SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1689-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PAUL D. LEE,

Defendant-Appellant.

Argued February 1, 2022 – Decided April 22, 2022

Before Judges Fisher, Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 18-05-1173.

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; John Boyle, on the briefs).

Maura M. Sullivan, Assistant Prosecutor, argued the cause for respondent (Grace C. MacAulay, Camden County Prosecutor, attorney; Maura M. Sullivan, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Paul D. Lee appeals from the trial court's orders denying his motions to suppress his video-recorded statement to police and to suppress an out-of-court identification. Law enforcement properly read defendant his Miranda[1] rights, and defendant understood them and did not later invoke any of the rights during the portion of the interrogation at issue. In addition, there was no error in the administration of the photo array and the out-of-court identification. Therefore, we affirm both orders.

I.

In January and February 2018, a man, later identified as defendant, committed a series of robberies in Camden County while holding an airsoft gun with its red tip removed. During the January 27 robbery of a Bath and Body Works store in Cherry Hill, defendant "pulled out what appeared to be a black handgun and pointed it at store employees demanding money from the register." The store clerk gave him approximately $1000 in cash. The next night, defendant entered the same store and "display[ed] a handgun, demanded money, and obtained approximately $750.00 in cash from the register."

[1] 384 U.S. 436 (1966).

On February 27, a woman called the Collingswood police and reported she had been robbed. She told officers she was in her car in the Bank of America parking lot after withdrawing $100 from the ATM when a man approached the car with what appeared to be a gun in his hand, extended his arm into the car's open window, and demanded she give him the money. The woman handed the man her wallet, which contained $150, her driver's license, and various credit cards; he then fled. She later described the man to police as a "white male in his late thirties approximately 5'8" and weighing approximately 150 pounds." Police located two eyewitnesses to the crime, one of whom described the robber as "a Hispanic or Asian male with sunglasses and a scarf . . . ."[2]

On February 28, another woman was in the ShopRite parking lot in Cherry Hill loading groceries into the trunk of her car when defendant approached her. He brandished an airsoft gun that resembled a real firearm because its red tip had been removed and demanded the woman give him money. In response, she ran away from defendant and back into the ShopRite.

[2] After defendant was arrested, police searched his car and found a knit winter hat, dark sunglasses, a grey and tan scarf, a brown wallet containing defendant's driver's license, and a card with the victim's name on it. The victim identified the hat and sunglasses as items worn by the man who had robbed her. She also confirmed the card belonged to her.

A few hours later, defendant was stopped by Cherry Hill police approximately three miles away from the ShopRite parking lot. In defendant's waistband, officers found a black airsoft handgun without a tip. Defendant was arrested at approximately 9:30 p.m. and transported to the police department.

A.

Defendant was placed in an interview room, and shortly after 11:00 p.m., Detectives Rene Lobanov and Thomas Leone entered and began speaking with him. The videotaped recording of the interview was played during the suppression hearing. Detective Lobanov was the only witness who testified at the hearing.

Prior to advising defendant of his rights, the detectives asked him a series of routine questions regarding his address, age, social security number, phone number, education level, and marital status. Defendant indicated he was thirty-nine, had attended several years of college (but did not receive a degree), and was unmarried but lived with his girlfriend of six years.

After concluding this line of questioning, Detective Lobanov advised defendant that "[b]efore [they] go any further," the detectives had to advise him of his rights. Detective Leone clarified they "want[ed] to straighten everything out," but first had to "get the formalities out of the way." After reading each

right, the officers asked defendant to confirm that he understood his rights. He said "yes" each time. He also stated he understood he could exercise his rights at any time during questioning. Pertinent to his appeal, Lobanov stated: "Any statement that you make can be held against you. Do you understand that?"[3] Defendant confirmed he was willing to talk to police without consulting a lawyer or having one present.

Lobanov asked defendant to sign a notification of rights form. Defendant responded affirmatively and signed the form, checking "yes" in response to questions asking if he understood his rights and was willing to speak to the detectives without an attorney present.

In response to detectives' questioning, defendant stated he worked at a gun show and had been "trying to show" and sell an airsoft gun with its red tip broken off to "a couple of people that [he] kn[e]w." He said he was on his way to show the gun to "a guy at the gas station" when he was stopped by police.

After police asked defendant what he had done that day, Lobanov referred to "facial recognition cameras" that are "out there all over the place . . ." and stated the police have access to the feed. The detective advised defendant that

[3] The transcript indicates defendant gave "[n]o audible response"; however, in the interview video, defendant is nodding his head and audibly says "yes."

"honest[y] is the best policy" and inquired whether he had tried to sell the airsoft gun in the ShopRite parking lot.

Defendant initially denied trying to sell the gun in the parking lot. But after Lobanov stated he might be on camera in the area, defendant admitted "[Y]eah, I went there . . . to sell a[n Airsoft] gun," but not the gun missing the red tip because he could not legally sell that one. He said he went to the parking lot to meet a "friend of a friend" but did not know his name.

Defendant further stated that he walked up to the car he thought belonged to the individual he was supposed to meet and pulled out the gun, but instead there was a woman who "flipped the f*** out" upon seeing him. Defendant said: "I guess she thought I was trying to rob her," so he told her, "I'm not going to hurt you," and he left.

Lobanov asked defendant where he went after that incident, again advised him that "honesty is the best policy," and gestured to a large folder on a nearby table, stating he had a "big pile" to work through. When defendant continued to maintain that he went straight home, Lobanov once again referenced the stores in the shopping center, representing there were "[v]ery very good cameras" and asked defendant to "help me out to help you . . . ." Lobanov said, "[I]f you aren't going to help me, I can't help you." Lobanov also told defendant, "I know what

happened" and "I have this," referring again to the large folder. When defendant asked the detective to show him what was in the file, the detective replied that some of "this stuff is confidential."

Eventually, defendant admitted he walked through the parking lot towards ShopRite. He said he "walked up to . . . a woman . . . and . . . pulled out the gun" and told her, "I'm not going to hurt you and all I need is . . . money." Defendant denied pointing the gun at the woman's face and instead said he pointed it "at the floor."

As the interrogation continued, Leone told defendant, "[W]e already know, pretty much, what happened. We . . . even understand . . . from talking to some of the witnesses, you were polite."

The detectives then told defendant, "[W]e know you were responsible for . . . another incident . . . ." Leone said defendant had a "distinct sort of . . . facial features, the clothes you wear, you have this distinct sort of gait also, like walking," and his voice was "very specific." The detectives further stated they knew what had happened at Bath and Body Works and there was "video in that store." Leone also said they had eight or nine witness statements from the two nights of robberies. Defendant repeated several times he had never been in the Bath and Body Works store and he did not rob it. The detective also represented

they had collected DNA from the store and were awaiting the results of the testing.

Defendant continued to assert he did not rob the Bath and Body Works store even after Lobanov suggested the detectives would "probably have to impound" his vehicle and "apply for a search warrant . . . ." The detectives also told defendant they had surveillance video from six stores in the area of the robberies but had not yet had the chance to fully review it. Leone even described the footage he had seen and stated, "I got a good view of you." When defendant asked to see the surveillance videos, the detectives advised him it was evidence and his "attorney [could] request discovery."

They continued to encourage him to confess and stated, "[I]t always works out better when there's cooperation . . . ." However, even after the detectives reiterated that they had "so much evidence," defendant continued to deny any involvement.

Defendant then stated, "I just want to go to sleep. I'm so tired." Shortly thereafter, the following exchange took place:

> [DEFENDANT]: I didn't do it. I'm not going to say I did it if I didn't f[***]ing do it. Can you please take me to jail now or whatever you're going to do?
>
> [DETECTIVE LOBANOV]: [Y]eah, we will. Are you . . . all done?

> [DEFENDANT]: I have nothing else to say. I have told you everything. Can I make a phone call?
>
> [DETECTIVE LOBANOV]: All right. Give me a second.

Although detectives resumed their questioning for approximately eight more minutes, during which defendant confessed to the Bath and Body Works robberies, the State stipulated during the motion hearing that defendant's statement, indicating he had "nothing else to say," was an unequivocal invocation of the right to remain silent and that all questioning should have ended at this point. The State conceded the confession regarding the Bath and Body Works robberies was inadmissible.

During cross-examination at the suppression hearing, Lobanov stated he had video evidence of the Bath and Body Works robberies but was not sure whether footage had yet been obtained from the ShopRite parking lot incidents. He stated there was no DNA evidence. The detective explained his reference to various types of evidence was investigative and interview/interrogative techniques.

B.

Defendant sought to suppress the entire statement, arguing (1) he did not knowingly and intelligently waive his Miranda rights because Lobanov advised

him that his statements could be used against him, rather than could and would be used against him; (2) he did not voluntarily waive his Miranda rights because Lobanov suggested defendant could help himself by providing information regarding the offenses; (3) Lobanov's gesturing towards the large folder in the interview room constituted impermissible fabrication of evidence; and (4) his statement that he was tired amounted to an unequivocal invocation of his right to remain silent.

On December 12, 2018, the court issued a comprehensive, well-reasoned opinion denying defendant's motion, with the exception of the suppression of the portion of defendant's statement agreed to under the parties' stipulation. The judge found Lobanov was a "credible witness." In addressing defendant's arguments regarding his waiver of Miranda rights, the judge found it was sufficient to advise defendant that any statements "could" be used against him, instead of "could and would" be used against him, because the language "was substantively adequate to inform [defendant] of his Constitutional rights, notwithstanding" the minor variation in the words.

The court rejected defendant's argument that he did not voluntarily waive his Miranda rights because Lobanov advised him he could help himself by confessing. The court distinguished the circumstances present here from

authority cited by defendant, noting Lobanov administered the Miranda warnings prior to making any comments about help and the detective did not suggest that defendant could not hurt himself by confessing or would only hurt himself by refusing to confess. The judge stated, "Lobanov's statement to [defendant] merely encouraged a reluctant defendant to make a statement . . . [and] did not negate the Miranda warnings . . . by making a false or inaccurate statement to [defendant] regarding his decision to speak." Therefore, Lobanov's conduct fell "within the psychological tactics which law enforcement officers are permitted to use." In reaching this conclusion, the judge considered additional factors such as defendant's age, education, and familiarity with the criminal justice system resulting from prior felony and misdemeanor arrests in multiple states and time spent in jail or on probation.

In turning to defendant's contentions regarding the detectives' reference to the folder of evidence, the judge stated those actions "did not amount to a preparation of false incriminating documents." Lobanov merely "claimed to have . . . pieces of evidence . . . , which he was permitted to do"; he did not create and show defendant falsified evidence. Lastly, the court did not find defendant invoked his right to silence when he said, "I just want to go to sleep. I'm so tired." The judge found this statement was made in response to the

detectives asking defendant whether he wanted some coffee or water, and that his willingness to talk after making the statement demonstrated "it was not his intention to terminate questioning . . . ." The judge stated defendant "appeared alert, communicated clearly, and responded to each of the detectives' questions appropriately" during the interview.

II.

Defendant also moved to suppress the out-of-court identification made by an eyewitness to the theft in the Bank of America parking lot in Collingswood. He argued that numerous system variables rendered the photo array impermissibly suggestive and inadmissible. Specifically, he asserted the photo array was suggestive because: (1) defendant was the only white male, and the fillers were of Asian descent; and (2) the detective conducting the array did not ask the eyewitness about her percentage of certainty regarding her identification of a photo other than the one she identified as defendant.

A.

The court held a Wade[4] hearing and heard oral argument on the motion. The State called Sergeant Martin Farrell as its first witness. He testified regarding his qualifications, which included sixteen years with the Camden

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

County Prosecutor's Office and "experience in conducting and requesting photo arrays." During his investigation of the February 27, 2018 robbery, he found two eyewitnesses, one of whom was able to give a description of the suspect as he ran by her.

After Farrell was contacted by the Cherry Hill police officers who had arrested defendant and thought he might match the suspect in the Collingswood robbery, he decided to conduct a photo array with the eyewitness. Farrell selected Detective Andrew McNeil to administer the array because McNeil did not have any knowledge of the case. Farrell also explained that he converted the photos to black and white because he did not want the orange prison jumpsuit defendant was wearing in the photo used for the array to "draw someone's attention" to that particular photo. Farrell testified he was "satisfied" with the similarity of the photos in the array based on hair color, hair style, and facial features—including the eyes.

McNeil also testified, describing the process of the photo array and the eyewitness's identification of defendant's photo. He stated the eyewitness was seventy percent sure the photo she selected was of the man she saw run by her on the day of the Collingswood robbery. The State then played a video recording of the administration of the photo array.

B.

On April 4, 2019, the judge issued a thorough written opinion denying defendant's motion. She initially noted both witnesses were credible. She rejected defendant's argument that the photo array was constructed in a suggestive manner and found that defendant's photo did "not significantly stand out." The judge also found all the photos had "consistent" backgrounds and lighting, were taken from "approximately the same distance," and that it was "necessary" for officers to convert the photos to black and white to "neutralize [defendant]'s attire and prevent him from unduly standing out as potentially the only individual depicted wearing a prison jumpsuit . . . ."

The court further found the conversion to black and white photographs did not "[d]etract from the ability to determine that all eight individuals depicted have similar, tan skin tones," and that all of the individuals had "substantially similar features and appear[ed] similar in age." In addition, the judge noted the individuals had similar "dark eye color and hair color," "shorter style haircuts," "thinner build[s]," and were clean shaven. Therefore, the court concluded defendant did "not significantly stand out based on a difference in any particular physical features, or based on the composition of the photographs . . . ."

The judge then addressed whether the photo array was administered in a suggestive manner. She found McNeil "credibly testified" that he was a double-blind administrator with "no specific knowledge of the case" and she was "satisfied" the array was properly conducted. The court found McNeil provided the eyewitness with correct instructions and the witness signed a form indicating she understood the instructions.

The court rejected defendant's argument that McNeil should have asked the witness how confident she was about a second photograph she separated out from the array along with that of defendant. Because the witness did not make any identification other than the photo of defendant, the court stated McNeil was only required to ask her about her confidence in her selection of defendant's photo. The judge concluded the actions of the witness in setting aside two photos and later returning to them were not suggestive. No authority was presented to support defendant's argument that the procedure was inappropriate, and the court found the witness properly reviewed each photo individually rather than comparing them against each other. The court concluded that defendant "failed to show any evidence of suggestiveness with respect to the photo array administered to [the eyewitness]."

Defendant pleaded guilty to two counts of armed robbery and was sentenced to eleven years in state prison, subject to a parole disqualification period.

III.

On appeal, defendant presents the following points for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE MR. LEE DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHTS, AND HIS STATEMENTS WERE NOT VOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES.
>
> POINT II
>
> THE TRIAL COURT ERRED IN TERMINATING THE WADE HEARING BECAUSE THERE WAS MORE THAN SOME EVIDENCE THAT THE PHOTO ARRAY ADMINISTERED TO THE EYEWITNESS WAS SUGGESTIVE.[5]

A.

In his first point, defendant renews the arguments presented to the trial court. In reviewing a grant or denial of a motion to suppress, we must uphold

[5] Defendant's one-page pro se supplemental letter did not raise any additional issues.

the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). Deference to these factual findings is required when they are "substantially influenced by [an] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). We will only reverse when the trial court's determination is "so clearly mistaken 'that the interests of justice demand intervention and correction.'" Elders, 192 N.J. at 244 (quoting Johnson, 42 N.J. at 162).

A trial court's interpretation of the law, however, and the consequences that flow from established facts are not entitled to any special deference. State v. Gandhi, 201 N.J. 161, 176 (2010); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Thus, a trial court's legal conclusions are reviewed de novo. Gandhi, 201 N.J. at 176.

"A suspect's waiver of [their] Fifth Amendment right to silence is valid only if made 'voluntarily, knowingly and intelligently.'" State v. Adams, 127 N.J. 438, 447 (1992) (quoting Miranda, 384 U.S. at 444). A determination of the voluntariness of a custodial statement requires an assessment of the totality of the circumstances surrounding the giving of the statement. State v. Roach,

146 N.J. 208, 227 (1996). A court must look at the characteristics of the suspect, such as their age, education, intelligence, and prior encounters with the law. State v. Galloway, 133 N.J. 631, 654 (1993); State v. Miller, 76 N.J. 392, 402 (1978). It must also consider the nature of the interrogation, such as whether it was prolonged and resulted in the suspect's mental exhaustion and also whether the suspect was subjected to physical or psychological coercion. Galloway, 133 N.J. at 654.

"Because a suspect will have a 'natural reluctance' to furnish details implicating themself in a crime, an interrogating officer may attempt 'to dissipate this reluctance and persuade the [suspect] to talk.'" State v. L.H., 239 N.J. 22, 43-44 (2019) (alteration in original) (citing Miller, 76 N.J. at 403). One permissible way is by "[a]ppealing to [the suspect's] sense of decency and urging [them] to tell the truth for [their] own sake." Miller, 76 N.J. at 405. Our jurisprudence even gives officers leeway to tell some lies during an interrogation. See L.H., 239 N.J. at 44 (citations omitted).

Certain lies, however, have the "capacity to overbear a suspect's will and to render a confession involuntary." Ibid. A police officer cannot directly or by implication tell a suspect their statements will not be used against them because to do so is in clear contravention of the Miranda warnings. See State in re A.S.,

203 N.J. 131, 151 (2010) (holding that "[a] police officer cannot directly contradict, out of one side of his mouth, the Miranda warnings just given out of the other") (quoting State v. Pillar, 359 N.J. Super. 249, 268 (App. Div. 2003)); see also State v. Puryear, 441 N.J. Super. 280, 298 (App. Div. 2015) (holding the interrogator's representation to the defendant was impermissible where the interrogator said defendant "could not hurt himself and could only help himself by providing a statement" because it "contradicted a key Miranda warning").

Other impermissible lies are false promises of leniency that, under the totality of circumstances, have the capacity to overbear a suspect's will. See State v. Hreha, 217 N.J. 368, 383 (2014) (holding a promise of leniency was impermissible where officers told suspect he would avoid "traditional criminal prosecution" and receive "a slap on the wrist" if he confessed). A "free and voluntary" confession is not one extracted by "threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Brady v. United States, 397 U.S. 742, 753 (1970) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)).

We are satisfied the trial court did not err in denying defendant's motion to suppress and concluding defendant made the statement after knowingly and voluntarily waiving his Miranda rights. We find no merit in the assertion that

the detectives' Miranda warnings were inadequate because they informed defendant his statements can be, as opposed to can and would be, used against him. As the trial court stated, the detectives' language was substantially similar and adequately informed defendant of his rights. Defendant does not contend he was "misled into . . . disclosing incriminating information in reliance upon the warning he was given." State v. Melvin, 65 N.J. 1, 14 (1974).

Moreover, these warnings were not negated by the detectives referring to them as "formalities."[6] The record reflects the detectives thoroughly informed defendant of his rights, asking if he understood each one before proceeding to the next. Defendant also signed a notification of rights form, checking "[y]es" in response to questions asking if he understood his rights and was willing to speak to the detectives without an attorney present. The detectives, therefore, adequately informed defendant about his Miranda rights and did not impermissibly minimize their importance.

We also discern no error in the court's conclusion that the detectives did not use impermissible interrogation techniques during the interview by telling defendant he could help himself by confessing or by indicating they had considerable evidence of his guilt. The detectives did not tell defendant they

[6] This argument was not raised before the trial court.

would help him or make any promises. They instead suggested defendant could help himself by confessing. As found permissible in the cited case law, the detectives attempted to appeal to defendant's "sense of decency and urg[ed] him to tell the truth for his own sake." Miller, 76 N.J. at 405. This did not represent a promise so enticing it overcame defendant's free will, Hreha, 217 N.J. at 383, but was within the range of acceptable techniques police may employ to encourage a reluctant suspect to speak, L.H., 239 N.J. at 43-44.

It was also not impermissible coercion for the detectives to represent to defendant they had ample evidence of his guilt during the interview by gesturing to the large folder. Our courts recognize a "distinction between verbal trickery and the fabrication of false tangible evidence by police to elicit a confession." State v. Chirokovskcic, 373 N.J. Super. 125, 133 (App. Div. 2004). The trial court correctly held that the detectives engaged in the former and only "claimed to have these pieces of evidence . . . , which [they were] permitted to do, and then merely pointed to a folder indicating it was full of evidence."

The detectives did not fabricate any tangible evidence. They may have exaggerated the amount of evidence they actually had. But that is permissible under our case law. And, evidently the detectives' representations were not convincing, as defendant repeatedly indicated he did not believe them and even

asked to see the evidence. Another clear indictor that defendant's will was not overborne was, although he admitted to the ShopRite parking lot robbery attempt, he repeatedly and adamantly denied committing the robberies at the Bath and Body Works store.

Defendant's argument that the detectives engaged in pre-Miranda questioning and then used his statements to procure further admissions during the interview is equally unpersuasive. As we have stated, "[B]ooking procedures and the routine questions associated therewith are ministerial in nature and beyond the right to remain silent." State v. Mallozzi, 246 N.J. Super. 509, 515 (App. Div. 1991) (citation omitted).

Detective Lobanov testified that he asked defendant some routine questions regarding "biographical information, his wellbeing, and whether or not he wished to get anything to drink or eat" prior to the interview. Lobanov denied asking any questions about the case. While it is clear from the interview transcript that the two must have discussed defendant's girlfriend and his financial troubles, there is nothing in the record to indicate defendant did not volunteer this information in response to routine booking questions.

Following the submission of briefs, defendant asked this court to consider the Supreme Court's recent decision in State v. Gonzalez, 249 N.J. 612 (2022).

There, the Court found police must stop an interrogation when a defendant indicates, even ambiguously, that they want a lawyer. Id. at 631-32. Here, defendant did not request an attorney. Defendant argues he invoked his Miranda right to remain silent when he stated he was tired. However, in observing the recorded statement, the trial court found defendant was alert at that point. In addition, he continued speaking with police and did not state he no longer wished to talk. When he did state he "ha[d] nothing else to say," the State conceded it was an invocation of his Miranda rights and the remainder of the statement was inadmissible.

The totality of the circumstances surrounding the statement demonstrates defendant knowingly and voluntarily waived his Miranda rights. The trial court properly denied the motion to suppress the statement.

B.

Defendant argues that the trial court erred in terminating the Wade hearing and denying his motion to suppress the out-of-court identification because there was evidence of suggestiveness in the administration and construction of the photo array. Specifically, he asserts the array was suggestive because: (1) "when the witness was initially unable to make an identification, the administering officer suggested eliminating photos for additional viewings"; (2) "police edited

the images to appear in black and white, preventing the witness from evaluating characteristics like skin and hair tone"; and (3) defendant stood out from the filler photographs in his eye shape and hair style.

To challenge an out-of-court identification, "defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification." State v. Henderson, 208 N.J. 208, 288 (2011). Once a hearing has been granted, the State must present proof that the identification is reliable. Id. at 289. The State's burden is the same as the burden of producing evidence described in N.J.R.E. 101(b)(2), which is sometimes referred to as the "burden of going forward." State v. Henderson, 433 NJ. Super. 94, 107 (App. Div. 2013). "The burden of producing evidence has been described . . . 'as so light as to be little more than a formality.'" Ibid. (quoting State v. Segars, 172 N.J. 481, 494 (2002)). The evidence need not be persuasive; the State must merely "provide evidence on the issue that is germane to the inquiry with sufficient clarity so that the opposing party has a full and fair opportunity to respond." Ibid.

Although the State must present proof that the identification is reliable, it is defendant's ultimate burden to "prove a very substantial likelihood of irreparable misidentification." Id. at 106. Defendant may cross-examine the

State's witnesses and present their own witnesses and relevant evidence related to system and estimator variables to meet this burden. Ibid. If, under the totality of the circumstances, defendant meets this burden, the court will suppress the out-of-court identification. Ibid.

A defendant's evidence of suggestiveness "must be tied to a system [variable]—and not an estimator—variable." Henderson, 208 N.J. at 288-89. System variables are "factors . . . within the control of the criminal justice system." Id. at 247. Estimator variables are "factors related to the witness, the perpetrator, or the event itself . . . over which the legal system has no control." Ibid.

Defendant renews the arguments he made before the trial court. We are not persuaded.

There was no error in converting the photos to black and white. As the trial judge stated, it was done to "neutralize [defendant]'s attire and prevent him from unduly standing out as potentially the only individual depicted wearing a prison jumpsuit." The photos continued to depict eight individuals with similar, tan skin tones. The trial court considered hair style and eye shape and found that all the individuals depicted had "similar shorter style haircuts" and "substantially the same or substantially similar features, including the eyes."

Therefore, defendant's photo did "not significantly stand out based on a difference in any particular physical features, or based on the composition of the photographs . . . ." The trial court's findings are supported by the evidence in the record.

Moreover, there is no merit to defendant's argument that the array was administered in a suggestive fashion. Detective McNeil, who the court found credible, testified that he was a double-blind administrator who had no specific knowledge of the case, and he provided adequate pre-identification instructions.

McNeil showed the witness each photo sequentially and reminded her to "take as much time as you need." McNeil then gave her the option to review all the photos again or to only view certain ones. When the witness asked to see two photos again, McNeil reminded her she was "not required to choose any of the photographs" and then ensured she turned the first photo over before looking at the next to avoid comparing them. There is no evidence in the record that McNeil improperly administered the photo array.

There also is no merit to defendant's contention regarding "multiple viewings." The concern with multiple viewings is the effect of viewing a photo again at a subsequent identification procedure such as a lineup—not viewing a photo again during the same photo array. See Henderson, 208 N.J. at 255-56.

Here, there was a single photo array; McNeil initially showed the witness all the photos sequentially. When he finished, he gave the witness the option to view all the photos again or to only look at certain ones. The witness chose to only look at two photos and then identified defendant with seventy percent confidence after reviewing both photos. This process took approximately six minutes.

These circumstances do not implicate the same concerns outlined in Henderson. Id. at 255-56. Because there was only a single photo array, the witness's identification could not have been based on an earlier procedure. There is no error in a witness setting aside photos for further review during the same array. Defendant has failed to demonstrate the photo array was suggestive.

Therefore, we affirm the trial court's denial of defendant's motion to suppress the out-of-court identification.

Affirmed.