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

Supreme Court of New Jersey

DOCKET NO. 087251

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent	:	On Certification Granted from a Final Order of the Superior Court of New Jersey, Appellate Division.
v.	:	
QUINTIN D. WATSON,	:	Sat Below: Hon. Richard S. Hoffman, J.A.D., Hon. Richard J. Geiger, J.A.D.,
Defendant-Appellant.	:	Hon. Ronald Susswein, J.A.D.

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February 9, 2023

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PRELIMINARY STATEMENT

A bank was robbed in under sixty seconds. For months, the only evidence the police had was video footage from the bank's surveillance camera. At trial, the State introduced narration testimony of the surveillance footage by the lead investigator, the out-of-court misidentification by the bank teller, as well as his in-court identification of defendant. This case thus presents two evidentiary issues involving a law-enforcement agent's ability to narrate video footage and a witness's ability to make an in-court identification of defendant after previously picking someone else out of a photo array. In both instances, this Court should embrace the long standing practice of making case-by-case determinations and rejecting any bright-line rules limiting helpful evidentiary testimony.

During the trial, the lead investigator provided narration testimony about what was occurring in the bank's multiple-camera surveillance video that he had watched numerous times and used for his investigation. Also, the only witness to the robbery identified defendant in an in-court identification but stated he was only eighty percent sure defendant was the person who robbed him, despite being informed defendant would be sitting at counsel table. The Appellate Division properly determined that both types of evidence were admitted without error by rejecting bright-line rules and categorical bans of

valuable evidence testimony that would go against established practices in New Jersey. This Court should affirm the reasoning of the Appellate Division and establish rules and procedures for narration testimony and in-court identifications that embrace case-by-case determinations.

Lay opinion testimony from law-enforcement agents in the form of video narration is proper when it is based on the officer's extensive viewing of the video and aids the jurors in their determination of a fact at issue without usurping their role as triers of fact. Thus, the best practice to determine the proprietary of the proposed narration is for a trial court to conduct an evidentiary hearing to determine the scope of the testimony and allow the defendant to object to specific potential comments away from the jury's view. In this case, the lead detective narrated events in a video he had watched numerous times and highlighted actions in a quick-moving series of events that a jury might have otherwise missed. And the detective did so without commenting on the ultimate decision of guilt or innocence, that is, whether defendant was the person in the video. This testimony met all the requirements of lay opinion testimony and was properly introduced.

First-time in-court identifications that do not implicate due process and were not the result of highly suggestive behavior are properly admitted because the constitutional and evidentiary safeguards intrinsic to our

adversarial trial process mitigate any risk of misidentification. The ultimate decision of what weight to give to the identification should remain within the jury's province after cross-examination and proper jury instructions. The overwhelming weight of the law rejects applications of categorical bars to identification evidence and recognizes that in rare cases, identification evidence will be kept from the jury.

Here, although the victim made an in-court identification, the jury heard through effective cross-examination that he had failed to identify defendant in an unpressured photographic array, that he had been informed that the man accused of the bank robbery would be at counsel table, and that he was never more than eighty-five percent sure that the person in the photo array or the person at counsel table committed the crime. Also, during jury instructions, the jury was informed that the ultimate identification decision was theirs to make and that if they believed the in-court identification was the result of the impression gained at the in-court procedures, it should be afforded no weight. As demonstrated in the case, the adversarial system sufficiently protects defendants, and a categorical ban is unnecessary.

This Court should affirm the Appellate Division decision and defendant's conviction for these reasons.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The Attorney General relies on the procedural history and facts set forth in the Appellate Division opinion and adds the following.

On June 6, 2022, the Appellate Division issued a published decision in this case, State v. Watson, 472 N.J. Super. 381 (App. Div. 2022). (Pa1 to 166). On November 17, 2022, this Court granted defendant's petition for certification. (Dsa1).

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QUESTIONS PRESENTED

1. Whether narration testimony from the lead investigator who watched the multi-camera surveillance footage of a sixty-second bank robbery numerous times and highlighted minute details a first-time observer might miss is admissible lay opinion testimony under N.J.R.E. 701 and whether any issue about the scope of such testimony should be discussed at a pre-trial evidentiary hearing?
2. Whether this Court should continue its precedent of admitting eyewitness identification testimony on a case-by-case basis and allow in-court identifications when the witness failed to identify defendant in an out-of-court identification procedure but was subject to the traditional elements of the adversarial system so that the jury heard effective cross-examination, closing arguments, and jury instructions, which all diminished the weight of the in-court identification?

LEGAL ARGUMENT[1]

POINT I

POLICE NARRATION, BASED ON REPEATED REVIEW OF VIDEO FOOTAGE, IS HELPFUL TO THE JURY AND IS THUS PROPER LAY OPINION TESTIMONY THAT DOES NOT INVADE THE PROVINCE OF THE JURY.

Video footage capturing an incident, which all potential witnesses will not have observed in real-time, is a type of evidence already played at trials and will only become more common as closed-circuit television, camera phones, video doorbells, and surveillance cameras continue to dominate the public sphere. The sharpness of the films can vary greatly, and law-enforcement investigators frequently sort through and combine footage from numerous sources. And throughout an investigation, the police repeatedly review the tape, watching each video repeatedly, in order to catch little nuances that they might have missed during the initial viewings. A jury will not be in the same position to know where

[1] This brief responds to Points II and III of defendant's supplemental brief regarding Sergeant Vitelli's narration of the surveillance video and the victim's in-court identification of defendant. Concerning the alleged Confrontation Clause violation, the Attorney General agrees with the Appellate Division's thorough and well-reasoned decision that any alleged error "did not contribute to the guilty verdict and thus was harmless constitutional error." Watson, 472 N.J. Super. at 445. Any inappropriate testimony "was brief, viewed not just in the context of the entire trial but also in context of Officer Vitelli's proper testimony" and the State's case was "fortified by direct positive evidence." Id. at 440, 444.

and what to look for when watching the same footage, especially if it is of poor quality, includes multiple people, or is chaotic. This Court should thus proclaim that in those instances, narration by law enforcement in the form of lay opinion testimony of a video is permitted with several limiting principles and reject any categorical rule that prohibits video narration. The Attorney General urges this Court to adopt the procedures advanced by the Appellate Division, recognizing that this is a fact-sensitive issue to be decided on a case-by-case, question-by-question basis best dealt with at an N.J.R.E 104 hearing.

General principles of lay opinion testimony already established by this Court dictate that the type of narration testimony that occurred here is proper. A law-enforcement officer who benefits from repeated and often enhanced viewing capabilities can testify to his perceptions from watching the video. This type of testimony is helpful to the jury to notice, emphasize, or discern elements they might have otherwise missed, given their untrained eye and limited viewing capabilities. But the testimony should not and cannot invade the province of the jury by making comments that would be legal conclusions or a comment on a defendant's guilt or innocence. It remains up to the jury to decide what weight to give the testimony based on their own viewing of the video.

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A. Sergeant Vitelli provided objective narration based on his multiple views of the footage from the several bank cameras.

Sergeant Vitelli, a patrol sergeant in the North Brunswick Police Department, became the lead investigator after responding to the Garden State Community bank on January 14, 2017, because of a report of a bank robbery. (5T106-4 to 16). As part of his investigation, he obtained video surveillance footage from multiple Garden State Community Bank cameras. (5T118-5 to 7; 5T130-9 to 11). After receiving the footage, he reviewed the surveillance "numerous times." (5T130-12 to 14).

At trial before the Honorable Benjamin S. Bucca, Jr., J.S.C., and a jury, the surveillance from the bank was played while Sergeant Vitelli testified with a laser pointer. (5T132-15; 5T119-22 to 25). The prosecutor asked Sergeant Vitelli, "[w]hat do you see?" He answered that "[t]his would be our suspect entering the bank right here. You'll see him come in the front door[.]" (5T132-19 to 22). The prosecutor then asked, "[c]an you make any observations on his hands?" (5T132-23). But before Sergeant Vitelli could answer, defense counsel objected and at sidebar argued the video could be played, but Sergeant Vitelli "can't narrate what's going on. The jurors can see what's going on but . . . this officer [is] basically giving a lay opinion as to . . . what's going on in the video." (5T133-1 to 11). The trial judge overruled the objection. (5T133-16 to 17).

After the sidebar concluded, the prosecutor re-asked his question about the

suspect's hands. (5T133-21 to 22). Sergeant Vitelli answered, "as the suspect entered the doors, it appeared that he was wearing gloves over his hands." (5T133-23 to 24; 5T134-5 to 8). Sergeant Vitelli continued his testimony by describing which door the suspect entered, which area of the bank each camera focused on, and the suspect's relation to other people in the bank. (5T134-10 to 20). Sergeant Vitelli pointed out that at that moment in the surveillance, "it appears the suspect removes the glove from his right hand, places it in his left hand, and places his right hand into his jacket or sweatshirt pocket." (5T134-22 to 25). Next, he explained that the camera directly behind the teller showed "the suspect took his right hand and placed it down either in his pocket or by his waist, [and] placed his left hand on the note that he passed to the teller." (5T135-1 to 6).

Defense counsel renewed his objection regarding lay opinion testimony, stating that Sergeant Vitelli was "unqualified to testify" when the prosecutor asked what Sergeant Vitelli "observe[d] about [the suspect's] fingers in relation to the note and to the counter[.]" (5T135-17 to 22). Again, the trial court overruled the objection. (5T135-23 to 24). Sergeant Vitelli then answered the prosecutor's question explaining that "[i]n [his] opinion, from [his] observations, it looks like the suspect has two fingers on the note, holding the note as it's on the counter." (5T135-25 to 136-2).

When viewing the footage from the "vestibule camera," which showed the

exterior door, Sergeant Vitelli commented, "[s]omething that I picked up on is that . . . the suspect was very careful in which they proceeded in and out of the bank, not attempting to leave any type of evidence behind." (5T136-4 to 8; 5T136-13 to 16). This comment led to another objection. This time the trial judge sustained the objection on the basis that Sergeant Vitelli had made a net opinion because he did not "explain[] the underlying facts as to what formed that opinion[.]" (5T136-17 to 25). When the prosecutor tried to lay a better foundation for the opinion, defense counsel objected that the testimony was "speculative and . . . corroborative." (5T137-3 to 7).

At sidebar, defense counsel argued that because Sergeant Vitelli was not present at the bank robbery, he could not "speculate to what took place." (5T137-10 to 24). The trial judge sustained the objection because the "jury can make their own observations" but allowed the prosecutor to ask "what [he was] observing in [each] frame." (5T138-10 to 24). The trial judge explained to Sergeant Vitelli that he cannot make conclusions but can detail his factual observations." (5T139-8 to 11).

When Sergeant Vitelli's testimony resumed, he detailed that the "suspect has something in his right hand, whether it be the money or the note that was passed" and that the suspect "exits out the same door that he came in." (5T139-12 to 20). In response to what he observed about the door, Sergeant Vitelli testified that the

suspect used his elbow to open the door. (5T140-1 to 8). Sergeant Vitelli then noted that when the suspect got to the parking lot, it appeared he was running toward Route 130 South. (5T140-18 to 141-1).

Once the surveillance footage finished playing, the prosecutor began showing Sergeant Vitelli still photographs from the footage. The prosecutor asked Sergeant Vitelli what observation he made about a photograph of the suspect at the teller counter. Sergeant Vitelli answered that the suspect's "left hand appears to be either on top of the note or right next to the note[.]" (5T142-24 to 143-15). And when asked directly if "the paper [was] a barrier between his fingertips and the surface?" Sergeant Vitelli answered, "I would say yes." (5T143-22 to 24).

The prosecutor then showed Sergeant Vitelli a photograph of the suspect leaving the bank and asked him to describe what the suspect was wearing. (5T144-7 to 18). After providing his answer, the prosecutor next asked if the bank teller, Christian Gambarrotti, gave a physical description of the suspect and if the description was consistent after reviewing the video. (5T144-19 to 145-1). Before Sergeant Vitelli could answer, defense counsel objected, alleging "improper bolstering of a witness." (5T145-2 to 3). The judge dismissed the jury and discussed the objection with the parties outside the jury's presence. (5T145-2 to 146-6). The judge expressed that while the video "depicts an African American male" he had a concern "as to whether there's been a proper foundation as to

whether the video can adequately depict whether [the suspect is] six-two, six-three" as Gambarrotti had described. (5T147-7 to 16). But the judge stated that if there were a way "for the officer to testify . . . as to how that video can depict a tall, well-built African American male, that, in my ruling, would be admissible." (5T147-18 to 21).

When the jury returned, the following questioning occurred:

> Prosecutor: When I left off, I was asking if you had taken a statement on January 14th, 2017, from Christian Gambarrotti.
>
> Sergeant Vitelli: Yes, that's correct.
>
> Prosecutor: And in his statement, did he provide a physical description of what the suspect looked like?
>
> Sergeant Vitelli: Yes, he did.
>
> Prosecutor: Thereafter, you obtained the Garden State Community Bank surveillance footage from inside the bank.
>
> Sergeant Vitelli: Yes, I did.
>
> Prosecutor: And there's a suspect that's seen on that video. Is that fair to say?
>
> Sergeant Vitelli: Yes, it is.
>
> Prosecutor: And did you make any -- did you observe any physical characteristics of that suspect from the bank surveillance?
>
> Sergeant Vitelli: I observed it to be a dark-skinned male. I noticed that he was a larger individual. Noticed that he

> was larger than myself. I couldn't give you an approximate weight, but I did notice that he was a well-built individual.
>
> Prosecutor: Could you make any observations as to height from the video?
>
> Sergeant Vitelli: I'm approximately five-ten, and I would estimate that he was larger than myself.
>
> [(5T149-5 to 150-5).]

Finally, the prosecutor asked Sergeant Vitelli to describe the surveillance footage he obtained from a convenience store, which was five to seven yards from the bank. (5T131-8 to 19). Sergeant Vitelli described how the surveillance showed "somebody walking down Wood Avenue towards Route 130. And that direction is consistent with where the bank would be." (5T153-24 to 154-3). Next, he described how the footage showed "the same individual, coming back this way, walking in the opposite direction, basically almost retracing their steps" and stated it appeared "that they're either jogging or running, or walking at an expedited pace" but that it was hard to tell because the footage gets a "little pixelated." (5T154-10 to 24).

This testimony was proper because it was based on Sergeant Vitelli's repeated viewings of the surveillance from the multiple cameras in the bank, highlighted minute details that were not immediately apparent to a first-time viewer, and did not make any conclusions that are left for the jury to decide.

B. New Jersey precedent on lay opinions embraces a comment-by-comment approach to determine if the testimony is based on perception, helpful, and limited in scope; it certainly does not support a categorical bar to such helpful testimony.

Lay opinions are governed by N.J.R.E. 701, which provides that "[i]f 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 State v. McLean, 205 N.J. 438, 456 (2011). "Lay opinion testimony, therefore, when offered either in civil litigation or in criminal prosecutions, can only be admitted 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.

The Appellate Division correctly noted that there is "no dispositive authority in New Jersey or elsewhere to support defendant's sweeping contention that 'play-by-play narration is categorically inappropriate." Watson, 472 N.J. Super. at 459. Thus, the court correctly declined to adopt a rule that "would preclude a police witness from pointing out an event or circumstance depicted in the video or from otherwise offering a description of or comment on any such event or circumstance." Ibid. Instead, it aptly found that "the decision to allow a witness to describe and highlight something on the screen that the jury could see for itself must be made on a case-by-case if not comment-by-comment basis." Ibid.

N.J.R.E. 701 "follows . . . Fed. R. Evid. 701 . . . in substance." 1991 Supreme Court Committee Comment to N.J.R.E. 701. That rule states that

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
>
> [Fed. R. Evid. 701.]

The Federal Advisory Committee notes demonstrate that the rule has the same two essential limitations as N.J.R.E. 701. Namely that "[l]imitation (a) is the familiar requirement of first-hand knowledge or observation" and "[l]imitation (b) . . . require[es] testimony to be helpful in resolving issues." Fed. R. Evid. 701 advisory committee note (1972). There is significant authority under Fed. R. Evid. 701 allowing a law-enforcement officer to state his or her impressions of what is depicted in the video as lay opinion testimony based on his or her observations in video footage, even if he or she did not observe those events firsthand. Those cases are especially persuasive here, given our state's reliance on the federal rule.

1. The perception requirement is met through viewing a video because there is no requirement that there be first-hand observation of what is captured on the video.

The perception requirement under the lay opinion rule is meant to distinguish it from expert opinion so that, "unlike expert opinions, lay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay. McLean, 205 N.J. at 460; see N.J.R.E. 703 (authorizing experts to rely on hearsay of the type and kind ordinarily relied on by others in their field of expertise). "Thus, in order for lay opinion testimony to satisfy the first component of N.J.R.E. 701, the 'witness must have actual knowledge, acquired through his or her senses, of the matter to which he or she testifies.'" State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting State v. Labrutto, 114 N.J. 187, 197 (1989)); see Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 701 (2023) (noting that under the rule's first prong, "it is merely required that the witness have actual knowledge, acquired through the use of his senses, of the matter testified to").

This Court has already established that perception does not require the witness to "have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony." Sanchez, 247 N.J. at 469; see State v. Singh, 245 N.J. 1, 19-20 (2021). Instead, the meaning of perception "rests on the acquisition of knowledge through the use of one's sense of

touch, taste, sight, smell or hearing." McLean, 205 N.J. at 457. Thus, police officers have been permitted to offer lay opinions based on the officer's "personal perception and observation" without being present at the time of the crime. Id. at 459. For example, in Labrutto, the officer gave proper lay opinion testimony about the point of impact between vehicles even though he did not observe the accident. 114 N.J. at 197-98. It was sufficient that the officer's opinion was based on personal observations of the accident scene, area of damage to the vehicle, skid marks, and damage to the grassy shoulder. Ibid. Similarly, an officer was able to offer an opinion about an apartment building being in a high-crime neighborhood in Trentacost v. Brussel, 164 N.J. Super. 9, 12 (App. Div. 1978), based on the "frequency with which he answered calls, quelled disturbances and made arrests in the area." McLean, 205 N.J. at 459.

The perception prong does not have a first-hand requirement but instead aims to limit how the witness acquired his opinion. In Sanchez, the perception prong of N.J.R.E. 701 was met even though Sanchez's probation officer "did not witness the shooting, see [Sanchez] in the Buick, or possess 'firsthand' knowledge that [Sanchez] was in the Buick" because "N.J.R.E. 701's 'perception' prong imposes no such requirement." 247 N.J. at 469. Instead, this Court found that the probation officer's familiarity with Sanchez's appearance "by meeting with him on more than thirty occasions during his period of parole supervision . . . was

'rationally based on [her] perception' as N.J.R.E. 701 requires." Ibid. (second alteration in original).

Federal courts have found extensive review of video footage to satisfy the perception requirement. In United States v. Begay, an officer narrated events portrayed in a videotape he reviewed over one hundred times with a magnifying glass, had portions of the tape copied in slow motion, and had its quality enhanced. 42 F.3d 486 (9th Cir. 1994). The court rejected the argument that the officer's testimony was not based on his perceptions because he was not present during the videotaped events. Id. at 502-03. Rather, the court found that the officer was not required to observe the live events because "he was not testifying to his eyewitness account of those events." Id. at 503. The officer had sufficient personal knowledge based on his "extensive review" of the videotape, and "his testimony was based on his own perceptions of . . . the original videotape." Id. at 503.

The Ninth Circuit affirmed the same reasoning in an immigrant smuggling case. See United States v. Torralba-Mendia, 784 F.3d 652 (9th Cir. 2015). In that case, an Agent narrated videos showing cars arriving and departing a shuttle company. Id. at 656, 659. The agent "had watched each video roughly fifty times, and . . . watch[ed] the video feed live while it was being recorded." Id. at 659. Thus, his testimony was properly "based on his repeated viewing of the recordings[.]" Id. at 660.

The Third Circuit applied similar reasoning in a weapons-possession case where a detective "described for the jury his impressions of a surveillance video of [the defendant's] movements" when it contradicted the detective's "personal observations prior to viewing the footage." United States v. Brown 754 Fed. App'x 86, 88 (3d. Cir. 2018). "After watching the video close to a dozen times, [the detective] identified for the jury various instances when Brown could be seen carrying and manipulating a heavy object in his jacket pocket . . . as the Government proceeded frame-by-frame through the pixelated surveillance footage." Id. at 88-89. The court found the testimony to be rationally based on his perceptions because of the detectives "extensive review of the footage." Id. at 89.

Other states have also adopted this approach to narration. In a first-degree felony murder case, the Michigan Court of Appeals found an officer's testimony linking individuals in gas station surveillance was "rationally based on his perception" even though he "was not at the scene while the video footage was being recorded and did not observe firsthand the events depicted on the video." People v. Fomby, 831 N.W.2d 887, 890 (Mich. Ct. App. 2013). The court emphasized that the officer had "watched the video, produced short clips of the individuals while they were in the store, and isolated certain frames to create still images[.]" Ibid. Thus, the officer properly opined about the identity of the individuals in the video because of his "scrutiny of the video surveillance footage

and the still images." Ibid.

Likewise, the Appellate Division correctly found that Sergeant Vitelli's testimony here was based on his perception of his multiple viewings of the surveillance footage from the bank. The police had no leads when Sergeant Vitelli obtained the footage, so he viewed the videos multiple times and used the surveillance to create a still image to send to other law-enforcement agencies for any potential leads. (5T159-22 to 160-2). On this basis, Sergeant Vitelli's testimony about what he observed in his numerous viewings was properly based on his perception under the first prong of N.J.R.E. 701. That he was not present at the bank is of no moment because, like in Begay, Sergeant Viteli was not testifying to first-hand events but rather what he perceived in the video he watched as part of the investigation. Indeed, this Court made clear in Sanchez and Singh, that "[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." Sanchez, 247 N.J. at 469; Singh, 245 N.J. at 19.

2. Under the helpfulness prong, the testimony only needs to shed light on some disputed factual issues and does not require the witness to be in a superior position to the jury.

"The second requirement of the lay opinion Rule is that it is limited to testimony that will assist the trier of fact either by helping them 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). "Opinion testimony . . . is not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence." McLean, 205 N.J. at 462. But in Singh, this Court found the fact that "the jury may have been able to evaluate whether the sneakers were similar to those in the video" did not mean "[the] Detective['s] . . . testimony was unhelpful." 245 N.J. at 20.

Narration testimony is helpful if it can highlight to the jury details, events, or even people they might not have otherwise noticed. The Ninth Circuit concluded that the officer's testimony likely helped the jury evaluate the videotape because it could reasonably be assumed that a person "viewing a videotape of a demonstration involving over 200 people would likely not see certain details, given the tremendous array of events all occurring simultaneously." Begay, 42 F.3d at 503. But the officer's testimony "could help the jury discern correctly and efficiently the events depicted in the videotape." Ibid. Thus, the officer's "testimony concerning which persons were engaged in what conduct at any given moment could help the jury discern correctly and efficiently the events depicted in the video." Ibid.

Narratives help a jury understand what they are seeing. In Torralba-Mendia, the Agent's testimony explained the time lapses between the clips, pointed out the

unique characteristics of vehicles that helped the jury identify the same cars in subsequent videos, and pointed out the clothing of certain passengers to show that a person dropped off in one video was the same person picked up in a later clip. 784 F.3d at 659-60. His testimony thus "helped the jury understand the import of the videos." Id. at 660. Similarly, the detective's testimony was helpful in Brown because "his observations highlighted what the jury could not clearly see viewing the footage at full speed." 754 Fed. Appx. at 89. And in Fomby, the Michigan Court of Appeals also found that the testimony narrating surveillance footage from a gas station "helped the jury to correctly and efficiently determine whether the two individuals seen earlier in the footage were the same individuals who were involved in the murder later depicted in the video." 831 N.W.2d at 890.

Here, the Appellate Division correctly noted that when deciding "whether the proffered narration testimony would be helpful, the issue is not whether the jury could have discerned the narrated observation unaided, but whether the narration testimony would assist the jury, for example, by focusing its attention on that portion of the video so it can make its own evaluation." Watson, 472 N.J. at 465. The Attorney General agrees that the non-exhaustive list of six factors, as crafted and explained by the Appellate Division, will guide trial courts in deciding if the proposed video-narration testimony will be helpful to the jury. See id. 466-70 (identifying six relevant factors as follows: (1) background context; (2)

duration of video and focus on isolated events/circumstances; (3) disputed facts and comments; (4) inferences and deductions; (5) clarity and resolution of the video; and (6) complexity of video and distracting images).

The first two Watson factors require the trial judge to assess the video itself and the information that would be necessary for the jury to understand the video. For the first factor, background context, the Appellate Division recognized that a concise introduction of the video would assist the jury in understanding "the location of recorded events, the location, ownership, and viewing angle of the camera(s) that made the recording(s), and the date and time of the recordings." Id. at 466. Similarly, the second factor, duration of video and focus on isolated events/circumstances, examines whether it would help the jury to know the "length of the video and the amount of time between relevant events" or whether "the video is a composite of recordings made by different cameras showing different locations or different fields of view at a given location." Id. at 467.

The next two factors look at the relation between the video, the proposed narration testimony, and the other evidence. Factor three, whether there are disputed facts and comments, requires the trial court to balance if the narration testimony poses a "risk of invading the province of the jury, since the jury must ultimately decide for itself what the video shows" or if the narration "might be helpful to the jury by highlighting the specific event or circumstance at issue,

drawing the jurors' attention to it so they can resolve the factual dispute." Id. at 467-68. For the fourth factor, inferences and deductions, the court must decide if the "testimony might be helpful to the jury in understanding the video because it serves to piece together facts from different sources in the trial record." Id. at 468.

The last two Watson factors focus on the content of the video. Factor five, clarity and resolution of the video, requires trial courts to determine "if the photograph or video recording is so clear that the jury is as capable as any witness," which includes whether the jury can "clearly see the specific action or other circumstance the narrating witness proposes to describe or highlight." Id. at 468-69. And finally, for factor six, complexity of video and distracting images, the trial court must decide whether there are "multiple persons or vehicles in motion," or if there are composite videos "comprised of recordings made by multiple cameras at different locations to essentially track a vehicle or person in motion[.]" Id. at 469-70. (quotations omitted). Although the Appellate Division did not explicitly apply those factors to Sergeant Vitelli's testimony here, it is clear that the testimony was helpful because it focused on an area of contention between the parties, involved multiple cameras with different views, and involved a fast-moving incident.

The testimony provided by Sergeant Vitelli was helpful, in light of the heavy burden the State carries in proving guilt beyond a reasonable doubt. "Our judicial

system demands a high degree of confidence in a correct outcome in a criminal case because the stakes are enormous. . . . For that reason . . . the most rigorous standard of proof applies[.]" State v. Jimenez, 188 N.J. 390, 410 (2006) (Albin, J. dissenting). Here, the theory of defendant's case was misidentification. To assert this theory, defendant poked holes in the State's case, specifically pointing out that the victim, Christian Gambarrotti, who was face to face with the person who robbed him, failed to identify defendant in a photographic array and that there was a lack of corroborating evidence.

In his opening, defense counsel highlighted that although fingerprints were collected from the bank, including three from the "clean surface" where the perpetrator handed the note to the teller, and more from the door, none matched the defendant.[2] (5T30-19 to 32-5). Defendant also attacked the fingerprint evidence in his closing and urged the jury to look at the video themselves and discredit Sergeant Vitelli's opinion that the suspect never touched the teller counter directly. He emphasized that "we can see when we look at the video, that the person removed their gloves, did not have gloves on when they . . . touched the teller's

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[2] Sergeant Vitelli searched for fingerprints on doorways, handles, and the countertop in front of the teller. (5T112-15 to 113-13). In total, he collected seven fingerprints. (5T113-15 to 114-3). The fingerprints were sent to the State Police Laboratory, evaluated by an expert, and submitted to the Automated Fingerprint Indexing System for potential matches. (5T114-4 to 18; 5T116-17 to 18).

stand" and despite being able to "recover fingerprints from exactly those areas . . . [i]t did not come back to Mr. Watson." (6T33-23 to 34-10)

Given this attack on the State's investigation, Sergeant Vitelli's narration testimony helped point out aspects of the video the jury might not have otherwise noticed that explained the evidence and his testimony. Even though he testified that he had collected seven fingerprints from the bank, he could discern the elements of the video that were not readily apparent that affected that part of the investigation. He pointed to the suspect's use of gloves when he entered the bank, the suspect's use of the note as a barrier to the teller counter, and the use of his elbow to leave the bank. These were all minute details a casual first-time observer might not have picked up unless they knew what they were looking for.

Sergeant Vitelli's testimony was also helpful because he provided directions on what to look at in video clips from multiple camera angles of an event that was over in less than a minute. Thus, even though the jury could watch the same video, "it might not be completely accurate to suggest that a police witness is in no better position than the jury to understand what the video shows" because the police witness has an opportunity to "closely scrutinize the video before trial," which "may be very different from the opportunity that is afforded to jurors in the courtroom[.]" Watson, 472 N.J. Super. at 463-64.

3. Sergeant Vitelli's narration testimony was proper because it did not draw a legal conclusion or cross the line into the jury's province by discussing guilt or innocence.

The most important limiting factor for narration testimony is that "a trial court must be vigilant in safeguarding the province of the jury," but that does not require "imposing a categorical prohibition against real-time commentary on what is displayed in a surveillance video." Watson, 472 N.J. Super. at 459. In Begay, the Ninth Circuit rejected the defendant's argument that the officer's testimony regarding the video "improperly invaded the province of the jury" by supporting the government's version of events. 42 F.3d at 503. The court found the testimony "did not offer arguments or conclusions concerning the actions of those depicted in the videotape" and was limited to a factual explanation. Ibid.

Further, the court noted that the officer was "subject to extensive cross-examination by defense counsel," and the defense had "every opportunity to present evidence to contradict" the officer's testimony. Ibid.; cf. People v. Sykes, 972 N.E.2d 1272, 1281 (2012) (distinguishing Begay and concluding trial court improperly allowed loss-prevention officer to narrate video because "[t]he only issue the jury needed to determine was whether defendant removed money from the cash register" and the officer "was in no better position" to answer that question than the jury).

Similarly, in Fomby, the Michigan Court of Appeals determined that the

Sergeant's linking individuals in surveillance footage did not "invade the province of the jury" because the Sergeant did not comment on Fomby's guilt or innocence. 831 N.W.2d at 890. Instead, his testimony was limited to a comparison based on the video surveillance and still images. Ibid. But the ultimate decision of identifying that person as Fomby— the ultimate decision on guilt or innocence— was left to the jury. Ibid.

This limitation is one that already exists in New Jersey precedent. In McLean, this Court found the officer's testimony inappropriate because it went beyond an observation that McLean exchanged an object with another person. 205 N.J. at 445. Instead, the officer testified as to the ultimate conclusion of guilt that Mclean had conducted a hand-to-hand drug transaction. Ibid. But no such line-crossing occurred here, because, as the Appellate Division correctly acknowledged in addressing defendant's objections, "the trial court drew an apt distinction between stating an observed 'fact' and stating a 'conclusion.'" Watson, 472 N.J. Super at 462.

Here, when the trial started, the jury was informed that they were "the sole judges of facts" and were to "determine the credibility of the witness."(4T22-21 to 23-2; 4T28-11 to 24). Also, during jury instructions, they were reminded that they were "judges of the credibility of the various witnesses, as well as the weight to be given to their testimony" and told that they "are the sole and exclusive judges of

the evidence, of the credibility of the witness, and the weight to be attached to the testimony of each witness." (6T64-6 to 13). Thus, the jury was free to reject Sergeant Vitelli's opinion based on their viewing. But even so, "the judge did not permit Officer Vitelli to comment on the identity of the suspect shown in the video" and "permitted Officer Vitelli to testify only as to factual observations and disallowed testimony as to conclusions." Watson, 472 N.J. Super. at 470. As a result, his opinion was limited to specific movements the suspect made in the bank. It had no bearing on guilt in this case, as there was no dispute that the bank was robbed. And whenever describing the person in the video, Sergeant Vitelli referred to him as the suspect and not the defendant as this Court found could be interpreted to imply guilt. See Singh, 245 N.J. at 18. Moreover, Sergeant Vitell did not make a conclusion about the suspect's identity but instead compared the suspect to himself. Sergeant Vitelli's narration testimony did not even come close to usurp the jury's role.

C. To ensure the scope of narration testimony is proper, it is best determined by the trial judge at an N.J.R.E. 104 hearing away from the jury.

"[I]t is not uncommon for investigators to piece together recordings made by multiple cameras at different locations at specific time indices to essentially track the movements of a person or vehicle[.]" Watson, 472 N.J. Super. at 472. As these video recordings become more prevalent, "issues concerning the manner in which video evidence is presented to the jury" will continue to "arise frequently."

Ibid. The current procedures used to determine the admissibility and scope of narration testimony require defendants to "punctuate[] [the testimony] with a series of objections and sidebar conferences." Id. at 471. Consequently, "[t]here is growing need for a clear set of rules and procedures on the use of video narration testimony at trial." Id. at 472.

The Attorney General agrees that "the better practice going forward would be for the judge to make an in limine ruling—before a narrated video is played for the jury— as to the narrative comments that will be allowed and those that will not be permitted." Watson, 472 N.J. Super. at 473. The prosecutor should thus "move to introduce video narration testimony and that application should be addressed at a Rule 104 hearing outside the presence of the jury." Ibid. This enables trial courts to address "the helpfulness test . . . to each proposed narrative comment, not just to the initial question of whether any narration testimony should be allowed." Watson, 472 N.J. at 465.

This procedure would benefit both parties as prosecutors would have the exact boundaries of the narration testimony they are trying to elicit and can prepare their questions, the video, and the witness accordingly. And defense counsel will not be forced to make multiple objections on the spot and in front of the jury. See Watson, 472 N.J. Super. at 474. This Court has already considered the usefulness of an N.J.R.E. 104 hearing to help parties resolve disputes about the scope of lay

opinion testimony. See Sanchez, 247 N.J. at 477. This Court noted that the trial court could conduct an N.J.R.E 104 hearing "outside of the presence of the jury . . . to resolve any dispute about the scope of [the probation officer's] testimony[.]" Sanchez, 247 N.J. at 477.

But the application of any relevant considerations analyzed by the trial court must be "viewed through the lens of the deferential standard . . . that applies to all evidentiary decisions," given the fact that the "trial judge will be watching the video along with the jury and can hear the officer's verbal account as the jury hears it." Watson, 472 N.J. Super. at 469-70. Thus, "the trial judge is in the best position to determine whether a particular video narration comment would assist the jury, or instead impermissibly intrude upon its role." Id. at 470. This Court should thus endorse the Appellate Division's recommended procedures and encourage pre-trial hearings to determine the scope of narration testimony, or better yet encourage the parties to resolve any disputes among themselves.

POINT II

THE APPELLATE DIVISION CORRECTLY DETERMINED THE VICTIM'S IN-COURT IDENTIFICATION OF DEFENDANT WAS PROPER BY USING A CASE-BY-CASE ANALYSIS.

The inherent constitutional and evidentiary protections of our adversarial trial system minimizes the possibility of in-court misidentification. A witness who is sworn and testifies in front of the judge and jury during an in-court identification, in contrast to police procedures, is doing so while under oath. The jury can see the identification or lack thereof, hear the arguments made by the parties, listen to the cross-examination of the witness, and hear the court's instructions. Thus, as the ultimate finders of facts, the jury will decide how much weight to give an in-court identification due to these safeguards.

"The automatic exclusion of first-time in-court identifications that defendant proposes would . . . contravene an important theme in our state's eyewitness identification jurisprudence, which is to avoid using bright-line rules to determine the admissibility of such evidence." Watson, 472 N.J. Super. at 501. "Even more fundamentally, the defendant's proposal contravenes our general policy to leave for the jury to decide the weight to be given to eyewitness identification testimony." Ibid.

While "[c]ourts have a gatekeeping role to ensure that unreliable, misleading

evidence is not admitted," State v. Chen, 208 N.J. 307, 318 (2011), "[t]he strength or credibility of the identification is not the issue on admissibility; that is a matter of weight, for the fact finder, under appropriate instructions from the trial judge." State v. Farrow, 61 N.J. 434, 451 (1972). Thus, a court's gatekeeping role regarding identification evidence is limited to whether an identification is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). The in-court identification here was not impermissibly suggestive.

Defendant's request for a new per se rule that departs from the well-established case-by-case determination established by this Court's precedent should be rejected. The constitutional and evidentiary safeguards intrinsic to our adversarial trial process compensate for any alleged suggestiveness, thereby protecting against the risk of misidentification. Unlike police procedures, in-court identifications involve a witness who is under oath and gives live testimony before the judge and jury. Thus, the jury can observe the setting, conditions, and act of identification or lack thereof. It hears contemporaneous cross-examination, the parties' arguments, and the court's instructions. These protections ensure that the question is left for the jury to determine how much weight to give an in-court identification.

It was not plain error to admit Gambarrotti's in-court identification.

Defendant did not object to the identification at trial, nor did he request a Wade[3] hearing to determine the admissibility of the out-of-court identification or allege that the photo array was administered improperly. See Watson, 472 N.J. Super. at 476. "[A]nd in any event, the result of that procedure was exculpatory because Gambarrotti selected the photograph of someone else." Ibid. So while the jury observed the in-court identification, it also heard defendant's forceful opening, cross-examination, and closing, all of which diminished the impact of the in-court identification.

A. Identification law jurisprudence embraces in-court identifications while rejecting bright-line categorical rules.

The bright-line rule argued for by defendant is a drastic departure from this state's identification jurisprudence and the history of the use of in-court identification in this country. In fact, the in-court identifications defendant now requests to categorically ban, were the only type of identification originally allowed at trial, because out-of-court identifications were perceived as improper bolstering of the state's case. See People v. Jung Hing, 106 N.E. 105, 107 (N.Y. 1914).

Since then, it has been established that out-of-court identifications are proper but that due process concerns arise "when law enforcement officers use an

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

identification procedure that is both suggestive and unnecessary." Perry v. New Hampshire, 565 U.S. 228, 238-39 (2012). But "[e]ven when the police use such a procedure, . . . suppression of the resulting identification is not the inevitable consequence." Id. at 239. That is because "[a] rule requiring automatic exclusion, . . .would 'g[o] too far,' for it would 'kee[p] evidence from the jury that is reliable and relevant.'" Ibid. (quoting Manson v. Brathwaite, 432 U.S. 98, 112 (1977)). Instead, the "Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" Ibid. (quoting Neil v. Biggers, 409 U.S. 188, 201 (1972)). Thus, whether the State seeks to admit evidence of an out-of-court identification or to elicit a live in-court identification from the witness at trial, due process requires the trial court to assess whether, under the totality of the circumstances, the identification is nevertheless reliable. Biggers, 409 U.S. at 198-99.

Similar to reasoning espoused by the United States Supreme Court embracing a case-by-case analysis of identification evidence, New Jersey has always rejected bright-line exclusionary rules when it comes to identification evidence. In State v. Madison, where there was a first-time positive in-court identification, this Court held that "[e]ven if the out-of-court identification process used is found to be suggestive and inadmissible, it does not necessarily follow that the witness's in-court identification is so tainted that it too will be inadmissible."

109 N.J. 223, 242 (1988). Under the facts there, this Court found that the out-of-court identification procedures were impermissibly suggestive. Id. at 244. But, the result was not to ban the first-time in-court identification, but rather a remand for a taint hearing to determine whether the in-court identification had an independent source. Ibid.

This Court "did not suggest that an in-court identification should be suppressed based on the inherent suggestiveness of the in-court procedure itself . . . [or] on the grounds that the witness in that case had not made a positive identification of the defendant in the prior out-of-court identification procedure." Watson, 472 N.J. Super. at 480. Thus, "under the Madison analytical framework, the decision to prohibit an in-court identification is made on a case-by-case basis, focusing on whether the in-court identification was tainted by an impermissibly suggestive out-of-court identification procedure." Watson, 472 N.J. Super. at 479.

Even when updating our "framework to evaluate eyewitness identification evidence," this Court rejected "[a]n all-or-nothing approach" because it "does not account for the complexities of eyewitness identification evidence." State v. Henderson, 208 N.J. 208, 286-93 (2011) (modifying the Manson/Madison test). Thus, the new framework created "avoid[ed] bright-line rules that would lead to suppression of reliable evidence[.]" Id. at 303. Instead, this Court crafted a process that "allows for a more complete exploration of system and estimator

variables to preclude sufficiently unreliable identifications from being presented and to aid juries in weighing identification evidence." Ibid.

When a private actor's suggestive behavior potentially influences an identification, it does not implicate due process, but it still must be evaluated for reliability to avoid the risk of misidentification. State v. Chen, 208 N.J. 307 (2011). Thus, there is "a higher, initial threshold of suggestiveness to trigger a hearing, namely, some evidence of highly suggestive circumstances as opposed to simply suggestive conduct." Id. at 327. The case law shows that in New Jersey, "the critical fact-sensitive question under the Henderson/Chen framework [is]—whether suggestiveness renders the eyewitness identification so unreliable that it should be kept from the jury." Watson, 472 N.J. Super. at 485.

But this Court has steadfastly adhered to its rejection of bright-line rules and all-or-nothing approaches regarding the admissibility of identification evidence. It is "in rare cases" that "highly suggestive procedures that so taint the reliability of a witness' identification testimony will bar that evidence altogether." Chen, 208 N.J. at 328 (emphases added). "[I]n the vast majority of cases, identification evidence will likely be presented to the jury" as the "threshold for suppression remains high." Henderson, 208 N.J. at 303. That is because the ultimate decision regarding the reliability and credibility owed to identifications is up to juries "with the benefit of cross-examination and appropriate jury instructions." Ibid.

The request defendant makes here has already been considered and rejected by the Appellate Division. In State v. Guerino, 464 N.J. Super. 589 (App. Div. 2020), the Appellate Division was "presented with the question of whether all in-court identifications should be abolished, or else restricted to cases where there had been an 'unequivocal' out-of-court identification." Watson, 473 N.J. Super. at 48-81. But the Appellate Division aptly noted that the "relief [Guerino] seeks would represent a significant change to our State's eyewitness identification jurisprudence." Id. at 606. There is no basis to depart from our well-settled and well-reasoned precedent.

B. No other court has accepted a bright line rule regarding in-court identification; this Court should adopt the majority approach that absent suggestive procedures, the in-court identification is left for the jury to weigh.

In the courts where first-time in-court identifications have been challenged, a majority have found that when there has been no claim that the out-of-court identification procedure was inherently suggestive, and that there is an independent basis for the in-court identification, there is no reason to preclude the evidence. Instead, those courts left the decision of what weight to give the in-court identifications to the jury as the ultimate fact finder after the identification was subject to the adversarial system.

This Court should adopt the reasoning of Garner v. People from the Colorado Supreme Court finding the ordinary trial safeguards protect against any

inherent suggestiveness from in-court identification that are not preceded by any improper law enforcement conduct. 436 P.3d 1107, 1119 (Colo. 2019) (citing Perry, 565 U.S. at 246-48). In that case, following a bar shooting that injured three brothers, "[t]he People's case hinged on the brothers' live identifications of Garner at trial almost three years later, though none of them could identify Garner as the shooter in an earlier photographic array." Ibid. The Court determined that if the "identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement" and "nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect, due process does not require the trial court to assess the identification for reliability." Id. at 1119.

Thus, because Garner "allege[d] no impropriety regarding the pretrial photographic arrays, and the record reveal[ed] nothing unusually suggestive about the circumstance of the brothers' in-court identifications," the court found that "the in-court identifications did not violate due process." Id. at 1108. And the court also recognized that "there are legitimate reasons why a witness might be better able to identify a defendant at trial—live, and in person, with views of his expression and manner—than in the sort of photographic array" used here. Id. at 1119.

As the court pointed out, criminal defendants also have "safeguards at trial

to test the reliability of identification evidence, including the right to counsel and the opportunity to cross-examine prosecution witnesses." Id. at 1107-08. Those protections "can expose . . . any suggestiveness at work in the courtroom[.]" Id. at 1119. "And where a witness makes a first-time in-court identification, the witness's previous failure to identify the defendant presents ideal fodder for impeachment on cross-examination." Id. at 1119-20. For those reasons, the Colorado Supreme Court rejected the contention that "in-court identifications alleged to be suggestive simply because of the ordinary trial setting must be screened rather than subjected to cross-examination and argument before the jury." Id. at 1120.

Defendant, however, urges this Court to adopt the reasoning of the Supreme Court of Massachusetts, which found that first-time in-court identification could only be admitted into evidence where there is "good reason for its admission." Commonwealth v. Crayton, 21 N.E.3d 157, 166, 169 (Mass. 2014). But New Jersey identification jurisprudence does not align with Massachusetts's, which has a history of parting ways with United States Supreme Court decisions that this Court has adopted fully or in modification. See Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995) (rejecting the decision in Manson, which found an out-of-court identification that is unnecessarily suggestive can be admissible if it is reliable under totality of circumstances); Commonwealth v. Jones, 666 N.E.2d 994,

1001 (1996) (rejecting Perry and deciding that identification made under "especially suggestive circumstances" even where circumstances did not result from improper police activity should be suppressed); cf. Chen, 208 N.J. at 327 (holding that when a private actor's suggestive behavior potentially influences an identification the result is a higher threshold for a hearing not suppression)..

As a result, our courts fundamentally differ on how identification evidence is handled. Thus, there is no reason for this Court to now adopt Massachusetts's method for handling in-court identifications when our courts have wisely declined to follow their method for handling out-of-court identifications.

Defendant's reliance on the Connecticut Supreme Court's finding that "first-time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court," is likewise misplaced for two reasons. See State v. Dickson, 141 A.3d 810, 823 (Conn. 2016). First, the court there was answering the "specific question . . .whether the trial court is constitutionally required to prescreen first-time in-court identifications." Id. at 828. And second, in answering that question the court found that "one-on-one in-court identifications do not always implicate the defendant's due process rights, as when identity is not an issue or when there has been a nonsuggestive out-of-court identification procedure." Dickson, 141 A.3d at 826 (emphasis added). The court did not limit

the exception to when there has been a non-suggestive out-of-court identification of the defendant but rather when there has been a non-suggestive out-of-court identification procedure regardless of the result. Defendant here has not claimed that the photo-array procedure was suggestive and did not request a Wade hearing. Thus, even under Connecticut's standards, the in-court identification here would have been admissible without being prescreened.

Likewise, Crayton and Dickson, do not go as far as defendant asks this Court to go. Dickson "calls for the 'prescreening' of first-time in-court identifications, not the automatic suppression of such evidence as defendant urges in the present matter." Watson, 472 N.J. Super. at 490. And Crayton allows admission of first-time in-court identifications into evidence where there is "good reason for its admission." 21 N.E.3d at 166.

Nevertheless, the reasoning and conclusions in Crayton and Dickson represent deviations from how most courts presented with this issue have decided to handle admission of first-time in-court identifications. The Iowa Supreme Court, when presented with a similar argument in the ineffective-assistance-of-counsel context, recognized "Crayton and Dickson as outliers" and decided to follow the majority approach based on its own precedent. State v. Doolin, 942 N.W.2d 500, 515 (Iowa 2020).

This Court should follow the majority approach, which is most faithful to

this Court's long-standing precedent, and reject any request for a categorical ban on first-time in-court identifications.

C. The jury heard Gambarrotti give a second equivocal identification, as well as defense counsel's cross-examination and closing argument that exploited the weakness in the identification.

Twenty months after the bank robbery, Gambarrotti was shown a photographic array at the Middlesex County Prosecutor's Office to identify the man that committed the bank robbery. (5T69-9 to 19). He was shown six photographs but was stuck between two of them. (5T70-15 to 24). He selected a photograph—which was not defendant— that he was "75 to around 90 percent sure it was the person" from the bank but noted that "because honestly it happened a year — over a year and a half ago;" he could not recall. (5T70-11 to 25). On cross-examination, he indicated that he was "85% sure that it was the person in the bank that day." (5T71-4 to 8). At trial, the prosecutor asked Gambarrotti if he saw the man who robbed him in court that day. In response, Gambarrotti identified defendant but still would not say he was one hundred percent sure, stating he was "maybe like . . . 80 percent." (5T66-7 to 21; 5T80-23 to 81-18). Defendant did not object to this identification.

Defense counsel attacked both of Gambarrotti's attempts at identifying the person who robbed him by focusing on his choice of someone who was not defendant and the lack of reliability of his ability to do so in a courtroom. In

defendant's opening, he highlighted "that the person who was most close to the individual as he walk[ed] into the bank and hands him that note can't even identify Mr. Watson." (5T32-6 to 9).

Defense counsel then presented the jury with the weaknesses of Gambarrotti's in-court identification during cross-examination. After Gambarrotti identified defendant in the courtroom, when defense counsel asked him on cross-examination if "the individual that was in that photograph that you picked out was not Mr. Watson, the defendant, correct?" Gambarrotti answered, "I am not sure, to be honest with you. I'm not 100 percent sure." (5T71-9 to 13). Then, when looking at the photograph he had selected at the prosecutor's office, defense counsel asked him if the person in the photograph was defendant. Gambarrotti still stated he could not "say 100 percent that they look alike." (5T82-13 to 16). He stated, "I mean, they look alike, but I'm not 100 percent sure that that's the same person[.]" (5T82-21 to 23). Also, on cross-examination, defense counsel highlighted to the jury that before coming to testify, Gambarrotti went to the Prosecutor's office, met with the prosecutor, and was informed that the individual accused of committing this robbery was going to be in court seated at the defense table. (5T83-22 to 84-8).

Defendant's theory was misidentification, and defense counsel's closing also highlighted the weaknesses in the identifications made here. He pointed out that

the only witness in the Garden State Community Bank that day, and the only eyewitness in this case, identified someone other than defendant in a photo array and that he was eighty to eighty-five percent sure that it was the man who robbed him face-to-face. (6T27-14 to 18; 6T27-24 to 28-6). Defense counsel next emphasized that even when Gambarrotti picked defendant out at counsel table, he was still not 100 percent sure despite knowing that the man alleged to have robbed him was going to be sitting at the defense table. (6T28-7 to 14; 6T28-15 to 23; 6T30-25 to 31-4). Defense counsel urged that this misidentification provided sufficient doubt for the jury to find defendant not guilty. (6T35-12 to 21). Based on these facts, after defendant decided not to object to Gambarrotti's in-court identification, the trial court properly allowed the jury to decide how much weight to give the identification, which was thoroughly contested during the trial.

Thus, in affirming defendant's conviction, the Appellate Division properly rejected the implementation of a bright-line rule banning first-time in-court identifications and held that juries should assess the credibility of such identifications with proper jury instructions. Watson, 472 N.J. Super. at 494. Implementing a bright-line rule would erroneously divest juries of their fact-finding function. This Court should continue to rely on juries to assess the evidence presented. Even if a jury finds that it should discount an in-court identification due to suggestiveness, there is still a legitimate interest in allowing

the jurors to hear and give some weight to the witnesses' testimony.

Additionally, like Guerino, this case does not have a sufficient record to decide whether updated social science requires such a drastic change to our existing identification law. Watson, 472 N.J. Super. at 498-99. But for the reasons already discussed, there is no reason to establish a new bright-line that would result in the "extreme sanction of suppression to an entire class of cases." Id. at 501.

As the Appellate Division correctly held, and as demonstrated by the events in this case, "the suggestiveness and potential unreliability of first-time in-court identifications can be addressed, as they are with one-on-one showup identifications, on a case-by-case basis by means of cross-examination and appropriate jury instructions." Id. at 502. "[I]n this instance, defense counsel used cross-examination effectively to expose that Gambarrotti had misidentified the culprit in an out-of-court photo array procedure" and "that during witness preparation, the assistant prosecutor informed him that defendant would be in the courtroom." Ibid.

Finally, the trial court did not commit plain error by relying on the current model jury charge, because the weight of the in-court identification was sufficiently challenged on cross-examination and in the closing. When a defendant does not object to the charge, "there is a presumption that the charge was not error and was unlikely to prejudice . . . defendant's case." State v. Montalvo, 229 N.J.

300, 320 (2017) (quoting State v. Singleton, 211 N.J. 157, 192 (2012)). And a jury charge is presumed to be proper when it tracks the model jury charge verbatim because the process to adopt model jury charges is "comprehensive and thorough." State v. R.B., 183 N.J. 308, 325 (2005). Thus, "in the absence of a specific request, the judge was under no obligation to revise, sua sponte, a model charge that was drafted in compliance with the Court's instructions in Henderson and has been used without apparent controversy since 2012." Watson, 472 N.J. Super. at 502-03.

Those instructions reminded the jury that they were "the judges of the facts" and that they were to "determine the credibility of the various witnesses, as well as the weight to be given to their testimony." (6T64-6 to 13). The instruction also explained to the jury that "[t]he burden of proving the identity of the person who committed the crime is upon the State" and to find this "defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime." (6T71-3 to 7).

Regarding Gambarrotti, the instructions reminded the jury of the testimony surrounding his failure to identify defendant in a photo array and that he was only eighty to eighty-five percent sure when he identified defendant in the courtroom. The jury was instructed, "[i]t is your function to determine whether the witness's identification of the defendant is reliable and believable, or whether it is based on a

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mistake or for any reason is not worthy of belief. (6T70-23 to 72-22). In addition, the jury was instructed about the faultiness of eyewitness identifications, (6T72-23 to 73-21), and expressly told that if they found "the in-court identification is the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight." (6T74-11 to 21). Thus, the jury here was adequately instructed about their role and how to evaluate the identifications in this case.

This Court should thus affirm the Appellate Division's finding that the in-court identification and use of the current model jury charge was not plain error.

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CONCLUSION

For the foregoing reasons, the Attorney General urges this Court to find that narration of video footage is proper lay opinion testimony that should be first introduced at an N.J.R.E. 104 hearing so that the judge can establish the scope of that testimony outside the jury's presence. The Attorney General also asks this Court to reject a categorical bright-line ban on first time in-court identifications that is unnecessary and unsupported by this Court's precedent. This Court should affirm defendant's conviction based on the Appellate Division's well-reasoned opinion that it was not an abuse of discretion to admit the narration testimony and it was not plain error to admit the in-court identification.

Respectfully submitted,
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DATED: February 9, 2023