SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4859-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASUL MCNEIL-THOMAS,

Defendant-Appellant.

Argued October 2, 2017 – Decided December 28, 2017

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 12-06-1570.

James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; James K. Smith, Jr., of counsel and on the brief).

Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Robert D. Laurino, Acting Essex County Prosecutor, attorney; Camila Garces, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Rasul McNeil-Thomas was convicted of: first-degree carjacking, N.J.S.A. 2C:15-2(a)(2); the lesser-included offense of first-degree aggravated manslaughter of Newark Police Officer William Johnson, N.J.S.A. 2C:11-4(a)(1); two counts of first-degree attempted murder of M.T. and A.L., N.J.S.A. 2C:5-1 and 2C:11-3 (a)(1) and (2); aggravated assault of A.L., T.J. and J.S.; and related conspiracy and weapons offenses.[1] On the carjacking and aggravated manslaughter convictions, the judge imposed consecutive thirty-year sentences, each with an 85% period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. He imposed concurrent sentences on the remaining convictions.

On appeal, defendant raises the following points for our consideration.

> POINT I
>
> THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WERE VIOLATED WHEN, IN HIS SUMMATION, THE PROSECUTOR PLAYED PORTIONS OF THE SURVEILLANCE VIDEOS WHICH HAD NOT BEEN PLAYED FOR THE JURY DURING THE TESTIMONY OR ADMITTED INTO EVIDENCE, AND THEN TESTIFIED THAT THOSE VIDEOS SHOWED A BLACK CADILLAC AND A PICKUP TRUCK, PRESUMABLY DRIVEN BY DEFENDANT

[1] The identities of these victims and other witnesses are irrelevant to our decision, so we utilize initials to protect their privacy.

AND HIS STEPFATHER, DRIVING BY THE CHICKEN RESTAURANT A FEW MINUTES BEFORE THE SHOOTING.[2]

POINT II

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE EVIDENCE THAT [M.G.] TENTATIVELY IDENTIFIED DEFENDANT'S PHOTO FROM AN ARRAY, EVEN THOUGH SHE HAD NOT BEEN ABLE TO MAKE AN IDENTIFICATION WHEN SHOWN THE EXACT SAME ARRAY ONLY HOURS EARLIER.

POINT III

THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR RESENTENCING BASED UPON THE VIOLATION OF THE RULE SET FORTH IN STATE V. MILLER, 108 N.J. 112 (1987), AND THE COURT'S USE OF AN ELEMENT OF THE CRIME AS AN AGGRAVATED FACTOR. (NOT RAISED BELOW).

I.

The State contended that on the evening of May 26, 2011, defendant and an unknown co-conspirator carjacked a silver Chevrolet from the driveway of a home on Clinton Place in Newark, and participated in a drive-by shooting less than two blocks away at Texas Fried Chicken & Pizza (Texas Fried Chicken) located at the corner of Lyons Avenue and Clinton Place. It alleged that defendant fired numerous rounds, killing Officer Johnson and wounding several others at the scene.

[2] We have eliminated headings for the sub points of defendant's legal arguments.

The motive for the shooting was a brawl that occurred earlier outside defendant's home, which was only a few blocks from the restaurant. A group of young women, including M.T. and A.L., physically assaulted defendant, and his mother, stepfather and sister. These female assailants were at Texas Fried Chicken during the drive-by shooting.

A.L. was grazed by a bullet and required stitches. J.S., one of the patrons, suffered a through-and-through gunshot wound of his torso. T.J., who was walking down Clinton Place toward Lyons Avenue alongside the restaurant, lost a tooth when a bullet fragment ricocheted and struck her in the mouth. Officer Johnson was off duty and buying food when a bullet struck him in the chest and killed him.

The Brawl

At about 7:00 p.m., R.S., who lived across the street from defendant and his family, heard a commotion and, looking out her second-floor window, saw a group of six girls screaming at defendant. Defendant's mother emerged from the home and the argument grew more heated. About thirty minutes later, defendant's stepfather arrived in a dark blue pickup truck. The argument escalated into a brawl, with people fighting in the middle of the street. R.S. called 9-1-1, but, by the time police arrived, the group of girls had left the area. After the police left, R.S.

heard defendant's family and another girl talking, and someone asked, "where they live at? Where they live at?" R.S. heard someone name a street, one block from defendant's home. We describe below in detail some of R.S.'s other testimony, which is critical to our disposition of the appeal.

The Carjacking

M.G. and her boyfriend, T.B., both testified regarding the carjacking. After dining out, M.G. remained in the car parked in the driveway of her boyfriend T.B.'s home, while he went inside to get some clothing. A man approached the driver's side, knocked on the window with a gun, opened the door and told M.B to get out. When she did, another man on the passenger side was in front of her. At trial, M.G. testified that defendant "look[ed] like the guy." She believed that he might have had a gun based on the outline of his "hoodie." Before M.G. could reach the front door of the house, the men sped off in the stolen car, and she heard shots fired shortly thereafter.

In the early morning hours of the following day, police showed M.G. six photographs, including a photograph of defendant. She initially told them she could not make an identification. However, later the same day, officers went to T.B.'s house, showed M.G. the same photographs, and she identified defendant as the person outside the passenger side of the car.

T.B. testified that he heard the gunshots and M.G. banging on the front door of his house. His mother called police to report the carjacking, and, using a GPS tracking application in the car, T.B. located the vehicle within twenty minutes of the shooting, parked only a few blocks away near St. Peter's Park. He escorted police to the car, which was undamaged, where they recovered three brass and two steel spent shell casings in the car.

The Shooting

At trial, T.J., who knew defendant from the neighborhood, identified him as the shooter and said that he fired from a "light-colored car, silver, four door" car. However, at the time of the shooting, T.J. did not tell the police anything about the shooter, and first identified defendant as the shooter in September, 2011, when she gave a statement. During direct examination, T.J. admitted she was under the influence of heroin at the time of the shooting.

M.T. knew defendant for years. She lived on Clinton Place, between Texas Fried Chicken and where the carjacking occurred. M.T. was a self-professed gang member and one of the women at defendant's home during the brawl. She was at Texas Fried Chicken at the time of the shooting and initially told police "Rasul" was the shooter. She identified defendant from a photo array, and

told one of the investigating detectives she was an intended target of the shooting.

M.T. initially told police she "beat up" defendant's family, but, during her trial testimony, she denied that. M.T. received a phone call from defendant at 9:08 p.m., forty-one minutes before the shooting.[3] Defendant told her she "didn't have to let everything go down the way it went down." M.T. told him she was only trying to break up the fight. Shortly after the shooting, M.T. received a call from the same phone number. This time, it was a relative of defendant, who referenced the earlier fight and asked M.T. if everyone was all right after the shooting.[4]

At trial, although she claimed to have "locked eyes" with the shooter, M.T. testified he was not in the courtroom.[5] She did testify that the shooter had "dreads," which was how defendant wore his hair at the time of the shooting. She also said the shots were fired from a newer black Mercedes or BMW, even though,

---

[3] Through "ShotSpotter" technology, police were able to identify the exact time of the shooting.

[4] The next day, M.T. was assaulted in her home. She alleged defendant's mother, sister, and one other person were there. Defendant's mother was telling the others, "That's not her. That's not her," apparently to convey M.T. did not participate in the earlier brawl.

[5] Following a Gross hearing, State v. Gross, 216 N.J. Super. 98 (App. Div. 1987), aff'd, 121 N.J. 1 (1990), M.T.'s redacted statement was played for the jury.

as we explain below, the shots were fired from the silver Chevy. M.T. also claimed only the driver of the car fired at the restaurant.

J.S., also a member of the same gang as M.T., could not identify either the shooter or the car from which the shots were fired. J.S. was shot in the leg during a drive-by shooting that occurred months earlier near Texas Fried Chicken. His friend was killed in that attack.

The Investigation

Defendant was arrested on May 27 and charged with carjacking. He waived his Miranda[6] rights and provided a statement to police, which was played for the jury. Defendant said there was a fight between a group of seven or eight females, and his mother and two sisters around 7:40 p.m. or 8:00 p.m. Defendant claimed that he, M.T. and his stepfather, B.J., attempted to break up the fight.

After the fight, defendant remained inside his house until about 9:30 p.m. He left with his stepfather in B.J.'s pickup truck to see his cousin, but returned to the house because his cousin was not home. Defendant did not leave the house again and denied being near Clinton Place or Lyons Avenue at any point between 7:00 and 11:00 p.m. Police executed a search warrant of

[6] Miranda v. Arizona, 384 U.S. 436 (1966).

defendant's home and B.J's pickup truck but found nothing of evidential value.

The events at and near the restaurant were captured by several surveillance cameras. As described by a police witness, one of the videos showed the silver Chevy driving by Texas Fried Chicken with "a muzzle flash . . . coming out of the front passenger window." The car turned left, and another camera captured the car turning left one block away and heading in the general direction of where it was later found.

A police detective testified that another camera captured "two . . . black males, walk[ing] through St. Peter's Park with hoodies" "[j]ust after the carjacking and the shooting/homicide." Although the men could not be identified, police testified they were walking in the general direction of the street where defendant lived. A K-9 detective testified that after the Chevy was located, his dog tracked a scent from the car and through the park, before losing it near where defendant lived.

Police performed ballistic analysis of the shells recovered from the Chevy and others found outside Texas Fried Chicken, as well as bullets recovered from the restaurant and at Officer Johnson's autopsy. Expert testimony revealed that the shots fired at Texas Fried Chicken came from two different guns.

On July 6, 2011, responding to a call of shots fired only a few blocks from Texas Fried Chicken, Irvington police arrested a man with the 9 millimeter handgun that killed Officer Johnson. That man was never connected to the homicide or shooting.[7] Additionally, police linked the other shells fired at Texas Fried Chicken to a second gun that was involved in four prior unsolved shootings in Newark.

II.

A.

The State called the owners of Texas Fried Chicken, and two other nearby businesses, the Oasis Bar and Bobby's Restaurant (Bobby's), to identify video recordings made from surveillance cameras in or outside their establishments. Sixteen different cameras shot the video recordings from Texas Fried Chicken, and these were displayed as sixteen "channels."[8] The restaurant's owner was the State's first witness. Defense counsel quickly requested a sidebar:

> Defense Counsel: I definitely don't have any objections . . . to any of the portions they are going to play, but I do want to reserve, just for later, whether every single thing should go in, you know, from . . . like an

[7] He was not called as a witness at trial.

[8] We have been provided with copies of what was introduced at trial. Each of the sixteen channels from the Texas Fried Chicken displays more than ninety minutes of video recording.

hour before. You know what I'm saying? The video itself contains a lot of material.

Court: Downtime and other stuff and extraneous stuff.

Defense Counsel: Well, maybe there's some things relevant or not, but all I'm saying, by agreeing now that it's in evidence - -

Prosecutor: If you find something you don't like --

Defense Counsel: Those portions are in. Later on we can talk about the scope. Obviously, everything played before the jury in the courtroom is in evidence, but we can talk about the scope later. There might not be any problems.

Court: You can't unring the bell. I don't know what's on the video.

Defense Counsel: I know what sections they are going to play, I believe. Right?

Prosecutor: It goes on, you can see the people shot. You can see when they entered. You can see the victim enter and you can see the victim fall. You can see the police and you can see the ambulance.

Court: Once you show it to the jury, obviously, you showed it to the jury.

Defense Counsel: I don't have a problem with any of that, if you want to move it into evidence.

Prosecutor: I want to show him camera by camera.

Defense Counsel: In order for you to show anything, you have to move it in evidence. I

> have no objection, with the caveat we discussed.
>
> Court: As long as you don't have a problem, I don't have a problem.
>
> . . . .
>
> Court: [Video] in evidence subject to sidebar.
>
> [(emphasis added).]

The prosecutor then asked the witness to identify where the cameras were situated, and, generally speaking, what each of the channels displayed.

The owner of Bobby's testified, and the State sought to move the video from its surveillance cameras, which contained four channels, into evidence. When defense counsel stated he had no objection, the judge asked, "Subject to the issue we spoke of before[?]" Counsel answered affirmatively, and the judge admitted the DVD into evidence, "subject to counsel's qualification." The video from the camera at the Oasis Bar was on the same disc.

At various points, the prosecutor showed witnesses portions of videos from Texas Fried Chicken during their testimony. Detective Kevin Lassiter, who was eating lunch with his partner nearby and was the first officer to respond to the restaurant after the shooting, viewed some of the video from the restaurant and narrated the events immediately after the shooting. During Lassiter's testimony, at sidebar, defense counsel objected to the

video "showing [Officer Johnson] bleeding to death on the floor." Among other things, the prosecutor's response was that the DVD was "in evidence." The judge overruled the objection.

Defense counsel renewed the objection, when Lassiter was out of frame, and the video showed EMT's tending to Officer Johnson; he argued any probative value was outweighed by the prejudice of the video. Again the prosecutor declaimed, "The video is in evidence." The colloquy continued:

> Defense counsel: Judge, just to remind the Prosecutor, it's not all in evidence. I was very clear on the record at the time, as I'm sure this Court remembers, that just because we're playing parts of the video doesn't mean all of the video is in evidence. I made that very clear at the time. The Court understood it and noted it for the record at the time, so the entire video is not in evidence. There are portions of the video that are relevant, like the shooting and arguably what police officers arrived, when they arrived, but a man rolling around on the floor bleeding to death is not in that category.

This time, the prosecutor responded, "I submit it goes to the cause and manner of death." The judge overruled the objection.

T.B. identified a car shown on the video from the Oasis Bar as his silver Chevy. J.S., M.T., and T.J. were shown video from several Texas Fried Chicken channels, including, in some instances, video from channel two, which was shot from a camera on the exterior of the Clinton Place side of the restaurant and

displayed the muzzle flash coming from the silver Chevy. In each case, the video from channel two depicted only events immediately prior to and after the shooting.

During her testimony, R.S. said that during the fight, she called 9-1-1 at 8:11 p.m. An officer arrived about fifteen minutes later, but the girls had already left the area.[9] R.S. did not recall if defendant was there "right after the police came," but she remembered that at some point he left with B.J. in the pickup truck. R.S. identified photos of the pickup truck.

B.J. returned in the truck shortly thereafter alone. R.S. testified that defendant arrived at the house in "a black . . . Cadillac," perhaps a CTS model, with "another guy and two girls." R.S. saw defendant leave in the black Cadillac with three other people as it followed B.J.'s pickup truck. She later clarified that defendant left in the black car with only the other male; however, on cross-examination, R.S. said all four people left in the black Cadillac. She saw B.J. come back alone in the pickup truck. Eventually the black Cadillac parked across the street, but R.S. never saw defendant return.

[9] Immediately thereafter, pointing to a phone record, the prosecutor said the time was 8:46 p.m., to which the witness agreed.

R.S. became aware of the shooting when a man came down the street and said, "Big man got shot." Defendant was there, and she saw him get into the black Cadillac and leave.

The prosecutor showed R.S. video taken from inside Texas Fried Chicken, and she identified the women she saw fighting with defendant's family as they entered the restaurant. The prosecutor never asked R.S. to look at any other video, nor did the prosecutor present her with still shots from the Texas Fried Chicken video.

During his summation, the prosecutor referred to R.S.'s testimony about defendant leaving in a black Cadillac CTS following his stepfather's pickup truck. Playing video from channel two recorded "three minutes and [forty-six] seconds before the bullets were fired," the prosecutor argued it displayed B.J.'s pickup truck "eerily creeping up Clinton Place . . . right by [Texas Fried Chicken]," followed by a black Cadillac CTS.[10] He played a portion of the video from Bobby's and argued it showed the two vehicles after turning left onto Lyons Avenue. With the video recording paused, the prosecutor then said:

> [R.S.] said she saw [defendant's stepfather] leaving in that pickup truck and the defendant was in this car. It was about three and a half minutes before the shooting.

[10] Apparently, recognizing that no witness had said the car depicted was in fact a Cadillac CTS, the prosecutor suggested one of the jurors would know what the model looked like.

. . . .

> The detective testified he watched these videos. He said that he watched these videos to see if he could corroborate any of the witness testimony. That's what he said. Any of the witness statements. And you have corroboration here.

At oral argument before us, the State contended Detective Holt Walker, to whom the prosecutor referred, testified about these portions of the videos. During Walker's testimony, the prosecutor showed a portion of the video from Bobby's and only asked if it depicted the silver Chevy driving on Lyons Avenue. He cued channel two of the Texas Fried Chicken video to approximately one minute before the portion he showed to the jury. He asked the detective, "Is it your testimony that you spent a significant amount of time trying to figure out about the cars that were coming in and out of this location?" The only answer given by the detective was, "That's correct." When the video was played, the prosecutor immediately asked his assistant to "fast forward to get to maybe a minute before . . . the shooting."

Detective Holt was never asked to identify the pickup truck or the purported Cadillac CTS. In fact, the specific questions posed by the prosecutor thereafter focused on parked cars at the scene as the shooting began, and whether the detective had

attempted to check the license plate of a specific black minivan parked next to the restaurant.

Returning to the Oasis Bar video and the purported image of a Cadillac CTS as he finished his summation, the prosecutor said, "Cadillac CTS. You can't see the whole thing. You can't see the license plate. You can't see the defendant driving in there. But [R.S.], that's what she testified about. The most neutral witness in this case."

The State cited us to other parts of the transcript where it contends these portions of the videos were played for the jury. We have reviewed those and, indeed, the entire record. It does not appear that the prosecutor ever showed any of the witnesses, especially R.S., the portions of the video recordings he referenced in his summation.

After the summation, defense counsel immediately moved for a mistrial.

> The Prosecutor just played a piece of tape and testified about it. There was no prior testimony, and, in fact, he also misrepresented testimony. So he played a piece of tape where he purported to testify that the blue pickup truck in the tape was the same blue pickup truck that is owned by my client's stepfather. No one had testified in the case that, in fact, the blue pickup truck on that video was my client's stepfather's truck. Had they, I could have met that testimony. Had they, I could have called

> additional witnesses to meet that testimony. There was no such testimony.
>
> Additionally, the Prosecutor testified in his summation that the detective -- I assume he meant Holt Walker, although he didn't say it —- sent the license plate of that blue pickup truck out to another agency to determine could they read the license plate.
>
> Well, that's not the testimony in this case. The only testimony about a license plate being sent out in this case is for the van that was parked outside of the chicken shack at the time of the shooting. So that's, again, testimony of the Prosecutor, not in evidence, no opportunity to meet it.
>
> Additionally, the Prosecutor testified that a black car -- and that's all I could tell from the video, is that it's a black car -- is a Cadillac CTS.
>
> There was no witness in this case who testified that that black car is a Cadillac CTS. Again, had that testimony been presented, the defense could have attempted to meet that testimony.
>
> So the defense is now in a position where the Prosecutor has just testified as to facts never presented at the trial in his summation with no opportunity to meet those facts. That's not permitted, Judge. And at this point in time the only, unfortunately, solution to that is to declare a mistrial.

The prosecutor responded, arguing the videos were in evidence, were shown to the jury previously and were corroborated by Detective Walker. He contended that no testimony was required

prior to the showing of the video and the two cars could be "[p]lainly" seen.

The judge denied the motion stating:

> There was testimony with regard to the pickup truck. The photographs are in evidence, the video was in evidence and it's been asked multiple times and played for multiple witnesses in this case. . . . It was provided in discovery. What's said on the video is a fair comment made by counsel.

The judge also found that the video corroborated R.S.'s testimony about defendant leaving his home and returning in different cars. The judge refused defense counsel's request for a curative charge.

The following day, defense counsel supplemented the argument for a mistrial. He contended that the video clips used in summation were not presented during the trial and, therefore, were not in evidence. The prosecutor argued the entire video recording was in evidence. After checking his notes, the judge concluded the videos "went into evidence," noted the objection and denied the mistrial motion "for the same reasons" stated the previous day.

Less than one hour after it commenced deliberations, the jury sent out a note:

> We would like to see: The tape <u>before the shooting</u> which shows the blue truck and the black car. <u>It was only shown by the Prosecutor at the closing statement</u>. Can/may we see this again? Can it count as evidence?

[(Emphasis added).]

Defense counsel objected, stating only the prosecutor "testified" about the blue truck and black car and renewing his earlier argument that those portions of the video were not in evidence. The judge again denied any request for a curative charge, ruling the videos were admitted into evidence "and there was no objection."

Defense counsel reminded the judge that he did object and only consented to the admission of certain portions that were played for the jury. He reiterated that the jury was now asking to see video that was never played before the prosecutor's summation and was not in evidence. The prosecutor contended that only the videos from Bobby's Restaurant and Texas Fried Chicken, not the Oasis Bar, showed both vehicles, and he had played those portions for the jury during the trial and before his summation.

The judge asked the jury to be more specific about which portion of the videos it wanted to see. It responded: "We would like to see the video, (both) of the shooting, cameras 2, 7, 8, five minutes before the shooting and five minutes after." Defense counsel noted that the prosecutor had not played video from five minutes before to five minutes after the shooting, and again argued

those portions of each video was never in evidence. The judge disagreed and the videos were played.[11]

At one point during the deliberations, the jury indicated it had reached a verdict on some charges but was "hung" on others. The judge gave the jurors further instructions, and they returned the verdict detailed above. Defendant moved for a new trial prior to sentencing, which the judge denied.

B.

Defendant argues those portions of the video that the prosecutor showed during his summation — allegedly showing B.J.'s pickup truck and a black Cadillac CTS driving by Texas Fried Chicken before the shooting — were never admitted in evidence. Further, defendant contends that even if those portions of the video were in evidence, the prosecutor essentially testified, without any support, that the video showed the two vehicles about which R.S. testified. The State counters that the videos were in evidence, the prosecutor's summation was fair comment on the

[11] How to respond to the jury's question consumed much debate, and it would appear that the judge ordered the prosecutor to play the ten minutes of video that straddled those portions played during his summation, not the ten minutes that straddled the actual shooting. The prosecutor conceded that during the presentation of the case, the State "jumped around," displaying portions of the videos during the testimony of the witnesses. But, he contended that each video recording was admitted into evidence in its entirety.

evidence, and, even if the summation comments were improper, they do not rise to reversible error given the substantial evidence of defendant's guilt.

We have considered these arguments in light of the record and applicable legal standards. We reverse and remand for a new trial.

C.

In considering whether those portions of the video recordings were "in evidence," we recognize that "[o]nce evidence is deemed relevant, it is admissible, N.J.R.E. 402, unless 'its probative value is substantially outweighed by the risk of [ ] undue prejudice,' N.J.R.E. 403, or some other bar to its admission is properly interposed.'" State v. Nantambu, 221 N.J. 390, 402 (2015) (quoting Brenman v. Demello, 191 N.J. 18, 34-35 (2007)). While we generally defer to the trial court's evidentiary rulings, we owe no such deference if they reflect a clear error of judgment or are premised on an erroneous legal conclusion. Ibid. (citations omitted).

It is clear that the judge initially understood that defense counsel reserved his ability to object to portions of the videotape even though he was not objecting to others. When the prosecutor first attempted to authenticate the videos from Texas Fried Chicken, defense counsel did not object to what he anticipated the prosecutor intended to show to the jury, in part because the

prosecutor himself phrased the proffer as follows: "[Y]ou can see the people shot. You can see when they entered. You can see the victim enter and you can see the victim fall. You can see the police and you can see the ambulance." When the prosecutor sought to authenticate the video from Bobby's, which contained extensive video recorded from four cameras, the judge duly noted that it was being admitted subject to defendant's reservation of his right to object to specific portions. We cannot explain why the judge later concluded otherwise -- that defendant had not objected to the entire video recordings being admitted into evidence.

In any event, it is beyond peradventure that all of the hours of video actually recorded and marked as exhibits at trial were not relevant evidence. The prosecutor's flippant responses after summation, i.e., that defendant's objections were meritless because all the videos were in evidence, is therefore not worthy of comment. At argument before us, the State essentially conceded that unless the specific portions of the video shown by the prosecutor in summation were actually shown during trial, those portions could not be considered to have been "in evidence." As already noted, it appears those portions were not shown to witnesses during trial.

"New Jersey courts have commented repeatedly on the special role filled by those entrusted with the responsibility to represent

the State in criminal matters, observing that the primary duty of a prosecutor is not to obtain convictions but to see that justice is done." State v. Smith, 212 N.J. 365, 402-03 (2012) (citing State v. Daniels, 182 N.J. 80, 96 (2004)). "It is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Frost, 158 N.J. 76, 83 (1999). "In fulfilling that two-pronged duty, prosecutors should be guided by the maxim that they 'may strike hard blows, [but] not . . . foul ones.'" Smith, supra, 212 N.J. at 403 (quoting State v. Feaster, 156 N.J. 1, 59 (1998)).

Consistent with this unique obligation, "a prosecutor should 'confine [his or her] comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.'" State v. Bradshaw, 195 N.J. 493, 510 (2008) (quoting State v. Smith, 167 N.J. 158, 178 (2001)). "So long as the prosecutor's comments are based on the evidence in the case and the reasonable inferences from that evidence, the prosecutor's comments 'will afford no ground for reversal.'" Ibid. (quoting State v. Johnson, 31 N.J. 489, 510 (1960)).

Here, the prosecutor's summation comments were not based on evidence introduced at trial before the jury. The jury itself recognized this when it sent out its first note asking to see

portions of the videos first shown during the prosecutor's summation. Given the extensive investigation in this case, and the meticulous preparation by the prosecutor, it is certainly curious, at the least, that he never specifically asked the investigating detective whether the pickup truck in the video was B.J.'s pickup truck.

This detective had executed a search warrant of the pickup truck and was obviously intimately familiar with its appearance. Instead, the prosecutor suggested to the jury in summation that a dent in the truck's fender and distinctive fender "flares," as shown in the still photos, proved it was the same truck as the one in the video. While showing the brief snippet of Bobby's video showing both vehicles, he told the jury Detective Holt used it to confirm witnesses' statements; however, no evidence supported the assertion that it was used to confirm R.S.'s statements.

The prosecutor also never asked R.S. whether the pickup truck or the purported "black Cadillac CTS" in the video were the vehicles she saw defendant and his stepfather drive away in before the shooting. Instead, while showing a portion of the Oasis Bar video of the "Cadillac," the prosecutor told the jurors, "[R.S.], that's what she testified about. The most neutral witness in this case." Of course, R.S. never testified about the truck or car shown in the video.

Even if the prosecutor exceeds the bounds of proper conduct, "[a] finding of prosecutorial misconduct does not end a reviewing court's inquiry because, in order to justify reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" Smith, 167 N.J. at 181 (quoting Frost, supra, 158 N.J. at 83). The Court has "not hesitated to reverse convictions where [it has] found that the prosecutor in his summation over-stepped the bounds of propriety and created a real danger of prejudice to the accused." Id. at 178 (quoting Johnson, 31 N.J. at 511). This is such a case.

There was no evidence produced in discovery nor adduced through the twenty-one witnesses the State produced at trial that linked the vehicles shown in the videos to those seen by R.S. Assuming arguendo that it was nevertheless permissible for the prosecutor to ask the jury to use their common sense and infer those were the same vehicles, it was prejudicially unfair to do so for the first time in summation based on recordings not shown to the jury, particularly since defense counsel had reserved his right to object.

As defense counsel argued when moving for a mistrial, by waiting until summation to show the jury for the first time video about which there was no testimony, the prosecutor effectively denied defendant any opportunity to challenge the State's evidence

or produce his own witnesses to rebut the claim. See State v. Cope, 224 N.J. 530, 551 (2016) ("The right 'to call witnesses in one's own behalf' is essential to a 'fair opportunity to defend against the State's accusations,' and therefore is indispensable to due process and a fair trial.") (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

We must consider the State's contention that even if it was error to play these portions of the videos during summation and urge the jury to consider them as evidence that defendant planned the attack beforehand, the error was harmless, given the balance of the evidence of defendant's guilt. After all, it was undisputed that the shots were fired from the carjacked silver Chevy minutes after it was carjacked. If the jury found defendant guilty beyond a reasonable doubt of the carjacking, it is unlikely its verdict on the shootings were influenced by the prosecutor's improper conduct.

"The State's argument, i.e., without the offending evidence a jury would have still reached the same verdict because of the balance of the evidence, misstates the standard guiding our review." State v. Rinker, 446 N.J. Super. 347, 367 (App. Div. 2016). Given the nature of the error in this case, "[t]he question is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction." Ibid.

(emphasis in original) (quoting State v. Slaughter, 219 N.J. 104, 119 (2014)). "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." State v. Pillar, 359 N.J. Super. 249, 277-78 (App. Div. 2003) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).

We conclude that the error in this case was not harmless. Based upon the prosecutor's conduct, we are compelled to reverse defendant's convictions and remand for a new trial.

III.

Because the State may try defendant again, we address defendant's argument in Point II. He contends M.G.'s out-of-court photo identification was unreliable, as demonstrated by her stated uncertainty and that she viewed defendant's photo during two separate procedures conducted hours apart. We disagree.

M.G. was brought to police headquarters on the night of the shootings, shown six photographs, one of which was defendant's, and could not make a positive identification. Later that day, police went to T.B.'s home. A detective, who had not participated in any interviews of M.G. beforehand, presented her with six photos, one after the other, and M.G. said photo number four, defendant's, "look[ed] like the guy." The detective recorded the

identification procedure and M.G. signed the back of the photograph.

Following a Wade[12] hearing, the judge carefully identified the standards set by the Court in State v. Henderson, 208 N.J. 208, 288-89 (2011). He considered the system and estimator variables involved in M.G.'s identification. Id. at 289-92. He concluded "the possibility of mug shot exposure combined with the estimator variables is not enough to prove a very substantial likelihood of irreparable misidentification."

"Our standard of review on a motion to bar an out-of-court-identification . . . is no different from our review of a trial court's findings in any non-jury case." State v. Wright, 444 N.J. Super. 347, 356 (App. Div. 2016) (citing State v. Johnson, 42 N.J. 146, 161 (1964)). Here, we find no reason to disturb the judge's factual findings or legal conclusions. On retrial, the State is free to introduce into evidence the out-of-court identification M.G. made of defendant.

As a result of our decision, we need not address the sentencing arguments made by defendant in Point III.

Reversed and remanded. We do not retain jurisdiction.

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