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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0134-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

P.C.,

Defendant-Appellant.

Argued March 14, 2023 – Decided June 15, 2023

Before Judges Gilson, Rose, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 17-01-0028.

Scott M. Welfel, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Scott M. Welfel, of counsel and on the briefs).

Colin Rizzio, Assistant Prosecutor, argued the cause for respondent (Angelo J. Onofri, Mercer County Prosecutor, attorney; Brittany Saxton, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Seven teenagers were riding in a minivan in Trenton when someone fired shots at them, killing one of the teenagers. P.C. (Paul), a juvenile, was waived to adult court and charged with fifteen crimes related to the murder and shootings.¹

A jury convicted Paul of first-degree murder, N.J.S.A. 2C:11-3(a)(1); six counts of first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:11-3(a)(1); seven counts of fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and second-degree unlawful possession of a firearm without a permit, N.J.S.A. 2C:39-5(b)(1). Paul was sentenced to an aggregate prison term of fifty-five years with periods of parole ineligibility and supervision as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

We reverse because the jury heard inadmissible testimony that deprived Paul of a fair trial. In addition, the record is not clear that law enforcement personnel followed proper procedures in recording the initial identifications

¹ We use initials and fictitious names for defendant who was a juvenile at the time the crimes were committed. We also use initials and fictitious names for the victims, all of whom were juveniles at the time of the shooting, and certain witnesses to protect their privacy interests and the confidentiality of the juvenile record. R. 1:38-3(d)(1).

made by two witnesses who identified Paul. Furthermore, Paul did not receive effective assistance of counsel at the juvenile waiver hearing. Accordingly, we reverse his convictions and remand for new proceedings, including a new waiver hearing.

I.

We summarize the relevant facts and proceedings from the record. On April 24, 2016, seven teenagers were driving around Trenton in a minivan. The teenagers were: K.A. (Kim); C.L. (Conor); A.V. (Amy); C.K. (Cathy); Q.P. (Quinn); Z.P. (Zoe); and M.V. (May).

While the minivan drove down Jersey Street, Kim screamed out the window at some people. After driving away to other parts of Trenton, the minivan drove back to Jersey Street. As the minivan was driving down Jersey Street towards Home Avenue, a male walked towards the van and fired several shots at the vehicle. The van turned onto Home Avenue, traveled for approximately another block, and then pulled over. At that point, the teenagers saw that Cathy was unresponsive and bleeding. A woman in another car pulled over and called the police.

When the police responded, they found a group of people gathered around Cathy, who was lying unresponsive on the sidewalk. Cathy was taken to a

hospital, but several days later she was declared dead. A post-mortem examination revealed Cathy's cause of death was a gunshot wound to the back of her head.

A. The Investigation.

Almost immediately after the shooting, law enforcement personnel began an investigation, led by Detective Patrick Holt of the Mercer County Prosecutor's Office. As part of the investigation, law enforcement personnel interviewed the six surviving teenagers, located and preserved videos from surveillance cameras, found a sweatshirt near the scene of the shooting, and identified and interviewed other witnesses.

Of the six surviving teenagers, only one of them – Kim – told the police that she could identify Paul as the shooter. The other teenagers either did not know the shooter or had not seen the shooter.

The police retrieved videos from surveillance cameras on a pole at the intersection of Home Avenue and Jersey Street. Those videos depicted the events surrounding the shooting from different angles.

Using the videos, the police were able to identify P.G. (Patrick), who witnessed the shootings while sitting in his car on Jersey Street. Patrick later testified that he had seen someone in a "gray sweatshirt" cross the street and

shoot at a passing minivan. Patrick acknowledged on cross-examination that he had not seen the shooter's face or the weapon.

Holt showed a clip from one of the videos to Ilissa Peterson. Peterson was an assistant superintendent of a school Paul had attended for several months. In a recorded statement, Peterson identified the male depicted in the video as Paul. The record is not clear, however, whether Holt recorded his entire interview of Peterson.

B. The Evidence at Trial.

Four of the six surviving teenagers testified at trial: Kim, Conor, Amy, and May. Only Kim identified Paul as the shooter. Kim testified that she had seen Paul at the intersection of Jersey Street and Home Avenue just before the shooting. Kim could not recall what Paul was wearing, but when shown her prior statement to the police, she stated: "I guess a gray sweatshirt." She agreed that after identifying Paul to the police, she had told the police "I swear on my mother['s] grave" that Paul was the shooter.

Conor testified that he had seen a single shooter come from the direction of a corner store. He described the shooter as a person with "[l]ight skin . . . like brownish," who was wearing "a black and gr[a]y jacket."

Amy and May could not describe the shooter. Amy testified that when she heard shots, she had ducked and had not seen the shooter. May testified that she did not "really remember" the shooting. She recalled hearing shots but explained that she had not seen the shooter because she had put her head down.

Peterson also testified at trial. She explained that she was a staff member at Paul's former school and that she had interacted with Paul individually and in group settings between approximately twenty and fifty times. She stated that she had last seen Paul in March 2016. Peterson testified that Holt showed her a clip from a surveillance video on April 29, 2016. She viewed the video clip again during her testimony and identified Paul as the person in the video.

One of the State's key witnesses at trial was Holt. Holt explained to the jury that law enforcement personnel had located and preserved surveillance videos. Three videos were then played for the jury: exhibits S-38 and S-48. S-38 included two videos that captured the intersection at Jersey Street and Home Avenue. One video showed Home Avenue towards the direction of Beatty Street. The other video depicted Home Avenue towards Hancock Street. S-48 consisted of a video that showed the location at the intersection of Jersey Street and Home Avenue and provided a view "straight down Jersey Street."

Holt narrated the videos for the jury starting with S-48 and commenting on clips from S-38. Six different times during his narration of S-48, Holt identified the suspected shooter as Paul. Holt first described Paul as "starting to approach" just before the minivan came into view. When the minivan came into view, Holt was asked about the "individual that you were identifying as [Paul]," and Holt responded that Paul was "off screen at this point." As the van made a left turn onto Home Avenue, Holt explained to the jury that the shooting had occurred because a "bullet strike" was visible on a black Nissan parked on the street. Holt then testified that "[Paul] appears coming back into the screen." When asked by the prosecutor what he was "observing with regard to [Paul]," Holt replied, "[i]t appears that he's – his right hand is sticking some object into, like, the sweatshirt pocket or towards his pants." The prosecutor then asked Holt "what direction is [Paul] running?" Holt responded that Paul was "running on the odd side of Jersey Street" towards Tremont Avenue. Holt then added: "[Y]ou see what appears to be [Paul] crossing over Jersey Street to the even side."

In addition to identifying Paul in his narrations, Holt identified various other individuals who appeared on the videos and explained to the jury his efforts to interview those witnesses.

Holt also testified about his interviews of the surviving teenage victims.

Holt explained that the day after the shooting, he spoke with Zoe and Quinn.

The following exchange ensued:

[The Prosecutor:] Okay. Based on the information that you provided – that you received from [Zoe and Quinn], what did you do next with regard to this investigation?

[Holt:] Spoke to [Zoe and Quinn] and they had indicated that, from what they knew, the individual who had reportedly done the shooting was an individual by the name of [Paul].² They were able to locate his picture of him or who he was on a Facebook page. I believe it was called Band Gang ADH. At that point, we had brought up the Facebook page and observed a picture of [Paul] who was the suspect that [Kim] had told us in the investigation and eventually applied for a communication data warrant to secure the Facebook page and any records or results attached to it.

[The Prosecutor:] Okay. Did you eventually get the results back from Facebook?

[Holt:] Yes.

[The Prosecutor:] And did they – were there photos – profile photos that were consistent with [Paul]?

[Holt:] Correct.

² Holt did not use Paul's full name, but he used Paul's first name. In his next reference to Paul in this same answer, Holt used Paul's full name.

As part of his testimony, Holt also explained to the jury how law enforcement personnel found a sweatshirt near the scene of the shooting. Holt told the jury that another detective had interviewed a resident whose property backed up to Jersey Street. That resident had observed a "black male" discard a sweatshirt on the day of the shooting. The jury had already heard testimony from another detective that he had found a sweatshirt "half hanging" on the fence in the backyard of a resident at 32 Jersey Street. Holt testified that "[t]his sweatshirt . . . matched almost perfectly to the sweatshirt that was worn by the suspect [Paul] as he was walking down Jersey [Street] toward the area of Home Avenue prior to the shooting." The sweatshirt, which was admitted into evidence, had six words printed on the front: "Real Teens, Real Life, Real Results." Holt told the jury that the sweatshirt worn by the suspect on the video also had wording on it, which "look[ed] exactly like" the writing on the sweatshirt in evidence. Holt acknowledged that the actual words on the sweatshirt in the video were not visible, but Holt stated that the "patterning, coloring, everything was spot on" between the sweatshirt found on the fence and the one depicted in the video.

The jury also heard testimony from an expert in DNA comparison who conducted a DNA analysis of the sweatshirt found near the scene of the shooting.

That expert told the jury that the DNA collected from the sweatshirt matched Paul's brother.

Paul also testified at trial. He told the jury that on the day of the shooting, he was wearing a gray sweatshirt and he had gone to Jersey Street where he hung out with some friends. He claimed he had run into his cousin M.N. (Max), who was wearing an identical sweatshirt. Paul stated that he and Max had bought the sweatshirts at Finish Line in the Quaker Bridge Mall. Paul also claimed that he and Max look like twins except Max's eyes and skin tone are lighter than Paul's.

After meeting Max, Paul left to play basketball with his friends. He took off his sweatshirt and hung it on the back of a fence. Paul acknowledged that it was the same sweatshirt that was in evidence. According to Paul, after playing basketball, he returned to Jersey Street and hung out with his friends. Therefore, Paul was present when the shooting occurred. He told the jury that he had hidden behind a white car during the shooting and was not visible on the surveillance videos. Paul then narrated what was depicted on the videos. Initially, Paul did not identify the shooter, but later he told the jury that the shooter was Max. He then identified Max on the videos.

In rebuttal to Paul's testimony, the State called Detective Jessica Senese. She testified that she had attempted to locate Max and his parents by reviewing

various online databases. Paul testified that Max's mother's name was Michelle N. Senese explained that she had been able to locate only one person named Max who lived in Mercer County and had a mother named Michelle. She further explained that the Max she had located listed his race as "white" and had "light brown hair." In summary, Senese explained to the jury that none of the Maxs she had found were "similar in appearance" to Paul. In giving her testimony, Senese did not show the jury any photographs of the Maxs she had located in her database search.

After hearing the evidence, the jury convicted Paul of all the charged crimes, including first-degree murder and six counts of first-degree attempted murder. Paul was then sentenced to serve fifty-five years in prison subject to NERA.

II.

On appeal, Paul presents six arguments, which he articulates as follows:

POINT I – REVERSAL IS REQUIRED BECAUSE THE STATE IMPROPERLY BOLSTERED ITS CASE WITH INADMISSIBLE HEARSAY AND INADMISSIBLE LAY OPINION TESTIMONY IMPLICATING [PAUL] AS THE SHOOTER THROUGH DETECTIVE HOLT'S TESTIMONY, VIOLATING THE CONFRONTATION CLAUSE AND N.J.R.E. 701.

- A. Admission Of The Detective's Hearsay Testimony That Two Non-Testifying Witnesses Implicated [Paul] As The Shooter Violated The Confrontation Clause.
- B. The Detective's Identification Of The Male In The Gray Sweatshirt In The Video As [Paul] And Opinion That The Sweatshirt In Evidence Perfectly Matched The Sweatshirt In The Video Violated N.J.R.E. 701 Because The Detective Lacked Personal Knowledge.

POINT II – THE STATE FAILED TO RECORD THE FULL INTERVIEWS WITH ITS TWO IDENTIFICATION WITNESSES IN VIOLATION OF RULE 3:11, THE COURT ERRONEOUSLY PROHIBITED [PAUL] FROM CROSS-EXAMINING THE DETECTIVE REGARDING THIS FAILURE TO RECORD, AND THE COURT ERRONEOUSLY PERMITTED A WITNESS TO IDENTIFY THE MALE IN THE SURVEILLANCE VIDEO AS [PAUL] IN VIOLATION OF N.J.R.E. 701.

- A. Because The Police Violated Rule 3:11 And State v. Delgado[, 188 N.J. 48 (2006)] By Failing To Record [Kim's] First Interview And Peterson's First Viewing Of The Surveillance Video, State v. Anthony[, 237 N.J. 213 (2019)] Requires This Court To Remand For A Hearing.
- B. In Precluding Defendant From Cross-Examination Regarding The Detectives' Failure To Record [Kim's] Initial Interview, The Court Erroneously Impeded [Paul's] Right To Confront The Witnesses Against Him.
- C. Because The Quality Of The Surveillance Video Was Such That No Witness Could Identify The

Face Of The Male In The Gray Sweatshirt, The Court Erred In Permitting Peterson To Identify The Male As [Paul].

POINT III – IT WAS HARMFUL ERROR TO PERMIT DETECTIVE SENESE TO OPINE THAT NONE OF THE [Maxs] IN THE DATABASE RESEMBLED [PAUL], AS HER TESTIMONY WAS NOT BASED ON PERSONAL KNOWLEDGE.

POINT IV – THE CUMULATIVE IMPACT OF THE ERRORS DENIED [PAUL] DUE PROCESS AND A FAIR TRIAL.

POINT V – THIS COURT MUST REMAND FOR A NEW WAIVER HEARING BECAUSE THE PROSECUTOR'S STATEMENT OF REASONS FAILED TO ADEQUATELY EXPLAIN HIS DECISION, THE PROSECUTOR ABUSED HIS DISCRETION IN FAILING TO GIVE ADEQUATE WEIGHT TO [PAUL'S] CHILD WELFARE HISTORY, AND [PAUL] DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE WAIVER HEARING.

- A. The Prosecutor's Statement Of Reasons Failed To Adequately Explain His Reasoning And The Prosecutor Abused His Discretion In Failing To Give Adequate Weight To [Paul's] Child Welfare History.
- B. A New Waiver Hearing Is Required Because Defense Counsel Provided Ineffective Assistance By Failing To Obtain [Paul's] Special Education Records and Psychological Evaluations.

POINT VI – A RESENTENCING IS REQUIRED BECAUSE THE COURT'S MILLER [V. ALABAMA,

567 U.S. 460 (2012)] ANALYSIS WAS INSUFFICIENT AND NOT SUPPORTED BY EVIDENCE IN THE RECORD, AND THE NEARLY FIFTY-YEAR PAROLE DISQUALIFIER WITHOUT ANY INTERMEDIARY REVIEW FOR REHABILITATION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

- A. The Court's Miller Factor "Findings" Were Contradicted By Competent, Credible Evidence In The Record And The Court Failed To Explain How it Justified A Forty-Six Year Nine-Month Parole Disqualifier In Light of Miller.
- B. The Imposition Of A Forty-Six Year Nine-Month Period of Parole Ineligibility Without Any Subsequent Review Of Whether [Paul] Can Demonstrate Rehabilitation Within That Period Constitutes Cruel And Unusual Punishment.

Having reviewed the record and governing law, we reverse Paul's convictions because the proceedings involved several reversible errors. Holt's testimony contained three significant errors. First, in narrating the videos, Holt repeatedly told the jury that the person depicted in the video was Paul. That testimony was highly prejudicial and inadmissible because Holt had no factual basis to offer his opinion. Second, Holt implied that two non-testifying witnesses – Zoe and Quinn – had identified Paul as the shooter. That testimony violated the hearsay rule and Paul's Sixth Amendment right to confront

witnesses. Third, Holt had no factual basis to opine that the sweatshirt found by another detective was the same sweatshirt seen on the person in the videos.

Those errors deprived Paul of a fair trial and require reversal and a remand for new proceedings. Moreover, the record is not clear that the State properly recorded the initial identifications made by Kim and Peterson. Those significant procedural questions may have compounded the errors at trial because Kim and Peterson were the only testifying witnesses who identified Paul as the shooter.

On remand, we also direct that a new juvenile waiver hearing be conducted. The record establishes that important mitigating information concerning Paul was never presented by defense counsel to the prosecutor or the family court. Because a juvenile waiver hearing is a critical procedure, a new hearing should be conducted before any new trial in the Law Division.

Given that we are reversing and remanding for further proceedings, we need not address Paul's other arguments, including his arguments concerning his sentence. Those arguments are moot and if there is a new trial, the issues raised in those arguments will need to be reviewed and ruled on in the context of that new trial.

III.

We begin by analyzing Holt's testimony because significant portions of his testimony were inadmissible and highly prejudicial. We recognize that "[t]he determination of whether a person is competent to be a witness lies within the sound discretion of the trial judge." State v. G.C., 188 N.J. 118, 133 (2006) (alteration in original) (quoting State v. Savage, 120 N.J. 594, 632 (1990)). "[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Singh, 245 N.J. 1, 12-13 (2021) (alteration in original) (quoting State v. Nantambu, 221 N.J. 390, 402 (2015)).

Paul's counsel did not object to Holt's testimony at trial. Accordingly, we review these issues for plain error. See R. 2:10-2.

A. Holt's Narration of the Videos.

Video footage that captures an incident, which is not witnessed in real time, presents challenging evidentiary issues. The initial question is whether the video should be simply played for the jury or whether someone can narrate what is depicted in the video to the jury. We have held that there is no categorical, per se rule that prohibits video-narration testimony. See State v. Watson, 472 N.J. Super. 381, 445 (App. Div.), certif. granted in part, 252 N.J.

598 (2022). Instead, "the critical fact-sensitive issue to be decided on a case-by-case, indeed, question-by-question basis is whether a specific narration comment is helpful to the jury and does not impermissibly express an opinion on guilt or on an ultimate issue for the jury to decide." Ibid.

When a person who did not witness an event narrates a video to a jury, he or she must generally limit his or her comments to objective descriptions of what is depicted in the video. If the narrator offers an opinion concerning what is depicted, the narrator must have an independent factual basis for offering that opinion. See Singh, 245 N.J. at 14-15. Accordingly, courts evaluate the admissibility of narrative testimony that offers an opinion under N.J.R.E. 701. Id. at 14; see also State v. Sanchez, 247 N.J. 450, 466 (2021).

In Singh, the Court addressed lay opinion testimony concerning a video from a surveillance camera. 245 N.J. at 4. The defendant in that case challenged testimony from a detective who had twice referred to the person shown in the video as "the defendant." Id. at 18. The Court in Singh began its analysis by examining the purpose and boundaries of N.J.R.E. 701, which provides:

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:

- (a) is rationally based on the witness' perceptions; and

(b) will assist in understanding the witness' testimony or determining a fact at issue.

[Id. at 14 (quoting N.J.R.E. 701).]

The Court determined that it was an error for the trial court to allow the detective to refer to the suspect in the video as "the defendant" because the detective had no independent basis for offering that opinion beyond looking at the video itself. Id. at 16-18. Ultimately, however, the Court concluded that the detective's two identifications of the defendant in the video were "fleeting" references and, therefore, harmless error. Id. at 17.

In Watson, we distilled general principles related to lay witness opinion testimony and adapted those principles to the specific context of a "play-by-play" narration of video recordings. Watson, 472 N.J. Super. at 449. We recognized certain principles that were already clearly established. For example, we pointed out that existing caselaw made it "clear that it is impermissible for a police witness to testify at trial as to defendant's guilt or an ultimate issue to be decided by the jury." Id. at 457-58. We noted "the law also is clear that there are significant restrictions on when a police witness may offer a lay opinion on whether the defendant is the person shown in a video recording or screenshot in cases where the identity of the culprit is at issue." Id. at 458.

We then drew a "fundamental distinction between narration testimony that objectively describes an action or image on the screen (e.g., the robber used his elbow to open the door) and narration testimony that comments on the factual or legal significance of that action or image (e.g., the robber was careful not to leave fingerprints)." Id. at 462.

The critical inquiry in defining the scope of permissible video-narration testimony is the second prong of N.J.R.E. 701: "[W]hether the narration testimony would be helpful to the jury by shedding light on the determination of a disputed factual issue." Id. at 464. "If the jury needs no assistance to fully understand the content of the video, then narration commentary [will] tread upon the role of the jury under N.J.R.E. 701 analysis." Ibid.

Applying these principles to Holt's testimony, we hold that Holt violated N.J.R.E. 701 by repeatedly identifying the person depicted in the video as Paul. Like the detective in Singh, Holt had no independent factual basis to offer his lay opinion. Holt did not testify that he had any prior interactions with Paul. Therefore, he had no independent factual basis to identify Paul in the video. Instead, Holt usurped the role of the jurors who, like Holt, could look at the video and decide for themselves if the person depicted was Paul.

Unlike the detective in Singh, Holt's testimony was not fleeting and harmless. Holt identified the person in the video as Paul six times. Indeed, Holt's narration made clear that he believed the person depicted in the video was Paul and both the prosecutor's questions and his answers were based on that inadmissible-fact assumption.

Paul's counsel did not object to the narration of the videos provided by Holt. Nevertheless, Holt's testimony was plain error because it was "clearly capable of producing an unjust result." R. 2:10-2; see also State v. Garcia, 245 N.J. 412, 437 (2021) (explaining that an error requires reversal "where the possibility of an injustice is 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached'" (quoting State v. Trinidad, 241 N.J. 425 (2020))).

B. Holt's Testimony Concerning Zoe and Quinn.

Paul argues Holt improperly testified that Zoe and Quinn had identified him as the shooter and that Holt's testimony violated the hearsay rule and his constitutional right to confront witnesses who testify against him.

At trial, Holt was asked if he had spoken to any of the teenage victims the day after the shooting. Holt responded, "[y]es," and stated that he had spoken to Quinn and Zoe. Holt was then asked whether he had done any further

investigation based on information received from Zoe and Quinn. In response, Holt told the jury that Zoe and Quinn reported that "the individual who had reportedly done the shooting was an individual by the name of [Paul]" and that Zoe and Quinn had located a picture of Paul on Facebook. Holt then stated: "[W]e had brought up the Facebook page and observed a picture of [Paul] who was the suspect that [Kim] had told us [about] in the investigation."

Although Paul's counsel did not object to that testimony, it was plain error for two reasons. First, the testimony violated the hearsay rule because Holt told the jury what two non-testifying witnesses had told him. N.J.R.E. 802; see also State v. Medina, 242 N.J. 397, 414-15 (2020) (noting that an officer's testimony "repeating incriminating information [received] from a non-testifying witness violates the hearsay rule"). The State argues that Holt's testimony concerning what Quinn and Zoe told him was not hearsay because it was not offered for the truth of the matter asserted but to show why Holt made certain investigatory decisions. We reject that argument. The prosecutor may have intended to limit Holt's testimony, but Holt's actual answer clearly stated that Quinn and Zoe had told him that the shooter "was an individual by the name of [Paul]." That error was then compounded because Holt went on to describe that Zoe and Quinn identified Paul's Facebook page, Holt pulled up that Facebook page, and Holt

testified that the person depicted was Paul. In full context, Holt's testimony was based on hearsay and was highly prejudicial.

Second, Holt's testimony also violated Paul's constitutional right to confront witnesses. "The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee the right of defendants to confront the witnesses against them." State v. Jackson, 243 N.J. 52, 65 (2020). "The opportunity to cross-examine a witness is at the very core of the right of confrontation." State v. Cabbell, 207 N.J. 311, 328 (2011) (citing California v. Green, 399 U.S. 149, 158 (1970)). Accordingly, "testimonial statement[s] against a defendant by a non-testifying witness [are] inadmissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him or her." State v. Wilson, 227 N.J. 534, 545 (2017) (citing Crawford v. Washington, 541 U.S. 36, 59 (2004)).

"[B]oth the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." State v. Branch, 182 N.J. 338, 350 (2005) (citing State v. Bankston, 63 N.J. 263, 268-69 (1973)). The "common thread" running through the Confrontation

Clause jurisprudence "is that a police officer may not imply to the jury that he [or she] possesses superior knowledge, outside the record, that incriminates the defendant." Id. at 351. Moreover, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." Bankston, 63 N.J. at 271.

The prosecutor may have intended to introduce only the investigatory steps Holt took to access Paul's Facebook account. See id. at 268 (noting that the hearsay rule is not violated when an officer testifies that he or she approached a suspect based "upon information received"). Holt's actual testimony, however, clearly went beyond that limited purpose by repeating incriminating information he had received from Quinn and Zoe. Accordingly, the statements Holt related that Zoe and Quinn had given to him were testimonial hearsay and violated the Confrontation Clause. See Medina, 242 N.J. at 413-14.

C. Holt's Testimony Concerning the Sweatshirt.

Holt also testified that the sweatshirt found near the scene of the shooting "matched almost perfectly to the sweatshirt that was worn by the suspect [Paul] as he was walking down Jersey [Street] towards the area of Home Avenue prior

to the shooting." He added that the fonts on the sweatshirts looked "exactly" alike and that "[t]he patterning, the coloring, everything was spot on" between them. Again, Paul's counsel did not object, but again that testimony was plain error.

Under N.J.R.E. 701, lay-witness opinion is admissible if it is rationally based on the witness' perceptions and will assist in understanding the witness' testimony or determining a fact in issue. In Singh, the Court addressed whether a detective could permissibly testify that sneakers worn by a suspect in a surveillance video looked like sneakers found on the defendant when he was arrested. 245 N.J. at 19. The Court held that the testimony was admissible because the detective saw defendant wearing the sneakers on the night of his arrest and, therefore, had first-hand knowledge of what the sneakers looked like. Importantly, the Court also noted that the detective did not definitively conclude they were the same sneakers, but just stated that they were "similar," and thus did not reach the "ultimate determination." Id. at 19-20.

In Sanchez, the Court articulated four factors to be used to determine whether lay-witness opinion will assist the jury. 247 N.J. at 470-73. A court should consider (1) the extent of the witness' contact with the defendant; (2) whether defendant had any change in appearance; (3) the availability of any

other identification witnesses; and (4) the quality of the photograph or video recording.

Holt had no contact with Paul on the night of the shooting. He also never saw Paul wearing the sweatshirt. Consequently, he had no prior perceptions or factual basis for opining that the two sweatshirts matched exactly. Moreover, unlike the detective in Sanchez, Holt did not limit his comments. Instead, he sought to usurp the fact-finding role of the jury by concluding that the sweatshirts were an exact match. He further compounded that problem by offering opinions concerning the lettering on the sweatshirts even when the video was not clear in depicting the lettering or the words.

In summary, Holt's identifications of Paul in the videos are reversible error. That error was compounded by Holt's inadmissible testimony concerning what Zoe and Quinn had told him and then further compounded by Holt's inadmissible testimony concerning the sweatshirt. In combination, those errors require vacation of Paul's convictions and a remand. The errors in Holt's inadmissible testimony, however, were not the only problems undermining a fair trial of the charges against Paul.

IV.

Paul argues that the State did not fully record its interviews with Kim and Peterson when they identified Paul as the shooter. He contends that this failure violated Rule 3:11 and warrants a remand. Because the record is not clear that the State recorded the initial identifications made by Kim and Peterson, we agree that a remand for a further hearing on those issues is necessary.

Rule 3:11 provides that out-of-court identifications must be recorded as a prerequisite for admissibility of the identifications at trial. That record must include "the identity of any individuals with whom the witness has spoken about the identification, at any time before, during, or after the official identification procedure, and a detailed summary of what was said." R. 3:11(c)(8) (2012).³ The rule was adopted at the direction of the New Jersey Supreme Court to ensure that the critical process of identifying a suspect is documented and to guard against misidentification. See Anthony, 237 N.J. at 228-29; State v. Henderson, 208 N.J. 208, 254-55 (2011); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 3:11 (2023).

³ Rule 3:11 was amended in 2020. The current version of this Rule contains nearly identical language to the quoted language above under subsection (c)(10). We cite to the version of the Rule that was in effect at the time of the alleged crimes.

It is unclear from the record before us whether the State documented the initial identifications made by Kim and Peterson. Holt and Detective Nancy Diaz conducted a video-recorded interview with Kim, during which she identified Paul as the shooter. That recording, however, begins with a reference that Kim had already spoken with Diaz. What is not clear from the record is whether Kim had identified Paul as the shooter when speaking with Diaz before the recorded interview.

The trial court conducted a Rule 104 hearing concerning Kim's anticipated testimony and her out-of-court identification of Paul. The focus of that hearing, however, was whether Kim would recant her identification. Kim ultimately did not recant, and her out-of-court identification was used only to refresh her memory on certain issues.

Nevertheless, Kim's testimony was critical. To ensure that Paul receives a fair trial, the full extent of any conversations between or among Diaz, Holt, and Kim prior to the recorded identification should be developed. See Anthony, 237 N.J. at 231-32. In Anthony, the Court held that when the full extent of prior conversations with an identification witness are unknown, and where there is a genuine issue about the completeness of the identification procedure, an evidentiary hearing should be conducted "to assess the reliability of the

identification" and to determine the "full exchange" surrounding the identification. Id. at 237-38.

There is also a question about the completeness of the out-of-court identification made by Peterson. At trial, Holt explained that he had played a video clip for Peterson and "[s]he let out a slight chuckle or laugh" and asked him to play the video again. After Peterson viewed the video a second time, she identified defendant. The recorded interview does not include Peterson's laugh and request to see the video again. Accordingly, there is a question of whether the identification by Peterson was completely recorded.

Here again, the court conducted a Rule 104 hearing to address whether Peterson should be permitted to identify defendant. That hearing, however, was not focused on the completeness of the out-of-court identification; rather, it addressed the question of whether Peterson had a reliable factual basis for her identification.

Because we are remanding this matter, we direct that the court conduct Rule 104 hearings to determine whether the identifications made by Kim and Peterson were completely documented in accordance with Rule 3:11. We express no opinion on whether the initial identifications were appropriately documented. We also express no opinion on whether, if there were failures to

fully document an initial identification, that failure sufficiently undercut the reliability of the identification given by either Kim or Peterson. Those issues will have to be addressed on a complete record after the Rule 104 hearings have been conducted.

V.

Paul also argues that there were errors in the procedures leading to the transfer of his charges from juvenile court to adult criminal court. He contends that the prosecutor failed to adequately explain his statement of reasons and abused his discretion in not giving proper weight to Paul's history in the child welfare system. Paul also contends that he did not receive effective assistance of counsel at the waiver hearing.

Our review of the record convinces us that Paul did not receive adequate assistance of counsel at the juvenile waiver hearing. The waiver hearing took place on August 31, 2016. Prior to the hearing, the family court received documentary evidence from the State in support of its application. The State presented testimony by Holt, who summarized the shooting, narrated the surveillance videos, and described his investigation, including the identifications received from Kim and Peterson. Paul's counsel did not cross-

examine Holt, did not present any witnesses, and apparently did not present any documentation concerning Paul's educational and psychological history.

The record is clear in establishing that Paul had an educational and psychological history that would have been highly relevant to his waiver hearing. In connection with Paul's sentencing, Dr. Gerald Cooke prepared a psychological evaluation of Paul in April 2019. That evaluation documented that Paul had a history of special educational diagnoses and developmental delays, stemming back to the time when he was six-years old. The history summarized by Dr. Cooke showed that Paul had been evaluated numerous times between 2004 and 2015 and had been diagnosed with attention deficit hyperactive disorder, oppositional defiant disorder, early mood disorder, and a neurologically-based learning disorder. Paul also underwent a neurodevelopment examination in 2004, which identified his IQ at 76 and deemed him "eligible for special education as multi-disabled."

Waiver of a juvenile to adult court "is the single most serious act that the juvenile court can perform." State in the Int. of N.H., 226 N.J. 242, 252 (2016) (quoting State v. R.G.D., 108 N.J. 1, 4-5 (1987) (quotation and citation omitted)). "[O]nce waiver occurs, the child loses the protections and opportunities for rehabilitation which the Family Part affords" and "faces the

real possibility of a stiffer adult sentence." Ibid. Because waiver "is a 'critically important' action determining vitally important statutory rights of the juvenile," a juvenile is entitled to a hearing, effective assistance of counsel, and a statement of reasons. Kent v. United States, 383 U.S. 541, 554, 556 (1966); accord State v. J.M., 182 N.J. 402, 410 (2005).

The decision to seek waiver is committed to the discretion of the prosecutor. N.H., 226 N.J. at 249 (citing N.J.S.A. 2A:4A-26.1(c)(3)). The prosecutor's waiver motion must be accompanied by a statement of reasons that sets forth the facts used to assess the eleven statutory factors set forth in N.J.S.A. 2A:4A-26.1(c)(3), together with an explanation of how those factors support waiver. Id. at 250. Those factors include: "(d) [the a]ge and maturity of the juvenile"; "(e) [a]ny classification that the juvenile is eligible for special education to the extent this information is provided to the prosecution by the juvenile or by the court"; and "(j) [e]vidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the prosecution by the juvenile or by the court." N.J.S.A. 2A:4A-26.1(c)(3).

Although Dr. Cooke's report was not prepared after the August 31, 2016 waiver hearing, much of the information detailed in that report concerns

information that predates the waiver hearing and should have been accessible to defense counsel. In particular, Paul's past diagnoses and special education evaluations would have been highly relevant to factors (d), (e), and (j) and would tend to weigh against waiver. See N.J.S.A. 2A:4A-26.1(c)(3). In failing to provide this evidence, Paul's counsel's performance was deficient, and that deficient performance prejudiced Paul. See Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

While we ordinarily do not address ineffective assistance of counsel claims on direct appeal, it is appropriate here because "the trial itself provides an adequately developed record upon which to evaluate defendant's claims." State v. Castagna, 187 N.J. 293, 313 (2006). Additionally, given that we have already determined this matter be remanded for a new proceeding, addressing Paul's ineffective-assistance claim now "promotes judicial economy and avoids the waste of time and resources." State v. Hooper, 459 N.J. Super. 157, 182 (App. Div. 2019). Therefore, we remand with the direction that a new waiver hearing be conducted in the Family Part.

VI.

Because we are vacating Paul's convictions and remanding for new proceedings, Paul's additional arguments, including his contentions concerning his sentence, are moot. See State v. Mann, 132 N.J. 410, 426 (1993).

Reversed and remanded for further proceedings in accordance with this opinion. 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