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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4834-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYRONE R. NURKETT,

Defendant-Appellant.

Submitted September 27, 2016 – Decided March 30, 2017

Before Judges Reisner and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 11-
05-0922.

Joseph E. Krakora, Public Defender, attorney
for appellant (Amira R. Scurato, Assistant
Deputy Public Defender, of counsel and on the
briefs).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Jane
Deaterly Plaisted, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the briefs).

PER CURIAM

A jury convicted defendant Tyrone R. Nurkett of various crimes arising from his role in the armed robbery of a neighborhood deli. On appeal, defendant challenges his conviction, arguing that the trial court erred in allowing a witness's out-of-court identification to be admitted at trial, permitting opinion testimony on the ultimate issue of defendant's guilt, and failing to investigate post-trial allegations of juror misconduct. Defendant also argues that the State's loss of evidence and the trial court's use of the term "and/or" in its charge to the jury violated his due process rights. We disagree and affirm his conviction. However, we are constrained to remand this matter to correct an error in his judgment of conviction.

I.

The facts adduced from the record can be summarized as follows. The robbery, which was captured on the deli's surveillance cameras, began between 11 a.m. and noon on December 16, 2010, when, according to the store's manager, a "kid" came into the deli to case the store. Two minutes later, two masked men came into the store and robbed the manager at gunpoint, taking money from the registers, his cell phone, and his wallet. The shorter¹ of the two men pointed a gun at him, while the taller man

¹ The manager described one of the robbers as approximately 5'6" tall and the other robber as approximately 6'2".

took the cash and the manager's property. When the two men fled, the manager called 911 and went outside to see the direction in which they ran.

Just prior to the robbery, a utility worker who was working in the area, saw the two robbers as he walked down the hill to the deli to buy lunch. He described the individuals by their height, stated they had ski masks pulled up to cover their noses, and mentioned one was wearing a burgundy sweat suit. A short while later, he observed the same two men running up the steep street, and saw them jump into a green taxicab. After noticing police activity in the area within several minutes, the utility worker informed a police officer about the two individuals he observed.

Officer Albert Jenkins responded to the report of an armed robbery at the deli. Jenkins spoke with the manager and then radioed a description of the individuals to the responding units. The manager described one of the robbers as wearing a gray North Face jacket, blue jeans, and gray Timberland boots. He described the other robber as wearing a North Face jacket with a red tracksuit.

While responding to the broadcast about the robbery, Detective Sergeant Peter Cassidy and Captain Vincent Vitiello heard over the radio that the suspects had fled in a green taxicab. On the way to the deli, the two officers observed a green taxicab

at an intersection. They pulled in front of the taxicab with their lights on, exited their vehicle with their guns drawn, and commanded the occupants to show their hands. Cassidy observed the rear passengers attempting to conceal something on the floor, defendant with a weapon in his hand, and a large amount of currency scattered about the floorboard and the rear passenger seat. Ski masks and gloves were recovered from inside and outside the taxicab. A cell phone was also recovered from the juvenile defendant, which was later identified as the manager's cell phone.

Within about five minutes, Jenkins was advised over his radio that the individuals that had been stopped matched the description he had just broadcasted. The manager heard the radio transmission. Jenkins explained to the manager that individuals fitting the description had been stopped and asked the manager to accompany him to their location so that he could identify the individuals.

According to Jenkins, when he and the manager arrived, there were three men standing outside of a taxicab approximately eighteen feet away, they all had their hands on the vehicle, but were not handcuffed, and they were surrounded by police officers. The men were all wearing black jackets, one wore a gray hooded sweatshirt, another wore red colored jeans, and the third wore boots. The other officers on the scene asked the individuals to move toward

Jenkins' car, and the manager identified two individuals as the culprits by their clothing.

According to the manager, however, upon his and Jenkins' arrival, the two robbers were seated in the patrol car approximately ten feet away from the patrol car in which he was seated. He identified these two individuals by their clothing and stated that the third individual, the juvenile who had cased the deli, was talking to officers in the distance. The manager identified the juvenile since his face had never been obscured by a mask. Jenkins never mentioned to the manager that the individuals may not be the robbery suspects.

After defendant's ensuing arrest, an Essex County Grand Jury returned an indictment charging him with second-degree conspiracy, N.J.S.A. 2C:5-2 (count one); first-degree robbery, N.J.S.A. 2C:15-1 (count two); second-degree unlawful possession of weapons, N.J.S.A. 2C:39-5(b) (count three); possession of weapons for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count four); and employing a juvenile to commit a criminal offense, N.J.S.A. 2C:24-9 (count five).

Defendant filed a motion for a Wade² hearing to challenge the admission of the manager's out-of-court identification and a

² United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

motion to dismiss the indictment based upon the prosecutor's failure to produce the clothing defendant wore when he was arrested. On October 3, 2013, the motion judge conducted a hearing at which Jenkins was the only witness. He testified to his version of the manager's identification of defendant where other officers stopped the taxicab. Judge Gardner denied the motion after finding that defendant had not met his burden of showing that the out-of-court identification was conducted under circumstances that were "impermissibly suggestive" or "so suggestive as to result in substantial likelihood of misidentification." The court also denied the motion to dismiss, reasoning that there was video surveillance of the crime that could be used to either corroborate or refute defendant's identity, without the need for producing his clothing. The judge barred the State, however, from introducing the lost clothing at trial.³

A second judge (the trial judge) presided over defendant's trial that lasted four days. On November 20, 2013, the jury convicted defendant of all counts as charged in the indictment.

At sentencing on April 11, 2014, defendant moved for a new trial based upon an allegation made by defendant's father that during the trial he overheard jurors questioning why defendant did

³ Neither decision reached on October 3rd was formalized in a written order.

not plead guilty and wondering why he remained in custody while awaiting trial. The trial judge denied the motion without taking testimony, explaining that there was no documentation to corroborate the father's allegations, such as an affidavit, but if one was ever produced, then the court would be obligated to consider the motion. He concluded by stating that there was nothing to suggest that the alleged juror misconduct interfered with the jury's verdict.

The trial judge sentenced defendant to an aggregate of ten years subject to a No Early Release Act, N.J.S.A. 2C:43-7.2, eighty-five percent period of parole disqualification. This appeal followed.

On appeal, defendant argues:

POINT I

THE TRIAL JUDGE SHOULD HAVE SUA SPONTE REOPENED THE MOTION REGARDING THE SHOWUP IDENTIFICATION AND FOUND THE SHOWUP TO BE UNRELIABLE WHEN TRIAL TESTIMONY REVEALED ADDITIONAL EVIDENCE OF TAINT. (NOT RAISED BELOW)

POINT II

THE STATE OVERSTEPPED ITS BOUNDS AND VIOLATED DEFENDANT'S RIGHTS IN OFFERING TESTIMONY ON THE ULTIMATE ISSUE BEFORE THE JURY. (NOT RAISED BELOW).

POINT III

THE TRIAL JUDGE ERRED IN FAILING TO CONDUCT A THOROUGH INQUIRY INTO POSSIBLE JUROR MISCONDUCT TO DEFENDANT'S EXTREME PREJUDICE.

POINT IV

THE STATE'S LOSS (OR DESTRUCTION) OF EVIDENCE VIOLATED NOT ONLY OUR RULES OF DISCOVERY, BUT DENIED DEFENDANT FUNDAMENTAL FAIRNESS AND DUE PROCESS.

In a supplemental brief, defendant adds the following contention:

POINT V

THE RECENT PUBLISHED APPELLATE DIVISION DECISION IN STATE V. VICTOR GONZALEZ MANDATES REVERSAL OF THE DEFENDANT'S CONVICTIONS FOR THE SAME REASON AS IN THAT CASE: THE REPEATED USE OF "AND/OR" LANGUAGE IN THE ACCOMPLICE-LIABILITY JURY INSTRUCTION COULD HAVE EASILY LED TO AN IMPROPER VERDICT FROM IMPROPER JURY DELIBERATION.

We have considered defendant's arguments in light our review of the record and applicable legal principles. We affirm, as we conclude that defendant's contentions are without merit.

II.

We begin by addressing defendant's arguments relating to the admission of the deli manager's out-of-court identification. According to defendant, the identification was the product of the suggestive circumstances surrounding the at-the-scene

identification as well as statements made by the police in the manager's presence before the identification took place. Those circumstances included having defendant in custody and surrounded by officers at the time of the identification. He argues that the manager's general description of the suspects by clothing, height, and weight was insufficient to permit the admission of the identification. He also contends that, in any event, because the manager could not see defendant while he and defendant sat in separate police vehicles, the manager could not confirm that any of the suspects matched the general description he gave to police. Defendant also argues that because the manager's testimony was different than Jenkins' testimony at the Wade hearing about the location of the suspects during the identification, the court should have reconsidered its decision about the admission of the out-of-court identification. We disagree with all of these arguments.

When reviewing an order denying a motion to bar an out-of-court identification, our standard of review "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.) (citing State v. Johnson, 42 N.J. 146, 161 (1964)), certif. denied, ___ N.J. ___ (2016) (slip op. at 1). We accept those findings of the trial court that "are supported by sufficient credible evidence

in the record." State v. Gamble, 218 N.J. 412, 424 (2014) (citing State v. Elders, 192 N.J. 224, 243 (2007)). "[T]he trial court's findings at the hearing on the 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), cert. denied, 410 U.S. 937, 93 S. Ct. 1396, 35 L. Ed. 2d 602 (1973)). Deference should be afforded to a trial judge's findings when they are "substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, supra, 42 N.J. at 161. However, "[a] trial court's interpretation of the law . . . and the consequences that flow from established facts are not entitled to any special deference." Gamble, supra, 218 N.J. at 425 (citing State v. Gandhi, 201 N.J. 161, 176 (2010); Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We initially observe that defendant did not apply to the trial court for reconsideration of the decision to admit the out-of-court identification, or argue to that court it should have done so on its own accord, based upon the deli manager testifying at trial to the circumstances surrounding the identification differently than Jenkins did at the Wade hearing. We therefore review that contention for plain error, one that is "clearly

capable of producing an unjust result" R. 2:10-2; see also State v. Wakefield, 190 N.J. 397, 473 (2007), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

Turning to the validity of the identification, we note that, at the time of defendant's trial, New Jersey followed the federal constitutional standard as originally articulated in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). See State v. Madison, 109 N.J. 223 (1988).⁴ In accordance with that standard, New Jersey courts recognized a two-pronged approach to determine the admissibility of an out-of-court identification. First, the court must ascertain whether the identification procedure was impermissibly suggestive. Adams, supra, 194 N.J. at 203 (quoting State v. Romero, 191 N.J. 59, 75 (2007)). Second, if the procedure is found to be impermissibly suggestive, it must determine "whether the impermissibly suggestive procedure was nevertheless reliable by considering the totality of the circumstances and weighing the suggestive nature of the

⁴ In State v. Henderson, 208 N.J. 208 (2011), the Court revised the Manson/Madison framework, effective September 4, 2012, elaborating specific variables that a court must consider in making determinations of suggestiveness. Id. at 288-93, 301-02. Because the crime and identifications here occurred in 2011, for which defendant was indicted in May 2011, the Manson/Madison framework was applicable to defendant's motion. See State v. Micelli, 215 N.J. 284, 287 (2013) (noting that the Manson/Madison standard applies because the identifications were completed prior to the decision in Henderson).

identification against the reliability of the identification." Ibid. (quoting Romero, supra, 191 N.J. at 76).

"Reliability is the linchpin in determining the admissibility of identification testimony." Madison, supra, 109 N.J. at 232 (quoting Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154). When determining reliability, the court should consider the totality of the circumstances and weigh the suggestive nature against the reliability of the identification. Id. at 232-33. In its determination of reliability, a court reviews "the opportunity of the witness to view the criminal at the time of the crime, the witness's 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." State v. Herrera, 187 N.J. 493, 507 (2006) (citing Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154).

At or near-the-scene identifications that take place shortly after the incident, commonly known as "show-up" identifications, are, to some extent, inherently suggestive. See Adams, supra, 194 N.J. at 204. A show-up can be impermissibly suggestive when it occurs while a defendant is surrounded by police officers. See State v. Wilson, 362 N.J. Super. 319, 324, 327 (App. Div.), certif. denied, 178 N.J. 250 (2003). So too if the show-up occurs after

a witness is first told, or overhears that, the individual the witness is about to observe was caught and is suspected of committing the crime. See Herrera, supra, 187 N.J. at 505.

A show-up without more, however, is not so impermissibly suggestive to warrant proceeding to the second step of the Manson/Madison analysis. Id. at 504 (citing State v. Wilkerson, 60 N.J. 452, 461 (1972)). It may be admitted at trial if the identification is otherwise reliable because generally, "they are likely to be accurate, taking place . . . before memory has faded[] [and because] [t]hey facilitate and enhance fast and effective police action and they tend to avoid or minimize inconvenience and embarrassment to the innocent." Ibid. (alterations in original) (quoting Wilkerson, supra, 60 N.J. at 461). In order for the admission of a show-up to give rise to a violation of a defendant's constitutional rights, a court must consider the Manson factors and determine whether the suggestive show-up resulted in an unreliable identification. See Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154.

Here, despite the suggestive nature of the show-up caused by defendant being surrounded by police and the deli manager overhearing that police caught the suspects, other relevant and probative evidence made the identification reliable. The show-up occurred shortly after the robbery, and the manager had ample

opportunity to view the defendant at the time of the crime. The other evidence testified to by Jenkins at the Wade hearing undermined defendant's argument that he was misidentified. That evidence included the video surveillance cameras that recorded the entire event, the manager's description of the suspects to Jenkins before the show-up, and the utility worker's description of the culprits. Also, when Cassidy came upon the suspects, he found defendant holding a weapon while in the green taxicab with the other culprits as well as the masks and gloves. Under these circumstances, the show-up "did not result in a substantial likelihood of misidentification." Herrera, supra, 187 N.J. at 506, 509.

Finally, based upon our determination that the challenged identification was reliable, we find defendant's contention - that the court had an obligation to re-open its consideration of the show-up after the deli manager testified at trial to facts different than those testified to by Jenkins at the pre-trial hearing - to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Suffice it to say the jury was allowed to consider all of the witnesses' testimony and the other overwhelming evidence of defendant's identification before determining whether it was defendant who committed a crime.

III.

Defendant next contends that the State improperly elicited opinion testimony from Cassidy. Defendant claims that in the State's direct examination, Cassidy was asked why the masks and the gloves recovered from the green taxicab were not submitted for DNA analysis and, allegedly, he improperly responded, "that the totality of the identification evidence against the defendant was overwhelming." Defendant asserts this testimony irreparably harmed the defense on the issue of identification. He also contends Cassidy's testimony constituted expert opinion testimony and should have been excluded pursuant to State v. McLean, 205 N.J. 438 (2011), since he was an investigating officer in the case.

As defendant did not raise these arguments at trial, we review his contentions for plain error. R. 2:10-2. Applying this standard, we find no error in the court's admission of the challenged testimony and find defendant's arguments to the contrary to be without merit.

The premise of defendant's argument is that Cassidy opined as to his belief that defendant committed the crime. However, Cassidy never uttered the challenged statement and, in any event, his comments about what he "believed" arose from questions about why further testing, such as trying to locate DNA samples, was not

conducted, as indicated in the following portion of his direct examination:

Q: [W]ere these masks, or hat[s], or glove[s] ever sent out for DNA analysis?

A: Not, it wasn't. No.

Q: What reason, if any, were they not sent?

A: We had the gun, and we had the proceeds from the incident. I didn't feel there was a need at this point.

. . . .

Q: At what point — what type of case would you normally do a DNA analysis?

A: That would be for a case where identification would be an issue, to help assist law enforcement identifying suspects and perpetrators.

Q: And in your belief, based upon these — the facts, or — what led you the believe that this was not an identification —

A: In the vehicle, we have proceeds, as well as a weapon in the car. At that point we had — I believed we had who we had in custody at that point.

On cross-examination, defense counsel pressed the officer about his decision to not obtain fingerprints or DNA analysis. In response, Cassidy reiterated that they had "the weapon [and the] proceeds — there was no need to go any further." When asked by defense counsel why Cassidy did not have the handgun tested for fingerprints when he sent it for ballistics testing, the officer

replied that there was no need because he "was certain who had the gun." In his opinion, he had enough evidence about who possessed the weapon.

We conclude that Cassidy's testimony did not offer an impermissible opinion of defendant's guilt. See McLean, supra, 205 N.J. at 463 (rejecting admission of an officer's opinion of a defendant's guilt based upon his observation of a suspected drug transaction, his expertise and his opinion of matters within the jurors' understanding). Nor did he, as defendant argues, attempt to convey to the jury superior knowledge about defendant committing the robbery based upon information supplied by others. See State v. Bankston, 63 N.J. 263, 271 (1973). Cassidy testified to facts describing the physical evidence he found at the scene that caused him to take no further action in trying to identify the three individuals as suspects. That evidence included the fact that defendant and the other suspects were found in the green taxicab that was reportedly the getaway car, finding defendant holding a handgun, and locating cash, masks, and gloves in the green taxicab. Moreover, he testified to his reasoning only because the defense took the position at trial that defendant was incorrectly identified as a suspect because police failed to conduct an adequate investigation.

To the extent admitting Cassidy's challenged testimony can be considered an error, we conclude the invited error doctrine applies. The doctrine is applicable "when a defendant later claims that a trial court was mistaken for allowing him to pursue a chosen strategy – a strategy not unreasonable on its face but one that did not result in a favorable outcome." State v. Williams, 219 N.J. 89, 100 (2014), cert. denied, __ U.S. __, 135 S. Ct. 1537, 191 L. Ed. 2d 565 (2015). Defense counsel here repeatedly argued that the police failed to properly investigate the crime by not, for example, conducting tests for fingerprints or DNA, and, as a result, defendant, who was not involved with the crime, was wrongfully accused. As part of his support for that argument, defense counsel pursued Cassidy about his decision to forgo further testing, which resulted in the challenged testimony. The admission of the testimony, without objection was clearly the result of defense counsel "induc[ing], encourage[ing] or acquiesce[ing] or consent[ing to its admission]." State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)).

We discern no error in the court allowing Cassidy's testimony. We assume defendant agreed that the testimony was not harmful, as he never objected to its admission. See State v. Nelson, 173 N.J. 417, 471 (2002) ("[it is] fair to infer from the failure to object

below that in the context of the trial the error was actually of no moment") (quoting State v. Macon, 57 N.J. 325, 333 (1971)).

IV.

Defendant next contends that the trial court erred in denying his motion for a new trial on the ground of juror misconduct. He made the motion more than four months after his conviction, based upon an allegation that his father overheard jurors talking about the case during trial, questioning why defendant had not pled guilty to the charges and why he remained in custody during the trial. The trial judge denied the motion for a new trial, observing that without an affidavit, there was nothing to corroborate the allegation or suggest that, even if true, the conversations among jurors interfered with the jury's verdict. Defendant asserts that the trial court should have, at the very least, questioned defendant's father about the incident. We disagree.

At the outset, we observe that although the transcript of the motion hearing reflects that defendant filed a written statement from his father in support of his motion, defendant's appendix does not contain a copy of the statement or any other document relating to his motion. Defendant's failure to include the document is a violation of Rule 2:6-1(a)(1)(I) and prevents us from conducting a complete review of defendant's contentions.

Despite defendant's omission of his father's statement, we can still determine that defendant's motion was untimely. Rule 3:20-2 requires that, except for unrelated grounds, the motion must be filed within ten days after the verdict. Despite that requirement, and without explanation, defendant filed his motion four months after the verdict, even though defendant's father was present in court during the trial.

Even assuming that defendant's motion was timely, and his father's statement contained the information as argued by defense counsel to the trial court, we conclude the trial judge properly exercised his discretion when he denied the motion. A trial court is accorded great discretion in matters pertaining to the jury. See State v. R.D., 169 N.J. 551, 559-60 (2001) (applying an abuse of discretion standard to trial court's determinations regarding claims of juror taint); see also State v. Brown, 442 N.J. Super. 154, 182 (App. Div. 2015). Our deference to that discretion is especially applicable to a defendant's allegation of juror misconduct made months after a verdict has been reached that requires the court to determine whether good cause has been shown to bring jurors back to be interviewed. See State v. Harris, 181 N.J. 391, 503 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005).

In order to prevail on a motion for a "new trial . . . because [of juror misconduct] or the intrusion of irregular influences[, a defendant must establish that] such matters [had] a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs." State v. Jenkins, 182 N.J. 112, 131 (2004) (first alteration in original) (emphasis omitted) (quoting Panko v. Flintkote Co., 7 N.J. 55, 61-62 (1951)). Thus, a new trial is required where the irregularity has the capacity to influence the result of the trial. A showing of actual prejudice is not required. R.D., supra, 169 N.J. at 558. Moreover, "it is presumed the irregularity had the capacity to influence, unless it has affirmatively been shown [by the State that] it does not." State v. Wormley, 305 N.J. Super. 57, 69 (App. Div. 1997) (alteration in original) (quoting State v. Grant, 254 N.J. Super. 571, 588 (App. Div. 1992)), certif. denied, 154 N.J. 607 (1998).

A trial court can interview jurors after a verdict has been reached to investigate claims of jury misconduct if good cause is shown. R. 1:16-1. "More than a mere possibility of a tainted verdict must exist to satisfy the good cause requirement." State v. Young, 181 N.J. Super. 463, 469 (App. Div. 1981) (citing State v. La Rocca, 81 N.J. Super. 40, 44-45 (App. Div. 1963)), certif. denied, 91 N.J. 222 (1982). "Calling back jurors for interrogation

after they have been discharged is an extraordinary procedure which should be invoked only upon a strong showing that a litigant may have been harmed by jury misconduct." Harris, supra, 181 N.J. at 503 (quoting State v. Athorn, 46 N.J. 247, 250 (1966)); see also Davis v. Husain, 220 N.J. 270, 279 (2014); State v. Griffin, __ N.J. Super. __, __ (App. Div. 2017) (slip op. at 5-6). Good cause does not arise because a juror expresses their opinion as to defendant's guilt or innocence prior to deliberations. See State v. LaFera, 42 N.J. 97, 108-09 (1964); see also Griffin, supra, __ N.J. Super. at __ (slip op. at 16) ("a post-verdict allegation that a juror formed such an opinion [is] insufficient to overturn a verdict already rendered").

We conclude that the trial judge properly determined that defendant's father's statement, offered long after the trial, was not a strong showing that defendant was harmed by any juror misconduct and was insufficient to warrant the court ordering the extraordinary procedure of recalling the jurors. Moreover, even if true, the statements alleged to have been made by the jurors to each other constituted no more than an expression of their opinions about defendant's guilt, which did not support granting a new trial.

V.

Defendant next contends that the motion judge erred by not dismissing the indictment based upon the State either purposely losing or destroying the clothing he wore when police arrested him. He asserts his due process rights were violated because he could not confront the manager's description of the suspect's clothing that did not match the clothing defendant was wearing at the time of his arrest. Specifically, the manager testified that defendant was wearing grey Timberland boots, but he was, in fact, wearing sneakers. Defendant contends that failing to produce the clothing was critical to the jury's consideration for purposes of identification.

We consider an appeal from the denial of a motion to dismiss an indictment for an abuse of discretion as the decision to dismiss an indictment lies within the sound discretion of the trial judge. State v. Warmbrun, 277 N.J. Super. 51, 59 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995).

Where there has been a suppression, loss, or destruction of evidence in a criminal trial, courts consider three factors: "(1) whether there was a bad faith or connivance on the part of the government; (2) whether the evidence suppressed, lost or destroyed was sufficiently material to the defense; [and] (3) whether defendant was prejudiced by the loss of the evidence." State v.

Hollander, 201 N.J. Super. 453, 479 (App. Div.) (citations omitted), certif. denied, 101 N.J. 335 (1985).

In order to establish bad faith, "there must be a finding of intention inconsistent with fair play and therefore inconsistent with due process or an egregious carelessness or prosecutorial excess tantamount to suppression." State v. Clark, 347 N.J. Super. 497, 508-09 (App. Div. 2002) (citations omitted). To establish materiality, there must have been a "reasonable probability" that the evidence disclosed would have altered the result of the proceeding. State v. Mustaro, 411 N.J. Super. 91, 101 (App. Div. 2009) (citation omitted). The "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Cal. v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984).

Applying these guiding principles, we conclude that the order denying defendant's motion to dismiss the indictment was an appropriate exercise of the court's discretion under the circumstances as defendant failed to establish any bad faith or that the missing items of clothing were exculpatory. At the motion hearing on September 16, 2013, defense counsel did not argue that the clothing was lost in bad faith. Even if he did, the State

produced a chain of custody report for defendant's clothing that demonstrated it was lost in the process of transferring defendant between detention facilities and the courthouse. There was no indication it was lost in bad faith.

Defendant also failed to establish any prejudice because, as Judge Gardner found, the video surveillance of the crime would reflect the culprit's clothing, which the jury could compare to the witnesses' description of what defendant wore. In any event, and in light of the other overwhelming evidence of defendant's participation in the crime, defendant cannot demonstrate how the production of the clothing would have altered the result in this matter.

VI.

Finally, we reject defendant's contention that the use of the phrase "and/or" in the court's jury instructions led to the type of confusion we found in State v. Gonzalez, 444 N.J. Super. 62 (App. Div.), certif. denied, 226 N.J. 209 (2016). Defendant did not raise this issue at trial, so we limit our review to a search for plain error, R. 2:10-2; see also Wakefield, supra, 190 N.J. at 473 ("failure to object to a jury instruction requires review under the plain error standard"), and we find none. Also, in its denial of certification in Gonzalez the Supreme Court went out of its way to limit our holding "to the circumstances in which it was

used in th[at] case." Gonzalez, supra, 226 N.J. at 209. The trial court's minimal use of that term in this case did not equate to the nineteen times it was used by the trial judge in Gonzalez during the court's charge on accomplice liability. We find no such error here.

VII.

Although we reject all of defendant's challenges to his conviction, we are constrained to remand the matter for correction of an error on defendant's judgment of conviction, as disclosed in defendant's brief and conceded by the State. According to the judgment of conviction, the trial court imposed Violent Crimes Compensation Assessments, N.J.S.A. 2C:43-3.1, and Safe Neighborhood Service Fund Assessments, N.J.S.A. 2C:43-3.2, which included counts that were merged into count one of the indictment. As to those counts, the trial court should not have imposed assessments.

Affirmed. Remanded for correction of the assessments. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION