

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3699-23
INDICTMENT NO. 22-02-00057-I

STATE OF NEW JERSEY, : CRIMINAL ACTION

Plaintiff-Respondent, : On Appeal from a Judgment of
v. : Conviction of the Superior Court
SHADON M. MCDOWELL, : of New Jersey, Law Division, Warren
Defendant-Appellant. : County.
: Sat Below:
: Hon. H. Matthew Curry, J.S.C.,
and a jury

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

In State v. Watson, the New Jersey Supreme Court held that a first-time in-court identification, due to its highly suggestive nature, can only be admitted at trial when (1) the State had moved in limine to admit it, giving the defendant adequate notice, and (2) the court has found a specific “good reason” to allow it. 254 N.J. 558, 587-88 (2023).

Five months after Watson was decided, Shadon McDowell was tried for his alleged participation in two controlled drug buys. The buyer did not identify the dealer at trial; he was never asked if he had seen Mr. McDowell before trial. But three police officers, who witnessed the controlled buys from a distance, each took the stand and identified Mr. McDowell as the dealer for the first time. The State made no motion. The court found no “good reasons.” Each of these first-time in-court identifications was reversible error.

Compounding the identification errors at trial, the judge failed to instruct the jury on how to assess the reliability of identification testimony. This amounts to separate reversible error.

In addition, during the lead detective’s testimony, he suggested to the jury that Mr. McDowell is a violent person -- despite the fact that Mr. McDowell was charged with non-violent crimes. The detective implied to the jury that there was

information that he, and the State, knew about Mr. McDowell's violent nature or past to which the jury was not privy. This was independent reversible error.

Each of these errors -- the three first-time in-court identifications, the failure to instruct the jury on the identifications, and the detective's insinuation that Mr. McDowell is violent -- amount to reversible error standing alone, but also are cumulative error when considered in combination.

Lastly, Mr. McDowell's sentence is riddled with legal errors and must be vacated.

PROCEDURAL HISTORY

On February 2, 2022, Warren County Indictment No. 22-02-00057-I charged Defendant-Appellant Shadon M. McDowell with two counts of third-degree distribution of heroin under N.J.S.A. 2C:35-5(a)(1) and two counts of second-degree distribution of heroin within 500 feet of a public park under N.J.S.A. 2C:35-7.1(a). (Da1-4)¹

¹ The following abbreviations will be used:
Da – Defendant-Appellant's Appendix
1T – December 1, 2023 (Pretrial Conference)
2T – January 8, 2024 (Pretrial Conference)
3T – January 10, 2024 (Trial)
4T – January 11, 2024 (Trial)
5T – June 14, 2024 (Sentencing)

Mr. McDowell was tried before the Honorable H. Matthew Curry, J.S.C., and a jury on January 10 and 11, 2024 and found guilty on all counts. (3T to 4T; Da5)

On June 25, 2024, Judge Curry granted the State's motion for an extended term. (Da6) On each of the first two counts, the judge sentenced Mr. McDowell to extended terms of six years' incarceration with three years of parole ineligibility. (Da7) On each of the second two counts, the judge sentenced Mr. McDowell to extended terms of twelve years' incarceration with five years of parole ineligibility. Ibid. The sentences run concurrently. Ibid.²

Mr. McDowell filed a notice of appeal on July 26, 2024. (Da11-13)

STATEMENT OF FACTS

The State's case centered around two controlled buys³ that allegedly occurred in a Phillipsburg park on two days in June 2021. (3T:29-7 to 30-3) At trial, the State presented four witnesses: three police officers who coordinated or witnessed the controlled buys, and the cooperating witness who bought the drugs.

² The court also imposed a concurrent five-year term of incarceration on Warren County Indictment No. 23-10-481, which is not a part of this appeal. (5T:15-15 to 19-14)

³ In a controlled buy, officers give a cooperating witness or undercover officer money, the witness or officer uses the money to purchase drugs, and then the witness or undercover officer returns and turns over the drugs they purchased. (3T:27-18 to 28-4)

The cooperating witness, Ryan Hnasko, could not remember who sold him the drugs on either day, and he was never asked to identify Mr. McDowell. (3T:83-16 to 18, 96-4 to 10) But all three officers, for the first time at trial, identified Mr. McDowell as the dealer. (3T:28-8 to 25, 68-22 to 69-7, 71-12 to 21, 110-9 to 21)

The Officers' Testimony

Phillipsburg Detective Brett Marino was the lead detective who arranged the controlled buys. (3T:29-7 to 20, 42-3 to 10) The detective explained how, on both days, he “met up” with Mr. Hnasko, who made a phone call to coordinate the purchase of heroin in a nearby park. (3T:29-21 to 30-3) Each time, Detective Marino gave Mr. Hnasko specially marked money and a recording device, and he sent Mr. Hnasko to meet the dealer at the park; when Mr. Hnasko returned, the money was gone and he possessed heroin.⁴ (3T:31-21 to 32-21, 33-10 to 34-24)

Detective Marino was the first to identify Mr. McDowell as the dealer Mr. Hnasko met in the park -- the first of three first-time in-court identifications:

[PROSECUTOR]: Are you familiar with an investigation into the defendant, Shadon McDowell?

DETECTIVE MARINO: Yes, I am.

Q: How did that investigation start?

A: We were advised by a confidential witness actually, that somebody was selling drugs by the name of Big Rob, out of 274 Mercer Street.

⁴ It is undisputed that the substance found in Mr. Hnasko's possession after the controlled buys was heroin. (3T:38-16 to 25, 39-20 to 40-9)

Q And were you able to identify who Big Rob is?

A: Yes.

Q: Who's Big Rob?

A: Shadon McDowell, the –

Q: Is he in -- is he in court?

A: He is, right over here in the light blue shirt with the blue tie.

THE COURT: Let the record reflect that the witness has identified the defendant sitting at counsel table.

[(3T:28-8 to 25)]

Nobody inquired how Detective Marino knew that “Big Rob” was Mr. McDowell, and the detective provided no further basis for the identification. Notably, Detective Marino did not witness either controlled buy. (3T:50-1 to 2, 51-10 to 12) However, he testified that, from his vantage point in a car, he could see Mr. McDowell leave 274 Mercer Street some time before the first meeting. (3T:32-22 to 33-1, 51-5 to 6) It was never established how far away the detective was from the residence at the time. The court gave the jury no instruction regarding how to assess this first-time in-court identification.

Detective Marino acknowledged that the audio recordings, taken with the device on Mr. Hnasko's person, corroborated nothing. One recording contained “just footsteps,” and on another recording an unidentified person said “hello”; the

rest of the recordings were inaudible. (3T:43-25 to 49-3) The officers took no photographs or videos of the controlled buys. (3T:77-16 to 78-16, 115-11 to 15)

Hackettstown Sergeant Joseph Cecere was the second officer to identify Mr. McDowell at trial. During the controlled buys, Sergeant Cecere's role was "[s]urveillance" and "to strictly observe the transaction[s]." (3T:68-14 to 18) Both days, the sergeant was stationed in a car in a parking lot across the street from the park, roughly 62 feet away. (3T:72-19 to 73-15, 75-21 to 76-22, 105-20 to 106-2) Sergeant Cecere identified Mr. McDowell as the person he saw participate in two "transaction[s]" in the park:

[PROSECUTOR]: And did you observe a transaction involving Mr. McDowell?

SERGEANT CECERE: Yes Sir, I did.

Q: Is Mr. McDowell present in court?

A: Yes Sir.

Q: Where is he seated?

A: At the defense table.

Q: I'm going to show you –

THE COURT: Let the record reflect that the witness identified the defendant sitting at defense counsel table. Thank you.

[(3T:68-22 to 69-7, 71-12 to 21)]

The court gave no instruction to the jury regarding this second first-time in-court identification.

Officer Teddy Garcia was the third officer to identify Mr. McDowell at trial. Officer Garcia was only present for the first controlled buy and was stationed in a car about 30 to 40 yards -- or 90 to 120 feet -- away. (3T:109-20 to 21, 111-4 to 5)

He testified as follows:

[PROSECUTOR]: Could you see what Mr. Hnasko ultimately did?

OFFICER GARCIA: Yes.

Q: What did he do?

A: He met with Shadon McDowell, an exchange happened and then they parted ways.

Q: When you say Shadon McDowell, is that person in court right now?

A: Yes, he's sitting right there.

THE COURT: Let the record reflect that the witness identified the defendant sitting at counsel table.

[(3T:110-9 to 21)]

The court gave no instruction to the jury regarding this third first-time in-court identification.

Mr. McDowell was arrested at 274 Mercer Street on July 9, 2021 – over a week after the second controlled buy. (3T:49-19 to 21, 54-3 to 13) Detective

Marino was present at the arrest, but Sergeant Cecere was not.⁵ (3T:54-17 to 22, 79-10 to 11) The arresting officers found no drugs on Mr. McDowell's person or anywhere in the house. (3T:54-20 to 24, 55-24 to 25) Although Detective Marino conceded it would have been "typical" for a drug dealer to have drug paraphernalia, such as baking soda, packaging agents, plastic baggies, wax folds, or scales, the arresting officers found no drug paraphernalia on Mr. McDowell's person or anywhere in the house. (3T:56-1 to 19) They also never recovered the specially marked money that Detective Marino gave Mr. Hnasko to use to purchase the heroin. (3T:55-2 to 19)

When asked by the prosecutor about the delay between the controlled buys and Mr. McDowell's arrest, Detective Marino testified that such a delay is "[v]ery common," because "we're -- pending charges to hope that they will cooperate with us to get somebody, a -- a larger drug dealer, maybe somebody a little more violent." (3T:64-1 to 8)

Ryan Hnasko's Testimony

Ryan Hnasko described how he got in contact with Detective Marino to participate in the controlled buys. Mr. Hnasko was arrested on unrelated drug charges and brought to the police station; while he was in custody, officers approached Mr. Hnasko and "[j]ust told [him] to call somebody and buy some

⁵ It was never established whether Officer Garcia was present for the arrest.

dope.” (3T:84-11, 91-17 to 92-21) Mr. Hnasko testified that, in exchange, the officers promised to drop the charges against him. (3T:89-3 to 7) Although Detective Marino testified that the officers promised Mr. Hnasko nothing in exchange for his participation, (3T:56-23 to 57-17), the charges were in fact dismissed after the controlled buys. (3T:93-16 to 24)

Ryan Hnasko testified that he had been addicted to heroin for fifteen years at the time of trial, and that his drug use affected his memory. (3T:91-5 to 16, 98-2 to 14) When asked about the details of the controlled buys, Mr. Hnasko testified: “I’m sure it happened, it’s two and a half years ago and I was a mess back then, but yeah.” (3T:85-24 to 25) Mr. Hnasko could not remember where the controlled buys took place. (3T:96-17 to 98-17) When asked point-blank by the prosecutor whether he remembered who he was asked to purchase heroin from, Mr. Hnasko replied, “No.” (3T:83-16 to 18) Mr. Hnasko testified that, during the controlled buys, he bought drugs from someone named “Big Rob,” but the prosecutor never asked if Mr. McDowell was Big Rob. (3T:96-4 to 10) Mr. Hnasko was also never asked whether Mr. McDowell had ever dealt him drugs, or whether he had ever seen Mr. McDowell before trial.

Jury Charge

The court did not give the jury any instruction regarding the identifications or how to assess their reliability -- not when the three witnesses identified Mr.

McDowel during trial, and not when it gave the general charge at the conclusion of the trial.

LEGAL ARGUMENT

In its landmark holding in State v. Henderson, the New Jersey Supreme Court held that “courts must carefully consider identification evidence before it is admitted to weed out unreliable identifications, and [] juries must receive thorough instructions tailored to the facts of the case to be able to evaluate the identification evidence they hear.” 208 N.J. 208, 302 (2011). At Mr. McDowell’s trial, the court failed to abide by either of Henderson’s core protections, which apply to first-time in-court identifications under State v. Watson, 254 N.J. 558 (2023).

POINT I

MR. MCDOWELL WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT PERMITTED THE STATE TO ELICIT THREE FIRST-TIME IN-COURT IDENTIFICATIONS IN DIRECT CONTRAVENTION OF THE PROCEDURES MANDATED BY STATE v. WATSON, 254 N.J. 558 (2023). (Not Raised Below)

A. The State Solicited Three First-Time In-Court Identifications Without First Moving In Limine to Introduce Them and Without a Hearing to Assess Their Reliability.

“Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country.” State v. Delgado, 188 N.J. 48, 60 (2006).

“Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work.” Henderson, 208 N.J. at 231 (quoting Int’l Ass’n of Chiefs of Police, Training Key No. 600, Eyewitness Identification 5 (2006)). “It is the likelihood of misidentification which violates a defendant’s right to due process.” State v. Washington, 256 N.J. 136, 151 (2024) (quoting Neil v. Biggers, 409 U.S. 188, 198 (1972)).

Here, the State solicited three first-time in-court identifications at trial. The Watson Court defined “first-time in-court identifications” as all “in-court identifications that are not preceded by a successful out-of-court identification.” 254 N.J. at 579 n.1. “Settled case law, scientific studies, and common sense underscore the problems with first-time in-court identifications.” Id. at 579. First, “an in-court identification is essentially a live, single-person line-up in a courtroom. It is comparable to a showup⁶ but is conducted well after the crime has taken place.” Id. at 579. A showup is “inherently suggestive . . . because the victim can only choose from one person’ who is generally in police custody.” Ibid. (quoting State v. Herrera, 187 N.J. 493, 504 (2006)); Washington, 256 N.J. at 154. Showups “present a heightened risk of misidentification” when “conducted more than two hours after an event.” Henderson, 208 N.J. at 261. “In-court

⁶ “Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission.” Henderson, 208 N.J. at 259.

identifications at trial, of course, invariably occur months if not years after the crime was committed.” Watson, 254 N.J. at 581.

Second, “in-court identifications are ‘extremely suggestive’ when ‘the only person sitting at the defense table who reasonably could [be] the defendant’ is the accused.” Id. at 580 (quoting State v. Madison, 109 N.J. 223, 243 (1988)). “Most anyone who has watched a trial on television knows where the defendant sits in a courtroom. Beyond that, compared to a showup, ‘the witness is given an even stronger impression that the authorities are already satisfied that they have the right man.’” Ibid. (quoting Madison, 109 N.J. at 243 ((quoting Wayne R. LaFave & Jerold H. Israel, Criminal Procedure, § 7.4 at 341-42 (1985))). “[G]iven the setting, confirmatory feedback is built into the prosecutor’s question.” Id. at 585. “Plus[,] in-court identifications are conducted in the presence of a judge, lending the court’s imprimatur to the procedure.” Id. at 580. “If a one-on-one confrontation at the police station is highly suggestive, then surely such a confrontation in court is the most suggestive situation of all.” Madison, 109 N.J. at 243 (quoting LaFave & Israel, Criminal Procedure, § 7.4 at 341).

Third, “[f]ading memories compound the problem.” Watson, 254 N.J. at 581. “Memory decay ‘is irreversible’; memories never improve.” Henderson, 208 N.J. at 267. “In other words, the more time that passes, the greater the possibility that a witness’ memory of a perpetrator will weaken.” Ibid. (citing Carol Krafka &

Steven Penrod, Reinstatement of Context in a Field Experiment on Eyewitness Identification, 49 J. Personality & Soc. Psych. 58, 65 (1985)); Washington, 256 N.J. at 155.

Fourth, juries fail to understand the potential weaknesses of identification testimony. Watson, 254 N.J. at 581 (quoting 2019 Report of the Third Circuit Task Force on Eyewitness Identification 59 (2019)). Indeed, “there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting Elizabeth F. Loftus, Eyewitness Testimony 19 (1979)).

“Courts should not sanction such highly suggestive procedures.” Watson, 254 N.J. at 586. “Indeed, it is hard to see how the court system can justify overseeing the very type of identification procedure it would likely criticize law enforcement officers for conducting,” a procedure that “risks depriving defendants of their due process rights.” Id. at 568, 586.

For these reasons, the Watson Court held that “first-time in-court identifications can be conducted only when there is good reason for them.” Id. at 587 (quotation omitted). The Court explained that “good reasons may exist” where “an eyewitness was familiar with the defendant before the crime.” Ibid. (quotation omitted). The Court gave three such examples: “Victims of domestic violence, for

example, could properly be allowed to identify their assailant in court for the first time. Friends or associates, among others, could identify someone they have known for some time. And officers could confirm that the person on trial was the same person they arrested.” Ibid.

“To ensure fair and orderly proceedings,” the Court also established new procedures governing first-time in-court identifications going forward. Ibid. Crucially here, the Court held that “defendants are entitled to advance notice and an opportunity to challenge in-court identification evidence before trial. With that in mind, the State must file a motion in limine if it intends to conduct a first-time in-court identification procedure.” Id. at 588. “At the hearing on the motion, the court will determine whether ‘good reason’ exists to allow the first-time in-court identification.” State v. Burney, 255 N.J. 1, 26-27 (2023).

Here, the State did not move in limine to conduct first-time in-court identification procedures with Detective Marino, Sergeant Cecere, or Officer Garcia -- even though Watson had been in effect for five months at the time of trial.⁷ The Court held no pre-trial hearing to determine whether any of these three first-time in-court identifications was sufficiently reliable for a jury to hear them. And these were not surprise identifications; they were directly solicited by the

⁷ Watson was decided on August 2, 2023, and Mr. McDowell’s trial commenced on January 10, 2024. (3T)

prosecutor. (3T:28-8 to 25, 68-22 to 69-7, 71-12 to 21, 110-9 to 21) All of this was error, as it directly contravenes Watson. These errors deprived Mr. McDowell of due process, because it put three untested, years-delayed showups before the jury, absent a finding of “good reason” by the court.

Furthermore, there was no “good reason” to allow the three first-time in-court identifications here. Although there was “good reason” for Detective Marino to identify Mr. McDowell as the person he arrested on July 9, see Watson, 254 N.J. at 587, neither he, nor Sergeant Cecere, nor Officer Garcia, testified that they had any previous relationship with Mr. McDowell that would establish “good reason” for them to identify Mr. McDowell for the first time at trial as the person they saw in the park in June. None of the officers testified that they had ever seen Mr. McDowell before they allegedly saw him at the controlled buys. Moreover, Sergeant Cecere was roughly 62 feet away from the park, Officer Garcia was approximately 90 to 120 feet away, and nobody asked Detective Marino how far away he was from the residence. (3T: 75-21 to 76-22, 105-20 to 106-2, 111-4 to 5) None of the officers testified that they used binoculars in their surveillance. And “greater distance between a witness and a perpetrator . . . can diminish the reliability of an identification.” Henderson, 208 N.J. at 264 (citing R.C.L. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 Law & Hum. Behav. 526 (2008)). On this record, there is simply no

way to find the requisite “good reason” for the State to conduct three first-time in-court identifications.

B. The Three First-Time In-Court Identifications Without Notice or a Hearing Amount to Plain Error.

Conducting three first-time in-court identifications in front of the jury, without notice to Mr. McDowell or a hearing, was plain error necessitating reversal because it violated Mr. McDowell’s rights to due process and a fair trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

Because Mr. McDowell did not object to the three erroneous first-time in-court identifications, they are reviewed for plain error. State v. Singh, 245 N.J. 1, 13 (2021). Under that standard, the errors are reversible if they were “clearly capable of producing an unjust result,” R. 2:10-2, or if “a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached.” State v. R.K., 220 N.J. 444, 456 (2015). Plain error is “evaluated ‘in light of the overall strength of the State’s case.’” State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Walker, 203 N.J. 73, 90 (2010)).

“By conducting a suggestive identification procedure in a courtroom, the State may implicate due process concerns and deprive defendants of their due process rights in a way that neither cross-examination nor jury instructions can adequately address.” Watson, 254 N.J. at 586. The Watson Court found that the admission of just one first-time in-court identification was plain error and reversed

the defendant's conviction. 254 N.J. at 590-91. Even though the jury in Watson saw a surveillance video of the crime being committed and heard a second undisputed identification by the defendant's ex-girlfriend, the Court held that the first-time in-court identification impermissibly "reinforced" the ex-girlfriend's "pivotal identification," which "raise[d] a reasonable doubt as to whether the jury reached a verdict it otherwise might not have." Ibid.

The errors here are even more harmful than in Watson. There were not one but three first-time in-court identifications. Unlike in Watson, the first-time in-court identifications were the only identifications of Mr. McDowell. And there was no video, photo, or physical evidence connecting Mr. McDowell to the crime -- only the eyewitness accounts of the three police officers.

Moreover, without the three officers' first-time in-court identifications of Mr. McDowell, the State's case is threadbare -- the State has no other evidence that Mr. McDowell is their dealer. Their cooperating witness, Mr. Hnasko, could not recall who sold him the heroin. (3T:83-16 to 18) There was no photo or video evidence for the jury to consult. (3T:77-16 to 78-16, 115-11 to 15) The audio recording of the controlled buys was inaudible. (3T:43-25 to 49-3) There was no physical evidence connecting Mr. McDowell to the controlled buys; the search of Mr. McDowell's person and home after his arrest turned up no drugs, no drug paraphernalia, and no marked money. (3T:54-20 to 56-19) The State elicited no

testimony confirming that the phone number Mr. Hnasko called to coordinate the drug deal with “Big Rob” was Mr. McDowell’s phone number. Without the three officers taking the stand and pointing at Mr. McDowell, identifying him as the man they saw at the controlled buys, a jury could have found that Mr. Hnasko bought heroin from someone named “Big Rob,” but would have had absolutely no evidence that Mr. McDowell is the “Big Rob” in question. Mr. McDowell’s conviction must be reversed.

POINT II

MR. MCDOWELL WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON HOW TO ASSESS THE RELIABILITY OF THE THREE FIRST-TIME IN-COURT IDENTIFICATIONS. (Not Raised Below)

While Mr. McDowell maintains, as discussed in Point I, that it was reversible error for the court to admit the three first-time in-court identifications, the court’s failure to instruct the jury on how to weigh the reliability of these identifications constitutes yet another reversible error which violated Mr. McDowell’s rights to due process and a fair trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

A. The Jury Needed Instruction on How to Assess the Reliability of the Three First-Time In-Court Identifications.

“[I]t is for the jury to decide whether an eyewitness credibly identified the defendant. Guided by appropriate instructions from the trial judge, juries determine how much weight to give an eyewitness’ account.” State v. Lazo, 209 N.J. 9, 24 (2012).

“Appropriate and proper charges to a jury are essential for a fair trial.” State v. Green, 86 N.J. 281, 287 (1981). “Underscoring the importance of jurors understanding the complicated issues underlying the reliability of eyewitness identification evidence the Court identified in Henderson, it directed the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to develop an enhanced jury charge on eyewitness identification,” which became effective in September 2012. State v. Wright, 444 N.J. Super. 347, 362 n.12 (App. Div. 2016) (citation omitted); see Model Jury Charge (Criminal), “Identification: In Court and Out-of-Court Identifications” (2012); Model Jury Charge (Criminal), “Identification: In Court Identification Only” (2012; Model Jury Charge (Criminal), “Identification: Out-of-Court Identification Only” (2012).

“When eyewitness identification is a ‘key issue,’ the trial court must instruct the jury how to assess the evidence -- even if defendant does not request the charge.” Sanchez-Medina, 231 N.J. at 466 (quoting State v. Cotto, 182 N.J. 316, 325 (2005)); State v. Davis, 363 N.J. Super. 556, 561 (App. Div. 2003) (“[A] model

identification charge should be given in every case in which identification is a legitimate issue. . . . The failure to give such a charge or to give an adequate charge is most often reversible error.”). “While in some instances it may not be necessary to present an extended charge on identification, nevertheless, the complete absence of any reference to identification as an issue or as an essential element of the State’s case is improper.” Davis, 363 N.J. Super. at 561. “In some instances,” even “an abbreviated charge on identification may be so inadequate as to constitute plain error.” Id. at 562 n.2. Where identity is ultimately at issue, “general instructions on such things as credibility and the elements of the crimes charged,” absent “specific instruction on the State’s burden to prove identification beyond a reasonable doubt” are insufficient. Id. at 561.

In Sanchez-Medina, the Court held that identification was a “key issue” necessitating an identification charge because the eyewitness “was the sole witness to identify defendant.” 231 N.J. at 466. The Court noted that the jury “should have been instructed about some of the factors discussed in Henderson. . . . At a charge conference, the parties and the court should have considered whether charges on memory decay, confidence, stress, duration, lighting, and other factors were warranted.” Id. at 467.

In State v. Frey, the victim of an assault -- the sole eyewitness to the crime -- identified the defendant at trial after a Wade⁸ hearing. 194 N.J. Super. 326, 328-29, 333 (App. Div. 1984). This Court held that “[t]he absence of any eyewitness other than the victim and defendant’s denial of guilt, made it essential for the court to instruct the jury on identification,” even though the defendant did not request it. Id. at 329. The Court noted that “[t]he Model Jury Charge on identification instructs the jury on how to determine identification and the reliability of that identification. Here, the instructions as a whole fell far short of properly advising the jury on how to decide such a crucial issue.” Id. at 330.

At Mr. McDowell’s trial, the identity of “Big Rob,” the person who allegedly sold Mr. Hnasko the heroin, was a key and crucial issue emphasized by both counsel. In his opening statement, the prosecutor highlighted the three officers’ testimony as the conclusive proof that Mr. McDowell was guilty: “The defendant is charged with selling heroin, twice. Each time in a public park in Phillipsburg, specifically Mercer Street Park. Well, how do we know that? We know that because the police all knew. In fact, at least three police officers (indiscernible) knew and they’re going to testify.” (3T:22-3 to 9) In summation, the prosecutor reminded the jury: “Three detectives, without hesitation say, [Mr. McDowell] was there and Ryan Hnasko was there.” (4T:19-21 to 22) The prosecutor emphasized

⁸ United States v. Wade, 388 U.S. 218 (1967).

that Mr. McDowell was “positively id’d consistently,” and that “three detectives in a row” said “that’s the guy.” (4T:24-16 to 25)

In summation, defense counsel emphasized to the jury that Mr. Hnasko, the only witness who was in close contact with “Big Rob,” failed to identify Mr. McDowell as “Big Rob”:

[Mr. Hnasko] never identified Mr. McDowell as a person that he bought any drugs from. . . . Unlike the officers, he never pointed to Mr. McDowell and said that’s the guy I sell to [sic], he didn’t describe Mr. McDowell. He said and this was the information that the police went by to start the investigation, he said he bought from Big Rob or Big Bob or something to effect. . . . There’s no proof that Big Rob or Big Bob is Shadon McDowell.

[(4T:8-19 to 9-12)]

Defense counsel also highlighted to the jury how far away Detective Cecere and Officer Garcia were when they were surveilling the park. (4T:14-3 to 21, 15-23 to 16-1)

But ultimately, identity undoubtedly became a “key issue” -- necessitating a jury charge on identification -- when the State solicited three first-time in-court identifications without fair notice to Mr. McDowell or a hearing. The Model Jury Charge, titled “Identification: In Court Identification Only,” was not only warranted, but necessary to ensure that the jury understood the State’s burden to prove the identity of the perpetrator, the research surrounding human memory, and the Henderson factors that impact the reliability of identification testimony. See

Model Jury Charge (Criminal), “Identification: In-Court Identification Only”

(2012) (Da14-19); see also Davis, 363 N.J. Super. at 562 (finding reversible error where the court failed to give the model jury charge on identification).

B. The Omission of Any Jury Instruction on Identification Testimony Was Plain Error.

When “identification evidence should not have been admitted without an appropriate jury instruction, [the court] shall vacate the convictions and order a new trial.” State v. Guerino, 464 N.J. Super. 589, 623 (App. Div. 2020); see Davis, 363 N.J. Super. at 560-62 (reversing the defendant’s conviction because “the court gave no instruction whatsoever as to the State’s obligation to prove identification beyond a reasonable doubt, and instead gave “general instructions on such things as credibility and the elements of the crime charged”); Frey, 194 N.J. Super. at 329-30 (reversing the defendant’s conviction where the sole eyewitness identified the defendant at trial and the court failed to instruct the jury on identification). The court’s failure to instruct the jury on identification is reviewed for plain error, which “depends on the strength and quality of the State’s corroborative evidence.” Cotto, 182 N.J. at 326. But the failure to give an identification charge, where it was necessary, “is most often reversible error.” Davis, 363 N.J. Super. 556, 561.

In Sanchez-Medina, the Court found that “[l]ooking at all of the proofs together, the evidence against defendant was not overwhelming.” 231 N.J. 452, 468–69. There, the State’s case “rest[ed] largely on the testimony of four victims,

only one of whom could identify him. No forensic evidence linked defendant to the crimes charged, and no other witnesses observed or could corroborate any of the incidents.” Ibid.

Here, for much of the same reasons already outlined, the State’s case -- absent the three unreliable first-time in-court identifications -- was unacceptably thin. Mr. Hnasko could not remember who “Big Rob” was, and no physical, telephonic, photographic, audio, video, or any other forensic evidence was introduced at trial establishing that Mr. McDowell was “Big Rob.” A jury verdict in a case that relied so heavily on shoddy identification testimony, where the jury received no instruction on how to properly assess identification testimony at all, simply cannot stand. The absence of any jury instruction on identifications at this trial raises “a reasonable doubt . . . whether the jury came to a result that it otherwise might not have reached.” R.K., 220 N.J. at 456.

POINT III

MR. MCDOWELL WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT ALLOWED THE LEAD DETECTIVE TO IMPLY TO THE JURY THAT MR. MCDOWELL WAS VIOLENT. (Not Raised Below)

Detective Marino, when asked by the prosecutor why he did not arrest Mr. McDowell sooner, testified that he was hoping Mr. McDowell could help him “get . . . somebody a little more violent.” (3T:64-5 to 8) This comment sent an

unmistakable message to the jury that Mr. McDowell was violent, despite being charged with only non-violent offenses, which violated Mr. McDowell's constitutional rights to due process and a fair trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

“It has oft been recognized that the underlying danger of admitting other-crime or bad-act evidence is that the jury may convict the defendant because he is a ‘bad’ person in general.” State v. Skinner, 218 N.J. 496, 514 (2014) (cleaned up). For that reason, “N.J.R.E. 404(b) guards against the wholly unacceptable prospect that a jury might become prejudiced against a defendant based on earlier reprehensible conduct.” Ibid. Bad-act evidence must be “examined cautiously because it has a unique tendency to prejudice a jury.” Ibid. (internal quotations omitted); State v. Hernandez, 170 N.J. 106, 123 (2001) (“Studies confirm that the introduction of a defendant’s prior bad acts can easily tip the balance against the defendant.” (internal quotation omitted)).

Mr. McDowell was charged with non-violent offenses. There was no evidence presented to the jury that Mr. McDowell was violent. But Detective Marino’s comment created two prejudicial and impermissible inferences for the jury: (1) that Mr. McDowell was a violent person, and that Detective Marino -- and the State -- knew something that they were not revealing to the jury about Mr. McDowell’s violent nature; and (2) that Mr. McDowell has prior convictions for

violent crimes. Moreover, none of the permitted uses of bad-act evidence apply to Detective Marino’s testimony. See N.J.R.E. 404(b)(2) (permitting bad-act evidence as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute). Instead, this testimony had the exact effect that Rule 404 is designed to prevent. “Put simply, a defendant must be convicted on the basis of his acts in connection with the offense for which he is charged. A defendant may not be convicted simply because the jury believes that he is a bad person.” Skinner, 218 N.J. at 514. Detective Marino invited the jury to believe that Mr. McDowell was a violent person and had a history of violence and was therefore guilty of the charged crimes. This implication was irretrievably prejudicial, and the trial court’s failure to strike this testimony amounted to reversible error.

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL. (Not Raised Below)

While each of the errors raised in Points I, II, and III individually warrants reversal, if the Court does not so find, it should find that the errors amount to cumulative error which violated Mr. McDowell’s rights to due process and a fair trial, necessitating reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10. “[E]ven when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast

sufficient doubt on a verdict to require reversal.” State v. Jenewicz, 193 N.J. 440, 473 (2008); State v. T.J.M., 220 N.J. 220, 238 (2015) (“Where the aggregation of legal errors renders a trial unfair, a new trial is required.”). In Sanchez-Medina, the Court found that the trial court’s failure to instruct the jury on identification, coupled with a second jury instruction error, “undermined defendant’s right to a fair trial” and were cumulatively reversible error. 231 N.J. at 469. And in Burney, the Court found that one first-time in-court identification without “good reason,” coupled with an expert’s improper net opinion, amounted to cumulative error necessitating reversal. 255 N.J. at 28-31.

Here, the court improperly allowed the jury to hear three untested, unreliable first-time in-court identifications, and then failed to instruct the jury on how to assess these identifications. “The thematic effect of th[e]se errors requires that they be evaluated cumulatively.” Jenewicz, 193 N.J. at 474. On top of these identification errors, the court permitted the lead detective who coordinated the controlled buys to suggest to the jury that Mr. McDowell was violent. “So viewed,” these errors “had a disproportionately harmful effect in defendant’s trial than they would have, had each been examined individually.” Ibid. This Court should find that these three errors amount to cumulative error and reverse Mr. McDowell’s convictions.

POINT V

**MR. MCDOWELL'S SENTENCES ARE
ILLEGAL. (Not Raised Below)**

The court imposed extended terms on all four of Mr. McDowell's convictions: Mr. McDowell received six years on Counts One and Two, which were third-degree crimes, N.J.S.A. 2C:43-7(a)(4); (5T:12-6 to 12; Da7), and he received twelve years on Counts Three and Four, which were second-degree crimes, N.J.S.A. 2C:43-7(a)(3); (5T:12-13 to 18; Da7). While it is not clear whether the court imposed the extended terms under N.J.S.A. 2C:43-6(f) or 2C:44-3(a), all four sentences are illegal under either interpretation.

The legality of a sentence is reviewed “de novo, ‘affording no special deference to the court[’s] interpretation of the relevant statutes.’” State v. Steingraber, 465 N.J. Super. 322, 327-28 (App. Div. 2020) (alteration in original) (quoting State v. Nance, 228 N.J. 378, 393 (2017)). “If a defendant’s sentence is illegal, a reviewing court must remand for resentencing.” Id. at 328.

“There are two categories of illegal sentences: those that exceed the penalties authorized for a particular offense, and those that are not authorized by law.” State v. Hyland, 238 N.J. 135, 145 (2019). McDowell’s sentences were not authorized by law for six independent reasons:

- (1) Because the extended terms imposed under N.J.S.A. 2C:43-6(f) on the public-park offenses (Counts Three and Four) were not authorized by the statute;

- (2) Because the State did not move for extended terms under N.J.S.A. 2C:43-6(f) for Counts One and Two as required by the statute;
- (3) Because the State did not move for extended terms for any of the convictions under N.J.S.A. 2C:44-3 as required by the statute;
- (4) Because the extended terms imposed under N.J.S.A. 2C:44-3(a) are unconstitutional under Erlinger v. United States, 602 U.S. 821 (2024);
- (5) Because the court failed to merge the convictions for Count One with Count Three, and Count Two with Count Four; and
- (6) Because multiple extended terms were imposed at one sentencing proceeding in violation of N.J.S.A. 2C:44-5(a)(2).

A. Insofar as the court imposed extended terms under N.J.S.A. 2C:43-6(f), the sentences are illegal.

1. The extended terms imposed under 2C:43-6(f) on the public-park offenses (Counts Three and Four) were not authorized by law.

Counts Three and Four charge distribution in a public park under N.J.S.A. 2C:35-7.1, which provides that distribution “within 500 feet of . . . a public park . . . is . . . a crime of the second degree.” The State moved for extended terms under N.J.S.A. 2C:43-6(f). (Da20) However, 2C:43-6(f) lists the offenses that qualify for an extended term under the statute, and the public-park offense, 2C:35-7.1, is not one of the enumerated crimes. State v. Patterson, 435 N.J. Super. 498. 514-16 (App. Div. 2014) (holding that, because 2C:43-6(f) “clearly and unambiguously lists only N.J.S.A. 2C:35-3, -4, -5, -6, and -7” as eligible offenses, “the public

facility offense cannot be subject to a mandatory extended term under Subsection 6(f)"). The extended terms imposed on the public-park convictions under Counts Three and Four are therefore illegal and must be vacated.

2. The extended terms imposed under N.J.S.A. 2C:43-6(f) on Counts One and Two were not authorized by law because the State did not request them in its motion.

The extended terms imposed under N.J.S.A. 2C:43-6(f) on Counts One and Two are illegal because the State did not move for them as required by statute and court rule. N.J.S.A. 2C:43-6(f) authorizes the court to impose an extended term "upon application of the prosecuting attorney." Rule 3:21-4(e) provides that the prosecutor must file a motion pursuant to N.J.S.A. 2C:43-6(f) "within 14 days of . . . the return of the verdict." Where, as here, the defendant has multiple convictions, the State's motion for an extended term "obviously should include an identification of the offense with respect to which the prosecutor is seeking an extended term." State v. Thomas, 195 N.J. 431, 436 (2008).

The State did not explicitly identify in its written motion or at the sentencing hearing the offense(s) for which it was seeking an extended term. However, by describing the applicable extended term, the motion implicitly and effectively identified the offenses for which the State was seeking extended terms: the motion states that the extended term ranges from ten to twenty years and asks the court to impose thirteen years. (Da22) Ten to twenty years is the extended term for a

second-degree crime. N.J.S.A. 2C:43-7(a)(3). Only Counts Three and Four charge second-degree crimes. (Da3-4) The State’s motion for an extended term was, therefore, limited to Counts Three and Four.

Counts One and Two, in contrast, charge third-degree crimes. (Da1-2). Nevertheless, the court imposed extended terms on Counts One and Two “based on the motion submitted by the State.” (5T:10-20 to 12-12) But because the State did not apply for extended terms on Counts One and Two, the imposition of extended terms on those counts was not authorized by law. Accordingly, the extended terms imposed on Counts One and Two are illegal and must be vacated.

B. Insofar as the court imposed extended terms under N.J.S.A. 2C:44-3(a), the sentences are illegal.

1. The extended terms imposed under N.J.S.A. 2C:44-3(a) were not authorized by law because the State did not move for them.

As noted, prior to the sentencing hearing, the State filed a motion for extended terms under 2C:43-6(f). (Da20) But apparently realizing that the public-park counts did not qualify for extended-term sentencing under that statute, the State abandoned that argument at the sentencing hearing. The State made no reference to 2C:43-6(f) at the hearing. Instead, the State requested extended terms under N.J.S.A. 2C:44-3(a), the persistent offender statute; the prosecutor argued Mr. McDowell “is the definition of a persistent offender[,] and I would the [sic] Court to grant the motion.” (5T:5-15 to 17)

To qualify as a persistent offender, a defendant must have prior convictions from “when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant’s last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.” N.J.S.A. 2C:44-3(a). Accordingly, at the sentencing hearing, the prosecutor pointed out that Mr. McDowell had a conviction from when he was at least eighteen and that his latest convictions “were within the last 10 years of his release.” (5T:4-24 to 5-1)

2C:43-6(f) is not concerned with the age or dates at which the defendant incurred his prior convictions. Instead, it calls for an extended term where a defendant has prior drug convictions, and only prior drug convictions -- specifically, for “manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog.” N.J.S.A. 2C:43-6(f). Thus, the prosecutor’s citations at the hearing to Mr. McDowell’s prior convictions for assault and robbery (5T 5-8 to 11) were irrelevant to his eligibility for an extended term under 2C:43-6(f). However, the prior assault and robbery convictions were qualifying convictions for an extended term under N.J.S.A. 2C:44-3(a), which requires only that the defendant was previously convicted for “two crimes.”

Sentencing under N.J.S.A. 2C:43-6(f) is not discretionary; it states that the court “shall” impose an extended term “upon application of the prosecuting attorney,” and it “requires a sentencing court to impose an enhanced-range sentence when the prosecutor applies for such relief.” State v. Thomas, 188 N.J. 137, 149 (2006) (emphasis added). In contrast, N.J.S.A. 2C:44-3(a) states that “[t]he court may ... sentence a person ... to an extended term,” (emphasis added) and “prescribes ... a discretionary extended term.” Thomas, 195 N.J. at 436. At the sentencing hearing, the prosecutor said that the State was “seeking a discretionary extended term.” (5T:3-22 to 24)

In imposing extended terms on all four convictions, the sentencing court alluded to both 2C:43-6(f) and 2C:44-3(a). On one hand, the court’s order granted “the State’s motion for an extended term pursuant to N.J.S.A. 2C:43-6(f)” (Da6) and quoted the provisions of 2C:43-6(f) at the hearing. (5T:10-23 to 11-14) On the other hand, the court cited as justification for imposition of the extended terms Mr. McDowell’s prior robbery convictions (5T:12-19 to 24), which, as noted, only pertain to extended terms under 2C:44-3(a).

But the State did not move for an extended term under 2C:44-3 as required by statute and court rule. 2C:44-3 provides that “[t]he court may [impose an extended term], upon application of the prosecuting attorney.” And Rule 3:21-4(e) provides that “[a] motion pursuant to N.J.S.A. 2C:44-3 . . . shall be filed with the

court by the prosecutor within 14 days of the entry of the defendant's guilty plea or the return of the verdict." See Thomas, 195 N.J. at 436 (noting that an extended term under 2C:44-3(a) "may be imposed only upon application of the prosecutor . . . as provided in the court rules. R. 3:21-4(e).") The State filed a motion expressly seeking an extended term under 2C:43-6(f); it did not file a motion for an extended term under 2C:44-3. Because the State did not apply for extended terms under 2C:44-3, the imposition of an extended term on any count under 2C:44-3 was not authorized by law. Accordingly, the extended terms, to the extent that they were imposed under 2C:44-3, are illegal and must be vacated.

2. The extended terms imposed under N.J.S.A. 2C:44-3(a) are unconstitutional under Erlinger.

Mr. McDowell's extended terms, if imposed pursuant to 2C:44-3(a), also violate the Sixth and Fourteenth Amendments to the United States Constitution and Article I, ¶ 8 of the New Jersey Constitution, because they were based on findings of fact made by the sentencing judge -- not the jury. Erlinger, 602 U.S. at 836-39.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Blakely v. Washington, 542 U.S. 296, 303

(2004). The prior-convictions exception to Apprendi is a “‘narrow exception’ permitting judges to find only ‘the fact of a prior conviction.’” Erlinger, 602 U.S. at 823 (quoting Alleyne v. United States, 570 U.S. 99, 111, n.1 (2013)). “Under that exception, a judge may ‘do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.’” Id. at 838 (quoting Mathis v. United States, 579 U.S. 500, 511-512 (2016)). However, to determine whether a defendant’s prior convictions occurred on “different occasions” requires the court “to do more than identify his previous convictions and the legal elements required to sustain them.” Id. at 838-39. Accordingly, the United States Supreme Court held that the factual finding of whether prior offenses occurred on separate occasions exceeds the “prior conviction” exception to Apprendi. Ibid.⁹

If, as it appears, Mr. McDowell was sentenced to extended terms pursuant to N.J.S.A. 2C:44-3(a), the sentencing court had to find that he was

⁹ Erlinger directly abrogates State v. Pierce, 188 N.J. 155, 163 (2006), which held that there was “no Sixth Amendment violation in the sentencing court’s consideration of objective facts about defendant’s prior convictions, such as the dates of convictions, his age when the offenses were committed, and the elements and degrees of the offenses, in order to determine whether he qualifies as a ‘persistent offender.’” Erlinger is therefore a “new rule”; as with every other new rule announced under the Apprendi framework, Erlinger must be given pipeline retroactivity. See, e.g., State v. Grate, 220 N.J. 317, 335 (2015) (affording pipeline retroactivity to Alleyne); State v. Natale, 184 N.J. 458, 494 (2005) (affording pipeline retroactivity to Blakely claims).

“previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.” But the jury was not asked to make any findings concerning Mr. McDowell’s prior convictions. The jury found defendant guilty of a second-degree crime; thus, the maximum sentence that the court could impose is ten years. N.J.S.A. 2C:43-6(a)(2). Mr. McDowell’s twelve-year terms on Counts Three and Four are illegal therefore must be vacated.

C. The court failed to merge the convictions for Count One with Count Three, and Count Two with Count Four.

Mr. McDowell’s sentence is also illegal because the court failed to merge the two third-degree convictions for drug distribution under 2C:35-5 into their related second-degree convictions for distribution in a public park under 2C:35-7.1. A “third-degree [2C:35-5] conviction merges into the [2C:35-7.1] conviction,” and Mr. McDowell “must be sentenced as a second-degree offender consistent with the Section 7.1 conviction.” Patterson, 435 N.J. Super. at 518 (quoting State v. Gregory, 336 N.J. Super. 601, 608 (App. Div. 2001)). “[M]erger is rooted in the established principle that an accused who has committed only one offense cannot be punished as if for two.” State v. Dillihay, 127 N.J. 42, 46 (1992) (cleaned up).

Here, Mr. McDowell was found to have committed two offenses -- the two controlled buys. However, he was convicted and sentenced twice for each offense: once for distribution under 2C:35-5 (Counts One and Two), and again for distribution near a public park under 2C:35-7.1 (Counts Three and Four). These sentences are illegal; the convictions for distribution must merge into the convictions for the public-park offenses, and the Judgment of Conviction must be amended accordingly.

D. The imposition of multiple extended terms was illegal.

As discussed earlier in this point, each of Mr. McDowell's sentences are illegal and must be vacated. But if the Court disagrees, Mr. McDowell's aggregate sentence is also illegal because it includes multiple extended terms. N.J.S.A. 2C:44-5a(2) provides: "[w]hen multiple sentences of imprisonment are imposed on a defendant for more than one offense . . . [n]ot more than one sentence for an extended term shall be imposed." It "expressly and unequivocally states that no more than one extended term sentence may be imposed in a single sentencing proceeding." State v. Robinson, 217 N.J. 594, 605 (2014) (barring the imposition of one extended term under 2C:43-6(f) and another under 2C:44-3(a)); State v. Hudson, 209 N.J. 513, 530 (2012). McDowell received extended terms on all four counts; these sentences must be vacated because they are not authorized by law.

CONCLUSION

Mr. McDowell's convictions must be reversed due to the improper admission of three first-time in-court identifications, the court's failure to instruct the jury on how to assess the reliability of those identifications, and the lead detective's improper testimony implying to the jury that Mr. McDowell was violent. Alternatively, Mr. McDowell's sentence must be vacated and remanded for resentencing.

Respectfully submitted,

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Dated: November 26, 2024

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On February 2, 2022, a Warren County grand jury returned Indictment No. 22-02-00057-I, charging defendant Shadon M. McDowell with two counts of third-degree distribution of heroin, contrary to N.J.S.A. 2C:35-5(a)(1) and 5(b)(3) (counts one and two), and two counts of second-degree distribution of heroin within 500 feet of a public park, contrary to N.J.S.A. 2C:35-7.1(a) (counts three and four). (Da1-4).¹

Defendant was tried before the Honorable H. Matthew Curry, J.S.C., and a jury on January 10 and 11, 2024, and found guilty on all counts. (4T63-23 to 66-24; Da5).

On June 14, 2024, Judge Curry granted the State's motion for an extended term and sentenced defendant on counts one and two to extended terms of six years' incarceration with three years of parole ineligibility. (5T12-6 to 12; Da6-7). On counts three and four, Judge Curry sentenced defendant to extended terms of twelve years with five years of parole ineligibility. (5T12-13 to 18; Da6-7). All sentences were ordered to run

¹ Da refers to defendant's appendix.

1T refers to transcript of December 1, 2023.

2T refers to transcript of January 8, 2024.

3T refers to transcript of January 10, 2024.

4T refers to transcript of January 11, 2024.

5T refers to transcript of June 14, 2024.

concurrently. (Da7). Appropriate fines and penalties were assessed. (5T12-25 to 13-5; Da8).

On July 26, 2024, defendant filed his Notice of Appeal. (Da11-12).

COUNTER-STATEMENT OF FACTS

On two separate occasions separated by a week in June of 2021, a team of police officers, who were already in place and waiting for defendant to arrive, looked on from various surveillance locations while a cooperating witness bought heroin from him in a Phillipsburg public park, after the cooperator called defendant on the phone to arrange the sales. Defendant was seen by the lead detective leaving his house before the first sale, was seen engaging in the criminal acts charged – distributing heroin – by other officers on both occasions, and was then arrested at his home by the lead detective and others a week after the second sale. The evidence was as follows.

Phillipsburg Detective Bret Marino was the lead detective and organized the two controlled purchases. (3T42-3 to 10). Detective Marino explained that a “controlled buy” occurs when an informant or undercover officer is involved in a transaction set up by the police, where the informant or undercover is sent to purchase drugs from a suspect. (3T27-15 to 28-1).

The investigation commenced when police were advised by an informant named Ryan Hnasko “that somebody was selling drugs by the name of Big

Rob, out of 274 Mercer Street” in Phillipsburg. (3T28-8 to 14). Police determined that Big Rob was defendant Shadon McDowell, whom Detective Marino identified from the stand without objection. (3T28-15 to 25). Accordingly, police arranged two controlled buys involving Hnasko buying heroin from defendant in June 2021.

The first controlled buy was arranged by police meeting with Hnasko, who called defendant and set up a buy at the Mercer Street Park. Marino explained that Hnasko “called Mr. McDowell’s phone. Whether [defendant’s phone] was a cell phone or not, I don’t know, but he did call him on a phone.” (3T52-6 to 10). Marino identified the park itself when shown a photograph of it. (3T29-2 to 31-10). Prior to the buy taking place, police met with Hnasko at a certain location, where they searched him to ensure he did not have any money or drugs on his person before he was to meet defendant. Police instructed Hnasko “to walk from our vehicle or wherever we may be sending him from, directly to the meeting location without stopping or talking to anybody and he will be provided with money that we had photographed and he will also be advised that after the buy, that he will meet directly back up with us without stopping and meeting up with anybody.” (3T32-1 to 13).

Hnasko was prepared according to that procedure, searched, provided with cash (that had been photographed) to consummate the transaction, and

also provided with a recording device so police could hear what was happening during the transaction. (3T32-14 to 21).² Detective Marino dropped Hnasko off a short distance from the park (a “couple hundred feet”) in a location such that defendant would not have been able to see, while Marino waited in his car and other detectives conducted surveillance from their vehicles. (3T51-2 to 9). Marino was not able to observe either transaction himself. (3T51-10 to 19). Detective Marino, however, did watch as defendant left his home at 274 Mercer Street prior to the first transaction. (3T32-22 to 33-1).

The first transaction was for a “brick” of heroin (50 wax folds) and occurred as planned, under the observation of detectives who were set up directly across the street from the park. (3T33-2 to 7; 3T59-2 to 19). Following the controlled buy, Hnasko returned to Detective Marino, whereupon Marino searched him again and recovered the drugs he had just purchased from defendant. The money Hnasko had been provided before the sale was gone. (3T33-10 to 20).

The second controlled buy took place at Mercer Street Park within a week of the first, and this time involved the sale of 11 wax folds (one more

² The recording device did not operate optimally. The transcript from the first controlled buy indicated that the conversation was inaudible. (3T47-2 to 14). For the second buy, “there’s really no audible besides hello.” (3T48-6 to 19).

than a “bundle” of ten folds). (3T59-2 to 19). Hnasko was prepared beforehand the same way as the first and again provided money from the police to make the purchase. The second transaction occurred as planned, Hnasko returned to Marino, was searched and found to be in possession of the drugs he had just bought from defendant and had nothing else in his possession. (3T33-21 to 34-24). Marino testified that Hnasko did not interact with anyone between the time he met with defendant and the time he returned to Marino; “he was kept under constant surveillance.” (3T34-25 to 35-4).

Marino identified the photographed money Hnasko had been provided, which totalled \$240.00 (3T35-5 to 36-2), as well as photographs of the drugs taken from Hnasko and placed in evidence bags after each controlled buy. (3T36-3 to 25). The first notation on the evidence bags holding the drugs noted that it contained 50 folds of suspected heroin, with the folds stamped “venom.” The second contained 11 folds of suspected heroin, with a similar stamp. (3T37-1 to 20). Marino explained that each heroin dealer “will have their own stamp for the drugs that they’re distributing,” with different names and colors to allow buyers to “know who has the good stuff and who has the bad stuff,” based off word on the street. (3T37-21 to 38-4).

Detective Marino explained that after the items were placed in an evidence bag, then marked, sealed and photographed, they were analyzed by

the New Jersey State Police, which determined the items to be heroin. The parties stipulated to the accuracy of the State Police Lab report. (3T39-11 to 40-18). After each controlled purchase, Hnasko gave a statement whereby he orally confirmed the heroin buy from defendant. (3T40-21 to 41-3).

Two officers who were part of the surveillance team and who witnessed the drug transactions testified. Seargent Joseph Cecere, assigned at the time to the Warren County Narcotics Task Force, was part of that surveillance. His role was strictly to observe both transactions, which he did from an unobstructed view of Mercer Street Park. He, too, was able to identify defendant in court, doing so without objection. (3T68-25 to 69-7). He was seated in a vehicle parked across the street and estimated that on both occasions, he was “a little bit further from where I’m sitting now to the back of the courtroom,” some 62 feet away. (3T75-21 to 76-22; 3T105-16 to 106-2).

In his capacity as a surveillance officer during the first controlled buy, Sgt. Cecere watched as Hnasko sat on a bench waiting for defendant, specifically identifying the bench as a brown bench (as opposed to a blue bench or silver bench also shown in one photograph). (3T69-10 to 70-23). He watched as defendant walked up and sat next to Hnasko, saw them exchange something, and watched as defendant left the park. He watched as Hnasko then waited a few moments before also exiting the park. (3T71-2 to 7). From

what he could see, Hnasko had no other interactions with anyone else after the exchange. (3T71-8 to 11).

Sgt. Cecere was also present for the second controlled buy. On that occasion, Hnasko was waiting on the park's swings. When defendant approached, he got off the swing and the two exchanged something and parted ways, with Hnasko not interacting with anyone afterward. (3T71-12 to 24).

Officer Teddy Garcia, who at the time of trial was a supervisor of the Warren County Narcotics Task Force, was on surveillance for the first buy as well. From where he had situated himself in his vehicle, Garcia could see the entire park with an unobstructed view. He watched as defendant met with Hnasko, where he saw an exchange happen and the two part ways. He was at a distance of 30 to 40 yards from them at the time. He also identified defendant in court, again without objection. (3T109-2 to 111-5). After the transaction and the two parted ways, Hnasko returned to the waiting undercover vehicle without interacting with anyone else in the meantime. (3T111-6 to 18).

Ryan Hnasko, the cooperating witness, also testified and offered a general recollection of having conducted two controlled buys at the direction of the police in June 2021. He had been arrested the day of the first controlled buy with defendant and, while in custody on that charge (unrelated to this matter), the police approached him and asked him to engage in the controlled

buys for favorable treatment. (3T91-17 to 94-1). He recalled having made two or three such purchases and recalled meeting with detectives beforehand, who “told me to call somebody and buy some dope.” The detective gave him a phone to make the call and money to buy heroin, which he did. (3T83-11 to 84-25). He recalled buying 50 bags one time and ten the other. After making the buys, he met with no one else before returning to the police. (3T88-2 to 18). He stated that he was promised “to get my charges dropped” in exchange for testifying in court. (3T89-3 to 15).

As for his prior knowledge of defendant and Mercer Street Park, Hnasko testified as follows under questioning by defense counsel:

Q: Okay. And you’re familiar with this area?

A: Yeah.

Q: And did you meet – the person that you told the officers, you told them the name of the person was Big Bob, correct?

A: Big Rob, I think.

Q: Okay. And do you have any knowledge of the person’s name – real name?

A: No.

Q: Okay. Had you seen the person before these two buys?

A: Yes. [3T96-2 to 13. (Emphasis added)]

On redirect, he stated that he had purchased heroin “500 or more” times

and that dealers often use fake street names. (3T102-20 to 103-10).

Defendant was arrested for these crimes on July 9, 2021, at his home at 274 Mercer Street, the same address from where Hnasko said Big Rob was selling drugs and where Detective Marino had seen defendant leaving before the first sale. (3T49-9 to 21). Defendant was searched incident to arrest, but no drugs or money were found on his person, nor was the money used for the controlled buys found in the house, nor were any drugs or drug paraphernalia (scales, cutting agents, wax folds, etc.) recovered. (3T54-3 to 56-19).

After considering the evidence, the jury convicted defendant as charged. (4T63-18 to 66-24). This appeal follows.

LEGAL ARGUMENT

POINT I

THERE WAS NO PLAIN ERROR IN THE ELICITATION OF FIRST-TIME IN-COURT IDENTIFICATIONS FROM THREE POLICE OFFICERS WHO WERE MEMBERS OF A TEAM INVOLVED IN TWO CONTROLLED BUYS OF HEROIN, WHO COLLECTIVELY WATCHED THE CRIMES HAPPEN AND ARRESTED DEFENDANT.

Defendant claims he was denied a fair trial by virtue of the State's elicitation of first-time in-court identifications by three officers who were all members of the enforcement team that was involved in setting up and then watching two controlled heroin sales between defendant and the State's cooperating witness on two occasions, culminating in defendant's arrest at his home a week after the second buy. Despite having had every opportunity, defendant did not object at any point on the three separate occasions when the three witnesses separately offered brief, confirmatory identifications at trial. Despite that silence at trial, he now complains that those identifications so undermined the fairness of his trial as to constitute plain error. Defendant is wrong. The sort of in-court identifications that occurred here are permissible under the caselaw and certainly did not amount to plain error, especially given that defendant's identity as the dealer was not open to serious question.

Because he did not object at any point when each officer briefly

identified him as the person they saw selling heroin, or then arrested him at his home (after seeing him leave there before the first controlled buy), defendant must meet his heavy burden of showing plain error in what occurred below. Plain error is error “clearly capable of producing an unjust result.” State v. Weston, 222 N.J. 277, 294 (2015); State v. Singleton, 211 N.J. 157, 182–83 (2012); State v. Reeds, 197 N.J. 280, 298 (2009). “The error must have been of sufficient magnitude to raise a reasonable doubt as to whether it led the jury to a result it would otherwise not have reached.” Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 2:10–2. As our Supreme Court noted, “[p]lain error has intentionally been created as a high bar for parties to meet in order to encourage litigants to raise any objections to evidence at the trial level where the court can best ‘forestall a potential error,’ in a timely manner.” State v. Santamaria, 236 N.J. 390, 409 (2019).

Plain error creates a “presumption” that no error occurred “and was unlikely to prejudice the defendant’s case.” State v. Montalvo, 229 N.J. 300, 320 (2017). “Under that standard, defendant has the burden of proving that the error was clear and obvious and that it affected his substantial rights.” State v. Morton, 155 N.J. 383, 421 (1998). See State v. Swint, 328 N.J. Super. 236, 256 (App. Div.), certif. denied, 165 N.J. 492 (2000) (“[w]e may infer from the lack of an objection that counsel recognized that the alleged error was of no

moment or was a tactical decision to let the error go uncorrected at the trial”).

Defendant cannot meet his burden here.

To make his claim, defendant relies entirely on State v. Watson, 254 N.J. 558 (2023). But Watson does not support that what occurred here was a clear and obvious error that adversely affected defendant’s substantial rights. In that case, the Supreme Court held for the first time that going forward, prosecutors must give notice of intent to introduce a first-time in-court identification, giving the defense the opportunity to challenge the identification before trial. Id. at 588. “At the hearing, the parties and the court should explore whether good reason exists to conduct a first-time in-court identification.” Ibid.

In adopting this new rule, the Court borrowed from the Supreme Judicial Court of Massachusetts’s opinion in Commonwealth v. Crayton, 21 N.E.3d 157 (2014), where the court adopted a rule in which in-court identifications would be permissible if “there is ‘good reason’ for them.” Id. at 169. Our Court in Watson explained what is meant by “good reason” under Crayton:

The [Crayton] court explained that “good reason” in this setting can include several situations, such as when a witness is already “familiar with the defendant” from before the crime, or when “the witness is an arresting officer who” saw the crime and “the identification merely confirms that the defendant is the person who was arrested for the” offense. Id. at 170. In both circumstances, the court reasoned the identifications are confirmatory. As a result, “there is little risk of misidentification” based on the suggestiveness of the in-court showup because [that risk occurs when] the witness is not relying “solely on his or her

memory of witnessing the defendant at the time of the crime.”
Ibid. [Watson, 254 N.J. at 583 (quoting Crayton, 21 N.E.3d at 169-70) (emphasis added).]

Watson thus adopted the Crayton rule: “To avoid unduly suggestive identifications of defendants in court that may trigger serious due process concerns under the State Constitution we draw on the standard in Crayton and hold as follows: first-time in-court identifications can be conducted only when there is ‘good reason’ for them. See Crayton, 21 N.E.3d at 169.” Id. at 587.

As the Supreme Judicial Court of Massachusetts observed, traditional “good reasons” for out-of-court showups no longer apply at trial. Id. at 170. By the time a criminal trial begins, the original investigation is long over, a suspect has been apprehended, and prompt confirmation is no longer needed to help ensure public safety. Ibid.

But other good reasons may exist, such as when an “eyewitness was familiar with the defendant before” the crime. Ibid. Victims of domestic violence, for example, could properly be allowed to identify their assailant in court for the first time. Ibid. Friends or associates, among others, could identify someone they have known for some time. And officers could confirm that the person on trial was the same person they arrested. Ibid. [Ibid.]

This case fits hand-in-glove with the Watson-Crayton definition of “good reason” and defendant cannot show plain error when he did not object at any point below, despite having three separate opportunities. These were, after all, the officers who, acting as a team, saw the crimes occur and then made the arrest. Small wonder defendant did not object. This was no whodunit and the evidence was overwhelming.

Indeed, the officers involved in these two controlled buys were operating with a known target and were sitting in their surveillance locations waiting for defendant (and no one else) to arrive. After Ryan Hnasko told the officers that “somebody was selling drugs by the name of Big Rob, out of 274 Mercer Street” in Phillipsburg, the officers had Hnasko call defendant on his phone, which Hnasko did, and set up the two transactions. As Officer Garcia explained, the issue of how much heroin was being sold was “set up before [the] buy.” Detective Marino (the lead detective) then saw defendant leaving that same address that Hnasko had given as Big Rob’s (274 Mercer) before the first controlled buy took place. Hnasko testified to having seen Big Rob before the two buys and thus knew who he was (as also evidenced by his having called defendant and used his street name).

Hnasko obviously knew what Big Rob looked like, met defendant in the park, and was observed not only interacting with him once, but on two separate occasions, successfully consummating both sales, all under the watchful eyes of officers whose sole function were to observe the transactions in question, and from which they were able to provide confirmatory identifications at trial as they had closely watched the crimes occurring in real time.

Indeed, unlike typical civilian eyewitnesses, they were actually sitting in their cars waiting for defendant to commit these particular crimes, and when

he did appear, their attention was fixed on him, and his criminal behavior was just what was expected. Finally, Detective Marino then went to defendant's home (again, 274 Mercer) and arrested him there a week after the second sale.

Not only was all this pre-planned with defendant singled out as the target, but it is worth emphasizing that the witnesses in question were not lay witnesses, but police officers, who are trained to be observant, and whose precise function at these encounters was to observe what was happening. Thus, different considerations from those applicable to civilian eyewitnesses come into play. As will be discussed more fully in Point II, infra, the difference between police witnesses and lay witnesses is such that the rules concerning eyewitness identification testimony set forth in State v. Henderson, 208 N.J. 208 (2011), do not apply.

State v. Little, 296 N.J. Super. 573 (App. Div.), certif. denied, 150 N.J. 25 (1997), observed as much as to the identification by an undercover officer:

There can be no dispute that a trained undercover police officer has heightened awareness of the need for proper identification of persons who engage in drug purveyance. [The officer] was a trained and experienced illicit-drug-activity investigator. As an undercover officer, he was not only trained to be observant but also had a strong incentive to be observant. [Id. at 580 (emphasis added).]

See also Manson v. Braithwaite, 432 U.S. 98, 115 (1977) (a police officer is “not a casual or passing observer, as is so often the case with eyewitness

identification;” rather, “as a specially trained, assigned, and experienced officer, [the eyewitness officer] could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial”). So too here.

As this fits within the paradigm of what constitutes “good reason” to permit in-court identifications, it follows that “‘there [was] little risk of misidentification’ based on the suggestiveness of the in-court showup because [in the non-confirmatory scenario] the witness is not relying ‘solely on his or her memory of witnessing the defendant at the time of the crime,’” but can be influenced by the suggestive conditions presented in the courtroom. Watson, 254 N.J. at 583. Here, there was no risk of that at all. Moreover, as police witnesses, they would not have been as subject to the suggestive influences of a courtroom as would lay witnesses.

To say in the face of this that there was any danger of misidentification or untoward suggestion to the witnesses in question, simply as a result of defendant’s presence in the courtroom, such that it was “plain error” to not conduct a pretrial hearing as to the admissibility of in-court confirmatory identifications, defies logic. Under defendant’s theory, these trained observers all got it wrong, or were so overawed by the fact that it was defendant seated at

counsel table as to meet his burden of demonstrating that what occurred was “clearly capable of producing an unjust result.” And they did so despite their sole duties here being to carefully observe the crimes unfold. Indeed, this was not a controlled buy where police were using an informant to purchase drugs from a random suspect who had not been pre-selected. These were pre-arranged sales with a specific target, who was seen by Detective Marino as he was leaving 274 Mercer Street (the address mentioned by Hnasko) before the first sale, was known by the cooperator who had seen Big Rob before the sales in question (and who called defendant to initiate the sales and then consummated those two sales when side-by-side with defendant both times), and who was watched by the surveillance detectives as both of the criminal transactions actually occurred.

If that does not constitute “good reason” in keeping with Watson and Crayton, we would be hard pressed to know what does. The fact that the two surveillance officers who actually observed the crimes (Sergeant Cecere and Officer Garcia) may not have been present when defendant was formally arrested a week after the second sale should not matter for plain error purposes. Nor should it matter that the arresting officer was Detective Marino, who was not able to actually observe the crimes given the tactical imperatives of getting the cooperator to the sale and interacting with him before and after

without being seen by the target. This was a team operation where a division of labor caused the officers to play different roles, but in the end, all were operating as a single unit. Thus, to seize on their need to assume different responsibilities and parse their observations, as defendant does, and conclude from that that none of the officers fit the definition of what constitutes a “good reason,” because none of them both saw defendant commit the crimes and arrested him, puts form over substance. Instead, their acts must be viewed holistically as they were members of a single team. That is how the police witnesses described it. (3T108-18 to 25). And that is what they collectively did.

As defendant cannot show plain error, his convictions must be affirmed.

POINT II

THERE WAS NO PLAIN ERROR IN THE TRIAL COURT’S OMISSION OF AN UNREQUESTED IDENTIFICATION CHARGE.

Defendant next claims that despite his counsel’s participation in the formulation of the final jury charge with the trial judge and prosecutor as trial was underway, it was somehow plain error for the trial judge to not issue an instruction he never asked for; that is, one detailing how the jury was to assess identification evidence. Defendant is wrong. There was no “plain error” in the absence of the unrequested charge.

That is because there was no serious question as to the identity of the person who sold the heroin at issue, which was confirmed by the three police witnesses who either (1) watched defendant leave his home before the first sale (the same address given by the cooperator as where Big Rob was dealing drugs out of), (2) waited for him at the site of the proposed sales and then watched him intently on two separate occasions as he sold drugs to the cooperator (who knew Big Rob from beforehand), or (3) arrested defendant at the same address he was seen leaving from two weeks earlier and from where the cooperator said Big Rob was dealing drugs. These circumstances bear no relation whatever to typical eyewitness identification scenarios, involving civilian witnesses who happen to see crimes unfold quickly and unexpectedly (and often shockingly) before them. Our Supreme Court recognizes that difference.

Plain error analysis again governs. When a party does not object to the absence of a jury instruction, the appellate court reviews the issue for plain error. R. 1:7–2; State v. Wakefield, 190 N.J. 397, 472–73 (2007), cert. denied, 552 U.S. 1146 (2008). Plain error refers to any error “clearly capable of producing an unjust result.” R. 2:10–2. Regarding a jury instruction, “plain error requires demonstration of ‘legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the

error possessed a clear capacity to bring about an unjust result.” State v. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930 (1970)). Indeed, “[w]ithout an objection at the time a jury instruction is given, “there is a presumption that the charge was not error and was unlikely to prejudice the defendant’s case.” State v. Montalvo, 229 N.J. 300, 320-21 (2017) (quoting State v. Singleton, 211 N.J. 157, 182 (2012)) (emphasis added). Thus, to prove plain error, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” State v. Morton, 155 N.J. 383, 421 (1998).

Here, defendant was afforded every opportunity to weigh in on the content of the instructions that would be given the jury. After the final witness testified, the court gave the parties copies of its proposed charge. (3T123-6 to 12). Then, after discharging the jury for the day, the court and counsel discussed various aspects of the proposed charge, with the court noting that additional discussions would occur the following day, after the court emailed copies of the revised charge to the parties. (3T126-5 to 128-17).

The following day, Judge Curry began the proceedings by noting for the record the preliminary charge conference of the preceding day, ensured the parties had received by email the amended charge, and asked the parties if they saw the need for any additional amendments. Both parties indicated that they

did not. (4T3-9 to 4-9).

With that backdrop, it is difficult to conceive how the charge at issue had any capacity to lead the jury astray, let alone to such an extent that defendant has met his burden of showing error, prejudice and a clear capacity to bring about an unjust result. As has been noted, this was a controlled buy with a specific target, where the police saw defendant leave his home address before the first transaction (the very address identified by the cooperator as where Big Rob was selling drugs from), where two surveillance officers (whose entire role here was to observe the sales) were waiting for Big Rob to arrive at the park, watched defendant exchange items with the cooperator (who knew and had seen Big Rob before, called him twice and defendant appeared both times to consummate the sales with him), and defendant was then arrested at the same address the cooperator gave and defendant left from on the earlier date. To say plain error occurred regarding a missing identification charge strains credulity.

That is even more the case when considering that all the witnesses in question were police officers. As noted in Point I, supra, police witnesses are trained observers, and trained witnesses. Our Supreme Court has thus agreed that there has been no evidential basis from which to conclude that eyewitness testimony from police witnesses ought to be evaluated by the same standards

as is done for civilian witnesses. In State v. Pressley, 232 N.J. 587 (2018), the Court was confronted with that very issue: that is, “whether an identification by a law enforcement officer should be tested by the same standards that apply to a civilian” under State v. Henderson, 208 N.J. 208 (2011). Id. at 590-91.

After considering the issue, the Pressley Court held that there was no evidential basis to apply Henderson’s regime to police witnesses:

Based on the record before us, we cannot determine whether part or all of the protections outlined in Henderson should apply to identifications made by law enforcement officers. We encourage parties in the future to make a record before the trial court, which can be tested at a hearing by both sides and then assessed on appeal. See State v. Adams, 194 N.J. 186, 201 (2008) (declining to adopt new standard for admissibility of identification evidence without full record to review); State v. Herrera, 187 N.J. 493, 501 (2006) (same). [Pressley, 232 N.J. at 592.]

Thus, defendant’s reliance on Henderson and its progeny is misplaced, as is his reliance on cases finding error in a missing identification charge where the witnesses were civilians and not all police officers, who in this case were witnesses to controlled buys with a pre-selected target. As noted above, this Court recognized in Little, 296 N.J. Super. at 580 (“no dispute that a trained undercover police officer” has a “heightened awareness of the need for proper identification of persons who engage in drug purveyance” and “as an undercover officer, he was not only trained to be observant but also had a strong incentive to be observant”), as did the Supreme Court in Manson v.

Braithwaite, 432 U.S. at 115 (a police officer is “not a casual or passing observer, as is so often the case with eyewitness identification” but rather “could be expected to pay scrupulous attention to detail, . . . [as] he knew that his claimed observations would be subject later to close scrutiny and examination at any trial”) that police witnesses are different and not subjected to the same sort of distorting influences as civilians, which is the very distinction that caused the Court in Pressley to find that it had no basis to extend to police witnesses the reasoning and rules set forth in Henderson.

That being so, defendant cannot meet his burden of showing plain error. As our Supreme Court has held, it is “[w]hen identification is a ‘key issue,’ [that] the trial court must instruct the jury on identification, even if a defendant does not make that request.” State v. Cotto, 182 N.J. 316, 325 (2005).

“Identification becomes a key issue when ‘[i]t [is] a major . . . thrust of the defense,’ particularly in cases where the State relies on a single victim-eyewitness.” Ibid. (quoting State v. Green, 86 N.J. 281, 291 (1981)) (emphasis added). Here, the State did not rely on a single eyewitness, let alone a single crime victim-eyewitness, who would naturally be subject to the vagaries of eyewitness testimony discussed in Henderson, none of which apply here.

Rather, “[t]he determination of plain error depends on the strength and quality of the State’s corroborative evidence rather than on whether

defendant's misidentification argument is convincing." Cotto, 182 N.J. at 326. Here, that corroboration was overwhelming. First, defendant obviously answered the phone and spoke with the cooperator during their initial phone conversation, when the terms of the first transaction were discussed. Second, defendant was seen by Detective Marino leaving the very home address before the first controlled buy that had been identified by the cooperator as where Big Rob was dealing drugs from. Third, defendant met the cooperator in the place where the controlled buys were set to occur and was able to consummate the transactions according to their terms with the cooperator, all under the watch of trained surveillance officers, all of whom were literally there waiting for Big Rob to show up. Fourth, the cooperator testified to having seen Big Rob before the sales in question, thus straining credulity as to whether he would have dealt with and commit the crimes at issue with someone other than Big Rob. And fifth, defendant was arrested a week after the controlled buy by Detective Marino and others, at the same address given by the cooperator (274 Mercer Street) as where Big Rob was dealing drugs from.

Again, this was no whodunit, and the interlocking corroborative evidence all served to negate any need for an identification instruction, certainly to the point that it was not plain error to not give such a charge. That evidence in the aggregate was overwhelming. That being so, defendant's

convictions must be affirmed.

POINT III

THERE WAS NO ERROR IN THE UNOBJECTED-TO TESTIMONY THAT THE POLICE MIGHT HAVE DELAYED DEFENDANT’S ARREST IN THE HOPE THAT HE MIGHT LEAD THEM TO MORE SIGNIFICANT CRIMINALS.

During Detective Marino’s testimony on re-direct (after defense counsel emphasized on cross that defendant had not been arrested immediately after the first or second controlled buys but only a week after the second (3T53-18 to 54-8)), the prosecutor asked if it was “uncommon to withhold charges after an initial purchase of CDS from a target?” Det Marino responded that it was “[v]ery common.” When asked why, he explained, “[b]ecause we’re – pending charges to hope that they will cooperate with us to get somebody, a – a larger drug dealer, maybe somebody a little more violent.” (3T64-1 to 8). After Det. Marino gave that answer, defense counsel interjected:

[DEFENSE COUNSEL]: A little more what, I’m sorry, I didn’t hear.

THE WITNESS: Violent. [3T64-9 to 11].

After asking for that repeat of the detective’s answer, defense counsel raised no objection and the re-direct continued.

Now on appeal, defendant argues for the first time that this single answer was so prejudicial as to itself warrant reversal, as it purportedly

characterized him as “violent.” To make that argument, defendant mischaracterizes what was said. The question at issue was directed at understanding whether it was “common” to withhold charges concerning a target (like defendant) from whom drugs had already been purchased, and Det. Marino explained why it was “very common” to do so. As he explained, sometimes criminal charges against a target may be withheld to give the target a chance to lead the police to “a larger drug dealer” and/or to “somebody a little more violent.” Suffice it to say this assertion of plain error has no merit. Indeed, its lack of merit is best illustrated by defense counsel seeing no need to object or request corrective action after she herself elicited its repetition, thus highlighting it.

To say that this explanation of the general practice of police offered a description of defendant as a violent person completely misreads the exchange. It did nothing of the kind and had no capacity for prejudice at all. It was entirely appropriate.

This was by no means “other crimes” evidence, as defendant now portrays it. If anything, it only suggested that the police thought of defendant as a smaller fish, who might be useful to catch larger dealers. Even if it had been objected to, perhaps under N.J.R.E. 403, it is hard to take seriously that it had such prejudicial import to warrant sua sponte exclusion, or even moreso to

justify reversing this well-deserved conviction. Under Rule 403, evidence may be excluded as “unduly prejudicial” only when its probative value “is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues.” State v. Cole, 229 N.J. 430, 448 (2017); State v. Thompson, 59 N.J. 396, 421 (1971). That is hardly the case here.

Defendant’s convictions must be affirmed.

POINT IV

THERE WAS NO CUMULATIVE ERROR BELOW.

Just as defendant’s arguments for reversal all fail when addressed on their own, they fare no better when viewed collectively. Thus, his claim of cumulative error has no merit. State v. Orecchio, 16 N.J. 125, 129 (1954). His convictions must therefore be affirmed.

POINT V

DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING.

Defendant is correct that his convictions for second-degree distribution of heroin in a public park (counts three and four) are not subject to mandatory extended terms under N.J.S.A. 2C:43-6(f). State v. Patterson, 435 N.J. Super. 498, 514-16 (App. Div. 2014), expressly so holds. The State moved for such a mandatory extended term in this matter, and the trial court sentenced defendant

under N.J.S.A. 2C:43-6(f) to extended terms on all counts, so noting at the sentencing hearing (5T10-20 to 12-5), in its written order granting the motion (Da6) and in the Judgment of Conviction itself. (Da9-10). Thus, the extended terms on counts three and four must be vacated and this matter remanded for a new sentencing hearing under State v. Randolph, 210 N.J. 330 (2012).

At the new sentencing, the State will have the option to move for a discretionary extended term under N.J.S.A. 2C:44-3a, as defendant appears to meet all the criteria for a persistent-offender sentence, given his age, prior convictions and the dates of those prior convictions (or release from confinement) when compared to the dates of the instant offenses. If the State files a motion for such a discretionary extended term, it will have to elect whether to seek such a sentence or seek to maintain the mandatory extended terms on the lesser charges of third-degree distribution set forth in counts one and two. See State v. Robinson, 217 N.J. 594, 610-11 (2014) (N.J.S.A. 2C:44-5(a)(2) prohibits a sentence containing both a mandatory and a discretionary extended term). Although counts one and two would merge into counts three and four for sentencing purposes, the periods of parole ineligibility would survive the merger if the mandatory extended terms on those counts are retained. Patterson, 435 N.J. Super. at 518. Again, the State will have the opportunity to elect whether to maintain those periods of parole ineligibility

that arise from N.J.S.A. 2C:43-6(f) on counts one and two, or have defendant sentenced to ordinary terms on those counts as well if defendant receives a discretionary extended sentence on counts three or four. Finally, the State could reserve the right to maintain those mandatory extended terms (and their parole disqualifiers) should its motion for a discretionary extended term be denied. See Robinson, 217 N.J. at 610 n.5 (“[i]f the State elects [at the resentencing] to pursue a discretionary extended term sentence, it may reserve the right to request a mandatory extended term in the event that the trial court denies the State’s application for imposition of the discretionary extended term”). Those options are available to the prosecutor here as well.

CONCLUSION

For the foregoing reasons, the State urges this Court to affirm defendant's convictions and order a remand for re-sentencing.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3699-23
INDICTMENT NO. 22-02-00057-I

| | | |
|-----------------------|---|--|
| STATE OF NEW JERSEY, | : | <u>CRIMINAL ACTION</u> |
| Plaintiff-Respondent, | : | On Appeal from a Judgment of |
| v. | : | Conviction of the Superior Court |
| SHADON M. MCDOWELL, | : | of New Jersey, Law Division, |
| Defendant-Appellant. | : | Warren County. |
| | : | Sat Below: |
| | : | Hon. H. Matthew Curry, J.S.C., and a jury. |

DEFENDANT IS CONFINED

Your Honors:

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

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REPLY PROCEDURAL HISTORY

Defendant-Appellant Shadon McDowell was charged with two counts of drug distribution and two counts of drug distribution within 500 feet of a public park. (Da1-4)¹ After a trial, Mr. McDowell was convicted as charged. (3T to 4T; Da5) He was sentenced to an aggregate term of twelve years' incarceration with five years of parole ineligibility. (Da7)

Mr. McDowell's plenary brief, filed in November 2024, raised five points: the inadmissibility of three first-time in-court identifications of Mr. McDowell, the lack of any jury instruction on identification testimony, the inadmissibility of bad-act evidence under N.J.R.E. 404(b), cumulative error, and a host of sentencing errors. (Db10-38) The State submitted a responding brief on April 3, 2025, disagreeing with Mr. McDowell's first four points but conceding that Mr. McDowell must be resentenced. (Sb10-30) Mr. McDowell now files this reply brief, which replies to the State's Point I concerning the

¹ The following abbreviations will be used:

Sb – State's Brief

Db – Defendant-Appellant's Brief

Da – Defendant-Appellant's Appendix

1T – December 1, 2023 (Pretrial Conference)

2T – January 8, 2024 (Pretrial Conference)

3T – January 10, 2024 (Trial)

4T – January 11, 2024 (Trial)

5T – June 14, 2024 (Sentencing)

admissibility of the three first-time in-court identifications and Point II concerning the lack of any jury instruction on identification testimony.

REPLY STATEMENT OF FACTS

During two controlled buys in June 2021, cooperating witness Ryan Hnasko bought drugs from someone named “Big Rob.” (3T:83-11 to 15, 96-4 to 10) The question for the jury was: is Shadon McDowell “Big Rob”?

At trial, the State presented four witnesses: three police officers who either coordinated or surveilled the controlled buys, and Mr. Hnasko. Mr. Hnasko testified that he could not remember who he bought the drugs from, other than that the dealer went by “Big Rob.” (3T:83-16 to 18, 96-4 to 98-17) He was never asked to identify Mr. McDowell. But all three officers, for the first time at trial, identified Mr. McDowell as the dealer. (3T:28-8 to 25, 68-22 to 69-7, 71-12 to 21, 110-9 to 21) The Court gave no instruction to the jury on how to assess the reliability of these first-time in-court identifications – not when they occurred, and not during the final jury charge.

LEGAL ARGUMENT

Mr. McDowell relies on the arguments from his initial brief and adds the following:

REPLY POINT I²

MR. MCDOWELL WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT PERMITTED THE STATE TO ELICIT THREE FIRST-TIME IN-COURT IDENTIFICATIONS IN DIRECT CONTRAVENTION OF THE PROCEDURES MANDATED BY STATE v. WATSON, 254 N.J. 558 (2023). (Not Raised Below)

A. State v. Henderson, 208 N.J. 208 (2011), and its Progeny Apply to Civilian Eyewitnesses and Police Officer Witnesses Alike.

The State argues that Henderson, which established a new legal framework for assessing the reliability of identification evidence informed by social science, does not apply to police witnesses. (Sb15, 21-23) To get there, it misreads the holding in State v. Pressley, 232 N.J. 587 (2018), ignores the most crucial and relevant language in State v. Watson, 254 N.J. 558 (2023), and disregards a consensus of social scientists to the contrary.

First, the State asserts that “the Pressley Court held that there was no evidential basis to apply Henderson’s regime to police witnesses.” (Sb22 (emphasis added)) It did no such thing. Pressley considered the proper application of Henderson to police witnesses, but it declined to answer the question presented. Pressley, 232 N.J. at 590-92.

² This argument is raised in Point I of Mr. McDowell’s plenary brief and replies to Point I of the State’s brief.

In Pressley, the parties presented the Court with “an intriguing question: whether an identification made by a law enforcement officer should be tested by the same standards that apply to a civilian.” Id. at 590-91. The Court first reaffirmed “a simple concept: identifications by law enforcement officers should be examined to determine if an ‘impermissibly suggestive’ identification procedure was used and to assess whether a defendant has proven ‘a very substantial likelihood of irreparable misidentification.’” Id. at 591 (quoting Henderson, 208 N.J. at 238). The Court next considered State v. Little, 296 N.J. Super 573 (App. Div. 1997), which the State relies on in its brief (Sb15, 22). The Court found Little inconclusive on the matter because it “cites no sources and does not analyze any social science evidence.” Pressley, 232 N.J. at 591-92. Ultimately, the Court concluded:

Based on the record before us, we cannot determine whether part or all of the protections outlined in Henderson should apply to identifications made by law enforcement officers. We encourage parties in the future to make a record before the trial court, which can be tested at a hearing by both sides and then assessed on appeal.

[Id. at 592.]

Nevertheless, the Court found that any error in not holding a pretrial hearing on the police officer’s identification testimony was harmless because the showup at issue occurred within an hour of the officer’s face-to-face interaction with the defendant, and “the trial judge gave the jury a full instruction on identification evidence,

consistent with Henderson and the model jury charge.” Ibid. Contrary to the State’s assertion, Pressley did not answer the “intriguing question” posed by counsel; it saved the question for another day. See id. at 590.

That question left open in Pressley was answered in Watson. There, the Court held as follows:

[F]irst-time in-court identifications can be conducted only when there is “good reason” for them. See [Community v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014)]. . . . [G]ood reasons may exist, such as when an “eyewitness was familiar with the defendant before” the crime. [Id. at 170]. Victims of domestic violence, for example, could properly be allowed to identify their assailant in court for the first time. Ibid. Friends or associates, among others, could identify someone they have known for some time. And officers could confirm that the person on trial was the same person they arrested. Ibid.

[Watson, 254 N.J. at 587 (emphasis added).]

In Watson, our Supreme Court explicitly contemplates that police officer witnesses will be bound by its holding. There is no alternative reading.

Moreover, the State’s misreading of Pressley and Watson conflicts with the social science consensus that police eyewitnesses are just as vulnerable to misidentification as civilian eyewitnesses. “Studies consistently find . . . that police officers are not superior to civilians as eyewitnesses.” State v. Padua, 869 A.2d 192, 229 (Conn. 2005) (Katz, J., dissenting and concurring); see Daniel Reisberg & Kathy Pezdek, Police Officers Have No Advantage Over Civilians When Making Identifications, Applied Cognitive Psych. 1, 7 (2023) (concluding that, based on

the data, “the suggestion of a police officer identification advantage is best regarded as a myth”) (emphasis in original); Annelies Vredeveldt & Peter J. van Koppen, The Thin Blue Line-Up: Comparing Eyewitness Performance by Police and Civilians, 5(3) J. Applied Rsch. Memory & Cognition, 252, 256 (2016) (concluding that “there is virtually no evidence that police officers are better at person identifications – if anything, they may be more likely to falsely identify an innocent person”); Shannon M. Smart, Melissa A. Berry & Dario N. Rodriguez, Skilled Observation and Change Blindness: A Comparison of Law Enforcement and Student Samples, 28(4) Applied Cognitive Psych. 590, 590-596 (2014) (finding that, where students and police officers both completed a change-blindness task and were then presented a lineup, students outperformed the officers identifying the correct target in the lineup, and that “officers’ confidence was either uncorrelated or negatively correlated with accuracy”); Lisa J. Steele, Trying Cases of Mistaken Identity: Advice to Connecticut Counsel Following State v. Ledbetter, 25 Quinnipiac L. Rev. 799, 808 (2007) (“Factors which are commonly believed to affect perception, but do not, are training and certainty.”).

Given the Supreme Court’s mandate in Watson, which explicitly limits first-time in-court identifications by both civilian and police witnesses, and the support of experts that find little or no distinction between the identification skills of civilians and police officers, it is beyond serious debate whether Henderson and its

progeny apply to police officer eyewitness; they do, and this Court must apply them accordingly.

B. All Three First-Time In-Court Identifications at Mr. McDowell’s Trial Were Elicited Absent the “Good Reason” that Watson Demands.

As Mr. McDowell stated in his plenary brief, first-time in-court identifications are only admissible when (1) the State moves to admit them before trial, and (2) the trial court finds “good reason” to admit them. Watson, 254 N.J. at 587-88; (Db13-14). The State does not argue that these procedures were followed – nor could it. This, alone, is grounds for reversal. (Db14-15) Ignoring this defect, the State argues that there was good reason to admit each of the three first-time in-court identifications, on the ground that the officers “collectively” had enough contact with Mr. McDowell to justify their identifications. (Sb13, 17-18) The State’s argument cannot survive the scrutiny of the caselaw it relies upon or basic evidentiary principles.

The State relies on the following language from Watson:

The [Crayton] court explained that “good reason” . . . can include several situations, such as . . . when “the witness is an arresting officer who” saw the crime and “the identification merely confirms that the defendant is the person who was arrested for the” offense. [21 N.E.3d] at 170. . . . As a result, “there is little risk of misidentification” based on the suggestiveness of the in-court showup because the witness is not relying “solely on his or her memory of witnessing the defendant at the time of the crime.” Ibid.

[Watson, 254 N.J. at 583.]

Watson, then, allows for the possibility of “good reason” to elicit a police officer’s first-time in-court identification where the officer both (1) “saw the crime” and (2) “arrested” the perpetrator. Ibid.

The State’s analysis immediately falls apart, however, because it concedes that no officer who identified Mr. McDowell on the stand both (1) saw the controlled buys and (2) was present for Mr. McDowell’s arrest. (Sb 13, 17-18) In the State’s own words, “the two surveillance officers who actually observed the crimes (Sergeant Cecere and Officer Garcia) may not have been present when defendant was formally arrested,” and “the arresting officer was Detective Marino, who was not able to actually observe the crimes.” (Sb17 (emphases in original)) Put simply, “none of them both saw defendant [allegedly] commit the crimes and arrested him.” (Sb18)

The State’s argument then takes a puzzling turn; it asks this Court to treat the three first-time in-court identifications as one “holistic[]” identification. (Sb13, 18) The State argues that “collectively,” the officers, “acting as a team, saw the crimes occur and then made the arrest,” because “they were members of a single team.” Ibid. (emphases in original).

No court in New Jersey – indeed, no court anywhere of which Mr. McDowell is aware – has ever allowed three witnesses to testify “as a team.” (See Sb13) Indeed, New Jersey courts only permit testimony where a witness “has

personal knowledge of the matter.” N.J.R.E. 602. It defies logic, then, to permit three witnesses to “collectively” identify Mr. McDowell at trial, based on an amalgamation of what all three perceived. (See Sb18)

Detective Marino witnessed Mr. McDowell leave his house on the day of one of the controlled buys. (3T:32-22 to 33-1, 51-5 to 6) He did not see where Mr. McDowell went, and did not see him return. Weeks later, Detective Marino arrested Mr. McDowell at his home. (3T:54-17 to 22) There was no good reason to permit Detective Marino to testify that Mr. McDowell participated in either controlled buy, because he did not witness them. (3T:50-1 to 2, 51-10 to 12)

Sergeant Cecere witnessed both controlled buys from approximately 62 feet away. (3T:72-19 to 73-15, 75-21 to 76-22, 105-20 to 106-2) This was the only time he allegedly saw or interacted with Mr. McDowell before trial. There was no good reason to justify his first-time in-court identification of Mr. McDowell.

Officer Garcia witnessed one controlled buy from 90 to 120 feet away. (3T:109-20 to 21, 111-4 to 5) This was the only time he allegedly saw or interacted with Mr. McDowell before trial. There was no good reason to justify his first-time in-court identification of Mr. McDowell.

None of the three first-time in-court identifications were supported by good reason as defined in Watson. Each one was reversible error.

REPLY POINT II³

MR. MCDOWELL WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON HOW TO ASSESS THE RELIABILITY OF THE THREE FIRST-TIME IN-COURT IDENTIFICATIONS. (Not Raised Below)

A. Absent the Three Inadmissible First-Time In-Court Identifications, the State’s Case Lacks the Corroborative Evidence Necessary to Survive Plain Error Review.

The State argues that any theoretical error at Mr. McDowell’s trial surrounding the three first-time in-court identifications cannot survive plain error review because “defendant’s identity as the dealer was not open to serious question.” (Sb10) The State overstates the strength of the prosecution’s corroborative proofs and misrepresents the evidence elicited at trial.

As a preliminary matter, the State’s evaluation of the prosecution’s proofs suffers from circular reasoning; it argues that “there was no serious question as to the identity of the person who sold the heroin at issue,” because it “was confirmed by the three police witnesses.” (Sb19) But the identifications of those police witnesses are the very testimony in dispute; they cannot corroborate themselves.

³ This argument is raised in Point II of Mr. McDowell’s plenary brief and replies to Point II of the State’s brief.

The State provides five reasons that the “corroboration was overwhelming.” (Sb24) All five either have no basis in the record or suffer from this self-corroboration fatal flaw.

First, the State asserts that Mr. McDowell “obviously answered the phone and spoke with the cooperator during their initial phone conversation, when the terms of the first transaction were discussed.” (Sb24) But the State elicited no testimony confirming that the phone number Mr. Hnasko called to coordinate the drug deal with “Big Rob” was Mr. McDowell’s phone number. (Db17-18) And, crucially, Mr. Hnasko never identified Mr. McDowell as the “Big Rob” that he contacted. (3T:83-16 to 18; Sb8-9, 17)

“Second, defendant was seen by Detective Marino leaving the very home address before the first controlled buy that had been identified by [Mr. Hnasko] as where Big Rob was dealing drugs from.” (Sb24) Although this assertion is repeated by the State throughout its brief (Sb2-3, 14, 17, 19), it is not supported by the record. Detective Marino testified: “We were advised by a confidential witness actually, that somebody was selling drugs by the name of Big Rob, out of 274 Mercer Street.” (3T:28-12 to 14) Detective Marino never clarified whether Mr. Hnasko was that confidential witness or whether it was somebody else. Mr. Hnasko, for his part, never testified to any knowledge of where “Big Rob” lived, nor that he had imparted that information to the officers.

“Third, defendant met the cooperator in the place where the controlled buys were set to occur.” (Sb24) The only proofs that it was Mr. McDowell who met Mr. Hnasko in the park are the surveilling officers’ first-time in-court identifications; they cannot corroborate themselves.

“Fourth, the cooperator testified to having seen Big Rob before the sales in question, thus straining credulity as to whether he would have dealt with and commit the crimes at issue with someone other than Big Rob.” (Sb24) But, again, Mr. Hnasko never identified Mr. McDowell as the “Big Rob” in question. (3T:83-16 to 18; Sb8-9, 17) When the prosecutor asked him whether he remembered who he was asked to purchase heroin from, Mr. Hnasko replied, “No.” Ibid. The prosecutor never asked if Mr. McDowell was Big Rob, if Mr. McDowell had ever dealt him drugs, or whether he had ever seen Mr. McDowell before trial. (Db9)

Fifth, the State asserts that Mr. McDowell “was arrested a week after the controlled buy by Detective Marino and others, at the same address given by the cooperator (274 Mercer Street) as where Big Rob was dealing drugs from.” (Sb24) Again, there is no proof in the record that Mr. Hnasko gave the officers Mr. McDowell’s address or connected it to the drug sales.

As a final note, the State asserts that “this was not a controlled buy where police were using an informant to purchase drugs from a random suspect who had not been pre-selected” (Sb17), and that “this was a controlled buy with a specific

target” (Sb21). Given that Mr. Hnasko testified that officers “[j]ust told [him] to call somebody and buy some dope” (3T:84-11), that assertion is seriously in question.

Absent the three inadmissible first-time in-court identifications, the State’s corroborative proofs that Mr. McDowell is the “Big Rob” who sold Mr. Hnasko drugs on the two days in question are unacceptably thin and cannot survive plain error review. This Court must reverse.

CONCLUSION

For the reasons discussed here and in Mr. McDowell’s plenary brief, his convictions must be reversed. Alternatively, as the State concedes (Sb27-28), Mr. McDowell’s sentence must be vacated and remanded for resentencing.

Respectfully submitted,

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