SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0322-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY C. FIGUEROA,

Defendant-Appellant.

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Submitted November 1, 2022 – Decided November 18, 2022

Before Judges Sumners, Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 16-09-0787.

Joseph E. Krakora, Public Defender, attorney for appellant (Molly O'Donnell Meng, Assistant Deputy Public Defender, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (William P. Cooper-Daub, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Anthony Figueroa appeals from his conviction of drug-related and weapons offenses, and his sentence.

Figueroa and his wife, co-defendant Nahomi Collazo, were charged with several defendants after an extensive law enforcement investigation into drug activity in Cumberland County. Figueroa and Collazo were severed from the other defendants upon the State's motion. Figueroa argues that the trial court erred by permitting two police officers to testify that his voice was on recordings of several phone calls in which he allegedly planned drug sales with one of the severed defendants, because the officers had no personal knowledge of the sound of his voice. He further contends that the court erred by not providing a specific jury instruction on voice identification. Figueroa also asserts cumulative error. Figueroa additionally contends he must be resentenced because the trial court improperly double counted his prior criminal record. We affirm.

I.

From the fall of 2015 into 2016, the Organized Crime Bureau of the Cumberland County Prosecutor's Office and local police departments investigated an alleged network of individuals distributing heroin, cocaine, and marijuana in the county. As part of this investigation, police obtained warrants

to monitor several telephones, including two cellular phones linked to Carlos Thomas, who was later indicted with defendants.

On twenty-two calls recorded pursuant to the wiretap warrants, officers heard Thomas discussing drug transactions with a man referred to as "Tone." The calls were played for the jury. One of the two phones Tone used to talk with Thomas had a number ending in 7325. This phone's origin was traced to a Cricket Wireless store in Vineland; Cricket Wireless's records stated that it was purchased by "Noami Calaza." The other phone could not be linked to any specific individual.

Vineland Police Detective Jose Torres, who was assigned to listen to the recorded calls, recognized Tone's voice as Figueroa's voice. Torres knew Figueroa from having heard him speak twice before: once for several hours in 2012 and once for twenty minutes a year or two later.[1]

Detectives linked Figueroa to an apartment on East Wood Street in Vineland, which was being rented by his then girlfriend, Collazo.[2] The

[1] These prior interactions occurred during other investigations. The State and Collazo were barred from eliciting detailed testimony about Figueroa's history with police.

[2] The two married at some point after their arrest.

apartment had previously been leased to Thomas, who recommended Collazo to the landlord as a tenant.

On January 12, 2016, after intercepting three calls in which Thomas and Figueroa talked about meeting for a drug transaction, officers watched Thomas drive to Collazo's apartment. After arriving, Thomas called Figueroa and told him he was outside. Thomas went inside the building, emerging twelve minutes later. On January 25, 2016, following two more calls where Thomas and Figueroa planned a drug transaction, officers again followed Thomas to the apartment. Thomas went inside, then came out eleven minutes later carrying a yellow shopping bag.

Investigators executed a search warrant for the apartment at 6:33 a.m. on February 5, 2016. Figueroa, Collazo, and Collazo's children were present. Officers found a backpack containing bags of marijuana, wax folds of heroin, cocaine, a Ruger handgun, and bullets inside a closet. In other locations in the apartment, officers found additional marijuana and cocaine, a grinder, a scale, small plastic baggies, and other paraphernalia. In total, 3.34 ounces of marijuana, 1.3 ounces of heroin, and 1.37 ounces of cocaine were recovered. Police also found $13,145.86 in cash, including $1,965 in Figueroa's pocket and $10,893 in Collazo's purse.

A Cumberland County grand jury issued an indictment charging sixteen individuals, including Figueroa and Collazo, with various drug-related offenses. Figueroa and Collazo were charged with second-degree possession with intent to distribute more than a half ounce of cocaine or heroin; third-degree possession with intent to distribute more than an ounce of marijuana; third-degree possession of cocaine or heroin; fourth-degree possession of more than fifty grams of marijuana; and second-degree possession of a gun while committing possession with intent to distribute a controlled dangerous substance (CDS). Figueroa was additionally charged with second-degree conspiracy to distribute CDS; two counts of third-degree conspiracy to distribute CDS; fourth-degree conspiracy to possess CDS; and second degree certain persons not to possess weapons.

Following a multi-day Driver[3] hearing, the court determined the wiretapped phone calls submitted by the State were admissible. The court also granted the State's motion to authenticate, and voice identify, wiretapped calls between Figueroa and a former co-defendant.

Figueroa and Collazo were tried together before a jury over seven days. At the close of the State's case, the court denied their motions for acquittal. The

[3] State v. Driver, 38 N.J. 255 (1962).

jury convicted Figueroa and Collazo of all charges against them. Following merger, Figueroa was sentenced to an extended eighteen-year term subject to a nine-year period of parole ineligibility on the second-degree possession with intent to distribute CDS, a consecutive ten-year term subject to a five-year period of parole ineligibility on the second-degree certain person offense, and two concurrent terms, yielding an aggregate twenty-eight-year term subject to a fourteen-year period of parole ineligibility. This appeal followed.

Figueroa raises the following points for our consideration:

> POINT ONE
>
> THE RULES OF EVIDENCE AND THE [FIGUEROA'S] DUE PROCESS RIGHTS WERE VIOLATED BY THE REPEATED ADMISSION OF HEARSAY STATEMENTS THAT [FIGUEROA] WAS THE PERSON SPEAKING IN THE WIRETAP RECORDINGS.
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> POINT TWO
>
> THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON VOICE IDENTIFICATION, AS REQUESTED BY THE STATE AND DEFENSE COUNSEL.
>
> POINT THREE
>
> THE CUMULATIVE EFFECT OF THE AFOREMENTIONED ERRORS DENIED [FIGUEROA] A FAIR TRIAL.

POINT FOUR

IN THE ALTERNATIVE, THE MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT IMPROPERLY DOUBLE-COUNTED [FIGUEROA'S] PRIOR RECORD.

II.

Figueroa argues the court erred by permitting Lieutenant Michael Donato and Detective Ryan Breslin to testify that that he was one of the people speaking in the wiretapped calls played for the jury. He asserts that neither officer had personal knowledge that it was his voice was on the calls, and that their testimony was inadmissible hearsay. Figueroa contends that Breslin and Donato's testimony unfairly bolstered Torres's identification, giving the jury "the impression that three officers, not one, definitively knew who was speaking on the tapes."

The trial court held a pretrial "voice identification hearing" for the wiretapped phone calls between Thomas and "Tone." The State called Breslin to testify at the hearing that Tone was Figueroa and that it was his voice on the recorded calls. It showed Breslin a surveillance log prepared by Torres, who had listened to the calls; Breslin testified that in the log, Torres identified Tone as Figueroa. The court asked the prosecutor whether Torres would be called to testify about this identification himself. The prosecutor explained that Torres

had been on medical leave for "a period of months" and would be available to testify at trial, but not at the hearing. Breslin continued to testify as to the content of specific calls between Thomas and Tone and investigators' observations of Thomas driving to Collazo's apartment after speaking with Tone.

Figueroa's counsel conceded that the State made a prima facie showing for the voice identification. In its decision, the court noted it had questioned whether Torres would be available to testify at trial, because Breslin's testimony that Torres identified Figueroa as Tone was hearsay. The court found that the State made a prima facie showing that the voice on the calls was Figueroa's voice. However, the court cautioned that at trial, "there would have to be admissible evidence presented . . . for the jury to be able to determine whether or not that is actually" Figueroa.

In his opening statement, Figueroa's counsel asserted that his client was not on any of the wiretapped calls, and that his participation in those calls was in "dispute." On May 14, 2019, Breslin was called to testify about his participation in the wider drug investigation. While discussing the wiretapped phone calls, Breslin testified that Torres identified Figueroa as "Tone," one of the participants on twenty-two of the calls. Breslin also testified that he

personally was able to identify Thomas as the other participant because he had met and spoken with him. The prosecutor then said that the State would play the calls.

At that point, Figueroa's counsel objected to Breslin's testimony regarding Torres's identification of his client on hearsay grounds. However, counsel then said, "If Detective Torres is going to testify, I'll withdraw my objection." The prosecutor explained that he had wanted to call Torres to testify while playing the calls, but that Torres was attending training that week. The State still intended to call Torres later. The court remarked that if counsel had objected right when Breslin began to mention Torres's identification of Tone as Figueroa, it "would have sustained [the objection] at that point." It stated that the "problem" was that Breslin's testimony was now "already in front of the jury" and could not be unheard. The prosecutor reiterated that Torres was "absolutely going to testify."

Figueroa's counsel stated that Torres testifying would "alleviate this line of inquiry." He said it "didn't bother [him] as much because [he] knew Torres was going to testify anyway and [he] knew the outcome of Torres's testimony." The court stated that if Torres did not eventually testify, it would strike Breslin's testimony about the voice identification, but that it did not know what it could

do "at the moment." Figueroa's counsel replied, "There's nothing you can do. The bell's already been rung." He stated that if Torres did not testify, the objection would be renewed, and the court agreed that at that point it would "absolutely . . . take some action."

The trial continued with the State playing the calls to the jury. Before each call was played, Breslin testified as to the date, length, and phone numbers associated with it, and said that the "participants were Carlos Thomas and Anthony Figueroa." Figueroa's counsel did not object to this testimony.

During cross-examination, Figueroa's counsel asked Breslin whether he had "any independent knowledge" of whether the person talking to Thomas on the phone was his client. Breslin said no and confirmed that his information came only from what Torres had reported. Counsel asked, "So if Detective Torres was wrong in his analysis, then as a result of that, your testimony yesterday would also be wrong, in relationship to who's on the other end of the phone. Is that fair to say?" Breslin agreed that would be so.

Torres testified on May 16, 2019. He identified one of the voices on each of the twenty-two calls as Figueroa's voice. On cross-examination, Figueroa's counsel pointed out that in a January 12, 2016, report Torres stated he "believed" that the voice belonged to Figueroa. Torres testified that he "definitely used the

wrong word," and that he was "100 percent certain" that he had heard Figueroa on the calls.

Donato testified about the wiretap investigation into the greater drug operation, and while doing so he referred to the calls played for the jury as being between Thomas and Figueroa. Figueroa's counsel did not object to this testimony. On cross-examination, Donato acknowledged his belief that Figueroa participated in those calls was "based primarily on information given to [him] by Detective Torres". Counsel also asked Donato if his testimony that it was Figueroa would be wrong if it turned out Torres's identification was incorrect. Donato replied he did not believe that Torres was "the ultimate determining factor" in identifying Figueroa, and there were "other steps that may have been taken" to link Figueroa to the drug investigation. However, he acknowledged that Torres's identification was a "major" factor.

During summation, Figueroa's counsel highlighted the fact that Breslin had no personal knowledge about who "Tone" was or whether Figueroa's voice could be heard on the wiretapped calls and had only repeated information he received from Torres. Counsel also pointed out the discrepancy between Torres's report during the investigation that he "believed" Figueroa was on the calls and his trial testimony that he was certain about it. Counsel asserted that

Torres "lied" and "fabricated" the identification and argued this falsehood was the only thing linking Figueroa to any drug ring.

A trial court's evidentiary rulings "are subject to limited appellate scrutiny," State v. Buda, 195 N.J. 278, 294 (2008), and are entitled to deference absent a showing that there has been a clear error of judgment, State v. Singh, 245 N.J. 1, 12 (2021). Because trial judges enjoy "broad discretion" in making evidence-related decisions, State v. Harris, 209 N.J. 431, 439 (2012), we review for abuse of discretion, Singh, 245 N.J. at 12.

"Out-of-court statements offered to prove the truth of the matter asserted are hearsay." State v. White, 158 N.J. 230, 238 (1999). Hearsay is not admissible at trial except as otherwise provided through an exception to the general rule. N.J.R.E. 802. The bar on hearsay exists "to ensure the accuracy of the factfinding process by excluding untrustworthy statements, such as those made without the solemnity of the oath, and not subject to cross-examination by the accused or the jury's critical observation of the declarant's demeanor and tone." State v. Engel, 99 N.J. 453, 465 (1985).

Similarly, N.J.R.E. 602 provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." This rule applies to lay opinion testimony

offered under N.J.R.E. 701, which must be "rationally based on the witness's perception." Thus, a law enforcement officer's lay opinion identifying a suspect as the defendant must be based on the officer's own direct perceptions and his or her own prior knowledge. See Singh, 245 N.J. at 17-18 (though harmless, it was error to allow detective to refer to suspect seen in surveillance video as "the defendant" because he was not an eyewitness to the crime and thus lacked personal knowledge as to what the video showed); State v. Lazo, 209 N.J. 9, 24 (2012) (lay opinion testimony by officer that defendant's arrest photo resembled a sketch of the perpetrator was inadmissible because the sketch was based on the victim's description and the officer lacked personal knowledge of the perpetrator's or defendant's appearance).

The admission of hearsay testimony may be harmless if the person who made the original statements is called to testify at trial. State v. Cotto, 182 N.J. 316, 331 (2005). For example, in Cotto, the Court found that it was error for the trial court to admit hearsay testimony by police officers concerning statements made by the victims at the scene of the crime and at the police station. Id. at 329-31. However, the Court found the defendant "suffered no significant harm from that testimony" because the victims had also been called to testify and identified the defendant in court. Id. at 331. Because the defendant's

counsel was able to "attempt[] to undermine their credibility with a thorough cross-examination, thereby reducing the danger inherent in out-of-court statements," the erroneous admission of hearsay was deemed harmless. Ibid.

Here, Breslin and Donato's testimony that Torres told them the voice belonging to "Tone" on the wiretapped calls was Figueroa's voice was hearsay. Their references to the calls being between Figueroa and Thomas were not based on their own personal knowledge, and was not proper lay opinion testimony. As a result, this testimony was inadmissible, and it was error to permit it.

We conclude the error was harmless. As in Cotto, the original declarant, Torres, was called to testify and subjected to thorough cross-examination as to his voice identification of Figueroa. Defense counsel was also able to challenge Torres's testimony that he was "certain" that Tone was Figueroa by bringing up his use of the word "believe" in his earlier police report and by suggesting that his prior conversations with Figueroa were too brief and too long ago for him to accurately identify his voice years later.

Breslin and Donato were also cross-examined on the subject, and the jury was made aware that the two had no personal knowledge that Figueroa was Tone and that the accuracy of their testimony's accuracy hinged on the accuracy Torres's voice identification. The jury was thus able to assess Torres's

credibility in making his identification, and the persuasive effect of Breslin and Donato's repetition of that identification was minimized. In Cotto, 182 N.J. at 331, as here, the defendant argued on appeal that hearsay testimony by police officers made the victims' identifications of the defendant "appear more certain than they actually were." The Court found this contention was "without merit." Ibid. We make the same finding and conclude that the error in admitting this hearsay was harmless.

We also consider whether Figueroa's counsel invited the very error that Figueroa now complains about. Under the invited error doctrine, trial errors that "were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." State v. Corsaro, 107 N.J. 339, 345 (1987). The principle is grounded in considerations of fairness and is intended to prevent defendants from manipulating the system. State v. A.R., 213 N.J. 542, 561 (2013).

The invited error doctrine will not be applied if a particular error "cut mortally into the substantive rights of the defendant," Corsaro, 107 N.J. at 345, or if it will cause a "fundamental miscarriage of justice." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996). By contrast, it should be applied to bar relief from a trial error where a defendant has persuaded the trial court to

allow him or her to "pursu[e] a tactical advantage that does not work as planned." State v. Williams, 219 N.J. 89, 100 (2014). In sum, "a defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial." State v. Jenkins, 178 N.J. 347, 358 (2004).

The invited error doctrine has been applied to the admission of hearsay at trial. For example, in New Jersey Divison of Youth & Family Services v. M.C. III, 201 N.J. 328, 341-42 (2010), the defendant consented to the admission of documentary records kept by a state agency. The Supreme Court found that any error in admitting the records was invited, because "defense counsel may have made a strategic decision to try the case based on the documents, instead of possibly facing a witness's direct testimony." Id. at 342. Similarly, in New Jersey Division of Child Protection & Permanency v. J.D., 447 N.J. Super. 337, 347-48 (App. Div. 2016), we found that a police report contained inadmissible hearsay, but because the plaintiff "relied on [the] defendant's attorney's consent" to its admission when deciding not to call the officer who created the report, any argument that the court erred by allowing it into the record was barred.

Here, Figueroa's counsel objected to Breslin's first statement that Torres had identified Figueroa on the wiretapped calls, but immediately rescinded that objection and consented to Breslin's testimony on that subject so long as Torres would testify later. While addressing the court about the issue, counsel expressly asked the judge to do "nothing" at that time to address Breslin's statement. Once it was confirmed that Torres would be called as soon as he was available, counsel did not object any further to Breslin's testimony. Torres did eventually testify at trial. Figueroa's counsel did not object to Donato's subsequent testimony.

Instead, counsel chose to adopt a strategy of cross-examining all three witnesses to weaken their identification testimony, without the court's intervention to prevent or strike any hearsay or testimony that was not based upon personal knowledge. By allowing Breslin to testify about the voices on the calls first, counsel not only attacked the foundations of Breslin's testimony, but began suggesting to the jury that Torres's identification of Figueroa was not credible even before Torres took the stand. This strategy was "not unreasonable on its face" and the fact that it "did not result in a favorable outcome" does not mean that a claim on appeal is not barred by the invited error doctrine. Williams, 219 N.J. at 100.

Retrying a defendant "when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." State v. Santamaria, 236 N.J. 390, 404 (2019). Further, a defendant's action in inviting an error or failing to object to testimony deprives the trial court of a proper opportunity to evaluate the issue when it arises and a reviewing court of a record allowing full consideration of the issue on appeal. State v. Robinson, 200 N.J. 1, 21 (2009). Here, Figueroa's counsel withdrew his initial objection and essentially consented to allow Breslin's and Donato's testimony, which Figueroa now complains was inadmissible. We conclude that Figueroa's argument is barred by the invited error doctrine. For this independent, additional reason, admission of the testimony was not reversible error.

III.

Figueroa further argues that the court erred by not providing a supplemental jury instruction on voice identification patterned after the model jury instruction on eyewitness identifications. He asserts that Torres's identification of his voice on the wiretapped calls was the primary issue in the case and, therefore, the court was required to instruct the jury that it must evaluate various factors concerning the reliability of that identification before

deciding whether he was indeed "the person who committed the alleged offense."

During the charge conference, Figueroa's counsel asked the court to give a "false in one, false in all" instruction regarding Torres's testimony identifying his client as "Tone." He argued the instruction was needed because Torres stated in his police report that he "believed" the voice on the calls was Figueroa's but testified at trial that he was "100 percent certain" this was the case. The court agreed to give the instruction, stating that "the heart of one of [Figueroa's] primary defenses" was "the believability of the identification" and that "the jury has to know that if they think [Torres] was not being completely truthful, they can give whatever weight they want" to his testimony. However, the court stated it would not specifically name Torres in the instruction.

The State proposed that a jury instruction be given on voice identification. The court asked if there was a model instruction, and the prosecutor replied that there was not but that the State drafted an instruction that conformed with applicable case law. Figueroa's counsel stated he too would also draft a voice identification instruction.

The court did not commit to giving an instruction and voiced concern that an instruction would be an "invitation" for reversal. The court explained the

issues in the case were "essentially covered under the standard charge" and that "the voice identification issue is simply another finding [the jurors] have to make." The court remarked that a voice identification instruction might improperly put a "spotlight" on one specific issue.

The charge conference continued the next day. The court ultimately decided to give an instruction on recorded statements because "the jury [could] always decide it wasn't him, but if they decide it was him . . . then the warnings that are contained within that [instruction] would apply." The court noted it would state that the recorded statements were "allegedly" made by Figueroa when giving the instruction. Figueroa's counsel commented, "That's fair."

When instructing the jury, the court gave a general charge on witness credibility, informing jurors that they could take into consideration a variety of factors when deciding what weight to give each witness's testimony. These included the witness's "means of obtaining knowledge of the facts," "whether the witness made any inconsistent or contradictory statement," and "whether the witness testified with the intent to deceive." The court further instructed that if the jurors believed that any witness "willfully or knowingly testified falsely to any material facts in this case with the intent to deceive [them]," they should "give such weight to his or her testimony as [they] deem[ed] it [was] entitled."

The court noted that the record included "a [recorded] statement allegedly made by Anthony Figueroa," as well as statements by Collazo. The court instructed the jury that it was their "function to determine whether or not those statements were actually made by [the] defendants and, if made, whether the statement[s] or any portion[s] of [them] . . . [were] credible." The court gave the following specific charge as to the recorded calls:

> It is alleged that [d]efendant Anthony Figueroa was recorded conversing with another about the . . . distribution of a controlled dangerous substance. In considering whether or not the statements are credible, you should take into consideration the circumstances and facts as to how the statement was made as well as all other evidence in this case relating to this issue. The recorded statements were obtained by authorized intercepts of telephone conversations.
>
> If, after consideration of all of these factors, you determine that . . . a statement was not actually made or that the statement is not credible, then you must disregard the statement completely. If you find that the statement was made and that part or all of the statement is credible, you may give what weight you think appropriate to the portion of the statement you find to be truthful and credible.

"It is axiomatic that appropriate jury instructions are essential for a fair trial." State v. Ball, 268 N.J. Super. 72, 112 (App. Div. 1993). Incorrect instructions are "poor candidates for rehabilitation under a harmless-error analysis," State v. Rhett, 127 N.J. 3, 7 (1992), and are "excusable only if they

are harmless beyond a reasonable doubt," State v. Vick, 117 N.J. 288, 292 (1989). However, where a defendant does not request an instruction or object to the lack of one, the trial court's actions are reviewed for plain error. State v. Cole, 229 N.J. 430, 455 (2017) (as to not requesting an instruction); State v. Townsend, 186 N.J. 473, 498 (2006) (as to not objecting at trial); R. 1:7-2. Under this standard, the defendant must demonstrate a legal impropriety in the charge that prejudicially affected his or her substantial rights in a "sufficiently grievous" manner as to convince the reviewing court that "the error possessed a clear capacity to bring about an unjust result," State v. Hock, 54 N.J. 526, 538 (1969), meaning that the error "led the jury to a result it otherwise might not have reached," Jenkins, 178 N.J. at 361.

As to the appropriate standard of review in this case, we note that it was the State, not Figueroa, that requested a specific instruction on voice identification. Although Figueroa's counsel interjected that he would "put something together," presumably a draft instruction for the court to consider alongside the State's draft, he did not pursue the topic or object to the lack of such an instruction at trial. He also consented to the instruction on recorded statements that was given, despite initially not wanting one. However, the court addressed the issue of a voice identification instruction and stated its reasoning

for deciding not to give one when the State requested it. We therefore consider whether the lack of a more specific instruction, if erroneous at all, was harmless beyond a reasonable doubt. Vick, 117 N.J. at 292.

We recognize the significant body of case law in New Jersey concerning eyewitness identifications. Such evidence is considered uniquely "powerful" and misidentification is "the single greatest cause of wrongful convictions in this country." State v. Delgado, 188 N.J. 48, 60 (2006). Because of the danger that mistaken eyewitness identifications pose, specific jury instructions on the subject have been required in cases where this type of evidence forms a key part of the State's case. Cotto, 182 N.J. at 325. Where identification of the defendant is "the major . . . thrust of the defense," State v. Green, 86 N.J. 281, 291 (1981), and particularly in cases where the State relies on a single victim eyewitness, State v. Frey, 194 N.J. Super. 326, 329 (App. Div. 1984), failure to issue a detailed instruction on the issue has been deemed reversible error even where the defendant did not request one, Cotto, 182 N.J. at 326.

In State v. Henderson, 208 N.J. 208, 298-99 (2011), the Court directed that "enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case." The Court set forth various factors to be included in the new instructions, both "system

variables" concerning the administration of identification procedures such as lineups and showups, and "estimator variables" affecting the eyewitness's ability to accurately perceive and remember events and people. Id. at 248-72. The latter group of variables included the following factors: the witness's stress level, the amount of time the witness had to observe the person, "weapon focus," distance and lighting, the perpetrator's physical characteristics and whether they changed between the time of the crime and the time of the identification, racial biases, and the speed with which the witness made the identification. Id. at 261-72. To carry out Henderson's mandate, the Court approved new model jury charges on eyewitness identification, which went into effect in 2012. See Model Jury Charges (Criminal), "Identification: In-Court and Out-Of-Court Identifications" (rev. May 18, 2020). In cases where eyewitness identification is a "key" issue, a conviction may be reversed if the court does not instruct the jury on relevant Henderson factors. State v. Sanchez-Medina, 231 N.J. 452, 467-69 (2018).

If the State presents "overwhelming corroborative evidence" supporting the eyewitness identification, the failure to instruct may be considered harmless, but "such cases are the exception." Cotto, 182 N.J. at 326. However, a conviction may be also affirmed despite a lack of a "more detailed" instruction

specifically mentioning the word "identification" if there is sufficient other evidence of the defendant's guilt and the court explains to the jury that the State bears the burden to prove beyond a reasonable doubt not only that each and every element of the offense occurred but "that [the] defendant was the individual that committed the crime." Id. at 326-27.

Less attention has been given to voice identification. In State v. Johnson, 138 N.J. Super. 579, 582 (App. Div. 1976), we stated that "the constitutional safeguards . . . with respect to visual identification are equally applicable to identification of a voice through auditory senses." In State v. Clausell, 121 N.J. 298, 328 (1990), the Court cautioned that before admitting voice identification testimony, the trial court should weigh the reliability of the identification against the suggestiveness of an identification procedure such as a voice lineup or an in-court identification based on hearing the defendant speak during proceedings. Id. at 329. The Court stated that "[r]eliability depends on such factors as the witness's opportunity to hear the accused and the consistency with prior voice identifications." Id. at 328.

Johnson and Clausell addressed the question of when voice identification testimony should be admitted, not the issue of related jury instructions. We note there are no model jury charges on voice identification. We conclude that a

specific voice identification instruction was not required, particularly since there was sufficient other evidence that the Figueroa was involved in drug transactions. Moreover, Torres was not a victim. Therefore, the level of stress applicable to victims or others who personally witnessed a crime as it was taking place is not relevant here. Nor was the distance between the witness and the alleged perpetrator since these were recorded phone calls. As to the listening conditions, during a lengthy Driver hearing the trial court concluded that the calls were adequately audible and comprehensible to be admitted into evidence. Regarding Torres's prior dealings with Figueroa, they occurred during official interviews in the course of Torres's duties and not under conditions that were stressful on his part.

We further note that the court instructed the jury on how to evaluate witness credibility in general, including the way a witness obtained his or her knowledge of the information testified to, which clearly applied to how Torres was able to recognize Figueroa's voice. The court also directed jurors to consider whether any witness had attempted to deceive them. Importantly, when instructing on defendants' prior statements and how to evaluate their credibility and value as evidence, the court stated that it had been "alleged" that Figueroa was recorded speaking with someone about CDS distribution. It advised the

jury that it could decide that "a statement was not actually made" and, if so, that it should "disregard the statement completely."

Against these facts, we find no error in the jury instructions. A specific instruction on voice identification was not required. Torres's identification had sufficient support based on his prior familiarity with Figueroa and was corroborated by other evidence in the record, including that on two occasions, shortly after conversing with "Tone," Thomas arrived at an apartment rented by Figueroa's girlfriend Collazo and called Tone again to say he was outside. Under these circumstances, the lack of a detailed instruction on voice identification was unlikely to lead the jury to a result it otherwise might not have reached. Jenkins, 178 N.J. at 361.

IV.

Figueroa contends that cumulative error denied him a fair trial, thereby requiring reversal of his conviction. We disagree.

The cumulative error doctrine provides that where a court's errors "are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair," a new trial by jury must be granted. State v. Orecchio, 16 N.J. 125, 129 (1954). Although each established error may not warrant reversal individually, a court may find that the errors together deprived the

defendant of due process. Id. at 134. Nevertheless, even where a defendant alleges multiple errors, "the theory of cumulative error will still not apply where no error was prejudicial, and the trial was fair." State v. Weaver, 219 N.J. 131, 155 (2014).

Considering our rulings, we find no harmful error. We therefore reject Figueroa's invocation of the cumulative error doctrine. State v. Rambo, 401 N.J. Super. 506, 527 (App. Div. 2008).

V.

Figueroa contends that his sentence is excessive and resulted from improperly double-counting his prior criminal record. More specifically, Figueroa argues that after imposing an extended term for his conviction of possession of CDS with intent to distribute under N.J.S.A. 2C:43-6(f), the court impermissibly double-counted his prior criminal history to find aggravating factor six ("extent of the defendant's prior criminal record"), N.J.S.A. 2C:44-1(a)(6). He asserts that a remand for resentencing is necessary, particularly since the court gave this factor "substantial weight" when determining that he should receive a sentence greater than the midpoint of the permissible extended term range.

"Appellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). A trial court enjoys "considerable discretion in sentencing." State v. Blann, 429 N.J. Super. 220, 226 (App. Div. 2013), rev'd on other grounds, 217 N.J. 517 (2014). An appellate court first must review whether the sentencing court followed the applicable sentencing guidelines set forth in the Code of Criminal Justice. State v. Natale, 184 N.J. 458, 489 (2005); State v. Case, 220 N.J. 49, 63 (2014).

Figueroa was sentenced to an extended term of eighteen years with nine years of parole ineligibility on count fourteen, second-degree possession with intent to distribute more than a half ounce of cocaine or heroin, pursuant to N.J.S.A. 2C:43-6(f). N.J.S.A. 2C:43-6(f) provides that a person who has been previously convicted of "manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance . . . shall upon application of the prosecuting attorney be sentenced by the court to an extended term" as authorized by N.J.S.A. 2C:43-7. The required previous conviction exists where the defendant has at any time been convicted of an offense under N.J.S.A. 2C:35-3, -4, -5, -6 or -7, among other statutes. N.J.S.A. 2C:43-6(f). An extended sentence under this statute is mandatory once application is made

and it is demonstrated that a qualifying prior conviction exists. State v. Robinson, 217 N.J. 594, 607 (2014). Figueroa does not dispute that he was previously convicted of a qualifying predicate drug-related offense, and the State made the required application.

Figueroa was sentenced to a ten-year term with five years of parole ineligibility on count eighteen, possession of a handgun while committing possession with intent to distribute CDS, to run consecutive to count fourteen, in accordance with N.J.S.A. 2C:39-4.1(d). For count thirty-four, second-degree certain persons not to possess weapons, Figueroa was sentenced to a ten-year term with five years of parole ineligibility, to run concurrent to count eighteen. On count fifteen, third-degree possession with intent to distribute more than an ounce of marijuana, he was sentenced to a five-years, to run concurrent to the sentence on count fourteen. The remaining counts were merged into counts fourteen and fifteen.

The ordinary range for a second-degree offense is five to ten years, and for a third-degree offense is three to five years. N.J.S.A. 2C:43-6(a)(1), (2). Pursuant to N.J.S.A. 2C:43-6(f) and N.J.S.A. 2C:43-7(c), an extended sentence for violating N.J.S.A. 2C:35-5 must be fixed at or between ten and twenty years, with a parole ineligibility period of one-third to one-half of the sentence

imposed, five years, whichever is greater. Figueroa's sentence for each offense fell within those parameters.

Next, the reviewing court must ensure that any aggravating or mitigating factors found by the trial judge under N.J.S.A. 2C:44-1 are based upon sufficient credible evidence in the record. State v. Miller, 205 N.J. 109, 127 (2011). If the factors found by the trial court are so grounded, the sentence must be affirmed even if the reviewing court would have reached another result. State v. O'Donnell, 117 N.J. 210, 215 (1989).

A court "must qualitatively assess" the factors it finds and assign each an "appropriate weight." Id. at 65. The sentencing judge must explain his or her findings about each factor presented by the parties and how the factors were balanced to arrive at the sentence. Id. at 66.

Whether a sentence will "gravitate toward the upper or lower end of the [statutory] range depends on a balancing of the relevant factors." Case, 220 N.J. at 64. "[O]rdinarily the longest permitted term of parole ineligibility would 'be imposed only on base terms at or near the top of the range for that degree of crime.'" State v. Kirk, 145 N.J. 159, 178 (1996) (quoting State v. Towey, 114 N.J. 69, 81 (1989)). Here, the court imposed a base term near the top of the range.

The court found aggravating factors three ("risk that the defendant will commit another offense"), N.J.S.A. 2C:44-1(a)(3); five (substantial likelihood defendant is involved in organized criminal activity), N.J.S.A. 2C:44-1(a)(5); six ("defendant's prior criminal record and the seriousness of the offenses of which defendant has been convicted"), N.J.S.A. 2C:44-1(a)(6); and nine (need for specific and general deterrence), N.J.S.A. 2C:44-1(a)(9). The court found that no mitigating factors applied, after addressing those requested by Figueroa. The court concluded that the aggravating factors substantially outweighed the non-existent mitigating factors.

Figueroa disputes only the court's finding of aggravating factor six, arguing that because he was already subject to an extended term due to a previous conviction, the court impermissibly double-counted that conviction when finding this factor. We are unpersuaded.

When discussing the requested sentence, the prosecutor stated Figueroa had a history that included juvenile offenses, a December 2012 conviction for second-degree possession of a firearm, and a March 2013 conviction for a second-degree drug offense. Addressing aggravating factor six, the court found that Figueroa had "two convictions as an adult, both of which were second degree," which "resulted in periods of incarceration in State prison." It gave

aggravating factors three, six, and nine substantial weight and aggravating factor five moderate weight. The court noted Figueroa had "a history of offenses, [had] been exposed to a full array of criminal sanctions, including diversion, probation, and incarceration," and had not been dissuaded from "continued antisocial criminal activity." The court then granted the State's application for an extended term on count fourteen and imposed the sentence on each count as described above.

The record supports the application of aggravating factor six without considering the prior second-degree drug conviction that was the predicate offense for the extended term. See State v. McDuffie, 450 N.J. Super. 554, 576-77 (App. Div. 2017) (finding no error in court's consideration of defendant's prior criminal record both when deciding to impose an extended term and when finding aggravating factor six, because defendant "had more than the requisite number of offenses to qualify for an extended term"). Moreover, although the predicate conviction mandated an extended term on count fourteen, Figueroa's prior juvenile and criminal history and current convictions were properly considered in setting the length of extended term and the period of parole ineligibility on count fourteen. See State v. Dunbar, 108 N.J. 80, 92-93 (1987) (aspects of defendant's record which are not among the minimal conditions for

imposing an extended term, "such as a juvenile record, parole or probation records, and overall response to prior attempts at rehabilitation," are "relevant factors in adjusting the base extended term," and it is "clearly . . . necessary to take into account the defendant's entire prior record" when deciding on a period of parole ineligibility).

We discern no basis to set aside Figueroa's sentence. It was not manifestly excessive or unduly punitive and does not shock our judicial conscience. That said, our ruling is without prejudice to any application seeking sentencing relief pursuant to Attorney General Law Enforcement Directive No 2021-4, "Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12" (April 19, 2021), from the period of parole ineligibility imposed under N.J.S.A. 2C:43-6(f) on count fourteen, which involved a non-violent drug offense.

Affirmed.