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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1410-21**

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JOSE ANTONIO VARGAS,

Defendant-Respondent.

Submitted May 31, 2022 – Decided June 9, 2022

Before Judges Sumners and Vernoia.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 19-12-0873.

Camelia M. Valdes, Passaic County Prosecutor, attorney for appellant (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the briefs).

Paul E. Fernandez, attorney for respondent.

PER CURIAM

We granted the State's motion for leave to appeal from an order barring the State's use of an out-of-court photo identification of defendant Jose Antonio Vargas by a witness, Edison Ulloa-Tejada. The State contends the court erred by failing to adjourn a N.J.R.E. 104 hearing on the admissibility of the identification based on Tejada's unavailability to testify. Unpersuaded by the State's arguments, we affirm.

A grand jury indicted defendant for murder and possessory weapons offenses. The victim died of a gunshot wound. Detectives discovered surveillance footage showing two suspects arriving in the area of the murder in a white vehicle. It was later determined Tejada, an Uber driver, drove the suspects to the area in the white vehicle shown in the recording.

Tejada met with the detectives three times and, on the last occasion, identified photographs of defendant and another individual as the persons he drove in the white vehicle to the area of the murder. Tejada told the detectives he knew defendant and the other individual, and he had seen defendant often.

Defendant moved to suppress Tejada's out-of-court identification of defendant. During a December 13, 2021 telephone conference, the court informed counsel testimony may be required at the scheduled December 15, 2021 hearing on defendant's suppression motion. In a December 14, 2021 email

from the trial court judge's law clerk to counsel, the court advised that a testimonial hearing on the admissibility of Tejada's out-of-court identification was required if the State intended to introduce evidence concerning Tejada's identification "in its case in chief."¹ In a December 14, 2021 letter, the State advised the court that Tejada "is unavailable to testify tomorrow."²

The following day, the court conducted a N.J.R.E. 104 evidentiary hearing on defendant's motion to suppress Tejada's out-of-court identification. The State presented the testimony of the detective who interviewed Tejada, and a recording of Tejada's identification of defendant in the photograph. The detective, who had interviewed Tejada in Spanish, testified he "show[ed]" Tejada a still photograph taken from the surveillance footage and Tejada identified defendant.

On cross examination, the detective explained he did not show Tejada a photo array including "other similarly looking young [h]ispanic males that were commonly found in that area" because Tejada "had allowed [defendant] into his

¹ The email also informed counsel that a testimonial hearing was not required concerning the admissibility of an out-of-court identification by another witness. The out-of-court identification made by that witness is not pertinent to the issues presented on appeal.

² The record on appeal does not establish the manner or timing of the delivery of the State's letter to the court.

vehicle," and "had seen him earlier in the same neighborhood[.]" The detective also testified Tejada told him he had seen defendant "numero" times, which the detective testified he understood to mean "[i]t's so many times that there's no number."

The court granted defendant's motion to suppress evidence concerning Tejada's out-of-court identification of defendant's photograph. In a decision from the bench, the court rejected the State's argument the evidence established a confirmatory identification of a person—defendant—known to Tejada. See generally State v. Pressley, 232 N.J. 587, 592-93 (2018) (explaining a "confirmatory identification occurs when a witness identifies someone he or she knows from before but cannot identify by name"). The court found the detective's testimony did not convincingly establish Tejada had sufficient familiarity with defendant to satisfy the standard for admission of a confirmatory identification.³ The motion court explained the detective's testimony did not support any "level of confidence" Tejada's selection of photograph shown to him constituted an admissible confirmatory identification. The court ruled Tejada's

³ Although not essential to its suppression of Tejada's out-of-court identification of defendant's photograph, the court also noted that based on the evidence presented at the evidentiary hearing, it would suppress the identification under the standards enunciated in State v. Henderson, 208 N.J. 208 (2011).

out-of-court identification of defendant inadmissible during the State's case in chief.

Defendant moved for reconsideration, arguing the court misinterpreted the evidence presented. In its oral decision denying the motion, the court explained the State relied on the detective's testimony to establish the foundation for the admissibility of Tejada's out-of-court identification as a confirmatory identification, and the detective's testimony did not adequately establish the requisite foundation. The court further noted that information concerning Tejada's prior familiarity with defendant required testimony from Tejada. The motion court's decision did not preclude the State from eliciting Tejada's testimony at trial.

The court entered an order granting defendant's motion to suppress Tejada's out-of-court identification and denying the State's motion for reconsideration. We granted the State's motion for leave to appeal from the court's order.

The State presents a singular argument in support of its appeal. It contends the court erred by failing to adjourn the hearing on defendant's motion to suppress the out-of-court photo identification so the State could produce a critical witness—Tejada. We reject the argument for the simple but dispositive

reason the State never sought an adjournment or continuance of the hearing to allow Tejada's appearance at the hearing.

To be sure, the State sent a letter to the court on the day prior to the hearing stating Tejada was unavailable. But the letter did not identify Tejada as a critical witness, and the State did not inform the court it sought any relief based on Tejada's unavailability. The letter did not request an adjournment of the hearing or propose that the hearing be continued following the State's anticipated presentation of the detective the next day.

At the hearing, the State did not request an adjournment or any other relief based on Tejada's unavailability. The State did not mention Tejada's unavailability or claim he was a critical witness. Instead, the State called only the detective as a witness. When the detective's testimony ended, the court inquired of the State, "[a]nything else[?]", to which the State replied, "subject to moving certain items into evidence for the purposes of [the] hearing . . . the State would rest." Then, without objection or any request related to Tejada's unavailability, the State and defense counsel made closing arguments on defendant's motion to suppress Tejada's out-of-court identification of defendant's photo.

The court did not render its decision on defendant's motion following closing arguments. Instead, the court reserved decision, and issued its decision from the bench the following day. Prior to the issuance of the court's decision, the State did not seek a continuance of the hearing to allow Tejada's attendance, seek to reopen the record to do so, or object to the court's issuance of a decision on the merits without hearing testimony from Tejada, who the State now claims was a critical witness. The court issued its decision, granting defendant's motion to suppress Tejada's out-of-court identification of defendant's photograph.

The State moved for reconsideration but argued only that the court erred by failing to properly interpret the evidence. In support of the reconsideration motion, the State did not argue the court erred by failing to adjourn or continue the hearing based on Tejada's unavailability.

The State therefore argues for the first time on appeal the court erred by failing to adjourn the evidentiary hearing based on Tejada's unavailability. We reject the argument because it was not "properly presented to the trial court" and does not "go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)); see also State v. Galicia, 210 N.J. 364, 383 (2012) (explaining a reviewing court will generally not consider

an issue, including a constitutional issue, that is not raised before the trial court (citing Deerfield Ests., Inc. v. Twp. of E. Brunswick, 60 N.J. 115, 120 (1972))). Moreover, absent a request for an adjournment or continuance based on Tejada's unavailability, we discern no basis to conclude, as the State suggests we should, that the court erred by failing to sua sponte adjourn or continue the hearing based on the witness's unavailability. The State claims the court should have sua sponte adjourned the hearing until Tejada was available because he was a witness critical to the State's success on the motion is unavailing. The argument is untethered to any citation to legal authority supporting the proposition that a court must monitor the State's proofs and offer an adjournment for the State to present "critical" evidence before ruling in a defendant's favor. The argument also ignores it is the State's obligation—not the court's—to determine which witnesses to call during a suppression hearing.

We also observe the record is bereft of any evidence as to what Tejada might have said if called to testify. Thus, it was impossible for the court to determine whether Tejada's testimony, or the testimony of anyone else, would have supported or undermined either party's position. In any event, it is not the court's role or responsibility to determine the evidence a party should present, and the court therefore had no obligation to sua sponte adjourn a hearing to allow

the State to produce a witness it knew was unavailable and in whose absence the State opted to proceed without objection or any request for relief.

The State's brief on appeal does not offer any argument challenging the court's substantive determination granting defendant's suppression motion. See Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5, 24 A.3d 829 (App. Div. 2011) (finding issues not addressed in a party's merits brief are deemed abandoned); Skłodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) (finding "[a]n issue not briefed on appeal is deemed waived"). We therefore do not consider the merits of the court's findings of fact or legal conclusion Tejada's out-of-court identification of defendant's photograph is inadmissible during the State's case at trial.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION