SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0239-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTOPH[1] G. ORSINI,

Defendant-Appellant.

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Argued April 25, 2022 – Decided May 6, 2022

Before Judges Sabatino, Rothstadt and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 18-09-0838.

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

Patrick R. McAvaddy, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County

[1] The judgment of conviction lists defendant's first name as "Christoph" but the parties' appellate briefs identify him as "Christopher."

Prosecutor, attorney; Patrick R. McAvaddy, on the brief).

PER CURIAM

This prosecution involved separate charges that arose from defendant Christoph G. Orsini's encounter with the victim while reaching into her parked car to seize her purse, their ensuing struggle, and his subsequent attempt to flee by driving away in a red car. According to the State, defendant had recently stolen that red car from someone else.

Initially, the trial court severed the stolen car charges from the purse-related charges, to be tried separately. On interlocutory review, we summarily reversed, directing that the charges be tried together. We did so because defendant's use of the stolen car to flee from the scene of the purse robbery could be considered part of a common plan or scheme admissible under N.J.R.E. 404(b).

Tried by a jury, defendant was acquitted of robbery but found guilty of the lesser included offense of third-degree theft, N.J.S.A. 2C:20-3(a), with respect to his efforts to steal the purse from the victim's car. As for the other allegations, the jurors acquitted defendant of theft of the red getaway car, but convicted him instead of third-degree receipt of stolen property, N.J.S.A. 2C:20-7(a).

The judge who presided over the trial imposed on defendant, a persistent offender, two extended custodial terms of ten years, to be served concurrently. The sentences were subject to a five-year parole disqualifier under the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. This appeal ensued.

I.

The State's proofs showed that, in broad daylight, defendant reached into the open passenger's-side window of the victim's car while she was parked on a street in Jersey City on May 23, 2017. He grabbed her purse and a struggle over it ensued. Defendant was able to grab the victim's wallet out of the purse and $50 in cash from the cupholder. He ran down the street and drove away in the red car.

The victim drove after defendant in a car chase for five to ten minutes. She called in his license plate and description to a 9-1-1 operator. Minutes later, police apprehended defendant within a few blocks of the incident. Defendant appeared to meet the description the victim provided of her attacker of a bald Black male, except he was not wearing what the victim had described as a gray shirt.

The police brought the victim over to defendant for a show-up identification. She stated she was "100 percent" sure he was her attacker. The

police found a gray shirt with defendant's DNA in a trash can a few blocks from the scene. The wallet and money were never recovered. The police also learned that the red car had been reported stolen the day before.

Much of the incident was filmed on surveillance cameras in the neighborhood. The video recordings were played for the jury.[2] The body of the thief appearing on the video, a bald Black male, is consistent with that of defendant. However, the quality of the videos is grainy, and does not enable one to discern the thief's facial features.

Defendant did not testify, and he did not call any witnesses. The defense theme at trial was that he was misidentified.

On appeal, defendant presents the following issues in his brief:

> POINT I
>
> THE TRIAL COURT ERRED IN ADMITTING THE IDENTIFICATION [BY THE VICTIM] WITHOUT HEARING ANY TESTIMONY ON RELEVANT ESTIMATOR VARIABLES.
>
> A. THE COURT ERRED IN PREMATURELY ENDING THE WADE[3] HEARING.

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[2] We have viewed the surveillance footage as part of the evidence supplied on appeal.

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

B. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE UNRELIABLE IDENTIFICATION.

POINT II

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE PERMISSIBLE, NON-PROPENSITY USE OF THE MULTIPLE CHARGES IN THE INDICTMENT.

POINT III

THE ADMISSION OF HEARSAY STATEMENTS BY AN UNNAMED, NON-TESTIFYING WITNESS VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION.

POINT IV

DEFENDANT'S SENTENCE OF TWO MAXIMUM EXTENDED-TERM SENTENCES WITH DISCRETIONARY PAROLE DISQUALIFIERS IS BOTH ILLEGAL AND EXCESSIVE.

For the reasons that follow, we conclude none of these arguments have merit, except we remand the matter to revise the judgment of conviction to reflect only one extended-term sentence as prescribed by statute.

II.

A.

The first set of issues raised by defendant concern his claim that the trial court improperly admitted evidence of the victim's identification of him as her attacker. We are satisfied the evidence was properly admitted.

As we noted above, the victim positively identified defendant to the police in a show-up identification that was conducted about thirty minutes after she struggled with defendant in her car. The victim reiterated her identification of defendant in the courtroom when she testified during the trial.

Our Supreme Court set forth the guiding principles for eyewitness identifications in State v. Henderson, 208 N.J. 208 (2011). The Court in Henderson outlined various factors—known as "system" variables and "estimator" variables—that can affect the reliability of an out-of-court identification. Id. at 248-72. System variables are factors within the control of the criminal justice system, such as suggestive aspects of lineup and photo array procedures. Id. at 248-61. Estimator variables are factors outside of the control of the criminal justice system, such as the distance between a victim and an assailant, poor lighting, stress, personal characteristics, and memory decay. Id. at 261-72.

A defendant can request a pretrial hearing to determine whether the out-of-court identification is admissible at trial. "[T]o obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification." Id. at 288. That "evidence" must "be tied to a system—and not an estimator—variable." Id. at 288-89.

If defendant has met his burden in showing "some evidence" of suggestiveness—"step one"—then a full hearing, including consideration of the estimator variables present at the identification, will be held to determine the admissibility of the identification—"step two." Id. at 290-91. However, if there is insufficient evidence of a suggestive identification procedure, the court stops its analysis, and does not explore the estimator variables. Id. at 291.

The Court in Henderson recognized that show-up identifications, by their very nature, involve some degree of suggestiveness. Id. at 259-60. However, the Court did not declare all show-up identifications inadmissible. Instead, the Court described considerations that can affect the reliability of such a procedure. Among other things, the Court noted that "the risk of misidentification is not heightened" if, as is the case here, the show-up is conducted within two hours of the event perceived by the eyewitness. Id. at 259. Additionally, the Court has found it significant whether the police officers conducting the show-up make

suggestive statements to the eyewitness, whether the suspect is presented in handcuffs, whether the witness had a sufficient opportunity to have viewed the person before the show-up, whether the show-up involves a cross-racial identification, and other factors. Id. at 259-261, 264, 267.

In this case, Judge Nesle A. Rodriguez presided over a pretrial "Wade" hearing to evaluate the admissibility of the victim's show-up identification of defendant. The State presented testimony at the hearing from Detective Jose Santana of the Jersey City Police Department, one of the officers who responded to the incident. After learning that a potential suspect had been apprehended in the neighborhood, Officer Santana drove the victim to that location. Officer Santana testified that he told the victim the person she would be shown "may or may not be" the person involved in the incident. He also told her that she should not feel "compelled" to make an identification, and that she should not identify the person unless she was "a hundred percent certain."

As described in Officer Santana's testimony, when he and the victim arrived at the show-up location, defendant was standing on the sidewalk flanked by two other officers, although he was not in handcuffs. Immediately after seeing defendant, the victim "animated[ly]" told Officer Santana, "I'm a hundred percent sure that that's the guy who robbed me." According to Officer Santana,

the victim was "calm" and "seemed fine" when making the identification. Officer Santana testified that he did not know who defendant was prior to conducting the identification, and that he did not influence or pressure the victim "at all" into making the identification.

Officer Santana did not fill out a written report of the show-up until about three and a half hours later. When asked about the delay, Officer Santana explained that he spent that time performing other tasks, including bringing the victim to the police station, canvassing the area of the crime, recovering defendant's shirt from the trash can, viewing surveillance footage at two locations, and waiting for evidence to be collected and processed.

After hearing this account from Officer Santana, Judge Rodriguez found it unnecessary to proceed with further testimony from the victim. As authorized by Henderson, the judge was satisfied by the evidence from this "step one" hearing that the show-up procedure was not unfairly suggestive and that the victim's identification would be admissible at trial.

In her oral opinion, Judge Rodriguez enumerated seven reasons that supported her finding: (1) Officer Santana gave a neutral pre-identification instruction to the witness; (2) the victim stated she was one hundred percent certain of the identification; (3) the inconsistencies on the identification

worksheet each had a reasonable explanation, and do not take away from the overall reliability of the identification; (4) the show up was conducted within thirty minutes of the crime; (5) the victim had a sufficient opportunity to view defendant during the encounter, and she was able to give a thorough description of him; (6) the victim did not appear to be under the influence of any drugs or alcohol; (7) there is no issue of cross-racial biases because both the victim and defendant are Black; and (8) the victim's description of the perpetrator matched the appearance of defendant.

At trial, the victim described on direct examination how the police had conducted the show-up identification. She confirmed that the police told her that they had "someone detained" and that when defendant was presented to her, she was "one hundred percent certain" he was the person who had attacked her, even though he was no longer wearing the same shirt. She also identified a photograph of the gray shirt that Officer Sanchez had recovered from the trash can as being similar to the shirt she had recalled her attacker wearing.

Defense counsel vigorously cross-examined the victim, attempting to undermine her identification of defendant. Among other things, defense counsel probed into the short amount of time the victim had to observe her attacker, her varying distance from him, and her focus at times on other objects including her

purse. Counsel also attempted to impeach the victim by highlighting her description to the police of her attacker having "big ears" and a "skinny nose," and then having defendant stand at trial and ostensibly show the jury that he lacks those features.

During the jury charge, the trial court provided the jurors with model instructions on eyewitness identification, consistent with Henderson. Defendant does not challenge the sufficiency of those instructions on appeal.

On appeal, defendant argues Judge Rodriguez improperly terminated the pretrial hearing and was required to hear further evidence, including testimony of the victim. Defendant further argues that, based on the record that was developed, the show-up identification was unduly suggestive and the identification evidence should have been excluded at trial. Defendant argues we should reverse the court's ruling on admissibility and order a new trial. In the alternative, defendant urges us to remand and direct the trial court to reconvene and complete other steps of the Wade hearing focusing on estimator variables, and reconsider its ruling in light of that additional testimony.

In reviewing this issue on appeal, our standard of review of a ruling on a motion to suppress an out-of-court-identification "is no different from our review of a trial court's findings in any non-jury case." State v. Wright, 444 N.J.

Super. 347, 357 (App. Div. 2016) (citing State v. Johnson, 42 N.J. 146, 161 (1964)). "The aim of the review at the outset is . . . to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." Ibid. (citing Johnson, 42 N.J. at 162). We consider de novo defendant's claims of legal error concerning the identification procedures and the pretrial Wade hearing. Id. at 357. However, we give due deference to the court's factual findings and credibility assessments. Id. at 356-57.

Having considered defendant's arguments accordingly, we affirm the admission of the victim's identification, substantially for the multiple reasons set forth by Judge Rodriguez in her oral opinion. We are also satisfied, as a matter of law, that the judge was not required under Henderson to proceed beyond "step one" of the pretrial hearing, as the officer's testimony was ample to show that system variables did not materially taint the show-up procedure.

Defendant criticizes the police for telling the victim at the show-up that she would have to be "one hundred percent" certain of any identification she made. We see nothing wrong with that sort of comment. The Court in Henderson noted that the eyewitness's degree of confidence is a factor that bears on admissibility. 208 N.J. at 236-37, 254-55. Defendant argues the officer

should not have mentioned a numerical percentage to the victim. We discern no prejudice from that, particularly because the officer appropriately made clear to the eyewitness that she did not have to make an identification, and that the person who had been detained may or may not be the perpetrator.

Defendant also speculates the victim might have heard a prejudicial police radio dispatch before she identified defendant, but there is no evidence confirming that she did. Defendant further contends it was unduly suggestive for the victim to have seen him flanked by two police officers, and maintains the police should have only placed one officer next to defendant. We reject this contention. Defendant was not seen in handcuffs. Moreover, the police sensibly had two officers flanking defendant, who reportedly had a physical struggle with the victim and who had fled the scene.

There is no need for the matter to be remanded to the trial court to continue additional phases of the Wade hearing. As we have already noted, the trial court was legally authorized under Henderson to conclude the hearing at "step one." In addition, we note that five years have passed since this incident, and the victim was already questioned extensively at trial by both sides. Little would be gained at this point by recalling the victim to go over her account once again. The record shows her confidence in her identification has not wavered, and that

she had a sufficient opportunity to observe her attacker from both the front and behind.

Defendant cites to State v. Anthony, 237 N.J. 208, 232 (2019), as illustrating a scenario where the Court on appellate review remanded an identification issue for a hearing several years after the identification had been made. The present case is different in that the Court in Anthony announced new legal standards requiring pretrial hearings when identification procedures are not sufficiently recorded—which is not at issue here—and no pretrial hearing had occurred at all in Anthony. Here, a pretrial hearing was conducted, but was terminated in accordance with Henderson after it became clear that structural factors did not make the show-up unduly suggestive.

B.

Defendant's second argument, which was not raised below, is that the trial court, sua sponte, should have instructed the jurors that they should not consider the State's evidence about the stolen car in evaluating his guilt with respect to the purse incident, except only to the extent they might find the two matters were part of a common plan or scheme. Because defendant did not request such a special jury instruction at trial, we review this argument through the limited prism of the plain error doctrine. State v. Macon, 57 N.J. 325, 337-38 (1971).

We find no error, let alone plain error, concerning the absence of this instruction. As is customary in criminal trials in which multiple alleged offenses occurring at different times and places have been joined in the same indictment, the trial judge here issued an instruction that tracked the model jury charge for such multi-incident cases. See Model Jury Charge (Criminal), "Criminal Offenses to Where More than One Defendant" (2013). The judge instructed the jury:

> There are three offenses charged in the indictment. They are separate offenses by separate counts in the indictment. In your determination of whether the State has proven the defendant guilty of the crimes charged in the indictment beyond a reasonable doubt, the defendant is entitled to have each count considered separately by the evidence which is relevant and material to that particular charge based on the law as I will give it to you.
>
> [(Emphasis added).]

Defendant now argues on appeal that because this court on interlocutory review had allowed the stolen-car charges to be included under N.J.R.E. 404(b)'s legal exception for a "common plan or scheme," the trial judge was compelled, sua sponte, to issue a "Rule 404(b) instruction" to the jury. We disagree. The evidence of the car theft was not solely presented by the State at trial as proof of a previous "bad act." That evidence was also presented on its own terms, that

is, to establish that defendant was guilty of stealing that car. As the judge rightfully explained to the jurors, the State needed to prove that allegation beyond a reasonable doubt, a proof standard we note is more stringent than the "clear and convincing" standard for Rule 404(b) evidence set forth in State v. Cofield, 127 N.J. 328, 338.

Had the additional instruction now hypothesized by defendant been provided, the jurors easily could have been confused. In essence, the judge would have told the jurors to consider the State's evidence concerning the stolen car in two different ways: (1) on a plenary, unrestricted basis as to the car theft allegations, but (2) on a restricted "common scheme or plan" basis as to the purse incident. Although this might have theoretical cogency, we doubt such an unrestricted/restricted usage concept would have been absorbed by the laypersons on the jury.

In any event, we discern no manifest prejudice. By their verdicts acquitting defendant of the most serious charges concerning both the purse incident and the stolen car incident and instead finding him guilty of lesser offenses, the jurors demonstrated their capacity to sift the evidence carefully and discriminate among the various offenses. The jurors did not find defendant guilty "across the board" of the most severe charges, animated by some

hypothesized perception that he has a propensity to be a wrongdoer. Instead, as instructed, the jurors obviously evaluated the case charge-by-charge, based on the evidence corresponding to that charge.

C.

As to his third argument, defendant contends the trial court erred by not striking an officer's testimony relating that a bystander told the police at the scene which direction she had seen a person running from the red car. When the testifying officer described this out-of-court statement, defense counsel objected on the grounds of inadmissible hearsay, and the judge sustained the objection. The judge found that the bystander's statement was not admissible for its truth, but could be admitted to show what the officer did (i.e., pursue the suspect in that direction) as the result of hearing the statement. The prosecutor then reframed the question in accordance with that limitation, and the officer then related what the officers did. No motion to strike or request for a curative instruction was made.

We detect no basis to set aside the conviction based on this brief exchange. The "upon information received" limitation imposed by the court was consistent with case law. State v. Bankston, 63 N.J. 263, 268 (1973). Moreover, the jurors' exposure to the bystander's comment was brief, and of marginal consequence in

light of the substantial direct evidence of defendants' guilt, including the victim's testimony, the surveillance videos, and the DNA evidence. Any error was harmless.

D.

We need not say much about defendant's arguments that his sentence is excessive, and that the trial judge did not fairly apply the pertinent aggravating and mitigating factors.

As the trial judge noted, this was defendant's sixteenth indictable conviction. Because of defendant's extensive previous criminal record, the court had the statutory authority under N.J.S.A. 2C:44-3 to impose a discretionary extended term sentence. We discern no manifest error in how the judge reasonably identified and weighed the aggravating factors urged by the State and the mitigating factors urged by defendant. Cf. State v. Case, 220 N.J. 49 (2014). The ten-year sentences imposed do not shock the conscience. See State v. Roth, 95 N.J. 334, 365 (1984) (appellate courts may not substitute their judgment for that of the sentencing court, unless the application of the sentencing guidelines to the facts makes the sentence "clearly unreasonable so as to shock the judicial conscience"). One modest correction is needed. The trial court was prohibited under N.J.S.A. 2C:44-4(a)(2) from imposing more

than one discretionary extended term sentence. See State v. Robinson, 217 N.J. 594, 664-65 (2014). The State does not oppose this point. Hence, the trial court shall revise the judgment of conviction to make this correction.

To the extent we have not addressed them, all other points raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed, but remanded to correct the judgment of conviction.