NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4544-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM HILL, a/k/a
RAHEEM HILL, RICKY HILL,
RUSSELL JOHNSON, JERRY
JONES, RAHEEM SANDER,
RAHEEM SANDERS, JOSEPH
SANDERS, BRUCE STRICKLAND,
BRUCE STRICTLAND, ANDREW
YOUNG, ANDY YOUNG, and
STEVEN YOUNG,

Defendant-Appellant.

Argued October 25, 2022 – Decided January 23, 2023

Before Judges Sumners, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-09-0946.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ashley Brooks, Assistant Deputy Public Defender, of counsel and on the briefs).

Patrick R. McAvaddy, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Patrick R. McAvaddy, on the briefs).

Catlin A. Davis, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Catlin A. Davis, of counsel and on the brief).

Doris Cheung argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, PC, attorneys; Doris Cheung, on the brief).

Ronald K. Chen argued the cause for amicus curiae American Civil Liberties Union of New Jersey Foundation (American Civil Liberties Union of New Jersey and Rutgers Constitutional Rights Clinic, attorneys; Alexander Shalom and Jeanne M. LoCicero, of counsel and on the brief; Ronald K. Chen, on the brief).

The opinion of the court was delivered by

SUSSWEIN, J.A.D.

Defendant, William Hill, appeals from his jury trial convictions for carjacking and witness tampering. He contends the witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad and vague. The statutory framework defendant challenges on appeal provides that a witness tampering offense is committed if a person knowingly engages in conduct which a

reasonable person would believe would cause a witness or informant to do one or more specified actions, such as testify falsely or withhold testimony.[1]

Defendant contends the "reasonable person" feature renders the statute unconstitutional and, to avoid constitutional infirmity, the statute must be construed to require the State to prove the defendant knew his or her conduct would cause a prohibited result. Aside from the constitutional issue, defendant contends the assistant prosecutor committed misconduct during summation and the trial court erred by admitting arrest photos into evidence.

After carefully examining the relevant precedents in light of the arguments of the parties and amici, we conclude N.J.S.A. 2C:28-5(a) is neither unconstitutionally overbroad nor impermissibly vague. We decline to embrace a new rule that categorically prohibits the Legislature from using an objective "reasonable person" test to determine a defendant's culpability. We also reject defendant's trial error contentions and, therefore, affirm his convictions.

I.

The following facts were elicited at trial. On the morning of October 31, 2018, the victim left her car running while she went back into her house to

[1] N.J.S.A. 2C:28-5(a) lists five distinct actions by the targeted witness or informant that can be caused by a defendant's witness-tampering conduct. The superseding indictment in this case alleged all five results, not just testifying falsely or withholding testimony. For purposes of brevity, we refer collectively to the statutorily enumerated actions as "prohibited" results.

retrieve a sweater. When she returned to her car one or two minutes later, she noticed a "figure" in the vehicle. The victim ran to her car, opened the door, and told the man to get out. The man put the vehicle in reverse while the door was still open. To avoid getting hit by the door, the victim jumped into the vehicle. She grabbed the steering wheel while her legs were hanging outside the door. She pulled herself into the car as the man shifted the vehicle into drive and sped off with the door still open. He drove erratically and began hitting other vehicles. Each time the vehicle struck another car, the driver-side door would hit the victim's back. Although she was unable to remove the ignition key, she eventually managed to shift the gear into neutral. When the vehicle began to slow down, the man hit the brakes, pushed the victim aside, jumped out, and ran away. From start to finish, the carjacking incident lasted approximately two minutes.

The victim drove to a police station and provided Harrison Police Department Detective Joseph Sloan a description of the carjacker. She stated he was "very, very scruffy. Like, he had hair all over his face, and it was not well maintained." He also had "big eyes" and his skin was not "too dark, but he wasn't light skinned." She stated the man was wearing a red winter "skully" hat, gray hoodie, olive or brown vest, and faded blue jeans.

Detective Sloan collected video surveillance recordings from the area, including from a coffee shop and a convenience store. The video footage and screenshot stills were introduced as evidence at trial to show what the suspect was wearing.

On November 6, 2018, the victim went to the police station to view a photo array. Sergeant Charles Schimpf showed the victim six photographs. He handed the victim one photo at a time and instructed her to stack the photos on top of one another. Despite the instruction to view the photos sequentially, the victim started looking at the photos simultaneously, comparing one against the other.

The record indicates the victim at one point "really thought" the man who attempted to steal her car was an individual in a photograph that was not defendant. However, she ultimately selected defendant's photograph from the array.

At trial, she testified,

> I recognized him by what I saw in my car. Like, I knew that I . . . know that I saw the person. You know, I was face to face with him. I know exactly what he looks like. The pictures just didn't look up to date, and so, . . . when I was looking at all of the pictures, I knew that I recognized him, but there were so many things missing. I was like this is definitely the guy, but the facial hair isn't there. You know what I mean? He was so scruffy and it looked like the

> picture was taken with a flash, so he looked a little bit lighter, but . . . I just . . . knew.

The victim stated she was confident in her identification because she recognized the carjacker's eyes, explaining, "[w]hen you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head." She also recognized the man's mouth and nose. The victim stated she was eighty percent confident in her identification.

Defendant was arrested on November 27, 2018. Following the arrest, Detective Sloan took six photographs of defendant. In the arrest photos, defendant is wearing faded jeans, a black jacket, a grey hoodie, and a red skully cap.

In April 2019, while awaiting trial, defendant sent a letter addressed to the victim's home. The letter, as redacted for its use at trial, reads:

> Dear Ms. [Victim],
>
> Now that my missive had [sic] completed its passage throughout the atmosphere and reached its paper destination, I hope and pray it finds its recipient in the very best of health, mentally as well as physically and in high spirits.
>
> I know you're feeling inept to be a recipient of a correspondence from an unfamiliar author but please don't be startled because I'm coming to you in peace. I don't want or need any more trouble.
>
> Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and

charged with Car Jacking upon you. You may be saying I have the audacity to write to you and you may report it but I have to get this off my chest, I am not the culprit of this crime.

Ms. [Victim], I've read the reports and watched your videotaped statement and I'm not disputing the ordeal you've endured. I admire your bravery and commend your success with conquering a thief whose intention was to steal your vehicle. You go girl! [smiley face].

Anyway, I'm not saying your eyes have deceived you. I believe you've seen the actor but God has created humankind so close in resemblance that your eyes will not be able to distinguish the difference without close examination of people at the same time. Especially not while in wake of such commotion you've endured.

. . . .

Ms. [Victim], due to a woman giving me the opportunity to live life instead of aborting me, I have the utmost regards for women, therefore, if it was me you accosted, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts. However, I am sorry to hear about the ordeal you had to endure but unfortunately, an innocent man (me) is being held accountable for it.

Ms. [Victim], I don’t know what led you into selecting my photo from the array, but I place my faith in God. By His will the truth will be revealed and my innocence will be proven. But however, I do know He works in mysterious ways so I'll leave it in His Hands.

. . . .

> Ms. [Victim], I'm not writing to make you feel sympathy for me, I'm writing a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise please tell the truth if you're wrong or not sure 100%.
>
> Ms. [Victim], I'm not expecting a response from you but if you decide to respond and want a reply please inform me of it. Otherwise you will not hear from me hereafter until the days of trial.
>
> Well, it's time I bring this missive to a close so take care, remain focus, be strong and stay out of the way of trouble.
>
> Sincerely,
> [Defendant]

Defendant was initially charged by indictment with first-degree carjacking, N.J.S.A. 2C:15-2(a)(1). Following the letter incident, a superseding indictment added a charge of third-degree witness tampering, N.J.S.A. 2C:28-5(a).

In June 2019, the trial court held a Wade[2] hearing to determine the admissibility of the eyewitness identification. On July 8, 2019, the trial court issued an oral ruling denying defendant's motion to suppress the victim's identification of defendant as the perpetrator.

---

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

In fall 2019, defendant was tried before a jury over the course of several days. The jury found defendant guilty on both counts. On June 10, 2020, the trial judge denied defendant's motion for a new trial and sentenced defendant to a twelve-year term of imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the carjacking conviction. The judge imposed a consecutive three-year term of imprisonment on the witness tampering conviction.

Defendant raises the following contentions for our consideration on appeal:

> POINT I
>
> TO AVOID CONSTITUTIONAL INFIRMITY, THE WITNESS-TAMPERING STATUTE MUST BE INTERPRETED TO REQUIRE THAT THE DEFENDANT KNOW THE SPEECH OR CONDUCT WOULD CAUSE A WITNESS TO IMPEDE OR OBSTRUCT AN INVESTIGATION OR PROCEEDING.
>
> A. FOR THE WITNESS-TAMPERING STATUTE TO BE CONSTITUTIONAL, IT MUST BE CONSTRUED TO REQUIRE KNOWLEDGE THAT THE SPEECH OR CONDUCT WOULD CAUSE A WITNESS TO IMPEDE OR OBSTRUCT AN INVESTIGATION OR PROCEEDING. OTHERWISE, THE STATUTE MUST BE DEEMED OVERBROAD AND VAGUE.
>
> B. MR. HILL'S CONVICTIONS MUST BE REVERSED BECAUSE THE JURY WAS NOT

INSTRUCTED ON AND DID NOT FIND THAT THE STATE PROVED THIS ESSENTIAL ELEMENT BEYOND A REASONABLE DOUBT.

POINT II

THE PROSECUTOR MADE NUMEROUS MISLEADING ARGUMENTS CONTRARY TO LAW AND FACT AS A MEANS OF BOLSTERING THE WEAK IDENTIFICATION, DEPRIVING MR. HILL OF A FAIR TRIAL AND REQUIRING REVERSAL.

A. THE SIMULATION USED BY THE PROSECUTOR IN SUMMATION TO ARGUE THAT, JUST LIKE THE JURORS WOULD NOT FORGET HIS FACE, THE VICTIM WOULD NOT FORGET THE PERPETRATOR'S FACE, WAS EXTREMELY MISLEADING. HIS ARGUMENT THAT THE STRESS OF THE INCIDENT MADE HER IDENTIFICATION MORE RELIABLE COMPOUNDED THE HARM.

B. THE PROSECUTOR ELICITED MISLEADING TESTIMONY AND MADE A MISGUIDING ARGUMENT CONTRARY TO FACT AND LAW: THAT BECAUSE THE EYEWITNESS THOUGHT MR. HILL LOOKED THE MOST LIKE THE SUSPECT, HE WAS THE SUSPECT.

C. THE CUMULATIVE EFFECT OF THE REPEATED PROSECUTORIAL MISCONDUCT DEPRIVED MR. HILL OF A FAIR TRIAL.

POINT III

THE ARREST PHOTOS SHOULD HAVE BEEN EXCLUDED BECAUSE THEY WERE MINIMALLY PROBATIVE, HIGHLY PREJUDICIAL, AND CUMULATIVE. AT MINIMUM, A LIMITING INSTRUCTION SHOULD HAVE BEEN GIVEN. REVERSAL IS THUS REQUIRED.

II.

We first address defendant's constitutional arguments. The State maintains we should not consider defendant's overbreadth and vagueness contentions because he did not challenge the constitutionality of the witness tampering statute before or during the trial. Defendant first argued the State was required to prove he knew his conduct would cause the victim to engage in prohibited acts in his post-verdict motion for a new trial. Defendant, in the relevant point heading of his initial appeal brief, asserts the constitutional argument was "partially raised below." See R. 2:6-2(a)(6).

In State v. Galicia, our Supreme Court explained, "[g]enerally, an appellate court will not consider issues, even constitutional ones, which were not raised below." 210 N.J. 364, 383 (2012) (emphasis added). Accordingly, "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem.

Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super 542, 548 (App. Div. 1959)). Because the problem of witness intimidation is a matter of great public interest—one that has a direct impact on the integrity of the criminal justice process and public safety—we choose to address defendant's constitutional arguments notwithstanding that they were not fully presented to the trial court.[3]

We begin our substantive analysis by acknowledging certain foundational legal principles. "A presumption of validity attaches to every statute" and the burden is on the party challenging the statute to establish its unconstitutionality. State v. Lenihan, 219 N.J. 251, 265–66 (2014).

Defendant contends the witness tampering statute is both overbroad and vague. Overbreadth and vagueness are analytically distinct concepts that implicate different constitutional concerns. When considering overbreadth, the "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." State v. B.A., 458 N.J. Super. 391, 407 (App. Div. 2019) (quoting State v. Saunders, 302 N.J. Super. 509, 517 (App. Div. 1997)). In

[3] Because this case raises important issues and implicates the need to deter witness intimidation, we invited the Attorney General, the American Civil Liberties Union of New Jersey (ACLU), and the Association of Criminal Defense Lawyers of New Jersey to participate as amicus curiae. We express our gratitude to the amici for their helpful arguments.

State v. Burkert, our Supreme Court commented that invalidating a statute on overbreadth grounds is a "drastic remedy." 231 N.J. 257, 276 (2017).

The Court in Burkert explained that "[v]ague and overly broad laws criminalizing speech have the potential to chill permissible speech, causing speakers to silence themselves rather than utter words that may be subject to penal sanctions." Ibid. (first citing Reno v. ACLU, 521 U.S. 844, 871–72 (1997); and then citing NAACP v. Button, 371 U.S. 415, 433 (1963)). The Court acknowledged, however, that certain categories of speech may be criminalized, noting that a statute will not be struck down on First Amendment grounds when, for example, the speech at issue "is integral to criminal conduct, . . . physically threatens or terrorizes another, or . . . is intended to incite imminent unlawful conduct." Id. at 281. In B.A., we held that "[w]ith respect to speech 'integral to criminal conduct,' the 'immunity' of the First Amendment will not extend to 'a single and integrated course of conduct' that violates a valid criminal statute." 458 N.J. Super. at 408 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). We further explained in B.A. that when an overbreadth challenge is rejected, "[t]he court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge

only if the enactment is impermissibly vague in all of its applications." Id. at 410 (quoting Saunders, 302 N.J. Super. at 517 (alteration in original)).

While the overbreadth doctrine typically addresses First Amendment free speech concerns, "[t]he constitutional doctrine of vagueness 'is essentially a procedural due process concept grounded in notions of fair play.'" State v. Borjas, 436 N.J. Super. 375, 395 (App. Div. 2014) (quoting State v. Emmons, 397 N.J. Super. 112, 124 (App. Div. 2007)). It "is well settled that '[a] criminal statute is not impermissibly vague so long as a person of ordinary intelligence may reasonably determine what conduct is prohibited so that he or she may act in conformity with the law.'" Id. at 395–96 (quoting Saunders, 302 N.J. Super. at 520–21 (alteration in original)).

Therefore, the test for vagueness is whether "persons of 'common intelligence must necessarily guess at [the statute's] meaning and differ as to its application.'" Id. at 396 (quoting State v. Mortimer, 135 N.J. 517, 532 (1994)). A statute need not be a "model of precise draftsmanship," but rather need only "sufficiently describe[] the conduct that it proscribes." State v. Afanador, 134 N.J. 162, 169 (1993). "[I]mprecise but comprehensible normative standard[s]" are sufficient to survive constitutional challenge. See Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

In State v. Crescenzi, we rejected a vagueness and overbreadth challenge to a predecessor version of the witness tampering statute. 224 N.J. Super. 142, 148 (App. Div. 1988). Regarding overbreadth, we held "the statute furthers the important governmental interest of preventing intimidation of, and interference with, potential witnesses or informers in criminal matters and easily meets the test of weighing the importance of this exercise of speech against the gravity and probability of harm therefrom." Id. at 148.

In 2008, the witness tampering statute was significantly amended. L. 2008, c. 81, § 1. The Senate Judiciary Committee Statement noted that the statute was amended to "ensure that tampering with a witness or informant is applied as broadly as possible." Sen. Judiciary Comm. Statement to A. 1598 4 (L. 2008, c. 81).

The societal interest in preventing intimidation of, and interference with, potential witnesses or informers in criminal matters remains an important governmental objective. See State v. Ramirez, 252 N.J. 277, 301 (2022) (noting the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-36(c), was amended in 2012 "to provide that victims have the right to be free from intimidation, harassment and abuse by any person, including the defendant or any person acting in support of or on behalf of the defendant" (emphasis omitted) (quoting Sen. Budget & Appropriations Comm. Statement to A. 2380 1 (L. 2012, c.

27))). Nothing in the 2008 amendments undermines the rationale supporting the conclusion we reached in Crescenzi regarding overbreadth.

We note that very recently—after oral argument in the matter before us—the United States Supreme Court granted certiorari in a Colorado criminal case to address the First Amendment implications of an objective reasonable-person test applied to a stalking statute. Counterman v. Colorado, 598 U.S. ___ (2023). The issue in that case is whether a "reasonable person" interpreting a statement as a threat of violence is sufficient to establish a "true threat" removed from First Amendment protection,[4] or whether the speaker must subjectively know or intend the threatening nature of the statement. Petition for Writ of Certiorari at 2, Counterman, 598 U.S. ___ (No. 22-138). That issue is distinct from the one before us.

Here, we are not evaluating speech directed broadly or to an unspecified class of persons. Instead, we are solely evaluating speech directed to victims, witnesses, or informants who are linked to an official proceeding or investigation. N.J.S.A. 2C:28-5(a). Also, in this case, the communication was sent by a charged defendant through regular mail directly to the victim-

[4] "True threats" to commit violence are not protected by the First Amendment. See Watts v. United States, 394 U.S. 705, 708 (1969).

witness's home. We are not addressing the criminalization of social media posts broadcast to a wide audience.

A defendant awaiting trial has no First Amendment right to communicate directly with the victim of the alleged violent crime. Were it otherwise, a court setting the conditions of pretrial release under the Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to -26, might be foreclosed from imposing a "no contact" order.[5] Thus, the contours of the "true threat" doctrine are not at issue in this appeal. Accordingly, we reject defendant's current overbreadth claim.

The 2008 amendments significantly impact the analytically distinct question of whether the statute in its present form is impermissibly vague. The 2008 amendments added the "reasonable person" standard for determining culpability that defendant now challenges. Because that feature was not at issue in Crescenzi, the legal analysis and conclusion in that case provide no guidance on the vagueness question before us in this appeal.

---

[5] We confirmed at oral argument the trial court had not issued an explicit pretrial "no contact" order. We emphasize this is not a case where defense counsel or his investigator reached out to the victim as part of the defense investigation or litigation strategy. See Ramirez, 252 N.J. at 302 (recognizing a distinction between disclosing a victim's address to the defense team and to the defendant himself or herself). Rather, defendant reached out to the victim directly and entirely on his own. The record does not indicate how defendant learned the victim's home address.

The witness tampering statute now reads in pertinent part:

> a. Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted or has been instituted, he knowingly engages in conduct which a reasonable person would believe would cause a witness or informant to:
>
> (1) Testify or inform falsely;
>
> (2) Withhold any testimony, information, document or thing;
>
> (3) Elude legal process summoning him to testify or supply evidence;
>
> (4) Absent himself from any proceeding or investigation to which he has been legally summoned; or
>
> (5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.
>
> [N.J.S.A. 2C:28-5 (emphasis added).]

In State v. Gandhi, 201 N.J. 161 (2010), our Supreme Court interpreted a substantially similar "reasonable person" feature in the stalking statute, N.J.S.A. 2C:12-10.[6] The defendant argued the jury instruction on the stalking

---

[6] N.J.S.A. 2C:12-10(b) provides:

> A person is guilty of stalking . . . if he [or she] purposely or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his [or her] safety or

charge "was insufficient because it did not explicitly require the jury to find that a defendant had the conscious object to induce, or awareness that his conduct would cause, fear of bodily injury or death in his victim."[7] Gandhi, 201 N.J. at 169. In rejecting that claim, the Supreme Court reasoned:

> [W]e do not discern a legislative intent to limit the reach of the anti-stalking statute to a stalker-defendant who purposefully intended or knew that his behavior would cause a reasonable person to fear bodily injury or death. Rather, we read the offense to proscribe a defendant from engaging in a course of repeated stalking conduct that would cause such fear in an objectively reasonable person. We view the statute's course-of-conduct focus to be on the accused's conduct and what that conduct would cause a reasonable victim to feel, not on what the accused intended.
>
> [Id. at 170.]

The Court further explained, "the reasonable-person standard demonstrates a legislative preference for the objective perspective of the fact-finder to assess a reasonable person's reaction to the course of conduct engaged in by the accused stalker." Id. at 180.

> the safety of a third person or suffer emotional distress.

[7] We note the jury charge/statutory construction argument the defendant raised in Gandhi, while not couched in constitutional terms, is very similar to the argument defendant raised in the present matter in his motion for a new trial.

Although the Court in Gandhi was not called upon to address the constitutionality of the reasonable-person standard,[8] we deem it unlikely, if not inconceivable, that the Court would have gone to such lengths to construe the

---

[8] The Supreme Court in State v. Pomianek, 221 N.J. 66 (2015), explicitly acknowledged that Gandhi did not address the constitutionality of the stalking statute, explaining:

> The State compares N.J.S.A. 2C:16-1(a)(3) [bias intimidation] to the stalking statute, N.J.S.A. 2C:12-10, which we addressed in State v. Gandhi, 201 N.J. 161 (2010). Unlike N.J.S.A. 2C:16-1(a)(3), the stalking statute has a mens rea component. The stalking statute provides that a defendant is guilty of a crime "if he [or she] purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his [or her] safety or the safety of a third person or suffer other emotional distress." N.J.S.A. 2C:12-10(b) (emphasis added). In Gandhi, we determined only that the Legislature did not intend by the statute's wording to impose a requirement on the prosecution to prove that the defendant purposefully or knowingly "cause[d] a reasonable victim to fear bodily injury or death." 201 N.J. at 187. Our task in Gandhi was statutory interpretation and not constitutional adjudication.
>
> [221 N.J. 66, 88 n.8 (2015) (second alteration in original) (emphasis omitted).]

The witness tampering statute, like the stalking statute, also has a mens rea component in that it requires proof the defendant "knowingly engage[d] in conduct which a reasonable person would believe would cause a witness or informant to [engage in a prohibited action]." N.J.S.A. 2C:28-5(a) (emphasis added).

statute in a manner that would render it impermissibly vague on its face. Following Gandhi, moreover, we upheld the constitutionality of the stalking statute. B.A., 458 N.J. Super. at 398.

Defendant contends the witness tampering statute is impermissibly vague based on our Supreme Court's ruling in Pomianek.[9] The Court in that case addressed the constitutionality of N.J.S.A. 2C:16-1(a)(3), "a bias-crime statute that allows a jury to convict a defendant even when bias did not motivate the commission of the offense." Pomianek, 221 N.J. at 69. The relevant portion of the bias intimidation statute at that time provided:

> (a) A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes; N.J.S. 2C:33-4; N.J.S. 2C:39-3; N.J.S. 2C:39-4 or N.J.S. 2C:39-5,
>
> > (1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or
> >
> > (2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race,

[9] Defendant did not rely upon, or even cite to, Pomianek in his initial appeal brief. He did so in compliance with our request to the parties to file supplemental briefs to address Pomianek.

> color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or
>
> (3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

[Id. at 81 (emphasis added) (quoting N.J.S.A. 2C:16-1).]

The Court concluded that N.J.S.A. 2C:16-1(a)(3) was unconstitutionally vague, noting, "[i]n focusing on the victim's perception and not the defendant's intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law." Id. at 70. The Court added:

> Unlike subsections (a)(1) and (a)(2), subsection (a)(3) focuses not on the state of mind of the accused, but rather on the victim's perception of the accused's motivation for committing the offense. Thus, if the victim reasonably believed that the defendant committed the offense of harassment with the purpose to intimidate or target him based on his race or color, the defendant is guilty of bias intimidation. N.J.S.A.

> 2C:16–1(a)(3). Under subsection (a)(3), a defendant may be found guilty of bias intimidation even if he [or she] had no purpose to intimidate or knowledge that his [or her] conduct would intimidate a person because of his [or her] race or color. In other words, an innocent state of mind is not a defense to a subsection (a)(3) prosecution; the defendant is culpable for his words or conduct that led to the victim's reasonable perception even if that perception is mistaken.
>
> [Id. at 82 (emphasis omitted).]

Ultimately, the Supreme Court struck subsection (a)(3) of the bias statute but allowed subsections (a)(1) and (a)(2) to stand. Id. at 91–92.

Defendant and the ACLU argue that the "reasonable person" feature in the witness tampering statute is analytically indistinguishable from the portion of the bias intimidation statute struck down on vagueness grounds in Pomianek. We disagree.

A close examination reveals significant, substantive differences between N.J.S.A. 2C:16-1(a)(3) and N.J.S.A. 2C:28-5(a)(1). It is true the witness tampering statute, like the bias intimidation feature that was invalidated in Pomianek, "criminalizes [the] defendant's failure to apprehend the reaction that his words would have [on] another." Id. at 90. It also is true that a defendant may be found guilty of witness tampering even if he or she did not intend to impede a proceeding or investigation.

But the similarities between the two statutes end there. As we have already noted, unlike the invalidated portion of the bias intimidation statute, the witness tampering statute includes a "knowing" mens rea component. See note 8. Most significantly, the invalidated portion of the bias intimidation statute employed a subjective test under which a defendant's culpability was determined from the perspective of the specific victim who was targeted. The witness tampering statute, in contrast, does not depend on the victim's subjective reaction. Rather, like the stalking statute, the witness tampering statute uses a purely objective test that relies on the "objective perspective of the fact-finder." See Gandhi, 201 N.J. at 180.

The Pomianek Court highlighted the subjective nature of the bias crime provision, which focused on the victim's personal perspective. 221 N.J. at 89. The Court explained:

> Of course, a victim's reasonable belief about whether he [or she] has been subjected to bias may well depend on the victim's personal experiences, cultural or religious upbringing and heritage, and reaction to language that is a flashpoint to persons of his [or her] race, religion, or nationality. A tone-deaf defendant may intend no bias in the use of crude or insensitive language, and yet a victim may reasonably perceive animus. The defendant may be wholly unaware of the victim's perspective, due to a lack of understanding of the emotional triggers to which a reasonable person of that race, religion, or nationality would react.
>
> [Ibid.]

That led the Court to conclude that "guilt may depend on facts beyond the knowledge of the defendant or not readily ascertainable by him [or her]," thereby rendering the statute impermissibly vague. Ibid.

The reasonable-person standard employed in the witness tampering statute, in contrast, does not account for, much less depend on, what the victim actually perceived or believed. Rather, it is an objective standard. As our Supreme Court explained in Gandhi,

> [t]he legislative choice to introduce a reasonable-person standard undercuts defendant's argument that the plain language of the statute calls for application of a subjective standard . . . . To the contrary, the reasonable-person standard demonstrates a legislative preference for the objective perspective of the fact-finder to assess a reasonable person's reaction to the course of conduct engaged in by the accused stalker.
>
> [201 N.J. at 180.]

The objective formulation of the witness tampering statute effectively eliminates the concern expressed in Pomianek regarding idiosyncratic personal characteristics of the victim. From a due process notice standpoint, the purely objective reasonable-person standard is vastly different from a subjective standard like the one used in the invalidated bias intimidation provision.

Furthermore, the bias crime provision struck down in Pomianek was a uniquely convoluted culpability formulation that essentially required a

defendant to divine what the victim would perceive as to the defendant's motivation. Notably, the constitutionally deficient portion of the bias intimidation statute did not focus on the impact of a defendant's conduct but rather on the victim's speculation as to what the defendant was thinking. That statute thus required clairvoyance, for lack of a better description, because it presupposed a defendant would somehow be privy to the subjective thought processes of the targeted victim or victims.

Because it uses a purely objective standard, N.J.S.A. 2C:28-5(a) does not suffer from the constitutional defect identified in Pomianek. The witness tampering statute, unlike the invalidated bias intimidation provision, does not require a defendant to know the "personal experiences" or "emotional triggers" of the victim and thus does not depend on "facts beyond the knowledge of the defendant or not readily ascertainable by him [or her]." Pomianek, 221 N.J. at 89.

We also emphasize that the invalidated provision in the bias intimidation statute was unprecedented—that culpability formulation had not been used in any preexisting statute and was never replicated in New Jersey or any other jurisdiction so far as we are aware. The objective "reasonable person" formulation employed in the witness tampering statute, in contrast, appears throughout the New Jersey Code of Criminal Justice. In addition to the

stalking statute construed in Gandhi and upheld in B.A., a "reasonable person" test is used in the following criminal statutes[10]:

> Criminal Attempt, N.J.S.A. 2C:5-1(a)(1) and (a)(3) (a defendant is culpable if he or she engages in conduct that would be criminal "if the attendant circumstances were as a reasonable person believes them to be");
>
> Human Trafficking, 2C:13-9(a)(2) (a defendant is culpable if he or she forces labor from someone "under circumstances in which a reasonable person would conclude that there was a substantial likelihood that the person was a victim of human trafficking");
>
> Distribution/Possession with Intent to Distribute Imitation Controlled Dangerous Substances, N.J.S.A. 2C:35-11(a)(3) (a defendant is culpable if he or she distributes/possesses with intent to distribute a non-controlled substance "[u]nder circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance");
>
> Financial Facilitation of Criminal Activity (Money Laundering), N.J.S.A. 2C:21-25(a) to (c) (a defendant is culpable if he or she possesses property "known or which a reasonable person would believe to be derived from criminal activity"; or "engages in a transaction involving property known or which a reasonable person would believe to be derived from criminal activity"; or participates in "transactions in property known or which a reasonable person would believe to be derived from criminal activity");

[10] The following statutory summaries are provided only to demonstrate the Legislature's use of the reasonable-person standard. They do not contain all the elements of the listed offenses.

> Minor's Access to Loaded Firearm, N.J.S.A. 2C:58-15(a)(2) (a defendant is culpable if he or she "knows or reasonably should know" a minor could access a loaded firearm, unless he or she "stores the firearm in a location which a reasonable person would believe to be secure");
>
> Criminal Trespass, N.J.S.A. 2C:18-3(c) (a defendant is culpable if, without consent, he or she peers into another's window "under circumstances in which a reasonable person in the dwelling or other structure would not expect to be observed");
>
> Invasion of Privacy, N.J.S.A. 2C:14-9(a) and (b) (a defendant is culpable if he or she, without license or privilege, "and under circumstances in which a reasonable person would know that another may expose intimate parts," observes another without their consent; or, records an image of someone's intimate parts without that person's consent "under circumstances in which a reasonable person would not expect to have his undergarment-clad intimate parts observed").
>
> Theft from Grave Site, N.J.S.A. 2C:20-2.3 (a defendant is culpable if he or she removes a headstone without permission "under circumstances which would cause a reasonable person to believe that the object was unlawfully removed").

So far as we are aware, none of the foregoing statutes have been challenged, much less stricken, on constitutional grounds because they employ a reasonable-person standard. In these circumstances, we decline to create a new categorical rule that would invalidate the use of an objective reasonable-person test for determining criminal culpability.

In sum, we conclude that a person of ordinary intelligence can reasonably determine whether his or her conduct constitutes witness tampering. See Borjas, 436 N.J. Super. at 395–96. In this particular application, moreover, we are satisfied defendant was on constitutionally sufficient notice that the letter he addressed to the carjacking victim's private residence violated N.J.S.A. 2C:28-5(a) as measured from the perspective of a reasonable person. As the ACLU acknowledges, "[o]f course, it is not necessary to a convict[ion] for witness tampering that the witness actually give false testimony or obstruct a proceeding, if the conduct of defendant made the risk of such behavior sufficiently likely." Amicus further acknowledges that "[w]ritten communications can, depending on context, often convey meanings that are at odds with their facial text."

Here, although defendant's letter was not explicitly threatening, the context shows defendant wanted the victim to recant her identification of him. Importantly, the context of the letter shows he knew where she lived and was prepared to interact with her directly and not through his attorney or the prosecutor's office. We believe defendant was thus on sufficient notice that a reasonable person would believe an eyewitness confronted with such a letter would feel pressured to accede to his request to recant an out-of-court identification and refrain from testifying against him at trial.

III.

Defendant next argues the prosecutor committed misconduct during his summation. Specifically, defendant contends the prosecutor improperly: (1) asked the jury to silently observe his face for ninety seconds, the length of time the victim had to observe the assailant; (2) suggested the victim's identification was more reliable because of the stressful nature of the carjacking event; and (3) engaged in "the fallacy of relative judgment," whereby the prosecutor improperly suggested the victim had correctly identified the suspect during the out-of-court identification procedure because his photo in the array most closely resembled the assailant.

A defendant's allegation of prosecutorial misconduct requires us to assess whether defendant was deprived of the right to a fair trial. State v. Jackson, 211 N.J. 394, 407 (2012). To warrant reversal on appeal, the prosecutor's misconduct must be "clearly and unmistakably improper" and "so egregious" that it deprived defendant of the "right to have a jury fairly evaluate the merits of his defense." State v. Wakefield, 190 N.J. 397, 437–38 (2007) (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)).

Prosecutors "are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). Furthermore, "[p]rosecutors are afforded

considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." Ibid. "Even so, in the prosecutor's effort to see that justice is done, the prosecutor 'should not make inaccurate legal or factual assertions during a trial.'" State v. Bradshaw, 195 N.J. 493, 510 (2008) (quoting Frost, 158 N.J. at 85). Rather, "a prosecutor should 'confine [his or her] comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.'" Ibid. (alteration in original) (quoting State v. Smith, 167 N.J. 158, 178 (2001)). "So long as the prosecutor's comments are based on the evidence in the case and the reasonable inferences from that evidence, the prosecutor's comments 'will afford no ground for reversal.'" Ibid. (quoting State v. Johnson, 31 N.J. 489, 510 (1960)).

We add that if a defendant fails to object to alleged prosecutorial misconduct at trial, reviewing courts apply the plain error standard. See R. 2:10-2. Under that standard, we may reverse a defendant's conviction only if the error was "clearly capable of producing an unjust result." Ibid.; State v. Cole, 229 N.J. 430, 458 (2017). In Frost, our Supreme Court emphasized that "[g]enerally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were

made." 158 N.J. at 83–84 (citation omitted); accord State v. Irving, 114 N.J. 427, 444 (1989); State v. Ramseur, 106 N.J. 123, 323 (1987). Failure to object also deprives the trial court the opportunity to take curative action. Irving, 114 N.J. at 444.

A.

We first address defendant's contention the prosecutor conducted an inappropriate demonstration when he argued in summation,

> I want to show you how long she looked at the man sitting behind me. So, I'm going to apologize in advance, because it's going to get awkward. But if it's going to get awkward, imagine how much [sic] she saw the guy for. A minute or two minutes, that's what she said, right? Let's split the difference. Ninety seconds. Ninety seconds in silence. Look towards me, look around me, you choose, but let's see how long it is.
>
> [Silence]
>
> Let me ask you a question. In the time that it takes to watch a Boy Meets World[11] episode, would you be able to identify me? [Thirty-three] minutes later, she described him.

"Ordinarily it is discretionary with the court as to allowing an experiment to be performed in the jury's presence. Demonstrations or experiments may be justified on the ground that they tend to enlighten the jury

[11] Boy Meets World is a thirty-minute television sitcom that originally aired from 1993–2000.

on an important point." State v. LiButti, 146 N.J. Super. 565, 572 (App. Div. 1977). However, "caution and prudence should govern in each instance, depending upon the circumstances and the character of the demonstration." Ibid. (quoting State v. Foulds, 127 N.J.L. 336, 344 (E & A 1941)). Importantly, "[t]he demonstration must be performed within the scope of the evidence in the case." Ibid.

Applying these principles, we do not believe the prosecutor conducted an impermissible demonstration, especially given the absence of an objection. The prosecutor was permitted to demonstrate the duration of the carjacking encounter to show the length of time the victim had to observe the assailant. Importantly, the prosecutor stayed within the bounds of the trial evidence. See LiButti, 146 N.J. Super. at 572. The failure to object, moreover, precluded the judge from interrupting the demonstration, and shows that defense counsel did not believe the demonstration was prejudicial within the atmosphere of the trial. See Irving, 114 N.J. at 444.

B.

We turn next to defendant's contention, again raised for the first time on appeal, that the prosecutor improperly suggested the victim's identification was more reliable because of the stressful nature of the carjacking event. The prosecutor argued the victim's identification was especially reliable because

the carjacking was a moment in her life she would not forget, and that defendant's face was a face she would not forget.

We note the prosecutor's argument was consistent with the victim's trial testimony, in which she stated, "[w]hen you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head." The prosecutor thus commented on evidence revealed during the trial. See Bradshaw, 195 N.J. at 510.

The gist of defendant's contention on appeal is that the prosecutor's comment conflicts with our Supreme Court's determination in State v. Henderson, 208 N.J. 208, 261–62 (2011), that stress during a criminal episode is an estimator variable that can diminish an eyewitness' ability to recall and make an accurate identification.[12] We are satisfied the jury was properly

---

[12] The Henderson Court explained:

> Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. The Special Master found that "while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator."
>
> . . . .

instructed on how to evaluate the victim's eyewitness identification testimony, thereby mitigating any prejudicial effect of the prosecutor's closing argument. At the beginning of the trial, the judge instructed the jury that arguments in summation are not evidence and that it is the jurors' recollection of the evidence that is controlling. See State v. Timmendequas, 161 N.J. 515, 578 (1999) (noting the prosecutor's statements are not evidence).

The trial court reiterated that point during the final jury charges, explaining:

> Regardless of what counsel said or I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts. Arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence. Although the attorneys may point out what they think is important in this case, you must rely solely upon your understanding and recollection of the evidence that was admitted during the trial.
>
> Whether or not the defendant has been proven guilty beyond a reasonable doubt is for you and only you to determine based upon all the evidence

---

> We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes "high" stress, which must be assessed based on the facts presented in individual cases.
>
> [208 N.J. at 261–62.]

> presented during the trial. Any comments by counsel are not controlling. It is your sworn duty to arrive at a just conclusion after considering all the evidence which is presented during the course of the trial.

Furthermore, the trial court properly instructed the jury regarding the impact of stress on the reliability of eyewitness identifications, noting:

> Even under the best viewing conditions, high levels of stress can reduce an eyewitness' ability to recall or make an accurate identification. Therefore, you should consider a witness' level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.

Accordingly, even assuming for the sake of argument the prosecutor's comment regarding the impact of stress contradicted social science principles adopted by the Supreme Court in Henderson, the trial court provided the correct standard for the jury to evaluate this estimator variable. "One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions." State v. Burns, 192 N.J. 312, 335 (2007). We reiterate, moreover, the failure to object shows that defense counsel did not believe the prosecutor's argument was prejudicial within the atmosphere of the trial. See Irving, 114 N.J. at 444. At bottom, we are not persuaded the prosecutor's remarks regarding the effect of stress on the victim's ability to identify the perpetrator were "clearly and unmistakably improper" and "so egregious" as to

deprive defendant of the right to have a jury fairly evaluate the merits of his defense. See Wakefield, 190 N.J. at 437–38.

C.

We turn next to defendant's contention the prosecutor exploited what defendant calls "the fallacy of relative judgment" by suggesting the victim correctly identified the suspect because his photograph in the array most closely resembled the perpetrator. In his summation, the prosecutor played the video recording of the photo lineup procedure and used a PowerPoint presentation to show the jury which photos were being reviewed and compared by the victim throughout the course of the identification procedure.

During the trial, the prosecutor asked the victim to compare the photos comprising the array and explain why she picked defendant's photo over the others. Defense counsel objected, and the court initially commented this seemed to be the kind of testimony that should not be elicited. The prosecutor explained that this line of questioning was critical because "the complexion which counsel has gone into considerably on cross and my point, to make it probative, relative, is that despite the fact that [photo] number [three], perhaps, is the lightest complexion." The judge permitted this line of examination but instructed the prosecutor to pose non-leading questions.

Defendant now contends the prosecutor improperly argued in summation that the victim looked at defendant's photograph the longest and that the video recording of the identification procedure shows that she was either reviewing or identifying his photo over ninety percent of the time. Defendant did not object to the prosecutor's comment at the time of summation.

The gravamen of defendant's argument on appeal is that the prosecutor yet again contradicted social science principles recognized by our Supreme Court in Henderson. We are not persuaded the prosecutor's comments were improper, much less deprived defendant of a fair trial.

The Court in Henderson, it bears noting, did not hold that simultaneous photo lineups—which allow for side-by-side comparisons—are categorically inappropriate. 208 N.J. at 256–58. Indeed, the Court expressed no preference for sequential presentation of photos over simultaneous presentation.[13] Ibid. However, as defendant notes, the Court expressed concern with a concept called "relative judgment." Id. at 234–35. The Court explained:

---

[13] The Court noted that social science researchers disagree on whether it is best to use simultaneous or sequential photo lineup procedures. The Court concluded, "[a]s research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient, authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure. As a result, we do not limit either one at this time." Id. at 257–58 (citation omitted).

> Under typical lineup conditions, eyewitnesses are asked to identify a suspect from a group of similar-looking people. "[R]elative judgment refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory relative to other lineup members." Gary L. Wells, The Psychology of Lineup Identifications, 14 J. Applied Soc. Psychol. 89, 92 (1984) (emphasis in original). As a result, if the actual perpetrator is not in a lineup, people may be inclined to choose the best look-alike.
>
> [Ibid.]

The Court added that "[r]elative judgment touches the core of what makes the question of eyewitness identification so challenging. Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors." Id. at 235.

But even assuming the prosecutor ought not have suggested that the victim's identification was more reliable because she compared the photos against one another and held on to defendant's photo throughout the identification procedure, that argument was not "clearly and unmistakably improper" or otherwise "so egregious" that it deprived defendant of the "right to have a jury fairly evaluate the merits of his defense," see Wakefield, 190 N.J. at 437–38, especially given the lack of an objection to the prosecutor's summation.

Furthermore, any prejudice was ameliorated by the trial judge's careful and thorough jury instructions on how to evaluate eyewitness identification evidence. See Burns, 192 N.J. at 335. In view of those instructions, the prosecutor's closing argument regarding the eyewitness identification procedure does not warrant reversal of his carjacking conviction.

IV.

Defendant next contends the trial court erred in admitting six photos of defendant taken at the time of his arrest three weeks after the carjacking incident. The photos show defendant was wearing faded jeans, a black jacket, a grey hoodie, and red skull cap. Defendant was not in any restraints.

Defendant objected to the admission of the photographs. The trial judge ruled, "I'll allow them. And, you know, they're relevant as to whether the jurors are going to . . . piece together the clothing he was arrested to . . . the clothing he was allegedly wearing -- someone was allegedly wearing at the time."

Defendant argues on appeal the arrest photos should have been excluded under N.J.R.E. 403[14] because they were "minimally probative, highly prejudicial, and cumulative."

---

[14] N.J.R.E. 403 provides: "Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is

A trial court's evidentiary rulings are subject to an abuse of discretion standard of review. State v. Garcia, 245 N.J. 412, 430 (2021). "The abuse of discretion standard instructs us to 'generously sustain [the trial court's] decision, provided it is supported by credible evidence in the record.'" State v. Brown, 236 N.J. 497, 522 (2019) (alteration in original) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010)).

We conclude the trial judge did not abuse his discretion in admitting the arrest photos. They were relevant to show that defendant owned clothing that matched the clothing worn by the suspect shown in the surveillance video and screenshots that were presented to the jury. We likewise reject defendant's argument, raised for the first time on appeal, the trial court should have sua sponte issued a limiting instruction. We find no plain error in failing to instruct the jury specifically on how to evaluate the arrest photos. R. 2:10-2.

V.

Finally, we address defendant's contention that the cumulative effect of the trial errors he asserts warrant reversal of his convictions. "When legal errors cumulatively render a trial unfair, the Constitution requires a new trial."

---

substantially outweighed by the risk of: (a) Undue prejudice, confusion of issues, or misleading the jury; or (b) Undue delay, waste of time, or needless presentation of cumulative evidence."

State v. Weaver, 219 N.J. 131, 155 (2014) (citing State v. Orecchio, 16 N.J. 125, 129 (1954)). It is well established, however, "[i]f a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." Ibid. We are satisfied that none of the trial errors defendant claims on appeal, viewed individually or collectively, warrant the reversal of the jury's verdict.

VI.

To the extent we have not specifically addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. See R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION