninety minutes after she was left almost naked on the street.[7] She had not yet had the opportunity to clean or compose herself, she was still extremely upset, and at times cried uncontrollably. It is clear that she was still under the stress of the event, and the record adequately supports the finding that the ongoing excitement deprived her of the

[7] Notably, while defendant objected to Det. Petzinger's testimony, he did not object to Nurse Skog's testimony. Accordingly, his present argument regarding the latter testimony falls under the plain error rule, R. 2:10-2, and we will only reverse if the error is "'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. Taffaro, 195 N.J. 442, 454 (2008) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). As stated above, the admission of Nurse Skog's testimony was not erroneous.

opportunity to fabricate. Therefore, we discern no abuse of discretion in the trial court's admission of hearsay testimony from Det. Petzinger and Nurse Skog.

V.

As to sentencing, we apply the deferential abuse of discretion standard. State v. Robinson, 217 N.J. 594, 603 (2014). However, as always, we address issues of law de novo. Id. at 604. Specifically, we affirm if: (1) the trial court followed the sentencing guidelines; (2) findings of fact and application of aggravating and mitigating factors were based on competent, credible evidence in the record; and (3) the application of the law to the facts does not shock the conscience. State v. Bolvito, 217 N.J. 221, 228 (2014).

N.J.S.A. 2C:1-8a provides that, when the same conduct may establish multiple offenses, a defendant can only be convicted of more than one offense in certain enumerated circumstances. Applying this statue, courts merge convictions where multiple counts otherwise call for "double punishment for a single wrongdoing." State v. Diaz, 144 N.J. 628, 637 (1996). The standard for merger is flexible, and entails the consideration of several factors. Id. at 637-38.

The imposition of concurrent or consecutive sentences for multiple crimes also serves to mitigate an otherwise excessive

sentence. In State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), our Supreme Court articulated six criteria for the imposition of consecutive sentences:

> (1) [T]here 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 [accumulation] of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.

Here, the trial court found aggravating factor N.J.S.A. 2C:44-1a(3), the risk of re-offense, without any explanation, and instead simply stated, "[T]his [c]ourt found absolutely no question, given the totality of all the circumstances, that the defendant poses a risk to commit another offense[.]" Moreover, the court never addressed merger, and imposed consecutive sentences without addressing the Yarbough criteria.

As the trial court failed to provide any basis for the application of aggravating factor N.J.S.A. 2C:44-1a(3), failed to address merger, and imposed consecutive sentences without completing a Yarbough analysis, we remand for resentencing. On remand, the trial court shall fully explain its basis for finding aggravating factor three, and shall explicitly address the issue of merger of the sexual assault convictions with each other and with the kidnapping conviction, including defendant's argument that the criminal acts were part of a single, relatively brief, and overriding criminal scheme or episode

aimed at defendant's sexual gratification. The court shall also fully consider the Yarbough factors and provide a thorough analysis for ordering or rejecting concurrent sentences.[8]

Finally, we are convinced from our review of the record that defendant's remaining arguments, including those presented in defendant's pro se supplemental brief, are entirely without merit, and we reject them summarily. R. 2:11-3(e)(2). We note that we discern no evidence in the record of false prosecution testimony, false representations by the State, or improperly undisclosed investigation reports. We further discern no basis for defendant to suppress Maria's driver's license, as defendant had no legitimate expectation of privacy in the contents of the center console of co-defendant's motor vehicle. State v. Hinton, 216 N.J. 211, 235-36 (2013). As to defendant's claim of ineffective assistance of counsel, we decline to entertain the argument on direct appeal, and we leave it instead for a timely filed petition for post-conviction relief. State v. Preciose, 129 N.J. 451, 460 (1992).

[8] On remand, the court shall also give further consideration to the amount of the SANE penalty, depending upon the number of sexual offense convictions that remain after merger. N.J.S.A. 2C:43-3.6.

Affirmed as to defendant's convictions, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.