SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2476-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Essex County.
ZAHIR D. MOORE,	:	
		Indictment No. 20-01-0033-I
Defendant-Appellant.	:	
		Sat Below:
	:	
		Hon. Ronald D. Wigler, P.J.Cr.,
	:	Hon. Patrick J. Arre, J.S.C., and a Jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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1T — October 19, 2020 — Motion
2T — November 29, 2022 — Trial
3T — December 2, 2022 — Motion
4T — December 7, 2022 — Trial
5T — December 9, 2022 — Trial
6T — January 4, 2023 — Trial
7T — January 5, 2023 — Trial
8T — January 6, 2023 — Trial
9T — January 9, 2023 — Trial
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PRELIMINARY STATEMENT

Nineteen-year-old Zahir Moore was charged with murder after Waleik McCullum was shot. The State had no physical evidence and no motive for the crime, instead resting their case on two compelling yet unreliable pieces of evidence: a dying declaration and an eyewitness identification. But multiple errors prevented the jury from properly evaluating the weaknesses of the State's case.

First, the court failed to recognize the suggestive police conduct during the identification procedure — suggesting that the witness look at the photos a second time rather than accepting that he did not recognize anyone and demanding that he provide a conclusive yes/no answer rather than asking for his confidence. This evidence of suggestiveness was sufficient to require a pretrial hearing on the admissibility of the identification, and the case must be remanded for such a hearing. Moreover, although the witness was never asked about his confidence at the time, at trial, he told the jury he was 100% confident that Moore was the shooter. But our caselaw precludes confidence statements after-the-fact, recognizing that years of confirmatory feedback irreparably distort confidence. The State's heavy reliance on the witness's inadmissible confidence statement deprived Moore of his right to a fair trial.

Second, the dying declaration was too unreliable to be admissible. McCullum's father, Richard, testified that his son's dying words were that "Pee-wee" shot him; Moore's nickname is Pee-wee. But Richard failed to mention this to any of the multiple police detectives he spoke to in the days after his son's death, notifying police about the alleged dying declaration only after he had seen a news story about Moore being arrested and charged with murdering McCullum. The court, acting as gatekeeper, was obliged to keep this unreliable evidence from the jury. Alternatively, the court was required to instruct the jury that McCullum's dying declaration was an identification and thus affected by all the same estimator variables as any other identification. The failure to instruct the jury on this identification in a misidentification case was clearly capable of producing an unjust result.

Third, the court erred in permitting two police detectives to testify that unnamed, unknown witnesses implicated Moore in the shooting — by name, nickname, and physical description. Moreover, in clear violation of well-established caselaw, a detective testified that he relied on this hearsay to assemble the photo array, further unduly corroborating the State's case. These errors, along with name-calling and burden-shifting prosecutorial misconduct and the failure to instruct the jury on an element of gun possession, deprived Moore of his right to a fair trial. His convictions must be reversed.

PROCEDURAL HISTORY

Essex County Indictment 20-01-0033-I charged Zahir Moore with first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2) (Count 1); second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b) (Count 2); and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count 3). (Da 1-4)

On June 6, 2020, the defense moved to exclude testimony by the victim's father about an alleged dying declaration. (Da 5) On August 8, 2020, the defense moved for a Wade hearing to determine the admissibility of an eyewitness's out-of-court identification. (Da 6) On October 19, 2020, following argument but no testimony, the Honorable Ronald D. Wigler, P.J.Cr., denied both motions. (Da 7-8; 1T 93-14 to 99-22, 124-20 to 130-11)

Between January 4 and 10, 2023, trial was held before the Honorable Patrick J. Arre, J.S.C., and a jury. The jury convicted Moore of all counts. (12T 7-22 to 8-7; Da 9)

On February 24, 2023, Judge Arre sentenced Moore to 35 years in prison, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, with the mandatory 30 years without parole for murder, concurrent with five years, 42 months without parole for gun possession. (13T 21-3 to 12; Da 13-15) A Notice of Appeal was filed on April 21, 2023. (Da 16-19)

STATEMENT OF FACTS

A little before 4 p.m. on September 29, 2019, Waleik McCullum was shot in the head and chest near his home in Newark. (6T 39-20 to 41-6; 7T 26-19 to 22) The trauma surgeon who treated McCullum testified that, although he was initially conscious and responsive, his mental status rapidly declined, he underwent emergency surgery, and he was eventually declared brain dead. (7T 21-15 to 19, 23-14 to 16, 33-25 to 34-3, 40-17) His family removed him from life support, and he died. (6T 46-10 to 23, 47-4 to 5) The medical examiner testified that the cause of death was gunshot wounds of the head, neck, and torso, and the manner of death was homicide. (8T 139-25 to 140-5) Although the State had no murder weapon,[2] no physical evidence, and no motive, the State's theory was that Moore was the shooter. The State's case hinged on testimony from McCullum's father about an alleged dying declaration, an eyewitness identification, and some surveillance footage.

Richard McCullum, Waleik McCullum's father, testified that on September 29, he was at the home he shared with his girlfriend, son, stepsons,

[2] Police did recover four .40 caliber shell casings from the area of the shooting along with another damaged projectile during McCullum's autopsy. The ballistics examiner testified that he could not draw any conclusions from the damaged projectile, but that the four shell casings were fired from the same gun. He was never given a gun to compare the casings with. (6T 171-15 to 16, 177-2 to 3, 177-12 to 178-10)

and McCullum's girlfriend Khaliyah Prosser, watching a football game. (6T 39-20 to 40-14) Around 3:50 p.m., he heard "around five" gunshots, followed by Prosser screaming. (6T 40-15 to 41-13) Prosser testified that she was inside when McCullum was shot, and, though she heard gunshots and ran to the balcony to see what was happening, did not see who shot McCullum. (7T 123-20 to 22, 124-4)

Richard[3] testified that a neighbor knocked on his door and urged him to come outside. (6T 40-15 to 41-13) When he got outside, he saw his son on the ground, having been shot in the head. (6T 41-14 to 20) Several people were already surrounding McCullum by the time Richard got outside. (6T 42-10 to 16) Richard began calling his son's name to try to rouse him and asked him what happened. According to Richard, his son responded, and his last words were "[t]hat Pee-wee shot him." (6T 68-2 to 4; see also 6T 41-21 to 24, 42-24 to 43-4, 45-1 to 3) Richard did not know who "Pee-wee" was at that time. (6T 41-21 to 24) It was undisputed at trial that "Pee-wee" was Moore's nickname.

Richard did not report the dying declaration to police officers who responded to the scene. (6T 43-20 to 25) While Richard testified that the officers did not speak to him at the scene, a clip from a responding officer's body-worn

[3] Richard McCullum will be referred to as Richard as he and his son share the same last name.

camera was played at trial during which the officer asked Richard what happened, and he said he did not know. (9T 37-20 to 38-16, 54-17 to 55-3, 71-1 to 14) An ambulance arrived, and Richard accompanied his son to the hospital. (6T 44-7 to 14) At the hospital, Richard spoke to two detectives and gave them his contact information; like with the responding police officer, Richard did not tell the detectives about the alleged dying declaration. (6T 71-15 to 72-5)

Although Richard did not tell the detectives about the alleged dying declaration, Newark Police Detective Shahid Brown testified that he did leave the hospital with the name "Pee-wee" as the possible shooter. (8T 168-12 to 18, 169-1 to 22) This implied hearsay from unknown witnesses implicating Moore is addressed in Point III of this brief.

Sometime later, after McCullum's death, Richard, Prosser, and McCullum's mother went to the prosecutor's office to speak with officers. (6T 47-10 to 13, 47-6 to 48-5) Richard testified that at this meeting, he "was asked did I know anything or was anything said to me and I told what was told to me," (6T 47-23 to 25) and agreed with the State that "Pee-wee's name was out there" after this meeting. (6T 48-3 to 5) However, on cross-examination, Richard agreed that when he spoke to a female detective on the phone following McCullum's death, he made no mention of the dying declaration. (6T 72-14 to 73-8) Moreover, he acknowledged that the first time he specifically told police

about his son's alleged dying declaration was in his formal, recorded statement on October 21 — after Richard had seen an online news story with Moore's name and picture indicating that Moore had been arrested and charged with McCullum's murder. (6T 73-9 to 17, 74-5 to 75-22) Richard testified that he learned Moore's real name from this online news story, though he recognized Moore's face, and particularly his blue eyes, from seeing Moore hang out with his son. (6T 52-16 to 21, 53-7 to 54-1)

The State's other key piece of evidence at trial was from Christopher Diaz. Diaz testified that on September 29, he was getting ready for work when he heard gunshots coming from right outside his window. (6T 89-8 to 13, 89-21 to 23) He peeked through his window blinds and saw "a man holding a gun[,] shooting." He described the man as "5'6" or probably one or two inches taller," "[d]ark-skinned," wearing a sweatsuit that was "probably gray maybe." (6T 90-1 to 16, 91-10 to 19, 93-8 to 12) Diaz testified that he could not see who the person was shooting at and that there was another person standing next to the shooter, but "I don't remember what he looked like." (6T 94-6, 94-10 to 16) Diaz estimated that the shooter was about 14 feet away from his window. (6T 96-1 to 15) He testified that after the shooting, the man went across the street and walked away. (6T 97-12 to 16)

Although Diaz testified that the shooter was about 5'6", which would have made him shorter than McCullum, who was 5'9", the medical examiner testified that McCullum's injuries were consistent with being shot by a perpetrator who was standing behind and above McCullum. (8T 136-15 to 137-4, 142-17 to 22)

A few days after McCullum's death, Essex County Homicide Task Force Detectives Norman Richardson and Suzanne Looges returned to re-canvas the area of the shooting. (8T 44-18 to 24) They knocked on Diaz's door, and he initially told them he had not seen anything. He then caught up with them when they were across the street and told them that he did have information for them. (6T 98-24 to 99-12, 101-23 to 102-5; 8T 45-15 to 46-23) According to Detective Richardson, in the unrecorded conversation that followed, Diaz said that he knew McCullum, had witnessed the shooting, and provided a description of the shooter. (8T 47-7 to 23; see also 6T 102-10 to 22) Richardson prepared a photo array for Diaz, and in preparing the array, he colored Moore's distinctive blue eyes so that Moore's photo did not stand out from the others. (8T 52-23 to 53-12)

Diaz came to the police station the next day where he was shown a photo array by Detective Cherilien, who was not involved in the investigation. (6T

103-3 to 8, 103-21 to 23; 7T 69-13 to 15; 8T 48-8 to 10; see also Da 20-40[4]) Diaz looked through all six photos but did not pick any initially. (6T 111-18 to 112-1) The detective then asked Diaz if he wanted to see the photos again, and on his second viewing, Diaz identified Moore's photo as the shooter. (6T 111-9 to 11, 111-18 to 112-1, 141-8 to 16, 142-9 to 22; 7T 87-4 to 7) Detective Cherilien did not ask Diaz how confident he was in his selection. (7T 103-1 to 3) Instead, the detective himself wrote that the "witness was sure of his selection," even though Diaz's exact words in selecting the photo were, "I think it's three." (6T 144-1 to 14; 7T 80-5 to 6, 87-11 to 25) At trial, over defense counsel's objection, Diaz testified that he was 100% confident in his identification.[5] (6T 113-3, 113-23 to 114-8)

Although Diaz told detectives that he had never seen the shooter before, (6T 146-1 to 18, 165-10 to 19) on cross-examination, he admitted that he had seen Moore around the neighborhood a few times before the shooting. (6T 145-13 to 17) Prosser confirmed that she saw Moore all the time around that neighborhood, and that sometimes she would hang out with both Moore and McCullum in that neighborhood. (7T 142-1 to 15) In fact, the State introduced

[4] The video recording of the identification procedure was admitted into evidence and played at trial. (Da 40; 7T 76-17 to 83-8, 92-25 to 93-16)

[5] The improper denial of a Wade hearing and the improper admission of Diaz's confidence statement are addressed in Point I.

multiple photographs of McCullum sitting on the front stoop of the multi-family home where Diaz lived, with Moore and another man standing behind McCullum. (6T 123-4 to 124-20; 7T 130-8 to 131-16) As the defense argued in summation, and as the court instructed the jury, "[l]esser degrees of familiarity do not enhance accuracy and may, in fact, decrease accuracy of the identification" because of "[u]nconscious transference." In particular, "studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a Defendant may unconsciously transfer a familiar Defendant to the role of a criminal perpetrator in their memory." (9T 131-7 to 132-12)

The State also introduced various surveillance videos from the day of the shooting. (8T 72-5 to 75-4) The State argued in summation that the videos showed Moore, wearing a gray sweatsuit, walking towards the area where the shooting happened. (9T 88-3 to 98-20)

On October 15, a little over two weeks after the shooting, police arrested Moore for the murder. (7T 150-19 to 151-8, 151-25 to 152-1) The arresting officer testified that when he first approached Moore, Moore ran away, though he was later apprehended and taken into custody. (7T 155-25 to 156-2, 156-17 to 157-2) The officer testified that he recognized Moore because of his blue eyes. (7T 159-17 to 22) Following Moore's arrest, he gave a recorded statement to

police in which he said that on September 29, he was in the area of the shooting. (9T 19-8 to 22)

LEGAL ARGUMENT

POINT I

THE COURT ERRED IN DENYING A WADE[6] HEARING AND IN ALLOWING THE WITNESS TO PROVIDE A CONFIDENCE STATEMENT AT TRIAL. (Da 8; 1T 124-20 to 130-11; 6T 113-23 to 114-8)

As our Supreme Court has repeatedly acknowledged, "the possibility of mistaken identification is real," and "eyewitness misidentification is the leading cause of wrongful convictions across the country." State v. Watson, 254 N.J. 558, 577 (2023) (quoting State v. Henderson, 208 N.J. 208, 218 (2011)); see also State v. Delgado, 188 N.J. 48, 60 (2006) ("Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country."). Although almost nothing is more convincing to a jury than a witness identification, State v. Romero, 191 N.J. 59, 75 (2007), almost one-third of witnesses who make identifications are wrong. Report of the Special Master, Jun. 18, 2010 at 15.[7]

At Moore's trial, the identification of the shooter was the sole issue. Thus, the risk that a misidentification could lead to a wrongful conviction was high.

[6] United States v. Wade, 388 U.S. 218 (1967).
[7] Available at https://www.physics.smu.edu/pseudo/eyewitness/njreport.pdf

Yet there were two fundamental errors that prevented full and fair consideration of the key identification evidence. First, the trial court improperly denied a Wade hearing, despite the evidence of suggestiveness in the out-of-court identification procedure with Diaz. The improper denial of a hearing requires a remand for such a hearing. State v. Anthony, 237 N.J. 213, 238 (2019). Second, the trial court erred in permitting Diaz to testify about his confidence in the identification at trial when he did not provide a confidence statement during the out-of-court identification procedure. In a case where the defense was misidentification, having the sole eyewitness testify that he was 100% confident in his identification, following years of confirmatory feedback that he had picked the right person, was misleading and highly unfairly prejudicial. The improper admission of this confidence statement requires reversal of Moore's convictions. U.S. Const. amends. VI, XIV; N.J. Const. art. 1, pars. 1, 9, 10.

A. The Court Erred In Denying A Wade Hearing Because The Defense Presented Some Evidence Of Suggestiveness. (1T 124-20 to 130-11)

In response to the high risk of misidentification, our Supreme Court established a multi-step framework to ensure that only reliable identifications are placed before a jury: (1) a court will hold a pretrial hearing if the defendant shows some evidence of suggestiveness that could lead to a mistaken identification; (2) the State must then offer proof that the eyewitness identification is reliable; and (3) the ultimate burden remains on the defendant

to prove a very substantial likelihood of irreparable misidentification, considering the system and estimator variables. Watson, 254 N.J. at 578 (citing Henderson, 208 N.J. at 288-89) The court here did not comply with this standard when it denied Moore's motion for a Wade hearing. (Da 7; 1T 124-20 to 130-11) The court improperly failed to recognize that (1) offering Diaz a second look at the photos, and (2) demanding that Diaz make a conclusive identification rather than asking for his confidence, were both suggestive and thus sufficient to require a Wade hearing.

First, the court failed to recognize the suggestiveness of Detective Cherilien failing to accept Diaz's determination that none of the photos depicted the shooter. (See 1T 114-15 to 116-6, 124-9 to 19) During the identification procedure, Diaz looked through all six photos to see if he recognized anyone. (Da 32-33; Da 40 at 3:41:22 to 3:43:38) Diaz responded "no" to each photograph. (Da 32-33; Da 40 at 3:41:22 to 3:43:38)

But rather than accepting Diaz's word that he did not recognize the shooter from the photos, Detective Cherilien instead asked Diaz if he wanted to see the photos again. (Da 33; Da 40 at 3:43:38 to 3:43:46) Scientific research and caselaw recognize that viewing photos a second time, even during the same identification procedure, is suggestive and leads to more mistaken identifications.

In a leading study on this issue, "Sequential Lineup Laps and Eyewitness Accuracy", investigators conducted several laboratory experiments where participants were shown a video of a 'crime' and then asked to identify a suspect based on either one or two viewings of a sequential photo array. Nancy K. Steblay et al., Sequential Lineup Laps and Eyewitness Accuracy, 35 L. & Hum. Behav. 262, 271 (2011). Across the different experiments, viewing the same photo array a second time increased the likelihood that witnesses would misidentify the culprit. Ibid. The researchers concluded that "[w]hen the additional lap prompted a decision change from a previous no-choice response to a lineup pick, more often than not this change was an error." Ibid. (emphasis added).

For example, in one of the experiments, "witnesses who elected a second viewing of a culprit-absent lineup pushed identification errors to an alarming 88%." Id. at 272. Even in a target-present lineup, sequential viewing increased the rate of erroneous identifications from 14.3% to 35.7%. Id. at 270 (Table 5). These significant error rates are consistent with the research that our Supreme Court reviewed in Henderson. See Green, 239 N.J. at 106 ("Research reviewed in Henderson showed that mistaken identifications increased from 15 to 37% when a witness had seen a photo of an innocent person in a prior mugshot.").

Numerous other studies have also found that multiple viewings of a photo array lead to more mistaken identifications. See, e.g., Wenbo Lin et al., The Effects of Repeated Lineups and Delay on Eyewitness Identification, 4 Cognitive Res. Principles. & Implications, at 16-17 (2019) (in experimental studies, "identical lineups still displayed the negative effects previously reported in other repeated identification studies involving a single-repeated target"); Ruth Horry et al., The Effects of Allowing a Second Sequential Lineup Lap on Choosing and Probative Value, 21 Psychol. Pub. Pol'y and L. 121, 132 (2015) (in laboratory testing, overall selections increased on second viewing of array and erroneous selections (fillers) increased); Amy Klobuchar et al., Improving Eyewitness Identification Hennepin County's Blind Sequential Lineup Pilot Project, 4 Cardozo Pub. L. Pol'y & Ethics J. 381, 398 (2006) (field testing showed that "repeated viewing of the lineup was associated with increased likelihood of filler choices (errors)").

Reflecting the scientific research, the Court in Henderson recognized that multiple viewings of the same person can have an improper reinforcing effect on an eyewitness, where it becomes unclear whether the witness is recalling the suspect or the first viewing of the image. "Successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification

procedure." 208 N.J. at 255. As a result, the Court specifically instructed that "law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once." Id. at 256. See also State v. Green, 239 N.J. 88, 106 (2019) (considering "the issue of multiple viewings of the same person during an identification procedure" in the context of a mugshot database, and concluding that because there was a risk that witness could be exposed to the same person multiple times, "the State will have the obligation to demonstrate that an eyewitness was not exposed to multiple photos or viewings of the same suspect" in the identification procedure).

The scientific research has found that the increased error rates from multiple viewings of the same array during the same identification procedure is tied to the exact same phenomena described by the Court in Henderson. The Henderson Court cited "mugshot exposure" and "mugshot commitment" as phenomena that affect the reliability of identifications. 208 N.J. at 256. Mugshot exposure occurs when a witness "views a set of photos" then at a "later identification procedure" selects someone "depicted in the earlier photos." Ibid. Mugshot commitment occurs when "a witness identifies a photo that is then included in a later lineup procedure." Ibid. In the Lin et al. 2019 study, the investigators tested for and found that "the effects of commitment and misplaced familiarity are present in both repeated lineups involving a single-repeated target

and identical lineups." 4 Cognitive Res. Principles & Implications at 17 (emphasis added). In sum, multiple viewings of the same array produce the same significant error rates in the same way as the examples of multiple viewings that our Supreme Court found problematic in Henderson and Green.

The procedure used in this case was exactly the kind of suggestive identification administration that can lead to mistaken identifications. Diaz looked through all the photographs once and told the detective that none of them was the shooter. The detective then asked Diaz if he wanted to look through the photos again. As the studies demonstrate, offering a witness a second look at the photo array following a non-identification is suggestive and leads to misidentifications: "[w]hen the additional lap prompted a decision change from a previous no-choice response to a lineup pick, more often than not this change was an error." Steblay et al., 35 L. & Hum. Behav. at 271 (emphasis added). Offering Diaz a second look at the photos was sufficient to demonstrate "some evidence of suggestiveness," requiring a pretrial hearing on the admissibility of Diaz's identification. 208 N.J. at 218.

Second, the trial court here also improperly failed to recognize the suggestiveness of Detective Cherilien's demand that Diaz make a conclusive identification. (1T 124-20 to 130-11) As Diaz was looking through the photos a second time, he paused at Moore's photo and said, "I think it was 3. Yeah. I think

it was 3." (Da 34; Da 40 at 3:44:20 to 3:44:41) Rather than neutrally ask Diaz how confident he was in his choice, Detective Cherilien instead pressured Diaz to offer a conclusive answer: "So that's a yes or no?" (Da 34; Da 40 at 3:44:41 to 3:44:44) Only after Cherilien pushed Diaz to commit to a yes/no answer did Diaz eventually respond, "Mmmmmm. (Indiscernible).[8] Yes." (Da 34; Da 40 at 3:44:44 to 3:45:03)

As the Supreme Court recognized in Henderson, "[c]onfirmatory feedback can distort memory"; thus, a witness's confidence "must be recorded in the witness'[s] own words before any possible feedback." Henderson, 208 N.J. at 254. Pressuring an eyewitness to declare certainty in an identification is suggestive because it distorts the witness's confidence. And our caselaw is clear that it does not require dramatic misconduct in the administration of an array. Even "seemingly innocuous" comments by an officer provide at least some evidence of suggestiveness. Anthony, 237 N.J. at 233 (holding that it is suggestive to "for example, simply tell[] a witness that he or she did a 'good job'"). Ultimately, the Henderson framework was developed to "allow judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible." Henderson, 208 N.J. at 288 (emphasis added). But

[8] Undersigned counsel is not able to determine what Diaz says in this portion of the video. The transcript of the video also notes that this is "Indiscernible."

by failing to hold a pretrial hearing on Diaz's identification in this case, the defense was deprived of the opportunity to flesh out those relevant factors — both system and estimator variables — that undermined the reliability of the identification. Because the defense presented some evidence of suggestiveness, the trial court was required to hold a pretrial hearing. Its failure to do so requires a remand for such a hearing. Anthony, 237 N.J. at 238-39.

B. It Was Error To Permit The Witness To Testify About His Confidence When Police Failed To Take A Confidence Statement During The Identification Procedure. (6T 113-23 to 114-8)

As explained above, Henderson requires a verbatim recording of the witness's confidence in his own words at the time he makes an identification. The solution to this failure was presented in Henderson: preclusion of any confidence testimony. As the Court explained, "if an eyewitness' confidence was not properly recorded soon after an identification procedure, and evidence revealed that the witness received confirmatory feedback from the police or a co-witness, the court can bar potentially distorted and unduly prejudicial statements about the witness' level of confidence from being introduced at trial." Henderson, 208 at 298.

In this case, confidence was not only not recorded "soon after" the procedure, ibid., it was never recorded at all. (7T 103-1 to 3; Da 33-34; Da 40 at 3:44:44 to 3:51:57) But strong confirmatory feedback existed after Diaz chose

Moore's photograph. Detective Looges returned to the room, told Diaz that he had chosen Zahir Moore's photo, and told Diaz Moore's SBI number. (Da 38; Da 40 at 3:55:04 to 3:56:30) After the array, there was almost four years' worth of confirmatory feedback between the identification and the moment Diaz testified at trial. Moore's arrest, any news coverage of it, any preparatory conversations between Diaz and the State, and the trial itself, with Moore sitting at counsel table, all confirmed that Diaz picked the right man. The State, at least, thought so, having brought the full weight of its prosecutorial power down on Moore.

Yet, despite the police's failure to record his confidence at the time of the identification, Diaz was asked about it at trial, testifying that he "was 100 percent certain" in his identification. (6T 113-1 to 5) The prosecutor followed up, asking, "Is there any doubt in your mind that that person you picked on three was the person that you saw?," and Diaz again responded he was "100 percent certain." (6T 113-15 to 19) The inappropriate recitation of his confidence years later was reversible error. This inappropriate testimony was so compelling, just as Henderson warned courts it would be, that the State brought it up in summation. Over defense objection, the State asked the jury to consider how long Diaz "stared at" the photo, arguing, "You could cut the tension in the room

with a knife. And then he said yes. Why? Because he said he wanted to be sure. He said 100 percent. You don't forget a face." (9T 84-2 to 14 (emphasis added))

As our Supreme Court has recognized, "there is almost nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" Henderson, 208 N.J. at 237 (internal quotation marks omitted). Scientific research reveals that "[t]he certainty that an eyewitness expresses in his or her identification is the primary factor that determines whether triers of fact (e.g., judges and juries) will accept the eyewitness's testimony as proof that the identification person is the culprit." Amy L. Bradfield et al, The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 J. Applied Psych. 112, 112, (2002) The confidence with which Diaz made his identification makes it all the more damning, yet the confidence should never have been elicited. Moore's convictions must be reversed.

POINT II

THE COURT ERRED IN ADMITTING THE HIGHLY UNRELIABLE ALLEGED DYING DECLARATION. ALTERNATIVELY, THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE IDENTIFICATION CONTAINED IN THE DYING DECLARATION. (Partially Raised Below: Da 5; 1T 93-14 to 99-22)

Over defense objection, and without conducting a testimonial hearing, the court ruled that Richard could testify about his son's alleged dying declaration. (Da 5; 1T 93-14 to 99-22) The trial court's ruling was in error. Richard's belated revelation of the dying declaration, after Moore had already been arrested for murder and Richard had seen Moore's picture and name in a news story, was too unreliable to be admissible. The trial court should not have permitted such unreliable, misleading, yet compelling evidence before the jury. In addition, the jury was not given any guidance as to how to assess the reliability of McCullum's alleged statement. Significantly, the statement was an identification: it identified Moore as the murderer. In a case where the defense was misidentification, the failure to instruct the jury on McCullum's alleged identification of Moore was reversible error. Admission of the statement, without any guidance to the jury, violated Moore's rights to due process and a fair trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10. His convictions must be reversed.

A. The Alleged Dying Declaration Was Too Unreliable To Be Admissible.

Referred to as a "dying declaration," a statement is admissible as an exception to the prohibition against hearsay if made "under belief of imminent death." N.J.R.E. 804(b)(2). Such a statement is admissible because it is assumed reliable, "based on the rationale that the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." State v. Williamson, 246 N.J. 185, 200 (2021) (internal quotation marks omitted). However, even when evidence could fall under an exception to the hearsay prohibition, that does not relieve the court, acting as gatekeeper, "to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence." State v. Michaels, 136 N.J. 299, 316 (1994). See State v. Brown, 236 N.J. 497, 508-09 (2019) (noting that the trial court initially excluded a dying declaration that otherwise satisfied N.J.R.E 804(b)(2) because the court found the victim's wife, who claimed to have heard the statement, "not a credible witness"); State v. Chen, 208 N.J. 307, 318 (2011) ("Courts have a gatekeeping role to ensure that unreliable, misleading evidence is not admitted."); N.J.R.E. 403(a) (noting that evidence "may be excluded if its probative value is substantially outweighed by the risk of. . . undue prejudice, confusion of issues, or misleading the jury"). "'[R]eliability [is] the linchpin in

determining admissibility' of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment." Michaels, 136 N.J. at 316. (quoting Manson v. Brathwaite, 432 U.S. 98, 114 (1977). As "[c]ompetent and reliable evidence remains at the foundation of a fair trial, . . . [i]f crucial inculpatory evidence is alleged to have been derived from unreliable sources[,] due process interests are at risk." Michaels, 136 N.J. at 316.

Here, as defense counsel argued, Richard's testimony about the alleged dying declaration was wholly unreliable and thus inadmissible. (1T 82-16 to 88-4) After he had been shot in the head and chest, McCullum allegedly was roused by his father and coherently identified his shooter before beginning to yell in distress and pain. (1T 96-9 to 23) Although there were many people surrounding McCullum at the time of his alleged statement, no one but Richard heard him. (1T 85-4 to 17) Moreover, although police arrived soon enough after the shooting for a body-camera video to capture McCullum yelling, no video captured the alleged dying declaration. (1T 82-20 to 83-5)

Compounding the implausibility of the circumstances surrounding the alleged statement were Richard's repeated failures to mention the statement to police. He did not tell the responding officer about the statement when the officer asked what happened. (1T 83-6 to 84-2) He did not tell any of the detectives he spoke to at the hospital about the statement. (1T 84-3 to 5) He did

not tell the female detective he spoke to on the phone about the statement. (1T 84-6 to 11) The first time Richard told police about this alleged dying declaration was after McCullum's funeral — after Moore had been arrested and charged with murdering McCullum and after Richard saw a news story about Moore's arrest. (1T 84-12 to 17) If McCullum's dying words had really been that "Pee-wee" was the shooter, Richard would have mentioned this in one of his many conversations with the police following the shooting.

Instead, by the time Richard finally told police about the alleged dying declaration, he had strong reason to suspect that Moore had shot McCullum and an incentive to bolster the State's case against Moore. The police had already arrested Moore and charged him with murder; Richard knew this, having seen an online news story about the arrest with Moore's name and photograph. (6T 52-16 to 21, 53-7 to 54-1, 73-9 to 17, 74-5 to 75-22) Yet there was still very little evidence against Moore. Police never recovered a gun, did not have any video evidence of the shooting itself, and had no other physical evidence to link Moore to the shooting. In light of all of these circumstances, Richard's belated revelation about McCullum's dying words was incredible and unreliable. The trial court, acting as gatekeeper, was obliged "to guarantee that only relevant, probative, and competent evidence that is sufficiently reliable not to run afoul of Rule 403 may be considered by the finder of fact." Chen, 208 N.J. at 319.

Proper execution of that gatekeeping function required exclusion of Richard's unreliable recitation of McCullum's alleged statement. N.J.R.E. 403. The improper admission of this unreliable yet compelling evidence inculpating Moore deprived him of his rights to due process and a fair trial and requires reversal of his convictions. U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10.

B. The Failure To Instruct The Jury On How To Assess The Alleged Dying Declaration Requires Reversal.

Even if the court did not err in admitting the dying declaration, it erred in failing to give the jury critical information about the alleged statement — that it was an identification and thus subject to all the same considerations about reliability as any other identification. The jury in this case needed to be given an identification instruction to properly assess the dying declaration. It is well-established that an identification instruction must be given in a case in which a defendant is identified as the perpetrator and his defense is that he was misidentified. State v. Sanchez-Medina, 231 N.J. 452, 467 (2018). Although the judge did instruct the jury on eyewitness identifications, this instruction only addressed Diaz's out-of-court identification. (9T 124-20 to 137-8) The failure to give a similar instruction with respect to McCullum's identification, in a case where there were so many factors to undermine the reliability of the statement and the person who made the identification was not subject to cross-

examination, was clearly capable of creating an unjust result and requires reversal of Moore's convictions. R. 2:10-2.

As noted in Point I, "[e]yewitness misidentification is the leading cause of wrongful convictions across the country," and without proper guidance, jurors do not have the "inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." Henderson, 208 N.J. at 218. Thus, one of the core protections against wrongful convictions is jury instructions about how to properly assess identifications. Trial courts must focus "the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." Id. at 296. Jurors cannot be left to "divine" how to assess these identifications themselves or "glean them" through trial. Ibid. As with all jury instructions, especially as to crucial matters, it is the "court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial." Ibid. (emphasis added). The current instructions, promulgated in response to Henderson, are very detailed and present a nuanced view of the reliability of identifications jurors cannot be assumed to possess on their own.

Because the trial court has an obligation to properly instruct the jury, "[w]hen identification is a 'key issue,' the trial court must instruct the jury on identification, even if a defendant does not make that request." State v. Cotto, 182 N.J. 316, 325 (2005) (emphasis added). Identification is a key issue when

"it is the major thrust of the defense," particularly in cases where the State relies on a single victim-eyewitness. Id. at 325-26 (internal alterations omitted) (citing State v. Frey, 194 N.J. Super. 326, 329 (App. Div. 1984)) ("The absence of any eyewitness other than the victim and defendant's denial of guilt, made it essential for the court to instruct the jury on identification."); see also State v. Davis, 363 N.J. Super. 556, 562 (App. Div. 2003) ("[T]rial courts are not at liberty to withhold an instruction, particularly when that instruction addresses the sole basis for defendant's claim of innocence and it goes to an essential element of the State's case.").

The key issue in this case was identification. The State's case hinged on two identifications: (1) Diaz's identification of Moore from a photo array at the police station; and (2) McCullum's identification of Moore, as evidenced by his alleged dying declaration. In both opening and closing arguments, the State emphasized the importance of McCullum's identification, arguing "[t]here's only one final word that matters in this entire case; Pee-wee. The final words of Waleik McCullum. . . . And if we can't believe the words of a dying man, what can we believe? Pee-wee." (9T 74-4 to 14; see also 9T 100-16 to 20, 110-4 to 6; 6T 21-24 to 22-3, 30-17 to 21) But even though this was an identification case, the jury was given incomplete tools to assess the identification issue and

therefore Moore's sole defense: misidentification. This failure requires reversal of his convictions.

At least five estimator variables undermine the reliability of McCullum's identification: stress, weapon focus, distance, duration, and unconscious transference. First, "even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification." Henderson, 208 N.J. at 261. The stress of being confronted and shot would be high. Second, the presence of a visible weapon can "impair a witness' ability to make a reliable identification." Id. at 262-63. McCullum was shot with a gun. Third, "clarity decreases with distance," and therefore so does reliability. Ibid. The medical examiner testified that McCullum's injuries were consistent with being shot from above and behind, limiting his ability to clearly see the shooter. (8T 136-15 to 137-4) Fourth, "the amount of time the witness has to observe an event can affect the reliability of an identification." Id. at 264. The shooting in this case took only seconds, severely limiting anyone's ability to make a reliable identification. (8T 28-11 to 20; 9T 62-17 to 25) Last, the identification may have been tainted by unconscious transference, as McCullum knew Moore. (9T 131-7 to 132-12)

But the jury was never told that McCullum's dying declaration was, in and of itself, an identification. Although the jury was told to consider these factors

in assessing Diaz's identification, they were never told that the same factors applied with equal force to McCullum's identification. The jury in this case should have been told that all these factors undermine the reliability of McCullum's statement as a matter of science, not as a matter of argument among the lawyers. Model Criminal Jury Charge, Identification: Out-of-Court Identification Only 2. The jury should also have been instructed to scrutinize McCullum's identification closely, bearing in mind that "human memory is not foolproof" and that "[a]lthough nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken." Id. at 5. That the jury was deprived of this information about McCullum's identification fatally undermines Moore's convictions, especially since McCullum was not able to be confronted with all these facts to be assessed by the jury. In short, because the failure to give a complete identification charge in a misidentification case is reversible error, and because in this particular case the failure deprived the jury of critical information to assess an otherwise inscrutable identification, Moore's convictions must be reversed.

Instructional errors on essential matters, even in cases where those errors are not raised below, are traditionally deemed prejudicial and reversible. State v. Rhett, 127 N.J. 3, 5-7 (1992). In particular, a lack of proper identification

instruction is reversible error in an identification case. Sanchez-Medina, 231 N.J. at 467. The failure to give appropriate instructions in this case was particularly harmful because of the weakness in the State's case. There was no physical evidence tying Moore to the shooting, no motive for the shooting, and substantial reasons to doubt the two core pillars of the State's case — the dying declaration/identification, belatedly revealed after Richard had seen news of Moore's arrest, and Diaz's out-of-court identification based on a view of the perpetrator that lasted only seconds and with a real risk of unconscious transference. The failure to properly instruct the jury cannot be deemed harmless. Moore's convictions must be reversed.

POINT III

THE COURT ERRED IN ADMITTING IMPLIED HEARSAY FROM NON-TESTIFYING WITNESSES THAT IMPLICATED DEFENDANT. (8T 18-7 to 24, 34-9 to 17, 35-8 to 19, 49-4 to 11)

The key question for the jury was the identity of the shooter. With significant reasons to doubt the reliability of McCullum's alleged dying declaration and Diaz's identification of Moore, the State improperly sought to bolster its case with testimonial hearsay from unidentified witnesses. Two different police detectives told the jury that they spoke to unnamed people and came away suspecting that "Pee-wee" was the shooter. Detective Brown testified

that he spoke to "family members at the hospital," and that after leaving the hospital, he had "a nickname" — "Pee-wee." (8T 168-4 to 9, 168-12 to 18)

Over defense counsel objection, Detective Richardson similarly testified that "[a]fter meeting with Detective Brown," he had been "provided with a possible name to look into as a potential suspect": "Pee-wee." (8T 34-9 to 17) Detective Richardson relayed to the jury, over defense objection, "a general description of who this Pee-wee was": "Blue eyes, brown skin, dark brown skin." (8T 34-19 to 35-7) Detective Richardson then went even further, testifying that he was "provided with another name after meeting with Detective Brown," that that name was "Zahir Moore," and that he was given a physical description of Moore: "About 5'6", dark brown skin, blue eyes." (8T 35-8 to 19) Detective Richardson used this description, provided by unnamed witnesses, to prepare the photo array shown to Diaz. (8T 49-4 to 11)

This testimonial hearsay from unknown, unnamed witnesses, was crucial to bolstering the State's shaky case against Moore. Because the admission of this hearsay violated Moore's rights to confrontation and due process, his convictions must be reversed, and the case remanded for a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10.

The United States and New Jersey Confrontation Clauses provide that the accused in a criminal prosecution has the right "to be confronted with the

witness against him." U.S. Const. amends. VI, XIV; N.J. Const. art. I, par. 10. The "opportunity to cross-examine a witness is at the very core of the right to confrontation." State v. Cabbell, 207 N.J. 311, 328 (2011). Cross-examination is "essential" to "test the reliability of testimony given on direct-examination." State v. Feaster, 184 N.J. 235, 248 (2005). Thus, the Confrontation Clause prohibits the admission of a "witness's out-of-court testimonial hearsay statement as a substitute for in-court testimony when a defendant has never been given the opportunity to cross-examine the witness." Cabbell, 207 N.J. at 329. See also Crawford v. Washington, 541 U.S. 36, 59 (2004).

Our Court has also held that, although an officer may explain his actions based on "information received," both the hearsay rules and the Confrontation Clause are violated when the officer "becomes more specific by repeating what some other person told him concerning a crime by the accused." State v. Bankston, 63 N.J. 263, 268-69 (1973). The rules of hearsay forbid even a suggestion of an incriminating out-of-court statement and therefore prohibit an officer from "imply[ing] to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." State v. Branch, 182 N.J. 338, 351 (2005). Thus, "both the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference,

information from a non-testifying declarant to incriminate the defendant in the crime charged." Id. at 350.

Moreover, it is a further violation for a police officer to explain why he put someone's photo in an array. As the Supreme Court held in Branch, a "detective's reasons for including defendant's photograph in the array were not relevant and were highly prejudicial." Id. at 352. Such testimony impermissibly "implie[s] that [the detective] had information from an out-of-court source, known only to him, implicating defendant." Id. at 352-53.

The "government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontational challenge." State v. Basil, 202 N.J. 570, 596 (2010). When a defendant's right to confrontation has been violated, it is "a fatal error, mandating a new trial, unless we are 'able to declare a belief that it was harmless beyond a reasonable doubt.'" Cabbell, 207 N.J. at 338 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). There is "very little that could be more prejudicial or more harmful than to admit an out-of-court declaration by an anonymous witness implicating defendant in the crime for which he stands trial which is not subjected to cross-examination." State v. Alston, 312 N.J. Super. 102, 144 (App. Div. 1998).

Here, Detectives Brown and Richardson violated these rules by relaying what the unidentified witnesses supposedly told them: that Pee-wee was

suspected of shooting McCullum; that Pee-wee had distinctive blue eyes; that Pee-wee's real name was Zahir Moore; and as a result of this incriminating information, police put Moore's photo in an array. This testimony was clearly inadmissible as it conveyed to the jury information allegedly provided by unnamed witnesses who never testified at trial yet who apparently had critical information implicating Moore in the shooting. Thus, the jury was able to hear alleged out-of-court statements without Moore being able to cross-examine the witnesses about the basis for their knowledge or the reliability of their information. This is the very definition of a violation of the Confrontation Clause.

Our Supreme Court has explained that "it has long been held that cross-examination is the greatest legal engine ever invented for the discovery of truth." State ex rel. J.A., 195 N.J. 324, 341-42 (2008) (internal quotation marks omitted). By denying Moore the benefits of this engine, "the jury never learned the basis of [the out-of-court declarant's] knowledge. . . , whether he was a credible source, or whether he had a peculiar interest in the case. Defendant never had the opportunity to confront that anonymous witness and test his credibility in the crucible of cross-examination." Branch, 182 N.J. at 348.

Admission of these incriminating statements from the unknown witnesses unfairly bolstered the State's relatively weak case against Moore and were

therefore highly prejudicial. Unnamed, unknown people believed that Moore shot and killed McCullum. This information was specific, including a clear description of Moore. And this information was credible enough that it led Detective Richardson to put Moore's photo as the suspect in a photo array. Yet Moore was deprived of his right to confront these anonymous witnesses, the very thing that the Confrontation Clause seeks to prevent.

This error cannot be characterized as harmless. The State did not present evidence of a motive. They did not have a murder weapon. They had no physical evidence linking Moore to the shooting. The belatedly revealed alleged dying declaration was unreliable, with Richard only mentioning it to police after he had seen a news story about Moore's arrest. The eyewitness identification was equally unreliable, with a real risk that Diaz chose the person he was most familiar with, having seen Moore around the neighborhood, and mistakenly believing him to be the shooter. In light of these serious weaknesses, un-cross-examinable hearsay from anonymous witnesses that Moore was the shooter cannot be ignored.

Our courts have not hesitated to reverse in similar situations where the right to confrontation was violated. See, e.g., J.A., 195 N.J. at 331 (reversing due to admission of statements by non-appearing witness describing robbery and race and clothing of suspect); State v. Taylor, 350 N.J. Super. 20, 32 (App. Div.

2002) (reversing due to admission of statements made to police providing physical description of suspect). Like those cases, "[g]iven the serious nature of the right infringed upon — the denial of the right of confrontation — and the importance of the impermissible testimony in the overall presentation of the State's evidence," reversal is required here. Taylor, 350 N.J. Super. at 35.

As plainly articulated by Justice Scalia, for the admission of testimonial statements "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 541 U.S. at 68. Neither was present in this case. Thus, the admission of such "testimonial statement[s]" against the defendant "despite the fact that he had no opportunity to cross-examine" the declarants is "sufficient to make out a violation of the Sixth Amendment." Ibid. Reversal is required so that Moore may have a trial that comports with the constitution.

POINT IV

THE PROSECUTOR'S IMPROPER BURDEN-SHIFTING AND NAME-CALLING IN SUMMATION REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. (Partially Raised Below: 9T 105-18 to 106-14)

Moore's defense throughout the trial was that, although he lived in the area, he did not shoot McCullum. The jury was tasked with deciding whether Moore was misidentified or whether he was the shooter. But the prosecutor

improperly muddied this issue through inappropriate name-calling and burden-shifting. These inappropriate tactics deprived Moore of his rights to due process and a fair trial and require reversal of his convictions. U.S. Const. amends. VI and XIV; N.J. Const. art. I, pars. 1, 9, and 10.

In summation, the prosecutor showed the jury a picture of McCullum from the day before the shooting, with Moore standing behind him. The prosecutor characterized this photo as "capturing the last happy moments of a young man's life, not knowing the devil behind him, what's to come." (9T 75-25 to 75-2 (emphasis added)) It was wildly inappropriate for the prosecutor to call Moore "the devil." This Court made clear that these kinds of personal attacks are wholly improper. Although a prosecutor has the right "to present the State's case forcefully and graphically. . . the prosecutor is required to refrain from making derogatory statements about a criminal defendant." State v. Gregg, 278 N.J. Super. 182, 190 (App. Div. 1994). Thus in Gregg, where the defendant was charged with aggravated manslaughter and a variety of assault charges, comments portraying a defendant as a "contemptible and despicable person" required reversal under the plain error standard. Id. at 189. In that case, as in this one, a person was dead and the jury was required to assess the defendant's culpability as to that death. By encouraging the jury to view the defendant as

"the devil," the State encourages conviction based on outrage, not on the facts themselves, something our law prohibits.

In addition, the prosecutor also improperly shifted the burden of proof to the defense in summation. As part of the defense closing argument, defense counsel sought to cast doubt on Diaz's identification of Moore in part by pointing to testimony from McCullum's girlfriend, Prosser, that she had spoken to someone in the building in which Diaz lived the day after the shooting. The defense argued that Prosser could have spoken to Diaz about her suspicions that Moore was the shooter, thus tainting Diaz's memory and his identification. (9T 57-13 to 24) Rather than appropriately responding to this argument, the State shifted the burden of proof, arguing that the defense should not be credited because the defense failed to present any evidence: "Why didn't you ask that follow up question; hey, who at 94 Lindsley did you talk to? Maybe because you don't want the right answer that you're going to expect to get." (9T 86-13 to 21) Later, the prosecutor again drew the jury's attention to the absence of evidence produced by the defense, asking the jury "Where was the got you moment?" in the defense's cross-examination of various witnesses. (9T 105-15 to 17) Defense counsel objected, arguing that the State was improperly shifting the burden of proof to the defense, and the court simply told the State to "move on from this area" without providing a curative instruction. (9T 105-18 to 106-14)

It is "a basic tenet of our criminal jurisprudence that a defendant has no obligation to establish his innocence." State v. Jones, 364 N.J. Super. 376, 382 (App. Div. 2003). He "need not call any witnesses, choosing instead to rely on the presumption of innocence." State v. Hill, 199 N.J. 545, 559 (2009). This basic principle "applies with equal force to the situation of a defendant assuming the stand to testify and the situation of a defendant proffering affirmative evidence on his own behalf. He has no obligation to do either, and his failure in either regard cannot affect a jury's deliberations." Jones, 364 N.J. Super. at 382. Thus, a prosecutor's comment on a defendant's decision not to produce affirmative evidence at trial is improper. "When a prosecutor's comments infringe upon such a basic right, the facts and circumstances must be closely scrutinized to determine whether the defendant's right to a fair trial has been compromised." Id. at 383 (quoting State v. Cooke, 345 N.J. Super. 480, 486 (App. Div. 2001) (internal quotation marks and alterations omitted).

Here, by pointing to the defense's supposed failure to prove that Prosser spoke to Diaz or to get a "got you" moment during cross-examination, the State asked the jury to use the absence of evidence from the defense against Moore. Moore had no obligation to prove that Prosser spoke to Diaz. Instead, it was entirely appropriate for the defense to point out this possibility to the jury as a way to undermine one of the State's key pieces of evidence. The court's failure

to strike these inappropriate comments by the prosecutor or to provide a curative instruction deprived Moore of his rights to due process and a fair trial. His convictions should be reversed.

POINT V

EVEN IF ANY OF THE COMPLAINED-OF ERRORS WOULD BE INSUFFICIENT TO WARRANT REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS WAS TO DENY DEFENDANT DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

Because each of the errors complained of in Points I-IV affected the jury's assessment of the State's evidence, even if none of those errors is deemed sufficient on its own to warrant reversal, together the errors deprived Moore of due process and a fair trial. State v. Sanchez-Medina, 231 N.J. 452, 469 (2018); State v. Orecchio, 16 N.J. 125, 129 (1954); U.S. Const. amends. VI, XIV; N.J. Const. art. 1, pars. 1, 9, 10.

Diaz's testimony that he was 100 percent certain in his identification of Moore as the shooter when he made no such confidence statement at the time of the identification was inadmissible and misleading yet highly persuasive to the jury, improperly bolstering the strength of his identification. Richard's testimony about McCullum's alleged dying declaration was too unreliable to be admissible, yet also highly compelling. Moreover, even if the dying declaration were admissible, it was an identification and thus required the court to instruct

the jury on all the factors that affected the reliability of that identification. Finally, implied hearsay from unnamed, unknown witnesses that implicated Moore in the shooting — by nickname, actual name, and physical description — unfairly bolstered the State's weak case. It allowed two separate police witnesses to testify about information they never shared with the jury that tended to show Moore's guilt. Moreover, in clear violation of well-established caselaw, a detective testified that he relied on this hearsay to assemble the photo array shown to Diaz, thus unduly corroborating the State's theory of the case. Together, and separately, these errors "cast doubt on a verdict and call for a new trial." Sanchez-Medina, 231 N.J. at 469. Moore's convictions should be reversed, and the matter remanded for retrial.

POINT VI

THE GUN POSSESSION CONVICTION MUST BE REVERSED BECAUSE THE COURT FAILED TO INSTRUCT THE JURY ON THE THIRD ELEMENT OF THE OFFENSE. (Not Raised Below)

Count two of the indictment charged Moore with possession of a handgun without a permit, contrary to N.J.S.A. 2C:39-5(b). (Da 3) This offense has three elements: (1) that there was a handgun; (2) that Moore knowingly possessed the handgun; and (3) that Moore did not have a permit to possess the handgun. N.J.S.A. 2C:39-5(b); Model Criminal Jury Charge, Unlawful Possession of a Handgun, at 1 (rev. June 11, 2018). But in instructing the jury, the court entirely

omitted any instruction on the third element. (9T 151-18 to 155-6) Thus, the court failed to instruct the jury that the State had the burden to prove beyond a reasonable doubt that Moore did not have a gun permit. See Model Criminal Jury Charge, Unlawful Possession of a Handgun, at 4. The failure to instruct the jury on this essential element of the offense renders the jury verdict on this count invalid. The gun possession charge must be reversed. R. 2:10-2; U.S. Const. amends. VI and XIV; N.J. Const. art. I, pars. 1, 9, 10.

A trial court's failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel. State v. Federico, 103 N.J. 169, 176 (1986). This is so because the absence of a correct jury instruction on an element means that there can be no proper jury finding of that element, even if it is uncontested or conceded. State v. Vick, 117 N.J. 288, 291 (1989). "[T]here is simply no substitute for a jury verdict" on every element of a crime. Ibid. The Sixth Amendment guarantees no less.

State v. Vick illustrates this foundational, constitutional requirement to instruct the jury on every single element of an offense. In Vick, the Supreme Court reversed the defendant's conviction for gun possession when the judge failed to instruct the jury that the State had to prove that the defendant did not have a permit to carry the gun. Id. at 290. The Court reversed in Vick, even

though there was no dispute whatsoever about defendant's lack of a gun permit. Id. at 290-92. Not only was the absence of a permit not disputed, but "the absence of a permit was inherent in the defense," such that based on the defense, "defendant could not possibly have had a permit for the weapon." Id. at 290-91. The Court recognized that "it is difficult to explain why juries should be required to make a finding of what seems to be the obvious," yet ultimately held that "there is simply no substitute for a jury verdict." Id. at 291. The Court concluded that a retrial would "seem such a waste," given the trial evidence. Id. at 292. However, the Court concluded that the need to instruct the jury on every element of an offense is a requirement "so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances." Id. at 292-93.

Here, as in Vick, the trial court erroneously omitted an instruction on the third element of the gun possession offense — that the State must prove Moore did not have a gun permit. As seen in Vick, it is always harmful error to fail to instruct the jury on an element of the offense, even when that element is uncontested. Thus, as in Vick, the gun possession conviction must be reversed.

POINT VI

THE COURT ERRED BY FAILING TO PROVIDE ANY EXPLANATION FOR THE AGGRAVATING FACTORS IT FOUND, RENDERING DEFENDANT'S SENTENCE EXCESSIVE. (13T 19-14 to 20-11; Da 13-15)

This offense was 19-year-old Moore's first conviction. In imposing a 35-year sentence, the court found aggravating factors 3, the risk of reoffense; 6, defendant's prior record; and 9, the need to deter. N.J.S.A. 2C:44-1(a)(3), (6), (9). (13T 19-14 to 21) The court also found mitigating factors 7, that Moore has no prior history of criminal activity, and 14, Moore's young age. N.J.S.A. 2C:44-1(b)(7), (14). (13T 19-22 to 25, 20-10 to 11) The court failed to provide any explanation for its finding of aggravating factors 3 and 9, and further made inconsistent findings with respect to aggravating factors 3 and 6 and mitigating factor 7. These errors, as well as the length of the sentence for a first-time offender, render Moore's sentence excessive and require a remand for resentencing.

When imposing a sentence, a court must "identify the aggravating and mitigating factors and balance them to arrive at a fair sentence." State v. Natale, 184 N.J. 458, 488 (2005). Simply enumerating the applicable aggravating and mitigating factors is insufficient. State v. Kruse, 105 N.J. 354, 363 (1987). Rather, a court's sentencing decision must "follow[] not from a quantitative, but

a qualitative analysis." Ibid. That is, the Code requires "a thoughtful weighing of the aggravating and mitigating factors, not a mere counting of one against the other." State v. Denmon, 347 N.J. Super. 457, 467-68 (App. Div. 2002).

In order to ensure proper balancing of the relevant factors, at the time of sentencing, a court must "state the reasons for imposing such sentence, including. . . the factual basis supporting a finding of particular aggravating and mitigating factors affecting sentence." State v. Fuentes, 217 N.J. 57, 73 (2012). A clear explanation of the balancing process is "particularly important," and that explanation "should thoroughly address the factors at issue." Ibid. (internal citations omitted).

A remand for resentencing is required when the trial court considers an improper aggravating factor, State v. Carey, 168 N.J. 413, 424 (2001), fails to find mitigating factors supported by the evidence, State v. Dalziel, 182 N.J. 494, 504 (2005), or if the trial court's reasoning in finding aggravating and mitigating factors is not based on factual findings "supported by substantial evidence in the record." State v. O'Donnell, 117 N.J. 210, 216 (1989). Although appellate review of sentencing decisions is generally deferential, where, as here, "the trial court. . . merely enumerates" the aggravating and mitigating factors "or forgoes a qualitative analysis, or provides little insight into the sentencing decision, then

the deferential standard will not apply." State v. Case, 220 N.J. 49, 65 (2014) (internal quotation marks omitted).

Here, a remand is required for several reasons. First, the court failed to provide any explanation whatsoever for its finding of aggravating factor 3, simply making the conclusory statement: "the Court finds in this case are aggravating factor three, the risk that this Defendant will commit another offense." (13T 19-15 to 16) But it is improper for a court to fail to explain the factual basis for an aggravating factor. Case, 220 N.J. at 65 ("trial judges must explain how they arrived at a particular sentence") (emphasis added); R. 3:21-4(h) ("At the time sentence is imposed the judge shall state reasons for imposing such sentence including. . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence") (emphasis added).

Second, the court failed to make sufficient factual findings to support aggravating factor 9. The entirety of the court's finding of this factor was: "And aggravating factor nine, the need to deter this Defendant and others from this type of seemingly senseless violence." (13T 19-19 to 21) The court failed to explain why it found this factor, let alone how much weight it was giving this factor. The court failed to distinguish between general and specific deterrence or explain why there was a particular need to deter Moore, especially where he was subject to a minimum sentence of 30 years in prison. See Case, 220 N.J. at

68 (2014) (reaffirming "that general deterrence unrelated to specific deterrence has relatively insignificant penal value," and remanding for resentencing due to the trial court's failure to adequately address specific deterrence) (quoting State v. Jarbath, 114 N.J. 394, 405 (1989)).

Insofar as the court's finding of aggravating factor 9 rested on the violent nature of the crime itself, that is not an appropriate basis for finding an aggravating factor. The role of aggravating and mitigating factors in the Code is to identify "individual circumstances which distinguish the particular offense from other crimes of the same nature." State v. Yarbough, 195 N.J. Super. 135, 143 (App. Div. 1984), mod. 100 N.J. 627 (1985). To find a need to deter in a murder case because it's a murder case constitutes inappropriate double counting rather than the proper finding of an aggravating circumstance that distinguishes the case from other murders. See State v. Kromphold, 162 N.J. 345, 353 (2000) (noting that "the Legislature had already considered the elements of an offense in the gradation of a crime," and that if courts also considered those same elements at sentencing, "every offense arguably would implicate aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating circumstances"); Carey, 168 N.J. at 424 (noting that a remand for resentencing is required "when the trial court double counts or considers an improper aggravating factor").

Third, without explanation, the court found conflicting aggravating and mitigating factors. The court found aggravating factors 3, the risk of reoffense, without any explanation, and 6, criminal history, based on Moore's juvenile record. (13T 19-14 to 18) Yet the court also found mitigating factor 7, as this was Moore's first indictable conviction. (13T 19-22 to 25) As our Supreme Court has held, these aggravating and mitigating factors conflict and, though they can all be found together, a sentencing court must provide a clear explanation for the basis of these factors. Case, 220 N.J. at 67. Such an explanation is entirely lacking in this case.

Overall, the court here sentenced a 19-year-old first-time offender to 35 years in prison, without providing any explanation for the basis of this lengthy sentence. As our Supreme Court has repeatedly recognized, a sentencing court's failure to explain its findings as required by law divests the sentence of deferential review and requires a remand for resentencing. Case, 220 N.J. at 65. Moore's sentence should be vacated and remanded for a full resentencing at which the court fully considers and explains its sentence.

CONCLUSION

For the reasons set forth in this brief, defendant's convictions should be reversed, or, alternatively, his sentence should be vacated and remanded for resentencing.

STATE OF NEW JERSEY, :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Respondent, :	DOCKET NO. A-2476-22
v. :	
ZAHIR D. MOORE, :	CRIMINAL ACTION
Defendant-Appellant. :	On Appeal from a Judgment of Conviction entered in the Superior Court, Law Division Essex County.
	Sat Below: Hon. Ronald D. Wigler, J.S.C. Hon. Patrick J. Arre, J.S.C., and a Jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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Procedural History

For the purposes of this appeal, the State adopts defendant's recitation of the procedural history of this matter.[1] (Db3-4).

Counterstatement of Facts

In the afternoon of September 29, 2019, defendant murdered his long-time friend Waleik McCullum, by shooting him in the head and chest—just outside of his home in Newark. (7T26:19-22).

Richard McCullum, Waleik McCullum's father, testified that on September 29, he was at the home he shared with his girlfriend, son, stepsons, and McCullum's girlfriend Khaliyah Prosser, watching a football game. (6T171:15-16, 177:2-3).

Around 3:50 p.m., he heard "around five" gunshots, followed by Prosser screaming. (6T40:15 to 41-13). Prosser testified that she was inside when McCullum was shot, and, though she heard gunshots and ran to the balcony to see what was happening, she did not see who shot the victim. (7T 123-20 to 22, 124-4). The victim's father testified that a neighbor knocked on his door and urged him to come outside. (6T 40-15 to 41-13). When he got outside, he saw his son on the ground, having been shot in the head. (6T 41-14 to 20).

[1] The State also adopts defendant's transcription codes. (Db3).

Richard began calling his son's name to try to rouse him and asked him what happened. Richard testified that his son responded, and his last words were "[t]hat Pee-wee shot him." (6T 68-2 to 4; to 24,). Richard did not know who "Pee-wee" was at that time. (6T 41-21 to 24).

It was undisputed at trial that "Pee-wee" was defendant's nickname. Richard did not report the dying declaration to police officers who responded to the scene. (6T 43-20 to 25). While Richard testified he did not think that the officers did not speak to him at the scene, a clip from a responding officer's body-worn camera was played at trial during which the officer asked Richard what happened, and he said he did not know. (9T 37-20 to 38-16, 54-17 to 55-3, 71-1 to 14).

An ambulance arrived, and Richard accompanied his son to the hospital. (6T44 7-14). Sometime later, after defendant's death, Richard, Prosser, and defendant's mother went to the prosecutor's office to speak with officers. (6T 47-10 to 13, 47-6 to 48-5). Richard testified that at this meeting, he "was asked did I know anything or was anything said to me and I told what was told to me," (6T 47-23 to 25), and agreed with the State that "Pee-wee's name was out there" after this meeting. (6T 48-3 to 5). However, he also acknowledged that the first time he directly told police about his son's dying declaration was in his formal, recorded

statement on October 21 — after Richard had seen an online news story with Moore's name and picture indicating that defendant had been arrested and charged with murder. (6T73:9-17, 74-5 to 75-22).

Richard testified that he learned defendant's real name from an online news story, though he recognized defendant's face, and particularly his blue eyes, from seeing defendant regularly hang out with his son. (6T52:16 to 21, 53-7 to 54-1). The State's also presented the testimony of witness Christopher Diaz, at trial. Diaz testified that on September 29, he was getting ready for work when he heard gunshots coming from right outside his window. (6T89:8-13, 89-21 to 23).

Diaz peeked out his window and saw "a man holding a gun[,] shooting." He described the man as roughly "5'6" or probably one or two inches taller," "[d]ark-skinned," wearing a sweatsuit that was "probably gray maybe." (6T90:1 to 16; 91-10 to 19, 93-8 to 12). Defendant is 5'9'', well within Diaz's estimation.

Diaz testified that he could not see who the person was shooting at and that there was another person standing next to the shooter, but "I don't remember what [the person next to the shooter] looked like." (6T 94-6, 94-10 to 16). Diaz estimated that the shooter was about 14 feet away from his window. (6T96 1-15). He testified that after the shooting,

the man went across the street and fled. A few days after the victim's death, Essex County Homicide Task Force Detectives Norman Richardson and Suzanne Looges returned to re-canvas the area of the shooting. (8T 44-18 to 24)

They knocked on Diaz's door, and he initially told them he had not seen anything. He then caught up with them when they were across the street and told them that he did have information for them. (6T 98-24 to 99-12, 101-23 to 102-5; 8T 45-15 to 46-23). Richardson testified that Diaz said that he knew the victim, had witnessed the shooting, and provided a description of the shooter. (8T 47-7 to 23; see also 6T 102-10 to 22).

Richardson prepared a photo array for Diaz, and in preparing the array, he colored Moore's distinctive blue eyes so that Moore's photo did not stand out from the others. (8T:52-23 to 53- 12). Diaz came to the police station the next day and was shown a photo array by Detective Cherilien, who was not involved in the investigation, and acted as a "blind administrator." (6T103:3-8, 103-21 to 23; 7T6:13-15; 8T48:8 to 10.) Diaz looked through all six photos but did not pick any initially. (6T 111-18 to 112-1). The detective then asked Diaz if he wanted to see the photos again, and on his second viewing, Diaz identified Moore's

photo as the shooter. (6T111:9-11, 111-18 to 112-1, 141-8 to 16, 142-9 to 22; 7T87:4-7). Admittedly, Detective Cherilien did not record how confident Diaz was in his selection. (7T 103-1 to 3)

On October 15, a little over two weeks after the shooting, police arrested Moore for the murder. (7T 150-19 to 151-8, 151-25 to 152-1) The arresting officer testified that when he first approached defendant, he fled, though he was later apprehended and taken into custody. (7T 155-25 to 156-2). The officer testified that he recognized defendant because of his blue eyes. (7T159:17-22). Following Moore's arrest, he gave a recorded statement to police in which he admitted he was in the area of the shooting at the time the victim was murdered. (9T19:8-22)

Although Diaz told detectives that he had never seen the shooter before, (6T 146-1 to 18, 165-10 to 19), on cross-examination he admitted that he had seen Moore around the neighborhood a few times before the shooting. (6T145:13 to 17). Prosser confirmed that she saw Moore all the time around that neighborhood, and that sometimes she would hang out with both Moore and McCullum in that neighborhood. (7T142:1-15).

The State introduced the video recording of the identification, and the recording of the procedure was admitted into evidence and played at

trial. (Da40). Additionally, the State introduced multiple photographs of the victim sitting on the front stoop of the multi-family home where Diaz lived, with defendant and another man standing behind the victim. (6T123:4 to 124-20; 7T:130-8 to 131-16). The State also introduced various surveillance videos from the day of the shooting. (8T72:5 to 75-4). The State argued in summation that the videos showed Moore, wearing a gray sweatsuit, walking towards the area where the shooting happened. (9T88:3 to 98-20).

The trial court, aware of the Supreme Court's dictates regarding identification and its limitations, properly instructed the jury that, "[l]esser degrees of familiarity do not enhance accuracy and may, in fact, decrease accuracy of the identification" because of "[u]nconscious transference." In particular, "studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a Defendant may unconsciously transfer a familiar Defendant to the role of a criminal perpetrator in their memory." (9T 131-7 to 132-12). After being charged, the jury returned a guilty verdict on all counts of the indictment.

Legal Argument

Point I

A Wade Hearing Was Not Necessary.

Defendant contends that the trial court erred in denying defendant a United States v. Wade, 388 U.S. 218 (1967), hearing, due to the alleged possibility of witness misidentification, and that the trial court erred in allowing the witness to provide a confidence statement as to identification of the defendant . (Db11). These contentions are wholly without merit. The State addresses each contention in turn.

A. The Trial Court Was Within Its Discretion In Denying a Wade Hearing

Defendant first argues that the trial court erred by not granting a Wade hearing, alleging Diaz was somehow swayed by Detective Cherilien asking Diaz if he would like to see the photographs again. (Db12). Defendant pronounces that Diaz was "demanded" to make a conclusive identification, which is wholly unsupported by the record, which shows no such demand. Thus, defendant's argument is without merit.

A trial court may hold a Wade hearing pursuant to N.J.R.E. 104(a) to determine whether a pretrial identification of a criminal defendant was properly conducted and therefore admissible under N.J.R.E. 803(a)(3). However, the right to a Wade hearing is not absolute, and a hearing is not

required in every case involving an out-of-court identification. State v. Ruffin, 371 N.J. Super. 371, 391 (App. Div. 2004). Appellate courts review the denial of a Wade hearing for an abuse of discretion. Ibid. "A threshold showing of some evidence of im-permissive suggestiveness is required." Ibid. Our Supreme Court has described impermissible suggestibility as:

> the determination [of impermissible suggestibility] can only be reached so as to require the exclusion of the evidence where all of the circumstances lead forcefully to the conclusion that the identification was not actually that of the eyewitness, but was imposed upon him so that a substantial likelihood of irreparable misidentification can be said to exist.
>
> [State v. Madison, 109 N.J. 233, 234 (1988).]

In State v. Henderson, 208 N.J. 208, 218 (2011), the Court outlined a "non-exhaustive list" of factors that weigh on suggestiveness. They include:

> 1. Blind Administration. Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" described above, to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?
>
> 2. Pre-identification Instructions. Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?
>
> 3. Lineup Construction. Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

> 4. Feedback. Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?
>
> 5. Recording Confidence. Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?
>
> 6. Multiple Viewings. Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?
>
> 7. Showups. Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?
>
> 8. Private Actors. Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?
>
> 9. Other Identifications Made. Did the eyewitness initially make no choice or choose a different suspect or filler?
>
> [Id. at 218-219.]

Here, as noted, there is no contention the identification was administered blindly, with "neutral" pre-identification instructions, in a properly constructed lineup, without the witness receiving feedback, in a non-"show-up" setting. Ibid. Defendant takes issue, primarily, with the fact that police did not record a confidence level from the witness. (Db18). Defendant then conflates the lack of a confidence statement with purported feedback from the officer, as the officer inquired whether the witness was making a positive identification,

based on the witness's initial statement: "Yeah. I think it was [photo] 3." (Da34; Da40 at 3:44:20 to 3:44:41).

Defendant's argument is too clever by half and attempts to have it both ways. Specifically, defendant alleges the statement by the officer, perhaps unartfully, requesting the defendant state whether they were certain—as mandated by Henderson—the defendant twists into the incongruous assertion that the request for a confidence level was somehow "feedback." (Db38). As noted, our Supreme Court defined feedback quite clearly, as whether "the witness receive[d] any information or feedback about the suspect of the crime, before, during, or after the identification procedure." Henderson, 208 N.J. at 295. The record is bereft of any such "feedback," in the instant matter. Defendant tries to buttress this argument by correctly pointing out that even "innocuous remarks" can be deemed suggestive, but there is simply no allegation any such innocuous remarks were made by the officer.

Moreover, regarding defendant's argument that a repeat showing of the same properly constituted photo array is somehow akin to mugshot exposure wherein, as defined by the Court, mugshot exposure occurs when ""views a set of photos" then at a "later identification procedure" selects someone "depicted in the earlier photos." Id. at 256 (emphasis added). Mugshot commitment occurs when "a witness identifies a photo that is then included in a later lineup

procedure." Ibid. The State does not deny these well enunciated Supreme Court holdings, instead it merely points out there was simply no "later identification procedure." Diaz correctly picked defendant out of a proper photo array in one relatively quick sitting. (Da34).

Tellingly, defendant recites a plethora of well-established case-law when setting the stage for their argument regarding suggestiveness. (Db17). However, once the actual circumstances of the proper photo array procedures are relayed to this Court, in defendant's brief, defendant then shifts to scientific studies, (Db17), that lend themselves more to what the Court deemed "estimator variables." Henderson made clear that "when the likely outcome of a hearing is a more focused set of jury charges about estimator variables, not suppression, we question the need for hearings initiated only by estimator variables." Id. at 295.

Further, this comports well with the trial court's decision to deny a Wade hearing. Specifically, defense counsel urged the need for a Wade hearing based on the argument that asking for confirmation was in fact a backdoor attempt at confirmatory feedback, and that—by counsel's own words—were through the lens of "estimated variables," including cross-racial identification concerns, "weapon focus," and stress. (1T118:22-25). Thus, the court's denial of a Wade hearing, based on the fact that it found the "six-pack

array" as one of the best constructed arrays in the court's entire career trying criminal cases, and the fact that the trial court restated the purpose of a Wade hearing is not to determine "estimated variables," but instead the purpose is to determine if "system variables are present"—all show the court did not abuse its discretion. (1T129:1-9).

Thus, it cannot be said that the trial court abused its discretion in denying a Wade hearing. Therefore, defendant's argument on this issue must be rejected in its entirety.

B. Harmless Error By Trial Court to Allow Confidence Statement.

Defendant contends the trial court erred by allowing Diaz to express a confidence statement. (Db15). This argument is partially correct but is merely harmless error. (Db20-22). Thus, the Court must reject this argument.

The defendant is correct that the confidence of Diaz was not recorded at the time of the photo array. However, an error affecting a defendant's constitutional rights requires reversal unless the appellate court finds it "harmless beyond a reasonable doubt." State v. Cabbell, 207 N.J. 311, 338 (2011). Reviewing courts must consider whether there was "some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. Lazo, 209 N.J. 9, 26

(2012). In doing so, appellate courts independently assess the quality of the evidence of defendant's guilt. State v. Sterling, 215 N.J. 65, 102 (2013).

There can be no reasonable doubt that had the photo identification been excluded, the jury would have reached the same conclusion. The photo identification was not an essential element of the State's case. Cf. Lazo, 209 N.J. at 26 (refusing to find harmless error where the conviction rested solely on the challenged identification evidence). To the contrary, the State presented strong compelling evidence of a dying declaration identifying defendant as the shooter, corroborating testimony from the father of the murder victim, corroborating testimony by an additional witness Ms. Prosser, and the video surveillance corroborating the victim's father's accounting of the events immediately following the murder of his son. (9T:90-106). Assuming arguendo the trial court should have exercised the confidence statement by Diaz, there is still no doubt the jury would have reached the same verdict.[2] Sterling, 215 N.J. at 102.

[2] The State notes that Diaz's identification itself would need not be excised, just simply Diaz's expression of 100% confidence. State v. Anthony, 237 N.J. 213, 238 (2019) (stating our Supreme Court has not "created bright-line rules that call for the 'suppression of reliable evidence any time a law-enforcement officer makes a mistake'"); Henderson, 208 N.J. at 298 (holding trial courts proper remedy is to use their "discretion to redact parts of identification testimony").

There can be no reasonable doubt that had the confidence statement had been excluded, the jury would have reached the same conclusion.

Point II

The trial court did not abuse its discretion in admitting the dying declaration of the victim.

Defendant contends the trial court erred by allowing the admission of the victim's final words to his father, as he lay dying from defendant's shooting. (Db22). This argument is wholly without merit.

Despite defendant's claims to the contrary,(Db24), a trial court is vested with considerable latitude in determining whether to admit evidence, and that determination will only be reversed on appeal if it constitutes an abuse of discretion. State v. Kuropchak, 221 N.J. 368, 385 (2015); State v. Rose, 206 N.J. 141, 157 (2011); State v. Marrero, 148 N.J. 469, 484 (1997). Appellate courts do "not substitute their judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" Kuropchak, 221 N.J. at 385 (quoting Marrero, 148 N.J. at 484).

Generally, hearsay statements are inadmissible as evidence. N.J.R.E. 802. Certain exceptions to the hearsay rule apply, however, if a declarant is unavailable. N.J.R.E. 804. One such exception is an unavailable declarant's statement made "under belief of imminent death"—commonly referred to as a "dying declaration." N.J.R.E. 804(b)(2). Under this exception, "a statement

made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death." Ibid.

When assessing the admission of a dying declaration, courts refer to:

> all the attendant circumstances . . . including [1] the weapon which wounded him, [2] the nature and extent of his injuries, [3] his physical condition, [4] his conduct, and [5] what was said to and by him. Whether the attendant facts and circumstances of the case warrant the admission of a statement as a dying declaration is [a decision] . . . for the court.
>
> [State v. Hegel, 113 N.J. Super. 193, 201 (App. Div. 1971).]

Here, the court heard the proffer of the State, that defendant and the victim were long-time friends, and video evidence demonstrated the victim seeing defendant "coming at him with a gun, and [the victim] runs away from that happening," the direction from which defendant shoots the victim. (1T78:17-25). This met the enumerated circumstance of the victim's knowledge of the weapon that "wounded him." Ibid. The State pointed out the fallacy in defendant's opposing argument that body-worn-camera footage from police officers did not pick up audio of the declaration, because the victim's father was by his dying son's side, for approximately "four or five minutes" before police arrived. (1T91:16-25).

The court ultimately admitted the dying declaration because it found the victim's father's delay in reporting the dying declaration was a product of "human nature," specifically:

> A parent who was confronted with their child who was just shot in the head, bleeding, and may very well expire, yes, obviously, those were the words he had mentioned and then, you know, the word -- and then the [victim] said Peewee and he said, well, how is Peewee, I would have to imagine as a parent, the first -- and the only thing that probably was [the father's] mind during this whole incident was saving his son, the wellbeing of his son. I mean, yes, he did ask this, but I have to imagine that's only very secondary or thereafter to -- for the love of god, please save my son. I don't want my son to die..... You know, as far as fabrication goes, if Mr. McCollum wanted to fabricate a statement when he asked who did this and [the victim] said Peewee, if Mr. McCollum really wanted to fabricate, he probably wouldn't have said Peewee. He probably would have said [defendant's name not a nickname for defendant]. That's who did it, Zahir Moore. He's not going to say Peewee because he didn't know who Peewee was [assuming this was a fabrication.]
>
> [(1T98:1-25).]

Furthermore, the court found that the victim was under the reasonable expectation of death, was asked by his father what happened, and was able to identify the defendant before descending into screams of agony. (1T96:9-23). As the court noted, defendant was still free to cross-examine the victim's father on his purported lying about who his son identified his killer as, and that ultimately it would be "a jury's call to be able to make that determination whether or not the statement was or wasn't said." (1T99:9-17). Against this

thorough analysis by the court, it cannot be said that the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" Kuropchak, 221 N.J. at 385 (quoting Marrero, 148 N.J. at 484).

Additionally, defendant's argument in the alternative, that a specific jury instruction should have been crafted by the trial court regarding the dying declaration, is without merit. Notably, no timely objection was made, so [reviewing courts] must determine whether the comment was "clearly capable of producing an unjust result." R. 2:10-2. The possibility of such an unjust result must be "'one sufficient to raise a reasonable doubt as to whether the error led the jury to the result it otherwise might not have reached.'" State v. Benedetto, 120 N.J. 250, 261 (1990) (quoting State v. Macon, 57 N.J. 325, 335 (1971)).

Even within defendant's recitation of the relevant law, (Db28), defendant cites to cases that are not analogous to the present matter. Specifically, defendant cites State v. Frey, 194 N.J. Super. 326, 329 (App. Div. 1984), for the Court's holding there that "[t]he absence of any eyewitness other than the victim and defendant's denial of guilt, made it essential for the court to instruct the jury on identification."

Defendant seems to forget the case at bar is not one in which the victim was the only eyewitness, despite his frustration that Diaz positively identified

him as the shooter. (Da40; 3:44:20 to 3:44:41.) Moreover, the record reflects that the trial court did in fact instruct the jury—extensively—on the risks associated with memory and misidentification. Specifically, the trial court instructed for over 8 pages of the trial transcript following the model jury charge on identifications, (9T:129-137); crucially touching on each of the requested items complained of in defendant's brief, including the "impacts of stress," weapons focus, and the fact that

> [t]he ultimate question of reliability of the out of court identification is for [the jury] to decide, and to decide whether the identification testimony is sufficiently reliable evidence to conclude that this defendant is the person who committed the offenses charged, you should evaluate the testimony of the witness in light of the factors focusing on credibility that I've already explained.
>
> [(9T126:19-25).]

Defendant is thus simply arguing that the jury should have been charged with the same jury-instruction twice—as to identification. (Db30). It is at best mere speculation, and thus defendant ignores the fact that failure to repeat the same identification jury charge undoubtedly did not lead "the jury to the result it otherwise might not have reached.'"[3] Benedetto, 120 N.J. at 261 (quoting Macon, 57 N.J. at 335).

[3] Additionally, it is well-established that there is a presumption juries will follow the "given instructions." State v. Loftin, 146 N.J. 295, 390 (1996).

Thus, defendant's argument in the alternative on this point must be rejected in its entirety by this Court.

Point III

The Trial Court Did Not Err in Its Admission of Testimony.

Defendant contends the trial court erred by purportedly admitting "implied hearsay" from non-testifying witnesses, that somehow allegedly bolstered the State's case. (Db31). No such "implied hearsay" was admitted, and thus this claim is wholly without merit.

Defendant specifically complains of testimony from Detective Richardson and Detective Brown. Detective Richardson permissively testified as to his investigative steps, as did Detective Brown. Because defense counsel only objected to Detective Brown's remarks, the State addresses the objected to remarks first. (Db32).

"[B]oth the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." State v. Branch, 182 N.J. 338, 350 (2005). Our Supreme Court has explained that the "common thread" running through Confrontation Clause jurisprudence

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Hence, it is illogical to assume jurors would disregard identification instructions when it came to different witnesses.

"is that a police officer may not imply to the jury that he [or she] possesses superior knowledge, outside the record, that incriminates the defendant." Id. at 351. In addition, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." State v. Bankston, 63 N.J. 263, 271 (1973).

Here, Detective Richardson testified he was provided with the nickname, physical description, and ultimately the name of defendant after speaking with Detective Brown. (8T34:9-17). The logical inference to be drawn here is that Detective Brown provided him with the information. However, this was permissible, given Detective Brown was a testifying witness, subject to cross-examination, and thus fully incongruent with the notion a jury would believe "a non-testifying witness has given the police evidence," when in fact that purported witness testified, and was subject to cross-examination. Ibid.; (8T151:1-25).

Defendant next takes issue, although not raised below, with the fact that Detective Brown testified that he spoke with "family members [of the victim] at the hospital," and that he came away with a "nickname" of the then still unidentified murderer. (8T168:4-9). The State notes this was not objected to and is thus reviewed for plain error. R. 2:10-2.

Read in isolation, Brown's remarks could appear to be problematic. However, given the context—a re-cross examination by defense counsel, counsel invited the purported "implied hearsay," by repeatedly questioning Brown regarding his report and whether Brown got "the name of Pee-Wee" from the victim's father. (9T169:20-21). And in response to this question by the defense, Brown answered "family members of" the victim, provided him with the nickname. (9T169:22). Defense counsel appeared to be focused on advancing defendant's theory of the case, that is the victim's father fabricated the dying declaration.

The State therefore submits this is a textbook example of invited error. "The doctrine of invited error does not permit a defendant to pursue a strategy . . . and then when the strategy does not work out as planned, cry foul and win a new trial." State v. Williams, 219 N.J. 89, 101 (2014). "Under that settled principle of law, trial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal[.]" State v. A.R., 213 N.J. 542, 561 (2013). Indeed, rather than objecting to testimony elicited from Brown by the State, the defense "acquiesced" to the State's line of questioning of Brown, and then doubled down and "pursued a strategy" of advancing the notion the victim's father fabricated his story. Ibid.; Williams, 219 N.J. at 91.

Specifically, the record reveals the following was elicited on re-cross examination:

> Q. You just testified that when you left the hospital you had a name, a nickname: correct?
>
> A. Yes. Yes.
>
> Q. And that nickname was Pee-wee?
>
> A. Yes.
>
> Q. That didn't come from the victim's father; correct?
>
> A. I can't remember who exactly gave the name Pee-wee, but I remember the family, they were all together with me.
>
> Q. They were all there together?
>
> A. They were all there together and they gave the name Pee-wee.
>
> Q. Okay. You wrote a report in this case; right?
>
> A. Yes, ma'am. ….
>
> Q. Without getting into who that information came from, there's nowhere in that report that it says the dad gave that information; correct?
>
> A. Specifically the dad, no.
>
> Q. Right. But there is information in that report about who gave you the name Pee-wee; correct?
>
> A. It was the family members of [victim], yes.
>
> [(8T168:23 to 169:22).]

Hence, the defendant chose to advance this line of questioning as part of "strategy," that is to impugn the victim's father's truthfulness regarding the dying declaration, but that "strategy [did] not work out as planned," and defendant is barred from "cry[ing] foul and win[inng] a new trial." Williams, 219 N.J. at 91.

Therefore, these statements are a far cry from the implied hearsay our Supreme Court has consistently stated is not admissible. Cf. State v. Irving, 114 N.J. 427, 446 (1989) (finding improper a police officer's testimony that after he canvassed the neighborhood looking for leads, "he focused on the defendant as the subject of his investigation and placed his picture in the [photo] array"). Thus, defendant's argument on this point must be rejected in its entirety.

Point IV

The Prosecutor's Summation Was Proper.

Defendant argues that the State allegedly shifted the burden from the State to the defendant through supposed "name calling." (Db37). Defendant further contends the State shifted the burden through commentary, in the State's summation, on the defendant's cross-examination of Prosser. These contentions similarly lack merit. Although defendant complains of three purported problematic comments, the State notes only one was objected to

below. Thus, the State addresses the objected to remarks first, followed by the remarks defense counsel had no issue with at trial.

Defendant first takes issue with the State's response to the defendant's attacks of Prosser's credibility on cross-examination. (Db39). As noted, one of defendant's issues as to the State's response to the credibility was not objected to below and will thus be addressed in turn. The objected to remark, "where was the got you moment," (9T86:13-21), was in direct response to defendant's own admission "defense counsel sought to cast doubt on Diaz's identification of Moore in part by pointing to testimony from McCullum's girlfriend from Prosser that she had spoken to someone in the building in which Diaz lived." (Db39).

"[I]t is well-established that prosecuting attorneys, within reasonable limitations, are afforded considerable leeway" in closing arguments. State v. Wakefield, 190 N.J. 397, 443 (2007) (quoting State v. DiFrisco, 137 N.J. 434, 474 (1994)). "'A prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence. There is no error so long as he confines himself in that fashion. Ultimately it was for the jury to decide whether to draw the inferences the prosecutor urged.'" State v. R.B., 183 N.J. 308, 330 (2005) (quoting State v. Carter, 91 N.J. 86, 125 (1982)). Further, "[a] prosecutor is not forced to idly sit as a defense attorney attacks the credibility

of the State's witnesses; a response is permitted." State v. Hawk, 327 N.J. Super. 276, 284 (App. Div. 2000). "Generally, remarks by a prosecutor, made in response to remarks by opposing counsel are harmless[.]" Id. at 284-85.

Against these principles, defendant's argument lacks merit. Read alone, the remark may be objectionable, however in the context of directly responding to the defendant's assertion this was all a conspiracy that Prosser helped engineer to ensnare the defendant, as the prosecutor was doing, in pertinent part just before the objection:

> Why wouldn't she say she was there, too? I saw him. I saw Pee-wee. I know him. I've known him. I've ridden in cars with him. I saw him kill my boyfriend. That's the man. Why don't you think she said that's the man who killed him? She didn't do that. But if this was a conspiracy, if she was out to get him, why wouldn't she have also said, yeah, I heard the loud dying declaration. I heard him say his last words were Pee-wee. I was there, too. You saw on the video, she's right there. If she's trying to frame the Defendant, don't you think that she would have done more? She doesn't know that the video is out there. Why wouldn't she have gone all out? Why wouldn't she have gotten -- why wouldn't Richard McCullum also say he saw the whole thing?...
>
> [(9T104:6-22).]

This is not burden shifting, this is very simply, "remarks by a prosecutor, made in response to remarks by opposing counsel" and thus at most "harmless." Ibid. Given the credibility of Prosser "was under attack" a "response was permitted," and it cannot be said pointing to holes in the

defendant's alleged theory of Prosser having it in for him is burden shifting. Id. at 284.

Turning to the non-objected to, purported problematic comments, defendant takes issue with another portion of the State's response to the attacks on Prosser's credibility, specifically the prosecutor's questioning the jury as to the defense's line of questioning, "[w]hy didn't you ask that follow up question; hey, who at [the residence] did you talk to? Maybe because you don't want the right answer that you're going to expect to get." (9T86:13-21).

Our Supreme Court has reiterated, "[g]enerally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." R.B., 183 N.J. at 333. Further, when no timely objection was made, the reviewing court must determine whether the comment was "clearly capable of producing an unjust result." R. 2:10-2. The possibility of such an unjust result must be "'one sufficient to raise a reasonable doubt as to whether the error led the jury to the result it otherwise might not have reached.'" Benedetto, 120 N.J. at 261 (quoting Macon, 57 N.J. at 335).

It is difficult to imagine a more textbook situation of a "prosecutor not sitting idly by" than the prosecutor directly responding to the attack on the credibility of the State's witness. Hawke, 327 N.J. Super. at 284-85. The prosecutor's comments were a relaying of the reasonable inference of the

evidence that yes, the defense counsel elicited testimony from Prosser that she spoke to someone at Diaz's residence, but the prosecutor accurately—from the "record" is pointing out the "logical inference" that defense counsel did not ask Prosser if she spoke to Diaz and in any way attempted to sway his identification of defendant as the killer. R.B., 183 N.J. at 380. Thus, this non-objected to remark clearly cannot constitute plain error.

Finally, defendant attempts to conflate an inelegant, non-objected to remark, of the prosecutor, to calling the defendant—specifically—"the devil." Defendant attempts to analogize the comment to a wholly separate comment this Court found wholly impermissible in State v. Gregg, 278 N.J. Super. 182, 190 (App. Div. 1994), wherein the prosecutor painted the defendant as a "contemptible and despicable person." Here, the prosecutor was far from calling the defendant a devil, instead while displaying a photo to the jury, he stated:

> [The victim's] sitting on the porch where the witness who ID's him lived, near three feet through that brick wall. That's right where he was shot. That's right where the shell casings were, and his girlfriend took the photo. Everything that would play out that next day is captured right in that photo and nobody realized it. No conspiracy, no inception, no fabrication. Just an innocent photo, capturing the last happy moments of a young man's life, not knowing the devil behind him, what's to come.
>
> [(9T75:17-25).]

Obviously, it was a fair inference from the record that defendant did not know he was going to die the day following the photograph being taken, and thus it is hard to square defendant's failure to object at trial with the notion this inelegant statement in any way suggested defendant was the devil. See R.B., 183 N.J. at 333. Instead, it refers to where the witness was in relation to the victim and defendant, shows corroboration that Prosser knew defendant was friendly with her boyfriend, and reiterates the obvious: defendant did not know death would come for him the following day. Thus, at most the remark is harmless error, and the argument should be rejected in its entirety.

Point V

Cumulative Error Was Not Present In This Matter.

Defendant next argues that based on the previously raised issues, the doctrine of cumulative error should apply. (Db41). This argument is also wholly without merit. Additionally, as same was not raised at trial, this Court reviews the same for plain error. R. 2:10-2.

"A defendant is entitled to a fair trial but not a perfect one." State v. Weaver, 219 N.J. 131, 155 (App. Div. 2014) (quoting Wakefield, 190 N.J. 397, 537 (2007)). "In some circumstances, it is difficult to identify a single error that deprives defendant of a fair trial." Id. at 160. "Where any one of several errors assigned would not in itself be sufficient to warrant a reversal, [but] all

of them taken together justify the conclusion that [the] defendant was not accorded a fair trial, it becomes the duty of this court to reverse." Id. at 155 (quoting State v. Orecchio, 16 N.J. 125, 134 (1954)). "If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply[, however,] where no error was prejudicial, and the trial was fair." Ibid. Each asserted error is thus assessed in light of the strength of the State's case. See ibid.

Thus, progressing through each of defendant's complained of purported errors, the common theme is the pointed strength of the State's case, and the fact that none of the complained of purported errors was prejudicial. To wit, defendant first complained of the need for a Wade hearing, but as mentioned in Point I of this brief, Henderson made clear that "when the likely outcome of a hearing is a more focused set of jury charges about estimator variables, not suppression, we question the need for hearings initiated only by estimator variables." Id. at 295. And here, by defense counsel's own argument, the focus was on "estimated variables," including cross-racial identification concerns, "weapon focus," and stress. (1T118:22-25). Thus, no error was present there.

Regarding the dying declaration, as noted, in determining whether to admit the testimony, broad discretion is given to the trial court, and here the

court properly exercised its discretion admitting the dying declaration under the direction set forth by Hegel, 113 N.J. Super. at 201. Moreover, the defendant's argument that a repetitive jury instruction can also not even be considered error in any sense—given the fact that failure to repeat the same identification jury charge undoubtedly did not lead "the jury to the result it otherwise might not have reached.'" Benedetto, 120 N.J. at 261 (quoting Macon, 57 N.J. at 335).

The "implied hearsay" argument advanced by defendant, as noted, similarly was not error as to Detective Richardson's discussion of his conversation with Detective Brown, because Detective Brown testified and was thus open to cross-examination. Further, any error by admitting Detective Richardson's testimony as noted fell within the invited error doctrine, based on defense's doubling down and asking for information from Detective Richardson that may have included "implied hearsay." See Williams, 219 N.J. at 91.

Further, as stated in the pervious point heading, the remarks by the prosecutor were all in either: (1) reference to an attack on Prosser's credibility, and thus generally "deemed harmless," or (2) the prosecutor commenting on and making inferences from items in the record. R.B., 183 N.J. at 380; Hawke,

327 N.J. Super. at 284-85. Thus, the unobjected to below argument of cumulative error is without merit.

Point VI

The Trial Court Did Not Err in its Jury Charges.

Defendant contends the trial court erred by failing to charge the jury as to all elements of the offense of possession of a handgun without a permit. N.J.S.A. 2C:39-5(b). (Db42). This argument is without merit, as the record reveals the trial court did in fact charge the jury to all elements of the offense, merely failing to explain the self-explanatory final element. Additionally, this argument was not raised below, and the method of the charges was consented to by defense counsel, thus same is reviewed by this Court for plain error. R. 2:10-2.

The trial court very clearly instructed the jury as to the third element of the offense, specifically the lack of defendant having a permit to legally own the handgun. (9T152-5 to 6). Additionally, at the charge conference, defense counsel stated "I don't have an objection to the testimony that he ran a search and the search did not reveal any application for a permit being issued." (9T34-2 to 19; 9T35-8 to 11).

Defendant's arguments to the contrary are unavailing. Simply put, leaving out an explanation of what "not having a permit" is undoubtedly differentiable from completely leaving out the third element of the offense.

The lack of an explanation of "not having a permit" could not possibly lead "the jury to the result it otherwise might not have reached.'" Benedetto, 120 N.J. at 261 (quoting Macon, 57 N.J. at 335).

Thus, defendant's arguments on this point must be rejected in their entirety.

Point VII

The Court Did Not Err In Sentencing.

Defendant additionally contends the trial court erred by purportedly failing to provide any explanation for the respective aggravating factors it found. (Db45). This argument is without merit.

Defendant asserts that the trial court incorrectly found aggravating factors 3, risk of re-offending; 6, defendant's prior record; and 9, the need to deter. (Db45). Additionally, defendant takes issue with the 35-year prison term, arguing the factors were incorrectly balanced by the trial court. (Db46).

Our Supreme Court has reiterated the well-settled principle that "[a]n appellate court may not substitute its judgment for that of the trial court." State v. Johnson, 118 N.J. 10, 15 (1990). Appellate courts may review and

modify a sentence when the trial court's determination was "'clearly mistaken.'" State v. Jabbour, 118 N.J. 1, 6 (1990). However, appellate courts are "bound to affirm a sentence, even if [they] would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." State v. O'Donnell, 117 N.J. 210, 215 (1989). A remand is required if the finding of the respective factors is not "supported by substantial evidence in the record." Ibid.

Indeed, the evidence in the record was quite substantial. The trial court's finding of aggravating factors 3, 6, and 9 were well supported. N.J.S.A. 2C:44-1(a)(3), (6) and (9). Specifically, regarding factor 3, the threat of reoffending, the record reflects the court noting defendant's escalating record of law-breaking including "Aggravated Assault on a Law Enforcement Officer, Resisting Arrest, Criminal Mischief and Receiving Stolen Property, and a Violation of Probation. He was also placed on probation, which resulted in one violation. In addition, he received 18 months' probation and one year probation respectively for those charges." (13T19:5-11).

Further, the court gave little weight to factor 6, his prior record, noting that this was defendant's first indictable conviction. Factor nine, the need to deter, was supported by the court's enumeration of the repeated chances at

probation, and defendant "failed to report on at least five occasions" as well as effectively "liv[Ing] the life he wanted]" with no regard for the consequences. (13T15:1-5). Contrary to defendant's argument, this is no way double counting of the offense. State v. Yarbough, 195 N.J. Super. 135, 143 (App. Div. 1984), rem'd, 100 N.J. 627 (1985).

And there was simply no error in regard to the court's weighing of the two aggravating factors against the mitigating factors of 7 and 14, lack of a criminal record and defendant is under the age of 26. N.J.S.A. 2C:44-1(b)(7), (14). The court explained it gave little weight to factor 7 and was convinced that the aggravating factors outweighed. (13T20:1-16).

The sentencing judge, who was also the trial judge, had to impose a sentence between 30 years and life for the murder of Waleik McCullum. See N.J.S.A. 2C:11-3b(1). After finding and balancing the aggravating and mitigating factors, the judge imposed a 35-year sentence with the remaining counts merged or ran concurrently. (13T18-12 to 21-20). While the judge's findings were brief, defendant fails to show any abuse of discretion in that sentencing decision.

Conclusion

No basis exists to disturb defendant's convictions or his aggregate State Prison sentence. Thus, this Court must affirm.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2476-22T2
INDICTMENT No. 20-01-0033-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Essex County.
ZAHIR D. MOORE,	:	
		Sat Below:
Defendant-Appellant.	:	
	:	Hon. Ronald D. Wigler, P.J.Cr.,
	:	Hon. Patrick J. Arre, J.S.C., and a Jury.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

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[1] The defense brief in support of its motion for a Wade hearing is submitted because the question of whether an issue was raised below is germane to the appeal. R. 2:6-1(a)(2).

REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Zahir Moore relies on the procedural history and statement of facts from his initial brief.

LEGAL ARGUMENT

Moore relies on the arguments from his initial brief and adds the following.

POINT I

THE COURT ERRED IN DENYING A WADE[2] HEARING AND IN ALLOWING THE WITNESS TO PROVIDE A CONFIDENCE STATEMENT AT TRIAL.

In his initial brief, Moore argued that the trial court erred in denying a Wade hearing because he had presented some evidence of suggestiveness in the identification procedure: (1) that the detective administering the photo array did not accept that Diaz did not recognize anyone and instead asked Diaz if he wanted to look at all the photos a second time; and (2) asking Diaz to make a conclusive "yes or no" identification rather than neutrally asking how confident Diaz was, in Diaz's own words. (Db 12-19)[3] Additionally, Moore argued that impermissibly allowing Diaz to express his confidence in his identification at trial, when he did not do so during the identification procedure, was harmful error. (Db 19-21) In response, the State argues that there was no need for a Wade hearing and no reversible error in admitting

[2] United States v. Wade, 388 U.S. 218 (1967).

[3] Defendant adopts the abbreviations from his initial brief. In addition, Sb refers to the State's brief, and Ra refers to the Reply appendix.

Diaz's confidence statement at trial. This Court should reject the State's arguments.

A. The Court Erred In Denying A Wade Hearing.

In responding that there was no need for a Wade hearing, the State makes several errors, rendering its arguments unavailing. As an initial matter, the State misstates the standard for holding a Wade hearing, citing the pre-Henderson standard that has not been in effect for more than a decade: "A threshold showing of some evidence of impermissive suggestiveness is required," where such a showing of impermissible suggestiveness exists only "where all of the circumstances lead forcefully to the conclusion that the identification was not actually that of the eyewitness, but was imposed upon him. . . ." (Sb 8 (citing State v. Ruffin, 371 N.J. Super. 371, 391 (App. Div. 2004) and State v. Madison, 109 N.J. 233, 234 (1988)).

State v. Henderson, 208 N.J. 208 (2011), overruled these cases. As the Supreme Court explained in Henderson, "The hearing revealed that Manson/Madison does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony." Id. at 285. Following the Supreme Court's landmark decision in Henderson, a defendant in New Jersey is entitled to a Wade hearing on the reliability of an eyewitness identification if

he can show "some evidence of suggestiveness that could lead to a mistaken identification." Id. at 288. That suggestiveness does not need to be "impermissible," as the State asserts in its brief.

Here, and contrary to the State's claims, Moore met that low, threshold showing of "some evidence of suggestiveness" because of features of this identification procedure that were in the control of the police: the detective's conduct after Diaz did not recognize anyone, and the detective's conduct after Diaz eventually did pick a photo.

In addition, the State takes issue with Moore's argument that showing Diaz the photos a second time after he failed to identify anyone on the first viewing is suggestive. The State claims that (1) a second viewing is not expressly prohibited by Henderson; (2) the second viewing is an estimator variable not a system variable and therefore cannot trigger a pretrial hearing; and (3) Moore did not challenge the second viewing at the trial level. The first contention is true but irrelevant. The second two are plainly false.

First, it is true that Henderson did not create a bright-line rule barring police from showing photos more than once. (Sb 10-11) But the Court in Henderson recognized that "[t]he factors that both judges and juries will consider are not etched in stone. We expect that the scientific research underlying them will continue to evolve, as it has in the more than thirty years

since Manson." Henderson 208 N.J. at 219. Thus, even if the Henderson Court did not mention the corrupting effects of multiple viewings of a suspect's photo, new scientific research demonstrating those corrupting effects is relevant and must be considered by courts assessing the suggestiveness of an identification procedure. (See Db 13-15)

However, Henderson did discuss how multiple viewings can affect the reliability of an identification. As the Court explained, "[v]iewing a suspect more than once during an investigation can affect the reliability of the later identification," and "successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." Id. at 255. The Court explained that these multiple viewings create risks of "mugshot exposure" and "mugshot commitment." Ibid. As explained in Moore's initial brief, the risks of mugshot exposure and commitment are the exact same whether the multiple viewings occur in different identification procedures, as discussed by the Court in Henderson, or the same identification procedure, as addressed in Moore's brief. (Db 13-17) Therefore, the fact that Diaz looked at the photos in the array more than once is a suggestive procedure that can lead to a mistaken identification. See Nancy K. Steblay et al., Sequential Lineup Laps and Eyewitness Accuracy, 35 L. & Hum. Behav. 262, 271 (2011) (finding

that viewing the same photo array a second time increased the likelihood that witnesses would misidentify the culprit, and "[w]hen the additional lap prompted a decision change from a previous no-choice response to a lineup pick, more often than not this change was an error") (emphasis added).

Second, the State contends that because Moore cited scientific research showing how a second viewing or second lap in the same identification procedure reduces the reliability of the identification, that this second lap is somehow an estimator variable rather than a system variable and therefore insufficient to require a pretrial Wade hearing. (Sb 11) This is wrong. As explained by the Court in Henderson, "[s]ystem variables are factors like lineup procedures which are within the control of the criminal justice system." 208 N.J. at 247. The detective's decision to offer Diaz a second look at the photos was within the control of the criminal justice system. The detective did not need to make such an offer. The fact that he did is not per se impermissible, but it certainly is a variable that affected the reliability of Diaz's identification and therefore needed to be explored at a pretrial hearing on the reliability of the identification.

Third, the State claims that it was not an abuse of discretion to deny the Wade hearing because trial counsel's argument for such a hearing included arguments on estimator variables. (Sb 11-12) But the defense brief in support

of the motion for a Wade hearing included a section on the suggestiveness of the detective's refusal to accept Diaz's initial non-identification and offer to view the array a second time. (Ra 27; see also Ra 7-8)[4] Thus, this issue was raised below, and it was an abuse of discretion for the trial court to fail to hold a hearing given the evidence of suggestiveness presented by the defense.

B. The Improper Admission Of The Witness's Confidence Statement Is Harmful Error.

The State concedes that it was improper for Diaz to testify to that he "was 100 percent certain" in his identification, and to repeat his extreme confidence in response to the prosecutor's question, "Is there any doubt in your mind that that person you picked on three was the person that you saw?" (6T 113-1 to 5, 113-15 to 19; Sb 12-14) However, the State asserts that this error was harmless beyond a reasonable doubt. (Sb 12-14) The State inexplicably claims that "[t]he photo identification was not an essential element of the State's case" such that "[t]here can be no reasonable doubt that had the photo identification been excluded, the jury would have reached the same conclusion. (Sb 13)

[4] The defense brief in support of its motion for a Wade hearing is submitted because the question of whether an issue was raised below is germane to the appeal. R. 2:6-1(a)(2).

But without Diaz's testimony that he was absolutely certain that he saw Moore shoot the victim, the prosecutor's case would have been much, much weaker. The State would have been left with an unreliable dying declaration, some surveillance video that does not show the shooting, and an identification by a witness who first failed to identify Moore as the shooter, and where there was a real risk that the identification was tainted by unconscious transference — where witnesses "who, prior to an identification procedure, have incidentally but innocently encountered a Defendant may unconsciously transfer a familiar Defendant to the role of a criminal perpetrator in their memory." (9T 131-7 to 132-12)

Moreover, the prosecutor's summation demonstrates the falsity of the State's claim on appeal that Diaz's confidence did not matter to the case. Over defense objection, the State asked the jury to consider how long Diaz "stared at" the photo, arguing, "You could cut the tension in the room with a knife. And then he said yes. Why? Because he said he wanted to be sure. He said 100 percent. You don't forget a face." (9T 84-2 to 14 (emphasis added)) The trial prosecutor knew exactly how important Diaz's certainty in his identification would be to the jury; that is why the State twice asked Diaz for that certainty during his testimony, and why the State emphasized that confidence in summation. The State knew that "there is almost nothing more convincing [to

a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" Henderson, 208 N.J. at 237 (internal quotation marks omitted). And the State knew that a witness's confidence in that identification is one of the key factors juries consider in evaluating the reliability of an identification. See Amy L. Bradfield et al, The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 J. Applied Psych. 112, 112, (2002) ("The certainty that an eyewitness expresses in his or her identification is the primary factor that determines whether triers of fact (e.g., judges and juries) will accept the eyewitness's testimony as proof that the identification person is the culprit."). Thus, contrary to the State's claim on appeal, the inappropriate recitation of Diaz's confidence years after the identification procedure was reversible, harmful error. Moore's convictions must be reversed. Alternatively, the case must be remanded for a Wade hearing.

POINT II

THE COURT ERRED IN ADMITTING IMPLIED HEARSAY FROM NON-TESTIFYING WITNESSES THAT IMPLICATED DEFENDANT.

In his initial brief, Moore argued that the trial court erred in admitting implied hearsay from non-testifying witnesses that implicated Moore in the shooting. (Db 31-37) Specifically: (1) Detective Brown testified that he spoke to "family members at the hospital," and that after leaving the hospital, he had "a nickname" — "Pee-wee;" (8T 168-4 to 9, 168-12 to 18); and (2) Detective Richardson testified that after meeting with Brown,

- He had been "provided with a possible name to look into as a potential suspect": "Pee-wee" (8T 34-9 to 17);
- He had "a general description of who this Pee-wee was": "Blue eyes, brown skin, dark brown skin," (8T 34-19 to 35-7);
- He was "provided with another name after meeting with Detective Brown," that that name was "Zahir Moore," and was given a physical description of Moore: "About 5'6", dark brown skin, blue eyes" (8T 35-8 to 19);
- He used this description of Moore to prepare the photo array shown to Diaz. (8T 49-4 to 11)

In response, the State claims that any error with Detective Brown's testimony was invited by defense counsel, and that there was no error with Detective Richardson's testimony because he said he spoke to Detective Brown. (Sb 19-23) The State entirely failed to respond to the error of permitting Detective Richardson to testify as to how and why he assembled the

photo array. The State's arguments should be rejected and will be addressed in turn.

First, Detective Brown's testimony was not invited error. The State elicited the testimony from Detective Brown that after leaving the hospital, he had a nickname – Pee-Wee. (8T 168-14 to 18) This testimony implicated Moore and came from non-testifying, unknown witnesses, in violation of State v. Bankston, 63 N.J. 263, 268-69 (1973) and State v. Branch, 182 N.J. 338, 351 (2005). Defense counsel did not invite this testimony; the information was elicited on the State's redirect of Detective Brown. The defense's attempt to mitigate the harm from Detective Brown's improper testimony by emphasizing that the information did not come from the victim's father did not somehow render the inadmissible testimony invited error. Thus, for the reasons set forth in Moore's initial brief, the improper admission of Detective Brown's testimony that non-testifying witnesses provided information that implicated Moore in the shooting was harmful error, clearly capable of producing an unjust result.

Second, this Court should also reject the State's argument that Detective Richardson's testimony was proper because he got the information implicating Moore from Detective Brown, who testified at trial. (Sb 20) But Detective Brown was not an eyewitness to the shooting. Thus, even if Detective

Richardson got Moore's nickname, name, and physical description from Detective Brown, that information did not originate with Detective Brown. That information implicating Moore came from unnamed witnesses who did not testify at trial. As such, this objected-to inadmissible testimony "impl[ied]to the jury that" the detectives "possess[ ] superior knowledge, outside the record, that incriminates the defendant." Branch, 182 N.J. at 351. In light of the weaknesses with the State's case against Moore, it was extraordinarily unfairly prejudicial for the jury to hear testimony from two police detectives that unnamed people provided information that Moore was the shooter.

The prejudicial effect of this improper testimony was heightened further because the jury also learned, contrary to well-established law, that Detective Richardson found the description of the shooter to be so credible that he used this information to assemble the photo array. (8T 49-4 to 11) See Branch, 182 N.J. at 352-53 (holding that a "detective's reasons for including defendant's photograph in the array were not relevant and were highly prejudicial"). The improper admission of all of this testimony from Detectives Brown and Richardson requires reversal of Moore's convictions.

CONCLUSION

For the reasons set forth in Moore's initial brief and here, his convictions must be reversed. Alternatively, his sentence should be vacated and remanded for resentencing.

Respectfully submitted,

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