SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1827-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NABIL S. NASR,

Defendant-Appellant.

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Submitted May 16, 2022 – Decided June 7, 2022

Before Judges Sabatino and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-08-1262.

Joseph E. Krakora, Public Defender, attorney for appellant (Jack L. Weinberg, Designated Counsel, on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (David M. Liston, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Nabil S. Nasr appeals from a December 23, 2019 judgment of conviction. On appeal, defendant raises several issues related to pre-trial and trial rulings. He also challenges the denial of his motion for a judgment of acquittal. We affirm.

I.

We recite the facts from the testimony presented to the trial court. In January 2018, defendant placed numerous food orders, over nine consecutive days, with Dusal's Restaurant (Dusal's). Each time, defendant called the restaurant, placed a large food order, and requested cashback when he arrived to pick up the order.

Giovanni Nilli (Nilli), a co-owner of Dusal's, interacted with defendant almost daily between January 11 and January 19, 2018. Over that time span, defendant ordered $1755 worth of food using the same credit cards and requested cash back.

Nilli described the customer's voice as "a little bit like [his]," and stated the customer did not "speak English." Nilli later described defendant's accent as possibly Indian, Pakistani, or Afghan. According to Nilli, the person who placed the telephone orders and the individual who arrived to pick up the food and receive cashback were the same because he recognized the voice and speech

pattern. Nilli described the customer's skin tone as similar to his own. Nilli further testified the customer was wearing a winter coat, hat, and scarf around his neck when picking up the food orders.

In February 2018, Nilli's cousin and co-owner of Dusal's, Antonio Assante (Assante), worked at the restaurant while Nilli was away. In early February, defendant called the restaurant, placed a large order, and requested cashback. Assante completed the order and gave defendant cashback. A few days later, Assante received a notice from the bank identifying ten fraudulent credit card transactions in January 2018 involving the credit card numbers used by defendant. Assante reported the fraudulent transactions to the police.

About a week later, defendant called Dusal's again, placed another order, and requested cashback. Assante accepted the order and contacted the police. Defendant arrived to pick up the order and Assante identified defendant to the police. Detectives Hoover and Tighelaar spoke to defendant, who claimed he was there "to buy a slice of pizza." The detectives did not arrest defendant at that time.

During their follow up investigation, the detectives determined the credit cards used by defendant to order food from Dusal's belonged to Mary Titone (Titone) and Rachel Mahan (Mahan). Titone and Mahan testified they

previously ordered food from Tony's Pizza and Restaurant (Tony's) but never ordered food from Dusal's. Titone also had fraudulent transactions from Las Crazy Piñas restaurant charged to her credit card.

Manuel Betancourt (Betancourt), the owner of Tony's, testified defendant worked for him as a "deliverer" in November and December 2017. He testified the "deliverer" answered the telephone and input customer credit card information into the restaurant's payment system. According to Bentancourt, defendant handled customer credit card orders while he worked at Tony's.

Defendant testified at trial. He told the jury he was born in Egypt and came to the United States in 2012. Because his native language is Arabic, defendant explained he has trouble understanding English.

Contrary to Betancourt's testimony, defendant testified he never answered the telephone while working at Tony's. Defendant told the jury he worked as a food delivery person and denied entering credit card information for customer orders.

According to defendant, he went to Dusal's on February 13, 2018 to have a slice of pizza. Before defendant placed his order, Assante "started talking about some fraud of credit." Defendant did not understand and asked Assante to call the police. Because he did not "feel safe to stay inside the restaurant,"

defendant waited outside for the police to arrive. After the police arrived, the officers searched defendant and checked his wallet.

Several months passed while law enforcement investigated the fraudulent credit card transactions at Dusal's. Based on the investigation, the police arrested defendant in May 2018. Despite investigating, law enforcement conducted no forensic analysis of the signatures on the credit card receipts from Dusal's. Nor did the police trace the telephone number used to place the food orders at Dusal's.

Nearly three months after the last transaction at Dusal's, the detectives arranged for Nilli to review a photo array to determine if he could identify the individual who use the fraudulent credit cards. Detective Hoover explained the photo array identification process to Nilli. The detective further advised he could not remain in the room while Nilli reviewed the photographs because the detective had "seen the individual" and did not "want to influence [Nilli's] decision at all." Detective Hoover also told Nilli "there's a chance that [the suspect] might not be in these pictures" and Nilli should not feel compelled to make an identification. Additionally, the detective clarified Nilli should state his confidence in "percentage" form if Nilli made an identification.

Out of the six photographs in the array, Nilli immediately identified defendant in the third picture. Nilli stated he was a "hundred percent" certain the third photograph was the person who placed the cashback food orders at Dusal's. To be absolutely certain in his identification, Nilli viewed the remaining three photographs and returned to the third photograph as the individual who ordered the food.

After identifying defendant from the array, Nilli asked whether defendant was in jail. In responding, Detective Hoover stated "the guy who did it" was not in custody, but the police knew where the suspect lived. Continuing their post-identification discussion, Detective Hoover asked Nilli to speak to other restaurant owners about similar fraudulent transactions.

II.

On August 31, 2018, defendant was indicted.[1] In the indictment, defendant was charged with two counts of third-degree theft of identity, N.J.S.A. 2C:21-17(a)(4) (counts one and two); two counts of fourth-degree credit card theft, N.J.S.A. 2C:21-6(c)(1) (counts three and four); two counts of third-degree impersonation, N.J.S.A. 2C:21-17(a)(2) (counts five and six); two counts of

[1] The indictment was amended on May 2, 2019 and May 23, 2019 to reflect only the fraudulent credit card transactions involving Dusal's.

third-degree fraudulent use of a credit card, N.J.S.A. 2C:21-6(h) (counts seven and eight); and two counts of third-degree theft by deception, N.J.S.A. 2C:20-4(a) (counts nine and ten).

On November 26, 2018, defendant filed a motion to suppress Nilli's out-of-court identification based on defects in the array's construction and administration. In a January 24, 2019 written opinion, the judge denied the motion.

Defendant argued the photo array was suggestive because he was the only person in the photo array who looked Middle Eastern or Indian. After reviewing all six photographs shown to Nilli, the judge found all the photographs "in the lineup display[ed] similar features to [d]efendant. While their exact races [were] uncertain, they all have dark eyes and hair, bushy eyebrows, and facial hair. A few of them have a lazy eye similar to the [d]efendant." The judge concluded the "actual ethnicities of the men in the photos [was] irrelevant as long as they are 'look alikes.'"

The judge also highlighted Nilli's certainty in identifying defendant as the customer who used the fraudulent credit cards to purchase food. The judge stated Detective Hoover's responses to Nilli's questions after the identification were "the opposite" of confirmatory feedback because the detective did not say

"defendant" or "the man in the picture." Instead, the detective responded "the guy who did [it]" was not in jail. Thus, Detective Hoover drew a distinction between the individual identified by Nilli and the actual suspect.

The judge found Nilli's description of defendant wearing a scarf partially covering his face did not affect Nilli's degree of certainty in identifying defendant. The judge concluded Nilli "recognized the top of the [d]efendant's face" and did "not rely on skin tone or ethnicity" in making the identification.

The judge also rejected defendant's argument the identification was unreliable due to the three-month delay between the fraudulent transactions and Nilli's identification. The judge noted Nilli recalled what defendant wore when he picked up his food and saw defendant nearly every day for nine consecutive days in January 2018.

Because defendant failed to proffer evidence of suggestiveness associated with Nilli's identification of defendant, the judge declined to conduct a Wade[2] hearing.

About a week prior to the start of the trial, the judge held a pre-trial conference. At the conference, the State moved in limine to allow Betancourt, the owner of Tony's, to testify at trial despite the State's failure to disclose his

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

status as a potential witness at least thirty days before the trial in accordance with Rule 3:13-3(b)(1).

While the judge admonished the State for the late disclosure of a trial witness, he permitted Bentancourt to testify but limited the scope of his testimony. Specifically, the judge precluded admission of any evidence of defendant's "termination from [Tony's], defendant's theft from the same, and defendant's disorderly persons adjudication for that offense." However, the judge allowed the State to introduce evidence of defendant's employment at Tony's. Although defense counsel requested Betancourt be barred from testifying, the judge stated "it's something [defense counsel] can handle . . . though it's not my preference to wait this late." After receipt of the judge's ruling, defense counsel did not seek an adjournment of the trial to prepare for Betancourt's testimony.[3]

[3] We note defense counsel had a week to prepare because Betancourt did not testify until June 6, 2019.

Defendant was tried before a jury on June 5, 6, and 11, 2019.[4] Nilli, Assante, Titone, Mahan, Betancourt, Detective Hoover, and defendant testified. On June 11, the jury found defendant guilty on all nine remaining charges.

On August 26, 2019, the sentencing judge granted defendant's application for admission to the drug-court program. On December 5, 2019, the judge sentenced defendant to drug-court probation for five years. Defendant has not challenged the sentence imposed.

On appeal, defendant raises the following arguments:

POINT I

> THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE STATE'S WITNESS IDENTIFICATION STATEMENTS. THE COURT FURTHER ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A WADE IDENTIFICATION HEARING.

POINT II

> THE COURT ERRED IN DENYING THE DEFENDANT'S REQUEST TO INCLUDE IN THE IDENTIFICATION CHARGE A CROSS-RACIAL IDENTIFICATION CHARGE. IN THE ALTERNATIVE, THE COURT SHOULD HAVE EXPANDED THE IDENTIFICATION CHARGE TO INCLUDE CROSS-ETHNIC IDENTIFICATION.

[4] Just before the start of the trial, the judge dismissed one of the third-degree theft by deception charges.

THE COURT ALSO ERRED WHEN IT REFUSED TO INCLUDE INSTRUCTIONS ON DISGUISES IN THE CHARGE.

POINT III

THE TRIAL COURT'S RULINGS PRECLUDING THE DEFENDANT FROM EFFECTIVELY CROSS-EXAMINING MR. NILLI AND DET. HOOVER ABOUT MR. NILLI'S DESCRIPTION OF THE CALLER AND THE ETHNICITY OF THE FILLER PHOTOGRAPHS IN THE PHOTOGRAPHIC ARRAY DEPRIVED THE DEFENDANT OF A FAIR TRIAL BECAUSE IT PRECLUDED THE JURY FROM MAKING AN APPROPRIATE ASSESSMENT OF HIS CREDIBILITY WITH REGARD TO HIS OUT-OF-COURT AND IN-COURT IDENTIFICATIONS.

POINT IV

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE PURSUANT TO R. 3:18-1.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE STATE'S WITNESS IDENTIFIED ONE WEEK BEFORE THE TRIAL BEGAN. THE DISCOVERY WAS NOT TIMELY PROVIDED TO THE DEFENSE.

POINT VI

INTRODUCTION OF FRAUDULENT ACTIVITY INVOLVING THE DEFENDANT WITH LAS

CRAZY PIÑAS WAS NOT SUPPORTED BY THE TESTIMONY AND AMOUNTED TO OTHER CRIMES EVIDENCE IN VIOLATION OF N.J.R.E. 404(b). THE PROSECUTOR'S ACTIONS CONSTITUTED PROSECUTORIAL MISCONDUCT.

III.

Our review of a trial court's denial of a motion to suppress is limited. State v. Robinson, 200 N.J. 1, 15 (2009). "In reviewing a motion to suppress, an appellate court 'must uphold 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. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). We give deference to the trial judge's factual findings in recognition of the judge's "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). However, legal conclusions to be drawn from those facts are reviewed de novo. State v. Smith, 212 N.J. 365, 387 (2012).

With respect to barring identification evidence, "to obtain a pretrial hearing, a 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) overruled on other grounds by State v. Anthony, 237

N.J. 213 (2014). That evidence must "be tied to a system – and not an estimator – variable." Id. at 288-89. If a defendant demonstrates "some evidence" of suggestiveness associated with a system variable, then a full hearing to consider estimator variables should be held. Id. at 290. However, if there is insufficient evidence of a suggestive identification procedure, the trial court may stop its analysis and need not explore the estimator variables. Id. at 290-91. The ultimate burden though "remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Id. at 289.

Defendant claims the trial court erred in denying his motion to suppress Nilli's out-of-court identification because defendant presented sufficient evidence of suggestiveness in the administration and construction of the photo array to be entitled to a Wade hearing. Defendant claims suggestiveness based on three system variables: pre-identification instructions, which consider whether an officer's pre-identification instructions were neutral and whether an officer told the witness the suspect may not be present in the array; construction of the array, which considers whether the suspect stood out from other photographs in the array; and feedback, which considers whether the witness received any information or feedback before, during, or after the identification

procedure.[5] After reviewing the record, we discern no suggestiveness in the administration or construction of the photo array.

Detective Hoover's pre-identification instructions to Nilli regarding the photo array were not suggestive. The detective properly advised he could not be in the room because he had previously seen the suspect. Further, Detective Hoover informed Nilli the suspect may not be in the photo array and Nilli should not feel compelled to make an identification. In the event Nilli made an identification, the detective instructed Nilli to state his level of certainty about the identification. We are satisfied no unduly suggestive comments were made by Detective Hoover to Nilli pre-identification to warrant a Wade hearing.

Nor has defendant demonstrated suggestiveness regarding construction of the photo array. Defendant claims his photograph was more sharply focused than some of the other photographs. Although some photographs in the array were less in focus, defendant's photograph was not sharper or more focused than every photograph in the array, particularly when compared to the first and last photographs.

[5] Because there is no evidence of suggestiveness regarding defendant's system variables, we need not address defendant's arguments associated with the estimator variable of racial bias.

Defendant also contends the array lacked individuals who appeared to be of Middle Eastern or Indian descent. However, the judge properly found the individuals depicted in the photo array were "look alikes" because the array showed men with dark-hair, brown eyes, bushy eyebrows, facial hair, and similar complexions. Several photographs also included men with a lazy eye like defendant. Although defendant is the only individual who has freckles, the freckles are not visible in his array photograph. Nor was the speech pattern or accent of the individuals in the array relevant because Nilli's identification was based solely on the appearance of the individual. In reviewing the photographic array, we are satisfied defendant failed to proffer evidence of suggestiveness in the construction of the photo array.

Lastly, we reject defendant's claim of suggestiveness based on improper feedback provided by Detective Hoover after Nilli's identification. After making an identification, Nilli asked Detective Hoover if defendant was in jail. The detective asked if Nilli meant "[t]he guy who did [it]?" and responded that individual was not in custody. By answering Nilli's question in this manner, Detective Hoover distinguished the man who Nilli identified in the photo array and defendant.

We also reject defendant's claim regarding improper feedback based on Detective Hoover's asking Nilli to speak with other restaurant owners about similar fraudulent transactions. This statement was unrelated to Nilli's identification. Moreover, the discussion occurred after Nilli confirmed his one hundred percent certainty in identifying defendant.

Here, defendant failed to demonstrate suggestiveness associated with the photo array. Thus, there was no need for the judge to conduct a Wade hearing and the judge properly denied defendant's motion to suppress the identification.

IV.

Defendant contends the judge's failure to give a jury instruction on cross-racial identification violated his right to a fair trial. Alternatively, he asserts the judge should have included a cross-ethnic identification charge.

Because defendant failed to object to the charge as given, we review for plain error under Rule 2:10-2. State v. Torres, 183 N.J. 554, 564 (2005). "Plain error, in the context of a jury charge, is '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Afanador, 151 N.J. 41, 54 (1997) (alteration in original) (quoting State

v. Jordan, 147 N.J. 409, 422 (1997)). Moreover, instructions given in accordance with the model charge, or which closely track the model charge, are generally not considered erroneous. Mogull v. CB Com. Real Est. Grp., Inc., 162 N.J. 449, 466 (2000).

A cross-racial identification charge is appropriate "whenever cross-racial identification is in issue at trial." Henderson, 208 N.J. at 299. "A cross-racial identification occurs when an eyewitness is asked to identify a person of another race." Id. at 267 (quoting State v. Cromedy, 158 N.J. 112, 120 (1999)).

Here, the omission of a cross-racial or cross-ethnic identification charge was not error, let alone plain error capable of producing an unjust result. Nilli testified defendant's skin tone was similar to his own skin color. According to the United States Census Bureau and the National Institutes of Health, a person is considered "white," if descending from "the original peoples of Europe, the Middle East, or North Africa." About the Topic of Race, U.S. Census Bureau, https://www.census.gov/topics/population/race/about.html (Mar. 1, 2022); see also Nat'l Insts. of Health, NOT-OD-15-089, Racial and Ethnic Categories and Definitions for NIH Diversity Programs and for Other Reporting Purposes (2015), https://grants.nih.gov/grants/guide/notice-files/not-od-15-089.html.

Consistent with this definition, defendant and Nilli are both white and therefore share the same race.

Further, there is no evidence in the record supporting a jury instruction on cross-ethnic identification. Nilli identified defendant based on an array containing photographs of men who shared the same features without any information regarding ethnicity. Moreover, the judge provided the jury with an instruction on identification testimony generally. We are satisfied defendant failed to demonstrate any error in the judge's denial of a cross-racial and cross-ethnic identification charge.

Nor do we find any merit to defendant's argument the hat and scarf worn by defendant when picking up food at Dusal's warranted a jury instruction on disguises. Disguises, such as "hats, sunglasses, masks," may reduce the accuracy of identifications. Henderson, 208 N.J. at 266. However, there is no evidence the hat and scarf were worn as part of a planned disguise.

Here, the fraudulent credit card transactions occurred during the winter months. Defendant's wearing a hat and scarf when he entered Dusal's was likely weather related rather than part of an intended disguise. Additionally, Nilli testified the scarf did not cover defendant's face and defendant often removed his hat once inside the restaurant. Further, Nilli saw defendant nearly every day

over the course of about nine days and described defendant being similarly dressed each time he picked up food. Thus, on this record, we are satisfied the judge did not abuse his discretion in declining to provide the jury with an instruction regarding disguises.

V.

Defendant next argues the judge erred by "precluding the defendant from effectively cross-examining [Nilli] and [Detective Hoover] about [Nilli's] initial description of the caller and person showing up to pick up the food orders." He further contends the judge's prohibiting questions directed to Detective Hoover regarding the "ethnicity of the filler photographs in the photographic array," deprived defendant of a fair trial. According to defendant, the intended cross-examination would have allowed the jury to assess the credibility of Nilli and Detective Hoover related to the in-court and out-of-court identification of defendant.

Trial courts are afforded broad discretion in controlling cross-examination. State v. Jenewicz, 193 N.J. 440, 467 (2008). We review a trial judge's rulings regarding cross-examination for abuse of discretion. Ibid. "[A]n abuse of discretion 'arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an

impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). We will "reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

When a police officer testifies about a witness identification from a photo array, "what counts is whether the officer fairly arranged and displayed the photographic array and whether the witness made a reliable identification." State v. Branch, 182 N.J. 338, 352 (2005). "Why the officer placed the defendant's photograph in the array is of no relevance to the identification process and is highly prejudicial." Ibid.

Here, defendant's attorney was allowed to cross-examine Nilli and Detective Hoover regarding suggestiveness associated with the photo array and the identification process. The judge only precluded defense counsel from inquiring as to the ethnicity and the last names of the individuals depicted in the photo array because ethnicity was not the basis for construction of the array or Nilli's identification of defendant from that array.

Defense counsel stated the purpose of the questions on cross-examination was to allow the jury to "criticize" the photo array evidence. Based on our review of the cross-examination questions and responses, defense counsel more than ably examined both Nilli and Detective Hoover, raising issues for the jury to resolve concerning the suggestiveness of the photo array.

For example, defense counsel thoroughly cross-examined Detective Hoover regarding the entirety of the photo array as well as the instructions he provided to Nilli prior to displaying the photographs. Counsel asked the detective about the number of photographs in the array depicting a person with freckles similar to defendant. She also asked if the men in the photographs had hair like defendant. Additionally, defense counsel asked Detective Hoover if the photograph of defendant was clearer and more in focus as compared to the rest of the photographs in the array. The judge allowed defense counsel to question the detective extensively about the general appearance of the individuals in the photo array and the instructions the detective provided prior to Nilli reviewing the array.

During cross-examination of Nilli regarding the photo array, defense counsel confirmed Nilli identified defendant as the third photograph before he completed a review of the entire array. She also inquired which features in the

photographs led Nilli to make his identification because defendant had worn a scarf when picking up the food orders. Defense counsel also challenged Nilli's testimony by suggesting he focused on a specific facial feature rather than the entire face, causing Nilli to misidentify defendant as the individual involved in the fraudulent credit card transactions.

During closing argument, defense counsel highlighted numerous problems with the photo array. For example, she noted Nilli's description of defendant's skin tone and appearance as being someone from India, Pakistan, or Afghanistan rather than Egypt. She also told the jury Nilli never described defendant as having freckles until Nilli testified at trial.

Regarding the photo array, defense counsel instructed the jury to review each of the original six photographs shown to Nilli. She explained defendant's picture was the only photograph of a person with freckles. She emphasized that defendant's photograph stood out because it was "clearer" than the other photographs and the jurors could "see every hair in [defendant's] beard" unlike the clarity of the other pictures. Defense counsel told the jury to examine each photograph and note the "angle, hair, the size of a face in a photo, all these other types of things . . . ." She argued defendant's "skin tone is different from

everyone else's. He stands out." Regarding the ethnicity of the individuals in the photographs, defense counsel stated the following:

> Ask yourselves how many Middle Eastern men there are in this photo array. If the answer is anything less than six, there's a problem.

Defense counsel also noted the time gap between the fraudulent credit card transactions and Nilli's out-of-court identification. Nilli last saw defendant in January 2018 and the photo array occurred in May 2018. Thus, she argued the delay resulted in Nilli's misidentification of defendant as the individual who committed the crimes.

These are just a few examples from defense counsel's cross-examination and closing argument effectively employed to convince the jury the photo array was improperly suggestive and, as a result, led to the misidentification of her client. Having reviewed the record, we are satisfied defendant was not deprived of a fair trial because his attorney extensively cross-examined Nilli and Detective Hoover on the suggestiveness of the photo array and the procedures leading to Nilli's identification.

VI.

Defendant asserts the judge erred in denying his motion for acquittal. Rule 3:18-1 provides "[a]t the close of the State's case . . . the court shall, on

defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction." A trial judge must afford the State the benefit of all favorable testimony and inferences to be drawn from the testimony and determine whether a reasonable jury could find defendant guilty beyond a reasonable doubt. State v. Lodzinski, 246 N.J. 331, 340 (2021) (Patterson, J., concurring).

In reviewing a decision on a motion for acquittal, "the trial judge is not concerned with the worth, nature[,] or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. DeRoxtro, 327 N.J. Super. 212, 224 (App. Div. 2000) (quoting State v. Kluber, 130 N.J. Super. 336, 342 (App. Div. 1974)). Furthermore, "credibility issues . . . [should] not be resolved by the judge when ruling on [a motion for acquittal]" because such issues must be decided by the jury. State v. Pickett, 241 N.J. Super. 259, 265 (App. Div. 1990).

Our review of a trial court's denial of a motion for acquittal is "limited and deferential[,]" State v. Reddish, 181 N.J. 553, 620 (2004), and requires that "we apply the same standard as the trial court." State v. Fuqua, 234 N.J. 583, 590 (2018) (citing State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990)). In

assessing the sufficiency of the evidence on an acquittal motion, we apply a de novo standard of review. State v. Cruz-Pena, 243 N.J. 342, 348 (2020).

Defendant sought acquittal on the following grounds: (1) the State's failure to establish the identity of the perpetrator because the "description provided to the police did not match the defendant" and there was a delay in administering the photo array, and (2) the State's failure to prove Dusal's suffered damages in the form of lost money. We reject these arguments.

With respect to defendant's first theory, both Nilli and Assante recognized defendant based on his physical appearance during trial. Nilli also saw defendant enter Dusal's about nine times in January 2018. Based on the number of encounters between Nilli and defendant, Nilli identified defendant from a photo array despite the passage of time. There is no support in the record for defendant's contention that Nilli's description of the perpetrator failed to match defendant's appearance or that the passage of time impacted Nilli's ability to identify defendant.

Similarly, we reject defendant's alternative argument in support of an acquittal. The State need not proffer evidence that Dusal's lost money to meet its burden of proof. Under N.J.S.A. 2C:21-17(a)(4), theft of identity, the State must prove defendant used the credit card to "fraudulently obtain or attempt to

obtain a benefit or service[]." Under N.J.S.A. 2C:21-6(c)(1), credit card theft, the State must prove defendant "receive[d] the credit card with intent to use it or sell it . . . ." Under N.J.S.A. 2C:21-17(a)(1), impersonation, the State must prove defendant pretended to be a representative of another person and "[did] an act in such assumed character or false identity for the purpose of obtaining a benefit for himself . . . ." Under N.J.S.A. 2C:21-6(h), fraudulent use of a credit card, the State must prove defendant "use[d] . . . [a] stolen or fraudulently obtained credit card to obtain money, goods or services, or anything else of value . . . ." Under N.J.S.A. 2C:20-4(a), theft by deception, the State must prove defendant "obtain[ed] property of another" by creating or reinforcing a false impression.

None of the foregoing charges required the State to prove Dusal's lost money due to defendant's actions. To the contrary, monetary loss is not an element of the crimes for which defendant was charged.

Having reviewed the record, we are satisfied the judge properly denied defendant's motion for acquittal. The judge thoroughly reviewed and summarized the evidence presented by the State, properly set forth the legal standard for deciding a motion for acquittal, and, giving the State every

reasonable inference, cited the facts upon which a jury could find defendant guilty as to each count.

VII.

Defendant claims the judge abused his discretion by denying the motion to exclude Betancourt's testimony. The State identified Betancourt as a witness one week before the start of the trial. Due to the State's late notice of its intent to call Betancourt as a witness, defendant contends he was deprived of the ability to conduct any investigation. Additional, defendant asserts the State was obligated to pursue Betancourt's testimony earlier as part of its investigation. Absent Betancourt's testimony, defendant argues the State could not link defendant to the credit cards used to purchase food at Dusal's. By allowing Betancourt's testimony on such short notice, defendant claims he was deprived of the ability to defend himself.

"[T]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). "We review the trial court's evidentiary ruling under a deferential standard; it should be upheld 'absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment'" which is "so wide of

the mark that a manifest denial of justice resulted." State v. J.A.C., 210 N.J. 281, 295 (2012) (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

When presented with the addition of a late witness at trial, the trial court should explore possible sanctions such as granting a continuance, declaring a mistrial, or excluding the testimony of the witness. See Thomas v. Toys "R" Us, Inc., 282 N.J. Super. 569, 581 (App. Div. 1995). When the testimony is "pivotal," a court should avoid excluding the witness. Id. at 582. Further, sanctions should not be imposed if there is "(1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of the evidence." Westphal v. Guarino, 163 N.J. Super. 139, 146 (App. Div.), aff'd, 78 N.J. 308 (1978).

The State introduced Betancourt's testimony to establish defendant's access to credit cards issued to Titone and Mahan. While the judge admonished the State for the belated request to call Betancourt as a trial witness, the judge found the late witness was "something that [defense counsel] can handle." Moreover, the trial was scheduled to start in one week, and defense counsel had ample time to prepare for Betancourt's testimony. Additionally, defense counsel

did not request a brief delay of the trial to offset the State's late addition of Betancourt as a trial witness.

Here, Betancourt testified on the second day of trial. Betancourt's direct testimony spanned four pages of the trial transcript. During his brief testimony, Betancourt explained the Tony's food delivery workers answered the business telephone and entered the customer's credit card number to complete food purchases.

Defense counsel's cross-examination of Betancourt spanned three pages of the trial transcript. During cross-examination, defense counsel established defendant did not receive a paycheck because he "worked off the books." Additionally, defense counsel confirmed there was another pizza establishment named "Tony's." She also verified the State never contacted Betancourt until just prior to the trial.

During summation, defense counsel effectively challenged Betancourt's testimony. She also argued his testimony that delivery drivers answered telephones and entered customer credit card numbers defied common sense and it was more likely and logical that delivery workers at Tony's performed the task for which they were hired – making food deliveries.

Having reviewed the record, we are satisfied the judge did not abuse his discretion by allowing Betancourt to testify at trial. Betancourt's direct testimony was brief. Defense counsel competently cross-examined Betancourt notwithstanding the State's delay in identifying him as a witness. During closing argument, defense counsel effectively challenged Betancourt's credibility regarding the role of a Tony's delivery driver who was paid off the books.

VIII.

Defendant contends the prosecutor's repeated references to fraudulent credit card transactions at Las Crazy Piñas constituted prosecutorial error and deprived him of a fair trial, warranting reversal of his convictions. We disagree.

Because defense counsel did not object to the prosecutor's references to Las Crazy Piñas during the trial, we review for plain error. State v. Singh, 245 N.J. 1, 13 (2021); R. 2:10-2. Moreover, in the context of opening and closing statements, "when counsel does not make a timely objection at trial, it is a sign 'that defense counsel did not believe the remarks were prejudicial' when they were made." State v. Pressley, 232 N.J. 587, 594 (2018) (quoting State v. Echols, 199 N.J. 344, 360 (2009)).

"[P]rosecutors are given wide latitude in making their summations and may sum up 'graphically and forcefully.'" State v. Garcia, 245 N.J. 412, 435 (2021)

(quoting State v. Johnson, 31 N.J. 489, 510 (1960)). Their comments must be reasonably related to the scope of the evidence presented. State v. McNeil-Thomas, 238 N.J. 256, 275 (2019).

We will reverse "a conviction on the basis of prosecutorial misconduct only if 'the conduct was so egregious as to deprive defendant of a fair trial.'" Ibid. (quoting State v. Wakefield, 190 N.J. 397, 437 (2007)). In determining whether the conduct was sufficiently egregious, we consider the brevity of a prosecutor's improper comments and whether the jury was instructed that counsels' comments during opening and closing statements were not evidence. Echols, 199 N.J. at 361.

Here, the prosecutor made a single reference to Las Crazy Piñas in his opening argument, stating "as part of the ongoing investigation, it's revealed that Ms. Titone's card has also been used at Las Crazy Piñas . . . ." Defense counsel did not object. This statement was supported by Titone's trial testimony that she never ordered food from Las Crazy Piñas.

In her summation, defense counsel twice mentioned Las Crazy Piñas. On both occasions, she cast doubt on the State's case, claiming the State did not meet its burden of proof with respect to the "criminal charges" resulting from

transactions at Las Crazy Piñas. However, prior to trial, the judge amended the indictment to reflect fraudulent credit card transactions only at Dusal's.

Following defense counsel's summation, the prosecutor reiterated that Titone did not order food from Las Crazy Piñas. He twice suggested defendant may have used fraudulently obtained credit cards at Las Crazy Piñas in response to the statement made by defense counsel during closing argument.

The prosecutor's brief mentions of Las Crazy Piñas did not constitute prosecutorial error. Defense counsel failed to object to statements regarding Las Crazy Piñas during trial. Under Pressley, the failure of defense counsel to object suggests defense counsel did not believe the remarks were prejudicial.

Moreover, defense counsel referred to Las Crazy Piñas in her summation and erroneously stated the State did not meet its burden in proving the criminal charges relating to Las Crazy Piñas. Because there were no criminal charges regarding transactions at Las Crazy Piñas, the prosecutor responded to the argument during his closing statement to correct defense counsel's misstatement of the charges against defendant.

Significantly, after closing arguments, the judge instructed the jury "[a]ny arguments, statements, remarks, openings and summations of counsel are not

evidence and must not be treated as evidence." It is presumed the jury followed that instruction. See State v. Smith, 212 N.J. 365, 409 (2012).

Under the circumstances, we are satisfied the prosecutor's brief references to Las Crazy Piñas were not improper and therefore did not deprive defendant of a fair trial. Even if the brief remarks about Las Crazy Piñas were inappropriate, defendant failed to demonstrate resulting prejudice to warrant reversal of the convictions under the plain error standard.

To the extent we have not specifically addressed them, any arguments by defendant are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.