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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2615-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOVAN PHILLIPS, a/k/a TYRELL ATKINS, JOVONN T. PHILLIPS, JASON PHILLIPS, JOVANN PHILLIPS, TAREEKE SCOTT, and TAREEK SOTT,

Defendant-Appellant.

Submitted January 23, 2023 – Decided October 6, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 18-08-2719.

Joseph E. Krakora, Public Defender, attorney for appellant (Alison Gifford, Assistant Deputy Public Defender, of counsel and on the briefs).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Caitlinn Raimo,

Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Defendant Jovan Phillips appeals from the August 2, 2019 judgment of conviction of five drug-related counts entered by the Law Division after a jury trial. We reverse.

I.

While conducting a narcotics investigation in Newark, Detective Alejandro Andino observed from his police vehicle a suspect pacing back and forth near an empty lot. Andino saw an unidentified man approach the suspect, who walked to an orange traffic cone on the lot. The suspect lifted up the cone and removed what looked to Andino to be magazine paper from underneath the cone. Andino saw items protruding from the paper that, based on his training and experience, appeared to be glassine envelopes. Andino watched the suspect hand the glassine envelopes to the unidentified man in exchange for currency. The suspect then placed the magazine paper back under the traffic cone.

Believing he had witnessed a narcotics transaction, Andino summoned back-up units to arrest the suspect. Six or seven officers, some in plain clothes, some wearing badges and vests marked "SHERIFF," converged on the scene in

vehicles. As the officers approached, defendant, who admits he was in the vicinity of the vacant lot, bolted from the scene, ran through the lot, and then in a different direction through the yards of several nearby homes. A description of the suspect provided by Andino was transmitted over police radios. Andino remained on scene to monitor the traffic cone while the other officers chased defendant out of Andino's view.

Officer Dominick Petrucci testified that he was the passenger in a police vehicle that responded to Andino's call for assistance. As the vehicle approached the lot, Petrucci saw a man matching Andino's description of the suspect walking from the scene. The suspect began running when he noticed the vehicle. In court, Petrucci identified defendant as the suspect that ran from the scene.

Petrucci's partner, Anthony Piccinno, was driving the vehicle. He testified that he did not see the suspect flee from the scene as they approached, but that he and Petrucci were informed that the suspect was fleeing over the radio. He testified that a description of the suspect was not given until the flight began.

The officers began to search for the suspect. Both exited their vehicle. Piccinno testified that he saw defendant running and then climbing up a fire escape onto the roof of a house. He notified the other officers, who then

responded to the house where defendant was stuck on the roof. The fire department removed defendant from the roof using a ladder mounted on a firetruck. Andino arrived at the residence approximately a half hour after he observed the suspect engage in the narcotics transaction. He saw defendant on the ground being arrested after his removal from the roof and identified him as the suspect he saw selling narcotics. There is no evidence in the record that Andino was familiar with defendant prior to his arrest. It was later determined that the items under the traffic cone were 116 envelopes of heroin, twenty-four vials of crack cocaine, four plastic bags of crack cocaine, and four sandwich-sized bags of marijuana.

A grand jury indicted defendant, charging him with: (1) third-degree possession of a controlled dangerous substance (CDS) (heroin), N.J.S.A. 2C:35-10(a) (count one); (2) third-degree possession of a CDS (heroin) with intent to distribute, N.J.S.A. 2C:35-5(a)(1) (count two); (3) third-degree possession of a CDS (cocaine), N.J.S.A. 2C:35-10(a) (count three); (4) third-degree possession of a CDS (cocaine) with intent to distribute, N.J.S.A. 2C:35-5(a)(1) (count four); (5) fourth-degree possession of a CDS (marijuana), N.J.S.A. 2C:35-5(a)(1) (count five); and (6) third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a) (count six).

At trial, defendant did not dispute that he fled from the vacant lot and was the person apprehended on the roof. He denied, however, that he was the person Andino saw engage in a narcotics transaction. Defense counsel conceded that defendant was in the area of the empty lot when the officers approached, but argued that defendant fled out of fear when a group of unidentified men who were not clearly identified as police officers converged on the lot, and not because he had engaged in criminal activity.

During his testimony, Andino identified defendant as the person he observed engage in a narcotics transaction and as the person he saw being arrested by the other officers. During cross-examination, Andino acknowledged that in the narrative section of his written report of the incident, he described the person he observed selling narcotics as wearing a white t-shirt and black and grey shorts. Andino conceded, however, that on the first page of the report, which details defendant's arrest, defendant is described as wearing a blue shirt and white shorts. The detective attempted to explain the discrepancy as follows:

> When they generate an arrest report, I'm able to go and right click on that report and then it would – it'll transfer over. So if the – if they put blue jeans and red – red shirt on the arrest report, when I go on this side here, it's just going to carry over.

> My main concern is the narrative part, which is – is best to my belief, was going to describe the people and the events.
>
> . . . .
>
> My testimony is that this section here, which says suspect arrested and personal information would generate, because it's already generated elsewhere in the system. It could be in a – a[n] old arrest report or it could be in a – a current arrest report.
>
> . . . .
>
> The narrative part's what I do my best to accurately write down what happened.
>
> . . . .
>
> So, like I said, doing these reports, it kind of keeps like a history of the individual. So if the gentleman there was arrested several times –
>
> . . . .
>
> I'm just giving an example.

Following that exchange, defense counsel stated "I (inaudible) to strike." There is no indication the court responded to that statement. Andino later confirmed that when he was arrested defendant was wearing the white t-shirt and black and grey shorts he was wearing during the narcotics transaction.

After the close of the State's case, the court dismissed the count of the indictment charging resisting arrest. A jury subsequently returned guilty verdicts on the remaining counts of the indictment.

At sentencing, the trial court found aggravating factors seven, N.J.S.A. 2C:44-1(a)(7) ("[t]he defendant committed the offense pursuant to an agreement to either pay or be paid for the commission of the offense and the pecuniary incentive was beyond that inherent in the offense itself . . . ."); and nine, N.J.S.A. 2C:44-1(a)(9) ("[t]he need for deterring the defendant and others from violating the law . . . ."). The court found no mitigating factors, rejecting defendant's argument that several mitigating factors applied. Contrary to the court's oral opinion, the judgment of conviction lists only aggravating factor nine and lists mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11) ("[t]he imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents . . . ."). The court made no findings with respect to mitigating factor eleven at the sentencing hearing.

Also at sentencing, the court noted that the State had submitted a notice "to impose a mandatory extended term under 2C:46-7(c)." There is, however, no statute codified as N.J.S.A. 2C:46-7(c). It appears that the court intended to refer to N.J.S.A. 2C:43-7(c), which is noted in the judgment of conviction. That

provision requires the imposition of a mandatory minimum term where a defendant has been sentenced to an extended term under one of a number of statutes, one of which requires an extended term for persistent drug offenders pursuant to N.J.S.A. 2C:43-6(f). At sentencing, the court stated that, based on defendant's prior drug-related convictions, "[i]t is . . . required that the defendant is sentenced to an extended term." It did not, however, specify the statute on which it relied to find defendant was subject to an extended term as a persistent offender. N.J.S.A. 2C:43-6(f) does not appear in the judgment of conviction.

The court merged count one into count two and imposed a ten-year term of imprisonment with a five-year period of parole ineligibility. This sentence was at the top end of the range for the potential extended term defendant faced. It appears that the court considered this extended term to be mandatory. The court also merged count three into count four and imposed a ten-year term of imprisonment with a five-year period of parole ineligibility to run concurrently with the sentence on count two. The court did not state whether it considered this term to be a mandatory or discretionary extended term. On count five, the court sentenced defendant to a one-year term of imprisonment to run concurrent to his other sentences. Thus, defendant received an aggregate ten-year term of

imprisonment with a five-year period of parole ineligibility.[1] An August 2, 2019 judgment of conviction memorializes the convictions and sentence.

This appeal follows. Defendant raises the following arguments for our consideration.

> POINT I
>
> DEFENDANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S FAILURE TO PROVIDE ANY IDENTIFICATION INSTRUCTION TO THE JURY.
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> POINT II
>
> DEFENDANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S FAILURE TO PROVIDE THE JURY WITH THE MODEL INSTRUCTION CONCERNING THE DEFENDANT'S ALTERNATIVE EXPLANATION FOR FLIGHT.
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> POINT III
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> DEFENDANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY DETECTIVE ANDINO'S IMPROPER TESTIMONY IMPLICATING DEFENDANT IN CRIMINAL ACTIVITY.

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[1] The State sought imposition of a mandatory extended term as a persistent offender under N.J.S.A. 2C:44-3(a) and a mandatory extended term as a drug offender under N.J.S.A. 2C:43-6(f). These statutes, however, do not appear in the court's sentencing opinion or judgment of conviction. Defendant appears to concede the trial court imposed sentence pursuant to these provisions.

POINT IV

THE CUMULATIVE IMPACT OF THE ERRORS DENIED DEFENDANT A FAIR TRIAL.

POINT V

DEFENDANT'S SENTENCE IS EXCESSIVE AND THE COURT FAILED TO EXPLAIN THE REASONS FOR ITS IMPOSITION. MOREOVER, THE COURT ERRONEOUSLY IMPOSED MULTIPLE EXTENDED TERMS IN VIOLATION OF N.J.S.A. 2C:44-5(a)(2). THUS, THE SENTENCE MUST BE VACATED AND THE MATTER REMANDED FOR RESENTENCING.

II.

The State argues defendant is precluded from raising the absence of an identification instruction by the invited error doctrine. Under the doctrine, a defendant ordinarily cannot profit from an error which was "induced, encouraged or acquiesced in, or consented to by defense counsel . . . ." State v. Van Syoc, 235 N.J. Super. 463, 465 (Law Div. 1988), aff'd, 235 N.J. Super. 409 (App. Div. 1989). Errors resulting from such circumstances "ordinarily are not a basis for reversal on appeal . . . ." State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). "The doctrine is implicated 'when a defendant in some way has led the court into error . . . .'" Id. at 562 (quoting State v. Jenkins, 178 N.J. 347, 359 (2004)).

It is undisputed that defendant's trial counsel rejected inclusion of an identification jury instruction. At the charge conference, the extent of the discussion of an identification instruction was the following exchange:

> COURT: Identification?
>
> [DEFENSE COUNSEL]: No, Judge.
>
> COURT: I don't think identification – Mr. – I don't think – it's all law enforcement I don't think it's appropriate.
>
> [DEFENSE COUNSEL]: I mean, we're not asking for it.
>
> [ASST. PROSECUTOR]: I don't think so either.

Although defendant's counsel rejected inclusion of an identification instruction, we view the holding in Jenkins to preclude application of the invited error doctrine here. In Jenkins, defense counsel asked the court not to charge the jury on lesser included offenses. 178 N.J. at 359-60. The trial court acceded to defense counsel's request, but is also made "clear that [it] arrived at the decision not to instruct on lesser-included offenses independently of any invitation or encouragement by defendants." Id. at 360. "As such," the Court concluded, "the doctrine of invited error does not apply." Ibid. The same is true here.

Despite defense counsel having stated that defendant was not seeking an identification instruction, the trial court made clear that it had independently determined that the instruction was not warranted. As noted above, at the charge conference, the court stated, "I don't think identification . . . it's all law enforcement I don't think it's appropriate." The court determined that in the context of a police officer's identification of a suspect he observed engaging in a narcotics transaction and during the suspect's arrest approximately a half hour later, identification instructions were not appropriate. We conclude that the court's statements are sufficient to bar application of the invited error doctrine to defendant's argument.

As a result of this conclusion, we review the absence of a jury instruction on identification for plain error.

> As applied to a jury instruction, plain error requires demonstration of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result."
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> [State v. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969)).]

The mere possibility of an unjust result is not enough to warrant reversal of a conviction. State v. Jordan, 147 N.J. 409, 422 (1997). Plain error is a "'high

bar,' requiring reversal only where the possibility of an injustice is 'real' and '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. Trinidad, 241 N.J. 425, 445 (2020) (quoting State v. Santamaria, 236 N.J. 390, 404 (2019) and State v. Macon, 57 N.J. 325, 336 (1971), respectively). "The error must be considered in light of the entire charge and must be evaluated in light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting Chapland, 187 N.J. at 289).

It is well-settled that "[a]ccurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial." State v. Concepcion, 111 N.J. 373, 379 (1988). "[W]e must read the charge as a whole." State v. Townsend, 186 N.J. 473, 499 (2006). "[T]he prejudicial effect of an omitted instruction must be evaluated in light of the totality of the circumstances including all the instructions to the jury, [and] the arguments of counsel." Ibid. (alteration in original) (quoting State v. Marshall, 123 N.J. 1, 145 (1991)). A defendant is entitled to a charge that is "accurate and that does not, on the whole, contain prejudicial error." State v. Labrutto, 114 N.J. 187, 204 (1989). "The test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." State v. Baum, 224 N.J.

147, 159 (2016) (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997)).

The reliability of eyewitness identification evidence and the procedures for ensuring the admissibility of such evidence have been addressed at length by the Supreme Court. In State v. Henderson, 208 N.J. 208 (2011), the Court conducted an exhaustive analysis of scientific evidence complied by a Special Master concerning the reliability of eyewitness identifications. The Court held that

> we agree with the Special Master that "[t]he science abundantly demonstrates the many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications."
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> [Id. at 283.]

The Court identified a non-exhaustive list of nine system variables – those created or controlled by law enforcement – affecting the reliability of an identification of a suspect. Such identifications often arise from an eyewitness viewing a live line-up or a photo array of suspects after the incident in question or from a "showup" identification of a single suspect detained at or near the scene of the crime shortly after the event. To assess the reliability of such

identifications, questions addressing system variables include: (1) "[w]as the lineup procedure performed double-blind?"; (2) "[d]id the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?"; (3) "[d]id the array or lineup contain only one suspect embedded among at least five innocent fillers?"; (4) "[d]id the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?"; (5) "[d]id the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?"; (6) "[d]id the witness view the suspect more than once as part of multiple identification procedures?"; (7) "[d]id the police perform a showup more than two hours after an event?"; (8) "[d]id law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?"; and (9) "[d]id the eyewitness initially make no choice or chose a different suspect or filler?" Id. at 289-90.

The Court also set forth a non-exhaustive list of thirteen estimator variables – those outside the control of law enforcement -- that could influence the reliability of an identification. Id. at 291-92. Questions to assess the

reliability of an identification addressing estimator variables include: (1) "[d]id the event involve a high level of stress?"; (2) "[w]as a visible weapon used during a crime of short duration?"; (3) "[h]ow much time did the witness have to observe the event?"; (4) "[h]ow close were the witness and perpetrator?"; (5) "[w]as the witness under the influence of alcohol or drugs?"; (6) "[w]as the culprit wearing a disguise?"; (7) "[h]ow much time elapsed between the crime and the identification?"; and (8) "[d]oes the case involve cross-racial identification?" Ibid.

The Court established a four-part test for conducting a hearing, often referred to as a Wade hearing, to determine the admissibility of an identification of a suspect.[2] "First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification." Id. at 288. "That evidence, in general, must be tied to a system – and not an estimator – variable." Id. at 288-89.

Second, if the trial court finds a defendant has met the hearing threshold, "[t]he State must then offer proof to show that the proffered eyewitness identification is reliable[,] accounting for system and estimator variables . . . ." Id. at 289. "[T]he court can end the hearing at any time if it finds from the

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

testimony that defendant's threshold allegation of suggestiveness is groundless." Ibid.

Third, the defendant bears the ultimate burden "to prove a very substantial likelihood of irreparable misidentification." Ibid. "Fourth, 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.

Along with having the credibility of the eyewitness identification testimony tested at a hearing, the Court held that

> juries will continue to hear about all relevant system and estimator variables at trial, through direct and cross-examination and arguments by counsel. In addition, when identification is at issue in a case, trial courts will continue to "provide[] appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." [W]e direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.
>
> Those instructions are to be included in the court's comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted.
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> [Id. at 296 (quoting State v. Cromedy, 158 N.J. 112, 128 (1999)).]

The Court noted that previously it had, based on scientific evidence, held "that special jury instructions were needed in appropriate cases involving cross-racial identifications." Id. at 284 (citing Cromedy, 158 N.J. at 120-23).

The Court directed the consideration and proposal of jury instructions addressing the system and estimator variables affecting eyewitness identification. Id. at 298-99. "The following year, the Court approved new model jury charges on eyewitness identification, which addressed various factors like memory decay, stress, and the duration of the crime." State v. Sanchez-Medina, 231 N.J. 452, 466 (2018) (citing Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. July 9, 2012)).[3]

The parties have not identified, and our research has not revealed, a published precedent addressing whether the variables affecting eyewitness identification and the model identification jury instructions apply to a law enforcement officer's identification of a suspect he observed during a surveillance operation engage in criminal activity and who he saw being arrested

[3] The current version of the model jury charges on identification were revised on May 18, 2020.

by other officers a short time later. Two precedents on which defendant relies inform our analysis, but are not dispositive.

In State v. Davis, 363 N.J. Super. 556, 559 (App. Div. 2003), issued prior to the Court's seminal holding in Henderson, someone sold drugs to an undercover law enforcement officer. Backup officers attempted to arrest the drug seller, but he fled on foot. Ibid. About twenty-five minutes after the sale, the undercover officer was shown a single photograph by a detective which the undercover officer identified as depicting the drug seller. Ibid. The photograph was of the defendant Davis. Ibid. Four months later, Davis was arrested. Ibid.

At trial, Davis advanced a defense of misidentification. Ibid. "Cross-examination of the State's witnesses was in large part directed at whether the police officers knew defendant prior to the sale, whether they had the ability to accurately identify the perpetrator in light of all the surrounding circumstances, and whether the witnesses' recollections were accurate." Id. at 560. Defense counsel did not request a charge on identification. Ibid.

We concluded that the trial court's failure to give an identification instruction, despite the absence of a request from defendant, constituted plain error. Id. at 559-60. We held that

> [w]hile it is possible that the corroborative evidence against a defendant may be sufficiently strong that a

> failure to give an identification instruction does not constitute plain error, as a matter of general procedure a model identification charge should be given in every case in which identification is a legitimate issue. The failure to give such a charge or to give an adequate charge is most often reversible error. While in some instances it may not be necessary to present an extended charge on identification, nevertheless, the complete absence of any reference to identification as an issue or as an essential element of the State's case is improper. That is the situation in the present case. Although the trial court gave general instructions on such things as credibility and the elements of the crimes charged, there was no specific instruction on the State's burden to prove identification beyond a reasonable doubt. The defense's claim of misidentification, although thin, was not specious. A jury is at liberty to reject a meritless defense, but trial courts are not at liberty to withhold an instruction, particularly when that instruction addresses the sole basis for defendant's claim of innocence and it goes to an essential element of the State's case.
>
> [Id. at 561-62 (citations omitted).]

We concluded that "[a]n extended instruction on identification was not necessary" but "at the very least the jury should have been told" the basic instruction that proving the identity of the person who committed the crime beyond a reasonable doubt was the State's burden. Id. at 562. As a result, we reversed the conviction. Ibid.

In State v. Pressley, 232 N.J. 587, 589 (2018), issued after Henderson, a person sold cocaine to an undercover agent. Within an hour of the transaction,

the undercover officer viewed a single photograph of defendant Pressley at police headquarters. Ibid. She identified Pressley as the person who sold her cocaine. Ibid. Pressley was convicted, in part, on the officer's identification.

Before the Court, defendant argued that the trial court should have held a pretrial hearing pursuant to Wade and Henderson "because he made a sufficient showing that the identification procedure used in this case was impermissibly suggestive." Id. at 590. "He claim[ed] that the identification was essentially a showup and that an officer unfamiliar with the investigation should have presented a photo array – instead of a single picture – to the undercover detective." Ibid. In response to that argument,

> [t]he State and the Attorney General stress[ed] that police officers are "trained observers and trained witnesses" whose job requires them to remember details and faces when they conduct an investigation. They contend that when an officer "merely confirm[s] the identity of a suspect she was just investigating," a photo array is unnecessary and no Wade hearing is required.
>
> [Ibid.]

The Court described the issue before it:

> Counsel for both sides raise an intriguing question: whether an identification made by a law enforcement officer should be tested by the same standards that apply to a civilian. See Henderson, 208 N.J. at 248-72. Defendant claims that "police officers are not more

> accurate eyewitnesses than civilians." For support, he relies on social science research and cites multiple published studies. The State and the Attorney General, in turn, submit that the risk of undue suggestiveness is remote when a trained officer is involved. They also rely on social science articles, but for the proposition that "police officers are more accurate at remembering details of a crime than" members of the public.
>
> [Id. at 590-91.]

The Court concluded that

> [b]ased on the record before us, we cannot determine whether part or all of the protections outlined in Henderson should apply to identifications made by law enforcement officers. We encourage parties in the future to make a record before the trial court, which can be tested at a hearing by both sides and then assessed on appeal. See State v. Adams, 194 N.J. 186, 201 (2008) (declining to adopt a new standard for admissibility of identification evidence without full record to review); State v. Herrara, 187 N.J. 493, 501 (2006) (same).
>
> [Id. at 592.]

The Court noted, however, that had a Henderson hearing been held "it is difficult to imagine that the identification would have been suppressed." Ibid. The Court noted that "[a]lthough showups are inherently suggestive, 'the risk of misidentification is not heightened if a showup is conducted' within two hours of an event." Ibid. (citing Henderson, 208 N.J. at 259). "In addition, the trial

judge gave the jury a full instruction on identification evidence, consistent with Henderson and the model jury charge." Ibid.

A critical distinction between the facts in Davis and Pressley and those presently before the court is that Andino, unlike the law enforcement officers in Davis and Pressley, did not identify defendant from a single photograph selected by a fellow law enforcement officer. He instead identified defendant in court as the person he observed during a surveillance operation engage in the sale of narcotics. In addition, Andino identified defendant approximately a half hour after he had observed the narcotics transaction, as defendant was being arrested by the officers who chased him from the scene and remained with him as he was removed from the roof. Andino testified that at the time of his arrest, defendant was wearing the same clothing he wore during the drug sale approximately a half hour earlier. We do not view these facts to be the equivalent of the identification of a suspect in a one-photograph array at the police station.

There is no suggestion in the record that any system variables influenced Andino's identification of defendant. The detective observed the narcotics transaction from his vehicle. No other officer was involved in Andino's observation of defendant's illegal activity. In addition, according to the record, Andino arrived at the site of defendant's removal from the rooftop as he was

being arrested. There is no suggestion that other officers had any input into Andino's identification of defendant at the site of his arrest as the man he had seen selling narcotics a half hour earlier. Nor is there any suggestion in the record that estimator variables affected the reliability of Andino's identification of defendant.

In addition, as was the case in Pressley, defendant did not compile a record with respect to whether the officer's identification of the defendant in the circumstances presented here was reliable. As a result, we have no evidence or findings of fact to review addressing whether any of the estimator variables identified in Henderson are even applicable to a law enforcement officer's identification of a suspect he observed engaging in criminal activity during a controlled surveillance operation and while he was being arrested a short time later.

Despite these observations, we cannot overlook the fact that the jury received no instructions at all with respect to identification testimony or the State's burden to prove beyond a reasonable doubt that defendant was the person Andino observed selling narcotics. Given that there was no physical evidence connecting defendant to the drugs and in light of the defense argument that defendant fled from the scene for reasons not connected with him having

engaged in illegal activity, the failure to include any instructions regarding identification was clearly capable of bringing about an unjust result.

We note that the error with respect to identification instructions was compounded by the instructions given regarding flight. The model flight instructions have two options. The first option applies where "[t]he defendant denies any flight, (or, the defendant denies that the acts constituted flight)." Model Jury Charge (Criminal), "Flight" (rev. May 10, 2010). In those instances, the jury is instructed to first consider whether the defendant fled, and, if so, whether the defendant fled to avoid arrest. The jury is then instructed that if it determines the defendant fled to avoid arrest, it can consider such flight to be proof of consciousness of guilt.

The second option "should be used where the defense has not denied that he/she departed the scene but has suggested an explanation[.]" Ibid. In those circumstances, the court, while giving instructions to the jury, must summarize the explanation proffered by the defense. The jury is then instructed to consider whether it finds the defendant's explanation credible. If the answer is yes, the jury is instructed not to draw any inference of guilt from the flight. If the answer is no, the jury is instructed to consider whether the defendant fled to avoid arrest. And, as in the case with first option, the jury is instructed that if the answer to

that question is yes, it can consider such flight to be proof of consciousness of guilt.

At the jury charge conference, defendant's counsel stated that she was proposing to "amend" the jury charge as follows: "rather than the defendant denies any flight . . . we propose the defendant denies having knowingly fled police officers or knowingly fled law enforcement [a]nd further denies that this has any bearing on his guilt or innocence of the charges." The State objected to the proposed amendment. Defendant's counsel then reiterated that "[t]his isn't a case where we're denying that there was running or hiding" and explained that she sought only to amend the model instructions to reflect the facts of this case. The court denied defendant's request to amend the model jury charges.

The court read option one of the model charges to the jury. Thus, despite defense counsel's representation that defendant was not denying that he departed from the scene, which was highlighted in defense counsel's summation, the jury was not instructed on option two of the model charges. The jury, therefore, was not given a summary of defendant's explanation for fleeing the scene, nor the instruction that if they found that explanation credible it should not draw any inference of defendant's consciousness of guilt from his departure from the

scene. This error, particularly when considered in combination with the absence of identification instructions, warrants reversal of defendant's convictions.

In light of our conclusions with respect to the instructions, we do not address defendant's remaining arguments.

The August 2, 2019 judgment of conviction is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION