SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1502-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES JOHNSON,

Defendant-Appellant.

Argued March 13, 2018 – Decided April 6, 2018

Before Judges Mawla and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 15-06-1409.

Richard D. Huxford argued the cause for appellant (Triarsi, Betancourt, Wukovits, & Dugan, LLC, attorneys; Steven F. Wukovits, of counsel and on the brief).

Barbara A. Rosenkrans argued the cause for respondent (Robert D. Laurino, Acting Essex County Prosecutor, attorney; Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant James Johnson appeals from a November 4, 2016 judgment of conviction following a jury trial, and a November 10, 2016 order, which sentenced him to an aggregate extended-term sentence of 30-years imprisonment. We affirm.

The following facts are taken from the record. Jose Rosario is an electrician and owner of Rosemar Construction. After finishing a job in Newark on December 9, 2013, around 5:00 p.m., Rosario and an electrician's helper were traveling to the Home Depot on Springfield Avenue, Newark. The electrician's helper was driving a small SUV Mercedes-Benz Rosario used as a business and personal vehicle. Rosario was in the passenger seat. The vehicle was stopped at a red light at the intersection of Springfield Avenue and South 14th Street in Newark when it was rear-ended by another vehicle.

Rosario exited and walked to the rear of the Mercedes to examine the damage. Defendant, who had a garment covering the area from his bottom lip to his neck, was wearing military-like black clothing, and what looked like a bullet-proof vest, exited the passenger side of a black Range Rover, which had struck the Mercedes. According to Rosario, defendant threatened him with a boxy black handgun, and, between two and four times, aggressively ordered, "Give me the fucking key." Rosario responded, "No, you're not getting my key."

At that point, defendant lunged at Rosario and ripped off the gold chain Rosario was wearing. Defendant then ran back to the Range Rover. The electrician's assistant exited the Mercedes and lied on the nearby sidewalk in a fetal position.

Believing the ordeal was over, Rosario returned to the passenger side of the Mercedes. However, before Rosario could enter the Mercedes, defendant entered the vehicle and sat in the driver's seat. Rosario testified defendant attempted to push Rosario out of the vehicle with the hand in which he held the gun while Rosario's body was "halfway in, halfway out of the vehicle."

Defendant started to drive the Mercedes while Rosario was in it, causing Rosario's legs to drag on the street while he held the door handle of the vehicle. According to Rosario, defendant turned onto South 14th Street, and continued to "drag[] [Rosario until] . . . the vehicle hopped on the sidewalk," causing Rosario to fall out of the Mercedes. Rosario testified he "tumbled and rolled" and hit his shoulder and head on the curb. Rosario observed defendant drive the Mercedes down South 14th Street, with the Range Rover following immediately behind. Rosario suffered abrasions on his shoulder, knees, and face, his pants were ripped and his ankle was twisted.

Rosario described defendant as a bit taller than 5'8", between 160 and 170 pounds, and testified he saw defendant's eyebrows,

forehead, nose, and cheeks during the incident. Rosario also testified his wallet containing six credit cards, a briefcase containing his laptop and permits, and his checkbook were in the Mercedes at the time.

Detective Joseph Domicoli, a Belleville detective, was assigned to the county-wide carjacking task force from June 2013 to June 2014. He had investigated over fifty carjackings during this one-year period. Domicoli traveled to the scene with other officers and did not locate any witnesses or surveillance cameras in the area. In December 2013, Domicoli took a video-taped statement from Rosario who described defendant as "a black youth, [in his early thirties] or . . . late [twenties] . . . [whose] height was between five-eight and five-nine, because he was just an inch or so over me." Rosario stated "[defendant] was wearing a full black outfit [which was] vest-like in the front. He had a ski mask but it was down to underneath his nose. His nose was flat . . . [h]e had a wide nose . . . dark eyes and had a lot of hair on his eyebrows."

After the interview, Rosario discovered activity on his missing credit card. He informed Domicoli, who traveled to Lori's Gift Shop at Beth Israel Hospital, Newark, where the card had been used. Domicoli looked at two receipts from the shop and a video from the surveillance camera in the hospital's lobby. Catherine

Municchi, a district manager responsible for Lori's Gift Shop, testified and authenticated the receipts, which showed a MasterCard in Rosario's name had been used at the shop on December 10, 2013, at 1:14 p.m. and 1:32 p.m. The surveillance video from the camera in the lobby near the gift shop showed two black males during the time of the credit card activity. He also saw a female, identified as a hospital employee named Kimberly Rivers, hug defendant before he entered the gift store.

Domicoli interviewed Rivers at the hospital on December 13, 2013. At trial, Rivers testified she was acquainted with defendant and noticed him and another individual whom she did not know in the hospital lobby on December 10, 2013. Defendant and Rivers hugged and briefly spoke with each other. Rivers had known defendant for about four or five months and had seen him in the neighborhood where she lived. Domicoli showed Rivers a still shot from the video depicting defendant. Upon seeing the photo, Ms. Rivers stated, "Oh, that Beay-Beay," referring to defendant by his nickname. She told Domicoli Beay-Beay's first name is James, and later recalled his last name was Johnson. At trial, Rivers identified defendant in the video and in court.

Municchi also authenticated a video from a surveillance camera located in the gift shop. The video depicts that defendant and another man purchased items on December 10, 2013, at 1:14 p.m.

and 1:32 p.m., and the man with defendant used the credit card to make the purchases and signed the receipts.

Domicoli assembled a photo array consisting of defendant's photograph and the photographs of five other men with similar characteristics as defendant. On December 13, 2017, a member of the carjacking task force arranged to have Prosecutor's Detective Luigi Corino, who was not involved in any way in the investigation of the case, show the array to Rosario. Domicoli did not tell Rosario about the video and receipts from the hospital gift store, his conversation with Rivers, or that he had identified a suspect. Nor did he show Rosario any video. Likewise, Detective Domicoli did not tell Detective Corino anything about the case.

Corino read Rosario the photo display instructions, promulgated by the Attorney General's guidelines. These instructions informed Rosario: (1) he did not have to select a photograph; (2) the photograph of the person who committed the crime may or may not be in the array; (3) the mere display of a photograph did not suggest the police believed the culprit was in one of the photographs; (4) appearances may have changed because of changes in hairstyle, the presence or absence of facial hair, and weight gain or loss; (5) the detective did not know who the suspect was and Rosario would not receive feedback from him; and

(6) it was Rosario's choice that counts. Rosario signed the form containing the instructions, and appeared to understand them.

Detective Corino showed Rosario each of the six photographs separately. Upon seeing defendant's photograph, Rosario stated, "That's him. That's the guy, clearly. I can't forget, with the gun, I'll never forget that." Rosario signed defendant's photograph, and initialed the other photographs. On the photograph identification form, Rosario stated defendant's photograph was of a "black male who carjacked me with a gun." Rosario acknowledged on the form no one threatened or coerced him to select a photograph. At trial, Rosario explained he signed defendant's photograph because "it was the person who tried to steal my car, or did steal my car." Rosario had time to look at the photographs, but he "picked that one right away, immediately." Rosario identified defendant in court.

On December 16, 2013, Officer Michael Grainger was on patrol when the license plate recognition system, which alerts an officer to vehicles that were stolen or involved in serious crimes, alerted him to a Mercedes Benz located at Renner Avenue in Newark. Once activated, the license plate recognition system provides the name of the vehicle's owner, its vehicle identification number, and the date of the crime in which it was involved. The system indicated the Mercedes on Renner Avenue was involved in a carjacking at

gunpoint and was stolen. Officer Grainger had the vehicle towed, and notified the task force of the vehicle's recovery. On December 16, 2013, defendant was arrested pursuant to a warrant.

On December 23, 2013, Crime Scene Unit Identification Officer Jacquenetta Moton processed the Mercedes at the towing company location. She was unable to recover usable fingerprints or anything else of evidential value from the vehicle.

Defendant was indicted under Essex County Indictment Number 15-06-1409 with the following crimes: count one, second-degree conspiracy to commit carjacking, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-2; count two, first-degree carjacking, inflicting bodily injury or using force against Jose Rosario, N.J.S.A. 2C:15-2(a)(1); count three, second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); count four, second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a); count five, second-degree attempt to cause serious bodily injury aggravated assault, N.J.S.A. 2C:12-1(b)(1); count six, third-degree credit card theft, N.J.S.A. 2C:21-6(c)(5), amended before trial to fourth-degree credit card theft, N.J.S.A. 2C:21-6(c)(1); and count seven, fourth-degree forgery, N.J.S.A. 2C:21-1(a)(3). Defendant was convicted of all charges, except aggravated assault.

Following the jury's verdict, defendant pled guilty to the charge of second-degree certain persons not to possess a handgun,

N.J.S.A. 2C:39-7, contained in Essex County Indictment No. 14-08-2088. Also, during his trial defendant was sentenced, consistent with the plea agreement, to an aggregate term of five-years incarceration on Essex County Indictment No. 15-3-617, which had been disposed of by defendant pleading guilty to second-degree eluding, third-degree receiving stolen property, and fourth-degree simple assault on a law enforcement officer. Indictment No. 15-03-617 had no connection to Indictment No. 15-06-1409.

The State filed a motion for an extended-term sentence because defendant was a persistent offender. The sentencing judge rejected defendant's argument that the State's extended-term motion had to be dismissed because it failed to specify the charge to which the extended term applied. The judge also rejected defendant's argument that his guilty plea to the certain-persons offense under Indictment No. 14-08-2088 was rendered involuntary and unknowing because the State did not specify that it would seek an extended-term sentence on Indictment No. 15-06-1409. The sentencing judge noted the recommended five-year sentence on the certain-persons charge was to be concurrent, whether or not an extended-term sentence was imposed.

The sentencing judge adjourned the sentencing so defense could prepare in light of the assistant prosecutor advising at the first sentencing hearing the State would apply the extended term

to the carjacking charge. At a second appearance, defendant was sentenced on Indictment Nos. 15-06-1409 and 14-08-2088 to an aggregate extended-term sentence of 30-years imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On appeal, defendant raises the following points:

> POINT I — THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO [TRIAL COUNSEL'S] FAILURE TO CONDUCT A WADE[1] HEARING.
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> POINT II — THE COURT ERRED IN PERMITTING THE STATE'S MOTION FOR AN EXTENDED TERM DUE TO IMPROPER NOTICE.

I.

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

[1] United State v. Wade, 388 U.S. 218 (1967).

> [Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

Counsel's performance is evaluated with extreme deference, "requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'" Fritz, 105 N.J. at 52 (alteration in original) (quoting Strickland, 466 U.S. at 688-89). "To rebut that strong presumption, a [petitioner] must establish . . . trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." State v. Nash, 212 N.J. 518, 542 (2013) (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

To demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved[.]" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 692-93). Petitioner must show the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. (quoting Strickland, 466 U.S. at 694). Indeed,

> [i]t is not enough for [a] defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.
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> [Strickland, 466 U.S. at 693 (citation omitted).]

Defendant argues trial counsel provided prejudicially deficient representation because he did not request a Wade hearing. Defendant asserts his counsel should have challenged the photo array shown to Rosario because it was suggestive and therefore prejudicial.

"Our courts have expressed a general policy against entertaining ineffective-assistance of counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." State v. Castagna, 187 N.J. 293, 313 (2006) (quoting State v. Preciose, 129 N.J. 451, 460 (1992)). "However, when the trial itself provides an adequately developed record upon which to evaluate defendant's claims, appellate courts may consider the issue on direct appeal." Ibid. (citing State v. Allah, 170 N.J. 269, 285 (2002)). While we would typically not address defendant's ineffective assistance of counsel claim on direct appeal, the record here is sufficiently developed that we may consider the claim.

"A Wade hearing is required to determine if the identification procedure was impermissibly suggestive and, if so, whether the identification is reliable." State v. Micelli, 215 N.J. 284, 288 (2013). However, "there is no automatic entitlement to an evidentiary hearing on an out-of-court identification." State v. Ruffin, 371 N.J. Super. 371, 391 (App. Div. 2004). The trial court should order a Wade hearing only when a defendant "can show some evidence of suggestiveness . . . ." State v. Henderson, 208 N.J. 208, 218 (2011). "That evidence . . . must be tied to a system—and not an estimator—variable." Id. at 288-89. "[T]he State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless." Id. at 289. "[I]f after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence." Ibid.

System variables are factors "within the control of the criminal justice system[.]" Id. at 218. "[E]stimator variables

like lighting conditions or the presence of a weapon, [are factors] over which the legal system has no control." Ibid.

Suggestiveness refers to "inappropriate police conduct" that is capable of resulting in inaccurate and unreliable identification by an eyewitness. Ibid. The Supreme Court has articulated what constitutes system variables: (1) whether a detective with no involvement in the investigation — a "blind" administrator — was used; (2) whether pre-identification instructions were given; (3) whether the identification procedure was constructed of a sufficient number of fillers that look like the suspect; (4) whether the witness was given feedback either during or after the procedure; (5) whether the witness was exposed to multiple viewings of the suspect; (6) whether the lineup was presented sequentially versus simultaneously; (7) whether a composite [sketch] was used; (8) whether the procedure was a show-up where "a single suspect is presented to a witness to make an identification". See id. at 247-61.

The Supreme Court has also articulated what constitutes estimator variables: (1) the stress level of the witness; (2) whether a visible gun was used during the crime; (3) the amount of time the witness viewed the suspect; (4) the lighting and the witness's distance from the perpetrator; (5) the witness's age; (6) whether the perpetrator wore a disguise or hat; (7) the amount

of time that passed between the crime and the identification; (8) whether the witness and perpetrator were of different races; (9) whether the witness was exposed to co-witness feedback; and (10) the speed with which the witness made the identification. See id. at 261-72.

The record here does not support defendant's argument the photo array was conducted in a suggestive manner. As noted, Detective Corino had no earlier involvement with the case; he provided Rosario with the pre-identification instructions; he advised Rosario the suspect's photograph may or may not be in the array; he informed Rosario that appearances change; and he instructed Rosario not to seek feedback and none was provided. Rosario was not exposed to multiple viewings of defendant. Rather, Corino showed Rosario each of the six photographs, separately, and Rosario immediately recognized defendant's photograph.

Defendant contends because his photograph was the only one in the array depicting a man with cornrows, this renders the array impermissibly suggestive. However, the photo array consisted of six men with similar features, which is not impermissibly suggestive. See State v. Galiano, 349 N.J. Super. 157, 162 (App. Div. 2002). "[W]here photographs differ from others in the array, that does not render them impermissibly suggestive." State v. Rodriquez, 264 N.J. Super. 261, 269 (App. Div. 1993).

Defendant also argues eyewitness identification is inherently unreliable and his counsel should have argued as much in a Wade hearing. This issue has been adjudicated and rejected by the Supreme Court, and lacks merit to warrant further discussion in a written opinion. See Henderson, 208 N.J. at 301; R. 2:11-3(e)(1)(E). Moreover, in the present case, Rosario's close proximity to defendant for a meaningful period of time enabled him to make a confident identification during the photo array.

Given the totality of the circumstances, it is evident the photo array was not suggestive. Therefore, the failure to seek a Wade hearing does not demonstrate a prima facie showing of ineffective assistance of counsel.

II.

Defendant contends the State's motion for an extended term was fatally deficient because it did not specify the charge to which the extended term would apply as mandated by State v. Thomas, 195 N.J. 431 (2008). Thus, defendant argues the State's motion should have been dismissed for lack of adequate notice.

A trial court's decision to impose an extended-term sentence is subject to review under an abuse of discretion standard. State v. Young, 379 N.J. Super. 498, 502 (App. Div. 2005). Appellate review of a sentence is limited. State v. Roth, 95 N.J. 334, 364 (1984). "[A]ppellate review of a sentencing decision calls for

us to determine, first, whether the correct sentencing guidelines . . . have been followed[.]" Id. at 365. "We must avoid the substitution of appellate judgment for trial court judgment." Ibid. An appellate court should not "second-guess" the sentencing court's decision. State v. Cassady, 198 N.J. 165, 181 (2009).

N.J.S.A. 2C:44-3(a) states:

> The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if . . . [t]he defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is [twenty-one] years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least [eighteen] 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 [ten] years of the date of the crime for which the defendant is being sentenced.

"Where multiple offenses are charged, . . . notice obviously should include an identification of the offense with respect to which the prosecutor is seeking an extended term in order to give the defendant a fair opportunity to meet that claim." Thomas, 195 N.J. at 436 (emphasis added). "[T]he trial judge should give weight to the prosecutor's determination regarding which offense is to be subject to an extended term[.]" Ibid. "If the judge has

reason to disagree, he should state, on the record, along with his reasons for the sentence, why he chose to apply the extended term to a different charge than that sought by the prosecutor." Ibid.

Here, the trial court stated:

> [W]hile the Thomas opinion did state that the specific count should be mentioned in the initial [m]otion for [e]xtended [t]erm, it did not use the word "must", and more importantly, it did not rule that failure to do so was fatal to the application. And this [c]ourt is not aware of any such decision by any other court in this state holding so. In fact, neither the trial court, Appellate Division, or Supreme Court in Thomas ever mentioned that failure to specify . . . the count for the extended term basis was insufficient notice or otherwise fatal to the application.
>
> The [m]otion for [e]xtended [t]erm here did specify the indictment upon which the extended term was based, since he does have two indictments off a sentence. But it did specify the 1409 indictment and it also listed the charges the [d]efendant was convicted of at trial. The carjacking was the only first-degree charge which resulted in a guilty finding.
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> Therefore, the [c]ourt finds that the [m]otion for [e]xtended [t]erm does not fail due to insufficient notice under Thomas.

We agree. In the present case, defendant met the criteria for imposition of a persistent-offender based extended-term sentence. He was twenty-two years old when he committed the carjacking. He was previously convicted of second-degree reckless manslaughter (Essex County Indictment No. 10-01-49); third-degree

eluding (Essex County Indictment No. 09-05-1472); and third-degree burglary (Essex County Indictment No. 09-09-2436), for which he was sentenced on all three indictments, on June 20, 2011, to a total of three years imprisonment. Defendant was also convicted of another third-degree burglary (Monmouth County Indictment No. 14-4-705), and sentenced on August 7, 2015 to three years incarceration. On April 27, 2016, defendant was sentenced to five years imprisonment for second-degree eluding (Essex County Indictment No. 15-03-617). The sentencing judge thereafter engaged in a comprehensive analysis of defendant's eligibility for sentencing as a persistent offender, and discussed the court's authority to impose a discretionary term of imprisonment under N.J.S.A. 2C:44-3(a).

Also, the State clarified the conviction to which the extended-term sentence request applied because the assistant prosecutor explicitly stated so during the sentencing hearing. Additionally, defendant was not prejudiced because the sentencing judge adjourned the sentencing to allow the defense to prepare in light of the State's disclosure it sought the extended term for the carjacking charge. For these reasons, the sentencing judge did not err in permitting the State's motion for an extended term.

Affirmed.