NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0235-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

QUINTIN D. WATSON,

Defendant-Appellant,

APPROVED FOR PUBLICATION

June 6, 2022

APPELLATE DIVISION

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Argued March 16, 2022 – Decided June 6, 2022

Before Judges Hoffman, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-02-0234.

Ashley T. Brooks, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ashley T. Brooks, of counsel and on the briefs).

Nancy A. Hulett, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Nancy A. Hulett, of counsel and on the briefs).

The opinion of the court was delivered by

SUSSWEIN, J.A.D.

Defendant appeals from his jury trial conviction for second-degree robbery of a bank and from the imposition of an extended term of imprisonment as a persistent offender. He contends that the trial court committed several errors, some of which are raised for the first time on appeal. Specifically, defendant asserts that the trial judge erred by (1) permitting the jury to hear testimony that the investigating police agency consulted with another police department before filing criminal charges, violating defendant's Sixth Amendment rights under the Confrontation Clause; (2) allowing a police witness to render improper lay-witness opinion testimony by narrating a surveillance video as it was shown to the jury and by commenting on screenshot photographs; (3) permitting the victim to identify defendant at trial after he had misidentified another person in an out-of-court photo array identification procedure, and then failing to modify the model jury charge sua sponte to highlight the inherent suggestiveness of the in-court identification; (4) failing to tailor the robbery model jury charge sua sponte by commenting on whether the note the robber showed to the bank teller demanding money evinced an implied threat to cause immediate bodily injury; (5) double counting defendant's prior convictions and inappropriately considering arrests that did not result in convictions when determining the extended-term prison sentence as a persistent offender; and (6) imposing restitution without determining defendant's ability to pay it. With

respect to the last contention, the State acknowledges that the trial court did not make a finding on defendant's ability to pay restitution.

After carefully reviewing the record in light of the applicable principles of law and the arguments of the parties, we affirm defendant's conviction and extended-term prison sentence. We remand solely for the purpose of conducting a hearing on defendant's ability to pay the amount of restitution that was imposed.

In affirming defendant's robbery conviction, we conclude that the trial court erred in permitting the officer to testify that he had been contacted by and consulted with another police department just before filing the criminal complaint charging defendant with robbery. The trial court convened an in limine hearing to discuss this testimony and sought to balance competing interests: the need to explain to the jury why defendant's former girlfriend came forward to identify him nearly a year after the bank robbery, on the one hand, against, on the other hand, the need to keep the jury from learning that the other police department was investigating defendant's involvement in other bank robberies not charged in the present indictment. We conclude that the trial court abused its discretion in striking the balance between those competing interests because it did not address whether the officer's testimony would infringe upon defendant's Confrontation Clause rights. We believe that the testimony violated

defendant's Sixth Amendment rights because it implied that the other police department possessed incriminating evidence that was not presented to the jury. However, we conclude that the constitutional error in allowing the officer to briefly mention the consultation with the other department was harmless beyond a reasonable doubt.

We conclude that the trial court did not abuse its discretion by allowing a police witness to narrate surveillance video as it was being played to the jury. We decline to substitute our judgment for the trial court's in determining whether the officer's narration comments were helpful to the jury in understanding what was being shown in the video. We note that the admission of surveillance video recordings at trial is becoming more common because of the proliferation of government, commercial, and residential surveillance cameras. To improve the process by which police narration testimony is scrutinized, we recommend a new practice and procedure whereby a trial court would conduct a Rule 104[1] hearing whenever the prosecutor intends to present narration testimony in conjunction with playing a video recording to the jury. At the in limine hearing, the court should consider and rule upon narration comments that will be permitted and those that will be foreclosed, providing clear instructions for the

[1] N.J.R.E. 104; see also R. 3:9-1 (pretrial hearings relating to admissibility of evidence).

witness to follow. That would obviate the need for a series of spontaneous objections in the presence of the jury as well as the need to issue curative instructions when an objection is sustained. We also propose that the Committee on Model Criminal Jury Charges (Model Jury Charge Committee) consider whether it would be appropriate to draft a model instruction specifically tailored to address testimony that narrates or otherwise comments on video recordings as they are being played to the jury.

We reject defendant's contention, raised for the first time on appeal, that the trial court erred by allowing the bank teller to make an in-court identification after having selected the photograph of another person from a photo array. Defendant asks us to ban all "first-time" in-court identifications or at least in-court identifications where the witness had previously misidentified the culprit in an out-of-court identification procedure. He also argues that the trial court on its own initiative should have revised the model jury charge to explain the inherent suggestiveness of the in-court identification procedure. We conclude that the trial court did not commit error, much less plain error, in following the law as it presently stands by permitting the in-court identification. We decline to impose new bright-line preconditions on when an eyewitness may be asked to identify the perpetrator at trial.

We further conclude that the judge did not commit plain error by reading verbatim the current model jury instructions that were developed after the New Jersey Supreme Court's landmark decision in State v. Henderson, 208 N.J. 208 (2011). However, we believe the time has come to carefully review the current model jury charges pertaining to in-court identifications. The social science evidence and case law suggest it would be appropriate to update those model jury instructions, for example, by borrowing language now used to explain the suggestiveness of out-of-court "showup" identifications to inform juries as to the comparable risk of misidentification during an in-court identification. We therefore recommend that the Model Jury Charge Committee review the scientific literature in view of the relevant case law to determine whether revisions to the model charges pertaining to in-court identifications are warranted.

We also reject defendant's arguments that the trial court erred in failing to tailor the robbery model jury charge instructions sua sponte and that it improperly imposed the extended-term prison sentence.

I.
PROCEDURAL HISTORY, FACTS, AND ISSUES RAISED ON APPEAL

We discern the following pertinent facts and procedural history from the record. On January 14, 2017, Christian Gambarrotti was working as a teller at a bank in North Brunswick. Around noon, a man entered the bank and

approached Gambarrotti's teller window. The man was African-American, approximately six foot two inches, muscular, and wore a hat. The man pointed to a note he placed on the counter which read "everything now." Gambarrotti was not initially sure what the note meant until he looked up at the man, who "reassured what it meant" and stated "now." In accordance with his prior training, Gambarrotti did "not make a scene and [gave] out the cash" to the man. Specifically, Gambarrotti emptied the cash from his top and bottom drawers behind the counter. He also gave the man a stack of one-dollar bills. In total, Gambarrotti provided over $5,000 to the robber. However, he forgot to give the man "bait money," which contains serial numbers that banks record. After receiving the cash, the man retrieved the note, told Gambarrotti "to get home safe," and walked out of the bank.

After the robber left the bank, Gambarrotti walked outside to see if he was still in the vicinity and to get "a better glimpse of [what] he looked like." There was no sign of the man. Gambarrotti then went back inside the bank to notify his manager of the robbery. The manager "hit the alarm [and] . . . called the police." No one else present in the bank knew that a robbery had occurred until after Gambarrotti notified them.

North Brunswick Police Officer Frank Vitelli, Jr., responded to the bank where he interviewed three bank customers, the bank manager, and Gambarrotti.

Officer Vitelli then "dusted [for] . . . fingerprints" on the entrance door handles and on the counter at Gambarrotti's teller window. He collected seven fingerprints and later submitted them to the State Police Automated Fingerprint Identification System (AFIS).

Officer Vitelli also obtained surveillance video from the bank. Police canvassed the local area around the bank to see if any other surveillance cameras captured footage of the robbery or flight. Police located a video camera at a convenience store approximately fifty to seventy-five yards away from the bank.

The surveillance video from inside the bank showed the robber entering the bank wearing gloves, a black sweatshirt or jacket, and jeans. The video also showed the robber pass a note to Gambarrotti. The recording confirmed that the entire incident lasted only approximately one minute. The surveillance video from the convenience store camera showed the robber walking towards the bank and retracing his steps in the opposite direction shortly after the incident.

Office Vitelli issued a "TRAKs message" to other law enforcement agencies throughout New Jersey sometime in January 2017. The broadcast bulletin contained information about the robbery as well as a screenshot photograph of the robber taken from the bank surveillance video recording.

Although not presented as evidence at trial, the record shows that in November 2017, Franklin Township Police alerted the North Brunswick Police

Department about a man who was in "custody for three bank robberies."[2] Franklin Township Police[3] were responding to the January bulletin that Officer Vitelli had issued, noting that they "saw the [TRAKs] bulletin that [North Brunswick] had issued earlier in the year. He looks pretty similar to us. You may want to come down to take a look . . . ."

Defendant had been brought to the attention of Franklin Township police by Jennifer Hill, defendant's former girlfriend. In October 2017, Hill was reading a newspaper article about the bank robbery that had been committed in Princeton. The article included a picture of the robber. Hill recognized defendant as the person in the newspaper photograph and contacted the police.[4]

After North Brunswick police were notified that the suspect in the other bank robberies looked similar to the man in the TRAKs message, Officer Vitelli consulted with the Franklin Township Police Department. A criminal complaint was then filed charging defendant with the bank robbery in North Brunswick.

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[2] The record shows that one of the three bank robberies occurred in Princeton and the other two in the Franklin Township/Somerset County area.

[3] The name of the police department that responded to the TRAKs message, Franklin Township, was not disclosed to the jury.

[4] It is not clear from the record on appeal whether Hill contacted her local police department in Princeton or the Franklin Township police department. In any event, at some point, police in Franklin Township determined that defendant was a suspect in all three robberies.

Defendant was arrested and his fingerprints were taken as part of the routine booking process. Defendant's fingerprints did not match the latent fingerprints lifted at the North Brunswick bank.

In September 2018, approximately a year-and-a-half after the North Brunswick Bank robbery, the Middlesex County Prosecutor's Office (MCPO) administered a photo array to Gambarrotti to try to identify the culprit. The prosecutor showed Gambarrotti six photographs, one of which depicted defendant. Gambarrotti selected a photograph of the person he believed was the robber. However, he was not 100% sure.[5] The photograph Gambarrotti selected was not that of the defendant.

In early October 2018, the MCPO contacted Hill. She was shown a still photograph from the bank surveillance video that showed the robber at the teller's window pointing to the note. Hill was "100[%] positive" that defendant was the man in the photograph. This was so even though she could not see "the top . . . 20 to 25[%] of his face" in the photograph.

On February 8, 2018, a grand jury charged defendant with second-degree robbery, N.J.S.A. 2C:15-1. On May 25, 2018, the trial court heard oral

[5] At trial, Gambarrotti testified that "I believe I was 75 to around 90[%] sure that it was the person, because honestly, it happened a year—over a year and a half ago, so I couldn't recall." On cross- and re-direct examination, he testified that he was approximately 85% sure of the identification. During the trial, Gambarrotti positively identified defendant with approximately 80% certainty.

arguments on defendant's motion to dismiss the indictment. The trial court denied the motion to dismiss.

On October 22, 2018, the trial court heard oral arguments on the State's motion to admit other-crimes evidence relating to the three other bank robberies. The court denied the State's motion and determined that evidence relating to the other bank robberies would be inadmissible at trial.

Defendant's trial occurred over the course of two consecutive days in November 2018. Both Gambarrotti and Hill positively identified defendant in court. The trial judge denied defendant's motion for a judgment of acquittal. The jury subsequently found defendant guilty of second-degree robbery.

On January 28, 2019, the trial judge granted the State's motion to sentence defendant to a discretionary extended term pursuant to N.J.S.A. 2C:44-3(a) as a persistent offender. The court imposed a sentence of fifteen years in prison, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court also imposed a Victims of Crime Compensation assessment of $50, a Law Enforcement Officers Training and Equipment Fund penalty of $30, and a Safe Neighborhoods Fund assessment of $75, along with an order to pay $5,772 in restitution. On March 28, 2019, defendant's application for admission to drug court was denied.

This appeal followed. Defendant raises the following contentions for our consideration:

> POINT I[6]
>
> THE OFFICER'S TESTIMONY THAT HE CONSULTED WITH OFFICERS FROM ANOTHER POLICE DEPARTMENT, PROMPTING THE MIDDLESEX COUNTY PROSECUTOR'S OFFICE TO FILE CHARGES AGAINST WATSON, VIOLATED THE HEARSAY BAN, AS WELL AS DEFENDANT'S DUE PROCESS AND CONFRONTATION CLAUSE RIGHTS. THIS TESTIMONY WAS HIGHLY PREJUDICIAL, GIVEN MS. HILL'S TESTIMONY ABOUT HER CONTACT WITH ANOTHER LAW ENFORCEMENT AGENCY AND THE PROSECUTOR'S SUGGESTIONS IN SUMMATION THAT POLICE HAD ADDITIONAL INFORMATION INCRIMINATING WATSON.
>
> A. THE OFFICER'S TESTIMONY THAT HE WAS CONTACTED BY AND CONSULTED WITH ANOTHER LAW ENFORCEMENT AGENCY, LEADING TO THE INDICTMENT AGAINST WATSON, VIOLATED HEARSAY RULES, CONFRONTATION CLAUSE PRINCIPLES, AND WATSON'S DUE PROCESS RIGHTS.
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> B. MS. HILL'S TESTIMONY AND THE PROSECUTOR'S SUMMATION COMPOUNDED THE HARM BY FURTHER SUGGESTING THAT WATSON WAS IMPLICATED IN OTHER CRIMES.

[6] Defendant misnumbered the point headings. We have corrected the numbers accordingly.

POINT II

THE OFFICER'S IMPROPER LAY-WITNESS OPINION TESTIMONY AS TO THE CONTENT OF THE SURVEILLANCE VIDEO AND PHOTOGRAPHS REQUIRES REVERSAL.

POINT III

THE COURT COMMITTED REVERSIBLE ERROR IN PERMITTING GAMBARROTTI TO MAKE AN IN-COURT IDENTIFICATION AFTER HE IDENTIFIED A DIFFERENT PERSON OUT OF COURT. THE FIRST-TIME IN-COURT IDENTIFICATION WAS UNRELIABLE AND HIGHLY SUGGESTIVE. (Not Raised Below)

A. THE FIRST-TIME, IN-COURT IDENTIFICATION SHOULD HAVE BEEN EXCLUDED.

B. IF FIRST-TIME IN-COURT IDENTIFICATIONS ARE ALLOWED, THE JURY MUST BE INSTRUCTED THAT THEY ARE PARTICULARLY SUGGESTIVE AND UNRELIABLE. THE FAILURE TO DO SO HERE CONSTITUTED PLAIN ERROR.

POINT IV

THE FAILURE TO ISSUE TAILORED JURY INSTRUCTIONS REQUIRES REVERSAL GIVEN THE UNIQUE FACT PATTERN AND ISSUE THIS CASE PRESENTED: DID WATSON PURPOSELY THREATEN IMMEDIATE BODILY INJURY TO THE BANK TELLER WHEN HE QUIETLY PASSED HIM A NOTE DEMANDING MONEY? (Not Raised Below)

POINT V

THIS MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE COURT ACCORDED DUPLICATIVE WEIGHT TO PRIOR CONVICTIONS AND UNDUE WEIGHT TO PRIOR ARRESTS THAT DID NOT RESULT IN CONVICTIONS.

A. THE COURT ACCORDED DUPLICATIVE WEIGHT TO WATSON'S PRIOR OFFENSES IN FINDING AGGRAVATING FACTORS THREE, SIX, AND NINE BECAUSE THE PRIOR OFFENSES WERE THE BASIS FOR THE EXTENDED TERM.

B. THE COURT ERRED IN RELYING ON ARRESTS AND DISMISSED CHARGES.

POINT VI

THE MATTER MUST BE REMANDED FOR A HEARING ON DEFENDANT'S ABILITY TO PAY THE RESTITUTION IMPOSED.

Defendant raises the following additional points in his reply brief, which we list because they expand upon and amplify the arguments made in his initial brief:

POINT I

CONTRARY TO THE STATE'S ARGUMENT, SGT. VITELLI'S TESTIMONY, THAT HE CONSULTED WITH OFFICERS FROM ANOTHER LAW ENFORCEMENT AGENCY AND CHARGES WERE SUBSEQUENTLY FILED AGAINST WATSON, CREATED AN INESCAPABLE INFERENCE THAT

NON-TESTIFYING OFFICERS HAD IMPLICATED WATSON IN THIS OFFENSE.

POINT II

RECENT CASE LAW CLARIFYING THE REQUIREMENTS OF N.J.R.E. 701 DEMONSTRATES WHY THE OFFICER'S NARRATION OF THE VIDEO SURVEILLANCE WAS IMPERMISSIBLE.

POINT III

THIS COURT SHOULD DEPART FROM GUERINO[7] BECAUSE HERE, THERE WAS NOT EVEN AN EQUIVOCAL OUT-OF-COURT IDENTIFICATION. THE WITNESS IDENTIFIED SOMEONE ELSE IN THE PHOTO ARRAY. THEREFORE, THE WITNESS SHOULD NOT HAVE BEEN PERMITTED TO IDENTIFY THE DEFENDANT IN COURT.

II.
SIXTH AMENDMENT CONFRONTATION CLAUSE

We first address defendant's contentions regarding Officer Vitelli's testimony concerning the investigation. Officer Vitelli testified at trial that the criminal complaint charging defendant with robbery was filed after he had been contacted by and consulted with another police agency. Defendant contends that this testimony, alone and in conjunction with the testimony of Hill, created an inescapable inference that officers from another police department possessed

[7] State v. Guerino, 464 N.J. Super. 589 (App. Div. 2020).

incriminating evidence that was not presented to the jury, thus constituting a violation of defendant's Sixth Amendment right to confront the witnesses and evidence offered against him.[8] Defendant also argues that because this

[8] Defendant argues for the first time on appeal that Officer Vitelli's testimony also violates the hearsay rule, N.J.R.E. 802, and the Due Process Clause. We believe defendant's hearsay argument is, in practical effect, subsumed within our analysis under the Confrontation Clause precedents. We believe it would be unfair to defendant—and analytically confusing—to apply the plain error standard of review to the hearsay argument raised for the first time on appeal, see infra note 15 and accompanying text, while applying a different constitutional error standard to the closely-related if not inseparable Confrontation Clause question. See infra subsection D (concluding defendant adequately raised the Confrontation Clause issue to the trial court as to preclude our application of the plain error standard of review). Furthermore, given our conclusion that defendant's Confrontation Clause rights were violated, we need not apply ordinary hearsay rule analysis to determine, for example, whether Officer Vitelli's challenged testimony constitutes an out-of-court statement offered to prove the truth of the matter asserted. Cf. James v. Ruiz, 440 N.J. Super. 45, 60 n.8 (App. Div. 2015) (explaining the hearsay doctrine but noting, "[w]e confine our analysis in this case to civil matters, and do not address the application of these hearsay principles to criminal cases, where the constitutional rights of a criminal defendant under the Confrontation Clause may be at stake").

Relatedly, we believe that defendant's substantive due process contention is part and parcel of his Sixth Amendment Confrontation Clause argument. We recognize that the United States Supreme Court has noted that the Confrontation Clause "is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission." Michigan v. Bryant, 562 U.S. 344, 370 n.13 (2011). In this instance, however, defendant has not performed an independent substantive due process analysis but rather has merely cited the Due Process Clause in a string cite. Cf. N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 504 n.2 (App. Div. 2015) (citing Fantis Foods v. N. River Ins. Co., 332 N.J. Super. 250, 266–67

testimony implies that defendant committed other crimes, the testimony violated N.J.R.E. 404(b) notwithstanding the trial court's concerted efforts to ensure that the jury was insulated from any evidence concerning the three other bank robberies.

A.

The complexity and subtle nuances of the Confrontation Clause issue raised in this case cannot be addressed in a contextual vacuum. As we have already noted, the trial court sought to balance competing interests in determining the scope of police testimony to explain how the investigation leading to defendant's arrest unfolded.

Before the trial started, the judge heard oral arguments on the State's motion to admit other crimes evidence pursuant to N.J.R.E. 404(b). The court denied the State's motion and determined that evidence concerning any of the three other bank robberies not charged in the present indictment would be inadmissible. Although the court denied the State's motion, it also determined

> there should be . . . some explanation to the jury as to how this case came before the [c]ourt and mainly through the ex-girlfriend finding out about the crime that was allegedly committed in Somerset County, cooperating with Somerset County officials, which ultimately led them to the charges presented here and

(App. Div. 2000)) (noting that an argument presented in a single sentence of the party's brief was insufficient); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2022).

> then her identifying the defendant from the North Brunswick video.
>
> In that regard, the [c]ourt would not allow—and I believe that both parties agree—that the State cannot use the police officer to identify the defendant in the North Brunswick video. However, the ex-girlfriend certainly has knowledge of who the defendant is and can identify the defendant from the video. That would be admissible.
>
> The [c]ourt will allow some leeway as to what evidence can be presented as to how the ex-girlfriend came to come testify in court. We will establish what the relative effects could be[] permissible facts could be immediately prior to trial.

Following that initial pretrial hearing, on October 30, 2018, the judge and parties reconvened to determine the scope of the trial testimony of Officer Vitelli and Hill pertaining to the circumstances in which Hill came to the attention of the MCPO and how defendant came to be arrested and charged with the North Brunswick bank robbery months after it was committed. The trial court accepted the prosecutor's argument that providing no context to the jury would be "very prejudicial" to the State because it could lead to jury nullification. However, the trial court also recognized that informing the jury as to the full context "would obviously be very prejudicial to . . . defendant." After balancing the interests of both parties, the trial court determined that the testimony at trial should provide "some context" for the jury.

Regarding Hill's testimony at trial, the court determined that

> [she] can testify that she was reading the newspaper. Based on the article, she contacted the local police department. As a result of that initial contact, it ultimately led to her being contacted by the Middlesex County Prosecutor's Office. With that quick introductory, there's no reference to any other charges. They can just see that this was a natural progression for this investigation.
>
> The jury will be instructed on multiple occasions to not do any independent research so we don't have any fear of that. So[,] I think that that gives it a suitable context as to how this individual became involved in the case without being unduly prejudicial to the defense.

The in limine discussion regarding the scope of Officer Vitelli's testimony was more extensive. To provide full context for our Confrontation Clause analysis, and to show that the discussion focused predominately on how to keep the jury from learning about other bank robberies, we reproduce verbatim the relevant portion of the extended colloquy between the judge, prosecutor, and defense counsel:

> PROSECUTOR: The officer from North Brunswick, mindful of the same concerns, also has an obligation to testify truthfully how he came to arrest the defendant. So[,] we can't just say out of nowhere he just picked him out of obscurity eight months later with no cause because, really, the investigation went cold after the January 14th bank robbery. They had no leads. It wasn't until Somerset County contacted North Brunswick and they said, hey, come take a look at this guy that we have in custody. We think he is connected to your case too. Then they travel to Somerset. They seen [sic] the footage. They compared it with the footage they have from the [North Brunswick] Bank

robbery and that's when they signed criminal complaints.

And the police acted reasonably here. I'm concerned that if there is over sanitization that it will look like they just picked him arbitrarily and that's not the case.

So, what I suggest is the officer, again, they investigated. They had no leads. They were contacted by another law enforcement agency. They went and met with that agency after which they signed criminal complaints against Mr. Watson. We are not getting into what that other investigation was, specifically not saying he was charged with three bank robberies or anything of that nature. I recognize that would be prejudicial. But just simply they are contacted about an unrelated investigation. They went, you know, reviewed evidence and then signed criminal complaints. I think that's a fair—

THE COURT: When did they sign the criminal complaints?

PROSECUTOR: Not until November. So[,] he was arrested in early November of 2017 for the Somerset case. Middlesex came in—

THE COURT: But anything, . . . that had to do with the North Brunswick police contacting Somerset County . . . ., the interaction with Somerset County is not evidential in this case.

PROSECUTOR: Well, it is, Judge because it shows the police are not acting arbitrarily.

THE COURT: No, I mean substantively it's not evidential. It's not going to be evidence in this case.

PROSECUTOR: Of Somerset.

THE COURT: Yeah, or what they did with Somerset.

PROSECUTOR: Granted. I wouldn't even mention what agency.

THE COURT: Right.

PROSECUTOR: But simply that he was contacted by another law enforcement agency. He met with that agency, reviewed—

THE COURT: Well, what would be the prejudice to the State that just based on our investigation over the next 10 months, it wasn't until 10 months later that we were in a position to sign the complaint?

PROSECUTOR: Based on what? It looks arbitrary. There has to be something—he's going to say after January 14th, we had no leads. Now, all of a sudden, we are arresting somebody. That's the point. They didn't act arbitrarily here. They conducted an investigation when they had additional evidence. There's going to be a huge gap in this investigation [where] nothing happened.

THE COURT: And you want to avoid it looking like it was an arbitrary action on the police, which could lead to, in essence, the silent argument of jury nullification.

PROSECUTOR: Precisely. Or they got the wrong guy. They just picked anybody just to close the file out. And that's not what happened here.

THE COURT: So[,] you want to just say that we [referring to the North Brunswick police department] had contact with some other law enforcement agencies

and as a result of those contacts, we felt, at that point in time, that we had enough information?

PROSECUTOR: Or even one other, go a little farther and say that we reviewed evidence, after our review of evidence, we then signed criminal complaints. And I would, again, propose leading through that, shepherd him through that area, but it shows that they weren't acting arbitrarily, but it also sanitizes anything else about what that evidence was or what crimes were, none of that stuff.

DEFENSE COUNSEL: Sure, Judge. If there was any testimony to come out that through our contact with another law enforcement agency, we were able to bring in Mr. Watson, the inference would be overwhelming. The jury would inevitably think oh, what did he do somewhere else? I don't see why, once again, it's not uncommon for a case to remain open and based on new information received, Mr. Watson was subsequently identified. [State v. Bankston],[9] Judge, and I will provide the cite in a second, actually discusses this issue and specifically says to prevent prejudice, you can even allow a testifying officer to say based on this information, based on new information received, we followed up and did XYZ and Mr. Watson was brought in.

The State's concern about the way that their case comes out and that there might be jury nullification should be outweighed by the prejudicial impact that Mr. Watson could be exposed to. We contacted law enforcement agencies from somewhere else, they gave us information, and then we brought in Mr. Watson. Even with leading questions to try and prevent it, Judge, the inference would be overwhelming. And it would

[9] State v. Bankston, 63 N.J. 263, 268–69 (1973).

inevitably just lead to what the exact issue we litigated [concerning other crimes evidence].

THE COURT: What [would] be the inference from that? The inference would be that maybe—there could be just as much inference that Somerset County had some information . . . it doesn't necessarily mean that they contacted—that a jury would infer that just because they had contact with other law enforcement agencies, that there [were] other criminal activities. It just could have been that that was information that was helpful in solving this particular crime.

DEFENSE COUNSEL: I don't—if I heard . . . as a juror that we were contacted by another law enforcement agency, I would just almost right away think, Judge, that he had to have committed some crime somewhere else. That's exactly why we litigated that motion. And Your Honor denied the State's 404B motion because that inference alone is enough. I would like the opportunity to —since we don't—I provided a case to the Court, today, since we do not begin trial until November 13th, maybe brief this issue because I do feel very strongly that saying we were contacted or we contacted another law enforcement agencies would be overwhelmingly prejudicial.

. . . .

THE COURT: The thought is that once again you want—I think the State has a legitimate concern that there has to be some context to this. But if we give the full context, it would obviously be very prejudicial to the defendant. But if we give no context, it could be very prejudicial to the State because it could lead to a juror just concluding that this was arbitrary and a potential jury nullification.

So, having said that, then there should be some context to it coupled with the fact that the jury is on

more than one occasion instructed and we must presume that they follow the instructions—that they are to only consider the evidence that is presented in the courtroom by the testimony of the witnesses or the documents presented and that they should not have—in their deliberations, there should not be any discussions about anything outside of what was testified to in court. So, that gives this [c]ourt some sense of comfort that by . . . giving some context to the police investigation coupled with a very clear jury instruction that the jurors won't allow speculation to take part in their deliberation. So[,] you may want to keep that in mind when you are briefing that issue.[10]

DEFENSE COUNSEL: Sure.

THE COURT: Because that's what I will be looking for you to address.

DEFENSE COUNSEL: Sure.

THE COURT: Okay?

PROSECUTOR: Judge, I would prefer the [c]ourt to make the ruling and then if counsel wants to do a reconsideration or something, we could follow up, but I would like to be able to instruct the witnesses in parallel—

THE COURT: Well, listen, I will give you, like in family court, they give a preliminary ruling. So[,] I will give a preliminary ruling that's obviously not binding and allows both sides to argue otherwise. But this way, it does give a context as to what you're going to be arguing.

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[10] So far as the record before us indicates, this issue was not addressed in subsequent briefs filed with the trial court by either party.

> So[,] my preliminary ruling . . . is going to be consistent with what I did with Ms. Hill and that is that the police can testify that they opened up an investigation and that . . . the police were contacted by another law enforcement agency and that as a result of information provided, they then felt comfortable with signing the complaints in November. And that would be it. I guess it could be that they were contacted by another law enforcement agency that believed they had relevant evidence regarding the Middlesex County investigation. Okay? So let me write it down. So[,] they opened the investigation on the date of the incident which was?
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> PROSECUTOR: January 14th.
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> THE COURT: January of 2017 or 18? When did this occur?
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> PROSECUTOR: January 14th, 2017.
>
> THE COURT: 2017 opened investigation. In November 2017, contacted by another law enforcement agency that believed they had relevant info regarding the Middlesex County charge. I think actually we shouldn't say the Middlesex County charge—regarding the charge, met with representatives from that agency and as a result of that meeting, criminal complaint was signed. Okay? All right.

Based on the trial court's in limine ruling,[11] Hill provided the following testimony about contacting police and identifying defendant:

> Q: Now, in October of 2017, you were . . . still living in the Princeton area?

[11] So far as the record reflects, at trial, there were no further objections to or amplifications of the "preliminary" ruling the trial court made in the pretrial in limine hearing.

A: Yes, I was.

Q And did you have occasion to be reading the newspaper at that time?

A: Yes.

Q: And fair to say that while reading the newspaper, you happened to see a news article and a[n] accompanying photograph in the paper?

A: That is correct.

Q: And fair to say that upon looking at that photograph in the newspaper, you identified Mr. Watson in the photograph. Is that fair to say?
A: Yes, that's correct.

Q: And . . . after reviewing the photograph and making that identification in your mind, fair to say that you reached out to a law enforcement agency to report that?

A: Yes.

Q: And in 2018, just last month, fair to say that a detective from the Middlesex County Prosecutor's Office contacted you and asked you to come in to view a photograph?

A: Yes.

Q: And did you—were you presented a photograph that day in October and asked if you could identify who was depicted in it?

A: That is correct.

Q: And who did you identify as being in that photograph?

A: Quintin Watson.

Q: And did you determine how sure you were of your identification?

A: I was 100[%] positive.

Q: I'm going to show you what's been marked as S-2 for identification. Is that the photograph you were presented with in October of 2018 by the Middlesex County Prosecutor's Office?

A: Yes, it was.

Q: And who is depicted in that photograph?

A: Quintin Watson.

Q: Are you certain of that?

A: 100[%] positive.

. . . .

Q: Do you recognize [anyone]—the person depicted in S-3 in evidence?

A: Yes, I do.

Q: And who is depicted in that photograph?

A: Quintin Watson.

Q: Are you positive of that identification?

A: 100[%].

We note that Hill did not testify as to the contents of the newspaper article and made no mention as to which law enforcement agency she contacted.

Following Hill's trial testimony, Officer Vitelli testified concerning his role in the investigation of the bank robbery and also narrated the surveillance video.[12] Regarding the investigation, Officer Vitelli explained that he was called to the scene of the robbery, reviewed surveillance footage, and issued a TRAKs message. In accordance with the trial court's ruling at the in limine hearing, Officer Vitelli also testified about being contacted by another law enforcement agency regarding the TRAKs bulletin he had issued in January 2017. We reproduce verbatim the relevant portion of his trial testimony:[13]

> Q: Now, after you had examined the bank surveillance, [the convenience store] surveillance, and you said canvassed the area—
>
> A: Correct.
>
> Q: What was the next step in the investigation?
>
> A: So[,] at that point what we do is—

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[12] We address defendant's contentions regarding Officer Vitelli's narration of the surveillance video in section III of this opinion.

[13] Defendant's appeal brief relies on a selected portion of Officer Vitelli's testimony, which we have underlined. We reproduce Officer Vitelli's testimony immediately preceding the testimony highlighted by defendant to provide a more complete context for our analysis of whether his testimony violated defendant's Sixth Amendment Confrontation Clause rights.

DEFENSE COUNSEL: Objection to what we do, Your Honor. He can only testify—

THE WITNESS: I apologize.

DEFENSE COUNSEL: —what he did.

THE COURT: Sure.

THE WITNESS: I apologize. What I did at that time was I disseminated what's called a TRAKs message. Would you like me to explain what—

Q: Yes, please. What is a TRAKs message?

A: TRAKs message would be like a bulletin that is sent out to all law enforcement agencies, and we can decide the scope, whether it's sent out nationwide, tri-state, just in-state. And it will be sent out to all law enforcement agencies and some private security agencies as well. On those TRAKs messages, we will include information that we have on the incident, possible suspects and information if we have it, as well as photographs.

The reason that we send this out to other law enforcement agencies is because we're seeking information as well. Another law enforcement agency may see or recognize a suspect from a photo from prior dealings, they've known him from—anything from a motor vehicle accident to a crime that's been committed in the past. And that's a way to gather further information on the incident.

Q: And you create this TRAKs bulletin?

A: Correct.

. . . .

Q: [Y]ou think you submitted it soon after the—you getting the bank surveillance.

A: Correct. Yes.

Q: So sometime in January of 2017?

A: Yes.

Q: In November 2017, were you contacted by another law enforcement agency regarding Quintin Watson?

A: Yes, I was.

Q: And at some point[,] did you consult with that law enforcement agency and after which criminal complaints were signed against Mr. Watson?

A: Yes, they were.

Q: And at some point[,] was Mr. Watson taken to North Brunswick and subject to the booking process?

A: Yes, he was.

[(emphasis added).]

B.

We begin our analysis by acknowledging certain foundational legal principles established under the Sixth Amendment. As the United States Supreme Court recently reaffirmed, "[o]ne of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment . . . ." Hemphill v. New York, 142 S. Ct. 681, 690 (2022).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The New Jersey Constitution's analog to the Sixth Amendment, Article I, paragraph 10, "provides a cognate guarantee to an accused in a criminal trial." State v. Roach, 219 N.J. 58, 74 (2014); accord State v. Sims, 250 N.J. 189, 223 (2022) (quoting Roach, 219 N.J. at 74) ("Our confrontation jurisprudence 'traditionally has relied on federal case law to ensure that the two provisions provide equivalent protection.'").

As recently recognized by our Supreme Court, the United States Supreme Court has held that "the framers of the Constitution intended the Confrontation Clause to bar the admission of 'testimonial statements of a witness who did not appear at trial unless [the declarant is] unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination.'" Sims, 250 N.J. at 223 (alteration in original) (quoting Crawford v. Washington, 541 U.S. 36, 53–54 (2004)). A "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990).

The New Jersey Supreme Court has also recognized that the ability to confront witnesses is "an essential attribute of the right to a fair trial" as it

"secures for a defendant the 'fair opportunity to defend against the State's accusations . . . .'" State v. Medina, 242 N.J. 397, 412 (2020) (first quoting State v. Branch, 182 N.J. 338, 348 (2005); and then quoting State v. Garron, 177 N.J. 147, 169 (2003)). "[B]oth the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." Branch, 182 N.J. at 350 (citing Bankston, 63 N.J. at 268–69).

Our Supreme Court's frequently cited decision in Bankston lays the groundwork for our analysis. In that case, police officers entered a tavern and found drugs near where the defendant was sitting. Bankston, 63 N.J. at 265. The defendant was subsequently arrested. Id. at 265–66. At trial, one of the detectives testified that the defendant fit an informant's description of a person with drugs in the tavern. Id. at 266. The Court noted that

> [i]t is well settled that the hearsay rule is not violated when a police officer explains the reason he [or she] approached a suspect or went to the scene of the crime by stating that he [or she] did so "upon information received." Such testimony has been held to be admissible to show that the officer was not acting in an arbitrary manner or to explain his [or her] subsequent conduct. However, when the officer becomes more specific by repeating what some other person told him [or her] concerning a crime by the accused the testimony violates the hearsay rule.
>
> [Id. at 268 (citations omitted).]

The Court determined that the detective's testimony was inadmissible hearsay. "Although . . . the police officers never specifically repeated what the inform[ant] had [said], the inescapable inference from [the] testimony was that the inform[ant] had given information that defendant would have narcotics in his possession." Id. at 271. As a result, "the jury was led to believe that an unidentified inform[ant], who was not present in court and not subjected to cross-examination, had told the officers that defendant was committing a crime. The testimony was clearly hearsay." Ibid.

The Court in State v. Irving provided further guidance not only on when hearsay testimony constitutes a Confrontation Clause violation but also on when any such violation constitutes reversible error. 114 N.J. 427, 446–47 (1989). In that case, three armed men robbed a luncheonette in Newark. Id. at 431. The proprietor was shot and wounded in the course of the robbery. Ibid. A detective testified that he focused on Irving as the subject of the investigation and placed his picture in a photo array after going to the neighborhood and asking for leads. Ibid. The Court concluded that the inescapable inference from that trial testimony, although never specifically stated, was that an informant had told the detective that the defendant committed the crime. Id. at 446. The Court acknowledged that in Bankston, the officer had testified more specifically on the information provided by the informant. Id. at 447. The Court reasoned,

however, that the creation of the inference, not the specificity of the statements made, was the critical factor in determining whether the hearsay rule was violated. Ibid.

The Court in Irving ultimately distinguished Bankston because the defense counsel in Bankston had made a timely objection to each testimonial impropriety, thus preserving the issue for appeal. Ibid. By contrast, in Irving, the defense counsel did not object to the detective's hearsay testimony, even though the same testimony had been given at the Wade[14] hearing prior to trial. Ibid.

The Court noted that the issue was thus to be resolved under the plain error standard of review. Ibid. The Court cited and relied upon our then-recent decision in State v. Douglas, 204 N.J. Super. 265 (App. Div. 1985), where the defense attorney failed to make a timely objection to the prosecutor's remarks in summation regarding an officer's testimony explaining why the defendant's picture had been placed in a photo array. Irving, 114 N.J. at 447. The court in Douglas surveyed the relevant precedents and determined that in those earlier cases, hearsay testimony was deemed to be prejudicial because the State's cases were "very weak . . . ." 204 N.J. Super. at 274. We concluded that because the State's proofs in the matter before it were "fortified by direct positive

[14] United States v. Wade, 388 U.S. 218 (1967).

evidence"—for example, direct identification of the defendant—the hearsay testimony was not prejudicial under the plain error rule. Id. at 275. Applying that principle to the totality of the proofs in the record, the Supreme Court in Irving concluded that a reasonable doubt was not raised on whether the hearsay led the jury to a result it otherwise might not have reached. 114 N.J. at 448.

Our Supreme Court's Confrontation Clause decision in Branch, decided in 2005, provides further instruction in determining whether that Sixth Amendment right has been violated and in measuring the prejudicial impact of any such violation. The Court reviewed several New Jersey Confrontation Clause cases and discerned that the "common thread that runs through" those precedents was that "a police officer may not imply to the jury that he [or she] possesses superior knowledge, outside the record, that incriminates the defendant." Branch, 182 N.J. at 351.

In Branch, the Court reversed a defendant's robbery and burglary convictions, holding that defendant's right to confrontation had been violated by the investigating police officer's testimony that he had "included defendant's picture in a photographic array because he had developed defendant as a suspect 'based on information received'" from an unspecified source. Id. at 342. That testimony was deemed to be inadmissible hearsay. Ibid.

The Court found that because there "was no trial testimony or evidence" other than the victim's identification of defendant from the photo array "that could have led [police] to focus on defendant as a suspect . . . the jury was left to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime." Id. at 347–48. That was particularly problematic

> [b]ecause the nameless person who provided the "information" to [the detective] was not called as a witness, the jury never learned the basis of that person's knowledge regarding defendant's guilt, whether he was a credible source, or whether he had a peculiar interest in the case. Defendant never had an opportunity to confront that anonymous witness and test his credibility in the crucible of cross-examination.
>
> [Id. at 348.]

The Court concluded "that '[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay.'" Id. at 349 (alteration in original) (quoting Bankston, 63 N.J. at 271). The Court added that although a police officer "may testify that he went to the scene of a crime based 'upon information received, . . .'" id. at 351 (citing Bankston, 63 N.J. at 268), it expressly rejected the use of such "seemingly neutral language" to explain why a defendant's photo was added to a photo array. Id. at 352 (rejecting dicta approving such language in Irving).

The Court thus announced a clear rule, explaining, "[w]hy the officer placed the defendant's photograph in the array is of no relevance to the identification process and is highly prejudicial." Ibid. The Court added, "[w]hat counts is whether the officer fairly arranged and displayed the photographic array and whether the witness made a reliable identification." Ibid. Going forward, the Court permitted police to use the phrase "based on information received" outside of the photo array context, "but only if necessary to rebut a suggestion that they acted arbitrarily[,] and only if the use of that phrase does not create an inference that the defendant has been implicated in a crime by some unknown person." Ibid.

The Court then turned to whether the admission of such testimony rose to the level of plain error requiring the reversal of Branch's convictions. In concluding that the constitutional error in that instance was not harmless, the Court noted that the "State's evidence was far from overwhelming" as "[n]o physical evidence linked defendant to the scene of the crime" and the descriptions of the perpetrator by the witnesses "differed markedly from defendant's appearance." Id. at 353. The Court acknowledged that this "was a close case" and that "the detective's damaging hearsay testimony . . . may have tipped the scales." Id. at 353–54. The Court therefore reversed Branch's convictions and remanded for a new trial. Ibid.

Recently, our Supreme Court was presented with a similar Confrontation Clause issue in Medina. Medina was convicted of offenses related to a non-fatal slashing that occurred outside of a bar. Medina, 242 N.J. at 401. The identity of the perpetrator was contested at trial. Ibid. The victim positively identified Medina from a photo array, and later also made an in-court identification. Id. at 403–05. The jury viewed surveillance video of the attack, as well as a video of a previous bar fight involving Medina in which he was clearly seen. Ibid.

The fact-sensitive issue in Medina was whether a detective at trial violated the defendant's Confrontation Clause rights by telling the jury that his photo was included in the photo array "based on . . . the evidence . . . collected . . . [.]" Id. at 410–11. The detective also testified that he had spoken to various witnesses at the bar, including the victim, another man named Rafferty, and "one female who didn't want to get involved." Id. at 405–07. The jury was told that the woman refused to give a formal statement. The jury was not told that the anonymous woman had identified Medina as the assailant and had showed the police one of the defendant's Instagram pictures and his username. Id. at 402.

As a preliminary matter, the Court addressed which standard of review applies—plain error or abuse of discretion. Because the defendant in that case had objected to the detective's use of the phrase "based on information received," the Court "employ[ed] the abuse of discretion standard as we do for all

evidentiary rulings." Id. at 411–12 (citing State v. Prall, 231 N.J. 567, 580 (2018)).[15] The Court added that

> [u]nder that deferential standard, we review a trial court's evidentiary ruling only for a "clear error in judgment." State v. Scott, 229 N.J. 469, 479 (2017) (quoting State v. Perry, 225 N.J. 222, 233 (2016)). We do not substitute our own judgment for the trial court's unless its "ruling 'was so wide of the mark that a manifest denial of justice resulted.'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).
>
> [242 N.J. at 412.]

In applying that standard to the record before it, the Court stressed that the detective "never repeated to the jury what the anonymous woman told officers[,]" and, in fact, "did not imply that the woman gave police any information at all." Id. at 416. The Court stated that, as it had emphasized in Bankston, "we [are]unconcerned 'with mere possible inferences' to be drawn." Id. at 417 (quoting Bankston, 63 N.J. at 271). On those facts, the Court concluded that "the references to the anonymous woman did not create an 'inescapable inference' that she implicated defendant in the attack to the police." Id. at 417 (quoting Bankston, 63 N.J. at 271).

[15] The Court noted that plain error review applies in the absence of an objection. Ibid. (citing State v. Santamaria, 236 N.J. 390, 404 (2019)).

The Court "reiterate[d] that the best practice is to avoid explaining that a defendant's picture was placed in a photo array because he or she was a suspect or 'based on information received'" or "based on the evidence collected" as "such language can potentially sweep in inadmissible hearsay by producing the 'inescapable inference' that the officer obtained incriminating information about the defendant beyond the scope of the record." Id. at 420–21 (quoting Branch, 182 N.J. at 352). However, the Court found that no such inference was generated in that case because the detective used the phrase "evidence collected" only "after (1) he explained that Rafferty and [the victim] gave formal statements, (2) the jury watched the surveillance footage . . . , and (3) he read [the victim's] description of the attacker." Id. at 420.

Furthermore, the detective testified "that he had personally watched the surveillance footage before assembling the photo array" and that the victim told him of the earlier fight before the victim identified defendant. Ibid. The Court stressed that,

> most importantly, [the detective] repeatedly told the jury that no one other than Rafferty and [the victim] came forward to give a statement. Viewed in that light, "the logical implication" of [the detective's] testimony was that "the evidence that [he] collected" referred to evidence other than hearsay: the surveillance footage and [the victim's] and Rafferty's formal statements and descriptions of the attacker.
>
> [Ibid. (quoting Bankston, 63 N.J. at 271).]

Of special importance to the case before us, the Court further explained,

> [The detective] did not imply that the woman gave police any information at all. He referenced the anonymous woman twice: once on direct examination and again on redirect examination. In the first instance, he agreed with the prosecutor that she "didn't want to get involved," and in the second, he agreed that she "didn't want to give a statement." [The detective] also explained that he obtained formal statements only from [the victim] and Rafferty because "there was nobody else that wanted to come forward . . . to give a statement, any witnesses or anything like that."
>
> . . . .
>
> [Further,] [t]he record substantiates the Attorney General's contention that the jury likely considered the anonymous woman to be a "dead-end witness." The State not only was careful not to repeat what she told police, but also went to great lengths to suggest that she was not forthcoming. Additionally, the references to the anonymous woman would have seemed less significant than the other relevant evidence in the record. Both [the victim] and Rafferty gave descriptions of the attacker that matched defendant's picture; the surveillance video captured the incident; and [the victim] unwaveringly identified defendant both at trial and in the array. In sum, we find that the references to the anonymous woman did not create an "inescapable inference" that she implicated defendant in the attack to the police.
>
> [Id. at 416–17.]

The Court determined that in those circumstances, the detective's testimony did not violate the Confrontation Clause.

C.

We next apply the foregoing legal principles to Officer Vitelli's testimony and specifically to his affirmative answer to the prosecutor's question, "[a]nd at some point did you consult with that [other] law enforcement agency and after which criminal complaints were signed against Mr. Watson?" The critical issue we must address is whether Officer Vitelli's answer, read in context, implied to the jury that someone in the other police department possessed superior knowledge, outside of the record, that incriminated defendant. See Branch, 182 N.J. at 351 (noting that formulation of the question is the "common thread that runs through" our State's Confrontation Clause precedents). Stated another way, the pivotal fact-sensitive question before us is whether Officer Vitelli's testimony conveyed an "inescapable inference" that someone in the other police agency provided information that implicated defendant in the North Brunswick bank robbery, in which event that unnamed source would have functioned essentially as a non-testifying declarant to incriminate defendant. See Medina, 242 N.J. at 417; Branch, 182 N.J. at 350. We conclude that although Officer Vitelli never specifically repeated what the source in the other Police Department told him, see Bankston, 63 N.J. at 271, his testimony did indeed imply that the other agency possessed incriminating evidence that was shared with Officer Vitelli but not revealed to the jury. Officer Vitelli's testimony

concerning his interaction with the other police department thus constitutes an infringement of defendant's right to confront the evidence marshalled against him.

The present situation is distinguishable from the key circumstances that led the Court in Medina to a contrary conclusion. In that case, the Court held that police testimony that Medina's photograph was included in a photo-array "based on . . . the evidence collected" did not violate his Sixth Amendment rights, not just because the detective "never repeated to the jury what the anonymous woman [the detective referred to] told officers[,]" but also because the officer's testimony "did not imply that the woman gave police any information at all." Medina, 242 N.J. at 416 (emphasis added). We believe the latter finding was critical to the Court's ultimate conclusion that the detective's references to the anonymous woman "did not create an 'inescapable inference' that she implicated defendant in the attack to the police[]" as to violate Medina's Sixth Amendment right to confront her. Id. at 417.

The same conclusion cannot be drawn in the present case. It is true that here, as in Medina, the identity of the Franklin Township police department was not disclosed to the jury and, importantly, that Officer Vitelli never repeated to the jury what the unnamed police department told him. Indeed, the judge took great pains throughout the trial to ensure the jury never learned that defendant

was suspected of committing three other bank robberies, including two that occurred in the other police agency's jurisdiction. However, we deem it significant that in Medina, the Court emphasized that the detective's testimony regarding the anonymous woman in that case revealed that she "didn't want to get involved" in a police investigation. Id. at 416. That fact in evidence undergirds the Court's conclusion that there was no implication to the jury that she had given police any information at all. Id. at 417.

Here, in sharp contrast, the word "consult" used by the prosecutor in his leading question[16] implies an exchange of information. The word consult means "to deliberate on," "to take counsel to bring about," "to ask advice of," "seek opinion of," "apply to for information or instruction." Consult, Webster's Third New International Dictionary (1981). It is implausible that the other police department expressed the sentiment of the anonymous woman in Medina who did not "want to get involved" in a police investigation. On the contrary, the clear implication from Officer Vitelli's brief testimony is that the other police agency was cooperative, especially considering that it had contacted Officer

[16] It is somewhat ironic that the prosecutor expressly asked for and received permission to use leading questions to "shepherd" the officer through this sensitive portion of his testimony to make certain that he did not inadvertently allude to "other crimes" evidence. As it turns out, the manner in which the prosecutor phrased the leading question, and especially his use of the word "consult" to describe the interagency interaction, precipitated the Confrontation Clause problem now before us.

Vitelli regarding defendant in response to the TRAKs bulletin. A jury could thus readily infer that there was an exchange of information during the interagency consultation and that the ensuing decision to charge defendant with the North Brunswick bank robbery was influenced by such information. In these circumstances, the unnamed police department in this case is not comparable to the anonymous woman in Medina who had identified the defendant as the assailant but refused to give a formal statement. Accordingly, the Court's critical finding that the detective in Medina did not imply that the anonymous woman had given "any information at all," Medina, 242 N.J. at 416, cannot be made in the present matter with respect to the unnamed police department that Officer Vitelli consulted with.

In reaching that conclusion, we are mindful of the Court's admonition that we ought not be concerned with "mere possible inferences," but rather focus on whether the challenged testimony creates an "inescapable inference." Id. at 417. However, we do not interpret the phrase "inescapable inference"—as used in Bankston and Medina—to mean that the Confrontation Clause is violated only if no other inference can be drawn from the hearsay testimony.

Our Supreme Court, and other courts, have at times used phrases that appear to be less absolute than "inescapable" to describe the likelihood that a jury would draw an impermissible inference, that is, one that would signal a

Confrontation Clause violation. Indeed, although the Court in Bankston concluded that the witness's testimony in that case created an inescapable inference that the informer had given police information that defendant would have drugs in his possession, the Court suggested a different formulation of the rule going forward, explaining, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." 63 N.J. at 271 (emphasis added); see also Branch, 182 N.J. at 348–49 (emphases added) (noting "[t]he jury was left to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime" and "when the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay"); Favre v. Henderson, 464 F.2d 359, 364 (5th Cir. 1972) (emphasis added) (noting that the right to confrontation was violated where "testimony was admitted which led to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged."); Hutchins v. Wainwright, 715 F.2d 512, 516 (11th Cir. 1983) (emphasis added) (noting that the right to confrontation was violated where, "[a]lthough the officers' testimony may not have quoted the exact words of the informant, the nature and substance of the

statements suggesting there was an eyewitness and what he knew was readily inferred"); People v. Vadell, 505 N.Y.S.2d 635 (App. Div. 1986) (emphasis added) (noting that the right to confrontation was violated where "[t]he clear implication of this question and answer . . . was that defendant had told his wife that he had participated in the homicide").

We add that in Medina, the Court reasoned that "'the logical implication' of [the detective's] testimony was that 'the evidence that [the detective] collected' referred to evidence other than hearsay." 242 N.J. at 420. That led the Court to conclude that the impermissible inference was not inescapable.

In this instance, we believe the most logical inference the jury might have drawn from Officer Vitelli's testimony about the interagency consultation was that the unnamed agency shared some unspecified incriminating information as part of the consultative process. As the Court stressed in Irving, it is the creation of an impermissible inference, not the specificity of the statements made that is the critical factor. 114 N.J. at 447. Indeed, in this instance, the trial court during the Rule 104 hearing commented on what inference might be drawn from the interagency communication, explaining, "[i]t just could have been that that was information that was helpful in solving this particular crime." See also infra note 17. But that is precisely the inference that is prohibited by the Sixth Amendment.

We stress that Officer Vitelli's affirmative answer to the prosecutor's question concerning the consultation immediately followed Officer Vitelli's explanation as to the purpose and utility of a TRAKs bulletin. He testified that police send a TRAKs message to other law enforcement agencies "because we're seeking information as well" and further explained, "that's a way to gather further information on the incident." That explanation, given just before testifying that the other police department contacted him, bolstered the inference that the unnamed police agency that he consulted with shared information concerning defendant and "the incident," referring to the North Brunswick bank robbery.

We further emphasize that the leading question the prosecutor posed to Officer Vitelli simultaneously elicited two distinct facts: (1) that Officer Vitelli consulted with the other law enforcement agency, and (2) that "criminal complaints were signed against Mr. Watson" after the consultation. The juxtaposition of these two facts in a single question-and-answer suggests a direct if not causal relationship between the interagency consultation and the ensuing decision to charge defendant with the North Brunswick bank robbery. That circumstance, in turn, supports the logical, dare we say inescapable, inference not only that actionable information was shared in the consultation but also that the shared information was incriminating.

For this reason, we believe the present case is more closely analogous to the situation in Branch. In that case, the Court determined that the defendant's Confrontation Clause rights were violated when the officer testified that he included the defendant's photograph in a photo array, that is, that he had developed Branch as a suspect, "based on information received from an unknown source." Branch, 182 N.J. at 342. Here, the unnamed police department—which we know to be the Franklin Township Police Department in Somerset County—is for all practical purposes comparable to the "nameless person" who provided unspecified information to the officer in Branch. And as in Branch, here, "the jury never learned the basis of that person's knowledge regarding defendant's guilt" and "never had the opportunity to confront the anonymous witness and test his [or her] credibility in the crucible of cross-examination." Id. at 348.

As we have already noted, the Court in Branch held, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." Id. at 349 (alteration in original) (citing Bankston, 63 N.J. at 271). That is exactly what happened here, and we are thus constrained to conclude that Officer Vitelli's testimony regarding the consultation was hearsay.

However, we also acknowledge that the Court in Branch further held that a police witness is permitted to use the phrase "based on information received" to explain why he or she identified the defendant as a suspect "if necessary to rebut a suggestion that [police] acted arbitrarily." Id. at 352. Presumably, it is no coincidence that the gravamen of the prosecutor's argument at the Rule 104 hearing was that the State needed to present testimony to the jury to explain how Hill came to the attention of the MCPO months after the January 2017 North Brunswick bank robbery to show that police had not acted "arbitrarily" in charging defendant in November 2017.[17]

The problem with that argument, however, is that it ignores the second part of the critical sentence in the Branch opinion. The Court explained that a police witness would be allowed to use the phrase "based on information received" outside of the photo array context, "but only if necessary to rebut a suggestion that they acted arbitrarily, and only if the use of that phrase does not create an inference that the defendant has been implicated in a crime by some unknown person." Id. at 352 (emphasis added). The highlighted text confirms that a defendant's Confrontation Clause rights take precedence over the State's interest in rebutting a suggestion that police had acted arbitrarily in focusing on

[17] We note that the prosecutor at the Rule 104 hearing did not cite to Branch or any other Confrontation Clause case, or even mention the Confrontation Clause.

and charging the defendant. In this instance, as we have noted, the explicit reference to a consultation between police agencies creates an inference that some unnamed officer in the other police department implicated defendant in the North Brunswick bank robbery.

In sum, we believe that Officer Vitelli's affirmative answer to the prosecutor's leading question created an "'inescapable inference' that an unavailable source . . . implicated . . . defendant." Medina, 242 N.J. at 415 (citing Bankston, 63 N.J. at 271). In reaching this conclusion, we recognize that the trial court at the Rule 104 hearing sought to balance competing interests: the need to address the prosecutor's concern that the jury might resort to some form of "nullification" unless there was an explanation for the delay in bringing charges, against the need to ensure that the jury did not learn about the other three bank robberies not charged in the present indictment. Because the trial court did not analyze the facts with our Confrontation Clause jurisprudence in mind, and even applying a deferential abuse-of-discretion standard of review, Medina, 242 N.J. at 412, we believe the court struck the wrong balance.

The prosecutor's argument that "over sanitization" of the explanation would lead the jury to believe the police had acted arbitrarily and thus lead to jury nullification is, in our view, at best speculative and at worst exaggerated. The trial court aptly characterized the prosecutor's concern as "the silent

argument of nullification." We believe the prosecutor's concern about the possibility of jury nullification pales in comparison, and thus must yield, to the more immediate need to scrupulously safeguard defendant's Confrontation Clause rights. Cf. Branch, 182 N.J. at 352.

In balancing the competing interests, moreover, the trial court was focused intently on the need to prevent the jury from learning specifically about the three other bank robberies. The "sanitized" explanation provided to the jury accomplished that important objective but nonetheless still implied that defendant was under investigation by the other department for an unspecified reason.

We reiterate that with respect to the balancing of the competing interests, our review must be deferential; we may not substitute our own judgment, made with the benefit of hindsight and thorough briefs, for that of the trial judge unless his ruling "was so wide of the mark that a manifest denial of justice resulted." Medina, 242 N.J. at 412. The problem, in a nutshell, is that trial court's analysis and ruling was based entirely on N.J.R.E. 404(b) considerations and not at all on the Confrontation Clause implications of the proposed testimony.[18] While

[18] This conclusion is underscored by the trial judge's comment regarding the inference that might be drawn from the testimony proposed by the prosecutor. The court stated,

these two sources of authority protect closely-related interests in this application,[19] the protections afforded to defendants by N.J.R.E. 404(b) are not coextensive with the rights guaranteed by the Sixth Amendment. In this

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> What [would] be the inference from that? The inference would be that maybe—there could be just as much inference that Somerset County had some information —that it—it doesn't necessarily mean that they contacted—that a jury would infer that just because they had contact with other law enforcement agencies, that there was other criminal activities. It just could have been that that was information that was helpful in solving this particular crime. (emphasis added).

We note an inference that the other police department had information "helpful in solving [the North Brunswick robbery]" would not necessarily run afoul of the court's N.J.R.E. 404(b) ruling—clearly, the trial court's dominant concern—but is precisely the inference that is prohibited under the Confrontation Clause because it implies that the other agency possessed incriminating evidence of the North Brunswick bank robbery that was not disclosed to the jury.

[19] We recognize that on the facts of this case, concerns undergirding the Confrontation Clause are closely related to concerns that are addressed by N.J.R.E. 404(b). The gravamen of the defense argument to the trial court was that any testimony concerning the role played by the Franklin Township Police Department would create an inference that defendant committed other crimes. As defense counsel stated emphatically at the in limine hearing, "[i]f there was any testimony to come out that through [the North Brunswick Police Department's] contact with another law enforcement agency, [they] were able to bring in Mr. Watson, the inference would be overwhelming. The jury would inevitably think oh, what did he do somewhere else?" That argument—explicitly referring to "inferences" and to uncharged offenses—is grounded in both the Confrontation Clause and N.J.R.E. 404(b). The trial court's error in this case arises from its failure to recognize the Sixth Amendment issue as distinct from the N.J.R.E. 404(b) issue.

instance, the trial court made no mention of the Confrontation Clause and did not apply or distinguish the cases that explain the nature and boundaries of the rights protected under the Sixth Amendment. The failure to account for the broader protections afforded under the Sixth Amendment, as distinct from N.J.R.E. 404(b), constitutes an abuse of discretion. Cf. State v. S.N., 231 N.J. 497, 500 (2018) (noting in the context of a pretrial detention hearing that "failing to consider all relevant factors" can constitute an abuse of discretion). We are thus constrained to conclude that the trial court erred in permitting Officer Vitelli to testify concerning his consultation with the Franklin Township Police Department. At bottom, we believe the prosecutor's leading question was improper and Officer Vitelli's affirmative answer violated defendant's Confrontation Clause rights.

D.

Our decision that Officer Vitelli's testimony infringed upon defendant's Sixth Amendment right of confrontation does not end our inquiry, for we must next decide whether the violation requires us to vacate defendant's robbery conviction and order a new trial. We first consider the standard of review to apply in deciding whether there was reversible error. That inquiry, in turn, requires us to determine whether defendant tendered an objection on Sixth

Amendment grounds before the trial court or, instead, raised the Confrontation Clause contention for the first time on appeal.

Although no one referred expressly to the Sixth Amendment Confrontation Clause at the Rule 104 hearing, defense counsel argued forcefully that the testimony proposed by the State would lead to an impermissible inference. Specifically, as we have already noted, counsel argued, "[i]f there was any testimony to come out that through [the North Brunswick Police Department's] contact with another law enforcement agency, [they] were able to bring in Mr. Watson, the inference would be overwhelming. The jury would inevitably think oh, what did he do somewhere else?" Counsel also stated, "I do feel very strongly that saying [the North Brunswick Police Department] were contacted or [it] contacted another law enforcement agenc[y] would be overwhelmingly prejudicial." Furthermore, counsel in the colloquy referred specifically to Bankston, a seminal New Jersey Confrontation Clause precedent.

What is less clear from the record is whether counsel objected to the trial court's "preliminary" ruling announced at the conclusion of this portion of the Rule 104 hearing.[20] We presume defendant continued to object to the court's

[20] We note that at one point during the in limine hearing the trial court mildly chastised counsel, for lack of a better characterization, when counsel objected to the court's initial ruling "just to preserve my record." The court responded, "[y]ou just spent ten minutes objecting to it. So why would you need to

decision to allow the State to introduce testimony regarding the contact between the two police agencies since that ruling did not address counsel's underlying concern that such testimony would lead the jury to draw a prejudicial inference.

We note, however, that so far as the record reflects, defendant did not file a supplemental brief as he suggested he would at the Rule 104 hearing. Nor did counsel file a motion for reconsideration as the State had suggested when it urged, at the pretrial hearing, for the judge to rule immediately and not reserve judgment on the issue until the time of trial. Furthermore, defendant did not repeat or amplify his objection to the consultation portion of Officer Vitelli's testimony at the time of trial.

Considering the totality of these circumstances, although counsel might have done more to articulate an objection based on Sixth Amendment grounds, as distinct from N.J.R.E. 404(b) principles, we do not believe that defendant impliedly waived his Confrontation Clause rights. See Hemphill, 142 S. Ct. at 694 (Alito, J., concurring) (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009)) (noting a defendant can impliedly waive his Sixth Amendment right by "'fail[ing] to object to the offending evidence' in accordance with the procedural standards fixed by state law."). Given defense

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thereafter say I want to preserve my objection? How could it ever have been deleted? . . . . I just think that's a bad practice."

counsel's articulation of the "inference" problem and especially in view of counsel's specific reference to Bankston, we believe defendant did enough to preserve the Confrontation Clause issue for appellate review. Accordingly, we decline to apply the plain error standard of review. See R. 2:10-2; Medina, 242 N.J. at 411–12; see also supra note 8. Rather, we apply the standard of review that applies to constitutional errors that were properly preserved.

In State v. Weaver, the Court explained that "[w]hen evidence is admitted that contravenes not only the hearsay rule but also a constitutional right, an appellate court must determine whether the error impacted the verdict." 219 N.J. 131, 154 (2014) (citing Chapman v. California, 386 U.S. 18, 24 (1965)). "The standard has been phrased as requiring a reviewing court 'to declare a belief that [the error] was harmless beyond a reasonable doubt.'" Ibid. (alteration in original) (quoting Chapman, 386 U.S. at 24). Stated differently, the test is "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Scherzer, 301 N.J. Super. 363, 454 (App. Div. 1997) (quoting Chapman, 386 U.S. at 24).

In applying this standard, we also are mindful of the long-settled principle that,

> [a]s to "constitutional" errors, some may go so plainly to the integrity of the proceedings that a new trial is mandated without more. When this is true, a new trial is the just course because of the nature of the right

> infringed and its evident impact upon the fairness of the trial, rather than because the right happens to be embedded in the Constitution and is thus secured from legislative abolition. Equally clear must be the proposition that not every "constitutional" error can sensibly call for a new trial . . . . [A]n error may indeed be harmless despite its constitutional hue.
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> [State v. Macon, 57 N.J. 325, 338 (1971).]

We begin our harmless constitutional error analysis by stressing that the inappropriate testimony in this case was brief, viewed not just in the context of the entire trial but also in the context of Officer Vitelli's proper testimony. Our attention is focused on a single error in an otherwise carefully limited line of inquiry. Furthermore, the reference to the consultation with the unnamed police department was designedly vague. Officer Vitelli did not specify what information the other law enforcement agency told him. Thus, while the challenged testimony technically crossed the line under Confrontation Clause analysis, it was by no means an obvious and blatant violation of defendant's right to confront the witnesses against him.

We disagree with defendant's argument that the impermissible inference was bolstered by Hill's testimony, which preceded Officer Vitelli's testimony. The sequence is relevant to our harmless error analysis because the effect of Officer Vitelli's answer to the prosecutor's leading question cannot be viewed in isolation from other evidence the jury had already heard. Specifically, Hill

noted that she saw an article and a photograph in the newspaper and called police. She provided no detail about the circumstances that prompted her to call police. She did not specify, for example, what the article was about. Nor did she indicate what police department she called after reading the article. She also testified to identifying defendant from a still photograph she was shown by police in October 2018, which was a screenshot from the bank surveillance video in this case. Nothing in her testimony would create an "inescapable inference" that another law enforcement agency had information that implicated defendant in the present robbery or any other crimes. Nor did it exacerbate the constitutional error that would follow when Officer Vitelli took the witness stand.

We also reject defendant's argument, raised for the first time on appeal, that the prosecutor's comments in summation compounded the prejudice flowing from Confrontation Clause violation. We are satisfied that the prosecutor's summation neither exploited nor reinforced the testimony that violated the Sixth Amendment. The prosecutor in summation stated,

> [Officer] Vitelli though created a TRAKs bulletin. He realizes that they're a benefit in law enforcement. He regularly reviews what it says to see if he can be of assistance in other law enforcement agencies. They created it and submitted it. And the submission of that ultimately led to Ms. Hill identifying, and when charges were—were—were assigned to Mr. Watson for this robbery.

As a general matter, if no objection is made to a prosecutor's remarks, those remarks will not be deemed prejudicial. See State v. Ramseur, 106 N.J. 123, 323 (1987); see also Irving, 114 N.J. at 444 (failure to make a timely objection indicates defense counsel did not believe the remarks were prejudicial within the atmosphere of the trial).

Furthermore, the prosecutor did not provide any specific details about the investigation by the other law enforcement agency. The prosecutor did not mention Officer Vitelli's statement that a TRAKs message "is a way to gather further information on the incident." Importantly, nor did the prosecutor mention that Officer Vitelli had "consulted" with another law enforcement agency. The prosecutor, in other words, did not repeat the phrasing of the leading question that led us to conclude there had been a Confrontation Clause violation. Nor did the prosecutor in any way bolster Officer Vitelli's testimony with additional information outside the record. We add that the trial court properly instructed the jury that comments from attorneys are not evidence. See State v. Berry, 471 N.J. Super. 76, 103 (App. Div. 2022) (citing State v. Timmendequas, 161 N.J. 515, 578 (1999)) (noting that the "[p]rosecutor's summation, of course, is not evidence . . . ."). We thus conclude that the prosecutor's reference to the TRAKs bulletin in summation did not highlight or otherwise exacerbate the Confrontation Clause violation.

Defendant points to two other comments the prosecutor made in summation that defendant now claims "compounded" the Confrontation Clause violation. First, defendant argues that the prosecutor impermissibly referred to the incident as a "polished" robbery. The prosecutor used the term "polished" twice and also used the term "flawlessly." Importantly, defendant never objected to these remarks, indicating counsel did not believe they were prejudicial at the time they were made. See Irving, 114 N.J. at 444.

In view of the leeway afforded to prosecutors during summation, we reject defendant's argument that the prosecutor's description of the robbery as "polished" and "flawless[]" was improper. See State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) ("'[P]rosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries' and are therefore 'afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented.'"); see also State v. Nelson, 173 N.J. 417, 472 (2002) (citations omitted) ("On review, a court must assess the prosecutor's comments in the context of the entire trial record. Even where a prosecutor's statements amount to misconduct, that misconduct will not be grounds for reversal 'unless it was so egregious as to work a deprivation of a defendant's right to a fair trial.'"). We believe the prosecutor was entitled to note that the bank robbery was executed in a manner that did not leave physical

evidence behind, such as fingerprints or the note that was shown to the teller. We are satisfied that the prosecutor did not suggest that the robbery was polished or flawless because defendant is an experienced bank robber. Had he done so, in direct violation of the trial court's N.J.R.E. 404(b) pretrial ruling, we have no doubt that defense counsel would have objected.

Defendant next argues that the prosecutor in summation impermissibly suggested that defendant was "familiar with banks" when he commented on the teller's testimony that the robber asked for both the bottom and top drawers behind the counter. This time, defendant objected to the prosecutor's remark, but the court overruled the objection, noting that evidence in the record supported that comment. We see no abuse of discretion by the trial court, especially considering the court's indefatigable commitment to prevent the jury from hearing "other crimes" evidence. We thus conclude that none of the prosecutor's comments in summation exploited or compounded Officer Vitelli's fleeting hearsay testimony.

Finally, we consider the constitutional violation in light of the overall strength of the State's lawfully-admitted proofs. This was by no means a "weak case." See Douglas, 204 N.J. Super. at 274. We nonetheless acknowledge that the State's evidence was not overwhelming. The State presented no physical or forensic evidence linking defendant to the robbery, such as fingerprints, geo-

location data extracted from defendant's cellphone, proceeds of the robbery, i.e., "bait money" found in defendant's possession, or the note the robber displayed to the bank teller. See Branch, 182 N.J. at 353 (noting there was no physical evidence linking the defendant to the crime scene). Furthermore, although the teller identified defendant in court as the robber,[21] he was unable to identify defendant in an out-of-court identification procedure, and in fact selected a filler photo of someone other than defendant.

However, the State presented surveillance video capturing the bank robber in flagrante delicto. Importantly, Hill provided a reliable identification of the man depicted in the security video.[22] Hill's unwavering identification of defendant from the screenshot of the culprit distinguishes this case from Branch,

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[21] We address the reliability of the teller's in-court identification in section IV of this opinion.

[22] During summation, defense counsel suggested that Hill had "an axe to grind" with defendant based on their breakup and called into question her motive for identifying defendant in and out-of-court. On appeal, defendant does not challenge the reliability of Hill's identifications. However, we note in the interest of completeness that during oral arguments on appeal, defense counsel briefly mentioned defendant's argument from summation in the context of harmless error. We reject this argument. At trial, it was for the jury to determine whether Hill's identifications were reliable. Indeed, the trial court instructed the jury that "[i]t is your function to determine whether the witness's identification of defendant is reliable and believable . . . ." Furthermore, because defendant has failed to brief this argument, we deem it waived. See Alloway Twp., 438 N.J. Super. at 504 n.2 (citing Fantis Foods, 332 N.J. Super. at 266–67) ("[A]n issue that is not briefed is deemed waived upon appeal.").

where the Court emphasized that the witnesses' descriptions of the perpetrator "differed markedly from [the] defendant's appearance." 182 N.J. at 353. Furthermore, unlike the situation in Branch, but as in Medina, the jurors could see for themselves the perpetrator shown in the surveillance video. Medina, 242 N.J. at 403–05. In this way, the State's case was "fortified by direct positive evidence." See Douglas, 204 N.J. Super. at 275.

In sum, we do not believe that Officer Vitelli's fleeting hearsay testimony—essentially a three-word answer to the prosecutor's problematic question—"tipped the scales" as in Branch, 182 N.J. at 354. Considering all relevant circumstances, we conclude that the State has proved beyond a reasonable doubt that the brief, isolated infringement of defendant's right of confrontation did not contribute to the guilty verdict and thus was harmless constitutional error. See Weaver, 219 N.J. at 154; Scherzer, 301 N.J. Super. at 454.

III.
VIDEO NARRATION TESTIMONY

We turn next to defendant's contention that the trial court abused its discretion by allowing Officer Vitelli to narrate surveillance video recordings and offer lay witness opinion. Defendant initially objected to Officer Vitelli's narration testimony. That general objection was overruled. Defendant

thereafter objected at various points to specific narration comments. The trial court overruled some objections and sustained others.

Defendant argues that Officer Vitelli's narration testimony violated N.J.R.E. 701.[23] We are aware of no categorical rule that prohibits such testimony and we reject defendant's invitation to adopt any such per se rule. Rather, the critical fact-sensitive issue to be decided on a case-by-case, indeed, question-by-question basis is whether a specific narration comment is helpful to the jury and does not impermissibly express an opinion on guilt or on an ultimate issue for the jury to decide. In this instance, the trial judge did not abuse his discretion in permitting some narrative comments and prohibiting others.

A.

We discern the following pertinent facts from the trial transcript. Officer Vitelli testified after Gambarrotti (the bank teller) and Hill (defendant's former girlfriend). He provided a continuous narration, for lack of a better description, to the surveillance videos as they were played to the jury. The State first presented the surveillance video taken inside the bank. Defendant objected at the outset when Officer Vitelli remarked, "[t]his would be our suspect entering

[23] N.J.R.E. 701 provides, "[i]f a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness' perception; and (b) will assist in understanding the witness' testimony or determining a fact in issue."

the bank right here. You'll see him come in the front door, as we indicated in the photographs . . . ." Defendant argued that the officer was not permitted to narrate the video in this fashion because the jurors were able to see for themselves what was going on. The trial judge overruled the objection.

Officer Vitelli next testified that

> it appears the suspect removes the glove from his right hand, places it in his left hand, and places his right hand into his jacket or sweatshirt pocket. This would be the teller view. This would be a view from directly behind Mr. Gambarrotti. One thing I did notice, if you could pause it for one second please, the suspect took his right hand and placed it down either in his pocket or by his waist, placed his left hand on the note that he passed to the teller.

The prosecutor posed a follow up question: "[w]hat do you observe about his fingers in relation to the note and to the counter?" Defendant objected, arguing that this was improper lay witness opinion testimony. The judge overruled the objection. Officer Vitelli then answered the question: "[i]n my opinion, from my observations, it looks like the suspect has two fingers on the note, holding the note as it's on the counter."

Officer Vitelli next commented, "[s]omething that I picked up on is that he—the suspect was very careful in which [he] proceeded in and out of the bank, not attempting to leave any type of evidence behind." The defendant objected. This time, the judge sustained the objection, ruling that the officer did not

explain the underlying facts that supported his lay opinion. Defendant objected again after the prosecutor asked Officer Vitelli what he saw the suspect do in the video, essentially prompting Officer Vitelli to offer the same answer. The judge sustained the renewed objection, explaining that Officer Vitelli was only to provide "factual observations" as opposed to "conclusions."

Officer Vitelli then continued to narrate the bank surveillance video, noting that the suspect had something in his hand. He also noted that when the suspect left the bank, he pushed the bank door open by using his elbow. Officer Vitelli commented that once the suspect entered the parking lot, he appeared to run toward Route 130 South.

The prosecutor next showed Officer Vitelli still photographs taken from the surveillance footage. Officer Vitelli testified as to what was depicted in the screenshots, including what the suspect was wearing. Defendant did not object to Officer Vitelli's testimony concerning the still photographs until the prosecutor asked Officer Vitelli if Gambarrotti's description of the suspect was consistent with the image shown in the video screenshot.

The judge excused the jury for its lunch break and convened a hearing to consider defendant's objection. Defendant argued that the prosecutor's question called for improper lay opinion testimony designed to bolster Gambarrotti's testimony. The prosecutor countered that the testimony was meant to show that

the investigation had focused on the right suspect. The trial court sustained the objection, noting:

> Well, certainly, the video depicts an African American male, so it supports—so I think there's no dispute as to that. But the [c]ourt does have some concern as to whether there's been a proper foundation as to whether the video can adequately depict whether he's six-two, six-three, and—so I think you need to lay a little bit of a stronger foundation as to whether the description given was—let me say this precisely—tall African American well-built male. So[,] I don't know if that video distorts or not, or what.
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> So[,] if there's a way to—for the officer to testify that the—as to how that video can depict a tall, well-built African American male, that, in my ruling, would be admissible. Okay?

When the jury returned and testimony continued, the State elicited from Officer Vitelli that Gambarrotti provided a description of the robber when he gave his statement in January 2017. The prosecutor then asked Officer Vitelli if, after obtaining the bank surveillance video, he had been able to make any observations about the suspect's physical characteristics. Officer Vitelli testified, "I observed it [sic] to be a dark-skinned male. I noticed that he was a larger individual. Noticed that he was larger than myself. I couldn't give you an approximate weight, but I did notice that he was a well-built individual." In response to the prosecutor's follow up question, Officer Vitelli explained, "I'm

approximately five-ten, and I would estimate that [the suspect] was larger than myself."

The State next played for the jury the security video obtained from the convenience store. Officer Vitelli narrated that video as well, testifying that it showed someone walking down Wood Avenue toward the bank and then the same person retracing his steps about two minutes later. Defendant did not specifically object to the narration of the convenience store surveillance video.

B.

We next consider the applicable legal principles. The briefs submitted by the parties and our own research shows that there is comparatively little case law that discusses the parameters of video narration testimony, that is, testimony from a live witness describing, in real time, the content of a video as it is being shown to the jury.

Courts in other jurisdictions that have addressed this practice have generally held that this type of testimony is permissible, with limitations. See, e.g., United States v. Torralba-Mendia, 784 F.3d 652, 659 (9th Cir. 2015) ("[A]n officer who has extensively reviewed a video may offer a narration, pointing out particulars that a casual observer might not see."); United States v. Young, 745 F.2d 733, 761 (2d Cir. 1984) (citations omitted) ("Generally speaking, a trial judge has broad discretion in deciding whether or not to allow narrative

testimony. We see no reason to apply a different rule here, where the narrative testimony accompanied and explained videotaped evidence."); Ellis v. State, 312 Ga. 243, 248–50 (2021) (finding that the trial court did not err in determining that counsel was not ineffective for failing to object to a detective's narration of a surveillance video); State v. Holley, 327 Conn. 576, 614–15 (2018) ("[T]here is significant authority under rule 701 of the Federal Rules of Evidence to support the proposition that a lay witness narrating a video to a jury may state his or her impressions of what is depicted in the video, even if he or she did not observe those events firsthand."); Gales v. State, 153 So.3d. 632, 645 (Miss. 2014) (quoting Pulliam v. State, 873 So.2d 124, 127 (Miss. Ct. App. 2004)) ("It is permissible for a witness to narrate video evidence when the narration simply describes what is occurring in the video, but it is impermissible if the witness 'attempts to place his own subjective interpretation of events transpiring in the video based on nothing beyond the witness's own inspection of the contents of the videotape.'").

The New Jersey cases that discuss narration testimony focus on the propriety of specific narrative comments (e.g., the witness' identification of the defendant) rather than the general format of the testimony. We therefore deem it appropriate to distill general principles relating to lay witness opinion testimony under New Jersey law and then adapt those foundational principles to

the specific context of a "play-by-play" narration of a video recording.[24] We begin by surveying four important New Jersey Supreme Court precedents that define the boundaries of lay witness opinion testimony, explaining what is permitted, what is prohibited, and why.

In State v. McLean, the Court considered "whether a police officer, who observed [a] defendant . . . engage[d] in behavior that the officer believed was a narcotics transaction, should have been permitted to testify about that belief pursuant to the lay opinion rule." 205 N.J. 438, 443 (2011). The officer in that case was conducting an undercover surveillance operation from his vehicle when he witnessed two narcotics transactions. Ibid. At trial, the officer testified as to what he saw during the live surveillance, identified the defendant by name, and stated that he saw "hand-to-hand drug transactions." Id. at 445.

The Court outlined the contours of permissible fact testimony by police officers, as distinct from lay or expert opinion testimony, recognizing that "an officer is permitted to set forth what he or she perceived through one or more of the senses." Id. at 460. The Court stressed that permissible fact testimony

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[24] Although this case involves private commercial surveillance video recordings, sometimes also referred to as security video recordings, we believe the same principles would apply to the narration of all forms of video evidence that might be shown to a jury, including government-operated surveillance camera recordings, police body-worn camera and "dash-cam" recordings, residential "doorbell" camera recordings, videos recorded by public or private "drone" aircraft or "eye in the sky" cameras, and videos recorded by cellphones.

"includes no opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." Ibid.

The Court recognized that issues involving lay opinions "have less frequently been the focus of published decision." Id. at 456. The Court then explained the scope of permissible testimony: "[l]ay opinion testimony . . . when offered either in civil litigation or in criminal prosecutions, can only be admitted if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function." Ibid.

Importantly for purposes of the matter before us, the Court added that opinion testimony is "not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence." Id. at 462. Ultimately, the Court concluded that the officer's fact testimony and lay opinion testimony in that case were inadmissible. Id. at 463. The Court noted that "[t]o the extent [the testimony] might have been offered as a lay opinion," it was impermissible both because the officer "express[ed] . . . a belief in defendant's guilt and . . . presumed to give an opinion on matters that were not beyond the understanding of the jury." Ibid.

The following year, in State v. Lazo, the Court considered "whether it was proper for a police officer to testify at trial about how and why he assembled a photo array." 209 N.J. 9, 12 (2012). The Court concluded that the officer provided improper lay opinion testimony "that defendant's arrest photo closely resembled the composite sketch," noting that the testimony was not based on the officer's prior knowledge of the suspect's appearance. Id. at 24. The Court added:

> The detective had not witnessed the crime and did not know defendant; the officer's opinion stemmed entirely from the victim's description. Nor was there a change in appearance that the officer could help clarify for the jurors; they could have compared the photo and the sketch on their own. Finally, the sole eyewitness told the jury what he observed firsthand. As a result, . . . the officer's opinion could not pass muster under Rule 701.
>
> Because the detective's testimony had no independent relevance, it merely served to bolster the victim's account. Despite a lack of personal knowledge, the detective conveyed his approval of the victim's identification by relaying that he, a law enforcement officer, thought defendant looked like the culprit as well.
>
> [Ibid.]

More recently, and of particular relevance to this appeal, in State v. Singh, the Court addressed lay opinion testimony issues relating to video surveillance recordings. 245 N.J. 1 (2021). The defendant in that case challenged testimony from a detective who twice referred to the person shown in surveillance video

as "the defendant." Id. at 18. The detective further commented that the sneakers worn by the suspect in the surveillance video looked similar to those retrieved from defendant the night he was arrested. Id. at 19. The defendant argued:

> The improper admission of [the] Detective['s] . . . opinion testimony as to the content of the surveillance video and the identity of the robber amounted to plain error. Specifically, defendant contend[ed] that [the] Detective['s] . . . testimony was improper lay opinion testimony because the detective was not an eyewitness to the robbery and thus lacked personal knowledge of what the surveillance footage showed; defendant add[ed] that [the Detective's] testimony was not helpful to the jury because the jury was in the same position to evaluate the footage.
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> According to defendant, [the] Detective['s] . . . narration was improper because he identified the suspect on the video as defendant and because his testimony regarding the sneakers was not helpful for the jury because the sneakers were in evidence and the jury could compare the shoes in evidence to those on the video. Defendant further contend[ed] that permitting the disputed testimony allowed [the] Detective . . . to opine on defendant's guilt by implying the suspect in the video was defendant.
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> [Id. at 11.]

The majority determined that it was error for the detective to refer to the suspect in the video as "the defendant," but ultimately concluded that those

references were harmless.[25] Id. at 17. The majority also concluded there was no error in allowing the detective to testify that the sneakers he saw in the video were similar to those the defendant was wearing on the night of the arrest. Id. at 17–18. The majority held this was permissible lay opinion. Id. at 19–20. The majority reasoned that while "the jury may have been able [on its own] to evaluate whether the sneakers were similar to those in the video[,] [such fact] does not mean that [the] Detective['s] . . . testimony was unhelpful. Nor does it mean that [the] Detective['s] . . . testimony usurped the jury's role in comparing the sneakers." Id. at 20. The majority added, "the jury was free to discredit [the] Detective['s] . . . testimony and find that the sneakers in evidence were dissimilar to those on the surveillance video." Ibid. (citing State v. LaBrutto, 114 N.J. 187, 199 (1989)). The majority distinguished McLean because the detective in Singh made no "ultimate determination" about the defendant's guilt. Ibid.

We add that the recitation of facts in the majority opinion clearly shows that the detective "narrated the gas station's surveillance footage, which he

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[25] The Court nonetheless stressed that in similar situations where an officer is narrating a surveillance video, references "to 'defendant,' which can be interpreted to imply a defendant's guilt—even when, as here, they are used fleetingly and appear to have resulted from a slip of the tongue—should be avoided in favor of neutral, purely descriptive terminology such as 'the suspect' or 'a person.'" Singh, 245 N.J. at 18.

reviewed before testifying." Id. at 7.[26] The majority opinion noted that "[d]efense counsel did not object to that testimony [at trial]." Ibid.

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[26] The majority reproduced the exchange between the prosecutor and detective that constitutes the relevant portion of the narration testimony:

> [Prosecutor:] Let's start with Camera 7, Detective. Can you utilize the laser pointer, and describe for the jury what's depicted there?
>
> [Detective:] This is where the suspect is approaching the gas station, the inside store.
>
> . . . .
>
> [Detective:] Right over here he's about [to] enter the doors into the store area of the gas station.
>
> . . . .
>
> [Detective:] That's him walking towards the front register, right here.
>
> . . . .
>
> [Detective:] That's when the defendant is there pointing the knife at the gas station attendant.
>
> [Prosecutor:] And then it's picked up on the—the rest of the incident is on—what camera is that?
>
> [Detective:] That's going to be Camera 8. Right here he's demanding for the money, and pointing the knife at the—at the victim.
>
> [Ibid.]

In its analysis, the majority opinion focused on the detective's identification of the defendant and his remarks concerning his sneakers, rather than the general format in which the detective narrated the surveillance video. In contrast to the dissenting opinion, which we will discuss momentarily, the majority did not explicitly address whether a police witness may describe what is happening in a video. However, nothing in the majority opinion suggests that the portion of the transcript it reproduced verbatim, see supra note 26, was improper testimony, even though the defendant argued on appeal that the detective's testimony was improper because he was not an eyewitness to the robbery and thus lacked personal knowledge of what the surveillance video showed. Id. at 11. We thus conclude that the majority did not intend to categorically prohibit an officer from offering descriptive narration comments concerning the content of a video. We add, the majority admonished that

> in similar narrative situations, a reference to "defendant," which can be interpreted to imply a defendant's guilt—even when, as here, they are used fleetingly and appear to have resulted from a slip of the tongue—should be avoided in favor of neutral, purely descriptive terminology such as "the suspect" or "a person."
>
> [Id. at 18. (emphasis added).]

The underscored dicta suggests that the majority expected similar "narrative situations" to arise in future cases. Nor did the majority suggest that

improper lay opinions as to guilt could only be avoided by precluding narration testimony altogether. On the contrary, the implication is that the "slip of the tongue" error that occurred in Singh could be avoided by limiting narration testimony to "neutral, purely descriptive terminology." Ibid. (emphasis added).

The dissenting justices, in sharp contrast, criticized the narration format itself and not just the detective's slip-of-the-tongue reference to "the defendant" and his lay opinion regarding the appearance of the sneakers. The dissent emphasized, "the prosecution relied on the impermissible testimony of a police officer, who was allowed first to narrate the events of the robbery—which he had not witnessed—as captured on a video and then to offer lay opinion testimony that items of apparel taken from defendant matched those of the perpetrator in the video." 245 N.J. at 21 (LaVecchia, J., dissenting). The dissenting opinion reasoned that because the detective was not at the gas station when it was robbed, he "therefore did not have the opportunity to directly perceive the taped robbery, and his testimony should have been excluded under N.J.R.E. 701(a)." Id. at 29. Justice LaVecchia added,

> As a person who later viewed the tape, he is in no special position to offer his opinion as to what the video showed. If he could so testify, then what principled reason would prevent the State from calling any other officer—or two, or three—to tell the jury what they perceived the video to show? [The detective] had no direct personal knowledge beyond that of anyone else who could look at the video at any point in time. But,

> his special position as a police officer—and particularly as the officer who successfully subdued defendant when he was arrested—carries the potential for real influence over the jury without any special personal knowledge to back it up.
>
> [Ibid. (emphasis in original).]

Not long after Singh was decided, the Court was again faced with an issue involving surveillance video footage in State v. Sanchez, 247 N.J. 450 (2021). That case focused on whether a police witness may offer a lay opinion identifying the defendant as the suspect in a surveillance video or still frame image. Id. at 458. Specifically, the Court considered whether it was improper lay opinion for a "parole officer, who had met with [the] defendant more than thirty times as she supervised him on parole, [to tell] a detective investigating a homicide and robbery that [the] defendant was the individual depicted in a photograph derived from surveillance video taken shortly after the crimes." Ibid.

The majority summarized N.J.R.E. 701 and the two prongs that must be established to admit lay opinion testimony. The first prong "requires that lay opinion testimony be based on the witness's 'perception,' a term defined in predecessor rules, Evid. R. 56(1) and 1(14), as 'the acquisition of knowledge through one's own senses.'" Id. at 466 (citing McLean, 205 N.J. at 456–57). To satisfy the first prong, "the 'witness must have actual knowledge, acquired

through his or her senses, of the matter to which he or she testifies.'" Id. at 466–67 (quoting LaBrutto, 114 N.J. at 197). Importantly for purposes of the matter before us, the majority held that

> N.J.R.E. 701's first prong thus requires only that a lay witness testify based on knowledge personally acquired through the witness's own senses, rather than on the hearsay statements of others. The witness need not have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony.
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> [Id. at 469 (emphasis added) (citations omitted).]

Under the second prong of N.J.R.E. 701, "lay opinion testimony [needs to] . . . assist the jury 'in understanding the witness' testimony or determining a fact in issue." Id. at 469 (quoting N.J.R.E. 701). The "testimony must 'assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.'" Ibid. (quoting Singh, 245 N.J. at 15).

The Court in Sanchez compiled a non-exhaustive list of four factors to consider that may be relevant to the question of whether lay opinion testimony will assist the jury in a given case.[27] Id. at 473. The Court stressed that no single

[27] We note that these factors relate principally to whether identification lay opinion testimony by an officer would assist the jury. Only the fourth enumerated factor—the quality of the photograph or video—might pertain more broadly to whether the jury would be aided by having an officer describe what

factor will be dispositive in a given case. Id. at 474–75 (citing Lazo, 209 N.J. at 20–24).

Under the first factor, "the nature, duration, and timing of the witness's contacts with the defendant are important considerations." Id. at 470. "[W]hen the witness has had little or no contact with the defendant, it is unlikely that his or her lay opinion testimony will prove helpful." Id. at 471. Furthermore, "[e]ven a witness who has some familiarity with the defendant may be barred from providing lay opinion if he or she lacks information about the defendant's appearance at the time of the alleged offense." Id. at 472.

Factor two considers, "if there has been a change in the defendant's appearance since the offense at issue, law enforcement lay opinion identifying the defendant may be deemed helpful to the jury." Ibid. Factor three considers, "whether there are additional witnesses available to identify the defendant at trial." Ibid. (quoting Lazo, 209 N.J. at 23). Finally, factor four accounts for "the quality of the photograph or video recording at issue . . . ." Id. at 473.

The Court ultimately determined that the parole officer's testimony that the defendant was depicted in the photograph was based on her perception from having met with him more than thirty times. Id. at 469. Applying the four

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is transpiring on the video or point out some aspect of the image on the viewscreen.

factors, the Court concluded that her testimony would be helpful to the jury. Id. at 475.

Finally, in terms of summarizing the general legal principles that inform our analysis in this case, we reiterate and stress a long-settled rule that was recently reaffirmed by the Court in Singh:

> "[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Nantambu, 221 N.J. 390, 402 (2015) (alteration in original) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). Accordingly, such rulings "are subject to limited appellate scrutiny," State v. Buda, 195 N.J. 278, 294 (2008), as trial judges are vested "with broad discretion in making evidence rulings," Harris, 209 N.J. at 439 (quoting State v. Muhammad, 359 N.J. Super. 361 (App. Div. 2003)).
>
> [245 N.J. at 12–13.]

We add that pursuant to N.J.R.E. 611, a trial court is given broad authority to "exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence to . . . make those procedures effective for determining the truth." See also Cestero v. Ferrara, 110 N.J. Super. 264, 273 (App. Div. 1970), aff'd, 57 N.J. 497 (1971) ("The control of examination, both direct and cross, resides in [the trial judge], to the end that the proofs may be kept within

reasonable bounds . . . . [D]iscretion in this respect is . . . broad, and we will not interfere . . . absent a clear abuse of discretion.").

C.

Our task now is to distill from the foregoing precedents a workable rule governing police narration testimony. Our goal is to provide guidance to trial courts on how to exercise discretion in deciding whether to permit or disallow video narration comments. One of the major themes that runs through McLean, Lazo, Singh, and Sanchez, as well as other cases that apply the lay opinion rule set forth in N.J.R.E. 701, is that a trial judge must be vigilant in safeguarding the province of the jury from unwarranted intrusion. Thus, for example, these cases make clear that it is impermissible for a police witness to testify at trial as to a defendant's guilt or an ultimate issue to be decided by the jury. Relatedly, the law also is clear that there are significant restrictions on when a police witness may offer a lay opinion on whether the defendant is the person shown in a video recording or screenshot in cases where the identity of the culprit is at issue.[28]

The harder question—which was alluded to but not definitively resolved in the majority opinion in Singh—is whether a police officer may describe the

[28] We stress that, in this case, Officer Vitelli was not permitted to identify defendant as the person shown in the video entering and leaving the bank.

content of a video as it is being played to the jury, and if so, what foundational prerequisites limit such "play-by-play" narration testimony.

Defendant cites our Supreme Court's precedents for the broad proposition that "while the officer could have identified respective locations depicted in the video[29] and stills [i.e., screenshots], he could not provide a play-by-play of the entire incident by narrating the video surveillance from start to finish." Defendant further argues that "[a]n officer's play-by-play narration of a surveillance video is an inadmissible lay opinion when the officer does not have personal knowledge of what the video portrays, and thus, his [or her] opinion is therefore not helpful." The latter argument in practical effect blurs the two prongs of the lay opinion test by suggesting that in this instance, Officer Vitelli's narration comments were not helpful to the jury—the second prong—because he did not have personal knowledge of what the surveillance video portrayed—the first prong.

In our own analysis, we will attempt to keep the analytical strands of the two-pronged test separate. We acknowledge, however, that the degree to which the narration testimony in this case is helpful to the jury is tied closely to the fact that Officer Vitelli, during his narration, presented no information from

[29] Defendant's acknowledgement that an officer may identify the location of recorded events is consistent with the notion that such information could not easily be gleaned from watching the video itself.

knowledge independent of his earlier viewing of the surveillance video. Accordingly, the jury was, in theory, able to derive the same information that Officer Vitelli testified to from its own viewing of the video. In that sense, the two prongs of the lay opinion test are related if not intertwined when that test is applied to video narration testimony.

Although we are mindful of the concerns expressed by the dissenting Justices in Singh, we can find no dispositive authority in New Jersey or elsewhere to support defendant's sweeping contention that "play-by-play" narration is categorically inappropriate. As we have noted, courts in other jurisdictions that have considered the issue have allowed such testimony. See, e.g., Gales, 153 So.3d. at 645. We decline to adopt the rule suggested by defendant that would preclude a police witness from pointing out an event or circumstance depicted in the video or from otherwise offering a description of or comment on any such event or circumstance. Rather, we believe the decision to allow a witness to describe and highlight something on the screen that the jury could see for itself must be made on a case-by-case if not comment-by-comment basis.

In making those decisions, of course, a trial court must be vigilant in safeguarding the province of the jury. That objective, in our view, is the keystone of our Supreme Court's decisions in McLean, Lazo, Singh, and

Sanchez. But that objective can be achieved without imposing a categorical prohibition against real-time commentary on what is displayed in a surveillance video.

Defendant's metaphorical characterization of Officer Vitelli's testimony as a "play-by-play" narration is apt and insightful. It leads us to draw a rough analogy to televised sportscasting and the distinction between the roles performed by a "play-by-play announcer" and a "color commentator." The former type of sportscaster more or less objectively describes the events occurring on the field of play as they unfold. The color commentator offers more subjective analysis and opinion on the same play. Stated differently, the play-by-play announcer describes for the audience what is happening. The color commentator offers a more penetrating, beneath-the-surface explanation. Thus, for example, the play-by-play announcer might say, "the back ran off tackle and gained ten yards before being brought down by the strong safety." Such an announcement might not be subject to reasonable dispute. The color commentator might add—perhaps while using graphics generated by a telestrator—that "the right tackle threw a great block, opening a sizeable hole for the back to run through into the secondary."

We acknowledge that reasonable minds can differ on whether and to what extent the comments of either the play-by-play announcer or the color

commentator in this example are "helpful" to the television audience. Television viewers, after all, can watch the play on their own and decide for themselves what happened on the field. We suspect, however, that most viewers do not mute the soundtrack because they believe the sportscasters' comments are helpful to their appreciation of the game. We presume, moreover, that a television viewer's understanding of the play may be quite different if he or she had muted the soundtrack while watching the game. One of the key points of this analogy is that narration comments can make a difference.

Furthermore, the sportscasting analogy reveals that the fine line between real-time narration (a purely neutral and objective description) and "color" commentary (a subjective analysis, commonly referred to as an opinion) can and often will blur. Opinions, after all, are based on facts, including background facts that are not depicted on a television screen. In the law, as in sportscasting, the demarcation between objective fact and subjective opinion is not always obvious, and rarely beyond dispute. There's the rub.

Putting aside the sportscasting metaphor, other analogies can be drawn to familiar trial practices that have long been accepted in courthouses across this State. Long before courtrooms were equipped with large-screen video monitors/projectors, documentary trial exhibits such as photographs, maps, and diagrams often were enlarged and displayed to the jury on old-fashioned easels.

Cf. Macaluso v. Pleskin, 329 N.J. Super. 346, 350 (App. Div. 2000) (noting "a visual aid is a model, diagram or chart used by a witness to illustrate his or her testimony and facilitate jury understanding"). Both fact and expert witnesses in the course of their trial testimony might be called upon to highlight for the jury selected portions of these illustrative blow-ups. This might be done verbally, or else by using a felt-tipped marker or pointer stick or laser—the rough equivalents of the telestrator in our sportscasting analogy.

So far as we are aware, there has never been a categorical rule that prohibits a witness from being asked to highlight a portion of a demonstrative exhibit by drawing, sometimes literally, the jury's immediate attention to a specific bit of information conveyed in an exhibit that presents multiple bits of information.[30] So too, a witness might be asked to read aloud a specific portion

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[30] Nor are we aware of any rule that would categorically prevent a prosecutor, subject to the trial judge's approval and proper authentication, from presenting an augmented version of the video or screenshot. That modified version might, for example, zoom in on a specific portion of the recorded image. Indeed, a "screenshot," by its very nature, is essentially an excerpt from a video recording, focusing attention to that frame of film and thereby distinguishing it from the images recorded before and after that frame. In terms of the foundational goal of respecting the province of the jury, we see no fundamental distinction between augmentation accomplished by creating and introducing a new enhanced video exhibit and augmentation accomplished instead by allowing a witness to verbally "zoom in" on a specific image depicted within the frame of film on display.

We add that it is now common practice for prosecutors, and defense counsel as well, to replay selected portions of video evidence in summation, at

of a document that has been introduced into evidence and published to the jury. Such testimony would serve to highlight the recited excerpt, drawing the jury's attention to it and distinguishing the excerpt from the surrounding text. We believe that familiar recitation practice is comparable in important respects to a narrative comment on something depicted in a surveillance video exhibit.

We note that such "pointing" testimony may be purely objective, and, depending on the question that is posed, need not necessarily convey the witness's personal opinion as to the meaning or significance of the highlighted portion of the exhibit on display. That leads us to draw a fundamental distinction between narration testimony that objectively describes an action or image on the screen (e.g., the robber used his elbow to open the door) and narration testimony that comments on the factual or legal significance of that action or image (e.g., the robber was careful not to leave fingerprints).

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which time the advocates will offer commentary on both the factual and legal significance of the video evidence. We suppose a prosecutor might also alert the jury in his or her opening statement to be watchful for some specific portion of a surveillance video the State intends to introduce into evidence.

We recognize that juries are told that the remarks and arguments of counsel are not evidence, see Berry, 471 N.J. Super. at 103 (citing Timmendequas, 161 N.J. at 578), and that juries are instructed to disregard an advocate's recollection of the evidence if it conflicts with the juror's own recollection. Even so, it would seem odd to permit a prosecutor in closing arguments to highlight and isolate a particular portion of a video recording but prevent a witness from doing so with the permission of the trial judge and subject to cross-examination and rebuttal testimony.

In this case, the trial court drew an apt distinction between stating an observed "fact" and stating a "conclusion." We believe that distinction lies at the heart of the ruling in McLean, where the officer did not merely testify that defendant was observed exchanging an object with another person, but rather testified that defendant had conducted a hand-to-hand drug transaction. 205 N.J. at 445. Such testimony was an impermissible lay "opinion" in part because it included analysis in the form of an inference of criminality drawn by the officer from the objective conduct that he observed in light of his training and experience. Id. at 460 (explaining that permissible fact testimony "includes no opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge."); cf. Gales, 153 So.3d. at 645 (Miss. 2014) ("It is permissible for a witness to narrate video evidence when the narration simply describes what is occurring in the video, but it is impermissible if the witness 'attempts to place his own subjective interpretation of events transpiring in the video based on nothing beyond the witness's own inspection of the contents of the videotape.'").

The distinction drawn in McLean between fact testimony and opinion testimony suggests that "neutral, purely descriptive" video narration testimony, as described in Singh, 245 N.J. at 18, might fall outside the rubric of lay opinion

testimony and thus would not be subject to N.J.R.E. 701 analysis, McLean, 205 N.J. at 454. We nonetheless proceed to apply both prongs of that analytical framework to the video narration that occurred in this case.

D.

We next consider how the distinction between objective description and analytical commentary might actually play out in the context of the two-pronged test for lay opinion testimony under N.J.R.E. 701. As to the first prong—the witness' personal knowledge acquired through his or her own senses—we follow the holding in the majority opinion in Sanchez that "[t]he witness need not have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony." 247 N.J. at 469. In Singh, moreover, the majority noted that "[N.J.R.E. 701] does not require the lay witness to offer something that the jury does not possess." 245 N.J. at 19. We thus conclude it is sufficient, for purposes of satisfying the "personal knowledge" prong, that the police witness reviewed the surveillance video before trial. Accordingly, we assume that, in a majority of cases, this prong will likely be satisfied.

We add at this point that it might not be completely accurate to suggest that a police witness is in no better position than the jury to understand what the video shows. See Singh, 245 N.J. at 11. The opportunity a police witness has

to closely scrutinize the video before trial may be very different from the opportunity that is afforded to jurors in the courtroom. Presumably, an officer tasked to narrate a video has watched it numerous times, taking advantage in earlier viewings of the slow motion, pause, and zoom-in features of modern video players. The officer thus may have perceived an event or circumstance depicted in the video that would be hard to discern while watching it for the first time in the courtroom at full speed. See Torralba-Mendia, 784 F.3d at 659 (9th Cir. 2015) (noting that officers who have "extensively reviewed a video" may be able to "point[] out particulars that a casual observer might not see.").[31]

That leads us to address the second prong of the two-part test, which is whether the narration testimony would be helpful to the jury by shedding light on the determination of a disputed factual issue. See Singh, 245 N.J. at 15 (citing McLean, 205 N.J. at 458). We believe this is the most critical question, as it ultimately defines the scope of permissible video narration testimony. If the

[31] We do not mean to suggest that the credibility of an officer's narration testimony should be bolstered by eliciting on direct examination the number of times he or she has previously viewed the video. On the contrary, such self-serving testimony would be inappropriate, in our view, especially in any case where the officer's narration description is disputed. It would be improper for the State to suggest that the police lay witness had become, for lack of a better description, an expert on the content of the video. In the event of a dispute concerning what was shown in the video, ultimately, the video must speak for itself, and the jury should be so informed. See subsection E (recommending that a model jury instruction be developed concerning video narration testimony).

jury needs no assistance to fully understand the content of the video, then narration commentary would tread upon the role of the jury under N.J.R.E. 701 analysis.

As the proponent of such testimonial evidence, the State bears the burden of establishing how and why a specific narration comment would assist the jury in performing its function. The State need not establish, however, that the jury would not have been able to glean the highlighted event/circumstance on its own. As the majority noted in Singh, the fact that "the jury may have been able to evaluate whether the sneakers were similar to those in the video does not mean that [the] Detective['s] . . . testimony was unhelpful." 245 N.J. at 20. Accordingly, in deciding whether the proffered narration testimony would be helpful, the issue is not whether the jury could have discerned the narrated observation unaided, but whether the narration testimony would assist the jury, for example, by focusing its attention on that portion of the video so it can make its own evaluation.

We note, moreover, that the helpfulness test must be applied to each proposed narrative comment, not just to the initial question of whether any narration testimony should be allowed.[32] Some narration comments may be

[32] In part because this analytical paradigm presupposes a series of trial court decisions, in subsection E, we recommend a new rule of procedure whereby the

helpful. Some may not. And some may be affirmatively improper, for example, by suggesting an opinion on the defendant's guilt or on another ultimate question to be decided by the jury, such as the defendant's state of mind.

As we explain more fully in subsection E, we do not mean to suggest that a court must essentially conduct a dress rehearsal of the video narration testimony to address every comment the narration witness might make. But nor do we endorse the notion that a police witness should be given unfettered discretion to provide running commentary on a video from "start to finish," to use defendant's characterization.[33] While it rests ultimately in the trial court's discretion to decide whether any such "play-by-play" account of the video would assist the jury,[34] we believe it is still incumbent upon the trial court to determine,

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prosecutor would be required to file a motion to introduce narration testimony. That motion would be heard at a Rule 104 hearing.

[33] As we discuss in subsection E, such "running commentary" deviates from the preferred standard practice of having witnesses respond to questions posed by counsel. See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence cmt. 1 on N.J.R.E. 611 (2020-2021) ("A trial court may properly seek to narrow questions which might evoke long narrative responses from the witness"). The running commentary approach—essentially leaving to the witness' discretion what content of the video to comment on—would prevent a defense counsel from objecting to a specific comment until after it had already been heard by the jury. Of course, that problem would be ameliorated if not eliminated if the scope of the narration testimony were decided in limine.

[34] See N.J.R.E. 611(a) (affording trial courts broad discretionary authority over the "mode" by which testimony is elicited); see also Sanchez, 247 N.J. at 479

at some point, whether each narration comment the defendant objects to passes muster.

To aid trial courts going forward, we offer several factors to inform the decision whether a specific narration comment will assist the jury. These factors are intended to supplement the factors compiled in Sanchez, which, as we have noted, focus principally on whether a witness may offer a lay opinion on the identity of the culprit. See supra note 27. As in Sanchez, the following factors are not meant to be exhaustive; other considerations may be relevant to the question of whether narration testimony will assist the jury in a given case. 247 N.J. at 473. Nor are these factors mutually exclusive; rather, they can overlap. As also made clear in Sanchez, no single factor is dispositive. Id. at 473–74.

Specifically, a trial court evaluating proposed video narration testimony should consider these six factors:

1. Background Context

Whether the proposed comment is to be given before the video is shown, while the video is paused to permit the narration comment, or as the video is streaming are important considerations. Providing a concise introduction to the video would presumably assist the jury in understanding how the video

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(LaVecchia, J., dissenting) (noting that the trial court should determine whether the testimony of law enforcement officers would meet the requirement of being helpful to the jury at the time of trial).

recording relates to the crime at issue. Such introductory comments might include, for example, the location of recorded events, the location, ownership, and viewing angle of the camera(s) that made the recording(s), and the date and time the recordings. The court may determine that such prefatory comments regarding what might be characterized as neutral background information are all that is needed. The court may also consider whether the witness may provide prefatory information at the outset and thereafter remark when the prefatory comment ripens as the video is being played, e.g., "the following video clip shows when the green car passes Main Street" and thereafter, "that is the green car appearing on the left side of the screen and travelling left to right."

2. Duration of Video and Focus on Isolated Events/Circumstances

An explanation as to the length of the video and the amount of time between relevant events may be helpful to juries. A witness may explain, for example, that the video recording being shown to the jury has been edited to skip portions that are not relevant to the case. A witness might also explain that the video is a composite of recordings made by different cameras showing different locations or different fields of view at a given location.

It might also be helpful for a witness to explain that the video pertains to specific events or circumstances. We reiterate, however, that the trial court should carefully evaluate narration testimony that offers an opinion as to the

factual or legal significance of an event or circumstance. Accordingly, it might be appropriate for the witness to use neutral language to explain a redaction, a shift in the vantage point, or a specific action, e.g., "we are now going to fast forward to [indicate time index or amount of time skipped]" or "we are next going to see images from the camera at the rear of the lobby" or "we are going to fast forward to the moment when the perpetrator entered the building."

3. Disputed Facts and Comments

The court should consider whether the proposed narrative comment pertains to a fact in dispute, and whether the comment itself is disputed (e.g., the witness proposes to testify that the video shows an action and the defense argues the video does not show that action). We note that, while cross-examination is said to be "the 'greatest legal engine ever invented for the discovery of truth[,]'" State v. Cope, 224 N.J. 530, 555 (2016) (quoting California v. Green, 399 U.S. 149, 158 (1970)), cross-examination—as distinct from rebuttal—may not be the most effective way to show that the police narration witness is wrong in his or her description of events depicted in the video. The point, however, is that when there is a factual dispute over what is shown in the video, narration testimony may pose a greater risk of invading the province of the jury, since the jury must ultimately decide for itself what the video shows. On the other hand, a narration comment might be helpful to the

jury by highlighting the specific event or circumstance at issue, drawing the jurors' attention to it so they can resolve the factual dispute. See supra note 31.

4. Inferences and Deductions

The extent to which the proposed narrative comment is based on an inference or deduction drawn from or supported by other facts in evidence, or from the officer's training and experience, rather than just the content of the video itself is an important consideration. As we have noted, there is a difference between "neutral, purely descriptive" testimony and a narration comment based on the officer's analysis, which might include a consideration of circumstances not displayed on the screen. It is conceivable that such lay opinion testimony might be helpful precisely because it is based on facts that cannot be gleaned from the four corners of the video recording. In other words, the testimony might be helpful to the jury in understanding the video because it serves to piece together facts from different sources in the trial record.

5. Clarity and Resolution of the Video

The clarity and resolution of the video recording, accounting for the playback device and screen used to display the video to the jury may be a relevant consideration as our Supreme Court has previously recognized. In Sanchez, the Court noted that

> the quality of the photograph or video recording may be a relevant consideration. If the photograph or video

> recording is so clear that the jury is as capable as any witness of determining whether the defendant appears in it, that factor may weigh against finding that lay opinion evidence will assist the jury.
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> [247 N.J at 473.]

We add that, in determining the quality of the video recording, the court should account for the jury's ability to clearly see the specific action or other circumstance the narrating witness proposes to describe or highlight. Thus, the court should consider, for example, the overall size of the viewscreen and its distance from the jurors, as well as the relative proportion of the full screen that depicts the specific action or circumstance at issue (e.g., that the suspect used his elbow, rather than his hand, to open a door).

6. Complexity of Video and Distracting Images

Finally, the complexity of the video recording and the amount of visual information being displayed simultaneously may be relevant. A security video of a crime in progress, immediate flight from a crime scene, or other chaotic situation may display multiple persons or vehicles in motion, all but one (or few) of which are irrelevant to the case. So too, a composite video may be comprised of recordings made by multiple cameras at different locations to essentially track a vehicle or person in motion, moving from one field of view to another at specified time indices. In any of those circumstances, narration testimony may help the jury focus, literally, on the relevant person or vehicle, separating that

person or vehicle from surrounding images that are essentially distracting visual noise. So too, narration testimony might help the jury focus attention on a specific action made by the actor who is in motion and making multiple actions, e.g., opening a door with his elbow, rather than his hand.

The application of these and other relevant considerations must be viewed through the lens of the deferential standard of appellate review that applies to all evidentiary decisions. See Singh, 245 N.J. at 12–13. The trial judge will be watching the video along with the jury and can hear the officer's verbal account as the jury hears it. Our current courtroom recording technology does not permit an appellate court to recreate the perspective of the jurors in the box. We can review the surveillance video that was marked as a trial exhibit. We also can scrutinize the transcript of the narration testimony and listen to an audio-recording of it. But we cannot recreate the combination of the verbal narration and the video as it was perceived by the jury and judge. For these and other reasons, we are firmly convinced that the trial judge is in the best position to determine whether a particular video narration comment would assist the jury, or instead impermissibly intrude upon its role.

In this instance, the trial court considered each objection on its own merits, overruling some while sustaining others. Importantly, the judge did not permit Officer Vitelli to comment on the identity of the suspect shown in the video.

Furthermore, the judge permitted Officer Vitelli to testify only as to factual observations, and disallowed testimony as to conclusions.

While reasonable minds may differ on the amount of narration testimony that should have been permitted in this case, we decline to substitute our judgment for the trial court's as to whether Officer Vitelli's narration testimony was helpful to the jury. We interpret N.J.R.E. 611 to afford the trial court broad discretion to permit video narration testimony and also to impose limitations on such testimony. In this instance, we find no abuse of discretion in the trial court's determination to allow Officer Vitelli to present video narration testimony over defendant's general objection to such testimony. Nor do we believe the trial court abused its discretion in overruling defendant's specific objections.

We likewise reject defendant's contention that Officer Vitelli's testimony impermissibly bolstered Gambarrotti's initial statement to police and his trial testimony. We see no abuse of discretion in allowing the prosecutor to sequence Officer Vitelli's testimony so that his comment that the person in the video appeared to be tall closely followed his testimony concerning the description of the robber that Gambarrotti had given to police immediately after the robbery.

We add that, even assuming for the sake of argument that the trial court did abuse its discretion with respect to any part of Officer Vitelli's testimony,

any such error was harmless. See Prall, 231 N.J. at 581. The harmless error standard "requires that there be 'some degree of possibility that [the error] led to an unjust result.'" State v. R.B., 183 N.J. 308, 330 (2005) (alteration in original) (quoting Bankston, 63 N.J. at 273). To the extent an error requires reversal, "[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." Scott, 229 N.J. at 484 (alterations in original) (quoting R.B., 183 N.J. at 330). We do not believe that any of Officer Vitelli's narration comments led to a guilty verdict the jury would not have reached but for that testimony. Officer Vitelli's descriptions were neither inaccurate nor misleading. In the final analysis, the jurors watched the videos and could see for themselves how the robbery unfolded and who committed it.

E.

We conclude our discussion of video narration testimony by noting that the present case reveals weaknesses in the procedures that were used to determine whether and to what extent this form of testimony is admissible. Officer Vitelli's narration testimony was punctuated with a series of objections and sidebar conferences. As we have noted, because the format of the officer's testimony could be characterized as a "running commentary" while the video

was playing, the defense objections were made only after the jury had heard the challenged comments. See supra note 33.

There is, in our view, a better way to determine whether video narration testimony is helpful and admissible. Our Court Rules prescribe comprehensive procedures to address how videorecorded depositions are presented to a jury in civil matters. See R. 4:14-9; R. 4:16-1. Those rules of procedure ensure that questions and disputes about video evidence are resolved in limine. In contrast, neither the Court Rules nor evidence rules specifically address surveillance video narration evidence in criminal trials.

There is a growing need for a clear set of rules and procedures on the use of video narration testimony at trial. Recent years have witnessed explosive growth in the number of surveillance cameras in operation. Many public spaces today, both outdoors and indoors, are protected by these security devices. Criminal investigations now often begin by canvassing the surrounding neighborhood not just for potential suspects and eyewitnesses but also for public and privately-owned video cameras that may have captured a reported crime, the events leading up to it, or its aftermath (e.g., flight from the scene). As we have noted, it is not uncommon for investigators to piece together recordings made by multiple cameras at different locations at specified time indices to essentially track the movements of a person or vehicle, following it to an

ultimate destination or to a vantage point where he/she/it may be more clearly observed and more reliably identified.

Not surprisingly, video recordings and screenshots taken from those recordings have become a staple of criminal trials. As a result, issues concerning the manner in which video evidence is presented to the jury arise frequently. We expect that the trend of increasing use of surveillance video evidence at trials will continue in lockstep with the ongoing proliferation of video recording devices and new surveillance technologies, such as "doorbell" cameras.

The one constant is that the introduction of video evidence rarely arises unexpectedly during the course of a criminal trial. As we have noted, the typical narration witness will be intimately familiar with the content of the video, and presumably, the prosecutor, as part of pretrial preparation, will have determined what comments he or she intends to elicit from the narration witness on direct examination.

Because video narration testimony in criminal cases is thus planned if not scripted, we believe the better practice going forward would be for the judge to make an in limine ruling—before a narrated video is played for the jury—as to the narrative comments that will be allowed and those that will not be permitted. Accordingly, we believe the prosecutor should move to introduce video narration testimony and that application should be addressed at a Rule 104

hearing outside the presence of the jury. Cf. R. 3:9-1(e) ("Hearings to resolve issues relating to admissibility of . . . sound recordings . . . shall be heard prior to the Pretrial Conference, unless upon request of the movant at the time the motion is filed, the court orders that the motion be reserved for the time of trial. Upon a showing of good cause, hearings as to the admissibility of other evidence may also be held pretrial.").

As we have already noted, we do not mean to suggest that a trial court must convene a dress rehearsal of the narration testimony before ruling on the admissibility of specific narration comments. Our goal is to aid trial courts and reduce the opportunities for errors, not to impose new time-consuming burdens. We expect that the prosecutor will be able to succinctly and yet comprehensively summarize the narration comments that he or she intends to elicit at trial. Furthermore, we see no reason why the prosecutor and defense counsel cannot confer to discuss the nature and scope of video narration testimony and then bring to the attention of the court any specific disputes that need to be resolved. Cf. R. 3:9-1(d) ("The prosecutor and defense counsel shall also confer and attempt to reach an agreement as to any discovery issues, including any issues pertaining to discovery through the use of CD, DVD, email, internet or other electronic means.").

As we emphasized in the preceding subsection, the admissibility of narration testimony cannot always be reduced to a single "yes or no" question. Some proposed narration comments might easily pass muster under the multi-faceted analysis we have described. Other narration comments would cross the line and intrude impermissibly into the province of the jury. Defense counsel should not be required to make multiple sequential objections on the fly as an officer narrates a video to the jury.

An in limine hearing would also provide the judge the opportunity to explain the boundaries to the police witness. That would help to ensure that the witness does not make the "slip" that occurred in Singh, when the officer twice referred to the individual depicted in the video as "the defendant." 245 N.J. at 18.

We also believe the jury should be instructed, both before the narration witness testifies and again in the court's final instructions before deliberations, as to the limited purpose of the narration testimony. Such pre- and post-testimony instructions are given with respect to expert testimony. See Model Jury Charges (Criminal), "Expert Testimony" (rev. Nov. 10, 2003); see also State v. Torres, 183 N.J. 554, 580 (2005) (quoting State v. Berry, 140 N.J. 280, 304 (1995)) ("In all cases where expert testimony is allowed, the trial court . . . should give a limiting instruction to the jury 'that conveys to the jury its absolute

prerogative to reject both the expert's opinion and the version of the facts consistent with that opinion . . . .'"); State v. Hyman, 451 N.J. Super. 429, 455 (App. Div. 2017).

So far as we have been able to determine, there are no comparable model jury charges for lay opinion testimony. We therefore recommend that the Model Criminal Jury Charge Committee consider whether it would be appropriate to develop a model charge that specifically addresses video narration testimony. Jurors should be told they are free to reject a narration witness's testimony. See Singh, 245 N.J. at 20 (noting that the "the jury was free to discredit [the] Detective['s] . . . testimony . . ."). They also should be instructed that if there are any disputes as to the content of the surveillance video, it is for them to decide for themselves what the video shows. Jurors should also be informed that it is for them to decide the significance and import of anything shown in the video and that they are free to reject any lay opinion testimony provided by the narrator. Cf. City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 491 (2010) (noting jury should be instructed that it is not bound by the opinion of any expert and should only give an offered opinion the weight it deserves, whether that be slight or great); State v. Odom, 116 N.J. 65, 82 (1989) (jury must be carefully instructed that it must decide what weight is to be accorded expert testimony and that it alone must determine the ultimate issues of guilt or innocence).

IV.
FIRST-TIME IN-COURT IDENTIFICATIONS

We turn next to defendant's contention, raised for the first time on appeal, that the trial court erred by allowing the bank teller, Gambarrotti, to make an in-court identification of defendant as the culprit. Gambarrotti had not been able to identify defendant during a photo-array procedure administered over a year after the robbery. In fact, he selected a "filler" photograph of another person. Defendant argues that an in-court identification should be permitted only if there has been a positive out-of-court identification, asserting that "due process requires the exclusion of first-time, in-court identifications."[35] Defendant thus urges us to adopt a new per se rule—one that departs from the case-by-case analysis required under existing law—by imposing a new bright line precondition to in-court identifications. In the alternative, defendant urges us to reverse his conviction because the trial court failed to revise the model jury charge for in-court identifications sua sponte. Defendant contends for the first time on appeal that the model charge does not adequately explain the inherently suggestive nature of in-court identifications.

[35] Defendant argues the same result is required under the Rules of Evidence. See N.J.R.E. 403 (exclusion of evidence on grounds of prejudice, confusion, or waste of time).

We decline to impose a new categorical restriction on a familiar trial practice that has been used for many decades and that jurors have come to expect. We thus conclude that Gambarrotti's in-court identification was admissible. We also conclude that the trial court did not commit plain error in instructing the jury regarding the in-court identification. However, we believe it would be appropriate for the Model Jury Charge Committee to consider whether the model charge on in-court identifications should be revised, for example, to incorporate language from the out-of-court identification model charge relating to showup identifications.

A.

Defendant did not object to Gambarrotti's in-court identification. Nor did defendant request a Wade hearing to determine the admissibility of the out-of-court identification procedure that had been administered to Gambarrotti. There is no indication—or allegation—that the photo-array procedure was administered improperly, and in any event, the result of that procedure was exculpatory because Gambarrotti selected the photograph of someone else. Accordingly, the trial court had no opportunity or need to make findings of fact or conclusions of law relating to any eyewitness identification issues. Therefore, we must discern from the trial record what happened during the criminal investigation. We briefly summarize the relevant facts:

As we explained in our discussion of the Confrontation Clause issue in Section II, the jury heard testimony about the physical description of the robber that Gambarrotti had given to police in a statement he made shortly after the robbery. Because police did not have a specific suspect in mind, they could not administer a photo-array procedure when Gambarrotti gave his initial statement to police. He was not asked to view a photo-array until a year-and-a-half after the robbery, when defendant became a suspect based on information provided by the Franklin Township Police Department.

At trial, Gambarrotti testified about the robber's physical appearance. He also testified regarding the identification procedure that was administered at the police station. He explained that he was presented with six photographs and that he selected one. However, he was not 100% certain if the man in the photograph he picked was in fact the bank robber. He testified, "I believe I was 75 to around 90[%] sure that it was the person, because honestly, it happened a year—over a year and a half ago, so I couldn't recall." Gambarrotti also noted that he did not initially pick any of the photographs "because they all looked alike." On re-direct examination, he testified that he was approximately 85% certain that the photograph he eventually selected depicted the robber. In fact, the photograph that Gambarrotti selected from the six-photo array did not depict defendant.

Gambarrotti was asked whether the man who robbed the bank was in the courtroom. Defense counsel did not object to the in-court identification. We reproduce the relevant colloquy:

> Q: Mr. Gambarrotti, do you see the man who robbed you in court today?
>
> A: I wouldn't say 100[%], honestly. I would say maybe like an 80[%].
>
> Q: Who exactly are you looking at [and] saying looks 80[%] like him?
>
> A: The man in the middle.
>
> [PROSECUTOR]: For the record, Your Honor, [he is] pointing to Mr. Watson.
>
> THE COURT: Do you have any objection to the record reflecting that?
>
> [DEFENSE COUNSEL]: No objection, Judge, if [sic]—the man in the middle.
>
> THE COURT: Okay. The record will reflect that the witness pointed to the defendant, Mr. Watson.
>
> [PROSECUTOR]: No further questions, Your Honor.

On cross-examination, defense counsel elicited that Gambarrotti had met with the assistant prosecutor before trial and had been told that the man accused of committing the bank robbery would be present in court seated at defense counsel's table.

In his final instructions to the jury, the trial judge read verbatim the applicable model jury charge relating to out-of-court and in-court eyewitness identifications. Defendant did not suggest revisions to the model charge at the charge conference. R. 1:8-7(b). Nor did counsel object to the eyewitness identification jury instructions as given.

B.

Before we address defendant's request that we impose a new precondition to in-court identifications, we first examine the law as it presently exists in this State. There is surprisingly little case law discussing in-court identifications. That suggests to us that, at least until recently, there have been comparatively few defense challenges made to this familiar trial practice. See also infra note 44.

In State v. Madison, our Supreme Court considered whether a witness's in-court identification of the defendant had been "irreparably tainted" by an impermissibly suggestive out-of-court identification procedure. 109 N.J. 223, 239 (1988). The Court first determined that the out-of-court identification procedure was impermissibly suggestive because police had included multiple photographs of the defendant in the array. Id. at 241. Although the witness made a positive in-court identification of the defendant, "[h]e . . . had been unable to identify any of the robbers from a photo array after viewing 'a lot of

pictures.'" Id. at 243. We note that the positive in-court identification was thus a "first-time" positive identification, to use the phraseology that defendant employs in the present matter.

The Court next addressed the reliability of the witness's in-court identification, explaining "[i]n determining the reliability of an in-court identification we again apply the Manson[36] factors."[37] Ibid. On the record before it, the Court was unable to determine whether the witness's in-court identification had a reliable basis independent of the highly suggestive procedures that had been used in the out-of-court identification procedure. Id. at 244. Accordingly, the Court deemed it necessary to remand the case for a "taint hearing." Id. at 245.

In reaching that conclusion, the Court considered whether the exclusion of an in-court identification is appropriate as a remedy to redress the improper administration of an out-of-court identification procedure. Id. at 244–46. The Court noted that even when the out-of-court identification process is found to be unduly suggestive and inadmissible, "it does not necessarily follow that the witness's in-court identification is so tainted that it too will be inadmissible."

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[36] Manson v. Brathwaite, 432 U.S. 98 (1977).

[37] We note that the so-called "Manson factors" have since been reformulated in Henderson, at least with respect to determining the admissibility of out-of-court identifications.

Id. at 242. The Court cited Simmons v. United States, 390 U.S. 377, 384 (1968), for the proposition that

> convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
>
> [Ibid. (emphasis in original).]

The Court in Madison further noted that principle is "in accord" with its earlier ruling in State v. Thompson, 59 N.J. 396, 418–19 (1971), which held:

> If . . . the out-of-court procedures were so impermissibly suggestive as to fix in the victim's mind an identity probably based upon photographs rather than upon an independent mental picture of the person gained from observations of him at the time of commission of the crime, the in-court identification should be excluded.
>
> [Id. at 242–43.]

In sum, under the Madison analytical framework, the decision to prohibit an in-court identification is made on a case-by-case basis, focusing on whether the in-court identification was tainted by an impermissibly suggestive out-of-court identification procedure. See also Guerino, 464 N.J. Super. at 613–14 (noting that "[s]uppression of an out-of-court identification procedure . . . is not the only potential remedy for an impermissibly suggestive procedure that has

the potential to corrupt a witness's memory. Such a procedure could also place at risk the admissibility of a subsequent in-court identification.").

We find it noteworthy that although the Court in Madison remarked that the in-court identification process itself is "extremely suggestive"—an important comment we discuss more fully in subsection E—it did not suggest that an in-court identification should be suppressed based on the inherent suggestiveness of the in-court procedure itself. Nor did the Court suggest that the in-court identification should be suppressed on the grounds that the witness in that case had not made a positive identification of the defendant in the prior out-of-court identification procedure. On the contrary, the clear implication of the Madison Court's analysis and ultimate remand ruling is that an in-court identification—including a first-time positive in-court identification as occurred in Madison—is permitted unless the witness's memory was irreparably tainted by an impermissibly suggestive out-of-court identification procedure.

Here, the photo-array procedure that was administered to Gambarrotti was not impermissibly suggestive, and defendant does not contend otherwise. Accordingly, the analytical framework in Madison, which focuses on whether the in-court identification is a fruit of an impermissibly suggestive out-of-court identification, does not support defendant's contention that Gambarrotti's in-court identification should be suppressed.

In its landmark Henderson decision, the Supreme Court achieved significant reforms of our eyewitness identification jurisprudence, modifying the traditional Manson/Madison test. However, Henderson focused almost entirely on out-of-court identification procedures; there is no discussion in the opinion that specifically informs trial courts on whether and when to exclude in-court identifications.

Before we examine the Henderson decision in detail to glean its fundamental underpinnings, we acknowledge a recently published decision addressing whether in-court identifications should be suppressed based on their own inherent suggestiveness and not just as a remedy for an impermissibly suggestive out-of-court identification procedure. In Guerino,[38] we were presented with the question of whether all in-court identifications should be abolished, or else restricted to cases where there had been an "unequivocal" out-

[38] In State v. Burney, we recently addressed a fact-sensitive issue concerning the jury charge pertaining to an in-court identification but had no occasion in that case to address whether in-court identifications are impermissibly suggestive. __ N.J. __, __ n.12 (App. Div. 2022) (slip op. at 33, n.12). Defense counsel in that case did not request the trial court to instruct the jury on the inherent suggestiveness of in-court identifications. Indeed, the defendant in his appeal brief explicitly acknowledged that "there is no need for the [c]ourt to address the broader question of the more general suggestiveness of all (or at least many) in-court identifications whenever the victim identifies the defendant in court, but not out of court." Ibid. Accordingly, "[w]e therefore decline[d] to address the inherent suggestibility of in-court identifications at this time." Ibid.

of-court identification.[39] 464 N.J. Super. at 605. The defendant in that case argued that "the scientific principles that necessitated the reforms achieved in Henderson demonstrate that in-court identifications are the product of inherently suggestive circumstances and have minimal probative value." Ibid. The defendant further argued that "nearly all the system variables discussed in Henderson apply to in-court identifications, and that this traditional practice 'does not comport with the post-Henderson legal landscape and must be updated.'" Id. at 605–06.

We declined defendant's invitation to ban or restrict in-court identifications, noting that the relief defendant sought "would represent a significant change to our State's eyewitness identification jurisprudence[]" and that the defendant failed to cite to any "New Jersey authority to support his request for abolition of in-court identifications."[40] Id. at 606. Defendant now asks us to "depart" from the conclusion we reached in that case.

In Guerino, we explicitly left the door open for defendants to challenge the practice of in-court identifications, explaining:

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[39] In Guerino, the victim had previously identified the defendant out of court with 80% certainty. 464 N.J. Super. at 599–601.

[40] We acknowledge that here, defendant is not asking us to ban all in-court identifications as in Guerino. Rather, defendant proposes to ban either first-time in-court identifications, or at least in-court identifications where the witness had misidentified the perpetrator in an out-of-court identification procedure.

> We do not mean to suggest the familiar practice of having a trial witness point to the defendant sitting at counsel table is a talisman carved in stone. Chief Justice Rabner aptly recognized in Henderson that scientific research on human memory and the reliability of eyewitness identifications will continue to evolve. We are not persuaded, however, that we have the evidential foundation upon which to grant the fundamental change defendant seeks. In Henderson, the reform of New Jersey's eyewitness identification jurisprudence was supported by an extensive report of a special master appointed by the Court to compile and evaluate the scientific evidence regarding eyewitness identifications. Using that example of scientific groundwork as a benchmark, the record before us in this case is inadequate to test the validity and utility of in-court identifications.
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> [Id. at 606–07.]

C.

We next take a step back to closely examine the landmark Henderson decision to determine whether it supports defendant's call for further reform by imposing new limitations on the admission of in-court identifications. It bears repeating that Henderson, like Madison before it, focused on out-of-court identification procedures that are administered by police. Much of the Henderson opinion was devoted to prospective reforms to police practices. We therefore must consider whether the suppression of eyewitness identification testimony serves only as a form of exclusionary rule designed to deter violations of those prescribed practices, in which event Henderson principles might not

apply at all to in-court identifications, which are controlled by trial judges, not police.[41] Cf. State v. Shannon, 222 N.J. 576, 600 (2015) (Solomon, J., dissenting) (quoting United States v. Leon, 468 U.S. 897, 916 (1984)) ("The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.").

It is immediately evident, however, that our Supreme Court was not just concerned with impermissibly suggestive identification circumstances that are arranged by law enforcement officers. In State v. Chen, decided on the same day as Henderson, the Court addressed suggestive behavior by a private actor. 208 N.J. 307, 326 (2011). The Court noted,

> This case is not about government conduct. It therefore does not implicate due process concerns raised by suggestive police procedures. Cf. Colorado v. Connelly, 479 U.S. 157, 166 (1986) (noting that even outrageous behavior by private party seeking to secure evidence against defendant does not make that evidence inadmissible under Due Process Clause).
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> [Id. at 317–18.]

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[41] We note that courts in other jurisdictions, including the United States Supreme Court in Perry v. New Hampshire, have held that prescreening hearings (i.e., Wade hearings) are not required when the suggestive circumstances were not arranged by law enforcement officers. 565 U.S. 228, 232–33 (2012). We discuss those cases in subsection D. We presume that suppression would be inappropriate if the circumstances do not even warrant the judicial scrutiny of a Wade hearing. We add that, in State v. Anthony, our Supreme Court made clear that to obtain a pretrial hearing, a defendant must present some evidence of suggestiveness tied to a system variable that could lead to mistaken identification. 237 N.J. 213, 233 (2019) (citing Henderson, 208 N.J. at 288–89).

The Court added,

> The reasons animating the case law on eyewitness identification extend beyond police procedures and also address the reliability of evidence presented in court. In Manson, . . . the Supreme Court explained "that reliability is the linchpin in determining the admissibility of identification testimony." 432 U.S. at 113; see also [Madison, 109 N.J. at 232] (describing Manson test as "struggle to balance the State's need to use eyewitness identification against the defendant's need to protect him[or herself] against potentially unreliable eyewitness testimony").
>
> [208 N.J. at 318.]

Of special importance for purposes of this appeal, the Court further explained,

> Because of the pivotal role identification evidence plays in criminal trials, and the risk of misidentification and wrongful conviction from suggestive behavior—whether by governmental or private actors—a private actor's suggestive words or conduct will require a preliminary hearing under Rule 104 in certain cases to assess whether the identification evidence is admissible. We turn now to consider what the appropriate threshold for a hearing should be in cases that present suggestive identification procedures but no police action.
>
> . . . .
>
> Henderson, like Madison and Manson, addresses the reliability of identification evidence and the need to deter police misconduct. By definition, however, cases that do not involve police action raise no deterrence issues. Simply put, we cannot expect that private actors

> will conform their behavior to police standards they are unaware of. Absent police involvement, then, our principal concern is reliability.
>
> [Id. at 326. (emphasis added).]

Although the Court in Chen established a higher threshold for convening a Wade hearing than the one adopted in Henderson for when the suggestive behavior involves police conduct,[42] it is clear that under New Jersey law, the need for deterring police misconduct is not the sole basis for excluding eyewitness identification testimony. Rather, the admissibility of eyewitness identification evidence depends ultimately on its reliability, not the assignment of blame. For purposes of this appeal, moreover, it is of little moment whether the exclusion of unreliable in-court identifications is grounded in notions of due process (the legal basis relied upon in Henderson to suppress impermissibly suggestive police-controlled identifications) or the Rules of Evidence[43] (the

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[42] The Court in Chen explained,

> For that reason, we make one modification to Henderson in applying it to cases where there is no police action: we require a higher, initial threshold of suggestiveness to trigger a hearing, namely, some evidence of highly suggestive circumstances as opposed to simply suggestive conduct.
>
> [Id. at 327 (emphasis in original)].

[43] As recognized in Chen,

legal basis relied upon in Chen to suppress an identification tainted by suggestive conduct attributed to a private actor). See supra note 35.

Regardless of the source of legal authority for scrutinizing eyewitness identification testimony, the critical fact-sensitive question under the Henderson/Chen framework remains the same—whether suggestiveness renders the eyewitness identification so unreliable that it should be kept from the jury.

Relatedly, we do not believe the fundamental concerns expressed in Henderson regarding reliability are inapposite to in-court identifications. The Court in Madison expressly stated that "[i]n determining the reliability of an in-court identification we again apply the Manson factors." 109 N.J. at 243. Thus,

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> Courts have a gatekeeping role to ensure that unreliable, misleading evidence is not admitted. Certain basic evidence rules form the bedrock for that principle . . . . Eyewitness identification testimony, thus, must clear two preliminary hurdles: it must be sufficiently reliable to be able to prove or disprove a fact; and its probative value cannot be substantially outweighed by the risk of undue prejudice or misleading the jury . . . . Pieced together, those rules help ensure that certain unreliable evidence is not presented to the jury. They form the trial courts' gatekeeping function to guarantee that only relevant, probative, and competent evidence that is sufficiently reliable not to run afoul of Rule 403 may be considered by the finder of fact.
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> [Chen, N.J. at 318–19.]

it stands to reason that the modification of the Manson/Madison test achieved in Henderson would impact the admissibility of in-court identifications and not just out-of-court identifications. Furthermore, as we discuss momentarily, in expressing its concern regarding wrongful convictions, the Court in Henderson referred specifically to the powerful impact an in-court identification can have on a jury. 208 N.J. at 237. We note, also, that the model jury instructions drafted pursuant to the Henderson Court's instructions address both in- and out-of-court identifications. Given these circumstances, we believe the foundational principles announced in Henderson are applicable to in-court identifications and not just out-of-court identifications.

It is clear, however, that our Supreme Court has never held—or even been asked to hold, so far as we can determine[44]—that in-court identifications are prohibited unless the witness had previously made a positive out-of-court identification. Defendant, nonetheless, asks us to extrapolate just such a rule from basic principles that undergird the rationale for Henderson's reforms. We therefore deem it appropriate to examine those foundational principles to determine if they indeed presage such a marked course correction in our in-court

[44] Defendant suggests that the dearth of case law reflects the fact that "it is somewhat rare for a witness to be asked [by the prosecutor] to make an in-court identification when he or she identified someone other than the defendant during an out-of-court procedure."

identification practices to complement the reforms Henderson made directly to police investigation practices, Wade hearing standards, and jury instructions pertaining to out-of-court identification procedures.

We begin by acknowledging Henderson's recognition "that eyewitness '[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country.'" 208 N.J. at 231 (alteration in original) (quoting State v. Delgado, 188 N.J. 48, 60 (2006)). This is so because "[e]yewitness identifications are often 'considered direct evidence of guilt' and accorded great importance by juries." State v. Romero, 191 N.J. 59, 75 (2007). Referring explicitly to in-court identifications, the Henderson Court emphasized that "[t]here is almost nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" 208 N.J. at 237 (alteration in original) (quoting Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting)).

The Court carefully examined the frailties and vulnerabilities of human perception and memory. Id. at 217. In doing so, the Court surveyed specific circumstances that can lead to misidentification, identifying various "estimator" variables (e.g., lighting conditions, distance, the length of time the witness has to observe the perpetrator, stress during an encounter, and cross-racial effects) and "system" variables (i.e., the manner in which police administered a photo

array procedure or conducted a one-on-one show up procedure) that influence a witness's ability to accurately identify a culprit. Id. at 247, 289–90.

We recognize that all the system variables specifically identified by the Court fall into the category of police-controlled circumstances. Id. at 248–261. Indeed, the Court expressly noted, "[w]e begin with variables within the State's control." Id. at 248. But the Court also expressly noted that the compiled list of system variables is "non-exhaustive." Id. at 289. Furthermore, in Chen—a case that did not involve police conduct—the Court expressly instructed that "[a]t the Rule 104 hearing, courts will weigh both system and estimator variables." 208 N.J. at 327 (emphasis added) (citing Henderson, 208 N.J. at 287–89). That indicates to us that system variables can be applied to suggestive circumstances besides those arranged or controlled by police. Indeed, given the ultimate goal of preventing wrongful convictions resulting from misidentifications, we are convinced that the Court was concerned with all manner of suggestive circumstances that might affect the reliability of an eyewitness identification.

The Court in Henderson also stressed the need to rely upon science in identifying system variables. The Court emphasized, for example, that jurors "must be informed by sound evidence on memory and eyewitness identification, which is generally accepted by the relevant scientific community." Id. at 302–

03. Accordingly, the specific reforms achieved in Henderson are supported by social science studies that had been conducted over the course of the preceding thirty years and compiled by a Special Master appointed by the Court. Id. at 217–18.

The Court also emphasized the need to instruct juries on the risk of misidentification. That is one of the most important principles set forth in the opinion. The Court was mindful that the predecessor standard for assessing eyewitness identification evidence overstated the jury's innate ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate. Id. at 218, 296. The Court therefore "asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges [Committee] to draft proposed revisions to the . . . model charge on eyewitness identification and address various system and estimator variables." Id. at 219. Pursuant to the Court's request, the Committee drafted and approved a comprehensive set of model jury charges to explain to juries the risk of misidentification and to highlight certain specific circumstances that may affect the reliability of an identification. See also Anthony, 237 N.J. at 228–29.

As part of that effort, the Committee drafted model instructions not only to address out-of-court identifications, but also to be used when a case involved both out-of-court and in-court identifications. We deem it especially noteworthy

that the Committee also drafted a model instruction to be used when only an in-court identification occurred. While we do not attribute the force of law to the text of a model jury charge let alone its mere existence,[45] we note that the "Identification: In-Court Identification Only" model charge necessarily presupposes that an in-court identification can occur in a case where there was no out-of-court identification. That model jury charge, in other words, by its very nature, contravenes defendant's central tenet that "first-time" in-court identifications are categorically prohibited as a matter of due process or application of the Rules of Evidence.

Another foundational principle we glean from Henderson is that the Court soundly and explicitly rejected the use of per se rules to determine when identifications should be suppressed. The Court explained that

> [t]he framework [for evaluating the reliability of identifications] avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake. Instead, it allows for a more complete exploration of system and estimator variables to preclude sufficiently unreliable identifications from being presented and to aid juries in weighing identification evidence.
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> [Id. at 303.]

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[45] We note that in State v. Angoy, we explained that when a jury instruction follows the model charge, although "not determinative, it is a persuasive argument in favor of the charge as delivered." 329 N.J. Super. 79, 84 (App. Div. 2000).

Accord Anthony, 237 N.J. at 226 (re-affirming principle of avoiding bright-line rules in determining the admissibility of an eyewitness identification in a case involving the failure by police to record an identification procedure pursuant to R. 3:17). By using a "totality of the circumstances" test, moreover, see Henderson, 208 N.J. at 289, the Court again signaled its rejection of any bright-line rule for suppressing identifications like the unprecedented new rule defendant now urges us to adopt.

The Court also made clear that while trial courts are expected to "weed out unreliable identifications," id. at 302, the suppression remedy is to be used reservedly, not reflexively, or often. The Court noted:

> We also expect that in the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high. Juries will therefore continue to determine the reliability of eyewitness identification evidence in most instances, with the benefit of cross-examination and appropriate jury instructions.
>
> [Id. at 303.]

Notably, the Henderson Court retained the general rule announced in Manson and Madison that, "if after weighing the evidence presented [at a Wade hearing] 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." Id. at 289 (emphasis added);

see Manson, 432 U.S. at 116; Madison, 109 N.J. at 239. In Chen, the Court reinforced that the threshold for suppression is high, noting:

> In the end, if a defendant can demonstrate a very substantial likelihood of irreparable misidentification, the identification evidence would not survive scrutiny under [N.J.R.E.] 403. Its likelihood to mislead the jury and cause undue prejudice would substantially outweigh any probative value it might offer. In light of the courts' gatekeeping function, such evidence would properly be excluded under the rules of evidence.
>
> Under the above approach, we recognize—as we did in Henderson—that in most cases, identification evidence will likely be presented to the jury. 208 N.J. at 302–04. It will remain the jury's task to determine how reliable that evidence is, with the benefit of cross-examination and appropriate jury instructions. In rare cases, however, highly suggestive procedures that so taint the reliability of a witness' identification testimony will bar that evidence altogether.
>
> [208 N.J. at 328 (emphasis added).]

See also Lazo, 209 N.J. at 24 (citing State v. Farrow, 61 N.J. 434, 451 (1972)) ("In an identification case, it is for the jury to decide whether an eyewitness credibly identified the defendant. Guided by appropriate instructions from the trial judge, juries determine how much weight to give an eyewitness' account.").

D.

As we have noted, our Supreme Court has not specifically addressed the contention defendant now raises that first-time in-court identifications are categorically inadmissible. We therefore look for guidance from decisions in

other jurisdictions that have explicitly addressed the standards for admitting first-time in-court identifications. Our research has failed to identify any jurisdiction that has adopted the per se rule that defendant proposes, that is, one that would automatically exclude first-time in-court identifications.

Defendant relies on the Connecticut Supreme Court's decision in State v. Dickson, 322 Conn. 410 (2016). The Court in that case concluded "that first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." Id. at 426. The Court added, in a footnote, that "any first time in-court identification by a witness who would have been unable to reliably identify the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation." Id. at 426 n.11 (emphasis in original). We note, however, that Dickson calls for the "prescreening" of first-time in-court identifications, not the automatic suppression of such evidence as defendant urges in the present matter.[46]

[46] That "prescreening" process is commonly referred to as a Wade hearing. We note that defendant contends that in this case, he did not have advance knowledge that Gambarrotti would be asked by the prosecutor to identify the perpetrator at trial. He asks on appeal that prosecutors be required to provide notice as to which witnesses will be asked to make an in-court identification. We defer to the Criminal Practice Committee on whether such notice should be required. We add only that nothing precludes such matters from being discussed at a disposition conference, R. 3:9-1(d), or the pretrial conference, R. 3:9-1(f).

Furthermore, other jurisdictions have considered, and rejected, the approach adopted by the Connecticut Supreme Court. In State v. Doolin, for example, the Iowa Supreme Court expressly criticized the rationale in Dickson. 942 N.W.2d 500, 514 (Iowa 2020).[47] In rejecting the defendant's due process argument, the Iowa Supreme Court relied on the United States Supreme Court's decision in Perry. In that case, a decision joined by eight Justices, the United States Supreme Court explained:

> We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. . . . Our decisions . . . aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, . . . vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.
>
> [565 U.S. at 232–33.]

[47] In Doolin, the Court addressed whether defendant's trial counsel "provided constitutionally deficient representation by failing to object to [the crime victim's] first-time, in-court identification as inadmissible under the Due Process Clause of the Federal or Iowa Constitution." Id. at 508.

Finding the reasoning in Perry persuasive, the Iowa Supreme Court rejected the defendant's argument that his trial counsel was ineffective. Doolin, 942 N.W.2d at 510.

Of particular importance to this appeal, the Doolin Court also noted that "[m]ost courts adjudicating due process claims after Perry allow first-time, in-court identifications." Id. at 511. Recognizing this majority view, the Court noted that Dickson was an "outlier" and created an "unduly complex and restrictive" process for trial judges. Id. at 515. The Court in Doolin added, Dickson "created a multistep process that took five pages to describe and now governs how Connecticut courts must prescreen first-time, in-court identifications . . . . While acknowledging 'a number of courts have concluded otherwise,' . . . Dickson . . . concluded 'that this is an issue for which the arc of logic trumps the weight of authority[.]'" Id. at 514. The Court also pointed out that three justices on the Connecticut Supreme Court disagreed with the majority. Ibid. The Iowa Supreme Court further cautioned that "[e]xcluding such testimony would effectively deny justice to some victims." Id. at 515.

In Garner v. People, the Supreme Court of Colorado reached a similar conclusion, holding that

> where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the

> ordinary courtroom setting made the in-court identification itself constitutionally suspect, due process does not require the trial court to assess the identification for reliability . . . .
>
> [436 P.3d 1107, 1119, 1120 (Colo. 2019).]

In Young v. State, the Alaska Supreme Court also concluded that first-time in-court identifications do not implicate due process concerns, although the Court did not "foreclose the possibility that a first-time in-court identification could be unnecessarily suggestive." 374 P.3d 395, 412 (Alaska 2016). In that case, the defendant argued that the witness's in-court identification was itself "unnecessarily suggestive because it 'was equivalent to a show-up, where an individual is presented with one suspect and asked to make a yes or no identification.'" Id. at 411. Defendant noted that he was the only African American man in the courtroom and that he was sitting at counsel table with his lawyer. Ibid. He argued that given the suggestiveness of these circumstances, the trial judge should have assessed the reliability of the resulting identification under Manson and should have excluded it. Id. at 411–12.

The Court explained that it had never directly addressed whether a first-time in-court identification triggers application of the same due process protections that apply to suggestive pretrial identifications. Id. at 411. The Court ruled:

> We now decide it does not. Our conclusion is driven by the fundamental differences between identifications derived from state action prior to trial and those that occur in the courtroom. A pretrial identification ordinarily involves only the police and the witness, and how the identification is later evaluated at trial depends largely on those participants' recollections of it. An in-court identification, in contrast, occurs in the presence of the judge, the jury, and the lawyers. The circumstances under which the identification is made are apparent. Defense counsel has the opportunity to identify firsthand the factors that make the identification suggestive and to highlight them for the jury. We also note that there are other ways, though not used in this case, in which the risks of in-court misidentifications can be either minimized in practice or pointed out to the jury. Expert witnesses can testify about the problems inherent in first-time in-court identifications; the trial court may grant a defendant's request for an in-court lineup or to be seated somewhere other than counsel table for the identification.
>
> [Id. at 411–12.]

We add that the Court in Young remarked that it was "follow[ing] most closely" the New Jersey Supreme Court's decision in Henderson. Id. at 417.

We conclude our discussion of the law in other jurisdictions by noting that defendant also relies on the Massachusetts Supreme Judicial Court's decision in Commonwealth v. Crayton, 470 Mass. 228 (2014). The Court in Crayton held that "[w]here an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court showup[] and

shall admit it in evidence only where there is 'good reason' for its admission."[48] Id. at 242. The Court reasoned that this new rule was necessary to avoid "the unfair evidentiary weight of a needlessly suggestive showup identification that might be given more weight by a jury than it deserves." Id. at 244. That leads us to consider, in the next subsection, common features and characteristics shared by police-controlled show ups and judge-controlled in-court identifications.

E.

The gravamen of defendant's core argument is that in-court identifications are highly suggestive, much like one-on-one show up identifications. We find the comparison of in-court identifications to out-of-court showup identifications to be persuasive and well-supported by both social science and case law. The conclusion that these two types of identification events share common characteristics, however, does not necessarily support defendant's contention that first-time in-court identifications should be banned. After all, out-of-court

[48] In Henderson, our Supreme Court recognized that under Massachusetts law "there [must] be 'good reason for the use of a showup.'" 208 N.J. at 260 (quoting Commonwealth v. Martin, 447 Mass. 274 (2006)).

show up identifications are not categorically excluded. Rather, such evidence is generally admissible with appropriate jury instructions.[49]

We begin our discussion of the similarities between showups and in-court identifications by describing the former type of identification procedure. As the Court explained in Henderson, "[s]howups are essentially single-person lineups: a single suspect is presented to a witness to make an identification." 208 N.J. at 259. Often, it will be readily apparent that the person is in police custody so that the witness will know that the person on display is a suspect and has been arrested by police. The Court noted, moreover, that by their nature, showups cannot be performed blind or double-blind.[50] Ibid. The officer administering the procedure, in other words, will know that the individual on display to the witness is the person suspected of committing the crime under investigation.

The Court in Henderson also explained that "[s]howups often occur at the scene of a crime soon after its commission." Id. at 259. Timing is important.

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[49] We reproduce verbatim the model charge pertaining to showups in subsection G.

[50] A "blind" administrator knows who the actual suspect is but shields him/herself from knowing where the subject is located in the lineup or photo array. Henderson, 208 N.J. at 248. A "double blind" administrator does not know who the actual suspect is. Ibid. The double-blind best practice established in Henderson removes the possibility that the officer who is administering the identification procedure will suggest to the witness, even unconsciously, which photo in the array depicts the suspect. Id. at 248–49.

The Court accepted the finding of the Special Master that "'the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours' because 'the benefits of a fresh memory seem to balance the risks of undue suggestion.'" Ibid. The Court cited social science research that

> the timeframe for their reliability appears relatively small. A Canadian field experiment that analyzed results from more than 500 identifications revealed that photo showups performed within minutes of an encounter were just as accurate as lineups. A. Daniel Yarmey et al., Accuracy of Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 464 (1996). Two hours after the encounter, though, 58% of witnesses failed to reject an "innocent suspect" in a photo showup, as compared to 14% in target-absent photo lineups. Ibid.
>
> [Id. at 260.]

The Court noted that, while showups are a "useful—and necessary—technique when used in appropriate circumstances," they carry their "own risks of misidentifications." Id. at 259. The Court added that

> [e]xperts believe the main problem with showups is that—compared to lineups—they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes.
>
> [Id. at 260.]

The Court concluded,

> Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification . . . . That said, lineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive.
>
> [Id. at 261.]

Importantly for purposes of this appeal, the Court nonetheless did not categorically ban showup evidence, even when that procedure was conducted more than two hours after the crime.

We next consider the fundamental characteristics and features of an in-court identification. Unless arrangements are made to hide the defendant in the courtroom among other persons who would serve as the functional equivalent of filler photographs in a photo-array, an in-court identification, like a showup, is essentially a live single-person lineup. Also, like a showup, an in-court identification cannot be performed blind or double-blind. The prosecutor asking the witness whether the perpetrator is in the courtroom will know the identity of the defendant, if he or she is in the courtroom, and where he or she is seated.[51]

[51] We note that the Court in Henderson admonished that "[a]s with lineups, showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification." 208 N.J. at 261. In this case, it was revealed on cross-examination that the prosecutor told Gambarrotti that defendant would be in the courtroom.

We add that in many, if not most, showup situations, the witness will know that the subject is in police custody and therefore will know that police have determined to their own satisfaction that there is probable cause to believe that the subject committed the crime. So too, in the case of an in-court identification, the witness will know that the criminal justice system has determined that there is a basis to put the subject on trial, and that by returning an indictment, the grand jury has determined that there is probable cause to prosecute.[52] See also Aliza B. Kaplan & Janis C. Puracal, Who Could it be Now? Challenging the Reliability of First time In-Court Identifications After State v. Henderson and State v. Lawson, 105 J. of Crim. L. & Criminology 947, 985 (2015) ("There is no way to safeguard the witness from influence caused by subtle cues in the prosecutor's questioning or not-so-subtle cues in the courtroom itself. The expectation that the witness identif[ies] the defendant is palpable and may have a powerful effect on the reliability of an identification.").

As we noted in our discussion of the deterrent effect of suppressing eyewitness identification testimony, unlike an out-of-court identification

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[52] Juries are instructed that an indictment is not evidence. See Model Jury Charges (Criminal), "Preliminary Instructions to the Jury" (rev. May 5, 2014) ("The indictment is not evidence of the defendant's guilt on the charge(s). An indictment is a step in the procedure to bring the matter before the court and jury for the jury's ultimate determination as to whether the defendant is guilty or not guilty on the charge(s) stated in it."). The trial court provided this instruction to the jury.

procedure conducted by police, an in-court identification is conducted under the auspices of the judge presiding over the trial. It is the judge, moreover, who accepts the prosecutor's perfunctory request for the record to reflect that the witness had identified the defendant as the perpetrator. This circumstance creates a risk that jurors will believe that the judge countenanced the in-court identification process and that the procedure thus bears a judicial imprimatur of fairness and legitimacy.

We add, at the risk of stating the obvious, that the danger of undue suggestion inherent in an in-court identification cannot be mitigated by the benefit of fresh memory as will occur when an out-of-court showup is conducted within two hours of the crime. See Henderson, 208 N.J. at 259–61. An in-court identification will occur months if not years later. In this case, the bank robbery was committed on January 14, 2017. The trial was not convened until November 2018.

Finally, in terms of comparing and contrasting these two types of eyewitness identification procedures, our Supreme Court has already stated unequivocally that the inherent suggestiveness of an in-court identification is comparable to if not greater than the inherent suggestiveness of an out-of-court showup identification. In Madison, the Court commented,

> Because the defendant was the only person sitting at the defense table who reasonably could have been the

> defendant, [the witness's] in-court identification is extremely suggestive:
>
> > If a one-on-one confrontation at the police station is highly suggestive, then surely such a confrontation in court is the most suggestive situation of all, for the witness is given an even stronger impression that the authorities are already satisfied that they have the right man.
> >
> > [W. LaFave & J. Israel, Criminal Procedure, § 7.4, 341–42 (1985).]
>
> [109 N.J. at 243.]

Accord Dickson, 322 Conn. at 423 (emphasis in original) ("[W]e are hard-pressed to imagine how there could be a more suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the State has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. If this procedure is not suggestive, then no procedure is suggestive."). Nothing in Henderson, Chen, Anthony, or any other decision contradicts or questions this portion of the Madison opinion.

F.

As we have noted, the Court in Henderson emphasized the critical importance of determining the admissibility of eyewitness identifications based on legal standards and principles supported by social science. 208 N.J. at 217–

18. In Guerino, we rejected the defendant's call to ban in-court identifications, in part because the record before us in that case was inadequate to test the validity and utility of in-court identifications. 464 N.J. Super. at 607–08.

In the present matter, defendant has presented citations to and excerpts from social science literature published after Henderson that pertain specifically to the suggestiveness of in-court identifications. At oral argument, we asked the parties to provide specific suggestions for revising the model jury charge for in-court identifications. Defendant submitted additional citations to and quotations from studies in support of his proposed revisions to the "In-Court Identification Only" model jury charge. The prosecutor in her post-oral argument supplemental submission argued that the current model jury charge is adequate, but added:

> However, if the court decides that additional language should be used, the State submits that the matter should be referred to the Model Jury Charge Committee for its consideration where the positions of all interested parties can be addressed. This is pertinent because defendant is relying on out-of-state precedents and published studies to support his argument that first-time, in-court identifications are inherently unreliable.
>
> (emphasis added).

We note that the prosecutor has not specifically responded to or commented on social science evidence relied upon by defendant. Nor has the prosecutor provided us with citation to any studies that contradict the research

that defendant relies on. We recognize that there has been no adversarial hearing in this case to consider the validity, meaning, and import of the social science evidence. Nor do we have the benefit of a special master, as in Henderson, to sift through, compile, and make objective recommendations on the relevant social science studies.

With those caveats firmly in mind, we briefly summarize pertinent points in defendant's submission, focusing on a report published in 2014 by the National Academy of Sciences. The National Academy assembled a committee of researchers, scientists, statisticians, academicians, jurists, and practitioners "to assess the state of research on eyewitness identification and, when appropriate, make recommendations." National Research Council, Identifying the Culprit: Assessing Eyewitness Identification, at Preface, xiii (2014). "The committee's review analyzed relevant published and unpublished research, external submissions, and presentations made by various experts and interested parties. The research examined fell into two categories: (1) basic research on vision and memory and (2) applied research directed at the specific problem of eyewitness identification." Ibid. As part of its research and analysis, the committee considered the reliability of in-court identifications. Id. at 36 n.28, 65, 110–11.

The National Academy of Sciences publication explained that "[t]he enduring plasticity of stored memories is a serious concern for the validity of eyewitness identification[s]" and particularly for in-court identifications. Id. at 65. The publication also concluded that the in-court identification procedure itself is highly suggestive and, therefore, can result in unreliable identifications, noting that "in the courtroom, the eyewitness can easily see where the defendant is sitting. Thus, in-court identifications do not reliably test an eyewitness' memory." Id. at 36 n.28.

We note that defendant does not cite the National Academy study to support the specific proposition that the risk of misidentification is greater where the witness was unable to identify the defendant in an out-of-court identification procedure or had previously misidentified the culprit. However, defendant points to a study that focused on DNA exoneration cases in which there had been repeated identification procedures. Nancy K. Steblay & Jennifer E. Dysart, Repeated Eyewitness Identification Procedures with the Same Suspect, 5 J. of Applied Research in Memory and Cognition 284, 285 (2016). The study found that in 40% of the wrongful conviction cases that were reviewed, a witness had initially identified a different person or no person at all before misidentifying the defendant at trial. Ibid. The researchers concluded that, "a witness's failure to identify the suspect . . . is critical exculpatory evidence" and "[i]f the witness,

at a first attempt, rejects the police suspect . . . this should be highly informative for the police investigation and triers-of-fact." Id. at 286–87.

As we have noted, there has been no opportunity in this case to scrutinize the scientific literature in the crucible of an adversarial hearing. Nor have we had the benefit of expert testimony. Thus, we do not know, for example, whether the pertinent findings and recommendations made in the studies cited by defendant are "generally accepted by the relevant scientific community." Henderson, 208 N.J. at 303. However, nothing presented to us contradicts conclusions that have already been made by our Supreme Court concerning the "extremely suggestive" nature of in-court identifications, Madison, 109 N.J. at 243, the risk of misidentification associated with showup identifications, Henderson, 208 N.J. at 259–61, and the similarities between showups and in-court identifications, see supra Part IV, Subsection E.

Furthermore, we believe the study on wrongful convictions in cases involving repeated identification procedures provides support for the proposition that a witness's failure to identify the defendant in a prior identification procedure is a relevant circumstance in determining the reliability of a subsequent in-court identification. Indeed, that principle seems indisputable. It bears emphasis in this regard that the current model jury charges relating to both out-of-court and in-court identifications instruct jurors that they

"may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler." Model Jury Charges (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 8, 2020).

G.

There can be no doubt that our Supreme Court is committed, as are we, to preventing wrongful convictions based on juries' overreliance on eyewitness identification evidence that may have been tainted by suggestive circumstances. Under New Jersey jurisprudence, the system variables that can affect the reliability of an identification are not limited to those that are attributed to police, but also include those that result from the conduct of private actors and, presumably, those that arise from the trial process itself. That said, we are not persuaded that defendant has presented sufficient grounds to establish a new bright-line rule to invoke the extreme sanction of suppression to an entire class of cases. The automatic exclusion of first-time in-court identifications that defendant proposes would, in our view, contravene an important theme in our state's eyewitness identification jurisprudence, which is to avoid using bright-line rules to determine the admissibility of such evidence. Even more fundamentally, the defendant's proposal contravenes our general policy to leave for the jury to decide the weight to be given to eyewitness identification

testimony. See Lazo, 209 N.J. at 24 (citing Farrow, 61 N.J. at 451) ("In an identification case, it is for the jury to decide whether an eyewitness credibly identified the defendant. Guided by appropriate instructions from the trial judge, juries determine how much weight to give an eyewitness' account.").

It seems elementary that in-court identifications, like out-of-court showup identifications, "carry their 'own risks of misidentifications.'" See Henderson, 208 N.J. at 260 (describing showups). While we would not go so far as defendant by characterizing in-court identifications as "wildly prejudicial," we accept that the inherent suggestiveness of in-court identifications is real, not hypothetical. We also believe the level of suggestiveness of in-court identifications is comparable to the suggestiveness of out-of-court one-on-one identifications. We are nonetheless satisfied that the suggestiveness and potential unreliability of first-time in-court identifications can be addressed, as they are with one-on-one showup identifications, on a case-by-case basis by means of cross examination and appropriate jury instructions. See id. at 303 (stressing that the threshold for suppression remains high and that "[j]uries . . . therefore will continue to determine the reliability of eyewitness identification [testimony] . . . with the benefit of cross-examination and appropriate jury instructions").

In this instance, defense counsel used cross-examination effectively to expose that Gambarrotti had misidentified the culprit in an out-of-court photo array procedure. Counsel also exposed that during witness preparation, the assistant prosecutor informed him that defendant would be in the courtroom.

The issue then turns to whether the court in this case provided "appropriate" jury instructions on the risk of misidentification with respect to the in-court identification procedure. Defendant urges us to reverse his conviction because the trial court failed to revise the model jury charge for in-court identifications sua sponte. Defendant contends for the first time on appeal that the model charge does not adequately explain the inherently suggestive nature of in-court identifications.

We believe the trial court did not commit plain error by relying on the current model jury charge. See Singh, 245 N.J. at 13 (quoting R.K., 220 N.J. at 456) (reaffirming that an unchallenged error "will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached"). When a defendant does not object to the charge, "there is a presumption that the charge was not error and was unlikely to prejudice . . . defendant's case." State v. Montalvo, 229 N.J. 300, 320 (2017) (quoting State v. Singleton, 211 N.J. 157, 192 (2012)). Furthermore, a jury charge is presumed to be proper when it tracks the model jury charge verbatim

because the process to adopt model jury charges is "comprehensive and thorough." State v. R.B., 183 N.J. 308, 325 (2005); see also State v. Whitaker, 402 N.J. Super. 495, 513–14 (App. Div. 2008) (Following the model jury charge "is a persuasive argument in favor of the charge as delivered."); Mogull v. CB Com. Real Est. Grp., 162 N.J. 449, 466 (2000) ("It is difficult to find that a charge that follows the Model Charge so closely constitutes plain error."). We thus conclude that in the absence of a specific request, the judge was under no obligation to revise, sua sponte, a model charge that was drafted in compliance with the Court's instructions in Henderson and has been used without apparent controversy since 2012.

We emphasize, moreover, that the current model charge for in-court identifications includes explicit language that addresses defendant's concern regarding "first-time" in-court identifications. Specifically, the model charge provides:

> [Charge if appropriate: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]
>
> [Model Jury Charges (Criminal), "Identification: In-Court Identification Only" (rev. July 19, 2012).]

We believe this portion of the charge satisfactorily instructs the jury with respect to any heightened risk of misidentification associated with first-time in-court identifications.

We recognize that defendant also contends that the model jury charge does not adequately address the inherent suggestiveness of the in-court identification procedure itself. As a general matter, we agree that model jury charges relating to eyewitness identifications are not written in stone and should be reviewed as appropriate to account for our evolving understanding of the reliability of eyewitness identifications and the risk of misidentification and wrongful conviction.

As we have noted on several occasions in this opinion, there are many similarities between a live one-on-one showup identification of an arrestee in police custody and a live courtroom procedure where the witness on the stand is asked by the prosecutor to identify a defendant who is sitting at the defense table. And yet, the model jury charge pertaining to out-of-court showups is markedly different from the model charge pertaining to in-court identifications in terms of the level of specificity in describing the suggestive circumstances and the risk of misidentification. The model charge pertaining to showups provides:

> [CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

> (4) Showups: In this case, the witness identified the defendant during a "showup," that is, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a "showup" or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.
>
> [Model Jury Charges (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 8, 2020).]

In contrast, the relevant portion of the model charge for in-court identifications merely provides that "[i]f you instead decide that the identification is the product of an impression gained at the in-court identification procedure, the identification should be afforded no weight."[53] Model Jury

[53] We note that this sentence is essentially identical to a sentence that appears in the model jury charge for out-of-court identifications. The critical point, however, is that the model charge for showups does not rely entirely on the

Charges (Criminal), "Identification: In-Court Identification Only" (rev. July 19, 2012). There is no analog in the model in-court identification charge to the above-quoted paragraph in the out-of-court identification charge that draws attention to the suggestiveness of showups and that provides instruction on specific circumstances the jury should consider, such as how much time elapsed after the witness last saw the perpetrator, and whether the witness was told that he or she should not feel compelled to make an identification. Most notably, in sharp contrast to the model showup instruction, the model in-court identification instruction does not state that the procedure is "suggestive in nature" or that one-on-one identifications made more than two hours after an event present a heightened risk of misidentification.

We appreciate that the language in the model charge on showups was drawn from explicit language in Henderson. 208 N.J. at 259–61. Because the Court did not specifically identify the relevant circumstances and system variables pertaining to the reliability of in-court identifications, the Committee had no authoritative text to incorporate into a model jury instruction. That circumstance, however, does not change the fact that in-court identifications are indeed "suggestive in nature," much like out-of-court showup identifications.

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rather amorphous "product of an impression" language to convey the risk of misidentification.

Defendant, at our request, submitted proposed specific revisions to the model in-court identification charge that, he says, "draw inspiration" from the model showup instruction. We are appreciative of the effort that was expended to submit a detailed and thoughtful proposal, which provided us insight into how the current model charges might be updated. We nonetheless conclude that model charges are best debated and approved in the first instance by the Model Jury Charge Committee rather than an appellate court. We do not have the benefit of the give-and-take deliberations among a wide spectrum of interested parties that can help to refine the language of a model charge. We therefore are not prepared at this time to accept, reject, or modify the specific language defendant now proposes. The situation would be different, of course, if those revisions had been submitted to the trial court as a request-to-charge at the charge conference pursuant to R. 1:8-7(b). In that event, had the trial court rejected the defense request-to-charge language, we would be obliged to determine whether the trial court had abused its discretion in doing so.

We decline to issue what would essentially be an advisory opinion on specific language that is not part of the trial record. We can, however, say that as a general proposition, we see no reason why the instructions given to jurors regarding the reliability of one-on-one in-court identifications should not be comparable, in terms of specificity, tone, and tenor, to the instructions that are

now provided to jurors about the risk of misidentification at a one-on-one showup identification.

For the foregoing reasons, we recommend that the Committee consider whether it would be appropriate to revise the current model eyewitness identification charges as they pertain to in-court identifications. We leave for the Committee to decide whether the current model instructions should be updated, and if so, the task of drafting and approving any such revisions.

V.
TAILORED JURY INSTRUCTIONS REGARDING THE ROBBERY NOTE

Defendant next argues, for the first time on appeal, that the trial court erred by failing to tailor jury instructions to explain "whether passing a note demanding money somehow constitutes an implied threat, in and of itself." We disagree and conclude that the judge properly instructed the jury on the elements of the crime of robbery.

At the charge conference, the trial judge reviewed the final jury instructions with both counsel and made rulings on requests from counsel. The judge subsequently instructed the jury on the elements of second-degree robbery, reading the model jury charge verbatim. The trial judge explained to the jury that "[a] person is guilty of robbery if in the course of committing the theft, he threatens another with or purposely puts him in fear of immediate bodily injury." The trial court also explained to the jury,

> I have used the phrase "with purpose." You may hear . . . me use that phrase or the word "purposely" again. I shall now explain what that means.
>
> A person acts purposely with respect to the nature of his conduct or a result thereof if it is a person's conscious object to engage in conduct of that nature or to cause such a result.

The trial judge further instructed the jury,

> Purpose is a condition of the mind that cannot be seen and that can be determined only by inferences from conduct, words, or acts. A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts.
>
> Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he had a certain state of mind when he engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference, which . . . may arise from the nature of defendant's acts and conduct, from all that he said and did at the particular time and place, and from all surrounding circumstances.

Viewed in their entirety, we are satisfied that the court's final instructions thus made clear that it was for the jury to decide whether the note that defendant showed to Gambarrotti purposefully placed him in fear of immediate bodily injury.

When, as in this case, there is no objection to the jury charge, the standard of review on appeal is plain error. State v. Funderburg, 225 N.J. 66, 79; R. 2:10-2. "[P]lain error requires demonstration of 'legal impropriety in the charge

prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969)). When determining whether the plain error standard has been met, the charge must be read as a whole, and the error "must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, [and] the arguments of counsel." State v. Adams, 194 N.J. 186, 207 (2008) (alteration in original) (quoting State v. Marshall, 123 N.J. 1, 145 (1991)). Furthermore, as our Supreme Court reaffirmed in Montalvo, when a defendant does not object to the jury charge, "there is a presumption that the charge was not error and was unlikely to prejudice . . . defendant's case." 229 N.J. at 320 (2017) (quoting Singleton, 211 N.J. at 182).

In applying the plain error standard in this case, we acknowledge the bedrock principle of our criminal justice system that "[a]ppropriate and proper charges to a jury are essential for a fair trial." State v. Carrero, 229 N.J. 118, 127 (2017) (quoting State v. Daniels, 224 N.J. 168, 180 (2016)). Proper jury instructions are "crucial to the jury's deliberations on the guilt of a criminal defendant." State v. Jordan, 147 N.J. 409, 422 (1997). In its jury instructions, a "trial court must give 'a comprehensible explanation of the questions that the

jury must determine, including the law of the case applicable to the facts that the jury may find.'" State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Green, 86 N.J. 281, 287–88 (1981)). But, as we recently emphasized, "there is no principle requiring that in every case a court must deliver a specifically tailored instruction relating to the facts of the case to the applicable law." State v. Cotto, __ N.J. Super. __, __ (App. Div. 2022) (slip op. at 65) (quoting State v. T.C., 347 N.J. Super. 219, 240 (App. Div. 2002)).

In Berry, we recently addressed when a trial court should go beyond the text of the applicable model jury charges by tailoring the jury instructions to the distinctive circumstances of the case. 471 N.J. Super. at 114–15. We explained:

> "[N]ot every failure [to tailor jury instructions] is fatal." State v. Tierney, 356 N.J. Super. 468, 482 (App. Div. 2003) (quoting State v. Bilek, 308 N.J. Super. 1, 10 (App. Div. 1998)). When the facts are neither complex nor confusing, a court does not have to provide an intricate discussion of the facts in the jury charge. Ibid. (citing State v. Morton, 155 N.J. 383, 422 (1998)); see also State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999) (holding that although a more precise molding of the jury instructions to the facts would have been preferable, the charge was sufficient because "as a whole, [it] was consistent with the factual theories advanced by the parties").
>
> [Id. at 107–08 (alterations in original)].

Nothing in this case was so confusing, misleading, or complex as to warrant a tailored jury instruction as defendant now suggests.

In State v. Robinson, our Supreme Court reaffirmed that trial courts possess discretion in deciding whether to tailor jury charges. 165 N.J. 32, 42 (2000). The Court stressed, moreover, that trial judges are not required to comment on weaknesses in the State's evidence. Id. at 43. The Court explained that

> it is important . . . the jury be made aware of any weaknesses in the State's evidence, identification or otherwise. To ensure that a defendant is not convicted unless guilt is proven beyond a reasonable doubt, the jury must be assisted in critically evaluating the State's evidence. However, "our judicial system confers this responsibility upon defense counsel rather than the trial court." We look to defense counsel, not the court, to probe the State's evidence with vigor and diligence, and our adversarial system depends on counsel for that purpose.
>
> [Id. at 44–45.]

We add that the gravamen of the defense in this case was that defendant had been misidentified and that he was not the person who robbed the bank. If the defense wanted to focus the jury's attention on the content and impact of the note that was shown to the bank teller, rather than on the identity of the note's author, it was for defense counsel, not the trial court, to make that argument.

In sum, the trial judge in no way abused his discretion by not commenting on the meaning of the ominous note shown to Gambarrotti, especially in the absence of a request by defendant to do so and given that the predominant

defense theory was misidentification of the perpetrator. Accordingly, the trial court did not commit plain error by not tailoring the model jury charge sua sponte.

VI.
EXTENDED-TERM SENTENCE AS A PERSISTENT OFFENDER

Defendant next contends that the trial court erred in imposing an extended term of imprisonment as a persistent offender under N.J.S.A. 2C:44-3(a). Defendant argues that the judge double-counted prior convictions when fixing the term of imprisonment within the extended-term range and improperly considered prior arrests that did not result in convictions. The record belies defendant's sentencing contentions. His extensive criminal history speaks for itself, and the trial judge followed the procedures spelled out in State v. Pierce, 188 N.J. 155 (2006), for imposing a persistent offender extended term.

As a general matter, sentencing decisions are reviewed under a highly deferential standard. See State v. Roth, 95 N.J. 334, 364–65 (1984) (holding that an appellate court may not overturn a sentence unless "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience"). Our review is therefore limited to considering:

> (1) whether guidelines for sentencing established by the Legislature or by the courts were violated; (2) whether the aggravating and mitigating factors found by the

> sentencing court were based on competent credible evidence in the record; and (3) whether the sentence was nevertheless "clearly unreasonable so as to shock the judicial conscience."
>
> [State v. Liepe, 239 N.J. 359, 371 (2019) (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)).]

"[A]ppellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Relatedly, a trial court's exercise of discretion that is in line with sentencing principles "should be immune from second-guessing." State v. Bieniek, 200 N.J. 601, 612 (2010). We add that "[a]dult arrests that do not result in convictions may be 'relevant to the character of the sentence . . . imposed.'" State v. Rice, 425 N.J. Super. 375, 382 (App. Div. 2012) (quoting State v. Tanksley, 245 N.J. Super. 390, 397 (App. Div. 1991)).

N.J.S.A. 2C:44-3 provides that

> [t]he 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 it finds one or more of the grounds specified in subsection a., b., c., or f. of this section.

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

> The 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 21 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 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

When evaluating whether a defendant is a "persistent offender," courts must examine the "defendant's prior record and his or her age at the time of any prior convictions, facts that the State asserts are the who, what, when and where, . . . of those prior convictions and that do not entail any additional findings related to the offense for which the defendant is being sentenced." Pierce, 188 N.J. at 162 (citations and quotations omitted).

The Court in Pierce further outlined the procedure for imposing an extended term, explaining that

> [t]he sentencing court must first, on application for discretionary enhanced-term sentencing under N.J.S.A. 2C:44–3(a), review and determine whether a defendant's criminal record of convictions renders him or her statutorily eligible. If so, then the top of the range of sentences applicable to the defendant . . . becomes the top of the enhanced range. Thereafter, whether the court chooses to use the full range of sentences opened up to the court is a function of the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public. Consideration of the protection of the public occurs during this phase of the sentencing process.

[Id. at 168.]

The Court further noted that

> once the court finds that those statutory eligibility requirements are met, the maximum sentence to which defendant may be subject . . . is the top of the extended-term range. Stated differently, 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. By recognizing that the top of the extended-term range is the "top" applicable to a persistent offender, we do not make mandatory a defendant's sentencing within the enhanced range. Rather, we merely acknowledge that the permissible range has expanded so that it reaches from the bottom of the original-term range to the top of the extended-term range. Where, within that range of sentences, the court chooses to sentence a defendant remains in the sound judgment of the court—subject to reasonableness and the existence of credible evidence in the record to support the court's finding of aggravating and mitigating factors and the court's weighing and balancing of those factors found.
>
> [Id. at 169.]

In the present matter, the State filed a motion to sentence defendant to a discretionary extended term as a persistent offender. In support of that application, the State provided evidence of defendant's multiple prior convictions,[54] including (1) a 1987 robbery conviction from Missouri; (2) a New

[54] We note that the trial court found on the record that defendant had been released on his most recent New York conviction on March 7, 2007. The present

York conviction for robbery; (3) a 1987 conviction for third-degree assault; (4) a 2001 conviction from New York for possession of a forged document; and (5) a 1998 conviction for bail jumping.

The trial court made the following findings:

> So[,] the defendant's record is as follows. I'm going to read from the presentence report. He has [twenty-four] adult arrests. According to the—and I'm quote—I'm reading from the presentence report. According to the defendant's out-of-state rap sheet, he was arrested four times in Missouri between 1986 in 1987. All four arrests included robbery and other related charges. Two of the dispositions are unknown however, the defendant was convicted of two superior court matters. These convictions resulted in terms of incarceration.
>
> . . . .
>
> The defendant was arrested [seventeen] times in New York according to his out-of-state rap sheet. He was found guilty of charges including issuing a bad check with knowledge of insufficient funds six times, scheme to defraud, second-degree, possession of a forged instrument, second degree, two-time; petty larceny two times; criminal, criminal impersonation, a second-degree crime; bail jumping; forgery, second-degree, robbery, third-degree; and grand larceny, second-degree. In addition, he had four of those arrests resulted in four conditional discharges with four of those arrests and convictions being terms of incarceration as well as fines or fees were imposed.

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bank robbery was committed on January 14, 2017. Accordingly, defendant's last release from confinement was "within 10 years of the date of the crime for which defendant is being sentenced." N.J.S.A. 2C:44-3(a). We add that defendant on appeal does not contend that he is ineligible for a persistent-offender extended term.

> So[,] the State's argument has much merit that the criminal activity has been ongoing for [thirty] years.
>
> . . . .
>
> So as result of that, the Court finds that the aggravating factors are [three], the risk the defendant will commit another offense; No. [six], the extent of the defendants prior criminal record, and the seriousness of the offense for which he has been convicted; No. [nine], the need to deter this defendant and others from violating the law.

The trial judge noted that a robbery charge "goes to a very deep issue in our society." Furthermore, the judge reasoned that defendant's "consistent and repetitive[]" robbery crimes require a "strong public statement." See Pierce, 188 N.J. at 170 (Trial courts "may consider the protection of the public when assessing the appropriate length of a defendant's base term as part of the court's finding and weighing of aggravating factors and mitigating factors.").

On this record, we find no abuse of discretion in classifying defendant as a persistent offender, in weighing the applicable sentencing factors, or in imposing a fifteen-year prison sentence, which is at the midpoint of the extended-term range for a second-degree conviction. See N.J.S.A. 2C:43-7(a)(3). In view of defendant's extensive criminal record, that prison sentence in no way shocks the judicial conscience. See Roth, 95 N.J. at 364–65.

VII.
ABILITY TO PAY RESTITUTION

Finally, defendant argues that the case must be remanded for a hearing on defendant's ability to pay $5,772.00 in restitution. We agree. N.J.S.A. 2C:44-2(b) provides, "[t]he court shall sentence a defendant to pay restitution in addition to a sentence of imprisonment or probation that may be imposed" when "(1) [t]he victim, or in the case of a homicide, the nearest relative of the victim, suffered a loss; and (2) [t]he defendant is able to pay or, given a fair opportunity, will be able to pay restitution." In considering the payment amount and method, "the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose." N.J.S.A. 2C:44-2(c)(1). Furthermore, the court may look to the defendant's likely future earnings. N.J.S.A. 2C:44-2(c)(2). Restitution shall be set "so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay." Ibid.

Our Supreme Court has explained that sentencing courts are afforded "considerable discretion" when evaluating a defendant's ability to pay. State v. Newman, 132 N.J. 159, 169 (1993). However, "[i]n order to impose restitution, a factual basis must exist and there must be an explicit consideration of defendant's ability to pay." State v. Scribner, 298 N.J Super. 366, 372 (App. Div. 1997) (citing State v. Corpi, 297 N.J. Super. 86, 93 (App. Div. 1997)). The

State acknowledges that in this instance, the trial court did not make findings concerning defendant's ability to pay. We therefore remand the matter for the sole purpose of conducting a hearing to determine defendant's ability to pay restitution. We do not retain jurisdiction. In all other respects, we affirm defendant's conviction and sentence.

To the extent we have not addressed them, any additional arguments raised by defendant lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2).

Affirmed in part and remanded in part.