

New Jersey Appellate Division Vacates First Degree Robbery Conviction

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Recently, the Appellate Division decided the case *State v. DeJesus* (Docket No. A-2859-15T3, October 5, 2018). While this case has not been approved for publication, it provides a detailed discussion of identification/hearsay issues and the elements of prosecutorial misconduct and examples thereof.

The defendant in this case was convicted of first-degree robbery and appealed his conviction. He appealed on several grounds, including that his confrontation and due process rights were violated by the admission of out-of-court statements by non-testifying witnesses and of the eyewitnesses' photo array identifications. He also argued that the police had erroneously been permitted to offer opinion testimony about his guilt. Finally, of note, he alleged prosecutorial misconduct. The Appellate Division, in a per curiam decision, reversed the defendant's conviction, and remanded the matter for a new trial. They held that the cumulative effect of all the errors in the trial court necessitated a new trial.

First, the *DeJesus* court held that the trial court gave insufficient curative instructions after the officers testified to out-of-court hearsay statements. The court also held that the officers, testifying as fact witnesses, were improperly permitted to express beliefs and thoughts on the identification process. Specifically, the officers testified that in their opinion, the van observed in surveillance footage that was connected to the defendant was involved in their investigation; that the description of the suspect matched the defendant's appearance; that the defendant's appearance differed at trial from the time of his arrest; and that they did not arrest the defendant until they had probable cause to do so. The *DeJesus* Court held that the officers testified to more than facts, and the risk of undue prejudice from that testimony was substantial.

The court also held that there were several instances of prosecutorial misconduct. During the trial, the assistant prosecutor bolstered the virtue of eyewitnesses by having one testify about her six children

and how she thought about them during the robbery. During their closing, the assistant prosecutor told the jury how brave the eyewitnesses were to come forward and testify, so they must be believed. They also mentioned during their closing that the jury should afford the victims credibility and believability because of what they went through during the robbery. The court commented that questioning intended to elicit sympathy has no place in a fair trial. The court seemed to have the most problem with the assistant prosecutor's statements in their closing, in which they again try to bolster the witnesses' identification of the defendant and exhorted the jury to "do [its] job." The court considered asking the jury to do its "job" as a "call to action" and/or asking the jury to protect society, both of which are impermissible by the State.

Lastly, the court commented how the trial court did not properly instruct the jury when the officers gave the eyewitnesses positive feedback during the photo array. The officers asked the victim if the person she identified was "the person who committed the robbery," and when one explained the difference between the hairstyles of the photo and the suspect in real life, the detective commented, "sounds good." Both of these required the trial court to instruct the jury as to all of the pertinent factors for identification under *State v. Henderson*, 208 N.J. 208 (2011) as provided for in the Model Jury Charge for Identification.

The DeJesus Case not only provides decent examples of what can and cannot be done by testifying officers and assistant prosecutors during trial, but also provides a thorough analysis of several published cases such as *State v. Branch*, 182 N.J. 338 (2005), *State v. McLean*, 205 N.J. 438 (2011), and *State v. Frost*, 158 N.J. 76 (1999) (along with other related prosecutorial misconduct cases).