FILED, Clerk of the Supreme Court, 06 Mar 2023, **087251**, **AMENDED**

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney and
Director of Supreme Court Advocacy

973-854-1714
ashalom@aclu-nj.org

February 16, 2023

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-23-22 State v. Quintin D. Watson (087251)

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this amended letter brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

Table of Contents

Table of Appendix

Preliminary Statement

In a lengthy opinion, the Appellate Division found that the State violated Mr. Watson's rights under the Confrontation Clause by creating an inescapable inference that police possessed inculpatory information from another law enforcement agency. The court also considered whether a police officer could properly narrate a surveillance video as a lay witness and whether witnesses who could not make out-of-court identifications should be allowed to make highly suggestive in-court identifications, without specially tailored jury instructions. In addition to its holdings, the panel's opinion provided suggestions for how courts should address both narration issues and in-court identifications going forward.

Amicus American Civil Liberties Union of New Jersey has previously addressed several of the issues implicated in this case. We briefed and argued questions regarding lay witness narration in *State v. Allen* (A-55-21). In that case the ACLU-NJ took the position that witnesses without firsthand knowledge of that which is depicted on a video could not, consistent with *N.J.R.E.* 701, provide lay opinion testimony. The letter brief and appendix are attached as AA 001-139[1]. *Amicus* does not repeat that argument here, instead

[1] AAW refers to Amicus's Appendix in *State v. Watson*;

adopting the same position and adding that although the Appellate Division here misapplied the firsthand-knowledge requirement, the Court should adopt the prophylactic safeguards it proposed.

In *State v. Burney* (A-14-22), the ACLU-NJ's brief addresses the suggestiveness of in-court identifications and contends that the standard for examining in-court identifications requires updating based on both caselaw and social science. Again, *amicus* does not repeat those arguments here, and instead adopts the positions briefed in *Burney*. That letter brief is attached as AA 140-199.

That leaves the Confrontation Clause issue. The Appellate Division correctly held that the admission of testimony about consultation with another law enforcement agency unfairly conveyed to the jury that the testifying officer possessed some unknown but inculpatory information about Mr. Watson. Acknowledging that the case against Mr. Watson was "not overwhelming[,]" the court nonetheless found the constitutional error to be harmless. To reach that conclusion the court applied a waiver principle that is foreign in our harmless error jurisprudence and would convert even the

---

DSA refers to Mr. Watson's Supplemental Appendix;
DSBr refers to Mr. Watson's Supplemental Brief;
5T refers to the trial transcript dated November 13, 2018;
6T refers to the trial transcript dated November 14, 2018.

simplest appeals into lengthy, complex cases. In a single footnote addressing the testimony of Mr. Watson's ex-girlfriend, the court imposed a "waiver" requirement, which overly credited the ex-girlfriend's identification as dispositive in the case. Despite the panel's suggestion to the contrary, defendants on appeal need not – and, indeed, should not – brief every weakness in the State's case in order to rebut a suggestion of harmlessness.

Statement of Facts and Procedural History

For the purposes of this brief, *amicus* accepts the statement of facts and procedural history contained in Mr. Watson's Appellate Division brief, adding the following: In a published decision, the Appellate Division affirmed the conviction. *State v. Watson*, 472 N.J. Super. 381, 514 (App. Div. 2022). The court held that the State violated Mr. Watson's Confrontation Clause rights, but that the error was harmless. *Id.* at 445. On November 18, 2022, the Court granted Mr. Watson's Petition for Certification, limited to three issues. Dsa1. The State did not file a cross-petition regarding the Confrontation Clause issue. On January 6, 2023, the Court issued a peremptory briefing schedule. This brief follows.

Argument

Mr. Watson had no obligation to brief every weakness in the State's case to rebut a suggestion of harmlessness.

In assessing the strength of the State's case, the Appellate Division acknowledged some of the key weaknesses in the proofs: there was "no physical or forensic evidence linking defendant to the robbery, such as fingerprints, geo-location data extracted from defendant's cellphone, proceeds of the robbery, i.e., 'bait money' found in defendant's possession, or the note the robber displayed to the bank teller." *Watson*, 472 N.J. Super. at 443. The panel also conceded that teller's identification was shaky, insofar as he had been "unable to identify defendant in an out-of-court identification procedure, and in fact selected a filler photo of someone other than defendant." *Id.* at 444. Still, the court determined that this "was by no means a 'weak case'" (*id.* at 443) because "the State presented surveillance video capturing the bank robber *in flagrante delicto*." *Id.* at 444. But, although the surveillance video captured *someone* in the act of robbing the bank, the critical question jurors had to answer was whether the recording depicted Mr. Watson. *See* 6T 27:4-10 (defense summation beginning by reminding jurors that "this case is a case of mistaken identity" and explaining that "Quintin Watson is not the man that went to the Garden State Community Bank that day.").

In support of its conclusion that Mr. Watson was the person on the surveillance recording, the appellate panel noted that his ex-girlfriend has "provided a reliable identification of the man depicted in the security video." *Id*.[2] Troublingly, the court concluded that the arguments that Mr. Watson had raised at trial undermining the reliability of her identification had been waived, because he failed to advance them on appeal:

> During summation, defense counsel suggested that Hill had "an axe to grind" with defendant based on their breakup and called into question her motive for identifying defendant in and out-of-court. On appeal, defendant does not challenge the reliability of Hill's identifications. However, we note in the interest of completeness that during oral arguments on appeal, defense counsel briefly mentioned defendant's argument from summation in the context of harmless error. We reject this argument. At trial, it was for the jury to determine whether Hill's identifications were reliable. Indeed, the trial court instructed the jury that "[i]t is your function to determine whether the witness's identification of defendant is reliable and believable . . . ." Furthermore, because defendant has failed to brief this argument, we deem it waived.).
>
> [*Id.* at 444, n. 22 (citing *New Jersey Dep't of Env't Prot. v. Alloway Twp.*, 438 N.J. Super. 501, 504 n.2 (App. Div. 2015) and *Fantis Foods v. N. River Ins. Co.*, 332 N.J. Super. 250, 266–67 (App.Div.2000)).]

[2] The panel overstated the reliability of the identification. As Mr. Watson's supplemental brief explained, familiarity does not exempt an identification from the same factors that impair the reliability of all identifications. DSBr 42 (collecting studies).

But, of course, on appeal, defendants only raise issues that can serve as a basis for the reversal of a conviction (or sentence) and are instructed not to focus on issues where the judge properly ruled. *See, e.g.*, *Price v. Hudson Heights Develop*., 417 N.J. Super. 462, 466-467 (App. Div. 2011) (a party "who obtains the judgment sought, may not be heard to complain on appeal about the reasons or rationales cited for the action") (citing treatise); *State v. Rose*, 206 N.J. 141, 189 (2011) (Rivera-Soto, J., concurring in part, dissenting in part) ("The notion that a court of appeals willy-nilly can decide issues unnecessary to the outcome of the case results in the wholesale issuance of advisory opinions, a practice our judicial decision-making system categorically rejects.") Simply put, there exists no vehicle for a defendant to identify weaknesses in the State's case where the defendant does not allege any error. Moreover, appellate courts should not encourage a practice that would require lawyers to include the proverbial kitchen sink in their briefs. *See* John C. Godbold, "Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal," 30 SW LJ 801 (1976) (Circuit Court judge noting as an example of poor appellate advocacy "a fifty-eight-page brief, of which nineteen pages, one-third of the brief, are devoted to complaints about rulings and events before trial and at trial, followed by a statement that none of these matters is claimed to be reversible error.").

At trial, Mr. Watson challenged Ms. Hill's testimony by suggesting that she was biased against him.[3] On cross-examination, defense counsel sought to undermine the State's suggestion that Ms. Hill and Mr. Watson's relationship was "always friendly" (5T 92:17), even after they had broken up. Counsel elicited from Ms. Hill that Mr. Watson left her in 2012 and their "relationship did not end under the best circumstances[.]" *Id.* at 101:6-8. Specifically, Mr. Watson left Ms. Hill after telling her that he met another women and that the other woman had become pregnant with his child. *Id.* at 101:9-14. He left Ms. Hill for that woman, to whom he got married and with whom he had children. *Id.* at 101:15-102:3. In summation, defense counsel returned to this theme: he told the jury that it would be instructed it could consider a witness's motivation for testifying. 6T 31:23-32:1. And then he reminded the jury about the circumstances of their breakup and suggested that her presence as a witness came about because she "ha[d] somewhat of an axe to grind." *Id.* at 32:11-17.

Neither defense counsel's focus on the witness's bias nor his questioning regarding the limitations of the photograph she was shown suggest that he

[3] He also challenged her ability to identify him based on the photograph she was shown, in which she acknowledged she could not see "the top portion of his face," because "a hat [wa]s pulled down over the eyes" and obscured "20 to 25 percent of his face[.]" 5T99:24-100:12. She also agreed that she could not see whether the person in the photograph had hair nor could she see the color of his eyes. *Id.* at 100:14-19.

believed that the trial court made any errors in *admitting* the identification. Instead, he asked the jury to assign it minimal weight. The jury's failure to do so, to the extent it did, cannot serve as a basis for appeal and, as a result, should not have been raised in the defendant's brief.

Although it is true that "it was for the jury to determine whether Hill's identifications were reliable" (*Watson*, 472 N.J. Super. at 444, n. 22), the jury's return of a guilty verdict does not, on its own, indicate that it found the identification was reliable. The jury was asked whether *all* the evidence it received, including the improper testimony that suggested that a non-testifying law enforcement witness had inculpatory information about Mr. Watson, amounted to proof beyond a reasonable doubt. That they determined that all the proofs were sufficient to convict does not mean that without the improper evidence there was no real possibility of acquittal, which is the critical inquiry in harmless error analysis. *State v. Macon*, 57 N.J. 325, 336 (1971); *see also State v. Pillar*, 359 N.J. Super. 249, 276–77 (App. Div. 2003) (describing two acceptable, but different approaches to harmless error analysis: the contribution test, which asks whether the evidence was likely to have been considered by the jury in arriving at its verdict and a second test that asks whether the "untainted evidence" "is so overwhelming that in the judgment of the reviewing court conviction was inevitable" but noting that under either test

the State must demonstrate that the jury would have "arrived at the same collective decision regardless of the error.")

Not only does the Appellate Division overstate what the jury's verdict indicated about the weight to be assigned to the identification,[4] it also imposes unnecessary and inefficient requirements on litigants. A simple example illustrates the folly in the Appellate Division's requirement: Imagine a defendant challenged an identification under *State v. Henderson*, 208 N.J. 208 (2011), contending that the witness was too far away to see the event in question. Further suppose that the trial court held a hearing as required by *Henderson*, and determined that the identification, despite its flaws, was sufficiently reliable to be admissible. Under the Appellate Division's waiver rule, a defendant who wanted to challenge the admission of other crimes evidence in that case would have to brief the identification issue as a means to rebut a suggestion of

[4] In considering the reliability of the identification, compare the strength of the State's case here to the situation in *State v. Sterling*, 215 N.J. 65 (2013). There, despite improper joinder, the Court upheld one of the convictions, concluding that in light of "nuclear DNA evidence tying defendant to the crime, coupled with the victim's strong identification of defendant" the error was harmless beyond a reasonable doubt. *Id.* at 102. That decision, in a case with both DNA and a far-stronger identification than here, drew a strong dissent from Justice Albin who contended that it had "completely compromise[ed] our harmless-error jurisprudence." *Id.* at 109 (Albin, J., dissenting). Ms. Hill's identification of Mr. Watson not "immediate and strong" (*id.* at 104) as was the identification in *Stirling* and, as discussed above, was infected with bias from an acrimonious breakup.

harmlessness. This would be true even if the defendant concluded that the trial judge *correctly* applied the facts to the law in deciding the identification issue. The onerous obligation would not exclusively apply to identification issues: among other issues, defendants would need to brief the limitations of all sorts of forensic evidence, even when they did not challenge its admissibility, they would need to document every challenge to a witness's credibility, and they would need to brief every inconsistent statement.

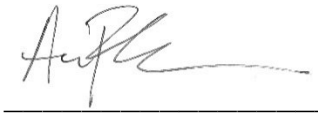
That requirement has no basis in our jurisprudence and would be wildly inefficient, transforming even the simplest brief into a tome. Not every weakness in the State's case reflects an issue that can, or should, be raised on appeal. Insofar as one of the purposes of the harmless error rule is "to conserve judicial resources," *State v. G.V.*, 162 N.J. 252, 261 (2000) (internal citations omitted), it would be particularly bizarre to require the inefficient elongation of all defendants' appellate briefs to prevent harmless error findings.[5]

[5] Indeed, because even those issues *mentioned* in a brief may be deemed waived if inadequately briefed, *see Ramapo Brae Condo v. Bergen County Hous. Auth.*, 328 N.J. Super. 561, 582 (App. Div. 2000), *aff'd o.b.*, 167 N.J. 155 (2001), the Appellate Division's requirement appears to demand significant discussion, not a mere mention, of every perceived weakness in the State's case.

Conclusion

Because Mr. Watson's did not waive his effort to undermine Ms. Hill's identification and because the proofs against Mr. Watson were far from overwhelming, the error in admitting testimony that created the inescapable inference that a non-testifying law enforcement witness had information about Mr. Watson cannot be deemed harmless. As a result, and because a witness without firsthand knowledge was allowed to narrate the surveillance video and another witness was permitted to make a first-time, in-court identification, the Court should reverse Mr. Watson's conviction.

Respectfully submitted,



Alexander Shalom (021162004)
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714

DATED: February 16, 2023

Amicus's Appendix

FILED, Clerk of the Supreme Court, 06 Mar 2023, **087251**, **AMENDED**

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney and
Director of Supreme Court Advocacy

973-854-1714
ashalom@aclu-nj.org

August 22, 2022

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-55-21 *State v. Dante Allen* (086699)

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief in the above-captioned case on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

Table of Contents

Table of Appendix

Preliminary Statement

In recent years, courts have become inundated with appeals seeking relief because law enforcement officers have narrated videos from surveillance cameras, dashboard cameras, and body worn cameras. Unless this Court provides clear substantive limitations and procedural safeguards, narration will continue virtually unabated, forcing reviewing courts into the difficult task of retrospectively determining whether the admission of that narration impacted the result of the trial.

Mr. Allen's brief ably sets forth the rationale for imposing an absolute prohibition on the narration of videos that are not based on the actual observations – firsthand knowledge – of the testifying law enforcement officer. *Amicus* adopts that position in full and does not repeat the argument here. Instead, this letter brief focuses on two points: First, *amicus* explains what the firsthand knowledge/ actual observation limitation means in practice (Point I). Second, *amicus* reinforces the importance of clear procedural protections and straightforward remedies for their violation. Without those protections and remedies, appellate courts will remain flooded with these claims of error (Point II).

Statement of Facts and Procedural History

Amicus ACLU-NJ accepts the statement of facts and procedural history contained in the unpublished Appellate Division decision. *State v. Allen,* No. A-0060-19, 2022 WL 200053 (App. Div. Jan. 24, 2022).

Argument

I. Lay opinion must be based on first-hand perceptions.

Mr. Allen's brief explains how this Court has always required that police officers testifying to their lay opinion base that testimony on "first-hand real-life perceptions." DBr 16-19[1] (*citing State v. LaBrutto*, 114 N.J. 187, 202 (1989), *State v. Locuto*, 157 N.J. 463, 472 (1999), *State v. Singh*, 245 N.J. 1, 17-19 (2021), and *State v. Sanchez*, 247 N.J. 450, 469 (2021)). That brief also cites to cases from Circuit Courts of Appeal supporting the same contention. *Id.* at 20-24 (*citing United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001) and *United States v. Garcia*, 413 F.3d 201, 210-17 (2d Cir. 2005)). *Amicus* agrees with Mr. Allen that real-life perceptions are both a prerequisite for the admission of lay testimony under *N.J.R.E.* 701(a), but also serve as a key feature of the helpfulness inquiry under *N.J.R.E.* 701(b). *Id.* at 30-42. Allowing officers to opine on what a video shows when the officers lack any knowledge – developed from something other than mere observation of the video – does not aid the jury: it simply puts law enforcement's heavy thumb on the scale of justice. Allowing officers to opine about a video about which they have no personal knowledge invites the sort of vouching for other witnesses' accounts that this Court has explicitly forbidden.

[1] DBr refers to Defendant Dante Allen's Supplemental Brief.

State v. Lazo, 209 N.J. 9, 24 (2012) ("Neither a police officer nor another witness may improperly bolster or vouch for an eyewitness' credibility and thus invade the jury's province." (citing *State v. Frisby*, 174 N.J. 583, 593-96 (2002)). The risk of vouching is particularly troublesome with law enforcement witnesses. *Neno v. Clinton*, 167 N.J. 573, 586 (2001) (acknowledging that "jur[ies] may be inclined to accord special respect to [police officer] witness[es]").

But that does not mean that an officer needs to have been at the scene of the crime to testify about what a crime scene video depicts. Two examples may be illustrative. Imagine a video that captured a police car chase. The driver of the police car could, of course, narrate the video (e.g. "this is where the suspect sped up"). But officers who were not giving chase could still testify about the video, assuming they had a source of information other than the video itself. Although they could not testify that "the suspect appears to be picking up speed here" they could explain to the jury that "the suspect is driving up a hill on Main Street; the hill is very steep," as long as the officers knew about the hill on Main Street from their own travels there.

Or consider an example derived from the Appellate Division's opinion in *State v. Watson*, 472 N.J. Super. 381, 467 (App. Div. 2022): imagine a police officer in a robbery case wants to testify that one surveillance video was shot from inside a bank and another from a building behind it. If the officer merely intuited

the location of the cameras based on a review of the videos, that testimony would not satisfy *N.J.R.E.* 701's first-hand perception requirement. On the other hand, if the officer had traveled to the bank – even months after the robbery – and personally observed the location of the surveillance cameras, the officer would have sufficient personal knowledge to satisfy the rule's requirement.

The Rules of Evidence require first-hand knowledge, but that mandate does not demand that officers had been at the crime scene at the time of the crime; it simply forbids them from relying on the videotape alone as a basis for their testimony.

II. To prevent appellate courts from confronting video narration errors with "numbing frequency," the Court should adopt clear procedural protections and provide clear remedies for their violation.

Whether or not the Court adopts Mr. Allen's position on the applicability of *N.J.R.E.* 701 – full endorsed by *amicus* – it must set forth both clear processes for the use of narration and well-defined remedies when witnesses narrate video outside of the bounds the Court sets. Claims that law enforcement witnesses have improperly narrated videos have begun to inundate appellate courts. In the first six months of 2022 alone, in addition to the published opinion in *Watson*, the Appellate Division has issued unpublished opinions in eleven cases raising this issue. *See State v. Williams*, No. A-2543-18, 2022 WL 53125 (App. Div. Jan. 6,

2022), certif. denied, 251 N.J. 12, 275 A.3d 898 (2022) (AA1-AA9)[2]; *State v. Ciccolello*, No. A-3931-18, 2022 WL 100615 (App. Div. Jan. 11, 2022), certif. denied, 251 N.J. 34, 275 A.3d 912 (2022) (AA10-AA25); *State v. Lemmon*, No. A-1628-18, 2022 WL 244119 (App. Div. Jan. 27, 2022) (AA26-AA38); *State v. Bailey*, No. A-1513-19, 2022 WL 274271 (App. Div. Jan. 31, 2022), certif. denied, 251 N.J. 36, 275 A.3d 913 (2022) (AA39-AA46); *State v. Holland*, No. A-3299-18, 2022 WL 433230 (App. Div. Feb. 14, 2022) (AA47-AA58); *State v. Enix*, No. A-2664-18, 2022 WL 829804 (App. Div. Mar. 21, 2022) (A59-AA67); *State v. Amer*, No. A-3047-18, 2022 WL 983661 (App. Div. Mar. 31, 2022) (AA68-AA81); *State v. Cooper*, No. A-4692-18, 2022 WL 1100521 (App. Div. Apr. 13, 2022) (AA82-AA92); *State v. Miller*, No. A-0738-20, 2022 WL 1577563 (App. Div. May 19, 2022) (AA93-AA96); *State v. Poole*, No. A-2811-19, 2022 WL 2232815 (App. Div. June 22, 2022) (AA97-AA108); *State v. King*, No. A-4005-17, 2022 WL 2289044 (App. Div. June 24, 2022) (AA109-AA126).

Appellate courts' treatment of these cases has run the gamut. In some cases the Appellate Division has found no error. *See, e.g.*, *Bailey*, WL 274271 at *4; *Lemmon*, No. A-1628-18, 2022 WL 244119 at *11. In others, where counsel failed to object, the court determined there was no plain error. *See, e.g.*, *Holland*, 2022

[2] Pursuant to *R.* 1:36-3 these cases are included in an Appendix. Insofar as they are cited for the proposition that many similar cases come before appellate courts, there are no cases to the contrary.

WL 433230 at *9; *Enix*, 2022 WL 829804 at *6. In some of those cases, the court found no plain error though it determined that the narration violated norms set forth by this Court. *See, e.g.*, *Williams*, 2022 WL 53125 at *5. In yet others, the failure to abide by the rules set forth by this Court has mandated reversal. *See, e.g.*, *Miller*, 2022 WL 1577563 at *4 (cumulative error); *Poole*, 2022 WL 2232815 at *1 (cumulative error); *King*, 2022 WL 2289044 at *13.

But the results of the cases matter less here than their quantity. As cameras proliferate, their use in criminal trials will only increase. *See* Liza Lin and Newley Purnell, A World With a Billion Cameras Watching You Is Just Around the Corner, *Wall Street Journal*, Dec. 6 2019 (estimating a billon surveillance cameras worldwide by the end of 2021, up from 770,000,000 in 2019);[3] *Watson*, 472 N.J. Super. at 405 (noting "that the admission of surveillance video recordings at trial is becoming more common because of the proliferation of government, commercial, and residential surveillance cameras."); Hyland, S., Body-Worn Cameras in Law Enforcement Agencies, 2016, Bureau of Justice Statistics, November 2018 (finding that 47% of general-purpose law enforcement agencies had acquired body-worn

[3] https://www.wsj.com/articles/a-billion-surveillance-cameras-forecast-to-be-watching-within-two-years-11575565402.

cameras and that 80% of large departments had)[4]; N.J.S.A. 40A:14-118.3 (requiring use of body worn cameras).

The ubiquity of video evidence makes the need for clear guidance from the Court even more acute. Decades ago, the Court noted that it had "repeatedly expressed concern for prosecutorial propriety. . . . [but d]espite those concerns, 'instances of prosecutorial excesses . . . seem to come to [our appellate courts] with numbing frequency.'" *State v. Frost*, 158 N.J. 76, 87–88 (1999) (quoting *State v. Watson*, 224 N.J. Super. 354, 362 (App. Div. 1988) (alterations in internal quotation appear in *Frost*). The Court acknowledged that prosecutorial misconduct claims appeared in appellate courts so often because there are cases where "derelictions go unpunished because it is clear that no prejudice to the defendant resulted." *Id.* at 88. Although the Court did not establish an automatic reversal rule in *Frost*, it acknowledged that such a rule might cut down on the numbing frequency with which the Court heard these cases. *Id.*

In the context of narration errors, prosecutors and police witnesses would be well-served to have a bright-line rule, as proposed by Mr. Allen (and as required by N.J.R.E. 701). *See State v. Patton*, 362 N.J. Super. 16, 48 (App. Div. 2003) (noting the benefit of a bright line rule in providing "clear procedure for police to

[4] https://bjs.ojp.gov/library/publications/body-worn-cameras-law-enforcement-agencies-2016.

follow that should produce a consistent result."). In addition to being the most faithful to the N.J.R.E. 701, a strict first-hand knowledge rule would help extricate courts from the difficult task of determining just how harmful improper testimony had been in the context of a trial. Where appellate courts find that a particular behavior is inappropriate, but do not reverse the conviction, prosecutors have less incentive to modify their approach in subsequent cases. *See* Bidish Sarma, Using Deterrence Theory to Promote Prosecutorial Accountability, 21 *Lewis & Clark L. Rev.* 573, 604 (2017) (explaining that harmless error and other doctrines that focus on assessing the integrity of the conviction have "water[ed] down the consequence of prosecutorial misconduct[,]" reducing the deterrent effect for prosecutors).

Wherever the Court draws the line of permissible narration, it must both be clear about what is permitted and set up a mechanism to ensure compliance with those limitations. In *State v. Watson*, the Appellate panel proposed procedures that should be implemented, regardless of what the Court ultimately permits: first, "trial court[s should] conduct a Rule 104 hearing whenever the prosecutor intends to present narration testimony in conjunction with playing a video recording to the jury." 472 N.J. Super. at 405. Second, the Court should endorse "model [jury] instruction[s] specifically tailored to address testimony that narrates or otherwise comments on video recordings as they are being played to the jury." *Id.* Both procedures will help reviewing courts understand the impact that erroneous

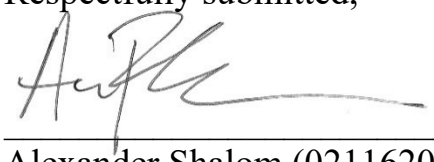
narrations have had on juries. In situations where police officers provide narration that has not been agreed to – or worse, that has been forsworn – a strong presumption of prejudice should attach.

A presumption of that sort would be entirely consistent with prior caselaw, which requires appellate courts to review trial courts' decisions regarding the admissibility of evidence for abuse of discretion. *State v. Sanchez*, 247 N.J. 450, 465 (2021); *State v. Singh*, 245 N.J. 1, 12 (2021). Where a trial court admitted narration, it would be subject to an abuse of discretion standard; but, where the trial court determined that testimony should be excluded, and the State nonetheless introduced it, the reviewing court should presume prejudice. And where jurors are not provided with appropriate instructions on how to treat narration, reviewing courts should be particularly concerned with the impact erroneous opinion testimony might have on the fairness of the trial.

Conclusion

The increased prevalence of cameras of all sorts makes inevitable the more frequent use of videos in trials. Unless the Court sets forth clear limitations on witnesses' narration of those videos, claims of error about narration will inundate appellate courts. Mr. Allen proposes the appropriate limitation: police officers should only be able to narrate videos when they have personal knowledge – obtained from a source other than watching the video itself – about what is contained in the video. Regardless of whether the Court adopts that limitation, it should mandate pretrial hearings to determine the admissibility of narration testimony and it should require jury instructions to ensure that juries understand the role that narration may play.

Respectfully submitted,



Alexander Shalom (021162004)
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, NJ 07102
(973) 854-1714
ashalom@aclu-nj.org

Amicus's Appendix

2022 WL 53125
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Khalif WILLIAMS, Defendant-Appellant.

State of New Jersey, Plaintiff-Respondent,

v.

Bria A. Bush, Defendant-Appellant.

DOCKET NO. A-2543-18, A-3415-18

Argued (A-2543-18) and Submitted (A-3415-18) November 29, 2021

Decided January 6, 2022

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 17-05-1393 and 17-05-1394.

Attorneys and Law Firms

Margaret McLane, Assistant Deputy Public Defender, argued the cause for appellant in A-2543-18 (Joseph E. Krakora, Public Defender, attorney; Margaret McLane, of counsel and on the brief).

Caitlinn L. Raimo, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent in A-2543-18 (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Caitlinn L. Raimo, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant in A-3415-18 (Louis H. Miron, Designated Counsel, on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent in A-3415-18 (Caitlinn L. Raimo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges Messano and Enright.

Opinion

PER CURIAM

***1** In these appeals, which we calendared back-to-back and now consolidate for the purpose of issuing a single opinion, co-defendants Khalif Williams and Bria A. Bush appeal from their respective convictions, and Williams challenges his sentence. We affirm.

I.

On the afternoon of December 6, 2016, Detectives Rahsaan Johnson and Phillip Reed of the Essex County Prosecutor's Office Narcotics Task Force were patrolling an area in Newark when their attention was drawn to a silver-colored car with "darkly tinted windows." Williams exited the vehicle and soon returned to it with co-defendant, Afrika Islam. Williams briefly opened the left rear door behind the driver's seat to peer inside the car before driving away with Islam in the passenger seat. The detectives "decided to perform [a] motor vehicle stop due to the tinted windows."[1]

Promptly following the stop, Islam alighted from the passenger side of the car. Reed quickly approached him and told him he was not free to leave. Johnson walked to the driver's side of the car and asked Williams for his license, insurance, and registration. As Williams handed over his documentation, Reed shouted out, "R.J., gun[!]" Although Johnson did not see the gun spotted by his partner, he reached for his own gun and trained it on Williams. Johnson commanded Williams to show his hands and not to move. Nevertheless, Williams was observed "touching the wheel of the car" and "touching his pockets." Johnson reached into Williams's car to remove the ignition key and threw the key into the street to prevent Williams from driving away. Williams then "blade[d]" away from Johnson so Johnson could not see Williams's "front anymore." This move caused Johnson to "beg" Williams not to make him shoot him because Johnson was unable to see what Williams "was reaching for."

Seconds later, while Reed was holding Islam to prevent him from fleeing the scene, Islam broke free from the detective's grip and ran in front of Williams's car. Johnson "cut [Islam] off" and Reed grabbed Islam again before moving him to the sidewalk. As Reed reached the sidewalk, his gun fell from its holster and dropped to the ground. Reed retrieved the gun with

one hand and held Islam with the other. Contemporaneously, Williams "rolled" over his front passenger seat and exited the vehicle. Reed bolted to grab Williams, prompting Johnson to run toward Islam to prevent him from absconding. Johnson struggled to detain Islam but ultimately handcuffed him to a railing while Islam attempted to pull away from the detective.

As Reed tried to keep Williams in his grasp, Williams "c[a]me out of his hoodie[,]" and pushed off of Reed. Williams fled down the street and crouched behind a car in a driveway. Reed cautiously approached him and saw Williams "fiddling ... down in his crotch area." Reed told Williams to "stop reaching" and "don't make me shoot you." Williams "hooked around" a nearby home and headed to the backyard area. Reed caught up to him in time to see Williams throw a gun in the air and hear it land on the ground. Shortly thereafter, backup arrived, the gun was recovered, and Williams and Islam were arrested.

***2** Much of this incident was captured on a cell phone video. Indeed, before Islam attempted to run and while Williams was still in his car, Bush and another co-defendant, Rana James[2] walked up to the detectives. The women started questioning the detectives, and yelling, "why you stopping them?" and "let them go[.]" Johnson later testified that the women were "in [his] investigation" and he could see they were "recording [him] with their cell phones." Because one of the women was "in [his] direct line of fire on the front passenger side" while he had his gun trained on Williams, Johnson told her to "back ... up." He reasoned that if he "had to shoot [Williams, he] didn't want to mistakenly shoot her." Despite this command, the woman "wasn't listening" and "stayed in [Johnson's] investigation."

Johnson again ordered the women to "back up," to "giv[e] them an opportunity to leave because [they were] in a criminal investigation at this point[.]" Neither woman heeded his commands. Moreover, when Johnson asked a bystander to call 9-1-1 as he struggled to gain control of Islam, one of the women responded, "Hey, yo, don't call ... nobody." Johnson warned that once law enforcement arrived, he would be "locking [her] up." Undaunted, the female responded, "You're not locking me up, I got you on record. What you locking me up for?" Bush and James stayed on the scene until they were arrested, along with their co-defendants.

II.

Williams was charged with second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) and third-degree resisting arrest by force, N.J.S.A. 2C:29-2(a)(3)(A). Additionally, he was charged in a separate indictment with second-degree possession of a firearm by certain persons, N.J.S.A. 2C:39-7(b). Bush was charged with one count of fourth-degree obstruction, N.J.S.A. 2C:29-1.

The State jointly tried Williams, Islam, and Bush. It produced Reed and Johnson as witnesses and played the footage from the incident that it recovered from James's cell phone. The recording lasted roughly five minutes and captured the detectives' interactions with the co-defendants from the time Johnson had his gun trained on Williams until other members of law enforcement arrived on the scene to assist the detectives.

Reed testified that after the detectives pulled over Williams's car, he conducted a protective pat down of Islam with negative results. Reed stated he subsequently spotted a silver handgun in the rear pocket of Williams's front passenger seat and promptly alerted Johnson to the gun's presence while Williams was still in the car. Reed identified Bush in court as one of the women who was "yelling at" him after Williams was stopped.

According to Reed, once Williams exited the car, he could see a "large bulge in [Williams's] pants," and suspected Williams had "a weapon on him." Reed testified he only had "one hand to actually hold Khalif Williams" because he had lost his holster and needed to hold his gun in his other hand. Reed worked to "keep [Williams] on scene[,]" believing the suspect had a weapon and anticipating the detectives would "have to make an arrest" after Reed "s[aw] a gun." Reed stated that after Williams broke free and ran to hide behind a car, he continued to suspect Williams had a weapon on him, which is why he ordered Williams to "stop reaching[,]" and "[d]on't make me shoot you please."

When Johnson testified about the motor vehicle stop, he conceded that on the day of the incident, he did not see the gun spotted by Reed. Nevertheless, the defense did not object when the State played and paused the cell phone footage for Johnson and he testified the video showed a bulge in Williams's pants, "between his groin area and his thigh." Johnson also testified he thought the bulge was "[t]he handgun" because of "the imprint of it." When Johnson was shown another frame from the video, he pointed to the still image and stated, "do you see this imprint right here? That's

the gun, I think." He explained that Williams had "the weapon trapped between [a pair of thermals], the jeans and his leg." The State again paused the video toward the end of the recording and Johnson testified the image depicted Reed and Williams walking out of a driveway, "minus ... the purple hooded shirt and no bulge." Such testimony corroborated the State's theory that by this point in the incident, Williams had disposed of the gun.

***3** Additionally, while Johnson watched the video, he identified Bush on the footage, stating she was "the person who just walked across the screen[.]" He identified her again in another section of the recording, testifying she was "walking out" onscreen.

At the close of the State's case, each defendant moved for a judgment of acquittal pursuant to Rule 3:18-1. The judge denied their motions, referencing the detectives' testimony, as well as the testimony of other witnesses, and the contents of the cell phone video before finding the evidence at that point in the trial was "sufficient to warrant a conviction and the jury could conclude beyond a reasonable doubt that [each defendant was] guilty of the offense[s] charged."

Regarding Bush's motion specifically, the judge found the evidence produced against her was "sufficient to warrant a conviction" for obstruction. He explained that the cell phone video placed her "in the center of a melee wherein the detectives had weapons drawn and were attempting to effectuate the arrests of [Williams] and [Islam]." Additionally, the judge noted Bush could "be seen walking between the person taking the cell phone video and the grappling officers." He also observed that in Johnson's direct testimony, Bush was identified "as a person who refused to heed his verbal commands during the shuffle and attempted arrest."

After the judge voir dired each defendant and confirmed none wished to testify, he conducted a charge conference with counsel. Bush's attorney objected to certain wording contained in the judge's draft instructions, but he did not object to the instruction pertaining to the obstruction offense. Importantly, when he was asked if he wished to include a reference to the grading of the obstruction offense, Bush's attorney responded that he did not want the instruction to contain the "lesser included" disorderly persons charge. The judge accommodated his request.

Following deliberations, the jury found Williams guilty of unlawful possession of a handgun and the certain persons charge, as well as fourth-degree obstruction, a lesser-included charge of resisting arrest. The jury also found Bush guilty of fourth-degree obstruction.

Four days after the jury rendered its verdict, Bush filed a motion to dismiss the indictment against her, or in the alternative, for a new trial, contending the verdict was against the weight of the evidence. She also argued that the judge failed to charge the jury on the lesser-included offense of obstruction and that she was entitled to relief because the trial lasted longer than the jury was told it would.

In a cogent written opinion, the judge denied her application. He found Bush was "within feet of the officers as they physically struggle[d] to subdue the co-defendants[,]" that "Detective Johnson beckoned her to move way because she was in the line of potential fire[,]" and Johnson "testified that she ... physically challenged the officers throughout the melee." The judge added that "[t]he testimony and video evidence detailed and captured that the officer's attention and focus were distracted from the extremely dangerous situation that he/they were involved in because of Bush's actions interjecting herself into the co-defendants' arrest(s)."

***4** Regarding the jury charge on obstruction, the judge recounted that he had "affirmatively asked defense counsel if he wished to include any lesser included offenses and the defense affirmatively requested that no lesser-included offense be charged." Moreover, he found that "[t]he proofs were overpowering and devastating to the defense[,]" so there was "no reason to believe that the jury could have acquitted [Bush] on the fourth[-]degree obstruction charge and returned a guilty verdict on the lesser disorderly persons charge of obstruction." Lastly, the judge determined that the "jury panels were well advised of the trial dates" and "[a]ny scheduling issues were resolved with the agreement of counsel." Therefore, he concluded there was no basis to grant Bush a new trial, finding "no prejudice accrued to anyone because of the length of the trial."

On November 9, 2018, Williams appeared before the trial court for sentencing. The judge analyzed the aggravating and mitigating factors and found that aggravating factors three (risk of reoffense); six (criminal history); and nine (need to deter), N.J.S.A. 2C:44-1(a)(3), (6), and (9), as well as mitigating factor eleven (excessive hardship), N.J.S.A. 2C:44-1(b)(11), applied. The judge sentenced Williams to a seven-year prison term with a forty-two-month parole ineligibility period for the unlawful possession of a handgun

charge; a seven-year term with a five-year parole ineligibility period on the certain persons offense; and an eighteen-month term for the obstruction charge. The judge directed all sentences to run concurrently.

Bush was sentenced the same day. The judge found that aggravating factor nine and mitigating factor ten (amenable to probationary treatment), N.J.S.A. 2C:44-1(b)(10), as well as "other [mitigating] reasons" advanced by Bush's attorney, applied. He sentenced Bush to a two-year period of probation and directed her to complete 200 hours of community service.

III.

On appeal, Williams raises the following arguments:

POINT I

THE IMPROPER ADMISSION OF THE LEAD DETECTIVE'S LAY OPINION THAT THE CELLPHONE VIDEO SHOWED A "BULGE" IN DEFENDANT'S PANTS THAT HE BELIEVED TO BE A GUN REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. (Not Raised Below).

POINT II

THE COURT'S IMPROPER FINDING AND WEIGHING OF AGGRAVATING FACTORS, AND REJECTION OF MITIGATING FACTORS RENDERS DEFENDANT'S SENTENCE EXCESSIVE.

Bush raises the following contentions for our consideration:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR A NEW TRIAL WHERE DEFENDANT'S CONDUCT DID NOT VIOLATE N.J.S.A. 2C:29-1.

POINT II

DEFENDANT'S CONVICTION FOR FOURTH DEGREE OBSTRUCTION SHOULD BE REVERSED BECAUSE THE TRIAL COURT OMITTED AN ESSENTIAL PORTION OF THE MODEL JURY CHARGE CONCERNING THE GRADING OF THE OBSTRUCTION OFFENSE AS A FOURTH DEGREE OFFENSE.

POINT III

DEFENDANT'S CONVICTION SHOULD BE VACATED BECAUSE AS APPLIED IN DEFENDANT'S CASE, N.J.S.A. 2C:29-1 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD. (Not Raised Below).

POINT IV

THE TRIAL COURT COMMITTED PLAIN ERROR BECAUSE THE CLAIMS AGAINST DEFENDANT SHOULD HAVE BEEN SEVERED FROM THE CHARGES AGAINST THE CO-DEFENDANTS BECAUSE THE TESTIMONY PRESENTED BY THE STATE AGAINST THE CO-DEFENDANTS CONCERNING THEIR ALLEGED WEAPON POSSESSION AND POTENTIAL NARCOTICS ACTIVITY WAS HIGHLY PREJUDICIAL TO DEFENDANT, WITH WHOM THE CO-DEFENDANTS HAD NO INVOLVEMENT. (Not Raised Below).

We find these arguments unavailing.

Regarding Williams's Point I, we note that his trial attorney did not object to that portion of Johnson's lay opinion testimony when the detective stated that certain cell phone footage and images showed a bulge in Williams's pants and that he believed the bulge was a gun. Therefore, we review the admission of this testimony for plain error. R. 2:10-2.

The admission of lay opinion testimony is governed by N.J.R.E. 701.[3] "The first prong of N.J.R.E. 701 requires the witness's opinion testimony to be based on the witness's 'perception,' which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." State v. Singh, 245 N.J. 1, 14 (2021) (quoting State v. McLean, 205 N.J. 438, 457 (2011)). "The second requirement of N.J.R.E. 701 is that lay-witness opinion testimony be 'limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.' " Id. at 15 (quoting McLean, 205 N.J. at 458). Regarding testimony by law enforcement, the Singh Court confirmed " '[f]act testimony has always consisted of a description of what the officer did and saw,' " and " 'an officer is permitted to set forth what he or she perceived through one or more of the senses.' " Ibid. (quoting McLean, 205 N.J. at 460).

***5** Here, Johnson acknowledged at trial that he did not see a gun, nor did he witness Williams retrieve a gun during the incident. Johnson also conceded under cross-examination that he simply assumed "the crease in [Williams's] pants [was] 'the gun,' " as he described the contents of the cell phone video presented by the State. Accordingly, we are satisfied it was error to allow this lay opinion testimony because it was not based on Johnson's perception of events at the time of the incident.

Nonetheless, because: Reed testified that he witnessed Williams exit the car and saw a "large bulge in [Williams's] pants" at that time; Reed stated that when he pursued Williams, he believed Williams had "a weapon on him"; Reed witnessed Williams dispose of the gun by throwing it in the air behind a home; and the jury was able to watch the cell phone footage to independently evaluate the contents of the recording, we are not persuaded this limited portion of Johnson's lay opinion testimony was so prejudicial as to meet the plain error standard. In short, we cannot conclude it was "clearly capable of producing an unjust result." R. 2:10-2.

In his argument under Point II, Williams argues he received an excessive sentence. He contends that he received a harsher sentence than warranted, in part, because the judge "improperly considered arrests that did not lead to convictions in finding aggravating factors [three] and [nine,]" and because the judge allowed his perception of society's problem with gun violence to influence his sentencing decision. These arguments are unconvincing.

We review a judge's sentencing decision under an abuse of discretion standard. State v. Fuentes, 217 N.J. 57, 70 (2014). As directed by the Court, we must determine whether:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) the "application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

We also recognize "[a]ppellate review of the length of a sentence is limited[,]" State v. Miller, 205 N.J. 109, 127 (2011), and we are to affirm a sentence, even if we would have imposed a different one, so long as the sentencing judge "properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record[,]" State v. Natale, 184 N.J. 458, 489 (2005) (quoting State v. O'Donnell, 117 N.J. 210, 215 (1989)).

Here, we discern no abuse of discretion in the judge's sentencing decision. Rather, his findings regarding the applicable aggravating and mitigating factors are amply supported by the evidence. Further, when reviewing the record of Williams's sentencing as a whole, we are satisfied the judge's brief mention of Williams's four prior arrests and his limited discussion about the impact of gun violence on society did not unduly sway his sentencing decision.

In fact, the record reflects the judge reviewed Williams's presentence report, his attorney's sentencing memorandum, and letters submitted from Williams's family and friends. The judge also considered Williams's prior criminal history, which included a second-degree robbery. The judge noted that Williams twice violated parole after serving time for the robbery conviction. Moreover, when discussing Williams's instant offenses, the judge stated, "[t]he video didn't lie. It showed a dangerous situation that escalated, where someone very easily could have been killed." Further, the judge determined Williams and Islam engaged in a "wrestling match" with the detectives and that the circumstances leading to his arrest "threaten[ed] serious harm." The judge stated Williams's actions "put lives in danger, including [his] own."

***6** Because Williams's prior conviction for robbery involved a firearm, much like Williams's instant offenses, the judge also found "there [was] no evidence that existed to detract from the reasonable likelihood that [Williams] would offend again if not appropriately sanctioned in this case." After weighing the applicable aggravating and mitigating factors, the judge concluded "a sentence in the middle to lower end of the range is appropriate." Therefore, the judge rejected the State's request that he impose consecutive sentences, opting for concurrent sentences instead, and imposed sentences within the appropriate range. Given our standard of review, and satisfied that Williams's sentence does not "shock the judicial conscience," we see no reason to disturb the judge's sentencing decision. Fuentes, 217 N.J. at 70

Turning to Bush's arguments, she contends in her Point I that because her conduct during the motor vehicle stop did not rise to the level of obstruction, she was entitled to a judgment of acquittal or, alternatively, a new trial. We disagree.

We review a denial of a motion for a judgment of acquittal de novo. State v. Williams, 218 N.J. 576, 593-94 (2014);

State v. Brown, 463 N.J. Super. 33, 47 (App. Div. 2020). The motion pursuant to Rule 3:18-1 will be denied "if 'viewing [only] the State's evidence in its entirety, be that evidence direct or circumstantial,' and giving the State the benefit of all reasonable inferences, 'a reasonable jury could find guilt ... beyond a reasonable doubt.' " State v. Sugar, 240 N.J. Super. 148, 152 (App. Div. 1990) (quoting State v. Reyes, 50 N.J. 454, 458-59 (1967)).

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000). Under Rule 3:20-1:

> The trial judge on defendant's motion may grant the defendant a new trial if required in the interest of justice.... The trial judge shall not, however, set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law.

"In considering whether a jury verdict was against the weight of the evidence, our task is to decide whether 'it clearly appears that there was a miscarriage of justice under the law.' " State v. Smith, 262 N.J. Super. 487, 512 (App. Div. 1993) (quoting R. 2:10-1). "We must sift through the evidence 'to determine whether any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present.' " Ibid. (quoting State v. Carter, 91 N.J. 86, 96 (1982)). However, "an appellate court may not overturn the verdict 'merely because it might have found otherwise upon the same evidence.' " Ibid. (quoting State v. Johnson, 203 N.J. Super. 127, 134 (App. Div. 1985)). "Appellate intervention is warranted only to correct an 'injustice resulting from a plain and obvious failure of the jury to perform its function.' " Ibid. (quoting Johnson, 203 N.J. Super. at 134).

As discussed, the jury found Bush guilty of fourth-degree obstruction. Pursuant to N.J.S.A. 2C:29-1(a):

> A person commits an offense if he [or she] purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.

Obstruction is a "crime of the fourth degree if the actor obstructs the detection or investigation of a crime or the prosecution of a person for a crime, otherwise it is a disorderly persons offense." N.J.S.A. 2C:29-1(b).

***7** Here, the testimony of the detectives and the cell phone video of the incident amply supported the jury's finding that Bush physically interfered with the detectives' investigation as they struggled to gain control of Williams and Islam. Accordingly, the judge aptly noted Bush placed herself "in the center of a melee wherein the detectives had weapons drawn and were attempting to effectuate the arrests of [Williams] and [Islam]." The evidence also was uncontroverted that Johnson directed Bush and James to "back up," to "giv[e] them an opportunity to leave because [they were] in a criminal investigation at this point," yet neither woman heeded his commands. Under these circumstances, we are satisfied the judge properly denied Bush's motions for acquittal and a new trial.

Regarding Point II, Bush contends her conviction should be reversed because the instructions the judge provided to the jury on the obstruction charge were incomplete. We are not persuaded.

It is well established that a related lesser offense must be charged to a criminal jury, even if it is not specifically requested by trial counsel, where that lesser offense is "clearly indicate[d]" by the proofs. State v. Jenkins, 178 N.J. 347, 361 (2004). Although a trial court does not have the duty to "scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty[,]" see State v. Brent, 137 N.J. 107, 118 (1994) (quoting State v. Sloane, 111 N.J. 293, 302 (1988)), the court is obligated to charge the jury, sua sponte, with a lesser crime "when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense[,]" Jenkins, 178 N.J. at 361; see also State v. Thomas, 187 N.J. 119, 136 (2006).

On the other hand, "[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." N.J.S.A. 2C:1-8(e); see also State v. Cassady, 198 N.J. 165, 177 (2009).

Here, Bush's attorney did not request that the lesser-included disorderly persons offense of obstruction be included in the

jury charge. Instead, he specifically asked the judge not to include it. Therefore, the State contends Bush's argument is barred by the invited-error doctrine.

"Trial errors which [are] induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." State v. Santamaria, 236 N.J. 390, 409 (2019) (quoting State v. Harper, 128 N.J. Super. 270, 277 (App. Div. 1974)). But in a criminal case, "[s]ome measure of reliance by the court is necessary for the invited-error doctrine to come into play." Jenkins, 178 N.J. at 359.

Governed by these principles, we are convinced that even if Bush's argument is not barred by the invited-error doctrine, the judge did not err in denying Bush's motion for a new trial based on the wording of the obstruction charge, and finding

> there [was] no reasonable basis to have charged the offense [of obstruction] as a disorderly persons offense as the proofs did not warrant this. The evidence of Bush's physical interference with an arrest was overwhelming[,] given the testimony of the officers and the video of the incident. The proofs were overpowering and devastating to the defense. You could see and hear Bush's actions, words, and conduct. You could see the officers being obstructed and impaired in their efforts to detain and arrest Bush's co-defendants while firearms were drawn by officers and possessed by co-defendant Khalif Williams. Frankly, this court remains astonished that no one was shot given Bush's conduct that without a doubt escalated and intensified the shocking incident..... This court finds that there is no reason to believe that the jury could have acquitted the defendant on the fourth[-]degree obstruction charge and returned a guilty verdict on the lesser disorderly persons charge of obstruction.

***8** The judge's findings are amply supported on this record. Accordingly, his legal conclusions about the obstruction charge provided to the jury are unassailable.

Regarding Bush's contention under Point III, she newly argues that her conviction should be vacated because N.J.S.A. 2C:29-1 is "unconstitutionally vague and overbroad." Again, we disagree.

We begin with the premise that "statutes are presumed constitutional[.]" Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 175 (2011). Indeed, we hesitate to find a constitutional infirmity absent a clear expression of the law from the United States Supreme Court, particularly where it would disturb settled law. Id. at 176. Instead of striking down a law on constitutional grounds, we endeavor to narrowly construe it to eliminate "doubts about its constitutional validity" so long as the law is " 'reasonably susceptible' to an interpretation that will render it constitutional." State v. Carter, 247 N.J. 488, 518-19 (2021) (quoting State v. Burkert, 231 N.J. 257, 277 (2017)). Whether a statute is unconstitutional is "an issue of law subject to de novo review." State v. Drake, 444 N.J. Super. 265, 271 (App. Div. 2016) (citing State v. Pomianek, 221 N.J. 66, 80 (2015)).

Vagueness "is essentially a procedural due process concept grounded in notions of fair play." State v. Saavedra, 222 N.J. 39, 68 (2015) (quoting State v. Lee, 96 N.J. 156, 165 (1984)). Criminal statutes that are impermissibly vague are unconstitutional. State v. Afanador, 134 N.J. 162, 170 (1993) (quoting Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1993)). "A law is void as a matter of due process if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' " Town Tobacconist, 94 N.J. at 118 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). Further, a statute is overbroad "if in its reach it prohibits constitutionally protected conduct." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). Stated differently, if a statute suffers from overbreadth, it implicates substantive due process concerns about "excessive governmental intrusion into protected areas." In re Hinds, 90 N.J. 604, 618 (1982).

Recently, in State v. Fede, 237 N.J. 138, 148-49 (2019), our Supreme Court discussed N.J.S.A. 2C:29-1(a), noting:

> The statute is unambiguous. It defines the explicit means by which one may be criminally liable for obstruction and requires affirmative interference. The statute's second sentence informs interpretation of the statute's meaning overall, namely, that the obstruction statute in its entirety requires as a necessary element an act of affirmative interference. Otherwise, the outer contours of the statute would be difficult to limit. For example, a defendant could be convicted of obstruction for sitting on his couch and declining to respond to [a] police officer's knock.

The Court further stated:

> The statute qualifies what conduct is prohibited — including obstruction of the administration of law — by reference to how the activity is carried out — including by means of "physical interference or obstacle." By the plain and ordinary meaning of the terms of the statute, criminal

liability for obstruction stems only from certain modes of behavior.

***9** [Id. at 148.]

Mindful of our standard of review, as well as the Court's recent comments about N.J.S.A. 2C:29-1(a) and our own reading of the statute, we are satisfied the statute's terms are plain enough and sufficiently limited in scope so as to pass constitutional muster. Stated differently, we decline to conclude the obstruction statute suffers from vagueness or overbreadth.

Finally, Bush raises the novel argument that her case should have been severed from that of her co-defendants because the testimony presented by the State against Williams and Islam was "highly prejudicial." We disagree.

Our court rules provide that "[t]wo or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged are of the same or a similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together[.]" R. 3:7-6. However, the court may "order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief" where "it appears that a defendant ... is prejudiced by a permissible or mandatory joinder of offenses ... in an indictment[.]" R. 3:15-2(b).

A mere claim of prejudice is insufficient to support a motion to sever. State v. Moore, 113 N.J. 239, 274 (1988). A defendant is not entitled to severance simply because he or she believes a separate trial "would offer ... a better chance of acquittal." State v. Johnson, 274 N.J. Super. 137, 151 (App. Div. 1994) (quoting State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975)).

"Central to the inquiry is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.' " State v. Chenique-Puey, 145 N.J. 334, 341 (1996) (alteration in original) (quoting State v. Pitts, 116 N.J. 580, 601-02 (1989)). Where the evidence would be admissible in separate trials, joinder is permissible "because 'a defendant will not suffer any more prejudice in a joint trial than he [or she] would in separate trials.' " Ibid. (quoting State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div. 1983)).

Here, Bush did not file any pre-trial motion seeking severance. Moreover, on appeal, she fails to assert any cogent reason why severance sua sponte was either appropriate or required. Further, it is uncontroverted that Bush's actions were connected to the acts of her co-defendants so that a joint trial was " 'preferable' because it serve[d] judicial economy ... and allow[ed] for a 'more accurate assessment of relative culpability.' " State v. Weaver, 219 N.J. 131, 148 (2014) (quoting State v. Brown, 118 N.J. 595, 605 (1990)). Accordingly, we cannot conclude the judge committed plain error in failing to sua sponte order that Bush's charge be severed from that of her co-defendants. R. 2:10-2.

In sum, we affirm the convictions of Williams and Bush, and affirm Williams's sentence.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2022 WL 53125

Footnotes

1 Pursuant to N.J.S.A. 39:3-75, "[n]o person shall drive any motor vehicle equipped with safety glazing material which causes undue or unsafe distortion of visibility or equipped with unduly fractured, discolored or deteriorated safety glazing material, and the director may revoke the registration of any such vehicle."

2 James failed to appear in court, and therefore, was not tried with her co-defendants.

3 This Rule provides that: "If a witness is not testifying as an expert, the witness' 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." N.J.R.E. 701.

End of Document

2022 WL 100615
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Alexander J. CICCOLELLO,
Sr., Defendant-Appellant.

DOCKET NO. A-3931-18
|
Submitted October 18, 2021
|
Decided January 11, 2022

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 17-08-1210.

Attorneys and Law Firms

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

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (William Kyle Meighan, Supervising Assistant Prosecutor, of counsel and on the brief; Samuel Marzarella, Chief Appellate Attorney, of counsel).

Before Judges Rothstadt, Mayer and Natali.

Opinion

PER CURIAM

***1** Defendant Anthony Ciccolello, Sr. appeals from his convictions and aggregate eight-year, extended term sentence that was subject to a four-year period of parole ineligibility, for having committed third-degree theft, N.J.S.A. 2C:20-3(a), and third-degree burglary, N.J.S.A. 2C:18-2(a)(1) at a motel room in Seaside Heights. On appeal, defendant argues

POINT I

THE COURT'S DENIAL OF EXCULPATORY DEFENSE WITNESSES VIOLATED [DEFENDANT'S] CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT II

THE COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO CHARGE THE JURY ON: (1) THE LESSER-INCLUDED OFFENSE OF CRIMINAL TRESPASS; AND (2) PRIOR CONTRADICTORY STATEMENTS OF WITNESSES. (NOT RAISED BELOW).

A. THE COURT'S FAILURE TO CHARGE THE JURY ON THE LESSER-INCLUDED OFFENSE OF CRIMINAL TRESPASS WAS PLAIN ERROR.

B. THE COURT'S FAILURE TO CHARGE THE JURY ON PRIOR CONTRADICTORY STATEMENTS OF WITNESSES WAS PLAIN ERROR.

POINT III

THE IMPROPER LAY-WITNESS OPINION TESTIMONY AS TO THE CONTENT OF THE SURVEILLANCE VIDEOS AND THE IDENTITY OF THE SUSPECTS WAS PLAIN ERROR. (NOT RAISED BELOW).

POINT IV

[DEFENDANT] WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL THROUGH THE TRIAL COURT'S ADMISSION OF THE FOLLOWING PRIOR-BAD-ACT EVIDENCE: (1) POLICE OFFICER TESTIMONY THAT THE OFFICER KNEW [DEFENDANT] FROM PREVIOUS ENCOUNTERS; (2) POLICE OFFICER TESTIMONY THAT [DEFENDANT] LIVED IN A "NOTORIOUS PROBLEM" AREA; AND (3) INTRODUCTION OF FINGERPRINT EVIDENCE WITHOUT THE APPROPRIATE LIMITING INSTRUCTION. (NOT RAISED BELOW).

A. THE COURT IMPROPERLY ADMITTED TESTIMONY THAT DETECTIVE BLOOMQUIST KNEW [DEFENDANT] FROM PRIOR ENCOUNTERS.

B. OFFICER PASIEKA'S TESTIMONY THAT DEFENDANT WAS IN A "NOTORIOUS PROBLEM"

AREA WAS IRRELEVANT AND HIGHLY PREJUDICIAL.

C. THE COURT'S FAILURE TO PROVIDE A LIMITING INSTRUCTION ON FINGERPRINT EVIDENCE WAS PLAIN ERROR.

POINT V

THE CUMULATIVE EFFECT OF THE EVIDENTIARY AND INSTRUCTIONAL ERRORS NECESSITATES REVERSAL OF [DEFENDANT'S] CONVICTIONS. (NOT RAISED BELOW).

POINT VI

[DEFENDANT'S] SENTENCE IS EXCESSIVE BECAUSE THE COURT IMPROPERLY REJECTED MITIGATING FACTOR FOUR.

We are not persuaded by any of defendant's contentions. For the reasons that follow, we affirm defendant's convictions and sentence.

I.

The facts adduced from the record are summarized as follows. Mitchell Andryszewski and Rodney Smith lived in a motel room in Seaside Heights. Their friend, defendant's son Alexander Ciccolello Jr., stayed with them during the month of November 2016. After arriving, Alexander[1] left for a couple days before returning around Thanksgiving. During the time he was away, Smith received a phone call from an individual who identified himself as defendant. During the call, the individual stated Smith "owed [Alexander] money and [he] needed to pay it back," but the caller did not say why Smith owed money or the amount of the alleged debt. The phone call did not "make any sense" to Smith because he did not owe Alexander money. After Alexander returned for a brief period and then moved out on November 28, without returning his room key, he had no further contact with Andryszewski or Smith.

***2** During the afternoon of December 1, 2016, Andryszewski and Smith had left their room for the day, locking their door behind them. When Andryszewski returned at around midnight, he noticed the door was unlocked but there was no noticeable damage to the front door or windows. Upon entering the apartment, Andryszewski observed that the walls of the motel room had been spray painted and that several electronics, including video gaming consoles, video games, a television, and a laptop were missing, the total value of which being approximately $1,500. Andryszewski then went to the motel's main office and reported the break-in to the motel's manager, who called the police.

At approximately 12:40 a.m., Officer Sean Varady of the Seaside Heights Police Department (SHPD) responded to the call. After speaking with Andryszewski, Varady investigated the motel room and observed "a large amount of spray paint covering the walls, the furniture[,] and the appliances and cabinetry in the kitchen area." He found the words "pay your drug debts," were spray painted on the walls in one room, and, in another, the words "Blood rules" were painted on the wall. Varady also found a green pocketknife with the letter "A" imprinted on it that was left in a crib used by Smith's child, a yellow rubber glove left on one of the victim's beds, and more yellow rubber gloves left in a small waste bin with a can of red spray paint that would later be identified as bearing defendant's fingerprint.

Earlier in the evening, at approximately 6:55 p.m., SHPD Officer Edward Pasieka conducted a motor vehicle stop of a white, four-door Mercedes. Pasieka initially saw the vehicle leaving the area of the motel and wanted to "check it out" because he had never seen the car there before and the area had been "a notorious problem" area for the SHPD. Pasieka stopped the Mercedes when it failed to completely stop at a stop sign and made a right turn without signaling.

According to Pasieka, four people were in the vehicle: defendant, Alexander, John Peccoreno, and the driver, Alexander's girlfriend, Angela Dowling. After speaking with the driver of the vehicle, Pasieka released the vehicle without issuing a ticket. The four of them eventually returned to Peccoreno's residence at another motel.

Later in his shift, Pasieka informed Detective Sergeant Luigi Violante and Detective Daniel Bloomquist about the stop. The two detectives conducted further investigation into the break-in, and, based on the evidence they collected, including video footage from surveillance cameras, on February 7, 2017, they arrested defendant and the others involved.

A grand jury later indicted defendant, Alexander, and Peccoreno, charging them with burglary and theft.[2] Thereafter, Alexander pleaded guilty to criminal trespass,

N.J.S.A. 2C:18-3, and provided a statement in which he inculpated defendant, which was inconsistent with an initial statement to police that exculpated defendant. Peccoreno pleaded guilty to burglary pursuant to a plea agreement, and similarly gave an initial statement that exculpated defendant, but later gave another that inculpated defendant. Peccoreno agreed to provide truthful testimony at defendant's trial.

***3** Prior to trial, defendant chose to act as his own attorney and waived his right to counsel, but later agreed to accept the services of standby counsel and then be completely represented by trial counsel. Thereafter, at the conclusion of defendant's trial, the jury returned its verdict finding defendant guilty of both charges. Later, the trial judge imposed defendant's sentence and entered a judgment of conviction on February 11, 2019. This appeal followed.

II.

In Point I of his brief, defendant contends he "was deprived of his rights to due process and a fair trial" when the trial judge denied his request to have his physicians, his son, and his fiancée, Patricia Ucci, testify in his defense. He argues the trial judge disregarded his obligation to explore alternative solutions to the witnesses' exclusion prior to "invoking the ultimate sanction of barring" them. We disagree.

A.

On November 27, 2018, prior to the beginning of trial, the trial judge held a hearing to determine which of the parties' respective witnesses would testify at trial. Defendant, appearing pro se at the time, indicated he intended to call as witnesses Dr. Mehta, Dr. Morris Antebi, Ucci, and Alexander as an alibi witness.

According to defendant, the purpose of calling his physicians would be "to have them opine that [he] could not have engaged in [the theft or burglary] because of [his] physical limitations." Dr. Mehta would testify that defendant had suffered complications from a liver treatment and that she instructed him not to lift weight and to be careful with exercising or climbing stairs. Similarly, he indicated Dr. Antebi would testify he treated defendant for more than four years for a knee replacement and "degenerative [osteoporosis] of arthritis" for which Antebi ordered physical therapy and pain medication. Notably, at the time the trial judge considered whether to allow the doctors to testify, defendant, for about two months prior, represented to the judge and the State that he would provide medical records related to his case and produced nothing.

After considering the matter, the trial judge denied defendant's request to have his doctors testify. The judge determined the only form of relevant testimony that defendant could extract from the doctors would be a medical opinion that defendant was not capable of engaging in the physical activity that was involved in the burglary due to his condition—testimony that would be "getting into the area of expert opinion." Further, he reasoned defendant produced no medical records or reports prepared by either doctor.

As for Ucci, defendant indicated she lived with him half of the time, regularly cleaned his house due to his medical limitations, and cleaned out his apartment after defendant was arrested. Defendant told the judge that Ucci would testify that she saw two spray paint cans in defendant's apartment under his sink and that, when she cleaned defendant's apartment after he was arrested, the paint cans were missing. Defendant claimed Ucci would also testify that Alexander had access to the paint cans and that he could have removed the cans from defendant's apartment and "planted" them at the crime scene. In response to the judge's questioning, defendant conceded Ucci would not be able to say she saw anyone take the paint cans.

With that, the judge barred Ucci from testifying, ruling that her testimony was not relevant, as she could not testify she witnessed anybody take the paint cans and could not provide any firsthand knowledge surrounding the burglary. He suggested to defendant that, if anything, defendant's description of Ucci's testimony would "establish the counter-proposition that the paint cans ... that had [been] underneath the sink were no longer there and at least one of them was found at the scene." He also stated defendant was "engaging in conjecture" by seeking to offer her testimony to show someone else might have taken the paint can and placed it at the scene of the crime, because Ucci could not say she saw anyone take the paint cans and had no firsthand knowledge of the facts.

***4** As to Alexander testifying, defendant relied upon the first of two statements Alexander, who already pleaded guilty, gave to police in which he stated he dropped defendant off at a CVS and defendant was at the CVS during the burglary. Defendant conceded the last time he spoke to his

son, which had not been for months, his son did not want to testify. Defendant only thought Alexander would "testify as an alibi witness" and wanted to "try to get [Alexander] to testify." However, defendant also indicated he wanted to cross-examine Alexander regarding his second statement given under oath at his plea hearing, which was inconsistent with his first and inculpated defendant. The State objected to defendant's request to call Alexander as an alibi witness because defendant never provided the State with notice as required by Rule 3:12-2.

In response, the judge asked standby counsel whether defendant communicated to him an intention to call Alexander as an alibi witness, to which counsel indicated defendant did not. The judge instructed both parties to search their respective files for any notice defendant may have sent to the State and indicated the issue would be addressed at the end of the hearing. When neither party found any such communication by the end of the day, the judge stated, "we'll leave that open until tomorrow. I'm going to give you an opportunity."

Notwithstanding the deferral of the issue, the next day defendant relinquished his self-represented status in favor of accepting trial counsel's services, and neither defendant nor counsel argued Alexander should be permitted to testify, nor did defendant provide any document sent to the State communicating an intent to call Alexander as an alibi witness.

B.

Our review of a trial judge's evidential rulings is limited. State v. Buckley, 216 N.J. 249, 260 (2013) (quoting State v. Buda, 195 N.J. 278, 294 (2008)). They will "be upheld 'absent a showing of an abuse of discretion' or 'a clear error of judgment.' " State v. Lora, 465 N.J. Super. 477, 492 (App. Div. 2020) (quoting State v. Perry, 225 N.J. 222, 233 (2016)). We will find an abuse of discretion only where "a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). Even if we disagree with the trial judge's conclusions, we will not substitute our own judgment for that of the trial judge unless the judge's ruling was "so wide of the mark that a manifest denial of justice resulted." Lora, 465 N.J. Super. at 492 (quoting Perry, 225 N.J. at 233).

In determining whether to bar a defense witness from testifying, courts recognize that "the sanction of preclusion is a drastic remedy and should be applied only after other alternatives are fully explored." State v. Washington, 453 N.J. Super. 164, 190 (App. Div. 2018) (quoting State v. Scher, 278 N.J. Super. 249, 272 (App. Div. 1994)); see also State v. Dimitrov, 325 N.J. Super. 506, 511 (App. Div. 1999); Zaccardi v. Becker, 88 N.J. 245, 253 (1982) (explaining "although it is the policy of the law that discovery rules be complied with, it is also the rule that drastic sanctions should be imposed only sparingly"). When adjournment of the trial will avoid the risk of prejudice resulting from untimely discovery, trial judges have discretion to choose that option rather than suppression. See State v. Utsch, 184 N.J. Super. 575, 580 (App. Div. 1982).

Here, defendant largely relies on our opinion in Dimitrov to support his contention that all his proposed witnesses should have been allowed to testify. However, his reliance is misplaced.

In Dimitrov, we reversed a defendant's conviction after the trial judge denied the defendant's request to present a potentially exculpatory witness on the grounds that the defendant's counsel neglected to present an investigative report regarding the witness in a timely manner. 325 N.J. Super. at 511-12. There, defense counsel provided a report concerning a previously undisclosed fact witness to the State on the morning of the first day of trial. Id. at 509. The State objected to allowing the witness to testify that day on the grounds that the witness added new facts which required further investigation and because the defendant's counsel possessed the report several weeks prior to the start of the trial. Id. at 509-10.

***5** In our opinion, we observed defense counsel deviated from his discovery obligations to the State. Nevertheless, we also detailed several factors we found persuasive in determining the trial judge should have granted a continuance instead of barring the witness outright. Id. at 511. First, we noted the State did not press for the exclusion of the witness's testimony. Ibid. Rather, the trial judge suppressed the witness sua sponte after the State simply requested a week-long adjournment to meet the defendant's new proofs. Ibid. Additionally, we observed the State had incurred costs in acquiring a necessary interpreter on the date of the trial, and we stated assessing the costs of rescheduling against defense counsel personally was a preferable sanction to precluding

the testimony of a witness who could potentially provide exculpatory testimony. Id. at 511-12.

In the present case, the facts are totally different. First, as to the doctors, assuming their testimony was relevant at all to defendant's defense, he never provided any medical records or reports from his proffered physicians. "[A] treating physician may be permitted to testify as to the diagnosis and treatment of his or her patient pursuant to N.J.R.E. 701." Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 578 (2016). However, "[u]nless the treating physician is retained and designated as an expert witness, his or her testimony is limited to issues relevant to the diagnosis and treatment of the individual patient." Id. at 579. Accordingly, where a party seeks to have their physician testify to topics beyond the scope of diagnosis and treatment, the physician's testimony must conform to the rules regarding expert testimony in N.J.R.E. 702 and 703. Ibid.; see also R. 3:13-3(b)(2) (requiring in criminal cases disclosure of expert opinion evidence during pretrial discovery).

Here, defendant sought to have his doctors not only testify to his physical problems and their treatment of him, but also to introduce their alleged opinion that he could not have physically committed the subject burglary and theft, a topic clearly beyond their diagnosis and treatment. Without defendant serving medical reports and records during discovery, he was not entitled to have the doctors testify to that opinion.

Assuming the doctors even agreed with defendant's understanding of their opinion and would provide a report to that effect, the trial judge had already allowed defendant time to permit him to provide medical evidence which he failed to deliver despite the additional time. As the judge already explored alternatives, suppressing the doctors' testimony was a reasonable sanction, considering defendant's delay and the State's objection to these witnesses.

As to defendant's contention the trial judge improperly barred Alexander from testifying as an alibi witness, he relies upon the Supreme Court's opinion in State v. Bradshaw, 195 N.J. 493 (2008). Defendant argues application of the Bradshaw test demonstrates a less severe sanction was warranted because there was no indication defendant intentionally withheld notice of his alibi for tactical advantage, and his case was severely prejudiced by the inability to present an alibi. We conclude again, his reliance is misplaced.

In Bradshaw, a defendant, who was on trial for sexual assault, notified the prosecution for the first time during trial that he intended to testify that he was elsewhere at the time of the rape. Id. at 498. The trial judge precluded defendant from testifying to any such alibi, finding that the prejudice to the State was great. Id. at 498-99.

In its opinion, the Supreme Court analyzed the "interest of justice" provision in Rule 3:12-2(b)[3] and established a four-factor test for determining whether witness preclusion is the appropriate sanction where a defendant has failed to furnish notice of an alibi defense. Id. at 507-08. The Court warned "only in the rarest of circumstances" should a defendant be barred from presenting alibi testimony and explained

> ***6** in reaching a fair determination for the appropriate sanction for the breach of the alibi rule, the trial court should consider: (1) the prejudice to the State; (2) the prejudice to the defendant; (3) whether other less severe sanctions are available to preserve the policy of the rule, such as a continuance or a mistrial to permit the State to investigate the alibi; and (4) whether the defendant's failure to give notice was willful and intended to gain a tactical advantage. Absent a finding that the factors on balance favor preclusion, the interest of justice standard requires a less severe sanction.
>
> [Ibid.]

Applying the above factors, the Court in Bradshaw concluded that the trial judge misapplied his discretion by issuing too severe of a sanction for the defendant's failure to abide by the Court Rules requiring disclosure. Id. at 509. The Court further concluded the preclusion of the alibi testimony was not harmless error. Id. at 509-10.

Here, defendant's case presents different circumstances that distinguish it from Bradshaw. Significantly, it is not clear from the record that the trial judge denied defendant's request to allow Alexander to testify as an alibi witness. The record only confirms the issue was raised, and the judge allowed the parties time to determine whether defendant ever notified the State of his intent to call Alexander for that purpose. The record, therefore, leads us to conclude defendant abandoned this argument, and there was no denial of defendant's request to call an alibi witness to review. See Cranbury Twp. v. Middlesex Cnty. Bd. of Tax'n, 6 N.J. Tax 501, 503 n.1 (Tax 1984) (deeming a contention raised at a pretrial conference but neither briefed nor raised at trial to be abandoned).

Assuming defendant did not abandon his intention to pursue an alibi defense, applying the Bradshaw factors, we conclude his failure to give notice barred his entitlement to call Alexander as an alibi witness. The first Bradshaw factor requires a reviewing court to weigh the prejudice to the State should a defendant be permitted to assert an unnoticed alibi defense. 195 N.J. at 507. Here, adjourning the matter would have been highly prejudicial as the State could not benefit from the opportunity to investigate defendant's alibi defense. It is extremely likely that any attempt to investigate defendant's presence at the CVS would have been obstructed by the nearly two years that passed since the crimes were committed.

***7** As to the second consideration, several factors militate against a finding that preclusion of Alexander's testimony prejudiced defendant. For example, Alexander provided two statements to the police. The earlier of the two placed defendant at a CVS at the time of the burglary, but the more recent statement, given in connection with Alexander's guilty plea under oath at his plea hearing, incriminated defendant in the burglary. Defendant indicated he wanted to call Alexander to testify to the truthfulness of his first statement—while simultaneously impeaching his credibility as to the second—but defendant knew Alexander expressed he would not testify, and, if he did, defendant had no guarantee he would provide exonerating testimony consistent with his first statement. If he did recant the latter statement, the State would have cross-examined him, using his sworn testimony from his plea hearing.

As to the third Bradshaw factor, defendant argues a continuance would have been proper and would have ameliorated any disadvantage to the State like in Bradshaw. In Bradshaw, however, the propriety of a continuance was deemed "obvious" because the State specifically requested that remedy, and it would have provided the State an opportunity to investigate the defendant's alibi. Id. at 508-09. In contrast, as noted, further investigation of defendant's suggested alibi would likely have been futile in this matter. Additionally, it is unclear how a continuance would serve to "preserve the policy of the alibi rule"; defendant failed to provide documentation to the State before the first day of trial, and when the trial judge did, in fact, defer a decision on the alibi issue until a later date, the issue was abandoned by the defense.

The final Bradshaw factor requires the reviewing court to consider whether the defendant's failure to provide notice earlier was willful and intended to gain a tactical advantage. Here, defendant's request was made while he was still proceeding pro se. There is no indication in the record that his failure to provide notice sooner was willful or motivated by potential tactical advantage. To the contrary, defendant displayed an unfamiliarity with the Court Rules—prompting the trial judge to comment on his lack of training.

Based on these circumstances, we do not discern any error in the trial judge's decision to bar Alexander from testifying as an alibi witness, to the extent he rendered one.

Defendant also argues he was improperly denied the opportunity to present Ucci as a witness to the fact that (1) she saw paint cans under defendant's sink before the burglary, and, following defendant's arrest, the paint cans were no longer under the sink; and (2) Alexander frequented defendant's house and had access to the paint cans. He contends it was error for the trial judge to conclude Ucci's testimony was not relevant because she had no firsthand knowledge of the circumstances surrounding the burglary and had not actually witnessed anyone taking the paint can. Defendant argues this evidence was relevant because it had "a tendency in reason to prove or disprove any fact of consequence" under N.J.R.E. 401.

While we agree with defendant's definition of relevant evidence, see N.J.R.E. 401, we also recognize, in considering whether evidence is relevant, "[t]he inquiry is 'whether the thing sought to be established is more logical with the evidence than without it.' " Buckley, 216 N.J. at 261 (quoting State v. Coruzzi, 189 N.J. Super. 273, 302 (App. Div. 1983)). We conclude, as the trial judge found, Ucci's proffered testimony was not relevant at all as it had no tendency to prove someone other than defendant used the paint can that was found at the crime scene bearing his fingerprint.

First, Ucci did not see Alexander take the paint can and could not testify he did so. Moreover, defendant's proffer did not suggest she would or could testify the paint can found in the motel room was the same paint can she had seen at defendant's home. Second, if admitted, Ucci's testimony would, rather than tend to exonerate him, further incriminate defendant, as it would have established a paint can of the type used in the burglary was once in defendant's possession and was absent from defendant's apartment after his arrest. Under these circumstances, we conclude the exclusion of Ucci's testimony was not "so wide of the mark" as to constitute an abuse of discretion.

***8** Even if it was error to exclude Ucci's testimony, in light of the overwhelming evidence against defendant, the error was harmless beyond a reasonable doubt when "quantitatively assessed in the context of other evidence presented." State v. Camacho, 218 N.J. 533, 547 (2014) (quoting Arizona v. Fulminante, 499 U.S. 279, 280 (1991)); cf. State v. J.R., 227 N.J. 393, 417 (2017) (citation omitted) ("An evidentiary error will not be found 'harmless' if there is a reasonable doubt as to whether the error contributed to the verdict.").

Here, the evidence of defendant's guilt was overwhelming. The jury heard one of the victims' testimony that someone identifying themselves as defendant called to tell him to pay a debt to Alexander, as well as Peccoreno's testimony about defendant's actions during the burglary, including defendant spray painting "pay your drug debts" on the motel room wall, and defendant owning the knife left at the scene. In addition, Peccoreno confirmed he was picked up by Dowling, Alexander, and defendant in a white Mercedes Benz prior to the burglary. Pasieka testified defendant was in the white Mercedes Benz he pulled over a few blocks away from the scene of the burglary shortly after the crime occurred. Additionally, the jury viewed surveillance footage that showed defendant leaving his nearby apartment shortly prior to the crime in the company of a man and a woman, and other footage showed three male subjects exiting a white vehicle resembling a Mercedes Benz, walking toward the motel, and returning with items the subjects put into the white vehicle. To the extent the trial judge committed any error by barring Ucci's testimony, the totality of the other evidence of defendant's guilt prevents us from concluding that the ruling led to an injustice.

III.

Next, we address defendant's second point about the trial judge committing plain error in failing to charge the jury with the lesser-included offense of fourth-degree criminal trespass, N.J.S.A. 2C:18-3(a), and about a witness's prior contradictory statements. As defendant did not object to the absence of these charges at trial, we review these contentions for plain error. R. 1:7-2; R. 2:10-2 (providing that reviewing courts "shall" disregard any error or omission "unless it is of such a nature as to have been clearly capable of producing an unjust result"); State v. Dunbrack, 245 N.J. 531, 544 (2021). We conclude there was no error.

A.

According to defendant, the "record clearly indicated that the jury" could have convicted defendant of criminal trespass instead of burglary. He correctly states a conviction for burglary requires the State to prove that defendant (1) entered a structure, (2) without permission, and (3) with the purpose to commit an offense therein, N.J.S.A. 2C:18-2; while a conviction for criminal trespass requires the State to prove only the first two elements, N.J.S.A. 2C:18-3(a). State v. Singleton, 290 N.J. Super. 336, 341 (App. Div. 1996). He argues there was no direct evidence or testimony related to defendant's intent, and the notion that defendant entered the motel room with the intent to commit an offense was refuted by the fact that Peccoreno testified defendant told him to help Alexander move his belongings out of the motel room. He also notes Alexander himself pleaded guilty to criminal trespass.

We conclude the trial judge correctly did not on his own motion include a charge about criminal trespass in his final instructions to the jury because there was no clear evidence that the jury could have convicted defendant of the lesser charge while acquitting him of burglary.

***9** Generally, "courts 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 (2006). A charge is warranted when a "jury could convict on the lesser while acquitting on the greater offense." State v. Jenkins, 178 N.J. 347, 361 (2004).

"[W]hen the defendant fails to ask for a charge on lesser-included offenses, the court is not obliged to sift meticulously through the record in search of any combination of facts supporting a lesser-included charge." Denofa, 187 N.J. at 42. The court is obligated to give a lesser-included offense instruction sua sponte only "if the record clearly indicates a lesser-included charge—that is, if the evidence is jumping off the page." Ibid. "[S]heer speculation does not constitute a rational basis. The evidence must present adequate reason for the jury to acquit the defendant on the greater charge and to convict on the lesser." State v. Brent, 137 N.J. 107, 118-19 (1994) (citations omitted).

Here, we conclude the record does not clearly indicate a rational basis to acquit defendant of the burglary charge, rather it clearly established he intended to enter the subject motel room to commit the theft. The evidence presented at trial demonstrated that defendant's fingerprints were found on the can of red spray paint found at the scene and that the pocketknife found in the child's crib belonged to defendant. In addition, the jury heard testimony from Smith that an individual identifying himself as defendant called Smith to inform him that he owed defendant's son money and that, when Smith returned home after work, he found the words "pay your drug debts" spray painted on the wall of the motel room and his property was gone. In addition, surveillance footage played by the State depicted three figures exiting a white vehicle parked near the motel before entering and exiting a room at the approximate location of the victim's room on the same evening of the burglary and theft. The footage then shows these figures walking back toward the white vehicle and putting bags in the car, which drives away from the scene only minutes before a white Mercedes Benz containing defendant, Alexander, and Peccoreno is stopped by Pasieka a few blocks away.

While circumstantial, the above facts were sufficient to place defendant at the scene of the crime at the time of the offense and for the jury to have inferred defendant's intent to commit a theft therein. Furthermore, the only evidence before the jury potentially detracting from the inference that defendant intended to commit the charged offenses in the motel room was Peccoreno's testimony that defendant enlisted his help by asking if he could help Alexander move his belongings out of his apartment. That evidence was simply insufficient to have required the trial judge to have charged the lesser included offense, especially considering defendant's failure to request the charge.

B.

Defendant also argues the trial judge failed to instruct the jury about its consideration of a prior contradictory statements of witnesses, and that failure was compounded by the omission of a "false in one, false in all" charge. We disagree.

i.

Defendant's arguments on this point revolve around the testimony provided by Peccoreno. The State called Peccoreno, who testified as a condition of a plea agreement he had made with the State.

***10** Peccoreno testified that as of December 1, 2016, he had known defendant, who was "like a father to [him]" for "three to four years," and that he met Alexander and his girlfriend through defendant on December 1, 2016. Recounting the events of December 1, 2016, Peccoreno testified he agreed to help defendant move Alexander's things out of the motel room and went with them on December 1, 2016, for that purpose, travelling in a white Mercedes Benz driven by Dowling. At the motel, Dowling remained in the car and he, defendant, and Alexander went inside, using Alexander's key. Upon entering the room, they began putting electronic items that Alexander said belonged to him inside bags to be moved to Dowling's residence in Kearny. He also stated he carried a TV out of the motel room.

Peccoreno also testified defendant and Alexander "started spray painting the wall and [he] basically ran out of there because ... [he] didn't want to get involved with that" and he "didn't know what that was about." Peccoreno stated he observed defendant spray painting "something like pay your debts and something with the Bloods in red." He also stated defendant "left the glove on the floor" and that he thought defendant "also caused some damage with a knife." When the State asked Peccoreno whether he had ever seen defendant in possession of a knife, Peccoreno testified that he had seen defendant in possession of "[a] green knife with an A on it" "at [defendant's] home." After they packed the items into the car, and left the motel, Pasieka stopped the car and spoke with Dowling before the four of them eventually returned to Peccoreno's residence.

On cross-examination, Peccoreno acknowledged on January 21, 2017, he went to the SHPD and provided a false statement, telling them that defendant had nothing to do with the robbery and that, instead, an individual named Daniel Brown assisted in committing the burglary. He testified he gave the false statement at defendant's request because defendant told Peccoreno he was dying, and Peccoreno "didn't want [defendant] to die in jail." When defendant's counsel pressed Peccoreno as to the falsity of his January 21 statement to police and asked Peccoreno to confirm he made the statement in exchange for "looking for [some other charges] to go away," Peccoreno told defendant's counsel that he did not "remember ... what [defense counsel was] talking about." He also told defense counsel that a video of his statement would "probably" reflect that he was seeking charges to be dropped

in exchange for testimony but that he did not "remember the whole conversation" because he "was on heroin," that defendant gave him, when he gave the statement.

Following the parties' closing arguments, the trial judge provided the full model instruction regarding determining credibility, see Model Jury Charges (Criminal), "Parts 1 and 2 (General Information to Credibility of Witnesses)" (rev. May 12, 2014), including that the jurors were to consider "whether [a] witness made any inconsistent or contradictory statement[s]." The judge did not, however, instruct the jury that it may consider the inconsistent statements not only for credibility, but also "as substantive evidence, that is, proof of the truth of what is stated in the prior contradictory statement," Model Jury Instructions (Criminal), "Prior Contradictory Statements of Witnesses (Not Defendant)" (May 23, 1994)—nor was such an instruction requested.

ii.

At the outset, we observe the jury was never presented with the exact language of Peccoreno's prior statement to police. On cross-examination, Peccoreno admitted to giving a statement to police on January 21, but, although he could not recall exactly what he said, he testified the contents of his statement were "all lies." While defense counsel spent considerable time on cross-examination referencing the past inconsistent statement to attack Peccoreno's credibility—and thereafter repeated the attack on Peccoreno's credibility at length in summation—defense counsel never showed Peccoreno the prior statement to refresh his recollection, nor was it ever read to the jury.

***11** When a defendant requests the charge and a witness's prior inconsistent statement conveys "conflicting versions of the same event," it is appropriate for a trial judge to charge the jury using the model instruction on the substantive use of prior inconsistent statements. State v. Hammond, 338 N.J. Super. 330, 342-43 (App. Div. 2001). However, the omission of the charge will "not prejudice[a] defendant's rights" if the defendant used the prior statement to impeach the witness. State v. Provet, 133 N.J. Super. 432, 438-39 (App. Div. 1975). This is so because in a criminal case, where a defendant has no burden of proof requiring substantive evidence, the use of a prior inconsistent statement to impeach "serve[s] the same purpose of disproving [the witness's positive] assertion" as admitting the statement as substantive evidence to prove the negative assertion, and "tends to the same conclusion" by the jury. Id. at 438.

Here, had the prior contradictory statements instruction been given at trial, the instruction would have informed the jury that they could consider Peccoreno's January 21 statement —indicating defendant was not present for or involved with the incidents in the motel room—as substantive evidence. This would have had the same effect as defense counsel using Peccoreno's prior statement to attack his credibility —i.e., discouraging the jury from believing Peccoreno's trial testimony implicating defendant in favor of believing that defendant was not involved. Accordingly, because defendant's use of the content of the statement to impeach Peccoreno's credibility tended toward the same purpose that would have been served by admitting the statement as substantive evidence, the omission of a prior inconsistent statement instruction "could not have prejudiced defendant's rights," and the omission was not "plain error justifying a reversal." Id. at 438-39.

We reach a similar conclusion as to the trial judge not charging Model Jury Charge (Criminal), "False in One-False in All" (rev. Jan. 14, 2013), again primarily because defendant did not request the charge. See R. 2:10-2; State v. McGuire, 419 N.J. Super. 88, 106-07 (App. Div. 2011). The provision of a "false about one fact false about all" instruction is a decision left to the discretion of the trial judge, and the charge may be given where "a witness intentionally testifies falsely as to some material fact." State v. Fleckenstein, 60 N.J. Super. 399, 408 (App. Div. 1960); see State v. Ernst, 32 N.J. 567, 583-84 (1960).

Here, there was no error in not giving the charge because defendant did not request it and the trial judge instructed the jury to take into consideration, among a host of other factors, whether any witnesses had testified "with an intent to deceive" them. The judge further instructed the jury that, because of that consideration, the jury must determine the appropriate weight to give the witness's testimony, including whether to "accept all of it, a portion of it, or none of it." As a result, despite defendant's failure to request the charge, the jury was adequately notified it was their job to decide the credibility of all witnesses and determine whether a witness was willfully or knowingly testifying falsely to any of the facts testified to at trial.

IV.

Next, we consider defendant's third point in which he argues the trial judge committed plain error when he allowed Bloomquist to provide lay witness opinion testimony when he narrated portions of the State's videotaped surveillance footage. He contends Bloomquist's testimony was "inadmissible lay opinion testimony because Bloomquist was not an eyewitness to the events shown on the video, so he lacked personal knowledge, and his opinion as to the contents of the videos was not helpful to the jury, as the jury was fully able to evaluate the video itself." Additionally, he argues the testimony's admission was "particularly harmful" because, as the lead detective investigating defendant's case, his testimony that the videos depicted defendant and a Mercedes Benz, and his dismissal of pedestrians he identified in the footage from being involved in this case, "could have easily influenced the jury's evaluation of those videos." Accordingly, defendant argues allowing the testimony was plain error. We disagree.

A.

***12** The State presented surveillance footage from outside defendant's home, and three locations near the subject motel. While the jury viewed the tapes, Bloomquist narrated the events depicted and provided his interpretation of what was being shown on the tapes.

In the first video that Bloomquist identified as footage of outside of defendant's residence, he stated the video depicted three individuals "walk[ing] upstairs to the second floor. Two males and a female. The person in the middle who I believed to be the defendant ... is attempting to open the door to his apartment." He later described how the three individuals are depicted leaving the apartment at approximately 7:13 p.m. That was the detective's only specific identification of defendant appearing in a video tape.

The next videos played were from locations near the subject motel, and, according to Bloomquist, depicted "a white four-door which appears to be a Mercedes Benz" pulling up. As other vehicles and people other than the occupants of the white four-door entered the view of the camera, Bloomquist stated those vehicles and people had "nothing to do with the case."

Bloomquist then narrated as three subjects got out of the car, walked to the motel, up its stairs, and entered a room. He continued as the subjects left the room and walked "back towards the white Mercedes," two of which appeared to have bags which they placed inside the trunk. Bloomquist continued to narrate as the individuals entered the white vehicle and drove away.

After concluding the presentation of the video evidence, Bloomquist testified that, during his investigation, he was also made aware of a white vehicle stopped nearby by Pasieka, shortly after the white vehicle on camera left the premises near the motel.

During cross-examination about his representations regarding the surveillance footage, Bloomquist admitted that he could not identify any of the individuals entering the apartment in the footage outside defendant's home and that he could not identify any of the individuals leaving the apartment because their faces were not visible, although he indicated he assumed defendant was the individual that had locked the door to the apartment that they left before heading to the motel. On redirect, Bloomquist testified that he was familiar with defendant's mannerisms and gait, having seen him in person approximately twenty times prior to viewing the surveillance footage, and that he had considered these factors in identifying defendant as the individual locking the door.

Regarding the individuals Bloomquist identified as not involved in the case, during cross-examination, Bloomquist indicated that he could not identify the individuals and did not know where they came from or where they were going. Bloomquist stated that he believed the white, four-door sedan depicted in the video was Dowling's Mercedes Benz, and that he knew it was a Mercedes Benz based on "pulling over vehicles in the past," but he acknowledged that he could not "see any identifying marks" on the car in the video. Bloomquist again identified the white, four-door car in another video clip that he believed to be Dowling's Mercedes Benz, but acknowledged that no distinguishing marks were visible in the video. He also acknowledged due to the video quality there was no way of distinguishing the identity or clothing of the three figures seen walking toward the motel from the direction of the white car, whether they were carrying anything, whether the room they entered was the victims' room, or the identities of the three figures who walked back to the car from the motel later in the video.

B.

***13** We again apply the plain error standard to defendant's challenges to Bloomquist's comments that were made during the videotapes' presentation, which he raises for the first time on appeal. With that standard in mind, we begin with defendant's contention that Bloomquist's narration constituted inadmissible lay opinion testimony. We disagree.

It is well established that a police officer may provide testimony describing "what the officer did and saw," because "[t]estimony of that type includes no opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." State v Singh, 245 N.J. 1, 15 (2021) (quoting State v. McLean, 205 N.J. 438, 460 (2011)). When the officer's testimony transitions into non-expert, lay opinion testimony, the parameters of his or her testimony are different.

"Lay opinion is admissible 'if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function.' " State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting Singh, 245 N.J. at 14). Opinion testimony of a lay witness is governed by N.J.R.E. 701, which states, "[i]f a witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness'[s] perception; and (b) will assist in understanding the witness'[s] testimony or determining a fact in issue." The Rule was adopted to "ensure that lay opinion is based on an adequate foundation." Singh, 245 N.J. at 14 (quoting State v. Bealor, 187 N.J. 574, 586 (2006)).

"The first prong of N.J.R.E. 701 requires the witness's opinion testimony to be based on the witness's 'perception,' which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." Singh, 245 N.J. at 14 (quoting McLean, 205 N.J. at 457). Therefore, the witness's knowledge may not be acquired through "hearsay statements of others." Sanchez, 247 N.J. at 469 (citing N.J.R.E. 701). But, "[t]he witness need not have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony" about what is depicted. Ibid.

Under the Rule's second prong, the lay witness's testimony must "assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Singh, 245 N.J. at 15 (quoting McLean, 205 N.J. at 458).

In Singh, the Court determined

> a police officer's lay opinion met N.J.R.E. 701's first prong .... There, an armed robbery was captured on surveillance video and the officer who arrested the defendant was properly permitted to testify that the sneakers worn by the perpetrator in the video were "similar" to the sneakers worn by the defendant when the officer encountered him shortly after the robbery. Although the officer did not witness the crime, he had personal knowledge of the sneakers worn by the defendant in its immediate aftermath, and his testimony thus satisfied N.J.R.E. 701's first prong.
>
> [Sanchez, 247 N.J. at 468 (citations omitted).]

In Sanchez, the Court affirmed our reversal of a trial judge's decision to bar a parole officer's testimony about telling "a detective investigating a homicide and robbery that [the] defendant was the individual depicted in a photograph derived from surveillance video taken shortly after the crimes." Id. at 458. The Court concluded that, since the parole officer "became familiar with defendant's appearance by meeting with him on more than thirty occasions during his period of parole supervision," "[h]er identification of defendant as the front-seat passenger in the surveillance photograph was 'rationally based on [her] perception,' as N.J.R.E. 701 requires." Id. at 469.

***14** Applying these principles to the instant case, and contrary to defendant's assertions, the fact that Bloomquist did not personally witness the events depicted in the surveillance footage does not mean his narration of the footage was inadmissible pursuant to N.J.R.E. 701. The detective did not purport to provide an eyewitness account, and his testimony was relevant to aid the jury in its understanding of what was depicted, with which he was familiar from his investigation of the areas depicted. Additionally, due to the poor quality in some of the footage, the narration from an individual with personal knowledge of the locations was undoubtedly helpful to the jury.

Although on appeal defendant also argues it was error for the trial judge to permit Bloomquist's identification of defendant in the video footage taken from outside defendant's home, he never raised this argument to the trial judge. To the contrary,

regarding the footage taken from outside defendant's home, defense counsel stated in summation, "we're not arguing that's not the defendant. That's his apartment and he's there with a woman." (Emphasis added).

In any event, Bloomquist testified in this regard that he only "believed" the person in that first video to be the defendant. On cross-examination, he testified that he could not see defendant's face in the video and assumed it was defendant because he was locking his front door. Further, on redirect, Bloomquist testified that he knew that the apartment in question belonged to defendant, that he had previously encountered defendant on approximately twenty occasions, and that he was familiar with defendant's mannerisms and gait based on these contacts. None of the officer's descriptions referred to defendant committing any offense while being taped. Under these circumstances, we cannot discern any error, let alone plain error, in permitting Bloomquist to testify as to defendant's identity in the one videotape.

Defendant also argues it was plain error to admit Bloomquist's testimony throughout his narration referring to the white vehicle in the footage as a Mercedes Benz because Bloomquist's testimony was "not based on what is observable in the videos." To that point, defendant notes that Bloomquist admitted on cross-examination that there were no identifying markings on the white vehicle in the footage, and his conclusion that the white, four door sedan was a Mercedes Benz was based on his experience "pulling over vehicles in the past." On redirect, Bloomquist also testified that the vehicle depicted in the videos matched the description of the vehicle stopped by Pasieka "seven minutes after" the white vehicle left the scene in the footage from near the subject motel.

Defendant's contentions about the identification of the vehicle are without merit. Bloomquist's opinion was based upon his perception and past experiences, did not require detailed measurements or scientific analysis, and assisted in determining a fact in issue. There was no error in allowing Bloomquist's hedged opinion testimony as to the make of vehicle depicted in the footage. Even if it was error under the circumstances, it was not plain error "clearly capable of producing an unjust result." R. 2:10-2.

Defendant further argues it was plain error for the court to admit Bloomquist's testimony dismissing certain individuals depicted in the surveillance footage as irrelevant. At several points during his narration, Bloomquist referred to individuals depicted in the footage and stated that the individuals were not relevant to the crime, yet, on cross-examination, he admitted he did not know who those people were or what they were doing. Defendant argues this was misleading to the jury because "[i]t was entirely possible that the people that he dismissed as irrelevant were the actual perpetrators of the burglary, but Bloomquist told the jurors that this was not the case." According to defendant, the same was true for Bloomquist's commentary regarding individuals that were not relevant to the investigation. We disagree.

***15** Bloomquist's opinion was based on his perception and knowledge of the area and the camera angles, did not require detailed measurements or scientific analysis, and assisted in determining a fact in issue. Moreover, at no point during this narration—or at any time other than the footage depicting defendant's home—did Bloomquist identify defendant as one of the individuals in the footage. Ultimately, the question of who the individuals were and what crime they committed was properly left for the jury. Accordingly, based on the foregoing, there was no error in the admission of Bloomquist's narration, let alone error capable of producing an unjust result. R. 2:10-2.

V.

In his fourth point, defendant argues the trial judge committed plain error when it permitted witnesses to testify as to facts that indicated defendant had a propensity for criminal activity. Specifically, defendant argues it was plain error for the trial judge to permit Bloomquist to testify he knew defendant from prior encounters, Pasieka to testify defendant lived in a "notorious problem" area, and a fingerprint examiner to testify law enforcement had defendant's fingerprint on file without issuing a limiting instruction.

As already noted, at trial, during cross-examination, Bloomquist identified defendant as the individual shown leaving defendant's apartment and locking the door behind him, initially only because he was locking the door and not from seeing defendant's face in the videotape. However, on redirect, Bloomquist stated he knew defendant resided at the depicted location, and that he personally visited the location when he retrieved the video footage. Additionally, the following exchange occurred with the prosecutor about Bloomquist's prior contact with defendant:

[Prosecutor]: And prior to even the December [first] incident, you had prior contact with the defendant; correct?

[Bloomquist]: Correct.

[Prosecutor]: And those contacts were of the nature of in-person contacts; right?

[Bloomquist]: Correct.

[Prosecutor]: You had seen him physically before; correct?

[Bloomquist]: Yes.

[Prosecutor]: Can you estimate on how many occasions you've seen him before the image that we see on [the videotape]? Roughly.

[Bloomquist]: I'd say [twenty].

[Prosecutor]: And based upon those previous contacts, have you become familiar with his physical characteristics?

[Bloomquist]: Yes.

[Prosecutor]: Have you become familiar with his gait?

[Bloomquist]: Yes.

[Prosecutor]: And his mannerisms?

[Bloomquist]: Yes.

[Prosecutor]: And were all those things you considered when you testified with respect to the person we see on [the videotape] as being the defendant?

[Bloomquist]: Yes.

Contrary to defendant's contention before us, Bloomquist's testimony that was elicited in response to defense counsel's questions about identifying defendant, did not lead to any prejudice to defendant by implying he had committed previous criminal acts. See State v. Love, 245 N.J. Super. 195, 197-98 (App. Div. 1991) (concluding officer's testimony on cross-examination about "prior contact" with the defendant, in which the officer interviewed him during a homicide investigation, did not provide the jury with an inference that the defendant "had been involved in prior criminal activity"). Significantly, Bloomquist did not testify his prior contacts with defendant sprang from defendant's involvement in any criminal investigation. Here, not only was there no inference that defendant had committed other crimes, but there was also no risk that Bloomquist's testimony could have provided improper weight to the victims' or any other witness's identification of defendant in the video, as no other witness provided such an identification. Under these circumstances, there was no error in allowing the challenged testimony.

***16** We reach a similar result as to defendant's challenge for the first time on appeal as to Pasieka's testimony regarding his reasons for pulling over the white Mercedes Benz. Pasieka testified he had seen the car—which he did not recognize—in an area that had "been a notorious problem ... so [he] just wanted to check it out." According to defendant, this testimony was irrelevant to any discrete issue and, even if it were relevant, its probative value was substantially outweighed by the risk of prejudice to defendant under N.J.R.E. 403.

Contrary to defendant's contention, we conclude the officer's testimony was relevant, see N.J.R.E. 401, and its probative value was not substantially outweighed by the risk of undue prejudice, N.J.R.E. 403(a). Here, Pasieka's testimony was offered to demonstrate why Pasieka followed the car and eventually pulled it over. To that end, the testimony was certainly relevant to explain why the vehicle that defendant was traveling in was stopped near the motel. The testimony was not offered for the purpose of buffering the State's case by creating an inference that defendant must be involved in criminal activity because the area he was in was known for such. Furthermore, aside from indicating that Dowling had failed to stop at a stop sign, Pasieka's testimony that he recognized the occupants in the vehicle and released them without even a citation indicated to the jury that defendant was not engaged in criminal activity. Accordingly, Pasieka's testimony was relevant, and carried minimal risk of prejudicing defendant, if at all. Here, again the admission of this testimony was not an error.

In defendant's final argument under his fourth point, he argues it was plain error for the trial judge to allow a fingerprint expert's testimony that defendant's fingerprint was on file with the police department without administering the model limiting instruction for fingerprint evidence[4] as it "indicated to jurors that [defendant] had a criminal history." Despite the fact that no such limiting instruction was requested, defendant argues that the judge should have issued the instruction sua sponte.

At trial, a fingerprint examiner testified a fingerprint obtained from the spray paint can found in the victims' motel

room matched an exemplar of defendant's fingerprints, and explained an exemplar is a copy of fingerprints kept for records, examinations, and for comparison to latent prints that were obtained. Prior to the expert's testimony, the trial judge discussed with counsel the best manner of redacting the fingerprint exemplar that was taken in connection with a separate matter, with defense counsel's requested redactions ultimately being made to the exemplar. The expert testified fingerprint exemplars are "taken under a controlled environment," but neither the expert nor any other witness testified as to why defendant's fingerprint was on file with the police, and no limiting jury instruction was requested or provided.

***17** Here again, because no limiting instruction was requested at trial, we review the trial judge's alleged failure to give such an instruction for plain error. See State v. Cole, 229 N.J. 430, 455 (2017). Although defendant speculates the mere mention of a fingerprint may imply the defendant's involvement in prior criminal activity, there was no mention of any such involvement in the fingerprint expert's testimony, and the fingerprint exemplar that had been shown to the jury was redacted based upon defense counsel's specific recommendations. As noted in the model jury instruction, fingerprints may reach law enforcement from many different sources "totally unconnected with criminal activity." Model Jury Charges (Criminal), "Fingerprints" (rev. Jan. 6, 1992). Based on the foregoing, the risk that the jury might infer defendant's prior criminal activity based solely upon the fact that the police department had access to his fingerprint was small.

In any event, it is likely that defense counsel's declination to request such an instruction was a tactical decision. As the Court has noted, the decision to seek a limiting instruction is not without certain tactical considerations; such instructions "may provide important guidance as the jury evaluates" the evidence, but may also "focus the jury's attention" on evidence that "it might otherwise have ignored." Cole, 229 N.J. at 455-56. Here, defense counsel was aware of the potential for impermissible prior crimes evidence and requested certain redactions to the exemplar accordingly. Moreover, the jury was not provided with any evidence that defendant's fingerprint was on record in connection with a prior criminal investigation, and they did not ask any questions regarding the circumstances surrounding the fingerprint being on file. Any limiting instruction on the matter would have called the jury's attention to this issue, where it may have otherwise carried little weight.

We are not persuaded by defendant's reliance on State v. Swint, 364 N.J. Super. 236 (App. Div. 2003). In Swint, the trial judge failed to provide a limiting instruction following the State's use of the defendant's photograph in a photo array. There, the State characterized the photographs in the array as "mug shots," and, unlike here, the defense in Swint requested a limiting instruction but the trial judge refused. Id. at 240-41. We concluded the trial judge's refusal to provide the model instruction on the use of photographs as requested by the defendant could not be considered harmless error because the jury asked multiple questions regarding the circumstances surrounding the selection of photographs for the photo array. Id. at 241-43. We observed the jury became "obviously concerned about the 'criteria' used to select the photos shown to the victims. The legal concern [was] that police photos suggest ... defendant had a criminal history, may have been suspect for that reason, and the jury may then find him guilty on the same basis." Id. at 243. Here, there was no concern or question expressed by the jury and defendant never requested any particular charge to the jury addressing the challenged testimony. Here therefore the trial judge did not commit plain error in not providing limiting instructions to the jury sua sponte.

VI.

Last, we address defendant's challenge to his sentence based upon his contention that the trial judge did not properly weigh the aggravating and mitigating factors. Specifically, relying on State v. Nataluk, 316 N.J. Super. 336, 349 (App. Div. 1998), defendant argues the judge failed to properly consider the evidence of defendant's failing mental health in favor of mitigating factor four ("substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"). N.J.S.A. 2C:44-1(b)(4). He contends the judge should have applied that factor because defendant's "Attention Deficit Hyperactivity Disorder, Severe Depression, Bipolar Disorder, and Anti-Social Personality Disorder" contributed to his behavior. However, defendant concedes the judge mentioned defendant's mental health issues but found they "didn't rise to the level of being a statutory defense to the crimes."

***18** We review sentencing determinations under a deferential standard, State v. Grate, 220 N.J. 317, 337 (2015) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)), and are bound to uphold the trial judge's sentence unless "(1) the

sentencing guidelines were violated; (2) the aggravating and mitigating factors found ... were not based upon competent and credible evidence in the record; or (3) 'the application of the guidelines to the facts ... makes the sentence clearly unreasonable so as to shock the judicial conscience.' " State v. Fuentes, 217 N.J. 57, 70 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

We begin by concluding defendant's reliance on Nataluk, is inapposite. In that case, the defendant presented an insanity defense based on his bipolar disorder, amnesia, and severe hallucinations. Nataluk, 316 N.J. Super. at 342. The trial judge in that case was presented with expert testimony that the defendant had suffered several traumatic brain injuries and had a history of drug and alcohol abuse and, as a result, he suffered from conditions that rendered him unaware of his conduct on the night of the shooting. Id. at 342-43. In addition, the defense called numerous witnesses who corroborated defendant's history of injury and resultant abnormal behavior. Id. at 341-42. Although the jury ultimately rejected the defendant's insanity defense, on appeal we concluded there was significant support for a finding of mitigating factor four. Id. at 349.

Here, defendant did not request a finding under mitigating factor four, nor did he produce any medical or psychological reports at trial to indicate a history of mental conditions that should have been considered under mitigating factor four. There was no evidence at all for the trial judge to have relied upon in applying that mitigating factor, especially in light of the failure of defendant to even request consideration of that factor. The judge did not abuse his discretion in sentencing defendant, leaving us with no cause to disturb the outcome here.

VII.

Because we conclude the trial judge did not commit any errors, we need not address defendant's remaining argument that he was denied a fair trial due to the trial judge's cumulative errors.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2022 WL 100615

Footnotes

1 We refer to defendant's son by his first name to avoid any confusion caused by his and defendant's common name.

2 In a third count, defendant was also charged with third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1), but later, on the State's motion, that charge was dismissed before trial.

3 Rule 3:12-2, addresses a defendant's obligation to give notice of an alibi defense. It provides as follows:

> (a) Alibi. If a defendant intends to rely in any way on an alibi, within [ten] days after a written demand by the prosecutor the defendant shall furnish a signed alibi, stating the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Within [ten] days after receipt of such alibi, the prosecutor shall, on written demand, furnish the defendant or defendant's attorney with the names and addresses of the witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged offense. The trial court may order such amendment or amplification as the interest of justice requires.
>
> (b) Failure to Furnish. If the information required in paragraph (a) is not furnished, the court may refuse to allow the party in default to present witnesses at trial as to defendant's absence from or presence at the scene of the alleged offense, or make such other order or grant such adjournment, or delay during trial, as the interest of justice requires.
>
> [R. 3:12-2 (emphasis omitted).]

4 The model limiting instruction for fingerprint evidence provides:

> There was testimony that the (law enforcement agency) had fingerprints of the defendant on file. You are not to consider that fact as prejudicing the defendant in any way.

That fact is not evidence that the defendant has ever been convicted, or even arrested for any crime, and is not to be considered as such by you. The fact that the (law enforcement agency) is in possession of a person's fingerprints does not mean that the person has a criminal record. Fingerprints come into the hands of law enforcement agencies from many legitimate sources. These include, but are not limited to: birth certificates, grade school child identification programs, military service, many forms of employment, including municipal, county, state and federal jobs, casino license applications, private security guard applications, firearms and liquor license applications, passport applications, as well as other sources totally unconnected with criminal activity.

[Model Jury Charges (Criminal), "Fingerprints" (rev. Jan. 6, 1992).]

End of Document

2022 WL 244119
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.

Tamaj R. LEMMON, Defendant-Appellant.

DOCKET NO. A-1628-18

Argued January 5, 2022

Decided January 27, 2022

On appeal from the Superior Court of New Jersey, Law Division, Criminal Part, Passaic County, Indictment No. 17-06-0632.

Attorneys and Law Firms

Marissa Koblitz Kingman, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Jodi Ferguson, Assistant Deputy Public Defender, Marissa Koblitz Kingman and Marc M. Yenicag, Designated Counsel, on the briefs).

Ali Y. Ozbek, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Ali Y. Ozbek, of counsel and on the brief).

Before Judges Sabatino, Mayer and Natali.

Opinion

PER CURIAM

***1** This multi-issue direct criminal appeal arises out of a gang-related fatal shooting. After a jury trial, defendant Tamaj Lemmon was found guilty of first-degree murder of Vishon Randolph, N.J.S.A. 2C:11-3(a) (count one), and other crimes. Randolph was the reputed member of a rival gang. The State's theory was that defendant shot and killed Randolph, and took part in attacking two of Randolph's companions, Tyshawn Daniels and Zimere Kellam, all in retaliation for the recent killing of a member of defendant's own gang.

In addition to Randolph's murder, the jury found defendant guilty of second-degree possession of a handgun for an unlawful purpose against Randolph, N.J.S.A. 2C:39-4(a)(1) (count two); second-degree possession of a handgun for an unlawful purpose against Daniels, N.J.S.A. 2C:39-4(a)(1) (count three); second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1) (count four); second-degree possession of a weapon for an unlawful purpose against Kellam, N.J.S.A. 2C:39-4(a)(1) (count six); and the lesser-included offense of third-degree aggravated assault of Kellam, N.J.S.A. 2C:12-1(b)(7) (count seven). The jury acquitted defendant on count five, which had charged him with first-degree attempted murder of Daniels, N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:11-3(a)(1).

The trial judge imposed a sixty-year custodial sentence, subject to the parole ineligibility period of the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2, for Randolph's murder and other offenses merged into the murder. The judge also imposed a consecutive nine-year NERA term for Kellam's aggravated assault, and another consecutive five years for the weapons offense associated to Daniels. Defendant's aggregate sentence therefore is seventy-four years, subject to NERA.

On appeal, defendant presents a host of issues concerning both his conviction and sentence. Having fully considered his arguments, we affirm.

I.

As shown by the State's proofs, the shooting and the other offenses arose out of a feud between factions of the "UTH" and "DTH" gangs[1] in Paterson. The "UTH" gang included a subgroup called "23XB," of which defendant Tamaj Lemmon was a member. The "DTH" gang included subgroups called the "GND" and the "BSQ". The homicide victim, Randolph, was associated with the BSQ. Randolph was also in the "SCMB," which the State alleged was also affiliated with "DTH", but which the defense claimed was merely a rap music group.

According to the State, defendant's shooting of Randolph was in retaliation for a GND member's killing of Kasir Davis, a member of 23XB, about a month earlier. The State's proofs at trial showed that on the night of Randolph's shooting, defendant and others in 23XB went to a party at a bar. Defendant saw Randolph at the party and, according to the

State's witness, asked Randolph if he was affiliated with GND. Randolph reportedly said he was not but admitted to defendant he was on good terms with the members of GND.

***2** After police broke up the party, Randolph started walking home with two friends, Kellam and Daniels. On the street, defendant and another man (Kamari Benbow) approached the trio from behind. Defendant and Benbow fired shots at the trio, causing Randolph to fall to the ground and hitting Kellam in the buttocks. Defendant then stood over Randolph and fired two or three more shots at him, point-blank. Randolph died from the gunshot wounds. Kellam survived the shot in his buttocks and fled with Daniels who was not hurt. Defendant and Benbow also fled.

The incident on the street was filmed by outdoor surveillance cameras operated by local businesses. The prosecution prepared a sixteen-minute composite video of that footage, which was shown to the jury.

The police arrested defendant a few days later at his residence. They found defendant hiding in his basement boiler room. The police found a loaded handgun on the floor of the boiler room, although that gun was not used in the street shooting. According to defendant, the officers used excessive force when they arrested him.

Defendant was charged with Randolph's murder and other crimes. The court severed the additional charges arising from defendant's arrest.[2]

A hostile encounter later occurred at the courthouse between defendant and a sheriff's officer, Cooper. During that encounter, defendant admitted to murdering Randolph and added that if he were out on the street he would "do [Cooper's] stupid ass, too." Defendant filed a complaint against Cooper, alleging that Cooper threatened him, which resulted in Cooper himself being criminally charged with terroristic threats.

The State obtained a sworn statement from Kellam inculpating defendant in the shooting of Randolph. Kellam later wrote a letter recanting his police statement, but thereafter repudiated the recantation and said he had written it under duress.

The State's case hinged largely on the surveillance video, testimony from Kellam and Daniels, and defendant's admission to Cooper. No DNA, fingerprint, or other forensic evidence tied defendant to the shooting. The guns used in the shooting were never recovered.

Defendant testified at trial and denied taking part in or being present at the shooting or any involvement in the other offenses.

As we noted in the introduction, the jury found defendant guilty of murdering Randolph, unlawful purpose gun possession charges with respect to Daniels, and the lesser-included offense of third-degree aggravated assault of Kellam.

On appeal, defendant presents the following arguments in his brief:

POINT I:

THE ADMISSION OF IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE OF LEMMON'S AND THE VICTIM'S GANG AFFILIATIONS, PURPORTEDLY ON THE ISSUE OF MOTIVE, VIOLATED N.J.R.E. 404(B) AND WAS SO HIGHLY PREJUDICIAL AS TO DEPRIVE LEMMON OF HIS RIGHT TO A FAIR TRIAL.

A. THE FIRST PRONG UNDER [STATE V.] COFIELD[3] WAS NOT MET BECAUSE GANG AFFILIATION WAS NOT RELEVANT TO ESTABLISH MOTIVE.

***3** B. THE FOURTH PRONG UNDER COFIELD WAS NOT MET.

POINT II:

THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE THAT LEMMON WAS FOUND WITH A LOADED GUN AT THE TIME OF HIS ARREST IN CONTRAVENTION OF N.J.R.E. 404(B) AND 403, WHICH DEPRIVED LEMMON OF HIS RIGHT TO A FAIR TRIAL.

A. THE FIRST PRONG UNDER COFIELD WAS NOT MET.

B. THE FOURTH PRONG UNDER COFIELD WAS NOT MET.

C. EVEN IF DEFENSE COUNSEL "OPENED THE DOOR," EVIDENCE THAT LEMMON WAS FOUND

WITH A LOADED GUN AT THE TIME OF HIS ARREST SHOULD NEVERTHELESS NOT HAVE BEEN ADMITTED PURSUANT TO N.J.R.E. 403.

POINT III

THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT, HIGHLY PREJUDICIAL STATEMENTS BY LEMMON, WHICH WERE PREVIOUSLY EXCLUDED BY THE TRIAL COURT.

POINT IV

THE STATE DID NOT PROPERLY AUTHENTICATE THE VIDEO COMPILATION.

POINT V

THE PROSECUTOR ELICITED IMPROPER LAY OPINION TESTIMONY AS TO THE CONTENTS OF THE SURVEILLANCE VIDEO.

POINT VI

THE TRIAL COURT ERRONEOUSLY ALLOWED THE JURY UNFETTERED ACCESS TO THE VIDEO COMPILATION DURING THEIR DELIBERATIONS.

POINT VII

THE PROSECUTOR COMMITTED MISCONDUCT DURING HIS SUMMATION, AND VIOLATED LEMMON'S RIGHT TO A FAIR TRIAL BY ASSERTING FACTS NOT ESTABLISHED IN EVIDENCE, APPEALING TO THE JURY'S EMOTIONS, AND UTILIZING EVIDENCE OUTSIDE THE SCOPE OF ITS PERMISSIBLE PURPOSE.

POINT VIII

THE TRIAL COURT'S JURY INSTRUCTIONS RELATING TO THE PERMISSIBLE USE OF GANG AFFILIATION EVIDENCE AND EVIDENCE THAT LEMMON WAS FOUND HIDING WITH A LOADED GUN WERE ERRONEOUSLY DEFICIENT.

POINT IX

BECAUSE OF INDIVIDUAL AND CUMULATIVE ERROR, THIS COURT SHOULD REMAND FOR A NEW TRIAL.

POINT X

THE SENTENCING JUDGE ABUSED HER DISCRETION BY IMPOSING CONSECUTIVE SENTENCES IN VIOLATION OF STATE V. YARBOUGH.[4]

Some of these issues were not raised, or fully raised, below. With respect to those particular issues, our review is guided by the "plain error" standard and by the principles of Rule 2:10-2, which prescribes 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[.]" (Emphasis added). See also State v. Macon, 57 N.J. 325, 338 (1971) (characterizing our court's "plain error" review as a question of "whether in all the circumstances there was a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits[.]")

As for the issues on which defendant brought an alleged error to the trial court's attention, the error "will not be grounds for reversal [on appeal] if it was 'harmless error.' " State v. J.R., 227 N.J. 393, 417 (2017) (quoting State v. Macon, 57 N.J. 325, 337-38 (1971)). In order for an error to be reversible under the harmless error standard, "[t]he possibility [of the error leading to an unjust result] must be real, one sufficient to raise a reasonable doubt as to whether [the error] led the jury to a verdict it otherwise might not have reached." State v. Lazo, 209 N.J. 9, 26 (2012) (quoting State v. R.B., 183 N.J. 308, 330 (2005)).

II.

***4** We first consider the four issues defendant's counsel chose to emphasize during the appellate oral argument.

A.

(Loaded Gun Evidence and Limiting Instruction)

Defendant contends the trial court erred in admitting testimony it had originally disallowed about the loaded gun police found near him in the basement boiler room at the time of his arrest. He argues this evidence was highly prejudicial because the seized gun was not used in the shooting. He further argues the trial court's limiting instruction as to this evidence was inadequate. We reject these contentions, mainly

because defendant's trial attorney, despite having obtained a pretrial ruling to bar the gun evidence, "opened the door" to admit it.

This is the pertinent background. Before trial, the court filed a consent order severing counts eight through thirteen of the indictment, which had charged defendant with crimes arising out of his arrest, including his constructive possession of the gun. The State did reserve the right to elicit testimony regarding the gun if the defense opened the door to such testimony.

Defendant had been arrested at his residence by Detective Angel Perales of the County Prosecutor's Office. On direct examination, Perales did not mention the gun, adhering to the pretrial order. During his cross-examination of Perales, defense counsel asked whether police had obtained any arrest or search warrants before proceeding to defendant's home, and, since he was a suspect, whether they had intended to arrest him there.

Later, when defense counsel raised the subject of warrants again, the prosecutor objected, arguing that defense counsel had opened the door to testimony regarding the gun in the boiler room. The trial court at that point disagreed, but did caution defense counsel about pursuing this line of questioning. The court admonished that defense counsel was "treading dangerously close to areas that we shouldn't get into," and that it did not "want to open the door" because "it's to the detriment of your client."

Thereafter, defendant on direct examination described what he characterized as his violent arrest. He also testified that he had never owned or handled a gun. At that point, the prosecutor renewed his request for permission to bring up the gun on cross-examination. The prosecutor noted defendant had just told the jury that the police had first attacked him and then arrested him for reasons they allegedly refused to disclose. The prosecutor argued that this testimony presented by the defense, coupled with defendant's claim that he was totally unfamiliar with guns, had opened the door for the State to reveal the reason for defendant's arrest.

The trial court agreed that the defense had opened the door to admit the gun evidence. Although defendant knew he had been arrested because of the gun, he had made it seem to the jury as though he was just going about his day when he was suddenly and arbitrarily assaulted and arrested. The court noted that, up to this point, no testimony had emerged that there was a gun in the boiler room near defendant at the time of his arrest.

The court emphasized it had tried to maintain the integrity of the trial and ensure that the defendant's constitutional rights were protected. It noted that it had not permitted the State to present evidence that defendant was charged with making terroristic threats to law enforcement officers, because of the prejudice to him.

***5** The court then ruled as follows:

> Now we have a situation where the defendant has painted a picture that he was innocently standing in his boiler room when he was arrested and physically assaulted by the police officers for no reason.
>
> In fact, [since] the circumstances of the arrest have now been put out there by defendant[,] to tie the State's hands and not allow them to present their version of the events of the arrest, would be prejudicial to the State.
>
> And this Court has to ensure the integrity of the trial by being fair to both sides. And [defense counsel] has clearly opened the door to this issue by eliciting ... testimony from his client ... [w]hich ha[s] painted a false impression of the circumstances of the arrest to the ... jury.
>
> And to preclude the State from being able to present their version of the facts would be unfair. And it would be a prejudice to the State.
>
> So, I am going to allow the State to cross-examine defendant about the circumstances of his arrest including the fact that a gun was located in the boiler room where the defendant was present.
>
> [(Emphasis added).]

Although defense counsel disagreed with the court's ruling, the court reiterated that counsel had elicited the at-issue testimony and thereby created a "falsehood" which in fairness had to be addressed by the State.

Thereafter, on cross-examination, defendant testified that he was surprised by police while in the doorway to the boiler room. He denied that he was hiding in the corner of the room. He also denied that he kept his left hand down when he was confronted by Perales and insisted that there was no gun found near his left hand. Defendant did not change his account when the prosecutor showed him a photo of the alleged gun on the boiler room floor.

At this point, and without any objection from defense counsel, the trial court instructed the jury as follows:

> In this case, the State has introduced evidence that the defendant was arrested on 4/24/17 because the police observed a gun on the floor in the boiler room where the defendant was present.
>
> The Court is allowing this testimony for the limited purpose of explaining the State's position as to the circumstances of the arrest of the defendant on 4/24/17. There is no dispute that the weapon recovered is not the weapon involved in the alleged offenses.
>
> The defendant has given his account of the facts surrounding his arrest and the State is now giving their account. Whether this testimony does in fact explain the circumstances of the defendant's arrest is for you to decide.
>
> You may not, however, use this testimony as substantive evidence or proof of the underlying charges. I further instruct you that you may not use this evidence to decide [that] ... defendant has a tendency to commit crimes or that he is a bad person.
>
> That is, you may not decide that just because there allegedly may have been a gun in the boiler room where the defendant was present when he was arrested that the defendant must be guilty of the crimes. I have admitted the evidence only to help you consider the specific circumstances of the defendant's arrest.
>
> ***6** You may not utilize this evidence for any other purpose and may not find the defendant guilty of the underlying offenses simply because the court has allowed this testimony.
>
> [(Emphasis added).]

On redirect, defendant insisted that: (1) police were rough with him; (2) he was in the doorway to the boiler room, not actually in the room, when the police arrived; (3) there was no gun near his left hand; (4) he did not put a gun in the boiler room and was not aware that one was there; and (5) he did not have a permit for a gun and was unaware that there was a gun in the house.

Following defendant's testimony, the prosecutor recalled Perales to the stand. Perales testified that, as he got his hands on defendant in the boiler room and threw him down, he noticed a Smith & Wesson revolver on the floor. Perales stated that defendant could have easily grabbed this gun, which was later determined to be loaded, if he had dropped to his knees. Perales confirmed that the gun was not the murder weapon.

Based on the circumstances as they unfolded, we conclude the trial court did not err in allowing the gun evidence, nor in its application of "opening the door" evidentiary principles.

The "opening the door" doctrine is a "rule of expanded relevancy" through which otherwise irrelevant or inadmissible evidence may sometimes be admitted if the "opposing party has made unfair prejudicial use of related evidence." State v. James, 144 N.J. 538, 554 (1996) (citing United States v. Lum, 446 F.Supp 328 (D.Del.), aff'd, 605 F.2d 1198 (3rd Cir. 1979)). In criminal cases, the doctrine "operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context." Ibid. (citing Lum, 466 F.Supp. at 334-35). The doctrine is limited by N.J.R.E. 403, thus evidence to which a defendant has "opened the door" may still be excluded if a court finds that its probative value is substantially outweighed by the risk of undue prejudice. Ibid.

Defendant now contends the gun evidence should have been excluded as prior "bad act" evidence under N.J.R.E. 404(b) and as unduly prejudicial under N.J.R.E. 403. We disagree.

It was not necessary for the court to analyze the gun evidence under N.J.R.E. 404(b), as it had already been excluded from the case under the pretrial order when the parties agreed to sever counts eight through thirteen of the indictment from this case. After defense counsel disregarded this limitation and the trial court's warning, and opened the door to circumstances of the arrest, the court reasonably determined the gun evidence had newly enhanced probative value. As the court justifiably noted, once defense counsel opened the door, the State was entitled to present its own version of the arrest and counteract a potentially false impression made by the defense. That probative value was not substantially outweighed by its prejudicial effect.

Perales's testimony about the gun as a recalled witness for the State was appropriate, after defendant in his own testimony had steadfastly denied any awareness of the gun. While the fact that the gun was loaded may not have been essential to

Perales's description of the arrest, that fact did confirm the threat posed to police at the scene.

***7** Defendant argues the prosecution, in its pursuit of justice, and the trial court, as a neutral arbiter of his trial, should have prevented the jury from learning about the gun. But these arguments fail because it was defense counsel's own choice to inject into the case the circumstances of the arrest and to present a claim and theme of police mistreatment.

The pretrial order disallowing the gun evidence at the severed trial was designed for defendant's benefit. Defense counsel nevertheless elected at trial to forego that benefit and delve into the facts surrounding the arrest before the jury. We need not speculate here what reasons prompted defense counsel's strategy. Regardless of the nature or wisdom of that strategy, the defense opened the door to allow the State to present counterproofs, including the gun.

Relatedly, defendant contends for the first time on appeal that the trial court's limiting instruction about the gun was inadequate. We disagree. As a preliminary matter, a trial court's curative jury instructions are reviewable only for an abuse of discretion. State v. Herbert, 457 N.J. Super. 490, 503 (App. Div. 2019). Here, the instruction was clear, direct, and timely. See State v. Vallejo, 198 N.J. 122, 134-36 (2009) ("Generally, for an instruction to pass muster in such circumstances, it must be firm, clear, and accomplished without delay."). It appropriately informed the jury the gun had not been used in the shooting. It explained the limited uses for which the jury could consider the evidence. The instruction was repeated in the final jury charge, again without objection. We must presume the jury followed the court's instructions. See State v. Herbert, 457 N.J. Super. 490, 504 (App. Div. 2019) (subject to certain rare exceptions, "[t]he authority is abundant that courts presume juries follow instructions[.]")

B.

(Defendant's Statements to the Sheriff's Officer)

Defendant contends the trial court erred in admitting previously excluded threatening statements and admissions he allegedly made at the courthouse to a Passaic County Sheriff's Security Officer, Fidel Cooper. This, too, is an instance of defense counsel opening the door for the State to present competing proofs. The doctrine of completeness further justifies admitting the State's evidence. The relevant background is as follows.

As described by Officer Cooper, at 9:00 a.m. on May 22, 2018, he transported defendant by elevator within the courthouse to the holding area adjacent to the courtroom. He had never met defendant before. Upon arrival, defendant initially resisted Cooper's requests for him to step into the holding cell because he was accustomed to waiting in a conference room for court proceedings to begin. When defendant finally complied, Cooper advised fellow Security Officer Herman Vega that they had arrived, and Vega told him to take defendant to the conference room instead.

According to Cooper, while he and defendant were alone in the conference room, defendant said, "You're a fucking ... rookie. You see, I told you that I always get dressed in here". Although Cooper told him to be quiet, defendant continued to curse at and insult him and then nonchalantly said, "I'm here for murder" and "I did that shit, and I'm going to beat that shit". As recounted by Cooper, defendant also said that: (1) Cooper "wouldn't have been acting like this if [Cooper] was on the street"; and (2) "he would do [Cooper's] stupid ass too".

***8** Cooper immediately summoned Vega to report defendant's statements. When Vega came in, defendant was still cursing at Cooper, but then he stopped and screamed, "Oh, [Cooper's] going to kill me. [He's] going to kill me". Vega told defendant to calm down.

Cooper related that defendant subsequently filed a complaint against him alleging that Cooper had threatened him by saying, "Shut the fuck up, you little piece of shit," and "I hope your little stupid ass win your trial so I can kill you myself since you think you're getting away with murder". Cooper denied threatening defendant. As a result of defendant's complaint, Cooper was charged with third-degree terroristic threats, which exposed him to a possible five-year prison term and the loss of his job.

Vega testified that he heard defendant call Cooper a "fucking rookie," and confirmed that Cooper advised him of defendant's confession and threats. Vega stated that he heard defendant say in a monotone voice, "Help, he's going to kill me. He threatened to kill me". Vega did not hear Cooper threaten defendant.

Prior to trial, the State sought the admission of these two sets of statements allegedly made by defendant to Cooper on May

22, specifically: (1) "You ain't read my charges, rookie. I'm here for murder and I did that shit and I'm gonna beat that shit;" and (2) "You're only acting tough 'cause I'm shackled. You wouldn't be acting like that if we were on the streets 'cause I would do your stupid ass, too".

Following a hearing during which Cooper and Vega testified, the trial court ruled that: (1) the first set of statements was admissible as a defendant's statement against interest under N.J.R.E. 803(c)(25); and (2) the second set of statements was not admissible because its prejudicial weight sufficiently exceeded its probative value under N.J.R.E. 403. As to the latter, the court explained:

> If this Court was trying the case regarding the terroristic threats[,] then this Court might be more inclined to allow th[ose] particular two statements in, if you will. I understand that the State is indicating that it wants that statement in because it's relevant and it's probative, however, it talks about a future act versus a prior act or the act we're talking about here. It talks about a future murder and so for that reason this Court finds that the probative value is outweighed by the prejudicial value to the defendant, so I am not going to allow [it] in[.]

During trial, the court learned that defendant had filed a complaint against Cooper alleging that Cooper had threatened him, and that Cooper had been charged with third-degree terroristic threats.

On June 21, 2018, the court cautioned defense counsel that if he asked Cooper whether he threatened defendant and he denied it, counsel would not be able to ask any questions regarding the substance of the alleged threats. As the court initially analyzed the issue, the only way to get in the exact statements allegedly made by Cooper was through defendant. Defense counsel would not be allowed to read from the complaint and ask Cooper whether he had made a particular alleged threat.

A short while later, however, the trial court reconsidered its ruling, relying upon the doctrine of completeness and the permissible bounds of cross-examination to assess credibility. On reflection, the court ruled that defense counsel could cross-examine Cooper as to the specific threats he was accused of making, but if he "opened the door" in this way, then the previously excluded threat allegedly made by defendant to Cooper would come in as well. In the court's view, because the allegations all dealt with reciprocal terroristic threats, it was an all-or-nothing scenario, and it was up to the jury to determine Cooper's and defendant's respective credibility.

***9** On the next trial day, the court further explained its ruling concerning the statements, which it based upon a review of N.J.R.E. 607, N.J.R.E. 611 and N.J.R.E. 803(c)(25):

> Here, the case law makes clear that any party may attack or support the credibility of a witness by direct and cross-examination upon the issues involved. The State here is introducing the alleged conversation that took place between the defendant and Special Officer Cooper .... Thus, the State is bringing before this jury the contents of the alleged conversation. Thus, the issue sought to be explored on cross-examination is relevant.
>
> Furthermore, under the doctrine of completeness, the entire alleged conversation should come in. It is for the jury to determine the credibility of the officer and whether the statements were made. The State can surely explore with the witness the fact that the complaint was not filed by the defendant for more than two weeks after ... the conversation took place. The facts and circumstances surrounding the complaint, such as the timing, are factors the jury can consider in determining the credibility of the alleged threats. In fact, the jury instruction on defendant's statement clearly provide you should take into consideration the facts and circumstances as to how the statement was made, as well as all other evidence in this case relating to this issue.
>
> Based upon all of the foregoing evidence rules and the case law, this Court will permit the defendant to ask Special Officer Cooper if certain statements were made by him during the alleged exchange on May 22, 2018.
>
> However, should the defendant seek to ask these questions, the Court will allow the State to introduce the statement that the defendant allegedly made to Officer Cooper, [i.e.] that he's lucky he's in shackles, because if they were out on the street, he'd do his ass too.
>
> The State will not, however, be permitted to tell the jury that ... there is a charge pending against the defendant for terroristic threats.
>
> In addition, the defendant will not be permitted to provide the jury with a copy of the complaint [against Cooper], nor will he be permitted to hold a copy of the ... [complaint] in his hand in front of the jury while he's questioning him. He can simply ask if certain statements were made.

[(Emphasis added).]

Thereafter, Cooper testified that, after he denied being familiar with the charges against defendant, defendant then said, "I'm here for murder," and "I did that shit, and I'm going to beat that shit". When Vega came in, defendant stopped cursing at Cooper and screamed, "Oh, you're going to kill me. You're going to kill me". Cooper denied threatening defendant.

Cooper acknowledged that defendant had filed a complaint against him alleging that Cooper had threatened him. Cooper denied saying to defendant, "shut the fuck up, you little piece of shit," and "I hope your little stupid ass win your trial so I can kill you myself since you think you're getting away with murder".

Immediately after this testimony, the trial court administered the following instruction:

> Ladies and gentlemen, you've now heard some testimony that this officer was charged with a third-degree offense. This officer enjoys the presumption of innocence, and, therefore, I would instruct you to consider that in your deliberations as well.
>
> ***10** In addition, you have provided with, for your consideration, some oral statements that were allegedly made by the defendant. It is your function to determine whether or not the statements were actually made by the defendant, and if made, whether the statements or any portion of the statements are credible.
>
> In considering whether or not an oral statement was actually made by the defendant and, if made, whether it is credible, you should receive, weigh, and consider this evidence with caution, based upon the generally recognized risk of misunderstanding by the hearer or the ability of the hearer to recall accurately the words used by the defendant. The specific words used ... and the ability to remember them are important to the correct understanding of any oral communication because of the presence or absence or change of a single word may substantially change the true meaning of even the shortest sentence. You should, therefore, receive, weigh, and consider such evidence with caution.
>
> In considering whether or not the statement is made or the statements were made, you should take into consideration the circumstances and facts as to how the statements were made, as well as other evidence in this case relating to this issue.
>
> If, after consideration of all the facts, you determine that the statement was not actually made or the statements were not actually made[,] or the statements are not credible, then you must disregard the statements completely.
>
> If you find the statements were made and that part or all of the statements are credible, you may give what weight you think appropriate to the portion of the statements you find to be truthful and credible.

Thereafter, on redirect, Cooper testified that defendant also said to him that Cooper would not have been acting like this if they were "on the street" because "he would do my stupid ass too".

Our review of these issues is guided largely by the principles of "opening the door," which we have already described, supra, in Part II(A), see James, 144 N.J. at 554, and by the doctrine of completeness.

The doctrine of completeness dates back to the common law. Its principles have been codified, for example, in N.J.R.E. 106. " 'Under th[e] doctrine of completeness [under N.J.R.E. 106], a second writing may be required to be read if it is necessary to (1) explain the admitted portion; (2) place the admitted portion in context; (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.' " State v. Lozada, 257 N.J. Super. 260, 270 (App. Div. 1992) (quoting United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)).

"The object of the rule is to permit the trier of the facts to have laid before it all that was said at the same time upon the same subject matter." State v. Gomez, 246 N.J. Super. 209, 217 (App. Div. 1991) (citing State v. Wade, 99 N.J. Super. 550, 556-57 (App. Div. 1968)). The determination of whether fairness requires inclusion of such additional evidence rests in the sound discretion of the trial court. Lozada, 257 N.J. Super. at 272.

Although N.J.R.E. 106 speaks only to the doctrine of completeness with respect to writings and recorded statements, the parties agreed at oral argument that case law extends these principles to oral communications as well. See, e.g., James, 144 N.J. at 554 (stating the doctrine applies, among other things, to conversations); State v. DeRoxtro, 327 N.J. Super. 212, 223 (App. Div. 2000) (applying it to unrecorded phone calls).

***11** The trial court reasonably applied these principles here. The testimony shows that defendant and Cooper engaged in heated discussion at the courthouse. Both of them allegedly made threatening statements, which defendant voiced while also admitting to having committed a murder. Once defense counsel opened the door to that exchange, the trial court reasonably allowed evidence of both participants' alleged words to be considered by the jury, for context. In addition, the court's limiting instruction was thorough and clear.

C.

(The Detective's Lay Opinion of What Was Shown on the Composite Video)

Defendant contends he was denied a fair trial because of improper lay opinion testimony from Paterson Police Detective Abdelmonin Hamdeh about the contents of the compilation of DVD footage from surveillance cameras. Because this issue was not raised below, we consider it under the plain error standard. We are satisfied that no error, let alone plain error, occurred.

During Hamdeh's direct testimony, the prosecutor played the compilation DVD and Hamdeh offered commentary regarding its contents. Hamdeh, in fact, had reviewed the original surveillance videos as part of his investigation and had authenticated the composite video for the court.

To help the jury understand what they were looking at, Hamdeh identified which camera the footage came from, named the streets that were visible in the footage, pointed out various landmarks such as the bar where the party took place and the throngs of people standing outside, and cross-referenced a map of the area which had already been shown to the jury. He also flagged each time the three victims, who were readily identifiable because of their clothes, appeared together on camera.

While commenting on the first segment, Hamdeh directed the jury's attention to two individuals ("suspect one" and "suspect two"), who appeared together throughout the compilation. He stated that these individuals (whom he did not name) could be spotted despite the poor quality of the footage because suspect one was wearing pants with a Nike swoosh symbol on one side, while suspect two was wearing shoes with white bottoms. He subsequently pointed out these "suspects" three more times. Hamdeh also noted when suspect one dropped something in the street in front of Harry and Phil's Auto Wrecking. He did not identify the dropped item and did not comment on the shooting that followed.

On cross-examination, defense counsel questioned Hamdeh as follows:

> [DEFENSE COUNSEL]: Okay. So, in – the videos that you looked at you were not able to identify any particular individual; were you? I believe you didn't testify that you w[ere] able to identify any individual; correct?
>
> [HAMDEH]: From the videos?
>
> [DEFENSE COUNSEL]: Yes.... [D]id you testify that you were able to identify any of the individuals in the videos?

Before Hamdeh could answer, the prosecutor objected and thereafter argued at sidebar that defense counsel had just opened the door for Hamdeh to identify suspect one as defendant, an identification Hamdeh had not been permitted to make during his direct testimony even though he did recognize defendant in the video. The trial court refused to permit this, but it did chastise defense counsel for asking questions that were overbroad. The court directed defense counsel to rephrase his question. Defense counsel then asked Hamdeh "in your previous testimony you were able to identify the three – individual victims, correct?" and Hamdeh acknowledged that he had.

The governing principles of lay opinion in this context are well established. Testimony from a lay witness in the form of opinions or inferences may be admitted if it is "rationally based on the witness' perception," and "will assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. The purpose of N.J.R.E. 701 is to "ensure that lay opinion is based on an adequate foundation." State v. Bealor, 187 N.J. 574, 586 (2006) (citing Neno v. Clinton, 167 N.J. 573, 585 (2001)). Perception "rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." State v. McLean, 205 N.J. 438, 457 (2011).

***12** A non-expert may give his opinion on matters of common knowledge and observation, Bealor, 187 N.J. at 586, but may not offer an opinion on a matter "not within [the witness's] direct ken ... and as to which the jury is as competent as [the witness] to form a conclusion." McLean, 205 N.J. at 459. Lay opinion "is not a vehicle for offering

the view of the witness about a series of facts the jury can evaluate for itself[.]" Id. at 462. However, testimony that just involves the relaying of observed facts does not implicate this Rule. Id. at 460. Testimony of that type "includes no opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." Ibid.

Defendant now contends for the first time that Hamdeh's testimony regarding the contents of the compilation DVD constituted improper lay opinion testimony. Specifically, he claims that Hamdeh was improperly permitted to opine that "an individual depicted on one video was the same individual depicted murdering the victim on another video". He argues that Hamdeh "based his opinion solely on what he saw in the surveillance video and not on any information he independently possessed".

In its very recent opinion in State v. Singh, 245 N.J. 1, 17-20 (2021), our Supreme Court held that although a testifying police officer had improperly referred to an individual depicted in a surveillance video as "the defendant" in his narration of that video, the error was harmless since the reference was fleeting and the officer primarily identified that individual as "the suspect." The Court directed that, in the future, "in similar narrative situations, a reference to 'defendant,' which can be interpreted to imply a defendant's guilt ... should be avoided in favor of neutral purely descriptive terminology such as 'the suspect' or 'a person.' " Id. at 18.

Here, Hamdeh never identified the individuals depicted on the surveillance video compilation as "defendants." He did not comment on the actual shooting. His testimony did not go beyond the evidence gathered in the case, and it was helpful to the jury given the poor visual quality of portions of the video. Hamdeh did not, in contravention of Lazo, 209 N.J. at 24, bolster or vouch for Kellam's testimony about the shooting or the identity of the shooters. Moreover, the jury was free to disregard Hamdeh's testimony if it so chose. We discern no plain error that compels a new trial.

D.

(The Prosecutor's Comments in Summation)

Defendant contends for the first time on appeal that he was denied a fair trial as a result of improper comments made by the prosecutor during his closing argument. Having reviewed the comments in context, we conclude that defendant, who did not object to them, is not entitled to a new trial on this basis.

A conviction may be reversed based on prosecutorial misconduct only where the misconduct is so egregious in the context of the trial as a whole as to deprive the defendant of a fair trial. State v. Wakefield, 190 N.J. 397, 435-38 (2007). When the alleged misconduct involves a particular remark, a court should consider whether: (1) defense counsel objected in a timely and proper fashion to the remark; (2) the remark was withdrawn promptly; and (3) the court gave the jury a curative instruction. State v. Smith, 212 N.J. 365, 403-04 (2012); State v. Zola, 112 N.J. 384, 426 (1988).

When defense counsel fails to object at trial, a reviewing court may infer that counsel did not consider the remarks to be inappropriate. State v. Vasquez, 265 N.J. Super. 528, 560 (App. Div. 1993) (citing State v. Johnson, 31 N.J. 489, 511 (1960)). In situations such as the present one, where prosecutorial misconduct is being raised for the first time on appeal, a reviewing court need only be concerned with whether "the remarks, if improper, substantially prejudiced the defendant['s] fundamental right to have the jury fairly evaluate the merits of [his or her] defense, and thus had a clear capacity to bring about an unjust result." Johnson, 31 N.J. at 510.

***13** A prosecutor is expected to make a " 'vigorous and forceful' " closing argument to the jury. Lazo, 209 N.J. at 29 (quoting State v. Smith, 167 N.J. 158, 177 (2001)). A prosecutor may make remarks that constitute legitimate inferences from the facts, provided he or she does not go beyond the facts before the jury. State v. R.B., 183 N.J. 308, 330 (2005). A prosecutor may also respond to arguments raised by defense counsel during his or her own summation. State v. Munoz, 340 N.J. Super. 204, 216 (App. Div. 2001). A prosecutor may not, however, make arguments contrary to the material known facts in the case, regardless of whether that information has been presented to the jury. State v. Sexton, 311 N.J. Super. 70, 80-81 (App. Div. 1999).

Defendant now argues for the first time that he was prejudiced when the prosecutor made unsupported and inaccurate factual assertions during his summation. Specifically, defendant complains that the prosecutor: (1) repeatedly stated that defendant was depicted in the video compilation, when no

one had actually identified defendant in that video; and (2) misquoted Kellam's testimony regarding the conversation between Randolph and defendant at the party by stating Randolph told defendant that he was not in GND, "but those are my people," rather than "but [I'm] cool with them".

The prosecutor was entitled to infer that defendant was depicted in the video based upon Kellam and Daniels' description of the murder and the suspects' attire without having seen the video, Kellam's repeated identification of defendant as the murderer, and defendant's statements to Cooper. Although defendant disputes Kellam's identification because he temporarily recanted it, this identification, which was reaffirmed by Kellam to the police and during his trial testimony, was part of the record.

Moreover, although the prosecutor did misquote what Randolph said to defendant at the party, the gist was the same and defendant has not set forth any specific prejudice resulting from that misquote. As such, the prosecutor's remarks were a fair comment on the evidence, and the one time he misspoke was a fleeting error that did not prejudice defendant.

Next defendant contends for the first time that the prosecutor improperly appealed to the jury's emotions when he stated:

> "I did that shit, and I'm going to get away with that shit and if I saw you out on the street I'd do your stupid ass, too." Bold, brazen, heartless. What kind of person would say that, would brag about taking the life of another? What kind of person would threaten an officer during the jury selection portion of his murder trial? Probably the kind of person that's capable of looking [Randolph] in the eyes as he lays helplessly on the ground and firing multiple shots to his face and head.
>
> [Daniels] and [Kellam] were lucky to survive, however, [Randolph] is dead. He is gone and he was 19 years old. He left behind a little girl. He will never see his daughter grow up, never hear her say her first words, watch her take her first steps. She will never know the sound of his voice. All she will have is a box of pictures of a 19 years old father that she will never know and all for what? So sad.

While defendant is correct that a prosecutor may not seek a verdict based upon an appeal to the emotions of the jury, that is not automatic grounds for reversal, particularly where, as here, no objection was made. State v. Williams, 113 N.J. 393, 448-56 (1988).

Here, the first set of remarks addressed defendant's statement to Cooper and the circumstances of Randolph's death, as testified to by Kellam and depicted in the compilation video. As such, they contained fair comment based on the evidence and were not simply a bare appeal to emotion. That said, we do disapprove of counsel's two rhetorical questions about "what kind of person would commit such acts?" as being a propensity-based argument contrary to N.J.R.E. 404(b). However, we are unpersuaded the rhetorical queries, which drew no objection, rendered the jurors incapable of deciding the case based on the evidence.

***14** Although the second set of remarks did reference Randolph's personal life and the sad consequences of his murder were improvident, they were fleeting enough so as not to have deprived defendant of a fair trial in light of the substantial evidence against him. As such, we reject this portion of defendant's argument as well.

Lastly, defendant contends for the first time that the prosecutor improperly used the fact that defendant was found with a gun at the time of his arrest to establish that defendant committed the crimes for which he was presently on trial. The passages cited by defendant read as follows:

> [T]his case has a lot of pieces ... that all work together to come to the ultimate outcome that it's come to and I want to talk about that a little bit, or just a couple of the key things down right here.
>
> Well, there's a video of him there. [Kellam] says he saw him do it. When the cops got to his house he was hiding in a boiler room with a gun and when he was back there he said, I did that shit and I'm going to get away with that shit.
>
> Where was the defendant when the cops came? Why didn't he answer the door? Was he on the couch surprised [by] ... the officers' arrival? Was he watching TV with his brother? ... No, he was in the closet hiding with a gun. He was there to fix the boiler. I bet.
>
> Why was he hiding in that closet? Because he didn't want the officers to find him. Why did he not want the officers to find him? Because he did that shit and he's trying to get away with that shit.
>
> While he was being arrested, and you heard Detective Perales testify that he got in there, saw [defendant] hiding in the corner, told him to put his hands up. He put one hand up, the other one he was a little hesitant and like Perales

said, action is faster than reaction. He has to go home at night. He grabbed him, he threw him to the floor because he saw that gun.

Although defendant now insists that the prosecutor's comments exceeded the limited basis on which the trial court admitted the gun evidence, we disagree. The first four paragraphs quoted above do not mention the gun, and the last paragraph is proper comment on the circumstances of defendant's arrest. As to the other two paragraphs, which also addressed the circumstances of defendant's arrest, the thrust of the prosecutor's comments was that defendant was hiding because he was conscious of his guilt. Although the mention of the gun in this context was arguably gratuitous, it appears the prosecutor was not suggesting that defendant was found with the gun involved in this case. As such, and because the jury was repeatedly instructed that the gun in the boiler room was not the murder weapon, and that mention of the gun was only made to clarify the circumstances of defendant's arrest, we reject this aspect of defendant's argument.

In light of the foregoing, and given that the jury was generally instructed that counsel's remarks in closing were not evidence, we reject defendant's contention that he was denied a fair trial as a result of prosecutorial misconduct during summation.

III.

We turn briefly to the additional points made in defendant's brief.

A.

(Gang Affiliation Testimony and Limiting Instruction)

We reject defendant's argument that the trial court unfairly admitted evidence that he and other participants in the events leading up to and at the shooting were members of rival street gangs. Although evidence of gang membership often should be excluded from criminal trials under N.J.R.E. 403 because of its potential inflammatory impact, see State v. Goodman, 415 N.J. Super. 210, 228-31 (App. Div. 2010), that general preference for exclusion is overcome by the inherent nature of this case: a killing allegedly motivated by a previous gang killing. The jurors were reasonably informed of the gang affiliation evidence to understand the case. The court also provided a sensible and fair limiting instruction to the jurors to guide their consideration of such evidence.

B.

(Authentication of the Surveillance Video)

***15** We are satisfied Detective Hamdeh supplied an adequate foundation to admit the composite surveillance video. The rational foundation required for authentication under N.J.R.E. 901 was established, see State v. Hannah, 448 N.J. Super. 78, 88 (App. Div. 2016), even though Hamdeh did not personally create the composite DVD. The composite was a fair practical alternative to forcing the jurors to watch hours of original footage from multiple surveillance cameras. See N.J.R.E. 1006 (allowing summaries of voluminous evidence). The likely reasons for variations in certain time stamps was reasonably explained.

C.

(Jury Access to the Video During Deliberations)

Defendant was not deprived of a fair trial by the jury's access to the compilation video in the jury room. Because the video had no audio track, it contained no testimony or statements, and therefore the holding of State v. A.R., 213 N.J. 542, 558-61 (2013), disapproving of unfettered access to "audio or video-recorded statements in the jury room during deliberations" is not on point. (Emphasis added). Moreover, the court reasonably granted the jury's request to play back eight portions of the video in the courtroom, and duly instructed the jurors not to give such evidence undue weight.

D.

(Cumulative Trial Error)

We reject defendant's claim he is entitled to a new trial based on alleged cumulative error under State v. Orecchio, 16 N.J. 125, 129 (1954). The alleged errors at this hard-fought trial were either not errors at all, or they were insignificant enough so as to not require a new trial. And, as we have

already pointed out, a number of the claimed matters of undue prejudice emanated from defense counsel's own actions that opened the door to additional proofs by the State.

E.

(Sentencing)

Lastly, we reject defendant's argument that his aggregate sentence was excessive, and that the trial court unfairly imposed sentences that were made consecutive to the murder conviction. Defendant has not demonstrated the court abused its discretion in identifying and weighing the aggravating factors for this brutal homicide documented by evidence that he stood over a helpless victim and shot him again. See State v. Case, 220 N.J. 49, 65 (2014). The consecutives sentences for the offenses against the three victims (decedent Randolph and the two survivors, Kellam and Daniels) are justified under State v. Yarbough, 100 N.J. 627, 643-44 (1985). We discern no reason to remand for the trial court to further consider the overall fairness of the sentence.

IV.

To the extent we have not addressed them, all other points raised on appeal lack sufficient merit to warrant comment. R. 2:11-3(e)(2).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2022 WL 244119

Footnotes

1 We choose to use pseudonyms for the gang names.

2 Specifically, the severed charges included counts: second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count eight); second-degree unlawful possession of a weapon with a permit, N.J.S.A. 2C:39-5(b)(1) (count nine); third-degree possession of a controlled dangerous substance (CDS) (heroin), N.J.S.A. 2C:35-10(a)(1) (count ten); third-degree possession of a CDS (heroin) with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count eleven); second-degree possession of a weapon while committing certain CDS offenses, N.J.S.A. 2C:39-4(a)(1) (count twelve); and fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(5)(a) (count thirteen).

3 127 N.J. 328 (1992).

4 100 N.J. 627 (1985)

End of Document

2022 WL 274271
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Terri BAILEY, a/k/a Terri Franklin, Terry Bailey, and David D. Jones, Defendant-Appellant.

DOCKET NO. A-1513-19
|
Argued November 29, 2021
|
Decided January 31, 2022

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 18-08-1277.

Attorneys and Law Firms

Al Glimis, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Al Glimis, on the brief).

Steven K. Cuttonaro, Deputy Attorney General, argued the cause for respondent (Andrew J. Bruck, Acting Attorney General, attorney; Steven K. Cuttonaro, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

Before Judges Messano and Enright.

Opinion

PER CURIAM

***1** An Atlantic County grand jury returned an indictment charging defendant Terri Bailey with second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1) (count one); fourth-degree obstructing the administration of law, N.J.S.A. 2C:29-1(a) (count two); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count three); second-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b) (count four); and first-degree unlawful possession of a handgun by an individual with a prior conviction for a crime enumerated in N.J.S.A. 2C:43-7.2(d),[1] N.J.S.A. 2C:39-5(j) (subsection (j)) (count five). At trial, before the jury was selected, the State dismissed counts one through four without objection.

The jury convicted defendant of the remaining count, and the State moved to sentence him as a persistent offender pursuant to N.J.S.A. 2C:44-3(a). The judge granted the State's motion and sentenced defendant to an extended, twenty-five-year term of imprisonment, with a twelve-and-one-half year period of parole ineligibility.[2]

Defendant raises the following points for our consideration:

POINT I

THE REPEATED REFERENCE TO THE UNSANITIZED DETAILS OF MR. BAILEY'S PREDICATE CONVICTION DEPRIVED HIM OF A FAIR TRIAL. (Partially raised below)

POINT II

MR. BAILEY'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE[3]

In a supplemental pro se brief, defendant makes the following arguments:

POINT ONE

THE DEFENDANT DOES NOT HAVE A PREDICATE NERA CONVICTION AS REQUIRED BY N.J.S.A. 2C:39-5(j), THUS HIS CONVICTION AND SENTENCE VIOLATES THE UNITED STATES CONSTITUTION V, VI, VIII, AND XIV AMENDMENTS, AND THE NEW JERSEY STATE CONSTITUTION ART. 1, PAR. 10[.] (Not raised below)

POINT TWO

BECAUSE THE DEFENDANT WAS NOT TRIED OR CONVICTED FOR A VIOLATION OF SUBSECTION (a), (b), (c), or (f) OF N.J.S.A. 2C:39-5(j), WHICH IS A REQUISITE COMPONENT OF THE STATUTE[,] HIS CONVICTION AND SENTENCE SHOULD BE VACATED[.] (Not raised below)

POINT THREE

THE DEFENDANT WAS DENIED HIS DUE PROCESS RIGHTS TO A FAIR TRIAL BECAUSE SERGEANT MOYNIHAN TESTIFIED THAT A STILL PHOTOGRAPH OF THE PERPETRATOR OBTAINED FROM THE VIDEO SURVEILLANCE FOOTAGE WAS THE DEFENDANT WHEN THE IDENTITY OF THE PERSON WAS A QUESTION SOLELY FOR THE JURY THEREFORE THE CONVICTION SHOULD BE REVERSED[.] (Partially raised below)

POINT FOUR

THE DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN SHE ENTERED INTO A STIPULATION THAT CONCEDED THE DEFENDANT'S GUILT TO THE REQUISITE ELEMENTS OF THE CHARGED OFFENSE, AND SHE FAILED TO SUBJECT THE STATE'S CASE TO AN ADVERSARIAL TESTING THEREFORE THE CONVICTION SHOULD BE REVERSED[.] (Not raised below)

***2** We have considered these arguments in light of the record and applicable legal standards. We affirm defendant's conviction and sentence. However, we remand the matter to the trial court to immediately conduct a hearing on defendant's claim of ineffective assistance of trial counsel.

I.

Before opening statements, the prosecutor and defense counsel advised the judge of two stipulations for her to read to the jury. The parties stipulated defendant "did not have a permit to possess a weapon" on the day in question. The second stipulation was that defendant "ha[d] a prior conviction of [an] enumerated crime in N.J.S.A. 2C:43-7.2, that being kidnapping in the first degree with a date of conviction of November 9th, 1989." The judge asked: "So, you're not going to be introducing any judgment of conviction ...?" The prosecutor said she still intended to introduce a redacted version. Defense counsel seemed surprised, stating, "I thought that was the whole point of the stipulation."

Defense counsel told the judge the "certified copy of the judgment of conviction does not delineate the degree of the offense so the stipulation should not either." When the prosecutor pointed out the "degree" was referenced on the second page of the certified copy, defense counsel said she no longer had any objection. Counsel then noted the certified copy contained the "penalties" associated with defendant's sentence, and the prosecutor agreed to redact those from the document. After further colloquy, defense counsel reiterated that she only objected to inclusion of the "fines and penalties page" of the certified judgment of conviction.[4]

In her preliminary instructions, the judge told the jury that the parties stipulated defendant was "previously ... convicted of ... kidnapping in the first degree with a date of conviction of November 9th, 1989." She also told the jury that it would have "a judgment of conviction which actually will depict the information I just gave you ... in the jury room for your deliberations." In her opening statement, the prosecutor reiterated defendant's prior conviction was for kidnapping; in her opening statement, defense counsel acknowledged that fact, but told jurors the only relevant issue in the case was identification.

The trial testimony was brief. On March 29, 2018, around 4:52 p.m., Police Officer Thomas Moynihan of the Atlantic City Police Department was dispatched to an address in response to a ShotSpotter alert. While canvassing the area, Moynihan received information that a black male with dreadlocks and a silver car were involved. Moynihan saw three men, one of whom matched the description, near a silver car. At trial, he identified defendant as one of these men. Moynihan said on that day, defendant was wearing a gray "hoodie" and black and white baseball cap.

Moynihan observed the men "for a few moments" before approaching. He saw defendant "reach around his waistband, around his hoodie pockets," and Moynihan instructed him to remove his hands from his pockets and stop moving. Defendant refused to comply and "took off running." Moynihan followed. During the chase, Moynihan heard "something hit the ground," and another officer who joined the pursuit, Thomas Gilardi, testified that he saw an automatic handgun fall from the fleeing man's waistband. Gilardi's bodycam video footage documented his recovery of the weapon, and the video was played for the jury. The officers lost the suspect who ran through the entrance gate of and into a housing site; they were unable to locate him.

***3** Moynihan reviewed video surveillance footage in the housing site's security booth near the gate, as well as video from a surveillance camera at a nearby school. Moynihan took still photos of the security booth's video, which he identified for the jury as showing defendant. The officer also identified

for the jury the school's video footage. It showed Moynihan approaching three men on the sidewalk, the officer patting down one of the men, and one of the other men fleeing down the sidewalk with Moynihan in pursuit.

About ninety minutes later, after speaking with other officers, Moynihan was able to "put the face" of the person he chased to "the name." Several days later, on April 5, 2018, Detective Ermindo Marsini was on surveillance at a location where he believed defendant might be and arrested him.

Michael Holts testified for the defense. Holts was working as a security guard at the housing site on the day in question. He testified defendant was present at the site before police arrived. Holts said defendant was wearing black and gold clothing emblematic of Holts' favorite football team, the Pittsburgh Steelers, not a gray hoodie like the man depicted in the video and described by Officer Moynihan. Another defense witness, Donette Faulkner lived next door to defendant's mother at the housing site, where Faulkner also worked in the security booth. Faulkner testified that when police arrived to look at the video surveillance footage and were in the security booth with her, defendant was present at the site and walked out of the entrance gate.

In summation, defense counsel argued that defendant was not the person shown in the surveillance videos and not the person Moynihan chased. She only briefly mentioned the predicate offense of kidnapping, noting defendant was a juvenile when convicted of that crime. The prosecutor's summation referenced defendant's kidnapping conviction more frequently, but without particular emphasis. The judge's final instructions tracked the model charge. See Model Jury Charges (Criminal), "Unlawful Possession of a Handgun Prior NERA Conviction (First Degree) (N.J.S.A. 2C:39-5(j))" (approved June 11, 2018) (the Model Charge). During the charge, the judge told the jury several times that defendant's predicate NERA conviction was kidnapping.

II.

Before turning to the arguments raised in Point I of counsel's brief, and Point Four of defendant's pro se brief, we briefly address the remaining points on appeal, none of which merit reversal. Defendant claims he was not previously convicted of a requisite predicate crime under subsection (j) because he was convicted of kidnapping in 1989, before NERA was enacted. In pertinent part, subsection (j) makes it a first-degree crime for anyone previously convicted of a crime listed in subsection (d) of NERA to unlawfully possess a handgun. Subsection (j) does not refer to NERA at all; it only requires that a defendant be previously convicted of a crime listed in N.J.S.A. 2C:43-7.2(d). Defendant was convicted of kidnapping, N.J.S.A. 2C:13-1, a crime enumerated in subsection (d) of NERA. Those facts are undisputed. The argument requires no further discussion. R. 2:11-3(e)(2).

Defendant contends the jury never convicted him of unlawful possession of a handgun pursuant to N.J.S.A. 2C:39-5(b), one offense for which a conviction is necessary to prove a violation of subsection (j). Even though the State dismissed count one of the indictment, it introduced proof of all the elements of unlawful possession, and the judge's charge instructed the jury that it must find beyond a reasonable doubt: (1) there was a handgun, (2) defendant knowingly possessed the handgun, (3) defendant did not have a permit to possess the handgun, and (4) defendant had a prior conviction of an enumerated offense under N.J.S.A. 2C:43-7.2(d), in this case, kidnapping. The argument requires no further discussion. R. 2:11-3(e)(2).

***4** Defendant argues that Moynihan's testimony identifying him as the man in the video stills and surveillance footage was impermissible lay opinion. Because there was no objection, we review the argument for plain error. R. 2:10-2.

"Lay opinion is admissible 'if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function.' " State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting State v. Singh, 245 N.J. 1, 14 (2021)). In Sanchez, the Court held the defendant's parole officer "became familiar with defendant's appearance by meeting with him on more than thirty occasions during his period of parole supervision. Her identification of defendant as the front-seat passenger in the surveillance photograph was 'rationally based on [her] perception,' as N.J.R.E. 701 requires." Id. at 469 (alteration in original). The Court also concluded the parole officer's opinion would assist the jury, because her "contacts with defendant were more than sufficient to enable her to identify him in the surveillance photograph more accurately than a jury could." Id. at 474.

The same is true in this case. Moynihan can be seen in the school surveillance video approaching a group of three men, one of whom he testified was defendant. After being in close proximity with defendant, albeit briefly, Moynihan identified

the man seen running away as defendant. Moynihan chased that man, who entered a housing site through a security gate; Moynihan viewed video footage shortly thereafter, taking still photographs of that footage to preserve its images. He testified the man seen in those photographs was defendant, who Moynihan identified in court. There was no error in admitting this testimony.

Lastly, we find no reason to reverse defendant's sentence. An appellate court reviews a sentence "in accordance with a deferential standard." State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)). We defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). An appellate court must 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." State v. Grate, 220 N.J. 317, 337 (2015) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)).

The judge found aggravating factors three, six and nine. See N.J.S.A. 2C:44-1(a)(3) (the risk of re-offense); (a)(6) (defendant's prior criminal history); and (a)(9) (the need to deter defendant and others). These were amply supported by evidence in the record, including defendant's prior criminal convictions and history of juvenile delinquency. The judge found no mitigating factors. She concluded the aggravating factors "clearly and substantially outweigh[ed] the non-existing mitigating factors," and, citing State v. Pierce, 188 N.J. 155 (2006), she determined a discretionary extended term was appropriate.

Defendant contends the judge erred in failing to find mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11), that his imprisonment would result in an excessive hardship to his family. However, the judge did consider that factor and concluded while "any type of incarceration by any defendant is a hardship," there was nothing presented demonstrating a particular hardship in this case. We agree.

***5** While this sentence was harsh, defendant was convicted of a first-degree crime, was indisputably eligible for an extended term as a persistent offender, and the sentence imposed does not shock our judicial conscience. State v. Tillery, 238 N.J. 293, 323 (2019).

III.

In Point I, defendant contends it was error to permit the jury to know the "unsanitized details" of his prior conviction. In his pro se brief, defendant contends trial counsel provided ineffective assistance because she stipulated to a prior conviction in the first place and did not put the State to its proofs. The State argues defendant is barred from raising this argument since counsel agreed to the stipulation and admission of the redacted judgment of conviction. Alternatively, the State contends any error was harmless.

We are unaware of any reported case addressing subsection (j), which was enacted in 2013. The statute's structure is similar to the "certain persons" statute, N.J.S.A. 2C:39-7(b)(1), which makes it a second-degree crime for any person previously convicted of certain crimes, including kidnapping, to "purchase[ ], own[ ], possess[ ] or control[ ]" a firearm.[5] The model jury charges for both crimes are virtually identical. We therefore look to case law developed under N.J.S.A. 2C:39-7(b)(1) in addressing defendant's arguments.

Frequently, as in this case, a defendant indicted for violating the certain persons statute is also charged in the same indictment for the possessory weapons offense. In those circumstances, the trial must be bifurcated, with the jury first considering guilt as to the possessory offense without being told of the prior predicate conviction. See State v. Ragland, 105 N.J. 189, 194 (1986) ("Severance is customary and presumably automatic where it is requested because of the clear tendency of the proof of the felony conviction to prejudice trial of the separate charge of unlawful possession of a weapon." (emphasis added)). However, in State v. Brown, the Court held that when the State dismisses the possessory offense and tries the defendant solely on the certain persons count, bifurcation is unnecessary. 180 N.J. 572, 582 (2004). Critically, to ameliorate "any potential for prejudice," the Court required "sanitization of the predicate offense." Id. at 584. The Court held: "if defendant stipulates to the offense, the jury need be instructed only that defendant was convicted of a predicate offense. If the defendant does not stipulate, then the trial court should sanitize the offense or offenses and limit the evidence to the date of the judgment." Id. at 585.

After Brown, the certain persons model charge was amended:

> In explaining what crimes are set forth as predicate offenses in N.J.S.A. 2C:39-7(b), the model jury charge

further explains how to sanitize the record of a defendant's predicate offense. Specifically, the charge notes:

> Unless the defendant stipulates, the prior crimes should be sanitized. Thus, the trial court should refer to them as crime(s) of the appropriate degree. For example, if the offense were aggravated sexual assault, the court would indicate that defendant previously was convicted of a crime of the first degree. Nothing prevents a defendant, however, from choosing to inform the jury of the name of the prior crime of which he/she was convicted.

***6** [State v. Bailey, 231 N.J. 474, 487 (2018) (quoting Model Jury Charges (Criminal), "Certain Persons Not to Have Any Firearms (N.J.S.A. 2C:39-7(b)(1)" at 1 n.4 (rev. June 13, 2005)).]

In Bailey, the defendant refused to stipulate to the predicate offense, and hewing closely to the guidance in Brown and the model charge, the judge redacted the predicate judgments of conviction "so as to include only the date and degree of each offense." 231 N.J. at 478–79 (2018). On appeal, we found the continued use of the model charge "disquieting," because the State introduced "no proof of any predicate crime"; nonetheless, we affirmed the defendant's conviction finding any error was invited. Id. at 480.

The Court reversed, holding "[t]he over-sanitization called for in the model charge inject[ed] a constitutional defect into any trial on a certain persons offense where a defendant declines to stipulate," because it relieved the State of "prov[ing] that the defendant was convicted of an enumerated predicate offense and later possessed a firearm." Id. at 488. The Court explained:

> If a defendant chooses to stipulate, evidence of the predicate offense is extremely limited: "[t]he most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that ... bar a convict from possessing a gun[.]" A defendant who stipulates can therefore prevent the State from presenting evidence of the name and nature of the offense. Provided that the stipulation is a knowing and voluntary waiver of rights, placed on the record in defendant's presence, the prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element.
>
> [Ibid. (alterations in original) (emphasis added) (quoting Old Chief v. United States, 519 U.S. 172, 190–91 (1997)).]

However, "[w]hen a defendant refuses to stipulate to a predicate offense under the certain persons statute, the State shall produce evidence of the predicate offense: the judgment of conviction with the unredacted nature of the offense, the degree of offense, and the date of conviction." Id. at 490–91. The Court also concluded the invited error doctrine did not apply "because the error cut mortally into defendant's due process right to have the jury decide each element beyond a reasonable doubt." Id. at 490. The Court referred the matter to its Committee on Model Criminal Jury Charges for revision. Id. at 491.

The Committee's action was swift. The current certain persons model jury charge provides: "If defendant is stipulating to the predicate offense, do not read the crime listed in the Certain Persons count." Model Jury Charges (Criminal), "Certain Persons Not To Have Any Firearms (N.J.S.A. 2C:39-7(b)(1))" at 1 n.3 (revised Feb. 12, 2018) (emphasis added). Citing Brown and Bailey, the charge now instructs judges

> if defendant stipulates to the offense, the jury must be instructed only that defendant was convicted of a predicate offense[ ]. Defendant's stipulation must be a knowing and voluntary waiver of rights, placed on the record in defendant's presence; the prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element.

***7** [Ibid. n.6 (emphasis added).]

The model charge for subsection (j), however, only provides the following footnote: "If defendant is stipulating to the predicate offense, do not read the crime listed in the Certain Persons count." Id. at 1 n.1.

We have long recognized that in a prosecution under N.J.S.A. 2C:39-7(b), the court must permit a defendant to stipulate to the predicate conviction. State v. Alvarez, 318 N.J. Super. 137, 152–54 (App. Div. 1999); see also Old Chief, 519 U.S. at 191 (holding "it was an abuse of discretion to admit the record when an admission was available"). As future Justice Virginia A. Long wrote for our court, "[t]he specifics of defendant's prior crimes have no evidentiary significance beyond a stipulation that defendant falls within the class of offenders our Legislature thought should be barred from possessing weapons." Alvarez, 318 N.J. Super. at 153. See Bailey, 231 N.J. at 488 ("[T]he prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element."). We see no

principled reason why these same tenets should not apply to prosecutions under subsection (j).

In this case, however, defense counsel both stipulated that defendant had previously been convicted of a predicate crime enumerated in N.J.S.A. 2C:43-7.2(d) and agreed the jury would be told of the specific crime, kidnapping in the first degree. Additionally, despite entering a stipulation, counsel only voiced limited objection to introduction of the actual judgment of conviction in evidence, redacted only to delete the "penalties" imposed; during deliberations therefore, the jury had a document stating defendant had been convicted of first-degree kidnapping in 1989.

Undoubtedly, the judge's failure to "sanitize" defendant's kidnapping conviction does not provide a basis to reverse because any error in that regard was invited. See State v. A.R., 213 N.J. 542, 561 (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.' " (quoting State v. Corsaro, 107 N.J. 339, 345 (1987))). And, unlike Bailey, defense counsel's decision in this case did not relieve the prosecutor of the requirement to prove all elements of the offense, a structural error that the Court in Bailey held could not be harmless. As the State argued before us, defendant was free to stipulate and free to choose what that stipulation would be.

Defendant's argument in his pro se brief that trial counsel provided ineffective assistance because she agreed to stipulate to a qualifying predicate crime lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Counsel's decision to stipulate, particularly when the State had a judgment of conviction available for introduction in evidence, made eminent good sense; not so, however, as to counsel's decision to agree to a stipulation that identified the predicate crime and not object to admission of the redacted judgment of conviction that included the same information.

***8** "Generally, ineffective assistance of trial counsel claims are not entertained 'on direct appeal because such claims involve allegations and evidence that [normally] lie outside the trial record.' " State v. Veney, 409 N.J. Super. 368, 386–87 (App. Div. 2009) (alteration in original) (quoting State v. Castagna, 187 N.J. 293, 313 (2006)). "However, when the trial itself provides an adequately developed record upon which to evaluate defendant's claims, appellate courts may consider the issue on direct appeal." Ibid. (quoting Castagna, 187 N.J. at 313). As in Veney, we largely agree that this is such a case.

To prevail on an ineffective assistance of counsel (IAC) claim, a defendant must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 694 (1984), and recognized by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must first show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). As to this prong, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' [and t]o rebut that strong presumption, a defendant must establish that trial counsel's actions did not equate to 'sound trial strategy.' " Castagna, 187 N.J. at 314 (quoting Strickland, 466 U.S. at 689). Defense counsel's decision to tell the jury that her client was convicted of first-degree kidnapping, when the actual crime need not have been disclosed, was the result of deficient performance, not sound trial strategy, as the State contends in its supplemental brief.

Additionally, to succeed on an IAC claim, a defendant must prove he suffered prejudice. Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52). In general, "only an extraordinary deprivation of the assistance of counsel triggers a presumption of prejudice." State v. Miller, 216 N.J. 40, 70 (2013) (citing Bell v. Cone, 535 U.S 685, 695–96 (2002)).

In Veney, among other things, the defendant was charged with the possessory weapon offense under N.J.S.A. 2C:39-5(b), and the certain persons offense under N.J.S.A. 2C:39-7(b). 409 N.J. Super. at 373. Like here, the prosecutor dismissed all counts of the indictment against the defendant, including count one that charged him with unlawful possession, and tried the case solely on the certain persons offense. Id. at 374. The jury convicted the defendant, but the judge subsequently granted his motion notwithstanding the verdict, finding the defendant's prior conviction was not for one of the statutory predicate crimes. Id. at 375. The defendant then pled guilty to the unlawful possession of a handgun, count one of the indictment. Id. at 376–77.

On direct appeal, the defendant raised an IAC claim. Id. at 377. We rejected the defendant's contention that counsel provided ineffective assistance because prosecution of count one was barred by principles of double jeopardy. Id. at 382. However, we concluded the defendant's subsequent prosecution under count one violated the Code's "mandatory joinder provision," N.J.S.A. 2C:1-8(b), and Rule 3:15-1(b), and was fundamentally unfair. Id. at 384–85. We also determined that the existing record was sufficient to conclude the defendant satisfied the two prongs of Strickland. Id. at 387. We held that defense counsel's failure to move for formal dismissal of count one prior to the defendant's guilty plea "cannot be deemed trial strategy," and that failure "denied [the] defendant the effective assistance of trial counsel." Id. at 388.

***9** In State v. Allah, the Court considered the defendant's IAC claim on the existing record and concluded that trial counsel's failure to file a meritorious motion to dismiss a second prosecution on double jeopardy grounds demonstrated deficient performance, finding "[n]o assertion of strategy complicates this analysis." 170 N.J. 269, 285 (2002). The Court also found the defendant had been prejudiced, noting "[a]t the very least, had counsel filed the motion, defendant's claim of double jeopardy would have been preserved. Counsel's inaction plainly prejudiced defendant." Id. at 286.

Unlike Veney and Allah, where the defendants were forced to undergo a second trial or enter a guilty plea because of counsel's deficient performance, defendant here received competent representation in all aspects of the trial, but for the admission of evidence that he had been convicted previously of kidnapping in the first degree. Yet, it is indeed difficult to see how permitting the jury to know the nature of defendant's prior conviction, when an avoidable alternative was available, did not affect the outcome of the case. Fritz, 105 N.J. at 58. As we said in State v. Hooper,

> We acknowledge that situations such as the one we confront in this case, where the record on the post-trial motion contains all the facts necessary to establish a prima facie case of ineffective assistance of counsel, are rare. But when circumstances permit, a defendant is entitled to the court's prompt review of the claim.
>
> [459 N.J. Super. 157, 180–81 (App. Div. 2019) (citing Allah, 170 N.J. at 285).]

Nonetheless, because we think it fair defendant and the State have an opportunity to address the IAC claim as now framed in this opinion, we remand the matter to the trial judge to immediately conduct a hearing regarding trial counsel's decisions: 1) to enter into a stipulation that provided the jury with evidence of defendant's prior conviction for first-degree kidnapping; and 2) to consent to admission of a minimally redacted judgement of conviction that included the specific crime.

Although the court may inquire as to counsel's reasons for making these decisions, we have already concluded on this record that those decisions demonstrate deficient performance as a matter of law. The judge shall only consider whether defendant has met the second prong of the Strickland/Fritz standard. We leave the conduct of the hearing, including additional testimony if necessary, to the judge's sound discretion. If considering the strengths and weaknesses of the State's case the judge concludes by a "reasonable probability" that counsel's deficient performance affected the outcome of the trial, Fritz, 105 N.J. at 58, she shall vacate defendant's conviction. Otherwise, we affirm defendant's conviction and sentence.

Affirmed in part; remanded in part. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 274271

Footnotes

1 N.J.S.A. 2C:43-7.2 is the No Early Release Act, commonly referred to as NERA.

2 The State also moved pursuant to N.J.S.A. 2C:43-6(c), which mandates an extended term of imprisonment for a defendant convicted of certain Chapter 39 crimes if previously convicted of certain crimes enumerated in N.J.S.A. 2C:44-3(d). The judge denied this motion, finding subsection (j) was not one of the Chapter 39 crimes enumerated in N.J.S.A. 2C:43-6(c).

3 We omitted the subpoints in defendant's brief.

4 Defendant's 1989 judgment of conviction for kidnapping is not in the appellate record.

5 As noted, defendant was indicted for violating N.J.S.A. 2C:39-7(b) in the dismissed count four of the indictment.

End of Document

2022 WL 433230
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.
Jeffrey HOLLAND, a/k/a Jeffrey R. Holland, Defendant-Appellant.

DOCKET NO. A-3299-18
|
Submitted January 12, 2022
|
Decided February 14, 2022

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos: 16-07-2123 and 16-07-2129.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Daniel S. Rockoff, Assistant Deputy Public Defender, of counsel and on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges Hoffman, Whipple and Geiger.

Opinion

PER CURIAM

***1** Defendant Jeffrey Holland appeals his conviction for three first-degree murders and related charges, and his sentence, which included multiple consecutive terms, yielding an aggregate sentence of 180 years with 158 years of parole ineligibility. He also appeals from an order that denied his motion to sever counts eight through fourteen of Indictment No. 16-07-2123. We affirm defendant's conviction but remand for resentencing of certain counts.

Defendant was accused of the murders of Tiniquah Rouse, Ashley Jones, and Jarrell Marshall. Investigators believed the murders were connected because both Rouse and Jones were previously sexually involved with defendant, and Marshall was Jones's new boyfriend. In addition, investigators believed that surveillance footage recovered at both crime scenes showed defendant wearing similar clothing.

I.

On January 29, 2016, Rouse was murdered in her apartment in Newark. Harold McSwain, a neighbor, saw Rouse's door was open, noticed water was running, found her body in the bathtub, and called 911.

Upon their arrival, police found Rouse's naked, slightly contorted body on the floor. The bathroom floor and hallway were covered in water, and the tub was partially filled. A hair curling iron was inserted in Rouse's vagina and anus. Detective Christopher Brown found Rouse's infant son in the bedroom closet underneath some clothes.

Rouse did not have a pulse when EMS arrived and was pronounced dead at the hospital at approximately 12:18 a.m. An autopsy determined the cause of death as compression to the neck and drowning. No viable fingerprints of the perpetrator were discovered in the apartment.

Defendant testified on his own behalf about his version of the events. He explained that he and Rouse had a "sexual relationship" but did not consider each other boyfriend and girlfriend. He also had a sexual relationship with Saleemah Anderson, Rouse's roommate and cousin. On the day of the incident, defendant was bored and "wanted to have a good time." He texted Anderson and went to Rouse's apartment, arriving at approximately 5:00 p.m. Anderson was not home. The two engaged in sexual activity "the way [they] normally do" in Rouse's bedroom. According to defendant, Rouse "likes to be choked and tied up and spit on and stuff of that sort." The two engaged in sexual activity again, at which time defendant choked Rouse. Defendant testified that he found a brown wire and asked if Rouse wanted him to use it, and she agreed. The judge sustained objections from the prosecutor about anything Rouse said that night. Defendant further testified:

> I choked her. I proceeded to choke her harder at her request. In the process of having sex, ... she's like making like this

> arching like movement. And it didn't really cause me like no concern because I just figured she was having an orgasm and it wasn't unusual for her to move in that manner when she [would] have orgasms. So after I ejaculated and ... got [up] from on top of her, I noticed ... she wasn't moving. She still didn't get up. She wasn't saying anything. And I kind of heard this gurgling noise.... That's when I became concerned. I went to her, I tried to get the restraints off her hand, I couldn't. I ran to the kitchen, grabbed a knife out the sink and cut it off.

***2** Defendant stated he then took Rouse to the bathroom and tried to resuscitate her. He testified that he "completely panicked" and wiped down everything in the apartment that he had touched. Defendant also took everything off the bed and put it into a suitcase, including the used sheets, blankets, and sex toys. He tried washing out her vagina with soap from the bathroom, and then found a curling iron under her sink. He inserted one part of it into her vagina and the other into her anus and turned the iron on to destroy his DNA.

Defendant then wrapped the baby, who had previously been on the bed, in a blanket and placed him inside of the bedroom closet. He stated that he turned the water on in the bathtub so that it would flood the apartment and alert someone to come find the baby. Defendant left the apartment unlocked and discarded the suitcase in a dumpster. He then returned to the apartment because he realized he left a bottle of soda there, which may have had his DNA on it. After that, he returned home at around 11:00 p.m., where he lives with his father and brother. Defendant admitted that it was him in the surveillance video going in and out of Rouse's apartment with the suitcase, wearing a black Northface jacket, jeans, and gray shoes.

Officers recovered the suitcase, which contained an air mattress pump, lotion, a sex toy, clothing, and a receipt, which were all Rouse's belongings. Police also found electrical cords, one with a long hair in it, and a serrated steak knife in the suitcase. Police could not find Rouse's phone, but cell tower records showed it was near defendant's home in East Orange on January 29 after Rouse was already dead.

Defendant claimed he woke up around 9:00 a.m. the following day and left his home wearing red sneakers, a red sweatshirt, green cargo pants, and carrying a blue backpack that contained his Northface jacket. He discarded the jacket in a trash chute in a nearby building. Defendant claims he spent the rest of the day with his brother. That night, he returned to Rouse's apartment building to see if there was a police presence.

The trial court found that the video surveillance footage recovered from the interior and exterior of the building revealed:

- 5:08 p.m. An individual with long dreadlocks, ripped jeans with the left black pocket sticking out of the rip of the left jean legs, rips on the right jean leg, a black Northface jacket, a hat, and a mask over his mouth, walked to [Rouse's apartment building].
- 5:12 p.m. An unknown person lets the individual into the building and the individual is seen walking to the stairwell.
- 5:13 p.m. The individual is now seen on the fourth floor of the building. The individual walks to and then waits outside [Rouse's apartment].
- 5:16 p.m. The individual is let in. No one is seen entering or exiting [Rouse's apartment] until almost [seven] hours later.
- 11:00 p.m. The individual that entered earlier now leaves wearing the same clothes. However, this time, the individual has a red glove on his left hand holding a suitcase and a white cloth in his right hand. The individual is then observed pulling the suitcase and proceeding down the stairwell and into the vestibule area in front of entrance of [the building]. The individual then exits the apartment building with the suitcase.
- 11:14 p.m. The individual returns to the apartment building ... wearing the same clothes.
- 11:15 p.m. While inside the vestibule, the individual pulls up his mouth mask and goes to the stairs and up to the fourth floor. As he walks past the fourth floor camera, he is observed with the same clothes, but the mask is now on and he is putting on red gloves. He then enters [Rouse's apartment] without delay.

***3** • 11:18 p.m. The individual is still wearing the same clothes, but he is now holding a green bottle and his dreadlocks are tucked into his Northface jacket.

- 11:19 p.m. The individual leaves [the apartment] and exits the apartment building.

- 11:42 p.m. McSwain, riding his bike, arrives at [the building].
- 11:44 p.m. McSwain walks down the fourth-floor hallway and enters [Rouse's apartment].
- 12:09 p.m. McSwain is seen opening [the] building for police and EMS.
- 12:21 p.m. EMS is observed carrying a swaddled baby out of [the apartment].

Saleemah Anderson knew defendant as "Rodrese," – defendant's middle name. On January 31, Anderson identified defendant on surveillance footage. She also identified him in the courtroom. Anderson identified the suitcase as Rouse's.

Defendant was previously in a sexual relationship with Jones. They have two children together. They previously lived together, until she received housing assistance and moved.

During the evening of January 30, 2016, police reported to Jones's apartment in response to a report of a shooting. A neighbor called 911 after hearing gunshots coming from the apartment. Jones and Marshall were found dead in the apartment. Police found three children in the apartment crying in the bedroom where Jones and Marshall lay dead. Jones was holding one of the children. Two of the children were defendant's biological children, the other was Marshall's child with another woman.

The door to the apartment was kicked in and nearly off its hinges. Seven shell casings were found near Marshall, and there were bullet holes in the window and near where Jones lay. Autopsies revealed that Jones had two gunshot wounds to the head, and Marshall had multiple gunshot wounds to the neck, torso, arms, and legs. The medical examiner found Jones's cause of death was the gunshot wound to the head and Marshall's was multiple gunshot wounds. No fingerprints of the perpetrator were found at the scene.

Surveillance footage recovered from the building revealed:

- 8:14 p.m. An individual wearing green cargo pants, a red sweatshirt with white strings and the hood over his head, a black Northface jacket, red sneakers, and a red glove is observed going up the stairwell at the apartment building.
- 8:20 p.m. The individual, wearing the same clothes, is observed going down the stairwell.

Seven gunshots and a woman's scream can be heard on another surveillance video. Jones and Marshall were fatally shot within minutes of each other. An individual is then seen running away from the building.

After receiving Miranda[1] warnings and waiving those rights, defendant was interviewed by detectives on January 31, 2016, at about 4:30 a.m. He consented to detectives searching his cellphone. Defendant was held on several unrelated arrest warrants.

The two incidents were initially investigated separately, but as the investigations progressed, defendant became a suspect in all three murders. Detective Anthony Lima noticed that the suspects in the three murders were wearing similar clothing, their descriptions matched, and the suspect in the surveillance videos resembled defendant. Investigators obtained search warrants for defendant's residence, the clothing he wore on January 31, 2016, and his person.

***4** During the search of defendant's residence, detectives seized green cargo pants, a black ski mask in the pants pocket, and red gloves. They also found defendant's sneakers, his driver's license, documents belonging to Jones, a gun holster, two handgun magazines, and nineteen live rounds of ammunition. Defendant did not have a permit to carry a gun. They also recovered a key to the front door of Jones's apartment and one of defendant's cellphones, which showed text messages from Jones asking defendant to leave her alone. The text messages include defendant stating, "I could have killed you three times" to Jones, and that the only reason he did not kill Marshall was because he left his gun at his house. He also texted her saying he would kick her door in, which is exactly how officers found the door the night of the shooting. Defendant testified that he was out of state when he sent that message and did not mean it, he was "just harassing."

Investigators also recovered Facebook messages that defendant sent to Dominique Street describing sexual acts Jones performed on him, along with the message, "Nah dis b**ch just dirty. [I'm] just waiting on my moment to kill this b**ch." He sent similarly vulgar messages to Jones' entire friend list on Facebook. Detectives examined defendant's internet search history on his phone and found that just hours before Rouse was killed, defendant searched "New Jersey

law on Murder" multiple times. On January 27, defendant searched where to buy 0.40 caliber ammunition. Jones and Marshall were killed with 0.40 caliber ammunition.

He sent similar messages to one of Jones's friends, writing that he was waiting for the go ahead to "kill him" (meaning Marshall), that the children would be "better without" Jones and that he was "seriously thinking about paying Dominique a visit." He also wrote: "the way I move I rather just eliminate both of them out of the picture"; "b**ch I'm senseless." "Just be patient and watch my work." He also stated that Jones was terrified of him "because she know[s] I'm ruthless."

On January 31, 2016, defendant emailed his father prior to speaking to detectives, stating, "Dad I love [you with] all my heart if [you don't] hear from me by tomorrow evening[,] I got locked up...."

An Essex County grand jury returned three indictments against defendant. Indictment No. 16-07-2123 charged defendant with first-degree murder of Rouse, N.J.S.A. 2C:11-3(a)(1)-(2) (count one); two counts of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (counts two and thirteen); second-degree desecration of human remains, N.J.S.A. 2C:22-1(a)(2) (count three); second-degree desecration of human remains, N.J.S.A. 2C:22-l(a)(3) (count four); two counts of third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(l) (counts five and six); third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a) (count seven); first-degree murder of Jones, N.J.S.A. 2C:11-3(a)(1)-(2) (count eight); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-5(b) (count nine); two counts of second-degree unlawful possession of a weapon N.J.S.A. 2C:39-4(a) (counts ten and twelve); first-degree murder of Marshall, N.J.S.A. 2C:11-3(a)(1)-(2) (count eleven); two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (counts fourteen and fifteen); second-degree burglary, N.J.S.A. 2C:18-2 (count sixteen); and first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count seventeen).

Indictment No. 16-07-2129 charged defendant with second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b) (count one). Indictment No. 16-07-2128, which charged defendant with fourth-degree contempt of a domestic violence restraining order, N.J.S.A. 2C:29-9(b), was dismissed by the State following the verdict on the other indictments.

Defendant moved to sever counts eight to seventeen, contending that joinder of the counts relating to the first and second incidents would be prejudicial. The State argued that while the two incidents were different events that happened at different times and locations, they eventually "became one case," with the identity of Rouse's killer leading directly to the identity of Jones's and Marshall's killer.

***5** In his oral decision, the judge performed a Cofield[2] analysis and summarized the essential facts of both incidents that made them similar. He noted the following physical evidence shared between the incidents: defendant's distinctive dreadlocks, ripped jeans, Northface jacket, black face mask, red gloves, hat, green cargo pants, and red sweatshirt. After outlining the evidence, the court found that the two incidents were "so intertwined together that it would be next to impossible to separate" them. The court also found that the possible prejudice to defendant was outweighed by "the enormous probative value[.]"

In a written decision, the judge recounted the pertinent facts and applied the applicable legal principles. Under the first prong of Cofield, whether the evidence of another crime is relevant to a material issue which is genuinely disputed, the court found that defendant's identity as the killer in both instances was genuinely in dispute because defendant originally denied involvement in either homicide. The evidence of identity proffered by the State showed that killer of all three victims was wearing similar items of clothing outside their homes. Some of that clothing was found in defendant's apartment. This evidence would be used to prove his identity as the killer in both incidents.

Under the second Cofield prong, that the other bad acts evidence be "similar in kind and reasonably close in time to the offense charged," the judge found that the two incidents involved homicides and similar related offenses that occurred within forty-eight hours of one another. Although the methods of killing were different, the crimes were otherwise sufficiently similar.

Under the third Cofield prong, whether the evidence of the misconduct is clear and convincing, the judge found there was "substantial evidence connecting [d]efendant" to all three homicides, noting:

> The surveillance video on January 29, 2016 from [the apartment building] where Rouse was killed, shows the suspect who has long black dreadlocks, ripped jeans with

> the left pock[et] sticking out of the rip of the left jean leg with rips on the right leg, a black half-mask, and red gloves. Defendant is shown on surveillance video at [his residence] and is shown via photographs taken of him at University Hospital and surveillance video of him at the Essex County Prosecutor's Office to have long black dreadlocks. Defendant is shown via photographs taken of him at University Hospital and surveillance video of him at the Essex County Prosecutor's Office to have ripped jeans with the left pock[et] sticking out out of the rip of the left jean leg with rips on the right leg. Furthermore, a search of [d]efendant's apartment ... revealed a pair of green cargo pants that contained a black half-mask and red gloves.
>
> The surveillance video on January 30, 2016 from [Jones's apartment building], where Jones and Marshall were killed, shows the suspect who has red gloves, green cargo pants, a red sweatshirt with white strings, and red sneakers. Defendant is seen on surveillance footage that same day, two hours after the Jones-Marshall homicide, entering his apartment ... wearing green cargo pants, a red sweatshirt with white strings, and red sneakers. Furthermore, a search of [d]efendant's apartment ... revealed a pair of green cargo pants that contained red gloves.

Under the fourth Cofield prong, whether the probative value of the evidence outweighs the prejudice to defendant, the judge found the highly probative value of the evidence of the two homicides outweighed any prejudicial effect if the offenses relating to the two incidents were tired together. He noted the female victims had prior intimate relationships with defendant. In addition:

> ***6** The two homicides took place within less than twenty-four hours of each other. The victims were pronounced dead by the same doctor and autopsied by the same medical examiner. The suspect was wearing similar clothes, which [d]efendant either was later also wearing at some point or was found to be in possession of. The investigations began within less than 24 hours of each other and rapidly became intertwined due to the similarities of the cases.

The judge further noted that while the murders were independent of each other, they were part of a chain of events

> that unfolded in a very short and rapid time span. Trying the murders together does not establish [d]efendant's propensity to commit crime nor would it have "a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation' of the issues in the case." Thus, the probative value of the evidence is not outweighed by any prejudicial effect and the fourth Cofield factor is satisfied.
>
> [(Citations omitted).]

Based on these findings, the court concluded that "[e]vidence from both homicides ... would be admissible if the two homicides were tried independently." Therefore, "it would be improper to sever the two cases." Accordingly, defendant's severance motion was denied.

The case proceeded to trial. The prosecutor repeatedly referred to defendant as the person who killed Rouse, Jones, and Marshall. In his opening statement, the prosecutor explained that evidence would show that defendant was the person on the surveillance video entering Jones's apartment, even though the identity of that individual was in dispute. When reviewing surveillance footage, Lima and the prosecutor repeatedly used defendant's name when identifying who was at Jones's apartment. Defendant did not object to the prosecutor's opening statement or to Lima's testimony. Instead, defense counsel argued that there was no one who was inside of the apartment that can say they saw defendant kill Marshall or Jones and there was no "viable evidence that shows that [defendant] was even there."

Without objection, FBI Special Agent John Hauger was admitted as the State's expert in historical cell site analysis. He analyzed two of defendant's cell phones.

Hauger testified that defendant's cellphones were near the crime scenes at the time of each murder, first at Rouse's apartment, then at the dumpster, then moving back to his residence in East Orange, and then at Jones's apartment. Hauger candidly acknowledged that he could not "tell you the exact spot a phone was historically." He also acknowledged that he did not do a drive test, which involves driving a cellphone up and down a street to see which tower it pings off and how far the tower's reach extends. He explained, however, that the cellphone chooses which tower to ping to, not the tower.

The jury found defendant guilty of all counts of Indictment Nos. 16-07-2123 and the certain persons offense charged in Indictment No. 16-07-2129.

Defendant was sentenced on February 26, 2019. The judge asked defendant if he wanted to allocute, but defendant declined. The judge described defendant as "a total menace to society." It explained the brutality of the murders, and the fact

that defendant "show[ed] absolutely no remorse whatsoever." In sentencing defendant, the judge indicated that he wanted to ensure the safety of public and that defendant would "not hurt anyone else again by his sentence today."

The judge declined to find aggravating factor one, N.J.S.A. 2C:44-1(a)(1), even though he found defendant's conduct was "heinous, cruel, and depraved." On both indictments, the judge found aggravating factors three (the risk defendant will reoffend), N.J.S.A. 2C:44-1(a)(3); six (the extent of defendant's criminal record and the seriousness of the offenses committed), N.J.S.A. 2C:44-1(a)(6); nine (the need for deterrence), N.J.S.A. 2C:44-1(a)(9); and fourteen (the offense involved an act of domestic violence), N.J.S.A. 2C:44-1(a)(14). The court found no mitigating factors and was clearly convinced the aggravating factors substantially outweighed the non-existent mitigating factors.

***7** The judge explained that although there is a presumption of concurrent sentences, under State v. Yarbough, 100 N.J. 627 (1985), and subsequent case law, the presumption can be overridden if "the crimes and their objectives were predominantly independent of one another, the crimes involve separate acts of violence or threats of violence, the crimes were committed at different times or separate places, [and consider] whether or not the crimes involve multiple victims." The judge found that because the murders were separate acts of violence, occurred on consecutive but separate dates, and there were three separate victims, the murder sentences should run consecutive to each other.

For each of the three murders (counts one, eight, and eleven), defendant received a sixty-year term, subject to the parole ineligibility and mandatory parole supervision imposed by the No Early Release Act, N.J.S.A. 2C:43-7.2, with counts eight and eleven running consecutively to each other and to count one. Defendant received five-year concurrent terms on counts two, five, and thirteen. On counts four, fourteen, and sixteen, he received concurrent ten-year terms. On count nine, he received a ten-year term, subject to a five-year period of parole ineligibility. On count fifteen, defendant received a ten-year NERA term. Counts three, six, seven, ten, twelve, and seventeen were merged for sentencing purposes. On the certain persons count (Indictment No. 16-07-2129), defendant was sentenced to a consecutive ten-year term, subject to a five-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c). This yielded an aggregate sentence of 190 years with 158 years of parole ineligibility. This appeal followed.

Defendant raises the following points for our consideration.

POINT I

THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO SEVER COUNTS 1-7 FROM COUNTS 8-17 OF INDICTMENT NO. 16-07-2123.

POINT II

THE IMPROPER ADMISSION OF A DETECTIVE'S LAY OPINION, IDENTIFYING THE DEFENDANT AS THE SUSPECT ON THE SURVEILLANCE VIDEOS, WAS PLAIN ERROR, REQUIRING REVERSAL OF DEFENDANT'S CONVICTIONS.

POINT III

BECAUSE THE STATE FAILED TO DEMONSTRATE THAT ITS EXPERT'S METHODOLOGY WAS SCIENTIFICALLY RELIABLE, THE COURT ERRED BY ALLOWING AN FBI AGENT TO OPINE AS AN EXPERT THAT CELL PHONE SERVICE RECORDS WERE CONSISTENT WITH THE DEFENDANT BEING AT THE HOMICIDE SCENE.

POINT IV

THE SENTENCING COURT VIOLATED THE DEFENDANT'S FIFTH AMENDMENT RIGHT TO SILENCE AND SIXTH AMENDMENT RIGHT TO COUNSEL BY FINDING AS AN AGGRAVATING FACTOR THAT HE DID NOT SPEAK TO EXPRESS REMORSE. THE COURT ALSO MISAPPLIED THE YARBOUGH FACTORS ON COUNTS 8 AND 11.

II.

We first address the denial of defendant's motion to sever counts one to seven from counts eight to fourteen. "A trial court's severance decision will be reversed only for an abuse of discretion." State v. Davis, 390 N.J. Super. 573, 591 (App. Div. 2007) (citing State v. Chenique-Puey, 145 N.J. 334, 341 (1996)).

We are guided by the following basic principles governing joinder of offenses. Rule 3:7-6 provides:

> Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan. Relief from prejudicial joinder shall be afforded as provided by [Rule] 3:15-2.

"Although joinder is favored, economy and efficiency interests do not override a defendant's right to a fair trial." State v. Sterling, 215 N.J. 65, 72 (2013). Rule 3:7-6 provides a remedy for prejudicial joinder, "referencing Rule 3:15-2(b), which vests a court with discretion to sever charges '[i]f for any other reason 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.' " Id. at 73. The Court explained:

> ***8** The relief afforded by Rule 3:15-2(b) addresses the inherent "danger[,] when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all." State v. Pitts, 116 N.J. 580, 601 (1989) (quoting United States v. Lotsch, 102 F.2d 35, 36 (2d Cir. 1939)).
>
> [Ibid. (alteration in original).]

In determining whether to grant severance, a trial court must assess whether joinder would prejudice the defendant or the State. Ibid. "The test for assessing prejudice is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.' " Ibid. (alteration in original) (quoting Chenique-Puey, 145 N.J. at 341). "The admissibility of the evidence in both trials renders inconsequential the need for severance." Davis, 390 N.J. Super. at 591 (citing State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div. 1983)).

Rule 404(b)(1) prohibits the use of other crimes, wrongs or acts "to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." However, such "evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(2).

The requirements of N.J.R.E. 404(b) must be met. Sterling, 215 N.J. at 73 (citing Cofield, 127 N.J. at 338). In Cofield, the Court adopted the following four-part test to determine admissibility: (1) "[t]he evidence of the other crime must be admissible as relevant to a material issue"; (2) "[i]t must be similar in kind and reasonably close in time to the offense charged"; (3) "[t]he evidence must be clear and convincing; and" (4) "[t]he probative value of the evidence must not be outweighed by its apparent prejudice." 127 N.J. at 338. In addition, "such evidence is admissible only if it is relevant to prove a fact genuinely in dispute 'and the evidence is necessary as proof of the disputed issue.' " State v. Darby, 174 N.J. 509, 518 (2002) (quoting State v. Hernandez, 170 N.J. 106, 118-19 (2001)).

Applying these principles to this case, we conclude that the denial of defendant's severance motion was not an abuse of discretion. The trial court provided cogent and thorough reasoning for denying defendant's motion to sever counts eight to fourteen. The court considered each prong of the four-part test separately, setting forth the pertinent facts in its analysis. We discern no abuse of discretion.

Under the first prong, a material issue in the Jones and Marshall murders was the identity of the suspect in the surveillance footage, and whether that suspect was defendant. Under the second prong, all three murders occurred within forty-eight hours, and the first and second victims were defendant's former girlfriends. The male victim was the current boyfriend of the second victim. Under the third prong, the court found that the evidence of the Rouse murder was clear and convincing; defendant admitted killing to Rouse but claimed he had no intent to kill her. Under the fourth prong, the court found the probative value of the evidence outweighed the prejudice to defendant.

III.

***9** Defendant contends that the admission of Detective Lima's lay opinion, identifying defendant as the suspect in the surveillance videos was reversible plain error. We disagree.

An appellate court defers to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). We do so because "the decision to admit or

exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that deferential standard, we "review a trial court's evidentiary ruling only for a 'clear error in judgment.' " State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)).

Where there is no objection to testimony, we review for plain error. The admission of the unchallenged evidence constitutes plain error if it was "clearly capable of producing an unjust result." R. 2:10-2. "Thus, the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." State v. Singh, 245 N.J. 1, 13 (2021) (quoting State v. R.K., 220 N.J. 444, 456 (2015)).

N.J.R.E. 701 permits testimony by lay witnesses "in the form of opinions or inferences" if it is "(a) is rationally based on the witness's perception; and (b) will assist in understanding the witness's testimony or determining a fact in issue." This testimony "must 'assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.' " State v. Sanchez, 247 N.J. 450, 469 (2021) (quoting Singh, 245 N.J. at 15). A witness should offer an opinion on something that the jury can come to a decision to on their own. Id. at 469-70. The purpose of the rule "is to ensure that lay opinion is based on an adequate foundation." Singh, 245 N.J. at 14 (quoting State v. Bealor, 187 N.J. 574, 586 (2006)).

Regarding identity, lay witness testimony may be admissible, but courts must consider the nature, duration, and timing of the witnesses' contacts with the defendant. Sanchez, 247 N.J. at 470 (citing U.S. v. Walker, 974 F.3d 193, 205-06 (2d Cir. 2020)). Another factor to consider when permitting an officer to testify about identity at trial is whether there are other witnesses capable of doing so. State v. Lazo, 209 N.J. 9, 23 (2012). Courts will also look to whether the identification is helpful to the jury where surveillance photos are so blurry that the subject's features are unclear, but not so clear that jurors can make the comparison to the defendant themselves. Sanchez, 247 N.J. at 475.

Here, Detective Lima's fleeting reference to defendant did not constitute plain error given the other evidence produced at trial. Unlike in Lazo, the evidence implicating defendant in the murders was not limited to identifying the suspect depicted in surveillance videos. Defendant admitted his involvement in Rouse's death. The evidence included the incendiary text messages defendant sent Jones, his history with her and Marshall, his Facebook messages, his cellphone location near the crime scene, and the fact that the same caliber bullets used on Jones and Marshall were found in his home. Moreover, there were no other witnesses available to testify about presence at Jones's apartment during the incident.

***10** Lima's lay opinion testimony was not "clearly capable of producing an unjust result." R. 2:10-2. Defendant has not demonstrated there is "a reasonable doubt" that "the jury came to a result that it otherwise might not have reached." Singh, 245 N.J. at 13 (quoting R.K., 220 N.J. at 456).

IV.

We next address the admissibility of the historical cell tower evidence. The State's expert, FBI Special Agent John Hauger, opined that the cell phone service records were consistent with the defendant being at the homicide scene. Defendant contends the State failed to demonstrate that the methodology used by its expert was scientifically reliable. We are unpersuaded.

We review a trial court's evidentiary determination that a witness is qualified to present expert testimony under N.J.R.E. 702 for abuse of discretion "and will only [ ] reverse for manifest error and injustice." State v. Rosales, 202 N.J. 549, 562-63 (2010) (quoting State v. Jenewicz, 193 N.J. 440, 455 (2008)). A trial court's decision to permit expert testimony is accorded deference. Townsend v. Pierre, 221 N.J. 36, 52 (2015). Here, there was no objection to the expert's qualifications or the admission of his testimony. Therefore, the plain error rule applies. R. 2:10-2.

N.J.R.E. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

The party offering expert testimony bears the burden of establishing its admissibility. State v. Harvey, 151 N.J. 117, 167 (1997) (citing Windmere, Inc. v. Int'l Ins. Co., 105 N.J. 373, 378 (1987)). We apply the following three-prong test for the admission of expert testimony:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

[Jenewicz, 193 N.J. at 454.]

Special Agent Hauger has more than fifteen years' experience in the field of historical cell tower analysis. He was properly qualified as an expert based on his experience.

In criminal cases, our courts apply the general acceptance test for reliability enunciated in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). State v. Cassidy, 235 N.J. 482, 491-92 (2018). Here, only the second prong of the Frye test is at issue. "Scientific test results are admissible in a criminal trial only when the technique is shown to be generally accepted as reliable within the relevant scientific community." Ibid. To establish general acceptance, "the party proffering the evidence need not show infallibility of the technique nor unanimity of its acceptance in the scientific community." Id. at 492. Here, the State must prove that the cell-site analysis methodology "and the interpretation of its results are non-experimental, demonstrable techniques that the relevant scientific community widely, but perhaps not unanimously, accepts as reliable." Harvey, 151 N.J. at 171.

***11** When reviewing a decision on the admission of scientific evidence in a criminal case, "an appellate court should scrutinize the record and independently review the relevant authorities, including judicial opinions and scientific literature." Harvey, 151 N.J. at 167; see also State v. Pickett, 466 N.J. Super. 270, 303 (App. Div. 2021) (an appropriate review in a criminal case requires an appellate court to "independently scrutinize the record, including the comprehensive and amplified declarations of the experts, the scientific validation studies and peer-reviewed publications, and judicial opinions"). "Whether expert testimony is sufficiently reliable to be admissible under N.J.R.E. 702 is a legal question we review de novo." State v. J.L.G., 234 N.J. 265, 301 (2018).

"Cell phones work by communicating with cell-sites operated by cell-phone service providers. Each cell-site operates at a certain location and covers a certain range of distance." In re U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113, 115 (E.D.N.Y. 2011). "The geographic area covered by a particular tower depends upon 'the number of antennas operating on the cell site, the height of the antennas, topography of the surrounding land, and obstructions (both natural and manmade).' " Holbrook v. Commonwealth, 525 S.W.3d 73, 79 (Ky. 2017) (quoting United States v. Hill, 818 F.3d 289, 295 (7th Cir. 2016)). "When a cell phone user makes a call, the phone generally 'connect[s] to the cell site with the strongest signal,' although 'adjoining cell [towers] provide some overlap in coverage." Ibid. (alterations in original) (quoting Hill, 818 F.3d at 295). Other factors affecting which tower a cell phone connects to include the terrain, the antennae's angle, the phone itself, and environmental factors. Hill, 818 F.3d at 296. "As a cell phone user moves from place to place, the cell phone automatically switches to the tower that provides the best reception." State v. Johnson, 797 S.E.2d 557, 562 (W. Va. 2017) (quoting In re Application for an Order for Disclosure of Telecomms. Recs., 405 F. Supp. 2d 435, 436-37 (S.D.N.Y. 2005))

Numerous federal courts have acknowledged the general reliability of cell-tower analysis. See e.g., Hill, 818 F.3d at 297 ("District courts that have been called upon to decide whether to admit historical cell-site analysis have almost universally done so."). State appellate courts have also found cell-tower analysis to be generally reliable. See generally State v. Boothby, 951 N.W.2d 859, 871-76 (Iowa 2020) (surveying treatment of historical cell-site data by other jurisdictions); see also Commonwealth v. Nevels, 203 A.3d 229, 241 (Pa. Super. Ct. 2019) (concluding "there exists no legitimate dispute regarding the reliability of historical cell-site analysis"), aff'd, 235 A.3d 1101 (Pa. 2020); Pullin v. State, 534 S.E.2d 69, 71 (Ga. 2000) (affirming the trial court's conclusion that "the geographic location of the cell calls in question is based on sound scientific theory and that analysis of the data can produce reliable results").

Special Agent Hauger did not perform a drive test to confirm the specific coverage areas of the nearby cell towers. In Holbrook, the testifying FBI agent also did not perform a drive test. 525 S.W.3d at 80. The agent testified that Holbrook's cell phone was within the general coverage area of the scene of the crime when the murder was committed. Id. at 81. The expert acknowledged "that while a drive test is the best way to refine the coverage area, the general principles of coverage apply regardless." Id. at 80. Noting that the expert's "testimony expressly identified limitations in the scientific techniques he employed[,]" the Kentucky Supreme Court affirmed the admission of the evidence regarding the general locations of the callers. Id. at 82. We reach the same

conclusion here. "[W]hile the absence of a drive test may limit the degree of precision with which an expert may testify about cell phone locations, providing grounds for cross-examination, that absence does not negate the admissibility of such testimony." United States v. Nelson, 533 F.Supp. 3d 779, 794 (N.D. Cal. 2021). Defendant relies on an unpublished opinion that he contends reached a contrary result. The facts in that case are distinguishable. Moreover, unpublished opinions do not constitute precedent, are not binding, and shall not be cited by any court. R. 1:36-3.

***12** In Hill, the defendant challenged the reliability of historical cell site analysis based on the variables involved, arguing they rendered the methodology too unreliable to be admissible. 818 F.3d at 296. The court found that "[h]istorical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. It shows the cell sites with which the person's cell phone connected, and the science is well understood." Id. at 298 (citing United States v. Evans, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012)).

Despite the variables affecting cell sites, the court determined that exclusion of the evidence was not the correct remedy. Ibid. Instead, any limitations of the methodology should be presented to the jury for the jury to determine the weight of the resulting evidence. Id. 298-99; see also United States v. Jones, 918 F.Supp. 2d 1, 5 (D.D.C. 2013) (stating that "numerous other courts" have concluded that "the mere existence of factors affecting cell signal strength that the expert may not have taken into account goes to the weight of the expert's testimony and is properly the subject of cross-examination, but does not render the fundamental methodology of cell site analysis unreliable").

Special Agent Hauger candidly explained the limitations of historical cell data analysis. The jury had the opportunity to consider those limitations and was free to give his opinions "whatever weight it deemed appropriate." Harvey, 151 N.J. at 200.

Having carefully reviewed the record in light of the applicable precedents, we find that the methodology used by the State's expert is "generally accepted as reliable within the relevant scientific community." Cassidy, 235 N.J. at 491-92. We discern no abuse of discretion, let alone plain error. The trial court properly found that cell-site analysis is a sufficiently reliable method to determine the approximate location of a cell phone at the time the incident occurred.

V.

Finally, we address defendant's argument that the trial court misapplied the Yarbough factors in imposing the consecutive prison terms and violated his Fifth Amendment right to counsel by considering his failure to personally express remorse as an aggravating factor.

Appellate courts review sentencing determinations deferentially. State v. Fuentes, 217 N.J. 57, 70 (2014). "The reviewing court must not substitute its judgment for that of the sentencing court." Ibid. (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). We affirm a sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience." State v. Roth, 95 N.J. 334, 364-65 (1984).

To facilitate appellate review, the sentencing court must "state reasons for imposing such sentence including ... the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence[.]" R. 3:21-4(h); Fuentes, 217 N.J. at 73; see also N.J.S.A. 2C:43-2(e) (requiring a sentencing court to provide the "factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence.").

Additional review is undertaken when consecutive terms are imposed. In Yarbough, the Court adopted the following factors for trial courts to consider when determining if prison terms should run concurrently or consecutively:

> ***13** (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including 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;

(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; and

(6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.

[100 N.J. at 643-44.]

The Legislature subsequently amended N.J.S.A. 2C:44-5(a) to clarify that "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." L. 1993, c. 233, § 1.

"[T]he reasons for imposing a consecutive or concurrent sentence should be separately stated in the sentencing decision." State v. Miller, 205 N.J. 109, 129 (2011) (quoting Yarbough, 100 N.J. at 643). "An explicit statement, explaining the fairness of the sentence imposed on a defendant for multiple offenses in a single proceeding ... is essential to a proper Yarbough sentencing assessment." State v. Torres, 246 N.J. 246, 268 (2021); see also State v. Chavarria, 464 N.J. Super. 1, 19 (App. Div. 2020) (explaining that a sentencing court "must 'articulate [its] reasons' for imposing consecutive sentences 'with specific reference to the Yarbough factors.' "). "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." Miller, 205 N.J. at 129.

The court must also "be mindful of the real-time consequences of NERA and the role that it customarily plays in the fashioning of an appropriate sentence." State v. Marinez, 370 N.J. Super. 49, 58 (App. Div. 2004). A reviewing court will "consider the judge's evaluation of the aggravating and mitigating factors in that light." Id. at 58. Lengthy consecutive terms may be manifestly excessive. See State v. Louis, 117 N.J. 250, 254-58 (1989) (aggregate term of 130 years with a 65-year parole disqualifier found excessive); State v. Candelaria, 311 N.J. Super. 437, 454 (App. Div. 1998) (finding six consecutive terms totaling 105 years plus a life sentence excessive). Here, the judge imposed three consecutive NERA terms, followed by a consecutive ten-year term, subject to a five-year period of parole ineligibility, yielding an aggregate 190-year term, that requires defendant to serve 158 years before being eligible for parole.

***14** The trial court noted defendant's failure to express remorse for his role in committing the homicides. The trial court may consider a defendant's lack of remorse during sentencing. See State v. Int. of D.S., 289 N.J. Super 413, 426 (App. Div. 1996) (affirming a judge's decision that considered defendant's lack of remorse); State v. Jackson, 138 N.J. Super 431, 436 (App. Div. 1976) (same). However, "a defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in the sentencing decision." State v. Marks, 201 N.J. Super. 514, 540 (App. Div. 1985).

The judge made the following findings. Defendant was thirty years old at sentencing. He was single, had four children, and earned a GED while at the Essex County Youth House. Defendant had adjudications of juvenile delinquency for aggravated assault, unlawful possession of a weapon, criminal sexual contact, and served an eighteen-month term at Jamesburg, where he maxed out after incurring a parole violation. Defendant also received a deferred disposition on an obstruction charge.

As an adult, defendant had prior convictions for third-degree eluding and fourth-degree aggravated assault, and eight disorderly persons offenses. Defendant had seven domestic violence restraining orders entered against him.

The judge found that defendant had been involved with the criminal justice system since age fifteen and had "been a total menace to society." He described defendant's actions as "cruel, depraved, and inhumane...." The judge noted that defendant "killed Tiniquah Rouse in front of her five-month-old infant" and the next day "went to Ashley Jones's apartment where [he] kicked in the door and brutalized

[Marshall] and [Jones] by shooting them multiple times in front of three young children." Defendant was the father of two of those children.

The judge found defendant "show[ed] absolutely no remorse whatsoever." The judge intended the sentence to "ensure the safety of" other people and prevent defendant from hurting anyone in the future.

The judge engaged in an incomplete analysis of the Yarbough factors. He noted "that there shall be no free crimes in a system in which the punishment shall fit the crime." The judge concluded that the terms for the three murders should run consecutively, finding the murders were "separate acts of violence" that "were committed at two separate locations over the course of two ... consecutive dates."

As to the certain persons offense, the judge noted the statute "was meant to enhance the penalty for those individuals who have a prior conviction, otherwise this statute would serve absolutely no purpose whatsoever...."

Defendant was sentenced to three consecutive sixty-year NERA terms for the murders and a consecutive ten-year term, subject to a five-year period of parole ineligibility on the certain persons offense pursuant to the Graves Act. Following merger, the aggregate sentence was 190 years with 158 years of parole ineligibility.

The judge did not any expressly consider Yarbough factors: three (a) ("the crimes and their objectives were predominantly independent of each other"); three (c) (whether the crimes were committed "so closely in time and place as to indicate a single period of aberrant behavior"); and five ("successive terms for the same offense should not ordinarily be equal to the punishment for the first offense"). In addition, the judge did not expressly consider the real-time consequences of the consecutive NERA and Graves Act terms. These omissions constrain us to vacate the consecutive sentences imposed on counts eight and eleven of Indictment No. 16-07-2123 and count one of Indictment No. 16-07-2129, and remand for resentencing of those counts. See Chavarria, 464 N.J. Super. at 19 (App. Div. 2020) (vacating the consecutive sentences and remanding resentencing due to absence of "findings of the Yarbough factors"); State v. Soto, 385 N.J. Super. 247, 256 (App. Div. 2006) ("Failure to provide reasons for the imposition of a consecutive sentence may compel a remand for resentencing.").

***15** At resentencing, the judge shall provide a fulsome evaluation of each of the Yarbough factors and explain the fairness of the sentence imposed, considering the real-time consequences of the terms imposed.

In sum, we affirm defendant's convictions but vacate and remand for resentencing of counts eight and eleven of Indictment No. 16-07-2123 and count one of Indictment No. 16-07-2129.

Affirmed in part, vacated in part, and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 433230

Footnotes

1 Miranda v. Arizona, 384 U.S. 436 (1966).

2 State v. Cofield, 127 N.J. 328 (1992).

End of Document

2022 WL 829804
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.

Aaron ENIX, Defendant-Appellant.

DOCKET NO. A-2664-18

Submitted March 2, 2022

Decided March 21, 2022

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment Nos. 16-08-1102 and 17-04-0267.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Steven K. Cuttonaro, Deputy Attorney General, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

Before Judges Hoffman, Whipple and Geiger.

Opinion

PER CURIAM

***1** Defendant Aaron Enix appeals from his conviction and sentence. Enix and co-defendant Davon Cooper were tried together before a jury. The jury found Enix guilty of murder, N.J.S.A. 2C:11-3(a)(1), (2), second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), and second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1). The trial judge sentenced him to an aggregate fifty-five-year term, subject to the parole ineligibility imposed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. After reviewing the record, we discern no legal basis to disturb the jury's verdict and affirm his conviction. We also affirm his sentence for murder. Because the judge incorrectly merged the possession of a handgun without a license count and failed to merge the possession of a handgun for an unlawful purpose, we are compelled to remand this matter for resentencing of those counts.

I.

We glean the following facts from the record. At approximately 9:20 p.m. on November 27, 2016, Jersey City Police Department (JCPD) officers Luis Rentas and Patrick Canfield responded to reports of shots fired on Claremont Avenue. Rashay Washington was found in a pool of his own blood on a stoop, shot over a dozen times, but still conscious and alert.

Rentas asked Washington who shot him, and Washington replied, "Davon Cooper and Aaron Enix." Rentas asked Washington again who had shot him, and this time Washington responded, "[t]hose mother f**kers, Aaron Enix and Davon Cooper shot me." Rentas wrote the names down in his notepad. Canfield was beside Rentas and listed Cooper and Enix in his subsequent report as the men Washington claimed shot him. According to Canfield, in addition to identifying his attackers by name, Washington also told him that "the suspects ran south on Clerk Street." Rentas corroborated this account of Washington's statement describing the direction his assailants took immediately after the shooting.

A pedestrian also reported seeing two men wearing burgundy clothing fleeing the scene on foot down Clerk Street. Officers Terrell Darby and Raymond Guadalupe proceeded in that direction and came across two men wearing burgundy, apprehending them within two minutes of the police transmission of 'shots fired" made at 9:22 p.m. The two men turned out to be Davon Cooper and Aaron Enix. Darby described Enix as wearing a burgundy top and burgundy pants, and Cooper as wearing a black hat, a burgundy top with black shoulders, and black Adidas style pants. The clothing described by Darby matched the clothing worn by the assailants depicted in the video footage taken by surveillance cameras in the area of the crime scene.

Later that night, police conducted an investigatory canvas of the area between where defendants were apprehended and where the victim was shot. Sergeant Douglas Paretti recovered sixteen spent shell casings and six projectiles.

Officer Patrick Egan, canvassing through backyards and alleyways in the neighborhood, heard rustling in a nearby yard and went to investigate. Two handguns were found on the south side of Clerk Street—a semi-automatic Ruger and a semi-automatic Sig Sauer. Both weapons were found with their slides "locked back" indicating that they had been fired until their magazines were empty.

***2** Washington was treated at the scene by paramedics and transported to Jersey City Medical Center. His vital signs dropped while in the ambulance and he faded in and out of consciousness. The medical records show Washington was shot sixteen times, endured multiple surgeries in the immediate aftermath of the shooting, contracted pneumonia, and died on December 12, 2016, one day after a final surgery. The medical examiner conducted an autopsy and ruled the cause of death to be multiple gunshot wounds and the manner of death to be homicide.

A Hudson County Grand Jury returned an indictment charging Cooper and Enix, with first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a) (count 1); first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2) (count 2); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (counts 3 and 4); and second-degree possession of a handgun without a license, N.J.S.A. 2C:39-5(b)(1) (counts 5 and 6).

Prior to trial, the State moved to admit the victim's statement to Rentas identifying Cooper and Enix as his assailants. Rentas testified at the motion hearing that Washington said, "those mother f**kers, Davon Cooper and Aaron Enix shot me." Rentas also testified that Washington said that he "didn't want to die." Canfield was standing beside Rentas when Washington said this. Washington's statement that he did not want to die was not included in Canfield's report. Nor did Rentas write down this statement on the notepad where he wrote down Cooper and Enix's names. Rentas reviewed the report and opted not to supplement it. Nor did the paramedic recall any statement from Washington to that effect. In fact, defense counsel was able to adduce that Rentas only mentioned Washington's fear of death after a detective taught him about dying declarations after the shooting and prior to testifying.

The trial court issued a comprehensive memorandum opinion admitting Washington's statements identifying Cooper and Enix as dying declarations. The court noted that Washington "was suffering from multiple grievous injuries." The paramedic counted sixteen gunshot wounds and considered the victim to be in life-threatening condition. The court found the motion record

> clearly indicate[d] that Mr. Washington believed his death was imminent. Mr. Washington was in critical condition due to loss of blood from [sixteen] bullet wounds, and stated that he did not want to die. Based on the severity of his injuries, and Mr. Washington's statement that he did not want to die, a reasonable inference can be drawn that Mr. Washington believed his death was imminent. Mr. Washington made the identification to Officer Rentas three times, and there are no facts to indicate this statement was not voluntarily made.

Cooper and Enix were tried together. After Washington's dying declaration was admitted, the State showed surveillance footage that police pieced together from three different vantage points. The footage showed the shooting, and two individuals running down Claremont Avenue and then down Clerk Street.

The State called JCPD Sergeant Gilberto Vega to authenticate the recordings. Vega was not present on the scene the night of the shooting, but narrated portions of the footage shown to the jury. The jury asked for the footage to be replayed multiple times during deliberations.

After deliberating for more than a day, the jury returned its verdict. The jury found Enix guilty of murder and counts four and six (the weapons charges), but acquitted him of conspiracy to commit murder. The jury acquitted Cooper of murder and conspiracy to commit murder but found him guilty of counts three and five.[1]

***3** A few days after the verdict was returned, one of the deliberating jurors (the juror) contacted Enix's attorney and stated "I don't agree with the verdict" several times. Counsel recounted the telephone call from the juror, which was both brief and short on details, and noted the juror "specifically did not indicate any outside influence." Upon realizing that he was speaking to a juror, counsel stopped the conversation, suggested the juror contact the judge, and contacted the State, the court, and co-counsel to apprise them of the issue. The juror then called the court and left a message with the judge's secretary. He indicated that he was "not happy with the verdict" and wished to speak to the judge to know what could be done about it. The judge convened a hearing to discuss the issue.

The State did not believe the incident warranted any further action. Neither defense attorney sought a remedy. The judge concluded that there was no legal or factual basis to call back and interview the juror about the deliberative process, noting there was "not even a hint" of misconduct.

Enix was sentenced on January 4, 2019. The judge found the following aggravating factors: one (nature and circumstances of the offense), N.J.S.A. 2C:44-1(a)(1), as to count two only; three (risk of reoffending), N.J.S.A. 2C:44-1(a)(3); six (prior criminal record and seriousness of offenses), N.J.S.A. 2C:44-1(a)(6); and nine (need for deterring defendant and others), N.J.S.A. 2C:44-1(a)(9). The judge found no mitigating factors and that the aggravating factors substantially outweighed the non-existent mitigating factors.

For the murder, Enix was sentenced to a fifty-five-year term, subject to a fifty-year period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On count four, he was sentenced to a concurrent ten-year term, subject to a five-year period of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6(c). Both terms run concurrently to his sentence on another indictment. Count six was merged into count four. This appeal followed.

Appellant raises the following points for consideration:

POINT ONE

RASHAY WASHINGTON'S STATEMENT IDENTIFYING HIS ATTACKERS DID NOT QUALIFY AS AN ADMISSIBLE DYING DECLARATION.

POINT TWO

THE NARRATION OF SURVEILLANCE VIDEO BY SERGEANT VEGA CONSTITUTED IMPROPER OPINION TESTIMONY.

POINT THREE

THE TRIAL COURT ERRED BY FAILING TO CONDUCT A POST-VERDICT HEARING TO INVESTIGATE THE DETAILS OF THE ALLEGED JURY MISCONDUCT REPORTED BY JUROR NO. 14.

POINT FOUR

DEFENDANT'S SENTENCE OF FIFTY-FIVE YEARS, SUBJECT TO THE NO EARLY RELEASE ACT IS MANIFESTLY EXCESSIVE, AND THE CONVICTION FOR POSSESSION OF A FIREARM FOR AN UNLAWFUL PURPOSE MUST MERGE INTO THE MURDER COUNT.

II.

We first address Enix's contention that the trial court erred by admitting Washington's statements to police as dying declarations. Enix argues that Washington's statements were inadmissible hearsay that violated his right to confrontation. We conclude that Washington's identification of Enix and Cooper as the shooters qualified as dying declarations admissible under N.J.R.E. 804(b)(2) and an exception to the right of confrontation's proscription against the use of testimonial statements in a criminal case.

The trial judge also concluded that admission of Washington's statements did not violate Enix's right to confront his accuser because the sole purpose of eliciting the identification was to meet an "ongoing emergency." Identifying the shooters was imperative to neutralize the threat to the community. Therefore, no confrontation clause violation occurred, and the dying declaration to the hearsay rule applied.

Appellate review of a trial court's evidentiary determinations is limited to examining the decision for abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). In doing so, the reviewing court may not "create anew the record on which the trial court's admissibility determination was based." Ibid. Generally, evidentiary determinations are given considerable latitude and will not be disturbed unless the decision "was so wide of the mark that a manifest denial of justice resulted." State v. Kuropchak, 221 N.J. 368, 385-86 (2015) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

***4** Generally, hearsay statements are inadmissible as evidence. N.J.R.E. 802. Certain exceptions to the hearsay rule apply, however, if a declarant is unavailable. N.J.R.E. 804. One such exception is an unavailable declarant's statement made "under belief of imminent death"—commonly referred to as a "dying declaration." N.J.R.E. 804(b)(2). Under this exception, "a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence

of declarant's impending death." Ibid. "Despair of recovery may indeed be gathered from the circumstances if the facts support the inference." State v. Prall, 231 N.J. 567, 585 (2018) (quoting Shepard v. United States, 290 U.S. 96, 100 (1933)).

In assessing admission, courts look to:

> all the attendant circumstances ... including [1] the weapon which wounded him, [2] the nature and extent of his injuries, [3] his physical condition, [4] his conduct, and [5] what was said to and by him. Whether the attendant facts and circumstances of the case warrant the admission of a statement as a dying declaration is in the first instance for the court, but, when admitted, the declarant's state of mind and the credibility, interpretation and weight to be given his statement are for the jury under proper instructions.
>
> [State v. Hegel, 113 N.J. Super. 193, 201 (App. Div. 1971) (citation omitted) (quoting Commonwealth v. Knable, 85 A.2d 114, 117 (Pa. 1952)).]

Here, Washington clearly knew he was seriously injured, in critical condition, and believed in the imminence of his death, as evidenced by his statement that he did not want to die. He had been shot sixteen times and was bleeding profusely. The gravity of his wounds was obvious. No one had to tell him that that he was seriously wounded or facing death at the time the statements were made. Washington's vital signs quickly deteriorated, and he lapsed into and out of consciousness while inside the ambulance. He died shortly thereafter. By any measure, his death was imminent when he spoke to police.

When police asked Washington who shot him shortly after the shooting, he voluntarily stated without hesitation that Enix and Cooper had shot him. There is no indication that his statements were not made in good faith. Enix has not asserted that Washington had a reason to fabricate the identifications. Given these circumstances, Washington's statements clearly qualified as dying declarations admissible under N.J.R.E. 804(b)(2).

We next consider whether the admission of Washington's statements violated the Confrontation Clause. The right of a criminal defendant to confront witnesses against him is well grounded in Constitutional and New Jersey Law. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. "The Confrontation Clause generally prohibits the use of out-of-court testimonial statements by an absent witness who has not been subject to cross-examination." State v. Roach, 219 N.J. 58, 85 (2014) (Albin, J. dissenting) (citing Crawford v. Washington, 541 U.S. 36, 51 (2004)). The Confrontation Clause serves " 'to ensure the reliability of the evidence [admitted] against a criminal defendant by subjecting it to rigorous testing' in an adversarial proceeding." State v. Miller, 170 N.J. 417, 425 (2002) (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990)).

Critical to this rule, however, is the difference between testimonial and nontestimonial statements. Testimonial statements are those made during an interrogation with the "primary purpose ... to establish or prove past events potentially relevant to later criminal prosecution." Davis v. Washington, 547 U.S. 813, 822 (2006). Conversely, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Ibid. Only testimonial statements trigger a defendant's right to confrontation. Id. at 821.

***5** In a scenario similar to this case, the United States Supreme Court held that a victim's dying declaration to police identifying an assailant was non-testimonial because it was obtained to enable police to meet an ongoing emergency. Michigan v. Bryant, 562 U.S. 344, 378 (2011). Here, at the time Washington identified the shooters, the police were in the midst of an ongoing emergency—the shooters were still at large and believed to be armed and dangerous. The police were obliged to address the ongoing emergency and question Washington, who had been shot multiple times but was still conscious and alert, to learn if he could identify his assailants. Consequently, Washington's statements were nontestimonial. Therefore, his identification of defendants did not implicate defendants' rights to confrontation. Ibid.; Davis, 547 U.S. at 821.

In addition, "the right to confrontation has been interpreted to allow hearsay evidence to be admitted against a defendant under certain circumstances." Miller, 170 N.J. at 426. A defendant's right to confrontation is not violated if evidence is admitted where a " ''firmly rooted' hearsay exception or 'particularized guarantees of trustworthiness' assure its reliability." Ibid. (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). Washington's statements were properly admitted as dying declarations.

Pursuant to the ongoing emergency doctrine and the longstanding hearsay exception for dying declarations, which remains viable even post-Crawford, Enix's right of

confrontation was not violated. The court did not abuse its discretion in admitting Washington's statements

III.

Enix further argues that Vega's narration of the surveillance video constituted improper lay opinion testimony that invaded the province of the jury. The State responds that Vega provided the jury with observations and context based on his personal knowledge that could not have been drawn absent the narration.

Importantly, Enix did not object to Vega's narration at trial. Accordingly, we review for plain error. Under that standard, an error "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 ...." R. 2:10-2. The defendant who failed to raise an objection at trial "bears the burden of establishing that the trial court's actions constituted plain error[.]" State v. Santamaria, 236 N.J. 390, 404-05 (2019) (quoting State v. Ross, 229 N.J. 389, 407 (2017)). To carry this burden, the defendant must establish "a reasonable doubt [that] ... the jury came to a result that it otherwise might not have reached" absent the alleged error. State v. R.K., 220 N.J. 444, 456 (2015).

A lay witness may testify in the form of an opinion or inference only "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." N.J.R.E. 701. "Perception" testimony is limited to the direct observations and may not rest on otherwise inadmissible hearsay. State v. McLean, 205 N.J. 438, 457 (2011).

In State v. Singh, a detective was called as a lay witness to describe what was occurring on surveillance footage. 245 N.J. 1, 7-10 (2021). During his testimony, the detective "referred to 'the defendant' only twice in narrating the surveillance footage. All other references to defendant were as 'the suspect,' 'a male,' 'a person,' or 'the individual.' " Id. at 18. Defense counsel did not object to the detective's references to "defendant" at trial. Ibid. Although the Court found that the references to the individual in the surveillance footage as "defendant" were error, it concluded "that they were not so prejudicial as to meet the plain error standard[,]" because "they were not 'clearly capable of producing an unjust result.' " Ibid. (quoting R. 2:10-2).

***6** Also at issue in Singh was the police officer's testimony that the shoes the man in the footage was wearing appeared to be similar to the shoes the defendant was wearing when he was arrested the night of the robbery. Id. at 24-26. Over defense counsel's objection, the detective was permitted to describe the shoes seen on the video and say that they were similar to what defendant was wearing when he was arrested. Id. at 25.

Holding that N.J.R.E. 701 "does not require the lay witness to offer something that the jury does not possess," the Court concluded that the detective's observation of the similarities between the shoes on the footage and what defendant was wearing when arrested was based on his firsthand perception and was helpful to the jury. Id. at 19-20. The Court noted:

> Simply because the jury may have been able to evaluate whether the sneakers were similar to those in the video does not mean that Detective Quesada's testimony was unhelpful." Nor does it mean that Detective Quesada's testimony usurped the jury's role in comparing the sneakers. Indeed, the jury was free to discredit Detective Quesada's testimony and find the sneakers in evidence were dissimilar to those on the surveillance video.
>
> [Id. at 20.]

The Court found that unlike in McLean, the detective made no

> ultimate determination. He never stated that the sneakers seen in the surveillance footage were the sneakers he saw [the] defendant wearing that night. He testified to their similarity. Under N.J.R.E. 701, such testimony was proper because it was rationally based on his perceptions and assisted the jury in determining the robber's identity.
>
> [Ibid.]

The Court found no abuse of discretion in the admission of the detective's testimony about the sneakers. Ibid.

Applying those principles to this matter, we find that Vega's narration of the surveillance footage was proper lay opinion testimony. Vega did not refer to the men on the surveillance video as "defendant." He refers to them as "males," "suspects," and "actors." In addition, Vega's testimony assisted the jury by providing context to wat was shown on the surveillance footage.

The testimony at issue is as follows:

> Q: All right. Sergeant Vega, what did we just observe on that video based on the video you recovered?

A: We observed two males shooting into the body of a male that was standing in front of 62 Claremont.

Q: And how were you able to see that that was a shooting?

A: From just observing the video. I could see the gun flash, ... otherwise known as the muzzle flash, and --

Q: And the two --

A: -- from my training and experience.

Q: And the two males that you observed, where did they run?

A: They ran from that location, across the intersection of Claremont, and then south on Clerk.

Q: The video at 78 Clerk Street, what was significant regarding that video versus the video that you observed here?

A: It's significant, because 78 Clerk is in proximity to the incident location ... where the shooting just occurred, and it is in the path of where the two actors ran.

Q: And that's why you obtained this video and that video; is that correct?

A: Correct, sir.

Vega's testimony contextualized the location shown in the video by providing two addresses and describing their location in relation to each other. This information was helpful to the jury in determining the probative value to ascribe to the video and was based on his own knowledge of the crime scene and surrounding area. Notably, Vega did not indicate a belief that either defendant was shown on the footage, nor did he provide any other identifying details that might sway the jury. It was precisely the type of "ordinary fact-based recitation" that McLean held was permissible. 205 N.J. at 460. Further, the testimony is within the bounds set by Singh. Vega did not make any ultimate determinations, but rather provided context which the jury could not glean solely from the video. For these reasons, we discern no plain error.

IV.

***7** We next address defendant's argument that the trial court erred by failing to conduct a post-verdict hearing regarding the complaints of alleged jury misconduct made by the juror. Enix contends the court could not determine whether the good cause standard of Rule 1:16-1 had been met without hearing the details of the juror's allegations. We disagree.

Defense counsel did not request a hearing at which the juror could be questioned. We therefore review for plain error.

This court has long recognized the strong public interest underpinning the need to protect the confidentiality of the jury's deliberative process. State v. Young, 181 N.J. Super. 463, 468 (App. Div. 1981). "A jury deliberates in secrecy to encourage each juror to state his thoughts, good and bad, so that they may be talked out." State v. LaFera, 42 N.J. 97, 106 (1964). Protecting the jury's deliberative process during and after the trial is an indispensable part of creating an environment that allows individual jurors to express their views of the evidence freely and without fear of retribution. Ibid.

Pursuant to Rule 1:16-1, "[e]xcept by leave of court granted on good cause shown, no attorney or party shall directly, or through any investigator or other person acting for the attorney, interview, examine, or question any grand or petit juror with respect to any matter relating to the case." "Calling back jurors for interrogation after they have been discharged is an extraordinary procedure which should be invoked only upon a strong showing that a litigant may have been harmed by jury misconduct." State v. Athorn, 46 N.J. 247, 250 (1966). "That exacting standard balances the litigant's interest in ensuring an impartial jury with the importance of keeping deliberations secret." Davis v. Husain, 220 N.J. 270, 279 (2014). Otherwise, "an open invitation would be extended to any disgruntled juror who might choose to destroy a verdict to which he previously assented." Athorn, 46 N.J. at 250.

"Similarly, a judge's ability to inquire of jurors after trial is limited except where Rule 1:16-1 provides a good-cause basis to do so ...." Id. at 280. "Inquiring into any juror's thought process is a significant intrusion into the deliberative process." Ibid.

Good cause is shown when a juror is given "information ... extraneous to the issues that the jury is deciding, and that would be sufficiently prejudicial to warrant a new trial if such information were considered by the jury." Id. at 286 (citing State v. Kociolek, 20 N.J. 92, 100 (1955)). Good cause may also be shown by a manifestation of "racial or religious bigotry" in a jury's deliberations. State v. Koedatich,

112 N.J. 225, 288 (1988) (citing State v. Levitt, 36 N.J. 266 (1961)). Good cause triggering post-verdict voir dire occurs in "exceedingly few" instances. State v. LaFera, 42 N.J. 97, 107 (1964).

Here, the juror reached out to Enix's trial counsel, and then the trial judge's chambers, to express his "dissatisfaction with the verdict that was rendered." While he left a message with the judge's secretary, the juror managed to speak to Enix's attorney for about thirty seconds. Before Enix's attorney realized he was speaking to a juror, the juror "basically went through a dissertation of what took place in the jury room." While the juror was able to indicate in that short call that "one juror was pregnant, and another juror had poison ivy," there was no indication that anything improper occurred during deliberations. In fact, when asked by Enix's counsel why he voted guilty when polled, the juror said "well, that's what I felt at the time."

***8** Critically, the juror provided no indication whatsoever that outside information was considered by the jurors, that racial prejudice factored into the jury's deliberations, or that any other impropriety occurred. He provided no specifics of any juror misconduct and did not allege the jury was infected by racial animus. Moreover, while the juror was the only African-American on a jury where two African-Americans were tried for killing another African-American, the juror agreed to convict Enix. Speculating that racial prejudice infected the jury is simply too attenuated a supposition to meet the good cause standard under Rule 1:16-1. Our case law requires more than an unfounded suspicion, or one based on more than a tangential inference. While racial animus can play a part in jury deliberations, in this instance there is no indication that it did. The mere unsubstantiated possibility of racial animus does not trigger a post-verdict juror voir dire under Rule 1:16-1. Accordingly, we discern no error, let alone plain error. The trial judge correctly concluded that the statements made by the juror did not meet this standard.[2]

V.

Lastly, we address Enix's sentencing arguments. Enix first contends that his fifty-five-year NERA term is manifestly excessive. We are unpersuaded.

We are guided by well-established legal principles. Appellate courts review sentencing determinations deferentially. State v. Fuentes, 217 N.J. 57, 70 (2014). The reviewing court must not substitute its judgment for that of the sentencing court. Ibid. (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). Instead, we will affirm a sentence unless:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.
>
> [Id. at 70 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

To facilitate appellate review, the sentencing court must "state reasons for imposing such sentence including ... the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence[.]" R. 3:21-4(h); Fuentes, 217 N.J. at 73; see also N.J.S.A. 2C:43-2(e) (requiring the sentencing court to state the "factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence.").

Enix argues that the application of aggravating factor one constituted impermissible double counting. Aggravating factor one requires consideration of "[t]he nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner[.]" N.J.S.A. 2C:44-1(a)(1). The court characterized Washington's killing as "a callous, depraved, heinous murder" noting that when Washington "stumbled and fell," Enix did not stop, he "kept firing" ... "to "make sure" Washington died. Enix asserts that this finding amounted to double counting since Washington's death was an element of the murder.

"[A]ggravating factor one must be premised upon factors independent of the elements of the crime and firmly grounded in the record." Fuentes, 217 N.J. at 63. See also O'Donnell, 117 N.J. at 217-18 (factor one applied in a manslaughter case because the defendant intentionally inflicted pain and suffering in addition to causing death); State v. Locane, 454 N.J. Super. 98, 123-24 (App. Div. 2018) (the trial court erred in failing to find factor one in relation to a vehicular homicide where the defendant's reckless driving went beyond that required to prove the crime); State v. Soto, 340 N.J. Super. 47, 71-72 (App. Div. 2001) (factor one applied in an aggravated manslaughter and felony murder case were the defendant brutally and viciously attacked the victim); State v. Mara, 253 N.J. Super. 204, 214 (App. Div. 1992) (in an aggravated

assault case, factor one applied based on the victim's serious and excessive injuries).

*9 Enix further argues that the court's determination that the murder was heinous and depraved is not supported by the facts. Crimes omitted with extreme brutality are considered heinous and depraved. Fuentes, 217 N.J. at 75. The homicide must involve more than a fatal shooting. Soto, 340 N.J. Super. at 71-72.

Here, Washington was shot sixteen times while he was still alive and conscious. Washington was still conscious when police arrived and when placed in the ambulance. He continued to experience pain until he lapsed into unconsciousness in the ambulance as his vital signs plummeted enroute to the hospital. We discern no abuse of discretion in considering the shooting sequence to be heinous and depraved. This intentional infliction of pain amply supported finding aggravating factor one.

Enix also contends that the trial court did not adequately consider the real time consequences of the fifty-five-year NERA term, which will require Enix to serve almost forty-seven years before becoming eligible for parole. We are unpersuaded.

The sentencing range for knowing or purposeful murder is thirty years to life imprisonment with a minimum thirty-year period of parole ineligibility. N.J.S.A. 2C:11-3(b)(1). Because NERA applies to murder, N.J.S.A. 2C:43-7.2(d)(1), Enix will be approximately seventy years old before becoming eligible for parole.

This was not Enix's first involvement with the criminal justice system. He was adjudicated delinquent as a juvenile on three occasions, including aggravated assault, N.J.S.A. 2C:12-1(b)(5), and was incarcerated for nine months. As an adult, he had four other criminal convictions, including a second-degree weapons offense. The court found aggravating factors one, three, six, and nine and no mitigating factors. The record fully supports those findings. On appeal, Enix only attacks aggravating factor one and does not contend that any mitigating factors applied. The record supports the finding that the aggravating factors substantially outweighed the non-existent mitigating factors.

"Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors." State v. Case, 220 N.J. 49, 64 (citing Fuentes, 217 N.J. at 72). "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." Id. at 64-65 (alteration in original) (quoting State v. Natale, 184 N.J. 458, 488 (2005)). Here, the aggravating factors substantially outweighed the non-existent mitigating factors. Even so, Enix was not sentenced to the maximum. Moreover, he was sentenced to concurrent terms and his sentence runs concurrently to the sentence imposed on another indictment. We do not find the sentence imposed on the murder count to be manifestly excessive or unduly punitive. Nor does it shock our judicial conscience.

That said, the parties acknowledge that Enix's conviction for possession of a weapon for an unlawful purpose must be merged into the murder count. We agree. The State proffered no unlawful purpose for Enix's possession of the handgun other than to murder Washington. Accordingly, it should have been merged into the murder count. See State v. Tate, 216 N.J. 300, 307 (2013) (merging a conviction of possession of a weapon for an unlawful purpose with a conviction of aggravated manslaughter). The court may not impose sentence on a merged offense. State v. Trotman, 366 N.J. Super. 226, 237 (App. Div. 2004). We reverse Enix's sentence on count four and remand for merger of that count into count two.

*10 In turn, the State argues that the court erred by merging Enix's conviction for possession of a weapon without a permit conviction into count four. We agree. "Because the gravamen of unlawful possession of a handgun is possessing it without a permit, it does not merge with a conviction for a substantive offense committed with the weapon." State v. Deluca, 325 N.J. Super. 376, 392 (App. Div. 1999). Count six should not have been merged into count four. See State v. Bowser, 297 N.J. Super. 588, 592 n.1 (App. Div. 1997) ("A conviction for unlawful possession of a handgun should not merge with robbery while armed with the same gun."). This merger error renders the sentence illegal. State v. Romero, 191 N.J. 59, 80 (2007). Although the State did not file a cross-appeal, "a reviewing court is not free to ignore an illegal sentence[,]" State v. Moore, 377 N.J. Super. 445, 450 (App. Div. 2005) (citing State v. Flores, 228 N.J. Super. 586, 594 (App. Div. 1988)), and should correct it, State v. Tavares, 286 N.J. Super. 610, 617 (App. Div. 1996). On remand, the trial court shall resentence Enix on count six.

In sum, we affirm the jury's verdict and Enix's sentence for murder, remand for resentencing on count six, reverse the sentence on count four, and remand for merger of count four into count two.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 829804

Footnotes

1 We affirmed Cooper's conviction on counts three and five but reversed the merger of the unlawful possession of a handgun into the possession of a handgun for an unlawful purpose and remanded for resentencing. State v. Cooper, No. A-2695-18 (App. Div. Apr. 7, 2021). Cooper did not challenge the admission of the dying declarations in his appeal. Id. (slip op. at 8).

2 We reached the same conclusion in Cooper, (slip op. at 16).

2022 WL 983661
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.

Rami A. AMER, Defendant-Appellant.

DOCKET NO. A-3047-18

Argued January 18, 2022

Decided March 31, 2022

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 18-06-0460.

Attorneys and Law Firms

Shane D. Avidan, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alison Perrone, Assistant Deputy Public Defender, of counsel; Shane D. Avidan and Harris Fischman, Designated Counsel, admitted pursuant to Rule 1:21-3(c), on the briefs).

Dana R. Anton, Special Deputy Attorney General/Acting Sr. Assistant Prosecutor, argued the cause for respondent (Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney; Dana R. Anton, on the brief).

Before Judges Messano, Rose and Enright.

Opinion

The opinion of the court was delivered by

ENRIGHT, J.A.D.

***1** Defendant Rami A. Amer appeals from his February 11, 2019 convictions stemming from a series of "smash and grab" burglaries. We affirm defendant's convictions and remand for resentencing pursuant to State v. Torres, 246 N.J. 246 (2021).

I.

Background

During the period between November 12, and November 21, 2016, multiple burglaries occurred in municipalities throughout Gloucester County. The modus operandi was essentially the same. The suspect smashed the glass of a storefront, entered the business, and removed cash found on the premises. Some of the burglaries were captured on surveillance footage while in progress. Although the quality of the footage neither permitted identification of the suspect nor definitive identification of the light blue minivan the suspect used when committing the offenses, some footage captured images of the hooded, masked suspect wearing gloves and using a hammer to smash the glass, and displayed a damaged hubcap on the suspect's vehicle.

On November 19 at approximately 2:30 a.m., defendant was stopped by an officer from the Harrison Township Police Department. Prior to the stop, the officer saw one of the vehicle's headlights was out, observed defendant driving partially over the white line, and wanted to "double check[ ] on why [defendant] was in the area" that late at night. Defendant was driving a light blue Chrysler Town and Country minivan with Pennsylvania plates and had turned into a local shopping center. He received a ticket for the broken headlight and was permitted to leave without further incident.

The next day, officers from the same police department were asked to investigate burglaries committed at a local pet supply store and a spa. The businesses were situated in the same plaza where defendant was pulled over for the motor vehicle stop. Color surveillance footage from the pet supply store showed a light blue minivan with a broken hubcap drive past the store at around 7:10 a.m., and a masked and hooded suspect wearing gloves shatter the storefront entrance with a hammer.

The police investigated whether there were any light blue minivans in their system that matched the one used during the burglaries. Their search revealed defendant's motor vehicle stop from November 19 and that his minivan was registered to Laila Amer, defendant's wife. Accordingly, the police drove past defendant's nearby residence, and found a light blue minivan parked in his driveway. The minivan was missing part of a hubcap.

On November 21, 2016, officers in Harrison Township responded to a complaint of another burglary, this time at a

local bagel shop. The owner of the shop reported he received an alert shortly after 3:00 a.m. and when he went to the scene, he saw the glass front door was smashed. Surveillance footage obtained from a nearby bank captured the image of a light blue Chrysler minivan at the scene as the burglary was in progress.

That same morning, officers from the Mantua Township Police Department received a report of an erratic driver on Bridgeton Pike, the same thoroughfare where many of the burglaries had occurred. The description of the erratic driver's car purportedly matched the description of the minivan seen on surveillance video from recent burglaries. The police found the driver, later identified as defendant, in a parking lot on Bridgeton Pike. He was alone and sitting in the driver's seat; the rear passenger side hubcap on his car was broken. Defendant was removed from the vehicle and placed in a police car.

***2** Although officers from Mantua Township stopped defendant, Detective Adam McEvoy, from the Harrison Township Police Department, joined them at the scene after learning the suspect's car might match the description of the minivan associated with burglaries in the area. Detective McEvoy spoke to defendant while defendant was seated in the police car and given his Miranda[1] rights. The detective testified at trial that defendant asked him to retrieve his wallet and phone from inside his car, and Detective McEvoy complied with the request. When he went to pick up defendant's items, the detective saw a red hammer inside the minivan, purportedly matching the description of the hammer used by the suspected burglar as seen on surveillance footage. He also saw a large number of loose coins inside the minivan. The detective secured the hammer and loose change. Once defendant was removed from the minivan, the police also discovered shards of glass on the soles of defendant's work boots.

Defendant was transported to the Harrison Township Police Department for a custodial interview and when he arrived, officers observed a cut on his right arm. Defendant agreed to waive his Miranda rights and speak to members of various police departments who inquired about burglaries committed in their municipalities. The interview lasted several hours, during which defendant was afforded a break. He did not confess to any of the burglaries and finally advised he was unwilling to answer more questions.

While in custody, defendant executed a consent to search form for the minivan. Additionally, his wife signed another form authorizing the search and was present for the search. During the search, the police found black gloves matching those seen on surveillance video of some of the burglaries, as well as black clothing, a flashlight, and shards of glass.

Several months later, separate indictments were issued against defendant for his alleged role in the "smash and grab" burglaries, as well as related offenses; in June 2018, he was charged under a superseding indictment with seventeen counts of third-degree burglary, N.J.S.A. 2C:18-2(a)(1), five counts of third-degree theft, N.J.S.A. 2C:20-3(a), two counts of fourth-degree theft, N.J.S.A. 2C:20-3(a), two counts of fourth-degree attempted theft, N.J.S.A. 2C:5-1(a)(1), and 2C:20-3(a), and eleven counts of fourth-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1), for a total of thirty-seven counts.

II.

Pretrial Motions and the Commencement of Trial

While defendant's case in New Jersey was pending, he began serving a state prison sentence in Pennsylvania for similar offenses. He requested disposition of his charges in New Jersey under the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15; the State of New Jersey received his request by February 23, 2018.

In May 2018, the trial judge in the present matter issued a scheduling order, directing any suppression motions related to the November 2016 warrantless search be filed within two days. The judge further ordered any other motions and supporting briefs be filed no later than June 1. The defense filed two suppression motions on May 21, but its corresponding letter briefs were submitted after the deadline fixed by the court. One such brief was filed electronically on the day of the suppression hearing and referenced a search warrant and a canine sniff, neither of which were implicated in this matter. In any event, defendant's filings confirmed he sought suppression of the items seized from his person and his minivan, as well as statements made during his custodial interview.

On June 29, 2018, the judge proceeded with the suppression hearing. The State called one witness — the Woolwich Township police officer who conducted the search of defendant's minivan in the presence of defendant's wife and was present for a portion of defendant's custodial interview.

The officer confirmed that after defendant's arrest, he was given his Miranda rights, was "very cooperative," and agreed to the search of the minivan. The officer also stated defendant's wife consented to the search.

***3** In his closing argument, defense counsel noted that he presented the court with "twin motions of ... Miranda and consent to search. And ... they're intertwined[.]" Defendant's attorney did not dispute defendant was Mirandized at the commencement of his custodial interview, but contended defendant was "tired" during his interview. The judge responded to counsel's remarks, stating:

> This was a motion that you filed to challenge the search ... that comes from the consent forms plus [defendant's] Miranda [rights] with regard to the statement. It's all right there apparently on the video but no one ever gave it to the [c]ourt. Your argument is that ... he is so tired[,] that he is so sleepy, so groggy, so fatigued that his will is overborne and yet you don't give me the video to assess that.

Defense counsel continued his argument, stating:

> [W]ith regard to the consent to search[,] we ... have ... [defendant] at some point as he's getting more and more tired and ... he's signing this consent to search and he waives his right to be present at execution [of the search], of course he can withdraw his consent at any time even though he is not present.
>
> We also have [defendant's wife]. And we hear ... she is eager to get her car back ... and so eager to get her car back she signs the consent to search and dutifully waits while they search ... the vehicle.
>
> ....
>
> She doesn't do it knowing the circumstances of the situation and we don't know whether [defendant's wife] would have consented to that search ... if she had been told something about what her husband was facing here ....
>
> And so, ... defense also asserts that that consent to search is invalid and asks that the glove and all the photographs that were taken including of loose change and all that ... be suppressed as well.

At no time during the hearing did defense counsel contest the State's recitation of facts in its June 1, 2018 brief that Detective McEvoy seized items in plain view when defendant asked him to retrieve items from the minivan.

At the conclusion of the hearing, the judge rendered a decision from the bench, finding,

> with regard to the search[,] there's no question that it was a valid search. The consent came from both the defendant as well as the wife. They signed the consent forms.... [T]here's nothing to suggest that the defendant was ... in such a condition that he didn't ... understand the consent form, that he ... was unable to sign the form [because] he was so fatigued or otherwise. He waived his right to be present.
>
> The wife signed the consent form. She did not waive her right to be present. She was present during the search. There's nothing to suggest that the consent here was invalid in any way. So the search of the van is valid based upon the consent ....
>
> ... I have nothing before me to suggest that the defendant's will was overborne in any way with regard to the statement. The witness testified that the defendant was very cooperative. He did appear tired, did appear fatigued, but without the benefit of reviewing the video to determine ... whether or not he is completely incoherent because of fatigue or otherwise ... there's nothing present before me to suggest that the defendant was of such a condition that he was incapacitated or incapable [in] any way to make a valid waiver of his rights.
>
> ....
>
> So ... his waiver of his Miranda rights seems to be knowing and voluntarily made .... So ... the motion to suppress the statement is denied. The motion to suppress the search is denied.

***4** On July 13, 2018, the judge issued a written decision, supplementing his reasons for denying the suppression motions. Preliminarily, he commented in a footnote that "[d]efense counsel filed a notice of motion for both motions to suppress. However, defense counsel has only submitted a written brief in support of the motion to suppress [d]efendant's statement to police. The State has submitted briefs in opposition to both motions."[2]

The judge found that when defendant was arrested and removed from his vehicle, he asked Detective McEvoy to enter the minivan to retrieve defendant's wallet and cell phone. Further, the judge noted that when the detective accommodated defendant's request, he

inadvertently discovered a red hammer and large amounts of coins "in plain view inside the vehicle." Additionally, the judge found Detective McEvoy recognized the red hammer in defendant's car was similar to the hammer seen on surveillance videos of the "smash and grab" burglaries recently committed; the detective was aware the hammer was found in a blue minivan with a rear hubcap missing, just like the van seen on surveillance footage, and the amount of coins Detective McEvoy spotted was consistent with the money stolen from the cash drawers at the businesses targeted by the suspect. After highlighting the requirements for a plain view exception to the warrant requirement, under State v. Mann, 203 N.J. 328, 341 (2010), the judge found the detective properly seized the hammer and coins under that exception.

Additionally, citing State v. Johnson, 68 N.J. 349, 353-54 (1975), the judge confirmed the search of defendant's vehicle was valid under the "recognized exception to the warrant requirement" of consent. The judge found because "[d]efendant and his wife completed consent to search forms prior to the search of the vehicle[,]" defendant's wife "was present for the entire search[,]" and "consent was voluntarily given[,]" the search was lawful.

Further, the judge found "the State proved beyond a reasonable doubt that [d]efendant's decision to waive his Miranda rights was knowing and intelligent." The judge specifically rejected defendant's argument that his waiver was "not knowing and intelligent because [defendant] was sleep deprived at the time he waived his rights." Instead, the judge found "[d]efendant's conduct during the interview demonstrated ... the alleged lack of sleep did not affect his understanding of his Miranda rights," because he was "coherent during the course of the interview and able to make informed, deliberate decisions," including the decision to "assert[ ] his right to terminate the interrogation, which was honored." Citing State v. Nyhammer, 197 N.J. 383, 401 (2009), the judge concluded under the "totality of the circumstances[,]" including defendant's age and prior involvement with law enforcement, as well as the fact defendant "never confessed to any of the alleged crimes[,]" defendant's will was not "overborne."

Four days after he issued his supplemental suppression opinion, the judge executed a Trial Management Order, directing the parties to appear for a pretrial conference on July 23 and notifying counsel he "anticipate[d] selecting a jury" that morning "and opening thereafter." The order also stated "[c]ounsel must have witnesses available so as to utilize the entire trial day."

***5** On July 23, the judge conferenced the matter with counsel, and jury selection was rescheduled to the next day. The judge noted jury selection would continue the following week, but the court would need to "take a break and then pick back up in September." Neither defense counsel nor the State objected to the timeframes outlined by the court. Also on July 23, defendant filed a motion in limine, asking the judge to bar the State from eliciting certain testimony during the trial.

Jury selection began on July 24, 2018. Later that day, the judge informed counsel that jury selection would continue the next day and the parties would return to court again on July 31. Because he anticipated a break in the proceedings in August, due to his calendar obligations and vacation schedule, and defense counsel's vacation plans in early September, the judge also advised counsel they should expect to resume the case on September 13. Again, neither the State nor defense counsel objected to the dates provided by the court.

But on July 25, as jury selection continued, defense counsel informed the court that he and defendant discussed "the IAD" and defendant had expressed concern that "in August, we don't have trial." Counsel added:

> And I did go over it, you know, I understand [a] jury trial must commence within 180 days of the defendant's demand.
>
> ....
>
> ... I just wanted to make a record.... I just note that I have availability for the month of August.... I have the days where this could be, I submit, accomplished in time.
>
> ... And so, we're talking about delay – I looked at it this way, Your Honor is commencing this within 180 days, and so, that part is met. And then I thought ... well what if a [c]ourt commenced the trial and then put it off, like six months and then didn't continue the trial ... that would be violative and undue delay, unnecessary delay.
>
> [(Emphasis added).]

The assistant prosecutor countered:

> I think the IAD is very clear that trial must commence before the IAD date. We are commencing the trial, we're picking a jury as we're currently sitting. We still have

another day in this month to continue .... The defense filed two motions, the dates between that motion being heard and the previous hearing, those should be excluded from the 180 days, which would put us well into September.

Therefore, even if we didn't ... commence until September, we would be commencing at the proper time.

The judge responded:

[W]e commence[d] trial within 180 days and this is not the situation that ... the defense ... suggested ... as a possibility for a six-month delay. The [c]ourt is commencing, getting it started. It is unavailable in August. It has a specific assignment in August that has to be achieved. The assignment is criminal justice reform where it does not permit trial days within that month.

I do have vacation in that month. We realized yesterday that the defense has a vacation in early September.... The case cannot be tried when there's a dispositive motion that's pending. It has to be resolved. I think we did resolve it as expeditiously as we could, so I will look at that.

But in any event, we commenced the trial within the statutory framework of the IAD ....

So, we have begun the trial. There is going to be a disruption. I'll look into the question of tolling and that may provide the dates in question.

....

Certain motions may call upon ... that [IAD] clock to be tolled, ... because if they're dispositive motions, the case can't be tried until they're briefed and heard. And I think both counsel have a right to be thorough in their review of the issue and brief it so the [c]ourt is well-informed in the argument ... [a]nd we, in fact, did that.

***6** So, I'll consider, I'll look at the issue of exclusion, but within the confines of the IAD, we've started the case, we commenced it with 180 days, and I don't see that there's an IAD violation.

Later that day, the judge asked if either attorney had any issues that needed to be addressed. The assistant prosecutor asked, "should the State be ready to open, and more importantly, have witnesses for next Tuesday [July 31], or are we just going to finish jury selection?" The judge stated:

If it were me trying the case, I would say let's get the jury picked and then we'll start openings when we return. You'll have a witness and a half, two witnesses, ... and you'll be asking the jury to remember what they said ... over ... a month or so, so that would be what I'd be asking. But what do you think?

The following exchange then occurred between defense counsel, the judge, and the assistant prosecutor:

DEFENSE COUNSEL: I'm concerned about time, but what happens is there's no way that the trial finishes on Tuesday –

JUDGE: No.

DEFENSE COUNSEL: – at this point, I do concede. [D]o that. I just think – I think what that will also help is prevent, hopefully, a lot of questions about the testimony that came in ... on Tuesday, you know?

ASSISTANT PROSECUTOR: And then –

DEFENSE COUNSEL: And that would extend proceedings.

JUDGE: Read backs and all that kind of stuff.

[(Emphasis added).]

In response to a follow-up question by the assistant prosecutor, the judge stated it was not his intention to swear in the jury once the selection process concluded because jurors could be lost over the upcoming break. In fact, he stated, "in that time period, who knows? We could have a problem with one or more [jurors]."

The following day, the judge issued a six-page opinion, confirming he understood a "prisoner must 'be brought to trial within 180 days' " of the State receiving a prisoner's request for disposition under the IAD. The judge determined "New Jersey authorities received [d]efendant's request to address his untried matter(s) in New Jersey" on February 23, 2018 and the "[t]rial commenced on July 24, 2018 with jury selection," well within the 180-day timeframe under the IAD.

Noting defendant was transported to New Jersey in March 2018 and indicted by way of a superseding indictment in June 2018, the judge also found that at one point, defendant was "unable to stand trial due to the filing and pendency

of [his] pretrial motions," thereby tolling the 180-day time period for disposition of his case. Further, the judge stated that a "delay attributable to disposition of motions filed by ... defendant" constituted "good cause" for tolling under the IAD. He calculated that the 180-day period within which defendant was to be tried was tolled from May 21, when defendant's suppression motions were filed, to July 13, 2018, when they were resolved.

The parties returned to court on July 31, at which time the judge addressed defendant's pending in limine motion. The judge granted the motion, in part, and barred the State from eliciting testimony from police officers that the hammer, clothing, and boots recovered during defendant's arrest were the same items seen in surveillance footage from the burglaries. Further, the judge granted defendant's request to prohibit officers from testifying about drugs and paraphernalia found in the minivan, as well as defendant's suspected drug use.

***7** The judge also barred officers from testifying about how defendant may have received a cut on his arm before he was arrested, and, "[a]bsent expert testimony," the State's witnesses were not permitted to testify that shards of glass found in the minivan or on defendant's boot matched the broken glass found at the businesses burglarized. Still, the judge did not preclude the State from arguing at closing that the jury could draw an inference that the hammer, coins, and glass shards found in the minivan, along with the cut on defendant's arm and glass shards found in his boot, were tied to the burglaries. Moreover, the judge saw no reason to prohibit officers from testifying why, "based upon the commonality of things in different burglaries, [they] were focusing on finding a minivan, finding a hammer, [and] finding a person of [a certain] stature."

In a pro se letter to the judge dated August 28, defendant stated he was "filing a motion to dismiss all charges being held against him ... due to a violation of his rights in regards of the [IAD]." He claimed the 180-day time limit expired "as of August 22, 2018." Nine days later, the judge entered an order, accompanied by a thirteen-page decision, denying defendant's application, noting defendant's "very issue was raised by defense counsel on July 24[ ] orally at the start of jury selection."[3] The judge reiterated many of the findings set forth in his July 26 opinion, and specified that the "180-day clock" was tolled for fifty-four days to account for the filing and resolution of defendant's suppression motions. By the judge's calculations, the "[t]olling of [fifty-four] days ... move[d] the maximum date of August 22nd [to start the trial] to October 14th."[4]

Additionally, the judge expressed that after jury selection started on July 24, "[t]he court was unavailable to try any case in August due to its assigned duties ... and a scheduled vacation." Further, he stated defendant's attorney "was unavailable to try the case until September 13, 2018, due to a scheduled vacation." Given "[o]pening statements [were] scheduled to commence on September 13th[,]" the judge reasoned, "[i]f you consider either July 24th or September 13th as the commencing date of trial, either is within the tolled 180-[d]ay statutory period." Therefore, the judge again found there was "no violation of the [IAD]."

On September 13, prior to opening statements, the judge informed counsel he saw no need for further argument regarding the IAD because no new issues were raised in defendant's pro se letter that had not been previously addressed. Later that day, the judge also declined to revisit his decision on the suppression motions.

After calling its first witness on September 13, the State introduced over one hundred exhibits, including surveillance footage and items seized from defendant's minivan. Also, the State provided photos of the cut found on defendant's right forearm when he was arrested. Further, it produced over one dozen witnesses, including victims of the burglaries, as well as Detective McEvoy, and Harrison Township Police Officer Kevin McGowan. Both members of law enforcement testified about their respective investigations, the surveillance footage they viewed, and the damaged hubcap they found on defendant's vehicle, which was similar to that seen in the footage.

At the close of the State's case, defendant moved for a judgment of acquittal, pursuant to Rule 3:18-1. The motion was denied. Defendant elected not to testify or call any witnesses.

On October 4, 2018, the jury returned its verdict, convicting defendant of: thirteen counts of third-degree burglary; one count of third-degree theft by unlawful taking; five counts of fourth-degree theft by unlawful taking; eight counts of fourth-degree criminal mischief; and one count of fourth-degree attempted theft by unlawful taking. It acquitted defendant of four counts of burglary.[5] Subsequently, defendant was sentenced to four consecutive terms of imprisonment of four years each, i.e., one four-year term for each day he committed

burglaries in November 2016. The judge ordered defendant's sixteen-year aggregate sentence to run consecutively to the sentence defendant was serving in Pennsylvania.

III.

***8** Defendant raises the following contentions for our consideration:

I. The Indictment Should Be Dismissed With Prejudice Because [Defendant] Was Not "Brought to Trial" Within 180 Days, as Required by the Interstate Agreement on Detainers.

A. [Defendant] Was Not "Unable to Stand Trial" While His Pretrial Motions Were Pending.

B. [Defendant] Was Not "Brought to Trial" When Voir Dire Began.

II. The Prosecution Failed to Prove Beyond a Reasonable Doubt that [Defendant] Committed the Burglaries.

A. The Hammer Does Not Link [Defendant] to the Crimes.

B. The Minivan Does Not Link [Defendant] to the Crimes.

C. The Other Evidence Does Not Link [Defendant] to the Crimes.

III. [Defendant] Was Deprived of a Fair Trial by Police Officers' Lay Opinion Testimony Purporting to Identify the Hammer and Minivan in the Surveillance Videos as [Defendant's] Hammer and Minivan.

IV. The Hammer and Coins Should Have Been Suppressed.

V. The Trial Was So Infected With Error That Even If Each Individual Error Does Not Require Reversal, The Aggregate Of The Errors Denied [Defendant] A Fair Trial.

VI. At a Minimum, [Defendant] Should be Resentenced.

A. The Sentencing Court Failed to Consider Special Probation on the Erroneous Ground that [Defendant] Was Not Eligible.

B. The Sentencing Court Failed to Explain Why the Four Consecutive Sentences Should Be of Equal Length, Which Resulted in an Excessive Sentence.

We are persuaded defendant's argument under Point II lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

As to Point IV, we affirm the denial of defendant's suppression motions for the reasons expressed by the trial judge in his oral and written opinions. To the extent defendant quarrels with the judge's determination that certain items were found by Detective McEvoy in plain view, the record reflects defendant failed to timely raise this argument before or during the suppression hearing. Further, even in his untimely June 29 brief, defendant simply asserted "[t]he items [recovered by law enforcement] were not in plain view until police had made [d]efendant exit the vehicle. He should have been allowed to go on his way."

"The mere allegation of a warrantless search ... does not place material issues in dispute ...." State v. Green, 346 N.J. Super. 87, 91 (App. Div. 2001). Rule 3:5-7(b) provides that when a defendant files notice that he or she will seek to suppress evidence seized without a warrant, the State must file a motion, together with a brief and a statement of facts. The defendant then is required to file a brief and counterstatement of facts. R. 3:5-7(b). "It is only when the defendant's counter[-]statement places material facts in dispute that an evidentiary hearing is required." Green, 346 N.J. Super. at 90 (citing State v. Hewins, 166 N.J. Super. 210, 213-15 (Law. Div. 1979), aff'd, 178 N.J. Super. 360 (App. Div. 1981)). Under these circumstances, where defendant submitted no facts contrary to those presented by the State regarding Detective McEvoy's recovery of items in plain view, we decline to conclude it was error for the judge to rule on the suppression motions and make his findings without requiring testimony from Detective McEvoy.

***9** Additionally, because we reject defendant's individual claims of error relative to the judge's handling of the trial, we decline to reverse defendant's convictions under the cumulative error doctrine, as argued in Point V. See State v. Terrell, 452 N.J. Super. 226, 308 (App. Div. 2016). We address defendant's remaining contentions more fully.

A. The IAD

Regarding Point I, defendant renews his argument that he was not brought to trial within the requisite 180-day period under the IAD and therefore, his charges should have been dismissed. We are not convinced.

"As a 'congressionally sanctioned interstate compact,' the interpretation of the IAD 'presents a question of federal law.' " State v. Pero, 370 N.J. Super. 203, 214 (App. Div. 2004) (quoting Cuyler v. Adams, 449 U.S. 433, 442 (1981)). "Questions related to statutory interpretation are legal ones" and therefore, we review those conclusions de novo. State v. S.B., 230 N.J. 62, 67 (2017).

The purpose of the IAD "is 'to encourage the expeditious and orderly disposition of such [outstanding] charges and determinations of the proper status of any and all detainers based on untried indictments, informations or complaints' and to provide 'cooperative procedures' for making such determinations." State v. Perry, 430 N.J. Super. 419, 424-25 (App. Div. 2013) (alteration in original) (quoting 18 U.S.C. app. 2, § 2, art. I; N.J.S.A. 2A:159A-1). The IAD "shall be liberally construed so as to effectuate its purposes." N.J.S.A. 2A:159A-9. Also, "whenever possible, the interpretation of the [IAD] and the [Speedy Trial Act (STA)], 18 U.S.C.S. §§ 3161-74 should not be discordant." United States v. Peterson, 945 F.3d 144, 151 (4th Cir. 2019) cert. denied, 141 U.S. 132 (2020) (quoting United States v. Odom, 674 F.2d 228, 231-32 (4th Cir. 1982)).

Under Article III of the IAD, the prosecutor is required to proceed to trial within 180 days of written notice of the defendant's current place of imprisonment and his or her request for a final disposition. N.J.S.A. 2A:159A-3(a). The 180-day period to bring the prisoner to trial runs from the date the appropriate written notice is actually delivered to the prosecutor. Fex v. Michigan, 507 U.S. 43, 52 (1993); Pero, 370 N.J. Super. at 215. If the defendant is not brought to trial within the applicable period, the indictment is subject to dismissal with prejudice. N.J.S.A. 2A:159A-5(c).

However, the 180-day period is "not absolute." State v. Binn, 196 N.J. Super. 102, 108 (Law Div. 1984), aff'd as modified, 208 N.J. Super. 443, 450 (App. Div. 1986). Under Article III(a) of the IAD, "the court having jurisdiction of the matter may grant any necessary or reasonable continuance" "for good cause shown in open court, [and] the prisoner or his [or her] counsel being present[.]" N.J.S.A. 2A:159A-3(a). The grant of a continuance, on good cause shown, may be made "at any time prior to an actual entry of an order dismissing the indictment pursuant to Article V[.]" State v. Lippolis, 107 N.J. Super. 137, 147 (App. Div. 1969) (Kolovsky, J.A.D., dissenting), rev'd on dissent, 55 N.J. 354 (1970).

Good cause for a continuance under the IAD is analyzed for an abuse of discretion. See State v. Buhl, 269 N.J. Super. 344, 356 (App. Div. 1994). But the IAD does not define the term "good cause." See Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007) (explaining " '[g]ood cause' is an amorphous term ... difficult of precise delineation"). Thus, "the question of whether good cause exists for a continuance must be resolved from a consideration of the totality of circumstances in the particular case, on the background of the considerations which motivated the interstate agreement, as expressed in N.J.S.[A.] 2A:159A-1." State v. Johnson, 188 N.J. Super. 416, 421 (App. Div. 1982) (quoting Lippolis, 107 N.J. Super. at 148-49 (Kolovsky, J.A.D., dissenting)).

***10** Additionally, under Article VI(a), the 180-day period can be "tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." N.J.S.A. 2A:159A-6(a). "To bring this provision of the [IAD] into conformity with the STA, the clear majority of [federal] circuits have read this tolling section 'to include those periods of delays caused by the defendant's own actions[,]' " Peterson, 945 F.3d at 154 (quoting United States v. Ellerbe, 372 F.3d 462, 468 (D.C. Cir. 2004)), including "periods of delay occasioned by ... motions filed on behalf of [a] defendant[,]" id. at 155 (alterations in original) (quoting United States v. Nesbitt, 852 F.2d 1502, 1516 (7th Cir. 1988)).[6] See also New York v. Hill, 528 U.S. 110, 112 (2000) (confirming the filing of "several motions" by defense counsel "tolled the time limits [under the IAD] during their pendency").

Notably, a defendant also will be deemed to have waived rights under the IAD if defense counsel requests or agrees to a trial date beyond the relevant 180-day timeframe. Id. at 114; see also Buhl, 269 N.J. Super. at 357. Such a waiver will bar the defendant from later seeking a dismissal of the indictment on those same grounds. As noted by the Hill Court, a defendant is "deemed bound by the acts of his [or her] lawyer[,]" and "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." 528 U.S. at 115. The Court reasoned that when the trial date is at issue

under the IAD, "only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case." Ibid.

Governed by these principles, we are convinced the judge properly denied defendant's motion to dismiss based on an IAD violation. We reach this result because defendant waived his right to start the trial within 180 days of February 23, 2018, i.e., August 22, 2018, when his attorney conceded during jury selection on July 25, 2018 that the State should not be required to present witnesses to testify on the next scheduled court day of July 31. As discussed, this waiver evolved from a dialogue between the judge and counsel about whether it would be prudent to commence testimony on July 31, given the distinct possibility jurors might not recall such testimony when trial resumed several weeks later. During the colloquy, although defendant's attorney stated he was "concerned about time," he also concluded, "there's no way that the trial finishes on Tuesday [July 31]" so "at this point, I do concede. [D]o that. I just think – I think what that will also help is prevent, hopefully, a lot of questions about the testimony that came in ... on [July 31], you know?" (Emphasis added). This waiver in open court is fatal to defendant's contention the judge erred in rejecting his request for dismissal of the indictment.

***11** Additionally, we are persuaded the judge correctly found the period between the filing of defendant's suppression motions and their resolution several weeks later tolled the time under the IAD for defendant to be brought to trial. Accordingly, we decline to disturb the judge's calculation that defendant's initial end date for being brought to trial, August 22, 2018, was extended by approximately fifty-four days to account for the time it reasonably took to resolve these motions. In short, because: the original IAD deadline was properly tolled and reset to October 14, 2018; defendant's trial commenced and concluded before October 14; the judge opted not to further toll the original deadline to account for defendant's additional motions; and there is no suggestion by defendant that the State engaged in dilatory tactics, we are satisfied the judge correctly concluded the tolling of the IAD deadline resulted in no IAD violation.

Although we need not address this issue further, for the sake of completeness, we note the judge also found there was "good cause" to extend the statutory 180-day period. As discussed, a court may grant a continuance under the IAD if "necessary or reasonable," "for good cause." Considering the judge listed, heard, and decided defendant's suppression motions within weeks of their filing, we decline to conclude the judge abused his discretion in finding there was "good cause" to extend the 180-day period under the IAD due to the filing of defendant's suppression motions.[7]

B. Lay Testimony

Regarding Point III, defendant argues his convictions should be reversed because Detective McEvoy and Officer McGowan provided improper lay testimony "to the effect that they could positively identify [defendant's] hammer and ... minivan in the surveillance videos." (Emphasis added). Because defendant did not object at trial to the portions of lay testimony he now challenges, we review the admission of this testimony for plain error. R. 2:10-2.

The plain error standard aims "to provide[ ] a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." State v. Bueso, 225 N.J. 193, 203 (2016). Indeed, "[t]he failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made." State v. Frost, 158 N.J. 76, 84 (1999). The Court has repeatedly emphasized that "rerun[ning] a trial when the error could easily have been cured on request[ ] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." State v. Singh, 245 N.J. 1, 13 (2021) (alterations in original) (quoting State v. Santamaria, 236 N.J. 390, 404-05 (2019)).

We typically defer to a trial court's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). Appellate courts review the trial court's evidentiary ruling "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)).

N.J.R.E. 701 governs the admission of lay opinion testimony.[8] "The first prong of ...N.J.R.E. 701 requires the witness's opinion testimony to be based on the witness's 'perception,' which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." Singh, 245 N.J. at 14 (quoting State v. McLean, 205 N.J. 438, 457 (2011)). "The second requirement of N.J.R.E. 701 is that lay-witness opinion testimony be 'limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.' " Id. at 15 (quoting McLean, 205 N.J. at 458).

***12** When it comes to testimony by law enforcement, "[f]act testimony has always consisted of a description of what the officer did and saw," and "an officer is permitted to set forth what he or she perceived through one or more of the senses." Ibid. (alteration in original) (quoting McLean, 205 N.J. at 460). Further, a witness is allowed to comment on something seen by the witness on a surveillance video, as long as the witness uses "neutral, purely descriptive terminology such as 'the suspect' or 'a person.' " Id. at 18. Moreover, a jury is free to credit such testimony or reject it entirely. Id. at 20.

Here, we are not persuaded Detective McEvoy or Officer McGowan violated the tenets of N.J.R.E. 701. Our review of the record reflects neither witness identified the burglary suspect seen on surveillance video as defendant; likewise, neither witness testified the minivan seen on such footage belonged to defendant.

For example, when Detective McEvoy was asked what he observed from the November 20 video depicting the burglary at a pet supply store, he stated:

> As the ... suspect vehicle approached the front of the store and drove by slowly, we then learned that it was a Chrysler Town and Country minivan, which was light blue in color. And ... the rear passenger side hubcap had a large piece missing out of it.
>
> ....
>
> The subject obviously is dressed in all black, wearing work boots, and had a two-toned hammer, which was red and black .... Another thing that we[ ] learned from that video, Patrolman McGowan, who initially responded to the scene ... later that day went back to our station and checked our records management system and ... was able ... to see if any vehicles matching that description had been stopped. And ... he learned that the evening prior to that burglary at [the pet supply store], a light blue Town and Country minivan was stopped in that same complex and issued a summons for a ... headlight violation. And at that time of the stop, [defendant] was driving the vehicle. And at that time, we identified the vehicle.

Detective McEvoy also stated he saw "the missing piece of hubcap ... from the right rear of the vehicle" on surveillance footage.

Thus, instead of identifying defendant as the "the subject ... dressed in black" or stating the "suspect vehicle" he saw on the video belonged to defendant, the detective used neutral language, leaving the jury to decide if defendant was the burglar at the scene or if the "light blue Town and County minivan" with the missing piece of hubcap seen on surveillance video belonged to defendant.

Additionally, when Detective McEvoy testified about the footage of the burglary from the bagel store, he confirmed the footage showed "a light blue, Chrysler minivan," not "defendant's light blue, Chrysler minivan." Further, when he testified about being at the scene of defendant's arrest on November 21, he stated:

> Upon my arrival, I had already been given the description of the vehicle and the tag and I was alerted by one of our officers that the same vehicle matched the description of a previously reported burglary in Woodbury and possibly Deptford earlier that morning. So[,] ... I now observed the vehicle parked in a marked parking spot and it ha[d] been stopped by [the] Mantua Township Police Department and they had removed him from the vehicle at that time.
>
> Immediately upon approaching the vehicle is when I again observed the rear passenger side hubcap had a missing portion ... out of it and then I began conversing with the officers on scene about what they observed.

Defendant argues this portion of the detective's testimony should have been excluded, in part, because the detective referred to "again" observing the damaged hubcap on the minivan, despite it being the first time he saw defendant's minivan in person. While we understand defendant's concern in this regard, we decline to conclude the admission of this statement was plain error, given the remark was fleeting, and the detective did not state the minivan defendant drove on the date of his arrest was the same minivan seen in the footage. Further, a fair reading of the transcript reflects the detective made clear that on the date of defendant's arrest, a colleague suggested to him that defendant's stopped vehicle matched the description of a vehicle used in another reported burglary. Thus, the detective explained that once he arrived on the scene of defendant's arrest and saw defendant's damaged hubcap, he "began conversing with the officers on scene about what they observed"; he did not state he or fellow officers concluded the stopped vehicle was the same vehicle seen on surveillance video.

***13** The nature of Detective McEvoy's testimony about the hammer found in defendant's minivan was along the same permissible lines. During the course of his testimony,

Detective McEvoy recalled retrieving the hammer found in defendant's minivan at the time of his arrest "[b]ecause it was in plain view and it matched ... the description of the item used ... in the burglar investigations." Again, the detective did not explicitly state the hammer found in defendant's car was the same hammer used in the burglaries. Further, his testimony about the hammer was based on his having personally recovered it from defendant's vehicle, and from viewing surveillance footage containing images of a similar hammer.

Turning to Officer McGowan's testimony, we note he also addressed what he saw on surveillance video, without stating he saw defendant or defendant's minivan on the footage. For example, when describing surveillance video from the burglary at the pet supply store, the officer stated:

> There was one camera ... pointed towards the front glass doors that was able to observe a blue minivan that pulled up in front of the store, stopped and the suspect got out of the vehicle, entered the store. When the van's pulling away, you can observe the entire driver's side of the vehicle and I was able to notice that the back hubcap of the vehicle was cracked and broken off.

Asked what he did with the information he gleaned from the footage, Officer McGowan testified:

> We had multiple burglaries that had happened within the days prior to the [pet supply] store. So after clearing the scene[,] I went back to our station and started inputting some data into our record management system. I was looking for blue minivans similar to the type that I saw on the surveillance footage and I came across a blue minivan that was stopped by [a sergeant] the night before. It had a Pennsylvania registration on it but the driver of the vehicle that he had documented on his motor vehicle stop had actually a New Jersey driver's license that was registered just up the street from [the pet supply store].

When the officer was asked whose name was on the registration of the stopped vehicle, he gave the name of defendant's wife.

In describing what the officer did after he secured this information, he stated:

> Because it was just outside of my jurisdiction[,] I was able to drive past the residence that it was registered to. I drove past the residence and the van was in the driveway and I observed the same missing piece of hubcap on the back driver's side tire.

These statements were admissible, as Officer McGowan provided no testimony positively identifying defendant's minivan as the same vehicle seen on surveillance footage. Instead, the officer explained how the footage led the police to pursue additional avenues of investigation.

On balance, given the neutral language law enforcement used to describe their interactions with defendant, their observations of his vehicle and what they perceived from surveillance video, and considering that jurors viewed the surveillance footage for themselves and determined what weight, if any, to give to the testimony of Officer McGowan and Detective McEvoy, we discern no reversible error regarding the challenged lay testimony.

C. Defendant's Sentence

Lastly, regarding Point VI, defendant argues he should be resentenced because the judge mistakenly found him ineligible for Drug Court and failed to explain why four consecutive prison terms of equal length were imposed. Although we are not persuaded by these contentions, in an abundance of caution, we remand this matter for resentencing due to the Court's recent holding in Torres.

A defendant's sentence is reviewed for an abuse of discretion. State v. Jones, 232 N.J. 308, 318 (2018). But "a trial court's application of the Drug Court Statute and Manual ... involves a question of law," and thus is subject to de novo review. State v. Maurer, 438 N.J. Super. 402, 411 (App. Div. 2014).

***14** Here, defendant contends the judge erred in deeming him ineligible for Drug Court.[9] We disagree. Because defendant was serving an existing prison sentence in Pennsylvania when he was sentenced for his New Jersey convictions, he was unable to participate in Drug Court, but more importantly, his ongoing imprisonment precluded imposition of a non-custodial probationary sentence. N.J.S.A. 2C:44-5(f)(1).[10] See also State v. Crawford, 379 N.J. Super. 250, 259 (App. Div. 2005).

Also, per Article V of the IAD, the sending State offers "temporary custody" of a prisoner to the receiving State and requires the prisoner to be returned to the sending State "at the earliest practicable time consonant with the purposes of [the

IAD].” N.J.S.A. 2A:159A-5(e). Thus, defendant was in New Jersey temporarily under the IAD, and had to be returned to Pennsylvania to complete his sentence there before he began serving his New Jersey sentence. As the judge properly noted, “[D]rug [C]ourt is not available to [defendant] because he's got an out[-]of[-]state sentence that really precludes him from participating.... The process is he returns to Pennsylvania ... to continue the service of his sentence there first.”[11]

Additionally, we are not convinced defendant's sentence is excessive. In imposing a sentence, the judge “first 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.” State v. Case, 220 N.J. 49, 64 (2014). The trial court is required to “determine which factors are supported by a 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).

We cannot “substitute [our] judgment for that of the sentencing [judge,]” State v. Fuentes, 217 N.J. 57, 70 (2014), and are limited to considering:

> (1) whether guidelines for sentencing established by the Legislature or by the courts were violated; (2) whether the aggravating and mitigating factors found by the sentencing court were based on competent credible evidence in the record; and (3) whether the sentence was nevertheless “clearly unreasonable so as to shock the judicial conscience.”
>
> [State v. Liepe, 239 N.J. 359, 371 (2019) (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)).]

***15** When deciding whether to impose a consecutive sentence, trial courts are to consider the following factors outlined under State v. Yarbough, 100 N.J. 627, 643-44 (1985):

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including 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;
>
> (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors; [and]
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.[12]

Recently, the Court reinforced the standards for imposing consecutive sentences and held that “essential to a proper Yarbough sentencing assessment” is “[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding.” Torres, 246 N.J. at 268.

Here, the judge found aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3) (risk of reoffense), (6) (prior criminal history), and (9) (need to deter), and gave these factors “significant weight.” Additionally, he found mitigating factor six, N.J.S.A. 2C:44-1(b)(6) (defendant will compensate the victims for damages sustained) and afforded this factor “moderate weight.” The judge also concluded the aggravating factors substantially outweighed the mitigating factor.

We see no reason to second-guess the judge's aggravating and mitigating factors analysis, considering defendant's history of substance abuse and significant criminal record, which consisted of “[twenty-five] felony convictions, [and] three misdemeanor disorderly persons convictions[,]” many resulting from burglaries in Pennsylvania during the same period he committed multiple burglaries in New Jersey.

Also, we note that when he applied the Yarbough factors, the judge carefully explained why he found the prison terms imposed should run consecutively, and why he rejected defendant's argument for concurrent sentences. Although

defendant urged the judge to impose concurrent sentences for each offense, based on his offenses being "fairly compact" in time and place, and committed with "one sole objective" for committing the crimes, namely "to feed [his] drug habit," the judge rejected this argument, explaining:

> ***16** [T]he events of each day appear to be a continuum of criminal activity on the part of the defendant, such that those particular events should run concurrent to each other. However, I do find that the defendant made a conscious decision from one date to the next to go back out and continue his criminal activity. It would be another thing if he continued through the daylight hours into the following day, and the next day, to continue to commit his burglaries ... along the way, but ... each individual date he consciously decided to go back out and commit more burglaries rather than stop his criminal behavior. Also, where he had an opportunity to reflect potentially on the criminal behavior the night ... or the day before, that reflection ... did not cur[b] his criminal activity. He went back out making that conscious choice.

In giving weight to the first Yarbough factor, i.e., "there [are] no free crimes[,]" the judge reasoned, "[i]f all of these were to be run concurrent[ly], it certainly would minimize the defendant's criminal behavior, and certainly would send the wrong message to the public [so] when they have an opportunity to curb their behavior and they don't, they should [receive] separate and distinct sentences." Additionally, the judge determined defendant's sentences should run consecutive to defendant's Pennsylvania sentence because defendant "did not get the message [after] being arrested ... in New Jersey for ... criminal conduct, and instead continued to commit crimes in Pennsylvania" in December 2016, following his release from custody in New Jersey.

After imposing concurrent sentences for each batch of burglaries committed on a single day "because they continued relatively close in time, albeit, maybe not geographically ... close," the judge imposed the standard fines and ordered restitution for various victims.[13] He also noted defendant would be eligible for parole in approximately "five years and four months."[14]

Defendant's aggregate sentence, while harsh, does not shock our judicial conscience. State v. Tillery, 238 N.J. 293, 323 (2019). But in an abundance of caution, we vacate the sentence and remand for resentencing, consistent with the Court's guidance in Torres, to allow the judge to provide "[a]n explicit statement, explaining the overall fairness" of the sentences imposed. 246 N.J. at 268.

To the extent we have not addressed any remaining contentions, it is because they lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed as to defendant's convictions and remanded for resentencing. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 983661

Footnotes

1 Miranda v. Arizona, 384 U.S. 436 (1966).

2 The record reflects defense counsel did not alert the judge to the late electronic filing of his June 29 letter brief, and the judge remained unaware of this filing until well after he issued his July 13 written opinion. Nonetheless, following his review of the untimely brief, the judge notified counsel that its contents did not alter the court's "position that the evidence is not suppressed and the [suppression] motion's denied."

3 The September 6, 2018 order was amended to correct the date of the decision and refiled on September 17.

4 Although the time period between these two dates actually equals fifty-three days, that fact does not affect our decision.

5 The following counts were dismissed before the jury deliberated: counts two and three (involving a November 20, 2016 burglary); counts five and thirty-seven (involving burglaries on November 21, 2016); and count thirty-two (involving a November 15, 2016 burglary).

6 We are cognizant a circuit split exists on whether pretrial defense motions render a defendant "unable to stand trial." At least six courts of appeal have found a defendant "unable to stand trial" when he or she has motions pending before the

trial court. See Peterson, 945 F.3d at 154-55 (4th Cir. 2019); Ellerbe, 372 F.3d at 468-69 (D.C. Cir. 2004); United States v. Cephas, 937 F.2d 816 (2d Cir. 1991); Nesbitt, 852 F.2d at 1512-13 (7th Cir. 1988); United States v. Johnson, 953 F.2d 1167 (9th Cir. 1992); United States v. Walker, 924 F.2d 1 (1st Cir. 1991). By contrast, the Fifth and Sixth Circuits have found that "unable to stand trial" "refer[red] to a party's physical or mental ability to stand trial throughout the fifteen years prior to Congress enacting the [IAD]." See Birdwell v. Skeen, 983 F.2d 1332, 1340-41 (5th Cir. 1993); Stroble v. Anderson, 587 F.2d 830, 838 (6th Cir. 1978). The United States Supreme Court recently denied certiorari to the Fourth Circuit Court of Appeals on this discrete issue. Sok Bun v. United States, —— U.S. ——, 141 S. Ct. 132 (2020).

7 Given defendant's waiver under the IAD, we also need not address his argument that he was not "brought to trial" as of the date jury selection began.

8 N.J.R.E. 701 provides:

> If a witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences may be admitted if it:
>
> (a) is rationally based on the witness'[s] perception; and
>
> (b) will assist in understanding the witness'[s] testimony or determining a fact in issue.

9 As we have observed:

> [T]here are two tracks available for entry into our Drug Courts. Track One is available to those eligible for special probation pursuant to N.J.S.A. 2C:35-14(a), and who otherwise satisfy the statutory criteria.... Track Two permits applicants to be admitted into Drug Court under the general sentencing provisions of the Code of Criminal Justice.
>
> [State v. Figaro, 462 N.J. Super. 564, 566 (App. Div. 2020) (internal citations and quotation marks omitted).]

10 N.J.S.A. 2C:44-5(f)(1) instructs that a court "shall not sentence to probation a defendant who is under sentence of imprisonment, except as authorized by [N.J.S.A. 2C:43-2(b)(2)]" (the split sentence provision).

11 Given the passage of time since defendant's sentencing in New Jersey, he may now be eligible for a sentence change under Rule 3:21-10(b)(1) if he has completed his Pennsylvania sentence. This Rule permits a motion for a change in sentence to be filed at any time "to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse." R. 3:21-10(b)(1).

12 The Yarbough Court originally outlined six factors, but the sixth factor, which provided "there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses," was superseded by a 1993 amendment to N.J.S.A. 2C:44-5(a), which states "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses."

13 The judge also properly merged the theft and criminal mischief charges into the burglary charges for each business.

14 The Department of Corrections website reflects defendant's parole eligibility date is in May 2024.

End of Document

2022 WL 1100521
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

David COOPER, Defendant-Appellant.

DOCKET NO. A-4692-18
|
Submitted March 21, 2022
|
Decided April 13, 2022

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment Nos. 16-12-1542, 17-02-0124 and 17-10-0670.

Attorneys and Law Firms

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

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Lauren Bonfiglio, Deputy Attorney General, of counsel and on the brief).

Before Judges Mayer and Natali.

Opinion

PER CURIAM

***1** Defendant David Cooper appeals from a June 17, 2019 judgment of conviction after a jury found him guilty of murder and weapons charges. He also appeals from an order admitting his statement made while in the hospital being treated for a gunshot wound and various evidentiary rulings during the trial. Additionally, defendant argues the judge erred in applying aggravating factor six and seeks a remand for resentencing. We affirm defendant's convictions but remand to the trial court for resentencing.

Defendant's appeal involves three separate indictments. Indictment 16-12-1542 charged defendant with unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1). Indictment 17-02-0124 charged defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1) or 2C:11-3(a)(2); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). Indictment 17-10-0670 charged defendant with second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); and third-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2). Defendant pleaded guilty to the gun charges under Indictment 16-12-1542 and the assault charges under Indictment 17-10-0670. He proceeded to trial on the murder and related weapons charges under Indictment 17-02-0124.

We summarize the facts related to these indictments based on the testimony adduced at defendant's pretrial hearing, plea hearing, and trial.

Indictment 16-12-1542

On July 31, 2016, defendant and two companions, Rshan White and Shawn Wright, were shot in Jersey City. The three men were shot near a parked car belonging to White's sister. At 3:30 a.m., detectives responded to a reported shooting. Defendant suffered a gunshot wound to his thigh. Defendant told detectives he did not see the shooter and did not hear any gun shots. Defendant and Wright were taken by ambulance to a nearby hospital. White, who also suffered a gunshot wound, left the scene on his own, eventually arriving at the same hospital as defendant.

Detective Joseph Chidichimo arrived at the hospital at about 4:00 a.m. Defendant and White were in the same trauma treatment room about six feet apart and separated by a curtain. Wright was in a separate room. Detective Chidichimo asked all three men how they suffered their gunshot wounds. Each responded they did not see the shooter. According to the detective, despite suffering a gunshot wound, defendant remained "pretty calm, conscious, alert."

After speaking with the men, Detective Chidichimo received a telephone call from his sergeant. He then arrested all three men based on a handgun discovered in a car belonging to White's sister.

Detective Chidichimo arrested White, handcuffed him to the hospital bed, and read him the Miranda warnings. According to the detective, White was "pretty upset" and claimed the handgun did not belong to him. The detective then arrested defendant, who remained in the same room as White,

handcuffed defendant to his hospital bed, and provided the Miranda warnings. The detective testified defendant was "pretty quiet" and "didn't seem to be getting too upset." Defendant also denied ownership of the handgun. The detective also arrested and read the Miranda warnings to Wright. Wright denied any knowledge of a handgun.

***2** Detective Chidichimo left the room where defendant and White were being treated to speak with his partner. While standing outside the hospital room, the detective heard an upset White tell defendant, "this is B.S.," "[t]hat ain't my gun," "[y]ou know, it ain't my gun," "you better do the right thing," "[b]etter man up," and "I['m] not trying to eat a gun charge."

Defendant then motioned for the detective to enter the room. Detective Chidichimo walked over to defendant and asked, "what's up[?]" Defendant told the detective the handgun belonged to him. The detective explained defendant did not "have to talk to [him]" and did not "have to tell [him] nothing." Defendant responded, "yeah, I know ... the gun's mine." Defendant was charged with second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1).

Prior to trial, the State moved to admit defendant's statement regarding his ownership of the handgun. A pretrial motion judge conducted an evidentiary hearing over three non-consecutive days. Two individuals testified for the State: Detective Chidichimo and Detective Brian Glasser.

According to his testimony, Detective Glasser responded to the scene where the shots were fired on July 31, 2016. The detective considered defendant, White, and Wright as victims of a shooting by an unknown assailant. Detective Glasser described the demeanor of the three men upon his arrival at the scene and remarked defendant was calm and did not appear to be under the influence of any substances. In speaking with Detective Glasser, each man denied knowing who fired the shots.

The defense called two witnesses who treated defendant after his gunshot wound: David Fowler and Dr. Vincent Ruiz. Fowler, a paramedic and emergency medical services technician, testified he treated defendant for a gunshot wound to the thigh and administered fifty micrograms of Fentanyl for pain. Fowler described defendant as alert and oriented. Fowler did not observe any slurred speech or involuntary body movements, negating any concern defendant might be under the influence of an illegal substance.

Dr. Ruiz treated defendant in the hospital emergency room. He administered morphine for defendant's gunshot wound. Dr. Ruiz wrote in his discharge report that defendant was awake, alert, and had no neurological or cognitive dysfunction. The doctor also noted diagnostic testing was negative for alcohol in defendant's system.

In a written post-hearing brief, defendant argued his statement should be suppressed because it was not voluntary and "illegally compelled by the State" absent a proper Miranda waiver. In its post-hearing written submission, the State asserted defendant's "[s]pontaneous, uninterrogated statements [were] admissible and d[id] not implicate Miranda." The State also claimed defendant "acknowledge[d] his rights before making the inculpatory statement a second time."

In an August 18, 2017 order and attached written decision, the judge granted the State's motion to admit defendant's statement in the hospital regarding ownership of the gun. The judge concluded defendant was under arrest and in custody at the time he made the statement to Detective Chidichimo. However, she determined defendant was not being interrogated when he made the statement. The judge found defendant "called [Detective] Chidichimo into the room to inform him that the gun was his and initiated the questioning himself." The judge held there "was no evidence that the officers asked him any questions regarding whether the gun was his, and accordingly, he was not being interrogated at the time that he stated that the gun was his." Because defendant's statement was spontaneous, the judge concluded "Miranda was not required."

***3** Even if defendant's statement had been the product of an interrogation, the judge found defendant waived his Miranda rights. Based on the testimony during the suppression hearing, the judge found defendant was conscious, alert, and capable of communicating and answering questions when he was in the hospital. In her decision, the judge wrote:

> [Defendant] is a 25-year-old man who was detained for no longer than twenty (20) minutes before he spontaneously stated the handgun was his. Det[ective] Chidichimo did not conduct repeated questioning. Rather, [defendant] called him over and Det[ective] Chidichimo repeated to [defendant] that he was under no obligation to speak with the detective. Therefore, [defendant] made a knowing, intelligent, and voluntary decision to speak with

Det[ective] Chidichimo, and his waiver of his Miranda rights was valid.

Indictment 17-02-0124

On September 19, 2016, a surveillance camera depicted an individual approach Ahmin Colclough from behind and shoot him in the back of the head.

Defendant's girlfriend, Alexis Brennan, testified she lived at 14A Rose Avenue in Jersey City in September 2016. The night before the Colclough shooting, defendant stayed at Brennan's house.

On the morning of the shooting, defendant drove Brennan to work in her 2001 Chevy Prism sedan. A surveillance camera showed a bearded black man leaving 14A Rose Avenue, wearing a dark hat with a star logo, dark jacket, dark jeans, and sneakers. After dropping Brennan at work, defendant continued driving Brennan's car.

Various surveillance cameras showed Brennan's car travelling on Forrest Street between 9:29 a.m. and 10:00 a.m. on the day of the shooting. Colclough and another companion were walking in the opposite direction on Forrest Street around 9:37 a.m. that morning. The shooter, wearing clothing similar to the clothing worn by the individual shown in the surveillance video from 14A Rose Avenue, exited his car and followed Colclough. The shooter took a handgun from his pocket and shot Colclough at close range. The shot severed Colclough's spinal cord. The shooter then fled the scene.

Detectives reviewed surveillance camera videos from the area of the shooting. Based on the video camera footage, the detectives suspected Brennan's car, seen circling the area, was involved in Colclough's murder. Police then located the suspected shooter's car at 14A Rose Avenue and placed the car under surveillance.

On the morning of September 21, defendant drove Brennan to work in the same car under police observation. Detectives seized the car, took Brennan to the police station, and photographed the car.

At the station, detectives interviewed Brennan. Her statements to the detectives were video and audio recorded. Brennan told the detectives defendant spent the night of September 18 in her home and drove her to work the next morning. The detectives asked Brennan to identify defendant and her car in still images taken from surveillance camera video footage. When Brennan was first asked to identify her car and the man from the still photographs, she was hesitant and unsure. Brennan could not be certain the vehicle was her car without seeing the license plate. Nor could Brennan confirm the man in the photograph was defendant because the individual's face was too blurry, and Brennan was uncertain if defendant owned the specific items of clothing worn by the shooter in the still images.

***4** Brennan told the detectives that defendant carried a handgun and sold drugs when she first met him. The detectives questioned Brennan about defendant's illegal activities, and she consistently stated she did not know anything about defendant's possible criminal activity.

After a while, the detectives and Brennan left the interrogation room to go to another room with video equipment for watching the surveillance camera footage. There was no recording of communications, if any, between the detectives and Brennan while Brennan watched the surveillance camera video. Upon returning to the original room for further questioning, a detective asked Brennan "can we confidently say that this is [ ] your vehicle?" She responded, "yeah."

The detectives also asked Brennan about defendant's clothing, specifically any hats or jackets worn by defendant. The detectives showed Brennan a still photograph from the surveillance video footage of the clothing worn by the shooter. Again, Brennan equivocated in response to the detectives' questions. The detectives returned with Brennan to the other room to watch another video showing the shoot. After returning to the interview room, the detectives showed Brennan the same still image displayed earlier and asked, "[d]o you believe this is [defendant]?" Brennan answered, "[y]eah." At the detectives' request, Brennan signed the back of the still photographic images.

Indictment 17-10-0670

While in custody in the Hudson County jail awaiting trial on the murder and gun related charges, defendant threw hot liquid on an inmate. The incident was captured on video. The victim suffered serious second-degree and third-degree burns. Defendant was charged with second-degree aggravated assault, N.J.S.A. 2C:12-1b(1), and third-degree aggravated assault, N.J.S.A. 2C:12-1b(2).

On December 18, 2017, defendant pleaded guilty to Indictment 16-12-1542, the unlawful possession of a gun charge. As part of his guilty plea under this indictment,

defendant reserved the right to challenge the admission of his statement in the hospital room regarding ownership of the handgun. He also pleaded guilty under Indictment 17-10-0670 to third-degree aggravated assault with a deadly weapon.

Murder trial

In February and March 2019, defendant was tried before a jury on the murder and gun charges. Brennan testified at trial. She told the jury she had been in a relationship with defendant and defendant spent the evening of September 18, 2016 in Brennan's home at 14A Rose Street. She explained defendant drove her car and took her to work on the morning of September 19. Brennan had no idea where defendant went with her car after dropping her off at work.

At trial, Brennan described being taken to the police station and interviewed by detectives. She told the jury the detectives showed her a surveillance camera video of the shooting and several still photographs taken from the video footage. Brennan's trial testimony was consistent with her recorded interview at the police station. At trial, Brennan identified still photographs showing her car on Forrest Street and "someone driving her car." Brennan then told the jury the "someone" in her car was defendant.

During cross-examination, defendant's counsel sought to highlight changes in Brennan's responses to the detectives' interview questions after she went to an unrecorded room to watch the surveillance camera videos. With the prosecutor's consent, defense counsel played three short portions of the video recording of Brennan's interview with the detectives. Defendant's attorney also used an audio transcript of Brennan's recorded interview to refresh her recollection at trial regarding her initial responses to the detectives' questions before being escorted to another room.

***5** When defendant's counsel attempted to play additional portions of Brennan's video recorded interview for the jury, the prosecutor objected. At sidebar, the judge ruled defense counsel could play the entire video of Brennan's three-hour recorded interview with the detectives or, alternatively, obtain the prosecutor's consent as to specific portions of the recorded interview to be shown to the jury. Defense counsel elected not to play the entire video of Brennan's recorded interview because the interview included highly prejudicial statements about defendant, such as his drug dealings, potential gang affiliation, prior criminal incarceration, suspension of his driver's license, and possession of a gun.

The State did not ask Brennan any question on re-direct. However, the judge asked Brennan several clarifying questions. Defense counsel objected only to one of the judge's questions. Counsel objected when the judge asked whether anyone forced Brennan to sign the back of the still photographs at the police station. The judge overruled the objection and Brennan answered "no." The judge allowed counsel to pose follow-up questions. Neither counsel asked Brennan any further questions.

During the trial, the State offered the testimony of Detective Lamar Nelson for admission of the still photographs of defendant and Brennan's car taken from the surveillance camera video footage. After counsel questioned the officer, the judge asked Detective Nelson about the "significance" of the photographs. According to Nelson, the still photograph showed a man who wore clothing similar to the clothing worn by the man leaving 14A Rose Street on the morning of the shooting. Nelson explained the other photograph showed the vehicle driven by the "actor." In response to the judge's questions, Detective Nelson described the man as "our suspect." Defense counsel objected, arguing the detective improperly provided lay opinion testimony and usurped the role of the jury in determining who and what was depicted in the still photographs. The judge overruled defense counsel's objection, stating the detective did not provide opinion testimony.

The State offered additional evidence at trial. Special Agent Ajit David, assigned to the Federal Bureau of Investigation, testified as an expert in the field of cellular analysis. Agent David testified defendant's cell phone-location data confirmed his presence in the area around the time of the Colclough shooting.

The State also presented a "selfie" photograph defendant sent to Brennan on September 7, 2016. In the "selfie" photograph, defendant had a beard and wore a blue hat with a star logo.

Additionally, the State proffered evidence obtained during a search of an apartment associated with defendant. In the apartment, the police found defendant's driver's license and letters addressed to defendant. The police also found five Winchester nine-millimeter live rounds under a dresser in the apartment. The bullets found in the apartment were similar to Winchester nine-millimeter empty shell casings found at the scene of Colclough's murder.

At the conclusion of the testimony, the judge conducted a charge conference with counsel. In her charge to the jury, the judge instructed the jury not to be influenced by any questions the judge asked the witnesses. She explained:

> The fact that I may have asked questions of a witness in the case must not influence you in any way in your deliberations. The fact that I asked such questions does not indicate that I hold any opinion one way or another as to the testimony given by that witness.

On Brennan's identification of defendant, the judge gave the jury the relevant portion of the identification charge. Specifically, the judge instructed the jury as follows:

> ***6** ... David Cooper, as part [of his] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense ....
>
> The State has presented testimony that on a prior occasion before this trial, Alexis Brennan identified David Cooper as the person captured in the still photograph that was marked for you as S-97, as the person who committed the murder.
>
> ....
>
> According to Ms. Brennan, her identification of the defendant was based upon her viewing of the still photograph, Exhibit S-97, and the video from Exhibit S-31 she was shown by detectives from the Hudson County Prosecutor's Office.
>
> It is your function to determine whether [the] witness's 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 this defendant is the person who committed the offenses charged.

In addition to the foregoing, the judge instructed the jury on assessing the credibility of the witnesses in accordance with the Model Jury instruction.

Counsel gave closing arguments, and the judge instructed the jury on March 15, 2019. The same day, the jury returned a verdict, finding defendant guilty on all counts.

Sentencing

On May 31, 2019, the trial judge sentenced defendant on all the three indictments. For the murder conviction, Indictment 17-02-0124, the judge sentenced defendant to life in prison with a twenty-five-year parole disqualifier. She further sentenced defendant to seven years for each of the gun charges. Based on the negotiated plea related to the unlawful possession of a weapon, Indictment 16-12-1542, the judge sentenced defendant to five years. Consistent with defendant's negotiated plea to third-degree aggravated assault, Indictment 17-10-0670, the judge imposed a five-year flat sentence. The aggregate sentence was life imprisonment plus five years with twenty-five years of parole ineligibility.

On appeal, defendant raises the following arguments:

> POINT I
>
> THE TRIAL COURT'S EXCLUSION OF THE VIDEO OF THE OUT-OF-COURT IDENTIFICATION OF [DEFENDANT] - WHICH SHOWED THAT THE CRUCIAL IDENTIFICATION WAS LESS RELIABLE THAN THE PROSECUTOR PORTRAYED - WAS IMPROPER UNDER THE EVIDENCE RULES. U.S. CONST. amends. VI, XIV; N.J. CONST. art. I, ¶¶ 1, 10.
>
> POINT II
>
> THE TRIAL COURT IMPROPERLY APPEARED TO TAKE THE PROSECUTOR'S SIDE BY CONDUCTING ITS OWN REDIRECT EXAMINATION OF THE PROSECUTOR'S CRUCIAL IDENTIFICATION WITNESS, ASKING, "DID ANYONE FORCE YOU TO SIGN THESE PHOTOGRAPHS?" U.S. CONST. amend. XIV; N.J. CONST. art. I, ¶ 1.
>
> POINT III
>
> THE TRIAL COURT IMPROPERLY ELICITED THE INCRIMINATING LAY OPINION OF A DETECTIVE - WHO WAS NOT AN EYEWITNESS AND HAD NO PERSONAL KNOWLEDGE OF EVENTS OR [DEFENDANT] - THAT PHOTOS DEPICTED "OUR SUSPECT" AND THE "SUSPECT CAR." U.S. CONST. amend. XIV; N.J. CONST. art. I, ¶ 1.
>
> POINT IV
>
> [DEFENDANT]'S STATEMENT TO A DETECTIVE SHOULD BE SUPPRESSED BECAUSE IT WAS MADE UNDER INTERROGATION, AND THE PROSECUTOR PRESENTED NO EVIDENCE THAT [DEFENDANT] RESPONDED TO OR

UNDERSTOOD THE MIRANDA WARNINGS. U.S. CONST. amends. V, XIV; N.J. CONST. art. 1, ¶ 1.

POINT V

***7** [DEFENDANT] SHOULD BE RESENTENCED BECAUSE THE COURT IMPROPERLY CONSIDERED THE OFFENSES FOR WHICH [DEFENDANT] WAS BEING SENTENCED IN FINDING AGGRAVATING FACTOR SIX – WHICH SHOULD ONLY APPLY WHEN THE DEFENDANT'S "PRIOR" RECORD IS BAD.

I.

We defer to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). We review such evidentiary rulings "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Mero. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that deferential standard, we "review a trial court's evidentiary ruling only for a 'clear error in judgment.' " State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)).

Defendant challenges several evidentiary rulings related to Brennan's trial testimony. Defendant contends the judge erred by excluding portions of Brennan's video recorded interview with the detectives pertaining to Brennan's identification of defendant. According to defendant, the jurors needed to see the relevant portions the video interview to evaluate "the reliability of Brennan's claim that [defendant] was the shooter depicted" in the still photograph. Defendant also argues the judge misapplied the rule of completeness regarding Brennan's video recorded interview because the rule only authorizes admission of additional parts of a conversation if related to the same subject matter.

Additionally, because Brennan lacked the ability to recollect in response to questions at trial, defendant contends the audio transcript of her recorded interview failed to adequately convey Brennan's hesitation and equivocation in responding to the detectives' questions. Thus, defendant argues other portions of Brennan's video recorded interview should have been allowed to be shown to the jury. Defendant also claims the audio transcript failed to "show the extent to which the detectives pressured Brennan" to identify her car and defendant.

Defendant further argues the out-of-court identification by Brennan failed to comport with the procedures established under State v. Henderson, 208 N.J. 208 (2011), and the identification was not properly recorded under State v. Anthony, 237 N.J. 213, 227-30 (2019).

For the first time on appeal, defendant argues N.J.R.E. 803(a)(3), a hearsay exception, allows admission of a witness's prior statement that is "a prior identification of a person made after perceiving that person." Previously, defense counsel argued portions of Brennan's video recorded interview should be admitted for impeachment purposes.

A.

We begin with defendant's assertion that N.J.R.E. 803(a)(3) supported playing additional portions of Brennan's recorded interview for the jury. Arguments raised for the first time on appeal are reviewed for plain error under Rule 2:10-2 ("Any 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"). A defendant who fails to raise an objection at trial "bears the burden of establishing that the trial court's actions constituted plain error[.]" State v. Santamaria, 236 N.J. 390, 404 (2019) (quoting State v. Ross, 229 N.J. 389, 407 (2017)). The plain error standard requires a determination: "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result,' R. 2:10-2; that is, whether there is 'a reasonable doubt ... as to whether the error led the jury to a result it otherwise might not have reached.' " State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)).

***8** We reject defendant's argument N.J.R.E. 803(a)(3) supported admission of other portions of Brennan's video recorded interview with the detectives. N.J.R.E. 803(a)(3) provides certain statements are not excluded under the hearsay rule provided "[t]he declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement: ... is a prior identification of a person made after perceiving that person if made in circumstances precluding unfairness or unreliability." The rationale for admitting a prior identification is grounded on the notion the statements were "made when the events and sensory impressions [were] fresh

in the mind of a witness." State v. Matlack, 49 N.J. 491, 498 (1967).

Here, N.J.R.E. 803(a)(3) did not apply. Brennan's trial testimony was not inconsistent with the statements she made to the detectives during her interview. Additionally, Brennan was not an eyewitness to Colclough's murder. She merely identified defendant from a still photograph and her statements were akin to a confirmatory identification based on her relationship with defendant. See State v. Sanchez, 247 N.J. 450, 477 (2021).

B.

We also reject defendant's argument Brennan's identification of defendant failed to comport with the requirements under Henderson. Because Brennan was not an eyewitness to a crime, no showup or photo array was necessary, and the detectives were not required to provide Henderson instructions prior to her identification of defendant. Similarly, because Brennan's out-of-court identification did not implicate Henderson, there was no need to record the identification under Anthony.

C.

We concur with the judge's determination regarding defendant's request to play selected portions of Brennan's interview, applying the rule of completeness. N.J.R.E. 106 provides "[i]f a party introduces all or part of a ... recorded statement, an adverse party may require the introduction at that time, of any other part, or any other ... recorded statement, that in fairness ought to be considered at the same time." "When a witness testifies on cross-examination as to part of a conversation, statement, transaction or occurrence ... the party calling the witness is allowed to elicit on redirect examination, 'the whole thereof, to the extent it relates to the same subject matter and concerns the specific matter opened up.' " State v. James, 144 N.J. 538, 554 (1996) (citing Virgin Islands v. Archibald, 987 F.2d 180, 188 (3d Cir. 1993)); see also State v. Lozada, 257 N.J. Super. 260, 272 (App. Div. 1992) (explaining an adverse party's request to read a portion of a writing "may be required if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding") (quoting United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)).

Here, defense counsel sought to introduce specific portions of Brennan's out-of-court video recorded statement to argue she was coerced into identifying her car and defendant when the detectives took her to a different, unrecorded room to watch the surveillance camera video footage. On the other hand, the State sought to admit other portions of Brennan's video recorded interview to provide context for the video clips defendant sought to play, and to avoid misleading the jury. Those portions of the recorded interview the State claimed were necessary to give the jury context and provide a fair understanding of the evidence included Brennan uttering the following statements while the detectives were not in the interview room, "It's just stupid ... It's all there ... [t]here's nothing to ask. I see it's my car. It looks like him, so ...."

***9** Brennan's video recorded interview also contained statements about defendant's prior drug connections, ownership of a gun, and potential gang affiliation. If those statements were presented to the jury, it is likely defendant would have suffered prejudice. Consequently, it is likely defense counsel strategically decided to forego playing additional clips from Brennan's video recorded interview with the detectives.

Moreover, defense counsel effectively relied on the audio transcript of the video recording of Brennan's interview to refresh her recollection and impeach her credibility before the jury. In fact, during summation, defense counsel argued Brennan's trial testimony was inconsistent with her video recorded interview and she was pressured by the detectives off-camera to positively identify her car and defendant.

N.J.R.E. 106 precluded defendant from selecting those portions of Brennan's video recorded interview he wanted the jury to see without allowing the State to present other portions of the video interview to give the jury context and avoid any misimpression as to events that transpired during Brennan's three-hour interview with the detectives. Under the circumstances, there was no error, let alone plain error, resulting from the judge's refusal to allow defendant to select portions of Brennan's video recorded interview to be played for the jury absent the prosecutor's consent.

II.

Defendant argues the judge's questions directed to Brennan and Detective Nelson impermissibly demonstrated the judge

sided with the State. Specifically, defendant claims a follow up question asked by the judge concerning Brennan's voluntary signing of the reverse side of the still photographs and questions directed to Detective Nelson regarding the sequencing of the photographs he authenticated were improper and elicited inappropriate lay witness testimony. We reject these arguments.

A.

Judges are authorized to question witnesses. N.J.R.E. 614. Although a trial judge has wide latitude to question witnesses, a judge must exercise that authority with "great restraint," especially during a jury trial. State v. Taffaro, 195 N.J. 442, 451 (2008). Additionally, a judge must use care when questioning witnesses to avoid influencing the jury. Ross, 229 N.J. at 408.

A judge may question a witness to expedite the proceedings, clarify testimony, or assist a distressed witness in eliciting facts. Ibid. A trial judge errs when her [or his] inquiries give the jury the impression that she [or he] takes one party's side or that she [or he] believes one version of an event and not another. See Taffaro, 195 N.J. at 451 (citing Village of Ridgewood v. Sreel Inv. Corp., 28 N.J. 121, 132 (1958)). In determining whether a trial judge erred in questioning a witness, we examine the record as a whole and consider the impact of the court's questions. See id. at 454.

B.

We reject defendant's claim the judge improperly questioned Brennan and sided with the prosecutor by asking, "[d]id anyone force you to sign those photographs?" Because the prosecutor did not ask questions of Brennan on redirect, defendant contends the judge's question benefited the State and was phrased so as to suggest to the jury nothing improper occurred when the detectives spoke to Brennan in another room.

Here, we discern no evidence the jury perceived the judge favoring the State. While it would have been better had the judge neutrally phrased the question directed to Brennan, the inquiry stemmed from defense counsel's cross-examination and sought to clarify information for the jury. The judge did not frame the question in an overtly suggestive manner.

***10** Further, after Brennan responded to the judge's question, the judge allowed counsel to ask Brennan additional questions and counsel declined. More importantly, in charging the jury, the judge expressly instructed the jury it should not be influenced by her questions directed to any witnesses.[1] Based on the ample additional evidence presented to the jury, this single question by the judge could not have affected the outcome of the trial.

C.

We also reject defendant's assertion the judge improperly elicited incriminating lay opinion testimony from Detective Nelson. Nelson authenticated the still photographs from the surveillance camera video to admit the photographs in evidence. Nelson, in response to the judge's questions regarding the "significance" of the photographs, referred to the man depicted as "our suspect." The detective also offered testimony that the still photographs of the car, before and after Colclough's murder, showed the "same vehicle." Based on Detective Nelson's responses to the judge's question, defendant claims the witness usurped the jury's role by proffering impermissible lay opinion testimony.

A lay witness may testify in the form of opinions or inferences if the testimony will help the trier of fact understand the testimony or determine a fact in issue. See N.J.R.E. 701; State v. Singh, 245 N.J. 1, 15 (2021). In Singh, the New Jersey Supreme Court found it was an error for a police officer, acting as a lay witness, to describe the events depicted in surveillance video footage and to refer to an individual depicted in the surveillance video as "the defendant." Singh, 245 N.J. at 17. However, the Court found the error was harmless "given the fleeting nature of the comment and the fact that the detective referenced defendant as 'the suspect' for the majority of his testimony." Ibid.

Here, Detective Nelson did not refer to the individual depicted in the still photograph as "the defendant." Rather, the detective referred to the individual as "our suspect" and "the suspect." As approved in Singh, there was nothing improper about Detective Nelson's description of the individual as "the suspect" or "our suspect" as the meaning of the two phrases is no different. Given the fleeting nature of Detective Nelson's comments regarding the individual depicted in the still photograph, the judge did not abuse her discretion in allowing those comments.

The statements by the detective and the judge concerning "the vehicle," "same vehicle," and "suspect vehicle" are slightly more problematic. The detective's use of these terms was not a one-time, fleeting reference. The "same vehicle" was mentioned several times during the detective's testimony. Additionally, the phrase "same vehicle" was repeated by the trial judge.

In Singh, the defendant argued it was improper for a witness to opine as to the similarity between sneakers observed in a surveillance video and sneakers worn by the defendant upon arrest. Id. at 19. The Court held N.J.R.E. 701 did not require "the testifying lay witness be superior to the jury in evaluating an item." Ibid. Additionally, the Court concluded the detective's observation of the similarities between the defendant's shoes in the video footage and defendant's shoes at the time of his arrest did not usurp the jury's role in comparing defendant's footwear and the jury remained "free to discredit [the detective's] testimony." Id. at 20. Thus, the Court determined admission of the detective's testimony was not an abuse of discretion. Ibid.

***11** Here, Detective Nelson never saw the actual car used by the shooter. The detective merely watched the surveillance camera videos and authenticated the still photographs based on the surveillance footage. Thus, it is unlikely the detective's opinion, stating the similarity between the depicted cars, was superior to the jury being able to make the same comparison. However, to warrant reversal "the error must be 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.' " State v. Daniels, 182 N.J. 80, 95 (2004) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

Based on our review of the record, we conclude the judge's questions and Detective Nelson's responses regarding the "same vehicle" were insufficient to raise reasonable doubt regarding the jury's verdict based on the overwhelming evidence of defendant's guilt. The evidence included Brennan's testimony identifying her car and defendant from the still photographs and surveillance camera videos taken near the murder scene. The State also proffered a "selfie" photograph taken by defendant a few days prior to the murder, showing defendant sporting a beard and wearing a blue hat with a star logo, the same as the shooter in the surveillance camera videos. Additionally, the State provided ballistic evidence that bullets found in defendant's apartment were the same as the bullet used to murder Colclough. Further, the State presented cellular telephone location evidence, placing defendant at the scene at the time of the murder. Thus, examining the record as a whole, the judge's clarifying questions directed to Brennan and Detective Nelson did not unduly influence the jury or affect the outcome of the case to warrant a new trial.

III.

Defendant claims the pretrial judge erred in admitting his statement to the detectives while in the hospital regarding ownership of a handgun. He argues his statement was made while he was under interrogation, the State failed to prove he knowingly waived his Miranda rights, and he failed to understand the warnings. We reject these arguments.

"In reviewing a motion to suppress, an appellate court 'must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record.' " State v. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (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.' " State v. Tillery, 238 N.J. 293, 314 (2019) (quoting State v. A.M., 237 N.J. 384, 395 (2019)). We review a trial judge's legal conclusions de novo. Ibid.

The Miranda warnings must be given during a custodial interrogation. See Miranda v. Arizona, 384 U.S. 436, 467-69 (1966). A defendant can waive his Miranda rights, if the waiver is "knowing, intelligent, and voluntary in light of all the circumstances." State v. Presha, 163 N.J. 304, 313 (2000).

After an evidentiary hearing, the pretrial judge aptly determined defendant was under arrest and in custody when he made the statement to the detective. However, the judge properly concluded defendant was not being interrogated and he spontaneously informed the detective the handgun belonged to him.

"[A]n interrogation is 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " State v. Mallozzi, 246 N.J. Super. 509, 515 (App. Div. 1991) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). "[U]nexpected incriminating statements made by in-custody

defendants in response to non-investigative questions" are admissible without Miranda warnings. Id. at 516.

***12** We agree with the judge's finding and legal conclusion there was no interrogation of defendant. Here, defendant "called [Detective] Chidichimo into the room to inform him that the gun was his and initiated the questioning himself" and there "was no evidence that the officers asked him any questions regarding whether the gun was his ...." Because defendant's statement was spontaneous, the judge correctly concluded "Miranda was not required."

Even if defendant's statement had been the product of an interrogation, defendant knowingly waived his Miranda rights. In fact, Detective Chidichimo advised defendant he was under no obligation to speak about the handgun after defendant received the Miranda warnings. Defendant expressly acknowledged he had no obligation to speak to the detective but twice spontaneously volunteered the handgun belonged to him.

Because defendant's admitted ownership of the handgun was spontaneous and unsolicited, we agree that Miranda was inapplicable, and the judge properly granted the State's motion to admit defendant's hospital statement regarding ownership of the handgun.

IV.

Defendant argues the sentencing judge improperly found aggravating factor six, N.J.S.A. 2C:44-1(a), applicable when he was sentenced on Indictment No. 17-02-00124. The State contends the sentence imposed was illegal and the matter should be remanded for the judge to impose an eighty-five percent parole disqualifier on the life sentence consistent with the governing statute.[2]

A.

We review a sentence imposed by the sentencing court for abuse of discretion. State v. Jones, 232 N.J. 308, 318 (2018). We should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). "Appellate courts must 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) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Under N.J.S.A. 2C:44-1(a), a sentencing court considers several aggravating factors. Aggravating factor six requires the sentencing judge consider "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which [the defendant] has been convicted." N.J.S.A. 2C:44-1(a)(6). When a sentencing court considers improper aggravating factors, we ordinarily remand for resentencing. See State v. Carey, 168 N.J. 413, 424 (2001).

In applying aggravating factor six, the judge explained:

> the extent that Mr. Cooper, his criminal record. It's not that extensive. I must agree with [defense counsel] in that. But something happened.
>
> I don't know what it was, where all of a sudden, you just went on one offense after another offense, after another offense that that [sic] occurred over a number of years. From weapons to aggravated assault, using hot oil in prison.

Here, the judge's application of aggravating factor six was not supported by the record because defendant's only prior crime involved a third-degree shoplifting conviction. Because judgments of conviction had yet to be entered on the indictments involving murder, weapons possession, and assault, the judge should not have considered those crimes as prior offenses for application of aggravating factor six.

B.

***13** The State contends the sentencing judge failed to impose the mandatory period of parole ineligibility period for first-degree murder under the No Early Release Act, N.J.S.A. 2C:43-7.2, rendering defendant's sentence illegal. The State seeks a limited remand "for imposition of the mandatory-minimum term." Defendant requests we remand for a plenary hearing on resentencing.

N.J.S.A. 2C:43-7.2(a) states "[a] court imposing a sentence of incarceration for a crime of the first or second degree enumerated in subsection d. of this section shall fix a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole." Murder is

an enumerated crime under the relevant subsection. N.J.S.A. 2C:43-7.2(d)(1). Where a sentence fails to include the statutory mandatory parole ineligibility term, it is an illegal sentence. See State v. Baker, 270 N.J. Super. 55, 70 (App. Div.), aff'd, 138 N.J. 89 (1994); State v. Copeman, 197 N.J. Super. 261, 265 (App. Div. 1984).

Here, by sentencing defendant to life with a twenty-five-year parole bar, the judge misapplied the mandatory minimum term required under the statute. See N.J.S.A. 2C:43-7.2(b). As a result, defendant and the State request a remand for the trial court to address the mandatory-minimum sentence.

On this record, we are constrained to remand for a new resentencing hearing. Because defendant had not been convicted of murder, weapons charges, and assault at the time of sentencing, he did not have an extensive criminal history for application of aggravating factor six. Additionally, the judge misapplied the statute governing the mandatory minimum term of imprisonment.

To the extent we have not addressed any of defendant's remaining arguments, we determine those arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed as to defendant's convictions. Remanded for resentencing. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 1100521

Footnotes

1 During the trial, the judge asked clarifying questions directed to other witnesses. However, defendant challenges only the judge's questions directed to Brennan and Detective Nelson.

2 In an August 10, 2021 order, we denied the State's motion to file a notice of cross-appeal as within time. However, we noted "the merits panel is free to correct an illegal sentence at any time."

End of Document

2022 WL 1577563
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Bronk H. MILLER, a/k/a Abdul-Halim Muhammad Asadullah, Defendant-Appellant.

DOCKET NO. A-0738-20
|
Submitted February 17, 2022
|
Decided May 19, 2022

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 16-07-1947.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Laura B. Lasota, Assistant Deputy Public Defender, of counsel and on the brief).

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Jason Magid, Assistant Prosecutor, of counsel and on the brief).

Before Judges Haas and Alvarez.

Opinion

PER CURIAM

***1** Defendant Bronk H. Miller was convicted by a jury of lesser-included second-degree reckless manslaughter, N.J.S.A. 2C:11-4(b)(1). The trial judge sentenced him to ten years' imprisonment, subject to the eighty-five percent parole ineligibility mandated by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, to run consecutive to a sentence defendant was already serving. The jury acquitted him of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). Prior to sentencing, the State dismissed the final indictment count, certain persons not to possess, N.J.S.A. 2C:39-7(b). On the initial appeal, we remanded for review of a surveillance video purporting to show defendant removing a handgun from his clothing shortly before the off-camera shooting for which he was prosecuted. State v. Miller, No. A-5253-17 (App. Div. July 22, 2020) (slip op. at 2-4). We again remand, this time for a new trial.

During the State's case-in-chief, an investigating officer narrated key video footage. The individual identified as defendant on the film was partially obscured by a set-up menu when played on a computer screen. We requested the trial court conduct a hearing and make findings as to whether the video shown to the jury was similarly obscured. The judge denied defendant's motion for a new trial after the showing, opining that the menu did not obscure the film when played on a seventy-inch screen.

Having viewed the film ourselves on a seventy-inch screen, we do not find the dark object defendant appears to be holding to be readily identifiable. Yet, as the film depicting defendant was played to the jury, the detective said defendant extracted an item in "the shape of [a] gun." This testimony was highly prejudicial. The detective narrated all the surveillance videos shown to the jury, including an earlier film in which a third party standing near defendant removed from his pants pocket a silver and black object which the detective described as "consistent with maybe the butt of ... like a handgun." The statements were prejudicial. Additionally, the judge did not instruct the jury as to credibility in the closing charge, which may have enhanced the potential for prejudice by virtue of the detective's interpretive narration.

The shooting took place outside of a bar, beyond the surveillance camera's range. Police recognized defendant from still photos taken from the surveillance video. Clothing and sneakers that matched those of the figure on video were later identified as defendant's and were taken from his apartment.

The parties stipulated that a presumptive positive test indicated blood was present on the laces of defendant's right sneaker and the front exterior of the right leg of his pants. However, there was not enough blood for DNA testing.

The adult daughter of Lois Reyes, defendant's girlfriend, testified that defendant displayed a black and silver handgun to his friends at her sister's birthday party about two weeks prior to the shooting. The jury watched a video of that incident taken from Reyes's cell phone.

***2** The State also introduced several wiretapped conversations in which defendant, using distinctive slang, appeared to instruct Reyes. The detective also narrated these conversations, interpreting them to be defendant's attempt to enlist Reyes to help him dispose of the gun. In one conversation, Reyes assured defendant she had wiped the prints off what he had referred to as a "hot block." The detective explained "hot block" is slang for a gun used in a shooting.

Defendant raises the following points on appeal:

POINT I

OPINION TESTIMONY BY THE LEAD DETECTIVE AS TO THE CONTENT OF SURVEILLANCE VIDEOS AND THE MEANING OF INTERCEPTED COMMUNICATIONS WAS IMPROPERLY ADMITTED AS LAY OPINION TESTIMONY, THEREBY DEPRIVING DEFENDANT OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL.

A. The Detective's Opinion Testimony About What He Believed The Surveillance Videos Depicted Was Inadmissible.

B. The Detective's Testimony About The Meaning Of Code Words And Slang Used During The Intercepted Phone Conversations And The General Meaning Of Those Conversations Was Not Properly Admitted As Expert Or Lay Opinion Testimony.

POINT II

THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO INTRODUCE, AS LAY-OPINION TESTIMONY, IDENTIFICATIONS OF DEFENDANT MADE BY THREE LAW ENFORCEMENT OFFICERS FROM STILL PHOTOS.

POINT III

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE ABOUT DEFENDANT'S ALLEGED PRIOR GUN POSSESSION UNDER N.J.R.E. 404(B).

POINT IV

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON HOW TO EVALUATE THE CREDIBILITY OF THE WITNESSES WHO TESTIFIED AT TRIAL DENIED DEFENDANT HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT V

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND MUST BE REDUCED.

I.

In State v. Singh, a detective testified at trial regarding surveillance videos, twice referring to the individual depicted on the film as "the defendant," and identifying the defendant's sneakers on the film. 245 N.J. 1, 4-5 (2021). The Court limited its decision to the question of whether the detective's testimony constituted plain error. Id. at 11. The Court found that the detective's two references were fleeting and harmless error: "[t]he detective should not have referenced defendant in his summary of the surveillance footage ... [but] that fleeting reference did not amount to plain error in light of the other evidence produced." Id. at 5. The court also found that it was permissible for the detective to state that the sneakers the suspect was wearing on the surveillance tape were similar to the defendant's "because he saw defendant wearing them on the night of his arrest." Id. at 4-5. The testimony was proper because, as N.J.R.E. 701 requires, it was "rationally based on the witness's perception and ... such testimony help[ed] the jury." Id. at 5.

Here, the improperly admitted testimony was more problematic. The detective told the jury the virtually indiscernible object in defendant's hand was in "the shape of [a] gun." That highly prejudicial testimony was not rationally based on his perception of the event. See N.J.R.E. 701. Rather, it was based on his perception of a film the jury could interpret for itself. The detective's testimony invaded the jury's province as factfinder.

Defendant unsuccessfully objected to the testimony, which "usurped the jury's role" in discerning the nature of the object in the video footage. See id. at 20. In this case, unlike Singh, the object at issue—the gun—was not introduced in evidence. In Singh, the jury physically had the sneakers, which they could compare to those shown in the video. Ibid. Here, in contrast, the video depicts a dark, indiscernible object. Thus, the police witness's characterization of the object, key to determining defendant's guilt, was prejudicial. In light of the fact that the jury actually acquitted defendant of other gun-related charges, and that the trial judge did not reiterate

the credibility charge as part of his closing instruction, the detective's interpretation of the surveillance footage was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

***3** The proofs in this case include: video of defendant with a silver handgun less than two weeks before the shooting; video of defendant's associate with an object that appears to be a silver handgun on the night of the shooting; video of defendant with the victim minutes before the shooting while holding a black object; and defendant's recorded concern in conversation with his girlfriend about a "jawn," or object. In those conversations, he expressed worry he could serve life. The State never recovered the handgun. This purely circumstantial evidence may or may not have been enough to convict defendant, absent the detective's narration.

Defendant complains the detective's interpretation of the phone calls between himself and Reyes required expert qualification. We agree the detective should have been qualified as an expert before he explained the slang used during the conversations. However, the error was ultimately harmless because the officer's credentials would have been sufficient to qualify him. If he testifies again on retrial, he must be qualified as an expert before explaining slang terms.

Furthermore, the officer testified regarding language that did not require expert testimony—such as the use of the word "that" in one of defendant's telephone conversations. The officer connected it to defendant's prior use of the word "jawn." Again, defendant did not object to the failure to qualify the detective as an expert, or to the detective's comments regarding words that did not require interpretation. Nonetheless, that harmless error can be readily corrected on retrial.

The officer's credibility became critical because he narrated the video and the slang defendant used in his conversations with Reyes. This made the inclusion of the credibility charge in the final closing instruction crucial. The omission of such an instruction is evaluated "in the context of the State's entire case against defendant" in order to determine whether an unjust result can ensue. See State v. Harris, 156 N.J. 122, 183 (1998). Here, omitting the credibility instruction became highly prejudicial in light of the nature and significance of the detective's testimony.

II.

Defendant also objects to the admission of testimony from three officers identifying defendant from still photos extracted from surveillance video. This objection lacks merit. The officers all had prior contact with defendant and said in a neutral fashion they knew him from the community. After they testified, the judge instructed the jury that their knowledge of defendant should not prejudice him in any way as police are often familiar with the residents of their community regardless of involvement in criminal activity.

The officers' testimony was proper. In State v. Sanchez, the Supreme Court held a parole officer could testify that she recognized the defendant in a surveillance video photograph, without explaining her employment or the manner in which she knew him. 247 N.J. 450, 469-77 (2021). The Supreme Court said the testimony was admissible under N.J.R.E. 701 even though the witness did not participate in the crime, witness the crime, or make the photographs or the video, because she was acquainted with the defendant, thus satisfying the first prong of the N.J.R.E. 701 test. Id. at 469. The nature of the parole officer's contacts with the defendant satisfied the second N.J.R.E. 701 prong. She had over thirty face-to-face contacts with the defendant over the course of thirty months, he had not changed his appearance, there were no other witnesses available to identify the defendant, and the quality of the photograph placed the witness in a better position than the jury to identify the defendant. Id. at 474-75.

***4** Here, the officers all knew defendant and had interacted with him on multiple occasions. Although the record does not indicate whether defendant's appearance changed, no non-law enforcement witnesses were available to testify, and the surveillance videos were of poor quality. The judge's instruction cured any prejudice from the officers revealing their employment. Thus, no error occurred in admitting their testimony.

III.

Defendant contends that admitting the birthday video was also prejudicial error under State v. Cofield, 127 N.J. 328 (1992); see also N.J.R.E. 404(b). We disagree.

The evidence was relevant because the State, unable to place the gun in defendant's hand at the time of the murder, needed

to place a gun in his possession at some point close in time to the shooting. Defendant's access to a handgun was a highly relevant and material issue. See State v. Gillispie, 208 N.J. 59, 87-88 (2011). The evidence was clear and convincing.

While Reyes's daughter displayed hostility towards defendant, the film itself was not biased. See State v. Hernandez, 170 N.J. 106, 126-28 (2001). Furthermore, the evidence of this prior bad act was highly probative but not overly prejudicial. This was no different than the admissible testimony in Gillispie that the defendant had previously possessed a handgun. 208 N.J. at 90-92.

IV.

The individual errors here—the detective's interpretation of the video, the failure to qualify him as an expert before testifying about the telephone conversations, and the court's failure to give the credibility instruction as part of the final charge—have the cumulative effect of raising a doubt as to whether the trial was fair. See Sanchez-Medina, 231 N.J. at 469; see also State v. Weaver, 219 N.J. 131, 155 (2014) ("When legal errors cumulatively render a trial unfair, the Constitution requires a new trial."). We are unable to conclude these cumulative errors were harmless or that defendant's trial was fair.

V.

We do not address the issue of defendant's sentence in light of our determination that a new trial is warranted.

Reversed and remanded for a new trial.

All Citations

Not Reported in Atl. Rptr., 2022 WL 1577563

End of Document

2022 WL 2232815
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Christopher POOLE, a/k/a Christoph Poole, and Jarred Hawthorne, Defendant-Appellant.

DOCKET NO. A-2811-19
|
Argued March 16, 2022
|
Decided June 22, 2022

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 18-07-2212.

Attorneys and Law Firms

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, of counsel and on the briefs).

Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Caroline C. Galda, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges Sabatino, Mayer and Natali.

Opinion

PER CURIAM

***1** Defendant Christopher Poole appeals his convictions and sentence for first-degree murder, N.J.S.A. 2C:11-3(a)(1)(2), second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A 2C:39-4(a), arguing:[1]

I. THE LEAD DETECTIVE'S REPEATED IDENTIFICATIONS OF DEFENDANT AS THE SHOOTER ON THE VIDEO AND HIS OPINION THAT DEFENDANT "MATCHED" THE DESCRIPTION OF THE SHOOTER GIVEN BY EYEWITNESSES WAS INAPPROPRIATE, PREJUDICIAL, AND REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

II. ADMISSION OF OTHER-BAD-ACT EVIDENCE THAT DEFENDANT POSSESSED CONTROLLED DANGEROUS SUBSTANCES AND PACKAGING MATERIALS USED TO DISTRIBUTE CONTROLLED DANGEROUS SUBSTANCES WAS IRRELEVANT, INADMISSIBLE, AND REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

III. THE LEAD DETECTIVE'S SPECULATION THAT PEOPLE DID NOT "COOPERATE" WITH THE POLICE BECAUSE THEY WERE AFRAID OF DEFENDANT WAS BASELESS, PREJUDICIAL, AND REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

IV. HEARSAY TESTIMONY THAT THE EYEWITNESSES WERE "CONFIDENT" IN THEIR IDENTIFICATIONS, DESPITE THEIR CONFIDENCE LEVEL NOT BEING RECORDED IN THEIR OWN WORDS DURING THE IDENTIFICATION PROCEDURE, WAS INAPPROPRIATE, PREJUDICIAL, AND REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

V. EVEN IF ANY ONE OF THE COMPLAINED-OF ERRORS WOULD BE INSUFFICIENT TO WARRANT REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS WAS TO DENY DEFENDANT DUE PROCESS AND A FAIR TRIAL.

VI. DEFENDANT'S LIFE SENTENCE, IMPOSED FOR AN OFFENSE COMMITTED WHEN HE WAS [TWENTY-FOUR], IS EXCESSIVE.

We have reviewed and considered each of these arguments in light of the entire record and applicable law. Although the errors identified by defendant, which were not objected to at trial, may not independently rise to the level of plain error, an issue which we do not address, we are satisfied that their cumulative effect clearly deprived him of a fair trial mandating that we reverse his conviction and remand for a new trial. In light of that determination, we do not reach defendant's argument challenging his sentence.

I.

The following facts were adduced at defendant's trial. On the morning of April 26, 2018, Rasheed Olabode left his home in Newark with his two roommates, Taiwo Fadare and Oyindamola Giwa. They planned to pick up a cellphone from a repairman and get something to eat afterwards. Olabode initially drove to the repairman's house, but upon discovering that he was not home, proceeded to his shop.

Afterwards, the group headed toward a restaurant where they planned to eat. On the way, Olabode had a strong urge to urinate and decided to stop and relieve himself beside the car. He attempted to pull over on 18th Street in Newark but was unable to because the road was blocked off. He then proceeded to South 20th Street, where he pulled over and exited the vehicle.

Shortly after, Olabode began speaking with a man, later identified as Solomon Fitzgerald, and the pair crossed the street. At that point, a second man, subsequently identified as defendant, briefly entered 765 South 20th Street and then joined Olabode and Fitzgerald on the sidewalk. Fadare and Giwa both observed Olabode as he appeared to "plead" or "beg" for something with his hands in a prayer position. Fadare and Giwa testified that defendant then took out a pistol and shot Olabode in his chest. Defendant then ran toward the rear of 765 South 20th Street.

***2** Fadare moved to the driver's seat of the car and, after Olabode was able to return to the vehicle, Fadare, Giwa, and Olabode drove to get medical assistance. On the way, Fadare saw a police vehicle, prompting him to stop the car. He spoke to Officer Carlos Colon who called for an ambulance. The ambulance arrived shortly thereafter and transported Olabode to a hospital, where he was pronounced dead.

The same day, Detective Kevin Green visited the area where Olabode had been shot. There, he observed a ".9 millimeter ... shell casing ... directly in front of 763 South 20th Street," which was "directly next door" to 765 South 20th Street.

Detective Green obtained a statement from Dorothy Hall, defendant's grandmother, who lived on the second floor of 765 South 20th Street. She explained that defendant lived with her and that his father lived on the first floor. She stated defendant was at the house at the time of the shooting, but was "downstairs," and that she spoke to him "ten [or] fifteen minutes" after the shooting. Hall also described defendant's appearance that day. She stated that he was wearing a "yellow hat" and a yellow long-sleeved shirt and described that defendant had facial hair.

Detective Green also discovered and collected a bag located in the stairwell leading to the second floor of 765 South 20th Street next to mail addressed to defendant. It contained one bag of marijuana, and several "glassine bags," which Detective Green understood were "used for packaging [controlled dangerous substances]."

After examining the scene of the shooting, Detective Green obtained statements from Fadare and Giwa, who had been transported to the police station. In those statements, Fadare and Giwa both identified 765 South 20th Street as the house in front of where Olabode was shot. Giwa also described the shooter as wearing what he believed to be a gray-colored hoodie and having a beard. Fadare did not provide a description of the shooter's clothing. After speaking to Fadare and Giwa, Detective Green suspected that defendant might be the shooter.

On April 27, 2018, Detective Green obtained video from a surveillance camera located several houses away from 765 South 20th Street that provided a blurry depiction of the shooting. The next day, Fadare and Giwa returned to the police station. There, each individual participated in a photo array identification procedure conducted by detectives who were not familiar with the case. Fadare and Giwa both viewed six photos and selected defendant's photo as the person who shot Olabode.

Detective Green later requested and obtained an arrest warrant for defendant. Detective Green attempted to determine defendant's location by tracking his cellphone, but was unable because his phone had been turned off. Likewise, Detective Green was unable to locate defendant in the area of South 20th Street. Defendant was eventually arrested several weeks later.

Prior to trial, defense counsel requested a Wade[2] hearing to determine the admissibility of the photo array, claiming the procedures were impermissibly suggestive. The court rejected the application, reasoning that law enforcement properly conducted the array via "blind administration" with detectives who had no knowledge of the case, and presented photos that looked very similar "in terms of age and complexion," and all showed African American males. Further, the police properly covered up defendant's tattoos on his face and neck and did

the same for all photos in the array. The court concluded that there was no reason to hold a Wade hearing, reasoning that law enforcement did "an excellent job of constructing the photo array and there [was] absolutely nothing whatsoever that [was] the least bit suggestive."

***3** At trial, the State's proofs included testimony from Fadare, Giwa, Officer Colon, Hall, Detective Green, and Special Agent John Hauger, an expert in historical cell site data analysis. Further, the State presented the surveillance video depicting the shooting, an audio recording of Hall's April 26, 2018 statement to Detective Green, and audio-visual recordings of the photo identification procedures in which Fadare and Giwa participated.

The first two witnesses presented at trial were Fadare and Giwa. During their testimony, Fadare and Giwa each identified defendant as the person who shot Olabode. The State played the surveillance video during both witnesses' testimony, and Fadare specifically identified defendant as appearing in the video. Giwa acknowledged, however, that he and Fadare were "in shock" following the shooting.

Fadare and Giwa also testified as to their participation in the photo identification procedures and the State inquired about their level of certainty that the photo they selected depicted the person who shot Olabode. Fadare stated he was "very sure that was the individual who did it" and that he did not "have any doubts." Likewise, when asked if he had "any doubt" that defendant was "the man who shot ... [Olabode]," Giwa stated "I saw his face. He's the one."

On cross-examination, defense counsel asked Fadare and Giwa about the shooter's appearance. Fadare described the shooter as wearing a hoodie but was unsure of the hoodie's color, the shooter's height, or whether the shooter had facial hair. Giwa stated the shooter wore a hoodie and had facial hair "[a]ll around his face," but did not know the color of the hoodie, whether the shooter wore a hat or glasses, or the color of the gun. He also acknowledged that his opportunity to view the shooter was brief. Finally, Fadare and Giwa both denied defense counsel's suggestion that Olabode stopped on 20th Street to purchase marijuana.

Officer Colon testified next and discussed his encounter with Olabode, Fadare, and Giwa, following the shooting. He described Fadare and Giwa as being "in a state of shock" and "nervous," and stated that Fadare was "hysterical" and "confused."

When the State called Hall to testify, she disavowed her April 26, 2018 statement. Specifically, she claimed she did not see defendant on the day of the shooting and that the yellow shirt she described was actually what he wore the previous day. After conducting a Gross[3] hearing, the court permitted the State to play Hall's prior statement for the jury.

Detective Green also testified for the State. He began by describing his arrival at the scene of the shooting and his initial investigation, and stated that he observed a surveillance camera in the area. When asked "what type of means" he had to use to obtain the surveillance footage, he stated "[everyone] ... on that street was not cooperative at all. Didn't want to talk to the police. Didn't want to provide any assistance" and, as such, he had to request a search warrant "because, again, no one wanted to cooperate."

Detective Green continued to describe why the South 20th Street residents all refused to cooperate with his investigation. He stated:

> Usually when that happens and it's for one of two reasons ... in my investigative experience, and I've been doing this for a pretty long time. Either you know the individual or you have fear that the individual knows you and will come back and do something to you.
>
> ***4** When I say know him, that means you have a personal relationship with him or you know of the individual and you want nothing to do with the situation, so you kind of shy off. Either that or you had a bad experience with the police. It's going to be one of ... the three.
>
> No one on that block wanted to talk. They all shut down. Closed. Don't ring my doorbell. Don't call me. Don't come. Don't try to contact. No, I'm not giving you my information. Leave me alone.
>
> [(emphasis added).]

As Detective Green continued to discuss his investigation of the scene, he described the bag he collected from 765 South 20th Street. He first stated that he collected the bag from "the hallway leading up to the second floor of 765 South 20th [Street]." The State then presented a photo of the contents of the bag and Detective Green stated "this is packaging for [controlled dangerous substances]" and described "these glassine bags [are] used for packaging [controlled dangerous substances]." The State then presented the contents of the bag.

Detective Green stated, "This is the actual contents that was shown in the photograph there. It has the nine bags of drug paraphernalia, as I call it, and along with the ... one bag of marijuana." He also described that the Union County Drug Lab determined that the bag contained "actual marijuana." The State moved the contents of the bag into evidence without objection.

The State then inquired why Detective Green never charged defendant with possession of marijuana. He stated:

> I'm a homicide detective. I've already charged him with murder, possession of a weapon, possession unlawful purpose. I felt the narcotics was fruitless. I mean, you're charging a man with murder. He's on trial for his life for murder and you're going to charge him with one bag of marijuana? No. I'm the murder police.
>
> [(emphasis added).]

Detective Green then provided his opinion as to why he suspected defendant to be the shooter. He stated that after speaking with Fadare and Giwa on the day of the murder he "began to believe that the individual responsible for the incident came out of 765 South 20th Street and the only one that matched ... the description that they were giving me was [defendant]," and that "they described [defendant] as if he's sitting right now."

The State then asked Detective Green about the surveillance video he obtained. He stated that it "[s]hows the victim, at some point, go across the street and approach the individual, later determined to be Mr. Poole, ... at which point Mr. Poole pulls out a weapon and shoots him." The State then clarified:

> PROSECUTOR: Now, at this point, you're viewing the video. You kept using the word -- the name Mr. Poole. Did you know specifically that was Mr. Poole at this time?
>
> DETECTIVE GREEN: No.
>
> PROSECUTOR: But, of course, you had your suspicions?
>
> DETECTIVE GREEN: Correct.

The State then played the surveillance video again. As the video began, Detective Green stated:

> If you notice, there's people standing outside. They're all in the same opposite side of the street.... I began to understand why no one ... would talk to us, because all these individuals were out there and they saw what transpired, and they probably know Mr. Poole. That's why ... they were shutting down, not talking to us.
>
> [(emphasis added).]

***5** Upon the shooter's appearance in the video, Detective Green stated, "that's Mr. Poole." Shortly thereafter the following exchange occurred:

> DETECTIVE GREEN: Now he gets closer. Now I can see him. He's still far away. That's Mr. Poole.
>
> PROSECUTOR: Now, of course, the video is far away and blurry?
>
> DETECTIVE GREEN: Yes.
>
> PROSECUTOR: You can't --
>
> DETECTIVE GREEN: I can't see his face.
>
> PROSECUTOR: Uh-huh.
>
> DETECTIVE GREEN: But I can see the clothing. The clothing that he's wearing is the same clothing described by Ms. Hall. Had that yellow shirt.
>
> [(emphasis added).]

Detective Green then stated "As you can see here, this individual is wearing that yellow shirt. He has a hoodie jacket on top of it, but the shirt inside of it is yellow."

Detective Green also testified regarding the photo array identification procedures in which Fadare and Giwa participated. In doing so, Detective Green described reports authored by the detectives who conducted the photo arrays. Specifically, Detective Green testified that the detective who conducted Fadare's procedure reported that Fadare was "calm and ... sure of his selection," and the detective who conducted Giwa's procedure reported that Giwa was "calm and confident with his selection."

On cross-examination, defense counsel again played the surveillance video and questioned Detective Green regarding his ability to identify defendant as the shooter in the video. After a series of questions, the following exchange occurred:

> DETECTIVE GREEN: That person is Christopher Poole. And that person shoots him. Christopher Poole.

DEFENSE COUNSEL: But you don't know at this point its Christopher Poole?

DETECTIVE GREEN: Oh, yes, I do. In fact (inaudible) Christopher Poole.

DEFENSE COUNSEL: How do you know that?

DETECTIVE GREEN: I followed the same ... individual that had that yellow shirt described by grandma. Back to the house .... Gets a gun and comes out. That person identified as Christopher Poole, wearing that yellow shirt, shot the victim.

[(emphasis added).]

Detective Green also acknowledged that the gun used in the shooting was never recovered despite his execution of a search warrant at 765 South 20th Street, nor were any fingerprints incriminating defendant found.

On redirect examination, Detective Green clarified that his identification of defendant as the shooter depicted in the surveillance video was based on what he could see in the video combined with the information he obtained from Hall and Giwa. The State then asked Detective Green, "Now, you're in no way saying that you could tell by this blurry photo, just by itself, that that's Mr. Poole?" Detective Green confirmed that he could not, and stated that his identification was based on the "[t]otality" of the information he had.

Finally, Special Agent Hauger testified regarding his analysis of defendant's cell phone records. He stated that defendant was in the "general geographic area" of 765 South 20th Street on the morning of the shooting and that defendant's phone last connected to a cell tower at 2:46 p.m. that day.

In summation, defense counsel described that Fadare's and Giwa's descriptions of the shooter were vague and inconsistent in certain aspects. Further he noted that neither witness described the shooter as wearing yellow, as Hall stated defendant was wearing on the day of the shooting, nor could the shooter be identified as wearing yellow in the surveillance footage. Defense counsel also recounted Officer Colon's testimony describing that Fadare and Giwa were "in shock, confused, and nervous" following the shooting.

***6** In its closing statement, the State acknowledged that the surveillance video was "fuzzy," shot from "eight houses down," and appeared to be "shot with a potato." It specifically stated it did not expect the jury to "find this man guilty just based on that video alone." Instead, it argued that the video combined with the other evidence in the case demonstrates that "[t]here's only one person that ... fits and that's the defendant." The court then provided instructions to the jury including instructions regarding how to evaluate Fadare's and Giwa's identifications of defendant.

The jury found defendant guilty of all three charges. The court merged defendant's second-degree possession of a weapon for an unlawful purpose offense with his first-degree murder offense. It then sentenced defendant to a life sentence subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, for his murder conviction, and a concurrent ten-year sentence with five years of parole ineligibility for his second-degree unlawful possession of a handgun conviction. This appeal followed.

II.

In his first point, defendant argues, relying on State v. Singh, 245 N.J. 1, 243 A.3d 662 (2021), that Detective Green's in-court identification of defendant amounted to an improper lay opinion and violated his "right to due process and a fair trial." Specifically, defendant identifies several portions of Detective Green's testimony in which he stated that defendant was the shooter depicted in the surveillance video, the shooter in the video wore the same clothing Ms. Hall described defendant as wearing, and defendant matched the description of the shooter provided by the eyewitnesses.

Further, defendant cites State v. Frisby, 174 N.J. 583, 593, 811 A.2d 414 (2002) and Neno v. Clinton, 167 N.J. 573, 586-87, 772 A.2d 899 (2001) for the proposition that "a detective's unambiguous naming of the defendant as the person shooting in the video would hold great weight with the jury." We agree with defendant that, when considered in its entirety, Detective Green's trial testimony constituted improper and prejudicial lay opinion testimony.

"A trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion." State v. Nantambu, 221 N.J. 390, 402, 113 A.3d 1186 (2015). We "will not substitute [our] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.' " State v. Garcia, 245 N.J. 412, 430, 246 A.3d 204 (2021) (quoting State v. Medina, 242 N.J. 397, 412, 231 A.3d 689 (2020)). This court also defers to a judge's findings based on video recording or documentary evidence that is

available for review. State v. S.S., 229 N.J. 360, 379, 162 A.3d 1058 (2017).

However, "[w]hen a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard. Under that standard, an unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result.' " Singh, 245 N.J. at 13, 243 A.3d 662 (quoting R. 2:10-2). "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated in light of the overall strength of the State's case.' " Id. at 13-14, 243 A.3d 662 (quoting State v. Sanchez-Medina, 231 N.J. 452, 468, 176 A.3d 788 (2018) (internal quotations omitted)). In addition, "trial errors which were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." State v. Harper, 128 N.J. Super. 270, 277, 319 A.2d 771 (App. Div. 1974).

Recently, in Singh, our Supreme Court addressed the requirements of lay opinion testimony. 245 N.J. at 14, 243 A.3d 662. The Court began its analysis by examining the purpose and boundaries of **N.J.R.E**. **701**, which provides:

> ***7** If a witness is not testifying as an expert, the witness' 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.

See also State v. Watson, —— N.J. Super. ——, —— (App. Div. 2022) (slip op. at 83-102).

The Court made clear "that '[t]he purpose of **N.J.R.E**. **701** is to ensure that lay opinion is based on an adequate foundation.' " Singh, 245 N.J. at 14, 243 A.3d 662 (alteration in original) (quoting State v. Bealor, 187 N.J. 574, 586, 902 A.2d 226 (2006)). "Accordingly, lay opinion testimony can be admitted only 'if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function.' " Ibid. (quoting State v. McLean, 205 N.J. 438, 456, 16 A.3d 332 (2011)).

N.J.R.E. **701**(a) first "requires the witness's opinion testimony to be based on the witness's 'perception,' which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." Ibid. (quoting McLean, 205 N.J. at 457, 16 A.3d 332). "[U]nlike expert opinions, lay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." Id. at 27, 243 A.3d 662 (alteration in original) (quoting McLean, 205 N.J. at 460, 16 A.3d 332). **N.J.R.E**. **701**(b) requires that the witness's opinion testimony be "limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 15, 243 A.3d 662 (quoting McLean, 205 N.J. at 458, 16 A.3d 332).

The principles discussed in Singh are directly applicable to our analysis here. In that case, the lead detective testified while the State played a surveillance video of the robbery for which the defendant was on trial, and he twice referred to the individual shown in the video as "the defendant." Id. at 17, 243 A.3d 662. The defendant argued that the detective's "**narration**" of the video was improper because he "lacked personal knowledge of what the video showed," and his testimony was "not helpful to the jury because the jury was in the same position to evaluate the footage." Id. at 11, 243 A.3d 662.

The Court concluded that the detective's references to the person shown in the video as "the defendant" instead of "the suspect" were in error, but reasoned that these references were "fleeting," and therefore "not so prejudicial as to meet the plain error standard." Id. at 18, 243 A.3d 662. The Court stressed, however, that "in similar **narrative** situations, a reference to 'defendant,' which can be interpreted to imply a defendant's guilt -- even when, as here, they are used fleetingly and appear to have resulted from a slip of the tongue -- should be avoided in favor of neutral, purely descriptive terminology such as 'the suspect' or 'a person.' " Ibid.

Here, Detective Green's testimony identifying defendant as the shooter depicted in the surveillance video was improper because it was not based on "personal knowledge of what the video showed" and was "not helpful to the jury because the jury was in the same position to evaluate the footage." Id. at 11, 243 A.3d 662. The testimony also was not "fleeting," as Detective Green repeated his identification several times. Id. at 18, 243 A.3d 662.

***8** Further, Detective Green's inappropriate identification testimony was highly prejudicial. The outcome of the trial turned on the State's ability to prove defendant's identity as the man who shot Olabode. Although its proofs of that critical fact were strong in certain aspects, multiple shortcomings were revealed at trial. For example, Fadare and Giwa provided

vague descriptions of the shooter and did not reference him wearing yellow, Giwa and Officer Colon described that Fadare and Giwa were in "shock" following the shooting, and Hall repudiated her prior statement placing defendant at the scene and describing his clothing.

By repeatedly testifying that defendant was the shooter depicted in the video and that he could recognize the shooter as wearing a yellow shirt under a hooded sweatshirt, Detective Green inappropriately and significantly bolstered the State's case against defendant. We acknowledge that Detective Green attempted to qualify his testimony by describing that his identification of defendant was not based solely on the surveillance video, however, we find those statements were insufficient to alleviate the prejudicial effect of his repeated and zealous identification of defendant.

III.

Defendant next argues Detective Green's testimony that defendant possessed marijuana and associated packaging materials constituted improper introduction of "other-bad-act evidence" and deprived him of his due process and fair trial rights. He contends that it was never proven that he owned the marijuana and, in any event, it "was not relevant to any material issue in dispute." Further he claims the evidence was prejudicial and capable of producing an unjust result because "[i]nappropriately establishing that [defendant] was a drug dealer ... raises the specific likelihood, in the mind of the jury, that he possessed a weapon and was likely to use it violently," and the judge failed to instruct the jury regarding the proper use of the evidence.

The State counters that defense counsel opened the door to this evidence when he asked both eyewitnesses whether Olabode drove to South 20th Street to buy marijuana, rather than to relieve himself. We agree with defendant that the testimony was improper, and even if defense counsel opened the door, the testimony was highly prejudicial and the court should not have permitted the jury to consider the evidence, and certainly not without a limiting instruction.

N.J.R.E. 404(b) allows for the admission of evidence of other crimes or wrongs for one of the reasons delineated in the rule — proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident — but not "to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." " '[B]ecause **N.J.R.E**. 404(b) is a rule of exclusion rather than a rule of inclusion,' the proponent of evidence of other crimes, wrongs or acts must satisfy a four-prong test." State v. Carlucci, 217 N.J. 129, 140, 85 A.3d 965 (2014) (quoting State v. P.S., 202 N.J. 232, 255, 997 A.2d 163 (2010)). Under this test, commonly known as the Cofield test, to be admissible under **N.J.R.E**. 404(b), the evidence of the other crime, wrong or act: (1) "must be admissible as relevant to a material issue"; (2) "must be similar in kind and reasonably close in time to the offense charged"; (3) "must be clear and convincing"; and (4) its probative value "must not be outweighed by its apparent prejudice." State v. Cofield, 127 N.J. 328, 338, 605 A.2d 230 (1992).

To satisfy the first prong of Cofield, the evidence must have "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See **N.J.R.E**. 401 (defining "[r]elevant evidence"). The evidence must also concern a material issue, "such as motive, intent, or an element of the charged offense." State v. Rose, 206 N.J. 141, 160, 19 A.3d 985 (2011) (quoting P.S., 202 N.J. at 256, 997 A.2d 163). Under Cofield, an issue is material if "the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede." Ibid. (quoting P.S., 202 N.J. at 256, 997 A.2d 163).

***9** Proof of the second prong is not required in all cases, but only in those that replicate the facts in Cofield, where "evidence of drug possession that occurred subsequent to the drug incident that was the subject of the prosecution was relevant to prove possession of the drugs in the charged offense." State v. Barden, 195 N.J. 375, 389, 949 A.2d 820 (2008) (quoting State v. Williams, 190 N.J. 114, 131, 919 A.2d 90 (2007)).

The third prong requires clear and convincing proof that the person against whom the evidence is introduced actually committed the other crime or wrong. Carlucci, 217 N.J. at 143, 85 A.3d 965. "[T]he prosecution must establish that the act of uncharged misconduct ... actually happened by 'clear and convincing' evidence." Rose, 206 N.J. at 160, 19 A.3d 985 (quoting Cofield, 127 N.J. at 338, 605 A.2d 230).

Last, the fourth prong is "generally the most difficult part of the test." Barden, 195 N.J. at 389, 949 A.2d 820. "Because of the damaging nature of such evidence, the trial court must engage in a 'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice."

Ibid. (quoting State v. Stevens, 115 N.J. 289, 303, 558 A.2d 833 (1989)). The analysis incorporates balancing prejudice versus probative value required by N.J.R.E. 403, but does not require, as does N.J.R.E. 403, that the prejudice substantially outweigh the probative value of the evidence. State v. Reddish, 181 N.J. 553, 608, 859 A.2d 1173 (2004). Rather, the risk of undue prejudice must merely outweigh the probative value. Ibid.

Admitting evidence of other crimes, wrongs or acts is left to the discretion of the trial judge. State v. Marrero, 148 N.J. 469, 483, 691 A.2d 293 (1997); State v. Crumb, 307 N.J. Super. 204, 232, 704 A.2d 952 (App. Div. 1997). As with other evidential rulings by a trial judge, our scope of review is limited. State v. Foglia, 415 N.J. Super. 106, 122, 1 A.3d 703 (2010). "However, if the trial court admits evidence of other bad acts without applying the four-step Cofield analysis, the trial judge's determination does not receive deference and the reviewing court reviews the issue de novo." State v. Goodman, 415 N.J. Super. 210, 228, 1 A.3d 767 (App. Div. 2010).

The "opening the door" doctrine is a "rule of expanded relevancy" through which otherwise irrelevant or inadmissible evidence may sometimes be admitted if the "opposing party has made unfair prejudicial use of related evidence." State v. James, 144 N.J. 538, 554, 677 A.2d 734 (1996); see also Hemphill v. New York, 595 U.S. ——, 142 S. Ct. 681, 691, 211 L.Ed.2d 534 (2022) (describing the "door-opening principle" as "a substantive principle of evidence that dictates what material is relevant and admissible in a case" and "requires a trial court to determine whether one party's evidence and arguments, in the context of the full record, have created a 'misleading impression' that requires correction with additional material from the other side.")

In criminal cases, the doctrine "operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context." James, 144 N.J. at 554, 677 A.2d 734. The doctrine is limited by N.J.R.E. 403, thus, evidence to which a defendant has "opened the door" may still be excluded if a court finds that its probative value is substantially outweighed by the risk of undue prejudice. Ibid.

***10** Here, the evidence suggesting that defendant possessed marijuana and associated packaging materials was not offered for any of the permitted uses of such evidence provided in N.J.R.E. 404(b) and clearly failed to satisfy the Cofield test and, therefore, should not have been admitted. The evidence was not "relevant to a material issue," and the State failed to establish that the marijuana actually belonged to defendant. Cofield, 127 N.J. at 338, 605 A.2d 230. Further, the evidence lacked probative value and presented a considerable risk of prejudice, given the common association between drug dealing and violence involving firearms. Ibid.; see also State v. Rodriguez, 466 N.J. Super. 71, 245 A.3d 598 (App. Div.), leave to appeal denied, 247 N.J. 234, 253 A.3d 1170 (2021) ("The Legislature has recognized that given the violence associated with the illicit drug trade, there are special dangers posed by drug dealers who have access to firearms."). Likewise, the lack of probative value and risk of prejudice associated with the evidence should have precluded its admission despite defense counsel arguably "opening the door" by asking Fadare and Giwa whether Olabode stopped at 20th Street in hopes of purchasing marijuana. James, 144 N.J. at 554, 677 A.2d 734; N.J.R.E. 403.

IV.

Defendant argues further that Detective Green's testimony that defendant's neighbors refused to cooperate with the investigation because they were afraid of defendant was unduly prejudicial and gave the impression that defendant "was such a dangerous person that he could silence whole neighborhoods." He claims the testimony was speculative, not based on facts in the record, an inappropriate lay opinion, and suggestive that [defendant] was a dangerous or threatening person, in violation of N.J.R.E. 404(b)." Again, we agree.

Lay witnesses are permitted to describe "what [they] did and saw," but not about what they "believed, thought or suspected." McLean, 205 N.J. at 460, 16 A.3d 332. We have cautioned that "if the lay opinion is presented by a testifying police officer, courts should exercise discretion to prevent jurors from unduly relying on the views of that law enforcement official." State v. Gerena, 465 N.J. Super. 548, 568, 244 A.3d 774 (App. Div. 2021). Further, "the lay witness should not cross into the realm of expert opinion that entails ... specialized knowledge." Ibid. A witness relying on " 'his training and experience' to 'testify about his belief as to what happened' strongly suggests" that the witness is providing an expert opinion subject to N.J.R.E. 702. State v. Derry, ——

N.J. ——, —— (2022) (slip op. at 26) (quoting McLean, 205 N.J. at 462, 16 A.3d 332).

Detective Green's testimony on this issue was highly improper. His opinion as to why defendant's neighbors refused to cooperate with his investigation exceeded the bounds of an appropriate lay opinion, see McLean, 205 N.J. at 460, 16 A.3d 332; Derry, —— N.J. —— (slip op. at 26), and his insinuations regarding defendant's general violent nature were speculative and not based on facts in the record. Further, when considered in combination with his improper **narration** of the surveillance video, Detective Green's comments that the South 20th Street residents' failure to cooperate with his investigation suggested that they knew the shooter and feared that he would "come back and do something to [them]," and that the residents were "shutting down" because "all these individuals ... saw what transpired, and ... probably know [defendant]," clearly implied that defendant was known to be a violent individual and likely committed the murder.

V.

Defendant next argues that the admission of testimony describing Fadare's and Giwa's confidence in their out-of-court identifications of defendant also constituted plain error. First, he claims Detective Green's testimony describing the reports of the detectives who conducted the photo array procedures was inadmissible hearsay and violated the Confrontation Clause. Second, he argues that admitting the testimony was erroneous because "neither eyewitness's confidence was recorded in his own words at the time the identifications were made, as required by State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011)." Finally, defendant claims the error was "compounded" because Fadare and Giwa were asked at trial about their confidence in their identifications after they had been exposed to confirmatory feedback. We, again, agree that admission of this testimony was improper.

***11** "Out-of-court statements offered to prove the truth of the matter asserted are hearsay." State v. White, 158 N.J. 230, 238, 729 A.2d 31 (1999) (citing **N.J.R.E**. 801). "Hearsay evidence [is] considered untrustworthy and unreliable," ibid., and "is not admissible except as provided by the ... rules [of evidence] or by other law." **N.J.R.E**. 802. There are several exceptions to the hearsay rule, which "are justified on the ground that 'the circumstances under which the statements were made provide strong indicia of reliability.' " White, 158 N.J. at 238, 729 A.2d 31 (quoting State v. Phelps, 96 N.J. 500, 508, 476 A.2d 1199 (1984)).

One such exception is the "business records" exception found in **N.J.R.E**. 803(c)(6), which provides:

> The following statements are not excluded by the hearsay rule ...
>
> (6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A statement contained in a writing or other record of acts, events, conditions, and subject to [**N.J.R.E**.] 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.
>
> This exception does not apply if the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

The Supreme Court has reaffirmed the standards governing the admissibility of business records:

> In order to qualify under the business record exception to the hearsay rule, the proponent must satisfy three conditions: "[f]irst, the writing must be made in the regular course of business; second, it must be prepared within a short time of the act, condition or event being described. Finally, the source of the information and the method and circumstances of the preparation of writing must justify allowing it into evidence."
>
> [State v. Sweet, 195 N.J. 357, 370, 949 A.2d 809 (2008) (quoting State v. Matulewicz, 191 N.J. 27, 29 (1985)).]

"The purpose of the business records exception is to broaden the area of admissibility of relevant evidence where there is necessity and sufficient guarantee of trustworthiness." Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 219, 673 A.2d 309 (App. Div. 1996). "The rationale for the exception is founded upon the theory that records which are properly shown to have been kept as required normally possess a circumstantial probability of trustworthiness, and therefore ought to be received in evidence." Ibid. A statement is reliable where the "declaration is so recorded is under a duty, in the context of the activity in which the record is made, to make an honest and truthful

report." State v. Lungsford, 167 N.J. Super. 296, 309, 400 A.2d 843 (App. Div. 1979).

It is well settled that a police report is generally "admissible as a record of a regularly conducted activity, commonly known as a business record, N.J.R.E. 803(c)(6), and as a public record, N.J.R.E. 803(c)(8)." Manata v. Pereira, 436 N.J. Super. 330, 345, 93 A.3d 774 (App. Div. 2014). Such reports may be admissible to show, for example, a person spoke to an officer, ibid., or that a report of a crime was made and the time of the report, Lungsford, 167 N.J. Super. at 310, 400 A.2d 843. Our Supreme Court has explained, however, that "police officers who draft reports have an interest in prosecuting defendants," and held, therefore, that a police report containing "factual statements, observations, and the officer's opinions" constituted "inadmissible hearsay outside the scope of the business records exception." State v. Kuropchak, 221 N.J. 368, 388-89, 113 A.3d 1174 (2015); see also State v. Mosley, 232 N.J. 169, 191, 179 A.3d 350 (2018) ("A police report ... prepared in the context of an investigation and recounting subjective events in a narrative form, is not a document that fits into any exception to the hearsay rule.").

***12** Where the business record at issue is a police report, "[i]f the police officer who wrote the report is unavailable, any other police official who could state that the report was a record made in the regular course of the officer's duties and was made at or near the time of the event may establish the report's admissibility." Dalton v. Barone, 310 N.J. Super. 375, 378, 708 A.2d 783 (App. Div. 1998). The declarant who records the information in the report, however, must have had a " 'business' duty to communicate it truthfully." Lungsford, 167 N.J. Super. at 309, 400 A.2d 843.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution both provide that the accused in a criminal trial has the right to confront the witnesses against him. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. "[T]he Confrontation Clause of the United States Constitution bars the 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' " State v. Slaughter, 219 N.J. 104, 116-17, 96 A.3d 246 (2014) (quoting Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). Testimonial statements are defined as "those 'objectively indicat[ing] that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' " State ex rel. J.A., 195 N.J. 324, 329, 949 A.2d 790 (2008) (quoting Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)). Generally, the Confrontation Clause forbids the admission of testimony that is directly or indirectly derived from a non-testifying witness and incriminates a defendant. State v. Branch, 182 N.J. 338, 350, 865 A.2d 673 (2005).

The right of confrontation, [however] ... may be waived by the accused. State v. Williams, 219 N.J. 89, 98, 95 A.3d 701 (2014). "Because counsel and the defendant know their case and their defenses, they are in the best position to make the tactical decision whether to raise a Confrontation Clause objection." Id. at 99, 95 A.3d 701. "[T]he defendant always has the burden of raising his Confrontation Clause objection." Ibid. (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 327, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)). "It is the defendant's choice "to assert (or forfeit by silence) his Confrontation Clause right." Ibid. (quoting Melendez-Diaz, 557 U.S. at 326, 129 S.Ct. 2527).

In Henderson, 208 N.J. at 227-28, 27 A.3d 872, our Supreme Court set forth a modified framework to evaluate eyewitness identification evidence. The Court canvassed a variety of factors that scientific studies have shown may confound what otherwise might appear to be an eyewitness's reliable identification of a criminal wrongdoer. Id. at 218, 27 A.3d 872. These confounding factors include "system variables" (factors within the control of the criminal justice system, such as suggestive aspects of lineup and photo array procedures), and "estimator variables" (factors outside of the control of the criminal justice system, such as the distance between a victim and an assailant, poor lighting, stress, personal characteristics, and memory decay). Ibid.

In its evaluation of the system variable "avoiding feedback and recording confidence," the Court emphasized that "to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback." Id. at 254, 27 A.3d 872. As such, Henderson requires law enforcement officers to "make a full record—written or otherwise—of the witness' statement of confidence once an identification is made." Ibid. More recently, our Supreme Court set forth specific standards for preservation of identification procedures. State v. Anthony, 237 N.J. 213, 230-31, 204 A.3d 229 (2019). Anthony now requires identification procedures to be electronically captured in "video or audio format." Id. at 231, 204 A.3d 229.

***13** Rule 3:11(b) also requires police to "electronically record the out-of-court identification procedure in video or audio format, preferably in an audio-visual format." The Rule specifically requires the record to include "a witness' statement of confidence, in the witness' own words, once an identification has been made." R. 3:11(c)(9). It also provides a remedy in the event the record is lacking in important required details if it would have been feasible to obtain and preserve those details. R. 3:11(d). In such cases, "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." R. 3:11(d).

Here, the statements contained in the detectives' reports explaining that the eyewitnesses were "confident" in their photo selections were inadmissible hearsay without an applicable exception. The statements were made out of court and offered for their truth, White, 158 N.J. at 238, 729 A.2d 31, and were not admissible under the business records exception because they were prepared for the purpose of prosecution, Kuropchak, 221 N.J. at 388-89, 113 A.3d 1174. Further, the failure to record statements of the eyewitnesses' confidence at the time of the photo arrays violated Henderson, 280 N.J. at 254 and Rule 3:11(c)(9). No Confrontation Clause violation occurred, however, because defendant's failure to object constituted an implicit waiver of his right of confrontation. See Williams, 219 N.J. at 99, 95 A.3d **701**.

In light of these improprieties, we conclude the testimony should not have been admitted. We also recognize that it created a risk of prejudice to defendant by bolstering Fadare's and Giwa's photo array identifications and reducing the adverse impact of the somewhat vague descriptions of the shooter they provided in court and on the day of the murder. We acknowledge, however, that the prejudicial effect of the testimony was limited because the State played video recordings of both photo array procedures at trial, allowing the jury to draw its own conclusions regarding Fadare's and Giwa's confidence in their photo selections.[4]

VI.

Finally, defendant argues that the aggregate effect of the various trial errors raised on appeal deprived him of his constitutional right to due process and a fair trial. We agree. "When legal errors cumulatively render a trial unfair, the Constitution requires a new trial." State v. Weaver, 219 N.J. 131, 155, 97 A.3d 663 (2014). "[W]here any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet if all of them taken together justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of this court to reverse." Ibid. (alteration in original) (quoting State v. Orecchio, 16 N.J. 125, 134, 106 A.2d 541 (1954)); see also State v. Jenewicz, 193 N.J. 440, 473, 940 A.2d 269 (2008) ("[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.").

Determining whether the cumulative effect of trial errors deprived a defendant of a fair trial necessarily requires weighing the strength of the State's case against the prejudicial effect of the complained of errors. Here, we do not doubt that the State presented sufficient evidence to support defendant's conviction. However, as noted, the State's proofs establishing defendant's identity as the man who shot Olabode were not unassailable. In particular, Fadare's and Giwa's vague descriptions of the shooter, which did not include him wearing yellow, Hall's repudiation of her prior statement, and the testimony describing Fadare and Giwa being in "shock" after witnessing their friend's murder all raised reasonable questions regarding the evidence identifying defendant as the shooter.

***14** Detective Green's improper testimony effectively eliminated any weaknesses in the State's proofs identifying defendant. He was permitted to improperly resolve the discrepancies between Hall's statement describing defendant's clothing and Fadare's and Giwa's descriptions of the shooter by stating that he could tell that the shooter was wearing a yellow shirt under a hooded sweatshirt in the surveillance video. Detective Green also remedied the vagueness of Fadare's and Giwa's descriptions and the possibility that their memories might have been impacted by the stress of viewing their friend's murder by stating that defendant matched the description they provided.

In addition, the admission of Detective Green's testimony opining that the South 20th Street residents feared defendant and implying that he possessed and distributed marijuana further prejudiced defendant. That testimony inappropriately suggested defendant's guilt based on a propensity for wrongdoing and violence.

Indeed, Detective Green's testimony implying that defendant possessed materials used for packaging controlled dangerous substances suggested that he was a drug dealer. Further, by suggesting that the South 20th Street residents witnessed the shooting and failed to cooperate with the investigation because they knew defendant and feared he would retaliate against them, Detective Green not only implied that defendant was extremely violent, but also that his violent nature was common knowledge in his community. Viewed in the aggregate, these errors deprived defendant of a fair trial and, therefore, compel us to reverse his conviction. Weaver, 219 N.J. 155.

Reversed and remanded to the trial court for further proceedings in accordance with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 2232815

Footnotes

1 We have reorganized defendant's point headings to reflect the order in which we discuss each issue in our opinion.

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

3 State v. Gross, 121 N.J. 1, 7-9, 577 A.2d 806 (1990).

4 We note that, because the prejudice of this error was likely limited in light of the jury's ability to evaluate Fadare's and Giwa's confidence in their identifications, this error would not support a remand standing alone.

End of Document

2022 WL 2289044
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Rick KING, Defendant-Appellant.

DOCKET NO. A-4005-17
|
Submitted March 16, 2022
|
Decided June 24, 2022

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 14-01-0084 and 17-01-0181.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (John A. Albright, Designated Counsel, on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges Sumners, Vernoia and Firko.

Opinion

PER CURIAM

***1** Defendant Rick King appeals from his conviction and sentence on charges arising from two separate incidents—a 2013 robbery of Roseway Liquors in Irvington and the 2015 murder in Roseway Liquors of the sole witness to the robbery, Amit Patel (Patel). Defendant claims the court erred by: joining for trial the separate indictments on the charges related to each incident; allowing improper lay opinion testimony during the narration of surveillance recordings; admitting crime scene and other photographs; admitting testimony concerning Patel's identification of defendant as the perpetrator of the robbery; failing to sua sponte instruct the jury on issues concerning identification and the playback of recordings during deliberations; admitting testimony from the State's fingerprint expert; and imposing an excessive sentence. Based on our review of the record in light of the parties' arguments and applicable legal principles, we reverse and remand for a new trial.

I.

On October 31, 2013, Patel worked at Roseway Liquors, a store his family owned and operated at 701 Lyons Avenue in Irvington. He reported to the police that an individual had entered the store, robbed him at gunpoint, and fled from the store with stolen cash. The police stopped defendant a short time later. Defendant fled on foot, and he was apprehended and arrested by the police after a short chase. In 2014, a grand jury charged defendant in an indictment with first-degree robbery, possessory weapons offenses, aggravated assault, resisting arrest, and obstruction.

On February 15, 2015, fifteen months after the robbery and while defendant awaited trial on the charges in the indictment, Patel was again working at Roseway Liquors when an individual entered the store, directed Patel lay down on the floor, and shot Patel once at close range through the head. Defendant was later arrested for Patel's murder and charged in a 2017 indictment with murder, possessory weapons offenses, and tampering with a witness.

The State moved to join the 2014 and 2017 indictments for trial. Defendant opposed the motion. The court granted the motion and subsequently conducted a lengthy jury trial. We summarize the evidence presented at trial to provide context for our discussion of the arguments presented on appeal.

The 2013 Robbery

On October 31, 2013, Patel called 9-1-1 and reported he was in Roseway Liquors and was just robbed at gunpoint by an individual who took cash and fled towards a nearby park.[1] Irvington police officers Jamar Neal and Steve Gene Simon responded to the store and spoke with Patel. Neal testified Patel said he was robbed by a black male, who was approximately 5'10" tall, weighed 170 pounds, wore a black hooded sweatshirt that displayed a skull design, possessed a chrome revolver, and took cash in denominations of fifties and tens. Patel said he saw the suspect quickly walk away from Roseway Liquors, and he described the route the suspect traveled before he lost sight of the suspect in a nearby

park. Neal contacted the police dispatcher and relayed the description and direction of the suspect's flight.

***2** Irvington Police Detective Brechner Jeannot and Officer Shenara Cannon were on patrol, overheard the information provided to the dispatcher, saw a man matching the suspect's description—wearing blue jeans, black boots, and a black hooded sweatshirt—walk down a sidewalk, run into an alley, and then emerge from the alley wearing only blue jeans, black boots, and a black tank-top. They noted the weather was cold and rainy and the man was sweating, nervous, jittery, and out of breath. Cannon took the man, later identified as defendant, into custody, while Jeannot reported the events to dispatch.

Additional officers arrived and overheard a report to dispatch from Neal, describing what was taken from Roseway Liquors. In response, defendant shoved Cannon and fled, ignoring instructions from the officers to stop.

Officers pursued defendant on foot, and others pursued defendant in police cars. Defendant was apprehended when he collided with a police car as he ran onto a nearby street. Defendant alleged he was intentionally struck by the police car, but Irvington Police Detective Michael Gardner, who investigated the incident as a member of the department's Internal Affairs Unit, testified at trial he believed defendant ran into the police car while fleeing. During his testimony, Gardner also narrated a surveillance video recording from a Woroco gas station showing an individual collide with a police car, and identified defendant as the individual depicted in the recording. In any event, defendant was apprehended following the collision at the intersection at which the gas station was located.

Neal then transported Patel to the gas station for a showup identification. Neal testified Patel said defendant's height, weight, jeans, and boots matched those of the individual who robbed the store, and he explained Patel also identified the currency in defendant's possession as matching the cash taken during the robbery—one fifty-dollar bill, thirteen ten-dollar bills, and five one-dollar bills. Neal also testified Patel was unable to identify defendant as the perpetrator of the robbery because the perpetrator's face had been covered by a black-and-white bandana during the robbery.

Hours after the robbery, Patel provided a video-recorded statement to the police. During the statement, Patel repeated the information he previously provided to the police concerning the robbery and the perpetrator, including the description of the perpetrator, his clothing, and the gun. Patel also again said he could not identify defendant as the perpetrator because the perpetrator's face was covered during the robbery. The recording of Patel's statement was played for the jury at trial.

The officers searched the alleyway Jeannot and Cannon had observed defendant enter wearing a black hooded sweatshirt, and emerge from wearing blue jeans, black boots, and a black tank top. In a garbage can in the alleyway, police recovered a black hooded sweatshirt with a skull design on it, a hat, a black thermal long-sleeve shirt, gloves, a black-and-white bandana, and a loaded silver .38 caliber revolver. Inside the hooded sweatshirt's pocket was a cell phone.

At trial, the State presented a fingerprint expert who testified three fingerprints found on the gun could not be confirmed as belonging to defendant but could not be ruled out as belonging to defendant. Testing revealed DNA recovered from the gloves and hooded sweatshirt belonged to defendant, and the cell phone included naked photographs of defendant that he had apparently taken of himself.

Following defendant's arrest, he was transported to the hospital, where Gardner read defendant his Miranda[2] rights and interrogated defendant concerning his claim he was injured after being struck by the police car. During the interrogation, defendant said he lived at 64 Union Avenue in Irvington and claimed he could not recall his telephone number. Defendant also said he had been at a friend's house prior to being stopped by the police and he fled because he had an active warrant for his arrest. The audio recording of defendant's statement was played for the jury.

***3** Detective Christopher Burrell later conducted a second interrogation of defendant after again advising defendant of his Miranda rights. During the interrogation, defendant denied that the items recovered from the alleyway were his, admitted he may have been in the area to smoke marijuana in the park, and claimed the money found in his possession was a work-related payment. The video recording of the statement was played for the jury.

After advising defendant of his Miranda rights, Burrell questioned defendant a second time. Defendant claimed he had been in the park smoking marijuana with Jerrell Alexander, who defendant described as a gang member who was known as "Black." Defendant said he touched a silver revolver Alexander had shown him, and that Alexander was

wearing blue jeans and a black hooded sweatshirt on the day of the robbery. A video recording of Burrell's interrogation of defendant was played for the jury. The police investigated Alexander as a possible perpetrator of the robbery but did not discover any evidence connecting him to it.

As noted, in 2014, a grand jury charged defendant in an indictment with charges related to the robbery and defendant's flight from the police. On January 29, 2015, the State received the results from DNA testing of the gloves and black hooded sweatshirt recovered from the garbage can in the alleyway. The results revealed defendant's DNA on the gloves and the sweatshirt's cuffs and collar. Two weeks later, Patel was murdered in Roseway Liquors.

The February 15, 2015 Murder

At around 3:30 p.m. on February 15, 2015, Patel was working at Roseway Liquors with his father, Girish Patel (Girish).[3] Girish went into the back of the store, while Patel remained in the front. A short time later, Girish heard a gunshot, ran to the front of the store, and saw Patel lying on the floor. Girish ran to the door, looked outside, and saw a person running away. As a customer approached the store, Girish instructed him to call 9-1-1. Video recordings from within the store depicted the perpetrator's entry into the store, Patel's murder, the perpetrator's exit, and the movements of Girish and others following the murder. The video recordings and the audio recording of the 911 call were played for the jury at trial.

Paul Bell, a frequent customer at Roseway Liquors, arrived and entered the store. He observed Patel laying in a pool of blood on the floor and heard Girish screaming. Bell asked Girish if the store was robbed, but after checking the cash register, Girish determined nothing had been taken.

Irvington Police Detective Mario Clarke and Officer Miles Brown responded to Roseway Liquors and searched for suspects. Later, Essex County Prosecutor's Office Detective John Manago arrived at the store. Manago thereafter served as the lead detective investigating the murder.

Manago recovered a 9 mm shell casing on the floor of the store, and he observed that nothing had been stolen. He also observed that Patel had a ring on his finger, and $1,000 in cash, keys to a BMW automobile, and a cell phone in his pockets.

During his investigation, Manago interviewed Nelson Escobar, the building superintendent at 64 Union Avenue, an Irvington apartment building located blocks from Roseway Liquors, and the place defendant said he lived during his interrogation by Gardner following the 2013 robbery.

***4** Escobar reviewed recordings from the building's surveillance cameras that were made the day of the murder. At trial, Escobar testified he saw the individual shown in the recordings on multiple occasions during the six years prior to the murder and had most recently seen the individual a week before Patel's murder. After viewing a photograph array at the police station, Escobar identified defendant as the individual shown in the recordings and Escobar identified defendant at trial as the individual shown in the 64 Union Avenue surveillance recordings. Escobar testified defendant had family members living in the apartment building who defendant often visited, and he had seen defendant sleeping in the building's laundry room over the years.

During the investigation of Patel's murder, police obtained surveillance recordings from cameras located at various businesses between Roseway Liquors and 64 Union Avenue. The evidence showed Roseway Liquors is located at 701 Lyons Avenue. Lyons Avenue runs east and west, and Roseway Liquors is located on the north side of the street. Its front door faces south. A person exiting the store and turning right, heads west on Lyons Avenue, which runs under a Garden State Parkway overpass.

Once on the west side of the overpass, there are businesses located on the north side of the street. Relevant here, among those businesses is a car wash and, at the northeast corner of the intersection of Lyons Avenue and Union Avenue, there is a convenience store, King's Farm Market, which has a parking lot with entrances on Lyons Avenue and Union Avenue.

If an individual travels west on Lyons Avenue and turns north on Union Avenue, King's Farm Market is on the corner to the right at the intersection. As an individual travels north on Union Avenue, immediately behind the convenience store—again to the right on the east side of the street—is the K&J Laundromat. Farther north on Union Avenue, and also on the east side of the street is a motel, and then farther north is the apartment building at 64 Union Avenue. A short distance to the north of the apartment building is a BP gas station located at 45 Union Avenue.

The route west from Roseway Liquors on Lyons Avenue to its intersection with Union Avenue, and then north on Union Avenue to the apartment building at 64 Union Avenue is at the center of the State's proofs against defendant. The State's case is bereft of physical evidence tying defendant to the murder or the murder scene at Roseway Liquors.

In great part, at trial the State relied on evidence defendant had a motive to commit the murder, arguing Patel was the victim and primary witness in the robbery case, and the January 2015 return of the results of the DNA testing tied defendant to the clothes and gun that were consistent with Patel's description of those worn and used by the perpetrator of the robbery. The State also utilized video recordings from 64 Union Avenue and various businesses on Lyons and Union Avenues between Roseway Liquors and the apartment building, claiming they showed defendant traveled to the liquor store at the precise time the murder was committed, and then returned to 64 Union Avenue after Patel was murdered.

During its case, numerous video recordings from eleven cameras along Lyons and Union Avenues, and still photos reaped from the recordings, were admitted in evidence and published to the jury without objection. As the recordings were played, they were narrated by Manago and Brian Innis, an employee in the Media Services Unit of the Essex County Prosecutor's Office.

More particularly, the surveillance recordings from the apartment building at 64 Union Avenue show a person, who both Escobar and Manago identified as defendant, moving through the basement area and other interior locations before and after the murder. Recordings from the car wash, the convenience store, a liquor store located across Lyons Avenue from the convenience store, the BP gas station, a location on Union Avenue near the gas station, the laundromat, and motel show a person the State argued was defendant walking towards Roseway Liquors prior to the murder and later traveling back through the area after the murder. A surveillance video from outside of an ice cream store located to the east of Roseway Liquors was presented to demonstrate no one walked east past Roseway Liquors following the murder. The State further claimed the recordings showed the same individual changed his clothing before and after Patel's murder.

***5** During the investigation, the police photographed defendant and seized various articles of his clothing. The police also measured defendant's height, and determined he was 5'10.5" with his shoes on. Kimberly Meline, an FBI height analysis expert, testified the suspect shown in the recordings walking past the convenience store before and after the murder was 5'10.5" tall with his shoes on.

Detective Clark testified he seized a cell phone from defendant in July 2015, five months after the murder. An examination of the cell phone revealed it contained data showing online searches using the terms "Amit Patel" and "Amit Patel murder," and it had been used to access articles entitled "Indian-American Amit Patel Shot Dead in U.S." and "Amit Patel was Killed in Town Beset by Rash of Armed Robberies."

The State also presented Dr. Eddy Lilavois, the assistant medical examiner who performed Patel's autopsy, who testified the cause of Patel's death was a close-range gunshot wound to the head, which caused a cracking of his skull, the deposit of black powder at the entry wound and brain, and extensive blood loss. Dr. Lilavois opined the manner of death was homicide. During his testimony, the State moved for the admission of multiple photographs from Patel's autopsy that were shown to the jury.

The State also presented the testimony of a Newark police officer who recovered a gun the State claimed, based on ballistics testing, was used to commit Patel's murder. The officer testified that on October 15, 2015, eight months after the murder, he responded to the report of a robbery in progress in Newark and observed a black male wearing a black hooded sweatshirt running from the scene. The officer described the suspect as 5'5" tall, and explained the suspect dropped a 9 mm handgun, a black sweatshirt, and a white sneaker as he fled. The suspect was not apprehended but the officer recovered the handgun, sweatshirt, and sneaker.

Christopher Szymkowiak, a forensic scientist employed by the New Jersey State Police Office of Forensic Science, testified there were at least two different DNA profiles on the gun recovered in Newark, but the DNA profiles from the sneaker and hooded sweatshirt were too weak to be evaluated. An officer from the Newark Police Department's ballistics laboratory testified he tested the handgun and determined it was the same weapon that discharged the shell casing found at the scene of Patel's murder.

Defendant did not present any witnesses at trial. The jury found defendant guilty of all the charges arising from the robbery and murder. The jury also determined

defendant committed the murder for the purpose of escaping detention, apprehension, trial, punishment, or confinement for another offense. The court therefore imposed a life sentence without parole pursuant to N.J.S.A. 2C:11-3(b)(4)(f) on defendant's conviction for knowing and purposeful murder under N.J.S.A. 2C:11-3(a). The court imposed concurrent custodial sentences on the weapons and witness tampering charges in the 2014 indictment.

Based on defendant's prior criminal record—including four prior criminal convictions, two of which were for Graves Act, N.J.S.A. 2C:43-6(c), offenses—his conviction of the first-degree robbery charge in the 2014 indictment required imposition of a mandatory extended term sentence pursuant to N.J.S.A. 2C:43-6(c). The court imposed a forty-year extended term sentence on the robbery charge subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2, and ordered defendant serve the sentence consecutive to his sentence on the murder charge. The court imposed custodial sentences on each of the remaining charges in the 2014 indictment, and ordered defendant serve those sentences concurrently to the sentence imposed on the robbery charge.

***6** Defendant appeals from his convictions and sentence. He presents the following arguments for our consideration.

POINT I

TRIAL OF THE ROBBERY AND MURDER INDICTMENTS TOGETHER DEPRIVED [DEFENDANT] OF A FAIR TRIAL AND IRREPARABLY TAINTED THE VERDICT; THE TWO INDICTMENTS AROSE OUT OF SEPARATE EVENTS OCCURRING OVER A YEAR (FIFTEEN MONTHS) APART.

POINT II

THE PROSECUTOR ELICITED EXTENSIVE IMPROPER LAY WITNESS OPINION TESTIMONY AS TO THE CONTENT OF THE SURVEILLANCE VIDEOS AND THE IDENTITY OF THE SHOOTER.

POINT III

NUMEROUS GRUESOME AND EXPLICIT PHOTOGRAPHS, INCLUDING THOSE OF THE VICTIM'S BODY IN A POOL OF BLOOD, HAD NO OTHER PURPOSE BUT TO INFLAME THE JURY.

POINT IV

THE JURY CHARGE WAS MANIFESTLY DEFICIENT ON THE KEY ISSUES OF IDENTIFICATION, AND VIDEO PLAYBACK DURING DELIBERATIONS REQUIRING REVERSAL.

A. The identification charge did not mention any of the numerous identifications of [defendant] during the narration of the surveillance videos, or the showup "partial" identification by the victim.

B. The failure to properly instruct the jury on how to consider the video played back during deliberations, as required by State v. Miller[4], had the clear capacity to produce an unjust result.

POINT V

ADMISSION OF OFFICER NEAL'S TESTIMONY ABOUT THE VICTIM'S SHOW-UP "PARTIAL" IDENTIFICATION OF [DEFENDANT] AFTER THE ROBBERY WAS REVERSIBLE ERROR.

POINT VI

THE STATE WAS IMPROPERLY ALLOWED TO PRESENT EXPERT TESTIMONY THAT A FINGERPRINT ANALYSIS COULD NOT "RULE OUT" [DEFENDANT], WITHOUT ACTUALLY MATCHING ANY FINGERPRINTS TO [DEFENDANT].

POINT VII

THE AGGREGATE LIFE TERM OF IMPRISONMENT WITHOUT PAROLE WITH A CONSECUTIVE AGGREGATE FORTY YEARS SUBJECT TO THE NO EARLY RELEASE ACT WAS MANIFESTLY EXCESSIVE, IMPROPER, AND UNSUPPORTED BY THE REQUISITE YARBOUGH[5] ANALYSIS.

II.

We first consider defendant's argument his convictions should be reversed because the court erred by allowing detectives Gardner, Manago, and Innis to testify defendant is the individual depicted in various video recordings they narrated during their testimony. He contends the testimony constituted

inadmissible lay opinion that was prejudicial, usurped the jury's fact-finding function, improperly bolstered the State's claim defendant committed the crimes, and had the clear capacity to produce an unjust result.

Defendant recognizes there was no objection to the challenged testimony at trial. We therefore review the admission of the testimony for plain error; that is, we must determine whether the alleged error was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. To warrant a reversal under this standard, the "error must be sufficient to raise 'reasonable doubt ... as to whether the error led the jury to a result it otherwise might not have reached.' " State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

We review a trial court's evidentiary rulings "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). "Under [the] deferential standard, we review a trial court's evidentiary ruling only for a 'clear error in judgment.' " State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). A reviewing court will not substitute its "judgment for the trial court's unless," the trial court's determination "was so wide of the mark that a manifest denial of justice resulted." Ibid. (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

***7** N.J.R.E. 701 allows lay opinion testimony "if it falls within the narrow bounds of testimony that is based on the perception of the witness and ... will assist the jury in performing its function." State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting State v. Singh, 245 N.J. 1, 14 (2021)); see also State v. McLean, 205 N.J. 438, 456 (2011). To be admissible, lay opinion testimony must be supported by an "adequate foundation." Ibid. (quoting Singh, 245 N.J. at 14).

To establish an adequate foundation for the admission of lay opinion testimony, the proponent of the testimony must satisfy two requirements. See ibid. First, the opinion testimony must be "based on the witness's 'perception,' which 'rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing.' " Singh, 245 N.J. at 14 (quoting McLean, 205 N.J. at 457); see also Sanchez, 247 N.J. at 466; State v. Watson, —— N.J. Super. ——, —— (App. Div. 2022) (slip op. at 79-80) (summarizing the standard for admission of lay opinion testimony under the first prong of the Singh standard). "[L]ay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." Id. at 14-15 (quoting McLean, 205 N.J. at 460); see also Sanchez, 247 N.J. at 466-67.

Second, lay opinion is "limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 15 (quoting McLean, 205 N.J. at 458). "A witness may not offer lay opinion on a matter 'as to which the jury is as competent as [the witness] to form a conclusion.' "[6] Sanchez, 247 N.J. at 469-70 (alteration in original) (quoting McLean, 205 N.J. at 459); see also Watson, —— N.J. Super. at —— (slip op. at 80-81) (summarizing factors to be considered under the Singh standard when determining whether lay opinion testimony will assist a jury).

In Singh, the Court applied the foregoing principles in its assessment of the admissibility of lay opinion testimony provided by a police officer identifying the defendant as the individual depicted in the events shown in a video surveillance recording. Id. at 17. Relying on its holdings in McLean and State v. Lazo, 209 N.J. 9 (2012), the Court found the officer's testimony identifying the defendant on the recordings constituted inadmissible lay opinion testimony because it was not based on the officer's prior personal knowledge of the defendant, the officer did not personally witness the events depicted in the recordings, it impermissibly bolstered the identification of the defendant, and it provided an opinion on a matter that was not beyond the understanding of the jury. Id. at 15-17.

***8** In Singh, the police officer twice referred to the individual depicted in a video recording of a robbery as "the defendant," but otherwise referred to the individual depicted as "the suspect." Id. at 18. The Court found the officer's two references to the individual as "the defendant" constituted improper lay opinion but determined the error in admitting the testimony was harmless "given the fleeting nature of the comment and the fact that the detective referenced defendant as 'the suspect' for the majority of his testimony." Id. at 17. The Court, however, explained

> that in similar narrative situations, a reference to "defendant," which can be interpreted to imply a defendant's guilt—even when, as here, they are used fleetingly and appear to have resulted from a slip of the tongue—should be avoided in favor of neutral, purely

descriptive terminology such as "the suspect" or "a person."

[Id. at 18.]

Here, defendant contends Gardner, Innis, and Manago separately offered inadmissible lay opinion testimony when they identified defendant either by his name or as "defendant" as the individual depicted in various video recordings they narrated as the recordings were played for the jury.[7] We consider the witnesses' testimonies in turn.

A.

Detective Gardner testified he interrogated defendant as part of a police department internal affairs investigation of defendant's claim he was struck by a police car as he fled from the police after he was initially stopped following the 2013 robbery. The interrogation was recorded. The recording was played without objection for the jury, and the jury was provided with a transcript of the interrogation. During the interrogation, defendant admitted he was in the vicinity of the Woroco gas station when he was struck by a police car, and that after he was struck and fell, the police arrested him for the robbery.

During his testimony, Gardner narrated for the jury, without objection, a surveillance video recording from the Woroco gas station that was recorded after the robbery at Roseway Liquors. The recording was admitted in evidence without objection. During his narration of the recording, Gardner identifies an individual as "Mr. King" and "defendant," stating for example, "This is ... Mr. King running right there," "Mr. King is running northbound," and "you could actually see that the car didn't strike him. He actually ran into the car." Gardner also described defendant's actions and offered an opinion concerning the cause of defendant's collision with the car—faulting defendant for what occurred.

Gardner's identification of the individual in the recording by name and as "defendant," and his assignment of fault for the collision that occurred, constituted inadmissible lay opinion testimony under N.J.R.E. 701 and the principles enunciated by the Court in Singh; his testimony was not based on his personal knowledge, it bolstered the State's version of the events, and it was unnecessary to assist the jury's fact-finding, see Singh, 245 N.J. at 15-17; see also Watson, —— N.J. Super. at —— (slip op. at 80-81) (explaining factors to be considered when determining whether lay opinion testimony will assist a jury).

We are not, however, convinced admission of the testimony was clearly capable of producing an unjust result. R. 2:10-2. Defendant did not dispute he was depicted in the recording, defendant admitted in his recorded statement he collided with a police car after fleeing from the police, the recording and its narration related to defendant's claim the police drove the car into him, and the recording was not probative of defendant's involvement in the robbery as it pertained only to an undisputed fact defendant admitted during his statement—he fled from the police after they initially stopped him. Based on those circumstances, and the otherwise substantial evidence supporting defendant's guilt on the robbery-related charges in the 2014 indictment, the error in admitting Gardner's lay opinion testimony did not constitute plain error. See, e.g., State v. Trinidad, 241 N.J. 425, 447 (2020) (explaining testimony that would not "have tipped the scales in" favor of the State is harmless error); State v. Hightower, 120 N.J. 378, 410 (1990) (finding the strength of the State's case can render officer's improper testimony as harmless).

B.

***9** Defendant also argues the court committed plain error by allowing Detective Innis, without objection, to provide inadmissible lay opinion testimony during his narration of a four-part surveillance video that was recorded on the day of Patel's murder at the BP gas station located at 45 Union Avenue.[8] Unlike Gardner, Innis did not refer to the person depicted in the recordings, and some still photos taken from the recordings, as "defendant," "Rick King," or "Mr. King." Instead, he referred to the individual in the videos and still pictures using neutral language, such as "a person," "the person," "they," "that person," "the individual," and "that individual." We find no error in Innis's reference to the individual depicted in the recordings and photos in that manner. See Singh, 245 N.J. at 14.

C.

Defendant also argues his convictions should be reversed because Detective Manago's narration of the numerous video recordings taken from 64 Union Avenue and the businesses along the alleged perpetrator's route to and from Roseway Liquors, and still photos taken from the recordings, was

replete with identifications of defendant by name and as "defendant," and by inadmissible lay opinions concerning the actions of the individual shown. Prior to addressing Manago's testimony, we again note the significance of the recordings that he, as lead detective in the investigation of Patel's murder, narrated for the jury.

Lacking any physical evidence tying defendant to the murder and any witnesses to the murder, the recordings constituted the life blood of the State's case. Indeed, in its closing arguments, the State characterized the various video cameras that produced the recordings as the "witnesses" establishing defendant's guilt because, according to the State, the cameras tracked defendant from 64 Union Avenue to Roseway Liquors at the time of Patel's murder and tracked defendant's return to 64 Union Avenue following the murder.

Unlike the officer's two fleeting references to "the defendant" during the narration of recordings in Singh, throughout his more than two days of testimony Manago referred to defendant by name at least forty-six times as he narrated the recordings and testified about still photographs made from the recordings. Manago regularly referred to "Rick King" as the person seen on the videos from: 64 Union Avenue; King's Farm Market; K&J Laundromat; the motel; the BP gas station; and 40 Union Avenue. Similarly, Manago referred to the person in the still frame shots taken from the several recordings as "Rick King." Manago repeatedly used the phrase "[t]his is Rick King" to refer to the individual depicted in the video recordings.

It is unnecessary that we detail each instance Manago referred to the individual depicted in the recordings and photos as "defendant," "Rick King," or "Mr. King." It is sufficient to note there is no evidence he had any prior personal interactions with defendant, prior knowledge of defendant's appearance, or familiarity with defendant. As a result, each of his identifications of the individual depicted in the video recordings and photos as "defendant," "Mr. King," or "Rick King," constituted inadmissible lay opinion testimony under the first prong of the standard for the admission of lay opinion under N.J.R.E. 701. See Singh, 245 N.J. at 14; see also Sanchez, 247 N.J. at 469 (finding a witness satisfied the first prong of the standard for admission of a lay opinion—that the testimony was "rationally based on [her] perception"—because the witness's identification of the defendant in a video recording was based on her familiarity with the "defendant's appearance by meeting with him on more than thirty occasions" prior to the recording (alteration in original)). Nonetheless, we summarize Manago's inadmissible lay opinion testimony prior to addressing whether its improper admission constitutes plain error.

***10** During his narration of the video recordings from 64 Union Avenue the State contends were made prior to the murder, Manago testified Rick King entered the building, walked down a hallway, entered the laundry room and removed a leather jacket, and walked out of the building. Manago offered his opinion defendant is depicted in the recordings even though in many portions of the recordings, the individual's facial features are either not shown at all or cannot be discerned due to the quality of the recordings and the camera angles. Indeed, there are portions of the recordings where the individual's back is to the camera, but Manago nonetheless identifies the person as defendant or Rick King.

Manago similarly offered opinion testimony concerning the individual depicted in still photographs taken from the 64 Union Avenue video recordings the State claims preceded Patel's murder. For example, Manago offered testimony, such as "[t]his picture shows Rick King," "this photograph shows Rick King," and "this is a still photograph showing Rick King."

Manago provided additional opinion testimony while narrating the claimed post-murder recordings and still photos from 64 Union Avenue. He opined that the recordings showed defendant enter the building through what was referred to as the tradesman's door, go to the laundry room, exit the laundry room while wearing a leather jacket, exit the building, and then re-enter the building through its front door, enter the lobby, walk down a hallway, take a staircase to the basement, return to the laundry room, and then exit the laundry room, walk down a hall, and exit the building through the tradesman's door. Again, Manago's identification of defendant during his narration of the recordings is not based on his personal perceptions, see Sanchez, 247 N.J. at 466; Singh, 245 N.J. at 14; McLean, 205 N.J. at 447, and the State made no showing it was necessary to assist the jury in its review of the recordings, see Sanchez, 247 N.J. at 469-70.; Watson, —— N.J. Super. at —— (slip op. at 95-102).

Portions of the recordings and still photographs include blurred facial images and images recorded from behind the individual, and, although a juror may have been able to conclude, based on the individual's clothing, the same person is depicted in each, Manago consistently offered the opinion the individual was defendant, stating, for example, "[t]his is

Rick King," "you see Rick King," "Rick King exits [64 Union Avenue]," "Rick King enters [64 Union Avenue]," "that is Rick King," and "we just watched Rick King."

In sum, Manago's narration of the recordings from 64 Union Avenue constituted inadmissible lay opinion testimony in violation of N.J.R.E. 701 and the principles explained by the Court in Singh. 245 N.J. at 14; see also Sanchez, 247 N.J. at 469. His opinions concerning the identity of the individual shown in the recordings and photographs were not based on his personal knowledge or perceptions of the individual's actions, he was not present when the individual moved about 64 Union Avenue, and his opinions were founded on the recordings and photographs the jury was equally able to view, consider, and assess in its determination of the identity of the individual or individuals depicted.

Moreover, Manago's testimony improperly bolstered the testimony of Escobar, who Manago testified identified defendant as the individual depicted in the recordings from 64 Union Avenue. Escobar properly testified at trial defendant was the individual depicted in the 64 Union Avenue recordings because he was familiar with defendant prior to the date the recordings were made. See Sanchez, 247 N.J. at 469 (finding a witness could properly identify a defendant in a recording who met with the defendant thirty times before the recording was made); Singh, 245 N.J. at 18-20 (allowing a police officer to testify that a sneaker shown on surveillance video was same as one worn by the defendant during arrest); In re Darcy, 114 N.J. Super. 454, 460 (App. Div. 1971) (permitting co-worker to testify about genuineness of the defendant's signature even though co-worker never saw the defendant sign his name); State v. Carbone, 180 N.J. Super. 95, 97-100 (Law. Div. 1981) (stating lay witness can identify bank robber from surveillance photograph under prior rule).

***11** Escobar's credibility as a witness, including the credibility of his identification of defendant in the recordings, was an issue for the jury's determination. State v. Frisby, 174 N.J. 583, 594-95 (2002) (explaining that question of witness's credibility is for jury). "In an identification case, it is for the jury to decide whether an eyewitness credibly identified the defendant." Lazo, 209 N.J. at 24. A police officer may not "improperly bolster or vouch for an eyewitness'[s] credibility and thus invade the jury's province." Ibid. Here, Manago's inadmissible lay opinion testimony concerning the identity of the individual depicted in the 64 Union Avenue recordings improperly "conveyed his approval of [Escobar's] identification by relaying that he, a law enforcement officer, thought defendant looked like the culprit as well." Sanchez, 247 N.J. at 467 (quoting Lazo, 209 N.J. at 24).

The State argues that even if Manago's lay opinion testimony during his narration of the recordings from 64 Union Avenue is inadmissible, its presentation to the jury did not constitute plain error. The State notes defendant did not dispute he is depicted in the recordings and defendant's counsel conceded in his opening statement the jury would see defendant in recordings from 64 Union Avenue. We might agree with the State's argument if Manago's identifications of defendant in the recordings were limited to the recordings made at 64 Union Avenue and were otherwise untethered to other inadmissible lay opinion but, as we have explained, Manago's inadmissible identifications of defendant permeated his testimony and the State's proofs at trial. In addition, counsel's statement in his opening did not relieve the State of presenting admissible evidence establishing its case beyond a reasonable doubt or allow the State to rely on inadmissible evidence to bolster, with the affirmative testimony of an experienced law enforcement officer, Escobar's identification of defendant as the individual depicted in recordings that do not consistently offer a clear view of the individual's face.

In any event, although on appeal defendant focuses on those portions of Manago's lay opinion testimony concerning the 64 Union Avenue recordings, we cannot properly assess the impact of that testimony concerning the 64 Union Avenue recordings in isolation where, as here, it constituted only one of many essential threads the State sought to weave together to establish defendant's guilt. We therefore consider other instances of inadmissible lay opinion offered by Manago's testimony to determine if the testimony, including his inadmissible testimony concerning the 64 Union Avenue recordings, was clearly capable of producing an unjust result. R. 2:10-2.

Manago offered inadmissible lay opinion testimony identifying defendant in recordings taken from the cameras at King's Farm Market. During his narration of the surveillance videos from the parking lot of King's Farm Market, Manago repeatedly states the individual in the videos with timestamp 2:37 p.m. (camera seven) is defendant even though neither the individual's clothing nor facial features are discernable, and he testified the individual shown at timestamp 2:38 p.m. (camera eight) is defendant even though the individual's facial features are not discernable. Manago further testified "Rick King" can be seen coming from Union Avenue, entering King's Farm Market, and then exiting the market at recordings

timestamped at 3:53 p.m. and 3:54 p.m. Manago then stated "Rick King" can be seen walking from the market through the parking lot to Lyons Avenue and looking down the street toward Roseway Liquors. Manago also used still photos from the recordings, again identifying the individual depicted as Rick King, to provide the same narration of his version of what occurred.

***12** The clear implication of the testimony is that the person Manago identified as Rick King in the recordings and photos returned to King's Farm Market shortly after the murder, walked to Lyons Avenue, and looked in the direction of the Roseway Liquors because he committed the murder and was interested in whatever police or other activity there was related to the murder at the store. Indeed, the State relied on Manago's narration of those portions of the recordings—and Manago's repeated identification of defendant—to make that point to the jury during its closing argument.

Manago similarly testified defendant is an individual depicted in recordings from K&J Laundromat located at 144 Union Avenue, immediately north of King's Farm Market. In recordings taken prior to the murder, and still photos taken from them, Manago repeatedly refers to an individual shown as Rick King and describes the individual's movement. In one video (4-42-10 S-47-B1-D) a person is not seen "running" past the laundromat as Manago describes during his testimony. Rather, the person walks past the laundromat and then jogs for the last few steps before he or she leaves the frame of the recording. Manago's inadmissible lay opinion identifying defendant as the individual shown in the recordings supported the State's theory defendant shot Patel and fled from Roseway Liquors, and then quickly down Union Avenue, to return to the apartment building at 64 Union Avenue.

Manago also testified an individual seen in the videos taken from the motel located at 100 Union Avenue was defendant. In his narration of a video filmed prior to the shooting, Manago stated defendant is walking on Union Avenue past the driveway entrance to the motel, then a few minutes later is seen in front of the motel walking around a car. Manago claimed that in the same recording defendant is seen walking out from behind a wall a few minutes after he walked around the car. Further, in a video taken after the shooting, Manago testified that defendant is seen running down Union Avenue and, a few minutes later, defendant can be seen over a fence and near a wall. Manago similarly testified defendant is the individual in still photos taken from the motel's video recordings.

During his narration of one portion of the motel's recordings, Manago describes the movement of an individual down Union Avenue. The recording does not show the person's face, and his or her clothing cannot be discerned. Nonetheless, Manago testified, "this is part of the homicide. This [is] Rick King. Rick King walking past the driveway entrance to the" motel.

Again, Manago's identification of the individual in the recordings and photographs, and his declaration some movements by an individual he stated as fact was defendant were "part of the homicide," constitute inadmissible lay opinion under N.J.R.E. 701. See Singh, 245 N.J. at 14-17. His identification of defendant in the recordings and photos from the motel are particularly egregious because it is impossible to discern the facial features or even the clothing of the individual depicted. Yet, despite Manago's lack of any prior personal knowledge of defendant, and the manifest lack of clarity of the recordings and photos, he consistently identifies the individual as Rick King or defendant as if it were fact.

Manago further testified defendant is the individual seen in recordings from the BP gas station located at 45 Union Avenue. For example, Manago testified that in one recording defendant is seen walking into and out of the apartment building at 64 Union Avenue, and, in another recording, defendant exits the building and walks down Union Avenue carrying a dark garbage bag in his left hand, crossing through the BP gas station parking lot, and moving out of the recording's frame. During his narration of a recording from 40 Union Avenue, Manago testified defendant can be seen near the BP gas station when the recording is viewed in conjunction with recordings from 64 Union Avenue and the BP gas station. And, the State relied on Manago's narration of those recordings, claiming in summation they showed defendant getting rid of the clothes he wore during the commission of the murder.

***13** During portions of Manago's testimony, he properly referred to individuals that were seen on recordings from the car wash and the liquor store across Lyons Avenue from King's Farm Market in neutral terms, such as "he," "the individual," "the person," and "the suspect." See Singh, 245 N.J. at 17-18. We note the individuals he identified in the recordings as such appear as dark silhouettes, but Manago describes their movements, offers a lay opinion they are the

same person, and, in other testimony, links the individual he identifies from the car wash recordings with the person seen in the King's Farm Market recordings, who he identifies as defendant. Thus, even Manago's neutral references to individuals seen on the various recordings from the car wash and liquor store across from King's Farm Market are tethered to inadmissible lay opinion testimony the individuals are the same person, and the neutral references are linked by other inadmissible lay opinion testimony to defendant.

The State's proofs defendant murdered Patel rest on the alleged movement of an individual depicted in the recordings from 64 Union Avenue to Lyons Avenue to Roseway Liquors immediately prior to the murder, and the alleged movement of an individual depicted in the recordings down Lyons Avenue to Union Avenue and to 64 Union Avenue immediately following the murder. According to the State, defendant's movement along those routes is established by the various recordings Manago narrated in detail during his lengthy testimony. Indeed, as the State's case was presented at trial, Manago's inadmissible lay testimony is the only testimonial evidence defendant is that individual, such that the State was able to convincingly argue the recordings were of the same person—defendant—who moved to and from the scene of the murder immediately before and after its occurrence. There was nothing fleeting about Manago's identifications of defendant on the various recordings. See Singh, 245 N.J. at 17-18. Manago's inadmissible lay opinion testimony was so pervasive and important to the State's proofs at trial that we have no difficulty in concluding its admission was clearly capable of producing an unjust result. R. 2:10-2. For those reasons, we reverse defendant's convictions and remand for a new trial.[9]

III.

***14** Defendant claims the court erred by granting the State's motion for joinder of the separate charges related to the 2013 robbery and 2017 murder. He contends the court abused its discretion by granting joinder because the robbery and murder are factually separate and distinct events that occurred fifteen months apart, "the only thing they have in common are the victim and the location," and defendant suffered undue prejudice from the presentation of evidence concerning each incident with the trial on the charges concerning the other incident.

Rule 3:15 authorizes a court to "order [two] or more indictments ... tried together if the offenses ... could have been joined in a single indictment." See also R. 3:7-6 (permitting joinder "if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan"). Joinder is favored to promote judicial economy and efficiency, but those "interests do not override a defendant's right to a fair trial." State v. Sterling, 215 N.J. 65, 72 (2013).

In our review of a trial court's decision permitting joinder of separate offenses, we "assess whether prejudice is present, and [the court's] judgment is reviewed for an abuse of discretion." Sterling, 215 N.J. at 73; accord State v. Chenique-Puey, 145 N.J. 334, 341 (1996). "The test for assessing prejudice is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.' " Ibid. (alteration in original) (quoting Chenique-Puey, 145 N.J. at 341).

Because of the dangers that admission of other crimes evidence presents, "evidence proffered under Rule 404(b) 'must pass [a] rigorous test.' " State v. Garrison, 228 N.J. 182, 194 (2017) (alteration in original) (quoting State v. Kemp, 195 N.J. 136, 159 (2008)). In State v. Cofield, 127 N.J. 328, 338 (1992), our Supreme Court established a four-part test for determining the admissibility of other-crime evidence:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [Garrison, 228 N.J. at 194 (quoting Cofield, 127 N.J. at 338).]

Here, defendant does not challenge the motion court's determination that evidence concerning the robbery is relevant to material issues—defendant's motive, intent, and identity—pertinent to establishing defendant's alleged commission of the murder. See State v. Rose, 206 N.J. 141, 165 (2011) (explaining "[a] wide range of motive

evidence is generally permitted, and even where prejudicial, its admission has been allowed in recognition that it may have 'extremely high probative value' " (quoting State v. Long, 173 N.J. 138, 164-65 (2002))); id. at 145-46 (finding the defendant's previous incarceration and indictment for the attempted murder of a victim admissible in defendant's trial for arranging the murder of the victim because the evidence was relevant to the defendant's motive, intent, and plan to commit the murder).

Defendant also does not challenge the court's determination that evidence showing defendant murdered Patel is relevant to his alleged commission of the robbery because it establishes his consciousness of guilt for the commission of the robbery, and, in doing so, tends to establish defendant's identity as the perpetrator of the robbery. See, e.g., State v. Yough, 208 N.J. 385, 402 n.9 (2011) (noting evidence a defendant threatened or intimidated the victim of a robbery following a robbery "would be admissible to demonstrate consciousness of guilt under N.J.R.E. 404(b)"); State v. Williams, 190 N.J. 114, 125 (2007) (finding a jury may consider a defendant's attempts to cover up a crime as evidence of consciousness of guilt). Thus, the court did not abuse its discretion in finding the first Cofield factor favored joinder of the offenses in the 2014 and 2017 indictments.

***15** Defendant also does not claim the evidence does not clearly and convincingly establish defendant committed the separate offenses. And our review of the evidence—without consideration of the evidence we have determined was inadmissible at trial—confirms there is clear and convincing evidence defendant committed the separate offenses such that the third Cofield factor supports the court's joinder of the charges in the separate indictments for trial.

Defendant's challenge to the court's joinder order is focused solely on the second and fourth Cofield factors. Defendant first argues there is insufficient evidence supporting admission of evidence concerning the robbery and murder at the same trial under the second Cofield factor because the crimes are dissimilar and do not have a close temporal proximity. However, as the Court explained in Rose, "[t]he second prong of the Cofield test, addressing the similarity and temporality of the evidence, is not found in Rule 404(b), and is not universally required." 206 N.J. at 163. Application of the second prong of the Cofield test "is limited to cases that replicate the circumstances in Cofield," Williams, 190 N.J. at 131, and defendant makes no showing circumstances similar to those extant in Cofield are present here.[10] Thus, we reject defendant's argument that any purported lack of similarity or close temporal proximity between the robbery and murder under Cofield's second factor required the denial of the State's joinder motion. See Rose, 206 N.J. at 160 (explaining "[t]emporality and similarity of conduct is not always applicable, and thus not required in all cases").

We also are not persuaded the court erred by rejecting defendant's claim that under Cofield's fourth factor, the probative value of evidence concerning the crimes charged in the separate indictments is outweighed by its apparent prejudice. An assessment of Cofield's fourth factor "necessarily implicates an examination into whether less inflammatory sources of evidence that are equally probative are available." Rose, 206 N.J. at 164. Here, the record is devoid of less inflammatory sources of evidence that equally establish defendant's consciousness of guilt for the commission of a robbery for which the victim is no longer available to testify and defendant, in his statements to the police, denied committing. Similarly, there is no less inflammatory evidence of defendant's motive, intent, and plan to allegedly commit what may be properly characterized as a cold-blooded execution other than defendant's alleged commission of the robbery and desire to rid himself of the sole witness to the robbery, Patel.

To be sure, evidence concerning the separate offenses was prejudicial when presented in a joint trial, "[b]ut, it was prejudicial in the way all highly probative evidence is prejudicial: because it tends to prove a material issue in dispute." Rose, 206 N.J. at 164. The relevant inquiry "is whether the evidence was unfairly prejudicial, that is whether it created a significant likelihood that the jury would convict defendant on the basis ... he was a bad person, and not on the basis of the actual evidence adduced against him." Ibid. In our view, the evidence permitted a proper response to that inquiry in the negative and, for that reason, we reject defendant's claim the court erred by joining the charges in the 2014 and 2017 indictments for trial.

IV.

***16** During its case, the State introduced six of sixty-nine crime scene photographs, six of twenty-one autopsy photographs,[11] and five photographs of defendant obtained from the cell phone recovered following the robbery that defendant contends the court erroneously admitted in evidence. He claims the photographs are inflammatory, and

whatever relevance they may have is outweighed by their undue prejudice.

A court's decision to admit photographs is reviewed for an abuse-of-discretion. State v. Johnson, 120 N.J. 263, 297 (1990). A court abuses its discretion when the "tenuous relevance" of the admitted evidence "was overwhelmed by [the] inherently prejudicial nature [of the evidence]." State v. Lockett, 249 N.J. Super. 428, 433 (App. Div. 1991). In other words, if the trial court's finding was "so wide [of] the mark that a manifest denial of justice resulted," then it abused its discretion. State v. Lykes, 192 N.J. 519, 534 (2007) (alteration in original) (quoting Verdicchio v. Ricca, 179 N.J. 1, 34 (2004)).

Defendant objected to the admission of six crime scene photographs, claiming the probative value of the images is outweighed by their undue prejudice because they depicted excessive amounts of blood. See N.J.R.E. 403; see also State v. Carter, 91 N.J. 86, 106 (1982) (explaining a party seeking to exclude evidence bears the burden of establishing the probative value is substantially outweighed by the risk of undue prejudice). The challenged photographs showed: Patel lying in a pool of blood; the left side of Patel's head and the entry wound; a close-up view of the entry wound; blood near Patel's right ear and the exit wound; Patel's scalp and the entry wound; and Patel's wedding ring on his right hand.[12]

We are not persuaded admission of the photographs constituted an abuse of discretion. The court admitted the photograph showing Patel lying in a pool of blood because it revealed the location and position of Patel's body after the murder, the type of gunshot wound inflicted, and that the shooter was in close proximity to Patel. The court found the extent of the blood at the scene supported the State's claim the shooter was likely to have blood on his or her clothing such that they would be motivated to dispose of their clothing following the murder. "[T]he presence of blood and gruesome details are not ipso facto grounds for exclusion," of crime scene photos, State v. Morton, 155 N.J. 383, 456 (1998) (quoting State v. DiFrisco, 137 N.J. 434, 500 (1994)), and, for the reasons noted by the trial court, "[t]he relevance of [the] photograph[ ] was not outweighed by [its] potential to prejudice to the jury," ibid.

***17** Another crime scene photograph admitted in evidence showed Patel's bloody hand with a wedding ring on one of his fingers. The photograph is not particularly gruesome, and it is probative of the State's theory the murder was a knowing and purposeful execution unaccompanied by any intent to rob the victim. Again, we discern no basis to conclude the court abused its discretion by rejecting defendant's claim the probative value of the photograph was substantially outweighed by any undue prejudice.

Two of the remaining crime scene photos show closeups of the entry wounds to Patel's head and two others show the exit wounds. Three of the photographs are closeups of Patel's head, and the remaining photograph includes Patel's bloodied face. Although it was perhaps unnecessary to admit all the photographs to show the wounds, the photographs were probative of the manner in which Patel was shot and supported the coroner's determination of the manner of death —homicide. We have recognized photographs of murder victims may be "unpleasant" but that does not render them inadmissible where their probative value is not substantially outweighed by some undue prejudice. State v. Sanchez, 224 N.J. Super. 231, 250 (App. Div. 1988).

We similarly find no abuse of discretion in the court's admission of five of the seven photographs found on the cell phone recovered from the garbage can following the robbery.[13] Defendant contends the photographs are unduly prejudicial because they show him either naked or without items of clothing, with his genitalia redacted. There is nothing about the redacted photographs that are unduly prejudicial, and, as the court correctly determined, the photographs are probative of defendant's ownership of the phone that was recovered from the pocket of the sweatshirt that was found with the gun following the 2013 robbery. Defendant offers no basis to conclude the purported undue prejudice from the admission of the photographs substantially outweighed their significant probative value.

Defendant also challenges the court's admission of six autopsy photographs, which show: the lower half of Patel's body on the autopsy table; the right side of Patel's head and the exit wound; a close-up of the right side of Patel's head and the exit wound; the left side of Patel's skull and the entry wound; a close-up of the left side of Patel's skull and entry wound; and Patel's skull showing burnt skin around the entry wound and stippling.[14]

The court found the photograph of the lower half of Patel's body admissible because it assisted the jury in understanding the medical examiner's testimony and showed the pockets in Patel's pants were undisturbed, which supported the State's claim the perpetrator had no interest in robbing Patel.

The court further found the four photographs of Patel's head were not gruesome, did not include excessive blood, and supported the medical examiner's testimony concerning the cause of Patel's death. The court also found the photograph of Patel's skull showing stippling and burnt skin was probative of the State's theory he was the target of a gunshot administered at very close range and the photograph otherwise supported the medical examiner's testimony and assisted the jury in understanding the testimony.

***18** Again, we find no abuse of the court's discretion in admitting the photographs based on the court's finding their probative value was not substantially outweighed by any undue prejudice. In his brief on appeal, defendant expressly argues only that the photograph showing Patel's skull is unduly prejudicial. But the trial court did not abuse its discretion by concluding the photograph was probative of the fact that the murder—which the State argues constituted an execution to prevent Patel from testifying in the robbery case—was knowingly and purposely committed at very close range in a manner consistent with the State's theory and the medical examiner's testimony concerning the cause and manner of Patel's death.

In sum, we are not persuaded the court abused its discretion in the admission of any of the photographs. That does not mean they shall be automatically admitted at the trial on remand. At any retrial, the judge should carefully review each of the photographs submitted by the State in the context of the evidence presented at that time and make specific findings under N.J.R.E. 401 and N.J.R.E. 403 to determine which photographs may be properly admitted.

V.

For the first time on appeal, defendant claims the court provided inadequate jury instructions on the issues of identification and prior to the playback of video recordings requested during the jury's deliberations. Defendant claims the purported errors deprived him of a fair trial.

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions. Correct jury instructions are 'at the heart of the proper execution of the jury function in a criminal trial.' " State v. Afanador, 151 N.J. 41, 54 (1997) (citation omitted) (quoting State v. Alexander, 136 N.J. 563, 571 (1994)). A trial court must explain the law as it relates to the facts and issues of the case. State v. Baum, 224 N.J. 147, 159 (2016). Erroneous jury instructions on "material" aspects are assumed to "possess the capacity to unfairly prejudice the defendant." Ibid.

A reviewing court must evaluate the jury charge in its entirety to determine its overall effect. State v. Savage, 172 N.J. 374, 387 (2002); see also State v. Wilbely, 63 N.J. 420, 422 (1973) (stating that jury charge must be accurate when evaluated as whole). Where, as here, a defendant fails to object to the jury charge, there is a presumption the charge was not erroneous, and counsel did not determine that the charge was prejudicial. State v. Singleton, 211 N.J. 157, 182 (2012). We therefore consider whether any errors constituted "[l]egal impropriet[ies] ... prejudicially affecting the substantial rights of the defendant 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." State v. Jordan, 147 N.J. 409, 422 (1996) (quoting State v. Hock, 54 N.J. 526, 538 (1969)). In criminal cases, an error in the jury instructions is only excusable if it is harmless beyond a reasonable doubt. State v. Vick, 117 N.J. 288, 292 (1989).

The trial court charged the jury substantially in accord with the Model Jury Charge on in-court and out-of-court identifications. See Model Jury Charges (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. July 19, 2012).[15] During the charge, the court noted that Escobar identified defendant as the person in the surveillance videos taken from 64 Union Avenue, and the court explained the factors pertinent to the jury's consideration of Escobar's identification.

***19** Defendant claims the court erred because the court's instruction did not refer to the identifications of defendant made by detectives Gardner and Manago during their respective narrations of the various video recordings. The court did not specifically address the identifications of defendant on the surveillance videos by Manago or Gardner. As we have explained, the identifications of defendant made by the detectives during their narrations of the recordings and photographs constituted inadmissible lay opinion testimony, and for that reason defendant's convictions are reversed and the matter is remanded for new trial. As a result, it is unnecessary to address defendant's argument concerning the jury instructions because the same issue will not arise on remand.

Moreover, in our assessment of the validity of the jury instructions provided by the trial court, we are loathe to suggest the court should have provided an instruction concerning the identifications of defendant made by the detectives where the identifications should not have been admitted in evidence in the first instance. We observe only that, as the Model Jury instruction makes clear, a proper charge to the jury should reference any witness who the evidence shows made an out-of-court identification, as well as any witness who makes an in-court identification. See Model Jury Charges (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 18, 2020).

We also note that immediately following its provision of the Model Jury charge on identification, the court provided a specific instruction, at defendant's request, concerning the jury's consideration of the identifications of defendant provided during the narrations of the video recordings. The court stated:

> There is for your consideration in this case several surveillance videos. While some of—while some witnesses have testified concerning their belief as to what is depicted in the video, it is your function to determine what is depict [sic] in the video, and whether the video or any portion of it is credible. You may consider all the circumstances surrounding the video in making that determination.

Although the instruction states it is the jury's function to determine "what" occurred in the recordings, we find it wholly inadequate to have remedied, or rendered harmless, the erroneous admission of the pervasive and inadmissible lay opinion identifications of defendant by the detectives. In the first instance, the instruction is too narrow; it informs the jury its function is to determine "what" occurred on the recordings and not who is depicted on them. More importantly, it does not inform the jury Manago's numerous identifications of defendant and statements concerning defendant's actions on the recordings—including the detective's declaration one recording shows defendant involved in the homicide—constitute inadmissible evidence that cannot properly be considered in the jury's performance of its function. Thus, although the instruction informs the jury its function is to determine what the recordings showed, the instruction did not prohibit the jury from fulfilling that function based on consideration of inadmissible identifications offered as fact during the testimony of the detectives.

Defendant argues for the first time on appeal the court erred by failing to provide instructions to the jury concerning the proper consideration of the requested playback of the video recordings during deliberations. Because the issue was not raised before the trial court and does not "go to the jurisdiction of the trial court or [a] matter[ ] of great public interest[,]" see State v. Robinson, 200 N.J. 1, 20 (2009), and because we reverse defendant's convictions on other grounds, we opt not to address the merits of the argument.

***20** We note playbacks of recordings requested by a jury during deliberations should be accompanied by appropriate instructions in accordance with the guidelines established by the Court in Miller, 205 N.J. at 122-24. See State v. A.R., 213 N.J. 542, 564 (2013) (explaining the Court "expects full and careful consideration and application of the ... Miller guidance in all situations in which playbacks of video-recorded exhibits or trial proceedings are conducted"). We also note, however, that defendant's brief on appeal does not demonstrate the trial court's failure to comply with the Miller guidelines was clearly capable of producing an unjust result. R. 2:10-2.

VI.

Defendant next argues the court erred by allowing Officer Neal to testify about Patel's partial identification of defendant —by stating defendant's height, weight, jeans, and boots matched those worn by the perpetrator of the robbery, and the cash defendant possessed matched the denominations of the currency taken during the robbery—during the showup identification procedure at the Woroco gas station following the robbery. Defendant claims the showup procedure was inherently suggestive, and the procedure violated the principles established in State v. Henderson, 208 N.J. 208, 259-61 (2011).[16]

We review a trial court's evidentiary ruling for an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021) (citing State v. Nantambu, 221 N.J. 390, 402 (2015)). "We will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.' " Ibid. (quoting Medina, 242 N.J. at 412). A trial court abuses its discretion "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

The court's ruling defendant challenges was addressed to the admissibility of Neal's testimony concerning Patel's

statements during the showup procedure under the forfeiture-by-wrongdoing exception to the hearsay rule, N.J.R.E. 802, embodied in N.J.R.E. 804(b)(9). See generally State v. Rinker, 446 N.J. Super. 347, 359-365 (App. Div. 2016) (explaining principles applicable to admission of statements under the "forfeiture-by-wrongdoing" exception to the hearsay rule, N.J.R.E. 802, that is embodied in N.J.R.E. 804(b)(9)). On appeal, defendant does not challenge the court's determination of the admissibility of Patel's various statements under N.J.R.E. 804(b)(9). Instead, defendant argues for the first time Patel's statements to Neal during the showup procedure at the Woroco gas station are inadmissible for a wholly separate reason—they are not admissible under the principles governing the admission of out-of-court identifications in Henderson.

***21** We generally do not consider issues raised for the first time on appeal, including issues of constitutional significance, unless they go to the court's jurisdiction or concern matters of significant public interest. Robinson, 200 N.J. at 20. We therefore do not address defendant's claim other than to note defendant's decision not to raise it deprived the trial court of an opportunity to develop a fulsome record and therefore results in a record on appeal that does not permit a proper consideration of the claim. See State v. Pressley, 232 N.J. 587, 592 (2018) ("encourag[ing]" the parties disputing the admissibility of showup evidence "to make a full record before the trial court, which can be tested at a hearing by both sides and then assessed on appeal").

In any event, because we reverse defendant's conviction, defendant shall be permitted to challenge the admissibility of the evidence concerning the showup procedure before the trial court on remand. We offer no opinion on the merits of defendant's argument or the State's opposition. The issue shall be addressed and decided by the court based on the record presented on remand.

VII.

Defendant also claims the court erred by permitting, over his objection, the State's fingerprint expert Sergeant Tom Sheehan to testify defendant could not be ruled out as a contributor to the fingerprints found on the gun recovered on October 15, 2015, in Newark. Defendant argues the testimony shifted the burden of proof to him and was otherwise inadmissible as a net opinion.

We review a court's decision admitting expert testimony for an abuse of discretion. Townsend v. Pierre, 221 N.J. 36, 52 (2015). Defendant does not argue Sheehan's testimony did not satisfy the requirements of the admission of expert testimony under N.J.R.E. 702. See generally id. at 53 (explaining the "three core requirements for" admission of expert testimony). Instead, he argues Sheehan's testimony was inadmissible as a net opinion.

The net opinion rule "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Id. at 53-54 (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). For an expert opinion to be admissible, the expert must " 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.' " Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). The "rule simply stands for the proposition that an expert opinion must have a rational basis." Crispino v. Twp. of Sparta, 243 N.J. 234, 257 (2020).

We discern no basis to conclude Sheehan's testimony concerning the fingerprints found on the gun constituted an inadmissible net opinion, and defendant offers none. Sheehan explained his analysis of the fingerprints found on the gun, testified they were of insufficient clarity for purposes of identifying them as defendant's or someone else's, and opined the fingerprints therefore could not be either determined to be defendant's or ruled out as being defendant's. Sheehan's testimony was grounded in the facts gleaned from his examination of the fingerprints on the gun, and his comparison of those fingerprints to defendant's, and he fully explained the why and wherefore for his opinion. Contrary to defendant's contention, Sheehan's testimony did not constitute an inadmissible net opinion.

We find no merit to defendant's conclusory assertion Sheehan's testimony improperly shifted the burden of proof. There is nothing in his testimony or the way it was presented that shifted the burden of proof during the trial, and the court's instructions at the commencement of the case and in its final charge made clear the burden of proving each and every element of the offenses charged beyond a reasonable doubt rested solely upon the State. We may "presume that the jury faithfully followed [the] instruction[s]" it received. Miller, 205 N.J. at 126; see also State v. Marshall, 173 N.J. 343, 355 (2002).

VIII.

***22** Because we reverse defendant's convictions and remand for a new trial, it is unnecessary to address in detail his contention the court erred in imposing sentence. We note only that in the event defendant is convicted after trial of the offenses in the indictments, the court must address the issue of merger as to offenses for unlawful possession of a weapon and possession of a weapon for an unlawful purpose, see State v. Diaz, 144 N.J. 628, 639 (1996), and must consider and make appropriate findings of the factors pertinent to the imposition of any consecutive sentences, see State v. Torres, 246 N.J. 246, 268-70 (2021); Yarbough, 100 N.J. at 643-45. Of course, in any sentence imposed in the event of a conviction, the court shall consider and weigh the aggravating and mitigating factors as required under N.J.S.A. 2C:44-1 and apply all principles applicable to the imposition of sentence under our Criminal Code. See generally State v. Fuentes, 217 N.J. 57, 70 (2014).

Any arguments made on defendant's behalf we have not expressly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Reversed and remanded. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 2289044

Footnotes

1 At trial, the jury heard Patel's 911 call.

2 Miranda v. Arizona, 384 U.S. 436 (1966).

3 Because Amit Patel and his father Girish Patel share the same surname, for the purpose of clarity we refer to Amit Patel as Patel, and we refer to his father as Girish. We intend no disrespect by doing so.

4 State v. Miller, 205 N.J. 109 (2011).

5 State v. Yarbough, 100 N.J. 627 (1995).

6 In Sanchez, the Court identified factors relevant to "a trial court's determination [of] whether lay opinion testimony will assist the jury." 247 N.J. at 470-73. They include "the nature, duration, and timing of the witness's contacts with the defendant," id. at 470, "if there has been a change in the defendant's appearance since the offense at issue," id. at 472, "whether there are additional witnesses available to identify the defendant at trial," ibid. (quoting Lazo, 209 N.J. at 23), and "the quality of the photograph or video recording at issue," id. at 473. In Watson, we detailed additional factors a court must consider in determining whether lay opinion testimony will assist a jury. —— N.J. Super. at —— (slip op. at 95-102). It is unnecessary that we address the application of the factors here because, as we explain, Manago's testimony constituted inadmissible lay opinion under N.J.R.E. 701 because he repeatedly identified defendant in his narration of the video recordings and those identifications require a reversal of defendant's convictions.

7 Defendant does not separately argue the witnesses improperly identified defendant as being depicted in the still photographs taken from the video recordings, but our discussion of the principles applicable to the witnesses' identification of defendant in the video recordings applies to the identifications of defendant in the still photographs as well.

8 These videos are labeled S-34J2-A, S-34J2-B, S-34J-C, and S-34J2-D. Part A corresponds to the trial record references to video one, part B corresponds to video two, part C to video three, and part D to video four.

9 Although in Watson we explained a police officer may under certain circumstances describe events shown in a video recording for a jury, —— N.J. at —— (slip op. at 83-102), nothing in the opinion departs from the principles in Singh and Sanchez prohibiting a police officer who has no prior knowledge of a defendant or personal knowledge of what occurred on a recording from identifying a person shown in a recording as the defendant, see id. at 74 (explaining the majority in Singh "determined that it was error for the detective to refer to the suspect in the video as 'the defendant' "). As we have explained, we reverse because Manago's testimony consistently violated those principles. We note Manago's testimony included other narrations of what is depicted in the recordings—including, for example, his description of what

he described as a bulge in defendant's clothing and his declaration defendant changed his clothing. Similarly, during his narration of a recording, Innis offered an opinion the individual's clothing looked differently than it had in a prior segment of the recording. In both instances, the witnesses did not have personal knowledge concerning what they claimed the recordings depicted. See McLean, 205 N.J. at 456-57 (explaining lay opinion testimony must be based on information the witness acquired "through use of one's sense of touch, taste, sight, smell or hearing"). On remand, however, the court shall address the admissibility of such testimony, and any other anticipated testimony narrating video recordings, in accordance with the principles and procedure established in Watson. See generally —— N.J. at —— (slip op. at 83-107).

10 In Williams, the court explained the "similar in kind and reasonably close in time" factor in Cofield's second prong was applied in Cofield where "[t]he State sought to admit ... similar and close-in-time other-crimes evidence as relevant to prove the defendant's possession of drugs in the charged offense, an element that was hotly contested." 190 N.J. at 131.

11 Defendant argues the court erred by admitting seven autopsy photos, but he includes only six autopsy photos in his appendix on appeal. We are therefore unable to consider or assess the propriety of the court's purported admission of a seventh autopsy photo. See R. 2:6-1(a)(1)(i) (requiring the appellant to provide on appeal such parts of the record "as are essential to the proper consideration of the issues"); see also Cmty. Hosp. Grp., Inc. v. Blume Goldfaden Berkowitz Donnelly Fried & Forte, PC, 381 N.J. Super. 119, 127 (App. Div. 2005) (explaining a reviewing court will not review an issue where the pertinent portion of the trial record are not provided on appeal).

12 The photos were admitted in evidence as exhibits S-32H-36, S-32H-55, S-32H-57, S-32H-59, S-32H-61, and S-32H-62, respectively.

13 The photos were admitted in evidence as exhibits S-18G1, S-18G2, S-18G3, S-18G5, and S-18G6.

14 The photos were admitted in evidence as exhibits S-60A-1, S-60A-15, S-60A-16, S-60A-17, S-60A-18, and S-60A-21, respectively.

15 The instruction was modified on May 18, 2020, subsequent to defendant's trial. See Model Jury Charges (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 18, 2020). This model jury charge was revised to add instructions for cases where the police did not electronically record the out-of-court identification procedure and when a database of digital photographs was utilized. Ibid.

16 Defendant vaguely suggests the court erred by failing to provide a final jury charge concerning Patel's statements during the showup identification procedure at the Woroco gas station. The claim is undermined by the record because defendant argued at trial a showup charge was unnecessary because Patel did not identify defendant during the showup; Patel said he could not identify defendant because the perpetrator's face was covered, and Patel stated only that defendant's blue jeans, boots, height, and weight were the same as the perpetrator. The court accepted defendant's position Patel did not identify defendant as the perpetrator, and, for that reason, did not provide an instruction concerning showup procedures. Under those circumstances, any error in not providing the charge was invited and, therefore, does not provide grounds for reversal. See A.R., 213 N.J. at 561 (explaining the invited error doctrine). In any event, based on the evidence presented at trial on remand, the parties are permitted to request or oppose such a charge, and the court shall determine the applicability of the charge based on the evidence presented. See generally Model Jury Charges (Criminal), "Identification: Out-of-Court Identifications Only" (rev. July 19, 2012) (including a jury instruction concerning consideration of showup identification evidence).

End of Document

FILED, Clerk of the Supreme Court, 06 Mar 2023, **087251**, **AMENDED**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERSON BURNEY,

Defendant-Appellant.

SUPREME COURT OF
NEW JERSEY
Docket No. 086966

Criminal Action
Indictment No. 16-04-1376-I

On Certification From:
Superior Court of New Jersey,
Appellate Division

Sat Below:
Richard S. Hoffman, J.A.D.
Richard J. Geiger, J.A.D.
Ronald Susswein, J.A.D.

PROPOSED BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, AND THE INNOCENCE PROJECT, INC.

Lawrence S. Lustberg (023131983)
Ethan Kisch (349152020)
Gibbons P.C.
John J. Gibbons Fellowship in
Public Interest & Constitutional Law
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Rules

REFERENCES TO BRIEFS, APPENDICES, AND TRANSCRIPTS

In accordance with *Rule* 2:6-8, citations are as follows: "Dsb" refers to Defendant's supplemental brief, dated January 18, 2023; and "Da" refers to the appendix to Defendant's supplemental brief. Citations to transcripts refer to the following dates:

1T—July 25, 2016;
2T—July 26, 2016;
3T—June 15, 2017;
4T—July 6, 2017;
5T—September 19, 2017;
6T—January 30, 2018;
7T—January 31, 2018;
8T—February 6, 2018;
9T—January 7, 2018;
10T—February 8, 2018;
11T—February 12, 2018;
12T—February 14, 2018;
13T—February 15, 2018;
14T—February 21, 2018;
15T—February 22, 2018;
16T—February 23, 2018;
17T—February 26, 2018;
18T—February 27, 2018;
19T—February 28, 2018;
20T—March 1, 2018;
21T—August 31, 2018.

INTERESTS OF *AMICI CURIAE*

As described in their pending motion for leave to appear as *amici curiae*, the American Civil Liberties Union of New Jersey (ACLU-NJ), the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ), and the Innocence Project, Inc. (Innocence Project) (collectively, *Amici*), are public interest organizations committed to the development of the law with respect to forensic evidence, as well as eyewitness identification testimony, and have an interest in ensuring that only reliable evidence is admitted against New Jerseyans charged with crimes. *Amici* therefor submit this brief to address the weighty issues raised in this appeal and "assure that all recesses of the problem[s] will be earnestly explored." *Whelan v. N.J. Power & Light Co.*, 45 N.J. 237, 244 (1965).

PRELIMINARY STATEMENT

By ensuring that only reliable evidence is admitted at trial, courts play a critical role in preventing wrongful convictions and ensuring a fair justice system. This appeal concerns two forms of evidence improperly introduced against Defendant Roberson Burney during his criminal trial, neither of which is admissible under New Jersey's stringent legal standards.

First, the trial court permitted expert testimony by a Federal Bureau of Investigations Special Agent who purported to place Mr. Burney's cell phone in the area of the crime scene. However, the agent's methodology for analyzing

phone records was predicated on an unverified "rule of thumb" that Sprint cell phone towers have a one-mile range. The courts below failed to evaluate the reliability of the agent's specific testimony or determine whether his methodology was accepted in the relevant scientific community. Had they done so, the testimony would have been excluded under N.J.R.E. 702.

The second form of evidence was a first-time in-court identification of Mr. Burney by an eyewitness. It is widely accepted that in-court identifications are—as a general matter—inherently suggestive and unreliable. But these problems are only amplified when the courtroom identification is a first-time identification. Moreover, the particular facts of this case rendered the risk of irreparable misidentification even graver. In the days after the crime, the eyewitness failed to select Mr. Burney from a photo array. Weeks later, police indicated to her that they found a picture of the eyewitness's stolen watch on Mr. Burney's phone. Not surprisingly, at trial the eyewitness for the first time identified Mr. Burney as the perpetrator, admitting that she picked him because the police had tipped her off. The trial court allowed this first-time in-court identification, and the Appellate Division upheld its admission under the outdated legal standard articulated in *Manson v. Brathwaite*, 432 U.S. 98 (1977), and adopted in *State v. Madison*, 109 N.J. 223 (1988). However, the *Manson*/*Madison* standard for determining the admissibility of eyewitness

identification evidence was rendered obsolete by this Court's groundbreaking decision in *State v. Henderson*, 208 N.J. 208 (2011), requiring courts to consider estimator and system variables when assessing the suggestiveness and reliability of eyewitness identifications. When these *Henderson* variables are taken into consideration—and consistent with the empirical research on the subject—it is clear that first-time courtroom identification should not be permitted; in the alternative, trial courts should apply a strong presumption that such identifications will be excluded absent overwhelming indicia of reliability. Either way, the first-time in-court identification of Mr. Burney should have been excluded.

For these reasons and those set forth below, *Amici* respectfully urge the Court to reverse the decision of the Appellate Division.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the detailed facts and procedural history described in Mr. Burney's Supplemental Brief. Briefly stated, at around 8 p.m. on December 25, 2015, a man holding a shotgun entered the home in which Rosette Martinez, her daughter, Samantha, and her daughter's friend were present. The man ordered the women into Rosette's[1] bedroom and tied them up. (11T17-7 to 84-1;

[1] To avoid confusion, and consistent with the practice of the parties and the Appellate Division below, *Amici* refer to Rosette Martinez by her first name.

12T103-22 to 112-23; 13T30-6 to 40-24.) Soon after the man left, Rosette called 9-1-1 to report an armed robbery. (11T39-21 to 41-6.) Mr. Burney was later tried and convicted of robbery, burglary, aggravated assault, criminal restraint, and possession of a weapon for an unlawful purpose in relation to the break-in.

The Cell Tower Evidence

Prior to trial, the State sought to admit the testimony of FBI Special Agent Ajit David, a member of the Bureau's Cellular Analysis Survey Team (CAST). The trial court qualified him as an expert in the field of historical cell-site data analysis (4T40-17 to 41-24) and held a *Frye* hearing. After explaining his training, Agent David detailed his proposed testimony that shortly after 8 p.m. on the night of the break-in, Mr. Burney's cell phone "was utilizing a tower for a text message and that tower services an area that would reasonably include the crime scene[.]" (4T49-1 to 6.) His basis for this conclusion was his own "rule of thumb" that Sprint towers in the area have an approximate one-mile range (4T57-6 to 59-16, 76-6 to 17); because the crime scene was "close to a mile" from the tower (hereinafter the "Parkway Tower"), it was at the outer limit of that range. (4T78-25 to 79-6, 84-15 to 22). Agent David admitted that it was "possible" the crime scene fell outside the Parkway Tower's range, and that he failed to take measures that would more accurately assess the tower's range. (4T16-20 to 25-8, 54-17 to 57-5, 83-21 to 86-10.) Nevertheless, he created maps

that purported to show the Parkway Tower's coverage area using 120-degree wedge-shaped notations (Dsa 8-9), testifying that the wedges were based upon his "rule of thumb" (4T57-6 to 59-2). After hearing Agent David's testimony and argument, the trial court allowed his testimony at trial, holding that it was reliable under *Frye* "based upon its general acceptance by the courts and other jurisdictions" that have "admitted this type of testimony." (4T95-24 to 102-11.)

At trial, Agent David similarly testified that the "tower and sector that was accessed . . . covers an area that would reasonably be within the crime scene[.]" (12T35-21 to 36-3.) Again, he invoked his own one-mile "rule of thumb." (12T70-20 to 71-2, 94-4 to 96-1.) The prosecution relied heavily upon Agent David's testimony in its summation, arguing that "[h]e's an expert, ladies and gentlemen[.]" (15T62-2 to 167-5.)

The In-Court Identification of Mr. Burney

Days after the break-in, Rosette was shown two sets of photo arrays—the first on December 26 and the second on December 28. Mr. Burney was not included in the first array, and Rosette selected a filler photo with "at least" 90% certainty. (11T59-21 to 60-21, 88-3 to 21, 98-23 to 111-3.) The police did not, however, treat this as a positive identification. (14T34-1 to 35-14.) A picture of Mr. Burney was included in the second photo array, but Rosette failed to identify any photo as the perpetrator. (11T62-19 to 65-9, 116-8 to 123-23; 14T41-19 to

49-1, 81-13 to 82-20.) Three weeks later, police called Rosette back to the police station. Detectives indicated to her that Mr. Burney had been arrested for the break-in. Detectives also told Rosette that they had seized photos of jewelry from Mr. Burney's phone and proceeded to show her photos of a watch; Rosette identified it as her watch. Police then told Rosette they had obtained the photo from Mr. Burney's phone. (11T66-8 to 68-20, 126-4 to 133-11.)

The trial court denied Defendant's motion to prohibit Rosette from identifying Mr. Burney for the first time in court, holding that any problems with the police's behavior could be addressed through cross-examination and jury instructions. The court also predicted that it was unlikely the State would even seek an in-court identification. (6T16-21 to 40-15.) This turned out to be incorrect: at trial, Rosette identified Mr. Burney as the perpetrator, for the first time, in front of the jury. (11T74-5 to 75-6.) When asked on cross-examination whether she "concluded they arrested the right guy" based on the police telling her that they found a picture of her watch on Mr. Burney's phone, Rosette testified "Yes." She also testified she knew the person accused of the break-in would be sitting next to defense counsel during trial. (11T127-10 to 130-22.)

The Appellate Division upheld Mr. Burney's conviction. *State v. Burney*, 471 N.J. Super. 297 (App. Div. 2022). First, the appellate court held that the trial court did not abuse its discretion in permitting Agent David to provide

expert testimony concerning the Parkway Tower's coverage area and range. Relying on his "knowledge, skill, experience, and training," the "maps included in his expert report," and one federal case, the court determined that "[i]t was for the jury to decide whether his testimony was credible and how much weight to give it." *Id*. at 320-23. Second, the appeals court held that the trial court did not abuse its discretion when it allowed Rosette to make a first-time in-court identification. Although the court agreed that the police's out-of-court conduct was suggestive, it held that the trial court did not abuse its discretion because under *Madison* any unreliability inherent in Rosette's courtroom identification could be addressed by cross-examination and jury instructions. *Id*. at 323-30. On October 7, 2022, this Court granted Mr. Burney's petition for certification. 252 N.J. 134 (2022).

ARGUMENT

I. The State's Expert Testimony That the Parkway Cell Tower Had a One-Mile Range Should Have Been Excluded Because It Was Based on an Unreliable "Rule of Thumb."

Agent David's testimony, which was predicated on an unreliable methodology and relied on misleading demonstrative exhibits, should have been excluded under N.J.R.E. 702. At trial, Agent David testified that (1) Mr. Burney's cell phone connected to the Parkway Tower to receive a text message at 8:02:33 p.m. on the night of the break-in; (2) the Parkway Tower had an estimated one-mile range based on Agent David's "rule of thumb"; and therefore (3) Mr. Burney and the crime scene were both within the Parkway Tower's range. Both the trial court and Appellate Division held that Agent David's testimony was admissible. (4T95-24 to 102-11 (citing cases)); *Burney*, 471 N.J. Super. at 322 (citing *United States v. Jones*, 918 F. Supp. 2d 1, 5 (D.D.C. 2013)). But the courts below failed to perform the required judicial function of assessing the reliability of Agent David's specific testimony and determining whether his methodology was accepted in the relevant scientific community. Had they done so, Agent David's testimony would have been excluded under N.J.R.E. 702.

A. New Jersey Rule of Evidence 702 Requires a Careful Examination of Expert Scientific Testimony.

When considering whether to admit expert testimony under N.J.R.E. 702, "[i]t is reliability that must be assured" above all else. *In re R.S.*, 173 N.J. 134,

136 (2002) (citation omitted). Thus, the State had to prove that Agent David's testimony was "at a state of the art such that [it is] sufficiently reliable[.]" *State v. Kelly*, 97 N.J. 178, 208 (1984). For scientific testimony, techniques and modes of analysis must have "a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth." *State v. J.R.*, 227 N.J. 393, 409 (2017) (quoting *Kelly*, 97 N.J. at 210). Establishing that level of reliability requires "strict application of the scientific method" and "an extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience." *State v. Harvey*, 151 N.J. 117, 171 (1997) (quoting *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 436 (1991)). In criminal cases, a high degree of reliability is especially crucial because the defendant's "freedom or, in fact, his life may be at stake." *State v. Cary*, 99 N.J. Super. 323, 333 (Law. Div. 1986), *aff'd*, 56 N.J. 16 (1970).

To ensure that this stringent standard is met in criminal cases, our courts apply the standard first announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* standard requires the State to "clearly establish" that proposed testimony has "gained general acceptance in the particular field in which it belongs." *Harvey*, 151 N.J. at 169-70 (quotations omitted). This standard can be satisfied by "expert testimony, authoritative scientific and legal writings, and judicial opinions." *State v. J.L.G.*, 234 N.J. 265, 281 (2018)

(citations omitted). But if a court relies on judicial decisions, it must ensure that those opinions "indicate the expert's premises have gained general acceptance." *Harvey*, 151 N.J. at 170 (quoting *Kelly*, 97 N.J. at 210).

Moreover, rather than providing "mere conclusion[s]," experts must "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." *Townsend v. Pierre*, 221 N.J. 36, 54-55 (2015) (quotations omitted). "Given the weight that a jury may accord to expert testimony," it is vital that "[a]n expert's conclusion is excluded if it is based merely on unfounded speculation and unquantified possibilities." *Id*. at 55 (quotation omitted).[2] Furthermore, empirical evidence shows that, contrary to what courts

[2] "[R]esearch indicates that jurors often do not understand the fundamentals of scientific evidence, and lack the ability to reason about statistical, probabilistic, and methodological issues effectively." Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 948-49 (2008) (quotation omitted). For example, jurors often rely on "the personality, credentials, and perceived credibility of the experts, more than on the validity of scientific research[.]" *Id*. at 949; *see* Jonathan J. Koehler *et al.*, *Science, Technology, or the Expert Witness: What Influences Jurors' Judgments About Forensic Science Testimony?*, 22 Psychol. Pub. Pol'y & L. 401, 409-10 (2016).

Jurors' perceptions are likewise affected when they know an expert's testimony has been reviewed by the court. N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol. Pub. Pol'y, & L. 1, 4, 8, 11-12 (2009). Often termed the "gatekeeper effect," research shows that a key

often assume, adversarial questioning, judicial instructions, and opposing expert testimony do not meaningfully impact jurors' consideration of expert testimony. Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear*, 33 Law & Hum. Behav. 436, 439 (2009); Lora M. Levett & Margaret Bull Kovera, *The Effectiveness of Opposing Expert Witnesses for Educating Jurors About Unreliable Expert Evidence*, 32 Law & Hum. Behav. 363, 363-64, 370-71 (2008). For these reasons, it is all the more important that trial courts considering expert testimony fulfill their gatekeeping role, *State v. Sowell*, 213 N.J. 89, 99-100 (2013), and that, on appeal, the reliability of such expert testimony is subjected to *de novo* review, *J.L.G.*, 234 N.J. at 301.

B. Historical Cell Site Location Information (CSLI) Provides Generally Unreliable Location Information.

Before looking at the flawed methodology that Agent David used in this case, a brief primer on cell phone technology, telephone record-keeping, and the inexact science of CSLI will, *Amici* hope, be helpful to the Court.

To transmit information to a cellular network, cell phones connect to cell sites. There are hundreds of thousands of cell sites in the United States. They often take the form of radio tower masts, but also include antennas located on

---

predictor of jurors' views on the validity of expert evidence is whether or not the evidence is admitted—not the strength of the evidence itself. *Ibid.*

rooftops and other structures. Larry Daniel, Cell Phone Location Evidence for Legal Professionals 17-20 (2017). Cell phones are designed to connect to the cell site with the strongest signal, which may not come from the closet tower. *See* Matthew Tart *et al.*, *Historical Cell Site Analysis—Overview of Principles and Survey Methodologies*, 8 Digital Investigation 185, 186-87 (2012). Many factors influence the strength of a signal between a cell phone and cell site:

> First, the technical characteristics of cell sites may affect signal strength: (1) the number of sites available; (2) maintenance or repairs being performed; (3) height of the cell tower; (4) height above sea level; (5) wattage output; and (6) range of coverage. Second, technical characteristics of the antennas on cellular sites may affect signal strength, such as the number of antennas, the angle and direction the antenna is facing, height of each antenna, and call traffic processed through each antenna. Third, technical characteristics of the phone, such as the wattage output and generation of the phone's broadband capability, may affect signal strength. Fourth, signal strength may depend upon environmental and geographical factors, including the weather, topography, and level of urban development. Finally, indoor or outdoor use of the phone may alter the strength of the signal.
>
> [Aaron Blank, *The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Particular Cell Phone*, 18 Rich. J. L. & Tech. 3, 7 (2011) (citations omitted).]

Accord Paul C. Giannelli *et al.,* 3 Scientific Evidence (6th ed. 2022) § 26.07(2)(d) (listing "a myriad of factors"); Tart *et al.* at 186-87 (same).

Cell site coverage areas often vary widely in both distance and shape. For example, cell sites located in office buildings may only have a coverage area of 250 yards, while larger towers provide much longer ranges. Victoria Saxe, *Junk Evidence: A Call to Scrutinize Historical Cell Site Location Evidence*, 19 U.N.H. L. Rev. 133, 139 (2020). Towers have directional antennae that provide coverage to specific geographic "sectors." Daniel at 13-16. Range refers to the distance of antenna coverage emanating from a sector. Blank at 5.

Telecommunications providers keep varying types of records on cell phone usage. Daniel at 33-40. While turned on, a cell phone will continuously make connections (colloquially called "pings") to the cell site with the strongest signal. Saxe at 139-40. But more detailed information is logged when a cell phone makes or receives a call. The contents of such Call Detail Records (CDRs) vary based on the cellular provider. Daniel 33-40; Giannelli *et al*. § 26.07(1)(b). In this case, Agent David conducted his analysis using CDRs and Per Call Measurement Data (PCMD) related to Mr. Burney's phone that he received from police. (4T42-19 to 43-17.) Sprint's records provided information on the date and time of calls and text messages; which cell towers and sectors were used; and towers' locations. (12T11-5 to 12-15, 20-23 to 25-9, 56-24 to 57-13); (Dsa 4.) This is the type of data often referred to as CSLI. Daniel at 30.

There are three main ways law enforcement attempt to determine the location of a cell phone: (1) global positioning systems (GPS); (2) triangulation using multiple cell sites; and (3) analysis of historical CSLI. *See* Thomas J. Kirkham, *Rejecting Historical Cell Site Location Information As Unreliable Under Daubert and Rule 702*, 50 U. Tol. L. Rev. 361, 372-74 (2019); Saxe at 137; Blank at 9. GPS and real-time triangulation are the most accurate methods of determining a cell phone's location because they typically use real-time data. Michael Cherry *et al*., *Cell Tower Junk Science*, 95 Judicature 151, 151 (2012) ("[I]t takes GPS tracking or simultaneous [triangulation] to locate or track a caller and to determine his or her latitude and longitude.").

Because the State is often left trying to locate a phone's historical location, officers like Agent David employ the third, much less accurate, method—analyzing historical CSLI—to estimate the past locations of a cell phone. But CDRs and PCMD are intended for billing and network monitoring—not to track users' locations. Saxe at 142; Daniel at 80-81. As one commenter warns: "Only law enforcement employs CDRs for that purpose." Kirkham at 372; Daniel at 34-35 (CDR business purposes). Thus, unlike the more accurate location data provided by GPS or triangulation, CSLI merely indicates "that the phone was somewhere within the signal coverage radius of the [cell] tower during the recorded activity[.]" Saxe at 141. However, this is an inherently unreliable

estimate because a cell site's range can reach nearly thirty miles—meaning coverage can span up to 2,700 square miles. Blank at 5 & n.12.

Indeed, even the federal government has disclaimed the usefulness of CSLI. For example, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the government admitted that "[i]nferences about location drawn from cell site information . . . do not permit a detailed reconstruction of a person's movements" and provide estimates "as much as 12,500 times less accurate than GPS data." 2017 U.S. S. Ct. Briefs LEXIS 3694, at *23, *42 (quotation omitted); *see also* 2012 U.S. Dist. Ct. Briefs LEXIS 12753, at *8-9, *22-26 (arguing on remand from *United States v. Jones*, 565 U.S. 400 (2012), that CSLI "is too imprecise to place a wireless phone inside a constitutionally protected space").

Beyond the fact that CSLI analysis provides extremely imprecise location estimates, the data underlying CDRs may contain errors. Companies collect and produce CDRs without any validation or error rates. Saxe at 144-49; *see* John B. Minor, *Forensic Cell Site Analysis: Mobile Network Operator Evidence Integrity Maintenance Research*, 14 J. Digit. Forensics, Security & L. 59, 69, 82-83 (2019) (CDRs are sometimes "lost"). In this case, Agent David testified that he did not have access to Sprint's databases; nor did he independently verify the CDR data. (4T19-1 to 21-18; 12T64-11 to 65-7.) He even disregarded some data (but apparently not the data he relied upon) because it "is not very reliable

as to location." (12T12-16 to 13-8; *see* 4T59-17 to 66-16.). To that point, one study found that the locations of nearly 2% of cell sites in Los Angeles were incorrectly recorded in company records. John B. Minor, *Forensic Cell Site Analysis: A Validation & Error Mitigation Methodology*, 12 J. Digit. Forensics, Security & L. 33, 37-38 (2017). In one instance, records produced in response to a warrant "erroneously identified more than 20 cell site locations within a radius of 2 miles." *Ibid* ("[I]t is necessary for the analyst to compare the geographic cell site locations with the cellular carrier produced . . . location records."); *see* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721, 772-73 (2007) (CSLI analysis "requires verifying all the precursor data, including the accuracy of the tower location[.]"). Nonetheless, law enforcement officers—including Agent David here—often assume the reliability of underlying CDRs and CSLI.

C. Agent David's One-Mile "Rule of Thumb" Is Unreliable and Not an Accepted Method in the Relevant Scientific Community.

There are at least three reasons why Agent David's untested and unverified methodology should have rendered his testimony inadmissible. *First*, Agent David provided no scientific basis for his one-mile "rule of thumb." At the *Frye* hearing, he described how he had arrived at this distance in his expert report:

> So the—the length that was used for these arms is, again, an estimate and these are one mile, which is a rule of thumb for this particular technology and this particular frequency in this particular area. So just based on my training and experience, one mile is a good estimate of the tower range for Sprint in this area. It's also further kind of supported by the location of the adjacent towers. We can infer, based on how the network is laid out and the fact that Sprint has designed this to avoid coverage gaps, that the tower needs to extend out to a certain distance that obviously doesn't cross over other towers, but that provides enough overlap between adjacent sectors so that there's no drops, no call drops, no dead zones in between. So just using a one-mile approximation, which has been a good approximation in my experience in this area.
>
> [4T57-6 to 25; *see* 4T58-16 to 59-2.]

In short, Agent David's one-mile guess was based on his own "rule of thumb." But the State never offered any scientific authority for this technique.

Unsurprisingly, similar approaches have been rejected. In *United States v. Evans*, 892 F. Supp. 2d 949 (N.D. Ill. 2012), the court considered testimony from an FBI special agent who purported to pinpoint the location of a cell phone by analyzing CDRs and estimating the range of a cell site's antenna based on its proximity to other towers. *Id*. at 952. The court rejected this approach under the *Daubert* standard, observing that the agent failed to account for any of the factors that affect a cell site's range. It was obvious, the court found, that estimating coverage areas demands "more than just training and experience" and instead "requires scientific calculations that take into account factors that can

affect coverage." *Id*. at 956. And the agent's methodology was "wholly untested by the scientific community, while other methods of historical cell site analysis can be and have been tested by scientists," not just "the law enforcement community." *Id*. at 956-57; *see also United States v. Reynolds*, 626 F. App'x 610, 616 (6th Cir. 2015) (suggesting reliability of CSLI analysis should not be judged "on the basis of testimony that the technique had been tested and accepted by the *law-enforcement* community"; rather, it is the "*scientific* community" that matters). With no discernable, let alone valid, methodology to support his one-mile rule of thumb, Agent David's testimony obviously did not reflect "the strict application of the scientific method." *Harvey*, 151 N.J. at 171.

Second, by relying on his own guesstimate, Agent David rejected well-established approaches in the scientific community to more reliably determine the Parkway Tower's range and coverage area. As Agent David testified at the *Frye* hearing:

> [T]here are many things that effect the useable distance of a radio frequency, specifically for a cell phone, and it's very particular to the frequency range that is being utilized for that cell phone. So to make a calculation based on terrain, it's—it would account for many different things. You could do some rough math to account for these things, but as far as specifically determining how far a phone—a radio frequency would travel and still be usable at a particular distance is really not possible to do without actually measuring it with equipment.

[4T16-20 to 17-5.]

Agent David acknowledged that such factors include the height of the antenna; surrounding terrain and buildings; signal frequency; transmitter and phone power ratings; and antenna direction. (4T52-5 to 57-5; 12T14-8 to 18.)

Experts in the field have accordingly developed scientific methods to account for these factors and provide more accurate CSLI analysis. Two such measurement techniques are radio propagation maps and drive testing. *See* Daniel at 57 ("[U]nless there is a radio propagation map or drive testing map that is relevant, no information about radius or coverage should be assumed."). Propagation maps, Agent David testified, are created by phone carriers to more accurately estimate the range of a specific cell site based on topography, height of the tower, and density of interference from other towers. (4T16-20 to 17-25). Agent David did not, however, obtain any of this information from Sprint or create his own propagation map. (4T17-21 to 25; 12T74-14 to 18; *see* 4T83-21 to 84-14.) Likewise, drive testing, according to Agent David, "scans all of the radio frequencies in a particular area" and "translate[s] the measurements to a map to tell us where the actual coverage area of a particular cell site is." (4T23-5 to 24-17); *see* Minor, *Validation & Error Mitigation*, at 39 ("Radio surveys assist . . . in determining . . . the coverage extents of each cell site[.]"). But again, Agent David performed no drive test—despite having done so in other instances

and admitting it can accomplish an "actual" measurement of a tower's coverage area. (4T23-5 to 24-17; 12T16-24 to 17-5, 71-23 to 74-13.)

Propagation maps and drive tests are only two of a host of processes used by experts in the field, but not by Agent David. A 2017 peer-reviewed study identified 11 specific steps that should be taken to more accurately determine the coverage area of a particular cell site: (1) performing preliminary mapping; (2) validating cell site locations; (3) conducting drive testing or radio survey validation of actual sector coverage area; (4) analyzing topography for void coverage areas; (5) obtaining subscriber aggregating event research; (6) analyzing traffic congestion policies and cellular carrier network infrastructure thresholds; (7) researching historical weather conditions; (8) analyzing network maintenance logs for outages; (9) analyzing carrier performance metrics; (10) researching carrier adherence to operating standards; and (11) producing a final refined mapping analysis. Minor, *Validation & Error Mitigation*, at 35-47.

The same study also demonstrated the risks of failing to verify "rule of thumb" guesses. It found that, in a sample of nearly 100 civil and criminal cases in which CSLI analysis was used, taking those 11 steps led to modifying cell site coverage maps in 40% of cases. *Id*. at 45-46. And in 6% of cases, the procedures "resulted in a modified final mapping analysis that impacted the outcome of the case in terms of the verdict of guilt or innocence in criminal

cases or damages awarded in civil litigation." *Ibid*. Other experts similarly warn that "[g]eolocation estimates based on CDRs that only have information about the location of the sector that carried the call, and its [direction], are inherently unreliable." Vladan M. Jovanovic & Brian T. Cummings, *Analysis of Mobile Phone Geolocation Methods Used in US Courts*, 10 IEEE Access 28037, 28050-51 (2022) (providing list of best practices, including drive tests and placing test calls from proposed location); *Tart et al*. at 187-93 (same).

There is no indication that Agent David took any of these verification steps. To the contrary, he admitted that he did not obtain easily accessible data to support his estimate. (4T56-15 to 57-5 (no tower height or maintenance records); 12T16-24 to 17-5, 66-24 to 74-18 (no drive test, diagnostic data, tower/phone power ratings, or propagation map).) Nor did he gather data concerning two towers that were *closer* to the crime scene. (12T94-4 to 16.) Instead, he simply took the information he received from Sprint, applied a baseless one-mile rule of thumb to guess the range of the Parkway Tower, and then testified that the crime scene was within the tower's coverage area.[3] This

[3] Agent David's one-mile guess is particularly suspect given that he appears to have provided a different estimate in a 2018 case. *United States v. Phillips*, 3d Cir. Dkt. No. 18-3781. Although the record of that case is sealed, the defendant recounted in his appeals brief that Agent David testified "in an area like Newark . . . the effective coverage area . . . might be a half-mile to a mile in range," but later testified that the "primary coverage area" for Sprint's towers are "about a half-mile." ECF No. 104-1 at 18-19 (quoting transcript); *see also Carpenter*,

type of process is simply not accepted in the relevant scientific community. *See* Daniel at 51 ("It is not possible to know or determine the coverage area of a cell tower from [CDRs].").

Third, compounding the unreliability of his testimony, Agent David used a discredited mapping technique to create misleading demonstratives. Thus, he drew straight one-mile lines to depict the purported range and coverage area of the Parkway Tower in order to find the crime scene within its outermost bounds. (4T57-6 to 25, 73-7 to 86-10.) In effect, Agent David created a 120-degree wide, one-mile long wedge-shaped sector emanating from the Parkway Tower. (Dsa 8-9.) This depiction, he explained, was intended to approximate the Parkway Tower's coverage area. (4T26-23 to 31-11; 12T65-21 to 73-18.) He included similar depictions for two other towers, again using his one-mile rule of thumb. (Dsa 7, 10-11); (4T58-12 to 59-16.)

Experts in the field of CSLI analysis warn that any mapping technique must be highly scrutinized because maps "often provid[e] an unreliable interpretation of the actual evidence." Minor, *Validation & Error Mitigation*, at 33-34. And the type of maps drawn by Agent David are particularly unreliable.

---

138 S. Ct. at 2225 (Kennedy, J., dissenting) ("The FBI agent . . . testified that a cell site in a city reaches between a half mile and two miles[.]"); *United States v. Machado-Erazo*, 47 F.4th 721, 732, 736 (D.C. Cir. 2018) (one half-mile).

"No knowledgeable expert in this day and time should be using pie-slices to show cell phone location evidence." Daniel at 53-54 ("Since it is impossible to determine the distance the phone is from a cell tower at any particular time using the limited data in a historical [CDR], suggesting that the phone is within an arbitrary boundary drawn on a map is inherently false."); Jovanovic & Cummings at 28046 ("It is clear by now that a 'one-shape-fits-all' solution for depicting a sector's coverage shape . . . has no foundation in the science of [radio-frequency] engineering."). Indeed, Agent David admitted at the *Frye* hearing that his wedge-shaped depiction could not represent the actual coverage area of the Parkway Tower. As he put it, "[i]t all depends on how the network is laid out and what specific geographical features might cause [a] propagation pattern." In other words, the outer bounds of the coverage area will "depend on a lot of things"—none of which he took into account. (4T31-5 to 34-22, 52-5 to 57-5.) But that did not stop Agent David from creating maps purporting to reveal coverage areas. (Dsa 6-11.) These maps misled the jury into thinking that it is possible to determine the outer bounds of a cell site's historical coverage area without obtaining additional information. As one expert warns, a tower's coverage area should not be depicted on any map "unless that information comes directly from the wireless telephone company in the form of a radio propagation map or in some rare cases, in the form of drive testing that occurred

contemporaneous to the date and time of the incident." Daniel at 49-50; *see* Jovanovic & Cummings at 28051 ("Using a generic shape and inter-cell distances to depict the possible areas a phone could have been in while connected to a certain cell sector is a profoundly flawed practice[.]").

The prosecution nonetheless relied upon Agent David's testimony and demonstratives to obtain Mr. Burney's conviction. Even as it acknowledged that Agent David provided no discernable scientific method for his testimony, the State suggested, in summation, that his estimate should be trusted because

> what's clear from Agent A[j]it David's testimony is the man knows what he's talking about. He is confident in what he does. He's a certified [CAST] agent. . . . Ladies and gentlemen, think about it. Break it down on a basic level. I mean this is stuff he's doing. It's—it's technology. It's high end engineering stuff. Okay? But we all go to mechanics. Right? Right? I can bring in my car. The mechanic is going to know, all right, well, this part does this. This part does that. That part does that. Without even really examining the car, he knows what the parts do and how they work and how they operate. Okay? The same thing here.
>
> [15T163-9 to 25; *see* 15T166-18 to 23 ("He's an expert, ladies and gentlemen.").]

But Agent David used an unreliable and discredited method to estimate the coverage area and range of the Parkway Tower and failed to take any steps to

validate his "rule of thumb." His testimony should have been rejected; instead, it became a centerpiece of the State's case, requiring reversal.[4]

D. The Trial Court Relied on Non-Binding Cases That Did Not Address the Reliability of Agent David's "Rule of Thumb."

The courts below misapplied existing case law—none of which directly addressed Agent David's purported methodology—when they admitted Agent David's testimony. The trial court held that his testimony was "sufficiently reliable based upon its general acceptance by the courts and other jurisdictions." (4T98-4 to 102-11.) The Appellate Division proceeded in similar fashion, citing *Jones*, 918 F. Supp. 2d at 5, and holding methodological issues "speak to the

[4] For the reasons detailed above, Agent David's testimony likewise should have been excluded if examined under the *Daubert* standard. *See In re Accutane Litig.*, 234 N.J. 340, 398 (2018) (adopting non-exhaustive factors to evaluate expert testimony in civil cases). Indeed, each of *Accutane*'s four factors, *ibid.*, point strongly towards exclusion. *First*, Agent David's "rule of thumb" methodology has not been subject to any testing. In fact, Agent David did not obtain data—including drive testing and propagation maps—that could have tested his one-mile guess. *See supra* at 18-21. *Second*, the State provided no evidence that Agent David's theory was supported by any peer-review or publication. To the contrary, peer-reviewed journals provide other methods. *See supra* at 19-21. *Third*, the State failed to provide any error rate or standards to ensure Agent David's accuracy, and Agent David testified that he did nothing to independently verify Sprint's CDR data. *See supra* at 14-16. And *finally*, there is no general acceptance of Agent David's "rule of thumb" in the relevant scientific community. *See supra* at 14-16; *infra* at 26-27. In short, the State simply did not "demonstrate the soundness of [Agent David's] methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community" and it should therefore have been excluded "on the basis that it [was] unreliable." *Accutane*, 234 N.J. at 399-400.

weight of the evidence, not its admissibility." *Burney*, 471 N.J. Super. at 322.

This was error. Experts often apply one of several possible methodologies when considering similar evidence—even within the same scientific field. But the fact that CSLI testimony may be admitted under one set of circumstances does not mean that the use of another methodology employed under a different set of circumstances was appropriate. *See Machado-Erazo*, 47 F.4th at 737 (Rogers, J., concurring) ("Consulting other judges' analyses may be informative or persuasive, but not dispositive. Absent an independent evaluation of the expert's methodology and the nature of the expert's proposed testimony, real life tragedies can occur."). It is not surprising, then, that federal district courts have reached mixed results with regard to CSLI analysis under *Daubert*. *E.g., compare Jones*, 918 F. Supp. 2d at 5-6 (permitting limited CSLI testimony), and *United States v. Nelson*, 533 F. Supp. 3d 779, 795-99 (N.D. Cal. 2021) (same), *with Evans*, 892 F. Supp. 2d at 956-57 (barring CSLI testimony based on unverified methodology). But no court has endorsed Agent David's one-mile "rule of thumb" method. And even courts that have allowed CSLI testimony have made clear that such testimony should not include speculation about a tower's range or coverage area. *See Nelson*, 533 F. Supp. 3d at 795 (allowing testimony about a phone's "general or approximate locations" but making clear that any indication "as to the size of the radius of a particular cell tower's sector

[must] provide a specific and reliable basis therefor"); *Jones*, 918 F. Supp. 2d at 5 (allowing testimony under the condition that it "does not purport to portray the 'coverage area' of any particular cell tower or antenna").

And although "[n]o federal court of appeals has yet said authoritatively that historical cell-site analysis is admissible to prove the location of a cell phone user," *United States v. Hill*, 818 F.3d 289, 297 (7th Cir. 2016), some that have looked at the issue have pointedly criticized the use of fast-and-loose methodologies. For example, the Court of Appeals for the D.C. Circuit recently considered testimony that a cell phone "had to be within a half mile" of a particular tower. *Machado-Erazo*, 47 F.4th at 736-38 (Rogers, J., concurring). Although the court ruled the evidence should have been excluded on other grounds, *id*. at 732, Judge Judith W. Rogers's concurrence made clear her view that the agent's nebulous explanation for this range—"the very nature of cellular network, the fact that it's divided up into cells of [radio frequency] energy"—rendered the testimony inadmissible. In short, how the agent "derived 'within a half mile' from those vague statements was explained neither to the jury nor earlier for the district court." *Id*. at 737; *see Reynolds*, 626 F. App'x at 615-17 (criticizing CSLI methodology for overlooking "factors such as weather, obstructions, and network traffic," ignoring "independent peer review," and failing "to establish an error rate with which to assess reliability").

Here, the trial court and Appellate Division erred by failing to address Agent David's specific methodology before admitting his testimony. Given the centrality of that testimony to the prosecution's case and its likely impact upon the jury, this error requires reversal in this case—a ruling which would assure that courts in future cases will carefully consider CSLI analysis and its underlying methodology in light of the available science and the resulting standards that have been developed.

II. The Legal Framework for Examining In-Court Identifications Must Be Updated To Take Into Account *Henderson* and Advances in Social Science.

First time in-court identifications are among the least reliable and most dangerous of any eyewitness identifications and, in light of the *Henderson* framework, should not be admitted. The "annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, in his work recounting the fateful trial of Nicola Sacco and Bartolomeo Vanzetti, then-professor Felix Frankfurter questioned

> [w]hat is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.
>
> [Felix Frankfurter, The Case of Sacco and Vanzetti 30 (1927).]

Justice William J. Brennan, himself a former a New Jersey Superior Court judge, observed over 40 years ago that "[t]here is almost nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quotation omitted).

It is also, at this point, undisputable that the combination of eyewitnesses' spurious confidence in their unreliable identification and juries' acceptance of their testimony, based at least in part upon that confidence, has resulted in numerous wrongful convictions. The Innocence Project's latest data reveals that, of the 375 individuals in the United States exonerated based on DNA evidence, 69% of their cases involved an eyewitness misidentification. Innocence Project, *DNA Exonerations in the United States*, innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Feb. 2, 2023). And 54% of those misidentified individuals were misidentified in court. *Ibid*.

In the last two decades, social science research has further confirmed that in-court identifications—and especially instances in which the eyewitness has not successfully identified the defendant in a prior out-of-court identification procedure—are extremely suggestive and unreliable. This Court has incorporated that social science into its groundbreaking decision in *Henderson*, 208 N.J. at 283-85. The time has come to apply that framework to courtroom

identifications. *Amici* respectfully submit that when it does so, this Court will conclude that trial courts should bar courtroom identifications sought without a prior successful out-of-court identification and that it should have done so here.

A. *Henderson* Provides the Legal Framework for In-Court Identifications.

Before *Henderson*, New Jersey courts long applied the federal standard articulated nearly 45 years ago in *Manson*, 432 U.S. at 114, and adopted in *Madison*, 109 N.J. at 232-33, to determine the admissibility of eyewitness identification evidence. Under the two-step *Manson*/*Madison* test, a court first decided whether an identification procedure was "impermissibly suggestive"; if so, it determined whether it "resulted in a very substantial likelihood of irreparable misidentification." *Ibid*. (quotation omitted). In adopting the *Manson* framework, the Court in *Madison* "recognized that suggestive police procedures may 'so irreparably taint the out-of-court *and in-court identifications*' that a defendant is denied due process." *Henderson*, 208 N.J. at 285 (emphasis added) (cleaned up) (quoting *Madison*, 109 N.J. at 239).

The legal landscape fundamentally changed with this Court's decision in *Henderson*. Observing that scientific evidence "revealed a troubling lack of reliability in eyewitness identifications," *id*. at 218, the Court imposed a new framework that would govern how New Jersey courts would thereafter evaluate identification evidence. In particular, *Henderson* described the numerous

shortcomings in the *Manson*/*Madison* standard, ultimately concluding that its reliance on the reliability factors from *Neil v. Biggers*, 409 U.S. 188 (1972), was inconsistent with advances in scientific research. At bottom, *Manson*/*Madison* did "not offer an adequate measure for reliability" and "overstate[d] the jury's innate ability to evaluate eyewitness testimony by eyewitnesses who honestly believe their testimony is accurate." *Id*. at 218, 285-87. In its place, the Court introduced the now-familiar requirement that courts consider both "system" and "estimator" variables derived from the latest research. Under *Henderson*, if a defendant can present some evidence of suggestiveness related to a system variable, they are entitled to a hearing to explore all relevant system and estimator variables to determine the reliability of the challenged eyewitness identification evidence. *Id*. at 288-93. *Henderson* explained that this new framework "allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible" and "is not heavily weighted by factors that can be corrupted by suggestiveness[.]" *Id*. at 288.

Nonetheless, our courts continue to apply the discredited *Manson*/*Madison* standard to assess the admissibility of first-time in-court identifications. *Burney*, 471 N.J. Super. at 328 (employing *Madison*'s "two-step process"); *State v. Watson*, 472 N.J. Super. 381, 480 (App. Div. 2022) (applying "the clear implication of the *Madison* Court's analysis"), *certif. granted*, ___

N.J. ___ (2022); *see State v. Guerino*, 464 N.J. Super. 589, 606-07, 614 (App. Div. 2020) (citing *Madison*); *see also State v. Clausell*, 121 N.J. 298, 327-28 (1990) (applying federal standard). Because the outdated *Manson*/*Madison* standard rests on legal and scientific principles that *Henderson* rejected as inconsistent with the latest social science research, this Court should now make clear that *Henderson*'s legal framework applies to all eyewitness identification evidence—including identifications that take place before a jury. That is, to ensure that only reliable eyewitness evidence is admitted against a defendant, *Henderson*'s system and estimator variables must not only be applied to assess unreliable identification procedures attributable to police and private actors, but also those that arise from the trial process itself.[5]

Beyond the weaknesses of *Manson*/*Madison* identified in *Henderson*, three reasons compel this result. *First*, an in-court identification is itself an identification procedure. Indeed, courts and social scientists alike recognize that asking an eyewitness to identify a defendant during trial is another version of the kind of showup done at a crime scene—only more suggestive. *E.g.*, *Commonwealth v. Crayton*, 21 N.E.3d 157, 165-72 (Mass. 2014) (cataloguing reasons "in-court identifications may be more suggestive than showups"); Evan

[5] A similar issue is raised in the pending appeal from the Appellate Division's decision in *Watson*, 472 N.J. Super. 381.

J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 Alb. L. Rev. 389, 390 (1996) ("[T]he overwhelming majority of in-court identifications are nothing more than show-ups[.]"). Although one process unfolds in a courtroom and the other outside it, both are "essentially single-person lineups: a single suspect is presented to a witness to make an identification." *Henderson*, 208 N.J. at 259-61. There is no question that out-of-court showups are governed by *Henderson*. And there is no reason why the outdated *Manson*/*Madison* test should be applied to showups in a courtroom. Rather, *Henderson*'s framework must be applied to all potentially unreliable eyewitness evidence.

Second, in focusing the inquiry on reliability, *Henderson* did not distinguish between out-of-court and in-court identifications. *See* Mandery at 392, 422 ("[T]here is no basis in law or public policy to differentiate the treatment of in-court identifications from pre-trial identifications."). To be sure, the case considered an out-of-court identification procedure administered by police. But "*Henderson* reviewed concerns about the reliability of eyewitness identification evidence more broadly," *State v. Green*, 239 N.J. 88, 98 (2019), including when detailing how "system and estimator variables can affect the reliability of eyewitness identifications." *Henderson*, 208 N.J. at 285-93. At its core, *Henderson* explained why *Manson*/*Madison* was untenable given advances in social science understanding of *all* eyewitness identifications.

Third, *Henderson*'s framework applies whether courtroom identifications are examined under due process principles or under the New Jersey Rules of Evidence. On one hand, *Henderson* reaffirmed that the State Constitution's due process protections against unreliable eyewitness identification evidence extend beyond the floor provided by the federal Constitution. *Id*. at 287 n.10. And a prosecutor's decision to conduct a courtroom showup falls squarely within the heartland of state action: the State has arrested the defendant, charged him with a crime, brought him to court, presented the jury with an eyewitness who knows that the State has concluded the defendant is the wrongdoer, and then asked that eyewitness to identify him. A number of federal and state courts agree that such in-court identification procedures raise constitutional concerns. *United States v. Morgan*, 248 F. Supp. 3d 208, 213 (D.D.C. 2017); *State v. Dickson,* 141 A.3d 810, 822-27 (Conn. 2016); *City of Billings v. Nolan*, 383 P.3d 219, 224-25 (Mont. 2016); *see also State v. Doolin*, 942 N.W.2d 500, 543 (Iowa 2020) (Appel, J., dissenting).

But even assuming due process is inapplicable, *Henderson*'s framework would nevertheless apply under the Court's companion decision in *State v. Chen*, 208 N.J. 307 (2011). *Chen* clarified that, even when a "case is not about government conduct," *id*. at 317, the rules of evidence require application of

Henderson's system and estimator variables, *id*. at 326.[6] In so doing, the Court explained that "the reasons animating the case law on eyewitness identification extend beyond police procedures and also address the reliability of evidence presented in court." *Id*. at 318; *see Madison*, 109 N.J. at 232 (describing *Manson* test as attempting to "balance the State's need to use eyewitness identification against the defendant's need to protect himself against potentially unreliable eyewitness testimony[.]"); *Manson*, 432 U.S. at 114 ("[R]eliability is the linchpin in determining the admissibility of identification testimony."); *see also* 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, 983 (2015) ("The same concerns that compelled [*Henderson*] should compel courts to re-examine the admissibility of first time, in-court identifications."). And because procedures used by prosecutors in the courtroom can be just as suggestive as those outside it—indeed, even more so—they should be governed by the standard set forth in *Henderson*.

[6] *Chen* tweaked *Henderson*'s first step by requiring "some evidence of *highly* suggestive circumstances as opposed to simply suggestive conduct" to trigger a pretrial hearing "in cases that present suggestive identification procedures but no police action." 208 N.J. at 326-27. The test is otherwise the same. *Ibid*.

B. Application of *Henderson* Should Result in a Bar on First-Time In-Court Identifications.

The application of the system and estimator variables described in *Henderson* makes clear that first-time courtroom identifications are extremely suggestive and unreliable—and should be barred. Beginning with an analysis of system variables, which are used to determine suggestiveness under the first step of the *Henderson* framework, 208 N.J. at 288-89; *see Chen*, 208 N.J. at 327, it would be difficult to construct a more suggestive procedure. As an initial matter, such identifications—by definition—do not employ blind administration, neutral pre-identification instructions, or a lineup including other individuals. *Henderson*, 208 N.J. at 248-253, 289-91. Nor do such identifications immediately record the witness's confidence. *Ibid*. Instead, both the prosecutor and the witness know where the defendant is seated, and the prosecutor has almost complete discretion to craft her examination. These systemic features run squarely against best practices for identification procedures. *See* Gary L. Wells *et al*., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 Law & Hum. Behav. 3, 3-28 (2020).

Indeed, a first-time in-court identification is an even more suggestive and unreliable showup—a type of identification procedure so disfavored that it earned its own system variable. *Henderson*, 208 N.J. at 259-61, 290; *see*

Crayton, 21 N.E.3d at 165-72. Over 50 years ago, the United States Supreme Court observed that "the practice of showing single suspects to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). In fact, the Court warned, "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." *Wade*, 388 U.S. at 234 (citation omitted). And in *State v. Herrera*—a pre-*Henderson* case—this Court likewise held that it is a "commonsense notion 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." 187 N.J. 493, 504 (2006). Applying *Manson*/*Madison*, the *Herrera* Court explained "that standing alone a showup is not so impermissibly suggestive" if it takes place "on or near-the-scene . . . before memory has faded[.]" *Ibid*. (quotation omitted). But, the Court warned, "only a little more is required in a showup to tip the scale toward impermissibly suggestive." *Ibid*.

Conducting a first-time showup in front of a jury does not just tip the *Herrera* scale towards impermissibly suggestive—it breaks the scale altogether. In particular, there is extensive confirmatory feedback—another system variable, *Henderson*, 208 N.J. at 253-55—conveyed to a witness asked to identify the defendant for the first time at trial, a witness who knows that the

criminal justice system has determined to put the defendant on trial. As *Madison* described it: "If a one-on-one confrontation at the police station is highly suggestive, then surely such a confrontation in court is the most suggestive situation of all, for the witness is given an even stronger impression that the authorities are already satisfied that they have the right man." 109 N.J. at 243 (quotation omitted)).

As the Connecticut Supreme Court has held, "a first time in-court identification procedure amounts to a form of improper vouching" because it is

> likely that a jury would naturally assume that the prosecutor would not be allowed to ask the witness to identify the defendant for the first time in court unless the prosecutor and the trial court had good reason to believe that the witness would be able to identify the defendant in a nonsuggestive setting.
>
> [*Dickson*, 141 A.3d at 822-23 ("[W]e are hard-pressed to imagine how there could be a *more* suggestive identification procedure[.]").]

The Massachusetts Supreme Judicial Court has likewise observed that "[t]he presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime." *Crayton*, 21 N.E.3d at 166-67. For this reason, the "expectation that the witness identify the defendant is palpable and may have a powerful effect on the reliability of an identification." Kaplan & Puracal at 985.

Adding fuel to the fire, the physical setup of the courtroom creates a highly suggestive environment to test an eyewitness's memory for the first time because "the eyewitness can easily see where the defendant is sitting." National Academy of Sciences (NAS), Identifying the Culprit: Assessing Eyewitness Identification 36 n.28 (2014). This setup "fail[s] to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect." *Henderson*, 208 N.J. at 260; *see* Third Circuit Task Force, *2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications*, 92 Temp. L. Rev. 1, 58 (2019) ("[T]he 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."). So too will "the presence of jurors and the formality of the trial . . . create conditions under which the potential for self-persuasion is even greater." Mandery at 416.

Even worse, the defendant is often the only person in the courtroom who matches the perpetrator's description. And in some cases, the defendant is the only person of a particular race—or even the only person of color—in court. *See United States v. Correa-Osorio*, 784 F.3d 11, 21 (1st Cir. 2015) (holding that a courtroom identification when the defendant is "the only [B]lack person present" is within the "constitutional danger zone").

All of this 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. In the end, taking all of these system factors into account, there really can be no question: first-time in-court identifications are extremely suggestive.

As a result, under *Henderson*'s next step, the State bears the burden to prove "the proffered eyewitness identification is reliable—accounting for system and estimator variables[.]" *Id.* at 289; *see Chen*, 208 N.J. at 327. And in the end, the identification must be suppressed if the trial court finds from the totality of the circumstances that the defendant has demonstrated a "very substantial likelihood of irreparable misidentification." *Ibid*. But when it comes to a first-time in-court identification (and particularly one following a suggestive out-of-court identification procedure), it is hard to imagine how that would not be the case. Accordingly, first-time in-court identifications normally cause a very substantial likelihood of irreparable misidentification.

Indeed, beyond the system variables described above—each of which is controlled by the State's decision to seek an initial identification during trial—the memory decay estimator variable explains how the time that inevitably elapses between an initial encounter and a courtroom identification renders the process unreliable. *See Henderson*, 208 N.J. at 267, 292. Social science research,

the *Henderson* Court found, "casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification." *Id*. at 261. For example, *Henderson* cited a study that revealed after only two hours a showup was four times as likely to lead to a false identification of the innocent suspect than if that same suspect was in a six-person lineup. *Id*. at 260 (citing Daniel Yarmey *et al*., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 Law & Hum. Behav. 459, 464 (1996)). Of course, a first-time in-court identification necessarily takes place beyond this narrow window of reliability.

Nor is it significant that a witness appears to express confidence in her in-court identification, as Rosette did here. (*See* 11T74-5 to 75-5.) To the contrary, research shows that eyewitness confidence in an identification has very little relation to its accuracy. *Henderson*, 208 N.J. at 236 ("[A]ccuracy and confidence 'may not be related to one another at all.'" (quoting *State v. Romero*, 191 N.J. 59, 75 (2007)); *see id*. at 253-55; Third Circuit Task Force at 57 ("There is no scientific basis for correlating time-of-trial confidence with accuracy."); Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research*, 3 Applied Psychol. Crim. Just. 7, 31 (2007) (describing chasm between accuracy and confidence as "one of the most consistent findings in memory research").

And the disconnect between confidence and accuracy is especially acute for showups. Indeed, research reveals a dangerous combination: eyewitnesses who make showup identifications have greater confidence in their picks despite being less accurate than those presented lineups. Jeffrey S. Neuschatz *et al.*, *A Comprehensive Evaluation of Showups*, 1 Advances in Psychol. & L. 43, 63-66 (2016). Furthermore, studies have shown that "witnesses are more confident in their identifications of the suspect when the suspect stands out than when the suspect is surrounded by appropriate fillers, regardless of whether the suspect is guilty or not." Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 12 (2009).

When there has already been an unsuccessful out-of-court identification attempt, a subsequent "in-court identification will simply repeat any error that infected a pretrial identification procedure." Report of the Special Master, *State v. Henderson* (June 18, 2010) at 42. This results from the fact that, as this Court held, "[v]iewing a suspect more than once during an investigation can affect the reliability of the later identification." *Henderson*, 208 N.J. at 255; *see* Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. of Applied Res. Memory & Cognition 284, 286 (2016) ("Simply put, repeated procedures make certain that the suspect is

identified more often, but do not increase the likelihood that the identified suspect is actually guilty.").

This is all the worse with regard to courtroom identifications which, as discussed above, have particularly distorting effects on jurors. As this Court has said, "[j]urors likely will believe eyewitness testimony 'when it is offered with a high level of confidence, even though the accuracy of the eyewitness and the confidence of that witness may not be related to one another at all.'" *Romero*, 191 N.J. at 75 (quoting *Watkins*, 449 U.S. at 352 (Brennan, J., dissenting)). Social science research confirms this observation. "Many studies have shown that jurors are not aware of the limitations of eyewitness testimony" and instead "place great weight on the confidence of an eyewitness in the courtroom." Brandon L. Garrett *et al*., *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. Empirical Legal Stud. 556, 556-60 (2020) (compiling literature); *see* Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. Rev. 511, 568 (2022) ("[C]ourtroom identifications and courtroom expressions of eyewitness confidence have been shown to powerfully influence jurors.").

Indeed, research has long demonstrated that "the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether or not observers will believe the

eyewitness made an accurate identification." Gary L. Wells *et al.*, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Hum. Behav. 603, 620, 635 (1998); *accord Henderson*, 208 N.J. at 273-74 (citing study). For example, a recent study found that, among a host of tested variables, mock jurors "were most sensitive to confidence of eyewitnesses, as expressed by the defendant primarily at the courtroom trial[.]" Garrett *et al.*, *Factoring the Role of Eyewitness Evidence*, at 570-71 ("Our findings are broadly consistent with prior mock trial studies[.]"). Even more disturbing, the same study found that "neither jury instructions nor expert testimony altered the weight that laypeople placed on the courtroom confidence expressed by the eyewitness." *Id.* at 574. The same is true for cross-examinations, which are likewise "largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken." Wells *et al.*, *Eyewitness Identification Procedures*, at 609. As the Third Circuit Task Force on Eyewitness Identifications summarized: "[E]ven after judges, lawyers, and jurors are made aware of the potential weaknesses of eyewitness testimony, the probative force of a courtroom identification remains quite compelling." *Id.* at 11.

Amici recognize that *Henderson* "avoided bright-line rules," *State v. Anthony*, 237 N.J. 213, 226 (2019), and created a framework that "allows for a more complete exploration of system and estimator variables," *Henderson*, 208

N.J. at 303. However, the unreliability of first-time in-court identifications is so significant that, under any reasonable application of *Henderson*, courtroom identifications that have not been preceded by a successful out-of-court identification should simply not be permitted. Indeed, the overwhelming consensus of the social science detailed above makes clear that identifications that occur for the first time before a jury are extremely suggestive, totally unreliable, and cause a very substantial likelihood of irreparable misidentification. It is for that reason that the National Academy of Sciences has been unequivocal: identifications "should not occur for the first time in the courtroom." NAS at 110-11.[7] And state high courts in Connecticut and Massachusetts have barred such identifications except in very narrow circumstances. Connecticut allows first-time courtroom identifications "only if [the court] determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant

[7] The Appellate Division has twice left open the possibility of barring first-time in-court identifications if provided sufficient social science research. *Watson*, 472 N.J. Super. at 478-99 ("[T]here has been no adversarial hearing in this case to consider the validity, meaning, and import of the social science evidence. Nor do we have the benefit of a special master, as in *Henderson*, to sift through, compile, and make objective recommendations on the relevant social science studies."); *Guerino*, 464 N.J. Super. at 606-07 ("[T]he record before us in this case is inadequate to test the validity and utility of in-court identifications."). That social science research is brought to bear here.

is not at issue." *Dickson*, 141 A.3d at 835-36. And Massachusetts permits such identifications "only where there is 'good reason' for its admission," a narrow category that includes such circumstances as when an eyewitness knew the culprit before the crime or is simply confirming that the defendant is the person who was arrested. *Crayton*, 21 N.E.3d at 169-170.[8]

Excluding first-time in-court identifications would appropriately reflect both that such identifications are highly suggestive and unreliable, and that cross-examination and jury instructions really cannot effectively combat their overwhelmingly prejudicial effect. As well, it would incentivize police and prosecutors to apply the best-practices for identification procedures described in *Henderson* and elsewhere—including to eschew showups done more than two hours after an incident in favor of lineups and photo arrays. *See* 208 N.J. at 261 ("[L]ineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive."); Int'l Assoc. of Chiefs of Police, Model Policy: Eyewitness Identification § IV(A)(3) (2016) ("Do not use a showup procedure if probable cause to arrest the suspect has already been established."); Wells *et al*., *Policy and Procedure*

[8] Other states use different processes to address this issue. For example, in Alaska defendants may request an in-court lineup or that the defendant not be seated at counsel table. *Young v. State*, 374 P.3d 395, 411-12 (Alaska 2016).

Recs., at 8-9 ("[I]f probable cause exists to arrest the person then a showup should not be conducted[.]"). As it currently stands, the State is incentivized to sidestep best practices by conducting what is essentially a delayed, real-time showup in front of the jury; the proposed rule would patch this hole in the legal architecture by encouraging the use of more reliable out-of-court procedures and screening them with *Henderson*'s system and estimator variables.[9]

This Court—in *Henderson*, *Chen*, and their progeny—has made clear that our courts provide expanded protections against unreliable eyewitness testimony. Indeed, the Court "has long been considered a trailblazer" in protecting the rights of criminal defendants. Benjamin Weiser, *In New Jersey, Sweeping Shift on Witness IDs*, N.Y. Times (Aug. 25, 2011) at A1. By applying *Henderson*'s framework to first-time in-court identifications, and concluding that such identifications shall not be permitted, the Court will continue this historic tradition.

[9] In the event that the Court declines to adopt a *per se* rule, it should, at the very least, instruct trial courts examining the admissibility of a first-time in-court identification to apply a strong presumption against their use, one that could only be overcome in particularly compelling circumstances, such as when the out-of-court identification did not occur because the witness knew the perpetrator and identified them by name (*e.g.*, in a domestic violence prosecution). *See Dickson*, 141 A.3d at 835-36; *Crayton*, 21 N.E.3d at 169-70.

C. Rosette's First-Time In-Court Identification Should Have Been Excluded.

A straightforward application of *Henderson*'s system and estimator variables demonstrates why Rosette's first-time courtroom identification—like all other initial courtroom identifications—should have been excluded. Though social science research makes clear that first-time in-court identifications run headlong against numerous system and estimator variables, neither the trial court nor Appellate Division weighed any variables. Thus, although the Appellate Division correctly determined that the police's out-of-court conduct was highly suggestive, the courts below erred in holding that there was not a substantial likelihood that that process would result in irreparable misidentification. *See Burney*, 471 N.J. Super. at 329-30.

In particular, as set forth *supra* at 5-6, police called Rosette to the station and told her they had arrested Mr. Burney (by name) and showed her a photo of her watch they said was taken from his phone. (11T126-4 to 130-25.) This process, she testified, confirmed to her that Mr. Burney was guilty. (*Ibid.*); *see Burney*, 471 N.J. Super. at 329 ("Rosette candidly acknowledged that her in-court identification was in fact influenced by a deduction she drew from the information provided by Detective Alonso."). Rosette then knew that the person charged in relation to the break-in would be sitting next to defense counsel. (11T130-1 to 22.) When she ultimately pointed to Mr. Burney in court, it was

more than two years (780 days) after the break-in. The suggestiveness of this sequence of events is obvious, based on both common sense and the scientific principles detailed above.

This is especially true given that Rosette's in-court identification was her second viewing of Mr. Burney, a circumstance specifically warned against in *Henderson*. 208 N.J. at 255-56 (citing research showing that while "15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time," wrongful identifications "increased to 37% if the witness had seen the innocent person in a prior mugshot"); *see also* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 64-67 (2011) (reviewing 161 wrongful conviction trials and finding that 64 (40%) included an eyewitness who initially identified a different person or no person before later misidentifying the later-exonerated person). Nor did the courts below analyze the effects of estimator variables, including some that were at least potentially applicable here (*e.g.,* stress, weapon focus, and cross-racial identification).

It is also clear that Rosette's in-court identification was highly prejudicial. In the State's opening, the prosecutor previewed to the jury to watch out for a "Perry Mason moment' where a witness says 'That's the man. That's Mr. Burney who did it.'" (9T50-1 to 4.) And during summation, the State contended that Rosette "did identify the right man," minimizing the photo arrays because "a

picture is lot different than seeing somebody in person." (15T168-16 to 170-4.)

In sum, this case demonstrates why first-time in-court identifications should be limited. The trial court allowed Rosette to make a courtroom identification two years after seeing the perpetrator, despite her failing to select Mr. Burney in a photo array, and then being told the police arrested the correct perpetrator. If ever there were a case, Mr. Burney's in-court identification should have been suppressed in this one. This case also provides the Court with the opportunity to apply its landmark ruling in *Henderson* in this important context to bar first-time in-court identifications in most cases. It should do so.

CONCLUSION

For the reasons set forth above, *Amici* respectfully urge the Court to reverse the decision of the Appellate Division.

Respectfully submitted,

Gibbons P.C.
John J. Gibbons Fellowship in
Public Interest & Constitutional Law
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
Counsel for Amici Curiae

BY: */s/ Lawrence S. Lustberg*
Lawrence S. Lustberg (023131983)

/s/ Ethan Kisch
Ethan Kisch (349152020)

Dated: February 6, 2023