SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000628-23T2
IND. NO. 21-11-01514-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Monmouth County.
COWAN RAINEY,	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Vincent N. Falcetano, Jr., J.S.C.; Hon. Joseph W. Oxley,, J.S.C., and a
	:	Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: April 25, 2024

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PRELIMINARY STATEMENT

Defendant-appellant Cowan Rainey was convicted of the second-degree robbery of Edward Byham in connection with an August 1, 2021 incident in a Krauszer's parking lot. At trial, Mr. Rainey testified that he was present in the parking lot at the time of the incident, and that he witnessed an altercation between Byham and his co-defendant Darryl Pelzer, but that he never approached Byham himself.

The case turned on the jury's evaluation of Mr. Rainey's testimony and the various accounts of the incident given by the State's witnesses. Against this backdrop, the court made several errors that could have impacted the jury's assessment of the evidence: the court erroneously permitted Officer Dominic Pedone to narrate the contents of a surveillance video that was never produced at trial, failed to admit Byham's recorded statement into evidence, and permitted Pelzer to give extensive improper lay opinion testimony. Each of these errors made it more likely that the jury would reject Mr. Rainey's defense. Because these errors, individually and cumulatively, likely impacted the jury's verdict, Mr. Rainey was denied a fair trial and his convictions must be reversed. Alternatively, the case must be remanded for a resentencing.

PROCEDURAL HISTORY

Monmouth County Ind. No. 21-11-01514-I charged Cowan Rainey with second-degree robbery, contrary to N.J.S.A. 2C:15-1a(2) (Count 1); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a(1) (Count 2); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b(1) (Count 3); fourth-degree aggravated assault by pointing a firearm (Count 4); second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7b(1) (Count 6), and a disorderly persons offense. (Da 1-4)[1] Co-defendant Darryl Pelzer was also charged with Counts 1 through 4, as well as with second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7b(1) (Count 5).

On July 19, 2022, the Hon. Judge Vincent N. Falcetano, Jr., J.S.C., granted Mr. Rainey's motion to proceed pro se. (Da 5) Mr. Rainey was tried in June and

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[1] Da: Defendant's appendix
1T: Transcript of 11/9/2021 (Grand Jury Hearing)
2T: Transcript of 2/18/2022 (Hearing)
3T: Transcript of 5/10/2022 (Hearing)
4T: Transcript of 6/15/2022 (Hearing)
5T: Transcript of 7/18/2022 (Hearing)
6T: Transcript of 6/26/2023 (Trial)
7T: Transcript of 6/27/2023 (Trial)
8T: Transcript of 6/28/2023 (Trial)
9T: Transcript of 6/29/2023 (Trial)
10T: Transcript of 7/5/2023 (Trial)
11T: Transcript of 7/6/2023 (Trial)
12T: Transcript of 7/7/2023 (Trial)
13T: Transcript of 9/29/2023 (Sentence)
Note: An incomplete version of the transcript of 7/7/2023 was synced to e-Courts on 11/29/23. A corrected version of that transcript was synced to e-Courts on 3/5/2024. This accounts for why there are 14 total transcripts on e-Courts instead of 13.

July 2023, before the Hon. Judge Joseph W. Oxley, J.S.C., and a jury. On June 26, 2023, Mr. Rainey requested an evidentiary hearing regarding the expected lay opinion testimony of the State's law enforcement officer witnesses under N.J.R.E. 104. (6T:7-7 to 9-17) The trial court denied Mr. Rainey's oral motion for a hearing. (6T:23-6 to 24-1) On June 27, the trial court revoked Mr. Rainey's pro se status, and he was represented by stand-by defense counsel thereafter. (7T:47-20 to 24)

On July 7, 2023, the jury convicted Mr. Rainey of second-degree robbery (Count One). (12T:37-16 to 38-18); (Da 6-7) The State dropped the remaining four counts in the indictment after the jury was unable to reach a verdict. (12T:38-23 to 39-21). On September 29, 2023, the court imposed a discretionary extended term on Mr. Rainey, sentencing him to 18 years in prison with an 85-percent parole bar. (13T:27-16 to 28-17); (Da 8-11) The court ran the sentence concurrent to a six-month sentence on the disorderly persons offense. (13T:29-4 to 7) (Da 8) A timely notice of appeal was filed on October 30, 2023. (Da 12-14)

STATEMENT OF FACTS

At least two very different accounts of what happened on the night of August 1, 2021 were presented to the jury during Mr. Rainey's trial.

Officer Dominic Pedone testified that he was dispatched to a Krauszer's convenience store in response to an armed robbery and that he had been notified that there were "possibly three accused subjects that had fled." (8T:31-4 to 25) When he arrived on the scene, he took the statement of the victim, Edward Byham. Other officers and a K-9 unit checked the surrounding area for the suspects, but no one was found. (8T:32-6 to 33-20, 58-10 to 17)

Pedone spoke with the store's cashier, who did not see anyone involved in the incident, and told Pedone that he would have to contact the store manager to access the surveillance footage. (8T:33-21 to 35-15) Pedone assumed that the manager would be able to copy the footage onto a disk, but the manager told Pedone that he was not able to transfer the footage "at that time" because he did not understand the new system, which was still in the process of being set up with a third-party company. (8T:35-16 to 36-2) Pedone watched the footage in the manager's office and took photographs of the screen with his body-worn camera (BWC). (8T:36-7 to 20, 37-16 to 38-20)

At trial, Pedone proceeded to narrate what he had seen on the surveillance camera footage – which was not in evidence – based on his single viewing of

the video on the night of the incident. (8T:37-20 to 58-2) According to him, the footage depicted the suspect's vehicle – a silver Buick – pulling into the Krauszer's parking lot.

Pedone testified that he paused the video when he saw "the first suspect" exit the car and took a photograph with his BWC. (8T:39-14 to 23, 41-4 to 42-14) The photo was published to the jury. (8T:44-4 to 13); (Da 15) The photo depicts a bald black man with a beard wearing a dark gray sweatshirt and standing next to a silver car. The man in the photo was later identified as Mr. Rainey through the testimony of Pelzer, Detective Rhein, and Mr. Rainey himself. (8T: 44-16 to 25, 184-12 to 185-12; 9T:14-22 to 25; 10T:47-4 to 6, 77-9 to 11, 78-1 to 79-3) Pedone proceeded to testify that, in the video, the man in the gray sweatshirt exited the driver's seat of the Buick, approached Byham's car, and got into the front passenger seat, after which it "becomes dark and you can't see anything further." (8T:44-24 to 45-11)

Pedone testified that the video then depicted a second man getting out of the back of the Buick, going to the driver's seat, and turning the vehicle around to face the road. (8T:45-12 to 20) A photograph of the second suspect that Pedone had taken from the surveillance footage was published to the jury. (8T:46-1 to 49-1); (Da 16) The photo depicts a black man who appears to have a beard and a medical mask around his chin, wearing a white sweatshirt and dark

pants. (8T:49-6 to 12); (Da 16) The individual in the photo was later identified as Pelzer through Rainey's and Pelzer's testimony. (8T:77-12 to 17, 183-23 to 184-9) Pedone further testified that a third individual remained inside the Buick, but that he never saw him exit or approach the victim's car on the video, nor was he able to capture a photograph of him from the video. (8T:49-13 to 50-17; 63-5 to 12, 65-11 to 19)[2]

Pedone then testified that the video showed the man in the white sweatshirt (Pelzer) approaching the driver's side door of the victim's car, reaching into the car through the driver's side window, and appearing to take something before going to the back of the vehicle, opening the trunk, and looking through it. (8T:50-18 to 51-9) Pedone recalled seeing Pelzer close the trunk, then run back to the Buick and drive away – leaving the man in the gray sweatshirt (Mr. Rainey) in the front passenger seat of Byham's car. (8T:51-10 to 21) Pedone claimed that after Pelzer drove away, the video depicted Mr. Rainey exiting Byham's car and running towards a wooded area. (8T:52-16 to

[2] During cross-examination, defense counsel showed Pedone an additional still photograph that appeared to be taken from the surveillance video and depicted a man in a dark jacket. (8T:62-18 to 20); (Da 17) Although Pedone admitted that "[d]ue to the surveillance cameras being somewhat blurry at times, [he] was unable to completely identify" the individual in the dark jacket, he "believe[d] that was the second suspect." (8T:63-22 to 64-25) Pedone clarified that, based on the video, he believed that Pelzer was originally wearing a "dark jacket," but later was wearing a white sweatshirt (8T:62-18 to 25; 64-6 to 20)

25) He testified that Byham exited his car and ran after Mr. Rainey on the video. (8T:52-1 to 3) According to Pedone, Mr. Rainey then "turns and points an unknown object at the victim, Edward Byham, where it is observed that Edward falls to the ground and appears to duck for cover." (8T:52-3 to 7) Pedone testified that Mr. Rainey "take[s] off in an unknown direction" on the video. (8T:55-19 to 22)

Edward Byham, the victim, testified that he remembered very little from the night of the incident. (8T:96-12 to 97-10) All that Byham could recall was that he arrived in the parking lot of the Krauszer's store to purchase marijuana. (8T:98-1 to 11) Byham did not recall being robbed on the night in question, nor did he recall whether he ever obtained the marijuana that he had tried to purchase. (8T:109-20 to 110-17, 114-4 to 19) Byham testified that he remembered getting into an argument with someone, that person "getting out of the car," Byham "getting out [of] the car very briefly" before getting back into the car, and then Byham leaving "at some point," before seeing the police "at some point after that." (8T:98-12 to 23) Byham gave a police statement, but he testified that he honestly did not remember saying "certain things" that were in the statement, and acknowledged that on the night of the incident, he had just signed the statement without reviewing it. (8T:98-24 to 99-13, 100-8 to 101-2, 107-16 to 109-19, 159-11 to 165-15) Byham stated that, while he believed that

he had told the police the truth at the time, reviewing the statement still did not refresh his recollection, and that the attorneys knew more than he did "regarding what is on this paperwork." (8T:101-3 to 102-9, 117-1 to 118-11)

The court determined that Byham could read parts of his statement into evidence, but that the statement itself would not be admitted into evidence. (8T:130-23 to 135-8, 143-3 to 145-25); (Da 18-22) Byham responded that he was uncomfortable with reading the statement, and that he had been told that he "wouldn't have to read anything." (8T:145-4 to 146-3) Byham proceeded to read his statement into the record. Byham read that he called "this guy about weed," they ended up meeting in the parking lot of Krauszer's, "a guy" exited a car and approached the front passenger door of Byham's car, and Byham let him in. (8T:146-11 to 24) Byham read that he agreed to buy "a quarter of weed" and that he "put the money in the center console." (8T:146-25 to 147-3) Continuing to read, Byham stated that the man grabbed the money before Byham received the marijuana, and that he began asking Byham to exchange what Byham believed to be fake hundred dollar bills for smaller bills. (8T:147-4 to 7) Byham stated that when he refused, the man pulled a gun out of his sweatshirt pocket, pointed it at him, and asked "where the rest of the money [was]." (8T:147-7 to 13) Byham responded that it was in the trunk. Then a second man "got out of the car" that both men had arrived in and approached the driver-side door of

Byham's car. (8T:147-13 to 18) Byham tried to open the trunk, at which point his phone rang and the man standing outside his car grabbed it. The man who took Byham's phone opened the trunk, then shut it, jumped into his own car, and drove away. (8T:147-16 to 25)

Byham read that the man inside his car "pointed the gun," tried to get in the other car, then tried to flee – at which point Byham "tried to approach him." (8T:148-1 to 3) Byham read that when he "got close" to the man, the man pointed the gun at Byham and told him he would kill him if he came closer, before jumping over a fence and running. (8T:148-3 to 6) Byham stated "I guess, some point after that, the police were called." (8T:143-6 to 8)

Byham read from his statement that the man with the gun was a "short, black male" with a "scruffy beard" who was "older, mid-30s," wearing a gray sweatshirt, and that Byham knew him only as "JJ." (8T:148-9 to 19, 149-10 to 14)[3] Byham described the man who took his phone as a "black male wearing a hoodie."[4] (8T:149-23 to 150-1) Reading from his statement, Byham said that there was a third person who stayed inside the Buick. (8T:150-2 to 6) In response

[3] At the grand jury hearing, Det. Schoch testified that Byham gave him the phone number of the person he knew as "JJ," and the phone number belonged to Pelzer. (1T:10-5 to 11)

[4] Byham departed from the text of the written statement significantly here. In the written statement, Byham described the man as "wearing a dark colored hoodie." (Da 21)

to being asked whether he could identify the suspects if he saw a picture of them, Byham responded "No," before reading from the statement that he could only identify the man who had been in his car. (8T:150-13 to 18) Byham did not identify Rainey, either out-of-court or in the courtroom. Instead, Byham selected Pelzer's photograph from the photo array that was administered to him during the investigation by Det. Schoch. (8T:84-7 to 16)[5]

When Det. Schoch recovered Byham's cellphone from a location near the Krauszer's, he found a text message exchange between Byham and an unsaved number regarding "the meet-up" between Byham and the individual he was texting. (8T:80-4 to 81-4, 82-2 to 83-18) The unsaved phone number belonged to Pelzer. (8T:84-1 to 6)

Darryl Pelzer, Mr. Rainey's co-defendant, testified for the State after pleading guilty to one count of robbery in exchange for a five-year prison sentence. (8T:176-16 to 177-12) Pelzer disclosed that he had previously been convicted of attempted murder. (8T:177-3 to 178-2) His account of the incident was largely similar to Pedone's testimony, with the addition of Pelzer's own commentary regarding the police investigation and statements made by other witnesses. (8T:178-3 to 25, 179-11 to 22)

[5] At the grand jury hearing, Det. Schoch testified that "the victim identified Pelzer as the subject that got into the front seat with the hand gun." (1T:17-10 to 12)

Pelzer testified that on the night of the incident, he drove Rainey and a second man he did not know to the Krauszer's in a rented car, adding that Rainey was going to meet someone. (8T:179-2 to 180-23, 181-15 to 23) Pelzer testified that he did not know Byham at the time. (8T:178-11 to 19, 187-7 to 8) Pelzer testified that when they arrived at the Krauszer's, he remained in the car and Rainey got out and went over to another car. (8T:182-4 to 7) After some time, Pelzer claimed that he got out of the car to see what was taking so long, and that when he approached Byham's car, the only thing he saw was Rainey with his hand up and noticed that Byham, who was "fidgeting," appeared afraid. (8T:182-9 to 12, 186-12 to 187-2, 187-14 to 21, 188-20 to 189-7) While Pelzer denied knowing about or participating in a robbery, he testified that he grabbed Byham's phone so that he would not be able to call the police, then drove away and threw the phone into the woods. (8T:186-21 to 25, 191-2 to 10, 197-5 to 16)

Pelzer identified himself and Rainey from the surveillance stills – indicating that he was the individual in the white hoodie depicted in S-2 and that Rainey was the individual in the gray hoodie depicted in S-3. (8T:183-22 to 186-3) (Da 15, 16) When the prosecutor asked Pelzer whether he was sure that the individual who was in the car with Byham was Rainey, Pelzer responded affirmatively, stating that Byham "identifie[d] him, not me." (8T:200-15 to 25, 202-1 to 10) Pelzer testified that Byham had described the individual who got

in his car as being bald with a beard. (8T:193-22 to 194-2, 200-22 to 25) Though Pelzer acknowledged that he too was bald with a beard, he said that Byham could see neither his head nor his chin during the incident because his "hoodie was up" and he had a medical mask around his chin. (8T:185-10 to 18, 201-8 to 13)

Rainey gave a different account of the incident, testifying that he walked to the Krauszer's parking lot after receiving a call from Pelzer, who wanted to buy marijuana from him. (10T:20-7 to 21-22, 25-11 to 16) Rainey stated that Pelzer arrived in a car with another man in the passenger seat, who he described as dark-skinned with a "small afro" and wearing a Polo jacket. (10T:25-17 to 26-3) Rainey stated that this other man was depicted standing outside in one of the still photos from the surveillance footage. (10T:49-16 to 50-2); (Da 17) Rainey testified that he went up to the driver's side window to give Pelzer the marijuana, and that Pelzer asked him to wait because Pelzer had "somebody waiting" for him. (10T:26-4 to 27-10) Rainey identified himself as the individual in the gray sweatshirt in two surveillance stills. (10T: 33-6 to 14, 47-4 to 6, 78-1 to 80-13) (Da 15, 23) Rainey identified Pelzer as the individual in the white hoodie from another surveillance still. (10T:77-12 to 17) (Da 16)

Rainey testified that Pelzer went over to another car – later identified as Byham's car – and talked to the driver, while Rainey went inside the store to use the ATM to "buy a couple of minutes" before coming back out to complete his

transaction with Pelzer. (10T:27-7 to 28-5, 39-9 to 18, 48-13 to 19, 68-23 to 69-21, 82-1 to 7). When Rainey came back out, he saw Pelzer engaged in an altercation with Byham, who Rainey did not know and had never met. (10T:28-6 to 18; 35-25-36-1; 43-10 to 44-3) Rainey stated that Byham's car door was open, and that he seemed frantic and was yelling at Pelzer, apparently because Pelzer had taken his phone. (10T:30-8 to 22, 31-17 to 22) Rainey testified that Byham walked "towards Pelzer," Pelzer got in his car, and the man in the Polo jacket drove away. (10T:35-3 to 5, 40-6 to 13, 70-19 to 71-10) Rainey was leaving the parking lot on foot when he heard Byham address him, saying that he needed his phone. Rainey responded that he had "nothing to do with that" and kept walking. (10T:35-17 to 22, 75-5 to 19) Rainey testified that Byham did not pursue him. (10T:74-20 to 75-22)

Detective Dean Schoch, the lead detective on the case, arrived at the scene after midnight, took photographs, and dusted Byham's car for fingerprints. He testified that he was unable to match the fingerprints to any suspect. (8T:73-7 to 13, 91-19 to 92-5)[6] Schoch testified that he identified the suspect car by obtaining its license plate from the surveillance video. (8T:73-14 to 74-10) He was able to trace the car to its owner, and eventually develop Pelzer as a suspect.

[6] During the grand jury hearing, Det. Schoch testified that Pelzer's fingerprint was recovered from the front passenger door of Byham's car. (1T:9-10 to 10-4)

(8T:74-10 to 76-24) Schoch testified that when he located the suspect vehicle and dusted it for fingerprints, he "received a hit on one of the fingerprints," which matched Pelzer. (8T:77-3 to 79-7)

Pelzer was then arrested and interviewed by Detective Rhein. (9T:11-6 to 23) Rhein testified that after interviewing Pelzer, he identified Rainey as the individual in the gray sweatshirt from a surveillance still based on familiarity with Rainey from the community. (9T:12-9 to 13-21) Charges were subsequently filed against Rainey. (8T:84-17 to 86-3) No gun was recovered from Rainey's residence or from the scene. (8T:86-22 to 87-6)

LEGAL ARGUMENT

POINT I

OFFICER PEDONE'S IMPROPER TESTIMONY SUMMARIZING AN ABSENT SURVEILLANCE VIDEO IN VIOLATION OF N.J.R.E. 701, N.J.R.E. 901 AND N.J.R.E. 1002 DEPRIVED MR. RAINEY OF A FAIR TRIAL. (6T:21-21 TO 22-10, 23-6 TO 24-1; 8T:40-1 TO 5)

The trial court erred in permitting Pedone to testify regarding the contents of a surveillance video that the State failed to produce at trial. Permitting Pedone to testify about the contents of a video not before the jury violated N.J.R.E. 1002, the Best Evidence Rule, and N.J.R.E. 901, requiring authentication of documentary evidence. Pedone's testimony about the video's contents was not an adequate substitute for the video itself at trial, particularly where there is no evidence on the record suggesting that the video was unobtainable. Furthermore, Pedone's testimony regarding the events depicted in the missing video was inadmissible under N.J.R.E. 701, governing the admissibility of lay witness opinion testimony. Pedone's testimony was improper because he did not directly witness the incident, only watched the surveillance video once, and his testimony addressed two key factual disputes in the case – whether Mr. Rainey got into Byham's car, and whether Mr. Rainey threatened Byham with a weapon.

The erroneous admission of Pedone's testimony unfairly bolstered the State's case, particularly where there were no still photographs from the

surveillance footage showing Mr. Rainey near or in Byham's car, no forensic evidence tying Mr. Rainey to the car, and no weapon recovered. There was a real possibility that Pedone's testimony regarding the contents of the missing video impacted the jury's verdict, requiring reversal of Mr. Rainey's convictions. See U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9-10.

A. Officer Pedone's summary of surveillance video footage – which was not in evidence – was inadmissible because it violated the Best Evidence Rule and authentication requirements.

Pedone's testimony about the events depicted in a surveillance video that was never produced at trial or admitted into evidence violated the Best Evidence Rule, as well as the requirement that documentary evidence must be authenticated. N.J.R.E. 1002; N.J.R.E. 901. Under the Best Evidence Rule, an original video is generally required to prove its contents, and no exception applied here. The State did not prove, or even attempt to prove, that the original or a duplicate of the surveillance video was lost, destroyed or unobtainable. See N.J.R.E. 1004(a)-(b); N.J.R.E. 1003. Permitting Pedone to testify regarding the contents of the missing video in lieu of introducing the video itself or a copy into evidence also violated the requirement that documentary evidence be authenticated. N.J.R.E. 901. The trial court abused its discretion in admitting Pedone's narration of the absent video's contents over defense counsel's

objection. (8T:39-18 to 40-20)

Our courts have long held that "reliability is the decisive factor in determining the admissibility of a recording" and that "the determination is a highly fact-sensitive analysis, requiring consideration not only of any gaps or defects in the recording but also the evidential purposes for which the recording is being offered." State v. Brown, 463 N.J. Super. 33, 52 (App. Div. 2020) (citing State v. Nantambu, 221 N.J. 390, 395 (2015)) (internal quotations omitted). Both the Best Evidence Rule and the requirement that documentary evidence be authenticated are concerned with ensuring that evidence presented at trial is in fact what it purports to be. See N.J.R.E 1002; N.J.R.E. 901.

Under the Best Evidence Rule, "[t]o prove the content of a writing or photograph, the original writing or photograph is required" unless an exception applies. N.J.R.E. 1002. The definition of a "writing" or a "photograph" includes videos. N.J.R.E. 1001(b); N.J.R.E. 801(e). Rule 1004 provides that an original is not required when the proponent of the evidence demonstrates that the original was lost or destroyed or is otherwise unobtainable "by any available judicial process or procedure or by other available means." N.J.R.E. 1004(a)-(b). N.J.R.E. 1003 permits the admission of duplicate writings and photographs "to the same extent as the original," unless a genuine question is raised as to the authenticity of the original, or it would be unfair to admit the duplicate.

However, testimony concerning an unavailable writing or photograph is only admissible if the original and copies of the original cannot be found with due diligence. 2D New Jersey Practice: Evidence Rules Annotated, comment on N.J.R.E. 1004 (John H. Klock) (3d ed. 2023).

In State v. Brown, this Court held that a cell phone recording of a portion of a university bus stop surveillance video was both admissible as a duplicate under N.J.R.E. 1003 and properly authenticated. 463 N.J. Super. at 52-53. The Court found the cell phone recording admissible in lieu of the original video because both the investigating officer and a university manager familiar with the surveillance system testified as to why the original video was not obtainable and could not be exported from the surveillance system. Id. at 45, 53. The Court held the duplicate was admissible where the "defendant presented no evidence undermining the reliability of [the officer's] cell phone video." Id. at 53. The Court also held that the video was properly authenticated by an eyewitness to the incident, who testified that the video accurately depicted what she had observed on the night of the incident. See id. at 52-53 (citing State v. Wilson, 135 N.J. 4, 14 (1994) (holding "any person with the requisite knowledge of the facts represented in the photograph or videotape may authenticate it"); see also State v. Williams, 471 N.J. Super. 34, 48 n.5 (App. Div. 2022) (holding officer

who did not witness events depicted in video segment firsthand could not authenticate video, despite absence of objection based on authentication).

Here, Pedone was permitted to testify about the contents of the Krauszer's surveillance video in lieu of playing the video for the jury at trial. (8T:37-20 to 58-2) In contrast to Brown, no duplicate of the video was produced at trial or admitted into evidence. The State did not prove, or even attempt to prove, that the original video was lost, destroyed, or unobtainable by "reasonable means," nor did it explain why no duplicate video recording was preserved or produced at trial. See N.J.R.E. 1004(a)-(b).

Unlike in Brown, where the security system manager and the investigating officer both testified as to why the original video was unobtainable and why it was necessary to admit a duplicate recording, here, there was no such testimony. The Krauszer's manager who accessed the surveillance footage did not testify. Pedone testified only that the manager had told Pedone that he was unable to transfer the footage onto a disk "at that time" because the manager did not understand the new surveillance system. (8T:35-16 to 36-2) Pedone explained that the new surveillance system was administered by a third-party company, and that the manager needed additional information in order to transfer the video "as quick as possible." (8T:35-6 to 36-2) The State therefore failed to explain why the original was not produced or could not be found with due diligence.

The State also failed to explain why a duplicate recording of the video was not available. The absence of a duplicate is particularly striking where Pedone wore his body camera while viewing the surveillance footage, and used the camera to take several still photographs from the footage. (8T:36-7 to 20, 37-16 to 38-20) Pedone's testimony about the contents of the missing video was inadmissible under the best evidence rule because there was no evidence on the record that the police or the State exercised due diligence in attempting to obtain the original video or a copy of it.

Moreover, unlike in Brown, neither the absent surveillance video nor the still photographs from the video that Pedone referred to during his narration were authenticated. No eyewitness to the events depicted in the video confirmed that the video itself accurately described the events that the witness had observed firsthand. Nor did an eyewitness authenticate the still photographs. Because the contents of the absent surveillance video and the still photographs were not authenticated, Pedone's testimony regarding the video's contents was improper. In sum, Pedone's testimony regarding the video was inadmissible because the video was not the best evidence and it was not authenticated.

B. Officer Pedone's narration of the absent surveillance video was impermissible lay witness testimony where he did not witness the events depicted in the video firsthand and testified to key factual disputes in the case.

Pedone's testimony was also inadmissible because it constituted improper lay testimony. Though Pedone was not an eyewitness to the robbery and viewed the surveillance footage just once, the trial court permitted him to summarize the entire video. Furthermore, the court permitted Pedone to opine on two key factual disputes in the case: he asserted that the video showed an individual in a gray sweatshirt (later identified as Mr. Rainey), getting into the passenger seat of Byham's car. (8T:44-4 to 45-11) And he asserted that the video showed the individual in the gray sweatshirt pointing "an object" at Byham, causing Byham to "duck for cover." (8T:44-4 to 45-11, 51-22 to 52-7) This was sharply disputed at trial, where Mr. Rainey denied ever entering Byham's car or having a gun. (10T:45-15 to 17, 83-22 to 25) Pedone's lay opinion testimony violated N.J.R.E. 701 because it was not based on his direct perception of events or careful analysis of the video, and his testimony opined on factual disputes, infringing on the jury's role as the ultimate finder of fact. Thus, it was error for the trial court to admit Pedone's testimony over defense objection.[7]

[7] Prior to the beginning of trial, Mr. Rainey argued that expected police officer testimony regarding the events depicted in the surveillance video was inadmissible under Rule 701 because none of the officers were present for the

Our Supreme Court has held that N.J.R.E "701, 602, and 403 in tandem provide the proper framework to assess video narration evidence by a witness who did not observe events in real time." State v. Watson, 254 N.J. 558, 600 (2023). Rule 701 imposes two requirements for the admission of lay witness opinion testimony: A lay witness may offer an opinion or inference only if it (1) "is rationally based on the witness' perception" and (2) "will assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701; accord State v. McLean, 205 N.J. 438, 456 (2011).

To satisfy the perception prong of Rule 701, "the witness must have actual knowledge, acquired through his or her senses, of the matter to which he or she testifies." State v. Sanchez, 247 N.J. 450, 471 (2021) (citation omitted); see also Watson, 254 N.J. at 591-2. In Watson, our Supreme Court held that the video narration testimony of an officer who lacks firsthand experience of the events depicted in the video satisfies the perception and personal knowledge

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incident and lacked the requisite firsthand knowledge. (6T:21-21 to 22-4) The judge replied that the testimony about the video would be limited to explaining how the officers responded to the scene and the investigative steps they took. (6T:21-21 to 22-10) After the State clarified its intention to have police witnesses who viewed the surveillance footage "testify to the observations that they made" from that footage, the court ruled that this testimony was admissible. (6T:30-4 to 19, 31-6 to 32-1) Defense counsel also objected to Pedone's "interpretation of what he saw" on the missing video as soon as he began testifying about the video's contents. (8T:40-1 to 5)

requirements of Rule 701 under limited circumstances, such as where the officer "has carefully reviewed a video a sufficient number of times prior to trial." Watson, 254 N.J. at 601 (citing United States v. Begay, 42 F.3d 486, 502-03 (9th Cir. 1994) (finding officer who was not present at incident depicted in video had sufficient personal knowledge to narrate video where he watched it more than 100 times); United States v. Torralba-Mendia, 784 F.3d 652, 659 (9th Cir. 2015) (affirming admission of lay witness narration testimony from officer who watched videos about fifty times)).

The second prong of N.J.R.E. 701 requires that lay witness opinion testimony assist the trier of fact. However, such testimony must not infringe on the jury's role as the ultimate finder of fact by opining on a matter that is for the jury to decide. Watson, 254 N.J. at 603 (citing State v. Higgs, 253 N.J. 333, 363 (2023)). Watson reiterates that video narration testimony "must accord with specific limits" – namely, witnesses cannot comment on reasonably disputed facts depicted in the video or offer their subjective interpretations of the video's contents. Watson, 254 N.J. at 603-04 (citing Higgs, 253 N.J. at 366-67). By way of example, the Watson Court notes that an investigator can testify that an individual opened the door with his elbow on a video, but not if that fact was reasonably disputed. See id. at 603 (holding that "a witness cannot testify that a video shows a certain act when the opposing party reasonably contends that it

does not"). Nor could the investigator opine that the individual did so to avoid leaving fingerprints. See id. at 603-04 (internal quotations omitted) (holding that "investigators should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence"). Such testimony risks usurping the jury's function, misleading the jury, and prejudicing the defendant. Id. at 602-03 (citing N.J.R.E. 403). The same principles and constraints apply to narration testimony about screenshots or stills from a video. Id. at 602.

Here, Pedone's play-by-play testimony about the contents of the missing video was inadmissible under the first prong of Rule 701. Pedone did not witness the events depicted in the video, nor did he carefully review the video enough times to satisfy the Rule's perception and personal knowledge requirements. See id. at 601. Pedone's testimony also violated the second prong of Rule 702 for two reasons. First, Pedone improperly testified about the key factual disputes in the case: whether Mr. Rainey got into Byham's car and whether he pointed an object at Byham that caused Byham to "duck for cover." (8T:44-22 to 45-11, 52-1 to 7) Second, Pedone's testimony included impermissible subjective interpretations and inferences.

It was undisputed at trial that Mr. Rainey was the individual wearing a gray sweatshirt in the still photographs from the surveillance video. (8T:184-12

to 185-12; 9T:14-22 to 25; 10T:47-4 to 6, 77-9 to 11, 78-1 to 79-3); (Da 15, 23) However, Mr. Rainey's actions were sharply disputed: Pedone testified that the video depicted the individual in the gray sweatshirt arriving to the parking lot in the same car as Pelzer, getting into the passenger seat of Byham's car, then getting out and pointing something at Byham, causing Byham to "duck for cover." (10T:39-2 to 45-11) Mr. Rainey gave a different account of the incident, stating that he walked to the parking lot to sell Pelzer marijuana, then waited for Pelzer to conclude a separate transaction or interaction with Byham, who Mr. Rainey did not know at the time. (10T:20-7 to 28-5, 44-2 to 4) Mr. Rainey testified that he never approached or entered Byham's car at all. (10T:13 to 17) Therefore, Pedone's testimony that the video showed Rainey entering Byham's car, then getting out and pointing something at Byham, went directly to the key factual disputes for the jury to resolve and infringed on the jury's role as the ultimate arbiter of fact.

Pedone's testimony was also improper because it included his own subjective interpretations and inferences. In Allen, our Supreme Court held that the video narration testimony of a detective, who did not witness the shooting depicted in the video firsthand, was inadmissible because it relied on his subjective interpretations and inferences. 254 N.J. at 549. The central factual dispute in the case was whether the defendant intentionally fired the gun at an

officer, or whether it discharged accidentally. Id. at 534-5. The detective's testimony that the video depicted the defendant turning towards the officer and firing the gun was inadmissible because it was based on "his view of defendant's actions," and supported "the State's position as to sharply disputed facts." Id. at 549 (noting that detective's narration testimony would have been proper if instead, he had stated that "the surveillance video showed the discharge of a weapon at a particular location").

As in Allen, Pedone's testimony that, in the video, Mr. Rainey "points an unknown object" at Byham while fleeing the scene and then "it is observed that [Byham] falls to the ground and *appears* to duck for cover" is based on Pedone's subjective view of Mr. Rainey's actions. (8T:52-1 to 54-6) (emphasis added) See also Watson, 254 N.J. at 607-08 (holding officer improperly testified about "what he suspected or believed" video showed when he commented on where suspect's hand appeared to be and stated "it looks like" suspect used elbow to open door). The trial court erred in overruling defense counsel's objection to Pedone's subjective interpretation of the video as showing Byham appearing to duck for cover. (8T:52-10 to 54-6)

Furthermore, the State's failure to produce the video and play it for the jury made it impossible for Mr. Rainey to meaningfully contest the State's characterization of the video in his own testimony, or for defense counsel to contest

Pedone's account of the events depicted on the video. In State v. Williams, 471 N.J. Super. 34, 48-49 (App. Div. 2022), this Court held that allowing the prosecutor to comment in summation on a portion of a surveillance video that was not played for the jury during the trial was reversible error. The prosecutor's commentary on the video – which the jury would not watch for themselves until deliberations – denied the defendant the opportunity to address the footage himself during the trial, or to rebut the evidence. Id. at 48-49 (citing State v. McNeil-Thomas, 238 N.J. 256, 291 (2019) (LaVecchia, J., dissenting)). This Court held that the prosecutor's comments on the video "had the clear capacity to unfairly tip the scales" where the defendant contested the State's account of the events depicted in the video, and the case ultimately came down to a credibility contest. Ibid. The erroneous admission of Pedone's narration testimony in this case is even worse than the prosecutor's commentary on the video in Williams. Here, the jury never had the opportunity to view the video at all, but was only presented with Pedone's characterization of it. Because the video itself was entirely absent from evidence, it is impossible to determine just how much of Pedone's testimony relied on impermissible subjective interpretations, opinions, or inferences about what the video depicted.

Pedone's video narration testimony violated Rules 701 and 403 because it was not based on Pedone's firsthand experience of the incident, he only watched

the video once, and his testimony usurped the jury's function by directly addressing the key factual disputes in the case and including his own subjective interpretations and inferences about the events depicted in the video.

C. Officer Pedone's improper testimony regarding the missing video was extremely harmful because it bolstered the State's otherwise weak case.

It was undisputed at trial that Mr. Rainey was the man in the gray sweatshirt depicted in several still photographs from the surveillance footage. (Da 15, 23) The only question for the jury to resolve was whether Mr. Rainey entered Byham's car and robbed him. To find Mr. Rainey guilty of robbery, the jury had to find that, in the course of committing a theft, Mr. Rainey threatened Byham with immediate bodily injury, or purposely put him in fear of such injury. N.J.S.A. 2C:15-1a(2). Permitting Pedone to testify that an objective but unavailable video recording showed Mr. Rainey entering Byham's vehicle, then pointing an unknown object at Byham while fleeing, causing Byham to duck for cover, was extremely harmful. This is particularly true where Pedone's testimony about the contents of a missing video was the State's strongest evidence against Mr. Rainey. Notably, while the State produced several still photographs from the surveillance video at trial, there were no still photographs showing Mr. Rainey approaching, entering, or inside of Byham's car among them. There was also no

forensic evidence linking Mr. Rainey to the car, and no weapon was recovered from the scene.

The trial testimony of the two eyewitnesses was weak. Byham could no longer remember what had occurred during the incident at the time of trial and was incapable of testifying from memory. (8T:96-12 to 97-10) Instead, he read his police statement into the record. (8T:145-1 to 150-25) Byham's statement did not establish that Rainey was the individual who had entered Byham's car and taken the cash. In his statement to police, Byham said that he could only identify the man who had entered his car. Then, in the ensuing investigation, Byham positively identified Rainey's co-defendant, Pelzer, from a photo array – strongly suggesting that Byham believed that Pelzer was the man who had entered his car. (8T:84-7 to 16) Pelzer's testimony had clear credibility issues where he had pled guilty to robbery for taking Byham's phone during the same incident. Pelzer had agreed to testify for the State as a condition of his guilty plea, in exchange for a recommended sentence of five years. (8T:176-11 to 177-12)

Pedone's testimony that the absent surveillance video showed Mr. Rainey getting into Byham's car and then pointing an unknown object at Byham was by far the strongest evidence against Rainey, and it seriously bolstered the weak testimony of the State's two eyewitnesses. This is particularly true because improper police

testimony is often accorded undue weight by juries. See Neno v. Clinton, 167 N.J. 573, 586 (2001) ("A jury may be inclined to accord special respect to [a police] witness. Deference to a police officer in turn may have enhanced the credibility of the statements of [other witnesses]."); see also State v. Hawk, 327 N.J. Super. 276, 285 (App. Div. 2000) (noting ordinary citizens are more likely to believe testifying police officers than defendants because "police occupy a position of authority in our communities"). Additionally, the jury specifically requested a playback of Pedone's testimony, indicating that it may have been decisive to its final verdict. (10T:183-15 to 20; 11T:5-16 to 25-23); See State v. R.E.B., 385 N.J. Super. 72, 90 (App. Div. 2006) ("Since the jury asked for the playback, the [played-back] testimony must have been considered significant.").

Pedone's improper testimony based on his inferences from the video – that Mr. Rainey pointed "an object" at Byham, causing Byham to "appear[] to duck for cover" – was harmful. (8T:52-1 to 7; 7.6 84-10 to 85-7; 12T:36-6 to 40-4) To find Mr. Rainey guilty of robbery, the jury had to find that Mr. Rainey threatened Byham with immediate bodily injury, or purposely put him in fear of such injury. N.J.S.A. 2C:15-1a(2). Pedone's testimony that Rainey pointed "an object" at Byham, the sight of which made Byham duck, likely convinced some jurors that Mr. Rainey had a gun and made it more likely that even those jurors who were unconvinced that he had a gun would believe that he was armed with some other weapon.

Pedone's testimony regarding the contents of the missing video unfairly bolstered the State's case. Without this improper testimony, the jury could have acquitted Mr. Rainey. Therefore, Mr. Rainey's convictions must be reversed.

D. Alternatively, even if Officer Pedone's testimony regarding the video was admissible, the court erred in failing to give an adverse inference instruction.

The State's failure to preserve the surveillance video or a duplicate recording of it warranted an adverse inference jury instruction. The trial court's failure to give such an instruction compounded the harm from its erroneous admission of Pedone's testimony regarding the video. "An adverse inference charge may be warranted when a party's failure to present evidence raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him." State v. Brown, 463 N.J. Super. 33, 53 (App. Div. 2020) (quoting Torres v. Pabon, 225 N.J. 167, 181 (2016)) (internal quotation omitted). The State's loss, destruction, or failure to preserve potentially exculpatory evidence warrants an adverse inference instruction. See State v. Richardson, 452 N.J. Super. 124, 135-36, 138 (App. Div. 2017) (holding trial court should have granted adverse inference where State failed to preserve video that would have shown whether or not heroin was recovered from defendant's sock). Neither proof of bad faith nor a showing that evidence is exculpatory is required for a court to give an adverse inference charge. See Richardson, 452 N.J. Super. at 138 (citing State v. W.B., 205 N.J. 588 (2011); State v. Dabas, 215 N.J. 114, 119 (2013)).

Here, Pedone neither preserved the surveillance video nor made a duplicate recording of the video, despite taking several still photographs from it using his body camera. (8T:36-7 to 20, 37-16 to 38-20) The surveillance video was potentially exculpatory because it would have shown whether or not Mr. Rainey got into the passenger seat of Byham's car – the issue at the heart of the case. An adverse inference jury instruction would likely have added weight to Mr. Rainey's testimony by expressly permitting the jury to draw an adverse inference from the State's failure to preserve the video evidence that was central to its case. Thus, the court's failure to give an adverse inference instruction was extremely harmful.

POINT II

THE COURT'S FAILURE TO ADMIT BYHAM'S WRITTEN STATEMENT INTO EVIDENCE WAS ERRONEOUS AND HIGHLY PREJUDICIAL WHERE BYHAM'S READING OF THE STATEMENT INTO THE RECORD DIVERGED SUBSTANTIALLY FROM THE WRITTEN STATEMENT ITSELF. (8T:144-3 TO 22)

Following the prosecutor's unsuccessful attempts to refresh Byham's recollection of the incident, the State moved to have Byham read parts of his police statement into the record under the recorded recollection exception to the rule against hearsay. (8T:133-13 to 135-7) (Da 18-22); N.J.R.E. 803(c)(5). The trial court found that the exception applied and ruled that the State could have Byham read the relevant and admissible portions of his statement into the record, and that defense counsel could do the same during cross-examination. (8T:132-12 to 134-22, 138-22 to 139-6). However, the court erred in preventing defense counsel from introducing Byham's written statement into evidence. (8T:132-12 to 14; 143-14 to 144-24; 210-4 to 212-17) This error deprived Mr. Rainey of a fair trial and requires reversal where Byham's reading of his statement significantly diverged from the text of the written statement itself, omitting a fact that was important to the jury's assessment of the evidence. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

Rule 803(c)(5) applies when a witness's recollection cannot be refreshed – even after viewing his prior recorded statement – and the witness is therefore unable to

give substantive testimony. Several showings must be made for a witness's prior recorded statement to be admissible under Rule 803(c)(5): "the witness must be shown to have an impaired memory;" the record of the statement must have been made when the recorded facts actually occurred or were fresh in the witness's memory; the record must have been made by the witness or another person for the purpose of recording the statement; and the statement must concern a matter of which the witness had knowledge when it was made. N.J.R.E. 803(c)(5); See State v. Gore, 205 N.J. 363, 376-77 (2011).

The Rule states that "[w]hen the witness does not remember part or all of the contents of a writing, the portion the witness does not remember may be read into evidence but shall not be introduced as an exhibit over objection." N.J.R.E. 803(c)(5). Rule 803(c)(5) "permits the introduction of a written copy of [a statement], used as a past recollection recorded by an examining police detective, provided there is no objection and all foundational requirements … are satisfied." Gore, 205 N.J. at 381; see id. at 383 (contrasting N.J.R.E. 803(c)(5) – generally permitting admission of unobjected-to recorded statements into evidence – with its federal counterpart, F.R.E. 803(5), only permitting admission of recorded statements offered by adverse parties into evidence).

Here, the trial court erroneously interpreted Rule 803(c)(5) as requiring defense counsel to choose between two mutually exclusive alternatives: either permitting

Byham to read his statement into the record and cross-examining him on it, *or* admitting his written statement into evidence. (8T:131-19 to 133-9, 138-22 to 139-6, 143-14 to 144-24) When defense counsel replied that he was "under the impression" that Byham's "actual statement" would come in to evidence, the judge told counsel that he no longer had that option because "he had chosen… to cross… as opposed to admitting the entire statement," and "that's why we are proceeding in this fashion." (8T:144-3 to 22) This is a dramatic misunderstanding of N.J.R.E. 803(c)(5). The Rule only prohibits the recorded statement from being entered into evidence when the defense objects to its admission, and the admission of the recorded statement into evidence does not curtail defense counsel's ability to cross-examine the witness about his statement. Thus, the court erroneously prevented defense counsel from offering Byham's written statement into evidence due to its misunderstanding of Rule 803(c)(5).

This error was harmful because Byham did not read his recorded statement into the record as it was written, but rather, made significant omissions – one of which was material to the jury's assessment of the evidence. In the statement, Byham had told police that the man who took his phone was wearing "a dark colored hoodie," but on the witness stand, Byham read that the man was "wearing a hoodie." (8T:149-23 to 150-1); (Da 21) Byham's statement that the man who took his phone wore a dark colored hoodie contradicted the testimony of multiple State's witnesses.

(8T:185-19 to 25; 10T:77-12 to 17) (Pelzer's and Rainey's testimony that Pelzer took Byham's phone and was wearing a white hoodie); (8T:44-4 to 25) (Pedone's testimony that suspect wearing white hoodie took Byham's phone).

Byham's omission of this important fact from his reading of his statement impacted the jury's ability to assess the accuracy and credibility of the many different accounts of the incident given by various witnesses during the trial, as well as the central factual dispute in the case: the identity of the individual who got into Byham's car. Furthermore, the jury specifically requested Byham's written statement during deliberations – explicitly distinguishing between the recorded statement and Byham's reading of it. (10T:183-15 to 184-7) This demonstrated that the jury wanted the opportunity to evaluate the written statement itself. The trial court erred in finding that Byham's recorded statement could not be entered into evidence, thereby denying the jury the ability to assess the discrepancies between his reading of the statement and the statement itself. Denying the jury the opportunity to evaluate Byham's written statement could certainly have impacted the verdict where those discrepancies were material to the jury's evaluation of the State's case.

POINT III

PELZER'S TESTIMONY OPINING ON THE STATEMENTS OF OTHER WITNESSES AND ALLUDING TO FINGERPRINT EVIDENCE OUTSIDE THE RECORD WAS ENTIRELY IMPROPER AND DEPRIVED MR. RAINEY OF A FAIR TRIAL. (NOT RAISED BELOW)

Pelzer repeatedly testified that Byham identified Rainey, not Pelzer, as the man who had gotten into Byham's car. Pelzer also testified that the only evidence linking Pelzer to Byham's car was his fingerprint – allegedly recovered from the trunk of Byham's car. (8T:178-9 to 23, 194-8 to 18) Pelzer's testimony mischaracterizing Byham's statements was inadmissible because it was unhelpful to the jury and extremely prejudicial. See N.J.R.E. 701; N.J.R.E 403. Pelzer's testimony commenting on extra-record fingerprint evidence collected during the police investigation usurped the function of expert testimony and constituted testimonial hearsay – the admission of which violated Mr. Rainey's Confrontation Clause rights. Pelzer's wrongly admitted testimony had the clear capacity to produce an unjust result because it squarely addressed the question at the heart of the case – the identity of the person who entered Byham's car – and improperly bolstered Pelzer's account of events. R. 2:10-2. Therefore, reversal of Mr. Rainey's convictions is required. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. Pelzer's mischaracterization of Byham's statements as identifying Rainey as the man who had gotten into Byham's car was improper and prejudicial lay opinion testimony.

Co-defendant Pelzer repeatedly testified that Byham, during his trial testimony, had identified Rainey, not Pelzer, as the man who had gotten into Byham's car. (8T:182-22 to 23; 185-1 to 187-7 to 13; 194-8 to 18, 197-25 to 198-6; 200-15 to 22; 202-1 to 10) Pelzer's testimony interpreting and commenting on Byham's testimony was inadmissible under Rules 701 and 403. Under the second prong of Rule 701, a lay witness may offer an opinion or inference only if it "will assist [the jury] in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701; accord State v. McLean, 205 N.J. 438, 456 (2011). A lay witness may not opine on a matter "as to which the jury is as competent as he to form a conclusion" and that "does not fall outside the ken of the jury." McLean, 205 N.J. at 459, 461. Under Rule 403, evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury. N.J.R.E. 403.

Pelzer's testimony violated Rule 701 because it was based entirely on his own interpretation of Byham's testimony, but the jury was just as competent as Pelzer to form a conclusion regarding Byham's testimony. Pelzer's interpretation of Byham's testimony thus interfered with the jury's role of independently evaluating that testimony as the ultimate arbiter of fact. Pelzer's

testimony should also have been excluded under Rule 403 because one witness's interpretation of another witness's testimony is not probative of any fact at issue. Moreover, Pelzer's testimony was extremely prejudicial where the identity of the man who got into the passenger's seat of Byham's car was the key question for the jury to resolve. The testimony was not just prejudicial but extremely misleading, as Det. Schoch had previously testified that Byham had in fact selected *Pelzer's* photograph from a photo array following the incident. (8T:84-7 to 16, 150-13 to 17). This testimony therefore also warranted exclusion under Rule 403 because created a serious risk of confusing and misleading the jury.

The trial court itself recognized that it was improper for Pelzer to comment on and interpret Byham's testimony. (8T:194-9 to 18) After Pelzer told the jury that "the victim [told] you the person that got in his car" and that "the State is identifying me, not the victim or nobody," the judge interrupted Pelzer sua sponte, telling him "to listen to the question and just answer the question." (8T:194-8 to 195-3) However, the trial court had a responsibility to strike the improper testimony and to instruct the jury not to consider it. See Watson, 254 N.J. at 608 (holding court must clearly strike inadmissible testimony and instruct jury not to consider it.) This is particularly true given that Pelzer had already repeatedly made the same types of inadmissible statements by the point that the court interrupted him.

Where the identity of the man who entered Byham's car was the key issue for the jury to resolve, Pelzer's frequently repeated, confusing, and misleading testimony that Byham identified Mr. Rainey had the clear capacity to cause an unjust result.

B. Pelzer improperly testified as an expert regarding fingerprint evidence not in the record. This testimony was inadmissible hearsay and violated Mr. Rainey's right to confrontation.

Pelzer testified that the investigating police officers only found his fingerprints on the trunk of Byham's car. (8T:178-13 to 23, 192-21 to 193-11) This constituted improper expert testimony, hearsay, and violated Mr. Rainey's right to confront the witnesses against him. Pelzer's inadmissible testimony regarding extra-record fingerprint evidence corroborated his account of events – that Pelzer had remained outside of Byham's car and that Rainey had entered it. The admission of this improper testimony was particularly harmful because Pelzer was the State's only eyewitness who could recall the incident from memory and there were clear questions about the credibility of his testimony.

Pelzer improperly testified as an expert when he stated that the police recovered fingerprints from the trunk of Byham's car and determined that they matched Pelzer's fingerprints. Our evidence rules sharply distinguish between lay opinion testimony, governed by N.J.R.E. 701, and expert opinion testimony, governed by N.J.R.E. 702. Unlike expert testimony, in which a person who is

qualified to do so uses their scientific, technical, or specialized knowledge of an esoteric subject to assist the jury in understanding or determining facts at issue in the case, lay opinion testimony is limited to the witness's own personal observations on matters of common knowledge. See State v. Derry, 250 N.J. 611, 632 (2022); State v. McLean, 205 N.J. 438, 456-60 (2011). Lay opinion may not cross into the realm of expert testimony and usurp the function of expert opinion. Alpine Country Club v. Borough of Demarest, 354 N.J. Super. 387, 394 (App. Div. 2002); State v. Kittrell, 279 N.J. Super. 225, 235-36 (App. Div. 1995). Thus, when scientific, technical or other specialized knowledge is to be offered, N.J.R.E. 702 applies.

Pelzer, a lay witness, could only give opinion testimony based on his personal observations during the incident. Pelzer lacked any scientific or technical knowledge about fingerprint collection or analysis, and he was unqualified to testify on these subjects. His testimony that the police recovered fingerprints from the trunk of Byham's car and determined that they matched Pelzer's own fingerprints was clearly inadmissible because it lacked any basis in Pelzer's personal observations and usurped the function of expert opinion testimony.

Pelzer's testimony regarding the fingerprint evidence was also impermissible hearsay and completely unsupported by evidence in the record.[8] Hearsay is an out-of-court statement that is offered at trial for the truth of the matter asserted. N.J.R.E 801. Central to our evidentiary law is the principle that all hearsay is inadmissible unless it falls within an exception to the hearsay rule. State v. Branch, 182 N.J. 338, 357 (2005) (citing N.J.R.E. 802). Pelzer's testimony plainly offered an out-of-court statement – the results of the forensic fingerprint analysis conducted during the police investigation – for the purpose of getting the alleged results of that analysis before the jury. See id. at 351 (holding police officer witness "may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant"). This testimony was plainly inadmissible under any exception to the hearsay rule. Furthermore, the admission of Pelzer's hearsay testimony was particularly troubling because there were reasons to believe that it was not particularly trustworthy – namely, that Pelzer had a strong motive to inculpate Mr. Rainey.

Pelzer's testimony also raised significant Confrontation Clause concerns. The Confrontation Clause prohibits "the use of out-of-court testimonial hearsay, untested by cross-examination, as a substitute for in-court testimony." State ex

[8] Notably, contrary to Pelzer's claim, Det. Schoch testified that while "some prints" were found on the outside of Byham's car, none of the fingerprints matched either Pelzer or Rainey. (8T:73-7 to 13, 91-19 to 92-9)

rel. J.A., 195 N.J. 324, 342 (2008). The purpose of the Confrontation Clause is ultimately to ensure that evidence is reliable, but it is a procedural rather than substantive guarantee, commanding that the reliability of evidence must be determined by testing in the "crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004). To that end, the Confrontation Clause bars the admission of testimonial statements made by non-testifying witnesses where defendant had no prior opportunity for cross-examination. Davis v. Washington, 547 U.S. 813, 821 (2006). Forensic evidence is testimonial when its primary purpose is to establish facts for later use in the prosecution of a case. See State v. Michaels, 219 N.J. 1, 31-32 (2014) (adhering to primary purpose test to determine when forensic evidence is testimonial); State v. Bass, 224 N.J. 285, 316-17 (2016) (finding autopsy report not in evidence testimonial because its primary purpose was establishing facts for prosecution of case). For forensic science-based evidence to avoid running afoul of the Confrontation Clause, it must be accompanied by the in-court testimony of either the analyst who conducted the original forensic testing, or an independent reviewer knowledgeable about the testing process, who has independently verified the correctness of the process and results. See Michaels, 219 N.J. at 45-46.

Here, Pelzer testified regarding the results of extra-record fingerprint analyses conducted during the police investigation – forensic evidence that was

clearly testimonial. The primary purpose of the fingerprint analyses underlying Pelzer's testimony was to aid in the police investigation of the robbery and to establish facts for later use in the prosecution of the case. Therefore, the admission of this testimonial hearsay evidence violated Mr. Rainey's confrontation rights. Under the Confrontation Clause, Mr. Rainey had the right to cross-examine the fingerprint analyst who conducted or independently verified the fingerprint analysis regarding where fingerprints were found on the scene and who they belonged to. Cf. State v. Heisler, 422 N.J. Super. 399, 423 (App. Div. 2011) (noting there was no way of knowing whether cross examination of absent lab analyst would have undermined conclusions in lab certificate). The admission of these improper statements was particularly problematic when they were introduced through the testimony of a lay witness who had a strong motive to inculpate Mr. Rainey. See Idaho v. Wright, 497 U.S. 805, 826 (1990) (finding inculpatory hearsay statement of declarant was insufficiently reliable to outweigh defendant's confrontation rights where no "firmly rooted" hearsay exception applied and declarant had motive to inculpate defendant).

Pelzer's improper testimony regarding the fingerprint evidence was extremely prejudicial because it supported his account of the incident – that Pelzer approached the driver's side door and trunk of Byham's car while Rainey

remained inside. Where the identity of the individual who entered Byham's car was the key question for the jury to resolve, the admission of this testimony had the clear capacity to cause an unjust result, particularly taken together with Pelzer's improper testimony that Byham had identified Mr. Rainey. Thus, Mr. Rainey's convictions must be reversed.

POINT IV

THE CUMULATIVE IMPACT OF THE ERRORS DENIED DEFENDANT A FAIR TRIAL. (Not Raised Below)

"Even if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) (citing State v. Jenewicz, 193 N.J. 440, 473 (2008). Each of the errors in Points I through III is sufficient to require reversal. If, however, the court disagrees, defendant submits that the cumulative effect of these errors requires reversal. Id.

The outcome of this case depended on whose account of events the jury found credible. Because each of the trial errors – a police officer's improper narration of the missing surveillance video, the court's failure to admit the victim's recorded statement, and the erroneous admission of Mr. Rainey's co-defendant's highly improper testimony– served to improperly bolster the State's case, the cumulative

impact of the errors deprived Mr. Rainey of due process and a fair trial. Accordingly, Mr. Rainey's convictions should be reversed and the matter remanded for a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

POINT V

RESENTENCING IS REQUIRED BECAUSE THE COURT FAILED TO FIND TWO APPLICABLE MITIGATING FACTORS AND THE COURT DID NOT PROVIDE REASONS FOR IMPOSING NON-STATUTORY FINES.

Although the gun charges were dismissed and no one was physically injured during the robbery, the trial court imposed a sentence near the top of the extended term range for the robbery conviction: 18 years of incarceration subject to an 85% parole bar. This case should be remanded for resentencing because the trial court failed to properly consider, find, and weigh two applicable mitigating factors raised by defense counsel. In addition, the case should be remanded because the court imposed miscellaneous fines on Mr. Rainey's convictions for robbery and the disorderly persons offense of obstruction without making the required findings or providing reasoning on the record for imposing fines in excess of those mandated by statute.

A. The court's failure to properly address, find, and weigh two applicable mitigating factors was error. (13T:20-7 to 15, 28-7 to 17, 29-4 to 9)

The trial court failed to properly address, find, and weigh two mitigating factors requested by defense counsel, requiring the matter to be remanded for resentencing. A court's sentencing decision must involve a qualitative analysis, stating its reasoning for finding and weighing aggravating and mitigating factors. State v. Case, 220 N.J. 49, 65 (2014). "Mitigating factors that are called to the court's attention should not be ignored, and when amply based in the record ... they must be found." Id. at 64 (citing State v. Dalziel, 182 N.J. 494, 504 (2005); State v. Blackmon, 202 N.J. 283, 297 (2010)) (internal quotations omitted).

Here, the defense attorney argued that the fact that the victim "was not physically injured in any way should be taken into account" as a mitigating factor. (13T:20-7 to 15); See 2C:44-1b(1) ("Defendant's conduct did not cause serious harm"); 2C:44-1b(2) ("Defendant did not contemplate serious harm"). However, the judge found that "none of those factors that were outlined by our Legislature … even remotely would apply based on the facts and circumstances of this case." (13T:27-4 to 14) This was error where defense counsel brought mitigating factor one to the court's attention, and it was clear from the record that not only did Mr. Rainey's conduct "not cause serious harm," but that the

victim suffered no injury, supporting the application of mitigating factor one. See State v. Molina, 114 N.J. 181, 185 (1989) (When making fact findings on mitigating factor one, the judge must "be guided by the facts surrounding the defendant's offense" – it is not proper for the judge to focus on what could have happened). The court should have also found mitigating factor two because the evidence on the record supported a finding that Mr. Rainey did not contemplate serious harm. See State v. Zadoyan, 290 N.J. Super. 280, 289 (App. Div. 1996) (finding mitigating factor two applied where defendant committed a carjacking, but did not intend to take permanent possession of the car, and did not hurt the victim). Therefore, the court should have applied mitigating factors one and two based on the record before it, and should have assigned appropriate weight to the factor.

B. The trial court erred in imposing discretionary fines without making required findings or providing reasoning on the record.

The trial court's imposition of discretionary fines without making the required findings or providing reasons for doing so on the record was error and requires a remand. In order to impose a fine, the trial court must find that defendant derived a pecuniary gain from the offense, or that a fine is specially adapted to deterrence or correction, and that the defendant "is able, or given a fair opportunity to do so, will be able to pay the fine." N.J.S.A. 2C:44-2a(1)-(2). The trial court is also required to state its reasons for imposing a fine on the

record. R. 3:21-4(f); See State v. Ferguson, 273 N.J. Super. 486, 499-500 (App. Div.1994) (fine vacated where trial court failed to give reasons for imposing $1,000 fine, made no findings relating to defendant's ability to pay, and failed to give defendant opportunity to be heard regarding his ability to pay).

Here, in addition to the fines required by statute, the trial court imposed discretionary fines of $150 on the robbery conviction and $100 on the disorderly persons conviction. (13T:28-7 to 17, 29-4 to 9) (Da 9) The court gave no reasoning for its decision to impose these additional fines. The court failed to make the necessary findings that Rainey either derived pecuniary gain from the offense, or that the additional fines were specially adapted to deterrence or correction. Furthermore, the court failed to assess Rainey's ability to pay the fines and did not state any reasons for imposing the fines on the record. Therefore, the $250 in additional fines must be vacated and the matter remanded to the trial court.

CONCLUSION

For the reasons set forth herein, Mr. Rainey's convictions must be reversed. Alternatively, his sentence must be vacated and remanded for resentencing.

Respectfully Submitted,

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Assistant Deputy Public Defender
ID No. 404802022

Dated: April 25, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0628-23T2

INDICTMENT NO. 21-11-01514-I
CASE NO. 21002525

STATE OF NEW JERSEY,	:	
		CRIMINAL ACTION
Plaintiff-Respondent,	:	
		ON APPEAL FROM A FINAL JUDGMENT OF CONVICTION
v.	:	IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION
COWAN RAINEY,	:	(CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable, Vincent N. Falcetano, Jr., J.S.C.; Honorable Joseph W. Oxley, J.S.C., and a Jury.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT PROCEDURAL HISTORY

On November 30, 2021, a Monmouth County Grand Jury handed down Indictment No. 21-11-01514I, charging defendant, Cowan Rainey, with second-degree robbery, in violation of N.J.S.A. 2C:15-1(a)(2) (Count One); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a)(1) (Count Two); second-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b)(1) (Count Three); fourth-degree aggravated assault by pointing a firearm, in violation of N.J.S.A. 2C:12-1(b)(4) (Count Four); second-degree certain persons not to have weapons, in violation of N.J.S.A. 2C:39-7(b)(1) (Count Six).[1] (Da 1-4).

Defendant was also charged under Summons No. S-2021-00627-1337 for obstruction, in violation of N.J.S.A. 2C:29-1(a) for refusing to be fingerprinted and photographed after his arrest. See (12T:43-6 to 20).[2]

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[1] Co-defendant Darryl Pelzer was also charged under Counts One through Four of the indictment, as well under Count Five for Certain Persons Not to Have Weapons. (Da 1-3).

[2] 1T – Transcript of Proceedings, dated November 9, 2021 (Grand Jury);
2T – Transcript of Hearing, dated February 18, 2022 (Reopen Detention);
3T – Transcript of Hearing, dated May 10, 2022 (Pro Se Motions);
4T – Transcript of Hearing, dated June 15, 2022 (Status Conference);
5T – Transcript of Hearing, dated July 18, 2022 (Faretta Hearing);
6T – Transcript of Proceedings, dated June 26, 2023 (Jury Selection)
7T – Transcript of Proceedings, dated June 27, 2023 (Jury Selection);
8T – Transcript of Proceedings, dated June 28, 2023 (Trial);
9T – Transcript of Proceedings, dated June 29, 2023 (Trial);
10T – Transcript of Proceedings, dated July 5, 2023 (Trial);
11T – Transcript of Proceedings, dated July 6, 2023 (Trial);
12T – Transcript of Proceedings, dated July 7, 2023 (Trial, Verdict)(Corrected Transcript);
13T – Transcript of Proceedings, dated September 29, 2023 (Sentence).

On February 18, 2022, the Honorable Vincent N. Judge Falcetano, Jr., J.S.C. denied defendant's motion to reopen detention. (2T).

On July 18, 2022, Judge Falcetano conducted a Faretta[3] hearing and granted defendant's motion to waive his right to counsel and proceed pro se. (5T; Da 5).

On June 26, 2023, the parties met for jury selection before the Honorable Joseph W. Oxley, J.S.C. Prior to beginning with jury selection, Judge Oxley heard a motion filed by defendant to exclude all the State's witnesses as improper lay witnesses because they did not witness the crime. Defendant requested a 104 hearing for each witness to proffer their testimony. (6T:7-7 to 9-22). Judge Oxley denied defendant's request for an evidentiary hearing and denied defendant's motion to exclude the State's witnesses. (6T:48-5 to 49-5).

Following the denial of defendant's motion, jury selection began and continued the following day. (6T; 7T). On June 27, 2023, while still conducting jury selection, Judge Oxley revoked defendant's pro se status and ordered stand-by counsel to take over. (7T:42-18 to 59-20). Jury selection then resumed with stand-by counsel. (See generally 7T).

On June 28, 2023, trial commenced and continued until July 7, 2023 when the jury informed the judge that they could only come to a unanimous verdict on one count and were deadlocked on the rest. (12T:36-6-11; 37-10 to 38-1). The parties agreed to take the partial verdict. (12T:36-12 to 37-6). The jury was brought out and asked to state their unanimous verdict. They found defendant guilty on Count One, Robbery, only. (12T:37-10 to 38-18). The jury was polled and the verdict confirmed. (12T:39-23 to 40-4).

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[3] Faretta v. California, 422 U.S. 806 (1975).

Considering the partial verdict, the State did not proceed with the certain persons charge and further informed the court that it would not be seeking to retry the weapons counts (Counts Two through Four). The State did ask the court to rule upon the disorderly persons offense for obstruction, in violation of N.J.S.A. 2C:29-1A. (12T:42-10 to 43-8). As to that charge, Judge Oxley found defendant guilty for defendant refusing to be fingerprinted and photographed. (12T:43-15 to 44-7).

On September 29, 2023, defendant appeared for sentencing. The State filed a notice of motion for the imposition of a discretionary extended term based on his status as a persistent offender, pursuant to to N.J.S.A. 2C:44-3A. (13T:3-12 to 6-12). In support of its motion, the State appended eighteen separate certified judgement of convictions, as exhibits A-R, which the court detailed for the record. (13T:6-14 to 8-17). After a thorough analysis of all the necessary factors, the court granted the State's motion, noting that the range for sentencing was now between five and 20 years. (13T:9-19 to 12-19).

The court then analyzed the aggravating and mitigating factors. As to the aggravating factors, the court found factors three, six and nine applied. For factor three, the court stated there was "no question" that defendant would reoffend if released. (13T:26-3 to 10). As to factor six. the court opined that defendant's criminal record speaks for itself and that nothing has deterred this defendant and nothing has reformed him. The court stated, "He is the poster child of what it is to be a persistent offender." (13T:26-11 to 19). The court also found there was a clear need to deter defendant under factor nine and that although the possibility of a lengthy prison sentence has not deterred him thus

far, a lengthy sentence here may deter others from violating the law. (13T:26-20 to 27-3).

As to mitigating factors, the court made a specific point to say that none of the mitigating factors one through fourteen, "even remotely would apply based on the facts and circumstances of this case." In coming to this conclusion, the Judge Oxley specifically detailed, "I looked back over my notes with regards to the facts and circumstances that gave rise not only to the the trial, but the trial itself, and to the conviction, I find absolutely no mitigating factors." (13T:27-4 to 15).

The court then sentenced defendant to an 18-year prison sentence subject to the No Early Release Act (NERA) with three years of parole supervision. The court also ordered defendant to pay a $150 fine, $100 VCCO Assessment, $75 Safe Neighborhood Assessment, and a $30 Law Enforcement Training Fund Assessment. (13T:28-7 to 17). As to the obstruction charge, defendant was sentenced to six months imprisonment – to run concurrent to the 18-year term and a $100 fine, $50 VCCO Assessment, $75 Sage Neighborhood, and $33 court costs. (13T:29-4 to 9).

On October 30, 2023, defendant filed a notice of appeal to this Court. (Da 12-14).

COUNTERSTATEMENT OF FACTS

On August 1, 2021, Patrolman Domenic Pedone, of the Ocean Township Police Department, responded to Krauszer's Deli and Food Store on Deal Road for for a report of an armed robbery that had just taken place. Police were alerted that there were possibly three suspects that head fled the area. (8T:30-9 to 31-25).

Upon arrival on scene, Patrolman Pedone spoke with the victim, Edward Byham. After taking a statement from Mr. Byham, Pedone set up a perimeter around the store and had other officers check the surrounding areas. Pedone then went inside the store and spoke to the cashier, Andrew Sickels. (8T:32-9 to 33-23). Mr. Sickels stated he did not see the incident nor any of the subjects involved in the incident. (8T:33-24 to 34-2). Pedone asked him if there was any surveillance footage, to which Sickles advised that there was, but he did not have access to it and would have to contact his manager. (8T:34-10 to 24). Pedone assumed the footage could be copied onto a disk. However, the manager informed him that he was not able to copy the footage, explaining that since the store was new and the system had just recently been installed, he did not understand it. The manager contacted the surveillance company, but ultimately the footage was unable to be copied while Pedone was on scene. (8T:34-17 to 36-12).

Pedone was able to view the footage and later testified at trial to what he observed. 8T:36-7 to 14). Pedone observed the suspect's vehicle – a silver Buick – pull into the parking lot and clearly viewed the license plate. Pedone then communicated the plate information to dispatch, so it could be

communicated to other officers in the area. (8T:37-20 to 38-2; 39-2 to 17; 74-3 to 6).

Pedone observed three suspects. The first suspect exited the vehicle wearing a gray hoodie. Pedone observed he was a black male, wearing dark pants, and was bald with a beard. He got out of the driver's seat, walked towards the front of the store, and approached Byham's parked vehicle. Using his body-worn camera, Pedone paused the footage and took a photograph of this suspect. (8T:39-18 to 21; 41-5 to 10; 42-5 to 8; 43-22 to 45-8). From there, the suspect got into the front passenger seat of Byham's vehicle. At that point, Pedone was not able to see inside the vehicle. (8T:45-9 to 11). This first male suspect was later identified as defendant, Cowan Rainey. (8T:44-16 to 25; 184-12 to 185-12; 9T:14-22 to 25; 10T:47-4 to 6; 77-9 to 11; 78-1 to 79-3).

Pedone then observed a second black male suspect get out the rear of the Buick and move to the driver's seat. He drove down the parking lot and turned the Buick around so the front of the car was facing the road (Deal Road). Pedone observed this suspect wearing a white hoodie and dark pants with a medical mask. He had facial hair and short black hair. (8T:49-10 to 12). Using his body-worn camera, Pedone captured a photograph of the second male suspect. (8T:45-16 to 46-8; 48-12 to 15; 49-10 to 12). The second suspect was later identified as Darryl Peltzer.

Pedone observed a third male suspect on the surveillance footage; however, he did not observe this suspect getting out of the Buick, nor having any interaction with Byham's vehicle. In fact, Pedone did not observe him

being involved with the incident. Pedone was never able to identify him. (8T:49-15 to 50-13).

Pedone then observed the male in the white sweatshirt (Peltzer) exit the Buick and walk over to Byham's driver's side door. Pedone observed him reach into the driver's side window, grab something, and then immediately take his hand back out. (8T:50-23 to 51-5). He then walked to the rear of the vehicle, opened the trunk and looked around. He then closed the trunk. He then ran back to the Buick, got in, and drove off. (8T:50-23 to 51-13).

After Peltzer took off, leaving defendant behind, defendant exited the passenger seat of Byham's vehicle and ran west towards the woods. (8T:51-2 to 25). Pedone observed Mr. Byham get out of his vehicle and run after defendant. Defendant then turned around and pointed an object in Byham's direction. In response, Byham fell to the ground and appeared to "duck for cover." (8T:52-1 to 7; 54-12 to 55-22).

K-9 units were called to track the fleeing suspects; however, the search yielded negative results. (8T:58-3 to 21).

Detective Dean Schoch, of the Ocean Police Department was the on-call primary detective that night. Through his investigation of the silver Buick, he was able to identify Daryl Peltzer as a suspect. (8T:69-12 to 79-7). Meanwhile, Byham notified headquarters that he had utilized the "Find my iPhone" app and it was pinging in the area of Bloomfield Avenue and Eagle Avenue in Ocean Township, which was actually the other side of the shopping complex where the incident happened. Patrol officers responded to that location and found Byham's phone. Schoch fingerprinted the phone, but no fingerprints were recovered. (8T:79-24 to 81-14).

Schoch was, however, able to view and photograph a text message conversation between Byham, and Darryl Pelzer that was sent and received prior to the meet up at Krauszers. The text message from Byham stated, "Yo, wya" ("wya" stands for "where you at"). The response was, "3 minutes," "1 minute." (8T:83-4 to 10). Although not identified by name, Schoch determined that the phone number that Byham was communicating with belonged to Darryl Pelzer. (8T:83-17 to 84-6). Schoch then created a photo line-up and showed it to Byham. From that line-up, Byham positively identified Darryl Pelzer, who was subsequently arrested. (8T:84-7 to 23).

The victim, Edward Byham testified at trial. He testified that he remembered going to Krauszer's that evening to "buy some weed," but thereafter claimed, "I don't really remember too much." (8T:97-19 to 98-14). In fact, at one point during his testimony, Byham stated, Like – I—I don't want to be here right now." (8T:161-24). He testified that he remembered getting into an argument, but he could not remember how long the argument lasted. He remembered getting out of his car briefly, then getting back into his car, and then leaving and seeing the police at some point and speaking with them. (8T:98-14 to 99-3). He confirmed he gave a statement to police then night of the incident, yet stated, "I don't remember saying things that were in that paperwork." He stated he reviewed his statement prior to trial, but did not think he would "personally say it like that," before ultimately admitting, "if I did, I mean, it was right after it." (8T:100-16 to 24).

Based on Byham's feigned memory, the State tried to refresh his recollection by showing him the written statement he gave to police. However, even after confirming that his initials and signature were on the

statement and then reading it over, Byham claimed the statement did not refresh his memory. (8T:101-109-12; 114-20 to 116-25). When asked point blank if he recalled being robbed that evening, Byham responded, "I can't recall." When asked if he obtained the marijuana he went there to get, Mr. Byham replied, "I can't recall, sir." Mr. Byham testified he remembered speaking with police and believed he was truthful. In fact, when asked if he had any reason to disbelieve what was in his statement to police that he gave shortly after the incident, Byham stated, "I wouldn't." In effect, Byham testified he had no memory of what he said to police because his memory was, "just very, very bad." (8T:114-7 to 19; 118-2 to 124-5). At that point, the State had laid the proper foundation to introduce Byham's statement into the record and asked the court to do so. (8T:130-23 to 131-1).

The court granted the State's request and Byham read his statement to the jury:

> I called this guy about weed. He kept – he kept telling me to – he kept telling me to meet him certain places. So, I got a funny feeling. I ended up telling – I got a funny feeling, ended up meeting at Krauszers. He text when he was on the way, I guess, three minutes away. They pull in and pull left – to the left side. I was thinking the were – they were going to turn around to let out – to let the guy out the car. They pull in and pull to the left side of the store. I was thinking they were going to turn around. They let a guy out of – let a guy out of the car and approached my car to the – at the front passenger door. My car was – I unlocked my car and let him in. We agreed on a quarter of weed. I put the – money – the money was already in the center console prior to that, but I put the money in the center console. Before I asked him where the weed was at, the money was grabbed. He starts talking to me about a stack of money, hundred dollar bills which I say were fake. He tried to give me the hundred dollar bills for smaller

> bills, which I called him on it, with -- and his whole demeanor changed. He took his hand out of his pocket and he pulled a gun out of his hooded sweatshirt pocket, which was wrapped in a paper towel. The gun was pointed towards my – pointed – pointed it at me, asked me where the rest of the money. Said was in the trunk. His boy – he didn't believe me. This boy got out of the car, went to the passenger side door on the left side, approached the driver's side door, and I opened the trunk of my door to get the button to open the trunk of – to open the trunk. My phone rang, and then – my cell phone rang and my phone was grabbed from the side of my car where it was at. They guy at the window found the trunk, popped the trunk, went to the back of the trunk, and then – shut the trunk, and then walked off to the car that -- that was pulled up in. He jumped in the car and drove off. Guy pointed the gun, tried to get in the car, but left. He tried jumping the fence, and that's when I got out and tried to approach him. When I got close to -- when I got close to him, turned around, and pointed it, and said, 'come closer, I'll kill you'. The jump – he jumped the fence and then ran. And then I guess, some point after that the police were called. (8T:146-11 to 148-8).

When asked to read further, he stated that the guy holding the gun was "older, mid 30's" and was a "short, black male, scruffy beard." (8T:148-9 to 15). He stated he did not know the guy with the gun's name, just that he called him "JJ." When asked to describe the gun, he read from his statement that it was a "black handle with silver on -- and –black handle and silver." He went on that JJ was wearing "a gray sweatshirt" and that they had arrived in a "four door silver sedan." (8T:148-16 to 149-17). When asked what the other male that stole his phone was wearing, Byham read, "black male wearing a hoodie." As far as the third subject involved, Byham stated that he did not know what he looked like because he had stayed in the car. When asked which guy drove the car, he read, I guess the second guy who came to my window." (8T:149-23 to 150-9).

Co-defendant Darryl Pelzer also testified how he knew defendant prior to this incident. He explained that on the night of August 1, 2021, he rented a car from a friend and that he drove defendant and a third man he did not know to Krauszers. (8T:176-11 to 15; 179-1 to 181-14). Pelzer stated that the only reason he went to Krauszers that evening was to take defendant to "meet somebody...I'm taking him to go see the person he's going to see." (8T:181-15 to 23). Pelzer recounted that when they arrived at Krauszers, defendant got out of the car, while Pelzer and the other man stayed inside the car. After a few minutes, Pelzer wondered what was taking so long, so he exited the car. (8T:181-24 to 182-12).

When he approached Byham's, he saw a guy "fidgeting like...in fear." Pelzer also stated he saw "what is called a stage of a robbery. I don't know. I just see the guy's in fear." (8T:186-12 to 20). Pelzer said he saw defendant holding his arm out and "the dude fidgeting and jumping like this..." Pelzer explained that he spotted a phone inside the car, so, he took it and ran. When asked why he took the phone, Pelzer stated, "Because I don't know if he's going to call the cops. I wanted to get away from the whole scene...all that was was my safety to get away form what just happened. That's it." (8T:186-12 to 20; 187-18 to 188-3; 188-20 to 189-7190-20 to 191-15). Pelzer then got back inside his car and left, leaving defendant at the scene. Once he left the scene and he knew he was clear, Pelzer "tossed it [the phone] out of the car. I pulled out the – the --- the exit, and threw it out of the window in the bush down the street." (8T:197-5 to 16).

On cross-examination, Pelzer insisted that, "I did not go with him to go in the robbery, because I didn't know nothing about a robbery." Pelzer

identified defendant from the still photographs taken from the surveillance footage. Pelzer also identified himself from the still photographs and confirmed for the jury that he was the one in the white hooded sweatshirt. (8T:184-18 to 186-3).

Defendant testified in his own defense. However, his account of the events of August 1, 2021 were completely inconsistent with every other witness who testified. Defendant claimed he got a call from Darryl Pelzer, who wanted to meet up with him because defendant sold weed and K2 and Pelzer had "a hundred bucks" and wanted to buy the drugs from defendant. Defendant further testified did not drive to Krauszers that evening with Pelzer, rather he walked there. (10T:20-17 to 21-22; 24-6 to 8).

According to defendant, after he arrived at the parking lot of Krauszers, he went right up to the driver's side of Pelzer's car. He asked him. "what's up," to which Pelzer told defendant, "I need 80 of marijuana and $20 of K." Defendant stated he "gave him want he want." He then claimed that Pelzer said, "hold up, I got somebody waiting." So, defendant said he just gave Pelzer what he wanted, did not say anything because it was not his business, "I just gave him what he came for." Defendant also testified that there was another guy in the passenger's seat wearing a Polo jacket. (10T:25-8 to 26-25).

Defendant stated that after he gave Pelzer the drugs, Pelzer went over to Byham's vehicle, while defendant left and went inside the store to use the ATM. He claimed he withdrew his monthly $200 from his EBT card and left the store. He then claimed that when he stepped outside, he encountered an altercation between Byham and Pelzer. (10T:27-13 to 29-25). Defendant said

he had no idea what was going on and that he heard Byham yelling about his phone because "apparently Darryl Pelzer took his phone." Defendant testified he had nothing to do with Pelzer taking the phone. (10T:29-22 to 32-11).

Defendant turned to leave and headed towards a grassy field near some townhouses to walk back to home. As he did, Byham yelled to him, "Yo dude. I need my f-ing phone." Defendant stated he turned around and responded, "Yo. I ain't got nothing to do with that. That's between you and him" and then defendant said he "kept it moving." (10T:34-23 to 35-22).

Defendant denied arriving at Krauszers in Pelzer's car and denied being in the car with Byham. (10T:45-15 to 16; 54-15 to 21; 81-7 to 13). He stated Pelzer took the phone and the guy in the Polo jacket pulled up in the car and was now the driver. Pelzer got in the car and left. Defendant walked to the grassy area and that is when Byham yelled at him and defendant turned around to respond. He then walked home. He denied he had a gun. (40-6 to 41-12). During his testimony, defendant identified himself as the male in the gray sweatshirt from the still photographs. (10T:54-4 to 9).

Defendant was ultimately arrested. (8T:84-17 to 86-3. No gun was ever recovered. (8T:86-22 to 87-6).

LEGAL ARGUMENT

POINT I

PATROLMAN PEDONE'S TESTIMONY WAS PROPER AND DID NOT VIOLATE ANY PROVISION OF THE THE NEW JERSEY RULES OF EVIDENCE.

Under his first point, defendant asserts that various violations of the evidence rules affected his ability to receive a fair trial. More specifically, defendant asserts that (1) Officer Pedone's observational testimony regarding the surveillance video footage violated the Best Evidence Rule; (2) Officer Pedone's testimony was impermissible lay witness testimony; (3) Officer Pedone's testimony bolstered the State's case; and (4) The trial court failed to give an adverse inference. However, as defendant's assertions are legally misplaced, these arguments are without any substantive merit. The court did not abuse of discretion in its evidentiary rulings, thus there was no error committed in allowing this testimony before the jury. As such, reversal of defendant's conviction is not warranted.

Evidentiary rulings "'are subject to limited appellate scrutiny,'" because "trial judges are vested 'with broad discretion in making'" such rulings. State v. Singh, 245 N.J. 1, 13 (2021)(quoting State v. Buda, 195 N.J. 278, 294 (2008); State v. Harris, 209 N.J. 431, 439 (2012)). Reversal of a conviction based upon an alleged evidentiary ruling error is, thus, limited to only those rulings that constitute "'an abuse of discretion, i.e., there has been a clear error of judgment.'" Id. at 12 (quoting State v. Nantambu, 221 N.J. 390, 402 (2015)). "[A]n appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that

a manifest denial of justice resulted."'" Id. at 13 (quoting State v. Brown, 170 N.J. 138, 147 (2001); State v. Marrero, 148 N.J. 469, 484 (1997)).

1. Patrolman Pedon's Testimony did not violate the Best Evidence Rule.

Defendant's first argues that "Pedone's testimony about the events depicted in a surveillance video that was never produced at trial or admitted into evidence violated the Best Evidence Rule, as well as the requirement that documentary evidence must be authenticated." (Db 16). This argument is without merit.

Traditionally under N.J.R.E. 1002, the original must be produced unless it is shown to be *unavailable for some reason.* (emphasis added). The rules account for the unavailable for some reason in Rule 1002 by the language in Rule 1004(b). Under N.J.R.E. 1004(b), "The original is not required and other evidence of the contents of a writing or photograph is admissible if...(b) no original can be obtained...by other available means."

Here, defendant's argument that the failure of the State to produce the original video violated the Best Evidence Rule under Rule 1002. This argument of course ignores Rule 1004(b) whereby the State was entitled to the admission of "other evidence of the contents" of the video recording because, as evidence by the record, the original was unavailable because Pedone was unable to download a copy of the surveillance video due to the video system just being installed and the manager of the store not being able to copy or download the footage. (8T:35-6 to 36-14). As such, defendant's assertion that the State "did not prove, or even attempt to prove..." that the video was unobtainable by "reasonable means" is clearly negated by the record. (Db 19).

Defendant also argues that the State did not produce any testimony as to why it was necessary to have "other evidence" and cites to State v. Brown, 463 N.J. Super. 33, 45, 53 (App. Div. 2020) in support of this argument. However, this argument too, is negated by the record.

In State v. Brown, the Court held that a duplicate recording – via the officer's cell phone – was admissible in place of the original video because both the investigating officers and a manager familiar with the surveillance system testified as to why the original video was not obtained because it could not be exported from the surveillance system. Brown, 463 N.J. Super. at 45, 53. In citing to Brown, defendant argues that there was no due diligence by Pedone to try and obtain a copy of the footage and since the store manager did not testify, "the State failed to prove the original video was...unobtainable by 'reasonable means." Defendant further argues that the State did not "explain why no duplicate video recording was preserved or produced at trial." (Db 19). Both arguments simply ignore the testimony of Pedone in this case.

Patrolman Pedone testified that he asked for – and tried to obtain through multiple employees – a copy of the footage while he was on scene. Through no fault of his own, the system could not be accessed by the manager, who was honest with him and stated it was a new system and he did not understand it. The manager called the surveillance company, but to no avail. So, Pedone did what he could – at that time and while he was on scene – he watched the video and took still shots of the vehicle and the suspects. Pedone also took real-time notes of the license plates and relayed that information back to dispatch. (8T:36-13 to 39-8). As this record reflects, there was no bad faith on the part of Pedone, nor was there a lack of due diligence. Quite the

opposite. Pedone and the manager both tried to get access to copy the footage, but could not. Pedone encountered circumstance beyond the control of all involved at the scene that evening and attempted to obtain evidence of the crime as best he could – at that time and under those circumstances. Then, during his testimony, he explained to the court and the jury the steps he took to obtain the evidence, including viewing the footage, himself. This fully comports with our evidence rules. As to the holding in Brown, that Court was faced with a duplicate video created by the officer on his cell phone. The same facts are not present here as there was no video admitted into evidence. Thus, the same concerns in Brown regarding a duplicate video do not apply here.

Defendant also contends that "neither the absent surveillance video nor the still photographs from the video Pedone referred to during his narration were authenticated." (Db 20). However, defendant's argument is legally misplaced.

The authenticity of a document is "satisfied by evidence [that is merely] sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901. Moreover, "the individual need not even have been present at the time the video was recorded, so long as the witness can verify that the [video] accurately represents its subject." State v. Wilson, 135 N.J. 4, 14 (1994).

The events on the surveillance footage were introduced through the testimony of Patrolman Pedone, who did not witness the event, but, he told the jury how he accessed the footage from the store employee at the scene shortly after the robbery happened in the parking lot. He then personally reviewed the video and took still shots of the vehicles and the suspects. He described the videos with candor and described only the observations he personally saw happening on the

video. This, in and of itself, established a prima facie showing of authenticity. His testimony established a factual description of what he observed, thus he recounted that which the video purported to display, and that he observed the footage at the location at immediately following the time of the relevant events.

Defendant's argument that somehow additional eyewitness authentication was necessary, since Pedone was not a witness to the crimes, also finds no support in the law. Indeed, defendant cites to no legal authority that stands for the proposition he now asserts. To the contrary and as stated above, N.J.R.E. 901 does not require being present at the time the video was recorded. See Wilson, 135 N.J. at 14. Thus, this argument is simply legal incorrect.

Based on the foregoing, the trial court did not abuse its discretion in allowing Pedone to testify to his factual observations after personally viewing the surveillance footage. Nantambu, 221 N.J. at 402. His factual testimony was admissible as "other evidence" pursuant to N.J.R.E. 1004 and based on that testimony, Pedone verified that his factual assertion accurately represented the subject matter in the footage. N.J.R.E 901; Wilson, 135 N.J. at 14. On this score, defendant received a fair trial.

2. Pedone's Testimony did not Violate N.J.R.E. 701.

Defendant's next assertion that Pedone's testimony was improper lay testimony, pursuant to N.J.R.E. 701, is equally misplaced because (1) Pedone did not provide narration testimony as there was no video to narrate and (2) Pedone testified as a fact witness, thus he did not give an opinion or comment on any inferences based on the video.

While N.J.R.E. 701 permits the admission of "testimony in the form of opinions and inferences" from a witness "not testifying as an expert," where

two preconditions are met: (a) the testimony "is rationally based on the witness' perception; and (b)" the testimony "will assist in understanding the witness' testimony or determining a fact in issue" – "fact testimony" from police officers is "permitted to set forth what he or she perceived through one or more the the senses." State v. Singh, 245 N.J. 1, 25 (2021)(quoting State v. McLean, 205 N.J. 438, 460 (2011)). As explained in McLean:

> [f]act testimony has always consisted of a description of what the officer did and saw, including, for example, that defendant stood on a corner, engaged in a brief conversation, looked around, reached into a bag, handed another person an item, accepted paper currency in exchange, threw the bag aside as the officer approached, and that the officer found drugs in the bag. Testimony of that type includes no opinion, lay or expert, and does not convey information about what an officer "believed," "thought" or "suspected," but instead is an ordinary fact-based recitation by a witness with first-hand knowledge.

In McLean, the Court held that the detective's testimony went beyond the bounds of acceptable fact testimony and was improper as lay opinion testimony "both because it was an expression of a belief in defendant's guilt and because it presumed to give an opinion on latter that were not beyond the understanding of the jury." Singh, 245 N.J. at 26 (quoting McLean 205 N.J. at 463).

Pedone's testimony in this case was purely factual. He recounted only what he observed on the video: vehicles pulling in and moving around, license plate information, physical descriptions of suspects and what they were wearing, the movements of the suspects and the victim (in and out of cars, walking to the trunk, opening the trunk, closing the truck, running away, driving away, stopping and pointing an object, ducking for cover). (8T:37-20

to 55-22). Pedone also testified to what he did in regards to the investigation. He observed the video and tried to have it copied. He called dispatch with the license plate information to inform other patrol officers, he took still photographs of the suspects with his body-worn-camera, and he explained how he spoke with the victim, the store employee, and set up a perimeter around the surrounding areas. (8T:33-18 to 34-2; 38-11 to 18; 39-3 to 8; 42-5 to 12; 46-7 to 11). At no time during his testimony was Pedone asked, nor did he give his opinion on any aspect of the case. As such, defendant's argument that Pedone's testimony violated N.J.R.E. 701 is legally incorrect as it misunderstands the type of testimony Pedone gave in this case.

In that same vein, the recent decisions in State v. Watson, 254 N.J. 558 (2023) and State v. Allen, 254 N.J. 530 (2023), cited by defendant in his brief, regarding narration testimony of police officers does not apply to this case, thus those cases are wholly distinguishable. First and foremost, the testimony in the instant case was not narration testimony because Pedone was testifying like any other witness to facts from his memory. As the record makes clear, the video footage was not copied, thus it was not played for the jury during Pedone's testimony.

Unlike Watson and Allen, Pedone was not narrating a video that was playing for the jury simultaneously while he was testifying. In this case, the jury heard only from Pedone as to what he saw on the video and just like every other witness in the case, the jury had only his words and demeanor to determine the credibility of his testimony. Just like any other witness, the jury could have rejected his testimony – as it seems they did, at least in part, with respect to the inability to come to a unanimous verdict on the weapons

charges. As the jury was not convinced that defendant had a gun, it is clear that the jury was not swayed with that portion of Pedone's testimony, nor with his status as a police officer.

Second, State v. Allen, is also distinguishable. As defendant recounts, "The central factual dispute in the case was whether the defendant intentionally fired the gun at an officer, or whether is discharged accidentally." (Db 26)(citing to Allen, 254 N.J. at 534-5). The Court held that the detective's testimony stating that the defendant turned towards the officer and fired the gun was inadmissible because it was his view of the facts, which were in dispute. (Db 19; Id. at 549.). Despite the clear factual differences between this case and Allen, defendant argues that Pedone's testimony, like the detective in Allen, was based on his own subjective view of the facts. This is incorrect for two reasons. First, as stated above, Pedone was not narrating a video as it was being played. A such, unlike the detective in Allen, he was not interjecting his "view" of a particular fact while the jury was viewing the same event. Second, much of what defendant finds objectionable about the Pedone's testimony is testimony that was provided and corroborated by other witnesses. Byham – via his written statement – stated the exact same factual scenario (defendant arrived with Pelzer, defendant got into his passenger seat, defendant ran away and Byham followed, defendant turned around and pointed a gun at him). (See 10T:40-14 to 41-7). In any event, the fact that two witnesses said they saw a gun and defendant disputes that fact is of no moment because the jury clearly had issue with that fact and ultimately could not come to a unanimous verdict that he had a weapon. Thereafter, the State dismissed the charges. Pedone's testimony clearly did not usurp the role of the jury in determining if, in fact,

defendant had a gun. As to the robbery, Pedone's factual testimony was corroborated by Pelzer and Byham.

Defendant also argues that the missing video hampered the defense in its ability to counter Pedone's testimony and made it impossible to determine how much of Pedone's testimony was subjective interpretations. (Db 26-27). However, defendant took the stand and testified to his version of events and at least for some of the charges, was able to sway their decision in his favor. Thus, any argument that he was unable to counter the State's evidence is unavailing. As to his assertion that the missing video somehow makes it impossible to gauge the true "subjective" nature of Pedone's testimony, this argument is negated by the record. Indeed, the record is replete with other witnesses facts that are in direct corroboration with the facts testified by Pedone. The fact that the video could not be copied, thus unable to be admitted into evidence, simply does not provide the error here that defendant seeks. Likewise, it was not an abuse of discretion by the trial court to allow Pedone to testify as a fact witness.

3. Pedone's Testimony did not "Bolster" the State's Case.

Defendant next contends that Pedone's testimony – absent the video – was harmful and essentially "bolstered" the State's case. (Db 2829). This argument, too, is negated by the record and the corroborating testimony in this case. To be sure, the two eyewitnesses – the co-defendant and the victim – were in complete factual agreement. The fact that they had their own issues during their time on the witness stand does not dilute the information they provided to the jury – and its consistent nature. Thus, defendant's characterization that the State's evidence was "weak" is a convenient and self-

serving view of the record. Not to mention, incorrect. Pedone was not the only witness to to say defendant had a gun. Byham stated defendant pointed a gun at him and Pelzer stated he saw Byham "fidgeting in fear" with his hands up." (8T:147-9 to 148-8; 186-15 to 190-24).

Furthermore, the fact that there was no weapon recovered from the scene does not suggest, in any way, that there was not a gun because defendant ran from the scene. Byham never reached him in his chase and defendant was not ultimately found or arrested by police until December. (8T:86-4 to 8). The fact that there are no fingerprints matching defendant is of no moment. Defendant admits being at the scene, he admits selling drugs, he admits he was the one in the gray sweatshirt. There was no need to convince this jury of his identity. As such, defendant's attack on the absence of the surveillance footage is unpersuasive and his claim of an acquittal had the footage been presented finds no support in this record.

4. There was no Error in Failing to Give an Adverse Inference Charge.

Here, defendant contends that the trial court erred in not giving the jury an adverse inference charge based on the absence of the surveillance footage. However, an adverse inference is not proper here because not all missing evidence is entitled to an inference that some nefarious intent is behind its absence. Indeed, the adverse inference charge enunciated in State v. Clawans has fallen onto disfavor with our Supreme Court in more recent years. See State v. Hill, 199 N.J. 545, 566 (2009)." More specifically, the Court in Hill stated that an adverse inference had the "potential to give undeserved significance to the missing witness and unwarranted weight to evidence presented; potential for abuse and gamesmanship...scholars have questioned

the continued validity and utility of the inference. Id. at 563-64 (citing State v. Velasquez, 391 N.J. Super. 291, 306 (App.Div.2007)).

"An adverse inference charge may be warranted when a party's failure to present evidence 'raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him.'" State v. Brown, 463 N.J. Super. 33, 53 (App. Div. 2020); Torres v. Pabon, 225 N.J. 167, 181 (2016) (quoting State v. Clawans, 38 N.J. 162, 170 (1962)). That is not what happened in this case. The absence of the actual video was not due to the nefarious actions of the officer or the State. Due to circumstances beyond the control of Patrolman Pedone and the State, a copy of the surveillance video could not be obtained. What is more, based on the consistent testimony in this case as to what transpired and the actions of defendant – actions he claims are the "heart of the case" (such as him getting into the car with the victim) – it is unlikely that the footage, had it been obtained, would have been unfavorable to the State and even more unlikely that it would have been exculpatory to defendant. As this record reflects, quite the contrary. Pedone, Byham and Pelzer all testified that defendant arrived with Pelzer. They all three also testified that defendant got into Byham's car. Byham and Pelzer testified to the robbery taking place inside the car with defendant as the perpetrator.

What the defense is arguing here is exactly what the Court in Hill warned – giving an adverse inference can lead to undeserved significance and weight to the missing evidence and gamesmanship. Hill 199 N.J. at 566. Especially for evidence that was not mistreated by the State, nor intentionally withheld from the jury. Such an inference was simply not warranted here and the lack of such is not reversable error.

POINT II

A SIGNIFICANT PORTION OF BYHAM'S STATEMENT WAS SUBSTANTIALLY READ INTO THE RECORD, PURSUANT TO N.J.R.E 803 (C)(5), THUS NOT ADMITTING THE WRITTEN STATEMENT INTO EVIDENCE WAS NOT PREJUDICIAL.

Defendant's argument under this point is meritless because it is a mischaracterization of of Byham's statement – as a whole. As the statement was read to the jury, almost in its entirety, and the few remaining portions that were not read were certainly not favorable to the defendant, no prejudice resulted in not admitting the written statement, itself.

In order to satisfy N.J.R.E. 803(c)(5), recorded recollection, the party who offers the evidence must show there was a statement concerning a matter about which the witness is unable to testify fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record which:

> (A) was made at a time when the fact recorded actually occurred or was fresh in the memory of the witness, and (B) was made by the witness or under the witness' direction or by some other person for the purpose of recording the statement at the time it was made and; (C) the statement concerns a matter of which the witness had knowledge when it was made, unless the circumstances indicate that the statement is not trustworthy; provided that when the witness does not remember part or all of the contents of a writing, the portion the witness does not remember. may be read into evidence but shall not be introduced as an exhibit over objection.
>
> [N.J.R.E. 803(c)(5)].

To satisfy these requirements, the person offering the evidence must first establish that the witness has impaired memory. State v. Williams, 226 N.J. Super. 94, 103 (App. Div. 1998); see also State v. Gore, 205 N.J. 363, 376-377 (2011).

Once that showing has been made and accepted by the court, the proponent of the evidence must show that the statement was made when the event that gave rise to the statement occurred or was fresh in the memory of the witness. N.J.R.E. 803(c)(5)(A). This statement must concern a matter of which the witness had acknowledge when made. N.J.R.E. 803(c)(5)(C). Here, defendant incorrectly argues that the trial court "erroneously interpreted Rule 803(c)(5)." (Db 34). In support of this argument, he cites only to the end of the colloquy the court had with the parties in admitting the evidence, thus failing to give proper context to the court's decision.

As an initial matter, Mr. Byham, from the outset of his testimony, stated repeatedly that he did not recall the exact events of the evening of August 1, 2021. When the State tried to refresh his recollection with the statement he gave to police shortly after the incident, he also stated repeatedly that did not recall exactly what he said to police in his statement. (8T:94-9 to 109-12). At the point where nothing was refreshing his memory, the State began questioning Byham in order to lay the foundation to admit his statement as a recorded recollection, pursuant to N.J.R.E. 803(c)(5). (8T:114-8 to 131-6); State v. Gore, 205 N.J. 363, 376-378 (2011). Once the State laid the foundation and asked the Court to allow the portions of Byham's statement that he could not remember to be read into the record, defense counsel objected and stated, "I – I'm just wondering if you have to admit the whole statement or if you can choose which sections you want to." (8T:130-23 to 131-9). The State answered that the entire written statement could be admitted if there was no objection from the defense, to which defense counsel stated he did not "recall that in the rule" that certain oral portions could be put in and others cannot. (8T:131-10 to 18). The State responded by referring counsel to the rule. The

court then interjected and took the time to explain that yes, the portions he did not remember were allowed to be read in and if counsel wanted to cross on the unread portions he could – or he could not object to the written statement, itself, coming in as evidence. Defense counsel responded, "I – I – I think I would rather cross-examine him on the things that weren't put in." (8T:131-19 to 133-2). In other words, defense counsel objected to the written statement, itself, being admitted and going to the jury.

Defense counsel's objection to the written statement, itself, being admitted continued when he argued that Byham specifically stated that there were certain things in the document that he did not agree with and how defense counsel wanted to cross-examine him on that. (8T:136-1 to 5). At the end of the colloquy, the State asked for a ruling from the court. The court found the State had met the requirements for the hearsay exception and that defense counsel would be allowed robust cross-examination. (8T:133-13 to 139-20).

When Byham's testimony resumed, the State elicited testimony from him thereby having him read his written statement for the jury, pursuant to N.J.R.E. 803(c)(5). (8T:142-13 to 150-19). During this process, defense counsel objected again, stating that he thought the statement, itself, would be admitted. The court clarified that he had objected to the written statement being admitted because he wanted to cross-examine Mr. Byham as to what he claimed was not accurate in the statement. In response, defense counsel stated, "I understand now. Yes." (8T:143-14 to 144-22). Thus, as this colloquy aptly demonstrates, the court did not erroneously prevent defense counsel from admitting the written statement into evidence due to a misunderstanding of the law, the court explained the rule to defense counsel and asked him how he

wanted to proceed, as the rule requires. Defense counsel objected, as permitted to do under the Rule, and therefore, the court properly ruled the statement would not be admitted and given to the jury. To be sure, defense counsel's wavering back and forth and his own misunderstanding of the Rule does not now equate to an error by the trial court.

In that same vein, defendant also argues that not admitting the written statement was harmful because Byham did not read the statement into the record as written, but rather made "significant omissions," one being a distinction in the description of the hoodie Pelzer was wearing. (Db 35). This argument is of no moment because both Pelzer and defendant identified themselves, in their various hooded sweatshirt attire, during their own testimony. As such, identification of either man was never an issue in this case. Defendant, Byham and Pelzer all testified that Pelzer was the one who took Byham's phone. Moreover, defendant assertion that such an omission somehow affected the credibility of testimony as to who actually got into Byham's car is meritless. Every witness, with the exception of defendant, stated it was defendant who got into the passenger's seat of Byham's car. Clearly the jury's credibility issue centered on not believing defendant's version of events, as evidenced in the verdict convicting defendant of the robbery, which happened inside the car.

In any event, the admission of the statement, itself, would not have been favorable to defendant and in fact, could have affected the hung jury on the weapons charges. A review of the record side-by-side with the written statement show that with the exception of the introductory information (age, occupation, high school), the rest of Byham's statement – the events of August

1, 2021 – were read into the record. (See 8T:146-5 to 150-18; compare Da 19-21). But notably, on the witness stand when he read the statement, Byham only identified the gun as "black handle with silver on – and -- black handle and silver." However, in the written statement, Byham identified the gun as "Black handle with silver on the side ***semi-automatic***." (8T:149-4 to 8; compare Da 20)(emphasis added). As the record reflects, the jury struggled with the weapons charges and ultimately could not come to a unanimous decision. Had the jury received the written statement where Byham further described and identified the weapon, it is possible that his entire description may have convinced them defendant had a gun.

To the extent that this Court finds that the written statement should have been admitted and given to the jury, such error was harmless. The harmless error analysis requires a court to "determine whether the error was 'of such a nature as to have been clearly capable of producing an unjust result.'" Allen, 254 N.J. at 549 (quoting State v. Trinidad, 241 N.J. 425, 451 (2020); R. 2:10-2). This has "generally" been "considered to mean that the error was of a nature sufficient 'to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Id. at 549-50 (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

In light of the fact that the majority of Byham's statement was read to the jury and the parts that were not are either not favorable to defendant, or of of no factual significance, combined with the overwhelming evidence supporting defendant's guilt, such as the consistent and corroborating testimony of each witness, this Court should find that no injustice occurred in

defendant's trial that would cause the jury to reach a conclusion they may not have otherwise reached.

POINT III

DARYL PELZER TESTIFIED AS A FACT WITNESS, THUS N.J.R.E. 701 AND 702 DO NOT APPLY.

Defendant's two arguments under this point – that Pelzer opining on what other witnesses said was improper lay opinion testimony and making comments about fingerprints somehow transformed him into an expert is legally misplaced.

Pelzer testified solely as a fact witness. As a co-defendant, Pelzer was called to testify to his personal knowledge of events as he was clearly present at the scene and a witness to the actual event. N.J.R.E. 602 (requiring that a lay witness have "personal knowledge" to be allowed to testify). Indeed, Pelzer testified as part of his plea agreement with the State. (See 8T:176-11 to 177-10).

To that end and as this record reflects, Pelzer's testimony was often a narrative stream of verbal consciousness where he was consistently attempting to justify his own actions – not to comment on an independent source of evidence, as suggested by defendant. (See e.g.178-3 to 25; 179-11 to 25; 182-6 to 25; 186-12 to 190-3192-21 to 194-25; 196-6 to 21; Db 38). The fact that Pelzer made fleeting comments about other witnesses' statements – that he learned about in review of the discovery in his own case – does not automatically transform his testimony from purely factual into an improper lay opinion. (See 8T:196-10 to 12). As such, Rule 701 does not apply.

Likewise, Pelzer's comments about where his own fingerprints were and were not found – as already testified to and explained to the jury via the testimony of Detective Schoch prior to Pelzer taking the stand – also does not automatically transform his testimony into improper expert testimony. (See (8T:78-13 to 79-7; compare 189-8 to 190-1; 192-21 to 194-15. Expert testimony, as addressed by N.J.R.E. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

With the Rule in mind, it cannot be plausibly argued that Pelzer's comments about his fingerprints was scientific, technical or was even in the realm of having specialized knowledge. Nor can it be plausibly argued that his testimony regarding his fingerprints "usurped the function of expert opinion." (Db 41). Finally, it cannot be plausibly argued that Pelzer's comments were received by the jury as an expert "opinion" that swayed them in any convincing manner. Pelzer was trying to justify and explain his actions, not explain the give expert fingerprint analysis to the jury. Defendant's attempt to recharacterize Pelzer's testimony as prejudicial is unpersuasive because Pelzer's testimony factually corroborated every other witness in the case – except defendant. (Db 44). The fact that the jury did not believe defendant's version, and instead believed every other witness in this case, does not alter the type of testimony given in this case, nor demonstrate that defendant did not receive a fair trial. Accordingly, Rule 702 does not apply.

Defendant also argues that Pelzer's testimony somehow violated the Confrontation Clause. This argument is legally misplaced as the Confrontation Clause prohibits the use of out of court testimonial hearsay, untested by cross-examination, as a substitute for in-court testimony." State ex rel. J.A., 195 N.J. 324 (2008) (discussing Crawford v. Washington, 541 U.S. 36, 51-61 (2004)). As Pelzer clearly testified and was cross-examined, this argument finds no basis in the law.

POINT IV

THERE IS NO CUMULATIVE ERROR IN THIS RECORD TO WARRANT REVERSAL OF DEFENDANT'S CONVICTION.

"[I]ncidental legal errors" necessarily "creep into" proceedings. State v. Orecchio, 16 N.J. 125, 129 (1954); see also State v. Marshall, 123 N.J. 1, 169 (1991), cert. denied, 507 U.S. 929 (1993). Where they do so in a manner that does "not prejudice the rights of the accused or make the proceedings unfair," "an otherwise valid conviction" will not be disturbed. Ibid. Only where "the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the [proceedings] unfair," do "fundamental constitutional concepts dictate" the grant of relief. Ibid.

Despite having failed to establish that any reversible error exists, defendant argues this Court should aggregate these non-reversible errors into a cumulative effect that together render his conviction reversible. There is no basis in law or fact to do as defendant requests. The individual alleged errors complained of by the defendant do not alone rise to the level of reversible

error, see supra, and, for that reason, cannot and should not be aggregated to cumulative error warranting reversal of defendant's conviction.

POINT V

THE SENTENCE IN THIS CASE WAS PROPER.

Defendant agues that the trial court, in sentencing defendant, failed to take into account two mitigating factors: mitigating factor one ("The defendant's conduct neither caused nor threatened serious harm"); and mitigating factor two ("The defendant did not contemplate that the defendant's conduct would cause or threaten serious harm"). (Db 47-48). Defendant further argues that the court erred in imposing discretionary fines without making the required findings on the record. (Db 48-49). However, both of these arguments are negated by the record.

The sentencing court must consider and issue findings on mitigating factors raised by the defendant. State v. Case, 220 N.J. 49, 68 (2014). "[M]itigating factors that are suggested in the record, or are called to the court's attention, ordinarily should be considered and either embraced or rejected on the record." State v. Blackmon, 202 N.J. 283, 297 (2010). However, a trial court need not "explicitly reject each and every mitigating factor argued by a defendant." State v. Bieniek, 200 N.J. 61, 609 (2010).

Defendant's arguments regarding mitigating factors one and two are wholly unpersuasive. This defendant was convicted of second-degree robbery, which, as a matter of law, is an inherently violent crime. To be sure, it requires the actual use of force or threatened force. So, to assert there was no harm, simply because defendant did not inflict physical damage to the victim is not entirely accurate based on the elements of the crime for which he was

convicted. Furthermore, to suggest that defendant did not contemplate harm conveniently ignores the facts and circumstances of this case.

In rejecting these factors, the judge specifically noted that he "looked long and hard at the presentence report, went back over my notes with regards to the facts and circumstances that gave rise not only to the trial, but the trial itself, and to the conviction..." The judge then found, "I find absolutely no mitigating factors." (13T:27-4 to 9). In so finding, the judge stated, "None of these factors that were outlined by our Legislature, that's mitigating factors 1 through 14, even remotely would apply based on the facts and circumstances of this case." (13T:27-10 to 13). The court noted that the defense had asked him to take into consideration the fact that the victim was not seriously hurt, but the court responded, "I do take that into consideration, but it is of small solace with the history of this defendant," while also noting how the facts presented to the jury "were troubling." (13T:27-25 to 28-6). This thorough analysis fully demonstrates why the court rejected not only mitigating factors one and two, but all mitigating factors.

In that same vein, the record adequately supports the discretionary fines imposed. Defendant was convicted of robbery – a theft by force. Prior to imposing sentence, including the fines, the court went through defendant's extensive criminal history. (13T:6-20 to 8-17). The court was well aware of the factual circumstances leading to the conviction for robbery as it presided over the trial. In finding all applicable aggravating factors (and no mitigating factors), the court detailed how defendant was not stranger to criminal activity or to the criminal justice system. (13T:25-16 to 26-2). The court spoke to the fact that defendant was likely to commit another crime, spoke to the

seriousness of the current conviction as well as his previous criminal history and how there was a strong need to deter this defendant and others from violating the law. (13T:26-3 to 27-3).

With the court's sentencing colloquy in mind, in State v. Miller, the New Jersey Supreme Court held that "sentences can be upheld where the sentencing transcript makes it possible to 'readily deduce' the judge's reasoning.'" State v. Miller, 205 N.J. 109, 127, 129 (2011). The Court went on to say, "We can safely 'discern' the sentencing court's reasoning when the record is clear enough to avoid doubt as to the facts and principles the court considered and how it meant to apply them." Id. at 130. Based on the record before this Court, the judges reasoning as to why he imposed, not only the state prison term, but the entire sentence imposed, can be adequately gleaned form this record. As such, there is no need to remand for a resentencing.

POINT VI [4]

AS IT IS EVIDENT BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED HIS PRIOR CRIMES ON SEPARATE OCCASIONS, THE TRIAL COURT'S DETERMINATION OF THE OCCASIONS INQUIRY IS HARMLESS ERROR

Relying on the United States Supreme Court's opinion in Erlinger v. United States, 144 S. Ct. 1840 (2024), defendant contends that his sentence must be vacated and the case remanded for resentencing because his extended-term sentence as a persistent offender was based on the judge's findings, as

[4] This POINT responds to defendant's Motion to File A Supplemental Brief and his accompanying submission of POINT VI, dated August 6, 2024 and granted by this Court on August 27, 2024.

opposed to the jury's, that defendant's prior crimes were committed on separate occasions.

In Erlinger, the Supreme Court considered the question "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." Id. at 1846.

The defendant in the case was charged under federal law with being a convicted felon in possession of a firearm, a crime carrying a maximum term of imprisonment of 10 years. Ibid. Because of the defendant's criminal history, he was also charged under the federal Armed Career Criminal Act (ACCA), which provides for enhanced sentencing if a defendant "has three previous convictions...for a violent felony or a serious drug offense, or both, committed on occasions different from one another[.]" 18 U.S.C.S. § 924(e)(1); ibid. The ACCA imposes a minimum term of imprisonment of 15 years and a maximum term of life in prison. Erlinger, 144 S. Ct. at 1846. After the defendant pleaded guilty, "the judge [] found it more likely than not that [the defendant's] past included three ACCA-qualifying offenses committed on three different occasions." Ibid. Based on that finding, although the judge regarded a five-year sentence as appropriate, he imposed a 15-year sentence, believing himself constrained to do so under ACCA. Ibid.

The Supreme Court held that "[v]irtually 'any fact' that '"'"increase[s] the prescribed range of penalties to which a criminal defendant is exposed"'" must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." Id. at 1851 (quoting Apprendi v. New Jersey, 530

U.S. 466, 490 (2000)). In reaching its decision, the Supreme Court relied on Apprendi, which involved a New Jersey statute that permitted enhanced sentencing if a judge found by a preponderance of the evidence that the defendant's crime was motivated by racial bias. Id. at 1850. The court held that any fact that increases the maximum penalty for a crime must be found by a jury. Ibid. Likewise with respect to any fact that increases the minimum penalty, as the Supreme Court held in Alleyne v. United States, 570 U.S. 99 (2013). Id. at 1851.

Concurring in the Court's judgment, Chief Justice John Roberts emphasized that a violation of this rule is subject to harmless error review. Id. at 1860-61 (Roberts, C.J., concurring). On this point, Chief Justice Roberts drew upon the principal dissent by Justice Brett Kavanaugh, who noted that "[i]n any case that has not become final, the relevant appellate court can apply harmless-error analysis." Id. at 1866 (Kavanaugh, J. dissenting). Elaborating in a footnote, Justice Kavanaugh wrote, "For any case that is already final, the Teague rule will presumably bar the defendant from raising today's new rule in collateral proceedings." Ibid. at n.3. In Teague v. Lane, 489 U.S. 288 (1989), the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310.

This suggests that Erlinger be given "pipeline retroactivity" to cases on appeal from judgments of conviction. The New Jersey Supreme Court adopted this approach in a similar context in State v. Grate, 220 N.J. 317, 336 (2015), where it held that Alleyne, which was decided during the pendency of the appeals from the judgments of conviction, applied to the defendants'

convictions. Likewise, Erlinger would apply to cases where the judgments are not final because they were on appeal when Erlinger was decided.

Yet, as Justice Kavanaugh observed, "[i]n most (if not all) cases, the fact that a judge rather than a jury applied ACCA's different-occasions requirement will be harmless" because the occasions inquiry "is usually a straightforward question." Erlinger, 144 S. Ct. at 1866 (Kavanaugh, J. dissenting). In Erlinger, the defendant was previously convicted of three burglaries that he committed on different dates against different victims at different locations. Id. at 1867 (Kavanaugh, J. dissenting).

Here, defendant was sentenced on September 29, 2023 for his convictions for second-degree robbery and obstruction. During the sentencing proceeding, the court detailed, for the record, eighteen (18) separate prior judgment of convictions on six (6) different dates, beginning in 1995 through 2019, and leading up to the current 2023 convictions. (See 13T:6-14 to 9-1). It is thus "evident beyond a reasonable doubt that the failure to submit the different-occasions question to the jury had no effect on the defendant's sentence." Erlinger, 144 S. Ct. at 1866 (Kavanaugh, J. dissenting).

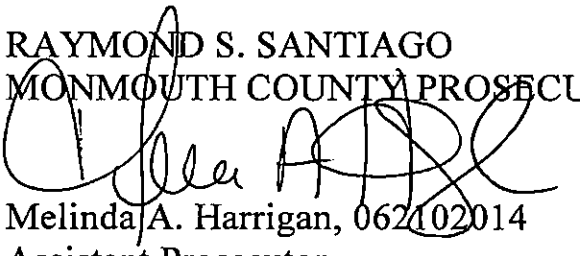
As it is clear that defendant committed his prior crimes on separate occasions, it was harmless error for the trial court to decide the occasions inquiry. Accordingly, the trial court correctly held that defendant is subject to an extended term of imprisonment as a persistent offender, N.J.S.A. 2C:44-3a.

CONCLUSION

For the above mentioned reasons and authorities cited in support thereof, the State respectfully submits defendant's conviction and sentence should be affirmed.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR



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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0628-23T2
INDICTMENT NO. 21-11-01514-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
		On Appeal from a Judgment of
Plaintiff-Respondent,	:	Conviction of the Superior Court of New Jersey, Law Division,
v.	:	Monmouth County.
COWAN RAINEY,	:	Sat Below: Hon. Vincent N. Falcetano, Jr.,
Defendant-Appellant.	:	J.S.C.; Hon. Joseph W. Oxley,, J.S.C., and a Jury.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Cowan Rainey relies on the Procedural History and Statement of Facts set forth in his opening brief. (Db 1-14)[1]

LEGAL ARGUMENT

POINT I

OFFICER PEDONE'S SUMMARY OF THE ABSENT SURVEILLANCE VIDEO VIOLATED THE BEST EVIDENCE RULE AND N.J.R.E. 901, REQUIRING THE REVERSAL OF MR. RAINEY'S CONVICTIONS.

For the reasons stated in Point I.A of Mr. Rainey's opening brief, the admission of Pedone's summary of the surveillance video violated N.J.R.E. 1002, the Best Evidence Rule, and the authentication requirement of N.J.R.E. 901. (Db 19-20) The State offered Pedone's testimony to prove the video's contents, but failed to produce either the original video or a duplicate, or to show that any exception to the Best Evidence Rule applied. Furthermore, the State failed to authenticate the absent video, or to demonstrate that it accurately represented the events that it allegedly portrayed. The admission of Pedone's summary of a missing video that allegedly captured the incident, establishing

[1] Da: Defendant's appendix
Db: Defendant's opening brief
Sa: State's appendix
Sb: State's brief
8T: Transcript of 6/28/2023 (Trial)

the identity of the individual who entered Byham's car, was extremely harmful and requires the reversal of Mr. Rainey's convictions. See U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9-10

N.J.R.E. 1002, the Best Evidence Rule, requires the production of an original writing or photograph. N.J.R.E. 1004 establishes exceptions to the Best Evidence Rule. Contrary to the State's assertion, N.J.R.E. 1004(b) does not establish an exception to the Best Evidence Rule any time the original "is shown to be *unavailable for some reason."* (Sb 15) (emphasis in original). Instead, the rule is clear that the exception only applies if "no original can be obtained *by any available judicial process or procedure or by any other available means.*" R. 1004(b) (emphasis added).

Here, the State fails to demonstrate that law enforcement was unable to obtain the surveillance video by any means available to them. See R. 1004(b). Instead, the State claims only that Pedone attempted to obtain the video on the night of the incident and did not act in bad faith. (Sb 15-17) Even assuming that Pedone made a good faith effort to obtain the surveillance video on the night of the incident itself, there is simply no evidence in the record suggesting that the original surveillance video (or a duplicate thereof) was unobtainable by any of the means available to law enforcement. See R. 1004(b). Pedone testified that on the night of the incident, the store manager told Pedone that "he [the store

manager] would contact the company, but ultimately, he stated that he was unable to copy it at the time when [Pedone] was there." (8T:35-20 to 36-2) Nothing in the record suggests that law enforcement ever attempted to contact the third-party company that managed the convenience store's surveillance system in order to gain access to the footage. The fact that Pedone was unable to obtain the original video immediately hardly renders the video unobtainable. The State fails to explain why any and all law enforcement efforts to obtain the video seemingly ended on the night of the incident.

State v. Brown (discussed in detail in Point I.A. of defendant's brief) provides a useful example of when an original surveillance video is unobtainable for purposes of the Best Evidence Rule. 463 N.J. Super. 33, 45, 53 (App. Div. 2020). In that case, the investigating police officer testified that he could not obtain the original surveillance video because the Rutgers University "surveillance system was too old" to export the original video. However, the officer's efforts to obtain the video did not end there. Instead, he explained how he worked with the university's "IT and security technologies to try and export it," but was ultimately unsuccessful and recorded the video with a cell phone in order to avoid "los[ing] the footage" altogether. A manager in the Rutgers Security Technologies Unit further testified that the original video was unobtainable because the surveillance system lacked any "backup system,"

making it necessary for the officer to record a separate video of the original surveillance video in order to preserve it. Id. at 45, 53. Here, unlike in Brown, there was no explanation for why law enforcement apparently never attempted to obtain the surveillance video from the third-party company that administered the convenience store's surveillance system after the night of the incident. And unlike the officer in Brown, Pedone inexplicably failed to use his body camera to record a duplicate of the original video. (Db 19-20)

Furthermore, Pedone's extensive testimony summarizing the missing surveillance video was also improper because the video was never authenticated. See N.J.R.E. 901 ("[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims.") The State's argument that the absent video was properly authenticated because Pedone "described the video[] with candor and described only the observations he personally saw happening on the video" reflects a fundamental misunderstanding of the authentication requirement established by our evidence rules. (Sb 17-18) A video cannot be authenticated through the testimony of someone who has watched it once. Instead, our evidence rules require the authenticator to verify that the video accurately depicts the scene or the events portrayed therein. See State v. Wilson, 135 N.J. 4, 14-15, 17-18 (1994); (Db 18)

The State's reliance on Wilson to support its argument that Pedone properly authenticated the absent video is misplaced. (Sb 17) In Wilson, an investigator made a video recreation of a crime that he did not witness himself, and which was not actually captured on video. The video recreation was based on what eyewitnesses to the crime and other investigators had told him. Id. at 10-11, 18-19. Our Supreme Court held that the investigator could not properly authenticate the video recreation of the crime because he was not present at the time when the crime occurred, and therefore could not verify "that the video accurately depicted events as he had seen them when they occurred." Id. at 19. Instead, the Court held that the video recreation could only be properly authenticated by the eyewitnesses to the crime. Ibid.

The State's argument that Pedone's narration of the absent video "in and of itself [] established a prima facie showing of [the video's] authenticity" is circular and conclusory. (Sb 18) Here, like the investigator in Wilson, Pedone was not present when the crime occurred. Although Pedone had watched the surveillance video once, he could not verify that the missing video "accurately depicted events as he had seen them *when they occurred*." Wilson, 135 N.J. at 18-19 (emphasis in original) (holding only a witness to the actual crime can properly testify that a video accurately depicts events as they occurred during the crime). Thus, the only trial witnesses who could have authenticated the

surveillance video in the instant case were the eyewitnesses to the crime. However, there is no evidence that either Pelzer or Byham were ever shown the surveillance video. Pedone – who lacked any firsthand experience of the events depicted in the video – could not properly authenticate the video.

The erroneous admission of Pedone's summary of a surveillance video that allegedly depicted the robbery, yet was not in evidence nor authenticated by any eyewitness, deprived Mr. Rainey of a fair trial. Pedone's summary of the missing video was by far the State's strongest evidence placing Mr. Rainey in Byham's car during the incident. The only eyewitness testimony presented by the State came from Byham and Pelzer. By his own admission, Byham could not recall much about what had occurred on the night of the incident. Furthermore, Byham had previously identified the man who got into his car as "JJ" – an individual whose phone number was traced back to Pelzer. And Byham had identified Pelzer from a photo array. (Db 9); (1T:10-5 to 11; 8T:148-16 to 19) The only other testimony placing Mr. Rainey in Byham's car at the time of the incident came from Pelzer, Mr. Rainey's codefendant. Thus, the trial court's admission of Pedone's summary of the absent surveillance video was extremely harmful and denied Mr. Rainey a fair trial.

CONCLUSION

For the reasons stated herein and in Point I of Mr. Rainey's opening brief, the State's violation of the Best Evidence Rule and authentication requirements requires the reversal of Mr. Rainey's convictions.

Respectfully Submitted,

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Dated: September 13, 2024