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
v.	:	Jersey, Appellate Division.
	:	
QUINTIN D. WATSON,	:	Sat Below: Hon. Richard S. Hoffman, J.A.D.,
	:	Hon. Richard J. Geiger, J.A.D., Hon. Ronald
Defendant-Petitioner.	:	Susswein, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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OF COUNSEL AND ON THE BRIEF

March 1, 2023

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'ACLU"	American Civil Liberties Union;
'AAWO"	Appendix to the ACLU's proposed Amicus brief;
"ACDL"	Association of Criminal Defense Lawyers;
"Da"	appendix to defendant's Appellate Division brief;
"Db"	defendant's Appellate Division brief;
"Dsa"	appendix to defendant's Supreme Court supplemental brief;
"Dsb"	defendant's Supreme Court supplemental brief;

"Pa"	appendix to defendant's Petition for Certification;
"Sb"	State's Appellate Division brief;
"1T"	Transcript dated May 25, 2018;
"2T"	Transcript dated October 22, 2018;
"3T"	Transcript dated October 30, 2018;
"4T"	Transcript dated October 31, 2018;
"5T"	Transcript dated November 13, 2019;
"6T"	Transcript dated November 14, 2018;
"7T"	Transcript dated January 28, 2019;
"8T"	Transcript dated March 28, 2019.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

The State relies upon the Counter-Statement of Procedural History in its Appellate Division brief and defendant's Statement of Procedural History in his supplemental brief before the Court.

COUNTER-STATEMENT OF FACTS

As of January 2017, Christian Gambarrotti was working as a bank teller at the Garden State Community Bank, located at 1727 Route 130 North in North Brunswick. (5T40-22 to 25; 5T41-1 to 16; 5T109-6 to 10). Gambarrotti was working on Saturday, January 14, 2017. (5T47-18 to 21). He was the only teller on duty; the bank manager, Marina Tavarez was also working. (5T48-2 to 4; 5T48-11 to 13). At his teller station, he had two bank drawers which contained cash. (5T42-22 to 5T43-5).

Shortly before noon, a man approached Gambarrotti's teller window. (5T50-4 to 10). The man was African American, about 6'2" tall, muscular and was wearing a hat. (5T52-19 to 22; 5T64-5 to 7). The man pointed with his finger to a note that he had placed on the counter, which said, "everything now." (5T50-16 to 21; 5T59-25 to 5T60-5; 5T67-8 to 11). He looked up to the man and he realized from the way the man looked at him that he was confronting a bank robber. (5T50-22 to 5T51-7).

In accordance with the training he had received, Gambarrotti emptied the cash from his top drawer after which the man at the window told him to also empty out his bottom drawer. (5T51-8 to 13; 5T51-20 to 25). Gambarrotti also had a stack of one-

dollar bills, and he asked the man at the window if he wanted these bills, as well. (5T52-7 to 12). The man said, "give me everything." (5T52-7 to 12). He relinquished to the robber $5772. (5T53-14 to 19). The robber, after receiving the cash, walked away. (5T56-6 to 12; 5T61-5 to 10).

After the robber left the bank, Gambarrotti walked outside to see if he could see any sign of him, but the robber was nowhere to be seen. (5T57-11 to 15). Gambarrotti went back inside where he spoke to the bank manager and called police. (5T57-18 to 19; 5T57-23 to 24). North Brunswick Police Officer Frank Vitelli, Jr., responded to the bank where he saw three bank customers, Gambarrotti and the bank manager. (5T109-4 to 10). Officer Vitelli spoke to the bank customers who were not even aware that the bank had been robbed. (5T111-8 to 10). The officer spoke to Gambarrotti, who provided a description of the robber. (5T58-5T110-18 to 21). He also spoke to the bank manager. (5T110-22 to 23). The officer dusted for fingerprints on the entrance door handles and on the counter at Gambarrotti's teller window. (5T113-9 to 13). He lifted seven fingerprints, which he later filed with the Automated Fingerprint Indexing System (AFIS). (5T116-13 to 5T117-2; 5T117-10 to 12; 5T191-16 to 5T192-1).

Later that day, the officer took formal statements from both Gambarrotti and the bank manager at police headquarters. (5T63-11 to 12; 5T63-16 to 18; 5T117-18 to 23). Gambarotti described the robber as tall, dark and muscular, wearing a dark blue jacket and a hat. (5T63-19 to 24; 5T64-2 to 7).

Officer Vitelli also obtained from the bank its surveillance video. (5T118-8 to 10; 5T129-17 to 22). There were three surveillance cameras at teller station and four around the "platforms." (5T58-21 to 24). The surveillance cameras run twenty-four hours a day. (5T59-3 to 4). Police also canvassed the area around the bank to see if they could find surveillance video that captured the robber. (5T130-20 to 22). Police located such a video at a Krauzer's convenience store, located at Route 130 and Wood Avenue, which is about fifty to seventy-five yards from the bank. (5T131-8 to 19). Both of the videos were played at trial for the jury. See Point II, infra.

Officer Vitelli distributed to other law enforcement agencies a TRAKs message, which is a bulletin that contains information about a crime, possible suspects, and photographs. (5T158-10 to 14; 5T118-23 to 25; 5T159-2 to 11). The police utilize these bulletins to gather information since another law enforcement agency may recognize the suspect. (5T159-14 to 19). The officer prepared and distributed the TRAKs bulletin in January 2017; it contained a still photograph of the robber from the bank surveillance video. (5T160-5 to 10; 5T196-2 to 8). There were no immediate leads from the TRAKs bulletin. (5T159-22 to 5T160-4).

Jennifer Hill was defendant's former girlfriend and was living in the Princeton area as of October 2017. (5T86-16 to 17; 5T89-13 to 17; 5T90-1 to 2). She had met defendant in 2008 when she was 22-years old. (5T90-3 to 9; 5T90-13 to 18; 5T97-1 to 2; 5T197-12 to 13). Following her graduation from college, she moved to Princeton to

live with her mother. (5T90-22 to 25; 5T91-6 to 8). Her relationship with defendant continued and defendant lived with her and her mother. (5T91-6 to 8). Her relationship with defendant ended in 2012, however, she remained on "friendly" terms with him. (5T91-15 to 17; 5T21 to 23). Between 2012 and 2017, she saw defendant every couple of months and saw him in September 2017. (5T92-2 to 4; 5T92-8 to 14). She had attended the funeral for defendant's aunt, as well. (5T92-5 to 7). In October 2017, Hill was reading a newspaper when she saw an article with an accompanying photograph. (5T93-4 to 13). She recognized the man in the photograph as defendant. (5T93-14 to 17). She contacted police. (5T93-18 to 22; 5T106-3 to 5).

One month later, in November 2017, Officer Vitelli was contacted by another law enforcement agency regarding defendant. (5T160-11 to 14). The officer consulted with that agency after which criminal complaints were filed against defendant for the North Brunswick bank robbery. (5T160-15 to 18).

Following defendant's arrest, he was booked at police headquarters. (5T160-19 to 21). Defendant gave his height as 6'2" and his weight as 220 pounds. (5T161-22 to 5T162-1; 5T162-2 to 3). Defendant's age was 52 years. (5T162-4 to 6). Police took defendant's fingerprints during the booking process. (5T161- 13 to 21). Police never received a hit on the fingerprints lifted at the bank either before defendant's arrest or after his arrest. (5T162-23 to 5T163-4; 5T166-20 to 24). At trial, Officer Vitelli identified defendant as the man arrested. (5T166-25 to 5T167-7).

On October 4, 2018, Hill was contacted by investigators at the Middlesex County Prosecutor's Office. (5T93-23 to 5T94-2; 5T98-6 to 8). She was shown a still photograph from the bank surveillance video, marked S-2, which was of the robber at the teller's window pointing to the note. (5T59-25 to 5T160-5; 5T94-13 to 17). Hill identified defendant as the man at the teller's window; she was "100 percent positive," even though the top twenty to twenty-five percent of defendant's face was not visible because his hat was pulled over his eyes. (5T94-3 to 21; 5T99-1 to 5T100-19).

At trial in November 2018, Hill was shown another still photograph from the bank surveillance video, marked S-3, which also was of the robber at the teller's window. (5T94-22 to 5T95-11; 5T94-22 to 23; 5T95-5 to 7). Hill identified defendant as the man in the photograph; she was "100 percent" positive. (5T95-8 to 11).

On September 25, 2018, Gambarrotti went to the Middlesex County Prosecutor's Office where he was shown six photographs in an array. (5T64-11 to 14; 5T69-9 to 11; 5T70-15 to 16). Gambarrotti focused on two out of the six photographs and selected one of them that was not of defendant, however, he was not 100% sure the man was the robber; he was 75% to 90% sure. (5T64-15 to 23; 5T71-9 to 13; 6T27-24 to 6T28-2). On cross-examination at trial, he testified that he was 85% sure of his identification. (5T70-25 to 5T71-8). He also testified that the photographs looked like one another. (5T84-23 to 25).

At trial, Gambarrotti identified defendant in court, but again, he testified he was not 100% sure; he was 80% sure. (5T66-7 to 15). He was shown during his cross-examination the photograph he had selected from the array, marked as D-7, and he claimed that the man in the photograph looked like defendant, but he was not 100% sure. (5T81-19 to 5T82-23; 5T83-5 to 20; 5T226-1). He also testified on cross-examination that before trial and was informed about what would happen in court, including that the "individual who was accused of committing the crime" would be "in court seated at the defense table." (5T83-22 to 5T84-8).

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION IMPROPERLY FOUND A BANKSTON[1] VIOLATION BUT IT CORRECTLY FOUND THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT. (472 N.J. Super. 381, 412-445).

An inference to the jury that the police had superior knowledge from a non-testifying source which incriminates the defendant is impermissible because it denies defendant his federal and state constitutional right to confront the witnesses against him. It is not just any inference; it must be inescapable. The jury in this case learned that the police gained information that led to defendant's arrest, however, the source of that information testified at trial. The witness was defendant's former girlfriend, Jennifer

[1] State v. Bankston, 63 N.J. 263 (1973).

Hill, who testified she saw a photograph in a newspaper article ten months after the bank robbery after which she contacted police. The inescapable inference raised by the evidence was Jennifer Hill came forward and then Officer Vitelli was contacted. Hill testified and was subjected to cross-examination by defendant. There was no confrontation clause violation.

The Appellate Division ruled that testimony from Officer Vitelli raised the impermissible and inescapable inference but that the error was harmless beyond a reasonable doubt. The Appellate Division's finding of harmless error was correct, but its finding of a Bankston violation resulted from a flawed interpretation of "inescapable inference," which the Appellate Division read to mean something less than its plain meaning of inevitability. The Appellate Division's analysis was flawed, and it should be corrected. In any event, if the Court agrees that an error occurred, it was harmless beyond a reasonable doubt.

In Bankston, detectives entered a tavern and found envelopes of heroin on the bar under a pair of gloves near where the defendant had been seated. Bankston, 62 N.J. at 265. The police arrested defendant and at his ensuing trial, one of the officers was permitted to testify that defendant fit the description of the person for whom the police were looking. Id. at 266-267. This Court held that when the "logical implication" to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police information of defendant's guilt, the testimony should not be permitted

as it is hearsay. Id. On the other hand, the Court ruled that the rule against hearsay would not have been violated if the officer had testified the police went to the tavern "upon information received," because the purpose of the testimony would be to dispel the notion the police were acting arbitrarily. Id. at 272.

In State v. Branch, 182 N.J. 338 (2005), the Court revisited Bankston in the context of a police officer's testimony about photographs placed in an array. A police officer testified that he included defendant's picture in the photographic array because he had developed defendant as a suspect "based upon information received." Branch, 182 N.J. at 342. The Court found no legitimate reason for the officer to testify why he placed defendant's picture in the array, and, in any event, the testimony left the impression the officer had superior knowledge from non-testifying witnesses that had incriminated defendant. Id. at 348, 351. The Court held that the gravamen of Bankston was protecting defendants "from the incriminating statements of a faceless accuser who remains in the shadows and avoids the light of court." Id. at 348.

In State v. Medina, 242 N.J. 397 (2020), the Court ruled that the impermissible inference of superior, police knowledge from a non-testifying witness incriminating defendant had to be "inescapable" to violate the tenets of Bankston. In Medina, the non-testifying witness was an anonymous person who spoke to police and this Court looked at the record in its entirety to conclude that the impermissible inference had not

been made to the jury since the anonymous person turned out to be a "dead-end witness" for the investigation. Id. at 416.

To place the Appellate Division's incorrect ruling into context, an outline of what happened below is necessary. On October 22, 2018, the trial court denied the State's motion to admit under N.J.R.E. 404(b) evidence of other bank robberies charged against defendant as relevant to the issue of identity. (2T3-11 to 14; 2T9-22 to 2T13-13). At this time, the trial court held that the State would not be permitted to have a police officer identify defendant in the bank surveillance video, however, Jennifer Hill, who had personal knowledge about defendant's appearance, would be able to make an identification. (2T13-23 to 2T14-4). The trial court reserved decision on the extent to which Jennifer Hill and Officer Vitelli could testify about how defendant came to be arrested for the bank robbery in North Brunswick. (2T14-10 to 15).

When counsel appeared before the court on October 30, 2018, Judge Bucca inquired how the State intended to structure Jennifer Hill's testimony. (3T4-8 to 11). The State argued that although the court had ruled inadmissible any evidence about the other bank robberies, some background testimony needed to be elicited in a sanitized manner so that it did not appear before the jury that defendant just suddenly appeared "out of nowhere." (3T4-12 to 16). The State proffered to have Hill testify that she was reading a newspaper and saw a photograph from a criminal investigation, after which she alerted police to say she knew the suspect. (3T4-14 to 18). She would then go on

to testify that she was thereafter contacted by the Prosecutor's Office and identified defendant from a photograph. (3T4-18 to 22).

The State also argued that Officer Vitelli's testimony should be sanitized in a similar fashion. (3T4-23 to 24). The State explained that the robbery in this case occurred in January 2017 and remained a cold case until November 2017, when police in Franklin Township contacted police in North Brunswick and said defendant was a suspect in three other robberies and that their suspect looked like the man depicted in North Brunswick's TRAKs bulletin. (3T5-1 to 6). After this call, police from North Brunswick went to Somerset County to review the evidence and identified defendant from surveillance videos. (3T5-6 to 10; 3T13-14 to 20). The State maintained that Officer Vitelli should be permitted to testify in such a way that it did not appear as if defendant was arbitrarily arrested, especially since his arrest took place ten months after the robbery. (3T13-10 to 11; 3T13-21 to 24; 3T15-12 to 23).

The State proffered to have Officer Vitelli testify that there were no leads immediately following the robbery and that he was contacted by another law enforcement agency after which criminal complaints were issued against defendant for the robbery. (3T14-1 to 7). The State's concern about not providing any context to the police investigation was jury nullification. (3T15-24 to 3T16-5).

Defendant argued that Hill could testify without mentioning she read an article in the newspaper. (3T10-3 to 16). Defendant felt that any testimony about police in North

Brunswick being contacted by another law enforcement agency would lead to an inescapable inference that defendant was implicated in other crimes. (3T16-18 to 3T17-1). In making his argument against the State's proposed sanitization, defense counsel cited Bankston as permitting the police to say they acted "on information," which counsel argued was less prejudicial than eliciting that the police had been contacted another police agency. (3T17-1 to 14). Defense counsel argued that the State's proposed line of questioning would "inevitably lead to. . .the exact issue we litigated." (3T17-15 to 16).

The trial court rejected defendant's argument that the only inference the jury would make from the sanitized testimony was defendant had committed other crimes. (3T17-17 to 24). The trial court held that the jury could infer that the information was "helpful in solving this particular crime." (3T17-24 to 3T18-1). Defense counsel's response was ". . .if I heard that. . .as a juror that we were contacted by another law enforcement agency, I would just almost right away think, Judge, that he had to have committed some crime somewhere else. That is why we litigated that motion." (3T18-2 to 7). Because defense counsel believed the proposed line of questioning would undercut the denial of the State's Rule 404(b) application, he objected to any question that the police were contacted by another police agency. (3T18-7 to 14). Defense counsel offered to brief the issue for the court. (3T18-11 to 12).

The trial court held that the State had a legitimate concern about the context of the evidence as it related to defendant's arrest. (3T18-18 to 20). No context at all was prejudicial to the State. (3T18-22 to 23). On the other hand, the judge agreed with the defense that the "full context" would clearly be prejudicial to him. (3T18-20 to 22). After balancing the interests of both parties, Judge Bucca concluded that the testimony at trial should provide some context. (3T19-1 to 2). The judge ruled that Hill would be permitted to testify she was reading a newspaper and based on the article she read, she contacted the local police department. (3T11-2 to 9). The trial court ruled that Officer Vitelli would be permitted to testify that after opening the investigation, he was contacted by another law enforcement agency and because of the information provided, the complaints were signed against defendant. (3T20-8 to 15; 3T20-25 to 3T21-9).

The State's presentation of evidence at the ensuing trial took one day. (5T). The State presented three witnesses: Gambarrotti testified first; Hill testified second; Officer Vitelli testified third. (5T). Defense counsel never submitted to the court a brief on the issue of using "information received" to tailor Officer Vitelli's testimony.

Hill testified that in October 2017 she was reading a newspaper and saw an article with a photograph and recognized defendant in the photograph. (5T93-4 to 17). She thereafter contacted a law enforcement agency. (5T93-18 to 22). No mention was made of what the article was about. No mention was made which police department she called. No mention was made about the photograph she saw in the newspaper

article. In fact, that newspaper photograph was never seen by the jury. What the jury saw was the still photograph from the bank surveillance video in this case that Hill was shown in October 2018. (5T94-13 to 17).

When Officer Vitelli testified right after Hill, the officer outlined the investigative steps he took, which included preparing the TRAKs bulletin. (5T158-10 to 14; 5T158-23 to 25). He testified that the TRAKs bulletin was a means by which law enforcement sought information in case another police agency recognized the suspect from "prior dealings. . .a motor vehicle accident to a crime that's been committed in the past. . ." (5T159-14 to 19). The officer testified that there were no leads following the robbery in January 2017. (5T159- 22 to 5T160-10). He testified that he was contacted by another law enforcement agency in November 2017 about defendant. (5T160-11 to 14). The assistant prosecutor asked a leading question: "And at some point did you consult with that law enforcement agency and after which criminal complaints were signed against Mr. Watson?" (5T160-15 to 17). The officer answered, "yes, they were." (5T160-18). No mention was made about which law enforcement agency called him. No mention was made about the other robberies defendant committed that led to Officer Vitelli being contacted. If defense counsel thought this trial testimony about "consulting" raised an inescapable inference of incriminating hearsay, he did not request a curative instruction.

Defense counsel used his summation to argue that defendant had been misidentified as the bank robber by highlighting Gambarrotti's selection of someone other than defendant from the photo array he was shown before trial. (6T27-2 to 6T28-6). He argued that the in-court identification made by Gambarrotti was not certain and was made under suggestive circumstances because defendant had no control over where he sat in the courtroom and because Gambarrotti had been told before trial that the man charged with the robbery would be seated at counsel table. (6T28-7 to 23). Defense counsel urged the jury to reject Hill's identification because she was not an eyewitness to the robbery and only looked at a still photograph from the surveillance video. (6T32-21 to 6T33-13). Counsel also attacked her motive because she her relationship with defendant had ended. (6T32-8 to 17). Counsel urged the jury to consider that the only person who saw the robber in person selected someone other than defendant from the photo array, so even the video of the robbery was not proof defendant was guilty. (6T34-19 to 6T36-3).

The State argued on summation that Gambarrotti was interacting with the bank robber for a stressful and very short period of time totaling about sixty seconds and his selection of someone other than defendant from the photo array did not undercut his in-court identification, which was less than 100%. (6T37-11 to 6T43-24). The State argued that Hill was a credible witness, whose identification of defendant from the photo at the Prosecutor's Office was "the break" in the case. (6T43-25 to 6T47-18).

The State argued that Officer Vitelli conducted his investigation in a methodical fashion, however, the officer was not going to be successful in uncovering evidence because the bank robber took precautions to leave nothing behind, such as fingerprints, and the robbery was over and done in a minute. (6T47-19 to 6T50-21).

The State argued that Officer Vitelli created the TRAKs bulletin because it is a tool of law enforcement and "submission of that ultimately led to Ms. Hill identifying, and when charges were. . .assigned to Mr. Watson for this robbery." (6T51-14 to 21). The State argued that the following showed the State apprehended the right person for the bank robbery: ". . .Sergeant Vitelli's investigation, that videotape, the Krauzer's videotape, the TRAKS Bulletin, and ultimately the help of Jennifer Hill. . ." (6T52-15 to 19).

In his Appellate Division brief, defendant claimed Officer Vitelli's testimony that he consulted with another police department before filing charges against defendant, combined with Hill's testimony about recognizing defendant's photograph in a newspaper, violated the tenets of Bankston because the testimony led to the "inescapable inference" that "the officers from the other, unnamed police department had conveyed to the officers investigating this case. . .that they suspected Watson of other crimes." (Db8). Defendant argued that the officer's use of the word "consult" implied conversations with the other police department which incriminated defendant and led police in this case to suspect defendant. (Db15-Db16). Defendant argued that

Hill's testimony about recognizing defendant's photograph while reading the newspaper in October 2017 also suggested other crimes, especially since she was shown a different photograph by the Prosecutor's Office in 2018. (Db18-Db19).

Finally, defendant argued that the State's summation compounded the Bankston violation by arguing that the bank robber had carried out the crime in a "polished, experienced manner" and was familiar with banks. (Db19-Db20). Defendant argued that the prosecutor's comments had insinuated evidence not before the jury, "specifically evidence that Watson had committed other crimes that were being investigated by other agencies." (Db20). Defendant claimed the jury here "likely inferred" that other police departments had informed Officer Vitelli that defendant had committed other crimes, and, therefore, might be guilty of this offense. (Db20).

In its decision, the Appellate Division outlined the testimony at trial and the pretrial discussions between the trial court and counsel. State v. Watson, 472 N.J. Super. 391, 412-421 (App. Div. 2022). After outlining the relevant precedent from the Court, the Appellate Division concluded that "[b]ecause the trial court did not analyze the facts with our Confrontation Clause jurisprudence in mind, and even applying a deferential abuse-of-discretion standard of review. . .we believe the court struck the wrong balance." Id. at 435-436. The Appellate Division noted the trial court had focused "intently" on preventing the jury from learning about the other bank robbery charges and that the trial court had successfully accomplished this task with the

sanitized testimony, however, the Appellate Division concluded that the testimony from Officer Vitelli implied that defendant was under investigation by the other police department for "an unspecified reason." Id. at 436. The Appellate Division found no issue with Hill's sanitized testimony and the State's arguments on summation. Id. at 441- 445.

As the Appellate Division explained, ". . .the trial court's analysis and ruling was based entirely on N.J.R.E. 404(b) considerations and not at all on the Confrontation Clause implications of the proposed testimony." Id. at 437. The Appellate Division found error by the trial court at the same time it concluded defendant preserved for appeal his Confrontation Clause claim by citing Bankston during oral argument before Judge Bucca and by articulating the "inference problem." Id. at 439.

The Appellate Division held the "most logical inference" the jury drew from Officer Vitelli's testimony was that "the unnamed agency shared some unspecified incriminating information as part of the consultative process." Id. at 433. The Appellate Division acknowledged that the court was not to be concerned with possible inferences, but with an "inescapable" one. Id. at 431. Nevertheless, the Appellate Division went on to hold that the phrase of "inescapable inference" used in Bankston and in Medina does not mean that a violation is found "only if no other inference can be drawn from the hearsay testimony." Id. The Appellate Division relied on language from Bankston and Branch where the Court discussed "the logical implication" from

the offending testimony to opine that "inescapable" in this context means "less than absolute." Id. at 431-432.

The Appellate Division went on to hold that the error it found with Officer Vitelli's testimony was harmless beyond a reasonable doubt. Id. at 440-445. The Appellate Division looked at the context of the case, which was a one-day trial, and in the context of Officer Vitelli's entire testimony. Id. at 440. The Appellate Division held that the officer's offending testimony was brief, or fleeting, and held that the sequence of the witness testimony was relevant to the contextual analysis, thus holding that Hill, who testified before the officer, testified that she had called police after she saw the article and the photograph in it. Id. at 441. Unlike the officer, her general testimony did not raise "an inescapable inference" that the police had superior knowledge about defendant's involvement in the North Brunswick robbery or any other crime from a non-testifying witness. Id. at 441. Nor did the prosecutor's challenged comments on summation "exploit" or "reinforce" the offending testimony from the officer. Id. at 441-443.

The Appellate Division finally found the State's proofs were less than overwhelming, but nonetheless supported by the bank surveillance video, which captured the robber "in flagrante delicto," and by Hill's reliable identification of defendant in the video. Id. at 443-444. So, while the proofs were not overwhelming, the proofs were not 'weak," either. Id.

In his supplemental brief, defendant argues that the Appellate Division erred by not finding Hill's testimony to be violative under Bankston, claiming that it "reinforced" the offending testimony from Officer Vitelli. (Dsb11). He argues that the State "repeated the drumbeat" on its summation that defendant was "an experienced, knowledgeable, savvy criminal" who robbed the bank in North Brunswick. (Dsb13).

The Appellate Division's affirmance on harmless error grounds does not moot the substantive issue of whether there was a Bankston error. Defendant argues the Appellate Division did not go far enough in finding the "inescapable inference" that Bankston prohibits. And, as the State outlined above, the Appellate Division, made incongruous findings about the trial court's analysis and what "inescapable" under Bankston means. The State submits that for the reasons the Appellate Division discussed in finding harmless error, it should have found no "inescapable inference" that some non-testifying witness had incriminated defendant.

First, finding an abuse of discretion because the trial court focused on 404(b) in addressing the issue of sanitizing the trial testimony reads the record out of context. The trial court discussed the scope of the trial testimony with counsel after he denied the State's 404(b) motion. Defendant objected to the State's proposed line of sanitized testimony because it raised the impermissible inference that defendant was implicated in other crimes. To this extent, defense counsel cited to Bankston as support for sanitizing the trial testimony even more by using the phrase of "information received."

He offered to further brief the matter but did not submit a brief. The thrust of the impermissible inference urged by defendant was him having other charges of robbery lodged against him, and Judge Bucca responded to the arguments made by counsel. The other crimes evidence and the Bankston issue were synonymous here.

So, if defendant preserved his Bankston issue on appeal by citing to it during argument before the trial court and by arguing the "improper inference," which the Appellate Division held, then it is equally true that the trial court properly addressed the Bankston claim raised by defendant. Neither party argued below that defendant's Bankston claim was being raised as plain error under R. 2:10-2. The Appellate Division too quickly found an abuse of discretion, especially considering defendant's arguments in his Appellate Division brief addressed the impermissible inference of him being implicated in other crimes. In fact, the Appellate Division held that the sanitized testimony at trial succeeded in keeping from the jury defendant's complicity in three other bank robberies. Id. at 437. It also should have ruled that no inescapable inference was made defendant had been incriminated from a non-testifying witness since the sanitized testimony, in context, did not lead to the impermissible and "inescapable inference" prohibited by Bankston.

Because defendant objected to the sanitized testimony, the trial court considered defendant's argument and rejected it. When the trial court noted that the inference could be North Brunswick received information "helpful in solving this particular

case," (3T17-24 to 3T18-1), the court was responding to the inference argument advanced by defendant. No one argued that the sanitized testimony would implicate hearsay on the crime at issue because everyone knew that Jennifer Hill would be identifying defendant at trial. The only potential, impermissible inference at issue was implicating defendant in other crimes.

On this score, the sanitized testimony presented at trial did not implicate, either expressly or impliedly, that defendant was incriminated in other crimes by a non-testifying witness. The context of the testimony, including the order of it, is important. Also important is that the jury heard the State's three witnesses in sequence during the span of a one-day trial. To reiterate, Hill, who testified before Officer Vitelli, recounted reading a newspaper article in October 2017 and seeing a photograph after which she contacted law enforcement. When Officer Vitelli testified after Hill, he testified that he was contacted by another law enforcement agency in November 2017 and after he consulted with that agency, defendant was charged with the North Brunswick robbery.

The inescapable inference from the sanitized testimony was that Officer Vitelli was contacted because Hill contacted police. The consultation was over Hill's identification of defendant, which she testified to at trial. The State reinforced this point during its summation when it argued that Hill was the "break" in the case and that submission of the TRAKs bulletin ultimately led to Hill identifying defendant. To the

extent that Officer Vitelli explained to the jury that a TRAKs bulletin is used to gather information, it was a general explanation of why the police prepared and distributed the bulletin. In the context of the trial, the jury would not have come to the "inescapable" inference that some police department consulted with Officer Vitelli about this crime or another crime due to the TRAKs bulletin. The only photographs the jury learned about were the ones taken from the bank video; Hill identified defendant from the still photographs shown to her. Contrary to what the Appellate Division ruled, an inescapable inference must be inevitable, else it is not inescapable. Id. at 431.

The record does not support the Appellate Division's holding that Officer Vitelli's testimony implied that defendant was under investigation by another police department for "an unspecified reason." Id. at 436. No superior knowledge from a non-testifying witness was implicated at trial of another crime. The testimony from both Hill and Officer Vitelli was purposely kept general so the jury would not learn about the other bank robbery charges against defendant. Thus, no details of the newspaper article Hill read was elicited. The name of the police department Hill contacted was not elicited. The same holds true for Officer Vitelli's testimony about being contacted in November 2017 and consulting with another police department.

The Appellate Division analyzed the use of the verb "consult" out of context because the inescapable inference must be seen in the context of the evidence. Hill contacted police after recognizing defendant in a photograph in the newspaper and then

police contacted and consulted with Officer Vitelli one month after she saw the photograph and contacted police. In context, "consult" was about this crime, not some other crime. As this Court held in Medina, possible inferences are not the issue. Medina, 242 N.J. at 217.

Because the record is bereft of any reference, express or implied, that defendant was incriminated by a non-testifying witness, the Appellate Division properly rejected defendant's plain error claim that the State compounded the error during its summation when it argued that the bank robbery had been executed in a "polished" and flawless manner. Id. at 442. The State was permitted to argue that the bank robber executed the robbery in less than sixty seconds and knew enough to leave no evidence behind, such as fingerprints.

The Appellate Division also properly rejected defendant's claim that the State implicated defendant in other crimes when it argued that defendant knew about banks because he told the bank teller he wanted the money from the second drawer. Id. at 443. The knowledge is inferred from what occurred during the robbery, and the knowledge was not in any way linked to defendant being a serial bank robber.

If this Court agrees with the Appellate Division that Officer Vitelli's testimony violated the tenets of Bankston and its progeny, the State submits the Court should uphold the Appellate Division's holding that the error was harmless beyond a reasonable doubt. Id. at 440-445. Contrary to defendant's claim, (Dsb7), the Appellate

Division properly found that the error was fleeting in the context of the trial and did not contribute to the jury's verdict. Id. The improper testimony about consulting with the other, unnamed police department was one answer in testimony that was purposely tailored to avoid alerting the jury to the outstanding robbery charges against defendant. It was not highlighted during the State's summation. The jury heard the identification testimony from Jennifer Hill and the jury saw for itself the bank surveillance video. The Court should hold that if any error occurred with Officer Vitelli's testimony, it was harmless beyond a reasonable doubt.

POINT II

THE APPELLATE DIVISION PROPERLY HELD THAT OFFICER VITELLI'S NARRATION OF THE BANK VIDEO WAS ADMISSIBLE.
(472 N.J. Super. 381, 445-475).

Video evidence has become a staple of criminal prosecutions. There is surveillance video from a crime scene or from a nearby location. It includes video from an officer's body worn camera or from the camera in a police vehicle. It includes video taken with a cell phone. Some videos will have audio; some will not. Some videos will be a clear image; others will be grainy. Some will be in color; some will be in black and white. Wherever on this gamut a video falls, it is helpful for the jury to have an objective narration from a police officer who is familiar from watching it and who can facilitate its presentation to the jury. Such an objective narration is not lay opinion evidence and is not binding on the jury, who ultimately determines the facts in deciding

guilt or innocence. The trial court limited Officer Vitelli mostly to objective and factual narration of the bank video which was helpful to the jury while preserving the jury's function as the ultimate fact finder.

A lay opinion from an officer regarding what is in a video also can be helpful, provided the proper foundation is laid for the lay opinion in compliance with Evidence Rule 701. The sole lay opinion the trial court permitted from the bank video was based on the officer's perception of his body size and that of the person in the bank video. It was proper lay opinion testimony under N.J.R.E. 701. Defendant's belated attack before this Court on the officer's narration of the Krauzer's store video, which was not raised at trial or before the Appellate Division, fails to rise to plain error.

As will be shown below, the trial court recognized that unfettered narration of the bank video evidence could prejudice defendant. Thus, conclusions, or subjective interpretations, of what was captured in the bank video was not permitted. The officer was not permitted to identify defendant as the bank robber. In its Appellate Division brief, the State argued that the factual and objective narration by Officer Vitelli of the bank video was not opinion evidence. (Sb29-Sb37). It argued that the lay opinion regarding body size was proper lay opinion testimony. (Sb37-Sb38).

The Appellate Division below analyzed defendant's challenge to the narration of the bank video as lay opinion testimony under N.J.R.E. 701, however, it questioned up front whether fact versus opinion testimony placed the limited and factual narration

allowed in this case outside the parameters of lay opinion testimony because it was not opinion testimony at all. State v. Watson, 472 N.J. Super. 381, 464 (App. Div. 2022). The Appellate Division juxtaposed "objective description" versus "analytical commentary." Id. The Appellate Division broached an important distinction between factual and opinion testimony in the context of narration of a video. The Appellate Division did not decide the issue. However, as this case demonstrates, narration of a video can be factual and objective in certain respects and it also can be interpretative in other respects within the confines of lay opinion testimony under Evidence Rule 701.

The Appellate Division's observation about this distinction drew upon the Court's opinion in State v. McClean, 205 N.J. 438, 460 (2011), where the Court outlined the "boundary line" between factual testimony and opinion testimony. Factual testimony sets forth what the witness perceived through one or more of the senses while opinion testimony provides what the witness "believed," "thought" or "suspected." Id. It also found insight from the Court's opinion in State v. Singh, 245 N.J. 1, 18 (2021), where the Court discussed "neutral, purely descriptive" video narration as a means of not referring to the person in the video as "defendant."

The objective narration of a surveillance video to help the jury as it views the video in court is analogous to the transcript of a video recorded statement, referred to as a "listening aid," which is provided to the jury when it views a recorded statement in court. State v. DeBellis, 174 N.J. Super. 195, 199 (App. Div. 1980). The jury is

instructed that the transcript is not binding and that it should be disregarded if the jury determines it is inaccurate. Id. In short, the jurors' own perception of the audio controls; the transcript is not admitted into evidence. Id.

Similarly, with crime scene photographs, close-ups of a victim's injuries often are taken so that the nature of the injuries can be highlighted and can assist the jury when the charge is purposeful or knowing murder. See State v. Sanchez, 224 N.J. Super. 231, 249 (App. Div. 1988), certif. denied, 111 N.J. 653 (1988). The State uses the close-up to focus the jury's attention on what it wants the jury to see.

Another analogy is when a witness uses a laser pointer to focus the jury on a particular section of a photograph or a graph that is being displayed on a screen in the courtroom. During Officer Vitelli's testimony about the bank video, it was apparent that he was using "the pointer" to assist the jury. (5T132-17; 5T152-14; 5T156-8 to 9).

The fact-finding function of the jury is not being usurped in these examples of helpful aids. It is no different when a police officer, who investigated the crime and is familiar with surveillance video uncovered in the investigation, provides objective and factual narration when the surveillance video is presented to the jury in court. It helps facilitate the evidence for the jury. It is not lay opinion testimony.

Lay opinion testimony which meets the requirements of Evidence Rule 701 can be relevant when an officer is helping to explain what is in a surveillance video. Such was the case in State v. Singh, 245 N.J. 1 (2021) and in State v. Sanchez, 247 N.J. 450

(2021). In Singh, one of the arresting officers was permitted to opine that the sneakers seen in the convenience store surveillance video looked like the sneakers defendant was wearing when arrested. 245 N.J. at 17-18. In Sanchez, the officer identified defendant from a surveillance video photograph and the Court held that the officer possessed the requisite degree of knowledge under Evidence Rule 701 to make the identification because the officer was defendant's parole officer. 247 N.J. at 469. The Court in Sanchez rejected the argument that to make an identification the witness must have witnessed the crime at issue or have been present when the still photograph or the surveillance video was made. Id. Evidence Rule 701 only requires that a witness gain actual knowledge with the use of his or her senses. Id.

The Appellate Division below cited to other jurisdictions that have admitted police narration of a video, 472 N.J. Super. at 449-450, to find no support for a per se rule prohibiting it, however, there are several unpublished decisions from the Appellate Division that illustrate the distinction between non-opinion narration and opinionated narration. These unpublished opinions are not precedential, R. 1:36-3, however, the State brings them to the Court's attention because the analysis in the opinions informs on the issue before the Court.

In a per curiam opinion from 2019, an appellate panel rejected defendant's challenge to a police officer's narration of a surveillance video by ruling it was not lay opinion testimony. State v. Reevey, 2019 WL 1332846 (App. Div. 2019) (March 25,

2019). The police officer in Reevey "described-without objection-what appeared onscreen." Id. at *3. Defendant challenged the narration of the video as improper lay opinion testimony; the Appellate Division found "no error in the admission of the detective's testimony about what was depicted in the video." Id. at *4. The panel held that the narration was not offered to provide "an eyewitness account" of the crime. Id. The panel held that the narration "was relevant to aid the jury in its understanding of what was depicted, as to which he was familiar from his investigation of the area. Id. As such, it was not lay opinion testimony since the officer did not identify the unnamed persons in the video and did not opine on how the crime occurred. Id.

The Appellate Division in Reevey described the officer's narration as simply describing "what was visible onscreen, which was permissible because his testimony was based on his perceptions of the video and his familiarity with the area." Id. The panel rejected defendant's argument that the officer was offering opinion when he talked about "a shadow" that appeared in the video because the testimony was based on the officer's "perception of what the video revealed, which the jury was simultaneously able to view and judge for itself." Id. at *5.

Two other unpublished decisions from the Appellate Division highlight the distinction between narration that is factual and narration that is opinionated. In State v. White, 2022 WL 3010996 (App. Div. 2022) (July 29, 2022), the panel held that the police officer's narration of a surveillance video crossed the line when the officer

opined that the individuals depicted in the video were exchanging gunfire, when the officer identified the man seen in the video as the same man seen in another video based on clothing and when the officer described flashes as being consistent with those from a gun. Id. at *7. The panel found error with the officer's "subjective testimony" and "subjective conclusions." Id. In State v. Rivera, 2022 WL 16984570 (App. Div. 2022) (November 17, 2022), the appellate panel found error with the police officer's narration because he offered his opinion on the ethnic background of the men in the video, that he saw a "muzzle flash" coming from a handgun by a "heavyset suspect with long hair," and that the "suspects" when crossing the street were looking in the direction of the victims. Id. at *9.[2]

The State submits that the narration of the bank video was mostly limited to factual material that the jury could see for itself when the video was played in court. The officer's narration was done to facilitate the playing of the bank video as the jury saw it. The officer did not proffer an opinion about defendant's guilt from the video. He did not provide narration beyond what the jury could see for itself. There was one lay opinion offered on this video, but it was limited to body size of the suspect

[2] The appendix to the ACLU'S proposed Amicus brief contains other, unpublished opinions where the defendants challenged narration of videos. (AAW2-AAW139). In one of those opinions, the panel found the narration to be proper because the officer did not provide an eyewitness account of the crime, the officer was familiar with the area depicted and his narration was helpful to the jury. (AAW33). In a second opinion, the panel found the narration to have been helpful to the jury and noted the officer did not comment on the crime and did not go beyond the evidence before the jury. (AAW48).

compared to the officer, himself. The State's point is that the narration of the bank video represented a combination of factual narration and lay opinion testimony, all of which was proper.

The Appellate Division's initial query about whether there was any lay opinion testimony at all during the narration of the bank video was well taken in light of the limitations placed upon the testimony by the trial court. Pursuant to the trial court's rulings, Officer Vitelli offered objective and factual material in his narration of the bank video that was not even opinion evidence and the sole lay opinion he did offer was proper under the requirements for lay opinion testimony. It thus is important now to outline what the officer narrated before the jury. The discs of the surveillance videos have been provided to the Court by defendant and are part of the appellate record.

The surveillance video from the bank, marked S-29, was played for the jury. (5T132-15 to 16). Before Officer Vitelli testified, photographs from the bank surveillance video, marked S-1, S-2 and S-3, had already been authenticated by Gambarrotti. (5T9-5 to 16; 5T59-25 to 5T60-5; 5T61-16 to 21).

When the State played the bank video for the jury, the officer testified that "our suspect" could be seen entering the bank. (5T132-17 to 21). Defendant objected to the officer narrating the bank video and Judge Bucca overruled the objection. (5T133-6 to 18). The officer testified that the suspect was wearing gloves, and the officer proceeded to outline that the suspect removed the glove from the right hand, placing the glove into

his left hand and putting his right hand into his jacket. (5T134-16 to 25). Defendant lodged another objection to the narration as being improper lay opinion testimony. (5T135-19 to 22). Again, Judge Bucca overruled the objection. (5T135-23).

The video continued to play for the jury and Officer Vitelli testified that when the suspect was at the teller station, it "appeared" as if he kept his two fingers on the note. (5T135-25 to 5T136-2). When the State elicited from the officer that the suspect was careful not to leave any evidence behind, Judge Bucca sustained defendant's objection to this testimony as a net opinion. (5T136-12 to 5T137-1).

When the State asked the officer what he saw the suspect do on the video, defense counsel objected again. (5T137-3 to 10). At the ensuing sidebar conference, defense counsel argued that the officer was not competent to testify about what he saw on the video because he was not in the bank when the robbery occurred. (5T137-19 to 25). The State argued that it was attempting to elicit factual material by asking what he was observing in a particular video frame. (5T138-8 to 19). Again, Judge Bucca sustained defendant's objection. (5T138-24).

When the officer's testimony resumed, Judge Bucca instructed him that the court did not want his conclusions but his "factual observations." (5T139-5 to 11). The officer continued to testify and outlined that the suspect had something in his hand, "whether it was money or the note he passed to the teller." (5T139-12 to 15). The officer testified that it appeared as if the left hand was on the door of the bank "or in the

area of the door." (5T139-17 to 20). The officer testified that when the suspect left the bank, "it look[ed] like he[was] using his elbow" to open the door. (5T139-22 to 5T140-8). Once the suspect got to the parking lot, he "appear[ed]" to run. (5T140-18 to 21). The officer testified that the suspect headed toward Route 130 South. (5T140-23 to 5T141-1).

The State showed to Officer Vitelli still photographs marked S-1, S-2 and S-3, and the officer testified to what was depicted in them. (5T142-10 to 5T143-15). The officer was also shown still photographs from the bank video, marked S-30, S-31 and S-31, and the officer explained what the suspect was wearing. (5T144-5 to 18). When the State asked the officer if Gambarrotti's description of the suspect was consistent with the image on the bank video, defendant objected. (5T144-19 to 5T145-5). Judge Bucca excused the jury for its lunch break. (5T146-4).

After the jury left the courtroom, the judge heard argument from counsel. Defendant argued that the State's question was eliciting improper lay opinion testimony and was improperly attempting to bolster Gambarrotti's testimony. (5T146-7 to 24). The State countered that its questions were not aimed at having the officer testify that Gambarrotti was credible but was attempting to show that the investigation was focused on the right suspect. (5T146-25 to 5T147-6).

Judge Bucca held that no foundation had been laid for the officer to testify that the man depicted in the surveillance video comported with Gambarrotti's description of

the robber. (5T147-7 to 17). The judge held that if the State could lay a foundation for the officer to opine that the video depicted a well-built African American man, the court would permit the testimony. (5T147-18 to 21). The judge sustained defendant's objection and ruled the State could rephrase its question. (5T147-23 to 25).

When the officer's testimony resumed, the State elicited that Gambarrotti provided a description of the robber when he gave his statement in January 2017. (5T149-5 to 11). The State then asked the officer if, after obtaining the bank surveillance video, he had been able to make any observations about the suspect's physical characteristics. (5T149-19 to 21). The officer testified that the suspect in the video was dark-skinned and, compared to the officer's height and size, was well-built and taller than he was. (5T149-22 to 5T150-5).

After playing the surveillance video from the bank, the State played for the jury the surveillance video obtained from the Krauzer's convenience store. (5T150-17 to 21; 5T152-5 to 7). The video, marked S-34, was played for the jury, and when the State stopped the video, the officer would explain what was depicted; the officer testified that it showed someone walking down Wood Avenue toward Route 130 and toward the bank and then what "appears" to be the same person retracing his steps about two minutes later. (5T153-19 to 5T154-17). He described the individual's gait in the later clip to be either running or jogging or walking at an "expedited pace." (5T154-18 to 21). He commented that it was sometimes hard with video cameras to tell if

someone is running or walking due to videos getting "pixelated." (5T154-23 to 24). Using two still photographs from the video, S-36 and S-37, and the officer testified S-36 showed an individual walking in front of the white-faced building in the direction of the bank; he identified S-37 as depicting the "same individual" walking back. (5T155-20 to 5T156-7). An aerial photograph, S-35, was used to have the officer identify the Krauzer's store, the camera angle and how the direction of the man in the video would be from the store to the bank. (5T155-1 to 6; 5T156-11 to 5T158-10).

Unlike the bank video, defendant lodged no objection at trial to the officer's testimony about the Krauzer's video. Nor did defendant lodge an objection to the officer's testimony about this video before the Appellate Division. Watson, 472 N.J. Super. at 448. (Db21-Db33). Before this Court, defendant belatedly argues that the narration of the Krauzer's video also was improper. (Dsb32).

The officer's narration of the suspect entering the bank, removing his glove, placing it in his left hand, placing his right hand down either in his pocket or by his waist, using his left hand to push the note to the teller, using his elbow to open the door on the way out should not be viewed as lay opinion testimony. The officer was simply aiding the jury when the video was played for the jury, just as the officer did in the unpublished Reevey case. The officer was describing objectively what he was seeing on the screen as the jury watched along with him. He did not attempt to force his narration of events onto the jury, since he often qualified his description of what the

video showed with, "it appears." The only opinion he was permitted to offer was his opinion comparing the build of the suspect in the bank video to himself. He was not permitted to opine that the man in the bank video matched the description given by Gambarrotti. The trial court recognized the potential for prejudice so conclusions, or subjective interpretations, were not permitted.

The officer's unchallenged narration of what was depicted in the Krauzer's video was based on the officer's review of the video and his familiarity with the area from being a North Brunswick police officer. He offered lay opinion on the layout of the store in relation to the bank and the possible route the person in the video took, however, his lay opinion was based on his personal knowledge, and it was helpful to the jury. To the extent he testified that the person seen in the video appeared to be the same person retracing his steps, he was basing this lay opinion on his viewing of the videos and what the person is seen wearing. He did not testify that it was defendant in the video. Defendant lodged no objection to the officer's testimony about this portion of the video, so his current claim of error and prejudice stands in stark contrast to his silence at trial and before the Appellate Division.

The officer's lay opinion from the bank video regarding the suspect's build as compared to his own was proper under Evidence Rule 701. The officer had personal knowledge gained from watching the bank video because he used his senses to gain this knowledge. The officer was not required to have been at the crime when it occurred to

be able to gain personal knowledge. Defendant, Amicus ACLU, who relies on the arguments made to the Court in the pending case of State v. Dante Allen, and Amicus ACDL urge a narrow a view on what is required for personal knowledge under Evidence Rule 701, especially considering the Court's ruling in Sanchez that a lay witness need not be at the crime scene or be present when a video was made to gain personal knowledge. Thus, the Appellate Division properly held an officer gains personal knowledge of what is in a video by watching it before trial. 472 N.J. Super. at 463.

The officer's lay opinion was helpful to the jury as Evidence Rule 701 requires because it gave the jury a basis for comparison on the physical build of the suspect in the bank video. Identification was the key issue for the jury. The fact that the jury could view the bank video and compare it to defendant's build does not mean the officer's opinion was not helpful. State v. Singh, 245 N.J. at 20. The ultimate decision on guilt was left for the jury to make.

The same holds true for Officer Vitelli's unchallenged narration of the Krauzer's video. The officer's narration of what was depicted in the Krauzer's video was based on the officer's review of the video and his familiarity with the area from being a North Brunswick police officer. He offered lay opinion on the layout of the store in relation to the bank, the possible route the person in the video took and it appearing to be the same person from the bank video, however, his lay opinion was based on his personal

knowledge, and it was helpful to the jury so the prerequisites of Evidence Rule 701 for the admission of his lay opinion testimony was met. It is defendant's burden to show "the high bar" of plain error when he failed to object to evidence at trial, and he has failed to do so before this Court. State v. Santamaria, 236 N.J. 390, 404 (2019).

The jury knew from the trial court's final charge that it was the sole judge of the facts and of witness credibility. (6T4-6 to 13). The jury was instructed that evidence stricken by the court could not be considered during deliberations. (6T66-2 to 6).[3] The jury was told to rely solely on its understanding and recollection of the evidence. (6T64-20 to 23). When the jury asked during its deliberations for a replay of the bank video, the court replayed it for the jury in the courtroom. (6T101-13 to 23). Only the bank video was replayed for the jury. The testimony provided by the officer during trial was not part of the replay. As the Appellate Division held, the jury relied on its viewing of the video to conclude that defendant was guilty of the robbery, not the officer's narration. Watson, 472 N.J. Super. at 471. Thus, even if the trial court had abused its discretion with the amount of narration permitted, it was not sufficient to raise doubt the jury was led to a result it might not otherwise have reached. Id.

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[3] Defendant faults the trial court for not issuing a curative instruction after sustaining the objection to the officer testifying the suspect was careful not to leave evidence behind. (Dsb32, n.9). Defendant did not request a curative instruction, but the trial court's final charge protected defendant from the jury considering any testimony that was stricken by the court. Santamaria, 236 N.J. at 412-413 (jurors presumed to follow court's instructions).

To the extent the Appellate Division outlined for future cases the parameters of a Rule 104 hearing on the scope and content of video narration, 472 N.J. Super. 466-475, the State concurs with the arguments of the New Jersey Attorney General in his proposed Amicus brief that the Appellate Division's suggested practice is in the best interests of the parties and the orderly presentation of evidence.

The Appellate Division's proposal of a Rule 104 hearing on the scope and content of video narration addresses the concern raised by defendant, the ACLU and the ACDL about the unlimited use of police narration of video evidence. Under the paradigm outlined by the Appellate Division, the trial court will act as the "gatekeeper" for such testimony, and will consider the State's proffer utilizing the criteria identified in the Appellate Division's opinion, which includes background content, neural narration, the extent to which the officer may infer and deduce from the video, which addresses the distinction between neutral narration versus lay opinion, and the clarity or lack of clarity to the video evidence. Watson, 472 N.J. Super. at 466-472.

Contrary to the claim argued by defendant and Amici, the Appellate Division did not rule that all police narration of video evidence was admissible. It ruled that there was no support for a per se rule of exclusion, a ruling that this Court should uphold. Id. at 459. The Appellate Division held that each case must be evaluated on its facts, "question-by-question," leaving the scope of the testimony to the sound discretion of the trial court. Id. at 445, 459. The Appellate Division properly found that there was no

abuse of discretion in the officer's narration about the bank video, which was the only claim of error made by defendant on appeal and that even if there was error, it was harmless. Id. at 470-471. The ruling of the Appellate Division should be upheld.

POINT III

DEFENDANT'S INVITATION TO PRECLUDE FIRST-TIME, IN-COURT IDENTIFICATIONS SHOULD BE REJECTED AS CROSS-EXAMINATION AND APPROPIATE JURY INSTRUCTIONS PROTECT DEFENDANT'S RIGHT TO A FAIR TRIAL. (472 N.J. Super. 381, 475-506).

Before the Appellate Division, defendant raised, for the first time on appeal, a wholesale attack against in-court identifications that had been rejected by the Appellate Division in State v. Guerino, 464 N.J. Super. 589 (App. Div. 2020), which was that first-time, in-court identifications should be prohibited because they are the product of impermissibly and inherently suggestive circumstances. (Db33-Db46). Defendant argued in the alternative that tailored instructions should be provided to the jury, even though he never asked the trial court to provide instruction that went beyond the model jury charge on identification, which the trial court charged to the jury.

The Appellate Division rejected defendant's argument for a per se rule of exclusion and held that cross-examination and appropriate jury instructions protect defendant's right to a fair trial. The State submits that the invitation to change long-established practice regarding the elicitation of an in-court identification before the jury should be rejected by this Court, as well. The role of cross-examination and argument

protected defendant's right to a fair trial. There was no plain error here with the in-court identification or with the trial court's instructions to the jury on identification.

The issue of admitting a first-time, in-court identification does not come to this Court on a blank slate. In State v. Clausell, 121 N.J. 298 (1990), defendant challenged the in-court identification made of him by a witness, who had been unable to identify him before trial in a photographic array. 121 N.J. at 327. Defendant argued that the in-court identification should have been disallowed because the identification relied upon "influences" other than her observations during the crime. Id. This Court held that the witness's in-court identification was "constitutionally valid." Id. This Court noted that while the reliability of the in-court identification was "undercut" by the long delay between the crime and trial and that the "courtroom atmosphere was suggestive," these factors did not weigh in favor of suppression, because there were indicia of reliability to the witness's identification, which included her "ample opportunity" to view the assailants and defense counsel's "ample chance" to challenge the identification on cross-examination. Id. at 327-328. And the jury was free to discredit the in-court identification due to the inability to identify anyone before trial. Id.

In Guerino, defendant urged the suppression of all in-court identifications based upon the Court's ruling in State v. Henderson, 208 N.J. 208 (2011). 464 N.J. Super. at 605-606. In Henderson, the Court "significantly revised the analytical framework" for evaluating the admissibility of eyewitness identifications. Id. at 604, citing Henderson,

208 N.J. at 218. The Court in Henderson articulated a four-part analysis for trial courts to apply in deciding whether to grant a pre-trial hearing and, if one was granted, whether to admit or suppress an out-of-court identification made from a police identification procedure. Henderson, 208 N.J. at 288-289. To aid in assessing the reliability of an identification, the Court in Henderson outlined a non-exhaustive list of circumstances that are within the control of law enforcement, called "system variables," and those that are not within the control of law enforcement, called "estimator variables." Id.

Defendant in Guerino argued that the system variables discussed in Henderson applied to in-court identifications and that the traditional practice of having a witness identify defendant in court before the jury no longer comported with the legal landscape after Henderson. Guerino, 464 N.J. Super. at 605-606. The Appellate Division declined to "cast aside a familiar courtroom practice" that had been in use for generations. Id. at 606. The panel noted that Henderson did not eliminate in-court identifications. Id. Precedent held that in-court identifications are made on a case-by-case basis. Id. The panel acknowledged that Henderson showed the evolving nature of scientific research on human memory and the reliability of eyewitness identification, so the "familiar practice of having a trial witness point to the defendant sitting at counsel table" was not a "talisman carved in stone." Id. But the panel held it did not have "the evidential foundation" to grant the "fundamental change" defendant sought, which was

unlike Henderson where a special master appointed by this Court wrote an exhaustive report. Id.[4]

The evidential basis lacking in Guerino is lacking in this case, as well. Defendant lodged no objection to Gambarotti's in-court identification. Nor did he lodge an objection to Gambarrotti's testimony about the out-of-court identification. Rather than involve the trial court and the State in a pre-trial hearing on the reliability of in-court identifications to effectuate a "fundamental change" in long standing courtroom practice, defendant relied on traditional means of attacking the State's evidence, which was cross-examination and argument to the jury. See Watson, 472 N.J. Super. at 468 (cross-examination is the "greatest legal engine" for discovering the truth) (citations omitted).

Thus, the jury learned about the out-of-court identification when Gambarrotti did not select defendant's photograph. It also learned through defense counsel's cross-examination that he had been told before trial that defendant would be seated in the courtroom at counsel table, which undercut the in-court identification. During summation, defense counsel argued that this was a case of mistaken identity. (5T27-2 to 8). Counsel argued that Gambarrotti selected a photograph from the array, but it was

[4] On March 2, 2022, the Appellate Division, in an unpublished decision, rejected a challenge to in-court identifications as being inconsistent with Henderson by relying on Clausell and Guerino. State v. Thompson, 2022 WL 610326 **14-17 (App. Div. 2022).

not defendant. (6T27-24 to 6T28-2). Counsel stressed that even when in court and asked to make an identification, Gambarrotti was not certain about it. (6T28-7 to 14). Counsel urged the jury to give more weight to the out-of-court identification than to the in-court identification. (6T30-22 to 25). Counsel also highlighted that Gambarrotti and defendant were of different races and this impacted the reliability of any identification. (6T31-12 to 14).

In addition to defense counsel's use of cross-examination and argument to persuade the jury that Gambarrotti's in court identification was worth no weight, the trial court, in relevant part, instructed the jury on the State's burden to prove defendant's identity as the perpetrator beyond a reasonable doubt. (6T70-18 to 6T71-15). The judge also provided the jury with instructions on in-court and out-of-court identifications in conformance with the Model Jury Charge on identification. (6T71-16 to 6T82-24). Thus, the jury was instructed that eyewitness identification evidence had to be reviewed "carefully" and that human memory was "not foolproof." (6T72-23 to 6T73-6).

In accordance with the model jury charge, the trial court further instructed the jury on the specific factors it had to consider in determining whether eyewitness identification evidence was reliable, including the opportunity to view and the degree of attention, the level of stress, the amount of time for observation, the distance involved between the eyewitness and the perpetrator, the lighting conditions, the use of a disguise

or an altered appearance, the accuracy of a prior description, the witness' degree of accuracy and confidence, the amount of time that had elapsed since the crime and the identification and the impact of cross-racial effects on identifications. (6T74-25 to 6T79-1).

Because both Gambarrotti and Hill had been shown one or more photographs by the police, Judge Bucca's instruction also included that portion from the model jury charge on the criteria for evaluating the circumstances of an out-of-court identification, which included consideration of the line-up composition, the number of choices, whether there were multiple viewings and whether the identification procedure was properly conducted. (6T79-2 to 6T81-11). The judge instructed the jury that Gambarrotti selected another photograph of an individual when shown a photographic array and when he identified defendant in court, he was only 80 to 85 percent sure of his identification. (6T72-2 to 10). The jury was instructed that its function was to determine the reliability of the identification. (6T72-16 to 212). Defendant lodged no objection to the trial court's instructions. (6T97-2 to 6).

The Appellate Division in this case, after outlining Henderson and precedent from other jurisdictions, held that the system variables which can affect the reliability of an identification are not limited to the police, but can include those that result from the conduct of private actors and those that arise from the trial process itself. Watson, 472 N.J. Super. at 501. Nonetheless, the Appellate Division found that defendant had not

presented "sufficient grounds" to establish a "new bright-line rule" to invoke the extreme sanction of excluding first-time, in-court identifications. Id. The panel held that such a per se rule would violate this Court's avoidance of bright-line rules to determine the admissibility of identification evidence. Id. And the Appellate Division held that the per se rule advanced by defendant contravened the general policy of leaving for the jury the decision on the weight to give to the evidence. Id. Thus, the Appellate Division held that each case must be addressed on a case-by-case basis by means of cross-examination and jury instructions. Id. at 502. Accord State v. Burney, 471 N.J. Super. 297, 327-329 (App. Div. 2022), certif. granted, 252 N.J. 134 (2022).

Analyzing the safeguards afforded defendant at trial, the Appellate Division held that defense counsel conducted an "effective" cross-examination of Gambarrotti which emphasized him not selecting defendant's photograph from the array and him being told before trial that defendant would be in the courtroom. Id. The Appellate Division found no plain error with the trial court's instructions to the jury, which followed the model jury charge on identification evidence. Id. at 502-503. The Appellate Division held that in the absence of a specific request from defendant, the trial court was under no obligation revise, sua sponte, the model charge drafted in compliance with Henderson. Id. at 503.

This Court should reject defendant's arguments in support of a per se rule deeming in-court identifications inadmissible. The arguments of defendant, the ACLU,

who relies on the arguments made to the Court in Burney, and the Innocence Project argue that in-court identifications should be prohibited because defendant is seated at counsel table and this show-up is too suggestive to be reliable. In Clausell, this Court noted the inherent suggestiveness of an in-court identification, however, this undisputed fact did not support suppression of the identification because the witness had been able to view her assailants and because defendant had the ability to cross-examine the witness. This Court held in Clausell held that the safeguards present at trial protect defendants from a mistaken identification made for the first time at trial.

A decision from the Supreme Court of Colorado, cited by the panel below, 472 N.J. Super. at 492, similarly rejected the contention that in-court identifications are impermissibly suggestive and thus inadmissible simply because of the ordinary trial setting. Garner v. People, 436 P.3d 1107, 1120 (Colo. 2019). See also United States v. Recendiz, 557 F.3d 511, 525 (7th Cir.), cert. denied, 558 U.S. 881 (2009). The United States Supreme Court has also observed that "all in-court identifications" involve suggestion. Perry v. New Hampshire, 565 U.S. 228, 244 (2012).

The reliance by defendant below on State v. Dickson, 322 Conn. 410, 141 A.3d 810 (2016) and Commonwealth v. Crayton, 21 N.E.3d 157 (Mass. 2014), (Db35), was misplaced. The Appellate Division was bound by precedent established by this Court. State v. Steffanelli, 133 N.J. Super. 512, 514 (App. Div. 1975). Clausell upheld the admission of an in-court identification made for the first time. In Henderson, the Court

did not bar the use of in-court identifications. The Appellate Division in Guerino, interpreting the law in this state, declined to adopt a per se rule of exclusion for in-court identifications. The Appellate Division's rejection in this case of a per se ban on in-court identifications was in accord with New Jersey precedent.

In any event, as the Appellate Division below noted, the court in Dickson called for the "prescreening" of a first-time, in-court identification, not for its automatic suppression. Watson, 472 N.J. Super. at 490. In Crayton, an in-court identification is admissible if there is a "good reason" for its admission, which again is not a wholesale suppression. 21 N.E.3d at 166. The Crayton and Dickson cases have been characterized as "outliers." State v. Doolin, 942 N.W.2d 500, 515 (Iowa 2020), cited in Watson, 472 N.J. Super. at 491. They are contrary to the great weight of authority that permit first-time, in-court identifications. Walker v. Commomwealth, 74 Va. App. 475, 503-504, 870 S.E.2d 328, 342 (2022) (cases cited therein).

It simply goes too far for defendant, the ACLU and The Innocence Project to argue that because an in-court identification is inherently suggestive, a jury should never hear and see it. See Clausell, 121 N.J. at 328 (noting advantage of jury observing witness making identification in court). There are too many nuances with an identification to bar all in-court identification. The witness may not have had a good opportunity to view in the out-of-court identification but was able to make an identification based upon seeing defendant in court, such as recalling some physical

characteristic not reflected in the out-of-court identification. Such a situation would be precluded under defendant's argument. See Garner, 436 P.3d at 1119 (there are 'legitimate reasons" why a witness might be better able to identify defendant at trial). The jury is well-equipped to weigh identification evidence. It is the jury's the traditional role to determine the credibility and weight of the evidence. Perry, 565 U.S. at 245. Cross-examination exposes weaknesses with the evidence and the arguments of counsel can highlight them to the jury. The State's high burden to prove guilt beyond a reasonable doubt protects defendant from conviction based on dubious identification evidence. Id. at 247.

Gambarrotti viewed the bank robber during the crime and even though he had not selected defendant's photograph from the array, he was not certain of his selection and it was not improper to ask him at trial if he could identify the bank robber. Gambarrotti made his identification in court, which was not given by him with full certainty, and it was effectively neutralized when defense counsel elicited that he had been told before trial that defendant would be in court. As this Court held in Henderson, categorical, "bright line" rules requiring suppression whenever the police use a suggestive procedure is to be avoided. 208 N.J. at 303. The same holding should obtain here with in-court identifications.

Defendant has a high burden to show plain error with the identification testimony and the trial court's instructions. Plain error is error that was clearly capable

of producing an unjust result and it is defendant's burden to show it happened. R. 2:10-2; State v. Morton, 155 N.J. 383, 421 (1998). Plain error is a "high bar," State v. Santamaria, 236 N.J. 390, 404 (2019), and it requires defendant to show error which raises a reasonable doubt the jury reached a verdict it might not otherwise have reached. State v. Singh, 245 N.J. 1, 13 (2021). Defendant has not sustained his burden of demonstrating that plain error occurred at his trial. The Appellate Division's affirmance should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the State urges this Court to uphold the Appellate Division's affirmance of defendant's robbery conviction.

Respectfully submitted,

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