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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000377-20T5

STATE OF NEW JERSEY, : CRIMINAL ACTION

Plaintiff-Appellant

On Appeal From a Final Judgment of Conviction in the Law Division, Superior Court, Essex County

: Indictment No. 19-01-00010-I

FUQUAN K. KNIGHT, : Sat Below:
Hon. Siobhan A. Teare, J.S.C.

Defendant-Appellant.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

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[2] Trial counsel submitted several scientific articles on the impact of showing slow motion videos to jurors. As the articles were submitted to and considered by the trial court they are include in the Appendix.

[3] Trial counsel's sentencing memorandum was submitted to and considered by the trial court which allows its inclusion pursuant to Rule 2:6-1(a)(2).

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PRELIMINARY STATEMENT

This matter comes as an appeal of the judgment of conviction and the sentence imposed. Fuquan Knight submits that multiple trial court errors deprived him of a fair and reliable trial. Whether the trial court's errors discussed infra are analyzed individually or for their cumulative effect, it was clear from this record that defendant did not receive a fair trial and is, therefore, entitled to a new trial. Defendant further submits that a resentencing is warranted as the trial court misapplied the mitigating factors and the imposition of a sixteen-year sentence in this case was manifestly unfair given the unique set of facts of the case.

STATEMENT OF PROCEDURAL HISTORY.

On January 9, 2019, an Essex County Grand Jury charged Fuquan Knight (appellant-defendant) with four counts under Indictment No. 19-01-00010-I. (Da1-Da6)[4]. Count One charged second-degree

[4] Da-Defendant's Appendix. Defendant's Adult Presentence Report (PSR) has been submitted separately to the Court.
Transcripts:
1T-Wade Hearing, October 22, 2019;
2T-Hearing, October 23, 2019;
3T-Jury Selection, October 24, 2019;
4T-Jury Selection, October 31, 2019;
5T-Jury Selection, November 7, 2019, Vol. 1 of 2;
6T-Jury Selection, November 7, 2019, Vol. 2 of 2;
7T-804 Hearing, November 13, 2019;
8T-Motion, November 18, 2019;
9T-Trial, November 19, 2019, Vol. 1 of 2;
10T-Trial, November 19, 2019; Vol. 2 of 2;
11T-Trial, November 20, 2019;

conspiracy to commit robbery against Thaddeus Osborne, contrary to N.J.S.A. 2C:5-2A(1) and N.J.S.A. 2C:15-1A(2). Count Two charged that on October 18, 20218, in the City of East Orange, defendant committed first-degree armed robbery, contrary to N.J.S.A. 2C:15-1A(2). Count Three charged third-degree unlawful possession of shotgun, contrary to N.J.S.A. 2C:39-5C(1). Count Four charged second-degree possession of shotgun for an unlawful purpose, contrary to N.J.S.A. 2C:39-4A(1). (Da1-Da6).

On October 22, 2019, the Honorable Siobhan A. Teare, J.S.C., held a Wade[5] evidentiary hearing on defendant's motion to suppress the out-of-court identification of defendants made by Thaddeus Osborne. (1T; Da7).

On October 23, 2019, in a written order, the trial court denied defendant's suppression motion. (Da7).

On November 13, 2019, following the death of Thaddeus Osborne, the trial court granted the State's motion to admit at trial his testimony from the Wade/N.J.R.E. 104 Hearing under N.J.R.E. 804(a) and N.J.R.E. 804(b)(1)(a). (Da97-Da98).

12T-Trial, November 21, 2019;
13T-Trial, December 3, 2019, Vol. 1 of 2;
14T-Trial, December 3, 2019, Vol. 2 of 2;
15T-Trial, December 4, 2019; Vol 1 of 2;
16T-Trial, December 4, 2019, Vol. 2 of 2;
17T-Trial, December 5, 2019;
18T-Trial/Verdict, December 6, 2019;
19T-Sentencing, February 18, 2020.

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

Defendant was tried before Judge Teare and a jury, on November 19, 20, 21, December 3, 4, 5, and 6, 2019. (9T-18).

On December 6, 2019, the jury found defendant guilty on all counts charged under Indictment No. 19-01-00010-I. (18T; Da113-Da116).

On February 19, 2020, the trial court sentenced defendant to an aggregate term of 16 years in State prison, with an 85% period of parole ineligibility. (Da121-Da123).

On October 8, 2020, defendant filed a Notice of Appeal. (Da124-Da127).

STATEMENT OF FACTS

To prove its case, the State intended to mainly rely upon the testimony of the victim Thaddeus Osborne. However, on November 3, 2019, Osborne passed away. (6T5-1 to 7)[6]. The State moved under N.J.R.E. 803(a) to admit Osborne's October 22, 2019 Wade hearing testimony. (1T; 6T5-10 to 17). Over defendant's objection, the trial court allowed a redacted version of Osborne's prior testimony to be played before the jury. (7T89-15 to 97-12; 15T58-6; Da97-Da98). The Appellate Division denied defendant's emergent application. (8T4-18).

[6] Osborne's body was found near a Fedex facility in Woodbridge where he worked. The cause of death was unclear. Nothing suggested that Osborne's death was related to defendants. (5T7-9 to 9-12).

At the Wade hearing, Osborne testified that on October 11, 2017, he went to Poppy's[7] Deli, located at 520 Central Avenue in East Orange, to cash a betting slip where he had won $500. (9T; 15T). While in the store, Osborne conversed with co-defendant Shaquan Knight. (15T65-8). Although he did not know his name, Osborne knew Shaquan as he had previously purchased marijuana from him and had seen him about five or six times before. (15T66-2; 15T66-6 to 12; 15T66-15 to 16). Shaquan asked whether Osborne wanted to buy some "weed." (15T65-8). Osborne agreed and the two men decided to do the transaction outside around the back of the store. (15T65-11 to 66-1). The store surveillance video, clocked at 11:35 a.m., showed Osborne greeting Shaquan with the two men laughing and talking. (13T86-6 to 13). Later in the same video, Osborne is seen reaching into his pocket and handing something to Shaquan. (13T89-19 to 25; 13T91-22). Osborne failed to disclose this to the lead detective when later questioned. (13T91-25).

Besides Osborne and Shaquan, also seen in the store surveillance tape were co-defendants Kyler Knight and defendant. The store video tape showed one of the suspects wearing a grey skull cap, dark colored Nike hooded sweatshirt with white lettering on the left sleeve and white lettering on the back of the

[7] The name of the deli appears as "Poppys" and as "Poppies" in the record. Defendant adopts "Poppys" as the naming convention for purposes of this brief.

sweatshirt, black pants with white lines alongside the pants legs, and black & white sneakers. (11T15-20 to 24). Osborne identified the suspect as Shaquan Knight. (13T33-17).

The other suspect, identified as Kyler, is seen with a "sunni beard," with a burgundy hooded sweatshirt with a gold design in the front of the sweatshirt. (11T15-25 to 16-2; 11T37-9 to 37-17).

The third suspect is seen in the video at 11:39:30 a.m., wearing a black baseball cap with "Chicago White Sox", a black jacket with gold lettering and black pants. (13T16-3 to 5; 13T38-20 to 39-7). Osborne identified the third suspect as defendant. (13T38-20 to 39-7).

Once outside the store, Osborne and Knight walked towards a parking lot around the back of the store. (15T67-23 to 68-8). Osborne claimed that Kyler came up from behind him and put a knife to his throat. (15T69-21 to 23). Osborne said that defendant brandished a compact shotgun in his face. (15T71-21 to 72-9). While the two men held weapons on Osborne, Shaquan went through his pockets. (15T70-11 to 12; 15T74-17 to 18). He took Osborne's wallet, cash, car keys, and identification card. Ibid. Shaquan kept asking Osborne for more money. (15T75-9 to 17). Osborne estimated that Shaquan took from him about $550-$560. (15T75-20 to 21).

During the robbery, a man in the parking lot yelled "stop." (15T73-7). Kyler told the man that Osborne owed them money and to

mind his own business. (15T73-10). As the three men left, Osborne asked if they could leave him his car keys. One of the men tossed the keys onto the sidewalk. (15T76-1 to 7).

After the robbery, Osborne ran across the street to the Auto Zone parking lot where he had parked his car. (15T76-19). At first he "kind of followed them to see where they went." (15T76-13 to 14). Osborne observed the men walk towards Princeton Street. (15T77-1 to 2). While driving home, he used his cell phone to call the police to report the incident. (15T77-20 to 22). Over defendant counsel's objection, the trial court allowed the jury to hear the 9-1-1 call as non-testimonial evidence and as an excited utterance. (9T159-2 to 160-16; 10T258-2 to 263-11). The robbery occurred at 11:42 a.m. and the 9-1-1 call was received at 11:45 a.m. (9T177-13 to 18).

Osborne told police that he knew the robber from the neighborhood. He provided a description of the suspects. (15T79-11). Osborne identified Shaquan from the store surveillance tape. (15T79-2 to 3). Later that day at the police station, Osborne identified Shaquan and defendant as two of the men who robbed him from single shot photos. (11T69-6 to 70-11; 15T81-23). Osborne said he had seen defendant one time before the incident at a local chicken shack maybe "months or weeks before" but he "was not sure." (15T84-12 to 13). Osborne had never spoken to defendant before. (15T84-23). At a subsequent meeting with police on October 16,

2018, Osborne identified co-defendant Kyler as the man who held a knife against his throat from a photo array. (11T79-5 to 6).

Based on Osborne's identifications, on October 18, 2018, police executed a warrant search of defendants' residence located at 21 Princeton Street, Apartment Number One. (11T87-15 to 89-4). In a bedroom, police found clothing similar to that worn by Shaquan and Kyler in the store video. (11T88-11 to 89-4). They also found Osborne's wallet, debit card, and employer identification card in the bedroom. (11T89-9 to 10). Nothing found in the apartment linked defendant to the incident. (11T119-17).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DENIED DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS WHEN IT PERMITTED THE INTRODUCTION OF THADDEUS OSBORNE'S WADE HEARING TESTIMONY AT TRIAL. (Da97-Da98).

On October 22, 2019, Thaddeus Osborne testified at a Wade hearing about the out-of-court identifications he made of defendants as the robbers. (1T). Osborne was subjected to cross-examination. During the hearing the trial court made it clear that the scope of the hearing was limited to identification. As trial counsel observed, several times the trial court unilaterally restrained trial counsel from deviating from the limits imposed at the evidentiary hearing. (6T33-5 TO 7). For example, when trial counsel sought to question the witness about where he had parked his car, the trial court sua sponte interjected an objection as to

relevance. (1T33-23 to 35-22). Thus, counsel was precluded from examining the witness in this area. (1T35-21). Later when counsel asked Osborne about his location when he called 9-1-1, the trial court sustained the State's objection. Trial counsel explained that he was "trying to get how he got to his house." (1T41-19 to 20). That trial judge said: "This is Wade hearing, or a 104." (1T41-23). Counsel said he would "move on." (1T41-24). Counsel noted that he "did not have the advantage of having Body-Worn Camera (BWC) footage for the hearing," had only been notified just before the hearing that Osborne "had disclosed" he had bought drugs from the defendant, and had not been provided the identity of "the mysterious officer that he disclosed information about the drug deal to." (Da20-Da21). Counsel noted that discovery was not complete by the time of the Wade Hearing which further prevented a meaningful cross-examination of Osborne. See (Da10-D11; Da20-Da21). Trial counsel argued:

> The hearing did not address issues that while germane in a full blown trial is considered collateral to the issues involved in a Wade Hearing and thus was excluded by the Court. During the hearing, defense counsel was admonished by the court and ordered to restrict his questions to the limited areas and topics covered by the prosecutor on direct, and not to develop any other areas of testimony. The Court in response to its own and the prosecutor's objections sustained a number of ruling to that effect.
>
> [Da10.]

Several times throughout the trial both defendants strongly

objected to the use of Osborne's pretrial testimony at trial. See, e.g., (6T33-6 to 44-16; 6T5-15 to 23; 15T56-21 to 30; 18T5-2 to 4).

Under the standard set forth in Crawford[8], a testimonial statement against a defendant by a non-testifying witness is inadmissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him or her. Crawford, 541 U.S. at 59. A witness is unavailable under N.J.R.E. 804(a)(4) where he or she "is absent from the hearing because of death, physical or mental illness or infirmity . . . ." Prior testimony of an unavailable witness may be admitted where:

> Testimony given by a witness at a prior trial of the same of a different matter, or in a hearing or deposition taken in compliance with law in the course of the same of another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.
>
> [N.J.R.E. 804(b)(1)(A).]

The party to whom the testimony is offered against must have had a "meaningful" opportunity to cross-examine the witness. State v. Gentile, 331 N.J. Super. 386 (App. Div. 2000), certif. denied, 175 N.J. 431 (2003). The test is whether "the motive and focus of the cross-examination at the time of the initial proceeding [was]

[8] Crawford v. Washington, 541 U.S. 36 (2004).

the same or similar to that which guides cross examination during the subsequent proceeding . . ." as "the . . . motive in calling that witness . . . [may] not necessarily [be] the same had the witness testified at the trial . . . ." (citation omitted). Id. at 382.

A Wade hearing by definition does not afford the defense with a "similar motive" to examine the witness as he would have had at trial. Such a hearing permits hearsay evidence that generally would be denied during trial and the Confrontation Clause does not apply. State v. Williams, 404 N.J. Super. 147, 171 (App. Div. 2008). A Wade Hearing has been described as:

> . . . a voir dire hearing by the court, with a full opportunity to cross-examine and present witnesses, or the initial determination of whether or not the out of court identification was made in unduly suggestive circumstances and then, if so, whether or not any ensuing in-court identification would be fatally tainted thereby.
>
> [Pressler, Current N.J. Court Rules, comment 2 on R. 3:11-2 (2018).]

The limitations of pretrial hearings have been recognized by the Court when a defendant's Confrontation Rights were at stake. The U.S. Supreme Court has held that testimony from an unavailable witness at a preliminary hearing could not be used as a substitute at trial because such a hearing was limited in scope. Barber v. Page, 390 U.S. 719 (1968). The Court observed:

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and

> the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.
>
> [Id. at 725.]

This court observed that "[t]he Committee Comment also infers that testimony from a probable cause hearing would be similarly excluded under this rule because "the motive to examine this witness extensively may be lacking or the opportunity curtailed." Gentile, 331 N.J. Super. at 390-391 (citing Biunno, Current N.J. Rules of Evidence, Comment 2 on N.J.R.E. 804(b)(1)(A) Gann). In State v. Moody, 169 N.J. Super. 177 (App. Div. 1978), this court noted that the "proposed rule was intended to provide only for the admissibility of evidence given at a prior trial, and was intended to exclude testimony given at preliminary hearings for the reason that cross-examination in such proceedings is either nonexistent or inadequate." Id. at 179

In People v. Ayala, 75 N.Y.2d 422 (N.Y. 1990), the New York Court of Appeals determined that testimony at a Wade Hearing was not admissible at a subsequent criminal trial under CPL 670.10, New York's corollary to N.J.R.E. 804(b)(1). The court observed:

> . . . the focus of suppression hearings is, typically, the propriety of certain challenged official conduct and the relationship between the unlawful official conduct, if any, and the evidence the defendant seeks to exclude. Thus, areas of importance to the substantive issues at trial may be inadequately – or

> not at all – explored. Moreover, because no jury is present and the question of guilt or innocence is not at stake, defense counsel may pursue strategies that would be highly prejudicial to the client in other contexts, such as eliciting facts suggestive of the client's guilt or withholding objection to prosecution testimony that might be harmful to the client's position.
>
> [Id. at 429-430.]

Arguably a probable cause hearing under R. 3:4-3 provides wider scope than does a Wade Hearing. At a probable cause hearing, the State is required to present legally credible evidence sufficient to prove probable cause that a crime had occurred and that it was likely that the defendant committed the offense. At a probable cause hearing the defendant is permitted to challenge the State's evidence as well as present any exculpatory evidence, e.g., alibi. No such leeway is permitted at a Wade Hearing, where the evidentiary hearing is narrowly defined as inquiring whether a witness's out-of-court identification of the defendant was the product of impermissible suggestiveness by law enforcement and should thereby be suppressed. Thus, as the courts have held that testimony at a probable cause or preliminary hearing is insufficient, even where there was cross-examination, to overcome a defendant's Confrontation Clause rights, and as testimony from a Wade Hearing affords defendants even less constitutional protection, such testimony cannot be used as a substitute at trial. Barber, 390 U.S. at 725; Gentile, 331 N.J. Super. at 390-391;

Moody, 169 N.J. Super. at 179.

In this case, Osborne had passed away before trial. The trial court allowed a redacted version of his Wade hearing testimony to be played before the jury. As the trial court made clear, however, the evidentiary hearing was limited to Osborne's out-of-court identification. The trial court was adamant: "This is Wade hearing, or a 104." (1T41-23). In essence, the trial court reminded counsel that the hearing was not the trial and he was to limit the scope of his cross-examination of the witness. Thus, the defense was precluded from inquiring further into Osborne's prior relationship with defendants, in particular Osborne's history of buying drugs from defendant and whether he owed them money. The motive of the defense, by perforce, was limited to challenging the out-of-court identification procedures and whether the witness had been unduly influenced by law enforcement. Further discovery had not been completed by the time of the hearing or critical new discovery had only been received by the defense just before or during the hearing. (Da10-Da11). As trial counsel argued:

> In this case, Osborne's statement was not made in a prior legal proceeding where the defense had an opportunity to perform a full cross-examination of him without restriction on the areas and topics which they could address or with the benefit of substantial and important discovery material. Accordingly, the exception set forth in N.J.R.E. 804(b)(1) does not apply.
>
> [Da15.]

Defendant was not afforded his constitutional right to a "meaningful" opportunity to cross-examine Osborne when considered within the context of a criminal trial. The prejudice here was particularly harmful. For other than Osborne's Wade testimony, the State's case against defendant was far from compelling. No evidence incriminating defendant was found during the search of his apartment. No fingerprint, DNA or any forensic evidence linked defendant to the incident. Defendant is never seen in any of the surveillance videos carrying a shotgun or any other weapon. Osborne does not specifically identify defendant as one of the robbers during the 9-1-1 call. While video surveillance showed defendant in the deli store, not once was he seen engaging with Osborne. Defendant, therefore, was convicted solely by Osborne's testimony taken during a preliminary hearing that afforded limited opportunity to cross-examine the witness. As defendant's Confrontation Rights were violated, the only constitutional remedy here will be a new trial. Barber, 390 U.S. 719; Gentile, 331 N.J. Super. at 390-391.

POINT II

THE TRIAL COURT DENIED DEFENDANT'S CONFRONTATION RIGHTS WHEN IT PERMITTED THE INTRODUCTION OF A TESTIMONIAL 9-1-1 CALL AT TRIAL. (9T258-2 to 263-11).

During trial the State moved to admit into evidence Osborne's declarations he made during a 9-1-1 call. (9T159-2). Defense counsel objected that the declarations were testimonial and their

introduction would violate defendant's Confrontation Clause rights under the Sixth Amendment. (9T160-6 to 16). Counsel argued that admitting Osborne's declarations, who was not available for cross-examination, only "amplifies the problem" with Osborne's Wade testimony being admitted as well. (9T160-14 to 16). Counsel further objected as the State had failed to notify the defense that it intended to introduce the 9-1-1 call and waited until trial was well underway. (9T160-6 to 161-4). Co-defendant's counsel further argued that Osborne was recalling a past event. (9T171-10). Counsel said:

> On a 9-1-1- he's talking about a past crime. He's saying I was robbed. That's not an ongoing emergency. You're saying this happened, that's testimonial. According to Davis v. Washington[9] that doesn't come in.
>
> [9T171-9 to 13.]

The trial court disagreed and admitted the 9-1-1 call as an exited utterance. (9T258-2 to 263-11). Defendant relies, in part, on the legal argument raised in POINT I, supra, and adds the following remarks.

In State ex rel. J.A., 195 N.J. 324 (2008), the Court rejected the argument that a robbery report made about ten minutes after the event had passed was not testimonial evidence. Id. at 348. In

[9] Davis v. Washington, 547 U.S. 813 (2006) (holding that hearsay statements made in a 9-1-1 call asking for aid were not "testimonial" in nature and thus their introduction at trial does not violate the Confrontation Clause as defined in Crawford).

that case, the victim had been robbed and followed the suspects some distance. When he met a police officer several minutes later, he recounted the past event including the flight of the robbers. Ibid.

The Court observed that the non-testifying witness told the officer "what had happened" and that "there was no ongoing emergency -- no immediate danger -- implicating the witness or the victim." Ibid. The Court rejected the State's argument that it "should interpret 'ongoing emergency', for Confrontation Clause purposes, in a way that would allow the use of testimonial hearsay narrating a past event so long as the suspects were at large, even when neither the declarant nor victim is in danger." Such as expansive definition was implicitly rejected by the Davis Court. Ibid. The Court held that given the significance of the witness's testimony, the violation of defendant's Confrontation Clause rights was not harmless error. Id. at 351.

As in J.A., Osborne's declarations to the 9-1-1 dispatcher were testimonial evidence and that by admitting the recording the trial court violated defendant's Sixth Amendment Confrontation Clause rights. Again as in J.A., Osborne reported the incident after the incident had occurred, after he had followed the suspects some distance, and after he had arrived home. Osborne was no longer in danger and he had observed the suspects walking home after conclusion of the incident. In the call, Osborne provided a past

recollection of events after the emergency and danger had passed. Further defendant never had an opportunity to cross-examine the witness. As the State had failed to notice the defense that it intended to use the 9-1-1 recording until after trial commenced, defendant did not have a "meaningful" opportunity to cross-examine Osborne about his 9-1-1 declarations at the Wade Hearing. Id. at 351.

Here defendant was convicted almost solely by Osborne's testimony at the Wade Hearing and the declarations he made during a 9-1-1 call. The significance of the 9-1-1 call should not be understated for during deliberations the jury requested that the recording be replayed. (17T157-13 to 161-21). Further, as trial counsel pointed out, the 9-1-1 call cannot be divorced from Osborne's testimony at the Wade Hearing. In neither case was defendant afforded a "meaningful" opportunity to cross-examine the witness. Under the circumstances, the only constitutional remedy is a new trial.

POINT III

THE TRIAL COURT ERRED WHEN IT PERMITTED THE 911 CALL TO BE PLAYED UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE. (10T258-2 to 263-11).

At trial the State moved to admit into evidence and play Osborne's 9-1-1 call under as a present sense impression hearsay exception. (9T159-2). Trial counsel objected arguing that the call fell under neither the present sense impression nor under the

excited utterance exceptions to the hearsay rule. (9T160-6 to 16). The trial court agreed that Osborne's declarations were not present sense impression but held they were excited utterances. (10T258-2 to 263-11). The trial court said it had listened to the 9-1-1 tape. It found that Osborne appeared to "sound out of breath." (10T258-20 to 21). The incident happened at 11:42 a.m., while the 9-1-1 call was recorded at 11:45 a.m. (9T171-13 to 18). The 9-1-1 recording was admitted into evidence and was played to the jury. (13T198-13).

N.J.R.E 803(c)(2) provides that a declaration is not hearsay where:

> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

The rule requires three conditions that must be met before the declaration can be admitted under the excited utterance exception. J.A., 195 N.J. at 340. The declaration must relate to startling event, it must be made under the stress of excitement caused by the event, and it must be made without an opportunity for the declarant to deliberate or fabricate. Ibid. The trial court should consider the temporal time between the initial observation of the event and amount of time when the declaration was made. State v. Branch, 182 N.J. 338, 366-367 (2005); State v. Cotto, 182 N.J. 316, 329 (2005). Thus, the question is whether there was a

"cooling off" period which allowed the declarant to reflect, deliberate, and fabricate. Cotto, 182 N.J. at 329 (finding a 45-minute period between the robbery and the declaration because the declarant could "achieve some physical and emotional distance" from the robbery); State v. Belliard, 415 N.J. Super. 51, 88 (App. Div. 2010), certif. denied, 205 N.J. 81 (2011) (finding 4-5 minutes between the event and the declaration too long to admit as an excited utterance); State v. Clark, 347 N.J. Super. 497, 506-507 (App. Div. 2002) (admitting statement of witnesses who appeared "hysterical" when police arrived within "a minute or two" of a 9-1-1 call reporting stabbing incident). In J.A., the Court rejected the presumption that simply because a declarant had been the victim of a robbery, her subsequent declarations must be an excited utterance. The Court said that there must be some objective evidence that the witness was still under the influence of the event. J.A., 195 N.J. at 341.

In this case, Osborne testified that after the alleged robbery, he ran to his car and then proceeded to follow the three men until he saw them walk down Princeton Street. Osborne then drove home. Only then did he call 9-1-1 to report the incident. During the call, Osborne demurred and left out several significant and unfavorable details. For instance, he failed to tell the dispatcher that he had been involved in a drug deal with one of the robbers. Osborne left out that he went to the store to cash a

betting slip. When he was asked whether he knew the person who robbed him, Osborne replied: "No." (13T-2). Later, however, Osborne said he had recognized defendant as he had seen him before in the neighborhood. At the Wade hearing, Osborne admitted that he had lied to the dispatcher. (9T170-9; 9T172-1 to 20). The trial court based its finding that Osborne made excited utterances because he sounded out of breath during the 9-1-1 call. However, Osborne was seen on the surveillance video running to his car at 11:42:44 a.m., which could readily explain his breathlessness. (16T241-19). Osborne said the robbery happened about "five minutes ago" from when he placed the 9-1-1 call. (13T200-22).

It was clear from the call that Osborne was recalling a past event where he was no longer threatened or in any danger. When Osborne made the call he had driven several blocks away from the crime scene and had arrived home. (13T200-19). Thus, there was a sufficient "cooling off" period. Cotto, 182 N.J. at 329. Osborne's declarations were not spontaneous or the product of a startling event. Rather, Osborne had the opportunity to shape a narrative that incriminated defendants but left out details that were unfavorable to himself. This was the essence of deliberation and fabrication that so concerned the Court in Branch. 182 N.J. at 344, 357-365. There the Court was particularly troubled that the excited utterance exception had been broadened to allow impermissible past narratives. The Court was also concerned when

the declarant failed to testify and was not subjected to cross-examination, as happened in this case. Id. at 371. Under the circumstances, defendant submits that the trial court prejudicially erred when it admitted Osborne's declarations as exited utterances as the declarations were both testimonial and impermissible hearsay evidence.

POINT IV

THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO A FAIR AND RELIABLE TRIAL WHEN IT PERMITTED SURVEILLANCE VIDEO RECORDINGS TO BE REPLAYED IN SLOW MOTION AND PAUSED MULTIPLE TIMES OVER DEFENDANT'S OBJECTION. (17T134-13 to 14).

During deliberations the jury asked to see a surveillance video replayed. (17T125-15 to 18). The jury's note further asked that the video be played in slow motion at different speeds and that it be paused at certain time periods. Trial counsel objected. (17T125-19 to 22). Counsel argued that playing the surveillance videos in slow motion was inherently prejudicial to his client. Counsel provided the trial court with several academic studies that found playing surveillance videos in slow motion tended to prejudice criminal defendants. (17T135-1 to 136-7; see also Da100-Da112). The trial court overruled the objection stating that there was no case law in support of trial counsel's objection. (17T134-13 to 14). The court ordered the video played at normal speed once and then at slower speeds and paused. (17T144-12 to 147-3). The trial court accepted that Juror Number 8 would speak for the jury.

The video was played in slow motion several times. (17T150-13 to 156-6; 18T89-21 to 101-7). At one point it was played at the slowest possible speed technically available. (17T155-18 to 156-6). The defense renewed its objection to the procedure. (18T94-12). The surveillance recording was played at least eight times at various slow speeds and paused multiple times on the instruction of Juror Number 8.

The courts have long recognized that video evidence plays a unique role in trials. As Justice Clifford observed in Jenkins v. Rainner, 69 N.J. 50 (1976), some forty-five years ago:

> The camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angles, speed, editing and splicing, and chronology. Hence, "that which purports to be a means to reach the truth may be distorted, misleading, and false."
>
> [Id. at 57, quoting Snead v. Amer. Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D.Pa. 1973).]

In State v. Dixon, 125 N.J. 223, 278 (1991), the Court said that showing a film is qualitatively different from showing still photographs. The Court observed: "A fortiori, it is qualitatively different from a narrative description. There is a danger that a jury will place inordinate weight on the moving pictures." Ibid.; Balian v. General Motors, 121 N.J. Super. 118, 128 (App. Div. 1972), (stating, "The danger of undue prejudice as a result of the jury's placing inordinate weight on the moving pictures is always present in light of the tremendous dramatic impact of motion

pictures"), certif. denied, 62 N.J. 195 (1973); accord Wagi v. Silver Ridge Park W., 243 N.J. Super. 547, 559-560 (Law Div. 1989). The Pennsylvania Supreme Court acknowledged that, "In a sense, all slow motion and freeze frame video distorts reality," and that "such distortions may enhance the jury's understanding or it may do the opposite." Com. v. Lewis, 65 A.3d 318 (Pa. 2013). An earlier Pennsylvania court found:

> In a sense, all slow motion and freeze frame video distorts reality. It distorts it in the same way that magnification of a photograph distorts reality.
>
> [Com. V. Hindi, 429 Pa. Superior Ct. 169, 171, 631 A.2d (1341) (1993).]

New Jersey has recognized the prejudicial effect on defendants when a jury is permitted to unduly focus on videotaped evidence. The Appellate Division found that "videotaped evidence is unique." State v. Michaels, 264 N.J. Super. 579, 643 (App. Div. 1993), aff'd on other grounds, 136 N.J. 299 (1994). While addressing the issue of recorded testimony, the appellate court's observation that replaying video evidence increases the "risk that the jury would unduly emphasize the videotaped testimony" applies equally well to surveillance video evidence. Id. at 644-645. So concerned about the prejudice that would accrue to a defendant, the panel held that such evidence must only be played in open court and that the trial court must provide a limiting instruction. Ibid. The Appellate Division instructed:

> If the request for a replay appears reasonably necessary to the jury's deliberations, the trial court should then exercise its discretion to balance that need against any possible prejudice to the defendant.
>
> [Ibid.]

In State v. Burr, 195 N.J. 119 (2008), the Court expanded Michael's ruling to include videotaped testimony that had been introduced as an exhibit and not as evidence at trial. Id. at 135. The common theme of all the above enumerated cases is the recognition that videotaped evidence plays a unique role in criminal trials. As such, the courts have shown increasing concern when the jury is allowed to place undue focus on video evidence.

These concerns have been borne out by scientific studies which have demonstrated that repeatedly showing video evidence in slow motion is prejudicial to criminal defendants. See (Da100-Da112). A 2016 study of four experiments involving "real surveillance footage from a murder or broadcast replays of violent contact in professional football demonstrate that viewing an action in slow motion, compared with regular speed, can cause viewers to perceive an action as more intentional." (Da100). The study further concluded that even if the same video is played at normal speed after the slow motion version was shown, the bias was not mitigated. (Da100). The study's authors found that there was a significant increase in the risk of a guilty verdict when a jury was shown a slow motion version as opposed to a jury shown the

video at regular speed. (Da101). Slow motion videos increase the likelihood that juries will find premeditation. (Da101). The authors cautioned: "If jurors perceive video as a particularly 'objective' representative of true events, its biasing potential may be especially pernicious." (Da101). The study found that "even when viewers were reminded that the video was artificially slowed, they were more likely to vote guilty and more frequently imposed a harsher sentence." (Da110). Co-author Zachery Burns, assistant professor at the University of San Francisco, said: "We found that the odds ratio of a unanimous jury for convicting for first-degree was more than four times larger than those who did not watch the slow-motion video." (Da111).

Cognitive neuropsychologist Ashok Jansari from Goldsmiths University of London echoed the above finding. He observed that the challenge how "perception information" is now being added to trials. (Da106). Jansari concluded: "In the case of slowed-down video evidence, jurors feel that the criminal is using the more calculated decision-making process – even when the time taken shows this is unlikely." (Da106). Forensic psychologist Jacqueline Wheatcroft of Liverpool University said "even minor changes can affect perception," and urged that caution and more "evidence based-research, is needed, "before we rush in and make changes that can have an impact on people's lives." (Da106).

In this case, the surveillance video was replayed at least

eight times at different slower speeds. It was then paused several times and replayed at least eight times at the direction of a single juror. This was not how the State presented its case at trial. There the surveillance videos were played at normal speed without the distorting effect of slow motion coupled with multiple pauses. What occurred at this trial was the trial court permitted the jury to place an "inordinate weight on video" evidence. Dixon, 125 N.J. at 278. It is reasonable to infer that the jury had doubts whether defendant was carrying a shotgun during the incident. The repeated playing of the surveillance tape at different motion speeds indicated that the jury had been unable to reach a verdict by solely relying on the case that had been presented by the State. By permitting the surveillance videos to be replayed multiple times in slow motion and with numerous pauses, the trial court allowed the jury to perceive something that it had not seen during trial. In effect, the jury saw a distorted reality. Hindi, 429 Pa. Superior Ct. at 171; Dixon, 125 N.J. at 278. The trial court's ruling further encouraged the jury to place an "inordinate weight" on the video evidence. Ibid.

Defendant submits that the trial court erred by allowing a distorted version of the video evidence to be played to the jury and failed to present any limiting instruction to the jury that slow motion can distort perception. The court failed to fully appreciate the potential prejudice to the defense. Defendant

submits that as he was denied his right to a fair and reliable trial, the only constitutional remedy is a new trial.

POINT V

THE TRIAL COURT ERRED WHEN IT FAILED TO ACCEPT A PARTIAL VERDICT. (18T105-15 to 106-25).

On December 5, 2019, a Juror 14 informed the trial court that she had a work related flight the next day at 9:00 a.m. (17T165-1 to 4). The court said it would not excuse the juror. (17T166-20 to 21). The next day the jury asked to hear a replay of Osborne's Wade testimony. The witness's testimony was replayed over defendant's objection. (17T5-2 to 86-20). Again over defense counsel's objection, the court acceded to the jury's request to replay the surveillance recording of the back of the deli store in slow motion. (18T89-2 to 101-7). At or about 3:08 p.m., the jury sent the following note to the trial court:

> We are at a standstill on one of the charges. What happens if we cannot come to a decision on that charge?
>
> [18T102-4 to 6.]

The note was not discussed with counsel until 3:30 p.m. (18T103-10). Trial counsel asked the court to take a partial verdict. (18T102-21 to 103-2). Counsel expressed concern that as one of the jurors had a scheduled 8:00 p.m. flight that same day, the jury might rush its decision. Ibid. Co-defendant joined in the motion. (18T103-10 to 11). The court disagreed and instructed the jury to continue deliberations. (18T105-15 to 106-25). Less than

twenty minutes later, at 3:56 p.m., the jury reached a verdict. (18T107-19 to 20).

Where the court determines that, in a criminal action, the jury has not reached a unanimous verdict, "the jury may be directed to retire for further deliberations or discharged." R. 1:8-10. A judge has discretion to require further deliberations after a jury has announced its inability to agree, State v. Figueroa, 190 N.J. 219, 235 (2007), "but exercise of that discretion is not appropriate 'if the jury has reported a definite deadlock after a reasonable period of deliberations.'" State v. Adim, 410 N.J. Super. 410, 423-24 (App. Div. 2009) (quoting State v. Czachor, 82 N.J. 392, 407 (1980)). Under those circumstances, a mistrial may be declared which "'is not a judgment or order in favor of any of the parties' and 'lacks the finality of a judgment and means that the trial itself was a nullity.'" State v. Miller, 382 N.J. Super 494, 503 (App. Div. 2006) (quoting State v. Cruz, 171 N.J. 419, 426 (2002)); see also State v. Hale, 127 N.J. Super. 407, 412 (App. Div. 1974).

In a case involving multiple counts to an indictment, a trial court may accept a partial verdict "specifying the count or counts as to which [the jury] has agreed." R. 3:19-1(a). "[T]he defendant . . . may be tried again on the count or counts as to which it has not agreed." Ibid. "[T]rial courts possess the discretion to accept [partial] verdicts absent a showing of prejudice to the

defendant." State v. Shomo, 129 N.J. 248, 257 (1992). Partial verdicts may be warranted where the jury has deliberated at length and where the court may be concerned that a juror may become unavailable during deliberations. Id. at 259. Before accepting a partial verdict, the trial court must be satisfied that the deadlock is "intractable." Figueroa, 190 N.J. at 237.

In this case, the trial court was aware that it would lose a juror. Juror 14 had informed the court the day before the verdict that she would was scheduled to leave on a work-related trip the next day. The jury deadlock note was presented to the court at 3:30 p.m. and it reached its verdict at 3:56 p.m. (18T107-20). Notably, the prosecutor, in arguing against a partial verdict, said he was concerned about "the possibility of losing this jury." (18T102-11). Thus, the trial court was on notice that at least one juror was under pressure to render a verdict that day and would be unavailable to continue deliberations after December 6, 2019. Shomo, 129 N.J. at 259. As trial counsel observed, "it's . . . going to be four o'clock where a juror that has an eight o'clock flight that more than likely is going to want to leave soon." (18T102-24 to 103-2). The trial court, however, failed to recognize the potential prejudice here. The jury had informed the court that it was unable to reach a verdict on one of the charges. The court was aware of Juror 14's time pressure. Further, the jury had already deliberated for about two days, where 5 notes requesting

replay of video surveillance tapes and witness testimony were received by the court. When the jury sent in the deadlock note it had spent the morning watching playback of three video tapes. By failing to accept the partial verdict, the trial court allowed the extrinsic factor of time pressure to enter into the deliberations. Time, therefore, tainted the verdict. Defendant should not have been subjected to an artificially rushed verdict. There was a reasonable likelihood that the jury reached a verdict it would not otherwise have rendered to accommodate Juror 14's travel schedule. Under the circumstances, the only fair remedy is a new trial.

POINT VI

THE TRIAL COURT'S CUMULATIVE ERRORS DENIED DEFENDANT A FAIR TRIAL. (Not raised below).

"[E]ven when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008); see also State v. Wakefield, 190 N.J. 397, 538 (2007) ("the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair"), cert. denied, 552 U.S. 1146 (2008). An appellate court may reverse a trial court's judgment if "the cumulative effect of small errors is so great as to work prejudice." Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 53 (2009). That matter goes to whether the trial court

afforded the defendant a fair trial. Id. at 56-57. Further, if an appellate court finds cumulative error, it need not consider whether each individual error was prejudicial. Jenewicz, 193 N.J. at 473. A reviewing court, therefore, considers the aggregate effect of the trial court's errors on the fairness of the trial. Pellicer, 200 N.J. at 56-57.

Defendant adopts and incorporates his arguments in POINTS I-V, supra. Each of the errors discussed therein were prejudicial and warrant judicial intervention. However, their cumulative effect, undermined the fairness of the trial as each error compounded the effect of the next. Jenewicz, 193 N.J. at 473.

POINT VII

THE 16-YEAR SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE GIVEN THE UNIQUE FACTS OF THE CASE. (Da121-Da123; 19T38-17 to 40-23).

At sentencing trial counsel argued in favor of 10 years in State prison, subject to the No Early Release Act (NERA). (Da118). Counsel said the following mitigating factors applied: Mitigating Factor 9, character and attitude of the defendant indicate that he is unlikely to commit another offense; Mitigating Factor 11, hardship, as defendant has a young daughter; and Mitigating Factor 13, conduct of a youthful defendant was substantially influenced by another person more mature than the defendant, as defendant's conduct was influenced by his father. (Da119-Da120). Trial counsel

further asked the court "to look at the proportionality of the sentences." (19T28-6 to 7).

The trial court found that aggravating factors 3, risk that defendant would commit another offense due to his prior criminal record, and 9, deterrence, applied. (Da123; 19T38-17 to 40-23). The court determined that Mitigating Factor 11 applied. (Da123). The trial court said that the aggravating factors outweighed the mitigating factor. (Da123). The court merged Count One, conspiracy, into Count Two, armed robbery. (Da121). On Count Two, the court sentenced defendant to 16 years in prison, with an 85% period of parole ineligibility. (Da121). On Count Three, unlawful possession of a handgun, the court sentenced defendant to 5years with a 42-month period of parole ineligibility. The trial court merged Count Four, possession of a weapon, into Count One. (Da121). Department of Corrections records show that defendant's maximum release and parole eligibility dates are July 9, 2032.

Under the New Jersey Criminal Code, a sentencing court first must determine, pursuant to N.J.S.A. 2C:44-1(a) and (b), whether aggravating and mitigating factors apply. State v. Bieniek, 200 N.J. 601, 608 (2010). "In general, a trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by the preponderance of the evidence, balance the relevant factors and explain how it arrives at the appropriate sentence." State v. O'Donnell, 117 N.J. 210, 215 (1989); see also

Bieniek, 200 N.J. at 608 (instructing that Rule 3:21-4(g) requires the sentencing court to explain the reasoning behind its findings). However, when an appellate court finds that the trial court has found aggravating and mitigating factors unsupported by the record, the appellate court may intervene and remand for appropriate resentencing. Bieniek, 200 N.J. at 608 (citing State v. Carey, 168 N.J. 413, 430 (2001)). A remand may also be required when "a reviewing court determines that a sentencing court failed to find mitigating factors that clearly were supported by the record." Ibid. Further, an appellate court may reject an imposed sentence "when a sentence shocks the judicial conscience." O'Donnell, 117 N.J. at 216. Further, the Supreme Court has emphasized that the sentencing court must explain why it believes the overall length of the term is warranted. State v. Cuff, 239 N.J. 321, 347-52 (2019). Thus a mechanistic approach towards sentencing is frowned upon. Ibid.

In this case trial counsel argued that defendant acted under the influence of his father. (Da119-Da120). A fact recognized by the trial court. (19T39-4 to 12). The court observed that defendant's father had also been indicted, "he had some influence in this matter," and that defendant acted upon orders from his parents. (19T39-4 to 12). During pretrial incarceration, defendant maintained "good conduct" as well as presented proper behavior and respect towards the trial court. (Da119-Da120).

Trial counsel also argued that the disparity between the plea offer and the final sentence imposed should be considered. (Da119, citing State v. Pennington, 301 N.J. Super. 216 (App. Div. 1997) (stating, "an extreme disparity between the State's offer and the sentence imposed after trial can be considered by this court when reviewing the reasonableness of the sentence"). No new facts were revealed since the State made an offer of 5 years that justified a sentence more than 3 times higher. (19T29-14; 19T33-19 to 20). The State last offer was eleven years in prison. (19T34-18 to 19). However, at sentencing, the State argued in favor of a much harsher sentence of twenty-years in prison for the robbery with an additional five years for the weapons charge, to be served consecutively.

While certainly robbery must be appropriately punished, in this case the victim suffered no physical injuries and his car keys were returned to him. Further, there is sufficient evidence in the record to suggest that this was not a typical robbery but was likely related a prior drug related dispute over money owed by Osborne to co-defendant Shaquan Knight. Defense counsel argued: "In this case Mr. Osborne admitted to the Prosecutor's Office that he had bought drugs in the past. We saw the video Judge. Unfortunately we never got a chance to question him on it." (19T28-23 to 29-1).

Trial counsel explained that defendant rejected the State's initial offer of 5 years because he anticipated that Osborne would testify at trial where his prior drug dealing relationship with defendants would be more fully explored than had occurred at the Wade Hearing. (19T29-16 to 20). However, after Osborne died, defendant was never provided an opportunity to revisit the State's plea offer. (19T29-22 to 23)[10]. Trial counsel explained that defendant would have accepted the State's offer given the change of circumstances with Osborne's unanticipated demise. (19T30-2). As trial counsel argued, a reasonable sentence would be ten years in prison with an 85% period of parole ineligibility or in the lower end for a first-degree conviction. (Da118; 19T30-16 to 18). A ten-year sentence in this case would be a fair sentence as it is near the midpoint between the State's initial five-year plea offer and the final 16-year sentence imposed by the trial court.

Lastly, trial counsel expressed concern about the sentence disparity between defendant and his co-defendant brother Shaquan Knight. (19T28-6 to 7). In State v. Roach, 146 N.J. 208 (1996), the Court stressed the importance of "uniformity" in sentencing, saying: "Achieving greater uniformity in sentencing is a firm judicial commitment." Id. at. 231. The Court explained that

[10] Osborne died on November 3, 2019, (6T5-1 to 7), while the last plea offer discussion occurred on October 24, 2019. (3T). There was no allegation that either defendant was in anyway involved in Osborne's untimely demise.

uniformity includes proportionality between sentences imposed on defendant who bear similar culpability for the crimes charge. Id. at 231-232. The Court said that "disparity may invalidate an otherwise sound and lawful sentence." Id. at 232 (citing State v. Hicks, 54 N.J. 390, 392 (1969) (reducing defendant's sentence to that imposed on codefendant whose participation in the homicide was greater than defendant's); State v. Lee, 235 N.J. Super. 410, 416 (App. Div. 1989) (remanding for a disparity determination involving comparative severity of sentences)).

The record clearly shows that it was Shaquan who orchestrated the robbery: he had prior drug dealings with Osborne, he approached Osborne in the deli store, lured him outside to the back of the store with the promise of a drug deal, and signaled to the other co-defendants to follow them to the store parking lot. It was Shaquan to searched Osborne's pockets, stole his wallet and money, it was Shaquan who demanded more money from Osborne, and it was in Shaquan's bedroom that police found Osborne's wallet. Thus, the record was clear, it was Shaquan and not defendant who orchestrated the robbery and directed his co-defendants to hold the victim at bay while he robbed him. While defendant may have held a weapon on the victim during the robbery, co-defendant was equally if not more culpable as he was the leader of the conspiracy. Nevertheless, Shaquan, received an 11-year sentence, (Da128-Da130), while defendant received a harsher sentence of 16 years - a disparity

far from "minimal." Roach, 146 N.J. at 233. Here the trial court applied the same aggravating and mitigating factors to both defendants. Under the circumstances, a uniform sentence in the lower range for a first-degree, as accorded to co-defendant Shaquan Knight, is more reasonable and fair.

CONCLUSION

For the foregoing reasons, Fuquan Knight respectfully asks this court to vacate the judgment of conviction and the sentence imposed.

Respectfully submitted,

/s/ Andrew R. Burroughs
Andrew R. Burroughs, Esq.

Electronically submitted,

September 21, 2021.

Superior Court of New Jersey

Essex County

(Law Division - Criminal)

9 TH Grand Jury 2018 Term

19-01-00010-I

The State of New Jersey

vs.

J	FUQUAN KNIGHT	Count (s) 1 thru 4
	KYLER KNIGHT	Count (s) 1 and 2, 5 and 6
J	SHAQUAN KNIGHT	Count (s) 1 and 2

18009152

Indictment #: 2019- 1-10 **INDICTMENT** 6 Count (s)

SECOND	degree	CONSPIRACY
FIRST	degree	ROBBERY
THIRD	degree	UNLAWFUL POSS. OF WEAPON(S)
SECOND	degree	POSS. WEAPON(S) UNLAW. PURPOSE
FOURTH	degree	UNLAWFUL POSS. OF WEAPON(S)

A True Bill Foreperson ☐ Deputy Foreperson ☐

P #: 18009152
w-2018-002548-0706

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