SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3309-21
IND. NO. 16-05-00800-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From A Judgment Of Conviction Of The Superior
v.	:	Court of New Jersey, Criminal Division, Monmouth Vicinage
JAMES R. SKINNER,	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Richard W. English, J.S.C. Hon. David F. Bauman, J.S.C. Hon. Lourdes Lucas, J.S.C.
	:	and a Jury

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

JOSEPH E. KRAKORA
PUBLIC DEFENDER
31 CLINTON STREET
P.O. Box 46003
NEWARK, NEW JERSEY 07101
ATTORNEY FOR DEFENDANT
973-877-1200

SCOTT M. WELFEL
Ass't Deputy Public Defender
Scott.Welfel@opd.nj.gov
Atty. ID: 084402013

Of Counsel And
On The Brief

DEFENDANT IS NOT CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

INDEX TO APPENDIX

[1] Pages from Defendant's trial court brief are included to demonstrate that "an issue was raised in the trial court." R. 2:6-1(a)(2). Only the relevant pages are included; the full brief can be provided at the Court's request.

[2] Pages from Defendant's trial court brief are included to demonstrate that "an issue was raised in the trial court." R. 2:6-1(a)(2). Only the relevant pages are included; the full brief can be provided at the Court's request.

INDEX TO APPENDIX (CONT'D)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONT'D)

STATUTES

COURT RULES

RULES OF EVIDENCE

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (CONT'D)

OTHER AUTHORITIES

PROCEDURAL HISTORY

On February 1, 2016, Kelly's Tavern in Neptune City was burglarized. (Da1)[3] On March 10, 2016, a Monmouth County Grand Jury issued Indictment 16-05-800-I against James Skinner, a former employee of Kelly's Tavern, charging him with third-degree burglary contrary to N.J.S.A. 2C:18-2 (Count 1) and third-degree theft contrary to N.J.S.A. 2C:20-3(a) (Count 2). (Da1-2) Defendant filed a notice of alibi accompanied by statements from Moira McDevitt, his partner, and Terrence Skinner, his father, indicating that James[4] was at home in Avon with them on the date and time of the burglary. (Da3-5)

On July 29, 2016, Defendant filed a motion to preclude all in-court and suppress all out-of-court identifications of Defendant. (Da6) After taking

---

[3] The following abbreviations are used:
Da – Defendant-Appellant's Appendix
1T – October 4, 2016 (Motion to Suppress/Preclude Identifications)
2T – June 28, 2017 (Testimony on Motion to Suppress/Preclude Identifications)
3T – June 28, 2018 (Ruling on Motion to Suppress/Preclude Identifications)
4T – October 17, 2019 (Second Motion to Suppress/Preclude Identifications)
5T – November 19, 2020 (Rule 404(b) Motion)
6T – September 3, 2021 (Motion to Compel Juror Demographics)
7T – September 14, 2021 (Trial – Opening Statements)
8T – September 15, 2021 (Trial)
9T – September 16, 2021 (Trial)
10T – September 17, 2021 (Charge Conference)
11T – September 20, 2021 (Trial – Closing Statements and Jury Charge)
12T – September 21, 2021 (Verdict)
13T – January 27, 2022 (Sentence)

[4] To avoid confusion, James and Terrence Skinner are referred to by their first names.

testimony from just some of the witnesses at a hearing (2T), the Court entered an order on June 28, 2017, denying Defendant's motion as to witnesses Christopher Lynch, Timothy Hendricksen, and Jeffrey LaPoint. (Da16-17; 3T 17-20 to 23) Defendant thereafter filed a second motion to suppress the in-court and out-of-court identifications of the witnesses not addressed in the court's June 28 order, most notably that of Kevin Dunn. (Da18, 20) On October 17, 2019, the Court denied this motion without taking any further testimony. (Da23; 4T 14-7 to 17-15)

Trial commenced on September 14, 2021, and closing arguments were delivered on September 20, 2021. (7T; 8T; 9T; 10T; 11T) On September 21, 2021, the Jury returned a verdict of guilty on both counts of the indictment. (Da30; 12T 101-7 to 103-2) On January 27, 2022, the Court sentenced Mr. Skinner to concurrent terms of five years' probation on each count of the indictment and ordered that defendant pay restitution in the amount of $12,443.56 to Kevin Kelly Sr. (Da31; 13T 25-16 to 26-11)

A notice of appeal was filed on June 30, 2022. (Da34)

STATEMENT OF FACTS

Kelly's Restaurant and Tavern ("Kelly's Tavern") in Neptune City is owned by Kevin Joseph Kelly, Sr. and his brother Ed Kelly. (7T 42-11 to 22) They have twenty full-time and forty part-time employees, including Kelly Sr.'s son, Kevin Kelly, Jr., who works as a bartender and manager (7T 45-25 to 46-1; 8T 68-5 to 19) Kelly's Tavern opens at 7:00 a.m. and closes at 2:00 a.m. (7T 44-21 to 24)

James Skinner, the Defendant, previously worked at Kelly's Tavern as a bartender and was one of only five or six people entrusted with the closing shift. (7T 48-13 to 24) Closing required taking the money from the cash registers, bringing it down to the basement office, and locking it in three wooden boxes kept there for that purpose. (7T 47-3 to 16) Kelly Sr. described James as six feet one inch tall, two hundred ten pounds, with red hair, a beard, and a chest tattoo. (7T 51-16 to 17 to 52-6) Conversely, Kelly Jr. described James as tall and thin, estimating his weight as only one hundred eighty pounds. (8T 71-13 to 19) James was the only male employee with red hair and one of only two male employees with a chest tattoo. (7T 51-18 to 52-8)

In September 2015, Kelly Sr. fired James for "after hours drinking," which he alleged had occurred about four times. (7T 52-12 to 24) Kelly Sr.'s reasoning was that his insurance would not cover any incidents or accidents

caused by his employees after Kelly's Tavern closes at 2:00 a.m. (7T 53-3 to 8) James told Kelly Sr. he understood that Kelly Sr. needed to fire him; they parted ways on friendly terms and James expressed no anger. (7T 93-13 to 94-1; 11T 15-2 to 10) However, Timothy Hendricksen, another employee of Kelly's Tavern, testified that after James was fired, he said something to Hendricksen like he would get his revenge or he would not go easily. (8T 96-3 to 13) James denied ever saying anything like this to Hendricksen. (11T 31-15 to 24)

Kelly Sr. testified that he asked James not to come into Kelly's Tavern anymore even as a patron after he was fired. (7T 53-23 to 54-5) The State introduced two message exchanges from James's phone. In an exchange dated December 31, 2015, Pat Ganley asked James whether he still goes to Kelly's Tavern, to which James replied, "LOL. No. I would have but the -- really pissed me off when I heard through the grapevine Ed didn't want me in the building. If it is after 15 years working for them, that's just foul." (9T 62-21 to 63-8) At trial, James explained that he thought Ganley had heard the same rumor James had heard—that James was not welcome back—and that Ganley was "messing with" him; James said he was not sure how true the rumor was but thought Ganley might be able to clear up whether it was true because

Ganley had introduced James to Kelly.[5] (11T 29-9 to 30-7) In an exchange dated January 30, 2016, James's phone contained the following text exchange between him and Ryan Kelly, Kelly Sr.'s younger son:

> James: IDK of it's true or not but I heard Timmy wasn't sure if I was allowed in there.
>
> Ryan: Pop says you're all good.
>
> James: Cool. I thought it was a rumor but timmy made me double guess it.
>
> [(9T 63-20 to 64-22)]

James explained he sent that text less than a minute after bumping into Ryan on his way home from the store, wherein Ryan had invited James to meet up for a few drinks at Kelly's Tavern later in the week; James said he wanted to make sure that he would actually be allowed to return to Kelly's Tavern. (11T 30-8 to 31-23)

On February 1, 2016, around 3:24 a.m., Kevin William Dunn from Share Point Distributors arrived at Kelly's Tavern to clean the draft beer lines. (8T 4-2 to 8-10) Around 3:37 a.m., a man with a beard, sunglasses, a hat, and a hoodie walked into the upstairs bar and said hello to Dunn. (8T 8-24 to 10-9) Initially, Dunn could not really see his face because it was dark, (8T 9-25 to 10-3) Dunn estimated the man's height to be six feet two inches. (8T 10-10 to

[5] The record is unclear whether Ganley introduced James to Kelly Sr. or Kelly Jr.

16) A short while later, when Dunn was cleaning the downstairs bar beer lines, the same man walked by Dunn and said to Dunn that he did not think they cleaned the beer lines at Kelly's. (8T 15-7 to 24) Dunn got a better look at the man's face and noticed his beard was red. (8T 9-25 to 10-9; 15-1 to 16-7) Dunn believed this man was a person he had seen twice at Kelly's Tavern when the person was just getting off his shift—a person with red hair and a chest tattoo—but Dunn did not know the person's name. (8T 10-17 to 12-4)

At 4:30 a.m., Chef Jeffrey LaPoint arrived at Kelly's Tavern. (8T 51-2 to 21) Just before he walked into the Tavern, the man exited the Tavern and walked past him. (8T 51-20 to 52-2) LaPoint only saw the man for half a second and did not get a good look at his face because it was dark, he was looking down, and he had dark glasses, a hood, and something covering his face; LaPoint did not recognize the man but assumed it was someone helping Dunn. (8T 52-5 to 53-2) LaPoint estimated that the man he saw was six feet or six feet one inch tall. (8T 53-3 to 9)

After LaPoint punched in and went into the back office, Vince, the man who was cleaning the bar, told LaPoint that the man was not working with Dunn; LaPoint spoke with Dunn to confirm this. (8T 53-12 to 20) LaPoint looked around the kitchen, did not see anything missing, but then called the police. (8T 53-21 to 54-8)

Sergeant Nicholas Morgan of the Neptune City Police Department was dispatched to respond to Kelly's Tavern around 4:48 a.m. on a report of a suspicious person inside the building; it was reported that the suspect had left the building ten minutes earlier. (8T 7-3 to 13) Dispatch provided a description of a subject wearing dark sunglasses, a dark wool hat, and had a beard. (8T 33-25 to 34-2) Morgan testified that when he arrived at Kelly's, Dunn gave him this same description, adding that the suspect was wearing a white collared shirt and had a full beard (8T 35-22 to 25); however, Dunn testified that he did not give any description to the police, but rather just gave the police his name and contact info and left to go to his next job. (8T 21-8 to 24) Dunn did not tell Morban he thought the suspect used to work there, that he recognized the suspect, that the suspect had a chest tattoo, or that the suspect had red hair. (8T 21-8 to 24, 39-16 to 40-12)

The Neptune Police called Kelly Jr. to inform him they thought there might have been a theft from Kelly's Tavern. (8T 69-1 to 3) Kelly Jr. arrived at the Tavern and checked the surveillance cameras. (8T 37-2 to 3, 69-5 to 7) Kelly's Tavern has sixty-four surveillance cameras, most of which are visible and apparent to patrons. (7T 55-6 to 18) Sergeant Morgan and Officer Isaacson[6] were in the office with Kelly Jr. while he was reviewing the

[6] The record does not contain indicate this officer's first name.

surveillance footage. (8T 81-24 to 2) Based on what he saw, he went downstairs to check the basement office. (8T 69-8 to 13) He observed that the boxes in the office where the money is kept had been disturbed. (8T 69-14 to 17) He told Morgan he had reviewed the surveillance and that the suspect had broken into the basement office and stole the Tavern's earnings from the weekend. (8T 37-5 to 14)

Kelly Jr. called Kelly Sr. at 5:00 a.m. to notify him that Kelly's Tavern had been burglarized. (7T54-6 to 9) When Kelly Sr. arrived at Kelly's Tavern, Kelly Jr. was showing four or five police officers the surveillance video. (7T 54-11 to 17) Kelly Sr. did not view the video at that point but instead went downstairs to check the basement office where the Tavern's money was kept. (7T 92-18 to 21) In the basement office, Kelly Sr. found that the Tavern's money, ordinarily stored in three wooden boxes in the basement office, had been stolen. (7T 76-8 to 14) Kelly Sr. estimated that $12,443 had been stolen. (7T 81-10 to 11) However, he admitted that the cash in the boxes had not yet been counted because it is counted every morning. (7T 90-18 to 21) This money was never recovered.

Kelly Sr. found what he believed to be a red, curly beard hair when he was searching through the wooden boxes and he gave it to Detective Volbrecht. (7T 91-18 to 92-1) Ultimately, the DNA of the hair was compared

with James's DNA and the DNA did not match James (9T 23-23 to 24-8); however, the Kellys did not know on February 1 that this hair did not belong to James. After Kelly Sr. found the red hair, Kelly Jr. showed him the surveillance video. (7T 92-18 to 21; 8T 82-23 to 83-2) Kelly Sr. and Kelly Jr. discussed the video with each other and that they thought the suspect depicted on the video was James. (8T 83-3 to 7)

The surveillance video depicted the suspect retrieving the key to the basement office from the north end of the bar where it was kept. (7T 70-2 to 17, 71-4 to 16) This was the key to the basement office where the cash was secured at Kelly's Tavern. (7T 69-25 to 70-17) The key had a void card on the key chain, but not a label identifying it as the key to the basement office. (7T 70-11 to 71-2) After the suspect grabbed the keys, the surveillance video depicted the suspect with the keys in his hand in the downstairs office where the money was stored. (7T 72-3 to 19) A photograph taken after the burglary showed one of three wooden boxes where the money was stored had been broken; the boxes were not broken prior to the burglary. (7T 74-6 to 75-5) The top two boxes are ordinarily locked by a key that is stored in the bottom box; the bottom box is locked with a combination lock. (7T 75-6 to 19) Kelly Sr. testified that he changed the combination within a week after he fired James in September; however, he admitted that he had told the police on February 5 that

he had changed the combination "recently." (7T 75-10 to 11, 107-1 to 4, 95-5 to 97-8)

Neptune City Police Sergeant Michael Vollbrecht, the lead detective assigned to this case, arrived at Kelly's Tavern around 8:30 a.m. (9T 18-7 to 20-13) Kelly Sr. gave Vollbrecht two hairs and a pair of white gloves. (9T 22-13 to 18) Kelly Sr. told Vollbrecht he found the first hair—the red hair—in one of the register tills in the downstairs main office. (9T 22-19 to 22, 23-19) A DNA analysis was performed on this hair and it was determined that the DNA of the hair did not match James's DNA. (9T 23-23 to 24-8) The pair of white gloves was never tested for DNA because the surveillance video showed the suspect wearing one white and one black glove, rather than two white gloves. (9T 23-11 to 12, 90-23 to 91-5) Two neoprene gloves were recovered from Oak Terrace, the last known general direction the suspect was seen heading, but they were never taken into evidence or tested for DNA. (9T 88-23 to 89-25, 91-6 to 20)

Vollbrecht set out from the Tavern to try to find James, and at approximately 10:00 a.m. he arrived at James's home in Avon where James lived with his girlfriend Lauren McDevitt and their daughter. (9T 52-7 to 22) McDevitt told Vollbrecht that James was not home and that she thought he was working out at Jersey Shore Fitness Shop in Bradley Beach or around the

boardwalk area. (9T 52-2 to 53-17, 108-7 to 10) Vollbrecht went to look for James at these locations but did not find him there. (9T 53-24 to 54-1)

Around 10:30 a.m., Dunn was contacted by either Kelly Sr. or Jr.[7] asking him to come back to Kelly's Tavern. (8T 22-10 to 14) Dunn returned to the Tavern and met with Kevin Kelly Sr. and Jr. in the second-floor office. (8T 22-15 to 23-10) Kelly Sr. and Jr. showed Dunn the surveillance video, although Dunn testified at trial that he did not remember watching the surveillance video. (8T 84-2 to 8, 23-18) Dunn told them he recognized the man he had seen that morning at the bar and that it was the man who used to work for Kelly's Tavern with red hair and a chest tattoo. (8T 23-24 to 24-22) Dunn did not identify this person by name. Thereafter, he went to the police station to give a statement. (8T 24-5 to 18)

An investigation revealed that James had rented a car on January 30, 2016, from Enterprise in Mull Township, due to be returned on February 1. (9T 51-15 to 52-6) James's partner McDevitt owned a car (9T 51-14), but James rented a vehicle that weekend so he could drive his daughter Mave around and also get around to his planned boxing training on February 1. (9T 110-10 to 17; 11T 25-18 to 23)

[7] Dunn did not specify which "Kevin Kelly" called him. (8T 22-10 to 14)

James testified and called McDevitt as well as his father Terrence Skinner to establish that he was at home on February 1, 2016, at the time the burglary took place. They all testified that on the night of January 31, 2023, James left the house around 11:30 p.m. or midnight to meet up with a friend. (9T 105-10 to 21; 11T 8-13) James met up with his friend Steven Kramer[8] at D'arcy's Tavern and later PK Shamrock's, and James was the designated driver for the night. (11T 26-6 to 12)

James came home around 2:35 a.m. and he and Terrence began watching the movie Braveheart (11T 8-21 to 9-10, 26-14 to 24) McDevitt heard the front door slam around 2:15 a.m. or 2:30 a.m. and believed that was James coming home, although she did not see him at that time. (9T 106-3 to 10) At 3:45 a.m (according to McDevitt) or 4:00 a.m. (according to Terrence), McDevitt got up to use the bathroom and saw James in a bedroom watching the movie Braveheart with Terrence. (9T 106-14 to 107-2; 11T 9-16 to 14, 27-6 to 2) James and Terrence then went to bed and woke up around 6:00 to 6:30 a.m. (11T 10-5 to 16, 13-12 to 14, 27-14 to 16) McDevitt woke up at 7:00 a.m. and saw James and his father leaving to go to the train station. (9T 107-2 to 12;

[8] Vollbrecht testified that he spoke with Kramer regarding James's whereabouts but did not testify as to what Kramer said. (11T 54-2 to 15) Kramer did not testify.

11T 10-10 to 16) James told McDevitt he was heading to the fit trail, the gym, or the boardwalk (9T 107-24 to 25)

James testified that after he dropped his father at the train station, he first went to the Manasquan foot trail, then went to his cousin's house, then went to the Middletown Police Athletic League at 5:00 p.m. (11T 27-24; 46-18 to 25) He then dropped the rental car off and arrived home around 6:00 or 7:00 p.m. (9T 112-13 to 17; 11T 28-10 to 12, 46-14- to 47-1) McDevitt told him the police were looking for him. (9T 112-13 to 17; 11T 28-15 to 18) James told her he would go to the police station first thing in the morning because he was too exhausted that evening. (11T 28-17 to 18)

On February 2, 2016, two officers from the Neptune City Police Department located James at his home, where they arrested him. (9T 53-24 to 55-4) They took into evidence a pair of sunglasses that James had on him as well as a pair of black sweat pants, boots, and a cell phone. (9T 55-11 to 10)

At trial, Dunn identified James as the man he saw in Kelly's Tavern on February 1, 2016. (8T 10-17 to 11-12) Kelly Sr., Kelly Jr., LaPoint, and Hendricksen identified the person depicted in the surveillance video as James. (7T68-18 to 69-15; 8T 56-10 to 12, 72-21 to 24 to 73-3, 94-15 to 95-12) Kelly Sr. testified he had previously observed James appear on the surveillance system over 200 times while James was an employee, and his identification of

the burglar as James was based on all these prior observations as well as the burglar's walk and his nose. (7T 69-3 to 24) Kelly Jr. said he had also observed James on the surveillance system "multiple times" and identified the burglar as James based on "his walk, his mannerisms, his height." (8T 73-6 to 9) . LaPoint testified that he had worked with James for many years and that he could recognize James in the surveillance video because "it looks like him" and because of the way he was walking—"like hunched and his arms swing a little." (8T 55-20 to 57-19) Hendricksen, an employee of Kelly's, testified that he had seen James in person hundreds of times over the years, and said he was able to recognize the suspect in the video as James from the suspect's nose and chin line. (8T 95-10 to 15)

Kelly Jr. identified two still shots from the surveillance video as images in which he believed the suspect was making a phone call because his hand was held to his ear like he was holding a phone; Kelly Jr. had told police he believed the suspect had made a phone call. (8T 79-2 to 81-13) James's phone records did not show any phone call from around that time. (9T 96-13 to 97-2)

LEGAL ARGUMENT

POINT I

THE COURT ERRED IN ALLOWING KEVIN DUNN TO IDENTIFY DEFENDANT FOR THE FIRST TIME AT TRIAL. (4T 14-7 to 17-15; 8T 10-17 to 11-12; Da23)

The Supreme Court in State v. Watson, 254 N.J. 558, 587 (2023) prohibited first-time in-court identifications unless there is a "good reason." Kevin Dunn, the only identification eyewitness, was permitted to identify James at trial as the suspect he saw in Kelly's Tavern even though he had never identified a photograph of James as the suspect. Dunn had only ever seen James approximately two or three times and did not know his name; he merely told police that the suspect was a man he had seen working at Kelly's Tavern who had red hair and a chest tattoo. The police never presented Dunn with an array containing James's photo to see if Dunn would identify James as the suspect; instead, the State waited until trial to ask Dunn whether he saw the suspect in the courtroom, when there was only one option—the defendant sitting at the defense table. Because there was no good reason to allow Dunn to identify James in court for the first time without a prior valid out-of-court identification, the admission of Dunn's first time in-court identification deprived defendant of due process and a fair trial and requires reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; N.J.R.E. 701.

Dunn never made an out-of-court identification. In his first statement—given to Sergeant Morgan around 4:48 a.m. before he left Kelly's Tavern for his next job—Dunn did not tell Morgan that he recognized the suspect, that he thought the suspect used to work there, that the suspect had a chest tattoo, or that the suspect had red hair. (Da9; 8T 21-8 to 24, 39-16 to 40-12) Dunn told the Kellys and police that he believed he recognized the suspect only after: (1) Kelly Sr. and Kelly Jr. watched the surveillance video and decided that the suspect was James; (2) Vollbrecht signed a complaint warrant charging James with the burglary; (3) the Kellys called Dunn to return to Kelly's Tavern; and (4) Dunn watched the surveillance video. (Da11; 8T 82-25 to 84-8)

Dunn then went to the Neptune Police Station, where he told Vollbrecht he recognized the suspect from having seen him on three previous occasions while he was cleaning the beer lines. (Da11-13) Dunn said the last time he had seen the suspect was the previous summer. (Da13) Dunn did not know the name of the man he believed the suspect to be but knew that the man worked for Kelly's and had red hair and a tattoo. (Da13-14) Dunn told Vollbrecht he first believed he recognized the suspect when the suspect said to him, "I don't think they get the lines cleaned here," because the Kelly's employee with red hair and a tattoo had previously said that to Dunn. (Da11) Vollbrecht did not present Dunn with a photo array, and Dunn never identified a photo of James

as the man he believed the suspect to be. (Da12-15) The first time Dunn ever identified James as the man he saw in Kelly's Tavern on February 1, 2016 was during trial. (8T 10-17 to 11-12)

Defendant's pretrial motion challenging the identifications moved to preclude all in-court identifications (as well as to suppress all out-of-court identifications), including that of Kevin Dunn. (Da6-7) The Court ordered that several witnesses appear for a Wade[9] hearing but did not order that Dunn testify. (2T) Thereafter, the Court entered an order denying Defendant's motion as to three witnesses from whom the Court had taken testimony but did not address Defendant's motion as to Dunn. (Da16-17) Defendant thereafter filed a second Wade motion noting that the Court's prior order had not addressed Dunn, who was not required to testify at the first hearing. (Da18, 20) The Court and the State responded that Dunn did not identify James as the person he saw but rather just provided a description of the person he saw. (4T 7-23 to 8-9, 13-18 to 23) The Court denied Defendant's Wade motion as to Dunn, stating, "whether the generalized description provided by Mr. Dunn constitutes an identification within the intendment [sic] of the Wade Henderson line of questioning, assuming that it does, the Court finds that Defendant has failed to show any evidence that this identification was made

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

amidst highly suggestive circumstances," because "[t]he Defendant does not point to any source of outside influence; he simply relies on the alleged change in Mr. Dunn's description of the Defendant and concludes summarily without any evidentiary basis that is must have been because of outside influence." (4T 16-14 to 15)

In Watson, the Court held that first-time in-court identifications are "inherently suggestive." 254 N.J. at 568. "Asking witnesses long after a crime was committed if they can identify the culprit—when the only person at counsel table who could reasonably be the defendant would be obvious to the witness, and when it is evident the prosecution team believes the person is the culprit—presents an even greater risk of misidentification than an out-of-court showup." Id. at 585. Thus, the Watson Court held that "first-time in-court identifications can be conducted only when there is 'good reason'" for them." Id. at 587 (citing Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014)). The principal "good reason" given by the Watson Court is where the "'eyewitness was familiar with the defendant before.'" Ibid. (quoting Crayton, 21 N.E.3d at 170). Specifically, "[v]ictims of domestic violence, for example, could properly be allowed to identify their assailant in court for the first time" and "[f]riends or associates, among others, could identify someone they have known for some time."

While the perpetrator in Watson was a stranger to the victim, the victim in State v. Burney, 255 N.J. 1 (2023) did have some prior familiarity with the suspect. When the suspect entered her home, he stated, "'I'm here for your dad, George,' leading [the victim] to believe he was there to fix something at the house." 225 N.J. at 6. The victim "believed she recognized the intruder as someone who had recently done contracting work on their house." Id. At trial, the victim "testified that she had seen defendant on two prior occasions" at her home, first when he was hired to clean the porch windows, and second a few weeks before the robbery when he rang her doorbell and asked for her father. Id. at 8. The Court held that the victim was not familiar enough with defendant to constitute a "good reason" to allow her to make a first-time in-court identification at trial because she "did not know defendant well prior to the robbery," having interacted with him only on two prior occasions. Id. at 28.

Just like in Burney, Dunn was not familiar enough with James to provide "good reason" to allow him to make a first-time in-court identification of James. Dunn had only ever seen James two or three times prior to the burglary. If the State had wanted the opportunity to have Dunn possibly identify James at trial, it would have had to conduct a photo array identification procedure with Dunn close in time to the crime to establish that Dunn was able to identify James in a non-suggestive procedure. Instead, the State waited five

years to ask Dunn to identify the suspect in the most suggestive procedure possible—at a trial in which the State was prosecuting James Skinner and there was only one option for Dunn to choose. This impermissibly suggestive procedure was clearly error.

Moreover, this error was harmful. Dunn was the only eyewitness to the crime to make an identification of the suspect. The other witnesses who made identifications did so only from the surveillance video and only after Kevin Sr. found the red hair that made him think the perpetrator was James. (7T 92-18 to 21) Furthermore, the four witnesses who identified James from the surveillance video all had some form of feedback. See Point III, infra. (8T 82-23 to 83-4) (2T 74-21 to 75-1) (2T 46-11 to 13) They were also all long-time employees of Kelly's Tavern and considered the Kellys to be very close friends or family, so they had a motive to agree with the Kellys' identification. Because Dunn was the only witness to make an identification from actually seeing the perpetrator in person as well as the only identification witness who was not an employee of Kelly's Tavern, Dunn's identification was certainly given the greatest weight by the jury. Thus, the erroneous admission of Dunn's identification deprived James of due process and a fair trial and requires reversal.

POINT II

THE STATE ELICITED INADMISSIBLE LAY OPINION TESTIMONY FROM DETECTIVE VOLLBRECHT REGARDING WHAT THE SURVEILLANCE SHOWED AND WHY THE SUSPECT DID CERTAIN ACTIONS, WHICH IMPERMISSIBLY BOLSTERED THE STATE'S THEORY THAT THE SUSPECT MUST HAVE BEEN AN EMPLOYEE OF KELLY'S TAVERN. (Not Raised Below)

During Detective Vollbrecht's testimony, the prosecutor showed Vollbrecht still images from the surveillance video and played clips of the surveillance video, asking Vollbrecht to describe what he saw. Vollbrecht proceeded to give a running commentary on the video evidence. While Vollbrecht had previously watched the surveillance video, he was not an eyewitness to the events depicted on the surveillance video. His testimony was not limited to descriptions of objective facts readily apparent on the surveillance video but included subjective interpretations of the suspect's actions as well as inferences drawn from other evidence. Vollbrecht's subjective interpretations and inferences all impermissibly bolstered the State's theory that the suspect must have been an employee of Kelly's Tavern, thereby pointing the finger at James. The admission of this testimony violated N.J.R.E. 701 because Vollbrecht was not an eyewitness to the events shown on the video and thus lacked the requisite personal knowledge. N.J.R.E. 701;

Watson, 254 N.J. at 569; State v. Higgs, 253 N.J. 333 (2023); State v. Singh, 245 N.J. 1, 17 (2021); State v. Lazo, 209 N.J. 9 (2012); State v. McLean, 205 N.J. 438 (2011). Because Vollbrecht's testimony improperly bolstered the State's central theory of the case, its erroneous admission deprived Defendant of due process and of a fair trial, and was clearly capable of producing an unjust result. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; R. 2:10-2.

N.J.R.E. 701 provides that "testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness' perception; and (b) will assist in understanding the witness' testimony or determining a fact in issue." Under the first prong of N.J.R.E. 701, the testimony must be based on the witness's personal knowledge. McLean, 205 N.J. at 459; N.J.R.E. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

In a series of cases, the Supreme Court has clarified the limited scope of lay opinion testimony of police witnesses who did not directly observe the events underlying their testimony.

In Lazo, the Supreme Court held that it was error to allow a detective to testify as to his opinion that the defendant's arrest photo closely resembled the

sketch of the suspect drawn by a sketch artist. 209 N.J. at 15. The detective "had not witnessed the crime and did not know [the] defendant; [his] opinion stemmed entirely from the victim's description." Id. at 24. The Court held that this opinion testimony was inadmissible under N.J.R.E. 701 because "the detective had no personal knowledge of that critical, disputed factual question." Id. at 22. The Detective's opinion "intruded on the jury's role" because "[i]n an identification case, it is for the jury to decide whether an eyewitness credibly identified the defendant." Id. at 22, 24.

Conversely, in Singh, a detective testified that sneakers depicted in a surveillance video were similar to ones he saw the defendant wearing at the time of his arrest. 245 N.J. at 19. Unlike the detective in Lazo, who had not witnessed the crime and did not know the defendant, the detective in Singh "had first-hand knowledge of what the sneakers looked like" from the arrest. Thus, the Court found that the Singh detective's testimony "was rationally based on his perception" and was thus admissible. Id. at 19-20.

In Higgs, the Court reaffirmed the distinction drawn by Lazo and Singh; a police-witness's lay opinion regarding what a video depicts is not admissible when it is based "solely on watching the video." 253 N.J. at 366. In that case, a detective testified as to his opinion that the video "showed a gun in defendant's back waistband." Id. at 365. The Court held that this testimony

"was impermissible under N.J.R.E. 701" because the detective "was not on the scene during the relevant time and had no prior interaction or familiarity with either defendant or the firearm in question." Id. at 366. Furthermore, the Court noted that "[t]he video was already in evidence, so the jury was able to view the video and determine for themselves what the video showed." The Singh Court reaffirmed McLean's holding that N.J.R.E. 701 does not permit a witness to offer an opinion on a matter not within the witness's direct personal knowledge "'and as to which the jury is as competent as he to form a conclusion.'" Ibid. (quoting Mclean, 205 N.J. at 459).

The Supreme Court in Watson synthesized the principles of these cases and summarized the rules regarding opinion testimony concerning video evidence. First, the Court in Watson reiterated that a fact witness who actually observed an event in real life "can testify about the portion of a recording that depicts their encounter" or what they observed. 254 N.J. at 599. However, "narration evidence by a witness who did not observe events depicted in a video in real time may not include opinions about a video's content and may not comment on facts the parties reasonably dispute." Ibid. (emphasis added). A witness who did not observe an event in real time—such as a detective—may "draw[] attention to key details that might be missed, or help[] jurors

follow potentially confusing, complex, or unclear videos that may otherwise be difficult to grasp." Id. at 602.

The Court thus outlined four rules that constrain a non-eyewitness's testimony about what a video depicts:

> (1) "[N]either the rules of evidence nor the case law contemplates continuous commentary during a video by an investigator whose knowledge is based only on viewing the recording;"
>
> (2) "[I]nvestigators can describe what appears on a recording but may not offer opinions about the content. In other words, they can present objective, factual comments, but not subjective interpretations;"
>
> (3) "[I]nvestigators may not offer their views on factual issues that are reasonably disputed;"
>
> (4) "[I]nvestigators should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence. That type of comment is appropriate only for closing argument."
>
> [Id. at 603-04.]

The Watson Court provided examples of applications of these principles. If the parties do not dispute that a video shows an "individual opened the door with his elbow," the investigator can testify as to that; however, he would not be permitted to testify as to his opinion that the reason the individual opened the door with his elbow was "to avoid leaving fingerprints." Id. at 693. In a drunk driving case, a detective could testify as to each drink that the video clearly shows being poured for the defendant, but could not offer his opinion

or characterization that "the defendant [was] drinking heavily for an hour and a half." Id. at 604.

The Court then applied these principles to the narration testimony in Watson itself. The Court criticized the officer's

> "play-by-play" commentary about the suspect's movements throughout the 57-second surveillance video: how he entered the bank, that he removed a glove, placed a demand note on the teller's counter, held the note with two fingers, pushed open the door with his elbow, and appeared to run across the parking lot.
>
> [Id. at 607.]

The Court also noted that the officer "described what appeared in various stills of the surveillance footage." Ibid. The Court held that this "[c]ontinuous commentary and speculation about each step the robber took inside the bank did not satisfy the requirements of the rules of evidence" because "[t]he video was not confusing, chaotic, or lengthy." Ibid. The Court also held that it was not proper for the officer to offer his opinion, "from [his] observations [that] it looks like the suspect has two fingers on the note, holding the note as if it's on the counter." Id. at 608. Finally, the Supreme Court held that the trial court correctly sustained defense counsel's objection to the officer's testimony that "the suspect was very careful in . . . not attempting to leave any type of evidence behind." Ibid.

Just as in Watson, Vollbrecht in this case impermissibly offered "'play-by-play' commentary about the suspect's movements throughout" Kelly's Tavern for over twenty pages of transcript peppered with his opinions and inferences. (9T 26-1 to 48-25). First, Vollbrecht testified that the suspect was heading to the tool room, where he opined that the tool room was not well organized, but "if you knew what was supposed to be there and where it was supposed to be, you would know where it is." (9T 32-1 to 21) After he stated that the suspect left the tool room, he opined that there appeared to be something in the suspect's hand, although he did not opine as to precisely what the object was. (9T 33-23 to 34-2) The following exchange then ensued:

> Q And what is he -- is he gonna try to do anything with that?
>
> A Looks like he's trying to manipulate the door, that door handle with it.
>
> Q Okay. Was he successful?
>
> A No.
>
> [(9T 34-3 to 8)]

Vollbrecht also testified that the next clip showed the suspect "[o]btaining the manager's key that's on a lanyard behind the cash register." (9T 34-17 to 18) Vollbrecht opined that the key was not plainly visible or marked and that based on his investigation, "it could only be employees" that would know that the keys are there. (9T 34-19 to 25) Next, in response to the

prosecutor's question as to what the suspect did with the keys, Vollbrecht stated, "He went downstairs to the money office and opened the door." (9T 38-15 to 16)

Vollbrecht's next inadmissible testimony concerned what he claimed to be a book bag in the suspect's hand. (9T 42-8 to 17) Vollbrecht testified that based on his investigation, the book bag did not belong to anyone in Kelly's Tavern. He testified that at time stamp 4:25 a.m., the book bag appeared to be full. (9T 42-19) The prosecutor's next question elicited Vollbrecht's opinion as to where "the book bag came from." (9T 42-24 to 25) The prosecutor's goal was to establish that the suspect must have had the book back on him under his jacket when he entered Kelly's Tavern. (9T 43-20 to 25) The Court sustained the objection, so the prosecutor instead elicited that: the suspect was wearing loose fitting clothing; the backpack that the suspect was holding is flat when it is empty; and, accordingly, the backpack could fit underneath something loose fitting. (9T 44-16 to 45-9)

Finally, directly on par with Watson's example of impermissible opinion testimony that a suspect opened a door with his elbow to avoid leaving fingerprints, Vollbrecht testified that the suspect appeared to be shielding his face from the camera, which led Vollbrecht to conclude that the suspect knew where that camera was located. (9T 32-22 to 33-3) Vollbrecht also later

testified that "the suspect appear[s] to be covering his face" because of "the presence of the camera." (45-19 to 46-2)

Vollbrecht's play-by-play narration, subjective interpretations of what the suspect was doing and why he was doing it, and inferences "based on his investigation" clearly violates N.J.R.E. 701 and was inadmissible. Watson, 254 N.J. at 569. Moreover, it was plain error clearly capable of producing an unjust result. R. 2:10-2. Put together, Vollbrecht's inadmissible opinion testimony improperly bolstered the State's theory that the suspect's actions supported the conclusion that the suspect must have been an employee who knew his way around Kelly's Tavern, which suggested James as a likely candidate. Indeed, the prosecutor relied heavily on this theme in his opening statement, arguing that "Kelly's was robbed by somebody that used to work there, somebody that knew where the surveillance cameras were, somebody that knew where the money was secured, and somebody that knew where the manager's key to the downstairs office was." (7T 28-17 to 22) He also argued that the suspect "knows where to go if he needs a tool to break the downstairs door." (7T 30-12 to 14) He repeated these arguments in his summation.[10] (11T 79-20 to 80-20)

[10] "The question is who did it? . . . . It was somebody that knew Kelly's. They knew exactly where to go. . . . It was someone who knew where the surveillance cameras are . . . . Somebody who knew when to look down, and cover his face from the cameras. Someone who knew where the surveillance cameras were even in the dark.

While the prosecutor's inferences and deductions were appropriate in "closing argument," it was absolutely inappropriate and inadmissible for Vollbrecht to offer those inferences and opinions to bolster the State's theory. Watson, 254 N.J. at 604. Because this testimony went to the heart of the State's theory of the case, its erroneous admission was clearly capable of producing an unjust result and it deprived defendant of due process and a fair trial.

POINT III

IT WAS PLAIN ERROR TO FAIL TO INSTRUCT THE JURY ON THE PORTION OF THE IDENTIFICATION CHARGE CONCERNING THE INFLUENCE OF FEEDBACK. (Not Raised Below)

In this case, the four witnesses who identified the suspect on the surveillance video as James all received positive feedback in the form of another employee at the bar telling them they agreed that the suspect was James. Kelly Jr. testified that he showed Kelly Sr. the surveillance video, that he told Kelly Sr. he thought the suspect on the video was James, and that Kelly Sr. also told Kelly Jr. that he thought the suspect was James. (8T 82-23 to

---

. . . Somebody who knows where to get a tool when he has a plan, preconceived plan, he knows to go directly to the tool room to get the tool he wanted for his plan. It's someone who knew where the money was kept in an unmarked door in that room. And it's somebody when—when that failed, which when trying to force his way in failed, he knew where the keys were. Unmarked keys hidden in the bar. . . . This is somebody that used to work there." (11T 79-20 to 80-20)

83-4) After Hendricksen watched the video and identified James as the suspect, Kelly Jr. told Hendricksen he also thought that the suspect was James. (2T 74-21 to 75-1) After LaPoint identified the suspect as James, Chris Lynch, a witness who did not testify, told LaPoint he also thought the suspect was James. (2T 46-11 to 13)

These post-identification statements of agreement are called "feedback" and have the capacity to influence an eyewitness's identification. In State v. Henderson, 208 N.J. 208 (2011), the Court explained that "[c]onfirmatory or post-identification feedback . . . occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness." Additionally, the Court noted in State v. Chen, 208 N.J. 307, 320 (2011) that

> private—that is, non-State—actors can affect the reliability of eyewitness identifications, just as the police can. The record on remand supports that conclusion. Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding "that post-identification feedback does not have to be presented by the experimenter or an authoritative figure (e.g. police officer) in order to affect a witness' subsequent crime-related judgments." See Elin M. Skagerberg, Co–Witness Feedback in Line-ups, 21 Applied Cognitive Psychol. 489, 494 (2007). Feedback and suggestiveness can come from co-witnesses and others not connected to the State.

Thus, "feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness' report of how he or she viewed an event." Henderson, 208 N.J. at 255.

Because feedback is a system variable that affects the reliability of an identification, the Henderson Court directed the Committee on Model Criminal Jury Charges to draft a proposed revision to the eyewitness identification charge that included an explanation of feedback and other system variables. Id. at 298-99. The present Model Charge accordingly has the following language concerning feedback:

> (c) Feedback: Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.
>
> [Model Jury Charges (Criminal), "Identification: In-Court And Out-Of-Court Identifications" (rev. May 18, 2020.]

The Court in this case inexplicably omitted this "Feedback" portion of the model charge from its Identification instruction. (11T 115-20 to 21)

"When eyewitness identification is a 'key issue,' the trial court must instruct the jury how to assess the evidence—even if defendant does not request the charge." State v. Sanchez-Medina, 231 N.J. 452, 466 (2018) (citing State v. Cotto, 182 N.J. 316, 325 (2005)). Here, one of defense counsel's principal arguments challenging the reliability of the four witnesses' identification of James on the surveillance video was that they had a close-knit relationship, all being employees of the family-owned Kelly's Tavern, and that that they talked to each other about who they believed the person on the video was. (7T 36-17 to 37-12) Thus, it was plain error for the Court to fail to provide the portion of the model jury instruction on feedback that was both supported by the evidence and central to the defense. This error was clearly capable of producing an unjust result and requires reversal. R. 2:10-2.

POINT IV

THE CUMULATIVE IMPACT OF THE ERRORS DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

Each of the errors cited above is sufficient alone to require a new trial. However, even if this Court concludes that none of the errors on its own is sufficient to warrant a new trial, "the probable effect of the cumulative error was to render the underlying trial unfair." State v. Wakefield, 190 N.J. 397, 538 (2007); U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Recently, in a case with extremely strong proofs, the Supreme Court nonetheless held that a new trial was required because the judge erroneously admitted two significant pieces of inadmissible evidence, and "the cumulative error impacted and prejudiced the fairness of defendant's trial." Burney, 255 N.J. at 29-31. Likewise, the three errors set forth in Points I, II, and III all went to the heart of the State's case and Defendant's challenge to the State's proofs—the identification of the perpetrator.

POINT V

BECAUSE THE SENTENCING COURT FAILED TO ASSESS DEFENDANT'S FINANCIAL MEANS AND HIS ABILITY TO PAY THE $12,443.56 IN RESTITUTION AND $1,500 IN PROBATION SUPERVISION FEES, THIS COURT SHOULD REVERSE THESE AMOUNTS AND REMAND FOR CONSIDERATION OF DEFENDANT'S FINANCIAL MEANS. (Da31-32; 13T 26-10 to 13)

The Court ordered that James pay restitution to Kelly's Tavern in the amount of $12,443.56 and to pay a $25 per month probation supervision fee, which adds up to $1,500 in probation supervision fees over the course of the five years of probation. (Da31-32) The Court did so without actually assessing James's financial means and ability to pay, even though it noted that James has been unemployed since 2020. (13T 16-15 to 18-8, 21-20) Accordingly, this Court should reverse and remand for consideration of James's financial means and ability to pay in the context of setting these two assessments.

The Court noted that James was presently a fulltime caretaker for his children while his wife worked. (13T 11-11 to 17) In reviewing James's employment history, the Court noted that James was a high school graduate with a history of employment. (13T 11-23 to 12-1) James had been employed in the restaurant business as a bartender or a waiter for fifteen to sixteen years. (13T 12-14 to 19) He had also previously held jobs in construction and his most recent job was with a tree service. (13T 12-14 to 14) However, he had been unemployed since 2020, possibly related to COVID. (13T 12-1 to 4) The Court responded to James's claim that his unemployment was related to COVID by asserting "there are many employment opportunities available now, precisely because of Covid, and that many establishments and businesses are desperate for help and work." (13T 12-7 to 10) James indicated he was working toward achieving a Commercial Driver's License (CDL) so he could get a job in the trucking industry. (13T 17-1 to 5) The Court also noted that James indicated he had previously been continuously employed and had never had any problems finding employment. (13T 27-1 to 4) The Court found that he had no disabilities of anything that would impede his ability to be gainfully employed. (13T 27-4 to 6)

In evaluating defense counsel's argument for mitigating factor (6), the Court noted that "the defendant is not challenging the amount of the

restitution" and he "is willing to pay restitution." (13T 20 to 23) But the Court also found that this did not constitute a "voluntary willingness to pay" because the Court was going to follow the recommendation of the State and order restitution regardless of James's willingness. (13T 17-22 to 25) In evaluating defendant's argument for mitigating factor (11), the Court noted that "[t]he fact that defendant has not been employed since 2020 also shows that the household has been supported either by the income generated by Mr. Skinner's partner, or by other members or other means." (13T 22-7 to 10)

The Criminal Code allows a sentencing court to order restitution if "[t]he defendant is able to pay or, given a fair opportunity, will be able to pay restitution." N.J.S.A. 2C:44-2(b). Furthermore, "[i]n determining the amount and method of payment of restitution, the court shall take into account all financial resources of the defendant, including the defendant's likely future earnings, and shall set the amount of restitution so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay." N.J.S.A. 2C:44-2(c)(2) (emphasis added). Thus, "[i]n order to impose restitution . . . there must be an explicit consideration of defendant's ability to pay." State v. Scribner, 298 N.J. Super. 366, 372 (App. Div. 1997).

While the Court in this case did consider that James had a history of employment, "[t]he sentencing transcript is devoid of any mention of

defendant's financial resources and/or his likely future earnings." State v. McLaughlin, 310 N.J. Super. 242, 264 (App. Div. 1998). The Court did not inquire as to James's salaries at any of his previous places of employment or his likely salary if he were able to secure a job in the future. Like in State v. Pessolano, 343 N.J. Super. 464, 479 (App. Div. 2001), the Defendant in this case "was no longer employed," which certain impacted his ability to pay. Thus, James's position was far different than the defendant in State v. Orji, 277 N.J. Super. 582, 589 (App. Div. 1994), who "ha[d] a bachelor's degree in marketing[,] and [wa]s gainfully employed as the owner operator of a limousine taxi service." Not only did the Court fail to ascertain or consider any information regarding a realistic salary that James might expect to earn if he were to obtain a new job, the Court would have also been required to consider that expected salary against James's expenses so as to be able to appropriately set "the time period for making restitution." Ibid.

Because the Court did not make any explicit findings regarding defendant's likely salary or expenses, the Court also did not make any findings that the amount of restitution imposed was "consistent with the defendant's ability to pay." N.J.S.A. 2C:44-2(c)(2). Accordingly, this Court should remand for a proper restitution hearing at which the sentencing Court will be required to make such explicit findings.

In addition to the sentencing Court's error in setting restitution, the Court erred in setting the probation supervision fee. N.J.S.A. 2C:45-1(d)(1) states:

> In addition to any condition imposed pursuant to subsection b. or c., the court shall order a person placed on probation to pay a fee, not exceeding $25.00 per month for the probationary term, to probation services for use by the State, except as provided in subsection g. of this section. This fee may be waived in cases of indigency upon application by the chief probation officer to the sentencing court.

The statute does not set forth any criteria the Court should use in determining the monthly probation supervision fee. However, it is clear that both (a) a defendant's ability to pay and (b) the other financial obligations the court is imposing are factors that must be considered when imposing a probation supervision fee.

Our courts have repeatedly emphasized that "[t]he paramount goal of sentencing reform [enacted by the Criminal Code] was greater uniformity" and seeks to achieve this goal through "channel[ing] the discretion of sentencing judges in fixing the terms of sentences for offenses under that Code." State v. Yarbough, 100 N.J. 627, 630 (1985) (citing State v. Roth, 95 N.J. 334, 361 (1984)). The Code channels the discretion of sentencing judges in setting the length of a prison sentence within the permitted range by requiring judges to consider aggravating and mitigating factors as criteria to guide the sentence.

Ibid. However, in Yarbough, the Court noted that the Code did not provide any criteria to channel the exercise of a sentencing court's discretion in deciding between concurrent and consecutive sentences. Id. at 636. Noting that N.J.S.A. 2C:1-2(c) states, "[t]he discretionary powers conferred by the code shall be exercised in accordance with the criteria stated in the code and, insofar as such criteria are not decisive, to further the general purposes stated in this section" the Supreme Court in Yarbough undertook to "fashion standards for discretion that will best further the purposes of the Code." Ibid.

Two "purposes of the provisions governing the sentencing of offenders" relevant to the exercise of a court's discretion in setting the probationary fee are: "(4) To safeguard offenders against excessive, disproportionate or arbitrary punishment;" and "(8) To promote restitution to victims." N.J.S.A. 2C:1-2(b). Although the purpose of imposing a probation supervision fee is to help the court system recoup some of its costs of supervising defendants from those very defendants themselves, the amount of the probation supervision fee in any individual case must be set in a manner to safeguard the defendant against an excessive amount—i.e. taking into consideration his ability to pay—and ensuring that the probation supervision fee is not so high that it impedes that defendant's ability to pay restitution to the victims. Many cases do not involve an order of restitution; where there is an order of restitution, it would

be an appropriate exercise of discretion for the sentencing court to set the probation supervision fee on the lower end in order "[t]o promote restitution to victims." N.J.S.A. 2C:1-2(b)(8).

In this case, the sentencing Court did not articulate any criteria that went into its decision to impose that maximum probation supervision fee; the Court simply stated, "Now, as a condition of probation, the Court will impose a probationary fee of $25." (13T 26-12 to 13) The Court did not consider that this monthly supervision fee adds up to a total of $1,500 over the course of the five years of probation to which James was sentenced. The Court's failure to consider James's financial means in the context of the probation supervision fee and its failure to articulate any factors on which it based the amount of the fee entails that this Court should vacate the probation supervision fee and remand. See N.J.S.A. 2C:43-2(e) ("The court shall state on the record the reasons for imposing the sentence."); R. 3:21-4(h) ("At the time sentence is imposed the judge shall state reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to 2C:44-3."). While the failure to explain its reason for the $25 fee alone requires vacatur of the $25 fee, it was also an abuse of discretion in this case to impose a total probation supervision fee of

$1,500 on top of the $12,443.56 in restitution ordered given that James was unemployed at the time of the sentence.

CONCLUSION

For the reasons in Points I-IV, this Court should reverse Defendant's convictions and remand for a new trial. If this Court affirms the conviction, this Court should reverse the amount of restitution and probation supervision fee and remand for reconsideration in accordance with Point V.

Respectfully Submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant

By: _____
SCOTT M. WELFEL
Ass't Deputy Public Defender
ID No. 084402013

DATED: October 6, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3309-21T1

INDICTMENT NO. 16-05-0800
CASE NO. 16000512

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM A FINAL
v.	:	JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF
JAMES R. SKINNER,	:	NEW JERSEY, LAW DIVISION (CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable Richard W. English, J.S.C., Honorable David F. Bauman, J.S.C., Honorable Lourdes Lucas, J.S.C., and a Jury

---

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR
132 JERSEYVILLE AVENUE
FREEHOLD, NEW JERSEY 07728-2374
(732)431-7160

Monica do Outeiro, 041202006
Assistant Prosecutor
Director, Appellate Section
Of Counsel and
On the Brief
email: mdooutеiro@mcponj.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Court Rules

Rules of Evidence

COUNTERSTATEMENT PROCEDURAL HISTORY

The defendant, James R. Skinner, was charged by way of Indictment Number 16-05- with third-degree burglary, N.J.S.A. 2C:18-2, and third-degree theft of moveable property, N.J.S.A. 2C:20-3(a). Da1-2.

Several pre-trial motions were litigated, including – and relevant to POINT I of this appeal – a motion made by the defense to suppress an in-court identification from witness Kevin Dunn. (4T:10-4 to 10-7; 14-7 to 14-11);[1] Da18-22; see also (4T:5-5 to 5-9)("So, basically, we are here today to argue whether or not Mr. Dunn can testify in court that the man he saw on that night was [the defendant] and whether or not there was any suggestibility as to that identification"). Mr. Dunn did not participate in any out-of-court identification procedure; however, he did provide two descriptions of the burglar to police.

Immediately following the burglary, Mr. Dunn had provided a "generalized" description of the burglar: "a full beard, wearing a jacket, dark wool hat, sunglasses, white-collared shirt and a dark zip-up jacket." (4T:7-23 to 9-2). When Mr. Dunn later provided a formal statement to police, his description of the burglar was "more specific:" "He gives the suspect's hair color and he describes a tattoo that [the defendant] has specifically on his chest. He says that he knows him as someone that used to work at the restaurant. He's seen him multiple times before. He knows his face, but he doesn't know his name." (4T:9-21 to 10-3).

The Honorable David F. Bauman, J.S.C., denied defendant's motion to preclude Mr. Dunn's in-court identification. (4T:14-7 to 17-15); Da23. The

[1] The State's transcript citations follow the transcript key contained in defendant's brief at page 1, footnote 3.

court rejected defendant's contention that Mr. Dunn's more-detailed description of the burglar – "assuming that it" "constitutes an identification within the intendment of the Wade Henderson line of" cases – was made "amidst highly suggestive circumstances." (4T:16-3 to 16-9). In so finding, the court noted defendant did "not point to any source of outside influence," but instead "simply relie[d] on the alleged change in Mr. Dunn's description of the Defendant and conclude[d] summarily without any evidentiary basis that i[t] must have been because of outside influence." (4T:17-2 to 17-6). In the absence of a factual basis for such a conclusion, the court was compelled to deny defendant's motion to preclude Mr. Dunn's in-court identification. (4T:17-7 to 17-15).

Defendant's trial took place before the Honorable Lourdes Lucas, J.S.C., and a jury from September 14, 2021 to September 21, 2021. (7T to 12T). On September 21, 2021, the jury returned its verdict, finding defendant guilty as charged. (12T:101-7 to 103-2); Da30.

Defendant appeared before Judge Lucas for sentencing on January 27, 2022. (13T). Judge Lucas found that the totality of the mitigating factors preponderated over the aggravating factors and imposed a concurrent five-year probationary sentence, along with $12,443.56 restitution, and all mandatory fines and penalties. The court also made "maintain verifiable employment" a condition of probation. (13T:25-18 to 26-26). See also Da31-33.

Defendant thereafter filed an appeal with this Court. Da34-37. The State opposes defendant's appeal and submits the following in support of its opposition.

COUNTERSTATEMENT OF FACTS

Kevin Joseph Kelly, Sr. and his brother Ed Kelly are the owners of Kelly's Tavern in Neptune City. The Kelly family has owned the tavern, which has a "very family-oriented" atmosphere, for 72 years. The tavern building consists of three floors: the main floor contains the bar and restaurant, the "third floor" contains the "financial office" and the "camera room," and the basement contains a "party room" (the Tiffany Room), as well as "an office … where [the] money is." This office is unmarked and kept locked, though a spare, unmarked key for the door known only to employees is "kept right behind the baron a little hook, but … tucked away." The tavern has approximately six entrances, some dedicated for patrons, others for employee use only, and others for deliveries. The ins and out of the tavern's public and private spaces can be confusing. As Mr. Kelly admitted, "you have to know where you're going." Even in the tavern's "workshop," where tools like "spray paint and all of our bolts, nuts, and screws" were kept, "you can't find the light switch. Nobody knows where the light switch is." (7T:41-25 to 46-12; 54-11 to 54-16; 55-4 to 56-18; 62-19 to 68-11; 69-25 to 71-24).

The third-floor camera room was where the tavern's 64-camera surveillance system saved its video recordings onto a hard drive. The recording were maintained on two to four week intervals, at which time the videos would be deleted. The videos recorded by these cameras included date and time stamps, but not audio. The 64 surveillance cameras recording these silent videos were scattered throughout the tavern and were not hidden. In fact some were placed by the tavern's television sets. In 2016, the tavern's surveillance camera system was already "four to five years" old. (7T:41-25 to 46-12; 54-11

to 54-16; 55-4 to 56-18

Kelly's Tavern opens at 7:00 a.m. and closes at 2:00 a.m. Approximately 20 full-time and 40 part-time employees keep the tavern running, during either a morning shift, mid-day swing shift, or night shift. It is the responsibility of a manager on the night shift to "lock up" the tavern: "lock the doors and lock the money up, close down, put the lights out." Locking up the money entails taking the cash "left" from tip bags and change and putting it into one of "three wooden" combination-locked boxes located in the basement office. The money secured in these boxes would be deposited in the bank "daily," except for Sunday. (7T:41-25 to 54-16; 73-12 to 82-4).

Mr. Kelly only trusted six people to be a closing manager. The defendant was one of those trusted managers. Defendant had worked at Kelly's Tavern for 10 years as a part-time closing shift bartender. Defendant was approximately "six-one … always had a beard. Red, red hair … maybe 210 pounds," with a chest tattoo. During his employment at Kelly's Tavern, Mr. Kelly saw defendant "close to a thousand" times and watched him close via the tavern's surveillance cameras "over 200 times." Mr. Kelly's trust in the defendant ended in September 2015, when Mr. Kelly fired the defendant for "[a]fter hours drinking," something the tavern's insurance company would not cover. When Mr. Kelly fired the defendant, he asked him "not to come on the premises" again. Mr. Kelly changed the combinations for the wooden cash boxes, but overlooked getting the tavern key back. On January 30, 2016, defendant text messaged Mr. Kelly's son Ryan inquiring as to whether he "was allowed in" the tavern; Ryan replied, "Pop says you're all good and have been." (7T:41-25 to 54-16; 68-24 to 69-5; 76-2; 106-21 to 106-25; 9T:63-16 to

64-22).

Defendant told Kelly's Tavern manager and friend Timothy Hendricksen "something to effect he'd get revenge or he wouldn't go easily" if fired. This revenge came at approximately 3:37 a.m. on Monday, February 1, 2016, only five months after defendant was fired, when Kelly's Tavern was burglarized. The only people that had permission to be in the tavern at the time of the burglary were Vincent Valencio, a Kelly's Tavern cleaner, and Kevin Dunn, an employee of Shore Point Distributors there to clean the draft beer lines. Mr. Dunn would clean these lines at Kelly's Tavern every two to three weeks at around 3:30 a.m. As per his usual process, on February 1, 2016, the cleaner let Mr. Dunn into the tavern, where he set up his equipment on the bar top in the main tavern room. Mr. Dunn's attention was drawn when the defendant, a man he recognized as a Kelly's employee despite not knowing his name, walked into the tavern. Mr. Dunn had seen defendant in the tavern at least "twice before … in the past years" and recognized him because of two distinctive features: he had red hair and "some tattoos," most notably "on his chest." Thinking nothing amiss because he believed defendant to be a Kelly's Tavern employee, Mr. Dunn greeted defendant and went back to work. (7T:54-6 to 54-21; 60-19 to 82-4; 8T:5-2 to 18-12; 92-7 to 96-13).

Mr. Dunn again saw defendant in the basement of the tavern. When defendant saw Mr. Dunn in the basement, defendant "stopped to tell that me didn't think they cleaned the beer lines there," a "comment that [Mr. Dunn] normally do[es]n't get," but one he recognized as a comment defendant had said to him before. Mr. Dunn saw the defendant a total of four separate times that morning, three times upstairs and one time in the basement of the tavern.

Mr. Dunn only realized something was amiss when the Kelly's Tavern chef, Jeffrey LaPoint, arrived and it became clear the defendant was not supposed to have been at the tavern. Mr. Dunn later told the Kellys that he recognized the burglar and later provided that information to police in a formal statement. (8T:13-24 to 26-23).

Mr. LaPoint had been the chef for Kelly's Tavern for 25 years, working from 4:30 a.m. to 2:00 p.m., six days a week. When Mr. LaPoint would arrive at the tavern for his shift, he would expect to encounter only the tavern's cleaner. On February 1, 2016, as he walked into the tavern he encountered the unexpected – a six-foot-one-inch man with a beard, dark glasses, and a hood up exiting the tavern. Mr. LaPoint initially assumed it was the "beer guy," Mr. Dunn. When Mr. LaPoint spoke with Mr. Valencio, and then Mr. Dunn, he learned that the man he had encountered leaving the tavern was not supposed to be in the tavern. Mr. LaPoint immediately called the police. Mr. LaPoint had worked with the defendant for "[q]uite a few years" and would see him "[m]aybe three or four" times per week. Mr. LaPoint estimated that he has seen the defendant "[a] couple thousand times, probably." As such, when later shown the tavern's surveillance video by manager Christopher Lynch, Mr. LaPoint recognized defendant, based not only upon the way defendant looks, but also the way he walks. (8T:49-24 to 58-3; 61-5 to 63-11).

Sergeant Nicholas Morgan of the Neptune City Police Department arrived at Kelly's Tavern approximately 10 minutes after defendant left. Sergeant Morgan learned that the "suspicious person" reported to have been in the tavern was wearing dark sunglasses, a dark wool hat, and a white shirt, and had a beard. Mr. Dunn told the sergeant that, "The subject … appeared to

know his way around the area." With this information, Sergeant Morgan put out a BOLO, or "be on the lookout," for a man matching this description to neighboring towns. (7T:54-6 to 54-21; 60-19 to 82-4; 8T:5-2 to 40-6).

Police altered Kevin Kelly, Jr., Mr. Kelly's son and a tavern manager, about the reported suspicious person. Upon arrival at the tavern, Kevin reviewed the tavern's surveillance cameras and discovered this was not merely a suspicious person, but a burglary. Kevin had "notice[d] something on the camera" and went to the basement, only to find that the burglar had been in what should have been a locked office; "everything was disturbed, cash drawers, change boxes, everything that would have been locked up." Mr. Kelly later confirmed that $12,443 had been taken from the office. (7T:54-6 to 54-21; 60-19 to 82-4; 8T:5-2 to 40-6; 69-1 to 70-13).

Kevin also noticed something else in the videos – the defendant. Kevin had been "[n]eighborhood friends with defendant, in addition to having worked with him at Kelly's Tavern. Kevin recognized in the video recording of the burglar defendant's "walk, his mannerisms, his height, just everything about him." Kevin was shocked by this discovery "because we've been friends for so long." Kevin also noticed that the backpack carried by the burglar was "[v]ery similar" to the backpack that defendant "always carries." (8T:70-14 to 78-6). When he got the opportunity to see the video recordings from the burglary, Mr. Kelly also recognized the burglar to be the defendant: "I recognize Jimmy. … I know the way he walks … I'm very familiar … I could tell by his nose." Mr. Kelly watched the video by himself. (7T:69-8 to 69-24; 93-1 to 93-12).

Sergeant Michael Vollbrecht of the Neptune City Police Department handled the follow-up investigation of the burglary. Part of this investigation included reviewing the four hours of surveillance video recorded by the tavern's 64 cameras. Sergeant Vollbrecht's review of these videos started at 1:47 a.m. on February 1, 2016. At this time, the various cameras show closing manager Chris Larocca walking into the office with "[r]egister tills and money bags" "into the wooden money locker" at closing time. No one enters the office until the "suspect" does. These videos also show an "individual with … sunglasses in his hands" enter a "front door that's in the parking lot … like a fire door by the bathrooms" that is not a "customer entrance" and that "connects" to the back of "the main bar." The videos then show this individual greet Mr. Dunn, who is already in the main bar area.

This individual in then seen on these camera walk towards "the kitchen area" and "breeze way." This area "leads to … an upstairs office area, a storage area, tool room area" and to "a stairwell that goes downstairs." The tool room was admittedly poorly organized: "Everything didn't have its own place … if you knew what was supposed to be there and where it was supposed to be, you would know where it is."

From the tool room, the cameras captured the "subject" downstairs to the basement office. The subject appears to have an unknown item in his hand and appears to be "trying to manipulate the door … handle with" this item. After having no success opening the office door, the subject is then seen back in the main bar area, where it appears that the subject "[o]btain[s] the manager's key … from behind the cash register," an area that only employees would know about. From there, the suspect re-enters the downstairs office and opens the

door. While the suspect is downstairs, the cameras show Mr. Dunn entering a downstairs bathroom near the Tiffany Room. When Mr. Dunn left to go back upstairs, the suspect is seen re-entering the office and close the door. When the suspect exits the office, he has a backpack in his hands. The suspect is then recorded leaving through the same fire door. No one is seen entering the office until Kevin enters it post-burglary. (7T:54-6 to 54-21; 60-19 to 82-4; 9T:18-18 to 48-25).

Sergeant Vollbrecht's investigation revealed that the defendant was at two separate bars – PK Shamrocks and D'Arcy's Tavern – until 2:00 a.m. on February 1, 2016. Defendant's Avon residence was an "[a]pproximately three minutes" from these bars. Defendant's residence is also approximately three minutes' drive from Kelly's Tavern. While defendant's partner, Moira McDevitt had a vehicle, defendant rented a vehicle on January 30, 2016. Defendant returned this vehicle either late on February 1, 2016 or early February 2, 2016. (9T:49-12 to 100-2).

Defendant testified on his own behalf and presented testimony from his father, Terrence Skinner, and his long-term partner, Ms. McDevitt. All three presented a version of events that differed markedly from that presented by the State. Ms. McDevitt testified to waking up at around 2:15 to 2:30 a.m. to someone entering their shared residence and waking up again at 3:45 a.m. to go to the bathroom, at which time she saw defendant and his father talking. In Mr. Skinner's testimony, he confirmed that the person entering the residence was the defendant, though he stated it was at 2:35 a.m., and confirmed Ms. McDevitt's testimony that she had seen the two men up talking, though he claimed it was closer to 4:00 a.m. Defendant's testimony with regard to his

whereabouts at the time of the burglary matched that of his father and Ms. McDevitt; defendant reported arriving home at exactly 2:35 a.m. and Ms. McDevitt seeing him and his father up talking at 3:30 a.m.-3:45 a.m. (9T:101-22 to 112-19; 11T:5-25 to 51-12).

LEGAL ARGUMENT

POINT I[2]

DEFENDANT'S ATTACKS ON THE IDENTIFICATION EVIDENCE OFFERED BY THE STATE, SPECIFICALLY DUNN'S IN-COURT IDENTIFICATION AND THE INSTRUCTION PROVIDED ON IDENTIFICATIONS OFFERED BY KELLY'S TAVERN EMPLOYEES, ARE WITHOUT LEGAL OR FACTUAL MERIT

Defendant asks this Court to find error with regard to all of the identification evidence proffered by the State at trial. With regard to eyewitness Dunn, defendant argues that admission of his first-time in-court identification violated the dictates of State v. Watson, 254 N.J. 558 (2023) and State v. Burney, 255 N.J. 1 (2023). See Db15, 18-20, 34. Defendant's argument is wholly without merit as it wholly ignores that the "standard," "rules," and "holding" of Watson, and its companion case Burney, do not apply to the defendant's trial, which was held two years before these opinions were issued. Watson, 254 N.J. at 589; Burney, 255 N.J. at 26.

On the point of future applicability, the Watson Court could not have been clearer: "We apply the above standard here and provide clearer rules

---

[2] This POINT is responsive to POINT I and POINT III of defendant's brief. Db15-20, 30-33.

going forward. Today's holding applies to this and future cases, and to … Burney …, filed today." Watson, 254 N.J. at 589 (citing to State v. Henderson, 208 N.J. 208, 302 (2011)(which similarly applied its new rules regarding out-of-court identifications prospectively and to its defendant the defendant in its companion case, State v. Chen, 208 N.J. 307 (2011)); Burney, 255 N.J. at 26 ("To ensure orderly proceedings, we outlined in Watson, the required procedures for first-time in-court identifications going forward"); see also State v. Haskins, __ N.J. Super. __, __ (App. Div. 2024)(noting that one of the accepted ways in which a new rule may be applied includes "in future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is set forth").

At the time of the burglary and defendant's September 2021 trial, the rule governing Dunn's first-time in-court identification was not that yet to be announced in Watson, but instead State v. Clausell, 121 N.J. 298, 327-28 (1990). In Clausell, the Court held that a first-time in-court identification is "constitutionally valid" so long as "[t]he courtroom atmosphere was" not "so" "suggestive" "as to outweigh the reliability of the identification." The Clausell Court found this standard met, even though the witness "could not identify" defendant from an out-of-court photo lineup, there was a "long delay between the crime and trial," the courtroom atmosphere "was suggestive, but not so much as to outweigh" its reliability, "[d]efense counsel had ample chance to challenge the accuracy of the identification on cross-examination, and the jury was free to discount its value." Ibid.

Dunn's first-time in-court identification likewise possessed sufficient reliability so as to outweigh the suggestiveness of the courtroom atmosphere. While Dunn did not participate in an out-of-court identification procedure, he provided police with detailed descriptions of the burglar which matched the defendant's distinctive characteristics of having red hair and beard and a chest tattoo. Not only had Dunn seen defendant in the tavern four times during the burglary, but Dunn had seen defendant in the past. Though he did not know the defendant's name, defendant was not a stranger to Dunn. Dunn had both seen and conversed with the defendant when defendant was an Kelly's Tavern employee. In fact, it was because Dunn recognized defendant, and believed he was still in Kelly's Tavern's employ, that Dunn did not find defendant's presence in the tavern after hours suspicious and did not raise an alarm. (8T:17-18 to 18-6). Dunn's lack of reaction proves the veracity of his recognition of the defendant.

Further supporting the reliability of Dunn's first-time in-court identification was the lack of any evidence of undue outside influence with regard to Dunn's identification of defendant. Even in the absence of the guidance of Watson, defendant moved before the trial court for the suppression of Dunn's in-court identification. This motion was denied because of the paucity of evidence to even suggest that Dunn's pretrial descriptions of the burglar were due to an outside influence. Defendant was given the opportunity to explore this during cross-examination of Dunn and, again, came up empty handed. See (8T:22-15 to 26-15).

Dunn's in-court identification of the defendant was a "confirmatory identification" – "when a witness identifies someone he … knows from before

but cannot identify by name." State v. Pressley, 232 N.J. 587, 592-93 (2018). Such identifications are not, as a matter of law, "considered suggestive." Ibid.; cf. Watson, 254 N.J. at 587 (providing as examples of "good cause" sufficient to allow for a first-time in-court identification "when an 'eyewitness was familiar with the defendant before' the crime;" "[f]riends or associates, among others, could identify someone they have known for some time" for the first time in court). That Dunn's first-time in-court identification occurred in the courtroom alone does not put sufficient suggestiveness onto an otherwise non-suggestive identification such that the identification's reliability was outweighed. The lower court did not err in allowing this identification to take place before the jury, and concurrently allowing the jury to consider this testimony, along with the cross-examination attacking the identification as the product of suggestion. That the jury found this testimony to be persuasive and, along with other evidence, sufficient to establish defendant's guilt beyond a reasonable doubt, does not provide a basis for reversal of defendant's conviction. This Court can and should respect the lower court's ruling and the jury's verdict and affirm.

Defendant's attack on the identification jury instruction with regard to the various Kelly's Tavern employees who identified defendant from the surveillance recordings of the burglary similarly fails both factually and legally. During the charge conference, the trial court noted that the proposed instruction submitted by the State included an "identification charge" that included "a lot of factors," but "not all" and that the court "did agree" with the exclusions, e.g., "weapons distraction, there's no weapons in this case so I thought that was appropriate." Nonetheless, the court advised defense counsel

to "review" the State's proposed instructions "over the weekend, if there's any that were left out that you think should be included, certainly just add it back in for consideration." (10T:7-9 to 8-1). At the final charge conference, the judge noted that "the only change [defense counsel] had to the proposed" charge "was the language in the alibi being more specific as to the testimony that was rendered by each of the alibi witnesses, which the court made. (11T:89-7 to 94-5).

The trial court's instruction to the jury with regard to identification evidence started as follows:

> The State has presented the testimony of Kevin Kelly, Sr., Kevin Kelly, Jr., Jeffrey LaPoint, Kevin Dunn, and Timothy Hendrickson. You will recall that each of theses witnesses identified the defendant in court as the person in the surveillance video of February 1st, 2016 who committed the burglary and theft at Kelly's Tavern in Neptune City.
>
> …
>
> According to Kevin Kelly, Sr., Kevin Kelly, Jr., Jeffrey LaPoint and Timothy Hendrickson their identification[s] of the defendant were based upon observation and perception they each made of the perpetrator from the surveillance that showed the perpetrator at the time the offense was being committed.
>
> It is your function to determine whether the witnesses['] identification of the defendant is reliable and believable, or whether it is based on a mistake or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence that James Skinner is the person who committed the offense charged.
>
> Eyewitness identification evidence must be scrutinized carefully.

(11T:109-9 to 110-13). The judge reminded the jury that "there are risks of making mistaken identifications" due to flaws in human memory: "Although

nothing may appear more convincing that 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. (11T:110-14 to 111-23). The judge specifically advised the jury of the various estimator variables, see Henderson, 208 N.J. at 261-272, that can impact identifications, see (11T:112-11 to 115-12), and concluded the instruction as follows:

> In evaluating the … reliability of a witness's identification, you should also consider the circumstances under which any out of court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process. You should consider the following factors.
>
> You may consider whether the witness was exposed to opinions, descriptions, or identifications by other witnesses, to photographs or newspaper accounts, or to any other information or … influence, that may have affected the independence of his or her identification. Such information can affect the independent nature and reliability of a witness identification and inflate the witness's confidence in the identification.
>
> You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identifications were reliable. … you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus worthy of your consideration as you decided whether the State has met its burden to provide identification beyond a reasonable doubt. … The ultimate issue of the trustworthiness of an identification is for you to decide.

(11T:115-13 to 117-4).

Before this Court, defendant argues that which he did not below – that this instruction was insufficient because it did not include the "feedback" instruction from the identification model charge. Db32. Before this Court, defendant characterizes this omission as "inexplicabl[e]." Ibid. Nothing could be further from the truth. The explanation for this omission is plain in this record. Despite being given the opportunity by the trial court to add anything into the proposed identification instruction, defendant chose not to. The State submits that this choice is dispositive to defendant's appellate attack on the instruction provided.

Where no objection is made by defendant at the time the instruction is given, this Court's review is governed by the plain error standard. R. 1:7-2; R. 2:10-2; State v. Williams, 168 N.J. 323, 335-36 (2001); State v. Chapland, 187 N.J. 275, 289 (2006); State v. Tierney, 356 N.J. Super. 477 (App. Div.), certif. denied, 176 N.J. 72 (2003). The defendant must demonstrate that the instruction given was so flawed that it "possessed a clear capacity for producing an unjust result" and was "so egregious that it 'rais[es] a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930 (1970); Williams, 168 N.J. at 336; Tierney, 356 N.J. Super. at 477 (quoting State v. Macon, 57 N.J. 325, 336 (1971)). To make such a determination, the "alleged error must be evaluated in light 'of the overall strength of the State's case'" and "the totality of the entire charge." State v. Burns, 192 N.J. 312, 341 (2007) (quoting Chapland, 187 N.J. at 289); State v. Savage, 172 N.J. 374, 387 (2002); State v. Hipplewith, 33 N.J. 300, 317 (1960); State v. Nelson, 173 N.J. 417, 447 (2002).

No such egregious error can be found here. Even without the un-requested 11-lines of instruction of feedback, the jury instruction on identifications as a whole made clear to the jury that because even good-faith identifications could be mistaken, it was important for the jury to scrutinize identification testimony for outside influences or information that could "affect the independent nature and reliability" of such testimony. The instruction further made clear for the jury that its scrutiny of the identification testimony was not limited to only those factors identified by the court, but all "any other factor based on the evidence or lack of evidence in this case" that the jury "consider[ed] relevant" to its determination on the identifications' reliability.

Admittedly, a "principal argument[]" raised by defendant was a challenge the veracity and underlying motivation of these identifications and this formed a key point in both his cross-examination of the State's witnesses (all of whom expressly denied outside influence or improper motivation, see, e.g., (7T:93-1 to 93-12; 106-8 to 106-15; 8T:23-11 to 24-1; 61-5 to 62-11; 82-16 to 84-10; 98-1 to 98-25)), and closing argument. In addition to this eyewitness identification testimony, the jury had before it the surveillance videos of the burglary, which allowed it to evaluate for itself the identification of the defendant as the suspect depicted therein. Coupled with the instruction that was given, which alerted the jury to be mindful of outside influences on identifications, allowed the jury to reach a verdict for which there can be no reasonable doubt. The jury's verdict here – guided by instructions that provided an appropriate roadmap for evaluation of identification testimony, even in the absence of the un-requested 11 lines of instruction – was not an unjust result.

To the extent that defendant asks this Court to come to the opposite conclusion and find plain error present here by relying on State v. Sanchez-Medina, 231 N.J. 452 (2018), this reliance is misplaced. Unlike here, in Sanchez-Medina, 231 N.J. at 465-68, the trial court failed to provide any instruction to the jury on how it was to evaluate identification evidence: "The jury, however, did not hear any charge on identification." Moreover, the State's evidence was weak. Only one of the four victim's identified defendant and there was no corroborating independent witnesses or forensic evidence. Defendant's proffered defense was "misidentification." While the jury "should have been instructed about some of the factors discussed in Henderson," it was provided nothing on how to "assess the evidence." Sanchez-Medina, 231 N.J. at 465-68. A finding of plain error in Sanchez-Medina thus makes sense in a way it does not here – where an identification instruction, though not in defendant's now-preferred wording, was provided, and the State's identification evidence was corroborated by surveillance videos the jury could evaluate itself in relation to the identification of the defendant as the burglar.

Because there was no error in either the admission of identification evidence, or the court's instruction to the jury on how to evaluate such evidence, this Court should affirm defendant's conviction.

POINT II

SERGEANT VOLLBRECHT'S NARRATION TESTIMONY WAS PROPERLY ADMITTED AS LAY OPINION TESTIMONY PURSUANT TO WATSON AND ALLEN AND ANY EXCESSES IN THE TESTIMONY WERE HARMLESS

Sergeant Vollbrecht's testimony included a question-and-answer period in which the assistant prosecutor asked him to rely upon his personal observations of Kelly's Tavern, made during the investigation of the burglary, and apply it to clips and stills taken from the tavern's 64, 10-year-old surveillance cameras during the burglary, which the sergeant had previously reviewed. Much of this testimony helped orient jurors to where on the tavern's three floors the clip/still was taken and which of the undisputed occupants of the tavern – e.g., Dunn, the burglar – were depicted therein. (9T:28-9 to 49-2). Some questions asked the sergeant to draw the jurors' attention to details that could be missed, e.g., an unidentifiable object in the burglar's hand, a backpack in the burglar's hand, a backpack-sized bulge under the burglar's coat. (9T:33-23 to 34-2; 42-8 to 47-21). Others asked the sergeant to opine as to the burglar's conduct as designed to hide his face from the surveillance cameras. (9T:34-3 to 34-8).

Interspersed within this narration testimony were times when the assistant prosecutor asked the sergeant to provide the jury with more information about what was depicted in the still/clip based upon his own personal knowledge of the tavern and his investigation, e.g., (9T:32-1 to 32-21)(describing the state of the tool room based upon having seen the room when the sergeant "initially responded"); (9T:34-15 to 34-25)(explaining how

his "investigation" had revealed that "only … employees" knew the location of the manager's key behind the cash register); (9T:35-13 to 38-11)(testimony regarding the color of the tavern's chairs in person compared to on video).

Admissibility of this type of lay opinion narration testimony, see N.J.R.E. 701, is dependent on it being 1. "rationally based on the witness' perception," and 2. assisting the jury "in understanding the witness' testimony or determining a fact in issue." State v. Allen, 254 N.J. 530, 543-44 (2023). Satisfaction of the first requirement generally "rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing," but can be satisfied by "[a]n investigator who has carefully reviewed a video a sufficient number of times prior to trial." Id. at 544, 546 (quoting State v. McLean, 205 N.J. 438, 457 (2011)); Watson, 254 N.J. at 601.

Satisfaction of the second requirement "depends heavily on the nature of the recording and the proposed comments." Watson, 254 N.J. at 601-02. Relevant considerations include whether the content of the video is "chaotic or confusing" and whether the video is lengthy or unclear. Ibid. "Rule 701's helpfulness prong can be satisfied when an investigator draws attention to key details that might be missed, or helps jurors follow potentially confusing, complex, or unclear videos that may otherwise be difficult to grasp." Id. at 602.

Narration testimony should avoid being a "running commentary" prompted by "introductory question[s]" like "[w]hat do you see?" Watson, 254 N.J. at 603. "[C]ounsel must ask focused questioned designed to elicit specific, helpful responses." Ibid. The testimony should also "describe what appears on the recording but … not offer opinions about the content" – e.g., "The

'individual opened the door with his elbow' can be allowed if not reasonably disputed; he did so 'to avoid leaving fingerprints' cannot" – or offer "inferences or deductions …drawn from other evidence" – e.g., "an investigator who carefully reviewed a video in advance could draw attention to a distinctive shirt or a particular style of car that appear in different frames, which a jury might otherwise overlook." Id. at 603-04. Finally, the testimony cannot "offer … views on factual issues that are reasonably disputed." Id. at 603. "[A] witness cannot testify that a video shows a certain act when the opposing party reasonably contends that it does not."

Contrary to defendant's arguments, the sergeant's testimony was admissible narration testimony that satisfied both N.J.R.E. 701 and Watson. The sergeant's testimony regarding the clips/still from the Kelly's Tavern surveillance cameras was based not only on his review of the surveillance videos, but also his investigation of the burglary, which allowed him to familiarize himself with the layout of the tavern's public and private spaces, spaced out over three floors and around six entrances. The age and number of surveillance cameras (64) and the layout of the tavern, which born and bred tavern owner Mr. Kelly admitted could be confusing, (7T:62-19 to 67-2), made the sergeant's narration testimony – much of which focused on orienting the jury to the location of the clip/still – helpful to the jury and its understanding of the intersection of the videos created by these dispersed surveillance cameras.

Contrary to defendant's claims, the sergeant's testimony was not "play-by-play commentary." Db27. Rather than play the surveillance video and give the sergeant license to testify, the assistant prosecutor showed the sergeant

short clips and stills and asked the sergeant questions designed to elicit the specific and helpful responses contemplated by Watson. The following excerpt is exemplary of nature of the sergeant's testimony and concludes with the longest answer provided during the sergeant's narration testimony – just barely five transcript lines:

> Q: This is Still 34. What is this a still of?
>
> A: The subject entering Kelly's Tavern.
>
> Q: Which entrance is this?
>
> A: The front door that's in the parking lot. It's considered like a fire door by the bathrooms.
>
> Q: Okay. Is it a customer entrance?
>
> A: No.
>
> Q: Does it connect to the main bar that we just saw?
>
> A: It does.
>
> Q: This is … S-35, this is the back at the main bar?
>
> A: Yes.
>
> Q: Is the subject the individual with the sunglasses in his hands?
>
> A: Yes.
>
> Q: This is S-4, and S-36. What happened in that clip you just watched?
>
> A: The subject greeted Kevin Dunn.

Q: Okay. Is the subject coming from the direction of the door as you saw him enter?

A: Yes.

Q: And what direction is the subject walking to?

A: Towards like the kitchen area or the alleyway.

Q: Is this the area that you're talking about, S-37?

A: Yes.

…

Q: Where is this in the bar?

A: This is a little bit west of the bar, and it leads to like an upstairs officer area, a storage area, tool room area, and there's also an access point just on the other side of that door to a stairwell that goes downstairs.

(9T:30-8 to 31-18).

Contrary to defendant's argument, the sergeant's testimony largely focused, as it was required, on describing what appeared in the recordings. Many of the examples defendant proffers to the contrary are unsupportive of his attack. For example, defendant appears to suggest that the sergeant relied upon the video surveillance to render an opinion that the room was not well organized, such that one would need to know where something was located to find it. Db27. Review of the sergeant's actual testimony on this point makes clear that this opinion was not offered based on the video, but on the sergeant's own view of the room during his investigation:

Q: What's in the tool room?

A: Various tools.

Q: Have you seen this tool room?

A: I have.

Q: Close in time to this incident?

A: Yes.

Q: How close?

A: When I initially responded.

Q: Okay, so the day of?

A: Yes.

Q: Was it well organized would you say?

A: Not so much.

Q: What do you mean?

A: Everything didn't have its own place but there was stuff, you know, where it was – if you were looking – if you knew what was supposed to be there and where it was supposed to be, you would know where it is. It wasn't organized to what I would consider my standards.

(9T:32-5 to 32-21).

Moreover, to the extent that any of the sergeant's testimony could be viewed as having crossed the Watson boundaries, see Db28-29; (9T:32-22 to 33-3), the State submits that this Court can and should find such minor

overstepping to be harmless error like in State v. Allen. "[N]o trial can ever be entire free of even the smallest defect." Allen, 254 N.J. at 550 (quoting State v. R.B., 183 N.J. 308, 333-34 (2005)). "A defendant is entitled to a fair trial but not a perfect one." Ibid.

The harmless error analysis requires a court to "determine whether the error was 'of such a nature as to have been clearly capable of producing an unjust result.'" Allen, 254 N.J. at 549 (quoting State v. Trinidad, 241 N.J. 425, 451 (2020); R. 2:10-2). This has "generally" been "considered to mean that the error was of a nature sufficient 'to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Id. at 549-50 (quoting State v. Macon, 57 N.J. 325, 336 (1971)). "[I]n appeals involving the erroneous admission of improper police officer lay testimony, the nature and extent of the admitted testimony is balanced against the strength of the prosecutor's case beyond that testimony in determining whether the … error requires a new trial." Id. at 550.

Applying this standard to the facts before it, the Allen Court found the detective's narration testimony had in one respect overstepped the Watson boundaries when the detective on four occasion "testified about his view of defendant's actions." Id. at 540, 548-49 ("Instead of commenting on the fact that the surveillance video showed the discharge of a weapon at a particular location, which would have constituted proper narration, [the detective] testified about his view of defendant's actions," e.g., "the defendant firing the handgun" and "where the suspect has turned and discharged the first round").

Nonetheless, the Court found this testimony to be harmless because "the evidence of defendant's guilt was compelling." Id. at 550. This was so for six

reasons: 1. "defendant admitted that he was the person" depicted in the video; 2. defendant made "key admissions," e.g., admitting to carrying a handgun he had no permit to possess; 3. defendant "admitted this his handgun had discharged; 4. the officer who was the victim of the shooting testified; 5. the video itself, which "by no means establishe[d] that defendant intentionally shot at" the officer, did capture the entire shooting incident; and 6. the State's ballistics expert refuted defendant's claim of an accidental discharge. Id. at 551.

Like the Allen Court, this Court too can find found on this record "powerful evidence" sufficient to negate the few instances of improper testimony and to ensure that the jury's verdict is not in doubt. Defendant here did not dispute the contents of the surveillance video – that it depicted a burglary of Kelly's Tavern; he disputed that it was him on that video, proffering only an alibi in defense. The State countered this defense with the presentation of various Kelly's Tavern employees – defendant's bosses (one of whom was a life-long friend) and coworker – and eyewitness Dunn, all of whom identified the defendant as the burglar depicted in the surveillance videos. The jury too had access to these videos (and still photos from these videos) to themselves judge the similarities between the burglar and the man before them, with his distinctive red hair, beard and chest tattoo. All of the State's identification witnesses were subject to cross-examination with regard to their motivations. Thus, the jury had multiple avenues before them to judge for themselves both the identity of the perpetrator and the credibility of these witness identifications.

Moreover, much of what defendant finds objectionable about the sergeant's testimony is testimony that had already been provided by other witnesses. Mr. Kelly himself testified about the messiness of the tool room, claiming that you could not even find the light switch in that room. Mr. Kelly himself testified that the tavern's surveillance cameras were not hidden, with some being completely visible to the public. Mr. Kelly testified that he did not retrieve the key for the tavern from the defendant after his termination. Mr. Dunn testified to having seen the defendant specifically in the tavern at the time of the burglary, notably finding defendant's after-hours presence at the tavern not noteworthy because he believed defendant was still an employee. Kevin Kelly testified to recognizing the backpack that was worn by the burglar as a backpack similar to one he had seen the defendant always in possession of. Numerous witnesses testified to the damage to the basement office and the money boxes inside based not on the videos, but on their personal observation of the office immediately after the burglary.

Sergeant Vollbrecht's testimony did not deprive the defendant of a fair trial. Defendant's conviction should be affirmed.

POINT III[3]

THERE IS NO CUMULATIVE ERROR IN THIS RECORD TO WARRANT REVERSAL OF DEFENDANT'S CONVICTION

"[I]ncidental legal errors" necessarily "creep into" proceedings. State v. Orecchio, 16 N.J. 125, 129 (1954); see also State v. Marshall, 123 N.J. 1, 169 (1991), cert. denied, 507 U.S. 929 (1993). Where they do so in a manner that

[3] This POINT is responsive to POINT IV of defendant's brief. Db33-34.

does "not prejudice the rights of the accused or make the proceedings unfair," "an otherwise valid conviction" will not be disturbed. Ibid. Only where "the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the [proceedings] unfair," do "fundamental constitutional concepts dictate" the grant of relief. Ibid.

Despite having failed to establish that any reversible error exists, see POINT I and II, supra, defendant argues this Court should aggregate these non-reversible errors into a cumulative effect that together render his conviction reversible. There is no basis in law or fact to do as defendant requests. The individual alleged errors complained of by the defendant do not alone rise to the level of reversible error, see supra, and, for that reason, cannot and should not be aggregated to cumulative error warranting reversal of defendant's conviction.

POINT IV[4]

DEFENDANT'S CONCESSION AS TO BOTH THE AMOUNT OF RESTITUTION AND HIS ABILITY TO PAY THAT AMOUNT MAKE HIS CURRENT REQUEST FOR A REMAND FOR A RESTITUTION HEARING UNWARRANTED

Defendant's request for the imposition of a probationary sentence, as opposed to the split county jail and probationary sentence requested by the State, focused heavily on the applicability of mitigating factor six: "[t]he defendant … will compensate the victim of defendant's conduct for the damage or injury that the victim sustained." See N.J.S.A. 2C:44-1(b)(6)). Defendant expressed not only a willingness "to compensate the victim in this

[4] POINT is responsive to POINT V of defendant's brief. Db34-41.

case, hence, the request for the Court to find [mitigating] factor number six," but also his future ability to do so. (13T:4-19 to 5-3).

Counsel for defendant told the sentencing court, "[t]he main issue that I see in this case is one of restitution. [Defendant] is going to have a period of supervision through probation, and during that time he's going to have to make the victim whole … But, judge he does plan to make the restitution." (13T:5-19 to 6-24) (emphasis added). Defendant elaborated on the details of his restitution plan during his sentencing allocution:

> I just prequalified for CRST Trucking, so I got a – we just got to finalize it for schooling, but as soon as I get through that, that I see – I see as a real way with a light at the end of the tunnel. Once I get into the schooling, my wife and I can switch [childcare responsibilities]. She could downgrade her hours so that I can start working. But, you know, it will take a little while before that can happen … Like I said, with trucking school, I could see a real – a way forward, getting everything paid, fulfilling all the obligations, whatever you determine they are.

(13T:8-17 to 9-8) (emphasis added).

The sentencing court found defendant's representations with regard to his future ability to pay restitution to be supported by the information he self-reported with regard to his employment history during preparation of his Presentence Report. While defendant was unemployed at the time of sentencing, this unemployment was related to the early days of the COVID-19 pandemic; his pre-pandemic employment "was a front house manager at an establishment in Asbury Park" and with a "tree service." Defendant also reported having "approximately 15 to 16 years in the restaurant … or bar industry" and construction. (13T:11-23 to 12-24).

Without objection from defendant or counsel, the sentencing court found "the defendant is not challenging the amount of the restitution, and that [he] is willing to pay restitution." The sentencing court accepted defendant's representation that his request for a full probationary sentence was linked to his ability "to fulfill" his financial restitution "obligation:" "defendant does need to secure employment, and does need to work, and … any period of incarceration would affect that." (13T:16-20 to 17-5; 25-13 to 25-15).

As requested by the defendant, the sentencing court found applicable mitigating factor six, though giving it only "light weight." The sentencing court noted that this finding was based upon defendant's concession that he "is, in fact, willing to pay restitution" and "has not challenged … the amount of restitution or whether the imposition of restitution would be fair or not fair." (13T:17-9 to 18-8; 26-23 27-11).

Defendant's arguments before this Court with regard to his financial obligations represent an about face to the representations both he and counsel made below. Despite having relied upon an express willingness and ability to pay full restitution in order to convince the sentencing court to apply mitigating factor six and not to impose a custodial term, before this Court defendant recalls no such promises. See Db35-36 (negating the import of any expressions of a willingness or ability to pay "because the [sentencing c]ourt was going to follow the recommendation of the State and order restitution regardless of [defendant's] willingness"). It is only in defendant's forgetfulness as to his restitution promises that his claims of error by the sentencing court, and of distinction from the holding of State v. Orji, 277 N.J. Super. 582 (App. Div. 1994), can thrive.

The record below makes plain the error in defendant's current position. The lower court did not, as defendant now claims, fail to "make any explicit findings" with regard to the amount of restitution or defendant's ability to pay. Db34, 37. Instead, the lower court relied upon defendant's express concessions as to both the amount of restitution and his ability to pay, supported by defendant's express plan with regard to future employment and defendant's self-reported employment history. In so doing, the lower court did not err, but instead followed this Court's precedent of State v. Orji. This Court should affirm.

N.J.S.A. 2C:44-2(b) directs a court to "sentence a defendant to pay restitution … if … [t]he victim … suffered a loss; and [t]he defendant is able to pay or, given a fair opportunity, will be able to pay restitution." This analysis "shall take into account the financial resources of the defendant, "including the defendant's likely future earnings," "the nature of the burden its payment will impose," and "the defendant's ability to pay." N.J.S.A. 2C:44-2(c). "[N]ormally," this "requires a hearing on both the ability to pay and the time period for making restitution." State v. Orji, 277 N.J. Super. 582, 589 (App. Div. 1994); State v. McLaughlin, 310 N.J. Super. 242, 263-64 (App. Div.), certif. denied, 156 N.J. 381 (1998).

Orji represents "circumstances" under which this Court found no error in the failure to hold a hearing before ordering restitution:

> No dispute exists as to amount of restitution … Moreover, during the sentencing hearing, defense counsel suggested that defendant would have the funds to pay restitution … Defendant raised no objection to the concession made by his counsel nor did he dispute his ability to pay. Consistent with counsel's representation, we

> believe that defendant has the ability to pay restitution. There was evidence in the pre-sentence investigation report that defendant has a bachelor's degree in marketing and is gainfully employed as the owner-operator of a limousine-taxi service. From this evidence, the judge properly could have inferred that defendant had the ability to pay. Also, the court gave defendant the maximum probationary sentence … thereby allowing a maximum duration for payment of restitution … No restitution hearing is required here.

Orji, 277 N.J. Super. at 589.

The circumstances of Orji bear sufficient identity to those before this Court such that the same result is warranted. This record makes clear that "[t]here [was] no dispute as to the amount [of restitution] ordered or defendant's ability to make restitution over five years of probation." Id. at 590. Like in Orji, defense counsel here made clear there was no dispute as to the amount of restitution owed or the defendant ability to pay that amount over the course of a five-year probationary term. Like in Orji, defense counsel made the payment of restitution the crux of his argument for a non-custodial sentence, relying upon defendant's payment of full restitution in support of his request for the application of mitigating factor six.[5] Counsel for defendant here assured

[5] Defendant's restitution promises to the lower court, from which he now seeks to withdraw, call to mind the "common[]sense" doctrine of "invited error." State v. Williams, 219 N.J. 89, 100 (2014)(quoting State v. A.R., 213 N.J. 542, 561-52 (2013)). "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.'" A.R., 213 N.J. at 561 (quoting State v. Corsaro, 107 N.J. 339, 345 (1987); State v. Harper, 128 N.J. Super. 270, 277 (App. Div.), certif. denied, 65 N.J. 574 (1974)). This doctrine is "intended to 'prevent defendants from manipulating the system,'" applying "'when a defendant in some way has led the court into error' while pursuing a tactical advantage that does not work as planned.'" Williams, 219 N.J. at 89; A.R., 213 N.J. at 561-62.

the sentencing court that defendant "plan[ned] to make the restitution." Compare (13T:4-19 to 6-24) with Orji, 277 N.J. Super. at 589.

Defendant here, like the defendant in Orji, did not object to the restitution-related concessions made by his counsel. In fact, rather than object, defendant here supported his attorney's concessions with the specifics as to how he would work to fulfill his restitution obligations, "whatever [the court] determine[d] they are." Defendant told the sentencing court about his future schooling and job plans and how both would work within his familial obligations. The defendant ended this by assuring that he "could see a real – a way forward, getting everything paid, fulfilling all the obligations." Compare (13T:8-17 to 9-8) with Orji, 277 N.J. Super. at 589.

Like the Orji Court, the lower court here reviewed the defendant's presentence report and found support therein for his and his attorney's concessions as to his ability to pay restitution over a five-year probationary period. While defendant was at that time unemployed, the lower court correctly found that unemployment to be related to the early days of the COVID-19 pandemic. Defendant's employment history was in the food and beverage service industry and construction, two sectors hard hit by the early stages of the pandemic, but which the court appropriately noted were, along with the rest of the economy, rebounding by the time of sentencing. The lower court appropriately noted that defendant had a wealth of employment experience (over 15 years in the food and beverage industry), which when coupled with defendant's trucking-related schooling provided every assurance that defendant had "future earning power and potential expectations of" earning power such that he would have the ability to pay restitution, as he had

assured the court. State in the Interest of R.V., 280 N.J. Super. 118, 122-23 (App. Div. 1995).

Finally, like in Orji, the court here also imposed the maximum five-year probationary term, giving the defendant the maximum duration for payment. Not only does this extended duration provide another point of identity with Orji, thus calling out for the same result – affirmance, it also calls into question the import of defendant's coupling of his restitution attack with an attack on the $25 per month probationary fee ordered by the sentencing court pursuant to N.J.S.A. 2C:45-1(d)(1). Before this Court, defendant does the math, noting that $25 per month over the course of five years will lead to a total of $1,500 in probation supervision fees. Db40. However, defendant's math stops there. The State submits defendant does so, because further math applied to the totalities of his fines, fees and $12,443.56 restitution shows – as the lower court found – that this total financial obligation is well within the defendant's conceded ability to pay over the course of five years of probation. Over the course of five years, defendant's per month financial obligation will be less than $250 per month and less than $3,000 per year – both of which are well within this defendant's conceded and self-reported future ability to pay. Defendant has failed to prove to the contrary before the lower court or this Court. This Court should affirm.

CONCLUSION

For the aforementioned reasons, and authorities cited in support thereof, the State respectfully requests defendant's conviction and sentence be affirmed.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR

/s/ Monica do Outeiro

By: Monica do Outeiro, 041202006
Assistant Prosecutor
Director, Appellate Section
Of Counsel and
On the Brief
email: mdoouteiro@mcponj.org

MD/mc
Date: March 13, 2024

c Scott M. Welfel, A.D.P.D.

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Deputy Public Defender
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973-877-1200 · Fax 973-877-1239

JENNIFER N. SELLITTI
Public Defender

April 8, 2024

SCOTT M. WELFEL
ID. No. 084402013
Ass't Deputy Public Defender
Scott.Welfel@opd.nj.gov

Of Counsel and
On the Letter-Brief

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3309-21

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment Of Conviction of the
v.	:	Superior Court of New Jersey, Law Division, Monmouth Vicinage
JAMES R. SKINNER,	:	
		Indictment No. 16-05-00800-I
	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Richard W. English, J.S.C. Hon. David F. Bauman, J.S.C.
	:	Hon. Lourdes Lucas, J.S.C. and a Jury

Your Honors:

This reply letter-brief and appendix are submitted on behalf of Defendant in lieu of a formal brief pursuant to R. 2:6-2(b).

TABLE OF CONTENTS

INDEX TO REPLY APPENDIX

LEGAL ARGUMENT

POINT I

THE COURT ERRED IN ALLOWING THE STATE TO ELICIT A FIRST-TIME IN-COURT IDENTIFICATION OF DEFENDANT BY KEVIN DUNN AT TRIAL. (4T 14-7 to 17-15; Da23)[1]

In the State's response to Defendant's Point I, challenging the admissibility of Kevin Dunn's first-time in-court identification of Defendant at trial, the State argues (1) that the Supreme Court issued a new rule in State v. Watson, 254 N.J. 558 (2023) which should only apply prospectively, and (2) that Dunn's identification was admissible because Dunn was familiar with James Skinner. (Sb11-13)[2] If this Court deems Watson's substantive holding to constitute a new rule for retroactivity analysis, this Court should hold that this rule should be afforded at least pipeline retroactivity. (Part A) Under the Watson rule, Dunn's level of familiarity with the person he saw at Kelly's Tavern is not sufficient to warrant permitting a first-time in-court identification. (Db19-20)

---

[1] Defendant is not withdrawing any arguments in his initial brief but only has space in this reply brief to address the State's responses to Point I.

[2] The following abbreviations will be used:
Sb – State's Response Brief
Db – Defendant-Appellant's Initial Brief
Dra – Defendant's Reply Appendix
4T – October 17, 2019 (Second Motion to Suppress/Preclude Identifications)
8T – September 15, 2021 (Trial)

However, if this Court deems the present record insufficient to make that determination, this Court should remand for the trial court to hold a testimonial hearing to determine whether Dunn's level of familiarity was sufficient under Watson to permit an in-court identification.

A. If Watson's Holding Precluding First-Time In-Court Identifications Is Found To Be A New Rule, It Should Be Afforded At Least Pipeline Retroactivity.

The first question in retroactivity analysis is whether the cited legal proposition constitutes "a new rule of law." State v. G.E.P., 243 N.J. 362, 382 (2020) (quoting State v. Feal, 194 N.J. 293, 307 (2008)). There were several components to the Watson Court's ruling on first-time in-court identifications. First, there was the substantive holding: "first-time in-court identifications can be conducted only when there is 'good reason' for them." Watson, 254 N.J. at 587. Second, there was the procedural holding setting forth three "practices going forward for proposed first-time in-court identifications." Ibid. The three procedural rules were clearly a new rule of law and clearly apply "to future cases" "going forward." Id. at 589. However, it is not clear, contrary to the State's assertion, that the Court intended to limit the application of its substantive holding to future cases only.

First, it is notable that the court did not write that the substantive holding applies only to future cases. The Court wrote: "We apply the above standard

here and provide clearer rules going forward. Today's holding applies to this and future cases, and to State v. Roberson Burney, 255 N.J. 1 (2023), filed today." Ibid. This is a stark contrast to the Court's language in State v. Washington, 256 N.J. 136 (2024), in which the Court wrote: "We apply today's ruling and the above guidance to this and future cases only." 256 N.J. at 163 (emphasis added). It also stands in contrast to the Court's language in State v. Henderson, 208 N.J. 208 (2011), in which the Court wrote that its holding would apply "to future cases only" and would "take effect thirty days from the date this Court approves new model jury charges on eyewitness identification." 208 N.J. at 302 (emphasis added).

Second, it is not clear that the Watson Court's substantive rule should be considered a "new rule" for retroactivity purposes. For a court's holding "to be deemed a new rule of law for retroactivity purposes, there must be a 'sudden and generally unanticipated repudiation of a long-standing practice.'" State v. Purnell, 161 N.J. 44, 53 (1999) (quoting State v. Afanador, 151 N.J. 41, 58 (1997)). The State asserts that, prior to Watson, first-time in-court identifications were clearly admissible under State v. Clausell, 121 N.J. 298 (1990). (Sb11) The State fails to note the obvious—that the opinion in Clausell preceded Henderson by two decades. Henderson not only changed the legal landscape concerning the admissibility of identification evidence, but the Court

issued its opinion after a Special Master hearing "to evaluate scientific and other evidence about eyewitness identifications" which involved "testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies." 208 N.J. at 217-18. Watson's holding grew directly out of Henderson and its progeny.

It is hard to characterize Watson's substantive holding excluding first-time in-court identifications as "sudden and generally unanticipated" when Watson itself framed "the problems with first-time in-court identifications" as "underscore[d]" by "[s]ettled case law, scientific studies, and common sense." 254 N.J. at 579. In particular, the Watson court pointed to State v. Herrera, 187 N.J. 493 (2006), which had held that "showups are inherently suggestive . . . because the victim can only choose from one person." Ibid. (quoting Herrera, 187 N.J. at 504). The Watson court recognized that this was identical to its recognition in State v. Madison, 109 N.J. 223 (1988) that "in-court identifications are 'extremely suggestive' when 'the only person sitting at the defense table who reasonably could [be] the defendant' is the accused." Id. at 580 (quoting Madison, 109 N.J. at 243).

Watson also noted that the Supreme Court in Henderson reaffirmed the highly suggestive nature of showups and also found they 'present a heightened risk of misidentification' if 'conducted more than two hours after an event.'" Id.

at 579 (quoting Henderson, 208 N.J. at 261). In support of this conclusion, the Henderson court noted that "[t]wo hours after" the incident in which the witness observed the perpetrator, "58% of witnesses failed to reject an 'innocent suspect' in a photo showup, as compared to 14% in target-absent photo lineups." 208 N.J. at 260 (citing Daniel Yarmey et al., Accuracy of Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 464 (1996)).

Most importantly, Henderson made clear that its holding was not meant to be static but was rather a call to courts and practitioners to remain apprised of research developments in the field of identification evidence:

> We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now. By providing the above lists, we do not intend to hamstring police departments or limit them from improving practices. Likewise, we do not limit trial courts from reviewing evolving, substantial, and generally accepted scientific research. But to the extent the police undertake new practices, or courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community.
>
> [208 N.J. at 292.]

Henderson's call for courts to consider developments in identification research is in line with courts' general "responsibility 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).

In light of Henderson's call to follow developments in identification research, the Watson Court grounded its substantive rule in "[a] number of scholarly sources agree that first-time in-court identifications are highly suggestive and unreliable." 254 N.J. at 580. Specifically, the Watson Court cited:

> - Nat'l Rsch. Council of the Nat'l Acad. of Scis., Identifying the Culprit: Assessing Eyewitness Identification 36 n.28 (2014) (concluding that "[a]n identification ... typically should not occur for the first time in the courtroom");
> - 2019 Report of the Third Circuit Task Force on Eyewitness Identification 59 (2019) (noting "the extreme suggestivity of a defendant sitting at counsel table with defense counsel should, by itself, raise caution flags regarding the independent reliability of an in-court identification"); and
> - Aliza B. Kaplan & Janis C. Puracal, Who Could It Be Now? Challenging the Reliability of First Time In-Court Identifications After State v. Henderson and State v. Lawson, 105 J. Crim. L. & Criminology 947, 990 (2015) (concluding that first-time in-court identifications have "all the suggestiveness of ... show-up[s]" and should be banned).
>
> [254 N.J. at 581.]

Accordingly, Watson observed that "[t]he concerns outlined in Henderson therefore apply with even greater force to first-time in-court identifications than they do to showups." 254 N.J. at 585.

Because Watson's substantive rule on first-time in-court identifications grew directly out of (1) Henderson's call to courts to remain apprised of identification research and (2) research published before the time of Skinner's trial, Watson's holding should not be considered "sudden and generally unanticipated."

Additionally, one would be hard pressed to characterize first-time in-court identifications as "long-standing practice." Purnell, 161 N.J. at 53. Even if the State were correct to read Clausell as articulating a prior rule on first-time in-court identifications, it is not reasonable to assert that the Clausell "rule" remained the law even after Henderson. Neither the Supreme Court nor this Court in Watson cited Clausell at all; thus, neither opinion described Clausell as a status quo rule that defendant Watson sought to upset. State v. Watson, 472 N.J. Super. 381 (App. Div. 2022), rev'd, 254 N.J. 558 (2023). Moreover, in the more than thirty-three years between Clausell and Watson, counsel has identified only fourteen total cases in which a witness identified the defendant as the perpetrator for the first time at trial without having previously identified the defendant in an out-of-court identification procedure.[3] This small number of

[3] State v. Washington, 256 N.J. 136, 145 (2024); Watson, 254 N.J. 558; Burney, 255 N.J. 1; State v. Telfair, No. A-2108-21, 2024 WL 743619, at *4 (App. Div. Feb. 23, 2024); State v. Thompson, No. A-5288-17, 2022 WL 610326, at *2 (App. Div. Mar. 2, 2022); State v. Owle, No. A-4829-18, 2022 WL 2195524, at *15 (App. Div. June 20, 2022); State v. Wingate, No. A-2090-09T1, 2012 WL

cases certainly corresponds with the suggestion that "it is somewhat rare for a witness to be asked [by the prosecutor] to make an in-court identification when he or she identified someone other than the defendant during an out-of-court procedure." Watson, 472 N.J. Super. at 486 n.44.

Thus, because Watson's substantive holding regarding first-time in-court identifications cannot truly be described as a "sudden and generally unanticipated repudiation of a long-standing practice," it cannot fairly be described as a "new rule" for retroactivity purpose. However, even if this Court finds that Watson's substantive holding constitutes a new rule, it should be afforded at least pipeline retroactivity.

Retroactivity analysis is "guided by three factors: '(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice.'" G.E.P., 243 N.J. at 386 (quoting Henderson, 208 N.J. at 300).

3731805, at *16 (App. Div. Aug. 30, 2012); State v. Johnson, No. A-2934-10T2, 2012 WL 2912754, at *3 (App. Div. July 18, 2012); State v. Delevry, No. A-2058-09T4, 2011 WL 5419745, at *9 (App. Div. Nov. 10, 2011); State v. Davis, No. A-2244-09T3, 2011 WL 2333357, at *7 (App. Div. June 15, 2011); State v. Johns, No. A-2423-08T4, 2011 WL 1631124, at *6 (App. Div. May 2, 2011); State v. Johnson, No. A-5330-06T4, 2010 WL 1427279, at *2 (App. Div. Apr. 9, 2010) State v. Kennebrew, No. A-2245-04T4, 2007 WL 674655, at *9 (App. Div. Mar. 7, 2007); State v. Moore, No. A-6303-03T4, 2005 WL 3730557, at *5 (App. Div. Feb. 3, 2006). (Dra1-188)

On the first factor, the Watson Court noted, "By conducting a suggestive identification procedure in a courtroom, the State may implicate due process concerns and deprive defendants of their due process rights in a way that neither cross-examination nor jury instructions can adequately address." 254 N.J. at 586. Thus, the purpose of Watson's substantive rule was "[t]o avoid unduly suggestive identifications of defendants in court that may trigger serious due process concerns under the State Constitution." Id. at 587. The Watson rule is thus "'designed to enhance the reliability of the factfinding process'" rather than being "an exclusionary rule whose primary goal is deterrence;" thus, "the first factor favors pipeline retroactivity." G.E.P., 243 N.J. at 387-88 (quoting Burstein, 85 N.J. at 408).

Skipping to the third factor, "the effect a retroactive application would have on the administration of justice," counsel is aware of only two cases that are still on direct appeal and thus would be impacted by pipeline retroactivity—this case and Telfair, No. A-2108-21. (Dra) If the G.E.P. court found that granting pipeline retroactivity to forty cases "would not present an unreasonable burden on the administration of justice," certainly granting pipeline retroactivity to two cases would not present an unreasonable burden. 243 N.J. at 388.

On factor two, the degree of reliance. "the State must have administered the old rule in 'good faith reliance [on] then-prevailing constitutional norms.'"

Feal, 194 N.J. at 311 (alteration in original) (quoting Purnell, 161 N.J. at 55). Language in Watson itself suggests that the State should have been aware of the inherent suggestiveness of first-time in-court identifications and questioned the propriety of eliciting such evidence:

> Suppose the State were to conduct the following identification procedure months after a crime but before trial: the prosecution first informs a witness that it has located and identified the culprit; it next singles out or otherwise highlights a particular person for the witness to view; and it then asks if the witness can make an identification. To be sure, such a highly suggestive process could readily pose "a very substantial likelihood of irreparable misidentification." . . . The process also mirrors a first-time in-court identification.
>
> Courts should not sanction such highly suggestive procedures—not in an individual case and not as a categorical approach to the introduction of certain evidence. Indeed, it is hard to see how the court system can justify overseeing the very type of identification procedure it would likely criticize law enforcement officers for conducting.
>
> [254 N.J. at 585-86.]

It is equally hard to see how the prosecution and justify eliciting the very type of identification that it knows would be inadmissible if administered by a police officer in an out-of-court identification procedure.

However, even if this Court determines that "the State acted in good faith" in eliciting an in-court identification in this case, that determination was not dispositive in G.E.P. and should not be here. 243 N.J. at 388. Ultimately,

the G.E.P. Court weighed the fact that the rule barring CSAAS testimony was "designed to enhance the reliability of the factfinding process" against the relatively small administrative cost of granting pipeline retroactive application to the forty cases then on appeal, and held that the rule barring CSAAS testimony should be afforded pipeline retroactivity. Ibid. This Court should likewise afford pipeline retroactivity to the rule in Watson..

B. There Was No "Good Reason" For Allowing A First-Time In-Court Identification In This Case.

As noted by the State, Watson's substantive holding contains one relevant "good reason" exception to the rule precluding all first-time in-court identifications:

> when an "eyewitness was familiar with the defendant before" the crime. Victims of domestic violence, for example, could properly be allowed to identify their assailant in court for the first time. Friends or associates, among others, could identify someone they have known for some time.
>
> [254 N.J. at 587 (emphasis added).]

However, the Watson Court also observed that even where the witness was familiar with the defendant, "[t]he better practice . . . is for the State to conduct appropriate identification procedures before trial," and if the State fails to do so, "there may well be no good reason to allow an in-court identification for the first time." Ibid.

Watson did not explore what level of familiarity would constitute "good reason" to justify an in-court identification. However, While the perpetrator in Watson was a stranger to the victim, the victim in Burney did have some prior familiarity with the suspect. When the suspect entered her home, he stated, "'I'm here for your dad, George,' leading [the victim] to believe he was there to fix something at the house." 225 N.J. at 6. The victim "believed she recognized the intruder as someone who had recently done contracting work on their house." Id. At trial, the victim "testified that she had seen defendant on two prior occasions" at her home, first when he was hired to clean the porch windows, and second a few weeks before the robbery when he rang her doorbell and asked for her father. Id. at 8. The Court held that the victim was not familiar enough with defendant to constitute a "good reason" to allow her to make a first-time in-court identification at trial because she "did not know defendant well prior to the robbery," having interacted with him only on two prior occasions. Id. at 28.

The familiarity at issue in Burney is comparable to Dunn's level of familiarity with the person he saw enter Kelly's Tavern on the night of the burglary. When Dunn was asked whether he was familiar with the person he saw at Kelly's Tavern, he did not answer, "yes," but rather responded, "I've seen him a couple of times before;" he acknowledged, however, that he did not

know this person's name. (8T 10-17 to 23) While Dunn's use of the word "couple," is ambiguous, "couple" can mean either "two" or "an indefinite small number." "Couple," Merriam-Webster.com, https: // w w w . merriam- webster. com/dictionary/couple (last visited Apr. 4, 2024). In Dunn's initial interview with the police, he stated he had seen this person "on about three separate occasions" prior to the date of the burglary. (Da13) This does not equate to a person that Dunn has "known for some time." Watson, 254 N.J. at 587. Rather, Dunn's familiarity with this person is equivalent to the level of familiarity deemed insufficient in Burney to justify an "in-court" identification. Thus, this Court should hold that, in applying Watson to the facts of this case, Dunn's first-time in-court identification should have been excluded.

While Defendant asserts that this Court can determine, on the record before it, that Dunn's level of familiarity was insufficient to justify an in-court identification as a matter of law, Defendant acknowledges that the trial court did not hold a pretrial hearing to assess Dunn's level of familiarity. Defendant had twice moved for a pretrial hearing to assess whether Dunn should be permitted to identify Skinner at trial, arguing that there was "some evidence of suggestiveness" under State v. Chen, 208 N.J. 307, 326 (2011). (Da20-22) Specifically, Defendant pointed to the fact that in Dunn initially gave only a "general description of the suspect," but "after speaking to police, other

employees, and the owners/managers of Kelly's, Dunn gave a" much more specific description of the suspect that seemed to more closely resemble Skinner. (Da21) The motion court denied the request for a hearing, ruling, "whether the generalized description provided by Mr. Dunn constitutes an identification within the intendment of the Wade Henderson line of questioning, assuming that it does, the Court finds that Defendant has failed to show any evidence that this identification was made amidst highly[4] suggestive circumstances." (4T 16-3 to 9)

This might be analogized to the posture of State v. Anthony, 237 N.J. 213 (2019). There, defendant moved to suppress the victim's out-of-court identification under Henderson because the identification procedure had not been sufficiently documented as required, which prevented defendant from "know[ing] if any impermissibly suggestive behavior took place." Id. at 221. Because under the law at the time, "[t]o obtain a pretrial hearing, a defendant [needed to] present some evidence of suggestiveness tied to a system variable which could lead to a mistaken identification," the motion court denied the motion, holding that "defendant had not presented evidence of suggestiveness."

[4] In denying Defendant's motion, the motion court applied an incorrect standard; rather than assessing whether Defendant had offered "some evidence of suggestiveness," the court found the absence of "highly suggestive circumstances." Compare Chen, 208 N.J. at 326. (4T 16-3 to 9, 17-8)

Id. at 221, 233. The Supreme Court's holding in Anthony expanded grounds for a pretrial hearing to include scenarios where there was not a sufficient recording of the out-of-court identification procedure. Id. at 233. The Court then remanded for "a hearing to assess the reliability of the identification" because that "option was one not available at the time" when "defendant could not present evidence of suggestiveness." Id. at 237.

Likewise, in denying Defendant's motion in this case, the motion only assessed whether Defendant had presented evidence of suggestiveness and did not assess whether there was "good reason" to allow the State to elicit a first-time in-court identification of Defendant by Dunn. Thus, if this Court does not hold that Dunn's first-time in-court identification should have been excluded on the record before the Court, the Court should remand for a hearing to determine whether pursuant to Watson there was sufficient familiarity to constitute "good cause" for a first-time in-court identification.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

By: __/s/ Scott M. Welfel_____
SCOTT M. WELFEL
Assistant Deputy Public Defender
ID. No. 084402013

DATED: April 8, 2024

2024 WL 743619
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Ordale R. TELFAIR, a/k/a Ordale Telfair, Odell Telfair, Odell R. Telfair, Orddale R. Telfair, Ordale R. Blitz, Ordale Blitz, and Blitz, Defendant-Appellant.

DOCKET NO. A-2108-21
|
Argued February 6, 2024
|
Decided February 23, 2024

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Indictment No. 19-09-0335.

Attorneys and Law Firms

Lauren Stephanie Michaels, Assistant Deputy Public Defender, argued the cause for appellant (Jennifer Nicole Sellitti, Public Defender, attorney; Lauren Stephanie Michaels, and James K. Smith, Jr., Assistant Deputy Public Defender, of counsel and on the briefs).

Amanda Gerilyn Schwartz, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Adam David Klein, Deputy Attorney General, of counsel and on the brief).

Before Judges Smith and Perez Friscia.

Opinion

PER CURIAM

***1** Defendant Ordale R. Telfair appeals from a September 9, 2021 judgment of conviction entered after a jury found him guilty of murder, N.J.S.A. 2C:11-3(a)(1) and (2), possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1), and the consecutive sentences imposed. We affirm in part, reverse in part, and

remand for the limited purpose of allowing the trial judge to provide "an explanation for the overall fairness of [the] sentence" as required by State v. Torres, 246 N.J. 246, 272 (2021).

I.

We summarize the pertinent facts adduced at the jury trial relevant to the claims on appeal. On May 23, 2019, around 8:22 p.m., defendant fatally shot Tayshon "Sapp" Hayward outside of a Penns Grove apartment complex. The shooting transpired after Cleon Burden instigated an altercation against Keyshon Davis, who Burden believed stole money from his wife's vehicle. Burden and Davis had fought earlier in the day requiring police intervention. Neither Hayward nor defendant was involved in the earlier incident.

On the night in question, Burden went to the apartment complex to visit a cousin and saw Davis there with other men. Feeling outnumbered, Burden left and enlisted his cousin and a friend to return with him to confront Davis. Burden's wife drove the men to the apartment complex. Burden's sister arrived separately in her vehicle. Burden approached Davis and asked him to fight, but Davis declined. During the exchange, Hayward, who was with Davis, walked away. Defendant ran after Hayward and fatally shot him in the face.

At trial, Hayward's girlfriend, Porsha Williams, testified she had been dating and living with Hayward for several months. She had joined him at the apartment complex on the night in question. Williams witnessed a "dark-skinned guy with like a mark underneath his eye [and] a bald head" follow Hayward and shoot at him twice with a handgun. One shot missed, and the other struck Hayward underneath his eye. She relayed hearing "boots hit the ground from [the shooter] jumping out [of] the truck." After shooting Hayward, the man "ran and jumped back inside the truck," and it "pulled off."

During Williams's testimony, the prosecutor, without providing defense counsel notice, attempted to conduct an in-court identification of defendant. Defense counsel had filed multiple motions to suppress witnesses' "[i]n and [o]ut of" court identifications, which were withdrawn. The identification exchange was as follows:

> Q. This person that shot [Hayward,] did you ever see him before?
>
> A. No.
>
> Q. No. Do you see him in the courtroom today?
>
> A. No.

Q. You don't see him in the court room today, this person?

A. Yes.

THE COURT: Asked and answered ...

[Defense Counsel]: Excuse me-

THE COURT: I said asked and answered.

[Prosecutor]: Judge, I thought she said yes.

THE WITNESS: I said yes.

....

Q. You do. Can you tell us where he's seated?

A. Right there.

Defense counsel requested a sidebar and objected. He moved for "the answer [to] be stricken" because Williams had previously "d[one] an array" where "she picked a different person," and argued a trial could not "be more of a suggestive atmosphere to do an identification." The judge inquired, "when you say you want me to strike the answer, do you want me to strike both answers? Because if I say that answer is stricken, will the jury know which one I mean[?]" Defense counsel responded that he "assume[d] it would have to be ... both answers," though he clarified he was most "concerned about ... the in-court identification." The judge advised, "I'm going to say to the jury that the last answer of the witness is stricken." Defense counsel requested no further charge. The judge then instructed the jury: "the last answer of the witness is stricken from the record and the jury will disregard it."

***2** The prosecutor then questioned Williams regarding her out-of-court identification from a photo array provided by the police of the person she believed shot Hayward. Williams testified she was "[seventy-five] percent sure" of her identification.

On cross-examination, defense counsel questioned Williams on her identification from the photo array. Claiming she "was still ... kind of in shock" and had not gotten any sleep, when asked whether the photograph she chose "was [of] the person who shot [Hayward]," Porsha responded "[n]o." The prosecutor later introduced the video of Porsha's photo array through Detective Salvatore Giuliano's testimony.

The State thereafter called Burden, who testified that after he asked Davis to fight, a man—later identified as Hayward—walked away stating "he was going to get a gun." Burden relayed defendant "ran after the ... guy" who had walked away, he heard gun shots, and defendant ran back into the car with Burden. In the car, defendant stated he thought "he hit him in the head or ... face." Burden had known defendant since childhood and identified him in court.

Robinson, a woman defendant had recently begun dating, testified that on the night of the shooting, defendant admitted to shooting Hayward "in the face." She testified she was scared after learning that he had killed Hayward.

During summations, a central focus was the credibility of the eyewitnesses at the shooting and the identification of defendant. Defense counsel argued the importance of photo array identification guidelines, which police had followed, and highlighted that Williams had not identified defendant as the shooter. Defense counsel further argued:

> Now on May 24, 2019[,] ... Williams is brought into the police station with the purpose – now this is within [twenty-three] hours of her having seen – is brought into the police station and they do a photographic array procedure with her. She's there importantly because she saw the crime happen. And she even said when she testified ... that the person who did the shooting [went] ... by her. She saw ... the person commit the crime. And the person went ... by her, but it was like at [an] angle. But the bottom line is she was there to make the identification because obviously the police thought she could make an identification having been there and seen the person who did it.
>
> ....
>
> So, all you have now in this case right now is you have ... Williams who identified somebody else as being the shooter was sure that it wasn't [defendant].

Defense counsel also commented to the jury regarding the veracity and motive of different witnesses, positing for consideration: whether all of Williams's testimony "was truthful"; that Robinson "ha[d] her own reasons for not being truthful"; and whether Burden was "trying to get out of trouble ... himself."

The prosecutor, in summation, classified the witnesses at the shooting into two groups: "people who knew and loved ... Hayward when he died on May 23, 2019[,] and people who knew and cared about" defendant. The prosecutor concluded his summation as follows:

> [I]n order to find [defendant] innocent[,] you have to completely discount the testimony of ... Hayward's girlfriend ... Williams. You have to completely

Dra4

> discount the testimony of [Hayward]'s friend Jasmine Bell. You have to completely discount that for some reason ... [defendant's] long-time friend [(Burden)] who knows his nickname, who knows his mom and ... lie[d] to the police and ... lie[d] again on the stand. You have to [for] some reason believe and discount the testimony of [defendant's] lover on the day of May 23, 2019[,] that she would for some reason lie to the police and then come to court and lie today on the stand. In order for you to find [defendant] innocent[,] you have to discount all that testimony.

***3** Defendant did not object to the prosecutor's closing statement.

The judge instructed the jury that "[r]egardless of what counsel and I may have said recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts." She further instructed, "[a]rguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence." Regarding any testimony stricken from the record, the judge charged, "[a]ny testimony that I may have had occasion to strike is not evidence and shall not enter in your final deliberations. It must be disregarded by you." She further instructed that "even though you may remember the testimony you are not to use it in your discussions or deliberations." Defendant did not object to the final jury charge.

On September 9, 2021, the jury found defendant guilty of purposeful and/or knowing murder, possession of a handgun with an unlawful purpose, and unlawful possession of a handgun. The State moved for an extended sentence based on defendant's eight prior convictions, including a prior firearms conviction under N.J.S.A. 2C:12-1(b)(2). After hearing argument, the judge granted the State's motion providing "the extended term range of sentencing for the crime of murder is [thirty-five] years to life and the statute requires that [thirty-five years] be served without parole." The impact statements submitted from Hayward's mother and brother were also considered. The judge found no mitigating factors, but found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), "risk that the defendant will commit another offense," six, N.J.S.A. 2C:44-1(a)(6), "extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted," and nine, N.J.S.A. 2C:44-1(a)(9), "need for deterring the defendant and others from violating the law." The judge found the aggravating factors predominated. Defendant was sentenced to a fifty-year prison term for murder, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, to be served consecutively to a ten-year sentence with a five-year period of parole ineligibility for unlawful possession of a firearm.

On appeal, defendant argues:

POINT I

DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR, APPARENTLY WITHOUT ANY NOTICE TO DEFENSE COUNSEL, ASKED PORSHA WILLIAMS TO IDENTIFY DEFENDANT IN COURT, EVEN THOUGH SHE HAD SELECTED ANOTHER MAN'S PHOTO IN A PRETRIAL PHOTO LINEUP. THE ERROR WAS EXACERBATED BY THE TRIAL COURT'S FAILURE TO GIVE A MEANINGFUL CORRECTIVE INSTRUCTION.

A. Where An Eyewitness Has Failed To Identify Defendant In A Pretrial Procedure, There Should Be A Pretrial Hearing Before The Prosecutor Is Allowed To Ask That Witness To Identify Defendant In Court.

B. The Prejudice To Defendant Was Not Rectified By The Trial Court's One-Sentence Statement That "The Last Answer Of The Witness Is Stricken From The Record And The Jury Will Disregard It." The Judge Should Have Instructed The Jury That Porsha Williams'[s] In-Court Identification Was Unreliable And Could Not Be Considered For Any Purpose.

***4** POINT II

DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S COMMENTS IN SUMMATION THAT THE JURY WOULD HAVE TO "COMPLETELY DISCOUNT" THE TESTIMONY OF SEVERAL STATE'S WITNESSES IN ORDER TO RETURN A NOT GUILTY VERDICT.

POINT III

IT WAS IMPROPER TO IMPOSE A CONSECUTIVE SENTENCE FOR POSSESSION OF A FIREARM WITHOUT ANY ANALYSIS OF THE YARBOUGH [1] FACTORS. MOREOVER, CONCURRENT SENTENCES WERE CLEARLY WARRANTED BECAUSE THERE WAS NO EVIDENCE THAT DEFENDANT POSSESSED THE FIREARM OTHER THAN DURING THE SHOOTING.

II.

Our Supreme Court has elucidated that trial courts confronted with a first-time in-court identification must "take steps to guard against practices that pose serious due process concerns —especially inside a court of law in front of a jury." State v. Watson, 254 N.J. 558, 586 (2023). "By conducting a suggestive identification procedure in a courtroom, the State may implicate due process concerns and deprive defendants of their due process rights in a way that neither cross-examination nor jury instructions can adequately address." Ibid. The Supreme Court

prospectively held that "the State must file a motion in limine if it intends to conduct a first-time in-court identification procedure" providing defendants with "advance notice and an opportunity to challenge in-court identification evidence before trial." Id. at 588. "Defendants can then challenge an identification at a pretrial hearing and try to prevent the jury from learning about potentially tainted evidence." Id. at 586. Indeed, trial courts are to be vigilant to exclude suggestive first-time in court identifications of a defendant.

Prior to the Supreme Court's decision in Watson, and at the time of this trial, an in-court identification was admissible so long as the suggestive courtroom atmosphere did not "outweigh the reliability of the identification." State v. Clausell, 121 N.J. 298, 328 (1990). Generally, "the ultimate burden remain[ed] on the defendant to prove a very substantial likelihood of irreparable misidentification." State v. Burney, 471 N.J. Super. 297, 327 (App. Div. 2022) (quoting State v. Henderson, 208 N.J. 208, 289 (2011)), rev'd, State v. Burney, 255 N.J. 1 (2023).

We have long recognized "the importance of immediacy and specificity when trial judges provide curative instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial." State v. C.W.H., 465 N.J. Super. 574, 595 (App. Div. 2021) (quoting State v. Vallejo, 198 N.J. 122, 135 (2009)). "Further, '[t]he adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached.' " Id. at 596 (alteration in original) (quoting State v. Winter, 96 N.J. 640, 647 (1984)). "That the jury will follow the instructions given is presumed." State v. Ross, 229 N.J. 389, 415 (2017) (quoting State v. Loftin, 146 N.J. 295, 390 (1996)).

III.

We reject defendant's argument that despite the judge's curative jury charge striking from consideration Williams's unnoticed in-court identification, he was denied a fair trial. "The simple response to defendant's argument is that the judge sustained the objection, struck the testimony, and the jury presumably followed the instruction." State v. Castoran, 325 N.J. Super. 280, 287 (App. Div. 1999); accord State v. Winder, 200 N.J. 231, 256 (2009). Undisputedly, the prosecutor sought to have Williams identify defendant for the first time in court without notice to defense counsel. We recognize, as defendant concedes, that at the time of trial, the Supreme Court had not yet held that a prosecutor was required to give notice to a defendant before asking a witness to make a first-time in-court identification; thus, a pretrial hearing on reliability of the in-court procedure was not required.

***5** Here, when Williams was first asked if she could identify the shooter in the courtroom, she responded "no." The prosecutor again asked, "You don't see him in the courtroom today, this person?" she stated "Yes." The judge then intervened and stated, "Asked and answered," to

which the prosecutor responded, "I thought she had said yes." The witness stated, "I said yes" and the prosecutor asked where he was seated and Williams stated, "Right there," which was immediately followed by a side bar conference, defense counsel's objection, and his request that the identification be stricken.

We are satisfied the judge sufficiently instructed the jury that Williams's last statement identifying defendant was stricken from the record and they were not to consider it. The judge issued the curative instruction immediately after hearing from counsel. We observe that before the judge gave the charge, after she inquired of defense counsel what he was requesting, she advised that she was going to instruct the jury that the "last answer of the witness is stricken," and defense counsel did not object. A judge's "decision to provide a curative instruction and the content of that [instruction] is left to the discretion of the trial judge." State v. McKinney, 223 N.J. 475, 497 (2015). Where defense counsel "d[oes] not object to the jury instruction at trial," we "review[ ] the charge for plain error." Id. at 494.

Having concluded the charge striking the identification was not in error, we further note that in light of the overwhelming evidence of defendant's guilt, if deficient, it did not have the potential to cause an unjust result. See State v. Cotto, 182 N.J. 316, 327 (2005) ("[T]he strength and quality of the State's corroborative evidence rendered harmless any deficiency in the instruction [on identification] and precludes a finding of plain error."). In particular, the substantial trial evidence against defendant included the eyewitness testimony of defendant's lifelong friend Burden, the corroborating testimony of Bell, and Robinson's testimony that defendant admitted shooting Hayward in the face. As the identification was immediately stricken, there is no "reasonable doubt as to whether the jury reached a result it otherwise might not have." Watson, 254 N.J. at 590-91.

IV.

Generally, "[p]rosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. Patterson, 435 N.J. Super. 498, 508 (App. Div. 2014) (quoting State v. R.B., 183 N.J. 308, 332 (2005)). Prosecutorial misconduct justifies reversal where the misconduct was "so egregious" as to "deprive[ ] the defendant of a fair trial." State v. Smith, 167 N.J. 158, 181 (2001) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). "In deciding whether prosecutorial conduct deprived a defendant of a fair trial, 'an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.' " State v. Williams, 244 N.J. 592, 608 (2021) (quoting Frost, 158 N.J. at 83). Reversal is appropriate only where the prosecutor's actions are "clearly and unmistakably improper." Patterson, 435 N.J. Super. at 508 (quoting State v. Wakefield, 190 N.J. 397, 437-38 (2007)).

As defendant failed to object to the remarks at the time of trial, we review the prosecutor's comments for plain error. See R. 2:10-2. We observe defense counsel in summation questioned the credibility of the witnesses present at the shooting. He questioned the veracity of Burden's testimony that defendant ran after Hayward, two shots were heard, and that defendant ran back entering the vehicle with Burden before admitting he shot Hayward in the face. Defense counsel further challenged the truthfulness of Robinson and Williams's testimony. The prosecutor's comment "to find [defendant] innocent, you have to completely discount the testimony" of the State's witnesses was followed by a recitation of the testifying witnesses who were present at the shooting and responded to defense counsel's challenges to their credibility. We conclude the prosecutor's remarks were not " 'clearly and unmistakably improper,' and [did not] substantially prejudice[ ] defendant's fundamental right to have a jury fairly evaluate the merits of his defense." Smith, 167 N.J. at 181-82 (quoting State v. Timmendequas, 161 N.J. 515, 575 (1999)). Further, defendant failed to establish the remarks constituted plain error. State v. Feal, 194 N.J. 293, 312 (2008).

***6** We are unpersuaded by defendant's arguments that the prosecutor's remarks "flipped the burden of proof" and "undermined the presumption of innocence." Notably, the prosecutor, immediately prior to the challenged comments in his summation, acknowledged that the State's "standard of proof here is beyond a reasonable doubt." In reviewing the prosecutor's statements, we evaluate the remarks not in isolation but in the context of the summation as a whole. State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008) (citing State v. Carter, 91 N.J. 86, 105 (1982)). We conclude the remarks were not "so egregious that [they] deprived the defendant of a fair trial." State v. McGuire, 419 N.J. Super. 88, 139 (App. Div. 2011) (quoting State v. Ramseur, 106 N.J. 123, 322 (1987)).

Further, in the final jury instruction after summations, the judge charged the jury that a defendant on trial "is presumed to be innocent and unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the defendant must be found not guilty of that charge." She instructed, "[t]he burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant." We note the challenged remarks are to be "viewed in the context of the entire record." State v. Bey, 129 N.J. 557, 622 (1992). We discern the prosecutor's statements were not "clearly capable of producing an unjust result." R. 2:10-2.

V.

Finally, we address defendant's contention that his sentence should be vacated and remanded for resentencing. Defendant argues because there was no evidence he possessed a handgun prior to or after the murder, and the crimes stem from one incident, the convictions militate to a

concurrent sentence. He further argues because the judge failed to provide reasons for imposing the consecutive sentences, a remand is mandated for resentencing. We agree a remand is warranted.

The judge imposed a fifty-year term of imprisonment for murder, subject to NERA, and a ten-year term with a five-year period of parole ineligibility for unlawful possession of a firearm without a permit, to be served consecutively. Regarding the consecutive sentences, the judge's sole statement was, "[t]he sentences will run consecutively to each other, which results in an aggregate sentence of 60 years—47.5 years without parole." The judge did not engage in a complete analysis and address the required findings under the Yarbough factors. Further, the judge did not consider the overall fairness of the sentence imposed. See Torres, 246 N.J. at 268. The State has acknowledged a remand is required. We add only the following comments.

Applying an abuse of discretion standard, we maintain a limited scope of review when considering sentencing determinations on appeal. See id. at 272. Ordinarily, our review is deferential and we do not "substitute [our] judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). However, our deference applies "only if the trial judge follows the [Criminal] Code and the basic precepts that channel sentencing discretion." State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting State v. Case, 220 N.J. 46, 65 (2014)). In imposing a sentence, the sentencing judge is required to make individualized assessments based on the facts of each case and the aggravating and mitigating sentencing factors. See State v. Jaffe, 220 N.J. 114, 121-22 (2014). The judge must provide its reasons for the sentence and "the factual basis supporting a finding of particular aggravating or mitigating factors affecting [the] sentence." R. 3:21-4(h); see also N.J.S.A. 2C:43-2(e) (requiring sentencing court to state on the record the reasons for imposing a sentence and the "factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence").

***7** When sentencing a defendant for multiple offenses, "such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." N.J.S.A. 2C:44-5(a). In Yarbough, 100 N.J. at 642-44, our Supreme Court established criteria that a sentencing judge must consider when deciding whether to impose consecutive sentences. "The Yarbough factors are qualitative, not quantitative; applying them involves more than merely counting the factors favoring each alternative outcome." State v. Cuff, 239 N.J. 321, 348 (2019). A "sentencing court must explain its decision to impose concurrent or consecutive sentences in a given case." Ibid. "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011). An explanation of the "overall fairness" is necessary "to 'foster[ ] consistency in ... sentencing in that arbitrary or irrational sentencing can be curtailed and, if necessary, corrected through appellate review.' " Torres, 246 N.J. at 272 (alterations in original) (quoting State v. Pierce, 188 N.J. 155, 166–67 (2006)).

Consistent with our Court's holding in Torres, we therefore remand for the judge to provide reasons for the consecutive sentences with "[a]n explicit statement, explaining the overall fairness" of defendant's aggregate sentence. Id. at 268.

Defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in part, reversed in part, and remanded for resentencing. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2024 WL 743619

Footnotes

1 State v. Yarbough, 100 N.J. 627 (1985).

2022 WL 610326
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Tariq THOMPSON, a/k/a Towon Coon, Tarik Nelson,
and Tairq G. Thompson, Defendant-Appellant.

DOCKET NO. A-5288-17
|
Argued December 14, 2021
|
Decided March 2, 2022

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 17-07-1891.

Attorneys and Law Firms

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

Lucille M. Rosano, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens II, Acting Essex County Prosecutor; Lucille M. Rosano, of counsel and on the brief).

Before Judges Rothstadt, Mayer and Natali.

Opinion

PER CURIAM

***1** Defendant Tariq Thompson appeals from his June 13, 2018 conviction and sentence that were entered after a jury found him guilty of second-degree robbery, N.J.S.A. 2C:15-1(a)(2), and the disorderly persons offense of theft by unlawful taking, N.J.S.A. 2C:20-3(a). Defendant received an aggregate sentence of ten years, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On appeal, he argues the following points.

POINT I

BECAUSE THE POLICE LACKED AN OBJECTIVELY REASONABLE BASIS FOR BELIEVING THAT 1207 SPRINGFIELD AVENUE WAS ABANDONED, THE TRIAL JUDGE ERRED IN DENYING THE MOTION TO SUPPRESS.

POINT II

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE VICTIM'S IDENTIFICATION OR, ALTERNATIVELY, GRANTING THE REQUEST FOR A WADE[1] HEARING BECAUSE THERE WAS NO AUDIO, VIDEO, OR WRITTEN VERBATIM ACCOUNT OF THE IDENTIFICATION PROCEDURE, AND BASED ON THE LIMITED RECORD THAT DOES EXIST, THE SHOW-UP PROCEDURE WAS IMPERMISSIBLY SUGGESTIVE.

POINT III

THE COURT ERRED IN PERMITTING THE VICTIM'S WIFE TO MAKE AN IN-COURT IDENTIFICATION OF DEFENDANT, WHERE SHE HAD NEVER PREVIOUSLY MADE AN OUT-OF-COURT IDENTIFICATION, BECAUSE IT WAS HIGHLY SUGGESTIVE AND UNRELIABLE.

POINT IV

THE TRIAL COURT ERRED (1) IN IMPOSING A TEN-YEAR SENTENCE FOR THIS SECOND-DEGREE ROBBERY, WHICH WAS AT THE LOW END OF THE SEVERITY SPECTRUM, AS FOUND BY THE JURY; (2) IN CONSIDERING DEFENDANT'S PRIOR ARRESTS; AND (3) IN GIVING SIGNIFICANT WEIGHT TO THE PSYCHOLOGICAL EFFECT OF THE INCIDENT ON DEFENDANT'S FAMILY.

For the reasons stated in this opinion, we conclude there is merit only to defendant's contention about his entitlement to a Wade/Henderson[2] hearing. We remand the matter to the trial court to conduct that hearing and, depending upon the outcome, to determine whether to vacate defendant's conviction. In all other aspects, we affirm.

I.

The facts leading to defendant's conviction as developed at trial are summarized as follows. On April 15, 2017, Jose Garro, accompanied by his wife Joy[3] and their young sons, went to a restaurant to pick up take-out food. Joy parked in the rear parking lot of the restaurant shortly after midnight, and remained in the car with the children, with the engine running and the headlights on, while Jose ran into the restaurant to place the order.

As Jose walked toward the restaurant, a man, who Jose identified at trial as defendant, approached him in the entryway and asked him for a cigarette. Jose testified that although there was a "low level" of lighting, he could see defendant's face. He described defendant as a short, black man with a beard, who was wearing blue jeans and a blue baseball-style jacket with "letters" on it. Jose told defendant that he did not smoke and continued into the restaurant.

***2** After placing the order, Jose returned to the car and stood by the open driver's side car window, talking to Joy. Joy noticed a man, who she identified for the first time at trial as defendant, "walking around the parking lot," but he did not enter the restaurant. When Jose re-entered the restaurant, Joy saw defendant standing, facing the door to the restaurant. She described defendant at trial as a short, African American male, who was wearing a dark navy blue jacket with white lettering, which reminded her of a Yankees jacket.

A short time later, Jose walked out of the restaurant and then felt "someone's presence" behind him. Defendant then pointed a black, semi-automatic handgun at Jose's head, told him to walk slowly, and pushed him toward the darkest part of the parking lot.

While standing "face to face," Jose told defendant that he did not want any problems, explained that his family was nearby, and tried to push the gun away. Defendant asked Jose whether he "believe[d]" he "was serious," and then pulled the trigger and fired a shot towards Jose's feet. Jose was not sure whether defendant "was trying to shoot at [him] or whether [defendant] was frightened," but insisted that he "did shoot [the gun]."

Jose told defendant to "calm down," and placed his brown leather wallet, which he said contained $400 in cash, on the roof of a car. Defendant then told Jose to turn around. Jose turned toward the ground and bent over because he believed defendant was going to shoot him, but he then saw out of the corner of his eye that defendant was walking away.

During the encounter, Joy heard Jose yell, "Please stop my wife's right over there." She also heard a "popping [noise] like firecrackers," which she assumed was a gun, and then saw defendant walk by the driver's side of her car. As defendant walked in front of her headlights, Joy saw him pull on a black ski mask, with openings for his eyes and mouth, over his head.

Shortly thereafter, Jose returned to the car, "yelling and crying," and told Joy "to chase after the guy." When Joy refused, Jose grabbed his phone out of the car and ran after defendant.

Joy called 911 and during her call, which was played for the jury, she told the dispatcher that her husband had been robbed in the parking lot of the restaurant, by a short, African American man, wearing a navy blue jacket with white lettering on it and blue jeans. She said she heard "one pop," and saw the man pull a black mask over his face as he walked in front of her car.

At the same time, Jose also called 911 while he chased after defendant. During his frantic 911 call, which also was played for the jury, Jose told the dispatcher defendant shot at him on Springfield Avenue near a different restaurant and took his wallet. Jose described defendant as a little, black male, wearing a hat and black jeans.

Jose testified that while he was on the phone with the dispatcher, he lost sight of defendant, but a worker at the other restaurant directed Jose's attention to a building located at 1207 Springfield Avenue. That building was adjacent to a daycare center, across the street from the other restaurant, and close to a cell phone store.

Jose then saw defendant, who was not wearing a ski mask, enter the small alleyway adjacent to that building through the open gate. He did not follow defendant into the alleyway, but instead remained by the entrance and waved down Officer Steve Jean-Simon, of the Irvington Police Department, who at 1:12 a.m. had responded to the report of an armed robbery. Jean-Simon testified that Jose was "very excited and very frantic," and said he had been robbed at gunpoint by "a short black male wearing a dark-colored jacket and ... jeans," who ran "through the alleyway of 1207 Springfield Avenue."

***3** Jean-Simon and another responding officer, Sergeant Charles Capers, searched the alleyway and backyard of 1207 Springfield Avenue, but did not find anyone. Jean-Simon described the alleyway as just wide enough for a small car to drive through, said the empty lot behind the building was strewn with "a lot of trash and broken bottles," and that the building was not occupied. He thought defendant may have climbed over the chain-link fence that lined the alleyway and escaped onto Stuyvesant Avenue.

Shortly thereafter, Officer Zhane Morgan, of the Irvington Police Department, received a call directing all units to the area of Stuyvesant and Lyons Avenues. The suspect was described as "[a] short black male, wearing a varsity jacket and blue jeans." As Morgan drove down Lyons Avenue toward Stuyvesant Avenue, she made eye contact with a man, whom she identified at trial as defendant, and who fit the dispatch description, except that he was wearing a red shirt, not a jacket. She saw defendant run and then hop over a fence into the rear yard of the house at the corner of Lyons and Stuyvesant Avenues.

Capers climbed over the fence and illuminated the area with his flashlight. Morgan saw defendant lying on the roof of a shed and yelled to Capers, who grabbed the man's foot and told him to get down. Capers described the man, who he identified at trial as defendant, as a short, black male, wearing a red shirt and jeans.

Capers testified that he decided to do a showup identification because less than thirty minutes had elapsed between the robbery and the discovery of the suspect on the roof. At Capers's direction, Jean-Simon, who had been searching for shell casings in the restaurant's parking lot with Jose, brought Jose to a location near 665 Stuyvesant Avenue. Jean-Simon testified that he told Jose they had "someone detained," who "may or may not be the person involved in this robbery," and Jose had "no obligation to pick someone at this time." Jose testified at trial that the officer told him "we're going to see if we can recognize a person who is, like, a suspect."

Upon arrival, they saw Morgan and Capers standing in the driveway with defendant about one car length from the patrol car. When Jean-Simon shined his spotlight on defendant's face, Jose "immediately became hysterical, started crying," and said, "That's him. That's him. That's the guy that shot --." Jose testified that he identified defendant as the person who had robbed him, but admitted it was "a little bit confusing," because although he recognized defendant's face, defendant was wearing a red shirt, and not a jacket. Defendant was arrested and taken to police headquarters.

At approximately 2:54 a.m., Capers, Morgan, who was the department's evidence technician, and Sergeant Steven Salvatoriello, of the Essex County Sherriff's Office K-9 Unit, returned to 1207 Springfield Avenue to search for evidence. Capers testified at trial that the building looked abandoned, the rear door was unlocked, and that after they entered, they saw in plain view at the top of the stairs, a black and white varsity-style jacket, a handgun, a mask, and a brown wallet. The handgun contained six .22 caliber hollow-point bullets. The wallet contained Jose's identification and $138 in cash. At trial, Joy and Jose identified the jacket as the one they saw defendant wearing, and Joy identified the mask as the one she saw defendant wearing.

Linnea Schiffner, the State's DNA expert, testified that DNA testing could not be performed on the jacket because the samples were not of high enough quality but defendant's DNA (as a major contributor) was found on the mask, along with the DNA of two other individuals, who were minor contributors.

***4** On July 12, 2017, an Essex County grand jury indicted defendant for: first-degree robbery, in violation of N.J.S.A. 2C:15-1 (count one); second-degree unlawful possession of a weapon (handgun), in violation of N.J.S.A. 2C:39-5(b) (count two); possession of a firearm for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a) (count three); second-degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(1) (count four); third-degree aggravated assault, in violation of

N.J.S.A. 2C:12-1(b)(2) (count five); fourth-degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(4) (count six); fourth-degree possession of hollow-nose bullets, in violation of N.J.S.A. 2C:39-3(f) (count seven); third-degree receiving stolen property (a handgun), in violation of N.J.S.A. 2C:20-7(a) (count eight); and third-degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3(a) (count nine).

On January 8, 2018, the trial judge denied defendant's pre-trial motion for a Wade/Henderson hearing that challenged the admissibility of Jose's out-of-court identification of defendant. At the conclusion of a pre-trial hearing on March 29, 2018, the judge also denied defendant's motion to suppress the physical evidence—the handgun, jacket, mask, cigarette lighter, and wallet—found during a warrantless search of 1207 Springfield Avenue that the State alleged was an abandoned property. The judge denied the motion to suppress, finding the State had proved by a preponderance of the evidence that the property was abandoned, and the officers had a right to enter the building to conduct the warrantless search.

Trial was conducted before a jury in April and May 2018. At the conclusion of the trial the jury found defendant guilty of second-degree robbery as a lesser included offense of count one, and disorderly persons theft as a lesser include offense of count nine.

At defendant's sentencing on June 11, 2018, the judge denied the State's motion for a discretionary extended term. The judge then sentenced defendant on count one to a term of ten years, subject to an eighty-five percent period of parole ineligibility pursuant to NERA. The theft conviction (count nine) merged into count one. On June 13, 2018, the judge issued a judgment of conviction. This appeal followed.

II.

Defendant argues in Point I that the trial court erred in denying his motion to suppress the items found during the warrantless search of 1207 Springfield Avenue because the police lacked an objectively reasonable basis to believe that the building was abandoned. We disagree.

A.

At the suppression hearing, defense counsel, citing State v. Randolph, 228 N.J. 566, 581 (2017), argued that defendant had automatic standing to challenge the search of 1207 Springfield Avenue, which was not justified under an exception to the warrant requirement. The State conceded defendant had automatic standing because he was charged with a possessory offense, but argued

he had no reasonable expectation of privacy in the items he abandoned in the common hallway of an abandoned building.

Salvatoriello was the only witness at the hearing. He testified that on April 16, 2017, he received a call from the Irvington Police Department to report to 1207 Springfield Avenue with a search dog. Upon arrival, at approximately 2:20 a.m., Capers informed him that they had received a report that a suspect, later identified as defendant, fired a handgun during a robbery on a nearby street. The victim told the police that after he was robbed, he saw defendant enter the alleyway on the side of the building located at 1207 Springfield Avenue.

Capers told Salvatoriello that defendant was arrested a short time later, on Stuyvesant Avenue. At the time of his arrest, defendant was not wearing the jacket seen during the robbery and did not have a handgun, and thus Capers wanted Salvatoriello to search the courtyard behind 1207 Springfield Avenue where he believed defendant may have disposed of those items.

***5** Salvatoriello testified that the area surrounding 1207 Springfield Avenue was commercial, and the building located at that address appeared to be an abandoned commercial building. The sign on the front of the building read "Tabernacle of Grace Apostolic Ministries," and listed the hours for church services and other church events. He noticed the metal pull down gate at the entry to the adjacent alleyway was rolled up.

Prior to conducting the search, Salvatoriello inspected the alleyway and rear yard of 1207 Springfield Avenue and determined it was not safe for a canine search because the "entire length was littered with broken glass." He testified there was no lighting in the alleyway, the asphalt was "chopped up," and "[t]here was garbage and broken glass in the entire length of the alleyway." The rear fenced-in yard behind the building, which resembled a parking lot, was also "littered with broken glass" and "piles of debris." Salvatoriello assisted Capers in conducting a grid search of the yard and alleyway using flashlights, but they found nothing of evidential value.

The officers then walked the perimeter of the building and tried to open doors. The rear door to 1207 Springfield Avenue, which Salvatoriello described as a solid "metal commercial type exterior door," was unlocked. There was a lot of litter and debris in the area around the rear door, there were two broken chairs next to the door, and there was a camera to the upper right of the doorway.

Upon entering the building through the unlocked door, Salvatoriello saw what he described as a "commercial common stairwell." The interior of the building "appeared very rundown," the stairs were "well worn, [and] some were beat up," and there was a doorknob on the floor. To the left of the common hallway was a secured doorway with a metal "clamshell" covering -- the type of covering he said was placed on doors in "abandoned buildings."

Salvatoriello climbed the curved stairs to the second floor, immediately followed by Capers. Before he reached the top of the second-floor landing, he saw "in plain sight," a dark jacket, a handgun, a cigarette lighter, a mask or hoodie, and a wallet (later identified as Jose's wallet). He said that the second floor was "[d]irty," the wood looked "[b]eat up," and he did not see anything that would lead him to believe that anyone lived there. The officers called the crime scene unit to photograph and collect the evidence.

Salvatoriello admitted that prior to entering the building he had not spoken with the owners of 1207 Springfield Avenue or searched property records to ascertain who owned the building. However, later in preparation for the suppression hearing, he conducted a records search of deeds and tax records and discovered that the property was listed as a class four property (a commercial property), a bank had foreclosed on the property in 2017, purchased it at a Sheriff's sale and then sold it to a private third-party.

After considering the testimony, the judge denied the motion, finding that although defendant had standing to challenge the search, the State had proved by a preponderance of the evidence that the property was abandoned, and thus defendant had no expectation of privacy in the seized items. The judge found it was "clear from the record that the property was abandoned" and that defendant had no connection to the property, which had been foreclosed. The judge reasoned that if the church had been operating, the gate to the alleyway would have been down to protect the area, and there would not have been so much glass and debris on the ground.

***6** The judge also found Salvatoriello's testimony was credible, noting the officer's "demeanor seemed calm," he did not "try[ ] to deceive the [c]ourt," and he appeared to answer the questions "honestly." Based on that testimony, the judge found it was reasonable for the officers to search the alleyway, where it was reported that defendant was seen after the robbery, and it was a "simple estimate that the gun and the jacket were abandoned somewhere." It appeared to be almost "an afterthought" to check the back door and find it was open. "[T]he officer had an absolute right to go in a door that was unlocked," during the course of a normal search.

B.

Our review of a grant or denial of a suppression motion is limited. State v. Robinson, 200 N.J. 1, 15 (2009). We "defer to the fact findings of the trial court, provided they are supported by substantial credible evidence in the record...." State v. Shaw, 237 N.J. 588, 607 (2019). "Deference to those findings is particularly appropriate when the trial court has the 'opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.' " State v. Watts, 223 N.J. 503, 516 (2015) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice

demand intervention and correction.' " Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 151 (1964)). "A trial court's legal conclusions, however, 'and the consequences that flow from established facts,' are reviewed de novo." State v. Ahmad, 246 N.J. 592, 609 (2021) (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

"[T]he Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ....' " Randolph, 228 N.J. at 581 (second alteration in original) (quoting U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7). Warrantless searches and seizures are presumptively unlawful. Shaw, 237 N.J. at 608. "To overcome the presumption, the State has the burden of demonstrating the search fell within a recognized exception to the warrant requirement." Ibid.

In addressing a constitutional challenge to a warrantless search and seizure, courts consider whether the defendant has standing to pursue the challenge, and if he has standing, whether the search or seizure was justified by an exception to the warrant requirement. Randolph, 228 N.J. at 581. "For standing purposes, Article I, Paragraph 7 provides broader protection to the privacy rights of New Jersey citizens than the Fourth Amendment." State v. Brown, 216 N.J. 508, 528 (2014).

"Under New Jersey law, the State bears the burden of showing that defendant has no proprietary, possessory, or participatory interest in either the place searched or the property seized." Randolph, 228 N.J. at 582 (citing Brown, 216 N.J. at 528).[4] Significantly, a defendant charged with a possessory offense of the evidence seized, as in this case, has automatic standing to challenge a search or seizure, unless the State establishes an exception to that rule. Id. at 581, 585; State v. Lamb, 218 N.J. 300, 313 (2014); State v. Alston, 88 N.J. 211, 228 (1981). Courts "do not engage in a reasonable expectation of privacy analysis when a defendant has automatic standing to challenge a search," such an analysis is only applied "in determining whether a defendant has a protectible Fourth Amendment and Article I, Paragraph 7 right of privacy in a novel class of objects or category of places." Randolph, 228 N.J. at 583-84. See State v. Armstrong, 463 N.J. Super. 576, 592 (App. Div.) (explaining that "the two concepts — possessing a reasonable expectation of privacy and standing to challenge a search and seizure — are not congruent"), certif. denied, 244 N.J. 242 (2020).

***7** There are three exceptions to the automatic standing rule in searches of real property, that is, an accused will not have standing to challenge the search of: (1) an "abandoned property," (2) "property on which he was trespassing," or (3) "property from which he was lawfully evicted." Randolph, 228 N.J. at 585 (citing Brown, 216 N.J. at 527-29; State v. Hinton, 216 N.J. 211 (2013)). The State bears the burden of proving the exceptions by a preponderance of the evidence. Randolph, 228 N.J. at 585; Brown, 216 N.J. at 527-29.

"Ultimately, the focus must be whether, in light of the totality of the circumstances, a police officer had an objectively reasonable basis to conclude that a building was abandoned, or a defendant was a trespasser before the officer entered or searched the home." Brown, 216 N.J. at 535-36. "[A] police officer's sincere, good-faith but unreasonable belief that real property is abandoned will not justify a warrantless search when a defendant has an apparent possessory interest in that property." Id. at 531.

In Brown, the Court identified several factors to be considered, in light of the totality of the circumstances, in determining whether a building was abandoned. Id. at 532. In assessing whether an officer acted in an objectively reasonable manner, courts should consider whether the officer conducted a records check of deeds, tax records, or utility records to identify the owner of the property; the condition of the property; whether the owner or lessee has taken measures to secure the building from intruders; and "an officer's personal knowledge of a particular building and the surrounding area." Id. at 533-34. "No one factor is necessarily dispositive, and the weight to be given to any factor will depend on the particular circumstances confronting the officer." Id. at 532.

However, the Court in Brown cautioned that there is no "trashy house exception" to the warrant requirement. Id. at 534. Thus, and even "dilapidated housing, with interiors in disarray and in deplorable condition," may not be abandoned. Ibid. The Court explained that

> a police officer may be familiar with an unoccupied building with missing doors and broken windows, and an interior in utter shambles and lacking electricity, and reasonably conclude that the structure is abandoned. The decrepit condition of the exterior and interior of a building is a factor, but other circumstances will necessarily come into play. For example, the boarding of windows and bolting of doors of a shabby-looking building will suggest an intent to keep people out by a person exercising control over the property and therefore may be evidence that conflicts with abandonment.
>
> [Ibid.]

Applying that analysis, the Brown Court upheld the trial court's suppression of gun and drug evidence seized through the warrantless search of a dilapidated row house that the police apparently believed was abandoned. Id. at 537-42. Over the course of two non-consecutive days, the officers had conducted several hours of surveillance during daylight hours, and observed the defendants use a key to unlock the padlocked front door of the house to enter and retrieve a small item, presumably drugs, and hand it to a presumed buyer. Id. at 538-39. The house was in a "deplorable condition," in that there were broken windows, it was littered with trash bags filled with old clothes and soda cans, and other items, and had a missing electric meter. Id. at 540.

***8** However, both the front and back doors to the house were secured to keep intruders out; the front door was padlocked and the back door, although off its hinges, was propped shut from the inside. Id. at 540. Further, there was no reliable or first-hand testimony regarding the long-term condition of the house, nor any reasonable attempt by law enforcement to contact the owner or conduct a records check, which the Court found, would not have "been difficult or unduly cumbersome." Id. 540-42. Based on that evidence, the Court determined the trial court's finding that the house was not abandoned for standing purposes was supported by the record. Id. at 542. The Court held that "[t]he question to be answered is not whether the police have a subjective, good-faith belief that a building is abandoned, but whether they have an objectively reasonable basis to believe so." Ibid.

The Court in Randolph, 228 N.J. at 588, applying the principles in Brown, affirmed our decision that the defendant in that case had automatic standing to challenge the search of the apartment because the State failed to show it was abandoned or the defendant was a trespasser. In that case, the outside door to the three-story apartment building was locked and the officer was let in by a first-floor tenant. Ibid. The door to the second-floor apartment had been left ajar and before entering, the officer saw a couch and debris. Id. at 588-89. After entering, the officer saw "another couch, Timberland boots, a pair of Nike sneakers, a backpack, a television and video gaming system, and clothes draped on a couch and strewn on the floor along with a cigarette pack, a soda bottle, and mail [addressed to the defendant]." Id. at 589.

The Court in Randolph held "that, in light of the totality of the circumstances, the police did not have an objectively reasonable basis to believe that the second-floor apartment was abandoned." Ibid. During the surveillance, the police observed an individual peering out the window of the second-floor apartment, indicating the individual was either a resident or had been invited onto the premises. Id. at 588. Further, the "locked outside door was evidence that the building's residents intended to keep the public from entering even the common areas without invitation." Ibid. The Court found:

> Regardless of the disarray in the apartment and the fact that it was not fully furnished, there were clear signs that someone occupied it. The police did not contact the landlord to determine whether the second-floor apartment had been leased, and nothing in the record indicates that the first-floor resident was asked about the status or possible occupants of the upstairs apartment. Nothing in the record suggests that defendant was not an invitee in the apartment, and indeed the State argued at trial that the mail addressed to defendant found inside the apartment was evidence of his presence in the apartment.
>
> [Id. at 589.]

The Court in Randolph also set forth that:

> Importantly, at the suppression hearing, the prosecutor did not argue that defendant lacked standing to challenge the search on the basis that the apartment was abandoned. Instead, the prosecutor contended that the police conducted a lawful search pursuant to the exigent-circumstances and protective-sweep exceptions to the warrant requirement. The trial court never addressed the substantive grounds on which the prosecutor attempted to justify the search. The trial court, moreover, did not apply our well-established principles governing standing. Rather, the court turned to the reasonable expectation of privacy test, typically used in federal courts, and then came to a conclusion—not supported by the evidence—that the apartment was vacant.
>
> [Ibid.]

The Court concluded that the trial court erred in its analysis and remanded for a new suppression hearing, at which "the State and defendant should be afforded the opportunity to present evidence concerning the prosecutor's claimed justification for the warrantless entry and search." Id. at 590.

***9** Here too, based on the possessory weapons charges, the central issue was whether defendant had automatic standing to challenge the warrantless search of 1207 Springfield Avenue. Defendant did not have standing if the building was abandoned, or if he was a trespasser, because under those circumstances he would not "have the requisite possessory or proprietary interest in the property to object to the search." Brown, 216 N.J. at 529.

Applying the factors set forth in Brown, we conclude there was credible evidence to support the trial judge's finding that based on the totality of the circumstances the building was abandoned. That finding deprived defendant of any standing to challenge the search.

First, unlike Brown, the officers had not conducted a surveillance of the building and had not seen anyone enter the building by using a key to open a locked door. Instead, the officers searched an alleyway, late at night, shortly after the reported armed robbery, where they suspected defendant had abandoned the handgun. As the trial judge found, the officers checked the backdoor to the building "almost as an afterthought," because they had not located the handgun in the alleyway. An examination of the records on ownership of the building at that late hour and given the need to quickly find an abandoned loaded handgun would have been both difficult and unduly cumbersome under these circumstances.

Second, the condition of the property and the failure to secure the premises supported a finding of abandonment. Brown, 216 N.J. at 532. While searching the alleyway the officers noticed that the owner of the property had not taken measures to secure the building from intruders because the gate to the alley was open and the backdoor was unlocked. Additionally, the officers had personal knowledge that the building was in a commercial, not residential area, and their determination that the building was an abandoned commercial building was consistent with the building's appearance.

There was no furniture, clothes, shoes, blankets, food, or any other items in the building to indicate that anyone, much less defendant, resided there or had any possessory interest in the premises. The alleyway and backyard were filled with so much broken glass and debris that it was not safe for a search dog, and thus, reasonably would also not have been safe for residents. Those factors, the condition of the property, and the officers' knowledge of the commercial nature of the area, support a finding that the officers had an objectively reasonable basis to conclude that the building was abandoned before they entered it or searched it.

Under the totality of the circumstances, we conclude the trial judge's finding that the property was abandoned was supported by the substantial credible evidence in the record. Shaw, 237 N.J. at 607. Because the building was abandoned, defendant did not have automatic standing to challenge the warrantless search and seizure. Therefore, the officers did not violate his constitutional rights when they entered and searched the abandoned building, and seized the items defendant left there, without a warrant.

III.

Defendant argues in his Point II that the trial judge erred in denying his motion to suppress Jose's out-of-court identification or, alternatively, in denying his application for a Wade/Henderson hearing because there was no audio, video, or written verbatim account of the showup identification procedure, and based on the limited record, the procedure was impermissibly suggestive. We conclude the trial judge erred in not conducting a Wade/Henderson hearing on the admissibility of the out-of-court identification. For that reason, we remand the matter for the required hearing.

A.

***10** It was undisputed that no audio or video recordings were made of the showup, nor was a contemporaneous written record prepared. Instead, approximately three hours after the showup, at 4:43 a.m., Jean-Simon completed a written "Showup Identification Procedures Worksheet," documenting Jose's identification of defendant.

In the worksheet, the officer set forth the time and place where the identification was conducted and the identities of the officers; checked the box indicating he had instructed Jose that the actual perpetrator may or may not be in the showup and he should not feel compelled to make an identification; and, set forth that Jose "became extremely emotional" when he saw defendant and said, "[T]hat's him, that's the guy who tried to kill me." In the incident report, prepared on that same date, Jean-Simon similarly wrote, "After placing the spotlight on [defendant's] face and asking

[Jose] if he recognized [defendant], he became extremely emotional and stated[,] 'That's him that's the guy who tried to kill me.' "

Defendant filed a pretrial motion for a Wade/Henderson hearing to determine the admissibility of Jose's out-of-court identification. He argued the identification procedure was impermissibly suggestive due to system variables (the inherently suggestive showup procedure conducted based on an anonymous source), and the officer's failure to adequately record the procedure, including any pre-identification instructions, violated Rule 3:11 and State v. Delgado, 188 N.J. 48 (2006). In support of the motion, defendant submitted the incident report, an audio recording of Jose's testimony before the grand jury, and an audio recording of Jose's statement. In her brief, defense counsel stated that she had not received "any showup identification worksheet or report further documenting communications between officers and [Jose] during the procedure," and the incident report was the only record of the procedure.

The State opposed the motion and argued defendant had failed to meet his burden of presenting some evidence of suggestiveness in a system variable, and even if a hearing were granted, the motion to suppress should be denied because "there [was] overwhelming indicia of reliability." The prosecutor did not submit the worksheet to the trial judge but cited to Jose's grand jury testimony in which Jose said he was "confident" in his identification, and the officer told him the person they detained may or may not have committed the offense and he was not compelled to make a selection.

The trial judge denied the motion for a Wade/Henderson hearing and found that although "there are various elements of State v. Henderson, which may be argued to the [j]ury," it was clear from the testimony presented to the grand jury and other submissions that it had "not risen to the level that a hearing is required." There was a "very short period of time," about fifteen minutes, between the incident and the identification. Although Jose was nervous and under stress during the robbery, he was "clear and sure about the identification" during his grand jury testimony. The judge did not address defendant's argument that the officers violated Rule 3:11 and Delgado by failing to record the identification procedure. The judge also made no reference to the worksheet that, again, was not provided by the prosecutor.

B.

***11** Our "standard of review on a motion to bar an out-of-court-identification ... is no different from ... [a] review of a trial court's findings in any non-jury case." State v. Wright, 444 N.J. Super. 347, 356 (App. Div. 2016) (citing Johnson, 42 N.J. at 161). "The aim of the review at the outset is ... to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." Ibid. (alteration in original) (quoting Johnson, 42 N.J. at 162). In our review, we will defer to the trial court's findings even when they are based solely on its review

of documentary or video evidence. State v. S.S., 229 N.J. 360, 381 (2017). Our "review of the trial court's application of the law to the facts, however, is plenary." Wright, 444 N.J. Super. at 357.

A trial court may hold a Wade/Henderson hearing to determine whether a pretrial eyewitness identification of a criminal defendant was properly conducted and thus admissible under N.J.R.E. 803(a)(3). A hearing is not, however, required in every case in which the State seeks to introduce such evidence. The requirements for determining whether a defendant is entitled to an evidentiary hearing are set forth in Henderson, 208 N.J. at 208 and State v. Anthony, 237 N.J. 213 (2019). Also relevant are Delgado, 188 N.J. at 48 and the provisions of Rule 3:11.

In Henderson, 208 N.J. at 287, the Court revised the Manson/Madison[5] legal framework for evaluating eyewitness identification evidence, and reaffirmed its ruling in Delgado, 188 N.J. at 63, that identifications conducted by law enforcement officers must be recorded and preserved. Under the revised framework, in order to obtain a hearing, "a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification," tied to a "system variable." Henderson, 208 N.J. at 288-89. "System variables" are "variables within the State's control," and include pre-identification instructions and showups. Id. at 248, 250, 259-61. If a defendant makes a threshold showing for a hearing, the burden shifts to the State to "offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables ...." Id. at 289. "[E]stimator variables are factors beyond the control of the criminal justice system," and "can include factors related to the incident, the witness, or the perpetrator." Id. at 261.

At the hearing, however, "the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Id. at 289. "[T]he court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless." Ibid. Last, "if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence." Ibid.

Rule 3:11, Record of an Out-Of-Court Identification Procedure, was adopted effective September 2012, in response to Henderson and Delgado. Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 3:11 (2022). As initially adopted, and in effect at the time of this case, Rule 3:11(b), Method of Recording,[6] then provided:

> A law enforcement officer shall contemporaneously record the identification procedure in writing, or, if feasible, electronically. If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is prepared, it shall include, if feasible, a verbatim account of any exchange

> between the law enforcement officer involved in the identification procedure and the witness. When a written verbatim account cannot be made, a detailed summary of the identification should be prepared.

***12** Rule 3:11(c), also adopted at the same time, specified that the record should include, notably, the dialogue between the witness and officer who administered the procedure, and a witness' statement of confidence, in his own words, of the identification. Finally, Rule 3:11(d), provides:

> If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.

In October 2012, the Attorney General issued the model showup worksheet at issue here.[7] The worksheet was "designed to assist law enforcement officers in documenting the procedures/results of showups," and to "serve as a checklist to ensure that officers comply with all of the requirements for eyewitness identification procedures established by Court Rule and New Jersey Supreme Court case law." Showup Worksheet at 3. The worksheets are required to be "prepared during the procedure, or immediately thereafter." Ibid. Officers were instructed that showups could not be conducted if more than two hours had elapsed from the time of the incident, they were not to provide any feedback to the eyewitnesses, and they were required to make a statement regarding the eyewitness's level of confidence that the suspect was the perpetrator. Ibid.

In March 2019, a year after the trial judge's decision in this case, the Court in Anthony, 237 N.J. at 233, modified the Henderson framework, and held that "a defendant will be entitled to a pretrial hearing on the admissibility of identification evidence if Delgado and Rule 3:11 are not followed and no electronic or contemporaneous, verbatim written recording of the identification procedure is prepared." Ibid. Under those circumstances, a defendant "will not need to offer proof of suggestive behavior tied to a system variable" to be entitled to a Wade/Henderson hearing. Id. at 233-34. The Court stated "[t]his approach supplements the other remedies listed in Rule 3:11(d)." Id. at 234.

In Anthony, the Court found the officers had not complied "with Rule 3:11 or Delgado in full" because they had not prepared an electronic recording of the witness's out-of-court identification of the defendant, or a contemporaneous, verbatim written account of the exchange between the witness and the officer who administered the photo array. Id. at 235. Further, the State's reliance

on a three-page police department form to document the identification process did not create an adequate record, because without an electronic recording or contemporaneous written account of the exchange, the record did not reveal the full dialogue between the witness and the officer, Rule 3:11(c)(2), nor was the witness's statement of confidence reflected in his own words, Rule 3:11(c)(9). Id. at 236. The Court remanded the case for a Wade/Henderson hearing, even though defendant had not presented evidence of suggestiveness, to allow defendant to explore all relevant variables. Id. at 238.

***13** Here, defendant argues on appeal that the officer failed to comply with Rule 3:11 and Delgado, and thus, as clarified by Anthony, the trial judge should have suppressed the identification evidence, or at a minimum, granted his request for a Wade/Henderson hearing. We agree that a hearing was required.

The governing law at the time of the court's ruling in 2018, as to the contents of the record of an out-of-court identification procedure, was set forth in Delgado, 188 N.J. at 48 and Rule 3:11. In Delgado, 188 N.J. at 63, the Court invoked its supervisory powers under Article VI, Section 2, Paragraph 3 of the New Jersey Constitution to require "that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." Ibid. "When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared." Ibid. At that time, electronic recordation was advisable, but not mandated. Ibid.

Here, the officer filled out the worksheet, a form that is still in use today, which was designed to comply with Rule 3:11 and Delgado. The officer documented the time and place where the procedure was conducted, and the exact words that Jose used when identifying defendant. However, as in Anthony, the officer did not comply with Rule 3:11 or Delgado in full because he did not record the identification or prepare a contemporaneous written account. Anthony, 237 N.J. at 235. And reliance on the worksheet, which was apparently not submitted to the trial court during the suppression motion, "did not create an adequate record in other respects." Id. at 236. The worksheet did not contain a verbatim account or a detailed summary of the dialogue between the officer and Jose as required under Rule 3:11(c)(2). The officer simply checked the box indicating he instructed Jose that the actual perpetrator may or may not be in the showup, while Jose testified he was told before the identification the police had a suspect.

There is no per se rule barring identification evidence for failure to strictly comply with Rule 3:11. State v. Green, 239 N.J. 88, 109 (2019); Anthony, 237 N.J. at 239; Henderson, 208 N.J. at 303. Instead, "[w]hen the record of an identification 'is lacking in important details,' and it was feasible to preserve them, Rule 3:11(d) affords a judge discretion, consistent with appropriate case law,

to bar the evidence, redact part of it, and/or 'fashion an appropriate jury charge' if the evidence is admitted." Green, 239 N.J. at 109. "Indeed, suppression should be the remedy of last resort, and judges should explain why other remedies in Rule 3:11(d) are not adequate before barring identification evidence." Ibid.

Applying these guiding principles, we conclude defendant is entitled to a Wade/Henderson hearing because the officer failed to fully comply with Rule 3:11 and Delgado by making a contemporaneous record. Although Anthony was decided after the trial judge's decision in this case, notably the Court in Anthony, unlike Henderson, did not set forth that its ruling had prospective application only. Further, under the revised threshold standard adopted in Anthony, in State v. Guerino, 464 N.J. Super. 589, 611 (App. Div. 2020), we applied the ruling retroactively and remanded for the trial court to convene an evidentiary hearing on the admissibility of a photo array identification procedure conducted in 2016 because the report did not provide a detailed account of the dialogue between the officer and the witness. Ibid. Similarly, here, under the revised threshold, defendant was entitled to a Wade/Henderson hearing without having to prove suggestiveness. Anthony, 237 N.J. at 233-34.

***14** Moreover, under the pre-Anthony/Henderson framework, defendant made the threshold showing for a Wade/Henderson hearing based on "the inherent suggestibility of a showup ...." Wright, 444 N.J. Super. at 357. It is well established that "one-on-one showups are inherently suggestive .... because the victim can only choose from one person, and, generally, that person is in police custody." State v. Herrera, 187 N.J. 493, 504 (2006). In Herrera, a pre-Henderson case, the Court held "that standing alone a showup is not so impermissibly suggestive to warrant proceeding to the second step." Ibid. "Our law has permitted 'on or near-the-scene identifications because they are likely to be accurate, taking place ... before memory has faded and because they facilitate and enhance fast and effective police action and they tend to avoid or minimize inconvenience and embarrassment to the innocent.' " State v. Jones, 224 N.J. 70, 87 (2016) (alteration in original) (quoting Herrera, 187 N.J. at 504). "[H]owever, only a little more is required in a showup to tip the scale toward impermissibly suggestive." Herrera, 187 N.J. at 504.

Here, even though, as the trial judge found, the showup was conducted within fifteen to thirty minutes of the incident, the record is incomplete as to the pre-identification dialogue between Jean-Simon and Jose, a requirement under Rule 3:11 and Delgado. It appears that the trial judge did not have a copy of the worksheet at the time of the motion and thus there was no record of any pre-identification instructions. Further, even if the judge had the worksheet, and although the officer checked the box indicating he instructed Jose that the actual perpetrator may or may not be in the showup, Jose testified at trial that the officer told him "we're going to see if we can recognize a person who is, like, a suspect." See Jones, 224 N.J. at 87 (noting statements by police identifying witness as a suspect can bear on suggestiveness of a showup).

The Wade/Henderson hearing requested by defendant would have provided him with "the opportunity to attempt to secure the information denied to him by the Delgado violation," namely, the full dialogue between Jean-Simon and Jose, before, during, and after the identification, including whether the officer referred to defendant as a "suspect." State v. L.H., 239 N.J. 22, 54 (2019). As a result, we remand the matter for an evidentiary hearing to allow defendant the opportunity to explore the issue of suggestiveness in the showup process and for the appropriate remedy for the Delgado violation.

By way of guidance, the trial judge on remand may in her discretion end the hearing if she finds that the showup worksheet recounted verbatim the entire exchange between the officer and Jose, provided no evidence of suggestiveness has been demonstrated by the evidence. Guerino, 464 N.J. Super. at 612. If the trial judge finds the evidence should not have been admitted, or alternatively only admitted with redactions or cautionary instructions, the parties can then present argument as to whether a new trial is warranted. Henderson, 208 N.J. at 300. However, if the evidence presented does not show that any violations of Rule 3:11 and the out-of-court identification was reliable, then defendant's conviction and sentence shall stand. See Anthony, 237 N.J. at 238.

IV.

We reach a different conclusion as to defendant's argument in Point III that contends the trial judge erred in admitting Joy's first-time identification of defendant at trial because it was "highly suggestive and unreliable." He argues her in-court identification should have been stricken under the principles established in Henderson, and in the alternative, even if Henderson did not apply, "a straightforward application of N.J.R.E. 401 and 403 compelled the exclusion of Joy's in-court identification." We disagree.

A.

Prior to trial, defense counsel moved to preclude Joy from making an in-court identification because the officers failed to conduct an out-of-court identification procedure. There is no indication in the record that the trial judge addressed this application.

***15** During Joy's testimony at trial, she identified defendant, unprompted, for the first time on direct, as someone she saw in the parking lot of the restaurant where they had gone to pick up dinner. At side bar, defense counsel moved to strike Joy's identification because counsel believed the prosecutor had agreed not to elicit this testimony, it was "highly suggestive" for a person to make a first-time in-court identification, and there was out-of-state case law to support the exclusion of the identification. The prosecutor countered that he had not prompted Joy to identify

defendant, and, in any event, first-time in-court identifications were "completely proper." The prosecutor argued that defense counsel could cross-examine her on the identification and that the jury should be given a Henderson in-court identification charge.

The trial judge found that the prosecutor had not solicited the in-court identification, denied the application to strike, and agreed to include the in-court identification instruction in the final charge. The judge then instructed the jury, "you will note ... [that Joy] made an in-court identification.... that is the first identification she has made. There will be a charge that is given to you at the end of the case about in-court identifications."

Thereafter, defense counsel objected to Joy's testimony that she was "certain" of her identification of defendant. The court overruled the objection finding that defense counsel could address her answer on cross-examination. Joy subsequently testified that she had not previously identified defendant, she was "very certain" that defendant was the man she saw in the parking lot, and she described the circumstances surrounding her out-of-court observation of defendant.

In her final charge, the judge instructed the jury, without objection, substantially in accord with the Model Jury Charges (Criminal), "Identification: In-Court and Out-Of-Court Identifications" (rev. May 18, 2020), including that the jury could consider "whether the witness did not identify the defendant at a prior identification procedure."

B.

"[T]he decision to prohibit an in-court identification is made on a case-by-case basis." Guerino, 464 N.J. Super. at 606. In our review of these determinations, we "defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "[A]ppellate review," nonetheless, "remains a backstop to correct errors that may not be caught at or before trial." Guerino, 464 N.J. Super. at 620.

In determining the reliability of an in-court identification, the Court in Madison, 109 N.J. at 243, adopted the factors set forth in Manson, 432 U.S. at 114. Those factors include the "opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation.[8]" Id. at 239-40 (quoting Manson, 432 U.S. at 114).

Significantly, in Guerino, we recently rejected a defendant's contention that the court should "ban all in-court identifications, or at least to restrict in-court identifications to cases where there has been an 'unequivocal' out-of-court identification." 464 N.J. Super. at 605. In that case, the

eyewitness said she was eighty percent confident in her out-of-court identification of the defendant from a photo array, but after seeing defendant at trial, testified that she was one hundred percent certain of her in-court identification. Id. at 602. The defendant argued, as in this case, that "the scientific principles that necessitated the reforms achieved in Henderson demonstrate that in-court identifications are the product of inherently suggestive circumstances and have minimal probative value." Id. at 605. Further, as in this case, the defendant maintained that "nearly all the system variables discussed in Henderson apply to in-court identifications, and that this traditional practice 'does not comport with the post-Henderson legal landscape and must be updated.' " Id. at 605-06.

***16** We rejected that argument, stating that "[t]he relief defendant seeks would represent a significant change to our State's eyewitness identification jurisprudence," which is contrary to the "well-established precedent, including Henderson." Id. at 606.

We further explained:

> We do not mean to suggest the familiar practice of having a trial witness point to the defendant sitting at counsel table is a talisman carved in stone. Chief Justice Rabner aptly recognized in Henderson that scientific research on human memory and the reliability of eyewitness identifications will continue to evolve. [208 N.J.] at 219. We are not persuaded, however, that we have the evidential foundation upon which to grant the fundamental change defendant seeks. In Henderson, the reform of New Jersey's eyewitness identification jurisprudence was supported by an extensive report of a special master appointed by the Court to compile and evaluate the scientific evidence regarding eyewitness identifications. Id. at 228-29. Using that example of scientific groundwork as a benchmark, the record before us in this case is inadequate to test the validity and utility of in-court identifications.
>
> [Id. at 606-07.]

In any event, we concluded this was not "an appropriate case in which to decide whether to abandon an established practice" given its decision to remand for an evidentiary hearing. Id. at 607. "That hearing will examine whether the victim's in-court identification was tainted by either or both the photo array and hallway identification procedures. Defendant may yet obtain the ultimate remedy he seeks by applying existing legal principles. In these circumstances, we see no need to displace those principles." Ibid.

On appeal, defendant here raises identical arguments as to the application of the principles in Henderson to first-time in-court identifications and argues that they are the functional equivalent of a showup and thus Joy's in-court identification almost two years after the event could not produce a reliable identification and deprived defendant of a fair trial. We disagree.

Although not cited by the parties, our Supreme Court held that a first-time in-court identification was admissible in State v. Clausell, 121 N.J. 298, 327 (1990). In that case the witness identified one of the assailants for the first time at trial, even though she had been unable to identify him out-of-court in an earlier photographic array. Ibid. The Court held that the in-court identification, which took place nineteen months after the incident, was properly admitted. Id. at 328. The Court found:

> Notwithstanding that [the witness] identified defendant for the first time in court, her identification was constitutionally valid. See United States v. Domina, 784 F.2d 1361, 1368 (9th Cir. 1986) (observing that no decision of the Supreme Court requires in-court identifications to meet the same standards of reliability as pretrial identifications), cert. denied, 479 U.S. 1038 (1987). Although undercut by the long delay between the crime and the trial, the reliability of the identification is supported by other considerations.... [The witness] had ample opportunity to view the assailants under circumstances in which she was seeking to establish their identities. The courtroom atmosphere was suggestive, but not so much so as to outweigh the reliability of the identification. Defense counsel had ample chance to challenge the accuracy of the identification on cross-examination, and the jury was free to discount its value based on [the witnesses'] inability to identify anyone on earlier occasions. See Domina, 784 F.2d at 1368 (noting that one advantage of in-court identification over pretrial identification is that jury can observe [the] witness during identification process).
>
> ***17** [Id. at 327-28.]

Thus, first-time in-court identifications are admissible under Clausell and were not revised or eliminated under Henderson, which only addressed suggestive pre-trial identifications. We, as members of an intermediate appellate court, are "bound to comply with the law established by the Supreme Court." State v. Steffanelli, 133 N.J. Super. 512, 514 (App. Div. 1975).

We are not persuaded otherwise by defendant's reliance on the out-of-state opinion in Commonwealth v. Crayton, 21 N.E.3d 157 (Mass. 2014). At the outset, we observe that the opinion is not binding on us and has, in fact, been rejected by several courts. In Crayton, the Massachusetts Supreme Court overturned its precedent and held that "[w]here an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is 'good reason' for its admission." Id. at 169. The court placed "the burden on the prosecutor to move in limine to admit the in-court identification of the defendant by a witness where there has been no out-of-court identification." Id. at 171. However, in State v. Doolin, 942 N.W.2d 500, 515 (Iowa 2020), the Iowa Supreme Court described Crayton as an "outlier." See also Garner v. People, 436 P.3d 1107, 1118-19 (Colo. 2019) (declining to adopt Crayton because it turned on state common law principles of fairness and departed from the standard articulated in Perry v. New Hampshire, 565 U.S. 228, 246 (2012)).

Furthermore, despite some similarities between showups and in-court identifications, the exclusionary pre-trial principles announced in Henderson should not apply with equal force to in-court identifications because, as set forth in Clausell, there are significant safeguards built into our adversary system to protect against a mistaken identification made for the first time at trial. Perry, 565 U.S. at 246. Such safeguards include the Sixth Amendment right to confront witnesses, the right to the effective assistance of counsel "who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments," and eyewitness specific jury instructions. Ibid.

Those safeguards were at work during this trial. Defense counsel cross-examined Joy on the reliability of her spontaneous identification of defendant and argued in summation that her identification was not credible because it was based on feedback from her husband and her observation of him sitting at counsel table. Defense counsel also argued that Joy was not paying close attention to defendant when he walked around the parking lot because she was distracted by her phone, music, and her children, and was under stress and could not describe the face of the man who pulled a mask over his face as he ran in front of her car. The trial judge also gave the jury the lengthy model criminal jury charge on in-court identification, and the jury was free to discount the identification. Additionally, as in Clausell, the reliability of Joy's in-court identification was supported by other considerations, including the conditions under which she observed him and the fact that her independent description of defendant at the scene was identical to Jose's description of the man who robbed him.

***18** Last, defendant did not raise at trial, as he does now, the argument that Joy's in-court identification should have been excluded under N.J.R.E. 403. For that reason, we review the new contention for plain error. Under the plain error standard, we disregard "[a]ny error or omission" by the trial judge "unless it is of such a nature as to have been clearly capable of producing an unjust result ...." R. 2:10-2. To warrant reversal, "[i]n the context of a jury trial, the possibility must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.' " State v. G.E.P., 243 N.J. 362, 389-90 (2020) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

Under that standard, we conclude that even if the judge had erred in admitting Joy's identification, it was not plain error. Joy did not identify defendant as the robber, rather she identified him as the man she saw in the parking lot. Although Joy's testimony was corroborative, there was other strong evidence as to defendant's identity as the robber, notably, the descriptions provided by both Jose and Joy at the scene, the fact that defendant's DNA was found on the mask next to Jose's wallet, and the officer's testimony as to their apprehension of defendant near the alleyway where he had been seen running after the robbery. Additionally, the jury was able to assess Joy's credibility in making the identification and was specifically instructed on the factors they should consider in making that assessment.

We have no cause to disturb defendant's conviction based upon Joy's identifying defendant for the first time at trial.

V.

We last address defendant's argument in Point IV that the judge erred in imposing an excessive sentence. He contends that the judge erred in imposing a ten-year sentence, in considering his prior arrests, and in giving significant weight to the psychological effect of the incident on the victim's family. We find no merit to these contentions.

A.

At sentencing, the judge first denied the State's application to sentence defendant to a discretionary extended term as a persistent offender under N.J.S.A. 2C:44-3(a), on the second-degree robbery count. The judge then found aggravating factors three (the risk that defendant will commit another offense), six (the extent of defendant's prior record and the seriousness of the offenses), and nine (the need to deter), N.J.S.A. 2C:44-1(a)(3), (6), (9), and no mitigating factors under N.J.S.A. 2C:44-1(b). [9]

The presentence report considered by the judge in support of her findings revealed defendant's extensive criminal record. Defendant had two juvenile adjudications, and five adult indictable convictions for third-degree eluding, second-degree aggravated assault, second-degree possession of a weapon for an unlawful purpose, third-degree possession of a controlled dangerous substance (CDS), and fourth-degree resisting arrest. He received a five-year term for his conviction for aggravated assault and unlawful possession of a weapon, and was sentenced to probationary terms on the other convictions, which he violated in three cases and was sent to State prison. He also had nine disorderly person convictions for drug-related offenses, and was granted conditional discharge twice, with an extension of the program in one case, and discharged as absconded in the other. At the time of his arrest in this case, there was an active bench warrant for his arrest in New York for possession of CDS and he was on probation in Union County. Thus, as the trial judge found, defendant had "what appears to be ... a continuous period of being involved" in the justice system.

***19** In making her determination, the trial judge did not apply aggravating factor two, N.J.S.A. 2C:44-1(a)(2), ("gravity and seriousness of harm inflicted on the victim") explaining as follows:

> Having presided over the case, I note that it is clear, and it's very rare that I would ever use ... the serious gravity, seriousness of harm inflicted on the victim, including whether the victim knew or reasonably should have known that the victim of the offense -- I don't think ... it doesn't quite amount to the second ... aggravating factor, but it is clear that this incident has had a devastating impact on this family.
>
> They are not quite functioning the same way because of this incident that took place in front of their children, and they will never function in the same way. And that's between them and their [G]od to figure out how they will work through it. But it has had a devastating impact on the family and the family dynamics, of which I don't think there's a way that that's really going to be fixed except probably through counseling and through many other things. But the impact was beyond the point of significant to the victims in this matter.

The judge concluded "the aggravating factors do outweigh the mitigating factors" and sentenced defendant to a term of ten years, subject to an eighty-five percent period of parole ineligibility pursuant to NERA, on count one. Count nine merged with count one.

B.

Our "review of a sentencing court's imposition of sentence is guided by an abuse of discretion standard." State v. Jones, 232 N.J. 308, 318 (2018). "Although '[a]ppellate review of sentencing is deferential,' that deference presupposes and depends upon the proper application of sentencing considerations." State v. Melvin, 248 N.J. 321, 341 (2021) (alteration in original) (quoting State v. Case, 220 N.J. 49, 65 (2014)). We will "affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.' " State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364 (1984)). The first prong of the inquiry presents an issue of law that is reviewed de novo. State v. Robinson, 217 N.J. 594, 604 (2014).

The ordinary term for a second-degree offense is between five and ten years, N.J.S.A. 2C:43-6(a)(2), and thus defendant's sentence of ten years subject to the NERA, complied with the sentencing guidelines. Bolvito, 217 N.J. at 228. In determining the appropriate sentence to impose within that range, judges "must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." Case, 220 N.J. at 64. "The finding of any factor must be supported by competent, credible evidence in the record." Ibid. "Whether a sentence should

gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors." Ibid.

Here, defendant argues the judge improperly considered his twenty-five prior arrests in finding aggravating factors three, six, and nine. However, the judge specifically set forth that she was not "tak[ing] into account the matters that have been dismissed and no-billed." Moreover, such consideration to support her findings on the aggravating factors three, six, and nine would not have been error because, "[a]dult arrests that do not result in convictions may be 'relevant to the character of the sentence ... imposed.' " State v. Rice, 425 N.J. Super. 375, 382 (App. Div. 2012) (alteration in original) (quoting State v. Tanksley, 245 N.J. Super. 390, 397 (App. Div. 1991)).

***20** Defendant's assertion to the contrary, in reliance upon State v. K.S., 220 N.J. 190, 199 (2015), is inapposite. In that case, the Court addressed whether a prosecutor, in rejecting an application for pretrial intervention, may consider a defendant's prior dismissed charges, which were not "supported by undisputed facts of record or facts found at a hearing." Ibid.

Similarly unpersuasive is defendant's argument that the judge erred in failing to consider, based on the jury's finding, the robbery was on the lower end of a second-degree crime because the victim suffered no physical injuries and the incident lasted only a few minutes. However, there is no indication in this record that the judge improperly considered the more serious acquitted charges in deciding to impose a sentence in the highest range for a second-degree offense. Melvin, 248 N.J. at 350 (explaining that consideration of acquitted charges in sentencing defies the principles of due process and fundamental fairness). The judge focused only on defendant's lengthy past criminal history and did not, like in Melvin, make any findings as to the weapons charges for which defendant was acquitted.

That lengthy criminal conduct, beginning in 1993 when defendant was a juvenile, and continuing to the time of his arrest in this case, despite repeated attempted rehabilitation and punishment, supported the judge's finding as to aggravating factors three, six, and nine, because it presented a strong risk of re-offense and underscored the need to deter him from future criminal activity. See State v. Ross, 335 N.J. Super. 536, 543 (App. Div. 2000) (finding aggravating factors supported by the defendant's lengthy criminal history).

Last, defendant's argument that the judge, in effect, improperly applied aggravating factor two, N.J.S.A. 2C:44-1(a)(2), the "gravity and seriousness of harm inflicted on the victim," is not persuasive. The judge expressed sympathy for the victim and his family based on this incident, but specifically found that aggravating factor two did not apply in this case. [10]

We conclude defendant's sentence was in accord with the sentencing guidelines, was based on a proper weighing of the factors, and does not shock the judicial conscience.

Affirmed in part; reversed and remanded in part for further proceedings consistent with our opinion.

All Citations

Not Reported in Atl. Rptr., 2022 WL 610326

Footnotes

1 United States v. Wade, 388 U.S. 218 (1967).

2 State v. Henderson, 208 N.J. 208 (2011).

3 We refer to the victim and his wife by their first names to avoid any confusion caused by their common last name. No disrespect is intended.

4 In contrast, "[u]nder federal law, the defendant has the burden of showing that he had a reasonable expectation of privacy that was violated by the police." Ibid.

5 Manson v. Brathwaite, 432 U.S. 98, 114 (1977), State v. Madison, 109 N.J. 223, 242 (1988).

6 Rule 3:11, was amended effective June 8, 2020, two and a half years after the judge's decision in this case. Of particular note, subsection (b) now provides:

> A law enforcement officer shall electronically record the out-of-court identification procedure in video or audio format, preferably in an audio-visual format. If it is not feasible to make an electronic recording, a law enforcement officer shall contemporaneously record the identification procedure in writing and include a verbatim account of all relevant verbal and non-verbal exchanges between the officer and the witness; in such instances, the officer shall explain in writing why an electronic recording was not feasible. If it is not feasible to prepare a contemporaneous, verbatim written record, the officer shall prepare a detailed written summary of the identification procedure as soon as practicable and without undue delay, and explain in writing why an electronic recording and a contemporaneous, verbatim written account were not feasible.

7 Showup Identification Procedures Worksheet, N.J. Div. of Crim. Just. (rev. Oct. 1, 2012), [redacted] [hereinafter Showup Worksheet].

8 Thereafter, the Court in Henderson, 208 N.J. at 287, revised the Manson/Madison framework for evaluating out-of-court eyewitness identification evidence in view of scientific evidence, but did not eliminate or address in-court identification evidence.

9 While the judgment only listed two aggravating factors, N.J.S.A. 2C:44-1(a)(3) and (9), "[t]he sentencing transcript," which listed three aggravating factors, "is 'the true source of the sentence.' " State v. Walker, 322 N.J. Super. 535, 556 (App. Div. 1999) (quoting State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956)). On remand, the trial judge should enter a corrected judgment of conviction, if warranted, after the Wade/Henderson hearing.

10 Factor two is not listed on the judgment of conviction.

2022 WL 2195524
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Frederick OWLE, a/k/a Frederick Owle Jr., Fredrick Owle, and Chief, Defendant-Appellant.

DOCKET NO. A-4829-18
|
Argued May 11, 2022
|
Decided June 20, 2022

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 17-07-0728.

Attorneys and Law Firms

Stefan Van Jura, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Stefan Van Jura, of counsel and on the brief).

Alexis R. Agre, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (LaChia L. Bradshaw, Acting Burlington County Prosecutor, attorney; Alexis R. Agre, of counsel and on the brief).

Appellant filed a supplemental pro se brief.

Before Judges Hoffman, Whipple, and Susswein.

Opinion

PER CURIAM

***1** Defendant appeals from his jury trial convictions for two armed robberies and related weapons offenses. He contends for the first time on appeal that (1) his rights under the Sixth Amendment Confrontation Clause were violated by the admission of hearsay testimony explaining how police initially identified him as a suspect, and (2) the trial court erred by failing to properly instruct the jury concerning out-of-court eyewitness identifications. Defendant further argues in a pro se

supplemental brief that the prosecutor committed misconduct during both the charging process and at trial, and that the mandatory sentence of life imprisonment without parole imposed pursuant to the "Three Strikes Law," N.J.S.A. 2C:43-7.1, is illegal.

The prosecution hinged on proving the identity of the robber, which was contested at trial. The defense argued that police prematurely focused on defendant to the exclusion of the true culprit. The critical issue raised on appeal requires us to determine whether the State improperly introduced and commented upon inadmissible testimony concerning the initial stage of the police investigation. After carefully reviewing the record in view of the governing precedents, we conclude that inadmissible hearsay testimony elicited from two police witnesses concerning how defendant was first identified as a suspect created an impermissible inference that police possessed incriminating evidence that was not introduced at trial. The harm resulting from those repeated Confrontation Clause violations was compounded by the prosecutor's reference to the inadmissible hearsay in his opening argument when he told the jury that "other people," referring to non-testifying sources, told police "it's possibly this individual named Freddie Owle."

The prosecution, it bears noting, introduced substantial admissible evidence of defendant's guilt. The State's case was not so overwhelming, however, as to overcome the potential impact of the Confrontation Clause violations on the final verdict. We are thus unable "to declare a belief that [the constitutional error] was harmless beyond a reasonable doubt." See State v. Weaver, 219 N.J. 131, 154, 97 A.3d 663 (2014) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). We are therefore constrained to reverse defendant's convictions and remand the case for a new trial.

I.

We discern from the record the following facts that are pertinent to the issues raised on appeal. On April 14, 2017, the Wawa convenience store (Wawa) on Route 130 in Florence Township was robbed. At approximately 11:30 p.m., Wawa employee Tracy Craft was working at the cash register when a "middle-aged white male approached" her and asked for a pack of Newport cigarettes. He wore a "gray jacket with a blue or black hat" and gloves. Ms. Craft turned around, as the cigarettes were located behind her, grabbed them and gave them to the man. The man then "leaned over the counter with the knife in his hand and said, 'and everything in the register.' " Ms. Craft said, "excuse me?" and the man said again, "everything in the register." Craft immediately "got on [her] radio and started calling to the other associates who had radios to help, we were being robbed."

***2** Celenia Rivera, the Wawa "college graduate leader," was working in the office when she heard Craft's radio call. Ms. Rivera ran out of the office and saw Craft pointing at the perpetrator, who was walking toward the exit. Rivera followed the man into the vestibule. Defendant, who was

already outside the vestibule, turned around and lunged toward Rivera with the knife. Rivera got scared and closed the vestibule door. She locked the door and instructed all customers to stay inside while she called the police.

Sergeant Nicholas Czepiel of the Florence Township Police Department responded to the Wawa at approximately 11:44 p.m. and spoke to Craft and Rivera. Rivera described the robber as a "white guy with a beard" who was "possibly Hispanic" wearing a "black wool cap, a gray zip-up hooded sweatshirt with [a] black zipper and black drawstrings to it, black T-shirt, black pants and white sneakers. And male with facial hair." Rivera also told police that the robber had "the bluest eyes I've ever seen."

Customers arriving at the Wawa informed Sergeant Czepiel that another robbery had just taken place at a nearby Valero gas station (Valero). He immediately went to Valero and spoke with the two attendants.

Surendra Vasisht, one of the Valero attendants, testified that at approximately 11:50 p.m., a man came into the gas station "cabin" where Vasisht and the other attendant were doing paperwork. The man brandished a "shiny" metal rod with a "black handle" that was approximately "two to three feet" long. He wore a "grayish hoodie," black or "dark-colored" pants, white sneakers and gloves, and his face was covered, so only his eyes could be seen. Vasisht estimated that the man was forty years old and between five feet seven and five feet nine inches tall.

The robber told the two attendants to "put everything on the table" or "I'll kill you" or "I'll beat you." According to Vasisht, the robber also threatened to shoot them, but Vasisht did not see a gun. The men put approximately $530 in cash on the table. The robber grabbed the cash and fled on foot toward Route 130 South. Vasisht immediately called the police and Sergeant Czepiel arrived at Valero "within five minutes."

Both robberies were captured on security video from the Wawa and Valero. The surveillance video recordings were played for the jury at trial. Detective Christopher Powell of the Florence Township Police Department, who viewed the security videos on the night of the robberies, testified at trial that "the same subject [was] responsible for both robberies," because the man in the videos was "wearing the same exact clothing in both." Valero video depicted the suspect leaving the gas station on foot and turning left near the fence line. Powell testified that the video shows that "several moments" after the robber walked down the fence line, a vehicle entered the frame, travelled up the long driveway of the neighboring Burlington Coat Factory offices, and made a left turn southbound on Route 130.

Because the robber had fled Valero on foot, Sergeant Czepiel called for a canine tracker. Bordentown Township Police Officer Richard Brettell responded with his bloodhound, Liberty.

Officer Brettell testified that Liberty followed a scent trail south on Route 130 from Valero to the parking lot of the Budget Inn, at which point the dog lost the trail.

Shortly after the robberies, Sergeant Czepiel obtained the name of a possible suspect, not defendant, who stayed at the Budget Inn. Czepiel and two other officers went to the Budget Inn and spoke with the possible suspect, Matthew Haines, and his wife. [1] Mr. Haines appeared to have just "awoken from a deep sleep" and was wearing only a "T-shirt and his underwear." Czepiel testified that he discounted Mr. Haines as a suspect because he did not fit the description in that he "did not have any facial hair" and he had a "very pale" not "tan" skin tone. Also, Mr. Haines walked "hunched over" and appeared to have a back injury.

***3** Czepiel described the robber to the Haines. Czepiel testified at trial that Mrs. Haines "then made a statement that she has an idea of who she believed the suspect was." She specified a man nicknamed "Chief" and told police his real name was "Fred Owle" and that he also resided at the Budget Inn. After obtaining defendant's room number from the front desk, the officers went to defendant's room and encountered his girlfriend, Angela Petroski. Defendant was not there, and Petroski told the officers that he was in another specific room.

Sergeant Czepiel and other officers went to that room. Fred Deloise answered the door. Czepiel discounted Deloise as a suspect as he was "very pale," had no facial hair and was heavier than the robber seen in the surveillance video. Deloise initially denied that defendant was in the room, but eventually admitted that he was and allowed the officers to enter. Defendant was wearing a "black T-shirt, shorts and white sneakers" and was holding a pack of Newport cigarettes.

While canvassing the parking lot of the Budget Inn, Detective Powell observed a 2004 green Ford Taurus registered to Petroski. Powell and Czepiel observed through the car window a two-foot-long metal pipe and a black wool cap with an Eagles emblem. The car was impounded, towed, and searched pursuant to a warrant. Police recovered the pipe and cap. Nothing else of evidential value was found in the car.

Vasisht testified at trial that the pipe used by the robber to threaten him and his co-worker was "like" the metal pipe found in the Taurus, which he recognized by "the black handle." There is no indication in the record that Vasisht was ever asked to make an out-of-court identification of the robber. Furthermore, when Vasisht was asked at trial whether he could recognize the individual who came into the gas station that night, he testified that he could not.

The State did not present testimony from the other Valero attendant, Sankar Singh. Nor does the record reflect that Singh participated in a photo-array or other out-of-court identification procedure.

Ms. Craft testified that she went to the police station on the night of the robbery to provide a formal statement. Although she gave a description of the robber, the record does not indicate that she was ever asked to identify the culprit in an out-of-court identification procedure. At trial, she acknowledged that she could not remember any distinguishing characteristics of the robber because she "blacked out" from fear. She nonetheless identified defendant at trial as the person who robbed the Wawa.

Ms. Rivera went to the Florence Township Police Station at approximately 6:00 or 7:00 a.m. on April 15, 2017, after her night shift at the Wawa ended. Lieutenant I. Albert Jacoby had prepared a photo array that included photographs of defendant and five other men.[2] Lieutenant Jacoby testified at trial that Sergeant Czepiel and Detective Powell had "briefed [him] on the case," "indicated they [had] developed a suspect [defendant,]" and requested assistance with a photo array. Lieutenant Jacoby testified that he chose photos for the array "resembl[ing] the suspect in characteristics that were [developed] both by the description given by the witnesses and by any other investigative means that we have had." Florence Township Detective Nicole Bonilla, who had no other involvement in the case, showed the photos in the array to Rivera sequentially. Rivera positively identified the photograph of defendant as depicting the man who robbed the Wawa. She also identified defendant at trial.

***4** Three days after the robbery, Detective Powell canvassed the area around Valero where the video depicted the suspect running. He found a black ski mask in the woods near the gas station. The State presented expert testimony from a New Jersey State Police forensic scientist that established to a reasonable degree of scientific certainty that defendant's DNA was found on the ski mask.

On July 6, 2017, a Burlington County grand jury indicted defendant for three counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(2) (counts one through three); third-degree possession of a weapon (knife) for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count four); third-degree possession of a weapon (metal pipe) for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count five); fourth-degree unlawful possession of a weapon (knife), N.J.S.A. 2C:39-5(d) (count six); and fourth-degree unlawful possession of a weapon (metal pipe), N.J.S.A. 2C:39-5(d) (count seven).

Prior to trial, the court granted the State's application to dismiss count three. In January 2019, defendant was tried before a jury on the remaining counts over the course of five non-consecutive days. At trial, both Craft and Rivera identified defendant as the man who had committed the Wawa robbery. Rivera also testified regarding how she identified defendant from the photo array that was administered on the morning after the robbery. We deem it significant to highlight that defendant does not have blue eyes, as Rivera had initially told police. Rather, he has brown eyes. The State presented no witnesses who could identify defendant as the person who committed the Valero robbery.

During its deliberations, the jury asked to see the video surveillance recordings from both robberies. The jury also asked to hear a playback of Sergeant Czepiel's testimony. The jury ultimately convicted defendant of all remaining charges.

The sentencing hearing was conducted on April 17, 2019. On count one, first-degree robbery at the Wawa, defendant was sentenced pursuant to N.J.S.A. 2C:43-7.1 to a mandatory term of life imprisonment without parole. The court merged defendant's convictions on count four, possession of a weapon (knife) for an unlawful purpose, and count six, unlawful possession of a weapon (knife), with his conviction on count one. The court further merged defendant's convictions on count five, possession of a weapon (metal pipe) for an unlawful purpose, and count six, unlawful possession of a weapon (metal pipe), with his conviction on count two, first-degree robbery of the Valero gas station. On this second robbery conviction, the judge imposed a concurrent prison term of seventeen years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

This appeal followed.

Defendant raises the following contentions for our consideration in the brief submitted on his behalf by counsel:

POINT I

DEFENDANT WAS DENIED HIS RIGHTS TO CONFRONTATION AND A FAIR TRIAL BY TESTIMONY AND ARGUMENT CREATING AN INESCAPABLE INFERENCE THAT THE POLICE POSSESSED EXTRA-RECORD EVIDENCE OF DEFENDANT'S GUILT. U.S. CONST. amends. V, VI, and XIV; N.J. CONST. art. I, ¶ 1, 9, and 10. (Not Raised Below)

POINT II

DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY A FAULTY IDENTIFICATION JURY CHARGE THAT FAILED TO PROVIDE THE JURY WITH ANY GUIDANCE ON HOW TO ASSESS THE PHOTOGRAPHIC IDENTIFICATION PROCEDURE, WHICH WAS THE LYNCHPIN IN THE STATE'S CASE. U.S. CONST. amends. V and XIV; N.J. CONST. art. I, ¶ 1, 9, and 10. (Not Raised Below).

***5** Defendant additionally raises the following contentions in his pro se supplemental brief:

POINT I

CONTRARY TO THE PROSECUTOR'S STATEMENT THAT “IT'S NOT A CONSPIRACY TO TRY TO GAIN WRONGFUL CONVICTIONS,” THIS CASE PRESENTS THAT DEFENDANT'S DUE RIGHTS PROCESS RIGHTS AND OTHER CONSTITUTIONAL

RIGHTS [WERE] VIOLATED ON THE BASIS OF BAD FAITH, [CONNIVANCE] ON THE PART OF THE GOVERNMENT, BY PROSECUTORIAL MISCONDUCT, [WHOSE] CHARGING PROCESS AND DECISIONS RETURNED [AN] INVALID INDICTMENT THAT WAS NOT RETURNED IN OPEN COURT BEFORE THE "ASSIGNMENT JUDGE," R. 3:6-9(b), WAS NOT FILED AT THE TRIAL COURT, NOR ENDORSED AS A "TRUE BILL" BY THE FOREPERSON OF EITHER THE STATE OR [BURLINGTON] COUNTY GRAND JURY, MEANING APPELLANT IS IN CUSTODY DUE TO THE PROSECUTOR[']S VIOLATION [OF] BOTH ARTICLE I, ¶ 8 OF THE NEW JERSEY CONSTITUTION AND AMENDMENT V OF THE UNITED STATES CONSTITUTION. AS A RESULT[,] BURLINGTON COUNTY PROSECUTED THE CAUSE WITHOUT THE TRIAL COURT HAVING JURISDICTION ON THIS CASE. THE PROSECUTOR'S [SUMMATION] DIRECTS TO [CELENIA] RIVERA WHO ON CROSS[-EXAMINATION] RECANTED HER PRIOR TESTIMONY BECAUSE DEFENDANT DID NOT HAVE BLUE EYES BUT RATHER BROWN EYES, AS HE IS A "NATIVE AMERICAN[,]" A CLEAR MISTAKEN IDENTIFICATION CASE. ALL OF THIS WAS SO EGREGIOUS THAT IT CLEARLY AND UNMISTAKENLY DEPRIVED ... DEFENDANT A FAIR TRIAL REQUIRING [HIS] CONVICTION BE VACATED AND REVERSED. (Not Raised Below).

POINT II

THE SENTENCE AS A WHOLE IMPOSED "CRUEL AND UNUSUAL PUNISHMENT [HAS BEEN] INFLICTED," [sic] U.S. CONST. amend. VIII; N.J. CONST. art. I, ¶ 12, [THE JUDGE][,] DID NOT "STATE THE FACTUAL AND LEGAL BASIS SUPPORTING HIS IMPOSITION OF SENTENCE," N.J.S.A. 2C:43-2[8], CAUSING AN ILLEGAL SENTENCE OF "LIFE[,]" ... "85%" AS ARBITRARILY IMPOSED, MITIGATING FACTORS NOW [OUTWEIGH] THE AGGRAVATING FACTORS TO DROP BY ONE DEGREE THE ROBBERY CRIMES, REQUIRES APPELLATE REVIEW TO MODIFY THE CONVICTION PURSUANT TO N.J.S.A. 2C:44-7, THE CONVICTION MUST BE REVERSED, OVERTURNED AND VACATED[.] (Partially raised below).

II.

We first address defendant's contention, raised for the first time on appeal as plain error,[3] that his convictions should be reversed because of testimony of Sergeant Czepiel and Lieutenant Jacoby, as well as the prosecutor's opening statement. Defendant asserts that the testimony and opening statement impermissibly created the inference that police were aware of incriminating evidence provided by non-testifying witnesses, thereby violating his rights under the Confrontation Clause of the federal and state constitutions. We begin our analysis by surveying the Confrontation Clause precedents that dictate the outcome of this appeal.

***6** As the United States Supreme Court recently reaffirmed, "[o]ne of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment...." Hemphill v. New York, —— U.S. ——, 142 S. Ct. 681, 690, 211 L.Ed.2d 534 (2022). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. amend. VI. The New Jersey Constitution's analogue to the Sixth Amendment, Article I, paragraph 10, "provide[s] equivalent protection." State v. Roach, 219 N.J. 58, 74, 95 A.3d 683 (2014). "Our confrontation jurisprudence 'traditionally has relied on federal case law to ensure that the two provisions provide equivalent protection.' " State v. Sims, 250 N.J. 189, 223, 271 A.3d 288 (2022).

The United States Supreme Court has held that "the framers of the Constitution intended the Confrontation Clause to bar the admission of 'testimonial statements of a witness who did not appear at trial unless [the declarant is] unavailable to testify, and the defendant had ... a prior opportunity for cross-examination.' " Ibid. (alteration in original) (quoting Crawford v. Washington, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). Importantly, "[t]he Confrontation Clause applies to 'witnesses against the accused,' or those who 'bear testimony,' which is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " State v. Carrion, 249 N.J. 253, 268, 265 A.3d 115 (2021) (citing Crawford, 541 U.S. at 51, 124 S.Ct. 1354). A "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

The right to confront witnesses is "an essential attribute of the right to a fair trial" as it "secures for a defendant the 'fair opportunity to defend against the State's accusations....' " State v. Medina, 242 N.J. 397, 412, 231 A.3d 689 (2020) (first quoting State v. Branch, 182 N.J. 338, 348, 865 A.2d 673 (2005); and then quoting State v. Garron, 177 N.J. 147, 169, 827 A.2d 243 (2003)). "[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." Branch, 182 N.J. at 350, 865 A.2d 673 (citing State v. Bankston, 63 N.J. 263, 268–69, 307 A.2d 65 (1973)).

Our Supreme Court's frequently cited decision in Bankston lays the foundation for our analysis. In that case, police officers entered a tavern and found drugs near where the defendant was sitting. Bankston, 63 N.J. at 265, 307 A.2d 65. The defendant was subsequently arrested. Id. at 265–66, 307 A.2d 65. At trial, one of the detectives testified that the defendant fit an informant's description of a person with drugs in the tavern. Id. at 266, 307 A.2d 65. The Court noted that

> [i]t is well settled that the hearsay rule is not violated when a police officer explains the reason he [or she] approached a suspect or went to the scene of the crime by stating that he [or she] did

> so "upon information received." Such testimony has been held to be admissible to show that the officer was not acting in an arbitrary manner or to explain his [or her] subsequent conduct. However, when the officer becomes more specific by repeating what some other person told him [or her] concerning a crime by the accused the testimony violates the hearsay rule.
>
> [Id. at 268 (citations omitted).]

The Court determined that the detective's testimony was inadmissible hearsay. "Although ... the [detective] never specifically repeated what the inform[ant] had [said], the inescapable inference from [the] testimony was that the inform[ant] had given information that defendant would have narcotics in his possession." Id. at 271, 307 A.2d 65. As a result, "the jury was led to believe that an unidentified inform[ant], who was not present in court and not subjected to cross-examination, had told the officers that defendant was committing a crime. The testimony was clearly hearsay." Ibid.

***7** The Court in State v. Irving provided further guidance not only on when hearsay testimony constitutes a Confrontation Clause violation but also on when any such violation constitutes reversible error. 114 N.J. 427, 446–47, 555 A.2d 575 (1989). In that case, three armed men robbed a luncheonette in Newark. Id. at 431, 555 A.2d 575. The proprietor was shot and wounded in the course of the robbery. Ibid. A detective testified that he focused on Irving as the subject of the investigation and placed his picture in the array after going to the neighborhood and asking for leads. Ibid. The Court concluded that the inescapable inference from that trial testimony, although never specifically stated, was that an informant had told the detective that the defendant committed the crime. Id. at 446, 555 A.2d 575. The Court acknowledged that in Bankston, the officer had testified more specifically on the information provided by the informant. The Irving Court reasoned, however, that the creation of the inference, not the specificity of the statements made, was the critical factor in determining whether the hearsay rule was violated. Id. at 447, 555 A.2d 575.

The Court ultimately distinguished Bankston because the defense counsel in Bankston had made a timely objection to each testimonial impropriety, thus preserving the issue for appeal. Ibid. By contrast, in Irving, the defense counsel did not object to the detective's hearsay testimony, even though the same testimony had been given at the Wade hearing prior to trial. Ibid.

The Court noted that because the issue was to be resolved under the plain error standard of review, it must consider whether there is reasonable doubt that the jury would have ruled other than as it did. Ibid. The Court cited and relied upon our then-recent decision in State v. Douglas, 204 N.J. Super. 265, 498 A.2d 364 (App. Div. 1985), where the defense attorney failed to make a timely objection to the prosecutor's remarks in summation regarding an officer's testimony explaining why the defendant's picture had been placed in a photo array. Irving, 114 N.J. at 446–47, 555 A.2d 575. The court in Douglas surveyed the relevant precedents and determined that in those earlier cases, hearsay testimony was deemed to be prejudicial because the State's cases were "very

weak....” 204 N.J. Super. at 275, 498 A.2d 364. The Douglas panel concluded that because the State's proofs in the matter before it were “fortified by direct positive evidence”—for example, direct identification of the defendant—the hearsay testimony was not prejudicial under the plain error rule. Ibid.

Applying that principle to the totality of the proofs in the record, the Supreme Court in Irving concluded that a reasonable doubt was not raised on whether the hearsay led the jury to a result it otherwise might not have reached. 114 N.J. at 448, 555 A.2d 575. In reaching that fact-sensitive conclusion, the Court succinctly summarized the independent proofs of guilt:

> In this case, two eyewitnesses identified the defendant both in court and out of court. Defendant's time slips indicated that the only day he arrived late to work during a four week period was on the date of the robbery. The only day he missed work during this period was the day before the robbery, the same day that his accomplice, co-defendant Livingston, was seen parked on the street a distance away from Frisco's Luncheonette. Under those circumstances we do not find that a reasonable doubt is raised on whether the hearsay led the jury to a result it otherwise might not have reached.
>
> [Ibid.]

We take note that the Court placed at the top of the list of independent proofs that two eyewitnesses had identified the defendant both in court and out of court. [4] Ibid.

***8** The Supreme Court's Confrontation Clause decision in Branch, decided in 2005, provides further instruction in determining whether that Sixth Amendment right has been violated and in measuring the prejudicial impact of any such violation. The Court reviewed several New Jersey Confrontation Clause cases and discerned that the “common thread that runs through” those precedents was that “a police officer may not imply to the jury that he [or she] possesses superior knowledge, outside the record, that incriminates the defendant.” Branch, 182 N.J. at 351, 865 A.2d 673.

In Branch, the Court reversed a defendant's robbery and burglary convictions, holding that defendant's right to confrontation had been violated by the investigating police officer's testimony that he had “included defendant's picture in a photographic array because he had developed defendant as a suspect ‘based on information received’ ” from an unspecified source. Id. at 342, 865 A.2d 673. That testimony was deemed to be inadmissible hearsay. Ibid.

The Court found that because there “was no trial testimony or evidence” other than the victim's identification of defendant from the photo array “that could have led [police] to focus on defendant as a suspect ... the jury was left to speculate that the detective had superior knowledge through

hearsay information implicating defendant in the crime." Id. at 347–48, 865 A.2d 673. That was particularly problematic

> [b]ecause the nameless person who provided the 'information' to [the detective] was not called as a witness, the jury never learned the basis of that person's knowledge regarding defendant's guilt, whether he was a credible source, or whether he had a peculiar interest in the case. Defendant never had an opportunity to confront that anonymous witness and test his credibility in the crucible of cross-examination.
>
> [Id. at 348.]

The Court concluded, "when 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." Id. at 349, 865 A.2d 673 (quoting Bankston, 63 N.J. at 271, 307 A.2d 65). The Court added that although a police officer "may testify that he went to the scene of a crime based 'upon information received,' " id. at 351, 865 A.2d 673 (citing Bankston, 63 N.J. at 268, 307 A.2d 65), the Court expressly rejected the use of such "seemingly neutral language" to explain why a defendant's photo was added to a photo array. Id. at 352, 865 A.2d 673 (rejecting dicta approving such language in Irving, 114 N.J. at 447, 555 A.2d 575). The Court thus announced a clear rule, explaining, "[w]hy the officer placed the defendant's photograph in the array is of no relevance to the identification process and is highly prejudicial." Ibid. "What counts[,]" the Court added, "is whether the officer fairly arranged and displayed the photographic array and whether the witness made a reliable identification." Ibid. Going forward, the Court permitted police to use the phrase "based on information received" outside of the photo array context, "but only if necessary to rebut a suggestion that they acted arbitrarily, and only if the use of that phrase does not create an inference that the defendant has been implicated in a crime by some unknown person." Ibid.

The Court then turned to whether the admission of such testimony rose to the level of plain error requiring the reversal of Branch's convictions. In concluding that the constitutional error in that instance was not harmless, the Court noted that the "State's evidence was far from overwhelming" as "[n]o physical evidence linked defendant to the scene of the crime" and the descriptions of the perpetrator by the witnesses "differed markedly from defendant's appearance." Id. at 353, 865 A.2d 673. The Court acknowledged that this "was a close case" and that "the detective's damaging hearsay testimony ... may have tipped the scales." Id. at 354, 865 A.2d 673. The Court therefore reversed Branch's convictions and remanded for a new trial. Ibid.

***9** Recently, our Supreme Court was presented with a similar issue in Medina. The defendant was convicted of offenses related to a non-fatal slashing that occurred outside of a bar. Medina, 242 N.J. at 401, 231 A.3d 689. The identity of the perpetrator was contested at trial. Ibid. The victim positively identified Medina from a photo array, and later also made an in-court identification. Id.

at 403–05, 231 A.3d 689. The jury viewed surveillance video of the attack, as well as a video of a previous bar fight involving Medina in which he was clearly seen. Ibid.

The fact-sensitive issue in Medina was whether a detective at trial violated the defendant's Confrontation Clause rights by telling the jury that his photo was included in the photo array "based on ... the evidence ... collected ... [.]" Id. at 405–06, 231 A.3d 689. The detective also testified that he had spoken to various witnesses at the bar, including the victim, another man named Rafferty, and "one female who didn't want to get involved." Id. at 405–07, 231 A.3d 689. The anonymous woman had identified Medina as the assailant but refused to give a formal statement. Id. at 402, 231 A.3d 689.

The Court stressed that the detective "never repeated to the jury what the anonymous woman told officers" and, in fact, "did not imply that the woman gave police any information at all." Id. at 416, 231 A.3d 689. The Court also reiterated its emphasis in Bankston that "we were unconcerned 'with mere possible inferences' to be drawn." Id. at 417, 231 A.3d 689 (quoting Bankston, 63 N.J. at 271, 307 A.2d 65). On those facts, the Court concluded that "the references to the anonymous woman did not create an 'inescapable inference' that she implicated defendant in the attack to the police." Id. at 417, 231 A.3d 689 (quoting Bankston, 63 N.J. at 271, 307 A.2d 65).

The Court "reiterate[d] that the best practice is to avoid explaining that a defendant's picture was placed in a photo array because he or she was a suspect 'based on information received' " or "based on the evidence collected" as "such language can potentially sweep in inadmissible hearsay by producing the 'inescapable inference' that the officer obtained incriminating information about the defendant beyond the scope of the record." Id. at 420–21, 231 A.3d 689 (quoting Branch, 182 N.J. at 352, 865 A.2d 673). However, the Court found that no such inference was generated in that case because the detective used the phrase "evidence collected" only "after (1) he explained that Rafferty and [the victim] gave formal statements, (2) the jury watched the surveillance footage ..., and (3) he read [the victim's] description of the attacker." Id. at 420, 231 A.3d 689.

Furthermore, the detective testified "that he had personally watched the surveillance footage before assembling the photo array" and that the victim told him of the earlier fight before the victim identified defendant. Ibid. The Court stressed that,

> most importantly, [the detective] repeatedly told the jury that no one other than Rafferty and [the victim] came forward to give a statement. Viewed in that light, "the logical implication" of [the detective's] testimony was that "the evidence that [he] collected" referred to evidence other than hearsay: the surveillance footage and [the victim's] and Rafferty's formal statements and descriptions of the attacker.
>
> [Ibid. (quoting Bankston, 63 N.J. at 271, 307 A.2d 65).]

The Court further explained,

> [The officer] did not imply that the woman gave police any information at all. He referenced the anonymous woman twice: once on direct examination and again on redirect examination. In the first instance, he agreed with the prosecutor that she "didn't want to get involved," and in the second, he agreed that she "didn't want to give a statement." [The officer] also explained that he obtained formal statements only from [the victim and his friend Rafferty] because "there was nobody else that wanted to come forward ... to give a statement, any witnesses or anything like that."
>
> ***10** ....
>
> [Further] [t]he record substantiates the Attorney General's contention that the jury likely considered the anonymous woman to be a "dead-end witness." The State not only was careful not to repeat what she told police, but also went to great lengths to suggest that she was not forthcoming. Additionally, the references to the anonymous woman would have seemed less significant than the other relevant evidence in the record. Both [the victim and his friend] gave descriptions of the attacker that matched defendant's picture; the surveillance video captured the incident; and [the victim] unwaveringly identified defendant both at trial and in the array. In sum, we find that the references to the anonymous woman did not create an "inescapable inference" that she implicated defendant in the attack to the police.
>
> [Id. at 416–17.]

The Court determined that in those circumstances, the detective's testimony did not violate the Confrontation Clause.

III.

We next apply the legal principles gleaned from the foregoing precedents to the facts in the case before us. The prosecutor in his opening statement set the table for the testimony concerning how police initially identified defendant as a suspect in the robbery. The prosecutor explained to the jury,

> [s]o the police go and speak with this Mr. Haines individual and you're going to hear the officers testify. Immediately they knew it wasn't him. Maybe a little similar facial features but he had just woken up, was there with his girlfriend or wife. He was shorter. They knew right away after talking to this guy this is not him [the robber]. But through the investigation talking to other people, they learn that it's possibly this individual named Freddie Owle.
>
> [(emphasis added).]

Sergeant Czepiel subsequently testified regarding his interaction with Mr. and Mrs. Haines, neither of whom testified at trial. Sergeant Czepiel told the jury that he immediately discounted Mr. Haines as a suspect because he did not match the description given by the witnesses. Czepiel testified that he then provided the suspect's description to Mr. and Mrs. Haines. Czepiel told the jury that Mrs. Haines "made a statement that she has an idea of who she believed the suspect was." The sergeant then told the jury that Mrs. Haines named defendant and provided police the number of the room at the Budget Inn at which defendant resided.

The State at trial presented yet additional testimony explaining why defendant's photo was placed in the array. Lieutenant Jacoby told the jury that he included defendant's photo in the array based on Sergeant Czepiel's and Detective Powell's representation that "they developed" defendant as a suspect. Lieutenant Jacoby testified that he chose photos for the array "resembl[ing] the suspect in characteristics that were [developed] both by the description given by the witnesses and by any other investigative means" available. (emphasis added) On further questioning by the prosecutor, Jacoby repeated that "during the investigation" Sergant Czepiel and Detective Powell had "developed a name."

***11** Defendant did not object to any of this testimony, nor to the prosecutor's opening remarks regarding what police had learned about the suspect from "other people." Therefore, as in Branch and Irving, we apply the plain error standard of review. R. 2:10-2; see also State v. Singh, 245 N.J. 1, 13, 243 A.3d 662 (2021).

A.

We first consider whether defendant's Confrontation Clause rights were violated. Lieutenant Jacoby's testimony that defendant's picture was included in the photo array based on "other investigative means" and on Sergeant Czepiel and Lieutenant Powell having "developed a suspect" violated the clear rule that police witnesses should not explain to a jury why a defendant's photo was included in an array, even by using "seemingly neutral language...." Branch, 182 N.J. at 352, 865 A.2d 673. We are concerned that the trial judge, assistant prosecutor, and defense counsel all seem to have been unaware that such testimony is irrelevant at trial and can be highly prejudicial. [5] See id. at 352, 865 A.2d 673.

But Lieutenant Jacoby's testimony, while clearly improper, is not the principal cause for concern in this case. We are especially troubled by Sergeant Czepiel's more explicit trial testimony that Mrs. Haines "made a statement that she has an idea of who she believed the suspect was," namely, defendant. That remark falls squarely under the prohibition against hearsay testimony.

The State argues on appeal that the logical inference to be drawn from that hearsay statement is that Mrs. Haines mentioned defendant by name because he met the description of the robber that had been provided to her by Detective Czepiel and not because she was aware of defendant's complicity in the robberies or any other criminal acts.[6] But that is not the only logical inference that could be drawn from Czepiel's testimony as to why Mrs. Haines had "an idea" why defendant was the person police were looking for.[7] We note that at a sidebar discussion, it was revealed that Mrs. Haines implicated defendant because she was aware that he had previously "committed multiple robberies."[8] In other words, she did provide police incriminating information about defendant that was beyond the record.

***12** We recognize that the jury was unaware of that information, which would have been highly prejudicial independent of the hearsay problem. Even so, the true reason why Mrs. Haines directed police to defendant by name makes clear that there were other possible explanations for why she did so besides the fact that defendant met the general description of the robber that Czepiel had given her.

We add that the jury was told that Czepiel went to Haines' room in the first place because Matthew Haines was a "possible suspect." When Czepiel immediately discounted the possibility that Mr. Haines was the robber, the officers did not just leave. Rather, Czepiel solicited aid from the Haines in finding the culprit, who might have had confederates. That circumstance bolsters the impermissible inference that the Haines were aware of information about the robberies or the robber that was not disclosed to the jury.

We believe the facts of this case are more analogous to the facts in Branch than Medina. Certainly, the hearsay testimony regarding Mrs. Haines' role was far more direct and detailed than the testimony in Medina concerning the role played by the anonymous woman who refused to give a formal statement to police. The Court in Medina stressed that there was no implication that the anonymous woman gave police any incriminating information. 242 N.J. at 416, 231 A.3d 689. In contrast, there is a plausible implication that Mrs. Haines provided incriminating information to Czepiel—as in fact she did. Considering the totality of the circumstances, and viewed through the lens of the prosecutor's opening statement that "through the investigation talking to other people, [the police] learn that it's possibly this individual named Freddie Owle," we conclude that the jury "was left to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime." See Branch, 182 N.J. at 347–48, 865 A.2d 673; Bankston, 63 N.J. at 271, 307 A.2d 65.

We are thus satisfied that even though Sergeant Czepiel did not specifically repeat any incriminating information learned from a non-testifying source (e.g., that Mrs. Haines was aware of defendant's criminal record), the officers' testimony created an inescapable inference that a non-testifying source implicated defendant in contravention of defendant's Confrontation Clause rights.

See Medina, 242 N.J. at 415–16, 231 A.3d 689. Indeed, Mrs. Haines—a non-testifying source—explicitly implicated defendant by identifying him as a suspect in the robberies. Compared to other cases where the Supreme Court found a constitutional violation based upon far more neutral testimony, see e.g. Branch, 182 N.J. at 352, 865 A.2d 673 (referring to "seemingly neutral language"), we think the Confrontation Clause violation in this case is particularly obvious and egregious. Cf. State v. Watson, —— N.J. Super. ——, —— (App. Div. 2022) (slip op. at 58) (finding that "while the [officer's] testimony [about consulting with another law enforcement agency] technically crossed the line under Confrontation Clause analysis, it was by no means an obvious and blatant violation of defendant's right to confront the witnesses against him"). We add that any harm associated with the violation in this case was compounded by the prosecutor's reference to inadmissible hearsay in his opening argument which referenced non-testifying sources. Cf. Id. at —— (slip op. at) (concluding that "the prosecutor's summation neither exploited nor reinforced the testimony that violated the Sixth Amendment[,]" and therefore did not compound the prejudice flowing from the Confrontation Clause violation).

B.

***13** The conclusion that defendant's Sixth Amendment rights were violated, by the admission of hearsay testimony, does not end our inquiry. We must next consider whether the violations rise to the level of plain error. In Weaver, the Court explained that "[w]hen evidence is admitted that contravenes not only the hearsay rule but also a constitutional right, an appellate court must determine whether the error impacted the verdict." 219 N.J. at 154, 97 A.3d 663 (citing Chapman, 386 U.S. at 24, 87 S.Ct. 824). "The standard has been phrased as requiring a reviewing court 'to declare a belief that [the error] was harmless beyond a reasonable doubt.' " Ibid. (alteration in original).

The State contends that to the extent any error occurred in the admission of Czepiel's testimony, it should be deemed to have been "invited" because defense counsel not only failed to object, but cross-examined Czepiel regarding what Mrs. Haines had told him. We disagree that the invited error doctrine applies in these circumstances

Under that doctrine, "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, 65 A.3d 818 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345, 526 A.2d 1046 (1987)). The doctrine applies "when a defendant in some way has led the court into error" and "acknowledges the common-sense notion that a 'disappointed litigant' cannot argue on appeal that a prior ruling was erroneous 'when that party urged the lower court to adopt the proposition now alleged to be error.' " Ibid. (first quoting State v. Jenkins, 178 N.J. 347, 359, 840 A.2d 242 (2004); and then N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340, 990 A.2d 1097 (2010)). In Corsaro, the

Court succinctly characterized invited error as error that defense counsel has "induced." 107 N.J. at 346, 526 A.2d 1046. In Jenkins, the Court further explained that the doctrine of invited error as applied in criminal cases "is designed to prevent defendants from manipulating the system." 178 N.J. at 359, 840 A.2d 242.

In this instance, it was the State, not defendant, that "led the court into error" by presenting inadmissible evidence to the jury and by setting the table for that evidence in the prosecutor's opening arguments.[9] Defense counsel's strategic decision to cross-examine Sergeant Czepiel regarding the erroneously admitted evidence may have risked re-enforcing the significance of that hearsay testimony for the jury, but that circumstance did not "manipulate the system" or otherwise invoke the harmless error doctrine.

We thus turn to whether the hearsay evidence was so prejudicial as to constitute plain error. We stress at the outset of our analysis that there were two distinct Confrontation Clause violations in this case: (1) Lieutenant Jacoby's testimony explaining why defendant's picture was included in a photo array, in clear violation of Branch, 182 N.J. at 352, 865 A.2d 673, and (2) the incriminating hearsay statement attributed to Mrs. Haines, which is an even more direct and serious violation of defendant's Confrontation Clause rights. The latter violation, moreover, was amplified by the prosecutor's opening arguments to the jury.

We are mindful of the well-established principle that a failure to object permits an inference that any error in admitting the testimony was not prejudicial. See State v. Nelson, 173 N.J. 417, 471, 803 A.2d 1 (2002); see also Hemphill, 142 S. Ct. at 694 (Alito, J., concurring) (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)) (noting a defendant can impliedly waive his Sixth Amendment right by "'fail[ing] to object to the offending evidence' in accordance with the procedural standards fixed by state law."). As the Supreme Court explained in Irving, failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial within the atmosphere of the trial. 114 N.J. at 444, 555 A.2d 575; see also State v. Frost, 158 N.J. 76, 84, 727 A.2d 1 (1999) (stating "[t]he failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made"). Failure to object also deprives the court the opportunity to take curative actions. Irving, 114 N.J. at 444, 555 A.2d 575. Accordingly, defendant's failure in this case to object either to the prosecutor's opening argument or to the testimony of the police officers regarding information from non-testifying sources that led them to defendant militates against a finding of reversible error.

***14** We also are mindful of the plain error analysis undertaken by the Supreme Court in Branch and Medina, which focused on the strength of the State's case. The State argues that, even if error occurred, it did not rise to the level of plain error as there was ample evidence to connect defendant to the crimes independently of the officer's testimony regarding how they initially

identified defendant as a suspect. See Douglas, 204 N.J. Super at 275, 498 A.2d 364 (noting the State's case was "fortified by direct positive evidence").

To ensure we fully and fairly consider the State's argument, we reproduce verbatim the synopsis of the incriminating evidence from the State's response brief:

> As in Medina, the jury here heard ample evidence to connect defendant to the crimes independently of the officers' testimony that defendant was included in the photo array after speaking to Mr. Haines and to defendant. Defendant was identified by Ms. Rivera after she had time to view his face and the surveillance footage from the Wawa. Additionally, defendant's DNA was found in a mask that was found days after the robberies near the property line of the Valero gas station. A metal rod and a dark colored cap were found in defendant's girlfriend's car. Ms. Rivera and Ms. Craft identified defendant in court.

Our own review of the trial record demonstrates that while the State's proofs were by no means "very weak," see Douglas, 204 N.J. Super. at 275, 498 A.2d 364, as in Branch, the trial evidence was "far from overwhelming." 182 N.J. at 353, 865 A.2d 673; see Watson, —— N.J. Super. at —— (slip op. at 62, 64) (acknowledging "that the State's evidence was not overwhelming[,]" but nonetheless determining the Confrontation Clause violation was harmless). As often is true in criminal cases that go to trial, this contest falls somewhere between the polar extremes of "very weak" and "overwhelming" evidence of guilt.

In Branch, there was "[n]o physical evidence link[ing] defendant to the scene of the crime." 182 N.J. at 353, 865 A.2d 673. We therefore summarize the physical evidence presented in the matter before us. The ski mask containing defendant's DNA is relevant and incriminating. However, it was not found at the crime scene. Rather, the ski mask was found in the woods near the Valero gas station, which is also near where defendant resided. Thus, the ski mask, while certainly incriminating evidence, could not be definitively tied to the crime because it could have been dropped near Valero at another time unrelated to the flight from robbery.

We deem it to be significant that a metal pipe similar to the weapon used in the Valero robbery was found in defendant's girlfriend's car. We note that Vasisht testified that the pipe used by the robber was "like" the one found later in the Ford Taurus. We also note, however, the State provided no corroborating testimony regarding either the weapon or the perpetrator from the other gas station attendant, Sankar Singh.

In his closing statement, the prosecutor argued that the Wawa surveillance video showed an emblem on the back of the hat worn by the robber that was consistent with the Eagles emblem on the hat recovered from Petroski's vehicle. The prosecutor replayed the video for the jury, rhetorically asking, "[w]hat's that on the back of his hat? You've got to look at the evidence closely, people." But so far as the record before us reflects, the State did not introduce an enhanced or enlarged screenshot from the video confirming that the hat worn by the robber bore the same distinctive emblem as on the hat recovered from the vehicle. The remarks and arguments of counsel are not evidence. See State v. Berry, 471 N.J. Super. 76, 103, 272 A.3d 1 (App. Div. 2022) (citing State v. Timmendequas, 161 N.J. 515, 737 A.2d 55. 578 (1999)).

***15** We add to our review of the physical evidence that although the State does not mention the Newport cigarettes in the legal argument section of its response brief, we find it relevant that at the time of his arrest, defendant was holding a pack of the same brand of cigarettes as had been demanded by the robber at the Wawa. We note, however, that the State presented no evidence that the cigarette pack defendant was holding was nearly full, indicating that it had been obtained recently during the Wawa robbery. Nor does the record show that the State examined the serial number on the pack defendant was holding that might have shown that it had been part of the Wawa inventory.

Aside from the corroborative physical evidence, the State's case hinged on the eyewitness identifications made by the two Wawa employees. On appeal as at trial, the State relies heavily on their testimony. As we have noted, in view of Henderson and its progeny, we must be careful not to overstate the value of eyewitness testimony, 208 N.J. at 218, 27 A.3d 872, especially when there are differences in the initial description given of the perpetrator and defendant's actual appearance. See supra Section II; cf. Branch, 182 N.J. at 353, 865 A.2d 673 (noting the descriptions of the perpetrator by the witnesses "differed markedly from defendant's appearance").

In the present case, Ms. Rivera positively identified defendant in both a photo array identification procedure administered the morning after the robbery and an in-court identification procedure at the trial nearly two years later. We note, however, that her initial description, provided just minutes after the robbery, highlighted one of the perpetrator's distinguishing characteristics. Ms. Rivera explained to Sergeant Czepiel that the robber had "the bluest eyes I've ever seen." But it is undisputed that defendant does not have blue eyes. In his closing argument, the prosecutor sought to bolster Rivera's ability to identify the perpetrator by replaying for the jury the Wawa surveillance video, highlighting a moment in the recording where it appeared that Rivera made eye contact with the robber. The prosecutor argued to the jury, "[t]hat's eye contact." From our perspective in determining whether the State's evidence was overwhelming, the video proof that Rivera made eye contact with the robber underscores the significance of the discrepancy between the description of the robber she first gave to police and defendant's actual appearance. See Branch, 182 N.J. at 353, 865 A.2d 673; cf. Watson, —— N.J. Super at —— (slip op. at 64) (noting the State's case

was fortified by an unequivocal positive identification of the perpetrator shown in the surveillance video by the defendant's former girlfriend).

We also take note of what was not presented at trial by the State. Although Ms. Craft made a positive in-court identification, there is no indication in the record that she ever made an out-of-court identification or even was asked to do so. Craft candidly acknowledged at trial that she could not remember any distinguishing characteristics of the robber because she was too scared to remember details. Cf. Henderson, 208 N.J. at 261–62, 27 A.3d 872 (recognizing that high levels of stress undermine the reliability of eyewitness identification and that eyewitness memory of such high-stress events "may be subject to substantial error."). That circumstance undermines the reliability of the identification she made in court when she was shown the surveillance video of the robbery and when she observed defendant live in the courtroom. See Watson, —— N.J. Super. at —— (slip op. at 108–54) (discussing the inherent suggestiveness of an in-court identification procedure and addressing the defendant's contentions regarding the reliability of "first time" in-court identifications).

***16** Furthermore, although the testifying gas station attendant, Mr. Vasisht, stated that the pipe found in the Taurus registered to Petroski was "like" the weapon used in the robbery based on its handle, he was unable to identify defendant. The other eyewitness to the Valero robbery, Sankar Singh, never testified, never gave a statement, never participated in an out-of-court identification procedure, and never was shown the pipe retrieved from Petroski's vehicle.

Importantly, the surveillance videos of the two robberies do not show the perpetrator so clearly as to permit the jury to make an independent identification. Cf. Watson, —— N.J. Super. at —— (slip op. at 102) (noting the defendant's girlfriend was able to positively and unequivocally identify defendant as the robber from the bank surveillance video and a screenshot from the video, leading the court to conclude that "the jurors could see for themselves the perpetrator shown in the surveillance video").

We conclude our review of the incriminating trial proofs by emphasizing that the issue before us in this appeal is not whether the State presented sufficient evidence to convict.[10] Rather, our fact-sensitive inquiry in applying plain error analysis focuses on whether the inadmissible hearsay evidence "may have tipped the scales." Branch, 182 N.J. at 354, 865 A.2d 673.

We emphasize that the seriousness of the constitutional violation—or in this case, the combined effect of two distinct Sixth Amendment violations—is an important consideration in determining the appropriate remedy. We also reiterate and stress that the State shoulders the burden to convince us beyond a reasonable doubt that the jury verdict would have been the same in the absence of the Confrontation Clause violations. Ibid.; Irving, 114 N.J. at 447, 555 A.2d 575. The beyond-a-reasonable-doubt standard is a formidable threshold to mount. In view of that demanding standard,

we cannot declare our belief that the repeated Confrontation Clause errors did not have the capacity to cause an unjust result. Branch, 182 N.J. at 354, 865 A.2d 673 (citing R. 2:10-2); cf. Watson, —— N.J. Super. at —— (slip op. at 64) (concluding that because the officer's "fleeting hearsay testimony—essentially a three-word answer to the prosecutor's problematic question—[had not] 'tipped the scales' as in Branch ... [,]" the Confrontation Clause violation was harmless constitutional error). We are thus constrained to vacate defendant's convictions and remand for a new trial.

IV.

Because we remand for a new trial, we need not address most of defendant's remaining contentions regarding asserted trial errors and the sentence imposed, including defendant's argument, raised for the first time on appeal, that the trial court committed plain error by not instructing the jury concerning out-of-court identification procedures sua sponte.[11] We presume that defendant on remand will request the trial court to instruct the jury regarding the photo-array identification procedure administered to Ms. Rivera.[12]

***17** We need only briefly address the arguments raised in defendant's pro se supplemental brief, as those contentions lack sufficient merit to warrant extensive discussion. See R. 2:11-3(e)(2). We add the following comments.

Defendant contends that the indictment was defective as it was not "returned in open court before the 'assignment judge' ... nor endorsed as a 'true bill' " and the "indictment shows no date nor time of 'when' it was filed" in Superior Court. Defendant provides no support in the record, however, for any of his claims regarding error in the grand jury process.

Although defendant's pro se brief is unclear, he also appears to assert that he is immune from prosecution because he is Native American and the "grand jury is an English institution." He provides no legal support for the proposition that he may not be tried in the New Jersey criminal courts because of his Native American heritage.

Defendant further argues in his pro se supplemental brief that the prosecutor's charging decision was made in bad faith. Defendant provides no specificity, however, as to how the prosecutor allegedly engaged in bad faith in seeking an indictment against defendant for the robberies of the Wawa and Valero. The law is well-settled that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion." State v. Medina, 349 N.J. Super. 108, 127–28, 793 A.2d 68 (App. Div. 2002) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)). Further, "the

decision to prosecute is particularly ill-suited to judicial review." Ibid. (quoting Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)). We do not hesitate to conclude that in this instance, there was ample probable cause to support the charges associated with the Wawa and Valero robberies.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 2195524

Footnotes

1 The record is not clear whether she was Matthew Haines' wife or girlfriend. Nor does the record reflect her name, although her role in the investigation is critical to the Confrontation Clause issue before us. We refer to her as "Mrs. Haines." She did not testify at trial.

2 So far as the record before us indicates, there was no Wade hearing in this case, nor was there a request by defendant for such a hearing. See United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

3 We reject the State's contention that defendant is procedurally barred from asserting the Confrontation Clause claim on appeal because he did not raise it to the trial court and did not make a timely objection to the testimony on hearsay grounds. See R. 2:10-2; see also Hemphill, 142 S. Ct. 681 (Alito, J., concurring) (recognizing that a defendant may validly waive Sixth Amendment right to confront witnesses). We elect to review defendant's constitutional argument on the merits applying the plain error standard of review.

4 Since Irving and Douglas were decided, the Supreme Court in State v. Henderson recognized that reform of our eyewitness identification jurisprudence was necessary because "[s]tudy after study revealed a troubling lack of reliability in eyewitness identifications" and because the previous standard for assessing eyewitness identification evidence "overstate[d] the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." 208 N.J. 208, 218, 27 A.3d 872 (2011). Accordingly, in interpreting the plain error analysis described in Irving, we are mindful of the admonition in Henderson concerning the assumption that eyewitness identifications are inherently reliable.

5 As we have noted, in this case, there was no Wade hearing. See supra note 2. Had there been such a hearing, we believe it would have been prudent for the trial court to remind the parties that testimony elicited at a Wade hearing regarding the investigation leading to

the preparation of a photo-array is generally not relevant at trial and should not be repeated before the jury.

6 We note that there is nothing in the record to indicate that Sergeant Czepiel showed Mrs. Haines a photograph of the perpetrator taken from surveillance video of either robbery.

7 We decline to interpret the phrase "inescapable inference," see Bankston, 63 N.J. at 271, 307 A.2d 65; Medina, 242 N.J. at 416–17, 231 A.3d 689, to mean that no other inference could be drawn from the hearsay testimony. Cf. Branch, 182 N.J. at 347–49, 865 A.2d 673 (emphases added) (noting "The jury was left to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime" and "when 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"); Favre v. Henderson, 464 F.2d 359, 364 (5th Cir. 1972) (emphasis added) (right to confrontation violated where "testimony was admitted which led to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged."); Hutchins v. Wainwright, 715 F.2d 512, 516 (11th Cir. 1983) (emphasis added) (right to confrontation violated where, "[a]lthough the officers' testimony may not have quoted the exact words of the informant, the nature and substance of the statements suggesting there was an eyewitness and what he knew was readily inferred"); People v. Vadell, 122 A.D.2d 710, 505 N.Y.S.2d 635 (App. Div. 1986) (emphasis added) (noting that the right to confrontation was violated where "[t]he clear implication of this question and answer ... was that defendant had told his wife that he had participated in the homicide").

8 When the Wawa and Valero robberies occurred, defendant was on parole from a fifteen-year prison sentence imposed on his six previous first-degree robbery convictions. He was released from prison only three months before the Wawa and Valero robberies.

9 We note the trial court properly instructed the jury that the opening and closing arguments of counsel are not evidence and should not be considered as such.

10 We are not addressing an appeal from the denial of a motion for a judgment of acquittal notwithstanding a guilty verdict. Cf. State v. Lodzinski, 249 N.J. 116, 144, 265 A.3d 36 (2021) (emphasis added) (citing State v. Williams, 218 N.J. 576, 594, 95 A.3d 721 (2014)) (a court reviewing denial of a motion for a judgment of acquittal notwithstanding a guilty verdict pursuant to Rule 3:18-2 "must view the entirety of the direct and circumstantial evidence presented by the State and the defendant and give the State the benefit of all the favorable evidence and all the favorable inferences drawn from that evidence, and then determine whether a reasonable jury could find guilt beyond a reasonable doubt.").

11 We note that the trial judge did instruct the jury on in-court identifications. See Model Jury Charges (Criminal), "In-Court Identification Only" (rev. July 19, 2012). Additionally, we

note that defendant does not contend that police violated the procedures for administering a photo-array identification procedure as prescribed in Henderson, or that an out-of-court identification procedure was impermissibly suggestive. See supra note 2.

12 We note that since the trial, the Model Jury Charge has been revised. See Model Jury Charges (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 18, 2020).

End of Document

2012 WL 3731805
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Charly WINGATE, a/k/a Max B, Charley Wingate, Big Gavel Wingate, Max B. Wingate, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Kelvin Leerdam, a/k/a Sims, Foo, Kelvin Antoine Leerdam, Defendant–Appellant.

Submitted March 27, 2012.
|
Decided Aug. 30, 2012.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 07–06–1109.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant Charly Wingate (Alan I. Smith, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Kelvin Leerdam (Michael J. Confusione, Designated Counsel, on the brief).

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

Appellant Charly Wingate filed a pro se supplemental brief.

Appellant Kelvin Leerdam filed pro se supplemental briefs.

Before Judges NUGENT, CARCHMAN and MAVEN.

Opinion

PER CURIAM.

***1** In these back-to-back appeals, consolidated for purposes of this opinion, defendants Charly Wingate and Kelvin Leerdam seek to overturn their convictions and sentences for kidnapping, robbing, and murdering David Taylor; kidnapping and robbing Allan Plowden; and kidnapping and robbing Giselle Nieves. Wingate argues that his conviction should be reversed because the trial court erroneously declined to sever his trial from Leerdam's trial, misapplied its discretion when it refused to excuse a juror for cause, and improperly instructed the jury. Wingate also argues that the court erroneously denied his motion for a judgment of acquittal, and imposed a manifestly excessive sentence.

Leerdam contends that his conviction should be reversed because at trial the prosecutor failed to fully disclose the State's plea agreement with one of its witnesses, presented unreliable and unduly suggestive in-court identifications, and elicited improper hearsay and perjured testimony. Leerdam also argues that his sentence was excessive.

We affirm the judgment of conviction for each defendant.

I.

A.

The trial evidence presented by the State, including the testimony of co-conspirator Gina Conway, established the following facts. Wingate and Leerdam were twenty-eight and twenty-one years old, respectively, in September 2006. People knew them as brothers, but they may have been step-brothers. Wingate's on-again-off-again girlfriend, Gina Conway, was an exotic dancer at a Bronx club named Sin City. One of the victim's attraction to Conway precipitated the events that culminated in another victim's homicide.

Two of the victims, Allan Plowden and David Taylor, were partners in criminal enterprises that included mortgage, real estate, and credit card fraud. They drove expensive cars around New York City, and Plowden often carried a Louis Vuitton bag containing cash, sometimes as much as $40,000. On September 19, 2006, while in the Bronx, Plowden noticed Conway standing across a street. He introduced himself then took her to a bar where they had a drink. Later, he took her to a hotel in Mahwah, New Jersey, where he unsuccessfully tried to seduce her. Conway left the hotel

room at approximately 4:00 a.m. and took a taxi to Sin City where she met Wingate and gave him money, then met a bouncer named Turon Gholston, [1] with whom she left.

Two days later, on September 21, the day before the homicide, Plowden phoned Conway, picked her up, and took her shopping in Bergen County. He was carrying the Louis Vuitton bag. During the shopping trip, Conway telephoned Wingate to make him jealous, and told him what she was doing. After shopping, Conway accompanied Plowden to a hotel in Fort Lee. Plowden gave Conway a room key card. During their stay, Plowden opened the designer bag several times to impress Conway, who thought it contained approximately $50,000. Later that night, Plowden drove Conway to Manhattan where he dropped her off.

After dropping Conway off, Plowden met David Taylor and two women, spent the night in a club, and eventually returned to the Fort Lee Holiday Inn where he shared a room with one of the women, Giselle Nieves. Taylor shared a room in the same hotel with the other woman, Maite Castro. Before going to bed, Plowden hid all but $1000 of his cash, as well as his wallet, jewelry, and car keys, under the plastic liner of a trash can. He hid the remaining $1000 under his bed's mattress, and then went to bed while Nieves showered. The crimes were committed in his room later that morning.

***2** Meanwhile, after Plowden dropped off Conway, she took a taxi to a basketball court near 135th Street and Fifth Avenue where she met Wingate and his friends at approximately 11:00 p.m. During the next couple of hours, she took an ecstasy pill and drank some Hennessy Cognac, which made her high, but the degree of her intoxication seemed to rise and fall. She told Wingate about Plowden's money. When he asked how much, she replied “a lot.” Wingate then said he was “going to get him,” which Conway understood as meaning that Wingate was going to get Plowden's money.

Wingate asked Conway where Plowden was, and she told him Plowden was probably at a club. She also told him where Plowden was staying. Wingate telephoned Leerdam, who arrived a few minutes later and spoke with Wingate. When they finished speaking, Wingate told Conway to go with Leerdam and take him to the hotel where Plowden was staying. According to Conway, Wingate did not intend to use force, but rather intended to steal the money while Plowden was at the club. Shamell Foye, the only witness to testify on behalf of the defense, said he was at the basketball court and saw Wingate and Conway, but not Leerdam.

The group left the basketball court and Leerdam tried to get a car, but he was unable to find one suitable for his purposes. Wingate called the cell phone [2] of a taxi driver, Mouhamadou Mbengue, and asked Mbengue to drive his brother and his girlfriend to New Jersey. Mbengue drove Leerdam and Conway to New Jersey, but stopped for gas on the way. While Leerdam went into the store at the gas station, Wingate pulled up in a car and told Conway that if she “pulled it off” he would love her forever.

Mbengue, Leerdam, and Conway arrived at the Fort Lee Holiday Inn at approximately 4:30 a.m., after mistakenly going to two other Holiday Inn hotels. During the journey, three calls were placed from Leerdam's cell phone to the Holiday Inn reservation line. Upon their arrival, Conway spotted Plowden's car and told Leerdam that Plowden had returned. Leerdam told Mbengue to wait and Leerdam and Conway entered the Holiday Inn.

On the way to Plowden's room, Leerdam put on gloves, took duct tape from his pocket, and displayed a handgun. Conway, who had not seen any of these items previously, became nervous because this was not part of the plan. When they arrived at Plowden's room, Leerdam told Conway to use her key card to open the door, but it did not work. Conway called Plowden's cell phone and could hear it ringing, but Plowden did not respond. Conway knocked on the door. Nieves answered, told Conway and Leerdam that Plowden was sleeping, and tried to close the door. Conway used her foot to prevent the door from closing, and she and Leerdam entered the room.

Once inside, Leerdam grabbed Nieves by the hair, pointed the gun at her head, and demanded the money and Plowden's car keys. Conway searched the room. Plowden continued to sleep. Leerdam shoved Nieves into the bathroom and told Conway to tape her up, which Conway did, duct taping Nieves's wrists, mouth, and ankles. Nieves got a good look at Leerdam and noticed a scar on the left side of his face.

***3** Conway woke Plowden; Leerdam told Plowden not to look at him or he would be shot, so Plowden turned away and Conway duct taped his hands and eyes. Plowden told them about the money under the mattress. While Conway and Leerdam searched the room, Plowden, who was on the floor covered by a comforter, was able to lift part of the duct tape from his eyes, peek, and see what was going on. He eventually told Leerdam and Conway that the rest of the money was downstairs in a friend's room. Holding the gun to Plowden's head, Leerdam forced Plowden to call Taylor.

When Taylor arrived at the room, he knocked on the door and Conway opened it. Leerdam stood behind the door with the gun. When Taylor entered, Leerdam pointed the gun at his face, Taylor reached for the gun, it discharged, and Taylor fell dead. According to the Bergen County Medical Examiner who conducted the autopsy, Taylor had stippling [3] on his face and two of his fingers, and a gunshot wound in his mouth. Taylor had died from an intraoral gunshot wound to his head and neck.

Conway collected items from the room, including cell phones, a laptop computer, and new clothes that Plowden had purchased the day before. She then went through Taylor's pockets and took $800. Leerdam took Taylor's watch and changed into one of Plowden's shirts and a suit jacket. Leerdam then struck Plowden in the face with the gun; and Conway took Nieves's purse and threatened to

kill Nieves and her family. Before leaving, Leerdam and Conway told Plowden they were going to Taylor's room and if the money was not there, they would come back and kill him.

Plowden managed to free himself and chase after Leerdam and Conway. He caught and punched Conway, but when she screamed and Leerdam turned toward him with the gun, he retreated. When Leerdam and Conway returned to Mbengue's car, Mbengue noticed that Leerdam was wearing new clothes. Mbengue drove Leerdam and Conway back to Leerdam's apartment in New York City, where Leerdam phoned Wingate. Conway took a bag containing items stolen from the hotel room and went to Sin City, where she met Gholston and later took a bus with him to his apartment in Bloomfield, New Jersey. She left the bag at his apartment, took another bag, and went to the home of Wingate's sister-in-law. While there, she telephoned Wingate, who said he was sorry for what had happened and would take care of her.

During the ensuing police investigation, Plowden not only failed to identify Leerdam from two photo arrays, but identified the picture of another man the police had used as a "filler." Detectives interviewed Gholston and retrieved the bag that Conway had left at Gholston's house. The bag contained two Holiday Inn key cards, cell phones, a laptop, car keys, clothing, a wallet, and a camera. When detectives arrested Conway, she gave them a statement implicating Wingate and Leerdam.

B.

A Bergen County grand jury charged Wingate, Leerdam, and Conway[4] in a twelve-count indictment with first degree murder, *N.J.S.A.* 2C:11–3a(1) and (2) (count one); first degree felony murder, *N.J.S.A.* 2C:11–3a(3) (counts two and seven); first degree robbery, *N.J.S.A.* 2C:15–1 (counts three, four, and five); second degree conspiracy to commit robbery, *N.J.S.A.* 2C:5–2 and 2C:15–1b (count six); first degree kidnapping, *N.J.S.A.* 2C:13–1 (counts eight and nine); second degree possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4a (count ten); and third-degree possession of a handgun without a permit, *N.J.S.A.* 2C:39–5b (count eleven). The grand jury also charged Turon Gholston with receiving stolen property, *N.J.S.A.* 2C:20–7 (count twelve).

***4** The trial court denied defendants' motion for severance, and thereafter a jury acquitted them of count eleven; convicted them of the lesser-included offense of aggravated manslaughter on count one; and convicted them of all other offenses charged in the indictment.

At Wingate's sentencing, after appropriate mergers, the court imposed the following prison terms: on count two (felony murder), forty years with an eighty-five percent period of parole ineligibility and five years of supervision upon release under the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2; fifteen years subject to NERA on count three (robbery of Plowden) concurrent to count

two; fifteen years subject to NERA on count four (robbery of Nieves) concurrent to count two and consecutive to count three; twenty years subject to NERA on count eight (kidnapping Plowden) concurrent to counts two and three; and twenty years subject to NERA on count nine (kidnapping Nieves) concurrent to counts two and four, and consecutive to count eight. The court also imposed appropriate assessments and fined Wingate $50,000.

As to Leerdam, the court imposed the same sentence with two exceptions; it sentenced Leerdam to life imprisonment on count two, and imposed no fines.

II.

We begin with Wingate's arguments. In his original brief, Wingate argues:

> POINT I THE TRIAL COURT MISAPPLIED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE ON COUNTS TWO, THREE, FOUR, EIGHT, AND NINE, BECAUSE THE STATE ONLY PRODUCED SPECULATIVE EVIDENCE THAT THE DEFENDANT HAD THE INTENT TO PARTICIPATE IN A ROBBERY [of] ALLAN PLOWDEN, AND AIDED CO–DEFENDANTS LEERDAM AND CONWAY IN THE SHOOTING AND ROBBERY OF DAVID TAYLOR AND THE KIDNAPPING OF GISELLE NIEVES AND ALLAN PLOWDEN.
>
> POINT II THE DEFENDANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT MISAPPLIED ITS DISCRETION AND DEPRIVED THE DEFENDANT OF HIS RIGHT TO PEREMPTORY CHALLENGE BY DENYING TRIAL COUNSEL'S MOTION TO EXCUSE JUROR NUMBER 4.
>
> POINT III THE JURY CHARGE WAS PREJUDICIALLY DEFECTIVE BECAUSE THE TRIAL COURT FAILED TO PROVIDE ADEQUATE GUIDANCE TO THE JURY AS TO HOW TO ASSESS ACCOMPLICE LIABILITY (NOT RAISED BELOW).
>
> POINT IV THE TRIAL COURT MISAPPLIED ITS DISCRETION IN FAILING TO SEVER THE DEFENDANT'S TRIAL FROM CO–DEFENDANT LEERDAM (RAISED IN PART BELOW).

(A)

EVIDENCE WHICH PERTAINED SOLELY TO CO–DEFENDANT LEERDAM WAS SO DISPARATELY GREATER THAN THE EVIDENCE WHICH PERTAINED TO THE DEFENDANT TO HAVE JUSTIFIED SEVERANCE (RAISED IN PART BELOW).

(B)

THE TRIAL COURT ERRED IN FINDING THAT THE LEVEL OF ANTAGONISM BETWEEN THE DEFENDANT AND CO–DEFENDANT LEERDAM DID NOT WARRANT SEVERANCE.

POINT V THE AGGREGATE 40 YEAR BASE CUSTODIAL SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE AND REPRESENTS A MISAPPLICATION OF JUDICIAL DISCRETION.

(A)

IMPOSITION OF BASE SENTENCES IN EXCESS OF THE STATUTORILY AUTHORIZED MINIMUM 30 YEAR SENTENCE ON THE DEFENDANT'S CONVICTION FOR FELONY MURDER ON COUNT TWO, AND IN EXCESS OF THE STATUTORILY AUTHORIZED MINIMUM 10 YEAR SENTENCES ON THE DEFENDANT'S CONVICTIONS FOR ROBBERY AND KIDNAPPING ON COUNTS THREE, FOUR, EIGHT, AND NINE, CANNOT BE SUPPORTED BY QUALITATIVE ANALYSIS OF THE AGGRAVATING AND MITIGATING FACTORS PRESENT.

(B)

***5** CONSECUTIVE TERMS ON THE DEFENDANT'S CONVICTIONS FOR ROBBERY AND KIDNAPPING SHOULD NOT HAVE BEEN IMPOSED.

(C)

THE TRIAL COURT FAILED TO TAKE INTO CONSIDERATION THE "REAL TIME" CONSEQUENCES OF THE MANDATORY NERA PERIODS OF PAROLE INELIGIBILITY.

In his pro se supplemental brief, Wingate argues:

POINT ONE

DID THE STATE PROVE BEYOND A DOUBT THAT DEFENDANT *KNEW* AND POSSESSED A WEAPON FOR UNLAWFUL PURPOSE AGAINST THE PERSON.

POINT TWO

DID THE STATE PROVE BEYOND A REASONABLE DOUBT DEFENDANT KNEW OF A WEAPON INVOLVING A[N] ALLEGED CONSPIRACY–ROBBERY.

Lastly, in his supplemental brief, Wingate argues:

POINT I

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE JURY ON THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY (NOT RAISED BELOW).

A.

We first address Wingate's contention that the trial court misapplied its discretion by denying the motion to sever his trial from Leerdam's trial. He argues that most of the evidence involved Leerdam's conduct, and compared to that evidence, the evidence against him was so "disparately absent that denying the motion for severance deprived [him] of his right to a fair trial."

Rule 3:7–7 permits "[t]wo or more defendants [to] be charged in the same indictment ... if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." *Rule* 3:7–7 also provides that "[r]elief from prejudicial joinder shall be afforded as provided by *R.* 3:15–2." *Rule* 3:15–2(a) states that a court should grant severance if one defendant has made a statement implicating any other defendant and that portion of the statement cannot be effectively redacted. That rule is inapplicable here. *Rule* 3:15–2(b) provides that in cases where

> it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.

The decision to grant or deny a motion for severance rests in the trial court's sound discretion. *State v. Morton,* 155 *N.J.* 383, 452 (1998), *cert. denied,* 532 *U.S.* 931, 121 *S.Ct.* 1380, 149 *L.*

*Ed.*2d 306 (2001). Our courts have established a "general preference to try co-defendants jointly." *State v. Robinson,* 253 *N.J.Super.* 346, 364 (App.Div.), *certif. denied,* 130 *N.J.* 6 (1992). Joint trials are preferred when "much of the same evidence is needed to prosecute each defendant." *State v. Brown,* 118 *N.J.* 595, 605 (1990). Nevertheless,

> [w]hen considering a motion to sever, a court must balance the potential prejudice to a defendant against the interest in judicial economy. The test for granting severance ... is a rigorous one. Separate trials are necessary when co-defendants' defenses are antagonistic and mutually exclusive or irreconcilable. However, if the jury can return a verdict against one or both defendants by believing neither, or believing portions of both, or, indeed, believing both completely, the defenses are not mutually exclusive.
>
> ***6** [*State v. Brown,* 170 *N.J.* 138, 160 (2001) (internal quotation marks and citations omitted).]

In its written decision denying the severance motions, the trial court noted that Leerdam intended to present a defense that he was not involved, and that Conway lied to protect Wingate, with whom she was in love. To support that theory, Leerdam intended to emphasize at trial Wingate's statement to Conway that if she stole the money from Plowden, Wingate would "love her forever"; that Plowden identified another person as the shooter; that others conspired to rob Plowden;[5] and that proceeds from the theft were recovered from Gholston and Wingate's brother. The court nonetheless concluded that Wingate and Leerdam were not "urging antagonistic defenses at their core," and depending on what evidence it believed, a jury could convict both defendants, convict one of them, or acquit them both. The court reasoned:

> In the instant matter, the State intends to present identical evidence against both Leerdam and Wingate. The State claims that there is not one piece of evidence or testimony that would not be introduced against both defendants at separate trials. Leerdam and Wingate are charged with conspiracy and offenses which arise from the same acts and transaction. The prosecutor's theory of the case does not force the jury to choose between the defendants' conflicting accounts and to find only one defendant guilty. Thus, Leerdam's defense is not mutually exclusive and antagonistic at its core. The jury will be able to assess the credibility of all witnesses and evaluate each defendant's version of the events and reach a conclusion on the culpability of each. Moreover, this court will instruct the jury that it must return separate verdicts for each defendant as to each of the charges in the indictment, and that the jury will hence have to decide each case individually. Additionally, the jury will be instructed that whether the verdicts as to each defendant are the same depends on the evidence and its determination as judges of the facts.
>
> In view of the foregoing, this court is of the opinion that the defendants' due process right[s] to a fair trial are not outweighed by the State's interest in judicial efficiency, as such, severance

> is not appropriate. Because the prosecution of the offenses arises from the same transaction and requires the same evidence, this court must deny defendant's motion for severance.

The trial court analyzed and balanced the factors weighing in favor of and against severing the cases for trial. The court acted well within its discretion when it denied the severance motions.

Wingate relies upon *State v. Hall,* 55 *N.J.Super.* 441 (App.Div.1959) and *State v. Bellucci,* 165 *N.J.Super.* 294 (App.Div.1979), *aff'd as modified,* 81 *N.J.* 531 (1980), to support his argument that "severance is appropriate where most of the evidence presented by the State relates to persons other than the defendant." In both cases, we affirmed the trial court's discretionary denial of the severance motions, concluding that any potential prejudice to the defendant was overcome by timely and proper jury instructions. *Hall, supra,* 55 *N.J.Super.* at 455; *Bellucci, supra,* 165 *N.J.Super.* at 301. Here, too, the trial court specifically instructed the jury to consider the evidence against each defendant separately. Accordingly, we reject Wingate's argument.

B.

***7** Wingate contends in his second point that when the court failed to excuse a juror (Juror No. 4) for cause, the court effectively deprived him of his right to exercise peremptory challenges. [6] Following a weekend recess, Juror No. 4 reported that he had contact with the victim's father. When questioned by the court, Juror No. 4 described the incident:

> Yeah, a gentleman came in for some jeans and I waited on him for a couple of minutes, gave him a couple of pairs to try on. When he came out we were discussing alterations and that he didn't live in the area, and that he was up from North Carolina. And I kind of said uh-oh, and I recognized him and he recognized me and he immediately left. I tried to turn him over to somebody else but he—he just left, so—
>
> Upon the court's further inquiry, Juror No. 4 identified the "gentleman" as victim Taylor's father. The juror also indicated he had mentioned " 'having contact with someone' to the other jurors," but none of them reacted to his statement.

The court next questioned the victim's father, who described the incident:

> I researched the nearest (inaudible) so about 10 to 12 last Friday, I walked over to the store, I walked in the store, the gentleman was about 25 to 30 feet away said could I help you. I said no, I'm just looking. I walked over to the right of the store to look at jeans and it happened he was walking back folding some jeans. I did say do you have any jeans that fit me. He said what size you need, I told him what size, and he walked from one side of the store to the other looking for some jeans, and he told me I could stay where I was and he found three pair of jeans and said try these on. And I tried them on, he said if they don't fit call me and I'll bring some others

> over. They didn't fit, I called him and he brought me two other pair. They fit, I walked back out with the gentleman and I inquired about the length and did he have something a little longer. Apparently they were long enough but I felt I would like them a little longer and he said no, I really don't have the next size up.
>
> And so then I told him that I had two operations and I said I'm in town longer than I anticipated and (inaudible). And I said I needed them by today. And at that point, you know, I was kind of walking away and he said, turn around and look at me. I turned around and looked at him and in that instance he said I can't wait on you. And I recognized who he was and I headed back to the dressing room and at the same time he said one of my other associates can help you.
>
> I went back to the dressing room, changed my pants, came back out and a lady was trying to help me at the desk. And when I left I felt uncomfortable doing the transaction and then I left.

The court questioned each juror individually. Juror No. 4 told the court that his encounter with Taylor's father would not affect his role as a juror, and would not in any way affect his ability to be fair. Some of the other jurors heard the remark made by Juror No. 4—that he had encountered someone in the store—and some did not. Each juror who heard the remark informed the court that the remark would not affect his or her ability to be fair or to continue with the case.

***8** After questioning each juror, the court denied defendants' motion to excuse Juror No. 4 for cause. Wingate now contends that the court's decision effectively prevented him from exercising a peremptory challenge.

We reject Wingate's contention. His ability to exercise peremptory challenges was not impeded or affected by the situation, which arose not during jury selection, but during the trial.

Wingate relies upon *State v. Cooper,* 151 *N.J.* 326 (1997), *cert. denied,* 528 *U.S.* 1084, 120 *S.Ct.* 809, 145 *L. Ed* .2d 681 (2000), and *State v. Thompson,* 142 *N.J.Super.* 274, 282 (App.Div.1976), to support his argument. Each of those cases involved a juror providing misinformation or withholding information when questioned during jury selection. *Cooper, supra,* 151 *N.J.* at 349; *Thompson, supra,* 142 *N.J.Super.* at 277. Neither case has any applicability here. The case before us did not involve jurors withholding information when questioned during jury selection.

The Supreme Court has instructed that "if during the course of the trial it becomes apparent that a juror may have been exposed to extraneous information, the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." *State v. R.D.,* 169 *N.J.* 551, 557–58 (2001). The Court has explained that a trial court "is obliged to interrogate the juror, in the presence of counsel, to determine if there is a taint; if so, the inquiry must expand to determine whether any other jurors have been tainted thereby." *Id.* at 558. "Ultimately, the trial

court is in the best position to determine whether the jury has been tainted." *Id.* at 559. We review decisions of the trial court under an abuse of discretion standard. *Ibid.*

Here, Juror No. 4 was not exposed to extraneous information. Rather, he had an innocuous encounter with the victim's father. The trial court questioned both the juror involved in the encounter, as well as all of the other jurors, and was satisfied that each could continue to fulfill his or her role as a juror and continue to be fair and impartial. We are satisfied that the court handled the situation properly. The determination not to excuse Juror No. 4 was an appropriate exercise of the court's discretion.

C.

Wingate next contends the trial court failed to provide adequate guidance to the jurors as to how to assess accomplice liability. He also argues that the court erred by failing to charge theft as a lesser included offense of robbery.

In his challenge to the court's accomplice charge, Wingate does not assert that the charge given by the court was error; rather, he suggests that "the absence of any factual context to the legal issues in the trial court's jury instructions" constitutes plain error. Wingate did not object to the court's charge on accomplice liability. When neither the State nor the defendant objects to the trial court's instruction to the jury, we

> ***9** must determine whether the trial court's charge as a whole "misinformed [the jury] as to the controlling law," *State v. R.B .,* 183 *N.J.* 308, 324 (2005) (quoting *State v. Hipplewith,* 33 *N.J.* 300, 317 (1960)), or was "clearly capable of producing an unjust result," *R.* 2:10–2; *State v. Macon,* 57 *N.J.* 325, 335 (1971) ("[T]he question whether an error is reason for reversal depends finally upon some degree of possibility that it led to an unjust verdict."), or "whether there is reasonable doubt that the jury would have ruled other than as it did." *State v. Branch,* 182 *N.J.* 338, 353 (2005) (quoting *State v. Irving,* 114 *N.J.* 427, 447 (1989)).
>
> [*State v. Thomas,* 187 *N.J.* 119, 134 (2006).]

The trial court explained the State's allegation that Wingate was responsible for the crimes committed by Leerdam and Conway "because each defendant acted as the other's accomplice with the purpose that the specific crimes charged be committed." The court gave comprehensive instructions on the elements of accomplice liability. Wingate did not submit a proposed charge to the court that integrated the facts with the legal elements of accomplice liability, nor did he object at the time the court instructed the jury. Significantly, Wingate does not explain how the court could have "integrated" the facts without unduly emphasizing Wingate's role as the person

who conceived the conspiratorial plan and enlisted the help of Conway and Leerdam to execute it. More significantly, Wingate cites no authority for the proposition that a trial court must, without a request, integrate all of the facts adduced during a trial into its jury instructions.

"Trial courts have broad discretion when commenting on the evidence during jury instruction." *State v. Brims,* 168 *N.J.* 297, 307 (2001). Generally, "summarizing the strengths and weaknesses of the evidence is more appropriately left for counsel." *State v. Robinson,* 165 *N.J.* 32, 45 (2000). In the case before us, that is precisely what occurred. Counsel for Wingate zealously advocated Wingate's position in his closing argument.

Our review of the court's charge in its entirety discloses no basis for concluding either that the charge as a whole misinformed the jury as to controlling law, or was clearly capable of producing an unjust result. *R.* 2:10–2. Wingate's general assertion that the court should have integrated facts into its charge on accomplice liability does not establish that the trial court misapplied its discretion.

Wingate also asserts that the court committed error in its charge by failing to instruct the jury on theft as a lesser included offense of robbery. Wingate did not request the charge at trial, nor did he object to its omission from the court's jury instructions.

Theft is a lesser-included offense of robbery. *State v. Ingram,* 196 *N.J.* 23, 39 (2008). Nevertheless, "a trial court's obligation to instruct the jury on the court's own motion arises 'only when the evidence clearly indicates the appropriateness of such a charge[.]' " *State v. Rivera,* 205 *N.J.* 472, 489 (2011) (quoting *State v. Walker,* 203 *N.J.* 73, 87 (2010)).

***10** A person commits robbery if, during the course of committing a theft, he inflicts bodily injury or uses force upon another, or puts another in fear of immediate bodily injury. *N.J.S.A.* 2C:15–1a(1) and (2). Here, the indictment charged Wingate and Leerdam with robbing Plowden, Nieves, and Taylor. Nieves and Plowden were both robbed after Leerdam pointed a gun at them and Conway bound them with duct tape. Taylor's money and personal items were stolen after Leerdam shot him. No rational juror could have concluded that the acts charged in the indictment constituted theft, rather than robbery. *See State v. Cassady,* 198 *N.J.* 165, 178–79 (2009).

D.

In the first point of his initial brief, and in his pro se brief, Wingate contends that the trial judge erroneously denied his motion for a judgment of acquittal at the conclusion of the State's case because the State's evidence did not prove that he "had the intent to participate in a robbery [of] Allan Plowden, and aided ... Leerdam and Conway in the shooting and robbery of David Taylor and the kidnapping of Giselle Nieves and Allan Plowden." In his pro se brief, Wingate argues that

the State failed to prove he possessed a weapon for an unlawful purpose, and failed to prove that he conspired to commit robbery. He argues now, as he did before the trial court on his motion for a judgment of acquittal, that the State's case demonstrated his intent to commit burglary and theft, but nothing else.

Wingate presumably made his motion under *Rule* 3:18–1, which states that a trial court "shall ... order the entry of a judgment of acquittal ... if the evidence is insufficient to warrant a conviction."

> More specifically, the question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.
>
> [*State v. Reyes,* 50 *N.J.* 454, 458–59 (1967).]

Our review of a trial court's denial of a motion for acquittal under *Rule* 3:18–1 is de novo, and we apply the same standard. *State v. Bunch,* 180 *N.J.* 534, 548–49 (2004). We agree with the trial court's decision.

The State prosecuted Wingate on theories of accomplice liability and conspiracy. *N.J.S.A.* 2C:2–6a, the statute concerning liability for the conduct of another, provides that "[a] person is guilty of an offense if it is committed ... by the conduct of another person for which he is legally accountable[.]" A person is legally accountable for the conduct of another person when he or she "is an accomplice of such other person in the commission of an offense," or is "engaged in a conspiracy with such other person." *N.J.S.A.* 2C:2–6b(3) and (4). An accomplice is a person who acts "[w]ith the purpose of promoting or facilitating the commission of the offense," and, among other things, "[s]olicits [another] person to commit it," or "[a]ids or agrees or attempts to aid [another] person in planning or committing it." *N.J.S.A.* 2C:2–6c(1)(a) and (b).

***11** A person engages in a conspiracy with another person to commit a crime if, "with the purpose of promoting or facilitating its commission," he or she, among other things, "[a]grees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime...." *N.J.S.A.* 2C:5–2a. "[T]he agreement to commit a specific crime is at the heart of a conspiracy charge.... Actual commission of the crime is not a prerequisite to conspirator liability." *State v. Samuels,* 189 *N.J.* 236, 245–46 (2007). And "[b]ecause the conduct and words of co-conspirators is generally shrouded in silence, furtiveness and secrecy, the conspiracy may be proven circumstantially." *Id.* at 246 (internal quotation marks and citations omitted).

Wingate contends "there is no direct evidence of [his] guilt, and the circumstantial evidence cannot satisfy the 'proof beyond a reasonable doubt' standard of proof." He points out that he was not in the hotel room when the crimes occurred, and "was not even in the state of New Jersey." He

emphasizes that the crimes occurred more than three hours after Conway and Leerdam last were in his presence, and he did not possess a gun, gloves, or duct tape. Wingate's argument overlooks a basic principle of conspirator liability, namely, that the agreement is the heart of a conspiracy charge, and "[a]ctual commission of the crime is not a prerequisite to conspirator liability." *Id.* at 245–46.

Emphasizing that Conway told him that Plowden was not in the hotel room, Wingate also argues that the State failed to establish proof beyond a reasonable doubt that he "had a purpose or specific intent to commit a robbery or kidnapping or to aid another in the commission of same." He further argues that because the predicate offense for the felony murder charge was robbery, he could not have been convicted of felony murder because he and Leerdam planned only to commit theft. We reject Wingate's argument that the State's evidence could not have established that he intended to rob Plowden.

As we indicated previously, "[a] person is guilty of robbery if, in the course of committing a theft, he[ ] ... [i]nflicts bodily injury or uses force upon another[,] or ... [t]hreatens another with or purposely puts him in fear of immediate bodily injury[.]" *N.J.S.A.* 2C:15–1a(1) and (2). When Conway arrived at the basketball court and told Wingate about Plowden's money, Wingate asked where Plowden was. According to Conway, "[Wingate] asked me where is [Plowden] *now* and I told him I *think* he went to a club or something." (Emphasis added). Wingate then asked where Plowden was staying, and Conway "told him that [Plowden] was staying at a hotel." That exchange occurred after Conway told Wingate, "I was with this guy and, you know, he took me shopping and, you know, he had a nice car and he was *walking around* with a bag of money...." (Emphasis added).

***12** Conway had seen Plowden carrying the money; she never told Wingate that Plowden left the money in a hotel room. When Wingate decided to steal the money, he did not know where Plowden was, but he knew that Plowden was staying in the Fort Lee Holiday Inn. Contrary to Wingate's argument, the jury was not compelled to infer from those facts that Wingate believed Plowden's money was hidden in an unoccupied hotel room. The jury could have inferred from those facts, and from Wingate's statement that he was "going to get him," that Plowden kept the money bag with him, and that Wingate intended to take the money when Plowden returned to the hotel.

Significantly, Conway did not hear all of the conversations between Wingate and Leerdam. For example, when Conway and Wingate were at the basketball court and Conway first told him about Plowden's cash, Wingate made telephone calls and Leerdam appeared shortly thereafter. Wingate and Leerdam then spoke face-to-face immediately before Wingate told Conway to take Leerdam to the hotel where Plowden was staying. Conway did not hear all of that conversation. Later when Conway and Leerdam entered the Holiday Inn, Leerdam had a gun, gloves, and duct tape, evidence that he had previously formed the intent to rob Plowden. The jury could have reasonably inferred

from the totality of those circumstances that Wingate and Leerdam conspired to rob Plowden when Plowden returned to the hotel.

Unquestionably, the State's proofs concerning Wingate's accomplice liability and conspiratorial culpability were circumstantial. Nonetheless, the interconnected inferences were reasonable on the evidence as a whole. *Samuels, supra,* 189 *N.J*. at 246. In denying Wingate's motion, the trial court properly concluded that the State had presented sufficient circumstantial evidence of Wingate's accomplice liability to submit the issue to a jury.

"[A] co-conspirator may be liable for the commission of substantive criminal acts that are not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy." *State v. Bridges,* 133 *N.J.* 447, 466–67 (1993). Stated differently, under *N.J.S.A.* 2C:2–6b(4), "a conspirator is responsible for all criminal acts committed in furtherance of the conspiracy." *State v. Roldan,* 314 *N.J.Super.* 173, 188 (App.Div.1998). Conspiratorial liability encompasses possessory offenses. *Ibid.* Leerdam's offenses, as well as Conway's offenses, were all committed in furtherance of the conspiracy to rob Plowden. Robbery was one of the predicate offenses charged in the felony murder count of the indictment. Having conspired with Leerdam to rob Plowden, Wingate was responsible for the criminal acts committed by Leerdam in furtherance of the conspiracy, including the weapons offense.

E.

Lastly, Wingate argues that the trial court's imposition of sentences above the statutory mandatory minimum sentences "cannot be supported by a qualitative analysis of the aggravating and mitigating factors." Wingate also argues that the court erred by imposing sentences for Wingate's kidnapping convictions that were consecutive to his robbery convictions; and failed to take into consideration the "real time" consequences of mandatory parole ineligibility periods.

***13** A court has wide discretion when imposing a sentence, but the sentence must not be manifestly excessive nor unduly punitive. *See State v. O'Donnell,* 117 *N.J.* 210, 215–16 (1989); *State v. Ghertler,* 114 *N.J.* 383, 393 (1989); *State v. Roth,* 95 *N.J.* 334, 363–66 (1984). In determining the appropriate sentence to be imposed, the sentencing court must consider statutorily enumerated aggravating and mitigating circumstances, *N.J.S.A.* 2C:44–1a and b, balance them, and explain how the sentence was determined so that a reviewing court will have an adequate record on appeal. *State v. Kruse,* 105 *N.J.* 354, 360 (1987). When trial courts "exercise discretion in accordance with the principles set forth in [New Jersey's Code of Criminal Justice] and defined by [the Supreme Court]," we may not second-guess the trial court. *State v. Bieniek,* 200 *N.J.* 601, 607–08 (2010) (internal quotation marks and citation omitted).

When reviewing the sentence imposed by a trial court, we must determine

> first, whether the correct sentencing guidelines ... [or] presumptions, have been followed; second, whether there is substantial evidence in the record to support the findings of fact upon which the sentencing court based the application of the guidelines; and third, whether in applying those guidelines to the relevant facts the trial court clearly erred by reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors.
>
> [*State v. Tindell,* 417 *N.J.Super.* 530, 567 (App.Div.2011) (quoting *Roth, supra,* 95 *N.J.* at 365–66).]

At sentencing, the trial court found no mitigating factors and three aggravating factors: the risk the defendant will commit another offense, *N.J.S.A.* 2C:44–1a(3); the extent of the defendant's prior record, *N.J.S.A.* 2C:44–1a(6); and the need for deterrence, *N.J.S.A.* 2C:44–1a(9). In deciding to impose more than the mandatory minimum sentence, the court stated:

> In choosing to impose a lesser sentence on Mr. Wingate than I did as to Mr. Leerdam, I do so in recognition of the fact that Mr. Wingate was not personally present at the scene of these crimes, nor was he the one who actually shot the decedent, Mr. Taylor. However, in choosing to impose more than the minimum authorized sentence, I do so in recognition of the facts that the aggravating factors clearly outweigh the mitigating, especially when due weight is given to Mr. Wingate's prior record, including his prior conviction in New York for first degree robbery. And also in recognition [of] the role he played in contacting Mr. Leerdam and enlisting his assistance in this plot, but for which arguably none of this may have ever occurred.

Wingate contends that the three aggravating factors cannot support the sentences. He argues that he had only two prior indictable convictions, and that "there exists in this case only a general type of deterrence that is present in every sentencing." He also argues that the court failed to explain why it found a risk that he would commit further crimes.

***14** Wingate also argues that the court erroneously failed to find any mitigating factors. Specifically, he argues that his conduct was the result of circumstances unlikely to recur, *N.J.S.A.* 2C:44–1b(8), because he would have nothing more to do with Conway. He also argues that he cooperated with law enforcement authorities, *N.J.S.A.* 2C:44–1b(12), by helping them locate Conway.

Wingate had been convicted previously of first degree armed robbery, and he had been released from custody only one year before committing the current offenses. Those circumstances supported the court's finding of a risk of recurrence. On the other hand, Wingate's assertion that he would have nothing further to do with Conway was of little moment. There was no evidence that Conway initiated the conspiracy or enlisted Leerdam to commit the robbery. And there was certainly no evidence that Conway had anything to do with the previous armed robbery that Wingate committed.

Wingate's argument that he cooperated with law enforcement authorities is also devoid of merit. It was Conway, not Wingate, who admitted her complicity in the crimes and testified against Leerdam and Wingate. The statement Wingate provided to law enforcement authorities about Conway's whereabouts can hardly be deemed cooperation.

Wingate also argues that the court erred by imposing consecutive fifteen-year sentences for his robbery convictions, counts three and four; and consecutive twenty-year sentences for his kidnapping convictions, counts eight and nine. The consecutive sentences on those counts did not increase Wingate's aggregate prison term.

The robbery and kidnapping charges resulted from separate acts of violence perpetrated against separate victims, Plowden and Nieves. Generally, consecutive sentences are appropriate when multiple victims are involved. *See State v. Carey,* 168 *N.J.* 413, 428 (2001); *State v. Yarbough,* 100 *N.J.* 627, 644 (1985) ("some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not ... any of the crimes involved multiple victims"), *cert. denied,* 475 *U.S.* 1014, 106 *S.Ct.* 1193, 89 *L. Ed.*2d 308 (1986). The court did not misapply its sentencing discretion by imposing consecutive sentences.

Lastly, Wingate asserts that the court failed to take into consideration the real-time consequences of the NERA periods of parole ineligibility. However, "the impact of the eighty-five percent period of parole ineligibility on the time defendant would spend in custody [is] not [a] statutory mitigating factor [ ] and thus [does] not need to be addressed by [the][j]udge in sentencing." *Bieniek, supra,* 200 *N.J.* at 610 n. 1. Thus, the judge's failure to consider the real-time consequences of imposing this sentence does not provide an independent basis for reversing Wingate's sentence.

III.

Leerdam raises the following arguments in his original brief:

***15** Point 1 Defendant's constitutional due process rights were violated by impermissibly suggestive and insufficiently reliable in-court identifications that the trial court permitted before the jury without a line-up or other procedure to gauge their reliability.

Point 2 The jury was misled by the prosecutor's failure to fully disclose the plea agreement reached with a State witness.

Point 3 The admission of hearsay statements made by the alleged co-defendant violated defendant's constitutional right to confront the witnesses against him at trial, and the antagonistic defenses that developed during trial warranted a mistrial.

Point 4 Defendant's sentence is improper and excessive.

In his first supplemental pro se brief, Leerdam argues:

POINT ONE

THE DEFENDANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT MISAPPLIED ITS DISCRETION AND DEPRIVED THE DEFENDANT OF HIS RIGHT TO PEREMPTORY CHALLENGE BY DENYING TRIAL COUNSEL'S MOTION TO EXCUSE JUROR NUMBER (4), IN VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

In his final supplemental pro se brief, Leedam argues:

POINT ONE

DEFENDANT WAS DEPRIVED A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FOURTEENTH AND SIXTH AMENDMENTS BECAUSE THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY AND ALLOWED THE FALSE TESTIMONY BY A STATE WITNESS TO GO UNCORRECTED TO THE COURT AND JURY.

A.

Leerdam first argues that he was denied a fair trial when the court permitted one of the victims, Plowden, and the cab driver, Mbengue, to identify him during the trial. Within the week following the homicide, Plowden was twice shown photographic arrays but was unable to identify Leerdam. Plowden identified someone other than Leerdam in one of the arrays, though he told a detective

that he would prefer to see the suspects in person, because he did not think the pictures were clear enough for him to be certain of the identification. Mbengue was not shown a photo array.

During Plowden's trial testimony, Leerdam's counsel objected to Plowden identifying Leerdam in court. In response, the court conducted a *Wade*[7] hearing. Plowden testified at the hearing that he had ample opportunity to observe Leerdam on the night of the homicide. Plowden saw Leerdam's face when he initially woke up, at which time Leerdam was holding the gun. Leerdam was approximately three feet away, and the room was lit. Although Plowden turned away when Leerdam told him not to look, he was later able to partially remove the duct tape from his eyes and watch Leerdam "from the time David Taylor came inside the hotel room to the time that he fell to the floor." Plowden was also able to observe Leerdam's face for "seconds" when Plowden chased Conway after she left the hotel room. Plowden testified that he was one hundred percent certain of his ability to identify the perpetrator. Based on Plowden's testimony, the court permitted Plowden to identify Leerdam in front of the jury.

***16** Before Mbengue testified, Leerdam objected to Mbengue identifying him in court. Arguing that Mbengue had made no pretrial identification, Leerdam requested a *Biggers*[8] hearing, or that he, Leerdam, be placed in an appropriate line-up. Leerdam asserted that in the absence of a pretrial identification, Mbengue identifying him in court would be unduly suggestive.

The court denied Leerdam's application, noting that Leerdam had not filed a pretrial application concerning Mbengue identifying him. The court knew of no precedent that would preclude an in-court identification by a witness who had a reasonable amount of contact with a suspect. The court concluded that Leerdam had not made a sufficient showing to require an evidentiary hearing before Mbengue testified.

Leerdam essentially argues that Plowden did not make sufficient observations of the perpetrator to identify Leerdam as that person, as evidenced both by Plowden's inability to identify Leerdam from two photographic arrays, and from Plowden's identification of another individual. Consequently, the inherently suggestive procedure of Plowden identifying Leerdam while Leerdam sat next to his attorney during the criminal trial resulted in the substantial likelihood, if not the reality, of irreparable misidentification. Leerdam also argues that because Mbengue did not make any pretrial identification, Mbengue's ability to identify Leerdam should have been the subject of a hearing or tested by a line-up.

We begin with the fundamental proposition that " '[r]eliability is the linchpin in determining the admissibility of identification testimony [.]' " *State v. Madison,* 109 *N.J.* 223, 232 (1988) (quoting *Manson v. Brathwaite,* 432 *U.S.* 98, 114, 97 *S.Ct.* 2243, 2253, 53 *L. Ed.*2d 140, 154 (1977)). When deciding whether to permit an in-court identification following a suggestive out-of-court identification, the court must evaluate, among other things,

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
>
> [*Biggers, supra,* 409 *U.S.* at 199–200, 93 *S.Ct.* at 382, 34 *L. Ed.*2d at 411.]

See also Manson, supra, 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L. Ed.*2d at 154; *Madison, supra,* 109 *N.J.* at 239–40. [9]

Here, the trial court conducted a hearing before permitting Plowden to identify Leerdam in front of the jury. "[T]he trial court's findings at the hearing on the admissibility of identification evidence are 'entitled to very considerable weight.' " *State v. Adams,* 194 *N.J.* 186, 203 (2008) (quoting *State v. Farrow,* 61 *N.J.* 434, 451 (1972)). The trial court appropriately evaluated the circumstances under which Plowden viewed the photographic arrays, including his statements that he could not be sure of his identification without seeing the individuals in person. The court considered the amount of time that Plowden had to observe the perpetrator in the hotel room, the level of attention Plowden paid to the perpetrator as the perpetrator shot Taylor, Plowden's inability to identify Leerdam from two photographic arrays, and Plowden's in-court expression of certainty about the identification. The court had the ability to observe Plowden and gauge his credibility. *See State v. Locurto,* 157 *N.J.* 463, 470–71 (1999). We find no reason to disturb the trial court's decision to admit Plowden's in-court identification.

***17** We also conclude that Mbengue's in-court identification of Leerdam was properly admitted. Our Supreme Court has addressed the issue of in-court identification in a similar context:

> Notwithstanding that [the witness] identified defendant for the first time in court, her identification was constitutionally valid. Although undercut by the long delay between the crime and the trial, the reliability of the identification is supported by other considerations.... [The witness] had ample opportunity to view the assailants under circumstances in which she was seeking to establish their identities. The courtroom atmosphere was suggestive, but not so much so as to outweigh the reliability of the identification. Defense counsel had ample chance to challenge the accuracy of the identification on cross-examination, and the jury was free to discount its value based on [the witness's] inability to identify anyone on earlier occasions.
>
> [*State v. Clausell,* 121 *N.J.* 298, 327–28 (1990) (internal citation omitted).]

Mbengue had ample opportunity to observe Leerdam. He drove Leerdam from New York City to several Holiday Inns, then from Fort Lee back to New York City. In fact, when Leerdam returned to the car after exiting the Fort Lee Holiday Inn, Mbengue noticed that he had changed clothes.

Leerdam insists that the trial court should have granted his request for a line-up before permitting Mbengue to identify him in court. We disagree. "Although [a] defendant has no constitutional right to pretrial lineup discovery, ... a Court has the inherent power to order discovery when justice so requires." *State in Interest of W.C.,* 85 *N.J.* 218, 221 (1981). A defendant may, under certain circumstances, be entitled to a pretrial line-up. *Id.* at 225. However, before granting a defendant's motion for a pretrial line-up the court has to consider countervailing factors, including whether "identification [is] a substantial material issue ." *Id.* at 226.

The trial court in the case before us properly determined that Leerdam had not made a sufficient showing "that an evidentiary hearing is required prior to [Mbengue] testifying." Mbengue had ample opportunity to observe Leerdam on the night of the homicide, and Leerdam made no showing to the contrary. Leerdam did not file a pretrial motion to compel a line-up, but instead waited until mid-trial before making the request.

More significantly, both Nieves and Conway identified Leerdam. Nieves's identification of Leerdam from photographs shown to her four days after the homicide was admitted into evidence at trial, and she identified Leerdam during the trial as the man in the hotel room with the gun. Conway, who had known Leerdam as Wingate's brother or step-brother, also identified Leerdam. In other words, there was no significant question, considering "the nature and circumstances of the alleged crime," whether identification of Leerdam was truly an issue. *Id.* at 226. The trial court acted well within its sound discretion when it denied Leerdam's request for a line-up. *Cf. Henderson, supra,* 208 *N.J.* at 288 (explaining that "to obtain a pretrial hearing, defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification").

B.

***18** In Point II of his original brief, Leerdam argues that the jury was misled by the State's failure to fully disclose its plea agreement with Nieves. In a supplemental brief, Leerdam argues that the State permitted Nieves to give false testimony about the scope of her plea agreement.

Nieves and a friend, Maite Castro, had accompanied Plowden and Taylor to the Holiday Inn. Castro had been introduced to Taylor by two of her friends. She and the two friends had previously contemplated robbing Plowden and Taylor. Castro told Nieves about the plan to rob Plowden and Taylor, and Nieves was subsequently charged with conspiracy to commit robbery.

When the prosecutor questioned Nieves at trial, he elicited the circumstances resulting in Nieves being charged with conspiracy to commit robbery, and asked her: "What happened to those charges when you went to court?" She responded that she entered a pre-trial intervention (PTI) program,

which she described as a "no-plea program. After you complete it, the case is dismissed." She also testified that she got "kicked out" of the program, but the charges were nonetheless dismissed. The prosecutor did not elicit, and Nieves did not testify, that as a condition of her enrollment in the PTI program, she agreed to cooperate fully with the State and to testify, if necessary, against Wingate and Leerdam. During cross-examination, Nieves denied that she had to agree to cooperate with the prosecution as a condition of her entry into the PTI program. During her redirect examination, Nieves said she was not placed in the PTI program on the condition that she say "what the Prosecutor's Office wanted [her] to say."

Later in the trial, Leerdam's counsel obtained the transcript of Nieves's admission into the PTI program. The prosecutor at the PTI proceeding stated: "And as a condition of her enrollment, the defendant agrees to cooperate fully with the ... Prosecutor's Office, and to testify, if necessary, in two cases involving [Wingate and Leerdam]." [10]

The assistant prosecutor trying Leerdam responded that "all conditions of [PTI] disappeared when [Nieves] got kicked out and her case got relisted for trial." The prosecutor further explained that when he questioned Nieves, he was attempting to elicit truthful testimony that she was not testifying against Leerdam and Wingate "as part of a deal." In other words, her agreement to cooperate terminated with her removal from the PTI program, and Nieves was not asked to cooperate as part of any other "deal." Nonetheless, the prosecutor offered to have Nieves recalled so that she could be cross-examined on that point by Leerdam's attorney. Instead of recalling Nieves, the parties agreed that Leerdam's attorney would read a stipulation to the jury. As agreed, Leerdam's attorney read the following stipulation:

> [COUNSEL]: Ladies and gentlemen of the jury, it [is] stipulated by and between the parties, Mr. Delaney on behalf of the Bergen County Prosecutor's Office, and people of the State of New Jersey, and the defendant Kelvin Leerdam through his counsel, myself Jennifer Bonjean[, t]hat on May 30[,] 2007 the State moved the entry of Giselle Niev[e]s into the P.T.I. program and that during those proceedings Catherine Fantuzi (phonetic), a prosecutor in the Bergen County Prosecutor's Office, stated on the record:
>
> ***19** "It's my understanding that the defendant will be enrolled for a period of three years. And as a condition of her enrollment the defendant agrees to cooperate fully with the Bergen County Prosecutor's Office and to testify if necessary in two cases involving docket 2528–06 and 2629–06."

Despite the stipulation, Leerdam maintains that he was denied a fair trial.

Indisputably, the State must disclose all evidence favorable to a defendant. *Brady v. Maryland,* 373 *U.S.* 83, 87, 83 *S.Ct.* 1194, 1196–97, 10 *L. Ed.*2d 215, 218 (1963). The State's disclosure obligation "is not limited to evidence that affirmatively tends to establish a defendant's innocence but would

include any information material and favorable to a defendant's cause even where the evidence concerns only the credibility of a State's witness." *State v. Carter,* 69 *N.J.* 420, 433 (1976).

Assuming the State was required to disclose Nieves's agreement, even though she was not bound by it at trial, we conclude that Leerdam is not entitled to a new trial. Leerdam was aware of Nieves's agreement before the trial ended. The State offered to recall Nieves so that Leerdam could cross-examine her about her agreement. He elected not to cross-examine her, but instead to read to the jury the precise colloquy that occurred when Nieves was admitted into a PTI program. Leerdam has cited no authority for the proposition that a defendant who is unaware of *Brady* material at the inception of a trial, but is afforded a full opportunity to utilize the material during trial, is deprived of due process. We find no due process violation under those circumstances. *See United States v. Higgs,* 713 *F.*2d 39, 44 (3d Cir.1983); *People v. Leavy,* 736 *N.Y.S.*2d 681, 682–83 (N.Y.App.Div.) (holding that a "defendant's constitutional right to a fair trial is not violated when ... he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case"), *appeal denied,* 747 *N.Y.S.*2d 417 (N.Y.2002).

C.

Leerdam next contends that his constitutional right to confront and cross-examine witnesses against him was violated when hearsay statements attributable to Wingate were admitted into evidence; and that the court should have declared a mistrial due to the antagonistic defenses that developed during the trial. Leerdam argues that in *Crawford v. Washington,* 541 *U.S.* 36, 68–69, 124 *S.Ct.* 1354, 1374, 158 *L. Ed.*2d 177, 203 (2004), the United States Supreme Court abrogated its former "reliability" approach to the admissibility of hearsay evidence and held that out-of-court statements that are "testimonial" violate the Sixth Amendment. However, the Supreme Court did not apply its holding in *Crawford* to the co-conspirator exception to the hearsay rule. Our Supreme Court recently held that even if testimonial, "statements of a co-conspirator in furtherance of the conspiracy are an exception to hearsay, and their admission does not violate the Confrontation Clause." *State v. Cagno,* ——*N.J.* ——, —— (2012) (slip op. at 42).

***20** Leerdam also claims that certain statements attributed to Wingate by Conway were not made in furtherance of the conspiracy. Leerdam cites as examples testimony by Conway that: Wingate told her to meet him at Sin City; Wingate yelled an expletive at her after she disclosed that she went shopping with Plowden; Wingate asked questions about the amount of money Plowden carried; and, upon learning that Plowden carried a large sum of money, Wingate asked where Plowden "is ... now." Leerdam also takes exception to Wingate's post-shooting statement to Conway that he was sorry about what happened and would take care of her; and statements in letters Wingate wrote while in jail, telling Conway not to talk to anyone about the "situation" and blaming Conway for what occurred.

The admission of those statements, considered separately or collectively, does not warrant a new trial. *See R.* 2:10–2 (providing that "[a]ny error or omission shall be disregarded by the Appellate Court unless it is of such a nature as to have been clearly capable of producing an unjust result"). The State established Leerdam's guilt through an abundance of evidence, including the testimony of co-conspirator Conway; the testimony of Nieves, including both her out-of-court and in-court identifications of Leerdam; Plowden's testimony; and Mbengue's testimony. Wingate's statements, which did not implicate Leerdam, could hardly have affected the verdict.

Leerdam's remaining arguments concerning the admissibility of statements Conway attributed to Wingate lack sufficient merit to warrant further discussion, *R.* 2:11–3(e)(2), as does his argument that the antagonistic defenses that developed during trial warranted a mistrial. We add only the following. When Leerdam moved for a mistrial based on antagonistic defenses, the court denied the motion and referred to its previous finding that the respective defenses were not antagonistic. The court's decision incorporated its rationale for denying defendants' severance motions. We agree entirely with the court's decision for the reasons we have previously explained in this opinion.

D.

Leerdam also challenges his sentence as excessive. He argues that the court erred by imposing consecutive terms of imprisonment. He also contends that the court's findings of aggravating and mitigating factors were erroneous.

We previously explained that the trial court did not misapply its discretion by sentencing Wingate to consecutive prison terms. Our rationale applies equally to Leerdam's consecutive sentences. We need not reiterate those reasons.

Leerdam also argues that the court provided insufficient reasons for finding as aggravating factors the risk that he would commit another offense, *N.J.S.A.* 2C:44–1a(3); the extent of his prior criminal record, *N.J.S.A.* 2C:44–1a(6); and the need for deterring him and others from violating the law, *N.J.S.A.* 2C:44–1a(9). The court stated:

> First, with respect to Mr. Leerdam, as to aggravating factors, I find number three, the risk that he will commit another offense. I based that finding upon my review of his prior record, which indicates four adult arrests, although I believe the record has been clarified today so that two appear to be juvenile offenses and two are adult arrests. In conjunction with that, I find aggravating factor six, the extent of defendant's prior record, which appears to include one adult conviction,

> that being in New York for the sale of CDS, which Mr. Leerdam received a sentence between one and three years back in 2004. I also find aggravating factor number nine, the need to deter this defendant and others in engaging in this type of activity.

***21** Leerdam's criminal record, considered as a whole, supported the court's determination.

IV.

In conclusion, we affirm the convictions and sentences of Wingate and Leerdam.

Affirmed.

All Citations

Not Reported in A.3d, 2012 WL 3731805

Footnotes

1 Different spellings of Gholston's name appear throughout the trial transcripts.

2 The State introduced cellular phone records at trial to corroborate the communication among the conspirators.

3 According to the medical examiner, stippling results when a gun is fired at close range and specks of gunpowder are deposited on the skin.

4 Conway negotiated a plea and testified against Wingate and Leerdam. For that reason, we will refer to Wingate and Leerdam collectively as "defendants."

5 Trial testimony established that Castro, who accompanied Taylor to the Holiday Inn, had earlier conspired with two other men to rob Plowden and Taylor. Castro had solicited Nieves, but Nieves declined to participate in the robbery.

6 Leerdam raises the identical point in his pro se brief. Our disposition of Wingate's argument applies as well to Leerdam's argument.

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

8 *Neil v. Biggers,* 409 *U.S.* 188, 93 *S.Ct.* 375, 34 *L. Ed.*2d 401 (1972).

9 The trial in the case before us predated our Supreme Court's decision in *State v. Henderson,* 208 *N.J.* 208, 288–93 (2011), in which the Court announced the "revised framework" for testing the reliability of eyewitness identification. The Court's decision is prospective. *Id.* at 302.

10 The prosecutor who was present when Nieves was admitted into the PTI program was not the prosecutor who presented the State's case against Wingate and Leerdam.

End of Document

2012 WL 2912754
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Vernon K. JOHNSON, Defendant–Appellant.

Submitted April 25, 2012.
|
Decided July 18, 2012.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 08–01–0136.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Assistant Deputy Public Defender, of counsel and on the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (William Miller, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges SAPP–PETERSON and OSTRER.

Opinion

PER CURIAM.

***1** Defendant Vernon Johnson was convicted of third-degree shoplifting, *N.J.S.A.* 2C:20–11b(1) (Count One); first-degree robbery, *N.J.S.A.* 2C:15–1 (Count Two); and third-degree attempted shoplifting, *N.J.S.A.* 2C:20–11b(1) and *N.J.S.A.* 2C:5–1 (Count Three). He was sentenced to an aggregate term of nineteen years imprisonment with an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), *N.J.S.A.* 43–7.2. On appeal, defendant challenges various aspects of his trial, asserting unduly suggestive in-court identification and prosecutorial misconduct during summation. Defendant also contests the propriety of his third-

degree shoplifting conviction and challenges his sentence for first-degree robbery as excessive. We affirm the robbery and attempted shoplifting convictions, but reverse the third-degree shoplifting conviction, and remand for entry of judgment of fourth-degree shoplifting and resentencing on all counts.

The evidence presented at trial disclosed that on September 15, 2007, defendant approached the customer service desk at National Wholesale Liquidators (Liquidators) in Lodi with a flat screen television and attempted to return it without a receipt. The assistant manager, Diljit Kaur, who was working that morning, informed defendant the store would not issue a refund without a receipt. Defendant claimed to have left the receipt in his car and promised to return with it. Defendant then left the store with the television and did not return. The television was priced at $499 "plus tax." Defendant testified he had purchased the television with cash the previous day, but had lost the receipt sometime after exiting the store. However, upon discovering the television was missing a feature important to him, he sought to return it.

The following day, at approximately 9:00 a.m., defendant robbed a gas station attendant, Job Mose, at a BP gas station in Lodi. Defendant drove into the gas station in a silver Saturn and pulled up to the pump. Mose requested that defendant open the gas cap. Defendant instead exited the car and demanded money from Mose. Mose repeated his request and defendant returned to his car and retrieved what appeared to be a gun, wrapped in a white plastic bag. Defendant reached into Mose's left pocket and removed a wad of cash, after which he sped away. Mose immediately called the police and reported the incident. He described the perpetrator as a light-skinned black man of approximately 160 pounds driving a silver Saturn with a partial plate number of WL13L.

On September 17, at approximately 12:15 p.m., defendant returned to Liquidators and approached the customer service desk with a larger television priced at $699. When defendant attempted to return the television without a receipt Kaur recognized defendant and summoned the manager and security. An argument ensued and defendant ran from the store without the television. Store employees observed defendant drive off in a silver Saturn, with license plate number WBL13S, and relayed this information to the police.

***2** The police determined that the silver Saturn was owned by Enterprise Rent–a–Car and had been rented to Hackensack resident Lisa Smith on September 12. The Saturn was found parked near Smith's apartment on September 18. The day before the police located the vehicle, Smith had reported to police that the Saturn had been stolen by defendant, her boyfriend, who had disappeared with the vehicle "going into [September] 12th[,] into the 13th[,]" and had not been seen since.

The police knocked on Smith's apartment door and defendant answered. The police informed defendant they were investigating shoplifting incidents at Liquidators. Defendant replied that "he thought [they] were [there] investigating an incident that took place at the BP gas station [in]

which he ... slapped a man because he took his money." Police took defendant into custody. Police searched the trunk of the Saturn, finding a multi-colored toy cap gun next to a plastic bag.

At trial, Smith testified defendant took the car "going into [September] 12th [,] into the 13th[,]" and did not return until the morning of September 18. Defendant offered an alibi witness, Karl Hall, who testified defendant spent the entire day with him in New York on September 16, the day of the robbery. Defendant denied using the Saturn on September 16, and testified that when he returned home from spending the day with Hall, he found the interior of the car to be in disarray, leading him to believe the car had been loaned to Smith's nephew while defendant was away. Defendant also denied telling the police he thought they were at his apartment to investigate a confrontation he had with a man at a BP gas station.

During his direct examination, the prosecutor asked the gas station attendant, Mose, if the robber was present in the courtroom. After being permitted to walk around the courtroom, Mose said he could not identify the robber. The following exchange transpired:

> Q I'm going to ask you to look around the crook [sic], look everywhere. Do you see the person who was involved in this incident with you?
>
> A You want me to walk around?
>
> Q No. You can look around.
>
> THE COURT: See if you see the person. You can stand up if you wish.
>
> [ASSISTANT PROSECUTOR]: If you need to get down[,] it's okay. You can look anywhere you want.
>
> THE WITNESS: Can I go back there?
>
> THE COURT: Yes, you may.
>
> [ASSISTANT PROSECUTOR]: Look all the way around. Anywhere you want. If you can't do it[,] that's okay too. If you don't see the person[,] you have to tell us that too.
>
> THE COURT: Be careful coming back up on the witness steps. The question is, Mr. Mose, do you see the person who was in your station that day?
>
> THE WITNESS: No.
>
> Q Is it that you're sure he's not here or that it's been too long?

> A You know[,] it's three years down the line and this is something that happened [in] like five minutes.

After defense counsel cross-examined Mose, he was excused from the stand. Shortly thereafter, the State sought to recall Mose, asserting:

> ***3** [Mose is] from another culture [and] didn't really understand certain things.
>
> As he was walking out the courtroom[,] he made a comment that he thought he ... saw the defendant, he saw the person who did this but he thought it was the attorney because he was, in effect, sitting at the [counsel's] table[.]

Defense counsel objected, arguing Mose was unable to identify defendant from a photo array at or about the time of the crime, and three years later "the identification certainly would be questionable[.]" Counsel also argued the witness was already afforded the opportunity to walk around the courtroom in an effort to identify defendant and walked right by him, and "[t]o give [the witness] a second bite at the apple based on all that's gone on ... would be extremely prejudicial and inappropriate." Following an *N.J.R.E.* 104 hearing, in which both sides questioned Mose as to his reason for not identifying defendant earlier, the court permitted the State to recall Mose, stating, "I'm satisfied[.] [W]e're going to bring the jury back and we're going to open the direct.... I'm going to permit this witness to continue to testify." On recall, Mose testified he was "[one] hundred percent" sure he recognized defendant as the perpetrator, but mistakenly believed the counsel table was reserved for government officials who could not be implicated in crimes.

After the close of evidence, the prosecutor presented his summation. During summation, he read back portions of the testimony of witnesses. The prosecutor queried whether the testimony of Kaur, Liquidator's assistant manager, was consistent with defendant's version or with the State's version and proceeded to read excerpts from Kaur's testimony. The prosecutor also read back excerpts from Mose's testimony in which Mose identified defendant as the person who robbed him, as well as Mose's explanation for his confusion when earlier, he was unable to identify defendant as the person who robbed him. Finally, the prosecutor read back a brief excerpt from Hall's testimony as to defendant's whereabouts on the day of the robbery. Defense counsel did not object to any of these readbacks.

The jury deliberated for one day before finding defendant guilty on all counts. Sentencing took place on September 24, 2010. In sentencing defendant, the court considered four aggravating factors: the risk that defendant will commit another offense, *N.J.S.A.* 2C:44–1a(3); existence of a prior record, *N.J.S.A.* 2C:44–1a(6); the need to deter defendant and others, *N.J.S.A.* 2C:44–1a(9); and imposition of a fine or penalty or order for imprisonment would be perceived by the defendant as merely part of the cost of doing business, *N.J.S.A.* 2C:44–1a(11). The court also found

mitigating factor eleven, *N.J.S.A.* 2C:44–1b(11), imprisonment will entail excessive hardship. Finding "the aggravating factors substantially outweighed the mitigating factors" as to all counts and determining that "with the prior record [, defendant] is not entitled to the bottom end of any of these sentences," the court imposed an aggregate sentence of nineteen years.

***4** On appeal, defendant raises the following points for our consideration:

POINT I

UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE COURT ERRED WHEN IT ALLOWED THE STATE TO RECALL THE ONLY WITNESS TO THE ROBBERY TO IDENTIFY DEFENDANT AS THE ASSAILANT AFTER THAT WITNESS UNEQUIVOCALLY TESTIFIED THAT HE WAS UNABLE TO IDENTIFY ANYONE IN THE COURTROOM.

POINT II

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT READ, VERBATIM, SUBSTANTIAL PORTIONS OF WITNESS TESTIMONY TO THE JURY IN ITS SUMMATION. (NOT RAISED BELOW).

POINT III

DEFENDANT COULD NOT, AS A MATTER OF LAW, BE CONVICTED OF THIRD[-]DEGREE SHOPLIFTING FOR THE THEFT OF A TELEVISION WHOSE FULL RETAIL VALUE WAS $499. (NOT RAISED BELOW).

POINT IV

THE SENTENCE IMPOSED ON THE ROBBERY CONVICTION IS MANIFESTLY EXCESSIVE AND SHOULD BE REDUCED.

In his pro se supplemental brief, defendant raises the following points for our consideration:

POINT I

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN HE FAILED TO REQUIRE A *WADE* HEARING REGARDING THE VICTIM [']S IDENTIFICATION[,] WHICH DEPRIVED HIM FROM HAVING A FAIR TRIAL[,] CONTRARY TO *N.J.R.E.* 104 HEARING [,] *U.[S]. CON[S]T[.]* AMENDS. V, VI AND XIV, N.J. CONST. (1947) ART. I, [¶ 1], 9 AND 10. *U.S. V. WADE,* 388 U.S. 218 (1967) MISIDENTIFICATION.

POINT II

DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE BASED ON MITIGATING AND AGGRAVATING FACTORS USED BY THE TRIAL COURT AND MUST BE REVERSED.

Based on our review of the record and applicable law, with the exception of his conviction for third-degree shoplifting, we are not persuaded by defendant's arguments. We agree, however, defendant's conviction for third-degree shoplifting was erroneous and remand for re-sentencing.

I.

Defendant argues the court erred in permitting the State to recall Mose after he testified he was unable to identify anyone in the courtroom. Defendant acknowledged that under *State v. Clausell,* 121 *N.J.* 298 (1990), and *United States v. Domina,* 784 *F.*2d 1361 (9th Cir.1986), in-court identification is not required to meet the same standards as a pretrial identification. Defendant, however, argues these cases predate the "modern understanding" of the general limitation of eye witness identification and neither dealt with the "unique circumstances" of this case where "the only witness to the robbery was unable to select defendant's photograph from a pre-trial array *and* was unable to identify defendant in court the first time he took the stand." Defendant further argues that although defense counsel did not specifically cite *United States v. Wade,* 388 *U.S.* 218, 87 *S.Ct.* 1926, 18 *L. Ed.*2d 1149 (1967) in his objection to the witness recall, the court was nonetheless obligated to assess the reliability of the proffered identification testimony, and erred in failing to do so.

As defense counsel voiced his objection to the witness recall during trial, we review the court's decision under the harmless error standard. An error or omission shall be disregarded on appeal unless it is of such a nature as to have been "clearly capable of producing an unjust result." *R.* 2:10–2; *see State v. Macon,* 57 *N.J.* 325, 337–38 (1971).

***5** We discern no error in the admission of the eyewitness testimony and are satisfied the issue was properly left to the jury. In general, "[t]he reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury." *Foster v. California,* 394 U.S. 440, 443 n.2, 89 *S.Ct.* 1127, 1129 n.2, 22 *L. Ed.*2d 402, 407 n.2 (1969). However, "in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law." *Ibid.*

Where out-of-court identification is made under suggestive circumstances, the court must conduct a preliminary hearing, a *Wade* hearing, to determine the admissibility of the identification evidence. *State v. Ridout,* 299 *N.J.Super.* 233, 238 (App.Div.1997); *see State v. Herrera,* 187 *N.J.* 493, 501–04 (2006) (discussing the development of the analysis related to the admission of eyewitness testimony). "What is being tested in the preliminary inquiry as to admissibility is whether the choice made by the witness represents his own independent recollection" or observation at the time of the crime charged or results from the suggestive pretrial identification. *State v. Farrow,* 61 *N.J.* 434, 451 (1972).

Defendant apparently seeks to expand this rule of admissibility to situations in which there has been no suggestive out-of-court identification, but only an allegedly suggestive in-court identification. There is, however, no legal support for this proposition. While recognizing an in-court identification is inherently suggestive, *State v. Madison,* 109 *N.J.* 223, 243 (1988), our Supreme Court has noted the United State Supreme Court, to which we look for guidance, has set no guidelines for in-court identification procedures nor indicated that in-court identification must be made in a way that is not suggestive. *State v. Clausell,* 121 *N.J.* 298, 327 (1990) (citing *Domina, supra,* 784 *F.*2d at 1368).

An explanation for the disparate treatment of in-court and out-of-court identification is offered by *Domina:* "[w]hen the initial identification is in court, there are different considerations [than those implicated in a pretrial identification]. The jury can observe the witness during the identification process and is able to evaluate the reliability of the initial identification." 784 *F.*2d at 1368. A hearing on the suggestiveness of the identification is thus not required. Testimony is admissible subject only to the normal rules of evidence which permit only relevant, probative, and competent evidence to be considered by the fact-finder. *State v. Chen,* 208 *N.J.* 307, 318–19 (2011).

In the present case, Mose failed to identify defendant in an out-of-court photo array, failed to identify defendant on direct examination, then on recall testified he was "[one] hundred percent" sure defendant was the man who robbed him. Whether this about-face was the product of any external influence on Mose was for the jury to resolve, before whom this change in testimony occurred. On direct examination, the prosecutor did not ask Mose to identify the robber in a manner that suggested he was present in the courtroom or that defendant was the perpetrator, *State v. Wilson,* 362 *N.J.Super.* 319, 326, and there is no evidence that between the time he left the courtroom after direct examination and the time he returned to the stand, Mose spoke to anyone other than the officer to whom he commented that he recognized defendant. Thus, he was properly permitted to testify on redirect as to defendant's identity. "The strength or credibility of the identification is not the issue on admissibility; that is a matter of weight, for the fact finder, under appropriate instructions from the trial judge." *Farrow, supra,* 61 *N.J.* at 451. The trial court instructed the jury on assessing the credibility of a witness's testimony, including how to evaluate inconsistent statements. There is nothing in the record to suggest the jury did not follow the court's

instructions in this regard. *State v. Little,* 296 *N.J.Super.* 573, 580 (App.Div.), *certif. denied,* 150 *N.J.* 25 (1997).

II.

***6** Defendant next argues the prosecutor committed prosecutorial misconduct by reading, verbatim, large portions of the transcript of the trial testimony of the State's principal witnesses, Kaur and Mose, during his summation, mandating reversal of his conviction. We disagree.

In determining whether prosecutorial misconduct requires a reversal, we examine whether the conduct complained of "was so egregious that it deprived the defendant of a fair trial." *State v. Frost,* 158 *N.J.* 76, 83 (1999); *State v. Loftin,* 146 *N .J.* 295, 386 (1996); *State v. Ramseur,* 106 *N.J.* 123, 322 (1987). It is well-settled that prosecutors are afforded considerable leeway in their closing arguments and in criminal cases especially, are expected to make vigorous and forceful closing arguments to juries. *Frost, supra,* 158 *N.J.* at 82; *State v. Harris,* 141 *N.J.* 525, 559 (1995). There is no per se rule in New Jersey disallowing the readback of portions of trial testimony during summation. *See Condella v. Cumberland Farms, Inc.,* 298 *N.J.Super.* 531, 535–36 (Law Div.1996) ("[I]t is acceptable to read portions of the trial testimony from a transcript to the jury during summation...."). Nor are there any express rules governing the manner in which testimony may be read back during summation.

In general, "[t]he scope of defendant's summation argument must not exceed the 'four corners of the evidence.' " *Loftin, supra,* 146 *N.J.* at 347 (citation omitted). "[C]omment must be restrained within the facts shown or reasonably suggested by the evidence adduced," *State v. Bogen,* 13 *N.J.* 137, 140, *cert. denied,* 346 U.S. 825, 74 *S.Ct.* 44, 98 *L. Ed.* 350 (1953), and counsel may not "misstate the evidence nor distort the factual picture," *Matthews v. Nelson,* 57 *N.J.Super.* 515, 521 (App.Div.1959), *certif. denied,* 31 *N.J.* 296 (1960).

In the present case, the prosecutor did not misstate or distort the evidence. Counsel relied on verbatim recitals. We note defendant's concern about the piling on or overemphasis of select parts of the testimony. *See State v. Muhammad,* 359 *N.J. Super* . 361, 380–81 (App.Div.) (discussing these concerns in the context of video playback), *certif. denied,* 178 *N.J.* 36 (2003). However, the readback at issue was not unduly long so as to permit the State to substantially present its case a second time through the excerpts. *Id.* at 380. Of approximately thirty pages of summation, less than one-third were dedicated to readbacks. Finally, although the trial judge did not give cautionary instructions specifically addressed to the prosecutor's readback, the instructions given in his charge were sufficient to inform the jurors of their obligation to determine the facts from their own recollection. *Id.* at 382. In his charge, the judge directed that:

> Regardless of what counsel has said or what I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts.... Although the attorneys may point out what they think [is] important in this case, you must rely solely upon your own understanding and recollection of the evidence that was admitted during the trial.... Any comments by counsel are not controlling.

***7** We must assume the jury followed the judge's instruction.

In light of the judge's overall instructions, the brevity of the excerpts and the lack of distortion, the readback in this case was not clearly capable of producing an unjust result. Additionally, defense counsel failed to object to the readback, which may be deemed indicative of a lack of prejudice. *Ramseur, supra,* 106 *N.J.* at 323. As such, we conclude the prosecutor's readback was not improper and did not violate defendant's right to a fair trial.

III.

In his next point, defendant argues the definition of "full retail value" set forth in the shoplifting statute does not include sales tax and, as such, he could not have been found guilty of third-degree shoplifting but only fourth-degree shoplifting, and requests that the judgment of conviction (JOC) be amended accordingly.

The State submits that although the shoplifting statute is silent as to the inclusion of sales tax, the general theft statute, *N.J.S .A.* 2C:20–2, which includes sales tax as part of the valuation for theft offenses, should guide the application of the shoplifting provision with respect to the inclusion of sales tax as a part of determining value.

Shoplifting is defined as purposely taking possession of merchandise offered for sale by a store with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same "without paying to the merchant the full retail value thereof." *N.J.S.A.* 2C:20–11b(1). Shoplifting constitutes a crime of the third degree "if the full retail value of the merchandise exceeds $500 but is less than $75,000" and a crime of the fourth degree "if the full retail value of the merchandise is at least $200 but does not exceed $500." *N.J.S.A.* 2C:20–11c(2) and c(3). "Full retail value" is defined by the statute as "the merchant's stated or advertised price of the merchandise." *N.J.S.A.* 2C:20–11a(7).

The gradation scheme for shoplifting parallels the gradation scheme for theft under the general theft statute, *Statement to S.267* (Jan. 11, 2000), under which theft constitutes a crime of the third degree if "[t]he amount involved exceeds $500.00 but is less than $75,000.00" and a crime of the fourth degree if "the amount involved is at least $200.00 but does not exceed $500.00." *N.J.S.A.* 2C:20–2b(2)(a) and (3). "Amount involved" is defined in the Code's definitional section as "the fair market value at the time and place of the operative act." *N.J.S.A.* 2C:1–14m. Whereas the shoplifting statute is silent as to whether sales tax should be taken into account in determining the full retail value, the general theft statute provides that the "amount involved" in a theft "shall include, but shall not be limited to, the amount of any State tax avoided, evaded or otherwise unpaid, improperly retained or disposed of." *N.J.S.A.* 2C:20–2b.

The State seeks to equate the term "full retail value" (stated or advertised price) with the term "amount involved" (fair market value). However, a plain reading of the statute indicates that these terms are not synonymous. *See State v. King,* 164 *N.J.Super.* 330, 336 n.1 (App.Div.1978) ("Rather than the terminology of 'price or value' the grades of indictable theft offenses are defined in terms of 'the amount involved.' "), *certif. denied,* 81 *N.J.* 54 (1979).

***8** Price is probative, but not conclusive of fair market value and a party may prove that the sales price is not the fair market value by producing evidence showing that the list price of the article in question exceeds the sales price posted by other shops in the vicinity for similar articles or that the victim retailer customarily offers discounts of the posted sales price of the article in question. *Ibid.*

Cannel, *New Jersey Criminal Code Annotated,* comment 5 on *N.J.S.A.* 2C:20–11 (2011), also notes "[t]he phrase 'full retail value' is used in an entirely different context" than "amount" under the general theft provision. The author explains that under the shoplifting provision, "conclusiveness of price as value is required insofar as flexibility would allow a shoplifter to alter price labels [in violation of *N.J.S.A.* 2C:20–11b(3)] and argue that he was merely correcting them to reflect true or market value." *Ibid.*

While it is clear "full retail value" is not equivalent to "amount," the question still remains whether the "full retail value" or "price" should or does include tax. Based on the purpose of the shoplifting statute, which is "preventing the loss of merchandise without full payment—the protection of inventory," *De Angelis v. Jamesway Dep't Store,* 205 *N.J.Super.* 519, 525 (App.Div.1985), we believe the better approach would be to interpret full retail price to mean the pre-tax price. Sales tax is not a part of a store's inventory, so it should not be considered in assessing the value of the merchandise stolen. Additionally, not all goods are subject to sales tax, [1] and as such, the full retail value of certain products can never include such tax. Imposing greater criminal liability dependent solely on whether or not sales tax is paid has no rational relationship to an assessment of the gravity of the larcenous act. *People v. Medjdoubi,* 661 *N.Y.S.*2d 502, 506 (N.Y.Sup.Ct.1997). We thus conclude "full retail value" is the price of the stolen merchandise exclusive of tax.

Based on this analysis, defendant's conviction for third-degree shoplifting must be reversed. He cannot be convicted of such because the full retail value of the television was below the statutory threshold of $500.

This conclusion requires that we determine the appropriate disposition of the shop-lifting charge. A court may mold a verdict and "enter a judgment of conviction for a lesser included offense where the jury verdict necessarily constitutes a finding that all the elements of the lesser included offense have been established and where no prejudice to the defendant results." *State v. Greenberg,* 154 *N.J.Super.* 564, 567–68 (App.Div.1977), *certif. denied,* 75 *N.J.* 612 (1978). A guilty verdict may be molded to convict on a lesser-included offense if " '(1) defendant has been given his day in court, (2) all the elements of the lesser included offense are contained in the more serious offense and (3) defendant's guilt of the lesser included offense is implicit in, and part of, the jury verdict.' " *State v. Farrad,* 164 *N.J.* 247, 266 (2000) (citation omitted).

***9** Because fourth-degree shoplifting requires proof of the same elements as third-degree shoplifting, the only difference being that the punishment is less severe if the full retail value of the merchandise is at least $200 but does not exceed $500, defendant's JOC must be amended to reflect a conviction for fourth-degree shoplifting as a lesser-included offense of fourth-degree shoplifting.

IV.

We turn now to defendant's challenge to his sentence. Defendant argues that in sentencing him for first-degree armed robbery, three of the four aggravating factors the court considered did not apply. The State concedes the trial court improperly found aggravating factor eleven, *N.J.S.A.* 2C:44–1a(11), but argues this error caused no appreciable prejudice to defendant because, given the court's finding of the additional aggravating factors, and only one mitigating factor, it is thus "doubtful that aggravating factor eleven affected the court's analysis."

In reviewing the sentence imposed by a trial court, we must (a) determine if the sentencing guidelines were violated; (b) assess whether the aggravating and mitigating factors found were based upon competent, credible evidence in the record; and (c) "determine whether, even though the court sentenced in accordance with the guidelines, nevertheless, the application of the guidelines to the facts of this case makes the sentence clearly unreasonable so as to shock the judicial conscience." *State v. Roth,* 95 *N.J.* 334, 364–65 (1984). The appellate court should however avoid substituting its preferences for those of the sentencing court. *State v. Bieniek,* 200 *N.J.* 601, 608 (2010). In other words,

> [a]n appellate court is bound to affirm a sentence, even if it 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. Assuming the trial court follows the sentencing guidelines, the one exception to that obligation occurs when a sentence shocks the judicial conscience.
>
> [*State v. Cassady,* 198 *N.J.* 165, 180 (2009) (quoting *State v. O'Donnell,* 117 *N.J.* 210, 215–16 (1989)).]

The ordinary term for a first-degree crime is between ten years and twenty years. *N.J.S.A.* 2C:43–6a(1). The length of the term within this range depends on the court's analysis of the aggravating and mitigating factors. *N.J.S.A.* 2C:44–1a. Once the appropriate sentence is determined, the court shall "state on the record the reasons for imposing the sentence, including its findings pursuant to the criteria for withholding or imposing imprisonment ... and the factual basis supporting its findings of particular aggravating or mitigating factors affecting [the] sentence." *N.J.S.A.* 2C:43–2e; *R.* 3:21–4(g). "The absence of such a statement conceals both sound and improper reasons and bars informed evaluation on appeal." *State v. Martelli,* 201 *N.J.Super.* 378, 385 (App.Div.1985). "Without such a statement, appellate review becomes difficult, if not futile." *State v. Kruse,* 105 *N.J.* 354, 360 (1987).

***10** Defendant was sentenced to fifteen years imprisonment on the robbery count based on the court's finding of aggravating factors three, *N.J.S.A.* 2C:44–1a(3); six, *N.J.S.A.* 2C:44–1a(6); nine, *N.J.S.A.* 2C:44–1a(9); and eleven, *N.J.S.A.* 2C:44–1a(11); and mitigating factor eleven, *N.J.S.A.* 2C:44–1b(11), and the court's declaration that the "aggravating factors substantially outweigh the mitigating factors." The court however failed to explain its basis for finding these factors or how they were balanced. The record reveals defendant has only one prior conviction in New York for larceny, several arrests and two pending charges. We do not, however, know how the court weighed those circumstances with respect to the aggravating factors it found to exist. *Martelli, supra,* 201 *N.J.Super.* at 385. This cursory review of the aggravating and mitigating factors does not reflect "the qualitative weighing process contemplated by the Code." *State v. Towey,* 114 *N.J.* 69, 84 (1989).

As the State concedes, the trial court improperly considered aggravating factor eleven, *N.J.S.A.* 2C:44–1a(11), which is addressed to situations in which "[t]he imposition of a fine, penalty or order of restitution without also imposing a term of imprisonment would be perceived by the defendant or others merely as part of the cost of doing business." This provision, by its very terms, "is inapplicable unless the judge is balancing a non-custodial term against a prison sentence." *State v. Dalziel,* 182 *N.J.* 494, 502 (2005). Because defendant was convicted of a crime for which imprisonment is presumed, *N.J.S.A.* 2C:44–1a(11) should not have been applied. *State v. Rivera,* 351 *N.J.Super.* 93, 110 (App.Div.2002), *aff'd,* 175 *N.J.* 612 (2003); *N.J.S.A.* 2C:44–1d. We thus

remand to the trial court for re-sentencing on all counts. "[O]n remand[,] the trial court should qualitatively evaluate the aggravating and mitigating factors, explaining that evaluation on the record in sufficient detail to permit appellate review." *Towey, supra,* 114 *N.J.* at 84.

The robbery and attempted shoplifting convictions are affirmed. The third-degree shoplifting conviction is vacated and the matter is remanded for entry of judgment of conviction for fourth-degree shoplifting and resentencing on all counts. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2012 WL 2912754

Footnotes

1 Disposable paper plates, for example, are not subject to Sales Tax. *See* New Jersey Division of Taxation, New Jersey Sales Tax Guide, available at [redacted] (last visited April 12, 2012) (listing items Sales Tax exempt items).

2011 WL 5419745
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Carlos DELEVRY, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Michael Lamar Livingston, Defendant–Appellant.

Submitted Oct. 26, 2011.
|
Decided Nov. 10, 2011.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 08–01–0223.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant Carlos Delevry (Gilbert G. Miller, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Marcus Lamar Livingston (Robert L. Sloan, Assistant Deputy Public Defender, of counsel and on the brief).

Peter E. Warshaw, Jr., Monmouth County Prosecutor, attorney for respondent in both appeals (Mary R. Juliano, Assistant Prosecutor, of counsel and on the briefs).

Before Judges HARRIS and KOBLITZ.

Opinion

PER CURIAM.

***1** These back-to-back appeals, which we consolidate for purposes of this opinion, arise from defendants' convictions (at a joint trial) for first-degree armed robbery, *N.J.S.A.* 2C:15–1 (count one), second-degree possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4(a) (count

two), and third-degree unlawful possession of a weapon (a handgun without a permit), *N.J.S.A.* 2C:39–5(b) (count three). We affirm.

I.

A.

The following facts are derived from the trial record. Manuel Navarrete and his wife, Claudia Aguilar, operated The Little Diamond Jewelry Store in Red Bank. The store served a predominantly Hispanic clientele and Navarrete and Aguilar's English skills were limited.

On July 18, 2007, at 9:00 a.m., Navarrete and Aguilar arrived at The Little Diamond Jewelry Store with their infant son. At approximately 4:00 p.m., two young men entered the store. Aguilar emerged from the back office to assist them, but upon realizing that the men spoke only English, she called for Navarrete, who had a greater mastery of the language.

At trial, Navarrete and Aguilar described both men as young black males: one man was tall and thin and wore a black rag on his head; the other was shorter and wore a hat. Navarrete and Aguilar distinguished between the two by referring to their comparative heights. Their in-court identifications reflected that the "taller," "thinner" man was defendant Michael Lamar Livingston and the "shorter" man was defendant Carlos Delevry.

The afternoon of the incident, as the men perused a jewelry catalog, Livingston told Navarrete that he wanted to purchase a necklace with a name plaque that read "Erica" and wrote the name on a post-it. Livingston then asked Navarrete to make a photocopy of a particular catalog page to show his girlfriend the necklace. Navarrete produced the photocopy and gave it to the men.

The customers then departed, taking the photocopy with them but leaving the catalog and post-it on the counter of the display case. Five minutes later, they re-entered the store. Livingston again asked Navarrete for the price of the name plaque while Delevry stood off to the side. As Navarrete was speaking to Livingston about the jewelry, Delevry approached from behind and removed a .38 caliber handgun from Livingston's waistband and pointed it at Navarrete. Delevry announced a robbery and opened the firearm's cylinder to display five bullets. Meanwhile, Livingston ran towards the back of the store and came out with Navarrete's wife and son from the office. He seated the mother and child against a wall and directed Navarrete to sit down next to them while Delevry pointed the firearm at the family. Livingston then went back into the office and retrieved cash while Navarrete, Aguilar, and their son remained seated but able to observe Livingston's movements. When Livingston returned he began demanding more money while Delevry continued to hold the

victims at gunpoint. Moments later, a patron entered the store and defendants fled, leaving the photocopy behind.

***2** Red Bank Police Officer Paul Perez responded to the scene. Officer Perez's report, which was written several hours after interviewing Navarrete and Aguilar, stated that one suspect was a "black male, approximately 5′5″, thin build, early 20's, wearing [a] long black-sleeved shirt, black pants, and a black do-rag and black gloves." The other suspect was described as "[a] black male, approximately 6 foot tall, thin build, early 20's, wearing ... a black long-sleeve shirt, white undershirt, blue jeans, a black fishing-type hat, and black gloves." The taller individual (Livingston) was said to be in possession of the handgun, and the shorter man (Delevry) was reported to have entered the back office. Officer Perez's report contradicted Navarrete and Aguilar's trial testimony about the description of the individuals.

A second police officer, Lieutenant Elliot Ramos, [1] also interviewed the victims on the day of the robbery. Lieutenant Ramos testified that the descriptions he received from Navarrete and Aguilar indicated that the shorter man (Delevry) was wearing a fishing cap and wielding the gun. Navarrete also told Lieutenant Ramos that he recognized the shorter individual as someone who had visited the store several days earlier asking about "an ID." At trial, Navarrete's and Aguilar's testimony were consistent with the descriptions given to Lieutenant Ramos.

The police continued an investigation and proceeded to search the store for fingerprints using a kit containing powders, brushes, lift cards, lifting tape, and gloves. Images of fingerprints lifted from the countertop of the display case were delivered to the New Jersey State Police Automated Fingerprint Identification System (AFIS) Unit. An analysis of those latent fingerprints produced a positive match with an inked impression of Livingston's left middle finger and left index finger. The catalog, photocopy, and post-it were also delivered to the AFIS Unit where they were processed and analyzed. A latent fingerprint image detected on one side of the photocopy revealed a positive match with an inked impression of Delevry's left middle finger.

Approximately one month after the robbery the police prepared a photo array for the victims' viewing, which included Livingston's image. On August 22, 2007, Sergeant Michael Frazee and Officer Perez visited Navarrete and Aguilar at The Little Diamond Jewelry Store. Each victim was separately shown a differently-arranged photo array book containing six photographs. While neither Navarrete nor Aguilar were able to make a positive identification at that time, Navarrete did state that photograph number four in his photo array book resembled the taller robber. [2] Similarly, Aguilar stated that photograph number three in her photo array book looked like the taller robber, but that she could not be certain. [3]

One week later, on August 30, 2007, Police Officer Juan Sardo presented Navarrete with a second photo array book from which Navarrete identified Delevry as "the one that had the gun." Lieutenant

Ramos testified that a photo array book was not presented to Aguilar on this date because she had mistakenly been present when Navarrete reviewed the photo array book, which indicated to Lieutenant Ramos that any identification by Aguilar done at that time "would have been a tainted [identification]."

***3** After defendants were arrested, charged, and indicted, a six-day jury trial ensued. Navarrete, Aguilar, and several law enforcement officers involved in the case testified for the State. Delevry testified in his own defense and presented Janice Sims as an alibi witness. Livingston did not testify or present any witnesses.

Sims was in a dating relationship with Delevry in July 2007. She testified that in June and July 2007, she was employed by the United States Postal Service at the Broad Street post office in Red Bank. Because she and Delevry were living in Shrewsbury Arms, approximately five to six miles away from Red Bank, Delevry would regularly drop her off at work in the morning and pick her up at the end of her shift in the afternoon. She would typically call him prior to the end of her workday to let him know when she was free to go home.

Sims testified that the couple went shopping for an engagement ring on July 15, 2007. Three days later, on July 18, 2007 (the day of the robbery), she spoke to Delevry for approximately two minutes around 3:50 p.m. Sims clocked out of work at 4:38 p.m. that day, but could not "exactly recall" if Delevry picked her up. The Red Bank Post Office is a three to four minute drive from The Little Diamond Jewelry Store.

Delevry confirmed that he was living in Shrewsbury Arms during the summer of 2007 and that he and Sims went engagement ring shopping at the Monmouth Mall on July 15. Delevry also testified that he visited The Little Diamond Jewelry Store by himself on July 16 in search of a better price for a ring. [4] He claimed that he had only begun to discuss with Navarrete what he was looking for when he was interrupted by a call from Sims informing him that she was ready to be picked up. Delevry cut short the discussion and left the store, claiming never to return.

B.

Sergeant Albert DeAngelis of the Monmouth County Prosecutor's Office testified as an expert in fingerprint analysis. Prior to trial, an *N.J.R.E.* 104 hearing was conducted allowing defense counsel to inquire about Sergeant DeAngelis's methodology and analysis as well as to challenge the State's non-production of certain documents during discovery. At the hearing, Sergeant DeAngelis testified at length about the AFIS fingerprint comparison results as well as the police fingerprint investigation and evidence preservation methods. The court held that any discovery violations alleged by defendants were cured by the hearing and that it would be for the jury to assess the

believability of any opinion testimony relating to the fingerprints. At trial, no one from the AFIS Unit testified.

C.

At the close of the third day of trial, following the completion of the direct examination of Aguilar in which she made in-court identifications of both defendants, Livingston's counsel advised the trial court—outside the presence of the jury—of the following:

> Judge, we have a problem. Apparently, for whatever reason, one of the sequestered witnesses, the last witness who testified, was brought into the courtroom before the defendants arrived. She was then allowed to observe the defendants manacled and being led to their seats.

***4** Livingston's defense counsel announced his intention to cross-examine Aguilar about her observations to demonstrate the suggestiveness and lack of reliability of her in-court identification of his client. The court responded, "Okay. If you want to bring it out before the jury, I can not stop you from doing that."

When the trial resumed after the ensuing weekend, the issue was addressed again. The attorney for Delevry moved for a mistrial after the trial court indicated that if it permitted cross-examination of Aguilar about her observations, the jury would become aware that defendants had been held in custody. As such, the court suggested that counsel consider not revealing to the jury that defendants were in handcuffs and invited counsel to draft a limiting instruction to be read to the jury either before or after cross-examination.

The court denied the mistrial motion, but conducted an *N.J.R.E.* 104 hearing to determine what effect Aguilar's observations might have had on her in-court identifications. At the hearing, Aguilar testified that although she could not recall whether or not defendants "had anything on their hands," she immediately recognized "those two black gentlemen ... that came into the courtroom on Thursday when the two sheriff's officers were with them" as "the people who had come into our shop."

Following the hearing, both defense attorneys elected to fully cross-examine Aguilar about her in-court observations. Prior to doing so, however, the court issued the following instruction to the jury:

The record will reflect the jury is in the jury room. Counsel is at counsel table, as are the defendants. I apologize for the delay in getting you up here today. An issue arose late Thursday which we had to address this morning. We've been working since quarter of 9 on that issue. That issue has now resulted in my explaining the following to you and instructing you on a specific jury charge in anticipation of continuing with the trial.

What occurred is last Thursday, when we broke in the afternoon break, where you went into the jury room, in an attempt to try to get us moving and get everybody in place as quickly as I could, I instructed [the prosecutor] to get Ms. Aguilar, who was the last witness you heard Thursday, to bring her into the courtroom. After she came into the courtroom and was seated in the front seat, in the pew, the defendants were brought into the courtroom by sheriff's officers in handcuffs, and they were seated at counsel table.

You also heard during the direct examination of Ms. Aguilar that she identified both defendants as her assailants when she testified from the witness stand. She made an in-court identification. The issue arose as to whether or not that identification that was made in court was suggested to her, not verbally, but by the observation she made of the defendants coming into the courtroom in handcuffs.

Now, normally you would not ever be aware of whether someone is in jail or not in jail. We try to avoid you knowing that, because it should not enter into your decision at all in forming an opinion as to whether or not a defendant is guilty or not guilty of a charge. I'm going to read you this specific charge concerning that, and I'm ordering you to follow this charge. Then we will continue with cross-examination.

***5** You will hear testimony that the victim, Claudia Aguilar, was seated in the courtroom when the defendants entered the courtroom escorted by sheriff's officers while in handcuffs. It is the procedure of the courts to require defendants standing trial to post bail in order to assure their presence in court on the date of trial. If a defendant chooses not to post bail, they are transported by the Sheriff's Office to the courtroom in order to assure their appearance. It is regular, common, and required procedure for the sheriff's officer to place the defendants in handcuffs while they're being escorted to the courtroom.

Therefore, you are not to make any negative inference or give any weight to the fact that the defendants may have been escorted in the courtroom wearing handcuffs as they entered the courtroom. Normally such evidence is not permitted before you. Our rules specifically exclude evidence that the defendants are in custody, and you are not to consider or give any weight to this information when you are determining the defendants' guilt. Our rules of evidence would not allow such information to be introduced before you. However, if said information could be found to have affected the in-court identification of a witness or a victim in this case, specifically Claudia Aguilar, before you give any weight to this evidence, you must be satisfied

that because she was present in the courtroom when the defendants were escorted into their seats, this information affected Ms. Aguilar's ability to identify who the defendants were.

You, and you alone, are to determine how much weight, if any, you want to give to the fact that Claudia Aguilar was present in the courtroom and if that fact impacted her ability to identify the defendants. Whether or not this evidence does, in fact, affect the reliability of Claudia Aguilar's in-court identification is for you to decide. You may decide the evidence did not affect the identification and is not helpful to you at all. In that case, you must disregard the evidence in its entirety.

Again, you may not use this evidence, the fact that the defendants were in handcuffs, to decide that the defendants are, in fact, guilty; that is, you may not decide just because the defendants were in handcuffs, they must be guilty of these offenses that they are facing. I have admitted this evidence only to help you decide how reliable you are going to find Claudia Aguilar's in-court identification. You may not consider it for any other purpose and may not find the defendants guilty simply because you now know that they may presently be in custody. All right.

That is my specific instruction to you.

D.

Both defendants were convicted of all charges. The trial court sentenced Delevry to twelve years imprisonment subject to the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2, on count one and a concurrent five-year term of imprisonment on count three. Count two was merged with count one. A few weeks later, the court denied Livingston's motion for acquittal, or in the alternative a new trial, and sentenced Livingston to fifteen years imprisonment subject to the NERA on merged counts one and two and a concurrent five-year term on count three. These appeals followed.

II.

A.

***6** On appeal, Delevry raises the following arguments:

POINT I: AGUILAR'S OBSERVATION BEFORE THE JURY ENTERED THE COURTROOM OF SHERIFF'S OFFICERS ESCORTING DEFENDANT AND LIVINGSTON INTO THE COURTROOM IN RESTRAINTS FOLLOWED SHORTLY ONCE HER TESTIMONY COMMENCED BY HER IDENTIFICATION OF THEM AS HER

ASSAILANTS, COUPLED WITH LIVINGSTON'S COUNSEL'S DECLARED INTENTION TO CROSS–EXAMINE AGUILAR ON THE IMPACT OF HER OBSERVATION ON HER IDENTIFICATION, REQUIRED THE COURT TO GRANT DEFENDANT'S APPLICATION FOR A MISTRIAL.

POINT II: TO THE EXTENT THAT A MISTRIAL WAS NOT WARRANTED, THE COURT SHOULD HAVE PRECLUDED THE JURY FROM CONSIDERING AGUILAR'S IN–COURT IDENTIFICATION OF THE DEFENDANTS.

POINT III: THE TRIAL COURT PERMITTED INADMISSIBLE HEARSAY TESTIMONY FROM THE STATE'S FINGERPRINT EXPERT THAT A FINGERPRINT WHICH HE COMPARED TO AN ALLEGEDLY MATCHING LATENT FINGERPRINT DETECTED ON THE PHOTOCOPY OF A BROCHURE PAGE HANDED TO THE ROBBERS BY A VICTIM WAS IN FACT A KNOWN FINGERPRINT OF DEFENDANT; AND THAT ONE OF THE TWO JUXTAPOSED FINGERPRINTS FEATURED ON A BLOWN–UP DEPICTION OF THIS FINGERPRINT AND THE ALLEGEDLY MATCHING FINGERPRINT DISCOVERED ON THE BROCHURE PAGE COPY WAS AN ENLARGEMENT OF THE KNOWN FINGERPRINT OF DEFENDANT'S LEFT MIDDLE FINGER.

POINT IV: THE PROSECUTOR MADE REMARKS ON SUMMATION WHICH DEPRIVED DEFENDANT OF A FAIR TRIAL.

We consider none of these arguments persuasive.

Delevry's first two points revolve around Aguilar's in-court identification of defendants. He contends that the trial court erred in denying his application for a mistrial because Aguilar's in-court identification was irreparably tainted by her observation of defendants being brought into the courtroom in restraints and having the restraints removed in her presence. He further urges that the court's limiting instruction "enhanced the prejudice to [Delevry] by informing the jurors that [Delevry] was in custody and transported in handcuffs because he had chosen not to post bail, which the court characterized as a device used to secure a defendant's appearance at trial."

At trial, Delevry's mistrial motion was based upon the singular argument concerning Aguilar's observations of defendants in manacles and in the custody of sheriff's officers. There was no objection, much less a motion for a mistrial, directed at the court's subsequent limiting instruction to the jury. In fact, not only did Delevry not object to the instruction, he (along with Livingston) requested that it be provided to the jury before the cross-examination was to begin.

Ordinarily, "a defendant waives the right to contest an instruction on appeal if he does not object to the instruction[ ]" at trial. *State v. Adams,* 194 *N.J.* 186, 206–07 (2008); *see also N.J. Div. Youth & Family Servs. v. M.C. III,* 201 *N.J.* 328, 339 (2010) ("[I]ssues not raised below will ordinarily

not be considered on appeal unless they are jurisdictional in nature or substantially implicate the public interest."); *R.* 1:7–2. Nonetheless, a court may reverse where the unchallenged error was "clearly capable of producing an unjust result." *R.* 2:10–2.

***7** In this case, recognizing that misidentification can compromise an otherwise fair trial, the trial court ordered an *N.J.R.E.* 104 hearing to determine whether, and to what extent, Aguilar's observations of defendants in custody impacted her in-court identification of Delevry. *See State v. Delgado,* 188 *N.J.* 48, 60 (2006) ("The importance of recording the details of what occurred at an out-of-court identification flows from our understanding of the frailty of human memory and the inherent danger of misidentification."). At the hearing, Aguilar testified that she observed defendants entering the courtroom but did not see "whether or not they had anything on their hands." Although she recognized both defendants' faces from the date of the robbery, she stated that when Livingston looked at her, she peered away because of nervousness. Nevertheless, she said, "When I saw them, yes, I recognized them, and it all came back to me like I was reliving it."

After a weighing of relevant factors, the trial court found that Aguilar's identification of both defendants "was reliably independent of any prejudicial pre-testimonial procedure and that the verdict returned by the jury was not clearly and convincingly a result of prejudice or passion." The court took into account Aguilar's ability "to observe the defendants at the scene of the crime," the accuracy of her descriptions of defendants prior to trial, and the fact that Navarrete identified both defendants without having viewed them in shackles prior to his testimony.

We concur that regardless of any shortcomings in courtroom management, Aguilar's identification of defendants in the presence of the jury was sufficiently reliable to have been properly received and considered by the jury. Aguilar had ample opportunity to view defendants at the time of the crime, in the confined space of her store. Her fleeting view of defendants right before she testified pales in comparison to her opportunity to observe both defendants seated at counsel table during the length and breadth of her direct examination. Our review of the record leads us to agree with the trial court and we therefore conclude that there was "sufficient indicia of reliability to outweigh the corrupting effect of the suggestive identification." *State v. James,* 144 *N.J.* 538, 546 (1996). [5]

"A mistrial is an extraordinary remedy." *State v. Mance,* 300 *N.J.Super.* 37, 57 (App.Div.1997). It should be granted "only to prevent an obvious failure of justice." *State v. Harvey,* 151 *N.J.* 117, 205 (1997), *cert. denied,* 528 *U.S.* 1085, 120 *S.Ct.* 811, 145 *L. Ed.*2d 683 (2000). *See State v. Allah,* 170 *N.J.* 269, 280–81 (2002). Whether inadmissible evidence is capable of being cured by an instruction to the jury, or whether it requires a mistrial, is within the discretion of the trial court. *State v. Winter,* 96 *N.J.* 640, 646–47 (1984). That court "has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." *Id.* at 647. A denial of a mistrial motion is reviewable only for an abuse of discretion that has resulted in a manifest injustice. *Ibid.* This same degree of deference applies to the review of whether the

given limiting instruction was adequate. *Ibid.* In determining the adequacy of the instruction, we focus on "the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." *Ibid.* When the erroneous admission of evidence does not violate a defendant's constitutional rights, it will be disregarded "unless it is clearly capable of producing an unjust result." *Id.* at 647–48; *see also State v. Zapata,* 297 *N.J.Super.* 160, 175–76 (App.Div.1997), *certif. denied,* 156 *N.J.* 405 (1998).

***8** In reviewing a decision to deny or order a new trial, we recognize that "the trial court's findings at the hearing on the admissibility of identification evidence are 'entitled to very considerable weight.' " *Adams, supra,* 194 *N.J.* at 203 (quoting *State v. Farrow,* 61 *N.J.* 434, 451 (1972)). Furthermore, we "give deference to the judge's determination of the extent to which the prejudice, if any, may have contributed to an unjust result." *Hill v. N.J. Dept. of Corrs. Comm'r Fauver,* 342 *N.J.Super.* 273, 302 (App.Div.2001), *certif. denied,* 171 *N.J.* 338 (2002); *see also State v. Kueny,* 411 *N.J.Super.* 392, 403 (App.Div.2010). Where there is "sufficient credible evidence in the record to support the findings," we will not disturb them. *Ibid.*

Our state and federal constitutions guarantee every defendant "the right to a fair trial before an impartial jury." *State v. Artwell,* 177 *N.J.* 526, 533 (2003). "The fair trial right entitles a criminal defendant 'to have his [or her] guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, *continued custody,* or other circumstances not adduced as proof at trial.' " *Id.* at 533–34 (quoting *State v. Zhu,* 165 *N.J* . 544, 553 (2000)) (emphasis added). A defendant's right to a fair trial may be violated when an in-court identification is improperly admitted. *U.S. v. Wade,* 388 *U.S.* 218, 235, 87 *S.Ct.* 1926, 1936, 18 *L. Ed.*2d 1149, 1162 (1967).

With these principles in mind, we review whether Aguilar's in-court identification was based on her independent recollection of defendant from the date of the robbery or her impromptu observation of him in shackles on the day of her testimony. We recently held that "the mere fact that a suspect is presented in or around a police car in handcuffs does not in itself make a showup impermissibly suggestive." *Bayer v. Twp. of Union,* 414 *N.J.Super.* 238, 268 (App.Div.2010); *see also State v. Herrera,* 187 *N.J.* 493, 505 (2006) (a "witnesses' identification of the defendant seated and handcuffed in the back of the police car was suggestive but that 'such suggestive circumstances did not render the identification procedure per se improper and unconstitutional.' ") (quoting *State v. Wilson,* 362 *N.J.Super.* 319, 327 (App.Div.), *certif. denied,* 178 *N.J.* 250 (2003)).

Aguilar's observation of defendants being escorted into the courtroom by sheriff's officers before the start of proceedings was not suggestive as to outweigh the other indicia of reliability surrounding her in-court identification of Delevry. Aguilar testified that she did not notice whether the defendants were in shackles when they entered, in part because she timidly "looked down" when she made eye contact with Livingston. Moreover, the fact that defendants were seated at

counsel table does not amount to a violation of due process, *United States v. Sebetich,* 776 *F.*2d 412, 420 (3d Cir.1985), *cert. denied,* 484 *U.S.* 1017, 108 *S.Ct.* 725, 98 *L. Ed.*2d 673 (1988), as courtroom identifications are necessarily, but not always impermissibly, suggestive. *State v. Clausell,* 121 *N.J.* 298, 365 (1990).

***9** Aguilar first observed defendants the day of the crime from approximately three feet away. She proceeded to observe her husband speak to defendants from the store office, approximately twenty feet away from the display case. She testified that there was nothing obstructing her view during this time and that defendants were inside the store for approximately five minutes before their initial departure. When the two men returned and one pointed a gun at Aguilar and her family, she again had an unhindered view of both defendants from approximately six feet away.

Aguilar provided an accurate description of Delevry at trial and had ample opportunity to view both defendants at the time of the crime. Moreover, Navarrete positively identified Delevry in a photo array prior to trial as well as at trial, without having seen Delevry in shackles before testifying. Latent fingerprints found on the photocopy handled by Delevry also corroborated Aguilar's identification. *See Herrera, supra,* 187 *N.J.* at 505–06. Accordingly, under the totality of the circumstances, Aguilar's identification was sufficiently reliable and Delevry's motion for a mistrial was properly denied.

The fact that Aguilar positively identified Delevry for the first time at trial does not render the identification constitutionally invalid. *Clausell, supra,* 121 *N.J.* at 327–28. Where pre-trial procedures are impermissibly suggestive, a later in-court identification will still be permitted where the in-court identification is based on an independent source, including the witness's observations at the time of the crime. *State v. Ruffin,* 371 *N.J.Super.* 371, 394 (App.Div.2004); *State v. Davis,* 204 *N.J.Super.* 181, 184 (App.Div.1985), *certif. denied,* 104 *N.J.* 378 (1986). The believability of eye-witness identifications presented at trial ultimately rests with the jury. *State v. King,* 372 *N.J.Super.* 227, 239 n. 3 (App.Div.2004), *certif. denied,* 185 *N.J.* 266 (2005); *Delgado, supra,* 188 *N.J.* at 56.

Here, the jury was aware that Aguilar was not asked to identify Delevry using a photo array book, and it also heard defense counsel cross-examine her about what she observed when Delevry and Livingston were brought into the courtroom, and whether those observations influenced her identification of Delevry at trial or her level of certainty. The jury was also aware of the fact that Aguilar's in-court identification was made more than a year after the crime, yet it chose to convict. Therefore, notwithstanding the twenty-month passage of time between the date of the crime and the trial, and the inherent suggestiveness of the courtroom setting, Aguilar's in-court identification was properly admitted.

Delevry also challenges the limiting instruction on the ground that it multiplied the prejudice by "informing the jurors that defendant was in custody and transported in handcuffs because he had

chosen not to post bail, which the court characterized as a device used to secure a defendant's appearance at trial." We do not find this proposition convincing.

***10** The trial court specifically explained that cross-examining Aguilar about her observations of defendants entering the courtroom in handcuffs would necessarily alert the jury that defendants were in custody, a fact that could potentially undermine Delevry's credibility. *See State v. Grant,* 361 *N.J.Super.* 349, 358 (App.Div.2003) (a defendant's appearance in restraints "has the potential to detract from the witness's credibility" and "undermine the presumption of innocence"). Despite this advice, defense counsel proceeded to energetically question Aguilar about what she saw before the jury entered the courtroom. Ultimately, the jury did not learn that Delevry was in custody due to the limiting instruction, but rather because defense counsel chose to cross-examine Aguilar about what she saw. We do not fault the defense tactic but note that it was the voluntary product of a deliberate choice made during trial.

Assuming, however, that the instruction did direct extra attention to the fact that defendants were in custody because they had decided not to post bail, this information did not have a clear capacity to produce an unjust result. *R.* 2:10–2. Delevry takes particular issue with the following portion of the limiting instruction:

> It is the procedure of the courts to require defendants standing trial to post bail in order to assure their presence in court on the date of trial. If a defendant chooses not to post bail, they are transported by the Sheriff's Office to the courtroom in order to assure their appearance. It is a regular, common, and required procedure for the sheriff's officer to place the defendant's in handcuffs while they're being escorted into the courtroom.

He urges that this instruction effectively "deemed defendant to pose an enhanced risk of non-appearance because he chose not to post-bail" and suggested that "defendant was especially dangerous in that he would rather be in jail than post an amount of money which only served to ensure his appearance at trial."

These contentions are unfounded. First, the trial court made clear that escorting defendants into court in handcuffs was a "regular, common, and required procedure," that had nothing to do with a particular defendant. The purpose of the instruction was to remind jurors that any evidence of a defendant being in handcuffs was not to be considered in its finding of guilt or innocence. The court stated, "you are not to make any negative inference or give any weight to the fact that the defendants may have been escorted in the courtroom wearing handcuffs ... and you are not to consider or give any weight to this information when you are determining the defendant's guilt."

Moreover, the court's explanation as to why defendants were in custody served to dispel any belief in the minds of the jurors that defendants were held because they were dangerous or had criminal or violent propensities.

Second, the limiting instruction was issued at defense counsel's urging and he never objected to the instruction as given. Accordingly, we find no error, much less plain error, in the trial court's thorough explanation of (1) the unusual circumstances and (2) the application of law to that unique situation.

***11** Next, Delevry asserts that the trial court permitted inadmissible hearsay testimony from the State's expert on fingerprint analysis since the expert lacked personal knowledge to testify that the "known inked impression" of Delevry's left middle finger, supplied by AFIS, was actually produced by defendant's finger. Since the AFIS report was a writing, Delevry contends that it would be admissible only under the business or public record exception to the hearsay rule. Because no foundation was laid for either of these exceptions, it is claimed that hearsay was improperly admitted and the conviction must be reversed.

While Delevry asserts that his objection was partially raised in the Law Division, the State maintains that Delevry objected to the expert testimony on other grounds, namely that the expert's report was an inadmissible net opinion and that certain documents were not provided in discovery. As such, the State insists that the invited error doctrine applies because defendant raised no hearsay objection at trial. We agree that the doctrine of invited error applies.

" 'The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error.' " *N.J. Div. of Youth & Family Servs. v. N.D.,* 417 *N.J.Super.* 96, 113–14 (App.Div.2010) (quoting *M.C. III, supra,* 201 *N.J.* at 340 (2010)). However, "[s]ome measure of reliance by the court is necessary for the invited-error doctrine to come into play," *State v. Jenkins,* 178 *N.J.* 347, 359 (2004), and the court will "not automatically apply the doctrine if it were to 'cause a fundamental miscarriage of justice.' " *M.C. III, supra,* 201 *N.J.* at 342 (quoting *Brett v. Great Am. Recreation,* 144 *N.J.* 479, 508 (1996)).

Here, the failure to object to the admission of the AFIS materials into evidence constitutes invited error. In *M.C. III,* our Supreme Court applied the invited error rule to a claimed hearsay violation committed at trial, but not raised until appeal. In that case, certain documentary evidence admitted to support a finding of abuse and neglect was challenged by the defendant on grounds that the caseworker who testified lacked first-hand knowledge of the injuries sustained. *Id.* at 338. The Court held that the doctrine of invited error barred defendant from challenging the evidence on appeal, because had defendant made an objection at trial, "the Division could have taken steps to satisfy any evidentiary requirements needed for the admission of the documents or presented

a witness or witnesses in place of the documents." *Id.* at 341. The Court also noted that "where defense counsel may have made a strategic decision to try the case based on the documents, instead of possibly facing a witness's direct testimony, it would be unfair to the Division to reverse on this issue." *Id.* at 342.

***12** Similarly, there was no objection to the admission of the AFIS data at trial and, in fact, defense counsel vigorously cross-examined Sergeant DeAngelis about his methodology and findings at both an *N.J.R.E.* 104 hearing and before the jury. It is plausible that defense counsel chose not to insist upon direct testimony about the AFIS materials before the jury to protect his client against the stigma of criminality that could attach to individuals whose fingerprint data are already in the AFIS. Had Delevry timely objected to the AFIS documents, the trial court could have determined if DeAngelis's testimony was proper under *N.J.R.E.* 703 or, if a hearsay objection was sustained, the State could have either proffered a witness to provide a foundation for the document as a business record, *N.J.R.E.* 803(c)(6), or collected its own fingerprints of Delevry to cure the hearsay problem.

We also observe that a party's failure to timely object at trial may make it " 'fair to infer from the failure to object below that in the context of the trial the error was actually of no moment.' " *State v. Ingram,* 196 *N.J.* 23, 42 (2008) (quoting *State v. Nelson,* 173 *N.J.* 417, 471 (2002)). Furthermore, Delevry's fingerprint was not the only link between him and the robbery. The conviction is supported by both Navarrete and Aguilar's in-court testimony and identifications. See *State v. Nero,* 195 *N.J.* 397, 407 (2008) (" '[A]ny finding of plain error depends on an evaluation of the overall strength of the State's case.' ") (quoting *State v. Chapland,* 187 *N.J.* 275, 289 (2006)). Accordingly, application of the invited error rule in the instant case would not " 'cause a fundamental miscarriage of justice.' " *M.C. III, supra,* 201 *N.J.* at 342 (quoting *Brett, supra,* 144 *N.J.* at 508).

Delevry also claims that certain prosecutorial remarks during summation, including the suggestion that people in the jewelry business focus on customer's hands and faces, denied him a fair trial. We are unable to agree.

It is well-settled that "[p]rosecutors 'are afforded considerable leeway in making opening statements and summations.' " *State v. Echols,* 199 *N.J.* 344, 359–60 (2009) (quoting *State v. Williams,* 113 *N.J.* 393, 447 (1988)). However, while prosecutors are expected to be zealous in enforcing the law, " '[t]he primary duty of a prosecutor is not to obtain convictions, but to see that justice is done.' " *State v. Blakney,* 189 *N.J* . 88, 96 (2006) (quoting *State v. Ramseur,* 106 *N.J.* 123, 320 (1987)). Therefore, while " '[a] prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence,' " it is for " 'the jury to decide whether to draw the inferences the prosecutor urged.' " *State v. Wakefield,* 190 *N.J.* 397, 457 (2007) (quoting *State v. R.B.,* 183 *N.J.* 308, 330 (2005)), *cert. denied,* 552 U.S. 1146; 128 S.Ct. 1074; 169 *L. Ed.*2d 817 (2008). Accordingly, a conviction will not be overturned for prosecutorial misconduct " 'unless

the conduct was so egregious as to deprive defendant of a fair trial.' " Wakefield, *supra,* 190 *N.J.* at 437 (quoting *State v. Papasavvas (I),* 163 *N.J.* 565, 625 (2000)).

***13** The challenged remarks during the State's summation were the following:

> He tells you when he testified that he's less than three feet away from both defendants.... This is how close Manuel Navarrete was standing from the defendant, and nothing was obstructing his view. Take into consideration the degree of attention that he had when he was viewing the people involved in this robbery. He's in the jewelry business. People in the jewelry business focus on faces. They focus on hands. They focus on necks. Why? It's common sense. That's what they're selling, so they're going to pay attention to those details for sale purposes.

Delevry correctly argues that there was no testimony at trial that people in the jewelry business focus on hands, faces, and necks. However, although not grounded in specific testimony at trial, it is a reasonable inference and fair comment that a salesman looking to make a sale would devote his attention to a prospective customer, especially one who sought the salesman's assistance in making a purchase.

Nonetheless, even if the prosecutor's remarks were improper, they were harmless under the circumstances. First, there was evidence that Navarrete and Aguilar had ample opportunity to view the two defendants at the time of the crime. In fact, Navarrete came face to face with Delevry on three occasions, first when he came into the store to purchase "an ID" and twice on the date of the robbery. Although it was Livingston who spoke with Navarrete about purchasing a name plate on the date of the robbery, Delevry stood close by at all times. He was also face to face with Navarrete and Aguilar when the handgun was fixed on them and their son.

Also, because Delevry raised no objection at trial, we are permitted to infer that defense counsel did not believe "the prosecutor's remarks were ... prejudicial at the time they were made," *State v. Josephs,* 174 *N.J.* 44, 126 (2002); *see also State v. Frost,* 158 *N.J.* 76, 83 (1999) ("Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial."). The jury was also instructed that "[a]rguments, remarks, questions, openings, summations of counsel are not evidence and must not be treated as evidence," and that "[a]ny comments by counsel are not controlling." Thus, in light of the strength of the State's case and the fact that no objection was made at trial, the prosecutor's remarks, even if marginally inappropriate, did not rise to the level of plain error. *See Nero, supra,* 195 *N.J.* at 410.

Delevry's final point challenges his twelve-year sentence, subject to the NERA, as excessive. Appellate review of sentencing decisions is governed by an abuse of discretion standard. *See State v. Cassady,* 198 *N.J.* 165, 180 (2009). "Although 'appellate courts are expected to exercise a vigorous and close review for abuses of discretion by the trial courts[,]' " *ibid.* (quoting *State v. Jarbath,* 114 *N.J.* 394, 401 1989), "an appellate court may not substitute its judgment for that of the trial court." *Ibid.* (quoting *State v. Evers,* 175 *N.J.* 355, 386 (2003)). We consider, first, whether the correct sentencing guidelines have been followed, second, whether there is substantial credible evidence in the record to support the findings which warrant application of those guidelines, and third, "whether in applying those guidelines to the relevant facts the trial court clearly erred by reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors." *State v. Roth,* 95 *N.J.* 334, 365–66 (1984). As long as the aggravating and mitigating factors found were based upon credible evidence in the record and the sentence imposed is within statutory guidelines, the trial court "need fear no second-guessing." *Roth, supra,* 95 *N.J.* at 365.

***14** The court found two aggravating factors, Delevry's risk of recidivism, *N.J.S.A.* 2C:44–1(a)(3), and the need to deter defendant and others, *N.J.S.A.* 2C:44–1(a)(9). The court also observed that Delevry appeared to show no remorse despite substantial evidence pointing to his guilt. Nevertheless, the court also found two mitigating factors, defendant's lack of a prior criminal record, *N.J.S.A.* 2C:44–1(b)(7), and that incarceration would impose a significant hardship on him, *N.J.S.A.* 2C:44–1(b)(11). Concluding that the aggravating factors substantially outweighed the mitigating factors, the court imposed a sentence just two years longer than the statutory minimum.

The sentencing court's findings were supported by credible evidence in the record. *State v. Hupka,* 203 *N.J.* 222, 245 (2011). In finding aggravating factor three, risk of recidivism, the court noted that although Delevry was just twenty-two years of age, he had "two juvenile adjudications with two Violations of Probation and a juvenile conference committee, two municipal court convictions with conditional discharge ... [and] [eleven] motor vehicle suspensions, six for driving on the revoked list." Similarly, in finding that the aggravating factors outweighed the mitigating factors, the court cited Delevry's lack of remorse and the court's belief that he demonstrated a threat to public safety.

Delevry takes particular issue with the court's emphasis on his apparent lack of remorse, asserting, "the court was not entitled to take these factors into consideration in imposing a higher term of years than otherwise would be imposed," and urging that an appropriate sentence would not exceed the minimum term of ten years. We find this argument meritless.

Delevry's sentence, twelve years subject to the NERA for a first-degree robbery, was well within the guidelines of *N.J.S.A.* 2C:43–6(a)(1). Despite finding that the aggravating factors substantially outweighed mitigating factors, the court imposed a term at the lower end of the ten-to-twenty-year range. We perceive no manifest injustice in the length of this sentence and parole ineligibility

period, as it does not shock our conscience. *State v.. Bieniek,* 200 *N.J.* 601, 612 (2010); *Roth, supra,* 95 *N.J.* at 363–65.

B.

Livingston raises the following arguments for our consideration:

> *POINT I:* BECAUSE DEFENSE COUNSEL COULD NOT CHALLENGE THE CREDIBILITY OF THE IN–COURT IDENTIFICATION OF DEFENDANT BY ONE OF THE VICTIMS, WITHOUT ALSO REVEALING TO THE JURY THAT SHE HAD IMPROPERLY SEEN THE DEFENDANTS IN HANDCUFFS IN THE COURTROOM, THE DENIAL OF A MISTRIAL DEPRIVED DEFENDANT OF THE RIGHT TO CONFRONT AND CROSS–EXAMINE WITNESSES AND THE RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. *U.S. CONST.* AMENDS. VI, XIV; *N.J. CONST.* (1947) ART. I, PARS. 1, 9, 10.
>
> *POINT II:* DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE.

We do not find these arguments persuasive.

***15** Livingston's first argument is quite similar to the contentions raised by Delevry's points one and two, which we have rejected. The main difference, however, is Livingston's heavy reliance upon *State v. Sugar,* 100 *N.J.* 214 (1985), which is claimed to support the principle that a witness should not be allowed to testify if fair and effective cross-examination would require the introduction of prejudicial inadmissible evidence. *Id.* at 230.

In *Sugar,* a detective investigating a murder was found to have engaged in illegal eavesdropping and the resulting evidence was suppressed. Nonetheless, he was permitted to testify at trial because he was still subject to cross-examination. *Id.* at 226. On appeal, the Court issued a narrower holding than is advocated by Livingston, ruling that "a person who actually participated in, attended, or was contemporaneously informed of the unlawful intercept must be deemed to have been tainted by his direct knowledge of the intercept; he is therefore disqualified to testify as a witness in defendant's prosecution." *Id.* at 226–27. The court emphasized that the egregiousness of the official misconduct necessitated a remand to both "redress the constitutional injury but also to thwart even the temptation to repeat such conduct." *Id.* at 228.

The same degree of official misconduct is simply not present here. Although it was an operational error to allow Aguilar to enter the courtroom before defendants were seated and the restraints removed, it had no inherent capacity to inevitably deprive Livingston of a fair trial. The evidence against Livingston was strong. Navarrete spoke face to face with Livingston the day of the

crime, enhancing the strength of his identification, and he also made an in-court identification of Livingston, which took place prior to Aguilar viewing defendants in handcuffs. Moreover, the fingerprint evidence linked Livingston to the crime.

Furthermore, defense counsel was given a voluntary choice between (1) exploring the fact that his client was manacled and in custody before the jury or (2) keeping that information private. The trial court specifically addressed the potential effect of having the jury hear that defendants were in custody, stating:

> I had suggested to counsel to talk to their clients about in their cross-examination and their exploration of this viewing, if they wanted to consider not mentioning handcuffs, just the fact that the two defendants walked in with them and sat at counsel table ... did that have an [e]ffect on you in making your identification of them.... I'm leaving it to them to think about in weighing the prejudice they think it will have to the jury by hearing the information about handcuffs.

Therefore, although defense counsel might have reasoned that cross-examination of Aguilar would be less compelling without evidence that defendants were observed as they were, this was a purposive decision intended to better impeach the credibility of Aguilar's in-court identification. Ordinarily, "[s]trategic decisions made by defense counsel will not present grounds for reversal on appeal." *State v. Buonadonna,* 122 *N.J.* 22, 44 (1991).

***16** Second, it cannot reasonably be said that the admission of Aguilar's in-court identification resulted in a "manifest injustice ." *State v. Harris,* 181 *N.J.* 391, 518 (2004), *cert. denied,* 545 *U.S.* 1145, 125 *S.Ct.* 2973, 162 *L. Ed.*2d 898 (2005). As we have already noted, the trial court's decision as how to best proceed was informed by its first-hand experiences during the trial. The trial court wisely believed a limiting instruction was sufficient to constrain the prejudice, if any, caused by the jury's knowledge of Livingston's custodial status. Specifically, it found that "Miss Aguilar's in-court identification of the defendants was based on past experience as opposed to viewing the defendants in handcuffs." We find no reversible error, constitutional or otherwise, on this record.

Livingston also asserts that his fifteen year sentence subject to the NERA is manifestly excessive. Applying the sentencing principles already discussed, we have no grounds to disturb the sentence imposed.

At sentencing, the court found three aggravating factors, the risk that defendant would commit another offense, *N.J.S.A.* 2C:44–1(a)(3), the extent of defendant's prior criminal record, *N.J.S.A.*

2C:44–1(a)(6), and the need to deter defendant and others, *N.J.S.A.* 2C:44–1(a)(9). It found no mitigating factors.

The trial court imposed a term of imprisonment three years longer than the sentence imposed on Delevry. Citing *State v. Roach,* 167 *N.J.* 565 (2001), the court explained its rationale for a weightier sentence by noting that unlike Delevry, Livingston had "five juvenile adjudications, [which included robbery and possession of a weapon for an unlawful purpose]." Additionally, Livingston had committed two offenses prior to the robbery at The Little Diamond Jewelry Store and two additional offenses afterwards. This was not only Livingston's second robbery conviction, but "[o]ver a seven-month period, defendant committed an armed robbery, three thefts, [and] four receiving stolen properties." Therefore, the difference between his and Delevry's sentence was justified. *See State v. Roach,* 146 *N.J.* 208, 232 (1996) ("A sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant's sentence is lighter.") (quoting *State v. Hicks,* 54 *N.J.* 390, 391 (1969)).

Finally, the fifteen-year sentence imposed was in the middle of the sentencing range for a first-degree robbery even though the court found that "the aggravating factors substantially outweigh the mitigating factors." *N.J.S.A.* 2C:43–6(a)(1). This sentence emerged from the trial court's principled discretion and we find no basis to disturb it.

Affirmed.

All Citations

Not Reported in A.3d, 2011 WL 5419745

Footnotes

1 At the time of trial, Lieutenant Ramos had held the rank of lieutenant for approximately six months. At the time of the robbery, however, he was a sergeant in Red Bank's detective bureau. The trial transcript refers to Ramos as both a sergeant and a lieutenant. We elect to call Ramos by the rank he held at the time of trial.

2 Photograph number four in Navarrete's photo array book depicted Livingston.

3 Photograph number three in Aguilar's photo array book depicted Livingston.

4 Sims received an engagement ring from Delevry on August 20, 2007, but according to Sims, the engagement ended "a few months after he got arrested."

5 We do not view the revised identification procedures of *State v. Henderson,* —— *N.J.* —— (2011) as applicable to this case. There, the Court instructed that its ruling shall "apply to future cases only.... As to future cases, today's ruling will take effect thirty days from the date this Court approves new model jury charges on eyewitness identification." *Id.* at slip op. 160–61.

End of Document

2011 WL 2333357
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Timothy D. DAVIS, Defendant–Appellant.

Argued May 18, 2011.
|
Decided June 15, 2011.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 08–02–0637.

Attorneys and Law Firms

Daniel V. Gautieri, Assistant Deputy Public Defender, argued the cause for appellant (Yvonne Smith Segars, Public Defender, attorney; Mr. Gautieri, of counsel and on the brief).

Nancy P. Scharff, Assistant Prosecutor, argued the cause for respondent (Warren W. Faulk, Camden County Prosecutor, attorney; Ms. Scharff, on the brief).

Before Judges CUFF, SAPP–PETERSON and FASCIALE.

Opinion

PER CURIAM.

***1** Defendant appeals from his convictions for first-degree robbery, second-degree conspiracy to commit robbery, second-degree burglary, second-degree conspiracy to commit burglary, third-degree unlawful possession of a weapon for an unlawful purpose, and fourth-degree unlawful possession of a knife. The robbery, burglary, and in-court identification charges were flawed and contributed to an unjust and unwarranted result. We reverse.

On September 17, 2007, at 9:00 p.m., two men entered the victim's home through the back door. She recognized the first man as co-defendant Robert Schaub, but did not know the second person, later identified as defendant. The victim testified that defendant possessed a "pointy" object and

held it down to his side. The victim did not know what the object was. Although neither man said anything when they entered the residence, the victim was afraid and concerned for the safety of her seventy-year-old mother who also occupied the residence. Defendant approached her mother, the victim screamed as defendant grabbed two pocketbooks hanging on a chair, and both men ran out of the home. The victim chased both men, yelled for them to stop, and then returned to her mother who had called the police. The men continued to flee.

Schaub pled guilty to second-degree conspiracy to commit robbery. He received a six-year prison sentence with eighty-five percent parole ineligibility pursuant to the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2, and testified as a witness for the State. Schaub testified that he acted as a look-out while defendant stole the pocketbooks.

Defendant did not testify at trial. His girlfriend testified that defendant was with her in an apartment complex next to the victim's home, except for a brief period of time when defendant went to a neighbor's apartment for a cigarette.

The jury convicted defendant on all charges. The judge granted the State's motion to sentence defendant to an extended term pursuant to *N.J.S.A.* 2C:43–7.1b(2). He merged all of the counts into the robbery conviction and imposed a twenty-year prison term with eighty-five percent parole ineligibility subject to NERA. This appeal followed.

On appeal, defendant raises the following points:

POINT I

THE JUDGE'S INSTRUCTIONS ON ROBBERY WERE FLAWED, AS THEY: FAILED TO GIVE JURORS THE OPTION OF CONVICTING DAVIS OF SECOND–DEGREE ROBBERY; FAILED TO NOTE THAT DAVIS' INTENT WAS CRITICAL TO DETERMINING WHETHER HE WAS ARMED WITH A "DEADLY WEAPON;" STATED THAT DAVIS WAS GUILTY OF ROBBERY IF HE COMMITTED A THEFT IN THE COURSE OF A THEFT; AND FAILED TO CLARIFY WHO WAS THE ALLEGED VICTIM OF THE ROBBERY. THE VERDICT SHEET MADE MATTERS WORSE, PERMITTING AN ARMED ROBBERY CONVICTION EVEN IF JURORS FAILED TO FIND THAT DAVIS WAS ARMED. (Not Raised Below)

A. The Judge Should Have Instructed Jurors That They Could Convict Davis of Second–Degree Robbery

B. The Judge Erroneously Informed Jurors That Davis Was Guilty of Robbery if He Committed a Theft in the Course of Committing a Theft

*2 C. The Robbery Charge Was Confusing, Because it Was Not Tailored to the Evidence and Created the Possibility that Jurors Determined that Marks' Mother, Rather than Marks, Was the Victim

D. The Portion of the Charge Addressing the Issue of "Armed" Robbery was Flawed Because it Did Not Address the Fact That Jurors Were to Consider a Defendant's Intent in Determining Whether a Kitchen Knife Is a Deadly Weapon

E. The Verdict Sheet Was Deficient Because it Permitted a First–Degree Conviction in the Absence of a Finding That Davis Was Armed with a Deadly Weapon

F. The Aforementioned Errors Require a Reversal of the Robbery and Conspiracy–to–Rob Convictions

POINT II

THE BURGLARY AND CONSPIRACY TO COMMIT BURGLARY CONVICTIONS MUST BE REVERSED BECAUSE THE JUDGE FAILED TO PROVIDE JURORS THE OPTION TO CONVICT ON THIRD–DEGREE BURGLARY AND FAILED TO PROPERLY DEFINE KEY TERMS SUCH AS "RECKLESS," "ATTEMPT," AND "ARMED WITH A DEADLY WEAPON." (Not Raised Below)

POINT III

THE COURT'S INSTRUCTIONS REGARDING THE IN–COURT IDENTIFICATION WERE MISLEADING, AS THEY FOCUSED ON FACTORS THAT WERE IRRELEVANT AND FAILED TO MENTION THE CRITICAL CONSIDERATIONS THAT SUGGESTED THAT THE VICTIM'S IDENTIFICATION OF DAVIS MAY HAVE BEEN MISTAKEN. (Not Raised Below)

A. Introduction

B. The Henderson Report

C. Schaub's Testimony Should Not Have Been Treated as an Identification, as Schaub Was a Co-defendant Who Knew Davis

D. The Charge Focused on Three Factors that Social Science has Deemed Unreliable

E. The Charge Focused on Factors that Are Only Relevant to Situations in which There Has Been a Suggestive Out-of-court Identification

F. The Charge Failed to Focus on Factors that Social Science Reveal to be Critical to a Determination of Accuracy

G. The Charge was Not Tailored to the Facts of This Case

H. The Errors in the Charge Require a Reversal of Davis's Convictions

POINT IV

THE PROSECUTOR FAILED TO LAY A PROPER FOUNDATION FOR THE VICTIM'S ABILITY TO MAKE AN IN–COURT IDENTIFICATION, AND THE JUDGE SHOULD NOT HAVE PERMITTED AN IDENTIFICATION TO BE MADE ABSENT A HEARING. (Not Raised Below)

POINT v.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURORS ON AN ALIBI DEFENSE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST AN ALIBI INSTRUCTION. (Not Raised Below)

POINT VI

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO LIMIT USE OF THE CO–DEFENDANT'S GUILTY PLEA TO ASSESSING CREDIBILITY AND TO BAR ITS USE AS SUBSTANTIVE EVIDENCE OF THE DEFENDANT'S GUILT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW. (Not Raised Below)

POINT VII

THE JUDGE'S CHARGE REGARDING LESSER–INCLUDED OFFENSES IMPROPERLY SUGGESTED THAT SUCH OFFENSES WERE NOT OF EQUAL WEIGHT TO THE OFFENSES CHARGED IN THE INDICTMENT. (Not Raised Below)

POINT VIII

DEFENDANT'S CONVICTIONS SHOULD BE REVERSED ON THE BASIS OF CUMULATIVE ERROR. (Not Raised Below)

***3** It is well-settled that appropriate and proper jury charges are essential in a criminal case to assure a fair trial. *State v. Reddish,* 181 *N.J.* 553, 613, 859 A.2d 1173 (2004); *State v. Green,* 86 *N.J.* 281, 287, 430 A.2d 914 (1981). When a defendant identifies an error in the charge, we must

evaluate the charge in its entirety. *State v. Figueroa,* 190 *N.J.* 219, 246, 919 A.2d 826 (2007); *State v. Wilbely,* 63 *N.J.* 420, 422, 307 A.2d 608 (1973).

Although a flawed jury charge is a poor candidate for rehabilitation or the application of the harmless error rule, *State v. Simon,* 79 *N.J.* 191, 206, 398 A.2d 861 (1979), a defendant must still demonstrate that the error affected the outcome of the jury's deliberations. *State v. Jordan,* 147 *N.J.* 409, 422, 688 A.2d 97 (1997). When a defendant fails to object to the alleged error at trial, we must apply the plain error standard of review.

Here, defendant failed to object to the charge; therefore, we must determine whether any error contributed to an unjust and unwarranted result. *R.* 2:10–2; *State v. Macon,* 57 *N.J.* 325, 333, 337–38, 273 A.2d 1 (1971).

I

On the robbery charge, the judge failed to (1) charge second-degree robbery as a lesser-included offense, (2) define "deadly weapon," and (3) otherwise follow the model jury charge. These errors possessed the clear capacity to contribute to an unjust result.

"[C]ourts are required to instruct the jury on lesser-included offenses *only* if counsel requests such a charge and there is a rational basis in the record for doing so[;] or, in the absence of a request, if the record *clearly indicates* a charge is warranted." *State v. Denofa,* 187 *N.J.* 24, 42, 898 A.2d 523 (2006) (second emphasis added) (citing *State v. Garron,* 177 *N.J.* 147, 180 n. 5, 827 A.2d 243 (2003), *cert. denied,* 540 U.S. 1160, 124 S.Ct. 1169, 157 *L. Ed.*2d 1204 (2004)); *Accord, State v. Walker,* 203 *N.J.* 73, 87, 999 A.2d 450 (2010); *see also N.J.S.A.* 2C:1–8(e). Here, no request was made at trial to charge second-degree robbery as a lesser-included offense to first-degree robbery. Regardless of whether a defendant requests such an instruction, the judge must instruct the jury on a lesser-included offense if the facts "clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." *State v. Jenkins,* 178 *N.J.* 347, 361, 840 A.2d 242 (2004).

Here, the facts clearly indicate that a charge for second-degree robbery as a lesser-included offense was warranted. Robbery is a crime of the second degree, but is a crime of the first degree "if in the course of committing the theft the actor ... is armed with, or uses or threatens the immediate use of a deadly weapon." *N.J.S.A.* 2C:15–1b. The victim was unable to identify the object in defendant's hand as a weapon. The judge acknowledged that "it's a jury question whether [the victim] recognized [the "long and pointy" object] as a weapon; whether [the victim] was put in fear of it...." If the jury concluded that the object was not a weapon, they could still determine that the victim was put in fear of bodily injury by the mere presence of two men who entered her

residence without permission through the back door at 9:00 in the evening. Thus, the jury could acquit on first-degree robbery and convict on second-degree robbery.

***4** The judge determined that the record supported a lesser-included offense, but he charged only third-degree theft. We discern that he charged theft, as a lesser-included offense, because the jury could find that defendant did not possess a weapon. Under that rationale, it was plain error not to charge second-degree robbery as well.

Moreover, as part of the robbery charge, the judge did not define "deadly weapon." The failure to define that term prevented the jury from understanding an element of first-degree robbery. "[T]he 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, 510 A.2d 1147 (1986); *State v. Grunrow,* 102 *N.J.* 133, 148, 506 A.2d 708 (1986). The Court has explained:

> The traditional function of the judge is to instruct the jury as to the law governing the issues to be decided by them under the facts of the particular case. The classical practice generally followed in criminal cases is for the judge to outline the applicable law, explaining and defining the offense charged, and the jury, thus becoming informed as to the exact law which they must decide has or has not been violated, places its determination of the facts alongside the law and decides whether its verdict shall be guilty or not guilty.... To fail to define the offense attributed to the accused and the essential elements which constitute it, is to assume that jurors are educated in the law—an assumption which no one would undertake to justify. On the contrary, the appearance of a person with legal training on the jury panel would be a rarity. The criminal law cannot be administered justly or efficiently if the jury is allowed to speculate as to what conduct the law intended to proscribe by a specified crime. Accordingly, we hold the view that a mandatory duty exists on the part of the trial judge to instruct the jury as to the fundamental principles of law which control the case. Among such principles is the definition of a crime, the commission of which is basic to the prosecution against the defendant.
>
> [*State v. Butler,* 27 *N.J.* 560, 594–95, 143 A.2d 530 (1958).]

To aid the jury in understanding the definition of first-degree robbery, the model jury charge defines "deadly weapon" as:

> any firearm or other weapon, device, instrument, material or substance ... *which in the manner it is used or intended to be used,* is known to be capable of producing death or serious bodily injury or *which in the manner it is fashioned* would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury.
>
> [*Model Jury Charge (Criminal),* "Robbery in the First Degree" (2010) (emphasis added).]

By omitting the definition, the jury was required to speculate about the meaning of "deadly weapon," an essential element of the charge.

Finally, the judge was required to select from the following choices from the model jury charge:

***5** 2. that while in the course of committing that theft the defendant

a. knowingly inflicted bodily injury or used force upon another.

b. threatened another with or purposely put (him/her) in fear of immediate bodily injury.

c. committed or threatened immediately to commit the crime of [first or second degree].

[*Model Jury Charge (Criminal),* "Robbery in the First Degree" (2010).]

The judge selected all three, required that the jury must find both 2a and 2b, and referenced a third-degree crime-theft-concerning 2c, rather than a crime of the first or second degree. At the end of the robbery charge, the judge asked for a side bar conference because he understood, based on the charge conference conducted partially on the record, that the parties requested that he read only 2b. The judge stated that he was "concerned [because] I read [the charge] confusingly." During deliberations, the jury was also confused and asked the court to "re-explain robbery in layman's terms." In his re-charge, the judge included all three sections, substituted "any crime of the first or second degree" in place of theft, and—as the assistant prosecutor stated—"hinted that [the jury] had the option of finding [defendant guilty] under second-degree." The judge did not, however, instruct the jury that it must find defendant guilty of second-degree robbery, if it found that the State had not proven beyond a reasonable doubt that defendant was armed with, or used or purposely threatened the immediate use of a "deadly weapon." In other words, if the jury did not find that defendant used the knife as a deadly weapon, then it must acquit of first-degree robbery. Even though the judge "hinted" that second-degree robbery was an option, it was not included on the verdict sheet.

II

We find that the judge also committed plain error concerning the burglary charge. The judge omitted the definitions of "armed with," "recklessly," and "attempt," and although he charged third-degree burglary as a lesser-included offense, the verdict sheet did not provide for that option.

The judge charged the jury that

> A person is guilty of burglary in the third-degree if with purpose to commit an offense therein the person enters a structure or surreptitiously remains in a structure and is not licensed or privileged to do so. That person is guilty of burglary in the second-degree if in the course of committing the offense I have just described to you that person purposefully, knowingly or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone; or is armed with or displays what appears to be a deadly weapon.

The question on the verdict sheet concerning burglary stated

> On or about the 17th day of September, 2007 ... defendant did unlawfully enter the structure of [the victim] ... with the purpose to commit an offense therein; and in the course of committing the offense did,
>
> a.) Purposely, knowingly, or recklessly inflict, attempted to inflict or threatened to inflict bodily injury on [the victim;] or
>
> ***6** b.) Was armed with or displayed what appeared to be a deadly weapon—to wit a knife.

Sections a and b pertain to burglary in the second-degree. Although the verdict sheet contained a lesser-included offense of criminal trespass, the jury was unable to record a verdict of guilty to the lesser-included offense of third-degree burglary because the verdict sheet omitted any such option.

The judge charged the jury that "[i]n this case the State alleges that defendant was armed with or displayed what appears to be a deadly weapon." He omitted to then read

> In order for defendant to be guilty of being "armed with" ... a deadly weapon, however, the State must prove not only possession but also immediate access to that ... deadly weapon. The State must prove beyond a reasonable doubt that the weapon was easily accessible and readily available for use during the burglary.
>
> [*Model Jury Charge (Criminal),* "Burglary in the Second Degree" (2010).]

Similarly, the judge charged the jury,

> If you find beyond a reasonable doubt that the defendant committed the crime of burglary or in the course of committing that offense he ... recklessly inflicted or purposely intended to inflict or threatened to inflict bodily injury upon the

> victim, ... then you must find the defendant guilty of burglary in the second degree.

He did not define "recklessly."

Finally, the judge charged the jury that "burglary becomes a crime of the second-degree if the burglar ... attempts to inflict or threatens to inflict bodily injury...." He omitted to read, however, the definition of "attempt," which is "[a] person is guilty of an attempt to inflict bodily injury if (he/she) purposely commits an act which constitutes a substantial step toward the commission of the infliction of bodily injury." *Model Jury Charge (Criminal),* "Burglary in the Second Degree" (2010). "[T]he 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." *Federico, supra,* 103 *N.J.* at 176, 510 A.2d 1147.

III

We agree with defendant that the judge listed several irrelevant factors when he charged the jury on identification. There is no evidence to suggest that either Schaub or the victim identified defendant out-of-court. Nevertheless, the charge focused on a non-existent out-of-court identification.

The judge charged that, in deciding what weight to give to the identification testimony, the jury may consider "the circumstances under which the identification was made and whether or not it was the product of a suggestive procedure including anything done or said by law enforcement to the witness before, during or after the identification process." He then stated:

> In making this determination, you may consider the following circumstances: Whether anything was said to the witness prior to viewing a photo array, line-up or show-up; whether a photo array shown to the witness contained multiple photographs of the defendant; whether all in the line-up but the defendant were known to identifying witnesses; whether the other participants in the line-up were grossly dissimilar in appearance to defendant, whether only the defendant was required to wear distinctive clothing which the culprit allegedly wore; whether the witness is told by the police they have caught the culprit after which the defendant is brought before the witness alone or in jail; whether the defendant is pointed out before or after the line-up; whether the witness' identification was made spontaneously and remained consistent thereafter; whether the individual conducting the line-up either indicated to the witness that a suspect was present

> or failed to warn the witness that the perpetrator may or may not be in the procedure; whether the witness was exposed to opinions, descriptions of identifications given by other witnesses to photographs or newspaper accounts or to any other information or influence that may have affected the independence of his or her identification.

***7** These factors, however, were inapplicable. Furthermore, the victim's in-court identification of defendant was inherently suggestive; yet the trial judge provided no guidance to the jury to evaluate this circumstance.

Schaub testified that he knew defendant for a couple of months before the incident. Although the victim attempted to identify defendant out-of-court, she was unable to do so. About three months after the incident, an investigator conducted a photographic array with the victim at the prosecutor's office. The investigator showed the victim eight photographs twice, but the victim was unable to identify anyone. It was not until fourteen months after failing to identify defendant at the prosecutor's office, that the victim identified defendant for the first time at trial while defendant was seated at the counsel table. Thus, the identification charge was confusing and contributed to an unjust and unwarranted result.

IV

We have carefully reviewed the record and the arguments presented by counsel and conclude that the remaining issues presented by defendant are without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(2).

Reversed and remanded for a new trial.

All Citations

Not Reported in A.3d, 2011 WL 2333357

End of Document

2011 WL 1631124
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
John JOHNS, Defendant–Appellant.

Argued March 29, 2011.
|
Decided May 2, 2011.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 05–08–1618.

Attorneys and Law Firms

John Douard, Assistant Deputy Public Defender, argued the cause for appellant (Yvonne Smith Segars, Public Defender, attorney; Mr. Douard, of counsel and on the briefs).

Brian Uzdavinis, Deputy Attorney General, argued the cause for respondent (Paula T. Dow, Attorney General, attorney; Mr. Uzdavinis, of counsel and on the brief).

Before Judges PARRILLO, SKILLMAN and ROE.

Opinion

PER CURIAM.

***1** Defendant was indicted for six armed robberies and related offenses committed in Atlantic City between April 7 and 24, 2005. Defendant was also charged in a separate indictment with two armed robberies and related offenses committed in Egg Harbor on April 24 and 25, 2005. After the trial court rejected plea bargains that would have encompassed the charges in both indictments, defendant was tried before a jury on the indictment arising out of the Egg Harbor robberies and found guilty of all but one of the charges. The trial court sentenced defendant to consecutive

sixteen-year terms of imprisonment, subject to the 85% period of parole ineligibility mandated by the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2, for the two armed robberies, committed in violation of *N.J.S.A.* 2C:15–1. In addition, the court sentenced defendant to consecutive five-year terms of imprisonment for aggravated assault, in violation of *N.J.S.A.* 2C:12–1(b)(2), and two counts of possession of a handgun without a permit, in violation of *N.J.S.A.* 2C:39–5(b). For the other offenses defendant was found to have committed, the trial court either imposed concurrent terms or merged the convictions. Thus, defendant's aggregate term is forty-seven years imprisonment, with thirty-two of those years subject to NERA parole ineligibility.

Defendant subsequently entered into a plea bargain with respect to the indictment for the six armed robberies committed in Atlantic City, under which he pled guilty to one robbery, for which he was sentenced to a six-year term of imprisonment, subject to NERA ineligibility, to be served consecutively to his sentence for the Egg Harbor robberies, and the charges based on the other five robberies were dismissed.

The first of the robberies the jury found defendant to have committed occurred around 2 a.m. on April 24, 2005 in the Egg Harbor Econo Lodge. The front desk clerk, Richard Bennett, was in the back office when defendant and his confederate, Basim Reid, entered the lobby. After he saw defendant enter the hotel by viewing the monitor of the motel security camera, Reid came out front and saw defendant standing behind the counter with a gun. Defendant ordered Bennett to his knees and began rifling through the cabinets and cash register. After finding little money in the cash register, defendant became very aggravated and demanded the money from Bennett's wallet. Thereafter, defendant took the money from Bennett's wallet and hit Bennett on the side of his head with the gun he was wielding, causing Bennett to lose a tooth. Defendant and Reid fled with a total of approximately $2100.

The second of the robberies the jury found defendant to have committed occurred around 3:30 a.m. on April 25, 2005 in the Egg Harbor Ramada Limited. Defendant first entered the motel at approximately 2:30 a.m. with a “large wad” of cash in his hands, and asked about room rates. However, when the front desk clerk, Andrew King, told defendant he had to produce identification, defendant declined to rent a room. Around an hour later, defendant returned to the motel and pointed a gun at King as he ran towards the front desk. King fell on the floor for his own protection, and defendant then jumped over the desk, after which Reid joined him. Defendant demanded to know the location of the money on the premises, and King told him. Defendant and Reid removed about $380 from a cash drawer and safe, and fled.

***2** At trial, Bennett identified defendant as one of the persons who robbed him, and although King was unable to identify defendant as one of the perpetrators of the Ramada robbery, he did identify him as the person who had entered the motel at 2:30 a.m. and asked to rent a room. In addition, the State introduced videotapes of both robberies recorded by security cameras and defendant's

tape-recorded confession to commission of the robberies. The State also presented the testimony of two fingerprint experts who concluded that latent fingerprints found behind the counter of the Econo Lodge were defendant's fingerprints.

Defendant took the stand and denied he had committed either robbery. Defendant also testified that his confession to the robberies was the product of police coercion.

Defendant also presented the testimony of his sister and two brothers that defendant was with them in Atlantic City from 9:30 p.m. until around 11:30 p.m. on the nights of both Egg Harbor robberies. However, these witnesses could not vouch for defendant's whereabouts around the time of the robberies.

I.

On appeal, defendant argues under Point I of his brief that the trial court's rejection of plea bargains offered by the State was arbitrary and capricious, thereby denying defendant his constitutional right to due process.

Rule 3:9–3(e) provides:

> If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea.

In determining whether to reject a plea bargain under *Rule* 3:9–3(e), a trial court has "wide discretion." *State v. Madan,* 366 *N.J.Super.* 98, 108, 840 A.2d 874 (App.Div.2004). "One reason for permitting wide discretion in the sentencing judge is that at the time a plea is entered the judge ordinarily has before him only the offense. A fuller picture of the offender does not emerge until sentencing, when the judge has had the benefit of a defendant's presentence report." *State v. Brockington,* 140 *N.J.Super.* 422, 427, 356 A.2d 430 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 A.2d 1077, *cert. denied,* 429 *U.S.* 940, 97 *S.Ct.* 357, 50 *L. Ed.*2d 310 (1976). However, in determining whether to accept a plea bargain, a trial court is not limited to consideration of information in the presentence report that is contrary to representations made during the plea hearing. *State v. Daniels,* 276 *N.J.Super.* 483, 487, 648 A.2d 266 (App.Div.1994), *certif. denied,* 139 *N.J.* 443, 655 A.2d 446 (1995); *State v. Salentre,* 275 *N.J.Super.* 410, 418–20, 646 A.2d 482

(App.Div.), *certif. denied,* 138 *N.J.* 269, 649 A.2d 1289 (1994). Rather, the court may consider all relevant circumstances in determining whether "the interests of justice would be ... served by effectuating the agreement reached by the prosecutor and defense counsel." *R.* 3:9–3(e).

***3** In this case, the trial court tentatively indicated on May 22, 2006 that it would accept a plea bargain under which defendant would plead guilty to the two Egg Harbor and six Atlantic City robberies and the State would recommend a maximum aggregate sentence of sixteen years imprisonment, subject to NERA. At the plea hearing, defendant provided a factual basis for his pleas to each of the eight robberies. The factual basis that defendant provided for one of the robberies only established commission of a second-degree robbery because defendant denied using or threatening the use of a gun in that robbery. However, in view of the fact that defendant had provided an adequate basis for his pleas to seven other armed robberies, the prosecutor indicated that the indictment could be amended to reflect that the eighth robbery was a second-degree offense. The trial court then tentatively accepted the plea bargain and informed defendant: "I'll review a presentence report, and so long as I'm satisfied that this is an appropriate plea agreement, which I, at this point, believe it is, I will sentence you in accordance with it...."

Defendant's confederate, Basim Reid, who pled guilty to the robberies the same day as defendant, was scheduled to be sentenced before defendant. During the course of colloquy with the trial court at sentencing, Reid characterized the proceedings as "bull shit." The court then held Reid in contempt and rejected the plea bargain Reid had entered into with the State based on the bad attitude he displayed at sentencing.

Defendant was brought before the court for sentencing a month later, on August 25, 2006. The sentencing proceeding began with the prosecutor recounting the efforts of his office to communicate with the victims of the robberies and the responses his office had received. The prosecutor advised the trial court that the desk clerk at the Econo Lodge in Egg Harbor, Bennett, had been "pistol whipped" during the robbery, which had required "extensive dental work," and that Bennett was also suffering from "post traumatic syndrome." In addition, the prosecutor advised the court that the victim of one of the robberies defendant committed in Atlantic City was "severely hurt" and was suffering from "post traumatic syndrome."

At this point, the trial court stated that it was "on the fence" with respect to acceptance of the plea bargain between the State and defendant. The court described the circumstances of its rejection of the plea bargain between the State and Reid, stating that he had come to realize at Reid's sentencing "how ... little regard [Reid] had for the rights and safety of others," and that whenever he was released from prison, he would be "an instant danger to society." The court then stated:

> [Defendant is] not much better, and just the attitude I'm seeing here in court today with the way he's just smirking and everything, like this is a joke, really a joke, a walk in the park—

***4** Defendant interrupted the court, and said: "It's funny." After hearing this comment, the court tentatively concluded that the plea bargain should not be accepted:

> I just don't know that 16 do 85 is enough for a guy like this or a guy like Basim Reid. They are dangerous, dangerous people, they really are, and they have no thought whatsoever for the rights or safety of others.

The court reached this tentative conclusion based not only on the eight armed robberies defendant had committed but also "his attitude about these crimes." The court concluded the proceedings that day by saying that it wanted an opportunity to review the presentence report again before finally deciding whether to accept or reject the plea.

That presentence report, which was submitted to us after oral argument, indicated that defendant had struck the victims of three of the robberies in the head or the face with a pistol and punched a victim of one of the other robberies in the face.

On the next scheduled court date, September 8, 2006, defendant refused to appear in court. The court stated that it was rejecting the plea bargain for which it had taken the factual bases on May 22, 2006. The court also stated that it would not accept a plea bargain for less than twenty years imprisonment. In explaining its reasons for rejection of the plea bargain, the court stated: "Due to their [referring to both Reid and defendant] conduct in court as well as the severity of ... each and every one of the armed robberies."

Although the trial court should have given a fuller statement of reasons, we conclude that the court did not abuse its wide discretion in rejecting defendant's original plea bargain with the State. The presentence report disclosed that there were aggravating circumstances with respect to a number of the robberies that were not revealed by the factual bases defendant provided at the plea hearing held on May 22, 2006. For example, defendant testified in giving the factual basis for his guilty plea to the robbery of the Econo Lodge in Egg Harbor that he did not use an actual gun in that robbery but only simulated possession of a gun. However, the presentence report indicated that defendant not only possessed an actual gun in that robbery but that he had struck Bennett on the

side of the head with the gun, causing him to lose a tooth. The presentence report further indicated that defendant had inflicted physical harm upon a number of other victims by striking them in the head or face with a gun or punching them. In addition to these aggravating circumstances of several of the robberies disclosed by the presentence report, the trial court properly took into consideration that when defendant appeared for sentencing on August 25, 2006, he failed to show any remorse for the crimes he had committed, instead treating the proceedings as if it were a joke by "smirking" at the trial court, and when the court commented upon his bad attitude, stating "It's funny." Such absence of remorse was an appropriate consideration, together with defendant's acts of physical violence toward the victims of some of the robberies, in the court's decision to reject defendant's plea bargain with the State.

***5** Defendant argues that the trial court also erred in rejecting a second plea bargain he entered into with the State after the court's rejection of his original plea bargain, which provided for an aggregate seventeen-year term of imprisonment subject to NERA. Defendant argues that the court erroneously concluded that the factual bases he provided on October 4, 2006 for his guilty plea to the first of the seven first-degree robberies that were to be resolved by that plea bargain was insufficient.

We agree with defendant that the trial court seemed to be operating under the erroneous assumption that the simulation of use of a gun in a robbery is insufficient to establish commission of the first-degree offense. However, the court never rejected this proposed plea bargain. After erroneously stating that defendant had not established an adequate factual basis for his plea to the first of the seven robberies to which he had agreed to plead guilty, the court observed that it was 4:30 p.m. and that it was "shutting down" the plea proceedings "for the day." The court also observed that this would afford defense counsel "more time to meet with [defendant]," and that "[i]f [defendant] wants to plead guilty, and the factual bases match up to what he's pleading to, that's fine." The court concluded the day's proceeding by stating: "Yeah, this is no time to mess around with all these counts, okay. Okay, if we can work it out, we can do that at anytime. If we can't, we'll see you November 29th." Therefore, the trial court did not reject defendant's second plea bargain with the State at the proceeding conducted on October 4, 2006. Instead, it continued the matter until a later date.

On the next proceeding on the record, which was a pretrial conference held on November 29, 2006, the trial court began the proceeding by stating, "[t]his was ... to be the final pretrial conference and plea cut off for all of [defendant's] various charges and Indictments," and then asking defense counsel, "what do you and your client wish to do at this point because we have long since [passed] the time when you have to fish or cut bait." In response, defense counsel advised the court: "Your Honor, he's telling me he wishes to proceed to trial and proceed with any pretrial motions." The court subsequently addressed defendant directly:

THE COURT: Okay. Do you understand, Mr. Johns, that after today, after you fill out a pretrial memo form, you can't later negotiate these matters?

THE DEFENDANT: Yes.

Thus, there is no evidence before us that the trial court rejected the plea bargain presented on October 4, 2006. Rather, it appears defendant simply changed his mind about accepting that plea bargain.

Therefore, the only plea bargain the court rejected was the one it tentatively accepted on May 22, 2006, and for the reasons previously discussed, we conclude that the rejection of that plea bargain did not constitute an abuse of discretion.

II.

***6** Defendant argues under Point II of his brief that the trial court erred in admitting evidence of King's out-of-court and in-court identifications of him as the person who attempted to rent a room at the Egg Harbor Ramada an hour before the robbery and Bennett's in-court identification of him as the perpetrator of the robbery at the Egg Harbor Econo Lodge. This argument is clearly without merit and only warrants brief discussion. *R.* 2:11–3(e)(2).

Initially, we note that defendant did not move before trial to exclude evidence of King's out-of-court identification and did not object to King's and Bennett's identifications of him at trial. In any event, there was no basis for exclusion of this identification evidence. The fact that Bennett had been unable to identify defendant in a photo array the police showed him after the robbery was not a basis for exclusion of his trial testimony identifying defendant as the perpetrator of the Egg Harbor Econo Lodge robbery. *See State v. Clausell,* 121 *N.J.* 298, 327–28, 580 A.2d 221 (1990). The fact that King was only shown a single photograph of defendant in making his out-of-court identification was not a basis for excluding evidence of that identification, which was demonstrated to be highly reliable. *See State v. Adams,* 194 *N.J.* 186, 203–06, 943 A.2d 851 (2008). We note in particular that the State's evidence included not only Bennett's and King's identifications of defendant as one of the perpetrators, but also surveillance videotapes of both robberies, which provided strong corroboration for those identifications, and defendant's tape-recorded confession.

III.

Defendant argues under Point III of his brief that the State violated his rights under the Confrontation Clauses of the United States and New Jersey Constitutions because its fingerprint experts utilized the results of an analysis by the Automated Fingerprint Information System (AFIS), in screening possible matches of a fingerprint of the perpetrator of the Egg Harbor Econo Lodge robbery, without producing the AFIS operator to testify about how the AFIS generates fingerprint data. There was no fingerprint evidence relating to the robbery at the Ramada, so this argument pertains solely to the Econo Lodge robbery.

One of the State's fingerprint experts, Ian Finnimore, described AFIS as "a machine [that] gives law enforcement a list of candidates [for a fingerprint match] that we go through and look at systematically." Finnimore did not testify that he made any use of the data generated by AFIS other than to identify defendant's fingerprints, together with the fingerprints of nineteen other individuals, as one of the group of possible matches for the latent fingerprints found behind the counter of the front desk at the Econo Lodge. Finnimore's opinion that defendant was the source of that latent fingerprint was based solely on his comparison of the features of that fingerprint with those of defendant's fingerprint. The State's other fingerprint expert, Justin Furman, did not refer to AFIS at all in his direct examination in which he expressed the opinion that defendant was the source of the latent fingerprint found at the Econo Lodge. AFIS was mentioned for the first time during defense counsel's cross-examination. Furman testified that he did not make any direct use of the AFIS report because he was simply asked to verify a prior examiner's identification of defendant as the source of the latent fingerprint. Consequently, once he confirmed that that fingerprint belonged to defendant, he did not examine the other nineteen fingerprints identified by AFIS. Thus, the AFIS preliminary fingerprint screening did not play a significant role in the expert opinions provided by the State's fingerprint experts.

***7** Defendant failed to object to the testimony of the State's fingerprint experts regarding AFIS. This failure constituted a waiver of any objection defendant might have had to such testimony. *See Melendez–Diaz v. Massachusetts,* —— *U.S.* ——, n. 3, 129 *S.Ct.* 2527, 2534, 174 *L. Ed.*2d 314, 323 (2009); *State ex. rel. J.H.,* 244 *N.J.Super.* 207, 218, 581 A.2d 1347 (App.Div.1990). Therefore, even though it is doubtful the AFIS report would be considered "testimonial" evidence subject to exclusion under *Crawford v. Washington,* 541 *U.S.* 36, 124 *S.Ct.* 1354, 158 *L. Ed.*2d 177 (2004) even if it had been offered into evidence and defendant had properly objected, *see State v. Chun,* 194 *N.J.* 54, 146–47, 943 A.2d 114, *cert. denied,* —— *U.S.* 158, 129 *S.Ct.* 158, 172 *L. Ed.*2d 41 (2008), there is no need to decide that issue.

IV.

Finally, defendant argues that his aggregate sentence of forty-seven years imprisonment, with more than twenty-seven years of parole ineligibility under NERA, was excessive. Defendant's sentence

consisted of consecutive sixteen-year terms of imprisonment, subject to an 85% period of NERA parole ineligibility under NERA, for each of the Egg Harbor armed robberies and consecutive five-year terms of imprisonment for the aggravated assault and both convictions for possession of a handgun without a permit.

We vacate the consecutive sentence for the second of defendant's convictions for possession of a handgun without a permit. Insofar as the record before us indicates, defendant possessed the same handgun in the robberies at both the Econo Lodge and Ramada. We question whether the possession of the same unpermitted handgun in the commission of two offenses supports a finding of two violations of *N.J.S.A.* 2C:39–5(b), but we do not decide this issue because it has not been briefed. In any event, it is clear that such continuing possession of the same weapon does not involve separate wrongs that could justify imposition of consecutive sentences. *See State v. Yarbough,* 100 *N.J.* 627, 643–44, 498 A.2d 1239 (1985), *cert. denied,* 475 *U.S.* 1014, 106 *S.Ct.* 1193, 89 *L. Ed.*2d 308 (1986). In fact, we question whether any consecutive sentences at all were warranted for possession of a handgun without a permit. *See State v. Jones,* 66 *N.J.* 563, 567–68, 334 A.2d 20 (1975); *State v. Copling,* 326 *N.J.Super.* 417, 441, 741 A.2d 624 (App.Div.1999), *certif. denied,* 165 *N.J.* 189 (2000). Therefore, the trial court should reconsider this part of defendant's sentence.

We also conclude that the consecutive aspects and overall length of the remainder of defendant's sentence must be reconsidered. The determination whether sentences should be served consecutively or concurrently, and the overall length of consecutive sentences, are governed by the criteria set forth in *Yarbough:*

(1) there can be no free crimes ...;

(2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

***8** (3) ... the sentencing court should ... [consider] whether or not:

(a) the crimes and their objectives were predominantly independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims; [and]

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.

[*Id.* at 643–44, 498 A.2d 1239.]

In *State v. Miller,* 108 *N.J.* 112, 122, 527 A.2d 1362 (1987), the Court emphasized that even when consecutive sentences are appropriate, "the [court's] focus should be on the fairness of the overall sentence." *Accord State v. Abdullah,* 184 *N.J.* 497, 515, 878 A.2d 746 (2005); *State v. Soto,* 385 *N.J.Super.* 247, 256, 896 A.2d 1148 (App.Div.), *certif. denied,* 188 *N.J.* 491 (2006).

Applying these criteria, we question the appropriateness of imposing consecutive sentences for the armed robbery of Bennett and the aggravated assault committed upon him during the course of that robbery. These two crimes and their objective were not "predominantly independent of each other"; did not involve "separate acts of violence or threats of violence"; were not "committed at different times or separate places"; and did not involve "multiple victims." *Yarbough, supra,* 100 *N.J.* at 644, 498 A.2d 1239. The infliction of physical harm upon the victim of an armed robbery may be an appropriate factor to consider in determining the length of the sentence for that offense, *see N.J.S.A.* 2C:44–1(a)(2), but it is not ordinarily a basis for imposition of a consecutive sentence for assault.

We also conclude that the trial court failed to provide an adequate statement of reasons for imposition of consecutive sentences for the two robberies and the overall sentence for those offenses. The court seemed to be operating under the assumption that consecutive sentences should be automatically imposed if a defendant is convicted of multiple robberies. That is not what our law provides. Our Supreme Court has recently reaffirmed that a "comprehensive" analysis of the *Yarbough* criteria must be conducted "whenever consecutive sentences are considered." *State v. Miller,* 205 *N.J.* 109, 130 (2011). The trial court did not undertake that analysis in this case. The court also failed to separately consider "the fairness of the overall sentence." *Abdullah, supra,* 184 *N.J.* at 515, 878 A.2d 746. Therefore, defendant must be resentenced.

Accordingly, defendant's convictions are affirmed, but his sentence is vacated and the case is remanded to the trial court for resentencing in conformity with the principles set forth in this opinion.

All Citations

Not Reported in A.3d, 2011 WL 1631124

2011 WL 1631124

End of Document

2010 WL 1427279
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Lee JOHNSON, a/k/a Duval Johnson, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Rodney Johnson, Defendant–Appellant.

Submitted Sept. 30, 2009.
|
Decided April 9, 2010.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 05–03–0305.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant Lee Johnson A–5330–06 (Jay L. Wilensky, Assistant Deputy Public Defender, of counsel and on the brief).

Yvonne Smith Segars, Public Defender, attorney for appellant Rodney Johnson A–6330–06 (Michael C. Kazer, Designated Counsel, of counsel and on the brief).

Edward J. DeFazio, Hudson County Prosecutor, attorney for respondent (Nidara Y. Rourk, Assistant Prosecutor, on the briefs).

Appellants Lee Johnson and Rodney Johnson filed pro se supplemental briefs.

Before Judges FUENTES, GILROY and SIMONELLI.

Opinion

PER CURIAM.

2010 WL 1427279

***1** On February 8, 2005, a Hudson County grand jury indicted defendant Rodney Johnson, charging him with: conspiracy to commit armed robbery in the first degree, *N.J.S.A.* 2C:15–1 and *N.J.S.A.* 2C:5–2; purposeful or knowing murder, *N.J.S.A.* 2C:11–3a(1) or *N.J.S.A.* 2C:11–3a(2); causing the death of another during the commission of an armed robbery (felony murder), *N.J.S.A.* 2C:11–3a(3); three counts of first degree armed robbery, *N.J.S.A.* 2C:15–1; five counts of attempted murder, *N.J.S.A.* 2C:5–1 and *N.J.S.A.* 2C:11–3; five counts of second degree aggravated assault, *N.J.S.A.* 2C:12–1b(1); five counts of second degree aggravated assault with a deadly weapon, *N.J.S.A.* 2C:12–1b(2); three counts of third degree assault against a police officer, *N.J.S.A.* 2C:12–1b(5)(a); third degree knowing possession of a handgun without a permit, *N.J.S.A.* 2C:39–5b; second degree possession of a handgun for an unlawful purpose, *N.J .S.A.* 2C:39–4a; fourth degree knowing possession of a defaced firearm, *N.J.S.A.* 2C:39–3d; and second degree possession of a firearm by a person previously convicted of one or more of the offenses listed in *N.J.S.A.* 2C:39–7b.

That same grand jury indicted defendant Lee Johnson on the following charges: second degree conspiracy to commit armed robbery, *N.J.S.A.* 2C:15–1 and *N.J.S.A.* 2C:5–2; purposeful or knowing murder, *N.J.S.A.* 2C:11–3a(1) or *N.J.S.A.* 2C:11–3a(2); causing the death of another during the commission of armed robbery (felony murder), *N.J.S.A.* 2C:11–3a(3); three counts of first degree armed robbery, *N.J.S.A.* 2C:15–1; three counts of first degree attempted murder, *N.J.S.A.* 2C:5–1 and *N.J.S.A.* 2C:11–3; three counts of second degree aggravated assault, *N.J.S.A* . 2C:12–1b(1); three counts of second degree aggravated assault with a deadly weapon, *N.J.S.A.* 2C:12–1b(2); third degree assault against a police officer, *N.J.S.A.* 2C:12–1b(5)(a); third degree knowing possession of a handgun without a permit, *N.J.S.A.* 2C:39–5b; second degree possession of a weapon with an unlawful purpose, *N.J.S.A.* 2C:39–4a; fourth degree knowing possession of a defaced firearm, *N.J.S.A.* 2C:39–3d; second degree possession of a weapon by a person who has been previously convicted of one or more of the crimes listed in *N.J.S.A.* 2C:39–7b; and third degree giving false information to law enforcement for the purpose of hindering apprehension, prosecution, conviction, or punishment, *N.J.S.A.* 2C:29–3b(4).

Defendants were tried together before the same jury. Rodney Johnson was convicted of the following crimes: second degree conspiracy to commit armed robbery, *N.J.S.A.* 2C:15–1 and *N.J.S .A.* 2C:5–2; purposeful or knowing murder, *N.J.S.A.* 2C:11–3a(1) or *N.J.S.A.* 2C:11–3a(2); murder during the commission of an armed robbery (felony murder), *N.J.S.A.* 2C:11–3a(3); two counts of first degree armed robbery, *N.J.S.A.* 2C:15–1; third degree knowing possession of a handgun without a permit, *N.J.S.A.* 2C:39–5b; and second degree knowing possession of a handgun for an unlawful purpose, *N.J.S.A.* 2C:39–4a.

***2** Lee Johnson was convicted of the following crimes: conspiracy to commit armed robbery, *N.J.S.A.* 2C:15–1 and *N.J.S.A.* 2C:5–2; purposeful or knowing murder, *N.J.S.A.* 2C:11–3a(1) or *N.J.S.A.* 2C:11–3a(2); causing the death of another during the commission of an armed

robbery (felony murder), *N.J.S.A.* 2C:11–3a(3); first degree armed robbery, *N.J.S.A.* 2C:15–1; attempted murder, *N.J.S.A.* 2C:5–1 and *N.J.S.A.* 2C:11–3; aggravated assault, *N.J.S.A.* 2C:12–1b(2); aggravated assault against a law enforcement officer, *N.J.S.A.* 2C:12–1b(5)(a); knowing possession of a handgun without a permit, *N.J.S.A.* 2C:39–5b; possession of a handgun with an unlawful purpose, *N.J.S.A.* 2C:39–4a; knowing possession of a defaced firearm, *N.J.S.A.* 2C:39–3d; and giving false information to law enforcement in order to hinder apprehension, prosecution, conviction, or punishment, *N.J.S.A.* 2C:29–3b(4).

The court sentenced both defendants to aggregate terms of life imprisonment, with an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2, to run consecutive to sentences they are serving on unrelated matters. The court also imposed the required fines and penalties.

Based on the evidence presented before the trial court, and mindful of prevailing legal standards, we affirm.

I

On November 12, 2004, at approximately eleven o'clock in the evening, two men, subsequently identified as defendants, robbed the United Fried Chicken store located on the corner of Martin Luther King Drive (MLK) and Stegman Street in Jersey City. Several people were inside the store at the time, including David Ransom and his cousin James Ransom. David identified defendant Lee Johnson as one of the persons inside the store when he arrived. According to David, Lee was "acting rowdy" and pointing a handgun at a security camera located inside the store.

At one point, Lee and various other individuals left the store. As David and James waited for their food order, Lee and Rodney re-entered the store and demanded that the patrons turn over their wallets. David testified that Lee wore a tan jacket and brandished a handgun.

David threw his wallet onto the floor as directed. Rodney, who was wearing a hooded sweatshirt with "Pepe" on the back and "dark denim with red and white stitching," recovered the wallet. According to David, when Lee made a comment to James Ransom about being "the big dog" in the neighborhood, Rodney began "sucker punching" David in the face. David attempted to block the blows from striking his face. At this point, David heard what sounded like shots being fired; when he turned, he saw Lee shoot his cousin James. Both defendants then "sped out" of the store. After they left, David heard more shots, this time coming from outside the store. James Ransom was subsequently pronounced dead; his death was ruled a homicide.

On cross-examination, David admitted that he did not actually see a gun in Rodney's hand. Moreover, despite not having any doubt that Lee and Rodney had been in the fried chicken store that evening, David conceded that the first time he had positively identified either of the defendants was at the time of trial. In fact, he could not recall whether he gave the police a taped statement after the incident.

***3** Defense counsel then played for the jury a portion of the taped statement David gave to the police on November 13, 2004. On the tape, David identified one shooter as a man in a tan jacket and a second individual who had "[d]reds." By way of explanation for these memory mishaps, David claimed that he was emotionally distraught when he was at the police station after the shooting.

Robert A. Hennigar manages the Closed Circuit Television Unit of the Jersey City Police Department. At the time of this incident, closed circuit television cameras (CCTC) were located in the vicinity of the store where the robbery and shooting had occurred; these cameras were operational on the evening of the incident. According to Hennigar, one camera was installed at the intersection of MLK Drive and Dwight Street and another camera was located at the intersection of MLK Drive and Stegman Street.

The morning after the incident, Hennigar became aware that portions of the robbery had been recorded by both cameras. Hennigar "removed the original VHS tapes that recorded the incident and placed them into evidence and then subsequently [gave] copies [of the tapes] to the homicide unit and the south detectives." He later copied the tapes onto a compact disc and printed his name on the bottom of it with the case identification information. These tapes were admitted by the trial court for the limited purpose of supporting and corroborating the testimony of several police officer witnesses. Portions of the tapes were played as particular police officers testified concerning what he observed when he arrived at the crime scene.

Jersey City Detective Victor Smith was working off-duty in uniform at a nearby recreational center when a woman reported that shots had been fired at the fried chicken store. As he walked towards the corner of MLK Drive and Stegman Street, Smith reported the alleged shooting to the appropriate precinct.

As he neared the store, Smith heard the sound of gunshots and saw simultaneous flashes from the store's window. He confirmed via radio that shots were being fired and requested immediate backup. When he was approximately fifteen feet away from the store, Smith saw defendants leaving the store and "brandishing weapons." By the time Smith arrived, "the gunshots had stopped;" it was at this point that Smith saw a man he recognized as Jamal Roach "just laying there lifeless" in the doorway of the store.

What occurred next can best be characterized as the real-life equivalent of a fictional police drama. According to Smith, Rodney Johnson began shooting at him "at almost point blank range;" Lee Johnson, who "had a gun in his hand as well," also fired at Smith. Rodney then ran across the street and began exchanging gunfire with Smith "for probably forty seconds or more." At this point, another Jersey City police unit arrived and engaged in gunfire with Rodney. Smith estimated that by the time Rodney fled the scene running toward Dwight Street, Rodney had fired "more than seven or eight shots at me and I had fired more than seven or eight shots back at him." In the midst of this harrowing chaos, Smith lost track of Lee Johnson's whereabouts.

***4** As other officers were dispatched to pursue and apprehend Rodney and Lee Johnson, Smith and fellow officers Scott Rogers and Eddie Nieves went inside the store to assess the situation and protect the crime scene. Once inside, Smith saw James laying on the floor and bleeding from his mouth and head; David was also on the floor, crying and "very upset[.]"

According to Rogers, Roach, who was "laying right in front of the doorway," told him he had been shot in the leg. Rogers "briefly checked [James] for a pulse," but he "was in an apparently lifeless condition." Rogers also noted several shell casings surrounding James. The prosecutor played the Composite CD while Rogers testified and directed Rogers to demonstrate his course of action by referring to the scene displayed on the CD.

Officer Christopher Baker testified that as he and Officer Brian Glasser approached the store in response to Smith's radio call they heard shots being fired. According to Baker, he saw an African–American man with dreadlocks and wearing a black jacket, later identified as Rodney Johnson, step over a body laying in the doorway of the store. As he stepped out of the marked police car, he saw that Rodney "backed up a little bit" and began shooting at Smith. Baker then "immediately drew [his] weapon and [ ] discharged a round at him." Rodney continued firing at Smith and thereafter at Baker and Glasser.

While he was attempting to take cover from the gunfire, Baker saw a second African–American man wearing a dark jacket raise a handgun in Smith's direction; that individual was later identified as Lee Johnson. Baker fired two rounds at Lee, and the second round struck him in the area of his lower torso. Lee "flipped over himself and fell"; he then got up and started to walk eastbound on Stegman Street.

When the shooting between Rodney and Smith stopped, Rodney ran south on MLK Drive towards Dwight Street while shooting in the officers' direction. Pursuant to Smith's instructions, Baker and Glasser began to chase Rodney. From a distance of approximately four to five car lengths, Baker observed Rodney "discard a black object to the ground and then continue walking[.]" That object was later identified as David's wallet.

Baker also observed Rodney toss a second black object over a fence; Glasser went to recover this object while Baker continued chasing Rodney. Eventually, other officers arrived at the scene and took Rodney into custody. The prosecutor played a portion of the Composite CD to assist Baker in demonstrating the events he described in his testimony. Although Baker positively identified the jackets that both defendants were wearing, he conceded that the CD did not show Rodney stopping while he was being pursued. Glasser's testimony corroborated Baker's version of the events.

The State's account of the circumstances of Rodney Johnson's arrest came from the testimony of Officer Christopher Monaghan. According to Monaghan, while on duty on the night in question, he heard radio reports of shots being fired. As he and his partner, Officer Mark Minervini, were driving towards the scene of the incident, he heard a "radio transmission[ ] of a foot pursuit going south on MLK Drive now going west on Dwight" Street. Heading towards Dwight Street and Bergen Avenue, Monaghan "observed a black male standing on the ... northeast corner of Dwight and Bergen" and "heard transmissions from officers that were coming west on Dwight that that's him on the corner."

***5** This individual, later identified as Rodney Johnson, was the only person on the street. Monaghan and Minervini stepped out of their marked police vehicle, drew their weapons, and ordered Rodney to show his hands. Instead of doing so, however, Rodney "nonchalantly just walked across Bergen Avenue to the other side never taking his hands out of his pockets" and informed the officers that he was "just here to see [his] son ... in front of the building." Monaghan walked across the street and, because the suspect had refused to show the officers his hands, Monaghan "kicked the individual in his chest, put [his] service weapon away" and "turned him over on his stomach and [ ] started to pat him down."

Rodney was then transported to the Jersey City Medical Center where he was treated for a gunshot wound. The State and both defendants stipulated that "in [the] early morning hours of November 13, 2004[,] Rodney Johnson was treated at the Jersey City Medical Center for a gunshot wound. He was treated and released after stitches were applied."

In a fenced-in backyard nearby, Officer Carlos Lugo found the handgun tossed by Rodney as he was being pursued by the police. Officer Minervini stayed at the scene of the incident to assist the other officers in recovering items which they observed Rodney discard during the pursuit. On Dwight Street near Bergen Avenue, Minervini "observed a wallet next to a chain link fence." He noted that "[i]t didn't look like it had been out there for long because it was raining and the wallet was dry." He picked up the wallet, placed it in a bag and "secured it on [his] person." The wallet contained an identification card in the name of decedent James Ransom.

The State also presented evidence that two handguns, matching the ballistic characteristics of the weapons used by defendants, were recovered. Specifically, the police recovered a black forty

caliber Baretta handgun from the fenced-in yard; seven shell casings were also recovered inside the fried chicken store next to the victim's body. The police also found a loaded Glock 17 nine millimeter handgun laying in the street on the southeast corner of Stegman Street.

At approximately 2:00 a.m. on November 13, 2004, City of Newark Detective Richard Warren received a phone call from central command advising him that Beth Israel Hospital in Newark had reported that "[a] person just arrived at the hospital and [ ] was a victim of a gunshot injury." At the hospital, Warren interviewed the individual who identified himself as Duval Williams. [1] He told Warren that while walking home from the bus "he was approached by two unknown black males and somehow they started asking him questions." He alleged that a verbal altercation ensued and that one of the males "pulled out a gun ... and he was shot in the back area or the buttocks area as he was fleeing from the two individuals."

Warren also interviewed Lola Williams, the woman who had brought "Duval Williams" to the hospital and identified herself as his girlfriend, "Lola Powell." According to Warren, Ms. Williams said that they had been at Duval's grandmother's house before he was shot. When Warren went to the scene of the purported incident, he did not find any evidence to support Duval's version of events. When Warren went to the address where Duval's grandmother allegedly lived, a man answered the door, identified himself as Duval's uncle, and said that Duval's last name was Johnson, not Williams. Both the uncle and grandmother denied that Duval lived at the house and neither could remember the last time that they had seen him. When Warren re-interviewed Lola Williams, she admitted that Lee Johnson, a/k/a Duval Williams, had been shot in Jersey City.

***6** Jersey City Detective Kevin Wilder testified that he collected the clothing worn by Rodney and Lee Johnson when they were both hospitalized and received treatment for gunshot wounds. Wilder collected a "red, black, white and yellow warm [-]up jacket" and a "red, white and blue warm[-]up jacket" from the Jersey City Medical Center both of which were taken from Rodney Johnson.

Lee was treated for his wounds at Newark Beth Israel Hospital Medical Center. Wilder collected from this medical facility the following items of clothing worn by Lee when he was admitted to the hospital under the name "Duval Williams": a pair of brown boots, a white thermal long sleeve shirt, a grey hooded sweatshirt, a pair of black and blue gym shorts, boxer shorts, and a pair of blue jeans with a black and white leather belt. Wilder confirmed that Lee was not wearing a jacket when he first reported for treatment of his gunshot wound.

On November 13, 2004, Jersey City Detective Timothy Kaminski received a phone call from a woman who resided across the street from the fried chicken store, claiming to have found certain suspicious items on her property. When Kaminski reported to the property he saw "two jackets and some drug paraphernalia on the ground which were hanging on the fence of the property."

Kaminski described the items of clothing as brown Carhart jackets, "one with a hood, one without." Officer Smith identified one of the jackets as the one worn by Lee during the incident.

The State also presented expert testimony concerning James's manner of death and identification of the handguns and spent shell casings recovered from the scene. According to the State's firearm expert, the handgun Glock model 17 recovered by the police on the street next to the fried chicken store was the weapon used to kill James. This handgun also matched two spent casings found on the floor of the store. The expert also opined that the third bullet removed from James's body was fired from the forty caliber Baretta, the weapon recovered by the police from the fenced-in yard. The same Baretta also discharged five of the spent casings found inside the store.

The State called Jersey City Detective Calvin Hart to testify about his efforts to interview Jamal Roach and Charles Porter. According to Hart, by the time he arrived at the scene of the incident, Roach, the individual who had been shot and was laying in the doorway, had been transported to Jersey City Medical Center. When Hart attempted to speak to Roach at the hospital, he was "uncooperative" and "evasive."

Hart had a similar experience when he attempted to interview Porter. According to Hart, when Porter was shot in the store, he "ran up the street to a friend's house and a friend called the ambulance at that time." Detectives at the scene were able to locate him from both "a trail of blood" in the store and "the phone call to the Medical Center." Hart testified that Porter too was "[e]vasive, like [he] didn't really want to be involved."

***7** By the time the cases against the Johnson brothers came to trial, Roach was serving a four-year sentence on an unrelated matter. Counsel for Rodney Johnson called Roach to testify as one of the victims of the shooting. According to Roach, while he was in the fried chicken store, "two people came in, told everybody to lay down and started shooting." He described one of the men as a short "light skinned" African–American man with dreadlocks; he described the other assailant as a tall "brown skinned" African–American man with dreadlocks.

Roach testified that the "light skinned" man shot him twice. According to Roach, however, Lee and Rodney were not the men who shot him. In fact, Roach testified that Rodney was laying on the floor next to him during the robbery. On cross-examination, Roach conceded that in the statement he gave to the police three hours after the incident, he told the officer who interviewed him that he could not describe the individuals who shot him.

Porter was called as a witness by the attorney who represented Lee Johnson. According to Porter, while inside the store, he saw "five or six guys" come in "with dreds intending to rob the chicken spot;" one of the men ordered "everybody [to] get down." Because he "refused" to lay down, one of the men shot him and "took off after that[.]" Porter confirmed that he told the responding

officers that the shooter wore a "green army fatigue jacket." Similar to Roach's account of events, Porter testified that neither Lee nor Rodney Johnson were among the shooters.

After being advised of their rights on the record, both defendants decided not to testify.

II

Defendant Rodney Johnson now appeals and, through his assigned counsel, raises the following arguments:

POINT I

THE DEFENDANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE REPEATED PLAYING OF THE COMPOSITE POLICE SURVEILLANCE TAPE DURING TRIAL PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL. (Not Raised Below)

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED HARMFUL ERROR BY FAILING TO RECOGNIZE THE PREJUDICIAL IMPACT THAT PERMITTING THE VICTIM'S SISTERS TO REMAIN IN THE COURTROOM HAD ON THE JURY.

POINT III

THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED BECAUSE OF A VIOLATION OF THE SEQUESTRATION ORDER.

POINT IV

THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED WHEN THE PROSECUTOR ELICITED TESTIMONY FROM WHICH THE JURY COULD INFER THAT THE DEFENDANT WAS A "BAD PERSON." (Not Raised Below)

POINT V

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER AND AGGRAVATED MANSLAUGHTER ON COUNT TWO. (Not Raised Below)

POINT VI

THE AGGREGATE BASE CUSTODIAL SENTENCE OF LIFE PLUS 25 YEARS WAS MANIFESTLY EXCESSIVE AND CONSTITUTED AN ABUSE OF DISCRETION.

A. THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING BASE CUSTODIAL TERMS ON THE DEFENDANT'S CONVICTIONS THAT EXCEEDED THE STATUTORILY AUTHORIZED MINIMUM BASE TERMS.

***8** B. THE DEFENDANT'S CONVICTIONS FOR ROBBERY ON COUNTS FOUR AND FIVE SHOULD HAVE BEEN MERGED.

C. THE TRIAL COURT ABUSED IT'S DISCRETION IN RUNNING THE SENTENCES IMPOSED ON COUNTS TWO AND FIVE CONSECUTIVE TO EACH OTHER.

Defendant Rodney Johnson's pro se supplemental brief raises the following arguments:

POINT I

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AND DUE PROCESS IN VIOLATION OF THE *U.S. CONST.,* AMEND. VI AND XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10, WHEN THE TRIAL COURT *SUA SPONTE* CLOSED THE COURTROOM DURING JURY SELECTION. (Not Raised Below)

POINT II

THE FAILURE OF THE TRIAL COURT TO ADEQUATELY APPRAISE [sic] THE JURY OF THE NECESSITY OF RETURNING A SEPARATE VERDICT AS TO EACH DEFENDANT IN THE TRIAL OF TWO BROTHERS WAS ERRONEOUS AND PREJUDICIAL, NECESSITATING REVERSAL. *U.S. CONST.,* AMEND. XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10. (Not Raised Below)

POINT III

THE TRIAL COURT'S JURY CHARGE AS TO CIRCUMSTANTIAL EVIDENCE WAS HIGHLY PREJUDICIAL, NECESSITATING REVERSAL. *U.S. CONST.,* AMEND. XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10. (Not Raised Below)

POINT IV

THE TRIAL COURT'S JURY CHARGE CONCERNING THE DEFENDANT'S EXERCISE OF HIS RIGHT NOT TO TESTIFY WAS BIASED AND PREJUDICIAL, NECESSITATING REVERSAL. *U.S. CONST.,* AMEND. VI, XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10. (Not Raised Below)

Defendant Lee Johnson, through his assigned counsel, raises the following arguments in support of his appeal:

POINT I

THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL FOLLOWING TWO HIGHLY PREJUDICIAL IRREGULARITIES OCCURRING CLOSELY IN TIME. *U.S. CONST.,* AMEND. XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10.

A. A KEY STATE'S WITNESS WAS EVIDENTLY COACHED DURING HIS TESTIMONY, AND THE COURT FAILED TO HOLD A HEARING OR CONDUCT INDIVIDUAL JUROR *VOIR DIRE.*

B. THE COURT ALSO ERRED IN DENYING A MISTRIAL FOLLOWING A PARTICULARLY HEATED SPECTATOR OUTBURST.

C. THE INCIDENTS IN COMBINATION NECESSITATED THE GRANT OF A MISTRIAL.

POINT II

BECAUSE THE STATED [sic] FAILED TO DEMONSTRATE CHAIN OF CUSTODY OF THE GUN PURPORTEDLY USED BY THE DEFENDANT, ITS ADMISSION CONSTITUTED REVERSIBLE ERROR. *U.S. CONST.,* AMENDS. V, VI, AND XIV; *N.J. CONST.* (1947), ART. 1, PARS. 1, 10.

POINT III

THE FAILURE OF THE TRIAL COURT TO ADEQUATELY APPRISE THE JURY OF THE NECESSITY OF RETURNING A SEPARATE VERDICT AS TO EACH DEFENDANT IN THE TRIAL OF TWO BROTHERS WAS ERRONEOUS AND PREJUDICIAL NECESSITATING REVERSAL. *U.S. CONST.,* AMEND. XIV; *N.J. CONST.* (1947), ART. 1, PAR 10. (Not Raised Below)

POINT IV

THE TRIAL COURT'S JURY CHARGE AS TO CIRCUMSTANTIAL EVIDENCE WAS HIGHLY PREJUDITIAL, NECESSITATING REVERSAL. *U.S. CONST.,* AMEND. XIV; *N.J.CONST.* (1947), ART. 1, PAR. 10 (Not Raised Below)

POINT V

THE TRIAL COURT'S JURY CHARGE CONCERNING THE DEFENDANT'S EXERCISE OF HIS RIGHT NOT TO TESTIFY WAS BIASED AND PREJUDICIAL, NECESSITATING REVERSAL. *U.S. CONST.,* AMENDS VI, XIV; *N.J. CONST.* (1947), ART. 1 PAR. 10 (Not Raised Below)

***9** POINT VI

THE TRIAL COURT IMPOSED AN EXCESSIVE SENTENCE, NECESSITATING REDUCTION.

In defendant Lee Johnson's supplemental brief, the following arguments are raised:

POINT I

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AND DUE PROCESS IN VIOLATION OF THE *U.S. CONST.,* AMEND. VI AND XIV; *N.J. CONST.* (1947), ART. 1, PAR. 10 WHEN THE TRIAL COURT *SUA SPONTE* CLOSED THE COURTROOM DURING JURY SELECTION. (Not Raised Below)

POINT II

THE DEFENDANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE REPEATED PLAYING OF THE COMPOSITE POLICE SURVEILLANCE TAPE DURING TRIAL PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL. (Not Raised Below)

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED HARMFUL ERROR BY FAILING TO RECOGNIZE THE PREJUDICIAL IMPACT THAT PERMITTING THE VICTIM'S SISTERS TO REMAIN IN THE COURTROOM HAD ON THE JURY.

POINT IV

THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED WHEN THE PROSECUTOR ELICITED TESTIMONY FROM WHICH THE JURY COULD INFER THAT THE DEFENDANT WAS A "BAD PERSON." (Not Raised Below)

We are satisfied that none of the arguments raised by defendants warrant an outright reversal of their respective convictions. Despite this, we are compelled to comment on the trial court's decision to remove the public from the courtroom at the commencement of jury selection. Defendant Rodney Johnson argues in Point I of his supplemental pro se brief that the trial court's instructions in this regard violated his right to a public trial as guaranteed by the Sixth Amendment of the

Constitution of the United States and Article 1, Paragraph 10 of the New Jersey Constitution. Before commenting on the rest of the arguments raised by defendants, we are compelled to address this threshold issue.

At the start of the trial, but before any prospective jurors had arrived in the courtroom, the trial judge made the following announcement to all present:

> Alright, ladies and gentlemen, let me just explain something to you. I see that there are five people here who have come to view this trial and you're welcome here and you know that you've been here before and you're always welcome.
>
> The only problem is I have a very small courtroom and I'm trying to call up as many jurors as I can and what's going to happen is I'm going to end up filling these boxes and they're going to be standing up there and I just don't have room for you and I can't do anything where I'm keeping you-I have to keep you separate from these jurors and there's no way I can do it in a courtroom this small.
>
> So I apologize to you but *I'd like you to leave if you would please, at least until we get you know through some of the jurors* and obviously anything that happens during the case you'll be welcome—*you know you'll come back in and you know once we have the fourteen in the box, you're free to come and go as you please.* But I just don't have the room. I just don't have the physical room.
>
> ***10** You see that I only have four rows and I have two defendants and I need—I'm calling up seventy jurors and it's not really—probably not even enough but that's all I can fit here and I can't fit that many if I have you guys, okay? *So you know obviously you can stay in the hallway but the only thing is if you would stay down towards the other end, I—it's very important that you not mingle with these jurors in any way.*
>
> You certainly—we don't want that to happen, it's not permitted and you certainly don't want anybody saying anything about you and you know that you were there, you were talking to somebody or anything like that. So you'll end up riding up and down the elevators with the jurors and stuff like that. You can't talk to them, okay?
>
> So thanks very much, I really appreciate it but I'm going to need all those seats.
>
> [(Emphasis added.)]

We will review these instructions in the context of the following analytical framework.

The constitutional guarantee to a public trial, as expressed in both the federal and State constitutions, applies to all phases of the trial, including jury selection. *Press–Enterprise Co. v.*

Superior Court of Cal., 464 *U.S.* 501, 104 *S.Ct.* 819, 78 *L. Ed.*2d 629 (1984); *State v. Cuccio,* 350 *N.J.Super.* 248, 260, 794 A.2d 880 (App.Div.), *certif. denied,* 174 *N.J.* 43 (2002). If a defendant is denied the right to a public trial, the error is deemed "structural," which mandates reversal of the conviction without a showing that the defendant was prejudiced by the denial. *Neder v. United States,* 527 *U.S.* 1, 7–9, 119 *S.Ct.* 1827, 1833, 144 *L. Ed.*2d 35, 45–46 (1999); *Waller v. Georgia,* 467 *U.S.* 39, 49–50, 104 *S.Ct.* 2210, 2217, 81 *L. Ed.*2d 31, 40–41 (1984).

That being said, the right to a public trial is not absolute. The trial judge retains the authority to impose "reasonable and, as circumstances may dictate, well-considered limitations on access to a trial in order to prevent situations which might impede the progress or fairness of the trial, as long as basic rights involved are not unduly infringed." *Cuccio supra,* 350 *N.J.Super.* at 266, 794 A.2d 880.

In *Cuccio,* the trial judge removed from the courtroom all members of the defendant's and victim's family, including the defendant's brother who was a lawyer and had been assisting defense counsel in the case, and "all spectators." *Id.* at 265, 794 A.2d 880. The judge in *Cuccio* gave as reasons for the removal: (1) the possibility of spectators and family members mingling with potential jurors; and (2) not enough seats to accommodate the public and the number of jurors on the panel. *Ibid.*

Over the defendant's strong objections, jury voir dire began and continued until the jury was selected, outside the presence of all of the defendant's and the victim's family members. *Id.* at 258, 794 A.2d 880. The process to select the jury took more than a day. *Ibid.* The trial judge denied the defendant's motion for mistrial. *Ibid.* Against these facts, we reversed the defendant's conviction, holding that the measures taken by the trial court violated the defendant's right to a public trial. *Id.* at 265, 794 A.2d 880. With respect to the trial court's concerns about the possibility of jurors mingling with spectators and the problem associated with the size of the courtroom, we made the following observations:

> ***11** At the time the judge ordered the exclusion, there was nothing in the record to suggest a likelihood that the families or other spectators were likely to make improper remarks within the hearing of the jurors. Moreover, it seems that reasonable alternatives to closure were available. For example, the judge could have instructed the families and other spectators not to mingle with the potential jurors or say anything concerning the case that might be overheard by them. If the problem was primarily one of sufficient seating, additional chairs could have been brought into the courtroom so that at least some members of defendant's family and the victim's family could observe the jury selection process. The judge's concern regarding the families or other spectators mingling with the prospective jurors could also have been addressed by an order requiring observers to be segregated from prospective jurors, such as by keeping some of the prospective jurors in other parts of the courthouse until they were needed in the courtroom. The judge might even have arranged for temporary use of a larger courtroom for jury selection, and then moved the balance of the trial back to his own courtroom.

[*Cuccio, supra,* 350 *N.J.Super.* at 265–66, 794 A.2d 880.]

We recently had occasion to revisit this issue in *State v. Venable,* ——*N.J.Super.* —— (App.Div.2010) (slip op. at 5), where the trial court ordered that, for security reasons, "individuals" from either the "victim's family" or the "defendants' family" be removed from the courtroom during jury selection. In rejecting the defendant's argument that these restrictions violated his right to a public trial, we noted:

> First, there is no evidence that any members of the victim's or defendants' families were in the courthouse and desired to attend jury selection. Thus, there is no basis for a finding that any specific person was excluded from the jury selection stage of the trial. Second, neither defendant objected to the court's statement that members of the victim's and defendants' families would not be allowed in the courtroom during jury selection. As a result, the court did not have an opportunity to explore whether there were other measures available, short of total exclusion of family members, for preserving the security of the courtroom during jury selection.
>
> [*Ibid.*]

Here, the trial judge's instructions were apparently directed at "five people who [had] come to view this trial." Addressing this group directly, the judge informed them that due to the small size of the courtroom, the number of prospective jurors expected, and the need to keep the public "separate" from the prospective jurors, they would have to leave the courtroom. Another key factor here is the duration of the exclusion. In this respect, the trial judge advised the five spectators that they would have to leave the courtroom "at least until we get ... through some of the jurors ... [Y]ou'll come back in ... once we have the fourteen in the box, you're free to come and go as you please."

***12** From these words we infer that the judge intended to limit the duration of the exclusion to the time it took for the voir dire process to excuse a sufficient number of prospective jurors to free up enough space in the courtroom to accommodate the five members of the public. Although we are unable to ascertain how much time transpired before the members of the public were able to return, we are satisfied that such period of time was constitutionally insignificant.

As we noted in *Venable,* although the right to a public trial is constitutionally guaranteed, "this does not mean that any exclusion of persons from the courtroom during the course of trial proceedings, no matter how brief or insignificant, automatically constitutes a denial of the right to a public trial that necessitates a new trial." *Venable, supra,* —— *N.J.Super.* at —— (slip op. at 7). In certain circumstances, the temporary exclusion of the public from a criminal trial may be too "trivial" to warrant the reversal of an otherwise proper conviction. *Ibid.*

As we explained in *Venable,* the term "trivial" is not synonymous to, or the functional equivalent of, the concept of harmless error. *Id.* at —— (slip op. 8). Rather, in determining whether a particular violation of the right to a public trial may be considered "trivial," a reviewing court "looks ... to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment." *Ibid.* (quoting *Peterson v. Williams,* 85 *F.3d* 39, 42 (2d Cir.), *cert. denied,* 519 *U.S.* 878, 117 *S.Ct.* 202, 136 *L. Ed.*2d 138 (1996)).

Here, the temporary exclusion of members of the public was limited in both scope and duration, and there was no objection by defense counsel at the time the court gave the order. We are thus satisfied that the circumstances presented here are more in line with the situation we confronted in *Venable* than in *Cuccio.*

We next turn our attention to two incidents that occurred during the trial. Defendants argue that the prejudice caused by these incidents was of such magnitude that the trial court committed reversible error in denying their applications for a mistrial. We disagree.

The first of these incidents occurred during David Ransom's testimony. The court decided to take a short recess while counsel for Rodney Johnson was cross-examining David Ransom. Counsel alleged that the witness's father, who was not part of the court's sequestration order, spoke to the witness in a hallway outside the courtroom while the trial was in recess.

According to Rodney's defense counsel, the father advised David "that if [he] got confused, just make sure that [he told] the court and th[e] jury that those are definitely the two boys who killed [James]." David denied the allegations in response to the trial judge's questions about the matter. Defense counsel did not call David's father as a witness.

***13** The second incident occurred while Officer Rogers was testifying about the circumstances of James's death. Two women seated in the spectator area of the courtroom, later identified as James's sisters, made a clearly audible, though indiscernible, comment. The court immediately instructed them to leave the courtroom, prompting one of the women to yell out: "I hope that mother fucker die[s] ... I'll kill those fuckers." The trial judge gave the following instructions to the jurors: "I'm going to excuse you. Obviously emotional testimony, you'll ignore the outbursts, okay? And they should not influence you in any way in your decision in this case. But please step out for a moment, okay?"

Defendants moved for a mistrial; Rodney's counsel argued that the motion "goes [ ] beyond just the outburst in the courtroom. It ties in perfectly with what happened out in the hallway before we came back from the break with [David]." Counsel asserted that the comments made by members of the victim's family in the presence of the jury had the capacity "to inflame" the jurors and prejudice

defendants as the men who caused this pain. Coupled with "the vulgarity and the nastiness ... directed at our clients," in defense counsel's opinion, the only remedy was to declare a mistrial.

Counsel emphasized that:

> [W]e do not have just one isolated incident and if that was in and of itself I probably would not be asking for a mistrial but within the last hour we've had two significant things happen regarding this trial. We got a father coaching his son and then we have a family member of the victim speak out and basically almost threaten our clients.

The State argued that the incidents were two separate and distinct events, subject to remediation with an appropriate curative instruction from the court.

The trial court declined to address, at that time, the incident involving David Ransom's testimony. With respect to the conduct of decedent's sisters, the judge characterized the event as a "very unfortunate outburst." However, the judge concluded that she had "already instructed the jury not to pay any mind to it." The judge also indicated that she would repeat the curative instruction concerning the incident as part of her general charge to the jury at the end of the case. When the jurors returned to the courtroom, the judge again instructed them to disregard the outburst and "not be governed by prejudice, sympathy or emotions."

"[A] mistrial should be granted 'only in those situations which would otherwise result in manifest injustice.' " *State v. Harris,* 181 *N.J.* 391, 518, 859 A.2d 364 (2004), *cert. denied,* 545 *U.S.* 1145, 125 *S.Ct.* 2973, 162 *L. Ed.*2d 898 (2005) (quoting *State v. DiRienzo,* 53 *N.J.* 360, 383, 251 A.2d 99 (1969)). "Furthermore, '[t]he granting of a mistrial is within the sound discretion of the trial judge.' " *Ibid.* (quoting *DiRienzo, supra,* 53 *N.J.* at 383, 251 A.2d 99). Thus, a trial court's denial of a mistrial is not disturbed absent an abuse of discretion or "unless 'manifest injustice would ... result." *Ibid.* (quoting *State v. LaBrutto,* 114 *N.J.* 187, 207, 553 A.2d 335 (1989)).

***14** Mindful of these legal principles, we are satisfied that the trial judge did not err in denying defendants' applications for a mistrial. As to David Ransom's testimony, the judge noted that, at the time the alleged improper contact occurred, the witness had completed his testimony concerning the events in question and had positively identified the defendants as the culprits. Despite any alleged attempt by his father to influence his testimony, there was nothing inconsistent about his testimony after the recess. The witness reaffirmed his identification of defendants as the men who shot James.

The judge also properly responded to the outburst caused by decedent's sisters; the individuals were removed from the courtroom, the jury received an immediate curative instruction to disregard the incident, and the jury was removed from the courtroom directly after the instruction to allow counsel to protect the record by placing any objections or applications before the court for disposition. Under these circumstances, we discern no error in the judge's tacit decision to forgo questioning each juror separately to determine whether he or she was still capable of judging the evidence presented fairly and impartially. *State v. Wilson,* 335 *N.J.Super.* 359, 368–69, 762 A.2d 660 (App.Div.1999), *aff'd,* 165 *N.J.* 657, 762 A.2d 647 (2000).

The rest of defendants' arguments lack sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(2).

Affirmed.

All Citations

Not Reported in A.2d, 2010 WL 1427279

Footnotes

1 Defendant Lee Johnson is also known as Duval Johnson.

2007 WL 674655
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Anthony KENNEBREW, Defendant-Appellant.

Submitted Jan. 18, 2007.
|
Decided March 7, 2007.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 04-01-0048.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Joseph L. Bocchini, Jr., Mercer County Prosecutor, attorney for respondent (Dorothy Hersh, Assistant Prosecutor, of counsel and on the brief).

Before Judges CUFF, WINKELSTEIN and BAXTER.

Opinion

PER CURIAM.

***1** Defendant Anthony Kennebrew appeals from his conviction on charges of third-degree aggravated assault, in violation of *N.J.S.A.* 2C:12-1b(2)(count one); fourth-degree aggravated assault for pointing a firearm, in violation of *N.J.S.A.* 2C:12-1b(4) (count two); and second-degree possession of a firearm for an unlawful purpose, in violation of *N.J.S.A.* 2C:39-4a (count three). Defendant was found not guilty of unlawful possession of a weapon, a knife, and possession of a weapon, namely the knife, for an unlawful purpose under counts four and five. After merging counts one and two into count three, the judge sentenced defendant to a six-year term of imprisonment with a three-year period of parole ineligibility. Defendant appeals.

On appeal, defendant argues:

> POINT I-THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT ERRED AND MISLED THE JURY REGARDING THE IMPORTANCE AND WEIGHT TO BE GIVEN THE INDICTMENT BY INSTRUCTING THAT, SINCE THERE WAS AN INDICTMENT HANDED DOWN BY THE GRAND JURY IN THIS CASE, THE CIRCUMSTANCES WERE DIFFERENT FROM A COMPLAINT CHARGING A NON-CRIME.
>
> POINT II-THE TRIAL COURT SHOULD HAVE SUPPRESSED THE OUT OF COURT AND IN-COURT IDENTIFICATION OF THE DEFENDANT BY THE COMPLAINING WITNESS.
>
> POINT III-THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT IN VIOLATING ITS DISCOVERY OBLIGATIONS BY FAILING TO ADVISE DEFENDANT THAT THE VICTIM WAS ABLE TO IDENTIFY THE DEFENDANT WHEN DISCOVERY INDICATED THAT HE WAS UNABLE TO SO IDENTIFY HIM.
>
> POINT IV-THE SENTENCE WAS EXCESSIVE.
>
> POINT IV(A)-THE SENTENCE WAS EXCESSIVE DUE TO THE MISAPPLICATION OF AGGRAVATING AND MITIGATING FACTORS.
>
> POINT IV(B)-THE SENTENCE IMPOSED WAS IN VIOLATION OF BLAKELY AND APPRENDI.

As to Point I, we agree that the judge's comment to the seventy jurors assembled in the courtroom during voir dire that the case before them was different from a municipal court complaint because twenty-three grand jurors had considered the evidence and decided to return an indictment, was both unnecessary and highly prejudicial. We conclude that the comment, to which defense counsel immediately objected, had the clear capacity to cause the jury to reach a verdict it might otherwise not have reached.

As to Points II and III, we agree with defendant that the assistant prosecutor's failure to disclose to defense counsel the ability of the victim to identify his assailant until after defense counsel had opened to the jury constitutes prosecutorial misconduct. We agree further that the court erred in denying defendant's request for a mistrial as a result of that belated disclosure. Although the State reconsidered and ultimately chose not to elicit such identification testimony on direct, and the in-court identification of defendant by the victim ultimately resulted from testimony elicited by defendant, we nonetheless conclude that the court's improper denial of the mistrial motion set in motion a series of events that ultimately culminated in the in-court identification. In light of our

conclusion that defendant's arguments on Points I, II and III warrant reversal, we do not address defendant's claims regarding sentencing.

I.

***2** On July 5, 2003, at 11:45 p.m., on a dark street corner in the City of Trenton, Maurice Williams parked his car in order to visit his girlfriend. As he emerged from his vehicle, a black male nearly struck Williams with his vehicle as Williams stepped into the street. Sade Spence and Tashawn Ford, two seventeen-year-old females who were eyewitnesses, described the vehicle as a blue four-door Chevy Cavalier Wagon. They testified that as Williams jumped out of the way, he screamed at the driver "stay the f--- out of the street," and made a hand gesture similar to "giving the finger." Williams put down the coffee cup he was holding, as if to prepare for a fistfight. The driver of the vehicle, having already stopped his car, retrieved a gun from his glove compartment, emerged from his car with the gun in hand and said to Williams, "I'll shoot you." From a distance of seven to eight feet away, the driver shot Williams in the right knee. Spence and Ford described the shooter as approximately six feet tall, weighing 180 pounds, dressed in blue shorts, a white t-shirt and with hair braided or in short cornrows down the back of his neck.

The first officer to arrive at the scene was Patrol Officer Michael Palinczar, who spoke to Spence and Ford, and obtained from Ford a statement that "she thought she knew the suspect from the neighborhood," but she did not provide his name. Spence, in contrast, told Palinczar that she did not know who the suspect was. She stated that all she saw was a car speeding away and Williams running toward her after he was shot. After speaking with them briefly, Palinczar made arrangements for a detective to come to the scene to conduct a more detailed interview. Subsequently, Detective Wilfredo Rodriguez arrived and interviewed both Spence and Ford who, unlike in their statements to Palinczar, said the shooter "was known to them as Raga." [1] Both women provided a description of what "Raga" looked like and what he was wearing. On cross-examination, Rodriguez acknowledged that although both said "Raga" was an individual "that they knew from the area ... they couldn't be sure of his identity due to the poor lighting conditions on the street."

Detective Rodriguez then proceeded to the hospital to interview the victim Williams. Rodriguez testified that Williams told him "that he had a verbal confrontation with the gentleman, but he didn't say, he didn't give me a description of the gentleman."

On July 31, 2003, Spence was asked to give a formal statement concerning the events she had witnessed on July 3, 2003. During the course of that statement, a detective asked her to view a photo array and to indicate whether she recognized any of the individuals depicted in the array as the person who shot Williams. From the photo array, she picked out a photograph of defendant.

After Williams was released from the hospital, Detective Sheila Tatarek, the same detective who had prepared the photo array viewed by Spence, asked Williams to come into police headquarters to view a photo array. Tatarek testified that Williams was unable to identify any of the photographs as depicting the person who shot him on July 3, 2003. At no time prior to the trial did the State ever disclose that, despite Williams's earlier failure to identify his assailant, he had subsequently indicated he could do so.

***3** During a sidebar in the midst of Tatarek's testimony, defense counsel told the judge that the prosecutor had informed her earlier that day, after the testimony of Palinczar and Rodriguez had been completed, that contrary to all of the pretrial discovery in the case, Williams was now able to identify defendant as the person who shot him. In response, the assistant prosecutor stated that he and an investigator had met with Williams the prior afternoon, and Williams told them that when he was initially shown the photographic array by Detective Tatarek in July 2003, he did recognize the person who shot him, but did not make an identification because he was afraid of retribution. When the assistant prosecutor and the investigator asked Williams during that conversation if he could make an in-court identification, he answered in the affirmative. The judge asked the assistant prosecutor during the sidebar why he had not told defense counsel of that information the prior afternoon as soon as he learned it, which would have been before the openings and witness testimony the next morning. The assistant prosecutor stated "because this is the first time I have had an opportunity to tell her about this development."

The judge chastised the assistant prosecutor for this omission, noting that his delay in revealing such critical information had put both defense counsel and the court in a very difficult situation. Defense counsel argued that the State's delay in providing the new information about Williams's ability to identify defendant as his assailant was extremely prejudicial because in her opening to the jury she had emphasized that Spence would be the only witness to make an in-court identification. Defense counsel reminded the court that she had specifically told the jury in her opening that Williams would be unable to do so. After arguing that the resulting prejudice could not be cured, the defense moved for mistrial.

The State objected to defendant's motion for a mistrial by noting that the "evidence at issue is not before the jury right now. So, as far as a mistrial goes, there is nothing now in front of this jury that would cause a mistrial.... [I]t is really a motion in limine that is being made by [defense counsel]."

In response, defense counsel argued that the proposed in-court identification of defendant by Williams was "the most prejudicial identification that could possibly be.... There is no one else sitting next to me, and I'm clearly the defense attorney. How is that a valid identification?" The judge noted that defendant's objection went to the weight of any such in-court identification, but not to its admissibility. The court gave defense counsel the opportunity to request a *Rule* 104(a)

hearing outside the presence of the jury to determine whether the in-court identification would be permitted. Defense counsel indicated that rather than immediately proceed with the *Rule* 104(a) hearing, she would instead speak to Williams along with her investigator and show him the photo array to see whether he could still make an identification of defendant. She would then decide whether a 104(a) hearing would be necessary. The court agreed with that procedure, and the sidebar ended with the court formally denying the defense request for a mistrial.

***4** After court concluded for the day, defense counsel and her investigator met with Williams and asked him to review the photographs in the array and indicate if he could identify any of the six photographs as depicting the person who shot him. Williams picked out two photos, and indicated that the individuals shown in those two photos resembled the person who shot him. When asked to initial the photos, he refused to do so. Neither of the men depicted in the photographs was defendant.

The next morning, before the jury entered the courtroom, the State indicated that it would not, contrary to its assertion the day before, ask Williams to identify defendant as his assailant. Despite the assistant prosecutor's statement that he would not ask Williams to identify defendant as the shooter, defense counsel insisted that she had the right to question Williams about his failure to identify defendant in the photo array that she and her investigator had presented to Williams the day before.

When the defense argued that Williams's failure to identify defendant had a bearing upon his credibility, the State disagreed, asserting that credibility was not an issue because the State would not be asking Williams to identify the person who shot him. The assistant prosecutor contended that because the State had decided not to ask Williams to make an in-court identification, there was no need for the defense to question Williams about his inability to select the defendant's photograph the day before. In effect, the State argued that whatever prejudice might potentially have arisen due to the State's failure to tell defense counsel before her opening about the new developments, any such prejudice was neutralized, and indeed completely eliminated, by the State's decision not to elicit an in-court identification from Williams.

Unpersuaded, defense counsel insisted that defendant had the right to cross-examine Williams on anything that was "directly relevant to this case." The jury then entered the courtroom, and the State's examination of Williams was extremely brief and was limited to testimony of being shot in the leg by a man who got out of a car. The State, consistent with its earlier representation, never asked Williams to identify defendant. During the cross-examination of Williams, when it became clear that defense counsel intended to question Williams about his failure to make an out-of-court identification the day before, the judge excused the jury and conducted a *Wade*[2] hearing. With Williams seated in the witness stand, the judge handed him all of the photographs at the same time and asked Williams to indicate whether any of those photographs depicted his assailant.

Williams answered, stating two of the photographs looked the same to him and he believed that one of the two was the person who shot him. In fact, neither of the two photographs selected by Williams during the 104(a) hearing was a photograph of defendant. While Williams was on the stand, the State asked him to look at the defendant and indicate whether the defendant is the person who shot him, to which Williams answered, "yes." At that point, the assistant prosecutor stated, "Judge, I'm going to ask that on redirect. I just want everybody to be on notice of that. Thank you judge." When the jury returned to the courtroom, defense counsel continued her cross-examination by again showing the six photographs to Williams. After three prior unsuccessful attempts to select defendant's photograph, now, for the first time, in front of the jury, Williams selected two photographs, one of which depicted defendant.

***5** After establishing through cross-examination that Williams had been unable to select defendant's photo the day before when he met with her and her investigator, she then asked him a question about the *Rule* 104(a) hearing that had occurred moments earlier. In particular, she asked Williams whether his identification of her client outside the presence of the jury was "because he's the only person sitting here." Williams answered, "no." We emphasize that at the point defense counsel asked Williams about his out-of-court identification of defendant, there had been no questions from the State pertaining to either an in-court identification before the jury or identification made by Williams a few minutes earlier during the *Rule* 104(a) hearing.

After Williams denied that his in-court identification resulted merely from defendant being seated next to defense counsel in the courtroom, the State on redirect asked Williams whether he could see in the courtroom the person who shot him. When he said yes, the State asked him to point to that person and identify him, whereupon Williams pointed to defendant.

The State's next witness was Sade Spence, who, in response to a question from the assistant prosecutor, pointed to defendant as the person she observed shoot Williams on July 3, 2003. She stated that she was "sure" when she selected defendant's photo from the array that he was in fact the person she observed with a gun that day. On cross-examination, Spence admitted she was currently on probation, and acknowledged that her sister was Williams's girlfriend.

The State's next witness was Ford, who corroborated the testimony of Spence and stated that when she saw defendant get out of his car she thought that he and Williams were going to fight, but that instead defendant "just shot him." The State then rested.

The defense called a total of four witnesses. The first to testify were defendant's sister and niece, Keisha Phelps and Shaylin Phelps. Each stated that in July 2003, defendant had short hair, rather than the cornrows or braids that Spence and Ford indicated was the hairstyle of defendant the night they saw him shoot Williams. Keisha Phelps produced a photograph depicting defendant

with short hair which she claimed was taken on July 4, 2003, the day before Williams was shot, but the photograph was not marked with a date indicating when it had been taken.

Defendant's third witness was his girlfriend Sara McMillan, who testified that at the time Williams was shot defendant was with her at the Country House Motel. She produced a copy of the motel registration certificate that she had signed. McMillan acknowledged that it takes approximately ten minutes to drive from the motel to the corner of Rutherford and Hoffman, where Williams was shot. Although the motel registration certificate indicated that two people would be occupying the room, the name of the person sharing the room with her was not specified. McMillan acknowledged that on July 5, 2003, the day Williams was shot, she owned a station wagon.

***6** Defendant's final witness was Martin Alvarez, the investigator who had, along with defense counsel, shown the photo array to Williams the day before he testified. Alvarez described Williams's failure to select defendant's photo from the six that were shown to him.

The jury retired to deliberate, and returned a verdict finding defendant guilty of the three crimes we have described.

II.

We turn first to defendant's claims regarding the comments made by the trial judge during voir dire. Jury selection began on August 10, 2004. One juror, identified as juror number 6, responded to the judge's questioning and indicated that he had been the victim of a crime. In open court, rather than at sidebar, he described an incident in which animal rights activists had come into his store and were protesting. An altercation ensued, as a result of which the juror was charged with five counts of assault. He stated that although the charges had no basis, "they were able to go to the courthouse and file against me without any evidence, where it stated clearly in the police report that I did not assault them. And I was forced to defend myself and it cost me thousands of dollars, and I didn't think it was a fair thing."

At that point, it would have been prudent for the judge to have brought the juror to sidebar rather than risk the juror making an inflammatory statement in open court. Such risk was not insignificant because it was obvious from the juror's remarks that he was disgruntled by having been arrested. Instead, the judge continued to speak to the juror in open court and asked him whether he could "sit in this case and be fair and impartial with respect to charges that had been brought and the proofs that had been delivered?" The juror answered:

> I don't know how to rate things anymore. That when someone can go to a courthouse and file charges, I can say that that person behind that wall assaulted me, and then they're forced to go and prove themselves innocent. I don't, I don't care for the system the way it is. I guess it is the best system, but there is something about it that is not right.

The judge responded stating, "Well, you know there are a lot of problems, and I am not going to get into all of the problems of the legal system...." The judge remarked that, although the charge was eventually dismissed, he agreed with the juror that the juror's arrest nevertheless resulted in inconvenience and expense. The judge then asked, "it was in municipal court I take?"

After the juror responded that the charge had been lodged against him in a municipal court, the judge said "all of this being said, I detect you'll have a certain degree of cynicism about the system itself," to which the juror answered "unfortunately." The judge asked if he would be able to "dispense" with his negative feelings, at which point the juror answered that he didn't "think [he] would make a good candidate" because his mind had been "confused by the simple fact that someone can accuse you of something and then you are forced to defend yourself," which had cost him "literally thousands of thousands of dollars" that he was never able to recoup. Finally, at the end of this colloquy the judge excused the juror.

***7** After the juror left the courtroom, and without any request by the State, the judge spontaneously made the comments to the jury which are the subject of defendant's arguments in Point I. The judge stated:

> Ladies and gentlemen, we've had a little bit of discussion about the legal system.... I will say this that in [juror number six's] situation, that can be done with more or less impunity, as I said, anybody can charge anybody civilly or criminally in the municipal court. In this case, it's [a] little bit different and you are entitled and should know that it's different because in this case the matter has been presented to a grand jury, which is a collection of people, of 23 people, who by simple majority can indict a person. So it's not as if people come in automatically and file charges. You can file charges, but it still has been presented to a grand jury, and the grand jury is more involved a process than [juror number six] was involved in in terms of him being brought into a municipal court to be represented and with all the expense and problem. This is

> a little bit different in this court, and one cannot file a charge and then have the panorama of what we have here, start the machinery in gear.

Defense counsel immediately asked to approach the bench, and at sidebar objected to the judge's comments by stating "you just pretty much told the jury this case is just a big accusation, and because it was presented to a grand jury, there's more support for it." In response, the judge noted that he had already told the jury that an indictment is not evidence of guilt, but that he wanted "to distinguish that from the process that was described to the entire seventy jurors by [juror number six]." At that point, the assistant prosecutor indicated that if the judge had not given the jury a curative instruction, he would have requested one. Defense counsel stated her belief that the "comments made by the court were in fact kind of circular" because in the judge's preliminary instructions to the jury the judge indicated that the indictment was not evidence of guilt, but then, in effect, contradicted that instruction by telling the jury that a case in the Superior Court cannot be pursued unless the grand jury reviews the case and decides to return an indictment. The judge overruled the defense objection to his comments and the sidebar ended with the judge simply stating, "your objection is noted."

We conclude the judge made numerous errors in his handling of the dialogue with the juror. It is axiomatic that when a juror begins to discuss material which has the capacity to prejudice the venire, the judge should take whatever action is necessary to ensure that the panel is not prejudiced. *See State v. Bey,* 112 *N.J.* 45, 74-75 (1988). Accordingly, the proper course here would have been to bring the juror to sidebar rather than allow him to continue speaking in open court.

Second, we perceive no need for the trial court sua sponte to respond to a juror's comment once the juror has been excused. The better practice is to await a request from counsel. Here, the State indicated that had the judge not made the remark he did, it would have asked for an instruction, but this was, of course, after the fact. The judge's remarks, while intended to neutralize any prejudice to the State, had the effect of creating extreme prejudice to defendant.

***8** The effect of the judge's comment here is unquestionably to suggest to the venire that the case against defendant had been authorized by a grand jury, and that the grand jury would not have returned an indictment unless there were merit to the charge lodged against defendant. The judge's comment that "it's not as if people come in automatically and file charges," and here "it's different because in this case, the matter had been presented to a grand jury" could only be understood by the jury as tantamount to an endorsement of the prosecutor's case. We conclude that under the circumstances the judge's comments impermissibly bolstered the State's case. While we recognize that on three occasions the judge did tell the jury that "an indictment is not evidence of guilt," [3] we nonetheless conclude that the judge's very pointed remarks in response to the juror's statement were directly contradictory to the instruction he gave the jury on the other three occasions. At best,

the jury would have been confused about whether an indictment is evidence of guilt or not. On balance, the dramatic effect of the juror's impassioned remarks, followed as it was by the judge's discussion of the role of a grand jury, would have superseded in a juror's mind any benefit to defendant that would otherwise have resulted from the giving of an instruction that an indictment is not evidence of guilt.

An accused is guaranteed the right to a fair and impartial jury by both the Sixth Amendment to the United States Constitution and article 1, paragraph 10 of the New Jersey Constitution. *Ibid.* In *Bey, supra,* the Court held that "the securing and preservation of an impartial jury goes to the very essence of a fair trial." *Id.* at 75. The Court further held that the "conclusions to be reached [by the jurors] in a case [must] be induced only by evidence and argument in open court, and not by outside influence...." *Ibid.* While we agree with the State that not every stray comment by a judge is a ground for reversal, *State v. Tilghman,* 385 *N.J.Super.* 45, 60-62 (App.Div.2006); *State v. Salaam,* 225 *N.J.Super.* 66, 75-76 (App.Div.), *certif. denied,* 111 *N.J.* 609 (1988); *State v. Meneses,* 219 *N.J.Super.* 483, 489 (App.Div.1987), *certif. denied,* 110 *N.J.* 156 (1988), there are certainly instances where comments of a trial judge are so improper as to create reversible error. Here, unlike *Tilghman, Salaam* and *Meneses,* the judge's comment could well have been understood by the jury as a direct observation by the court on the strength of the State's case, whereas in those three cases, the trial judge's comments pertained to ancillary matters.

When presented with a claim that a trial judge's remark contributed to a jury's finding of guilt, we must determine "whether there is a reasonable possibility that the [remark] complained of might have contributed to the conviction." *Fahy v. Connecticut.* 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 *L. Ed.*2d 171, 173 (1963). When making that determination, we are obliged to review the overall strength of the State's case. *State v. Bankston,* 63 *N.J.* 263, 272 (1973). Where the record "presented a debatable case for the jury" and where "we cannot say the proof was so overwhelming as to foreclose a real possibility that the jury gave decisive weight to the improper [remark]," the offending remark of necessity assumes a greater weight in our analysis. *Ibid.*

***9** Here, although both Spence and Ford made an in-court identification of defendant, neither told the first officer on the scene that defendant was the shooter. Not until the two young women had an opportunity to confer among themselves, before Detective Rodriguez arrived to take a statement from them, did they specify that "Raga" was the person who had shot Williams. The alibi evidence presented by McMillan was inconclusive, as was the photograph offered by defendant's sister. Also, the in-court identification by Williams himself was preceded by three prior occasions where he had been unable to select defendant's photo from a photo array. Under these circumstances, as in *Bankston, supra,* the proof was not so overwhelming as to foreclose a real possibility that the jury gave decisive weight to the improper remark by the judge. 63 *N.J.* at 272. We therefore conclude the error was harmful, warranting reversal.

III.

We next address defendant's claim that the in-court identification by Williams was impermissibly suggestive and should have been barred. *Manson v. Brathwaite,* 432 U.S. 98, 107-09, 97 *S.Ct.* 2243, 2249-50, 53 *L. Ed.*2d 140, 149-50 (1977). It is unnecessary to directly address that claim because we conclude that the denial of defendant's motion for a mistrial was reversible error. Before the trial even began, the assistant prosecutor knew that Williams was now, for the first time, in a position to make an in-court identification of defendant. He failed to tell defense counsel what he had learned and not until she had opened and cross-examined the first two State's witnesses did he tell her of this extraordinary change in the posture of the State's case.

That delay is a violation of the discovery rules in criminal cases. *Rule* 3:13-3(g) obligates the State to "promptly notify the other party or that party's attorney of the existence" of "additional material." Unquestionably, delaying the disclosure until openings and two witnesses' testimony had been completed does not comport with the Rule's requirement of prompt notification. The assistant prosecutor's comment that he had not had the opportunity to tell defense counsel any earlier because he knew that the judge wanted to get started promptly that morning is unacceptable, as is his failure to notify defense counsel the previous day when he learned of the new information.

The Rule itself specifies the remedy for a discovery violation and gives the court the discretion to either "grant a continuance or delay during a trial, or prohibit the party from introducing in evidence, the material not disclosed, or it may enter such further order as it deems appropriate." *R.* 3:13-3(g). Here, the only remedial measures offered to defendant consisted of the judge telling defense counsel he would afford her greater latitude in cross-examination, and that he would tell the jury in his final jury charge that they should not hold it against defendant or his attorney that defense counsel incorrectly stated in her opening that Williams would not be able to make an in-court identification of defendant.

***10** In analyzing those remedial measures, we first review the judge's statement that he would afford defendant "greater latitude" in cross-examination. The State has not identified any latitude that defendant would not otherwise have had. As to the judge's curative instruction to the jury in his final charge, we find that instruction to be woefully inadequate to address the egregious violation of the discovery rules that confronted this defendant and his attorney. While we recognize that "[t]he disposition of a mistrial motion is addressed to the sound discretion of the trial judge" and "is an extraordinary remedy [that] should be resorted to only to prevent an obvious failure of justice," *State v. Hubbard,* 123 *N.J.Super.* 345, 351 (App.Div.), *certif. denied,* 63 *N.J.* 325 (1973), we conclude that in the particular circumstances presented here, the failure to grant a mistrial was indeed an abuse of the judge's discretion.

We discern that the trial judge recognized the unfairness in barring the State from introducing the evidence of Williams's belated identification of defendant as his assailant. Barring that evidence would have been unfair to the State and indeed to Williams himself. Under these circumstances, the only fair thing to have done would have been to grant a mistrial and thereby afford defendant and his attorney the opportunity to adjust their trial strategy and make an orderly determination of how to proceed in light of the new evidence.

We recognize that ultimately the State, apparently sensing the appellate issues that could be presented if defendant were to be convicted after such an egregious discovery violation had occurred, told defendant and his attorney that it had reconsidered and did not plan to introduce evidence of Williams's identification of defendant. We further recognize that at that point defendant and his attorney were restored to the status quo ante, in that they were at that juncture in no worse position than they were before the assistant prosecutor revealed that Williams could now make an in-court identification. Although defense counsel could, at that point, have decided not to pursue the issue of Williams's ability to identify defendant, and could have refrained from asking for the *Rule* 104(a) hearing, we view her decisions in an indulgent light. We do so because of the inherent unfairness that resulted from forcing a defense attorney to constantly readjust her strategy in the middle of the trial. It would be unfair to conclude under the extreme circumstances presented here that this was "induced error" that should cause a defendant to forfeit his right to any relief. *State v. Corsaro,* 107 *N.J.* 339, 346 (1987).

Even if the court had been correct in denying defendant's motion for a mistrial, and we conclude otherwise, at a minimum the judge should have given defense counsel a continuance of a few days time in which to evaluate and discuss with her client the consequences of the new information the assistant prosecutor had just disclosed. *State v. Clark,* 347 *N.J.Super.* 497, 508-09 (App.Div.2002). The judge's failure to either grant a mistrial or grant a continuance placed defendant and his attorney in the position where they were forced to confront a constantly changing set of facts. Ultimately their efforts to deal with those facts resulted in a cascading series of events leading to defendant being identified, before the jury, by Williams as his assailant.

***11** In light of our conclusion that the judge committed reversible error in failing to grant a mistrial or an adjournment, we need not address defendant's claim that the in-court identification was impermissibly suggestive. We therefore hold that under the circumstances presented, the failure to grant a mistrial or a continuance denied defendant his right to a fair trial. *Hubbard, supra,* 123 *N.J.Super.* at 351.

In light of our disposition, we need not address defendant's sentencing arguments.

Reversed and remanded for a new trial.

All Citations

Not Reported in A.2d, 2007 WL 674655

Footnotes

1 Testimony in the trial established that "Raga" was defendant's street name.

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

3 The judge gave the jury that instruction during his preliminary remarks to the jury at the beginning of voir dire, after the jury was sworn and in his final jury charge.

2005 WL 3730557
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
James A. MOORE, Defendant-Appellant.

Submitted Dec. 19, 2005.
|
Decided Feb. 3, 2006.

Synopsis

Background: Defendant was convicted in a jury trial in the Superior Court, Law Division, Salem County, William L. Forrester, J., of second-degree robbery, for which he was sentenced to ten years' imprisonment with 85 percent parole ineligibility period and three years of parole supervision. Defendant appealed.

Holdings: The Superior Court, Appellate Division, held that:

identification procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification;

witness's in-court identification of defendant just slightly less ten months after alleged robbery and without having first identified defendant prior to trial was permissible;

trial court's jury instruction on alleged offense of second-degree robbery did not misstate the proof necessary for predicate theft offense nor otherwise confuse jury; and

sentence was not manifestly excessive nor unduly punitive; but

imposition of greater-than presumptive sentence violated defendant's right to jury trial.

Affirmed as to conviction; remanded as to sentence.

2005 WL 3730557

On appeal from Superior Court of New Jersey, Law Division, Salem County, Indictment No. 03-07-0339.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant (Shara D. Saget, Assistant Deputy Public Defender, of counsel and on the brief).

Peter C. Harvey, Attorney General, attorney for respondent (Leslie-Ann Justus, Deputy Attorney General, of counsel and on the brief).

Before Judges CUFF and HOLSTON, JR.

Opinion

PER CURIAM.

***1** Defendant, James A. Moore, was tried before Judge William L. Forester and a jury between March 16, 2004 and March 18, 2004 and was found guilty on count one of Salem County Indictment Number 03-07-339 of second-degree robbery contrary to *N.J.S.A.* 2C:15-1. At the sentencing hearing on May 4, 2004, count two, charging defendant with second-degree conspiracy to commit robbery, contrary to *N.J.S.A.* 2C:5-2 and *N.J.S.A.* 2C:15-1, was dismissed. The judge determined the conspiracy count was subsumed in the robbery conviction. Defendant was sentenced for second-degree robbery to a ten-year term of imprisonment with an 85% parole ineligibility period pursuant to *N.J.S.A.* 2C:43-7.2, the No Early Release Act (NERA). Defendant was also sentenced to three years of parole supervision, appropriate monetary penalties were assessed and he was ordered to pay $165 in restitution. Defendant appeals his conviction and sentence. We affirm the conviction but remand for re-sentencing.

On March 16, 2004, the judge conducted a pre-trial hearing pursuant to *United States v. Wade,* 388 *U.S.* 218, 87 *S.Ct.* 1926, 18 *L. Ed.*2d 1149 (1967). At the conclusion of the hearing, the judge ruled that all identification testimony would be admissible.

On May 24, 2003, Jennifer Johnson was a sales clerk at Snyder's News Agency in Salem, where she had worked for the previous six years. After waiting on a few customers at about 9:00 a.m., Johnson observed defendant and his female co-defendant enter the store. There was a "suspicious look about them" because of "[t]he way they walked in, the way they observed the whole store [and because] they walked around the whole store." They went to the greeting cards section, moved in and out of aisles and settled in the middle aisle. When the last of the other customers exited the store, defendant, who she described as a dark male wearing a navy blue shirt and sweat pants,

walked up with a greeting card and a dark gift bag. The female, who was wearing a black sweat suit, walked towards the door. When the man said he could not pay for the items after Johnson rang them up, Johnson began to void the transaction and asked him if he wanted to pay for one of the items. The man answered, "all right, this is a holdup. I want all of the money in the bag." He put his hand in his pocket and gestured to her. Johnson thought that he might have a gun in his pocket and would not think twice about harming her. For that reason, Johnson put all of the money, totaling $165, into the gift bag. She clearly saw defendant's face. He was not wearing a mask. There was good lighting in the store. The man and woman left and Johnson called the police.

Earlier that morning, Dolores Stevenson was in the area of West Broadway running errands and observed a man and a woman walking in Fenwick Plaza. She noticed them because they were coming toward her and she recalled the couple "because they were the only two people there." There was nothing unusual about their appearance. A few minutes later, Stevenson noticed the two again as she was exiting a store. When they passed each other on the street, she looked directly into the man's face. Stevenson described the man as a tall black man, wearing dark shorts and carrying a black child's birthday bag in his hand. She thought to herself that he was "kind of handsome, kind of cute." Later, Stevenson saw the couple again but she noticed that the couple had separated and that the woman was on the opposite side of the street. Although she had never seen the male before, she recognized the female as the daughter of a woman who she had seen around the neighborhood, although she could not recall the woman's name. A little while later she stopped at Snyder's to find out why the police were there.

***2** Detective Duane Johnson, of the Salem City Police Department, tried to lift fingerprints from the scene of the robbery but was unable to collect any prints of evidential value. Johnson and Stevenson went to the police station and gave their statements. Both Johnson and Stevenson separately looked through four mug shot books but were unable to identify any of the photographs as either of the robbers. Defendant's photograph was not in any of the mug shot books. Stevenson, however, was able to pick out the photograph of the mother of the woman she saw in Fenwick Plaza from the mug book. From Stevenson's information, the police determined that the woman who Stevenson identified had a daughter named Brenda Simmons.

Detective Johnson conducted an investigation that led him to the Salem Motor Lodge where he found Brenda Simmons and defendant. He placed them under arrest. Three weeks later the detective put together a photo array, which was administered to Johnson by Detective Sergeant Eller. Johnson could not identify Simmons but did identify defendant, whose photograph was the fifth photograph in the photo array, as the man who committed the robbery. Stevenson was never shown the photo array.

At trial, both Johnson and Stevenson made in-court identifications of defendant as the person who committed the robbery. Johnson testified that defendant was a dark-skinned black man who wore a

navy blue shirt and sweat pants or sweat shorts on the day of the robbery. She described defendant as tall, about six-one or six-two. Johnson admitted that she was not able to see the woman as well as she had seen defendant. Defendant did not testify nor present any witnesses on his behalf.

Defendant presents the following arguments for our consideration:

POINT I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THE IMPERMISSIBLY SUGGESTIVE OUT-OF-COURT IDENTIFICATION BY JOHNSON AND THE RESULTING TAINTED IN-COURT IDENTIFICATIONS BY JOHNSON AND STEVENSON, THEREBY DENYING MOORE DUE PROCESS AND A FAIR TRIAL. *U.S. CONST.* AMENDS. VI, XIV; *N.J. CONST.* ART. I, ¶ 10.

A. THE COURT ERRED IN ADMITTING JOHNSON'S IMPERMISSIBLY SUGGESTIVE OUT-OF-COURT IDENTIFICATION WHICH RESULTED IN A TAINTED IN-COURT IDENTIFICATION.

B. THE COURT ERRED IN ADMITTING STEVENSON'S IMPERMISSIBLY SUGGESTIVE IN-COURT IDENTIFICATION.

POINT II

THE COURT'S CHARGE FOR ROBBERY MISSTATED THE PROOF NECESSARY FOR THEFT, DILUTING THE STATE'S BURDEN OF PROOF AND NECESSITATING REVERSAL. *U.S. CONST.,* AMEND. XIV; *N.J. CONST.,* ART. I, ¶ 10.

POINT III

THE SENTENCE IMPOSED ON MR. MOORE IS MANIFESTLY EXCESSIVE, AND VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND A JURY TRIAL.

A. THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

B. THE ABOVE-THE-PRESUMPTIVE SENTENCE IMPOSED DENIED MOORE HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO JURY TRIAL.

I

Defendant contends that the photo array shown to Johnson nineteen days after the offense was highly suggestive in that defendant's photograph appeared at the end of the array and immediately after a photograph of a person with a completely different complexion. Defendant contends that the impermissible out-of-court identification resulted in a tainted in-court identification. Additionally, defendant asserts that Stevenson's in-court identification was highly suggestive and that it resembled an impermissible one-man "show up" since defendant was the only person present in the court room. Defendant argues that the testimony regarding the out-of-court and in-court identifications of both Johnson and Stevenson should have been excluded because there was a substantial likelihood of misidentification.

***3** At the *Wade* hearing, the court found that the array was not suggestive and was permissible evidence. Judge Forester made several observations regarding the photographs. He noticed that all six men depicted were African-American, with short hair, facial hair, a mustache, and had a range of complexions. He commented about the range of the complexions. The photograph identified as S-13 was the comparatively lighter-complexioned male, S-9 was the darker-complexioned male, and the others, including defendant's photograph, ranged from medium-to-dark complexions. The judge stated, "[n]othing would suggest ... that the photograph that was identified, which turns out to be defendant, was suggestive or ... [that] there's a substantial likelihood of misidentification ."

We are convinced that Judge Forester properly exercised his discretion in making his findings. The test on appellate review of a *Wade* hearing is whether the trial judge could reasonably conclude that the identification procedure was not " 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " *State v. Madison,* 109 *N.J.* 223, 225, 536 A.2d 254 (1988) (quoting *Simmons v. United States,* 390 *U.S.* 377, 384, 88 *S.Ct.* 967, 971, 19 *L. Ed.*2d 1247, 1253 (1968)). Even in cases when there is held to be suggestivity in the identification process, courts have still held that "[t]he strength or credibility of the identification is not the issue on admissibility; that is a matter of weight, for the fact finder, under appropriate instructions from the trial judge." *State v. Farrow,* 61 *N.J.* 434, 451, 294 A.2d 873 (1972), *cert. denied,* 410 *U.S.* 937, 93 *S.Ct.* 1396, 35 *L. Ed.*2d 602 (1973).

The test for suggestivity is a two-pronged test. The first prong is whether the identification procedure employed was "impermissibly suggestive." *Madison, supra,* 109 *N.J.* at 232, 536 A.2d 254. Only if there is a finding of impermissible suggestivity does the second prong of the test even apply. *Ibid.* The second prong requires a determination of whether the suggestivity resulted in a " 'very substantial likelihood of irreparable misidentification.' " *Ibid.* (citation omitted). "The validity of a claim that a pretrial identification is so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a violation of due process must be evaluated upon the totality of the circumstances surrounding the confrontation." *State v. Mustacchio,* 109 *N.J.Super.* 257, 263, 263 A.2d 139 (App.Div.), *aff'd,* 57 *N.J.* 265, 271 A.2d 582 (1970).

An array depicting a range of facial characteristics is not suggestive and actually inures to the defendant's benefit. *See Farrow, supra,* 61 *N.J.* at 452, 294 A.2d 873. In *Farrow,* the Supreme Court stated, "[t]he other pictures were of men with both differing and similar facial characteristics, so as to afford a fair basis for choice." *Ibid.* Consequently, even in circumstances when there is a finding that the identification was suggestive, which was not the case here, the evidence should still be admitted if it is reasonable that the victim could, in fact, identify the defendant. *See Neil v. Biggers,* 409 *U.S.* 188, 93 *S.Ct.* 375, 34 *L. Ed.*2d 401 (1972).

***4** For the second prong, the court focuses on the witness' reliability. To determine whether or not the witness is reliable and the procedure resulted in a very substantial likelihood of misidentification, the following factors must be weighed: " '[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [the witness'] prior description ..., the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.' " *State v. Clausell,* 121 *N.J.* 298, 326, 580 A.2d 221 (1990) (quoting *Manson v. Brathwaite,* 432 *U.S.* 98, 114, 97 *S.Ct.* 2243, 2253, 53 *L. Ed.*2d 140, 154 (1977)). The time that lapses between the crime and the identification is not determinative. In *United States v. Archibald,* 734 *F.2d* 938, 943, *modified,* 756 *F.2d* 223 (2d Cir.1984), the court held that the array was not unduly suggestive where there was a twenty month delay between the robbery and the photographic identification.

In-court identifications are admissible even when a witness was presented a prior line-up or array but was unable to identify the defendant. *Clausell, supra,* 121 *N.J.* at 327, 580 A.2d 221 (citing *United States v. Domina,* 784 *F.2d* 1361, 1368 (9th Cir.1986), *cert. denied,* 479 *U.S.* 1038, 107 *S.Ct.* 893, 93 *L. Ed.*2d 845 (1987)). With respect to a testifying identification witness, defense counsel has "ample chance to challenge the accuracy of the identification on cross-examination, and the jury was free to discount its value based on [the witness'] inability to identify anyone on earlier occasions." *Id.* at 328.

A defendant does not have a constitutional right to a pre-trial identification. *State v. Walls,* 85 *N.J.* 218, 221, 426 A.2d 50 (1981). Pre-trial identifications must be requested in a timely manner and it is up to the judge's discretion whether to grant or deny the request. *Ibid.*

We are satisfied that the photographic array presented to Johnson was not suggestive. She was shown six photographs, all of African-American men with short hair, facial hair and mustaches. She was specifically instructed by the police that the photographs were not shown in any particular order of importance. She was not placed under any time restrictions nor pressured by the police to choose defendant's photograph.

Defendant's claim that his photograph was emphasized because his "photo[graph] was last in the array" is belied by the report in this case. Defendant's photograph was actually the fifth out of the

six array photographs shown prior to trial, when Johnson identified defendant. Therefore, there is no issue of whether defendant's picture was emphasized as the alleged "last photograph" in the array. [1]

Defendant's reliance on *Archibald* is misplaced. Unlike in *Archibald* where there were twenty months between the robbery and the identification, in this case there were only nineteen days. *Archibald, supra,* 734 *F.2d* at 939. Johnson did not identify defendant on the day of the robbery because his photograph was not in the mug books. Johnson, from her testimony, knew what defendant looked like and the array was not suggestive in any way. Johnson's out-of-court identification also satisfies the second prong of the *Madison* test. She was the victim in the robbery, observed defendant without a mask in a well-lit store for several minutes during his commission of the crime and identified him a few weeks later. Furthermore, the in-court identification was thorough and consistent with Stevenson's description of defendant.

***5** We are satisfied that the police procedure whereby defendant was identified by Johnson in a photo array was not suggestive and did not taint the in-court identification. Nor was it likely to lead to an irreparable misidentification. Defendant's claims to the contrary are rejected.

We are also satisfied that the judge's decision to allow Stevenson's in-court identification was a proper exercise of the judge's discretion. *Walls, supra,* 85 *N.J.* at 221, 426 A.2d 50. Similar to our Supreme Court's reasoning in *Clausell,* where there was no out-of-court identification but the in-court identification was permitted nineteen months after the crime, Stevenson's in-court identification ten months later was properly admitted. The duration of time between the crime and the identification is not the critical issue. What is most important is the witness' opportunity to view the defendant and the defense's opportunity to cross-examine the witness. *Clausell, supra,* 121 *N.J.* at 327-28, 580 A.2d 221. Stevenson's in-court identification was not akin to a one-man "show-up." Stevenson was asked if she had the opportunity to really look at defendant when he was carrying the bag and if she could identify him at the trial. She unequivocally answered yes to both questions. Additionally, Stevenson's identification was subject to cross-examination. Although Stevenson's in-court identification occurred slightly less than ten months after the robbery, this is not a considerable lapse in time, given that she observed defendant three times, her recollection ultimately led police to defendant, and she was cross-examined at trial. Like Johnson, Stevenson could not identify defendant from the mug books because his photograph was not in those books the day she reviewed them.

II

The court charged the jury on second-degree robbery and the lesser-included offense of theft of movable property. Defendant asserts that the judge read the model charge for second-degree robbery word-for-word, with a small but critical misstatement:

> In order to prove that the defendant was in the course of committing a *theft,* the State must prove beyond a reasonable doubt that the defendant threatened another with, or purposely put another in fear of immediate bodily injury. (emphasis added).

Defendant claims that this incorrect instruction had the capability of misleading the jury into thinking there was no distinction between second-degree robbery and theft of movable property, resulting in an unjust verdict. Although not raised below, defendant contends that the court's incorrect instruction on one of the material elements of the crime is clearly plain error, requiring reversal. *R.* 2:10-2.

The entire jury charge on second degree robbery was as follows:

> A person is guilty of robbery if, in the course of committing a theft he ...
>
> And the one that applies in this case is: ... threatens another with, or purposely puts him or her in fear of immediate bodily injury.
>
> ***6** Let me say it again, not for emphasis, but just so it's clear.
>
> A person is guilty of robbery if, in the course of committing a theft, he or she threatens another with, or purposely puts him or her in fear of immediate bodily injury.
>
> So in order for you to find the defendant guilty of robbery, the State is required to prove each of the following elements. And this is what I referred to earlier. Elements, factors, or points of law. This is what the State must prove beyond a reasonable doubt.
>
> (1) That the defendant, this defendant, James A. Moore was in the course of committing a theft.
>
> (2) That while in the course of committing that theft, the defendant threatened another with, or purposely put another in fear of immediate bodily injury.
>
> The State must prove, beyond a reasonable doubt, that the defendant was in the course of committing a theft. In this connection, you are advised that an act is considered to be in the course of committing a theft, if it occurs in an attempt to commit the theft, during the commission of the theft, or in immediate flight after that attempt or commission [sic] to commit a theft.

> Theft is defined as the unlawful taking, or exercise of unlawful control over property of another, with the purpose to deprive him or her, or it, in the case of a news agency, thereof.
>
> Now here you've heard me use the word with purpose, or purposely. A person acts purposely with respect to the nature of his conduct, or a result thereof, if it is his conscious object to engage in conduct of that nature. In order to prove that the defendant was in the course of committing a *theft,* the State must prove beyond a reasonable doubt that the defendant threatened another with, or purposely put another in fear of immediate bodily injury.
>
> The phrase bodily injury means physical pain, illness, or any impairment of physical condition. Although no bodily injury need have resulted, the prosecution must prove that the defendant either threatened the victim with, or purposely put the victim in fear of such bodily injury.
>
> Should you find that the State has failed to prove either of these elements of the crime of robbery beyond a reasonable doubt, then you must find Mr. Moore not guilty.
>
> But if you find that the State has proved both of those elements beyond a reasonable doubt, then you must find Mr. Moore not guilty [sic].
>
> (emphasis added).

The judge thereafter asked the attorneys if they had any objections to the charge. While defense counsel raised several objections that were addressed, he did not raise any objections to the portion of the second-degree robbery jury charge alleged as plain error here. At the conclusion of the jury charge, each member of the jury was given a jury verdict sheet. Again, defense counsel did not raise any objections to the judge's explanation of the elements of robbery.

The absence of an objection to the charge at trial is strong evidence that defendant's belated claims of error in the charge were not prejudicial. *State v. Tierney,* 356 *N.J.Super.* 468, 481-82, 813 A.2d 560 (App.Div.), *certif. denied,* 176 *N.J.* 72, 819 A.2d 1188 (2003). Furthermore, defense counsel's "failure to object points up the fact that experienced counsel did not consider that the use of the words detracted from the clear meaning which the charge as a whole conveyed." *State v. Wilbely,* 63 *N.J.* 420, 422, 307 A.2d 608 (1973); *State v. Macon,* 57 *N.J.* 325, 333, 273 A.2d 1 (1971).

***7** While a "trial court has an absolute duty to accurately instruct the jury on the law governing the facts of the case[,]" this does not mean that any misstatement of law during the course of jury instructions "automatically" warrants the reversal of a criminal conviction. *State v. Concepcion,* 111 *N.J.* 373, 379, 545 A.2d 119 (1988).

An appellate court reviews the charge in the context of the specific facts of the case under review and examines the alleged prejudicial effect of the challenged jury charge in the context of the trial,

the summations of counsel, and the entire charge. *State v. Marshall,* 123 *N.J.* 1, 145, 586 A.2d 85 (1991), *cert. denied,* 507 *U .S.* 929, 113 *S.Ct.* 1306, 122 *L. Ed.*2d 694 (1993).

In looking at the jury charge as a whole rather than in isolation, as defendant would have this court do, it is clear that the jury was properly charged on the law of second-degree robbery. The elements of second-degree robbery are (1) defendant was in the course of committing a theft; and (2) while in the course of committing that theft, defendant threatened another or purposely put another in fear of immediate bodily injury. *See N.J.S.A.* 2C:15-1a; *Model Jury Charge (Criminal), Robbery in the Second-Degree.* (Approved 4/13/92).

Judge Forester correctly charged the jury on the elements of robbery three times. It was only when he expounded on the mental culpability state of "purposely" in the context of the second-degree robbery charge that he varied from that portion of the Model Jury Charge. However, at that point, the jury had been well apprised that the judge was referencing robbery and not theft of movable property. Thereafter, the judge reiterated that the jury had to find that the State had proved the elements of the crime beyond a reasonable doubt. Judge Forester restated the elements of robbery again when he reviewed the verdict sheet with the jury.

The jury was correctly charged on the elements of robbery four times. We are, thus, satisfied that the judge gave a comprehensive and correct explanation of the law of second-degree robbery and that there was no risk that the jury could have misunderstood the elements of second-degree robbery.

III

Defendant received a sentence of ten years, 85% without parole, in accordance with the NERA. Defendant contends the sentence should be reduced for two reasons: (1) it is manifestly excessive, and (2) it violates his constitutional rights to due process and trial by jury. *U.S. CONST.,* Amends. VI, XIV; *N.J. CONST.,* art. I, ¶ 1, 9 and 10.

The trial court found three aggravating factors pursuant to *N.J .S.A.* 2C:44-1a: (3), the risk that defendant will commit another offense; (6), the extent of defendant's prior criminal record; and (9), the need to deter defendant and others from violating the law. The court also found mitigating factor *N.J.S.A.* 2C:44-1b(6), that Moore will compensate the victim (Snyder News Agency) for the money taken. The court gave the mitigating factor "slight" weight and concluded that the aggravating factors significantly outweighed the mitigating factors.

***8** Defendant asserts that the court overlooked the application of mitigating factor *N.J.S.A.* 2C:44-1b(11), the imprisonment of Moore would entail excessive hardship to his dependents

because at sentencing defendant stated that he has a daughter and "a family that need me out there." Additionally, the court should have considered the fact that he is relatively young (age twenty-five) and has a history of employment.

In reviewing a sentence imposed by the trial judge, an Appellate Court is deferential in its review of a trial court's exercise of sentencing discretion and is guided by the three-pronged test established in *State v. Roth,* 95 *N.J.* 334, 363-64, 471 A.2d 370 (1984):(1) whether the appropriate sentencing guidelines were followed; (2) whether the findings of fact were grounded in competent, reasonably credible evidence; and (3) whether in applying those guidelines to the facts of the case, the sentencing court showed such a "clear error of judgment that it shocks the judicial conscience[ ]" that a sentence should be modified on appeal. *See also State v. Pillot,* 115 *N.J.* 558, 564, 560 A.2d 634 (1989).

Defendant was subject to five to ten years imprisonment for second-degree robbery. *N.J.S.A.* 2C:15-1; *N.J.S.A.* 2C:43-6a(2). Judge Forester comprehensively discussed and then balanced the aggravating and mitigating factors presented by defendant's case. The judge noted that defendant has been involved in constant criminal activity since he was a juvenile, and his crimes are "progressing upward." In a six year period, the following are some of the convictions from New Jersey and Delaware of which defendant has been found guilty: three counts of receiving stolen property, criminal impersonation, resisting arrest, escape, two counts of theft, and possession or use of drugs. Defense counsel conceded, and Judge Forester agreed with the State, that defendant was extended term eligible in light of his unwavering disregard for the law. However, the judge declined to impose an extended term in this case, holding that the aggravating factors significantly outweighed the one mitigating factor and as a result imposed a ten-year term of imprisonment on count one. The sentence does not shock the judicial conscience.

Defendant contends, however, that the trial court abused its discretion in imposing a sentence in excess of the seven year presumptive term for a second-degree crime, and that such a sentence violated defendant's constitutional rights to a jury trial and due process as articulated by the Supreme Court in *Blakely v. Washington,* 542 *U.S.* 296, 124 *S.Ct.* 2531, 159 *L. Ed.*2d 403 (2004). In addition to *Blakely,* defendant relies on *Apprendi v. New Jersey,* 530 *U.S.* 466, 490, 120 *S.Ct.* 2348, 2362, 147 *L. Ed.*2d 435, 455 (2000), which held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

***9** In *State v. Natale,* 184 *N.J.* 458, 466, 878 A.2d 724 (2005), (*Natale II*), our Supreme Court held:

> Under New Jersey's Code of Criminal Justice, a defendant cannot be sentenced to a period of imprisonment greater than the presumptive term for the crime he committed, unless the judge finds one or more statutory aggravating factors. *See N.J.S.A.* 2C:44-1(f)(1). The Code does not require that a judicial finding of an aggravating factor be encompassed by the jury verdict or that it be based on an admission by the defendant at a plea hearing. We now hold that a sentence above the presumptive statutory term based solely on a judicial finding of aggravating factors, other than a prior criminal conviction, violates a defendant's Sixth Amendment jury trial guarantee.

Because in this case defendant's sentence was greater than the presumptive term of seven years, a remand is necessary in the form of a new sentencing hearing.

The Supreme Court in *Natale II* stated:

> Our Code provisions make clear that, before any judicial factfinding, the maximum sentence that can be imposed based on a jury verdict or guilty plea is the presumptive term. Accordingly, the "statutory maximum" for *Blakely* and *Booker* purposes is the presumptive sentence. Because the Code's system of presumptive sentencing allows judges to sentence beyond the "statutory maximum" based on their finding of aggravating factors, that system is incompatible with the holdings in *Apprendi, supra, Blakely, supra,* and [*U.S. v. Booker,* 543 *U.S.* 220, 125 *S.Ct.* 738, 160 L.Ed.2d 621, 160 *L.Ed.* 621 (2005)]. We, therefore, conclude that the Code's system of presumptive term sentencing violates the Sixth Amendment's right to trial by jury.
>
> In light of that holding, we now must provide the appropriate remedy for New Jersey's criminal sentencing system.
>
> [*Id.* at 484-85, 878 A.2d 724.]

The remedy chosen by our Supreme Court in *Natale II* to cure this constitutional problem was the elimination of presumptive terms. *Id.* at 487, 878 A.2d 724. "Without presumptive terms, the 'statutory maximum' authorized by the jury verdict or the facts admitted by a defendant at his guilty plea is the top of the sentencing range for the crime charged, e.g., ten years for a second-degree offense, *N.J.S.A.* 2C:43-6(a)(2)." *Ibid.* "Judges will continue to determine whether credible evidence supports the finding of aggravating and mitigating factors and whether the aggravating or mitigating factors preponderate." *Ibid.* The Court elaborated: "We suspect that many, if not most, judges will pick the middle of the sentencing range as the logical starting point for the balancing process and decide that if the aggravating and mitigating factors are in equipoise, the midpoint

will be an appropriate sentence." *Id.* at 488, 878 A.2d 724. However, the Court noted that this methodology is not compelled. *Ibid.*

As noted by the Court in *State v. Abdullah,* 184 *N.J.* 497, 506, 878 A.2d 746 (2005), "In *Natale II, supra,* we excised the presumptive terms from the Code so that judges, not juries, still will decide the aggravating factors as the Legislature would have intended...."

***10** In regards to the new sentencing hearing,

> the trial court must determine whether the absence of the presumptive term in the weighing process requires the imposition of a different sentence. The court should not make new findings concerning the quantity or quality of aggravating and mitigating factors previously found. Those determinations remain untouched by this decision. Because the new hearing will be based on the original sentencing record, any defendant challenging his sentence on *Blakely* grounds will not be subject to a sentence greater than the one already imposed.
>
> [*Natale, supra,* 184 *N.J.* at 495-96, 878 A.2d 724.]

We are satisfied that Judge Forester properly admitted both the out-of-court and in-court identifications of defendant and that the court properly charged the jury on the elements of second-degree robbery. We are, however, convinced that because defendant was sentenced to greater than the presumptive term of imprisonment for a second-degree offense that defendant's sentence must be remanded for re-sentencing in accordance with *Natale II.*

Affirmed as to conviction; remanded as to sentence.

All Citations

Not Reported in A.2d, 2005 WL 3730557

Footnotes

1 A photocopy of the photo array is exhibit (Pa2) in the appendix to the State's brief. Although it is a photocopy of the array, the exhibit does serve to confirm Judge Forester's observations that the complexions of the men depicted did not improperly focus on defendant.