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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3611-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN BRINSON,

Defendant-Appellant.

Submitted June 7, 2016 – Decided January 11, 2017

Before Judges Espinosa, Rothstadt and Currier.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 12-03-0811.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark H. Friedman, Assistant Deputy Public Defender, of counsel and on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Stephen A. Pogany, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

ROTHSTADT, J.A.D.

Defendant, John Brinson, appeals from a judgment of conviction entered by the Law Division after a jury found him guilty of first-degree murder, N.J.S.A. 2C:11-3(a)(1)(2), second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a).[1] After his conviction, the court sentenced him to an aggregate term of fifty years imprisonment, subject to an eighty-five percent period of parole ineligibility in accordance with the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The charges against defendant arose from the fatal shooting of thirteen-year-old Dante Young.

During defendant's trial, the State produced four different witnesses who were near the scene of the incident and who gave video-recorded statements to police about their observations of defendant prior to and directly after the shooting. During their recorded statements, they each identified defendant from a photo array. Prior to trial, a judge denied defendant's motion for a Wade hearing.[2] At trial, three of the four witnesses either claimed a loss of memory or refused to testify or

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[1] On March 16, 2012, defendant was indicted by an Essex County Grand Jury and charged in three counts with each of the crimes he was convicted of having committed.

[2] United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

acknowledge their prior video-recorded statements. After conducting separate Gross[3] hearings and ruling that the statements were reliable, the court played the earlier statements to the jury.

On appeal, defendant argues the trial judges committed reversible error by admitting the prior video-recorded statements given by the three witnesses; refusing to admit evidence of third-party guilt; denying a Wade hearing; and failing to consider mitigating factors during sentencing. We find no merit to these contentions and affirm.

The facts developed during the trial relevant to defendant's appeal can be summarized as follows. On the night of June 19, 2011, Young was shot multiple times and died upon his arrival at a hospital. Investigators at the crime scene located shell casings and an unfired "ballistic projectile." After examining the evidence, it was determined that the shell casings were discharged from the same .40 caliber gun. Identifiable fingerprints were not recovered from the scene. Within days of the shooting, police obtained the video-recorded statements from the four witnesses, which included their

[3] State v. Gross, 121 N.J. 1 (1990).

identification of defendant as the person they saw at or near the shooting.

Before defendant's ensuing trial began, he filed a motion to suppress the witnesses' out-of-court identifications of him. Judge Peter J. Vazquez heard oral argument and issued an order denying the motion supported by a written decision stating his findings. The judge denied the motion because he concluded that defendant "failed to demonstrate that the identification procedures . . . were unduly suggestive" and, even if they were, "they did not result in a very substantial likelihood of misidentification." Defendant filed a second motion for the same relief based on alleged new information, which Judge Vazquez also denied, essentially for the same reasons as the earlier motion.

At the ensuing trial, presided over by Judge Robert H. Gardner, the first witness called by the State was Gold Cley. Cley was employed as a security officer by a local bar that was located near a public housing complex - the Reservoir Village Housing Complex (The Vill) - and the corner where the shooting took place. On the night of the incident, Cley began her shift at eight o'clock that evening, heard "loud noises, loud voices . . . like an argument or a fight" coming from the Vill beginning

at around eleven o'clock that continued for approximately twenty minutes.

Either right before or during the arguing, Cley observed defendant walking fast across the street. Defendant walked closely past by Cley and stated, "[w]hat's up Officer Lady." She observed two other men walking with defendant. At that moment, she recognized defendant as a patron of her employer's bar, having seen him there on earlier occasions. Approximately ten minutes later, Cley heard a series of gunshots. Cley entered the bar, locked the door, and told everyone to get down. Looking through a window, she observed defendant walking by the bar after hearing the rounds of gunshots.

On June 30, 2011, Cley gave a video-recorded statement of her observations to the police. While being recorded, Cley was presented with a series of photographs, asked to select, sign, and initial a photo that depicted the individual she recognized as the person she had seen that night. Cley selected a photograph of defendant.

The State also called Lavon Ford[4] to testify. He gave his video-recorded statement to the police on June 23, 2011. In his

[4] Lavon Ford and the other witnesses, other than Cley, were identified by the victim's mother as friends with whom the victim associated on the day of the shooting.

statement, Ford explained that he and his friends were in the Vill on the night of the shooting. At approximately eleven o'clock, he saw a dark-skinned man with long dread locks walking quickly towards the Vill looking anxious. After noticing the man, Ford heard gunshots, hid in a hallway and saw the same person run by him. Ford was also presented with a photo array during the taping of his statement and selected defendant's photograph as a picture of the individual who he had seen that night.

At the trial, however, Ford denied any recollection of the statement he provided to the police and refused to acknowledge the content of the video recording. Judge Gardner excused the jury for the purposes of conducting a Gross hearing to determine the admissibility of Ford's prior video-recorded statement. After conducting the hearing, the judge relied upon N.J.R.E. 803(a)(1) and ruled that Ford's entire prior statement would be admitted based upon his finding from watching the recording, considering the testimony of Detectives Michael Davidson and Emanuel Miranda, who each stated Ford did not appear intoxicated during the interview. Judge Gardner concluded the "[p]rior statement [was] made under circumstances showing its reliability." The DVD of the interview and identification were then played to the jury. Before playing the recording, Ford

testified he had no recollection of the incident, was not at the scene, and was under the influence of drugs when he gave his statement to police.

The State also called Tamodd Young (Tamodd)[5] as a witness. He gave his video-recorded statement to the police on June 20, 2011. He stated that he saw defendant running from the scene of the shooting holding a black gun.[6] Tamodd was also presented with a photo array and asked to select the photograph of the individual who he saw that night, and he too selected a photograph of defendant.

During his testimony at trial, however, Tamodd made statements about the night of the shooting that were inconsistent with those provided to the police and he refused to cooperate, stating he was wrong about what he told police because he was under the influence of drugs and scared. As a result, Judge Gardner conducted a second Gross hearing to determine the admissibility of Tamodd's prior statement. The judge considered the testimony of Detective Pablo Gonzalez who stated Tamodd did not appear to be intoxicated during the

[5] We use Tamodd Young's first name to avoid confusion because he shares a common last name with the victim.

[6] Tamodd also informed police detectives that Dwayne Page called to warn Tamodd about a man that he described as having "dreadlocks and a long shirt."

interview. The judge ruled that the entire prior statement, except portions of the statement redacted to exclude hearsay statements, would also be admitted based on his finding that Tamodd's earlier statement was reliable, which he allowed to be played to the jury. Tamodd then continued his testimony, explaining that he did see defendant that night running while holding a gun. He also testified again that he was under the influence and was directed by police as to which photograph he should select.

On September 24, 2013, the State called Dwayne Page, who also had given a video statement to police on the night of June 23, 2011. In his statement, Page explained that he was near the location of the shooting at approximately eleven o'clock when a man, later identified as defendant, passed by him in a manner that caused Page to feel nervous and think the person was "up to something." Afterwards, Page heard people screaming that someone had a gun. He then saw the same individual standing with Young and firing three shots from his gun. Page was also shown a photo array and when asked to select the photograph of the individual who he believed fired the shots, he picked a photograph of defendant.

The next day Detectives brought Page back into the police station to "clear some things up" and to have him explain where

he and other people were located at the time of the shooting. He essentially gave the same account of the incident as he did the day before, except as to his earlier photo identification of defendant. Page stated he "probably [had] picked the wrong person" from the photo array. At that point, the officer conducting the interview turned off the video recording, left the room to consult with another officer, returned to the room to "change the disks on the machine," and had a different officer conclude Page's interview. During his interview with the second officer, Page acknowledged that he had completed a sketch of the shooter for the police, conceded that the drawing was identical to the picture of defendant that he had selected, and attributed his inconsistent statement to not understanding the first officer's original question. He also confirmed that during the break in his interview when the video equipment was off, nobody threatened him or made any promises in exchange for his statement.

At trial, Page refused to testify, "asked to take [his] statement back," and did not care if he was held in contempt. As a result, Judge Gardner conducted a third Gross hearing and considered the testimony of Detective Michael Davidson — who stated Page did not appear to be intoxicated — to determine the admissibility of Page's prior statement and ruled that the

entire prior statement, save hearsay statements, would be admitted based on his finding that the statement was reliable. The DVD of Page's statement was played for the jury.

Page also testified before the jury that he lied in his recorded statements. He claimed he was under the influence of narcotics that prevented him from understanding the officers' questions and that he did not see the shooting or the shooter. Page told the jury he was "scared" and did not want to be perceived as cooperating with the State.

The State also called Davidson to testify at defendant's trial. He described his response at the crime scene and his subsequent investigation. During cross-examination, Davidson was asked about the arrest of an individual, Yaseen Calloway, on the night of the shooting. The State immediately objected to the question and requested a sidebar, challenging the relevance of the testimony. During the conference, the prosecutor explained that the State provided discovery to defense counsel that indicated police in the area were notified after the shooting to look for suspects with guns, which resulted in police stopping Calloway, who initially ran from the police. When he was caught, he was found with a weapon that was ultimately "tested ballistically and found to be a different caliber, different gun" than the one used to kill Young.

According to defense counsel, the stopping of Calloway – who was arrested on the night of the shooting because he allegedly resembled defendant and was carrying a firearm at the time of seizure – was relevant to the fact that the police were pursuing a suspect other than defendant. He cited to the fact that Callaway was "in the area." Defense counsel also stated:

> The description -- basically they take this guy that fit the description, he has a gun, it was important enough to test the gun. It's possible for that person -- I mean the police thought to approach and arrest him because he fit the description. It's such a common experience.

After considering counsel's arguments, the judge sustained the State's objection, finding that the pursuit of Calloway, who was not charged with any offense relating to Young's shooting, "turned out to be a wild goose [chase]." The judge directed that counsel's question be stricken and that the jury not consider it in their deliberations.

At the conclusion of trial, the jury found defendant guilty of murder and the other counts charged in his indictment. The trial judge subsequently denied the State's motion to sentence defendant in the extended term, N.J.S.A. 2C:43-7 and N.J.S.A. 2C:44-3(a). Judge Gardner merged defendant's conviction for possession of a weapon for an unlawful purpose into his murder conviction, sentenced defendant to a fifty-year term of

imprisonment with an eighty-five percent period of parole ineligibility on count one, and a concurrent sentence of ten years with a three-year parole disqualifier on count two.

This appeal followed.

On appeal, defendant argues:

> POINT I
>
> THE TRIAL COURT IMPROPERLY PRECLUDED DEFENDANT FROM ADDUCING EVIDENCE REGARDING THIRD-PARTY GUILT — SPECIFICALLY, THAT A MAN FITTING THE DESCRIPTION OF THE SHOOTER AND CARRYING A FIREARM WAS ARRESTED ON THE NIGHT OF THE CRIME.
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> POINT II
>
> THE MOTION JUDGE ERRED BY REFUSING TO CONDUCT A WADE HEARING CONCERNING THE PRE-TRIAL IDENTIFICATION OF DEFENDANT BY DWAYNE PAGE AFTER IT WAS REVEALED THAT PAGE TOLD THE POLICE DURING A PRE-TRIAL INTERVIEW THAT HE 'PROBABLY . . . PICKED THE WRONG PERSON' DURING THE PHOTO ARRAY, AFTER WHICH DETECTIVE GONZALEZ GAVE HIM IMPERMISSIBLE FEEDBACK THAT CAUSED PAGE TO SAY THAT HE HAD "MISUNDERSTOOD" THE QUESTION THAT LED TO HIS EXCULPATORY STATEMENT.
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> POINT III
>
> THE TRIAL JUDGE ERRED IN ADMITTING INTO EVIDENCE THE PRIOR STATEMENTS OF THREE WITNESSES AS THE STATE

FAILED TO SATISFY THE STANDARDS OF STATE V. GROSS, 216 [N.J. SUPER.] 98 (APP. DIV. 1987), [AFF'D.] 121 N.J. 1 (1990). U.S. CONST., AMENDS. VI, XIV; N.J. CONST., ART. 1, [¶] 10.

POINT IV

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

We begin our review by addressing defendant's first argument that the trial judge improperly precluded the admission of third-party guilt evidence about Calloway, interfering with defendant's right to argue that someone else committed the crime. We find no merit to this argument.

We review a trial judge's evidentiary rulings for an abuse of discretion because "the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010) (citing Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)). "[T]he latitude initially afforded to the trial court in making a decision on the admissibility of evidence – one that is entrusted to the exercise of sound discretion – requires that appellate review, in equal measures, generously sustain that decision, provided it is supported by credible evidence in the record." Id. at 384. "The issue of whether the trial court abused its discretion in excluding

evidence of third-party guilt is a particularly fact-sensitive one." State v. Koedatich, 112 N.J. 225, 300 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989). "The question of relevancy [of the proferred third-party guilt evidence] ultimately rests in a sound exercise of discretion." State v. Sturdivant, 31 N.J. 165, 179 (1959), cert. denied, 362 U.S. 956, 80 S. Ct. 873, 4 L. Ed. 2d 873 (1960).

We do not discern any abuse of discretion from our review of the record as we agree with the judge's exclusion of the proffered testimony because it did not qualify as evidence of third-party guilt. An accused has a constitutional right under the due process clause of the Fourteenth Amendment to offer evidence of third-party guilt. See Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Koedatich, supra, 112 N.J. at 297; Sturdivant, supra, 31 N.J. at 165. Admissible evidence of third-party guilt must, however, have "a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case." State v. Fulston, 325 N.J. Super. 184, 191 (App. Div. 1999) (quoting Sturdivant, supra, 31 N.J. at 179), certif. denied, 163 N.J. 397 (2000). "Testimony concerning third-party guilt is not admissible unless there is evidence linking a third-party to the crime." State v. Perry, 225 N.J. 222, 242 (2016). "[T]he evidence a defendant

seeks to admit in support of a third-party guilt defense must be capable of demonstrating 'some link between the [third-party] evidence and the victim or the crime.'" Id. at 239 (alteration in original) (quoting Koedatich, supra, 112 N.J. at 301). It must do more than "prove some hostile event and 'leave its connection with the case to mere conjecture.'" Ibid. (quoting Sturdivant, supra, 31 N.J. at 179)). "Somewhere in the total circumstances there must be some thread capable of inducing reasonable men to regard the event as bearing upon the State's case." Sturdivant, supra, 31 N.J. at 179.

"Th[e] standard does not require a defendant to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt." Perry, supra, 225 N.J. at 238 (quoting State v. Cotto, 182 N.J. 316, 332 (2005)). "Indeed, even if there is no evidence linking another specific suspect to the crime, we 'have recognized that evidence that tends to create reasonable doubt that someone else, generically, rather than defendant, committed the offense, is admissible.'" Id. at 238-39 (quoting State v. Loftin, 146 N.J. 295, 345 (1996)).

Applying that standard here, we conclude Judge Gardner did not abuse his discretion when he concluded the proffered testimony about Calloway had virtually no connection to the

crime. At best, there was an allegation that Calloway looked similar to defendant. Calloway's possession of a weapon that was totally unrelated to the one that killed Young did not, however, undermine or raise any question as to the State's case against defendant. Without more, the proffered testimony was not relevant to the defense of third-party guilt as there was no link between Calloway and the crime or the victim.

We turn next to defendant's challenge to Judge Vazquez's denial of his motion for a Wade hearing. Defendant limits his argument to Page's out of court identification and contends that "the questioning leading to Page's clarifying that he misspoke constituted suggestive post-indictment positive feedback designed to induce Page to record confidence in his previous identification." We disagree.

We also review the denial of a Wade hearing under the abuse-of-discretion standard. See State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div.), certif. denied, 102 N.J. 335 (1985). A trial court "abuses its discretion" when it applies an erroneous legal standard in making a decision, and when it makes an evidentiary ruling that is not grounded on reasonable, credible evidence in the record. State v. R.D., 169 N.J. 551, 559 (2001). A "trial court's findings that photographic identification procedures were reliable should not be disturbed

if there is sufficient credible evidence in the record to support the findings." State v. Adams, 194 N.J. 186, 203 (2008). If we find that the trial court erred in denying the request, we will nonetheless affirm the ruling if we conclude that the identification procedure did not result in a "very substantial likelihood of irreparable misidentification." State v. Cherry, 289 N.J. Super. 503, 517 (App. Div. 1995) (quoting State v. Madison, 109 N.J. 223, 239 (1988)).

At a Wade hearing, a trial court decides whether a witness's identification testimony should be excluded from evidence as unreliable. Wade, supra, 388 U.S. at 241-42, 87 S. Ct. at 1940, 18 L. Ed. 2d at 1165-66; accord State v. Michaels, 136 N.J. 299, 320 (1994). There is "no automatic entitlement" to a Wade evidentiary hearing on out-of-court identifications. State v. Ruffin, 371 N.J. Super. 371, 390 (App. Div. 2004). To be entitled to a Wade hearing, a defendant "must make a showing of 'some evidence' that the [witness's] statements were the product of suggestive or coercive interview techniques." Michaels, supra, 136 N.J. at 320 (quoting Watkins v. Sowders, 449 U.S. 341, 350, 101 S. Ct. 654, 659, 66 L. Ed. 2d 549, 577 (1981)); see also State v. Henderson, 208 N.J. 208, 238 (2011).

In his written decision setting forth his findings, Judge Vazquez determined that "defendant ha[d] not met his burden of

meeting the two-prong Manson/Madison test.[7] Specifically, defendant failed to demonstrate that the identification procedures in this case were unduly suggestive." In analyzing the totality of the circumstances, Judge Vazquez identified that the procedures were in compliance with the mandated Attorney General Guidelines for Preparing and Conducting Photo and Live Line-up Identification Procedures. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf. He observed that the identification procedure was videotaped and the recordings "demonstrate[d] that the photo arrays were properly

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[7] See Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); Madison, supra, 109 N.J. at 223 (1988). In Henderson, supra, the Court revised the Manson /Madison framework, elaborating specific variables that a court must consider in making determinations of suggestiveness. Henderson, supra, 208 N.J. at 288-94. The Court expressly stated that the new rule of law would apply only to future cases, "but not in any other litigation that is pending or has reached final judgment," id. at 301, effective "thirty days from the date this Court approves new model jury charges on eyewitness identification." Id. at 302. The revised jury charges became effective September 4, 2012. See Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (Revised 7/19/12, Effective 9/4/12). Because the crime and identifications here occurred in 2011, for which defendant was indicted in March 2012, the Manson /Madison framework was applicable to defendant's motion. See State v. Micelli, 215 N.J. 284, 287 (2013) (noting that the Manson/Madison standard applies because the identifications were completed prior to the decision in Henderson).

conducted and indicate[d] the level of confidence with which the witness[] made [his] identifications of the defendant." The judge stated, "Page . . . did not have difficulty selecting the defendant." He found "the photo arrays were conducted in a double-blind or blind fashion, consistent with the Attorney General Guidelines." Importantly, he determined that "even if the identification procedures were impermissibly suggestive, . . . they did not result in a very substantial likelihood of misidentification." The judge also noted that "each witness had ample opportunity to view defendant at the time of, prior to, and/or immediately after the commission of the offense[and as to] Page[, he] had multiple opportunities to take notice of defendant[, which caused him to be] nervous at the sight of defendant and then after the shooting." Also, Page's description of defendant was consistent with the other witnesses and with the photograph they selected from the array. Judge Vazquez also observed that Page "provided the identifications at a time in close proximity to the shooting[,] [speaking] with investigators and identify[ng] the defendant on June 23, 2011, approximately four days after the shooting." He concluded that the identification procedures employed by the officers were properly conducted and did not "show any level of suggestiveness."

After denying the initial request for a Wade hearing, defendant filed his second motion for the same relief contending that the second interview of Page was tainted with suggestiveness. He argued the time lapse, the switch of questioning officers, and the "post-identification feedback" were impermissibly suggestive. In denying the second motion, Judge Vazquez found that "Page[] stated that he identified the wrong picture at a previous photo array . . . [; however, t]he transcript provided by defendant indicates that after this exchange, the witness clarifies that he misspoke and that he correctly made a positive identification of the defendant."

We conclude from our review that Judge Vazquez did not abuse his discretion in denying defendant's motions for Wade hearings and correctly determined defendant was not entitled to relief, essentially for the reasons expressed by the judge in his thoughtful, well-reasoned written decisions.

We next consider defendant's contention about Judge Gardner allowing the witnesses' videotaped statements to be played to the jury. He argues that there was insufficient evidence of reliability to support the judge's rulings that the statements were admissible and contends that minimally the judge should not have allowed the entire statements to be played without first redacting any hearsay statements. We disagree.

As with a trial court's other evidentiary rulings, we review a decision to admit a witness's prior out-of-court statements under the abuse of discretion standard. State v. Harris, 209 N.J. 431, 439 (2012); State v. Merritt, 247 N.J. Super. 425, 434 (App. Div.) (applying abuse of discretion standard to admission of prior inconsistent statements), certif. denied, 126 N.J. 336 (1991). To warrant reversal, we must be convinced that "the trial court's ruling is so wide of the mark that a manifest denial of justice resulted." State v. J.A.C., 210 N.J. 281, 295 (2012) (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

When a trial court has conducted an evidentiary hearing, our scope of review of its factual determination is limited. State v. Robinson, 200 N.J. 1, 15 (2009). Our function is to determine whether the findings of the trial court "could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). "That the case may be a close one or that the trial court decided all evidence or inference conflicts in favor of one side has no special effect." Ibid.

A court's decision about the admission of a prior inconsistent statement of a witness at trial is governed by N.J.R.E. 803(a)(1). State v. Johnson, 421 N.J. Super. 511, 516

(App. Div. 2011). The admission of extra-judicial statements by a witness is permitted "[w]hen a witness claims he or she cannot remember the events that he or she gave a previous statement." State v. Soto, 340 N.J. Super. 47, 66 (App. Div.), certif. denied, 170 N.J. 209 (2001). "[T]he trial judge may consider this a feigned loss of memory and admit the statements under N.J.R.E. 803(a)(1)." Ibid. "Although the judge, in admitting the statement, is essentially making a finding that the feigned memory loss is a lie, the jury is able to observe the witness and make its own decision about which account is true." Ibid.

Under the Rule, a prior inconsistent statement is admissible as substantive evidence when offered by the party who called the witness if it is "contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability." Ibid. (quoting N.J.R.E. 803(a)(1)); State v. Mancine, 124 N.J. 232, 247 (1991); Gross, supra, 121 N.J. at 7-9. In order to determine whether the circumstances provide sufficient indicia of reliability, a trial court holds a hearing outside of the presence of the jury, at which the party offering the statement has the burden of proving the reliability of the prior statement by a "fair preponderance of the evidence." Gross, supra, 121 N.J. at 15-16; see also Johnson, supra, 421 N.J. Super. at 517. Because the declarant

of the out-of-court statement will be subject to cross-examination at trial, the circumstances establishing reliability need not be as persuasive as those required when the declarant is not a witness at trial. Gross, supra, 121 N.J. at 12.

The trial judge's role "at that preliminary inquiry is not to determine the credibility of the out-of-court statement. Rather it is for the judge to determine from the proofs whether the prior statement was made or signed under circumstances establishing sufficient reliability that the factfinder may fairly consider it as substantive evidence." State v. Gross, 216 N.J. Super. 98, 110 (App. Div.), certif. denied, 108 N.J. 194 (1987). At the conclusion of the hearing, the court must determine whether the statement was made under circumstances establishing its reliability. Gross, supra, 121 N.J. at 9-10. In making that determination, courts should consider the non-exhaustive list of fifteen factors stated in Gross.[8]

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[8] The factors enumerated in Gross are:

> (1) the declarant's connection to and interest in the matter reported in the out-of-court statement, (2) the person or persons to whom the statement was given, (3) the place and occasion for giving the statement, (4) whether the declarant was then in custody or otherwise the target of investigation, (5) the physical and mental condition of the declarant at the time, (6)

(continued)

We conclude that Judge Gardner properly conducted Gross hearings in response to the three witnesses' initial trial testimony, indicating that they either had no recollection of the events that were the subject of their earlier statements to police or that they did not want to testify. Further, the record supports the judge's findings, as there is no evidence that anything that occurred during the recorded statements supported the witnesses' later statements that their drug use

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(continued)

> the presence or absence of other persons, (7) whether the declarant incriminated himself or sought to exculpate himself by his statement, (8) the extent to which the writing is in the declarant's hand, (9) the presence or absence, and the nature of, any interrogation, (10) whether the offered sound recording or writing contains the entirety, or only a portion of the summary, of the communication, (11) the presence or absence of any motive to fabricate, (12) the presence or absence of any express or implicit pressures, inducement or coercion for making the statement, (13) whether the anticipated use of the statement was apparent or made known to the declarant, (14) the inherent believability or lack of believability of the statement, and (15) the presence or absence of corroborating evidence.
>
> [Gross, supra, 121 N.J. at 10 (quoting State v. Gross, 216 N.J. Super. 98, 109-10 (App. Div. 1987)).]

We recognize that not all fifteen of the factors may apply in every case. See State v. Michaels, 136 N.J. 299, 317-19 (1994).

prevented them from understanding what they were being asked about by the police. The testimony of the detectives who were involved with the interviews that the judge found credible, confirmed there was no evidence that any of the witnesses were under the influence and defendant cannot point to anything in the video recording depicting anything but that all the witnesses were oriented as to place, time, and location of the shooting. There was no dispute that each witness identified the shooter either prior to or after the shooting. The judge found no credible evidence that any of the witnesses was coerced, or directed in their statements, as the defendant suggests, or in selecting a photograph of defendant, which they signed and dated.

We find, therefore, that Judge Gardner's admission of the witnesses' videotaped statements was not an abuse of his discretion.

Last, we turn to defendant's challenge to his sentence. He argues that the imposition of a fifty-year term for murder was an abuse of the court's discretion. Defendant contends that the court made no findings as to aggravating factor number nine, N.J.S.A. 2C:44-1(a)(9) ("[t]he need for deterring the defendant and others from violating the law") and, therefore, the sentence cannot be sustained. He also disputes the judge's finding that

there were no mitigating factors and avers that there should have been because defendant had no history of prior violent crimes, was employed and had the support of his family, factors which the judge relied upon in denying the state's motion for imposition of an extended term. N.J.S.A. 2C:43-7; N.J.S.A. 2C:44-3(a). We find these contentions to be without merit.

Our review of sentencing determinations is limited and is governed by the "clear abuse of discretion" standard. State v. Roth, 95 N.J. 334, 363 (1984); see also State v. Miller, 205 N.J. 109, 127 (2011). We are bound to uphold the trial court's sentence, even if we would have reached a different result, unless "(1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found . . . were not based upon competent and credible evidence in the record; or (3) 'the application of the guidelines to the facts . . . makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Fuentes, 217 N.J. 57, 70 (2014) (quoting Roth, supra, 95 N.J. at 364-65); see also State v. Bieniek, 200 N.J. 601, 608 (2010); State v. O'Donnell, 117 N.J. 210, 215-16 (1989). Even when a sentencing judge's findings are not as clear as we would like, we will, where "possible in the context of th[e] record . . . [,] extrapolate without great difficulty the court's reasoning." Bieniek, supra, 200 N.J. at 609

(quoting State v. Pillot, 115 N.J. 558, 565-66 (1989)). For that reason, it is not required that the trial court explicitly reject each and every factor if we can discern the reasons from the record. Id. at 609.

Also, we will "not . . . substitute [our] assessment of aggravating and mitigating factors for that of the trial court." Id. at 608. "However, when an appellate court determines that the trial court has found aggravating and mitigating factors unsupported by the record, the appellate court can intervene and disturb such a sentence with a remand for resentencing." Ibid. "[A] remand[, however,] may be required when a reviewing court determines that a sentencing court failed to find mitigating factors that clearly were supported by the record." Ibid. (citing State v. Dalziel, 182 N.J. 494, 505 (2005)).

Applying these guiding principles, we find defendant's arguments about his sentence to be without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2). Suffice it to say, we reject defendant's claim that the Supreme Court's opinion in Fuentes, supra, 217 N.J. at 79, requires the sentence to be remanded to the trial judge for a more explicit statement of why aggravating factor nine applies. The Court's decision in Fuentes to remand for resentencing was influenced by the defendant's plea agreement, the application of

not only aggravating factor nine but also mitigating factor eight,[9] and the failure by the court to explain its balancing of factors. Here, the trial judge addressed deterrence aspects by expressing his concerns arising from the fact that defendant's prior record was formidable. Defendant had numerous convictions for other indictable offenses and prior periods of probation, and incarceration had not deterred defendant. Essentially, "there was . . . reason to believe . . . that his violations of the law would continue." State v. Tarver, 272 N.J. Super. 414, 435 (App. Div. 1994). The need to deter defendant's further criminal conduct could not be more necessary.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

[9] N.J.S.A. 2C:44-1(b)(8) ("The defendant's conduct was the result of circumstances unlikely to recur").