SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3867-05T4
A-3602-13T4
A-3603-13T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RALPH BAKER,
a/k/a RALPH RAHMAN,

Defendant-Appellant.

Submitted November 29, 2016 – Decided June 28, 2017

Before Judges Fisher and Leone.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 02-10-1265 and Middlesex County, Indictment No. 02-10-1239.

Joseph E. Krakora, Public Defender, attorney for appellant (Alison Perrone, Designated Counsel, on the briefs).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent in A-3867-05 and A-3603-13 (Milton S. Leibowitz, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent in A-3602-13 (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Ralph Baker was convicted in separate trials in Middlesex County and Union County. He appeals his November 10, 2005 judgment of conviction in Middlesex County, Appeal No. A-3867-05. He also appeals the August 22, 2007, and September 17, 2007 orders denying a new trial in Union County, Appeal No. A-3602-13, and in Middlesex County, Appeal No. A-3603-13, respectively. The Middlesex County and Union County appeals were listed back-to-back, and we consolidate them for purposes of this opinion. We affirm in part, vacate in part, and remand.

I.

We outline the testimony in the Middlesex County trial. At closing time on the evening of July 10, 2002, defendant entered a Burger King in Edison Township. He was holding a black handgun, carrying a black bag, and wearing latex gloves. He ordered the fourteen-year-old cashier to give him "the f**king money." He also grabbed a fifteen-year-old employee of a different Burger King (the visitor), who was there visiting the manager, Michelle Krigger, and pushed her against the counter. Krigger came forward

and said only she had access to the cash register. Defendant pointed the gun at the cashier and then at the visitor and demanded the money. Krigger gave defendant the money from the cash register. Defendant then demanded and took money from the visitor's purse before he fled in a black vehicle.

We outline the testimony in the Union County trial. At about 1:40 a.m. on July 16, 2002, Union Township Police Officer Michael Wittevrongel saw defendant running from the office of an Amoco gas station. Defendant was headed toward a black vehicle in an adjacent lot while wearing a black ski mask with holes cut out for eyes and carrying a black bag. Wittevrongel radioed he believed a robbery was in progress. He pulled over and saw defendant run behind a small storage shed. Wittevrongel got out of his car, and saw defendant emerge from behind the shed without the mask and bag. Wittevrongel arrested defendant, and found $204 in his pocket. After handcuffing defendant, Wittevrongel went behind the shed and found the mask and the black bag. The bag contained a black handgun, a loose bullet, thirteen packs of cigarettes, loose cash, and fifty $1 bills in a wrapped bundle. In the black vehicle, which was parked unlocked with the keys in the ignition and was registered to defendant, Wittevrongel found defendant's wallet, his driver's license, his papers, and latex gloves.

A Union County grand jury indicted defendant for first-degree robbery (first count), N.J.S.A. 2C:15-1; second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and fourth-degree aggravated assault by pointing a firearm, N.J.S.A. 2C:12-1(b)(4), and separately indicted him for second-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b).

The Union County jury convicted defendant under the first count of the lesser—included offense of disorderly-persons theft, N.J.S.A. 2C:20-3(a), and also convicted him of the unlawful-possession and certain-persons counts. In judgments of conviction dated June 18, 2004, defendant was sentenced to seventeen years in prison with eight years of parole ineligibility on the certain-persons count, with concurrent sentences of six months in jail for theft and seven years in prison for unlawful possession. Defendant filed a notice of appeal.

Defendant was then tried in Middlesex County. The ski mask, bag, and gun seized in the Union County arrest were admitted into evidence. The jury convicted defendant of first-degree robbery of the Burger King cashier (Count One) and the visitor (Count Two), N.J.S.A. 2C:15-1; second-degree possession of a firearm for an unlawful purpose regarding the cashier (Count Three) and the visitor (Count Four), N.J.S.A. 2C:39-4(a); fourth-degree unlawful

possession of a handgun (Count Five), N.J.S.A. 2C:39-5(b); and fourth-degree aggravated assault by pointing a firearm at the visitor and/or the cashier (Count Six), N.J.S.A. 2C:12-1(b)(4). The trial court merged Count Three with Count One, and Count Four with Count Two. The court sentenced defendant to life in prison on Count Two, with concurrent sentences of twenty years in prison with ten years of parole ineligibility on Count One, and eighteen months in prison with nine months of parole ineligibility on Counts Five and Six. Defendant filed a notice of appeal.

Defendant was also charged in Somerset County with committing a July 2, 2002 armed robbery and aggravated assault. It appears the Somerset County court ruled the ski mask, bag, and gun seized in the Union County arrest would be admissible, and granted defendant's motion to have the mask tested for DNA. In 2006, the State Police laboratory informed the Somerset County authorities the mask bore DNA linked to another man arrested in April 2003 for a masked armed robbery in Hudson County. Although the Somerset County prosecutor disputed the DNA test excluded defendant, the Somerset County indictment was dismissed voluntarily on April 3, 2008.

When the DNA evidence came to light, defendant filed motions in his Middlesex County and Union County appeals seeking remands. We remanded the Middlesex County appeal to allow defendant to file

a motion for a new trial. We also allowed defendant to file a new trial motion in Union County, but proceeded with the Union County appeal. We affirmed the theft and unlawful possession convictions, but reversed his certain-persons conviction and remanded for a new trial on that charge, which the State later dismissed. State v. Baker, No. A-3855-04 (App. Div. Feb. 21, 2007).

Defendant's new trial motions in Middlesex and Union Counties were denied on August 22, 2007, and September 17, 2007, respectively. We dismissed defendant's untimely pro se appeals and the Supreme Court denied his petitions for certification. State v. Baker, 196 N.J. 592 (2008).

In 2009, defendant challenged his Middlesex and Union convictions by filing two federal "habeas" petitions under 28 U.S.C.A. § 2254 in the United States District Court for the District of New Jersey. The petitions were consolidated before Judge Kevin McNulty. Baker v. Ricci, No. 09-3654 (KM), 2013 U.S. Dist. LEXIS 91718, at *2 (D.N.J. June 28, 2013). The judge rejected the State's arguments that the petitions were untimely or procedurally defaulted, but agreed with the State that defendant had not exhausted his available state court remedies. Baker v. Ricci, No. 09-3654 (KM), 2013 U.S. Dist. LEXIS 128713, at *2-3 (D.N.J. Sep. 9, 2013). The judge stayed the petitions but retained jurisdiction while defendant exhausted his state court remedies.

Id. at *43. The judge commented that defendant's claim "based on later-discovered DNA evidence" appeared to "have sufficient merit to warrant further scrutiny." Id. at *2, *36-37.

In May 2014, we granted defendant's motion to reinstate his direct appeal in the Middlesex County case. We also allowed defendant to file appeals as within time from the orders denying new trials in Union County and in Middlesex County.

II.

We first consider defendant's appeal from his judgment of conviction in Middlesex County, Appeal No. A-3867-05. His counseled brief raises the following issues in that appeal:

> POINT ONE - KRIGGER'S IDENTIFICATION OF DEFENDANT SHOULD HAVE BEEN SUPPRESSED BECAUSE THE IDENTIFICATION PROCEDURE WAS IMPERMISSIBLY SUGGESTIVE AND RESULTED IN A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.
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> . . . .
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> POINT THREE - DEFENDANT'S DISCRETIONARY EXTENDED TERM OF LIFE IS MANIFESTLY EXCESSIVE AND REQUIRES A REMAND.[1]

Defendant's pro se brief raises the following issues:

> POINT I — THE IDENTIFICATION WAS NOT RELIABLE, DUE TO THE PHOTO ARRAY AND FAILURE TO ADHERE TO THE ATTORNEY GENERAL GUIDELINES ON IDENTIFICATION IN PHOTO ARRAYS, AND LIVE LINEUPS IN APRIL 2001, AGAINST UNITED [S]TATES

[1] Point Two in defendant's counseled brief concerns his Appeal No. A-3603-13, challenging the denial of a new trial, which we address in Point V.

SUPREME COURT AND NEW JERSEY SUPREME COURT PRECEDENTS, CODIFIED INTO LAW.

A.

Defendant first challenges the December 4, 2003 denial of his motion to suppress the out-of-court identification by Krigger. "Our standard of review on a motion to bar an out-of-court-identification . . . is no different from our review of a trial court's findings in any non-jury case." State v. Wright, 444 N.J. Super. 347, 356 (App. Div. 2016) (citing State v. Johnson, 42 N.J. 146, 161 (1964)). "Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential. We are obliged to uphold the motion judge's factual findings so long as sufficient credible evidence in the record supports those findings." State v. Gonzales, 227 N.J. 77, 101 (2016) (citations omitted). "Those factual findings are entitled to deference because the motion judge, unlike an appellate court, has the 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Ibid. (quoting Johnson, supra, 42 N.J. at 161). A "trial court's findings at the hearing on the [reliability and] admissibility of identification evidence are 'entitled to very considerable weight.'" State v. Adams, 194 N.J. 186, 203 (2008) (quoting State

v. Farrow, 61 N.J. 434, 451 (1972)). We must hew to that standard of review.

Because Krigger's identification occurred in 2002, it is governed by the "two-prong test articulated by the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)," which "was adopted essentially verbatim by [our Supreme] Court in" State v. Madison, 109 N.J. 223, 232-33 (1988). State v. Micelli, 215 N.J. 284, 290 (2013).[2]

Madison's two prongs examine suggestiveness and reliability:

> a court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence.

[2] In State v. Henderson, 208 N.J. 208, 288 (2011), our Supreme Court revised Madison's two-prong test, articulating a more detailed framework to be applied "to future cases only." Id. at 302. Although defendant's pro se brief relies on Henderson, "[b]ecause the events underlying this case arose before the Henderson decision was handed down, the guidelines established in Manson/Madison are applicable to this matter." State v. Jones, 224 N.J. 70, 86 n.1 (2016).

> [Madison, supra, 109 N.J. at 232 (citations omitted).]

"Reliability is the linchpin in determining the admissibility of identification testimony[.]" Micelli, supra, 215 N.J. at 292 (quoting Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154). "To assess the reliability of an identification," a court must consider "'[t]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'" Ibid. (citations omitted).

The judge at the suppression hearing found the following facts. During the July 10, 2002 robbery, Krigger viewed defendant for about five minutes from about four feet away, looking at him straight in the eye. Defendant never pointed the gun at her.

When police officers arrived, Krigger was able to describe defendant in detail, noting he was about 5'9" tall, had a stocky build, a receding hairline, short "salt and pepper" hair, a beard with gray throughout, a scar on his right cheek, was wearing a mechanics-type jumper and latex gloves, and carrying a black duffel bag. Krigger was very confident she could identify the robber.

The next day, July 11, Krigger helped prepare the computer-generated composite. The visitor and the cashier respectively confirmed the composite depicted or looked really similar to the robber. Additionally, the judge found the composite had "a lot of similarities" with defendant.

After defendant was arrested, a Union County detective provided Edison Sergeant Joseph Shannon with a photograph of defendant, which he gave to another officer to prepare a six-photo array. On July 19, nine days after the robbery, Shannon showed Krigger all six photos one at a time for ten seconds each. Krigger very quickly identified defendant's photograph and said he was the robber. When Shannon asked how sure she was, on a scale of one to ten, she replied "ten."

The motion judge found that both Krigger and Sergeant Shannon were credible, and that Krigger had "a very good opportunity" to observe defendant. The judge found her identification was reliable and admissible. Krigger identified defendant and his photo at the motion hearing and at trial.

Defendant argues that, in two respects, Sergeant Shannon violated the then-new Attorney General's Guidelines.[3] First, the

[3] The Guidelines became effective on October 15, 2001, about nine months before defendant's identification here. See Letter from Attorney General John J. Farmer, Jr., to All County Prosecutors

Guidelines "advise[] agencies to utilize, whenever practical, someone other than the primary investigator assigned to a case to conduct both photo and live lineup identifications." A.G. Letter, supra, at 1-2; A.G. Guidelines, supra, at 1. Sergeant Shannon acknowledged this Guideline and that he was one of the primary investigators on the case, but said he presented the photo lineup because he was the only officer available to do so at that time.

Second, the Guidelines "recommend that, when possible, 'sequential lineups' should be utilized . . . . by displaying one photo or one person at a time to the witness." A.G. Letter, supra, at 2. "When presenting a sequential photo lineup, the lineup administrator or investigator should . . . [p]resent each photo to the witness separately, in a previously determined order, removing those previously shown." A.G. Guidelines, supra, at 4. While Sergeant Shannon displayed each photo to Krigger sequentially, he was unaware of any need to remove from the table the photos previously shown, and he instructed her not to make an identification until she viewed all six photos before her.

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et al. (Apr. 18, 2001) (A.G. Letter), and Office of the Attorney Gen., N.J. Dep't of Law & Pub. Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (A.G. Guidelines), reprinted in State v. Herrera, 187 N.J. 493, 511-20 (2006), and available at http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

However, the Guidelines permit both simultaneous photo lineups and sequential photo lineups, albeit with a preference for the latter. Id. at 3-4. Our Supreme Court has subsequently observed that "recent studies that have called that preference into doubt. Because the science supporting one procedure over the other remains inconclusive, we are unable to find a preference for either," and "we do not limit either one at this time." Henderson, supra, 208 N.J. at 256-58.

In any event, the Supreme Court in Henderson explicitly rejected the argument that "any violation of the Attorney General Guidelines should require per se exclusion of the resulting eyewitness identification." Id. at 292-93. The Court also refused to draw a "'presumption of impermissible suggestiveness'" even from a material breach of the Guidelines. Id. at 227-28, 281 (citation omitted). The Court stressed "[t]he Attorney General expressly noted that identifications that do not follow the recommended Guidelines should not be deemed 'inadmissible or otherwise in error.'" Id. at 278 (quoting A.G. Letter, supra, at 3).[4] Rather, the Court found "the Guidelines are a series of

[4] Both the A.G. Letter, supra, at 3, and the A.G. Guidelines, supra, at 1, affirmed "that current eyewitness identification procedures fully comport with federal and state constitutional requirements" even without the Guidelines' procedures.

recommended best practices," prophylactic measures to reduce certain risks of suggestiveness. Ibid.

Here, defendant failed to show those risks were realized. There was no indication Sergeant Shannon gave "inadvertent verbal cues or body language" or other "signaling to the witness of the 'correct' response." A.G. Guidelines, supra, at 1. To the contrary, Shannon and Krigger testified, and the judge found, that Shannon did nothing suggestive whatsoever. Further, as recommended by the Guidelines, Shannon told Krigger not to assume that anyone depicted in the photos was involved in the robbery. Ibid.

Similarly, although Krigger examined all photos on the table before making her identification, there was no indication she chose "which individual looks most like the perpetrator." See A.G. Letter, supra, at 2. Rather, she testified she chose defendant's photograph because he was the "person that robbed me."

Defendant argues the photo array was suggestive because his photo shows him wearing a white shirt. The judge found that all the photos were color photos of African-American males of about the same complexion, except for one male who was lighter, but that Krigger was instructed the photographs do not always show the true complexion of the person. Although the males were wearing different-colored shirts, Sergeant Shannon and Krigger testified

she made the identification based on the face in the photos rather than the clothing. The judge concluded the photos all showed comparable-looking people. Defendant has given us no basis to doubt the judge's conclusion.[5]

Defendant notes that the police did not show the array to the others in the Burger King, but that is not a basis for suppression. Regardless, the officers could chose to seek an identification from the calm adult in charge, rather than from the traumatized young teenagers.

Defendant also notes the photo lineup was conducted nine days after the Burger King robbery, but that was not a lengthy period. State v. Clausell, 121 N.J. 298, 327 (1990) (finding "[t]he time lapse between the identification and the crime -- six weeks -- was not extensive"); see Madison, supra, 109 N.J. at 242 ("A two month time lapse without more . . . does not cause us to conclude that the evidence of identification is inadmissible."). Moreover, she helped prepare the composite only one day after the robbery, and it "resembled defendant and prompted other individuals to conclude that it was defendant who was depicted." State v. Cherry, 289 N.J. Super. 503, 520 (App. Div. 1995) (admitting identification

[5] Defendant has not supplied us with the photos used in the lineup.

two-and-one-half months after the crime where the witness helped prepare a sketch shortly after the crime).

The judge found beyond a reasonable doubt there was more than sufficient indicia of reliability to outweigh any suggestivity in the photo array. We defer to his findings, which were supported by substantial credible evidence.

B.

The Middlesex County court sentenced defendant to an extended—term sentence to life in prison for Count Two, the first-degree robbery of the visitor. Defendant claims that sentence was excessive. He does not dispute his prior convictions qualified him for an extended term as a persistent offender under N.J.S.A. 2C:44-3(a).[6] Nor does he claim the trial court abused its discretion in deciding to impose an extended term. Rather, defendant claims the court double-counted his prior record both

[6] A "persistent offender" must "ha[ve] been previously convicted on at least two separate occasions of two crimes, committed at different times," and "the date of the defendant's last release from confinement" must have been "within 10 years of the date of the crime for which the defendant is being sentenced." N.J.S.A. 2C:44-3(a). Defendant was convicted of multiple armed robberies in Essex and Union Counties in 1982, sentenced to prison with seventeen years of parole ineligibility, and initially paroled in 2000.

to qualify him for an extended term and to sentence him to the maximum extended-term sentence.[7]

We need not decide that claim because the State concedes defendant is entitled to resentencing on Count Two. Defendant's appeal was pending when our Supreme Court decided State v. Pierce, 188 N.J. 155 (2006). In Pierce, the Court held that "once the court finds that th[e] statutory eligibility requirements are met" for an extended term, "the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." Id. at 169; see State v. Robinson, 217 N.J. 594, 608 (2014). Thus, Pierce set the range for a first-degree extended term from "ten years to life imprisonment." Pierce, supra, 188 N.J. at 179 (Albin, J., dissenting); see N.J.S.A. 2C:43-6(a)(1), -7(a)(2). However, the prosecutor advised the trial court that "the range is 20 to life." Our Supreme Court "summarily remanded" numerous cases "for resentencing in the light of State v. Pierce." E.g., State v. Mejias, 198 N.J. 308 (2008).

[7] The convictions used to qualify defendant for an extended term may not be considered in determining the aggravating factors or the length of his extended-range sentence, but the court may consider "other aspects of the defendant's record," including other crimes, his "juvenile record, parole or probation records, and overall response to prior attempts at rehabilitation." State v. Dunbar, 108 N.J. 80, 91-92 (1987); see State v. Vasquez, 374 N.J. Super. 252, 267-68 (App. Div. 2005).

Accordingly, in Appeal No. A-3867-05, we vacate defendant's life sentence on Count Two and remand "for re-sentencing, but only in respect of reconsideration of the appropriate sentence for defendant within the expanded range . . . . The court must reconsider the applicable aggravating and mitigating factors and impose a sentence within the broadened range of sentences available consistent with [Pierce]." 188 N.J. at 171.[8] We affirm his convictions and remaining sentences in Middlesex County.

III.

We next consider defendant's appeal from the Union County trial judge's denial of a new trial, Appeal No. A-3602-13. "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000) (citing State v. Artis, 36 N.J. 538, 541 (1962)). Defendant claims:

> POINT ONE - THE COURT'S DECISION DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE MUST BE REVERSED.

[8] On remand, the trial court should reconsider aggravating factors three, six, and nine without "double-counting" the offenses relied on to qualify defendant for the extended term. Vasquez, supra, 374 N.J. Super. at 267. Defendant also challenges the court's finding of aggravating factors one and two. As the court is reconsidering the aggravating factors, we decline to address this challenge, except we agree that considering defendant's physical assault on the visitor was not "double-counting the elements of the offense[s]." State v. Fuentes, 217 N.J. 57, 76 (2014).

POINT TWO - DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON THE STATE'S DISCOVERY VIOLATION.

We address defendant's claims in reverse order.

A.

After defendant's arrest near the Amoco gas station on July 16, the gas station attendant reported to the police the Amoco had just been robbed. However, he returned to Turkey, the State was unable to secure his return to New Jersey, and he did not testify at trial.

Defendant claims the State failed to disclose a police teletype message relating to a July 2, 2002 robbery of the same Amoco and same attendant. The message related the attendant's statements that the perpetrator of the July 2 robbery as a black male, approximately 5'9" tall, weighing 225 pounds, and carrying a backpack, that he took thirteen packs of cigarettes and cash, and that he entered a small white vehicle.

After defendant was arrested near the Amoco on July 16, the attendant gave a statement that the masked person who robbed him on July 16 "resembled" the person who robbed him on July 2: "his

size is the same, gun looked the same, he took the same cigarettes and type of cigarettes. The first time he wasn't wearing a mask."[9]

Defendant argues that the message was material because its description of the robber differed from Officer Wittevrongel's estimation that defendant was 6'0" tall and 230 pounds.[10] The trial judge denied a new trial, finding that there was "really very little difference between the descriptions," that defendant's use of the attendant's description of the perpetrator of the July 2 robbery could have lead the jury to believe defendant committed that robbery as well, and that defendant had not shown how he could admit the attendant's description with the attendant being unavailable in Turkey.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). "In order to establish a Brady violation, the defendant must show that: (1) the prosecution suppressed evidence; (2) the

[9] Defendant has not provided us with the teletype or the attendant's statement.

[10] There was nothing in the record indicating defendant's actual height and weight.

evidence is favorable to the defense; and (3) the evidence is material." State v. Martini, 160 N.J. 248, 268 (1999). "[E]vidence is 'material' if there is a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Id. at 269 (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985)).

We agree that defendant failed to show such a reasonable probability. The attendant's statements in the police teletype message were hearsay which defendant fails to show would be admissible. Moreover, the attendant himself was unavailable to reiterate the statements or to be impeached by them. Thus, the attendant's statements were "not 'evidence' at all," and their disclosure "could have had no direct effect on the outcome of trial, because [defendant] could have made no mention of them either during argument or while questioning witnesses." Wood v. Bartholomew, 516 U.S. 1, 6, 116 S. Ct. 7, 9, 133 L. Ed. 2d 1, 6-7 (1995).

Defendant argues disclosure would have allowed him to make a more informed decision whether to attempt to procure the attendant's presence to testify at trial. Defendant offers no reason to believe he could obtain the attendant's return from Turkey and admission into the United States. As the trial court

noted, the State made "numerous efforts[] to try and get the attendant here and they were unsuccessful." Defendant's argument "is based on mere speculation." Ibid.[11]

Therefore, we affirm the denial of defendant's claim that the State committed a Brady violation regarding the teletype message.

B.

Defendant claims the DNA results are newly-discovered evidence requiring a new trial. "[T]he test to be satisfied under a newly discovered evidence approach is more stringent." State v. Carter, 85 N.J. 300, 314 (1981).

> Evidence is newly discovered and sufficient to warrant the grant of a new trial when it is "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted."
>
> [State v. Nash, 212 N.J. 518, 549 (2013) (quoting Carter, supra, 85 N.J. at 314).]

[11] Thus, we need not resolve whether the slight difference in the attendant's descriptions would have caused defendant to risk procuring the presence at trial of the attendant, the victim in the case. We note that, in the attendant's absence, defendant was not convicted of first-degree robbery, of the attendant, aggravated assault by pointing a firearm at the attendant, and possession of a firearm with an unlawful purpose.

"[A]ll three prongs of that test must be satisfied before a defendant will gain the relief of a new trial." State v. Ways, 180 N.J. 171, 187 (2004).

At the hearing in Union County, defendant's counsel offered the DNA report and proffered as follows. The State Police tested the inside and outside of the ski mask for DNA. Defendant was excluded as a potential source of the DNA inside the mask. The DNA was run through the CODIS database, which provided the name of a person whose DNA matched thirteen of fourteen potential alleles, with a one in 8.6 quadrillion chance it would occur in another African-American male. That person was under indictment in a July 2, 2002 armed robbery in Hudson County in which a ski mask was used.[12] Defendant was not excluded as a contributor to the DNA on the outside of the ski mask, with a match of six of six alleles, which would appear in one in 544 African-American males.

The trial court ruled that the DNA in its totality was "inconclusive and subject to much speculation." The court concluded it did not "meet[] standards one and three for the grounds for a new trial based on newly discovered evidence."[13]

[12] Defendant now argues the person was convicted of the robbery.

[13] It was not disputed that the second requirement was met.

We disagree. First, the DNA evidence as proffered was material. "'[M]aterial evidence is any evidence that would have some bearing on the claims being advanced,' and includes evidence that supports a general denial of guilt," or third-party guilt. Nash, supra, 212 N.J. at 549 (quoting Ways, supra, 180 N.J. at 188). Here, the DNA evidence clearly bore on defendant's denial of guilt and supported a claim of third-party guilt. Not only did it indicate that someone else had been wearing the mask, but it suggested that the bag, handgun, cigarettes, and cash found with the mask belonged to someone else. That supported defendant's claim that he was not guilty of theft or unlawful possession of the handgun.

The State echoes the trial court's observation that a ski cap could be worn inside out. Nonetheless, the vastly different probabilities that the DNA came from defendant versus the Hudson County suspect could make the DNA results material.

Moreover, the DNA results as proffered were evidence "of the sort that would probably change the jury's verdict if a new trial were granted." Carter, supra, 85 N.J. at 314; see State v. Behn, 375 N.J. Super. 409, 429 (App. Div. 2005) (noting "DNA testing has upset many convictions"). The DNA results strongly suggested the mask was worn by another African-American male who was also suspected of committing a masked armed robbery two weeks earlier.

That, coupled with the information that the Amoco station had been robbed two weeks earlier by someone who used a similar handgun and took the same type and number of cigarette packs, raised the possibility that the bag with handgun, cash, and cigarettes came from an earlier robbery by the person whose DNA was found on the inside of the mask.

Thus, the DNA evidence as proffered could "have the probable effect of raising a reasonable doubt as to the defendant's guilt." Nash, supra, 212 N.J. at 549 (quoting Ways, supra, 180 N.J. at 189); see Ways, supra, 180 N.J. at 195 (finding the third-party-guilt evidence had a rational tendency to engender a reasonable doubt). "DNA test results that not only tended to exculpate defendant but to implicate someone else would be evidence of 'the sort that would probably change the jury's verdict if a new trial were granted.'" State v. Peterson, 364 N.J. Super. 387, 398-99 (App. Div. 2003) (quoting Carter, supra, 85 N.J. at 314)); see State v. DeMarco, 387 N.J. Super. 506, 521 (App. Div. 2006) (stressing that the DNA results could "place direct responsibility for the very crime in question on a specific third party").

The State argues its evidence was overwhelming, citing Officer Wittevrongel's observation of defendant both before and after he disappeared behind the shed. However, defendant was not convicted of doing anything in Wittevrongel's sight. Rather, he

was convicted of possessing the handgun, and of theft of the cigarettes and cash, found in the bag. The handgun, cigarettes, cash, and bag were all found with the mask and linked to defendant in part based on the mask. "We cannot conclude that the evidence of guilt was 'overwhelming' in light of the newly discovered evidence." Nash, supra, 212 N.J. at 552.

Therefore, defendant's proffer regarding the DNA results indicated he could satisfy the newly-discovered evidence standard. However, a proffer by defense counsel is not the same as testimony from a DNA expert. Indeed, defendant presented no testimony at the hearing seeking a new trial. Moreover, defendant has not supplied us with the DNA report. "Such a record does not lend itself to suitable appellate resolution. A more precise understanding of the pertinent facts is obtainable only through live testimony and a trial level determination in the first instance." Carter, supra, 85 N.J. at 314.

Accordingly, in Appeal No. A-3602-13, we vacate the denial of the new trial motion in Union County to the extent it raised the newly-discovered DNA issue. We remand for an evidentiary hearing at which defendant should introduce not only the DNA results but also expert DNA testimony. The State may also introduce evidence, including its own expert DNA testimony. We

affirm the denial of the new trial motion to the extent it raised the Brady issue regarding the teletype message.

IV.

Finally, we consider defendant's appeal from the denial of a new trial in Middlesex County, Appeal No. A-3603-13. Defendant raises the following issue pertinent to that appeal:

> POINT TWO - THE COURT'S DECISION DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE MUST BE REVERSED.

As in Union County, defendant's counsel made a similar proffer at the Middlesex County motion hearing, and offered the DNA report. The motion judge found "no question that prong 2 [of the newly-discovered-evidence test] is met." Moreover, the court found the DNA evidence was material. However, the court found the DNA evidence would not alter the outcome of the Middlesex trial. The court cited that the Burger King robbery did not involve a ski mask, Krigger identified defendant's photo as the robber, Krigger and the visitor identified defendant in court, and the cashier clearly described the gun. The court added that only limited, sanitized information about the Union County arrest was introduced in the Middlesex County trial.

Nonetheless, in the Middlesex County trial, the State called Officer Wittevrongel. He testified he saw defendant, wearing a "woolen head covering" and carrying a bag, headed toward a black

car containing his documents and latex gloves. Wittevrongel testified he discovered where defendant dropped the bag, and found the bag contained a handgun, and found the woolen head covering just a couple of feet away. Wittevrongel identified defendant, the woolen head covering, the handgun, the bag, and photographs of the car and of the latex gloves.

Sergeant Shannon testified he received the photos of the handgun, bag, and latex gloves from Union County. A forensic ballistics expert testified the handgun was operable. The prosecutor showed the bag, the handgun, and the photo of the latex gloves to Krigger, the visitor, and the cashier, who commented on how much the bag, gun, and latex gloves resembled those used in the Burger King robbery.

Moreover, the prosecutor detailed this testimony and used the items from the July 16, 2002 Union County arrest both in her opening statement and closing argument. The prosecutor argued that defendant robbed the Burger King "with the same bag, the same gun. And, in the same type car, are found the gloves. The only thing that's different, or additional on July 16th of 2002, he's wearing a woolen head covering."

Given the use in the Middlesex trial of the mask, handgun, and bag from the Union County arrest, we agree with the motion judge that the DNA results as proffered are material. They bear

on the prosecution's assertion that those items were connected to defendant.

It is a far closer question whether the DNA evidence as proffered could have the probable effect of raising a reasonable doubt of defendant's guilt of the Middlesex County offenses. As the motion judge emphasized, defendant was linked to the Burger King robbery by eyewitness identifications both before and at trial. Moreover, defendant did not wear a mask in that robbery. However, the State offered the evidence about the mask to show defendant's ownership of the nearby bag and the gun it contained. Further, the prosecutor gave the information and items from the Union County arrest a major role in its proofs and arguments.

A "reviewing court must engage in a thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury." Ways, supra, 180 N.J. at 191. As noted above, defendant has merely proffered the DNA evidence and has not provided us with the DNA report. Moreover, defendant's counsel told the motion judge he was "essentially asking the court to hold off and hear from the DNA expert first." In these circumstances, it is most appropriate to vacate the order denying a new trial and remand to allow the court to have a full factual record to determine whether the actual DNA evidence could have the probable effect of raising a reasonable doubt of

defendant's guilt of the Middlesex County offenses. Again, defendant should present the DNA report and DNA expert testimony, and the State should have the opportunity to present contravening evidence including expert testimony. To reduce duplication, the parties and the courts may coordinate the conduct or the timing of the Union County and Middlesex County proceedings on remand.

We recognize the age of these convictions. Nonetheless, "[h]owever difficult the process of review, the passage of time must not be a bar to assessing the validity of a verdict that is cast in doubt by evidence suggesting that a defendant may be innocent." Id. at 188. Moreover, "our traditions of comprehensive justice will best be served by decisions that reflect thoughtful and thorough consideration and disposition of substantive contentions" prior to federal habeas review. State v. Preciose, 129 N.J. 451, 477-78 (1992).

Defendant's remaining arguments in his pro se brief lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

In Appeal No. A-3867-05, we affirm in part, vacate in part, and remand. In Appeal No. A-3602-13, we affirm in part, vacate in part, and remand. In Appeal No. A-3603-13, we vacate and remand. We do not retain jurisdiction.