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February 22, 2023

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LETTER BRIEF AND APPENDIX IN LIEU OF A FORMAL PETITION FOR CERTIFICATION ON BEHALF OF DEFENDANT-PETITIONER

SUPREME COURT NO. 087840
APP. DIV. NO. A-4544-19

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	Petition for Certification from a Judgment of the Superior Court of
v.	:	New Jersey, Appellate Division.
WILLIAM HILL,	:	Sat Below: Hon. Thomas W. Sumners, Jr., P.J.A.D.
Defendant-Petitioner.	:	Hon. Richard J. Geiger, J.A.D. Ronald Susswein, J.A.D.
	:	DEFENDANT IS CONFINED

Honorable Justices:

This letter is submitted in lieu of a formal petition for certification pursuant to R. 2:6-2(b).

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QUESTIONS PRESENTED

I. DOES THE WITNESS-TAMPERING STATUTE, N.J.S.A. 2C:28-5(a), REQUIRE THE STATE TO PROVE THAT THE DEFENDANT KNEW THAT HIS SPEECH WOULD CAUSE A WITNESS TO WITHHOLD TESTIMONY, TO AVOID UNCONSTITUTIONAL OVERBREADTH AND VAUGENESS?

II. DID THE PROSECUTOR COMMIT MISCONDUCT WHEN HE PERFORMED A MISLEADING SIMULATION AND MADE ARGUMENTS THAT CONTRADICT THE SOCIAL SCIENCE ON MISIDENTIFICATIONS SET FORTH IN STATE V. HENDERSON?

III. WAS THE ADMISSION OF DEFENDANT'S ARREST PHOTOGRAPHS, WITHOUT ANY LIMITING INSTRUCTION, IMPROPER UNDER N.J.R.E. 403?

STATEMENT OF THE MATTER INVOLVED

At around 6:00 a.m. on October 31, 2018, Alessa Zanatta left her car running in front of her house while she went inside to grab a sweater. (Dpa3-4; 7T149-42 to 153-5). When she returned a few minutes later, she saw a man in the car, told the man to get out, jumped into the car from the driver's door, and grabbed the steering wheel with her left arm. (Dpa4; 7T153-8 to 19; 7T156-24 to 161-18, 7T208-25 to 209-4). The man drove off with Zanatta's legs hanging out of the car, her stomach on his knees, and her knees between the driver's seat and the door. (Dpa4; 7T161-13 to 25; 7T165-13 to 19). The man drove erratically for about four blocks, hitting several other cars and causing the passenger's door to hit Zanatta's back. (Dpa4; 7T166-22 to 25;

7T170-19 to 171-7). After Zanatta eventually shifted the gear into neutral, the man hit the brakes, jumped out of the car, and ran away. (Dpa4; 7T185-11 to 18). The entire incident lasted one or two minutes. (Dpa4; 7T188-12 to 13).

Zanatta moved her car from the middle of the street to the side of the road, in front of the Harrison police station. (7T188-17 to 189-19). About thirty minutes after the incident, she provided a formal statement inside the police station, during which she described the suspect as "very, very scruffy. Like he had hair all over his face, and it was not well maintained." (7T179-8 to 15; Dpa4). She also said he had big eyes and was not "too dark or too light skinned." (7T179-16 to 180-2; Dpa4). She thought the man was wearing faded jeans, a red "skully" cap, a grey hoodie, and an olive or brown vest. (7T179-20 to 23; Dpa4). She said she saw grey arms of the hoodie under the vest, and that the suspect was not wearing a jacket on top of the hoodie. (7T215-12 to 15, 7T216-11 to 24). She did not estimate the suspect's height, weight, or age, or the color of the suspect's beard (Hill's beard is primarily grey). (7T211-17 to 213-2, 7T214-11 to 215-6; Da23). And although Hill has a noticeable facial scar between his eyebrows (Da23; Da26; Da27), Zanatta testified that she did not see any scars on the suspect's face. (7T217-4 to 19).

During the trial, the State introduced into evidence video footage and still images from surveillance cameras from nearby businesses, which the State

contended showed the suspect. (Da13-15; 7T70-1 to 77-24; Dpa5). The suspect's face is indiscernible in these still images and in the video footage. Contrary to Zanatta's description of the suspect during her statement to the police, these still images show the suspect wearing dark pants (not faded blue jeans), a black hat (not a red hat), and a black jacket (not a brown or olive vest over a grey sweatshirt). (Da13-15; see also Da42-45).

On November 6, 2018, Zanatta viewed an array of six photographs at the police station. (Dpa5). The video of the array procedure was played for the jury. (Da12; 7T109-10 122-7).[1] A detective handed Zanatta the photographs one at a time and told her to stack them on top of each other as she reviewed them, but instead she looked at the photographs simultaneously and compared them side by side. (7T128-2 to 129-4, 7T130-8 to 131-15, 7T227-2 to 229-3; Dpa5). The prosecutor used a PowerPoint presentation to show the jury which photos Zanatta was reviewing at different times and how she was stacking them into groups to compare them. (7T117-4 to 122-6; Da71-118). The detective admitted that Zanatta's simultaneous viewing of the photographs was contrary to the then-existing Attorney General's guidelines for out-of-court

[1] The CD containing the video of the out-of-court identification (Da12) is submitted to the Court under separate cover.

identifications, which require that sequential lineups be used whenever possible. (7T130-18 to 131-15).

After comparing the photographs simultaneously for about three minutes (Da12 at 2:48 to 5:40), Zanatta handed the officer Hill's photograph and stated, "Okay. Okay. He looked a little bit more scruffy." (7T121-3 to 6). The detective asked how certain she was in this identification. (7T121-5 to 6). Zanatta asked if this was the only picture the police had of the suspect. (Da12 at 6:05 to 6:07; 7T121-7 to 8). The detective confirmed that these were the only photographs, and after Zanatta sat in silence for about twenty seconds (Da12 at 6:07 to 6:27), the detective asked, "And what was it that you said about the photo?" (7T121-10 to 11). Zanatta responded, "I feel like he was a little bit -- I could see the side a little bit better. I feel like he's too white, but it -- but again, it was dark." (7T121-11 to 13).

The detective again asked her to describe her level of certainty in the identification in her own words, and in response Zanatta asked to view the photographs again. (7T121-14 to 19). Zanatta again compared several photographs for about one minute. (Da12 at 7:05 to 8:10). At one point, she told the detective that she "really thought" the suspect was the man in photograph number four (a filler), but the detective said nothing in response. (Da12 at 7:30 to 7:40; Dpa5; 7T224-21 to 225-1). Ultimately, Zanatta stated

that she was "pretty certain" that Hill's photograph was the suspect and estimated that she was eighty percent certain. (7T121-18 to 122-2).

During the trial, Zanatta did not make an in-court identification of Hill. Nonetheless, she testified that she "kn[e]w exactly what" the suspect looked like, but the array photographs "didn't look up to date" because the photograph of Hill did not have "scruffy" facial hair and his skin looked lighter than the suspect's. (7T192-10 to 22; Dpa5-6). Despite these discrepancies, she thought she had identified the suspect in the array because she remembered his eyes, mouth, and nose. (7T195-1 to 6). She believed that, "When you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head." (7T195-1 to 5). All six photographs in the array are of black men with dark brown eyes. (Da16-22).

The police arrested Hill on November 27, 2018. (Dpa6). Over the defense's objection, the State introduced into evidence six photographs of Hill taken after his arrest. (Da23-28; 7T81-15 to 82-14; 5T39-16 to 45-24). In these photographs, Hill is wearing faded jeans, a black jacket, a grey sweatshirt, and a dark red hat with a North Face logo. (Da23-28). The police did not show these arrest photographs to Zanatta to see if she thought Hill's clothing resembled the suspect's clothing. (7T86-10 to 22). In summation, the prosecutor argued that the clothing Hill was wearing when he was arrested – a

month after the carjacking – resembled the suspect's clothes. (8T67-7 to 68-2; 8T85-13 to 16; 8T92-5 to 6; Da35-45). The trial court did not provide a limiting instruction that the jury should not infer guilt from the fact that Hill was arrested.

On April 8, 2019, Zanatta received a letter in the mail from Hill. (7T195-11 to 197-5). The letter, as redacted for it use at trial, is reproduced in the Appellate Division's opinion. (Dpa6-7). The letter contains no explicit threats. (Dpa29). In the letter, Hill maintains his innocence and states, "I'm writing a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise please tell the truth if you're wrong or not sure 100%." (Dpa8). The trial court had not issued a no-contact order prohibiting Hill from contacting Zanatta before Hill had sent this letter. (Dpa17 n.5).

The jury convicted Hill of carjacking and witness tampering. (Dpa9). In a partially published opinion, the Appellate Division affirmed. (Dpa1-42). In the published portion of its opinion, the Appellate Division rejected Hill's argument that the witness tampering statute would be unconstitutionally overbroad (in violation of the First Amendment) and vague (in violation of the Due Process Clause) unless the statute was construed to require the State to prove that the defendant knew that his speech would cause a victim to

withhold testimony. (Dpa11-29). In the unpublished portion of the opinion, the Appellate Division held that the prosecutor did not commit misconduct by engaging in a misleading simulation and making arguments that contradicted the social science on misidentification set forth in State v. Henderson. (Dpa30-40). The Appellate Division also held that the trial court properly admitted Hill's arrest photos. (Dpa40-42).

LEGAL ARGUMENT

Hill incorporates all the points and arguments set forth in his Appellate Division briefing. He adds the followings reasons for granting certification as to the issues raised in Points I and II of his Appellate Division brief.

POINT I

THE COURT SHOULD GRANT CERTIFICATION TO DETERMINE THE CONSTITUTIONALITY OF THE WITNESS TAMPERING STATUTE.

In the published portion of its opinion, the Appellate Division rejected Hill's argument that the witness tampering statute, N.J.S.A. 2C:28-5(a), needed to be construed to require the State to prove that the defendant knew that his speech would cause a witness to withhold testimony (or another prohibited result under the statute) to avoid unconstitutional overbreadth or vagueness. (Dpa11-29). Hill's argument is very similar to the issue raised in the pending Supreme Court case of Counterman v. Colorado, 598 U.S. ___

(2023), as well as the issue that this Court allowed the State to appeal as of right in State v. Calvin Fair, 252 N.J. 243 (2022). Accordingly, the Court should grant certification to review this substantial constitutional issue. See R. 2:12-4; U.S. Const. amends. I, VI, XIV; N.J. Const. art. 1, ¶¶ 1, 6, 10.

Hill relies primarily on his extensive Appellate Division briefing as to the merits of this issue. He adds that the Appellate Division erroneously reasoned that this case did not implicate the "true threats" doctrine because it does not involve "speech directed broadly or to an unspecified class of persons" but speech directed to "victims, witnesses, or informants." (Dpa16). The Appellate Division did not cite any authority to support this supposed distinction. Indeed, "true threats" cases often deal with threats directed to a specific person. See, e.g., Virginia v. Black, 538 U.S. 343, 350 (2003) (three defendants attempted to burn a cross on the yard of an African American man); People v. Counterman, 497 P.3d 1039 (Colo. App. 2021) (threating messages to a one victim); State v. Fair, 469 N.J. Super. 538, 542-45 (App. Div. 2021) (threats to police officers). Just like these cases, the present appeal implicates the "true threats" doctrine because Hill's conviction is predicated on the allegedly threatening speech in his letter to the victim.[2]

[2] The Appellate Division also mistakenly focused on whether a defendant has a constitutional right to send a letter to a victim when a court has issued a no-contact order, even though it is undisputed that the trial court had not issued a

POINT II

THE COURT SHOULD GRANT CERTIFICATION TO ADDRESS WHETHER A PROSECUTOR COMMITS MISCONDUCT BY PERFORMING A MISLEADING SIMULATION AND MAKING ARGUMENTS THAT CONTRADICT HENDERSON, AS THIS IS AN ISSUE OF PUBLIC IMPORTANCE ON WHICH APPELLATE PANELS HAVE REACHED INCONSISTENT RESULTS.

"Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country." State v. Henderson, 208 N.J. 208, 231 (2011) (alteration in original) (quoting State v. Delgado, 188 N.J. 48, 60 (2006)); see also The Innocence Project, DNA Exonerations in the United States (available online, last accessed February 22, 2023) (noting that 69% of DNA exonerations involved eyewitness misidentification). One way in which the Henderson Court sought to decrease the risk of wrongful convictions based on misidentifications was by "direct[ing] that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case." Id. at 296. These enhanced instructions

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no-contact order in this case. (Dpa17 n.5). Moreover, regardless of whether a defendant might be able to challenge a no-contact order on free-speech grounds under some circumstances (an issue not presented by the facts here), our law is well-settled that regardless of a no-contact order's underlying validity, compliance with the order "is required, under pain of penalty, unless and until an individual is excused from the order's requirements." State v. Gandhi, 201 N.J. 161, 190 (2010).

distill the extensive social science reviewed by the Special Master, so that jurors can make more accurate assessments of reliability of eyewitness identifications by considering scientifically relevant factors. Ibid. As such, the instructions not only protect a defendant's right to a fair trial, but also serve the public interest by minimizing the risk of a wrongful conviction based on a mistaken identification.

In this case, the assistant prosecutor abdicated his responsibility to seek justice by repeatedly making misleading arguments to the jury that flatly contradicted the Henderson instructions and thereby increased the risk of a wrongful conviction based on a misidentification. See State v. Garcia, 245 N.J. 412, 435 (2021) ("In fulfilling that duty, a prosecutor must refrain from making inaccurate factual assertions to the jury, and from employing improper methods calculated to produce a wrongful conviction." (internal citations and quotation omitted)). The Appellate Division, however, mistakenly viewed the prosecutor's tactics as fair comment on the evidence and incorrectly discounted the prejudicial effect of the prosecutor undermining key aspects of the Henderson instructions. This Court should grant certification to review this question of general public importance, and because different panels of the Appellate Division have reached inconsistent results on this question. See R. 2:12-4. In sum, this Court should provide guidance on where the line lies

between fair comment on the evidence and impermissible contradiction of the social science set forth in Henderson.

Here, the assistant prosecutor improperly contradicted the Henderson instructions in several ways that amounted to reversible prosecutorial misconduct. First, the prosecutor performed a misleading simulation and advanced a scientifically unsound argument that Zanatta's ability to accurately identify the suspect was enhanced as a result of the highly stressful circumstances of the carjacking. The prosecutor told the jurors to look at his face for ninety seconds – the approximate length of the carjacking – and argued to the jurors that just as they would remember his face, Zanatta would remember the suspect's face. (8T61-10 to 21). The prosecutor then repeatedly argued to the jurors that Zanatta's ability to remember the suspect's face was enhanced by the stressful nature of "wondering if she was going to die" or "literally trying to figure out, how do I protect myself. (8T69-4 to 15; 8T70-5 to 12).[3] The prosecutor even contended that "[c]ross-racial ID, things of that nature . . . are big problems, societally speaking, but they're not big problems when you're jammed into a [two] foot window with a person for four

[3] In his opening statement, the prosecutor similarly argued that that the carjacking would have resulted in a "fixed memor[y]." (7T5-20 to 6-10).

and a half blocks and you're fighting for at least your car, if not perhaps, your life." (8T60-11 to 15; see also 8T81-14 to 18).

These arguments that stress increased the accuracy of the identification, somehow making Zanatta's ability to remember the suspect's appearance even more reliable than the jurors' ability to remember the prosecutor's familiar face in ideal viewing conditions (8T62-15 to 63-24; 8T69-4 to 70-20), are directly contradicted by the social science endorsed by Henderson. Based on the Special Master's analysis of relevant studies, the Court found that "high levels of stress are likely to affect the reliability of eyewitness identifications." Henderson, 208 N.J. at 262; see also id. at 261 ("The State agrees that high levels of stress are more likely than low levels to impair an identification."). Moreover, contrary to the prosecutor's argument that cross-racial misidentification is not a concern in stressful circumstances, the Henderson Court found that "the additional research on own-race bias . . . and the more complete record about eyewitness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial." Id. at 299. In these ways, the prosecutor's scientifically inaccurate arguments likely mislead the jury about the impact of stress and cross-racial identifications.

The prosecutor also argued, contrary to aspects of the Henderson instruction, that Zanatta's identification was reliable because she believed

Hill's photograph looked the most like the suspect. Over the defense's objection, the prosecutor elicited testimony from Zanatta comparing physical features in Hill's photograph to features in the other photographs. (7T233-4 to 235-8). As noted, during the array procedure, Zanatta compared the photographs side by side and viewed them simultaneously rather than sequentially. And in summation, the prosecutor used a PowerPoint Presentation to misleadingly argue that Zanatta was looking at Hill's photograph ninety-one percent of the time after she had been handed Hill's photograph, even though Zanatta often viewed several photographs simultaneously, to reinforce the notion that her identification was reliable because she thought that Hill's photograph most resembled the suspect. (8T79-14 to 24, Da39).

These specious arguments implicate the phenomenon of "relative judgement," which "refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory relative to other lineup members." Henderson, 208 N.J. at 234-35 (quotation omitted). Studies show that this concept increases the risk of misidentification because people are more likely to choose an innocent filler who they believe looks like the suspect rather than making no identification at all, thus making wrongful identifications when the actual suspect is not in the array. Ibid. Experts also

believe that the theory of relative judgment helps explain why sequential lineups tend to be more reliable than simultaneous lineups. Id. at 257. Here, Zanatta viewed the photographs simultaneously and explicitly acknowledged comparing them to one another. (7T224-1 to 11). Although the Henderson instructions and the corresponding social science provide that these aspects undermined the reliability of her identification, the prosecutor improperly argued just the opposite to the jury.

The assistant prosecutor's misleading simulation and scientifically inaccurate arguments amounted to prejudicial misconduct because they increased the risk that the jury would convict based on a mistaken identification. Because prosecutors "must refrain from making inaccurate factual assertions," Garcia, 245 N.J. at 435, it follows that it is misconduct to make arguments that contradict the social science underlying the Henderson instructions because such arguments are factually inaccurate. This is so particularity because "people do not intuitively understand all of the relevant scientific findings." Henderson, 208 N.J. at 274. Accordingly, in a case like this one where the only issue for the jury to decide is the reliability of a dubious identification, such misconduct is clearly capable of producing an unjust result of the jury wrongly crediting a misidentification without full appreciation of the relevant social science.

Moreover, it is inherently difficult for jurors to discern whether an identification is reliable, because "most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and [b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness." Henderson, 208 N.J. at 236. For example, it might seem intuitive for the jury to believe Zanatta's testimony that she would never forget the suspect's eyes because she saw the suspect in "such a . . . terrific moment." (7T195-1 to 5). The enhanced Henderson instructions, however, disabuse the jurors of this misconception and educate them that high levels of stress reduce the reliability of an identification. So, when the prosecutor improperly argued that the high level of stress enhanced the reliability of Zanatta's identification, "in the technical sense, the prosecutor may have limited his remarks to the evidence of record, but in the fullest sense, he pursued a course that he knew was not consistent with the truth." Garcia, 245 N.J. at 436.

The Appellate Division failed to appreciate these salutary purposes of Henderson. Instead, the Appellate Division incorrectly held that any harm caused by the prosecutor's arguments was cured because the trial court ultimately instructed the jury on factors to consider in evaluating the reliability of the identification and that counsel's arguments are not considered evidence.

(Dpa34-36; Dpa40). But the prosecutor did not merely make a single, isolated remark that was inconsistent with the social science contained in the Henderson instructions. He began his summation with a misleading visual simulation and repeatedly advanced arguments that contradicted several aspects of the Henderson instructions. Under these circumstances, it is unlikely that jury disregarded the prosecutor's intuitively appealing, but scientifically unsound, arguments and instead relied solely on the jury instructions. See State v. Daniels, 182 N.J. 80, 101-102 (2004) (finding that misconduct amounted to plain error even though the trial court instructed the jury to differentiate argument from evidence); State v. Rivera, 437 N.J. Super. 434, 464 (App. Div. 2014) (reasoning that "the sheer quantity and variety of highly prejudicial remarks, visual displays and a courtroom antic, give us reason to have serious doubt about the jurors' capacity to follow those instructions").

Most critically, the prosecutorial misconduct was particularly prejudicial because the State's evidence on identity was far from overwhelming. Zanatta's initial description of the suspect had many discrepancies with the still images of the suspect from the surveillance videos: dark pants (not faded blue jeans); a black hat (not a red hat); and a black jacket (not a brown or olive vest over a grey sweatshirt). She did not estimate the suspect's height, weight,

or age, or the color of the suspect's beard (Hill's beard is primarily grey). Athough Hill has a noticeable facial scar between his eyebrows, Zanatta did not see any scars on the suspect's face. Furthermore, Zanatta viewed the suspect in poor lighting at 6:00 a.m. and in a highly stressful and obstructive setting as she was hanging out of a moving car. During the array procedure, she simultaneously compared the photograph, repeatedly wavered when asked to express her level of confidence in her identification, and picked the photograph she thought looked the most like the suspect. At one point, she really thought a filler was the suspect. She said Hill's photograph had lighter skin and different facial hair than the suspect. Her identification was cross-racial. She thought she remembered the suspect's eyes, but all six photographs in the array are black men with dark brown eyes. Ultimately, she was only eighty percent certain of her identification. Considering all these weaknesses in the identification, even under plain error review, reversal is warranted because the misconduct had the "clear capacity to have led to an unjust verdict," State v. Frost, 158 N.J. 76, 88-89 (1999), and deprived Hill of his fundamental rights to a fair trial and due process of law. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

The Court should grant certification to provide guidance on this question of general public importance. Moreover, a grant of certification is also

warranted because different panels of the Appellate Division have reached inconsistent results on this question. See R. 2:12-4. Indeed, the same assistant prosecutor involved in this case engaged in similar improper tactics to bolster an identification in State v. Williams, No. A-0434-17T4, 2017 N.J. Super. Unpub. LEXIS 1377, at *7-8 (App. Div. June 8, 2017). (Da 66-70). There, the assistant prosecutor told the jurors to look at each other for two minutes, the amount of time the victim had observed the assailant during the robbery in that case, to argue that the victim would remember the assailant. Id. at 8. The Appellate Division found that this misleading demonstration constituted plain error prosecutorial misconduct because "[t]here is no fair analogy between staring at a person with whom one has become familiar over several days of jury service, and staring at a complete stranger holding a knife." Id. at 8-9. By contrast, in State v. Portillo, No. 0679-16, 2018 N.J. Super. Unpub. LEXIS 1352 (App. Div. June 11, 2018), a panel of the Appellate Division found nothing improper or misleading in a prosecutor standing in silent in front of the jury for thirty second in summation, the amount of time the victim saw the defendant. These divergent opinions show that this Court's guidance is needed on whether such demonstrations are appropriate or prosecutorial misconduct.

In addition, this case presents a unique opportunity for the Court to evaluate whether an appellate court can consider, as part of the factual record,

that the same assistant prosecutor has previously been found to have engaged in similar, reversible prosecutorial misconduct in an unpublished Appellate Division opinion. See State v. T.J.M., 220 N.J. 220, 232 n.3 (2015) (rejecting the argument that unpublished opinions could serve "as evidence supporting prosecutorial misconduct"). But see State v. Robertson, 438 N.J. Super. 47, 60 n.8 (App. Div. 2014) (citing unpublished opinions "for evidential and not precedential purpose"), aff'd on other grds. 228 N.J. 138 (2017); Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 560 (2015) (same).

Here, during the charge conference, the attorneys and the trial judge actually discussed the unpublished Williams opinion, albeit for a different point. (8T31-6 to 32-5; 8T35-6 to 37-10). Hill's appellate counsel then cited the Williams opinion in his Appellate Division brief to emphasize that the same assistant prosecutor had previously been found to have committed similar misconduct, and the State did not argue in its respondent brief that such citation was inappropriate. Nevertheless, the Appellate Division denied Hill's motion for leave to file a supplemental brief, after oral argument, to address whether the panel was prevented from citing the Williams opinion under Rule 1:36-3. (Dpa44). And the Appellate Division did not cite Williams in its opinion in Hill's appeal. Especially viewed from Hill's perspective, it is an injustice that the trial attorneys and trial judge had the Williams opinion but

allowed the assistant prosecutor to engage in very similar conduct that was previously deemed to be plain error misconduct, and the Appellate Division would not even consider this fact in evaluating Hill's claims of prosecutorial misconduct. See R. 1:1-2(a) ("[A]ny rule may be relaxed or dispensed with . . . if adherence to it would result in an injustice"). This issue presents another independent question of general public importance that warrants a grant of certification.

CONCLUSION

For the reasons stated above, certification should be granted and the Appellate Division's judgment reversed. Hill respectfully reserves the right to file a supplemental brief if certification is granted.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Petitioner

BY: /s/ John P. Flynn
JOHN P. FLYNN
Assistant Deputy Public Defender
Attorney ID No. 303312019

CERTIFICATION

I certify that this petition is being filed in good faith, presents a substantial question, and is not filed for the purpose of delay.

Dated: February 22, 2023

/s/ John P. Flynn
JOHN P. FLYNN

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4544-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM HILL, a/k/a
RAHEEM HILL, RICKY HILL,
RUSSELL JOHNSON, JERRY
JONES, RAHEEM SANDER,
RAHEEM SANDERS, JOSEPH
SANDERS, BRUCE STRICKLAND,
BRUCE STRICTLAND, ANDREW
YOUNG, ANDY YOUNG, and
STEVEN YOUNG,

Defendant-Appellant.

Argued October 25, 2022 – Decided January 23, 2023

Before Judges Sumners, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-09-0946.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ashley Brooks, Assistant Deputy Public Defender, of counsel and on the briefs).

Patrick R. McAvaddy, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Patrick R. McAvaddy, on the briefs).

Catlin A. Davis, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Catlin A. Davis, of counsel and on the brief).

Doris Cheung argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, PC, attorneys; Doris Cheung, on the brief).

Ronald K. Chen argued the cause for amicus curiae American Civil Liberties Union of New Jersey Foundation (American Civil Liberties Union of New Jersey and Rutgers Constitutional Rights Clinic, attorneys; Alexander Shalom and Jeanne M. LoCicero, of counsel and on the brief; Ronald K. Chen, on the brief).

The opinion of the court was delivered by

SUSSWEIN, J.A.D.

Defendant, William Hill, appeals from his jury trial convictions for carjacking and witness tampering. He contends the witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad and vague. The statutory framework defendant challenges on appeal provides that a witness tampering offense is committed if a person knowingly engages in conduct which a

reasonable person would believe would cause a witness or informant to do one or more specified actions, such as testify falsely or withhold testimony.[1]

Defendant contends the "reasonable person" feature renders the statute unconstitutional and, to avoid constitutional infirmity, the statute must be construed to require the State to prove the defendant knew his or her conduct would cause a prohibited result. Aside from the constitutional issue, defendant contends the assistant prosecutor committed misconduct during summation and the trial court erred by admitting arrest photos into evidence.

After carefully examining the relevant precedents in light of the arguments of the parties and amici, we conclude N.J.S.A. 2C:28-5(a) is neither unconstitutionally overbroad nor impermissibly vague. We decline to embrace a new rule that categorically prohibits the Legislature from using an objective "reasonable person" test to determine a defendant's culpability. We also reject defendant's trial error contentions and, therefore, affirm his convictions.

I.

The following facts were elicited at trial. On the morning of October 31, 2018, the victim left her car running while she went back into her house to

[1] N.J.S.A. 2C:28-5(a) lists five distinct actions by the targeted witness or informant that can be caused by a defendant's witness-tampering conduct. The superseding indictment in this case alleged all five results, not just testifying falsely or withholding testimony. For purposes of brevity, we refer collectively to the statutorily enumerated actions as "prohibited" results.

retrieve a sweater. When she returned to her car one or two minutes later, she noticed a "figure" in the vehicle. The victim ran to her car, opened the door, and told the man to get out. The man put the vehicle in reverse while the door was still open. To avoid getting hit by the door, the victim jumped into the vehicle. She grabbed the steering wheel while her legs were hanging outside the door. She pulled herself into the car as the man shifted the vehicle into drive and sped off with the door still open. He drove erratically and began hitting other vehicles. Each time the vehicle struck another car, the driver-side door would hit the victim's back. Although she was unable to remove the ignition key, she eventually managed to shift the gear into neutral. When the vehicle began to slow down, the man hit the brakes, pushed the victim aside, jumped out, and ran away. From start to finish, the carjacking incident lasted approximately two minutes.

The victim drove to a police station and provided Harrison Police Department Detective Joseph Sloan a description of the carjacker. She stated he was "very, very scruffy. Like, he had hair all over his face, and it was not well maintained." He also had "big eyes" and his skin was not "too dark, but he wasn't light skinned." She stated the man was wearing a red winter "skully" hat, gray hoodie, olive or brown vest, and faded blue jeans.

Detective Sloan collected video surveillance recordings from the area, including from a coffee shop and a convenience store. The video footage and screenshot stills were introduced as evidence at trial to show what the suspect was wearing.

On November 6, 2018, the victim went to the police station to view a photo array. Sergeant Charles Schimpf showed the victim six photographs. He handed the victim one photo at a time and instructed her to stack the photos on top of one another. Despite the instruction to view the photos sequentially, the victim started looking at the photos simultaneously, comparing one against the other.

The record indicates the victim at one point "really thought" the man who attempted to steal her car was an individual in a photograph that was not defendant. However, she ultimately selected defendant's photograph from the array.

At trial, she testified,

> I recognized him by what I saw in my car. Like, I knew that I . . . know that I saw the person. You know, I was face to face with him. I know exactly what he looks like. The pictures just didn't look up to date, and so, . . . when I was looking at all of the pictures, I knew that I recognized him, but there were so many things missing. I was like this is definitely the guy, but the facial hair isn't there. You know what I mean? He was so scruffy and it looked like the

> picture was taken with a flash, so he looked a little bit lighter, but . . . I just . . . knew.

The victim stated she was confident in her identification because she recognized the carjacker's eyes, explaining, "[w]hen you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head." She also recognized the man's mouth and nose. The victim stated she was eighty percent confident in her identification.

Defendant was arrested on November 27, 2018. Following the arrest, Detective Sloan took six photographs of defendant. In the arrest photos, defendant is wearing faded jeans, a black jacket, a grey hoodie, and a red skully cap.

In April 2019, while awaiting trial, defendant sent a letter addressed to the victim's home. The letter, as redacted for its use at trial, reads:

> Dear Ms. [Victim],
>
> Now that my missive had [sic] completed its passage throughout the atmosphere and reached its paper destination, I hope and pray it finds its recipient in the very best of health, mentally as well as physically and in high spirits.
>
> I know you're feeling inept to be a recipient of a correspondence from an unfamiliar author but please don't be startled because I'm coming to you in peace. I don't want or need any more trouble.
>
> Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and

charged with Car Jacking upon you. You may be saying I have the audacity to write to you and you may report it but I have to get this off my chest, I am not the culprit of this crime.

Ms. [Victim], I've read the reports and watched your videotaped statement and I'm not disputing the ordeal you've endured. I admire your bravery and commend your success with conquering a thief whose intention was to steal your vehicle. You go girl! [smiley face].

Anyway, I'm not saying your eyes have deceived you. I believe you've seen the actor but God has created humankind so close in resemblance that your eyes will not be able to distinguish the difference without close examination of people at the same time. Especially not while in wake of such commotion you've endured.

. . . .

Ms. [Victim], due to a woman giving me the opportunity to live life instead of aborting me, I have the utmost regards for women, therefore, if it was me you accosted, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts. However, I am sorry to hear about the ordeal you had to endure but unfortunately, an innocent man (me) is being held accountable for it.

Ms. [Victim], I don’t know what led you into selecting my photo from the array, but I place my faith in God. By His will the truth will be revealed and my innocence will be proven. But however, I do know He works in mysterious ways so I'll leave it in His Hands.

. . . .

> Ms. [Victim], I'm not writing to make you feel sympathy for me, I'm writing a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise please tell the truth if you're wrong or not sure 100%.
>
> Ms. [Victim], I'm not expecting a response from you but if you decide to respond and want a reply please inform me of it. Otherwise you will not hear from me hereafter until the days of trial.
>
> Well, it's time I bring this missive to a close so take care, remain focus, be strong and stay out of the way of trouble.
>
> Sincerely,
> [Defendant]

Defendant was initially charged by indictment with first-degree carjacking, N.J.S.A. 2C:15-2(a)(1). Following the letter incident, a superseding indictment added a charge of third-degree witness tampering, N.J.S.A. 2C:28-5(a).

In June 2019, the trial court held a Wade[2] hearing to determine the admissibility of the eyewitness identification. On July 8, 2019, the trial court issued an oral ruling denying defendant's motion to suppress the victim's identification of defendant as the perpetrator.

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

In fall 2019, defendant was tried before a jury over the course of several days. The jury found defendant guilty on both counts. On June 10, 2020, the trial judge denied defendant's motion for a new trial and sentenced defendant to a twelve-year term of imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the carjacking conviction. The judge imposed a consecutive three-year term of imprisonment on the witness tampering conviction.

Defendant raises the following contentions for our consideration on appeal:

> POINT I
>
> TO AVOID CONSTITUTIONAL INFIRMITY, THE WITNESS-TAMPERING STATUTE MUST BE INTERPRETED TO REQUIRE THAT THE DEFENDANT KNOW THE SPEECH OR CONDUCT WOULD CAUSE A WITNESS TO IMPEDE OR OBSTRUCT AN INVESTIGATION OR PROCEEDING.
>
> A. FOR THE WITNESS-TAMPERING STATUTE TO BE CONSTITUTIONAL, IT MUST BE CONSTRUED TO REQUIRE KNOWLEDGE THAT THE SPEECH OR CONDUCT WOULD CAUSE A WITNESS TO IMPEDE OR OBSTRUCT AN INVESTIGATION OR PROCEEDING. OTHERWISE, THE STATUTE MUST BE DEEMED OVERBROAD AND VAGUE.
>
> B. MR. HILL'S CONVICTIONS MUST BE REVERSED BECAUSE THE JURY WAS NOT

INSTRUCTED ON AND DID NOT FIND THAT THE STATE PROVED THIS ESSENTIAL ELEMENT BEYOND A REASONABLE DOUBT.

POINT II

THE PROSECUTOR MADE NUMEROUS MISLEADING ARGUMENTS CONTRARY TO LAW AND FACT AS A MEANS OF BOLSTERING THE WEAK IDENTIFICATION, DEPRIVING MR. HILL OF A FAIR TRIAL AND REQUIRING REVERSAL.

A. THE SIMULATION USED BY THE PROSECUTOR IN SUMMATION TO ARGUE THAT, JUST LIKE THE JURORS WOULD NOT FORGET HIS FACE, THE VICTIM WOULD NOT FORGET THE PERPETRATOR'S FACE, WAS EXTREMELY MISLEADING. HIS ARGUMENT THAT THE STRESS OF THE INCIDENT MADE HER IDENTIFICATION MORE RELIABLE COMPOUNDED THE HARM.

B. THE PROSECUTOR ELICITED MISLEADING TESTIMONY AND MADE A MISGUIDING ARGUMENT CONTRARY TO FACT AND LAW: THAT BECAUSE THE EYEWITNESS THOUGHT MR. HILL LOOKED THE MOST LIKE THE SUSPECT, HE WAS THE SUSPECT.

C. THE CUMULATIVE EFFECT OF THE REPEATED PROSECUTORIAL MISCONDUCT DEPRIVED MR. HILL OF A FAIR TRIAL.

POINT III

THE ARREST PHOTOS SHOULD HAVE BEEN EXCLUDED BECAUSE THEY WERE MINIMALLY PROBATIVE, HIGHLY PREJUDICIAL, AND CUMULATIVE. AT MINIMUM, A LIMITING INSTRUCTION SHOULD HAVE BEEN GIVEN. REVERSAL IS THUS REQUIRED.

II.

We first address defendant's constitutional arguments. The State maintains we should not consider defendant's overbreadth and vagueness contentions because he did not challenge the constitutionality of the witness tampering statute before or during the trial. Defendant first argued the State was required to prove he knew his conduct would cause the victim to engage in prohibited acts in his post-verdict motion for a new trial. Defendant, in the relevant point heading of his initial appeal brief, asserts the constitutional argument was "partially raised below." See R. 2:6-2(a)(6).

In State v. Galicia, our Supreme Court explained, "[g]enerally, an appellate court will not consider issues, even constitutional ones, which were not raised below." 210 N.J. 364, 383 (2012) (emphasis added). Accordingly, "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem.

Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super 542, 548 (App. Div. 1959)). Because the problem of witness intimidation is a matter of great public interest—one that has a direct impact on the integrity of the criminal justice process and public safety—we choose to address defendant's constitutional arguments notwithstanding that they were not fully presented to the trial court.[3]

We begin our substantive analysis by acknowledging certain foundational legal principles. "A presumption of validity attaches to every statute" and the burden is on the party challenging the statute to establish its unconstitutionality. State v. Lenihan, 219 N.J. 251, 265–66 (2014).

Defendant contends the witness tampering statute is both overbroad and vague. Overbreadth and vagueness are analytically distinct concepts that implicate different constitutional concerns. When considering overbreadth, the "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." State v. B.A., 458 N.J. Super. 391, 407 (App. Div. 2019) (quoting State v. Saunders, 302 N.J. Super. 509, 517 (App. Div. 1997)). In

[3] Because this case raises important issues and implicates the need to deter witness intimidation, we invited the Attorney General, the American Civil Liberties Union of New Jersey (ACLU), and the Association of Criminal Defense Lawyers of New Jersey to participate as amicus curiae. We express our gratitude to the amici for their helpful arguments.

State v. Burkert, our Supreme Court commented that invalidating a statute on overbreadth grounds is a "drastic remedy." 231 N.J. 257, 276 (2017).

The Court in Burkert explained that "[v]ague and overly broad laws criminalizing speech have the potential to chill permissible speech, causing speakers to silence themselves rather than utter words that may be subject to penal sanctions." Ibid. (first citing Reno v. ACLU, 521 U.S. 844, 871–72 (1997); and then citing NAACP v. Button, 371 U.S. 415, 433 (1963)). The Court acknowledged, however, that certain categories of speech may be criminalized, noting that a statute will not be struck down on First Amendment grounds when, for example, the speech at issue "is integral to criminal conduct, . . . physically threatens or terrorizes another, or . . . is intended to incite imminent unlawful conduct." Id. at 281. In B.A., we held that "[w]ith respect to speech 'integral to criminal conduct,' the 'immunity' of the First Amendment will not extend to 'a single and integrated course of conduct' that violates a valid criminal statute." 458 N.J. Super. at 408 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). We further explained in B.A. that when an overbreadth challenge is rejected, "[t]he court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge

only if the enactment is impermissibly vague in all of its applications." Id. at 410 (quoting Saunders, 302 N.J. Super. at 517 (alteration in original)).

While the overbreadth doctrine typically addresses First Amendment free speech concerns, "[t]he constitutional doctrine of vagueness 'is essentially a procedural due process concept grounded in notions of fair play.'" State v. Borjas, 436 N.J. Super. 375, 395 (App. Div. 2014) (quoting State v. Emmons, 397 N.J. Super. 112, 124 (App. Div. 2007)). It "is well settled that '[a] criminal statute is not impermissibly vague so long as a person of ordinary intelligence may reasonably determine what conduct is prohibited so that he or she may act in conformity with the law.'" Id. at 395–96 (quoting Saunders, 302 N.J. Super. at 520–21 (alteration in original)).

Therefore, the test for vagueness is whether "persons of 'common intelligence must necessarily guess at [the statute's] meaning and differ as to its application.'" Id. at 396 (quoting State v. Mortimer, 135 N.J. 517, 532 (1994)). A statute need not be a "model of precise draftsmanship," but rather need only "sufficiently describe[] the conduct that it proscribes." State v. Afanador, 134 N.J. 162, 169 (1993). "[I]mprecise but comprehensible normative standard[s]" are sufficient to survive constitutional challenge. See Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

In State v. Crescenzi, we rejected a vagueness and overbreadth challenge to a predecessor version of the witness tampering statute. 224 N.J. Super. 142, 148 (App. Div. 1988). Regarding overbreadth, we held "the statute furthers the important governmental interest of preventing intimidation of, and interference with, potential witnesses or informers in criminal matters and easily meets the test of weighing the importance of this exercise of speech against the gravity and probability of harm therefrom." Id. at 148.

In 2008, the witness tampering statute was significantly amended. L. 2008, c. 81, § 1. The Senate Judiciary Committee Statement noted that the statute was amended to "ensure that tampering with a witness or informant is applied as broadly as possible." Sen. Judiciary Comm. Statement to A. 1598 4 (L. 2008, c. 81).

The societal interest in preventing intimidation of, and interference with, potential witnesses or informers in criminal matters remains an important governmental objective. See State v. Ramirez, 252 N.J. 277, 301 (2022) (noting the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-36(c), was amended in 2012 "to provide that victims have the right to be free from intimidation, harassment and abuse by any person, including the defendant or any person acting in support of or on behalf of the defendant" (emphasis omitted) (quoting Sen. Budget & Appropriations Comm. Statement to A. 2380 1 (L. 2012, c.

27))). Nothing in the 2008 amendments undermines the rationale supporting the conclusion we reached in Crescenzi regarding overbreadth.

We note that very recently—after oral argument in the matter before us—the United States Supreme Court granted certiorari in a Colorado criminal case to address the First Amendment implications of an objective reasonable-person test applied to a stalking statute. Counterman v. Colorado, 598 U.S. ___ (2023). The issue in that case is whether a "reasonable person" interpreting a statement as a threat of violence is sufficient to establish a "true threat" removed from First Amendment protection,[4] or whether the speaker must subjectively know or intend the threatening nature of the statement. Petition for Writ of Certiorari at 2, Counterman, 598 U.S. ___ (No. 22-138). That issue is distinct from the one before us.

Here, we are not evaluating speech directed broadly or to an unspecified class of persons. Instead, we are solely evaluating speech directed to victims, witnesses, or informants who are linked to an official proceeding or investigation. N.J.S.A. 2C:28-5(a). Also, in this case, the communication was sent by a charged defendant through regular mail directly to the victim-

[4] "True threats" to commit violence are not protected by the First Amendment. See Watts v. United States, 394 U.S. 705, 708 (1969).

witness's home. We are not addressing the criminalization of social media posts broadcast to a wide audience.

A defendant awaiting trial has no First Amendment right to communicate directly with the victim of the alleged violent crime. Were it otherwise, a court setting the conditions of pretrial release under the Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to -26, might be foreclosed from imposing a "no contact" order.[5] Thus, the contours of the "true threat" doctrine are not at issue in this appeal. Accordingly, we reject defendant's current overbreadth claim.

The 2008 amendments significantly impact the analytically distinct question of whether the statute in its present form is impermissibly vague. The 2008 amendments added the "reasonable person" standard for determining culpability that defendant now challenges. Because that feature was not at issue in Crescenzi, the legal analysis and conclusion in that case provide no guidance on the vagueness question before us in this appeal.

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[5] We confirmed at oral argument the trial court had not issued an explicit pretrial "no contact" order. We emphasize this is not a case where defense counsel or his investigator reached out to the victim as part of the defense investigation or litigation strategy. See Ramirez, 252 N.J. at 302 (recognizing a distinction between disclosing a victim's address to the defense team and to the defendant himself or herself). Rather, defendant reached out to the victim directly and entirely on his own. The record does not indicate how defendant learned the victim's home address.

The witness tampering statute now reads in pertinent part:

> a. Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted or has been instituted, he knowingly engages in conduct which a reasonable person would believe would cause a witness or informant to:
>
> (1) Testify or inform falsely;
>
> (2) Withhold any testimony, information, document or thing;
>
> (3) Elude legal process summoning him to testify or supply evidence;
>
> (4) Absent himself from any proceeding or investigation to which he has been legally summoned; or
>
> (5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.
>
> [N.J.S.A. 2C:28-5 (emphasis added).]

In State v. Gandhi, 201 N.J. 161 (2010), our Supreme Court interpreted a substantially similar "reasonable person" feature in the stalking statute, N.J.S.A. 2C:12-10.[6] The defendant argued the jury instruction on the stalking

[6] N.J.S.A. 2C:12-10(b) provides:

> A person is guilty of stalking . . . if he [or she] purposely or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his [or her] safety or

charge "was insufficient because it did not explicitly require the jury to find that a defendant had the conscious object to induce, or awareness that his conduct would cause, fear of bodily injury or death in his victim."[7] Gandhi, 201 N.J. at 169. In rejecting that claim, the Supreme Court reasoned:

> [W]e do not discern a legislative intent to limit the reach of the anti-stalking statute to a stalker-defendant who purposefully intended or knew that his behavior would cause a reasonable person to fear bodily injury or death. Rather, we read the offense to proscribe a defendant from engaging in a course of repeated stalking conduct that would cause such fear in an objectively reasonable person. We view the statute's course-of-conduct focus to be on the accused's conduct and what that conduct would cause a reasonable victim to feel, not on what the accused intended.
>
> [Id. at 170.]

The Court further explained, "the reasonable-person standard demonstrates a legislative preference for the objective perspective of the fact-finder to assess a reasonable person's reaction to the course of conduct engaged in by the accused stalker." Id. at 180.

> the safety of a third person or suffer emotional distress.

[7] We note the jury charge/statutory construction argument the defendant raised in Gandhi, while not couched in constitutional terms, is very similar to the argument defendant raised in the present matter in his motion for a new trial.

Although the Court in Gandhi was not called upon to address the constitutionality of the reasonable-person standard,[8] we deem it unlikely, if not inconceivable, that the Court would have gone to such lengths to construe the

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[8] The Supreme Court in State v. Pomianek, 221 N.J. 66 (2015), explicitly acknowledged that Gandhi did not address the constitutionality of the stalking statute, explaining:

> The State compares N.J.S.A. 2C:16-1(a)(3) [bias intimidation] to the stalking statute, N.J.S.A. 2C:12-10, which we addressed in State v. Gandhi, 201 N.J. 161 (2010). Unlike N.J.S.A. 2C:16-1(a)(3), the stalking statute has a mens rea component. The stalking statute provides that a defendant is guilty of a crime "if he [or she] purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his [or her] safety or the safety of a third person or suffer other emotional distress." N.J.S.A. 2C:12-10(b) (emphasis added). In Gandhi, we determined only that the Legislature did not intend by the statute's wording to impose a requirement on the prosecution to prove that the defendant purposefully or knowingly "cause[d] a reasonable victim to fear bodily injury or death." 201 N.J. at 187. Our task in Gandhi was statutory interpretation and not constitutional adjudication.
>
> [221 N.J. 66, 88 n.8 (2015) (second alteration in original) (emphasis omitted).]

The witness tampering statute, like the stalking statute, also has a mens rea component in that it requires proof the defendant "knowingly engage[d] in conduct which a reasonable person would believe would cause a witness or informant to [engage in a prohibited action]." N.J.S.A. 2C:28-5(a) (emphasis added).

statute in a manner that would render it impermissibly vague on its face. Following Gandhi, moreover, we upheld the constitutionality of the stalking statute. B.A., 458 N.J. Super. at 398.

Defendant contends the witness tampering statute is impermissibly vague based on our Supreme Court's ruling in Pomianek.[9] The Court in that case addressed the constitutionality of N.J.S.A. 2C:16-1(a)(3), "a bias-crime statute that allows a jury to convict a defendant even when bias did not motivate the commission of the offense." Pomianek, 221 N.J. at 69. The relevant portion of the bias intimidation statute at that time provided:

> (a) A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes; N.J.S. 2C:33-4; N.J.S. 2C:39-3; N.J.S. 2C:39-4 or N.J.S. 2C:39-5,
>
> > (1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or
> >
> > (2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race,

[9] Defendant did not rely upon, or even cite to, Pomianek in his initial appeal brief. He did so in compliance with our request to the parties to file supplemental briefs to address Pomianek.

> color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or
>
> (3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.
>
> [Id. at 81 (emphasis added) (quoting N.J.S.A. 2C:16-1).]

The Court concluded that N.J.S.A. 2C:16-1(a)(3) was unconstitutionally vague, noting, "[i]n focusing on the victim's perception and not the defendant's intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law." Id. at 70. The Court added:

> Unlike subsections (a)(1) and (a)(2), subsection (a)(3) focuses not on the state of mind of the accused, but rather on the victim's perception of the accused's motivation for committing the offense. Thus, if the victim reasonably believed that the defendant committed the offense of harassment with the purpose to intimidate or target him based on his race or color, the defendant is guilty of bias intimidation. N.J.S.A.

> 2C:16–1(a)(3). Under subsection (a)(3), a defendant may be found guilty of bias intimidation even if he [or she] had no purpose to intimidate or knowledge that his [or her] conduct would intimidate a person because of his [or her] race or color. In other words, an innocent state of mind is not a defense to a subsection (a)(3) prosecution; the defendant is culpable for his words or conduct that led to the victim's reasonable perception even if that perception is mistaken.
>
> [Id. at 82 (emphasis omitted).]

Ultimately, the Supreme Court struck subsection (a)(3) of the bias statute but allowed subsections (a)(1) and (a)(2) to stand. Id. at 91–92.

Defendant and the ACLU argue that the "reasonable person" feature in the witness tampering statute is analytically indistinguishable from the portion of the bias intimidation statute struck down on vagueness grounds in Pomianek. We disagree.

A close examination reveals significant, substantive differences between N.J.S.A. 2C:16-1(a)(3) and N.J.S.A. 2C:28-5(a)(1). It is true the witness tampering statute, like the bias intimidation feature that was invalidated in Pomianek, "criminalizes [the] defendant's failure to apprehend the reaction that his words would have [on] another." Id. at 90. It also is true that a defendant may be found guilty of witness tampering even if he or she did not intend to impede a proceeding or investigation.

But the similarities between the two statutes end there. As we have already noted, unlike the invalidated portion of the bias intimidation statute, the witness tampering statute includes a "knowing" mens rea component. See note 8. Most significantly, the invalidated portion of the bias intimidation statute employed a subjective test under which a defendant's culpability was determined from the perspective of the specific victim who was targeted. The witness tampering statute, in contrast, does not depend on the victim's subjective reaction. Rather, like the stalking statute, the witness tampering statute uses a purely objective test that relies on the "objective perspective of the fact-finder." See Gandhi, 201 N.J. at 180.

The Pomianek Court highlighted the subjective nature of the bias crime provision, which focused on the victim's personal perspective. 221 N.J. at 89. The Court explained:

> Of course, a victim's reasonable belief about whether he [or she] has been subjected to bias may well depend on the victim's personal experiences, cultural or religious upbringing and heritage, and reaction to language that is a flashpoint to persons of his [or her] race, religion, or nationality. A tone-deaf defendant may intend no bias in the use of crude or insensitive language, and yet a victim may reasonably perceive animus. The defendant may be wholly unaware of the victim's perspective, due to a lack of understanding of the emotional triggers to which a reasonable person of that race, religion, or nationality would react.
>
> [Ibid.]

That led the Court to conclude that "guilt may depend on facts beyond the knowledge of the defendant or not readily ascertainable by him [or her]," thereby rendering the statute impermissibly vague. Ibid.

The reasonable-person standard employed in the witness tampering statute, in contrast, does not account for, much less depend on, what the victim actually perceived or believed. Rather, it is an objective standard. As our Supreme Court explained in Gandhi,

> [t]he legislative choice to introduce a reasonable-person standard undercuts defendant's argument that the plain language of the statute calls for application of a subjective standard . . . . To the contrary, the reasonable-person standard demonstrates a legislative preference for the objective perspective of the fact-finder to assess a reasonable person's reaction to the course of conduct engaged in by the accused stalker.
>
> [201 N.J. at 180.]

The objective formulation of the witness tampering statute effectively eliminates the concern expressed in Pomianek regarding idiosyncratic personal characteristics of the victim. From a due process notice standpoint, the purely objective reasonable-person standard is vastly different from a subjective standard like the one used in the invalidated bias intimidation provision.

Furthermore, the bias crime provision struck down in Pomianek was a uniquely convoluted culpability formulation that essentially required a

defendant to divine what the victim would perceive as to the defendant's motivation. Notably, the constitutionally deficient portion of the bias intimidation statute did not focus on the impact of a defendant's conduct but rather on the victim's speculation as to what the defendant was thinking. That statute thus required clairvoyance, for lack of a better description, because it presupposed a defendant would somehow be privy to the subjective thought processes of the targeted victim or victims.

Because it uses a purely objective standard, N.J.S.A. 2C:28-5(a) does not suffer from the constitutional defect identified in Pomianek. The witness tampering statute, unlike the invalidated bias intimidation provision, does not require a defendant to know the "personal experiences" or "emotional triggers" of the victim and thus does not depend on "facts beyond the knowledge of the defendant or not readily ascertainable by him [or her]." Pomianek, 221 N.J. at 89.

We also emphasize that the invalidated provision in the bias intimidation statute was unprecedented—that culpability formulation had not been used in any preexisting statute and was never replicated in New Jersey or any other jurisdiction so far as we are aware. The objective "reasonable person" formulation employed in the witness tampering statute, in contrast, appears throughout the New Jersey Code of Criminal Justice. In addition to the

stalking statute construed in Gandhi and upheld in B.A., a "reasonable person" test is used in the following criminal statutes[10]:

> Criminal Attempt, N.J.S.A. 2C:5-1(a)(1) and (a)(3) (a defendant is culpable if he or she engages in conduct that would be criminal "if the attendant circumstances were as a reasonable person believes them to be");
>
> Human Trafficking, 2C:13-9(a)(2) (a defendant is culpable if he or she forces labor from someone "under circumstances in which a reasonable person would conclude that there was a substantial likelihood that the person was a victim of human trafficking");
>
> Distribution/Possession with Intent to Distribute Imitation Controlled Dangerous Substances, N.J.S.A. 2C:35-11(a)(3) (a defendant is culpable if he or she distributes/possesses with intent to distribute a non-controlled substance "[u]nder circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance");
>
> Financial Facilitation of Criminal Activity (Money Laundering), N.J.S.A. 2C:21-25(a) to (c) (a defendant is culpable if he or she possesses property "known or which a reasonable person would believe to be derived from criminal activity"; or "engages in a transaction involving property known or which a reasonable person would believe to be derived from criminal activity"; or participates in "transactions in property known or which a reasonable person would believe to be derived from criminal activity");

[10] The following statutory summaries are provided only to demonstrate the Legislature's use of the reasonable-person standard. They do not contain all the elements of the listed offenses.

> Minor's Access to Loaded Firearm, N.J.S.A. 2C:58-15(a)(2) (a defendant is culpable if he or she "knows or reasonably should know" a minor could access a loaded firearm, unless he or she "stores the firearm in a location which a reasonable person would believe to be secure");
>
> Criminal Trespass, N.J.S.A. 2C:18-3(c) (a defendant is culpable if, without consent, he or she peers into another's window "under circumstances in which a reasonable person in the dwelling or other structure would not expect to be observed");
>
> Invasion of Privacy, N.J.S.A. 2C:14-9(a) and (b) (a defendant is culpable if he or she, without license or privilege, "and under circumstances in which a reasonable person would know that another may expose intimate parts," observes another without their consent; or, records an image of someone's intimate parts without that person's consent "under circumstances in which a reasonable person would not expect to have his undergarment-clad intimate parts observed").
>
> Theft from Grave Site, N.J.S.A. 2C:20-2.3 (a defendant is culpable if he or she removes a headstone without permission "under circumstances which would cause a reasonable person to believe that the object was unlawfully removed").

So far as we are aware, none of the foregoing statutes have been challenged, much less stricken, on constitutional grounds because they employ a reasonable-person standard. In these circumstances, we decline to create a new categorical rule that would invalidate the use of an objective reasonable-person test for determining criminal culpability.

In sum, we conclude that a person of ordinary intelligence can reasonably determine whether his or her conduct constitutes witness tampering. See Borjas, 436 N.J. Super. at 395–96. In this particular application, moreover, we are satisfied defendant was on constitutionally sufficient notice that the letter he addressed to the carjacking victim's private residence violated N.J.S.A. 2C:28-5(a) as measured from the perspective of a reasonable person. As the ACLU acknowledges, "[o]f course, it is not necessary to a convict[ion] for witness tampering that the witness actually give false testimony or obstruct a proceeding, if the conduct of defendant made the risk of such behavior sufficiently likely." Amicus further acknowledges that "[w]ritten communications can, depending on context, often convey meanings that are at odds with their facial text."

Here, although defendant's letter was not explicitly threatening, the context shows defendant wanted the victim to recant her identification of him. Importantly, the context of the letter shows he knew where she lived and was prepared to interact with her directly and not through his attorney or the prosecutor's office. We believe defendant was thus on sufficient notice that a reasonable person would believe an eyewitness confronted with such a letter would feel pressured to accede to his request to recant an out-of-court identification and refrain from testifying against him at trial.

III.

Defendant next argues the prosecutor committed misconduct during his summation. Specifically, defendant contends the prosecutor improperly: (1) asked the jury to silently observe his face for ninety seconds, the length of time the victim had to observe the assailant; (2) suggested the victim's identification was more reliable because of the stressful nature of the carjacking event; and (3) engaged in "the fallacy of relative judgment," whereby the prosecutor improperly suggested the victim had correctly identified the suspect during the out-of-court identification procedure because his photo in the array most closely resembled the assailant.

A defendant's allegation of prosecutorial misconduct requires us to assess whether defendant was deprived of the right to a fair trial. State v. Jackson, 211 N.J. 394, 407 (2012). To warrant reversal on appeal, the prosecutor's misconduct must be "clearly and unmistakably improper" and "so egregious" that it deprived defendant of the "right to have a jury fairly evaluate the merits of his defense." State v. Wakefield, 190 N.J. 397, 437–38 (2007) (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)).

Prosecutors "are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). Furthermore, "[p]rosecutors are afforded

considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." Ibid. "Even so, in the prosecutor's effort to see that justice is done, the prosecutor 'should not make inaccurate legal or factual assertions during a trial.'" State v. Bradshaw, 195 N.J. 493, 510 (2008) (quoting Frost, 158 N.J. at 85). Rather, "a prosecutor should 'confine [his or her] comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.'" Ibid. (alteration in original) (quoting State v. Smith, 167 N.J. 158, 178 (2001)). "So long as the prosecutor's comments are based on the evidence in the case and the reasonable inferences from that evidence, the prosecutor's comments 'will afford no ground for reversal.'" Ibid. (quoting State v. Johnson, 31 N.J. 489, 510 (1960)).

We add that if a defendant fails to object to alleged prosecutorial misconduct at trial, reviewing courts apply the plain error standard. See R. 2:10-2. Under that standard, we may reverse a defendant's conviction only if the error was "clearly capable of producing an unjust result." Ibid.; State v. Cole, 229 N.J. 430, 458 (2017). In Frost, our Supreme Court emphasized that "[g]enerally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were

made." 158 N.J. at 83–84 (citation omitted); accord State v. Irving, 114 N.J. 427, 444 (1989); State v. Ramseur, 106 N.J. 123, 323 (1987). Failure to object also deprives the trial court the opportunity to take curative action. Irving, 114 N.J. at 444.

A.

We first address defendant's contention the prosecutor conducted an inappropriate demonstration when he argued in summation,

> I want to show you how long she looked at the man sitting behind me. So, I'm going to apologize in advance, because it's going to get awkward. But if it's going to get awkward, imagine how much [sic] she saw the guy for. A minute or two minutes, that's what she said, right? Let's split the difference. Ninety seconds. Ninety seconds in silence. Look towards me, look around me, you choose, but let's see how long it is.
>
> [Silence]
>
> Let me ask you a question. In the time that it takes to watch a Boy Meets World[11] episode, would you be able to identify me? [Thirty-three] minutes later, she described him.

"Ordinarily it is discretionary with the court as to allowing an experiment to be performed in the jury's presence. Demonstrations or experiments may be justified on the ground that they tend to enlighten the jury

[11] Boy Meets World is a thirty-minute television sitcom that originally aired from 1993–2000.

on an important point." State v. LiButti, 146 N.J. Super. 565, 572 (App. Div. 1977). However, "caution and prudence should govern in each instance, depending upon the circumstances and the character of the demonstration." Ibid. (quoting State v. Foulds, 127 N.J.L. 336, 344 (E & A 1941)). Importantly, "[t]he demonstration must be performed within the scope of the evidence in the case." Ibid.

Applying these principles, we do not believe the prosecutor conducted an impermissible demonstration, especially given the absence of an objection. The prosecutor was permitted to demonstrate the duration of the carjacking encounter to show the length of time the victim had to observe the assailant. Importantly, the prosecutor stayed within the bounds of the trial evidence. See LiButti, 146 N.J. Super. at 572. The failure to object, moreover, precluded the judge from interrupting the demonstration, and shows that defense counsel did not believe the demonstration was prejudicial within the atmosphere of the trial. See Irving, 114 N.J. at 444.

B.

We turn next to defendant's contention, again raised for the first time on appeal, that the prosecutor improperly suggested the victim's identification was more reliable because of the stressful nature of the carjacking event. The prosecutor argued the victim's identification was especially reliable because

the carjacking was a moment in her life she would not forget, and that defendant's face was a face she would not forget.

We note the prosecutor's argument was consistent with the victim's trial testimony, in which she stated, "[w]hen you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head." The prosecutor thus commented on evidence revealed during the trial. See Bradshaw, 195 N.J. at 510.

The gist of defendant's contention on appeal is that the prosecutor's comment conflicts with our Supreme Court's determination in State v. Henderson, 208 N.J. 208, 261–62 (2011), that stress during a criminal episode is an estimator variable that can diminish an eyewitness' ability to recall and make an accurate identification.[12] We are satisfied the jury was properly

[12] The Henderson Court explained:

> Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. The Special Master found that "while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator."
>
> . . . .

instructed on how to evaluate the victim's eyewitness identification testimony, thereby mitigating any prejudicial effect of the prosecutor's closing argument. At the beginning of the trial, the judge instructed the jury that arguments in summation are not evidence and that it is the jurors' recollection of the evidence that is controlling. See State v. Timmendequas, 161 N.J. 515, 578 (1999) (noting the prosecutor's statements are not evidence).

The trial court reiterated that point during the final jury charges, explaining:

> Regardless of what counsel said or I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts. Arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence. Although the attorneys may point out what they think is important in this case, you must rely solely upon your understanding and recollection of the evidence that was admitted during the trial.
>
> Whether or not the defendant has been proven guilty beyond a reasonable doubt is for you and only you to determine based upon all the evidence

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> We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes "high" stress, which must be assessed based on the facts presented in individual cases.
>
> [208 N.J. at 261–62.]

> presented during the trial. Any comments by counsel are not controlling. It is your sworn duty to arrive at a just conclusion after considering all the evidence which is presented during the course of the trial.

Furthermore, the trial court properly instructed the jury regarding the impact of stress on the reliability of eyewitness identifications, noting:

> Even under the best viewing conditions, high levels of stress can reduce an eyewitness' ability to recall or make an accurate identification. Therefore, you should consider a witness' level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.

Accordingly, even assuming for the sake of argument the prosecutor's comment regarding the impact of stress contradicted social science principles adopted by the Supreme Court in Henderson, the trial court provided the correct standard for the jury to evaluate this estimator variable. "One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions." State v. Burns, 192 N.J. 312, 335 (2007). We reiterate, moreover, the failure to object shows that defense counsel did not believe the prosecutor's argument was prejudicial within the atmosphere of the trial. See Irving, 114 N.J. at 444. At bottom, we are not persuaded the prosecutor's remarks regarding the effect of stress on the victim's ability to identify the perpetrator were "clearly and unmistakably improper" and "so egregious" as to

deprive defendant of the right to have a jury fairly evaluate the merits of his defense. See Wakefield, 190 N.J. at 437–38.

C.

We turn next to defendant's contention the prosecutor exploited what defendant calls "the fallacy of relative judgment" by suggesting the victim correctly identified the suspect because his photograph in the array most closely resembled the perpetrator. In his summation, the prosecutor played the video recording of the photo lineup procedure and used a PowerPoint presentation to show the jury which photos were being reviewed and compared by the victim throughout the course of the identification procedure.

During the trial, the prosecutor asked the victim to compare the photos comprising the array and explain why she picked defendant's photo over the others. Defense counsel objected, and the court initially commented this seemed to be the kind of testimony that should not be elicited. The prosecutor explained that this line of questioning was critical because "the complexion which counsel has gone into considerably on cross and my point, to make it probative, relative, is that despite the fact that [photo] number [three], perhaps, is the lightest complexion." The judge permitted this line of examination but instructed the prosecutor to pose non-leading questions.

Defendant now contends the prosecutor improperly argued in summation that the victim looked at defendant's photograph the longest and that the video recording of the identification procedure shows that she was either reviewing or identifying his photo over ninety percent of the time. Defendant did not object to the prosecutor's comment at the time of summation.

The gravamen of defendant's argument on appeal is that the prosecutor yet again contradicted social science principles recognized by our Supreme Court in Henderson. We are not persuaded the prosecutor's comments were improper, much less deprived defendant of a fair trial.

The Court in Henderson, it bears noting, did not hold that simultaneous photo lineups—which allow for side-by-side comparisons—are categorically inappropriate. 208 N.J. at 256–58. Indeed, the Court expressed no preference for sequential presentation of photos over simultaneous presentation.[13] Ibid. However, as defendant notes, the Court expressed concern with a concept called "relative judgment." Id. at 234–35. The Court explained:

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[13] The Court noted that social science researchers disagree on whether it is best to use simultaneous or sequential photo lineup procedures. The Court concluded, "[a]s research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient, authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure. As a result, we do not limit either one at this time." Id. at 257–58 (citation omitted).

> Under typical lineup conditions, eyewitnesses are asked to identify a suspect from a group of similar-looking people. "[R]elative judgment refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory relative to other lineup members." Gary L. Wells, The Psychology of Lineup Identifications, 14 J. Applied Soc. Psychol. 89, 92 (1984) (emphasis in original). As a result, if the actual perpetrator is not in a lineup, people may be inclined to choose the best look-alike.
>
> [Ibid.]

The Court added that "[r]elative judgment touches the core of what makes the question of eyewitness identification so challenging. Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors." Id. at 235.

But even assuming the prosecutor ought not have suggested that the victim's identification was more reliable because she compared the photos against one another and held on to defendant's photo throughout the identification procedure, that argument was not "clearly and unmistakably improper" or otherwise "so egregious" that it deprived defendant of the "right to have a jury fairly evaluate the merits of his defense," see Wakefield, 190 N.J. at 437–38, especially given the lack of an objection to the prosecutor's summation.

Furthermore, any prejudice was ameliorated by the trial judge's careful and thorough jury instructions on how to evaluate eyewitness identification evidence. See Burns, 192 N.J. at 335. In view of those instructions, the prosecutor's closing argument regarding the eyewitness identification procedure does not warrant reversal of his carjacking conviction.

IV.

Defendant next contends the trial court erred in admitting six photos of defendant taken at the time of his arrest three weeks after the carjacking incident. The photos show defendant was wearing faded jeans, a black jacket, a grey hoodie, and red skull cap. Defendant was not in any restraints.

Defendant objected to the admission of the photographs. The trial judge ruled, "I'll allow them. And, you know, they're relevant as to whether the jurors are going to . . . piece together the clothing he was arrested to . . . the clothing he was allegedly wearing -- someone was allegedly wearing at the time."

Defendant argues on appeal the arrest photos should have been excluded under N.J.R.E. 403[14] because they were "minimally probative, highly prejudicial, and cumulative."

[14] N.J.R.E. 403 provides: "Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is

A trial court's evidentiary rulings are subject to an abuse of discretion standard of review. State v. Garcia, 245 N.J. 412, 430 (2021). "The abuse of discretion standard instructs us to 'generously sustain [the trial court's] decision, provided it is supported by credible evidence in the record.'" State v. Brown, 236 N.J. 497, 522 (2019) (alteration in original) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010)).

We conclude the trial judge did not abuse his discretion in admitting the arrest photos. They were relevant to show that defendant owned clothing that matched the clothing worn by the suspect shown in the surveillance video and screenshots that were presented to the jury. We likewise reject defendant's argument, raised for the first time on appeal, the trial court should have sua sponte issued a limiting instruction. We find no plain error in failing to instruct the jury specifically on how to evaluate the arrest photos. R. 2:10-2.

V.

Finally, we address defendant's contention that the cumulative effect of the trial errors he asserts warrant reversal of his convictions. "When legal errors cumulatively render a trial unfair, the Constitution requires a new trial."

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substantially outweighed by the risk of: (a) Undue prejudice, confusion of issues, or misleading the jury; or (b) Undue delay, waste of time, or needless presentation of cumulative evidence."

State v. Weaver, 219 N.J. 131, 155 (2014) (citing State v. Orecchio, 16 N.J. 125, 129 (1954)). It is well established, however, "[i]f a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." Ibid. We are satisfied that none of the trial errors defendant claims on appeal, viewed individually or collectively, warrant the reversal of the jury's verdict.

VI.

To the extent we have not specifically addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. See R. 2:11-3(e)(2).

Affirmed.

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SUPREME COURT OF NEW JERSEY

APP. DIV. # A-004544-19
SUPREME COURT #

CRIMINAL ACTION

STATE OF NEW JERSEY
V.
WILLIAM HILL

NOTICE OF PETITION FOR CERTIFICATION

Offense and sentence imposed by the trial court:

On June 10, 2020, defendant was sentenced to twelve years subject to the No Early Release Act for first-degree carjacking and a consecutive three years for third-degree witness tampering.

Appellate Division judgment date: 01/23/2023

Appellate Division disposition:

Affirmed convictions.

Relief sought from the Supreme Court:

Grant of certification and reversal of the Appellate Division's judgment.

Defendant in custody: YES

Place of confinement: SOUTH WOODS STATE PRISON

Please take notice that, Defendant-Petitioner, WILLIAM HILL, shall petition the Supreme Court of New Jersey for an Order certifying the judgment of the Superior Court of New Jersey, Appellate Division as described above.

Dated: 01/23/2023

S/ JOHN P FLYNN

FILED, Clerk of the Appellate Division, November 07, 2022, **A-004544-19**, **M-001105-22**
FILED, Clerk of the Supreme Court, 22 Feb 2023, **087840**

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4544-19T1
MOTION NO. M-1105-22
BEFORE PART F
JUDGE(S): THOMAS W. SUMNERS JR.
RICHARD J. GEIGER
RONALD SUSSWEIN

STATE OF NEW JERSEY
V.
WILLIAM HILL

MOTION FILED: 10/27/2022 BY: WILLIAM HILL

ANSWER(S) FILED: 11/01/2022 BY: STATE OF NEW JERSEY

SUBMITTED TO COURT: November 02, 2022

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 2nd day of November, 2022, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL LETTER BRIEF **DENIED**

SUPPLEMENTAL:

FOR THE COURT:

THOMAS W. SUMNERS JR., J.A.D.

19-09-00946-I HUDSON
ORDER - REGULAR MOTION
SB