

## RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4392-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSHUA M. GREEN,

Defendant-Appellant.

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Argued October 25, 2016 — Decided August 21, 2017

Before Judges Fisher, Ostrer and Vernoia.

On appeal from the Superior Court of New  
Jersey, Law Division, Middlesex County,  
Indictment No. 12-02-0322.

Rochelle Watson, Assistant Deputy Public  
Defender, argued the cause for appellant  
(Joseph E. Krakora, Public Defender, attorney;  
Ms. Watson, of counsel and on the brief).

Nancy A. Hulett, Assistant Prosecutor, argued  
the cause for respondent (Andrew C. Carey,  
Middlesex County Prosecutor, attorney; Ms.  
Hulett, of counsel and on the brief).

PER CURIAM

A jury found defendant guilty of second-degree attempt to  
commit aggravated sexual assault by sexual penetration during a

kidnapping, N.J.S.A. 2C:14-2(a)(3) and N.J.S.A. 2C:5-1; second-degree kidnapping (as a lesser-included offense of first-degree kidnapping), N.J.S.A. 2C:13-1(b); and second-degree attempt to commit sexual assault, N.J.S.A. 2C:14-2(c) and N.J.S.A. 2C:5-1. The convictions arose out of an attack on September 15, 2011 at a nutrition products store in Perth Amboy. Minutes after the store opened for business in the pre-dawn hours, a man walked in, forced the sole employee, Maria,<sup>1</sup> into a rear bathroom, threw her against the sink and toilet, and tried to rape her. After two regular customers entered the store, the assailant tried to barricade Maria in the bathroom with a mop and then fled. A surveillance video from a neighboring store recorded him as he entered and, minutes later, ran from the store, but the picture quality was poor.

The trial focused on identification, as the State lacked forensic evidence tying defendant to the crime. Months after the attack, the victim identified defendant from a photo array and identified him again in court. With some uncertainty, one of the regular customers also identified defendant in court, after he previously did not identify him from a photo array.

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<sup>1</sup> We use pseudonyms to protect the privacy of the victim and eyewitnesses.

As his principal point on appeal, defendant contends the court erred in allowing the State to bolster these two witnesses by (1) permitting Perth Amboy police officers involved in the investigation to opine that defendant was depicted on the video despite lacking any prior personal familiarity with defendant; and (2) allowing testimony that defendant's photo was included in the array because a South Brunswick police officer, who was familiar with defendant, believed he was the man in the video.

I.

Maria told police that her attacker entered the store soon after it opened and ordered a nutrition shake. While Maria's back was turned to prepare the drink, he grabbed her from behind, dragged her to the bathroom and locked the door behind him. He then tried to sexually assault her in various ways, choking and striking her in the face and neck when she resisted.

Gerardo was the first regular customer to enter the store the morning of the attack. He overheard what he believed was an argument in the bathroom. He heard Maria tell a man to let her go. Then, he saw a man exit and run out of the store. Maria came out, crying and apparently beaten, and said the man had tried to rape her. The second customer, Miguel, passed the fleeing man as he entered the store.

Maria was reluctant to call the police. She said that in El Salvador, from which she emigrated, women who accused men of rape were often killed. However, a coworker who arrived around 8:40 a.m. called the police and persuaded Maria to cooperate. Perth Amboy Police Detective Marcos Antonio Valera and Detective Sandra Rivera arrived soon thereafter. The police made no effort to collect fingerprint or DNA evidence from the scene. Detective Valera explained that multiple people had entered the store after the attack.

The eyewitnesses did not provide identical physical descriptions of the attacker. According to Detective Valera, Maria said she saw her attacker's face when he ordered a shake, but he "didn't let me see" him while they were in the bathroom. In her initial statement, she said her assailant was a twenty-four to twenty-six year old black male; he was taller than Detective Valera who is six feet tall; his hair was curly; he had a big mouth; and a face that appeared "pulled back." Detective Rivera testified that Maria said her attacker had a protruding mouth, "small ears, big eyes and his face was kind of drawn, kind of long and he was kind of lanky . . . ."

Later that day, Maria was unable to identify her assailant from about 400 photos – none of defendant – that police presented

to her. She also did not make an identification from a photo array a week later.

Gerardo said the assailant was black, between eighteen and twenty years old. He did not see his face, which he said was covered with a jacket. But, he confirmed that the man shown running from the store on the surveillance video was the man he saw flee the store. According to witnesses, the fleeing man wore shorts and a team jersey.

Miguel told Detective Valera that he saw the assailant well and he was confident he could identify him if he saw him again. In a statement given on the day of the attack, Miguel said the assailant appeared to be a young black man, eighteen or nineteen years old, weighing about 125 to 130 pounds, and about five foot seven.

Detective Valera took two still photos from the neighboring store's surveillance video and disseminated them to other police departments seeking assistance in identifying the man pictured.<sup>2</sup> South Brunswick Detective Roger Tuohy responded that he believed the still photos were of Joshua Green, with whom he was familiar. He sent photos he had of defendant. Notwithstanding Detective

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<sup>2</sup> The trial court overruled defense counsel's pre-trial objection to admission of the bulletin Detective Rivera disseminated. None of the photographic or video exhibits introduced in evidence has been included in the record on appeal.

Valera's alleged belief, based on Detective's Tuohy's input, that defendant committed the assault, the police took no immediate steps to arrest him, to place him under surveillance, or to seek a warrant to search his apartment for clothing that matched those worn by the man in the video.

Soon after the attack, Maria called Detective Valera to say she believed she saw her attacker board a bus that stopped near her workplace. But, when police stopped the bus in another town, they did not identify any passenger who looked like the attacker. Maria herself was not permitted to view the passengers.

On November 17, 2011, Detective Rivera noticed a man at a bus stop in Perth Amboy who, based on the photos Detective Tuohy had supplied, looked like defendant. Detective Rivera, who was out of uniform, struck up a conversation with the man, who identified himself as Joshua Green. She also surreptitiously took photographs of him.

Police did not show Maria an array with defendant's photo until November 25.<sup>3</sup> Maria selected defendant's photo with certainty. Miguel also reviewed the same November 25, 2011 photo array. He said defendant's photo looked most like the man who fled the store, but when asked if he is was sure, he said no. He

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<sup>3</sup> The photo used in the array was one from an unrelated arrest of defendant.

later testified that he was fifty to seventy percent certain that defendant's photo matched the fleeing man, but he remained silent because he thought he needed to be entirely certain.

Detective Valera arrested defendant a week later. He was then twenty years old, five-foot-ten, with a "very thin build." When arrested, defendant reportedly said he weighed 168 pounds. He was not wearing glasses; by contrast, defendant wore glasses at trial. Detective Valera testified that, at trial, defendant looked even heavier than 168 pounds.

In court, Maria identified defendant as her attacker. In contrast to her statement to Detective Valera, she said she got a look at his face when he spoke to her in the store, as well as in the bathroom. She said, "he had big ears, . . . his eyes were also big, his mouth was big, very thin, and . . . his hair were, [sic] like, very high." She asserted she provided Detective Rivera with additional details about her attacker after she completed her formal recorded statement, including that her attacker's hair was messy and his hair was not jet black, but dark. However, when defendant stood up in court, Maria said he was much shorter than he appeared the day of the attack. Still, she was "certain it's him." She also noted he did not wear glasses during the attack. On cross-examination, defense counsel attempted to highlight

inconsistencies between her trial testimony and her statement to police the day of the attack.

Miguel also made an in-court identification. At trial, he said defendant's face was thin and his hair curly. He also confirmed that the man depicted in the video was the attacker. He noted the man he saw running from the store was not wearing glasses. However, Miguel admitted he was "not positive" defendant was Maria's attacker. Asked how sure he was, he replied, "[s]eventy percent."

The eyewitnesses' testimony was bolstered by the testimony of the investigating officers. Detective Valera testified he "received information that this [the still photos] was Josh Green in September of 2011 from [Detective] Tuohy . . . ." Detective Valera also identified defendant as the person depicted in the surveillance footage who first walked by the store, then returned to enter, and later ran out. He also identified defendant in court.

Without objection, the State was permitted to ask Detective Rivera to state "who was the perpetrator of [the] crime" against Maria. She stated without reservation, "Joshua Green," and identified him in court. She explained that Detective Tuohy told her that he recognized the person in the circulated photos to be defendant. She testified that when she met defendant at the bus



stop in Perth Amboy, she identified him as the person in the surveillance video. She asserted that defendant was the person depicted in the still shots taken from the surveillance video, the photos supplied by Detective Tuohy, and photos she surreptitiously took of defendant when she met him at a Perth Amboy bus stop. She opined that defendant at trial looked heavier than he did when she saw him at the bus stop. This was also the first time she saw him wearing glasses. On cross-examination, she conceded that she could not positively identify defendant as the person in the surveillance video, even after Detective Tuohy sent photos of defendant.

Detective Tuohy testified that he had known defendant for four or five years based on "dealings" in South Brunswick.<sup>4</sup> He stated that he recognized Joshua Green as the individual depicted in the photos Detective Rivera sent and identified him in court. He said, with respect to one photo, he believed it depicted defendant because the person's posture matched defendant's. He

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<sup>4</sup> The defense objected pretrial to permitting Detective Tuohy to testify that he recognized defendant based on his prior arrests. The State informed the court that Detective Tuohy knew of defendant based on being an officer on patrol in South Brunswick, and was aware of, but was not directly involved in, prior arrests of defendant in the township. The court prohibited any reference at trial to defendant's prior arrests. Defense counsel also objected to Detective Tuohy reviewing the surveillance footage, or the photos taken from the footage, to identify defendant.

stated if he "had to guess," he was "probably . . . around 80 percent" positive that defendant was the man in the photos.

An employee of a temporary employment agency in Perth Amboy testified that defendant obtained work through their office, which was located a short distance from the store where Maria was attacked. Defendant worked the second shift of the day of the attack, beginning at 4:00 p.m., for a firm in Carteret. The agency provided transportation from Perth Amboy at about 3:00 p.m. The agency representative testified that workers could arrive as early as 6:00 a.m. to seek assignments, and could be sent out for work early in the morning for the first shift of the day. But the agency had no record that defendant sought work on the morning of the attack.

Over defendant's objection, the State was permitted to introduce a recording of a telephone conversation between defendant and his mother while defendant was incarcerated (although his incarceration was not disclosed to the jury). Defendant asked his mother to look for glasses that he claimed he wore to an interview in Perth Amboy on the day of the attack and noted that Maria's attacker was not said to be wearing glasses. Defendant's mother agreed to buy a pair if she could not find them.

The State contended the conversation demonstrated consciousness of guilt because records of medical examinations from November 2011 and 2012, which the State introduced, indicated that defendant had twenty-twenty vision. The court ruled that the conversation was admissible because defendant admitted to being in Perth Amboy on the day of the attack. The court declined to exclude references to the glasses.

The State also introduced medical records indicating that defendant's weight grew from 146 pounds in November 2011 to 172 pounds a year later. It also reported his height at five-foot-eleven and then five-foot-ten on those same dates. However, the arrest report showed that defendant weighed 168 pounds when he was arrested on December 1, 2011.

Defendant did not testify, but his mother did. She asserted defendant was home the morning of the attack and she left with defendant around 8:30 a.m. She went to Dunkin' Donuts by the bus stop where she normally dropped defendant off for the bus to New Brunswick. As proof, she providing a Dunkin' Donuts receipt generated at 8:43 a.m. She testified that she only went "that way" in the morning when she was dropping defendant at the bus. She said defendant was going to take a bus to New Brunswick and then another bus to Perth Amboy because "[h]e said he had a job

interview." She noted, however, that he did not have to be at work until 3:00 p.m.

On cross-examination, without objection, the State confronted Ms. Green with a twenty-three-year-old conviction for third-degree theft by deception from 1990. She testified that she received probation and admitted she also violated probation.

In summation, defense counsel contended defendant was misidentified. He noted Maria viewed the photo array months after the incident. He highlighted the lack of forensic evidence, inconsistencies in Maria's statements, and Miguel's uncertainty in his identification. He challenged the police detectives' identification, arguing that if the police had been sure defendant was the attacker, they would have acted sooner.

The State emphasized that defendant was identified not only by Maria and Miguel, but also Detectives Tuohy and Rivera (omitting without explanation Detective Valera's identification). The prosecutor highlighted defendant's contacts with Perth Amboy. She also referred to defendant's phone call regarding his glasses and contended that defendant wore glasses to court "[t]o perpetrate a fraud on the Court . . . ." She challenged Ms. Green's credibility, highlighting her past conviction for theft by deception.

The jury found defendant guilty of second-degree kidnapping, as it declined to find he failed to release Maria unharmed;

attempted aggravated sexual assault during the commission of a kidnapping; and attempted sexual assault. The jury found him not guilty of criminal restraint. After merger, the court imposed concurrent ten-year terms on the kidnapping and attempted aggravated sexual assault counts, both subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and Megan's Law, N.J.S.A. 2C:7-1 to -23.

On appeal, defendant presents the following points for our consideration:

POINT I

BECAUSE IDENTIFICATION WAS THE CRITICAL ISSUE BEFORE THE JURY, INADMISSIBLE TESTIMONY ABOUT WHY DEFENDANT'S PHOTO WAS INCLUDED IN THE ARRAY AND INADMISSIBLE LAY OPINION TESTIMONY FROM INVESTIGATING OFFICERS, IDENTIFYING DEFENDANT AS THE PERSON ON THE SURVEILLANCE FOOTAGE, INFRINGED HIS RIGHT TO A FAIR TRIAL. (PARTIALLY RAISED BELOW).

A. Testimony That Defendant's Photo Was Included in the Array Because the Police Had Concluded that Defendant Resembled the Surveillance Footage Was Inadmissible and Unduly Prejudicial.

B. Lay Opinion Testimony from Investigating Detectives, Identifying Defendant as the Suspect on the Surveillance Footage was Improper and Prejudicial.

POINT II

THE COURT ERRED IN ADMITTING IN EVIDENCE A PHONE CALL BETWEEN DEFENDANT AND HIS PARENTS,

WHICH THE STATE USED AS PROOF OF CONSCIOUSNESS OF GUILT. THE PREJUDICE TO DEFENDANT WAS COMPOUNDED BY THE JUDGE'S FAILURE TO GIVE THE REQUIRED JURY INSTRUCTION. (PARTIALLY RAISED BELOW).

POINT III

THE ALIBI WITNESS'S TWENTY-THREE-YEAR-OLD THIRD-DEGREE CONVICTION WAS INADMISSIBLE AS TOO REMOTE TO IMPEACH CREDIBILITY AND THE PROSECUTOR COMMITTED MISCONDUCT IN ARGUING THAT THE VICTIM WAS MORE CREDIBLE BECAUSE SHE HAD NO CRIMINAL CONVICTIONS. (NOT RAISED BELOW).

POINT IV

A RESENTENCING IS NECESSARY BECAUSE THE COURT FAILED TO SUPPORT ITS FINDING OF AGGRAVATING FACTOR ONE WITH COMPETENT CREDIBLE EVIDENCE IN THE RECORD, INDEPENDENT OF THE ELEMENTS OF THE CRIME.

II.

Identification of Maria's attacker was the principal focus of the trial. We are convinced that Maria's and Miguel's identifications of defendant was improperly bolstered by (1) the Perth Amboy detectives' explanation that defendant's photo was placed in the array based on the information that South Brunswick Detective Tuohy had provided; and (2) the Perth Amboy detectives' identification of defendant as the man in the surveillance video.

We turn first to the issue of the photo array. "[A]n officer's reasons for placing a particular photo in an array are irrelevant and prejudicial." State v. Lazo, 209 N.J. 9, 12-13

(2012) (citing State v. Branch, 182 N.J. 338, 352 (2005)). Moreover, when those reasons may lead a jury to infer past contact with law enforcement, the courts have found them generally inadmissible due to their limited probative value and prejudicial effect. See, e.g., State v. Tilghman, 345 N.J. Super. 571, 578-79 (App. Div. 2001).

In Tilghman, an officer testified "that when he heard the victim's description, he suspected that the assailant was defendant because he knew him." Ibid. The apparently neutral testimony implied "the officer knew defendant because of defendant's prior criminal conduct." Ibid. Although the testimony "explain[ed] why defendant's photograph was included in the array[,]" it was unnecessary to the victim's identification "and, if anything improperly bolstered it by letting the jury know that the victim had chosen the photograph of the person the officer already suspected." Ibid.

Similarly, in Branch, the Court found inadmissible an officer's testimony that he included a defendant's photo in an array "upon information received" because it implied hearsay information from an unknown source about the defendant's guilt. Branch, supra, 182 N.J. at 352. The Court concluded, "The jury only needed to know that the police fairly displayed the

photographs to the witnesses and that the process led to a reliable identification." Ibid.

In Lazo, supra, 209 N.J. at 21, the Court held that its reasoning in Branch was not limited to the admission of "prejudicial hearsay testimony," but "extend[ed] to testimony about the identification process in general." The detective in Lazo did not rely on information received; instead, he testified that he included the defendant's photo in an array because he believed the defendant matched the culprit. Id. at 22. The admission of that testimony was still error, the Court concluded, because the detective lacked personal knowledge of the attacker's appearance and his testimony improperly "enhanced the victim's credibility and intruded on the jury's role." Ibid.

We reach the same conclusion with respect to the testimony describing why defendant's photo was placed in the array shown to Maria and Miguel in November 2011. Detective Tuohy's suspicion was the obvious reason the photo was included. He and Detective Valera explained that after the surveillance stills were sent out, Detective Tuohy responded that he believed defendant was the man depicted. Detectives Rivera and Valera testified that afterwards, they suspected defendant as well, and ultimately included his photo in the array. Although Detective Tuohy obliquely stated that he knew defendant "through dealings" in the township, the



inference was inescapable that defendant's interaction with law enforcement was not benign, and arose because of "defendant's prior criminal conduct." Tilghman, supra, 345 N.J. Super. at 578. For example, if Detective Tuohy knew defendant because he coached him on the Police Athletic League baseball team, he presumably would have said so.<sup>5</sup>

It is also of no moment that, unlike the detective in Lazo, Detective Tuohy actually knew defendant. The Court has clearly held that the reason a defendant's photo is included in an array is irrelevant. See Lazo, supra, 209 N.J. at 12-13. "The only relevant evidence [is] the identification itself." Id. at 21 (quoting Branch, supra, 182 N.J. at 348).

The error regarding the origins of the photo array was compounded by the improper admission of the Perth Amboy detectives' lay opinion that the man depicted in the video was defendant.<sup>6</sup> A lay witness may testify "in the form of opinions or inferences" if "rationally based on the perception of the witness" and if the

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<sup>5</sup> Additionally, while the judge did provide a limiting instruction stating that photos of defendant could be derived from a variety of sources and that the jury could not consider them as evidence of having been arrested or convicted of a crime, this instruction merely cured speculation arising from the source of defendant's photo. It did not cure the testimony from Detective Tuohy that he knew defendant and had photos of him based on prior dealings.

<sup>6</sup> We do not address the propriety of allowing Detective Tuohy to identify defendant, as defendant does not challenge that on appeal.

testimony "will assist in understanding the witness' testimony or in determining a fact in issue." N.J.R.E. 701. "[T]estimony in the form of an opinion, whether offered by a lay or an expert witness, is only permitted if it will assist the jury in performing its function." State v. McLean, 205 N.J. 438, 462 (2011). "The Rule does not permit a witness to offer a lay opinion on a matter . . . as to which the jury is as competent as he to form a conclusion[.]" Id. at 459 (internal quotation marks and citation omitted). Furthermore, a police witness is not permitted to offer an opinion regarding a defendant's guilt. State v. Frisby, 174 N.J. 583, 593-94 (2002) (disapproving police testimony that opined regarding innocence of one person and inferentially the guilt of the defendant); State v. Landeros, 20 N.J. 69, 74-75 (1955) (holding that police captain's testimony that defendant was "as guilty as Mrs. Murphy's pet pig" caused "enormous" prejudice warranting reversal).

These principles apply to opinions regarding an offender's identity. "In an identification case, it is for the jury to decide whether an eyewitness credibly identified the defendant." Lazo, supra, 209 N.J. at 24. A police officer may not "improperly bolster or vouch for an eyewitness' credibility and thus invade the jury's province." Ibid.

The Lazo Court reviewed federal authority on whether a lay police witness may opine that a defendant is depicted in a crime scene photograph. The Court noted that one federal court held that a lay opinion "is permissible where the witness has had sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful." Id. at 22 (internal quotation marks and citation omitted). Whether the opinion is helpful in turn depends on the witness's knowledge of the defendant's appearance at the time of the crime, the defendant's dress, and "whether the defendant disguised his appearance during the offense or altered her looks before trial, and whether the witness knew the defendant over time and in a variety of circumstances." Ibid. (internal quotation marks and citation omitted). "[C]ourts recognize that when there is no change in defendant's appearance, juries can decide for themselves – without identification testimony from law enforcement – whether the person in a photograph is the defendant sitting before them." Id. at 23.

The Court cited a decision finding it error to admit an officer's opinion that a defendant was depicted in a bank surveillance photo where the officer's opinion "was based entirely on his review of photographs . . . and witnesses' descriptions . . . ." Ibid. (internal quotation marks and citation omitted).

Another factor in determining whether to permit a lay opinion on identification is "whether there are additional witnesses available to identify the defendant at trial." Ibid.

With this authority in mind, the Lazo Court held it was error to permit a detective to testify he believed the defendant's arrest photo closely resembled a composite sketch that was based on the victim's description of her assailant. Id. at 24. The detective did not witness the crime; did not know the defendant; and relied solely on the victim's description. Ibid. "Nor was there a change in appearance that the officer could help clarify for the jurors; they could have compared the photo and the sketch on their own. Finally, the sole eyewitness told the jury what he observed firsthand." Ibid.

Applying these principles, we conclude it was improper for Detectives Valera and Rivera to opine that defendant was the man depicted in the video, and, in Detective Rivera's case, to opine regarding the ultimate issue that defendant committed the assault against Maria. In particular, at various points in the playback of the video footage at trial, Detective Valera was permitted to assert that the person depicted was defendant. Detective Rivera was permitted to testify that defendant was depicted in stills from the video. Furthermore, she was permitted to opine on defendant's guilt, by responding that defendant was the

perpetrator of the crime. Yet, neither detective had any contact or familiarity with defendant before the assault. Their opinions were clearly affected by Detective Tuohy's opinion. The Perth Amboy detectives were no more competent than the jury to scrutinize the video, the 2011 photos, and defendant — who sat before them for several days — to determine whether defendant was the man in the video.

The evidence that defendant may have put on weight between the time of the attack and the trial does not alter our analysis. First, the evidence was not uncontroverted that defendant gained weight after the attack. Perhaps, he never was as slim as the attacker. Maria described her attacker as lanky, and Miguel believed he weighed between 125 and 130 pounds. The evidence was far from conclusive that defendant's weight was in that range in September 2011. Indeed, the incongruities in the weight-related evidence raise questions about its reliability. According to a November 2011 medical record, defendant reportedly weighed 146 pounds — which is roughly twenty pounds more than the range Miguel described. And, when he was arrested the next month, his weight was reportedly twenty-two pounds more, and it remained close to that a year later according to another medical record.

Second, even assuming defendant gained weight between 2011 and the time of trial — which was in March 2013 — the State did

not establish that the detectives were more competent than the jurors to ascertain whether defendant was the man in the video. Detective Rivera may have been competent to testify that the heavier person in the courtroom looked like the person she met at a bus stop in November 2011, and Detective Valera may have been competent to testify that the man in the courtroom resembled the person he arrested in December 2011. They may also have been competent to testify that Detective Tuohy's photographs, or Detective Rivera's bus-stop photographs, depicted defendant. However, that was not at issue. The issue was whether defendant was the man in the video. As to that question, the detectives were not significantly more capable than the jury to form a conclusion.

Furthermore, the fact that defendant wore glasses at trial did not justify admitting the detectives' opinion. Wearing glasses did not constitute a major change in defendant's appearance. In any event, defendant repeatedly removed the glasses during the trial when witnesses were asked to make an in-court identification.

In sum, Detective Valera's and Detective Rivera's testimony improperly "intruded on the jury's role." Lazo, supra, 209 N.J. at 22.

We next consider whether the court's admission of the testimony regarding the origins of the photo array and of the

Perth Amboy detectives' identification of defendant constitutes reversible error. Defendant raised the first issue at trial, but not the second. Thus, we consider whether the first was harmless error. See State v. J.R., 227 N.J. 393, 417 (2017) ("An evidentiary error will not be found 'harmless' if there is a reasonable doubt as to whether the error contributed to the verdict."); see also Lazo, supra, 209 N.J. at 26 ("The harmless error standard requires that there be some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." (internal quotation marks and citation omitted)).

The second error is subject to a plain error standard of review. Under that standard, "defendant has the burden of proving that the error was clear and obvious and that it affected his substantial rights." State v. Koskovich, 168 N.J. 448, 529 (2001) (internal quotation marks and citation omitted); see also State v. Williams, 168 N.J. 323, 336 (2001) (stating that, under plain error standard, "a defendant . . . must demonstrate . . . the error possessed a clear capacity for producing an unjust result" that is, one "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." (internal quotation marks and citation omitted)).

Whether an error is clearly capable of producing an unjust result "depends on an evaluation of the overall strength of the State's case." State v. Nero, 195 N.J. 397, 407 (2008) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

Applying these two standards, we are convinced that the photo array testimony was not harmless, and defendant has met his burden as to plain error. As noted, the trial centered on the issue of identification. The video surveillance did not clearly depict the attacker. There was no forensic evidence. The eyewitnesses' testimony was questionable. Although Maria said she was certain defendant attacked her, her physical description of the assailant's age, height and weight did not match defendant's physical characteristics. The defense also questioned whether Maria got a good look at her attacker's face.

Miguel was only seventy percent certain of his in-court identification, and fifty-to-seventy percent certain of his out-of-court identification, although he told a detective on the day of the attack that he was sure he could recognize the assailant. Miguel's physical description also did not completely match defendant. Furthermore, defendant presented an alibi.

The photo array testimony, the Perth Amboy detectives' identification, and Detective Rivera's opinion regarding guilt, constituted weighty evidence. The importance of Detective



Rivera's identification was reflected in the State's emphasis of it in summation. Given the high regard that jurors may have for the opinions of police officers, our Court has recognized the substantial prejudice that may befall a defendant if an officer is permitted to offer a personal opinion of defendant's guilt. See Landeros, supra, 20 N.J. at 74-75. Similar harm occurs when an officer provides improper testimony about the origin of a photo array, see Branch, supra, 182 N.J. at 353-54 (finding plain error because officer's testimony that defendant was a suspect "based on information received" could have "tipped the scales" as there was no physical evidence linking defendant to scene and the evidence was "far from overwhelming"), or provides an identification that usurps the difficult task assigned to the jury, see Lazo, supra, 209 N.J. at 24, 27.

In sum, we are constrained to reverse based on the admission of testimony regarding the origins of the photo array, and the Perth Amboy detectives' identification of defendant.

### III.

We add only brief comments on remaining issues to guide the trial court in the event of a retrial.

We discern no error in the court's admission of defendant's phone conversation with his mother about eyeglasses.<sup>7</sup> It was for the jury to determine whether defendant – despite evidence of twenty-twenty vision – wore glasses to interviews, perhaps to make himself look studious; or whether he was concocting a means of distinguishing himself from the attacker that the eyewitnesses described – which may have demonstrated a consciousness of guilt or merely an effort to look less like the described assailant. See State v. Mann, 132 N.J. 410, 422 (1993) (stating that a defendant's post-charge conduct is admissible if it supports an inference that the conduct "is evidence of consciousness of guilt"). However, it was error for the court to omit the model jury charge on consciousness of guilt. Id. at 420 (stating that when a court admits evidence of post-crime conduct, "it must instruct the jury carefully regarding the inferences the jury may draw from that evidence"). We recognize that defendant did not request the charge. In view of our disposition of other issues, we need not determine whether the omission of the model charge constituted plain error.

We also conclude it was error to permit the State to challenge defendant's mother's credibility with presentation of her twenty-

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<sup>7</sup> There is no reasonable dispute that defendant's admission in the conversation that he was in Perth Amboy was relevant.

three-year-old theft conviction. This, too, was not raised below and would be subject to a plain error analysis but for our reversal on other grounds. Although the then-applicable version of N.J.R.E. 609 did not draw any time limits on the use of prior convictions,<sup>8</sup> our Court has long recognized a conviction's remoteness weakens its probative force, which then may be substantially outweighed by the prejudice to the party against whom the conviction is used. State v. Sands, 76 N.J. 127, 144-45 (1978) ("The trial court must balance the lapse of time and the nature of the crime to determine whether the relevance with respect to credibility outweighs the prejudicial effect to the defendant.").

We have found no authority – and the State has provided none – for the proposition that a twenty-three-year-old third-degree conviction is sufficiently probative of a lack of credibility so as to outweigh its prejudicial effect. Cf. State v. Murphy, 412 N.J. Super. 553, 565 (App. Div.) (finding seventeen-year-old drug possession conviction too remote), certif. denied, 202 N.J. 440 (2010); State v. Leonard, 410 N.J. Super. 182, 186-89 (App. Div. 2009) (affirming exclusion of fifteen-year-old conviction of State's witness), certif. denied, 201 N.J. 157 (2010). Also,

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<sup>8</sup> The revised version effective in 2014 establishes a heightened burden for the proponent of evidence of a prior conviction over ten years old. N.J.R.E. 609.

there was no evidence of any intervening convictions that might have mitigated the extreme remoteness of Ms. Green's conviction. Sands, supra, 76 N.J. at 145 ("If a person has been convicted of a series of crimes through the years, then conviction of the earliest crime, although committed many years before, as well as intervening convictions, should be admissible.").


The error was exacerbated in two ways. The State improperly elicited that Ms. Green was found to have violated probation, which is not a conviction and, accordingly, not admissible under N.J.R.E. 609 irrespective of its remoteness. State v. Jenkins, 299 N.J. Super. 61, 75 (App. Div. 1997) ("Since a probation violation is not a criminal conviction, it cannot be used for impeachment purposes under N.J.R.E. 609."). And the State in summation juxtaposed Ms. Green's record with the victim's "who ha[d] no conviction, no convictions for trying to deceive anyone." That commentary was improper; there was no evidence of the victim's lack of a record, and, in any event, a party may generally not bolster a witness's character for truthfulness with evidence of specific instances of conduct. N.J.R.E. 405; see State v. Scott, \_\_\_ N.J. \_\_\_, \_\_\_ (2017) (slip op. at 21).

Finally, with respect to the defendant's sentence, we agree that the court did not identify facts independent of the elements of the crime in finding that aggravating factor one applied.

N.J.S.A. 2C:44-1(a)(1) (requiring the court to consider "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner"); State v. Fuentes, 217 N.J. 57, 77 (2014) (remanding for resentencing where trial court did not identify competent and credible evidence in the record – aside from that which was necessary to prove the elements of the offense – in finding aggravating factor one). If the defendant is retried, found guilty and resentenced, the court shall reconsider its application of aggravating factor one.

Reversed and remanded. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION