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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4692-18**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID COOPER,

Defendant-Appellant.

Submitted March 21, 2022 – Decided April 13, 2022

Before Judges Mayer and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment Nos. 16-12-1542, 17-02-0124 and 17-10-0670.

Joseph E. Krakora, Public Defender, attorney for appellant (Peter T. Blum, Assistant Deputy Public Defender, of counsel and on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Lauren Bonfiglio, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant David Cooper appeals from a June 17, 2019 judgment of conviction after a jury found him guilty of murder and weapons charges. He also appeals from an order admitting his statement made while in the hospital being treated for a gunshot wound and various evidentiary rulings during the trial. Additionally, defendant argues the judge erred in applying aggravating factor six and seeks a remand for resentencing. We affirm defendant's convictions but remand to the trial court for resentencing.

Defendant's appeal involves three separate indictments. Indictment 16-12-1542 charged defendant with unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1). Indictment 17-02-0124 charged defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1) or 2C:11-3(a)(2); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). Indictment 17-10-0670 charged defendant with second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); and third-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2). Defendant pleaded guilty to the gun charges under Indictment 16-12-1542 and the assault charges under Indictment 17-10-0670. He proceeded to trial on the murder and related weapons charges under Indictment 17-02-0124.

We summarize the facts related to these indictments based on the testimony adduced at defendant's pretrial hearing, plea hearing, and trial.

Indictment 16-12-1542

On July 31, 2016, defendant and two companions, Rshan White and Shawn Wright, were shot in Jersey City. The three men were shot near a parked car belonging to White's sister. At 3:30 a.m., detectives responded to a reported shooting. Defendant suffered a gunshot wound to his thigh. Defendant told detectives he did not see the shooter and did not hear any gun shots. Defendant and Wright were taken by ambulance to a nearby hospital. White, who also suffered a gunshot wound, left the scene on his own, eventually arriving at the same hospital as defendant.

Detective Joseph Chidichimo arrived at the hospital at about 4:00 a.m. Defendant and White were in the same trauma treatment room about six feet apart and separated by a curtain. Wright was in a separate room. Detective Chidichimo asked all three men how they suffered their gunshot wounds. Each responded they did not see the shooter. According to the detective, despite suffering a gunshot wound, defendant remained "pretty calm, conscious, alert."

After speaking with the men, Detective Chidichimo received a telephone call from his sergeant. He then arrested all three men based on a handgun discovered in a car belonging to White's sister.

Detective Chidichimo arrested White, handcuffed him to the hospital bed, and read him the Miranda warnings. According to the detective, White was "pretty upset" and claimed the handgun did not belong to him. The detective then arrested defendant, who remained in the same room as White, handcuffed defendant to his hospital bed, and provided the Miranda warnings. The detective testified defendant was "pretty quiet" and "didn't seem to be getting too upset." Defendant also denied ownership of the handgun. The detective also arrested and read the Miranda warnings to Wright. Wright denied any knowledge of a handgun.

Detective Chidichimo left the room where defendant and White were being treated to speak with his partner. While standing outside the hospital room, the detective heard an upset White tell defendant, "this is B.S.," "[t]hat ain't my gun," "[y]ou know, it ain't my gun," "you better do the right thing," "[b]etter man up," and "I['m] not trying to eat a gun charge."

Defendant then motioned for the detective to enter the room. Detective Chidichimo walked over to defendant and asked, "what's up[?]" Defendant told

the detective the handgun belonged to him. The detective explained defendant did not "have to talk to [him]" and did not "have to tell [him] nothing." Defendant responded, "yeah, I know . . . the gun's mine." Defendant was charged with second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1).

Prior to trial, the State moved to admit defendant's statement regarding his ownership of the handgun. A pretrial motion judge conducted an evidentiary hearing over three non-consecutive days. Two individuals testified for the State: Detective Chidichimo and Detective Brian Glasser.

According to his testimony, Detective Glasser responded to the scene where the shots were fired on July 31, 2016. The detective considered defendant, White, and Wright as victims of a shooting by an unknown assailant. Detective Glasser described the demeanor of the three men upon his arrival at the scene and remarked defendant was calm and did not appear to be under the influence of any substances. In speaking with Detective Glasser, each man denied knowing who fired the shots.

The defense called two witnesses who treated defendant after his gunshot wound: David Fowler and Dr. Vincent Ruiz. Fowler, a paramedic and emergency medical services technician, testified he treated defendant for a

gunshot wound to the thigh and administered fifty micrograms of Fentanyl for pain. Fowler described defendant as alert and oriented. Fowler did not observe any slurred speech or involuntary body movements, negating any concern defendant might be under the influence of an illegal substance.

Dr. Ruiz treated defendant in the hospital emergency room. He administered morphine for defendant's gunshot wound. Dr. Ruiz wrote in his discharge report that defendant was awake, alert, and had no neurological or cognitive dysfunction. The doctor also noted diagnostic testing was negative for alcohol in defendant's system.

In a written post-hearing brief, defendant argued his statement should be suppressed because it was not voluntary and "illegally compelled by the State" absent a proper Miranda waiver. In its post-hearing written submission, the State asserted defendant's "[s]pontaneous, uninterrogated statements [were] admissible and d[id] not implicate Miranda." The State also claimed defendant "acknowledge[d] his rights before making the inculpatory statement a second time."

In an August 18, 2017 order and attached written decision, the judge granted the State's motion to admit defendant's statement in the hospital regarding ownership of the gun. The judge concluded defendant was under

arrest and in custody at the time he made the statement to Detective Chidichimo. However, she determined defendant was not being interrogated when he made the statement. The judge found defendant "called [Detective] Chidichimo into the room to inform him that the gun was his and initiated the questioning himself." The judge held there "was no evidence that the officers asked him any questions regarding whether the gun was his, and accordingly, he was not being interrogated at the time that he stated that the gun was his." Because defendant's statement was spontaneous, the judge concluded "Miranda was not required."

Even if defendant's statement had been the product of an interrogation, the judge found defendant waived his Miranda rights. Based on the testimony during the suppression hearing, the judge found defendant was conscious, alert, and capable of communicating and answering questions when he was in the hospital. In her decision, the judge wrote:

[Defendant] is a 25-year-old man who was detained for no longer than twenty (20) minutes before he spontaneously stated the handgun was his. Det[ective] Chidichimo did not conduct repeated questioning. Rather, [defendant] called him over and Det[ective] Chidichimo repeated to [defendant] that he was under no obligation to speak with the detective. Therefore, [defendant] made a knowing, intelligent, and voluntary decision to speak with Det[ective] Chidichimo, and his waiver of his Miranda rights was valid.

Indictment 17-02-0124

On September 19, 2016, a surveillance camera depicted an individual approach Ahmin Colclough from behind and shoot him in the back of the head.

Defendant's girlfriend, Alexis Brennan, testified she lived at 14A Rose Avenue in Jersey City in September 2016. The night before the Colclough shooting, defendant stayed at Brennan's house.

On the morning of the shooting, defendant drove Brennan to work in her 2001 Chevy Prism sedan. A surveillance camera showed a bearded black man leaving 14A Rose Avenue, wearing a dark hat with a star logo, dark jacket, dark jeans, and sneakers. After dropping Brennan at work, defendant continued driving Brennan's car.

Various surveillance cameras showed Brennan's car travelling on Forrest Street between 9:29 a.m. and 10:00 a.m. on the day of the shooting. Colclough and another companion were walking in the opposite direction on Forrest Street around 9:37 a.m. that morning. The shooter, wearing clothing similar to the clothing worn by the individual shown in the surveillance video from 14A Rose Avenue, exited his car and followed Colclough. The shooter took a handgun from his pocket and shot Colclough at close range. The shot severed Colclough's spinal cord. The shooter then fled the scene.

Detectives reviewed surveillance camera videos from the area of the shooting. Based on the video camera footage, the detectives suspected Brennan's car, seen circling the area, was involved in Colclough's murder. Police then located the suspected shooter's car at 14A Rose Avenue and placed the car under surveillance.

On the morning of September 21, defendant drove Brennan to work in the same car under police observation. Detectives seized the car, took Brennan to the police station, and photographed the car.

At the station, detectives interviewed Brennan. Her statements to the detectives were video and audio recorded. Brennan told the detectives defendant spent the night of September 18 in her home and drove her to work the next morning. The detectives asked Brennan to identify defendant and her car in still images taken from surveillance camera video footage. When Brennan was first asked to identify her car and the man from the still photographs, she was hesitant and unsure. Brennan could not be certain the vehicle was her car without seeing the license plate. Nor could Brennan confirm the man in the photograph was defendant because the individual's face was too blurry, and Brennan was uncertain if defendant owned the specific items of clothing worn by the shooter in the still images.

Brennan told the detectives that defendant carried a handgun and sold drugs when she first met him. The detectives questioned Brennan about defendant's illegal activities, and she consistently stated she did not know anything about defendant's possible criminal activity.

After a while, the detectives and Brennan left the interrogation room to go to another room with video equipment for watching the surveillance camera footage. There was no recording of communications, if any, between the detectives and Brennan while Brennan watched the surveillance camera video. Upon returning to the original room for further questioning, a detective asked Brennan "can we confidently say that this is [] your vehicle?" She responded, "yeah."

The detectives also asked Brennan about defendant's clothing, specifically any hats or jackets worn by defendant. The detectives showed Brennan a still photograph from the surveillance video footage of the clothing worn by the shooter. Again, Brennan equivocated in response to the detectives' questions. The detectives returned with Brennan to the other room to watch another video showing the shoot. After returning to the interview room, the detectives showed Brennan the same still image displayed earlier and asked, "[d]o you believe this

is [defendant]?" Brennan answered, "[y]eah." At the detectives' request, Brennan signed the back of the still photographic images.

Indictment 17-10-0670

While in custody in the Hudson County jail awaiting trial on the murder and gun related charges, defendant threw hot liquid on an inmate. The incident was captured on video. The victim suffered serious second-degree and third-degree burns. Defendant was charged with second-degree aggravated assault, N.J.S.A. 2C:12-1b(1), and third-degree aggravated assault, N.J.S.A. 2C:12-1b(2).

On December 18, 2017, defendant pleaded guilty to Indictment 16-12-1542, the unlawful possession of a gun charge. As part of his guilty plea under this indictment, defendant reserved the right to challenge the admission of his statement in the hospital room regarding ownership of the handgun. He also pleaded guilty under Indictment 17-10-0670 to third-degree aggravated assault with a deadly weapon.

Murder trial

In February and March 2019, defendant was tried before a jury on the murder and gun charges. Brennan testified at trial. She told the jury she had been in a relationship with defendant and defendant spent the evening of

September 18, 2016 in Brennan's home at 14A Rose Street. She explained defendant drove her car and took her to work on the morning of September 19. Brennan had no idea where defendant went with her car after dropping her off at work.

At trial, Brennan described being taken to the police station and interviewed by detectives. She told the jury the detectives showed her a surveillance camera video of the shooting and several still photographs taken from the video footage. Brennan's trial testimony was consistent with her recorded interview at the police station. At trial, Brennan identified still photographs showing her car on Forrest Street and "someone driving her car." Brennan then told the jury the "someone" in her car was defendant.

During cross-examination, defendant's counsel sought to highlight changes in Brennan's responses to the detectives' interview questions after she went to an unrecorded room to watch the surveillance camera videos. With the prosecutor's consent, defense counsel played three short portions of the video recording of Brennan's interview with the detectives. Defendant's attorney also used an audio transcript of Brennan's recorded interview to refresh her recollection at trial regarding her initial responses to the detectives' questions before being escorted to another room.

When defendant's counsel attempted to play additional portions of Brennan's video recorded interview for the jury, the prosecutor objected. At sidebar, the judge ruled defense counsel could play the entire video of Brennan's three-hour recorded interview with the detectives or, alternatively, obtain the prosecutor's consent as to specific portions of the recorded interview to be shown to the jury. Defense counsel elected not to play the entire video of Brennan's recorded interview because the interview included highly prejudicial statements about defendant, such as his drug dealings, potential gang affiliation, prior criminal incarceration, suspension of his driver's license, and possession of a gun.

The State did not ask Brennan any question on re-direct. However, the judge asked Brennan several clarifying questions. Defense counsel objected only to one of the judge's questions. Counsel objected when the judge asked whether anyone forced Brennan to sign the back of the still photographs at the police station. The judge overruled the objection and Brennan answered "no." The judge allowed counsel to pose follow-up questions. Neither counsel asked Brennan any further questions.

During the trial, the State offered the testimony of Detective Lamar Nelson for admission of the still photographs of defendant and Brennan's car

taken from the surveillance camera video footage. After counsel questioned the officer, the judge asked Detective Nelson about the "significance" of the photographs. According to Nelson, the still photograph showed a man who wore clothing similar to the clothing worn by the man leaving 14A Rose Street on the morning of the shooting. Nelson explained the other photograph showed the vehicle driven by the "actor." In response to the judge's questions, Detective Nelson described the man as "our suspect." Defense counsel objected, arguing the detective improperly provided lay opinion testimony and usurped the role of the jury in determining who and what was depicted in the still photographs. The judge overruled defense counsel's objection, stating the detective did not provide opinion testimony.

The State offered additional evidence at trial. Special Agent Ajit David, assigned to the Federal Bureau of Investigation, testified as an expert in the field of cellular analysis. Agent David testified defendant's cell phone-location data confirmed his presence in the area around the time of the Colclough shooting.

The State also presented a "selfie" photograph defendant sent to Brennan on September 7, 2016. In the "selfie" photograph, defendant had a beard and wore a blue hat with a star logo.

Additionally, the State proffered evidence obtained during a search of an apartment associated with defendant. In the apartment, the police found defendant's driver's license and letters addressed to defendant. The police also found five Winchester nine-millimeter live rounds under a dresser in the apartment. The bullets found in the apartment were similar to Winchester nine-millimeter empty shell casings found at the scene of Colclough's murder.

At the conclusion of the testimony, the judge conducted a charge conference with counsel. In her charge to the jury, the judge instructed the jury not to be influenced by any questions the judge asked the witnesses. She explained:

The fact that I may have asked questions of a witness in the case must not influence you in any way in your deliberations. The fact that I asked such questions does not indicate that I hold any opinion one way or another as to the testimony given by that witness.

On Brennan's identification of defendant, the judge gave the jury the relevant portion of the identification charge. Specifically, the judge instructed the jury as follows:

. . . David Cooper, as part [of his] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense

The State has presented testimony that on a prior occasion before this trial, Alexis Brennan identified David Cooper as the person captured in the still photograph that was marked for you as S-97, as the person who committed the murder.

....

According to Ms. Brennan, her identification of the defendant was based upon her viewing of the still photograph, Exhibit S-97, and the video from Exhibit S-31 she was shown by detectives from the Hudson County Prosecutor's Office.

It is your function to determine whether [the] witness's identification of the defendant is reliable and believable, or whether it is based on a mistake or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence that this defendant is the person who committed the offenses charged.

In addition to the foregoing, the judge instructed the jury on assessing the credibility of the witnesses in accordance with the Model Jury instruction.

Counsel gave closing arguments, and the judge instructed the jury on March 15, 2019. The same day, the jury returned a verdict, finding defendant guilty on all counts.

Sentencing

On May 31, 2019, the trial judge sentenced defendant on all the three indictments. For the murder conviction, Indictment 17-02-0124, the judge sentenced defendant to life in prison with a twenty-five-year parole disqualifier.

She further sentenced defendant to seven years for each of the gun charges. Based on the negotiated plea related to the unlawful possession of a weapon, Indictment 16-12-1542, the judge sentenced defendant to five years. Consistent with defendant's negotiated plea to third-degree aggravated assault, Indictment 17-10-0670, the judge imposed a five-year flat sentence. The aggregate sentence was life imprisonment plus five years with twenty-five years of parole ineligibility.

On appeal, defendant raises the following arguments:

POINT I

THE TRIAL COURT'S EXCLUSION OF THE VIDEO OF THE OUT-OF-COURT IDENTIFICATION OF [DEFENDANT] - WHICH SHOWED THAT THE CRUCIAL IDENTIFICATION WAS LESS RELIABLE THAN THE PROSECUTOR PORTRAYED - WAS IMPROPER UNDER THE EVIDENCE RULES. U.S. CONST. amends. VI, XIV; N.J. CONST. art. I, ¶¶ 1, 10.

POINT II

THE TRIAL COURT IMPROPERLY APPEARED TO TAKE THE PROSECUTOR'S SIDE BY CONDUCTING ITS OWN REDIRECT EXAMINATION OF THE PROSECUTOR'S CRUCIAL IDENTIFICATION WITNESS, ASKING, "DID ANYONE FORCE YOU TO SIGN THESE PHOTOGRAPHS?" U.S. CONST. amend. XIV; N.J. CONST. art. I, ¶ 1.

POINT III

THE TRIAL COURT IMPROPERLY ELICITED THE INCRIMINATING LAY OPINION OF A DETECTIVE - WHO WAS NOT AN EYEWITNESS AND HAD NO PERSONAL KNOWLEDGE OF EVENTS OR [DEFENDANT] - THAT PHOTOS DEPICTED "OUR SUSPECT" AND THE "SUSPECT CAR." U.S. CONST. amend. XIV; N.J. CONST. art. I, ¶ 1.

POINT IV

[DEFENDANT]'S STATEMENT TO A DETECTIVE SHOULD BE SUPPRESSED BECAUSE IT WAS MADE UNDER INTERROGATION, AND THE PROSECUTOR PRESENTED NO EVIDENCE THAT [DEFENDANT] RESPONDED TO OR UNDERSTOOD THE MIRANDA WARNINGS. U.S. CONST. amends. V, XIV; N.J. CONST. art. 1, ¶ 1.

POINT V

[DEFENDANT] SHOULD BE RESENTENCED BECAUSE THE COURT IMPROPERLY CONSIDERED THE OFFENSES FOR WHICH [DEFENDANT] WAS BEING SENTENCED IN FINDING AGGRAVATING FACTOR SIX – WHICH SHOULD ONLY APPLY WHEN THE DEFENDANT'S "PRIOR" RECORD IS BAD.

I.

We defer to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). We review such evidentiary rulings "under the abuse of discretion standard because, from its genesis, the decision

to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Mero. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that deferential standard, we "review a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)).

Defendant challenges several evidentiary rulings related to Brennan's trial testimony. Defendant contends the judge erred by excluding portions of Brennan's video recorded interview with the detectives pertaining to Brennan's identification of defendant. According to defendant, the jurors needed to see the relevant portions the video interview to evaluate "the reliability of Brennan's claim that [defendant] was the shooter depicted" in the still photograph. Defendant also argues the judge misapplied the rule of completeness regarding Brennan's video recorded interview because the rule only authorizes admission of additional parts of a conversation if related to the same subject matter.

Additionally, because Brennan lacked the ability to recollect in response to questions at trial, defendant contends the audio transcript of her recorded interview failed to adequately convey Brennan's hesitation and equivocation in responding to the detectives' questions. Thus, defendant argues other portions

of Brennan's video recorded interview should have been allowed to be shown to the jury. Defendant also claims the audio transcript failed to "show the extent to which the detectives pressured Brennan" to identify her car and defendant.

Defendant further argues the out-of-court identification by Brennan failed to comport with the procedures established under State v. Henderson, 208 N.J. 208 (2011), and the identification was not properly recorded under State v. Anthony, 237 N.J. 213, 227-30 (2019).

For the first time on appeal, defendant argues N.J.R.E. 803(a)(3), a hearsay exception, allows admission of a witness's prior statement that is "a prior identification of a person made after perceiving that person." Previously, defense counsel argued portions of Brennan's video recorded interview should be admitted for impeachment purposes.

A.

We begin with defendant's assertion that N.J.R.E. 803(a)(3) supported playing additional portions of Brennan's recorded interview for the jury. Arguments raised for the first time on appeal are reviewed for plain error under Rule 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result"). A defendant who fails to raise an objection at trial "bears the

burden of establishing that the trial court's actions constituted plain error[.]"
State v. Santamaria, 236 N.J. 390, 404 (2019) (quoting State v. Ross, 229 N.J.
389, 407 (2017)). The plain error standard requires a determination: "(1)
whether there was error; and (2) whether that error was 'clearly capable of
producing an unjust result,' R. 2:10-2; that is, whether there is 'a reasonable
doubt . . . as to whether the error led the jury to a result it otherwise might not
have reached.'" State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting State v.
Funderburg, 225 N.J. 66, 79 (2016)).

We reject defendant's argument N.J.R.E. 803(a)(3) supported admission
of other portions of Brennan's video recorded interview with the detectives.
N.J.R.E. 803(a)(3) provides certain statements are not excluded under the
hearsay rule provided "[t]he declarant-witness testifies and is subject to cross-
examination about a prior otherwise admissible statement, and the statement: . .
. is a prior identification of a person made after perceiving that person if made
in circumstances precluding unfairness or unreliability." The rationale for
admitting a prior identification is grounded on the notion the statements were
"made when the events and sensory impressions [were] fresh in the mind of a
witness." State v. Matlack, 49 N.J. 491, 498 (1967).

Here, N.J.R.E. 803(a)(3) did not apply. Brennan's trial testimony was not inconsistent with the statements she made to the detectives during her interview. Additionally, Brennan was not an eyewitness to Colclough's murder. She merely identified defendant from a still photograph and her statements were akin to a confirmatory identification based on her relationship with defendant. See State v. Sanchez, 247 N.J. 450, 477 (2021).

B.

We also reject defendant's argument Brennan's identification of defendant failed to comport with the requirements under Henderson. Because Brennan was not an eyewitness to a crime, no showup or photo array was necessary, and the detectives were not required to provide Henderson instructions prior to her identification of defendant. Similarly, because Brennan's out-of-court identification did not implicate Henderson, there was no need to record the identification under Anthony.

C.

We concur with the judge's determination regarding defendant's request to play selected portions of Brennan's interview, applying the rule of completeness. N.J.R.E. 106 provides "[i]f a party introduces all or part of a . . . recorded statement, an adverse party may require the introduction at that time,

of any other part, or any other . . . recorded statement, that in fairness ought to be considered at the same time." "When a witness testifies on cross-examination as to part of a conversation, statement, transaction or occurrence . . . the party calling the witness is allowed to elicit on redirect examination, 'the whole thereof, to the extent it relates to the same subject matter and concerns the specific matter opened up.'" State v. James, 144 N.J. 538, 554 (1996) (citing Virgin Islands v. Archibald, 987 F.2d 180, 188 (3d Cir. 1993)); see also State v. Lozada, 257 N.J. Super. 260, 272 (App. Div. 1992) (explaining an adverse party's request to read a portion of a writing "may be required if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding") (quoting United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)).

Here, defense counsel sought to introduce specific portions of Brennan's out-of-court video recorded statement to argue she was coerced into identifying her car and defendant when the detectives took her to a different, unrecorded room to watch the surveillance camera video footage. On the other hand, the State sought to admit other portions of Brennan's video recorded interview to provide context for the video clips defendant sought to play, and to avoid

misleading the jury. Those portions of the recorded interview the State claimed were necessary to give the jury context and provide a fair understanding of the evidence included Brennan uttering the following statements while the detectives were not in the interview room, "It's just stupid . . . It's all there . . . [t]here's nothing to ask. I see it's my car. It looks like him, so"

Brennan's video recorded interview also contained statements about defendant's prior drug connections, ownership of a gun, and potential gang affiliation. If those statements were presented to the jury, it is likely defendant would have suffered prejudice. Consequently, it is likely defense counsel strategically decided to forego playing additional clips from Brennan's video recorded interview with the detectives.

Moreover, defense counsel effectively relied on the audio transcript of the video recording of Brennan's interview to refresh her recollection and impeach her credibility before the jury. In fact, during summation, defense counsel argued Brennan's trial testimony was inconsistent with her video recorded interview and she was pressured by the detectives off-camera to positively identify her car and defendant.

N.J.R.E. 106 precluded defendant from selecting those portions of Brennan's video recorded interview he wanted the jury to see without allowing

the State to present other portions of the video interview to give the jury context and avoid any misimpression as to events that transpired during Brennan's three-hour interview with the detectives. Under the circumstances, there was no error, let alone plain error, resulting from the judge's refusal to allow defendant to select portions of Brennan's video recorded interview to be played for the jury absent the prosecutor's consent.

II.

Defendant argues the judge's questions directed to Brennan and Detective Nelson impermissibly demonstrated the judge sided with the State. Specifically, defendant claims a follow up question asked by the judge concerning Brennan's voluntary signing of the reverse side of the still photographs and questions directed to Detective Nelson regarding the sequencing of the photographs he authenticated were improper and elicited inappropriate lay witness testimony. We reject these arguments.

A.

Judges are authorized to question witnesses. N.J.R.E. 614. Although a trial judge has wide latitude to question witnesses, a judge must exercise that authority with "great restraint," especially during a jury trial. State v. Taffaro,

195 N.J. 442, 451 (2008). Additionally, a judge must use care when questioning witnesses to avoid influencing the jury. Ross, 229 N.J. at 408.

A judge may question a witness to expedite the proceedings, clarify testimony, or assist a distressed witness in eliciting facts. Ibid. A trial judge errs when her [or his] inquiries give the jury the impression that she [or he] takes one party's side or that she [or he] believes one version of an event and not another. See Taffaro, 195 N.J. at 451 (citing Village of Ridgewood v. Sreel Inv. Corp., 28 N.J. 121, 132 (1958)). In determining whether a trial judge erred in questioning a witness, we examine the record as a whole and consider the impact of the court's questions. See id. at 454.

B.

We reject defendant's claim the judge improperly questioned Brennan and sided with the prosecutor by asking, "[d]id anyone force you to sign those photographs?" Because the prosecutor did not ask questions of Brennan on redirect, defendant contends the judge's question benefited the State and was phrased so as to suggest to the jury nothing improper occurred when the detectives spoke to Brennan in another room.

Here, we discern no evidence the jury perceived the judge favoring the State. While it would have been better had the judge neutrally phrased the

question directed to Brennan, the inquiry stemmed from defense counsel's cross-examination and sought to clarify information for the jury. The judge did not frame the question in an overtly suggestive manner.

Further, after Brennan responded to the judge's question, the judge allowed counsel to ask Brennan additional questions and counsel declined. More importantly, in charging the jury, the judge expressly instructed the jury it should not be influenced by her questions directed to any witnesses.¹ Based on the ample additional evidence presented to the jury, this single question by the judge could not have affected the outcome of the trial.

C.

We also reject defendant's assertion the judge improperly elicited incriminating lay opinion testimony from Detective Nelson. Nelson authenticated the still photographs from the surveillance camera video to admit the photographs in evidence. Nelson, in response to the judge's questions regarding the "significance" of the photographs, referred to the man depicted as "our suspect." The detective also offered testimony that the still photographs of the car, before and after Colclough's murder, showed the "same vehicle." Based

¹ During the trial, the judge asked clarifying questions directed to other witnesses. However, defendant challenges only the judge's questions directed to Brennan and Detective Nelson.

on Detective Nelson's responses to the judge's question, defendant claims the witness usurped the jury's role by proffering impermissible lay opinion testimony.

A lay witness may testify in the form of opinions or inferences if the testimony will help the trier of fact understand the testimony or determine a fact in issue. See N.J.R.E. 701; State v. Singh, 245 N.J. 1, 15 (2021). In Singh, the New Jersey Supreme Court found it was an error for a police officer, acting as a lay witness, to describe the events depicted in surveillance video footage and to refer to an individual depicted in the surveillance video as "the defendant." Singh, 245 N.J. at 17. However, the Court found the error was harmless "given the fleeting nature of the comment and the fact that the detective referenced defendant as 'the suspect' for the majority of his testimony." Ibid.

Here, Detective Nelson did not refer to the individual depicted in the still photograph as "the defendant." Rather, the detective referred to the individual as "our suspect" and "the suspect." As approved in Singh, there was nothing improper about Detective Nelson's description of the individual as "the suspect" or "our suspect" as the meaning of the two phrases is no different. Given the fleeting nature of Detective Nelson's comments regarding the individual

depicted in the still photograph, the judge did not abuse her discretion in allowing those comments.

The statements by the detective and the judge concerning "the vehicle," "same vehicle," and "suspect vehicle" are slightly more problematic. The detective's use of these terms was not a one-time, fleeting reference. The "same vehicle" was mentioned several times during the detective's testimony. Additionally, the phrase "same vehicle" was repeated by the trial judge.

In Singh, the defendant argued it was improper for a witness to opine as to the similarity between sneakers observed in a surveillance video and sneakers worn by the defendant upon arrest. Id. at 19. The Court held N.J.R.E. 701 did not require "the testifying lay witness be superior to the jury in evaluating an item." Ibid. Additionally, the Court concluded the detective's observation of the similarities between the defendant's shoes in the video footage and defendant's shoes at the time of his arrest did not usurp the jury's role in comparing defendant's footwear and the jury remained "free to discredit [the detective's] testimony." Id. at 20. Thus, the Court determined admission of the detective's testimony was not an abuse of discretion. Ibid.

Here, Detective Nelson never saw the actual car used by the shooter. The detective merely watched the surveillance camera videos and authenticated the

still photographs based on the surveillance footage. Thus, it is unlikely the detective's opinion, stating the similarity between the depicted cars, was superior to the jury being able to make the same comparison. However, to warrant reversal "the error must be 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.'" State v. Daniels, 182 N.J. 80, 95 (2004) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

Based on our review of the record, we conclude the judge's questions and Detective Nelson's responses regarding the "same vehicle" were insufficient to raise reasonable doubt regarding the jury's verdict based on the overwhelming evidence of defendant's guilt. The evidence included Brennan's testimony identifying her car and defendant from the still photographs and surveillance camera videos taken near the murder scene. The State also proffered a "selfie" photograph taken by defendant a few days prior to the murder, showing defendant sporting a beard and wearing a blue hat with a star logo, the same as the shooter in the surveillance camera videos. Additionally, the State provided ballistic evidence that bullets found in defendant's apartment were the same as the bullet used to murder Colclough. Further, the State presented cellular telephone location evidence, placing defendant at the scene at the time of the

murder. Thus, examining the record as a whole, the judge's clarifying questions directed to Brennan and Detective Nelson did not unduly influence the jury or affect the outcome of the case to warrant a new trial.

III.

Defendant claims the pretrial judge erred in admitting his statement to the detectives while in the hospital regarding ownership of a handgun. He argues his statement was made while he was under interrogation, the State failed to prove he knowingly waived his Miranda rights, and he failed to understand the warnings. We reject these arguments.

"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)). "A trial court's findings should be disturbed only if they are so clearly mistaken' that the interests of justice demand intervention and correction.'" State v. Tillery, 238 N.J. 293, 314 (2019) (quoting State v. A.M., 237 N.J. 384, 395 (2019)). We review a trial judge's legal conclusions de novo. Ibid.

The Miranda warnings must be given during a custodial interrogation. See Miranda v. Arizona, 384 U.S. 436, 467-69 (1966). A defendant can waive his

Miranda rights, if the waiver is "knowing, intelligent, and voluntary in light of all the circumstances." State v. Presha, 163 N.J. 304, 313 (2000).

After an evidentiary hearing, the pretrial judge aptly determined defendant was under arrest and in custody when he made the statement to the detective. However, the judge properly concluded defendant was not being interrogated and he spontaneously informed the detective the handgun belonged to him.

"[A]n interrogation is 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" State v. Mallozzi, 246 N.J. Super. 509, 515 (App. Div. 1991) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). "[U]nexpected incriminating statements made by in-custody defendants in response to non-investigative questions" are admissible without Miranda warnings. Id. at 516.

We agree with the judge's finding and legal conclusion there was no interrogation of defendant. Here, defendant "called [Detective] Chidichimo into the room to inform him that the gun was his and initiated the questioning himself" and there "was no evidence that the officers asked him any questions regarding whether the gun was his" Because defendant's statement was spontaneous, the judge correctly concluded "Miranda was not required."

Even if defendant's statement had been the product of an interrogation, defendant knowingly waived his Miranda rights. In fact, Detective Chidichimo advised defendant he was under no obligation to speak about the handgun after defendant received the Miranda warnings. Defendant expressly acknowledged he had no obligation to speak to the detective but twice spontaneously volunteered the handgun belonged to him.

Because defendant's admitted ownership of the handgun was spontaneous and unsolicited, we agree that Miranda was inapplicable, and the judge properly granted the State's motion to admit defendant's hospital statement regarding ownership of the handgun.

IV.

Defendant argues the sentencing judge improperly found aggravating factor six, N.J.S.A. 2C:44-1(a), applicable when he was sentenced on Indictment No. 17-02-00124. The State contends the sentence imposed was illegal and the matter should be remanded for the judge to impose an eighty-five percent parole disqualifier on the life sentence consistent with the governing statute.²

² In an August 10, 2021 order, we denied the State's motion to file a notice of cross-appeal as within time. However, we noted "the merits panel is free to correct an illegal sentence at any time."

A.

We review a sentence imposed by the sentencing court for abuse of discretion. State v. Jones, 232 N.J. 308, 318 (2018). We should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). "Appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Under N.J.S.A. 2C:44-1(a), a sentencing court considers several aggravating factors. Aggravating factor six requires the sentencing judge consider "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which [the defendant] has been convicted." N.J.S.A. 2C:44-1(a)(6). When a sentencing court considers improper aggravating factors, we ordinarily remand for resentencing. See State v. Carey, 168 N.J. 413, 424 (2001).

In applying aggravating factor six, the judge explained:

the extent that Mr. Cooper, his criminal record. It's not that extensive. I must agree with [defense counsel] in that. But something happened.

I don't know what it was, where all of a sudden, you just went on one offense after another offense, after another offense that that [sic] occurred over a number of years. From weapons to aggravated assault, using hot oil in prison.

Here, the judge's application of aggravating factor six was not supported by the record because defendant's only prior crime involved a third-degree shoplifting conviction. Because judgments of conviction had yet to be entered on the indictments involving murder, weapons possession, and assault, the judge should not have considered those crimes as prior offenses for application of aggravating factor six.

B.

The State contends the sentencing judge failed to impose the mandatory period of parole ineligibility period for first-degree murder under the No Early Release Act, N.J.S.A. 2C:43-7.2, rendering defendant's sentence illegal. The State seeks a limited remand "for imposition of the mandatory-minimum term." Defendant requests we remand for a plenary hearing on resentencing.

N.J.S.A. 2C:43-7.2(a) states "[a] court imposing a sentence of incarceration for a crime of the first or second degree enumerated in subsection d. of this

section shall fix a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole." Murder is an enumerated crime under the relevant subsection. N.J.S.A. 2C:43-7.2(d)(1). Where a sentence fails to include the statutory mandatory parole ineligibility term, it is an illegal sentence. See State v. Baker, 270 N.J. Super. 55, 70 (App. Div.), aff'd, 138 N.J. 89 (1994); State v. Copeman, 197 N.J. Super. 261, 265 (App. Div. 1984).

Here, by sentencing defendant to life with a twenty-five-year parole bar, the judge misapplied the mandatory minimum term required under the statute. See N.J.S.A. 2C:43-7.2(b). As a result, defendant and the State request a remand for the trial court to address the mandatory-minimum sentence.

On this record, we are constrained to remand for a new resentencing hearing. Because defendant had not been convicted of murder, weapons charges, and assault at the time of sentencing, he did not have an extensive criminal history for application of aggravating factor six. Additionally, the judge misapplied the statute governing the mandatory minimum term of imprisonment.

To the extent we have not addressed any of defendant's remaining arguments, we determine those arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed as to defendant's convictions. Remanded for resentencing. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION