SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2551-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALRASHIM N. CHAMBERS,
a/k/a ALRASHIM CHAMBER,
AL-RASHIM CHAMBERS, and
ALRASHIM CHAMBERS,

Defendant-Appellant.

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Submitted December 14, 2022 – Decided January 10, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 17-08-2309.

Joseph E. Krakora, Public Defender, attorney for appellant (Christopher W. Hsieh, Designated Counsel, on the brief).

Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney for respondent (Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Alrashim Chambers appeals from his 2019 convictions and aggregate fifty-year prison sentence. We affirm.

I.

We glean the following facts from a pretrial motion hearing and the jury trial. Following a May 27, 2017 street fight in Newark, Rajaee Montgomery was shot and killed; Raven Pugh, Montgomery's friend, also was shot during the incident but survived. Defendant was convicted of the shootings and related weapons offenses.

The shootings occurred days after a dispute arose over a used car registered in Montgomery's name but purchased by a person named Balon Edwards. Edwards asked Montgomery to register the car after she was unable to do so and he agreed. Subsequently, Montgomery received notice a parking ticket was issued on Edwards's car and he asked her to pay it. Edwards never paid the ticket.

Montgomery was advised by the Motor Vehicle Commission (MVC) his license would be suspended if the ticket remained unpaid. Accordingly, two days before the shootings, he and his live-in boyfriend, Jeffrey Hall,[1] arranged

[1] Jeffrey Hall is also referenced in the record as Jaquawn Hall.

to meet a tow truck driver at Edwards's home to tow away and "junk" the car. The driver paid Montgomery approximately $200 for the car and towed it away after Montgomery and Hall removed the license plates. The men returned the plates to the MVC and used the proceeds to pay Edwards's parking ticket.

On the evening of May 27, Hall received a phone call from Shante Chambers, Edwards's cousin and a relative of Hall's uncle. Edwards was with Shante[2] and testified Shante's voice was loud and agitated during the call. Shante's friend, Jamillah Allen, and defendant were with Shante, too, and heard Hall and Shante scream at each other. Montgomery's voice also was heard on the call with the "same energy" as Hall's voice. According to defendant, the conversation concerned money Shante owed Montgomery and when defendant joined the conversation to mollify the participants, Hall "was disrespectful" toward him so he "shout[ed] disrespect back at him."

When the call ended, Montgomery and Hall took separate vehicles to Fairmount Avenue in Newark, to continue their discussion with Shante. Hall drove with his sisters, Pugh, Montgomery's son and another child; Montgomery rode with his sister and picked up a friend, Michael Garner, on the way to

[2] Because Shante Chambers and defendant share the same surname, we refer to her by her first name. We intend no disrespect by this practice.

Fairmount Avenue.

When the two cars arrived on Fairmount Avenue, Shante was standing in the street, asking for Montgomery. As Montgomery and Hall exited their vehicles and walked directly toward her, Shante confronted Montgomery with a knife and began thrusting it at him.[3] Montgomery and Hall yelled at Shante to put the knife down. They also tried to knock it out of her hand. Edwards, defendant, and Shante's friend, Allen, witnessed the fight, and Allen pulled defendant aside to show him she had a gun in her purse.

Less than a minute after the fight started, defendant walked slowly into the street. Shante separated from Hall and Montgomery to drop her knife on the sidewalk where Edwards stood before returning to the street, and Edwards retrieved a nearby baseball bat to smash the rear window of Hall's car. Within moments of Edwards grabbing her bat, defendant spotted Garner walking toward him. Defendant testified that once he saw a gun in Garner's hand, he thought he

[3] It is unclear from the record whether Montgomery possessed a knife during the altercation with Shante. Some witnesses testified he had no weapons during the incident, but Edwards and Detective Eric Manns testified the victim possessed a knife.

"was in trouble" so he retrieved the gun from Allen's purse.[4]

According to defendant, Garner tried to hand his gun to Montgomery, but dropped it. Defendant fired a shot "at the gun" on the ground, purportedly in self-defense. He later testified that while everyone else in the area ran, Montgomery bent down to retrieve the gun. Defendant fired another shot at the gun, believing that if Montgomery "g[o]t the gun in his hand, then [defendant] was dead, basically." Defendant testified he thought he struck Montgomery with the second shot because Montgomery stopped reaching for the gun and grabbed his back instead.

Defendant admitted Montgomery fled the scene and defendant chased him. Further, defendant testified he fired additional shots into the crowd "just to keep the crowd going in that direction" and "to assure [his] safety." Defendant was captured on surveillance video, walking slowly back down the sidewalk and tucking a gun into his pants pocket after firing his last shot. Seconds later, he left the area in a car driven by another individual.

Pugh also testified at trial. She stated she went with Hall and Montgomery

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[4] Garner testified he had no gun, and neither Montgomery nor Hall had any weapons. Garner also stated after Shante dropped her knife, defendant walked into the street, stood by a tree, and immediately pulled out a gun before shooting Montgomery.

to Fairmount Avenue believing the men would "have a discussion about [Edwards's] car" and "there might be an argument." Additionally, she stated the people who accompanied Montgomery and Hall to the scene did not bring any weapons. Pugh also testified she saw Shante confront Montgomery and Hall and "just swing[] the knife at" Montgomery before dropping it on the sidewalk. Further, Pugh saw defendant silently standing in the street "with his hand in his pocket" "[l]ike he was up to something" before he pulled a gun out of his pocket and "cock[ed] it back." Once Pugh saw the gun, she turned around to run back to Hall's car because she "had to get to . . . where the kids was at." While running, she heard a gunshot. Pugh returned to Hall's car, "put the kids down on the floor and . . . [her]self over them" before realizing she sustained a flesh wound to her arm.

Montgomery died from his gunshot wound shortly after he was taken to a local hospital. Hours after the incident, the Newark Police Department conducted separate photo arrays with Garner, Hall, and Pugh. Each identified defendant as the shooter.

Following his arrest in June 2017, defendant was indicted on charges of first-degree murder, N.J.S.A. 2C:11-3(a)(1)(2) (count one); second-degree unlawful possession of a weapon without a permit, N.J.S.A. 2C:39-5(b) (count

two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count three); and fourth-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(3) (count four). Allen was named as a co-defendant and charged with second-degree unlawful possession of a weapon without a permit. Shante also was named as a co-defendant and indicted on charges of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2); fourth-degree unlawful possession of a knife, under circumstances not manifestly appropriate for lawful use, N.J.S.A. 2C:39-5(d); and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d).

II.

Prior to trial, defendant moved for a Wade[5] hearing, arguing the photo array conducted with Garner was "impermissibly suggestive" and Garner's out-of-court identification, along with "any subsequent identifications" of defendant as the shooter, should be suppressed. After hearing argument, the judge rendered an oral decision, denying the motion.

In a conforming written opinion issued the same day, the judge found defendant failed to meet "the threshold showing required by Henderson[6] that

[5] United States v. Wade, 318 U.S. 218 (1967).

[6] State v. Henderson, 208 N.J. 208, 251 (2011).

would entitle [him] to a Wade hearing to explore the propriety of the identification." The judge determined the contested photo array was conducted by "a double-blind administrator from the Essex County Prosecutor's Office" after Garner described the suspect's gender, approximate height and weight, and what the suspect was wearing. Additionally, the judge found Garner told detectives he "had a clear view of the shooter's face with no item obstructing his view, that the shooter's dreads were in a ponytail behind his head, and . . . he saw the shooter clearly in broad daylight."

Further, the judge concluded for Garner's photo array, "the individuals in the filler photos . . . [were] considerably similar in appearance to [d]efendant" and the detective administering the photo array provided proper instructions. The judge added, "[a]ll six photos depict men of similar age, facial features, and complexion. The background shades of the photos are very similar. The men also have similar length of dreads, tied back in ponytail fashion."

The judge also found "the State made substantial efforts to limit the likelihood of misidentification by constructing a photo array" consisting of men who matched the description of the suspect and who "resemble[d] the suspect in significant features." Noting defendant did not contend "the presence of any other system variables" and his "initial claim of suggestiveness [was] baseless,"

the judge concluded "the exploration of estimator variables at a hearing [was] not required."[7]

III.

Defendant's jury trial commenced in May 2019 and concluded the following month. At trial, Garner, Hall, and Pugh identified defendant as the person who shot and killed Montgomery; Hall also testified he knew defendant

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[7] In Henderson, the Court identified eight "system variables," defined as characteristics of the identification procedure over which law enforcement has control. 208 N.J. at 248-61. These variables are: (1) whether a "blind" or "double-blind" administrator is used; (2) whether pre-identification instructions are given; (3) whether the lineup is constructed of a sufficient number of fillers that look like the suspect; (4) whether the witness is given feedback during or after the procedure; (5) whether the witness is exposed to multiple viewings of the suspect; (6) whether the lineup is presented sequentially versus simultaneously; (7) whether a composite is used; and (8) whether the procedure is a "showup." Ibid.

The Court also identified ten "estimator variables," defined as factors beyond the control of law enforcement which relate to the incident, the witness, or the perpetrator. Id. at 261. These variables are: (1) the stress level of the witness when making the identification; (2) whether a visible weapon was used during the crime; (3) the amount of time the witness viewed the suspect; (4) the lighting and the witness's distance from the perpetrator; (5) the witness's age; (6) whether the perpetrator wore a hat or disguise; (7) the amount of time that passed between the event and the identification; (8) whether the witness and perpetrator were different races; (9) whether the witness was exposed to co-witness feedback; and (10) the speed with which the witness makes the identification. Id. at 261-72.

for the "majority of [his] life." Additionally, Pugh identified defendant as the person who shot her.

Eric Manns, a detective with the Newark Police Department, Major Crimes Unit, also testified. As the lead investigator of the shootings, Manns stated multiple witnesses informed him defendant shot and killed Montgomery. Further, Manns testified the decedent possessed a knife on the night he was killed.

Over defendant's objection, Manns stated he initially suspected Edwards conspired with defendant and "brought" Montgomery to Fairmount Avenue "for a reason." However, after interviewing Edwards, Manns concluded he "did not have . . . sufficient evidence" to charge her, and in fact "had no proof to prove what [his] feeling [was] about her."

Additionally, Manns testified "a couple of people . . . refused to speak to" him during his investigation, but he recognized he was "not going to speak to everybody, because people just do not want to be involved in a murder investigation." He explained that in general, he did not find "people are cooperative" during investigations of "a homicide or a shooting in the City of Newark." Manns also agreed with the assistant prosecutor on redirect examination that "[o]ftentimes, individuals [who] may be relatives or friends of

the suspect" "have a reason not to want to speak to" him and "love their friend" or "[t]heir family member." After interviewing various individuals, Manns testified he "wanted to get [defendant] off the streets" for "committing a shooting and a murder, so [he] sought [an arrest] warrant" before speaking to defendant.

While on the witness stand, Manns was asked to narrate surveillance footage from the night of the shootings. He stated one of the videos depicted defendant chasing Montgomery with a gun, pointing the gun at "Montgomery's back," and "[a] muzzle flash" coming from defendant's gun as he pointed it at Montgomery. On redirect examination, Manns admitted he did not know if Montgomery "got shot at that moment."

During his summation, defense counsel highlighted that neither Shante nor Jamillah Allen testified at trial and stated, "I quickly remind you, is it my job . . . . Do I carry the burden of proving my client's guilt?" The State immediately objected to this comment and following a sidebar, defense counsel clarified that although the State was responsible for proving defendant's guilt, once Shante or Allen were indicted, they had "[t]he right to remain silent[,] . . . to be represented by an attorney[, and] . . . to refuse to come. So, they are not here."

In the State's summation, the assistant prosecutor referenced defense counsel's comments about Shante and Allen before reiterating the two women had the "right to remain silent and to" have attorneys. The assistant prosecutor also stated, "I'd love to bring them here and make them tell you what they know, but I can't do that." He continued:

> I don't know what they know or don't know because I haven't had a chance to ever speak with them. But I'm going to tell you [to] put their existence out of your mind as to their case, because it's not important for what you're doing here. The only thing that's important about them is what you see and what you know about them from the evidence in this case.
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> [(Emphasis added).]

The assistant prosecutor also informed the jury, "there's only one witness that testified before you that has an interest in the outcome of [the] case, and that's [defendant] . . . because he's accused of this murder." Additionally, when referring to defendant's actions during the incident, the assistant prosecutor compared defendant's behavior to that of a character from the movie, Halloween, stating:

> there's a guy, Michael Myers, and [he] stands in the street . . . and he's staring, and he's deciding what he's going to do next. And that's what [this] reminds me of . . . [defendant] standing in the middle of the street, in the direction of [Montgomery], thinking "what am I going to do next?"

Two days after counsel provided their closing statements, the jury acquitted defendant of murder but convicted him of the lesser-included offense of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1). The jury also found defendant guilty of the three remaining charges. In September 2019, the judge granted the State's motion for a discretionary extended term and sentenced defendant to an aggregate fifty-year prison term.

IV.

On appeal, defendant raises the following arguments:

> POINT I
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> DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY THE ADMISSION OF DETECTIVE MANN[S]'S LAY OPINION THAT BALON EDWARDS ORCHESTRATED A SETUP TO BRING THE VICTIM TO FAIRMOUNT AVENUE; THAT DEFENDANT AIMED AT THE VICTIM'S BACK; THAT DEFENDANT NEEDED TO BE REMOVED FROM THE STREETS BECAUSE HE COMMITTED A MURDER; AND THAT DEFENDANT'S FRIENDS/RELATIVES REFUSED TO COOPERATE WITH THE POLICE BECAUSE THEY "LOVED" HIM. (PARTIALLY RAISED BELOW).
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> POINT II
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> THE PROSECUTOR ENGAGED IN MISCONDUCT IN SUMMATION BY STATING THAT HE WISHED THAT NON-TESTIFYING WITNESSES WERE HERE SO THAT HE COULD "MAKE THEM TELL

YOU WHAT THEY KNOW;" BY ARGUING THAT DEFENDANT SHOULD BE DISBELIEVED "BECAUSE HE'S ACCUSED OF THIS MURDER;" AND BY COMPARING DEFENDANT TO [A] MURDERER FROM [THE] HALLOWEEN MOVIE. THESE REMARKS DEPRIVED DEFENDANT OF A FAIR TRIAL AND REQUIRE REVERSAL. (NOT RAISED BELOW).

A. PROSECUTOR'S COMMENT THAT HE WANTED TO BRING NON-TESTIFYING RELATIVES/FRIENDS OF DEFENDANT HERE AND "MAKE THEM TELL YOU WHAT THEY KNOW."

B. PROSECUTOR'S REMARK THAT DEFENDANT SHOULD BE DISBELIEVED "BECAUSE HE WAS ACCUSED OF THIS MURDER" AND WAS THE ONLY WITNESS WITH AN INTEREST IN THE OUTCOME.

C. PROSECUTOR'S SUMMATION COMMENTS COMPARING DEFENDANT TO A MURDERER FROM THE HALLOWEEN MOVIE.

D. PROSECUTOR'S REMARKS, TAKEN TOGETHER, WERE EGREGIOUS AND CONSTITUTED PLAIN ERROR REQUIRING REVERSAL.

POINT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT A WADE HEARING.

POINT IV

THE CUMULATIVE IMPACT OF THE TRIAL COURT'S ERRORS WARRANTS A NEW TRIAL. (NOT RAISED BELOW).

POINT V

THE COURT'S SENTENCE WAS EXCESSIVE BECAUSE IT ENGAGED IN IMPERMISSIBLE DOUBLE-COUNTING AND FAILED TO PROPERLY FIND AND WEIGH THE AGGRAVATING AND MITIGATING FACTORS.

These arguments are unavailing.

Preliminarily, we recognize we must defer to a trial judge's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). That is "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. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Therefore, an evidentiary ruling will not be disturbed unless it "was so wide of the mark that a manifest denial of justice resulted." State v. Singh, 245 N.J. 1, 13 (2021) (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

We also observe as a threshold matter that "[w]hen a defendant does not object to an alleged error at trial, such error is reviewed under the plain error

standard." Ibid. (citation omitted). "Under that standard, an unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result." Ibid. (quoting R. 2:10-2). Accordingly, "the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." Ibid. (quoting State v. R.K., 220 N.J. 444, 456 (2015)). The plain error standard aims to "provide[] a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." State v. Bueso, 225 N.J. 193, 203 (2016) (citations omitted).

It also is well established that when "a party preserves an issue for appeal on the record," the issue is reviewed for "harmful error." See State v. Mohammed, 226 N.J. 71, 86 (2016) (citations omitted). Under the harmful error standard, we determine "whether the error is 'clearly capable of producing an unjust result.'" Id. at 87 (quoting R. 2:10-2). Thus, even though an alleged error was brought to the trial judge's attention, it will not be grounds for reversal if it was "harmless error." Willner v. Vertical Reality, Inc., 235 N.J. 65, 79 (2018); State v. J.R., 227 N.J. 393, 417 (2017); State v. Macon, 57 N.J. 325, 338 (1971).

As with "plain error," an error during a jury trial will be found "harmless" unless the "error [was] 'sufficient to raise a reasonable doubt as to whether [it]

led the jury to a result it otherwise might not have reached.'" State v. Jackson, 243 N.J. 52, 73 (2020) (citations omitted). "The Supreme Court has emphasized that 'most constitutional errors can be harmless,' and are therefore not subject to automatic reversal." State v. Camacho, 218 N.J. 533, 547 (2014) (quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991)). Applying these standards of review, we are not persuaded, as defendant argues, Detective Manns's lay testimony denied defendant a fair trial.

N.J.R.E. 701 permits testimony by lay witnesses "in the form of opinions or inferences" if it: "(a) is rationally based on the witness's perception; and (b) will assist in understanding the witness's testimony or determining a fact in issue." This "testimony must 'assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.'" State v. Sanchez, 247 N.J. 450, 469 (2021) (quoting Singh, 245 N.J. at 15). But the "Rule does not require the lay witness to offer something that the jury does not possess." Singh, 245 N.J. at 19. The purpose of the Rule "is to ensure that lay opinion is based on an adequate foundation." Id. at 14 (quoting State v. Bealor, 187 N.J. 574, 586 (2006)).

Regarding testimony by law enforcement, "an officer is permitted to set forth what [was] perceived through one or more of the senses." Id. at 15

(alteration in original) (quoting State v. McLean, 205 N.J. 438, 460 (2011)). Further, an officer may comment on something seen on a surveillance video, but in "narrative situations," the use of "neutral, purely descriptive terminology such as 'the suspect' or 'a person'" is favored. Id. at 18.

It is impermissible for an officer to express a belief regarding a defendant's guilt. See McLean, 205 N.J. at 463. As we have noted "the line between permissible and impermissible lay opinion from police officers is not always self-evident, and . . . some degree of case-by-case analysis may be necessary." Rice v. Miller, 455 N.J. Super. 90, 106 (App. Div. 2018). Ultimately, a jury is free to credit lay testimony or reject it entirely. Singh, 245 N.J. at 20.

Here, defendant contends it was reversible error for the judge not to preclude Detective Manns from testifying about the detective's suspicion that Edwards may have conspired with defendant to set up a confrontation between herself, Hall and Montgomery. He argues the detective's testimony conflicted with and undercut defendant's self-defense claim. We are not convinced.

When the assistant prosecutor questioned Manns on direct examination about the events that led to the shooting, Manns admitted he suspected Edwards had "set the thing up." Significantly, however, Manns also testified that after

speaking with Edwards, he "did not have . . . sufficient evidence" to charge her, and in fact "had no proof to prove what [his] feeling [was] about her." Accordingly, we perceive no reason to reverse defendant's convictions based on this testimony. In fact, Manns made it clear he lacked any proof Edwards conspired with defendant to trigger the confrontation on Fairmount Avenue. More importantly, during the detective's testimony, he did not opine about defendant's guilt on his pending charges.

Defendant's three remaining arguments about the detective's testimony were not raised during the trial. Thus, we review them under the plain error standard, recognizing such alleged errors "must be evaluated in light of the overall strength of the State's case." Id. at 13-14 (internal quotation marks omitted) (citation omitted).

Consistent with that standard, we decline to conclude, as defendant urges, the judge committed plain error in allowing Manns to narrate a surveillance video and testify about where defendant aimed his gun while the footage was played for the jury. As we recently observed, there is no per se rule barring video narration testimony. State v. Watson, 472 N.J. Super. 381, 459 (App. Div. 2022). In fact, we concluded in Watson "the decision to allow a witness to describe and highlight something on the screen that the jury could see for itself

must be made on a case-by-case if not comment-by-comment basis." Ibid.

We also 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).
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> [Id. at 462.]

Additionally, we identified six factors to guide trial courts in safeguarding the province of the jury from unwarranted intrusion by narration.[8] Id. at 466-69.

Mindful of the principles enunciated in Watson, we recognize that while Manns was on re-direct examination and narrating surveillance footage, he stated he saw defendant "chasing after . . . Montgomery, shooting" and "aiming . . . at his back" before "adjusting his waistband and walking back . . . towards . . . 307 Fairmount Avenue." As discussed, defense counsel did not object to this testimony. Rather, on re-cross examination, he posed follow-up questions

[8] The factors we enumerated included: (1) if the video-narration testimony would provide helpful background context; (2) if the testimony would explain the duration of the video and remain focused on isolated events or circumstances; (3) if a narrative comment would pertain to a fact in dispute; (4) if a narrative comment would be based on an inference or deduction supported by other facts in evidence; (5) the clarity and resolution of the video recording; and (6) whether the narration testimony would be helpful in focusing the jury's attention if a video is complex or contains distracting images. Ibid.

and asked Manns if he saw defendant on the footage "shooting the decedent in the back." Manns answered, "[y]es." Defense counsel then asked if Manns presumed the "muzzle flash" from the video was "directed to the back of Mr. Montgomery" or if he "saw [the flash] on the video as it's directed at [the victim's] back." Manns answered, "[b]ased on the totality of all of the evidence in the video and watching that video . . . a couple of hundred times, . . . I see [defendant] with the gun, [and] other witnesses have . . . also advised me that he has the gun, [and is] shooting the gun." As defense counsel probed further and asked multiple questions about what Manns saw on the video, he asked if Manns "jump[ed] to the conclusion" the flash he saw represented defendant firing at Montgomery's back. Manns denied "jump[ing] to . . . conclusions," and responded, "based on the totality of everything, with all the statements and the video and the medical examiner's reports, I did conclude . . . [defendant] shot . . . Montgomery in the back."

Critically, as defense counsel pressed Manns about what the detective observed on the video, Manns admitted he "didn't see that [Montgomery] was hit on the video." Manns explained, "I know he fell. I don't know when he was hit." Manns also admitted on re-cross, "whether [Montgomery] was hit and then fell or fell and then was hit, I don't know that." Additionally, Manns stated he

saw "the flashing of [defendant's] gun" as defendant chased Montgomery but "didn't say [he] saw the bullet" hit Montgomery or that he "saw the bullet go into [Montgomery's] back." Manns subsequently admitted on re-direct that when he saw the "muzzle flash" on the video, he did not know if Montgomery was "shot at that moment." In short, much of the narration testimony provided by Manns was elicited by the defense, and Manns made certain concessions based on defense counsel's inquiries.

Under the invited error doctrine, trial errors that were "induced, encouraged or acquiesced in, or consented to by defense counsel ordinarily are not a basis for reversal on appeal. . . ." State v. A.R., 213 N.J. 542, 561 (2013) (citations omitted). "In other words, if a party has 'invited' the error, [that party] is barred from raising an objection for the first time on appeal." Ibid. (citation omitted). Here, defense counsel not only lodged no objection to Manns's initial narration testimony but perpetuated such testimony with additional questions about certain surveillance footage. Moreover, defense counsel garnered concessions from Manns as he did so, including Manns's admission he could not pinpoint when Montgomery was hit by gunfire. Therefore, any error by the judge in allowing this testimony was, in part, invited by defendant.

Nonetheless, because Manns's narration testimony was initiated by the

State, and for the sake of completeness, we review the admission of Manns's narration testimony for plain error. In that vein, we note the identity of the suspect seen on surveillance footage was not at issue, as noted by defense counsel when he argued against a jury charge on identification and told the judge, "[i]dentification is . . . not in doubt. [Defendant] has testified it's him all the way." Additionally, the record reflects defendant testified after the detective did, admitting: he saw Shante and Montgomery arguing before they "both [gave] their knives away"; Montgomery "didn't take [his knife] out of the holster"; Allen gave him the gun from her purse; he used it to fire twice at the gun Garner dropped in the street and was "pretty sure that second shot was the shot that hit" Montgomery; he chased Montgomery after firing the second shot; and he fired additional shots after "everybody continued to run." Moreover, defendant identified himself on surveillance video as the person "shooting" "[d]own the street" after he saw Montgomery fall, and "sticking the gun down in [his] pants" as he walked away from the scene.

Under these circumstances, and assessing the Watson factors, including whether Manns's narrative comment: pertained to a fact in dispute; remained focused on isolated events in the footage; and was helpful, given the chaotic nature of the incident and the number of people captured on the video we are

satisfied it was not plain error to permit Detective Manns to testify about what he saw – and did not see – on the footage.

Defendant next argues it was plain error for the judge to allow Manns to testify he sought an arrest warrant for defendant before speaking to him because the detective "wanted to get [defendant] off the streets" for "committing a shooting and a murder." Again, we disagree.

Here, defense counsel elicited the testimony at issue when he cross-examined Manns to suggest Manns acted improperly by not making "any effort to find or contact [defendant] to see if he would be willing to sit down to answer questions, prior to [Manns] requesting the warrant." Defense counsel's questioning also prompted Manns to testify that as of the day after the shootings, the detective determined he needed an arrest warrant for defendant, "[b]ased on the facts that [he] had from witnesses."

Because Manns's testimony was invited by defense counsel and the jury ultimately rejected the detective's testimony, in part, by acquitting defendant of murder, we cannot conclude the judge committed plain error by admitting the disputed testimony. Further, given the strength of the State's case, we are not convinced the contested testimony was "clearly capable of producing an unjust result." R. 2:10-2.

Similarly, we discern no plain error in allowing Manns to testify family and friends of a suspect often "don't want to involve themselves" in an investigation about "a homicide or a shooting in the City of Newark" "[f]or various reasons." Nor was it plain error to permit Manns to acknowledge one reason people choose not to speak to him is because they "love their friend" or "family member" under investigation. Although defendant argues such testimony constituted "hearsay evidence" and implied Manns "received information from an unknown source" outside the record which "implicat[ed] defendant," these arguments lack merit. R. 2:11-3(e)(2).

Here, Manns testified in general terms when stating witnesses often were reluctant to speak with him about homicides or shootings in Newark. Also, during this portion of his testimony, Manns did not refer to any out-of-court statements nor was the jury "left to speculate that [Manns] had superior knowledge through hearsay information implicating defendant in the crime[s]." State v. Branch, 182 N.J. 338, 348 (2005). Additionally, given the strength of the State's case against defendant, which included testimony from numerous eyewitnesses, we cannot conclude Manns's testimony about the lack of cooperation from some individuals in an investigation created "a reasonable doubt" about "whether the jury came to a result that it otherwise might not have

reached." Singh, 245 N.J. at 13 (quoting R.K., 220 N.J. at 456).

Regarding Point II, defendant urges us to reverse his conviction based on certain comments the assistant prosecutor made in summation, such as "he wished that non-testifying witnesses were" present for the trial so he could "make them tell [the jury] what they know"; and defendant "should be disbelieved 'because he's accused of this murder.'" Defendant also argues for reversal based on the assistant prosecutor's comparison of defendant's actions during the incident to those of a fictional character from the Halloween movie. Because defendant did not object to the State's closing remarks at trial, we review his arguments under the plain error standard. R. 2:10-2.

Our consideration of this issue is guided by well-known principles. Prosecutors are entitled to zealously argue the merits of the State's case. State v. Smith, 212 N.J. 365, 403 (2012) (citations omitted). Indeed, the prosecution, "within reasonable limitations, [is] afforded considerable leeway in making opening statements and summations." State v. Gorthy, 226 N.J. 516, 539-40 (2016) (quoting State v. Wakefield, 190 N.J. 397, 443 (2007)).

A prosecutor's comments must be "reasonably related to the scope of the evidence presented." State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. Frost, 158 N.J. 76, 82 (1999)). But even if the prosecutor

exceeds the bounds of proper conduct, "[a] finding of prosecutorial misconduct does not end a reviewing court's inquiry because, in order to justify reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" State v. Smith, 167 N.J. 158, 181 (2001) (quoting Frost, 158 N.J. at 83); see also McNeil-Thomas, 238 N.J. at 275.

"Generally, remarks by a prosecutor, made in response to remarks by opposing counsel, are harmless." State v. C.H., 264 N.J. Super. 112, 135 (App. Div. 1993) (emphasis added) (citations omitted). Also, when defense counsel fails to timely object to statements made in summation, typically, "the remarks will not be deemed prejudicial." Frost, 158 N.J. at 83-84 (citation omitted). Defense counsel's "failure to object suggests . . . defense counsel did not believe the remarks were prejudicial at the time they were made. . . . [And] also deprives the court of an opportunity to take curative action." Id. at 84 (citing State v. Bauman, 298 N.J. Super. 176, 207 (App. Div. 1997)). Applying these standards, the complained-about conduct does not compel reversal.

It is undisputed that at the beginning of the assistant prosecutor's summation, he noted defense counsel's reference to the absence of Shante and Allen at trial. The assistant prosecutor then stated each of the women were "charged with crimes that are involved with this incident" and had "a right to

remain silent." He added, "I'd love to bring [Shante and Allen] here and make them tell you what they know, but I can't do that." Moreover, the assistant prosecutor told the jury:

> I don't know what [Shante and Allen] know or don't know because I haven't had a chance to ever speak with them. But I'm going to tell you put their existence out of your mind as to their case, because it's not important for what you're doing here. The only thing that's important about them is what you see and what you know about them from the evidence in this case.
>
> [(Emphasis added).]

During summation, "[a] prosecutor may respond to an issue or argument raised by defense counsel." State v. Johnson, 287 N.J. Super. 247, 266 (App. Div. 1996). That is what occurred here regarding the State's mention of defendant's co-defendants. Also, considering the assistant prosecutor conveyed to jurors he did not know what the co-defendants would say if they testified, and he informed jurors they should focus on what they knew about the women "from the evidence in this case," we are satisfied the State's closing remarks about the co-defendants did not constitute prosecutorial misconduct.

Next, defendant argues the State improperly bolstered the credibility of other testifying witnesses and "deprived him of the presumption of innocence" when the assistant "prosecutor commented in summation . . . that defendant had

a motive to lie because he was the only witness charged with murder." We disagree.

Here, when addressing defendant's testimony in summation, the assistant prosecutor did not state "defendant had a motive to lie." Rather, he stated:

> one of the factors of credibility . . . is whether or not a witness has an interest in the outcome of the case. And . . . there's only one witness that testified before you that has an interest in the outcome of [the] case and that's the man right here, because he's accused of this murder. . . . [H]e is the only witness in this case that has an interest in the outcome.
>
> The other witnesses might be biased. They might have some interest in the facts. But they don't have an interest in the outcome.

A prosecutor may point out a witness's interest in presenting a particular version of events. Johnson, 287 N.J. Super. at 267 (citing State v. Purnell, 126 N.J. 518, 538 (1992)). Also, a jury may properly consider "the possible bias, if any, in favor of the side for whom the witness testified." Model Jury Charges (Criminal), "Criminal Final Charge" (rev. Sept. 1, 2022). Thus, the State's comments about defendant's interest in the outcome of the case did not equate to prosecutorial misconduct nor deprive defendant of a fair trial.

Next, defendant newly argues it was prosecutorial misconduct for the assistant prosecutor to "liken[] defendant to Michael Myers, a murderous

character from the 1978 horror movie, Halloween." We are not convinced.

To provide context for this comment, we note that in his summation, the assistant prosecutor told jurors, "almost every witness told you . . . [defendant] stopped" in the middle of the street as he walked across it. The assistant prosecutor also reminded jurors that Raven Pugh testified she saw defendant "standing in the middle of the street, staring" and "[i]t was creepy." The assistant prosecutor stated when Pugh used the word, "creepy," he was reminded of the fictional character, Michael Myers, from the Halloween movie, "stand[ing] in the street . . . and . . . staring, . . . deciding what he's going to do next" because during the May 2017 incident, defendant was "standing in the middle of the street, [looking] in the direction of [Montgomery], thinking, 'what am I going to do next?'"

The State's summation "is best reviewed within the context of the trial as a whole." State v. Feaster, 156 N.J. 1, 64 (1998) (citation omitted). Here, defense counsel did not object to the comments at issue. We also note that during defendant's testimony, he admitted he paused "between the moment [he] fired the first shot and the second shot." Additionally, other eyewitnesses testified defendant stood in the middle of the street without saying anything before firing his gun. Therefore, we conclude any error related to the assistant

prosecutor's comparison of defendant's non-violent actions in the street to that of the malevolent Halloween character was insufficient to "raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." Macon, 57 N.J. at 336. In reaching this conclusion, we again note the jury did not find defendant guilty of murder.

Finally, given our determinations about each of defendant's prosecutorial misconduct arguments, we discern no basis to conclude, as defendant urges, that collectively, the contested closing remarks made by the State "were egregious and constituted plain error requiring reversal."

Regarding defendant's Point III, he contends "the trial court erred in denying [him] a Wade hearing." This argument lacks merit. R. 2:11-3(e)(2). We add the following brief comments.

When reviewing an order denying a motion to bar an out-of-court identification, our review is "no different from our review of a trial court's finding in any non-jury case." State v. Wright, 444 N.J. Super. 347, 356 (App. Div. 2016) (citation omitted). Thus, we accept the trial court's findings regarding such an identification, provided they are "supported by sufficient credible evidence in the record." State v. Watts, 223 N.J. 503, 516 (2015) (citations omitted).

The right to a Wade hearing is not absolute and a hearing is not required in every case involving an out-of-court identification. State v. Ruffin, 371 N.J. Super. 371, 391 (App. Div. 2004) (citations omitted). "A threshold showing of some evidence of impermissive suggestiveness is required." Ibid. (citing State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div. 1985)). Also, a defendant seeking to exclude an out-of-court identification must show "some evidence of suggestiveness tied to a system variable which could have led to a mistaken identification." State v. Anthony, 237 N.J. 213, 233 (2019) (citing Henderson, 208 N.J. at 288). If a defendant presents evidence of suggestiveness, the burden shifts to the State to "offer proof to show that the proffered eyewitness identification is reliable." Henderson, 208 N.J. at 289. The "ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Ibid. (citations omitted). In that regard, the "threshold for suppression" is high and in most cases the issue of identification should be "presented to the jury." Id. at 303.

Governed by these standards, and recognizing the confidence Hall, Garner and Pugh demonstrated in identifying defendant as the shooter from photo arrays conducted hours after the May 27 incident, we discern no basis to disturb the judge's denial of a Wade hearing. Instead, we are satisfied the denial was

appropriate for the reasons expressed by the judge, and note his findings are amply supported on the record. In reaching this conclusion, we also do not ignore: defendant identified himself on surveillance video from the night of the incident; he admitted he fired two shots before Montgomery fled the scene, one of which he believed struck Montgomery; and defense counsel successfully argued to the judge during a charging conference, "[i]dentification is not . . . in doubt. [Defendant] . . . testified it's him all the way."

Regarding Point IV, defendant newly contends "the cumulative impact of [the] trial court's errors warrants a new trial." This argument is not persuasive.

"We have recognized in the past that even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008) (citing State v. Koskovich, 168 N.J. 448, 540 (2001)). However, here, because we conclude there were no reversible errors, defendant's cumulative error argument also fails.

Finally, under Point V, defendant contends his sentence is excessive because the judge wrongly engaged in "double-counting" and failed to correctly "find and weigh the aggravating and mitigating factors." We disagree.

"[We] review sentencing determinations in accordance with a deferential

standard," and "must not substitute [our] judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). In our review, we determine whether "sentencing guidelines were violated"; whether "the aggravating and mitigating factors found" were "based upon competent and credible evidence in the record;" and whether "'the application of the guidelines to the facts of [the] case make[] the sentence clearly unreasonable so as to shock the judicial conscience.'" Ibid. (first alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

"The sentencing court must first, on an application for discretionary enhanced-term sentencing under N.J.S.A. 2C:44-3(a), review and determine whether a defendant's criminal record of convictions renders [the defendant] statutorily eligible." State v. Pierce, 188 N.J. 155, 168 (2006). If so, then "the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." Id. at 169. "Thereafter, whether the court chooses to use the full range of sentences opened up to the court is a function of the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public." Id. at 168.

> Where, within that range of sentences, the court chooses to sentence a defendant remains in the sound

> judgment of the court − subject to reasonableness and the existence of credible evidence in the record to support the court's finding of aggravating and mitigating factors and the court's weighing and balancing of those factors found.
>
> [Id. at 169.]

Here, the judge found defendant's criminal history included "four felony convictions" so that defendant's current convictions "represent[ed] his fifth, sixth, seventh, and eighth indictable convictions." Considering defendant was thirty years old when he committed his most recent offenses, and the date of defendant's last release from confinement before committing those offenses was within ten years of the sentencing date, the judge found defendant "eligible for sentencing as a persistent offender." Accordingly, he granted the State's motion for a discretionary extended term, although he did not identify which two prior convictions he used to qualify defendant as a persistent offender.

Next, the judge engaged in an aggravating and mitigating factor analysis and found aggravating factors three (risk of reoffense), six (prior criminal record), and nine (need to deter), N.J.S.A. 2C:44-1(a)(3), (6) and (9) applied. As to defendant's risk of re-offense, the judge highlighted defendant's multiple prior convictions, noting defendant received the benefit of "probation three different times, but violated each term by committing offenses" and "committed

this homicide while on supervised release." Based on defendant's criminal history, the judge stated, "defendant continues to engage in criminal activity which has now escalated in terms of severity" and "the court has no reason to believe he is capable of leading a crime-free life." Given "the nature and number of defendant's numerous felony convictions," the judge gave "great weight" to aggravating factor three.

Turning to aggravating factor six, the judge afforded this factor "significant weight," stressing "the seriousness of the offenses for which [defendant] has now been convicted." The judge also incorporated by reference his comments about aggravating factor three, stating they were "applicable here as well."

Next, the judge ascribed "great weight" to aggravating factor nine, noting "defendant did not dispute at trial that he shot the victim . . . with a weapon he was not supposed to possess" and the jury rejected his claim of self-defense.

As to potential mitigating factors, the judge stated "none were cited" by the defense and he found none. He explained defendant showed "some genuine remorse for what occurred," but "[t]hat is not a statutory mitigating factor." Also, despite receiving letters written on defendant's behalf showing defendant was "close to family and family members may be sick," the judge found "there's

nothing to indicate that they are his dependents," and given defendant was incarcerated in the past, "it seem[ed] that everyone got by [during that] period of time." Accordingly, the judge declined to find imprisonment would result in excessive hardship to defendant or his dependents under mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11).

Given these findings, the judge stated he was "clearly convinced that the aggravating factors totally and substantially predominate." He then supplemented his findings to explain why "the public . . . need[ed] to be protected from" defendant. He noted defendant "possessed firearms on more than one occasion[], . . . committed assaults, has not benefitted from probation or prison, and . . . escalated to committing homicide." Further, the judge referenced the May 27 incident, stressing "[t]here were at least two carloads of people . . . that came to the scene that [included] . . . young children." "And given the number of people present and . . . the shots . . . fired, there easily could have been more victims here. . . . [B]ut one fatality is bad enough."

Additionally, the judge described a "video of the incident" shown during the trial and stated

> [w]hat was glaring to the court was the relative calm this defendant displayed when he came out of the house towards the argument in the street, . . . the same calm . . . he displayed after the shooting. . . . Also, it

> bears [noting] how he positioned himself in the street next to the one person who had the gun, Jamillah Allen. And he testified that he knew she had a gun in her purse.
>
> In short, the court is clearly convinced . . . the defendant's past and present conduct, which has now . . . escalated, indicates that nothing short of an extended sentence will pre[v]ent him from further criminal conduct.

Thus, the judge sentenced defendant to an extended fifty-year term for the aggravated manslaughter conviction, subject to the No Early Release Act, N.J.S.A. 2C:43-7. The judge also imposed a ten-year term for each weapon conviction and an eighteen-month term on the aggravated assault conviction, ordering the three shorter sentences to run concurrent to the fifty-year term.

Defendant concedes the judge properly found defendant met the statutory requirements to be deemed a persistent offender under N.J.S.A. 2C:44-3(a).[9]

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[9] A sentencing court is permitted to impose an extended term of imprisonment if it concludes the defendant is a persistent offender, meaning

> the defendant was convicted of at least two separate prior crimes[,] but only if "the latest" of those crimes was committed or the defendant's last release from confinement occurred – "whichever is later" - within ten years of the charged crime.
>
> [State v. Clarity, 454 N.J. Super. 603, 606 (App. Div. 2018) (quoting N.J.S.A. 2C:44-3(a)).]

However, citing State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005), he contends we must vacate his sentence and remand for resentencing because the judge used two of his prior convictions — without specifying them — to find defendant was eligible for an extended term sentence, and "then relied on all of the prior convictions in setting the base term of [fifty] years," thereby wrongly increasing the length of his sentence and engaging in improper "double-counting." We are not convinced.

In Vasquez, we determined the sentencing judge erred in "rais[ing] the presumptive extended base term on account of defendant's only prior conviction, the very conviction which both allowed and required an extended term." Ibid. We concluded "[t]o do so was a form of 'double-counting.'" Ibid.

However, in State v. Tillery, 238 N.J. 293, 327 (2019), our Supreme Court found "no error in the trial court's reliance on defendant's criminal record both to determine defendant's 'persistent offender' status under N.J.S.A. 2C:44-3(a) and to support the court's finding of aggravating factors three, six, and nine." Indeed, the Tillery Court confirmed "the defendant's criminal record may be

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Additionally, a defendant must have been at least twenty-one years old when the crime for which the defendant is being sentenced was committed, and at least eighteen years old at the time of commission of the two prior offenses for which the defendant was convicted. N.J.S.A. 2C:44-3(a).

relevant in both stages of the sentencing determination" as "defendant's prior record is central to aggravating factor six . . . and may be relevant to other aggravating and mitigating factors as well." Id. at 327-28 (emphasis added) (citing Pierce, 188 N.J. at 168).

Also, in State v. McDuffie, 450 N.J. Super. 554, 576-77 (App. Div. 2017), we rejected, "as lacking merit," the defendant's claim "the court impermissibly double-counted his criminal record, when granting the State's motion for a discretionary extended term, and again, when imposing aggravating factor six . . . ." We explained defendant's "criminal history was not a 'fact' that was a necessary element of an offense for which he was being sentenced" and the sentencing judge was not "required to ignore the extent of his criminal history when considering applicable aggravating factors" where it was undisputed defendant "had more than the requisite number of offenses to qualify for an extended term." Ibid. (citing State v. Kromphold, 162 N.J. 345, 353 (2000)).

Guided by these standards and mindful defendant's sentence falls within the permissible range, we are satisfied the sentence is neither excessive nor the product of impermissible "double-counting" of the offenses that triggered the extended term here. Instead, the record reflects the judge found aggravating factors three, six and nine based on competent evidence of defendant's repeated

contacts with the criminal justice system, his escalating violent behavior, and the threat he posed to the public in general. Thus, we find no violation of Vasquez and no abuse of discretion regarding the sentence imposed.

Finally, in challenging his sentence as excessive, defendant contends for the first time on appeal that the judge erred by failing to find mitigating factors two (defendant did not contemplate his conduct would cause or threaten serious harm), three (defendant acted under strong provocation), four (substantial grounds existed tending to excuse or justify defendant's conduct) and eleven (excessive hardship due to imprisonment), N.J.S.A. 2C:44-1(b)(2), (3), (4) and (11). These arguments lack merit. R. 2:11-3(e)(2).

As to mitigating factor two, defendant testified he knew when he fired his gun, a bullet "could go into a person that's standing in front of [the] gun." Similarly, he admitted he was aware if he shot a gun in the air, it could "hit someone" and if he fired his gun "into a group," there was a "good chance . . . [he] might hit somebody." The record also does not support a finding of mitigating factors three, four or eleven. In fact, defendant testified the knife fight had subsided and "[t]he knives were gone" when he first fired his gun. Further, the jury rejected his claim of self-defense in rendering its verdict, and as the judge correctly found, there was nothing in the record to confirm

dependents would suffer excessive hardship as a result of defendant's imprisonment. The same is true of defendant. Thus, we are satisfied the judge did not abuse his discretion in imposing an aggregate fifty-year prison term.

Affirmed.