SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0208-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JON J. CARLO,

Defendant-Appellant.

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Argued April 6, 2022 – Decided May 10, 2022

Before Judges Sumners and Petrillo.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 18-01-0022.

Margaret McLane, Assistant Deputy Public Defender, argued for appellant (Joseph E. Krakora, Public Defender; Margaret McLane, of counsel and on the briefs).

Katherine A. Mika, Special Deputy Attorney General/ Acting Assistant Prosecutor, argued for respondent (Christine A. Hoffman, Acting Gloucester County Prosecutor; Katherine A. Mika, on the brief).

PER CURIAM

Following a jury trial, defendant was convicted of second-degree sexual assault of a child under age thirteen, N.J.S.A. 2C:14-2(b); third-degree endangering the welfare of a child under age sixteen by engaging in sexual conduct, N.J.S.A. 2C:24-4(a)(1); third-degree invasion of privacy by photographing or recording intimate parts of another without consent, N.J.S.A. 2C:14-9(b)(1); third-degree showing obscene material to a minor, N.J.S.A. 2C:34-3(b)(1); and second-degree endangering the welfare of a child by photographing a child in a sex act or the simulation of a sex act, N.J.S.A. 2C:24-4(b)(4). Defendant was sentenced to an aggregate prison term of six years with an eighty-five percent parole ineligibility period, No Early Release Act, N.J.S.A. 2C:43-7.2.

In his appeal, defendant argues:

> POINT I
>
> PHOTOGRAPHING FULLY CLOTHED INDIVIDUALS EITHER IN A PUBLIC AREA OR WHERE THE PERSON KNOWS SHE IS BEING PHOTOGRAPHED IS NOT AN INVASION OF PRIVACY.
>
> POINT II
>
> DEFENDANT'S INVASION OF PRIVACY CONVICTION MUST BE REVERSED BECAUSE

THE COURT FAILED TO INSTRUCT THE JURY [IT] HAD TO UNANIMOUSLY AGREE ON THE IDENTITY OF THE VICTIM.

POINT III

THE IMPROPER ADMISSION OF OTHER-CRIMES EVIDENCE AND THE FAILURE TO ADEQUATELY INSTRUCT THE JURY ON THE PERMISSIBLE USES OF THIS EVIDENCE REQUIRE REVERSAL OF DEFENDANT'S CONVICTIONS.

A. M.A.'S STATEMENT[.]

B. OCTOBER VIDEO[.]

C. ADULT GYMNASTICS PHOTOS[.]

D. PHOTOS OF UNIDENTIFIED GIRLS[.]

E. CONCLUSION[.]

POINT IV

THE TRIAL COURT ERRED IN ALLOWING THE DETECTIVE TO OFFER HIS LAY OPINION THAT DEFENDANT WAS GUILTY. (Partially Raised Below)[.]

POINT V

THE TRIAL COURT ERRED IN FAILING TO MERGE COUNTS BASED ON THE SAME UNDERLYING CONDUCT.

POINT VI

DEFENDANT'S SENTENCE IS EXCESSIVE BECAUSE THE COURT ERRONEOUSLY FAILED TO FIND MITIGATING FACTORS AND IMPROPERLY FOUND AND WEIGHED AGGRAVATING FACTORS.

We reverse the trial court's denial of defendant's motion for acquittal of the invasion of privacy charge and vacate the conviction of that offense. We vacate the other convictions and remand for retrial because we are persuaded that the trial court mistakenly applied its discretion in allowing the investigating detective to give opinion testimony—not first-hand testimony—regarding defendant's guilt. Given our remand, we do not address defendant's remaining arguments.

I

On July 24, 2015, eleven-year-old A.A. (Ann)[1] gave a video-recorded interview—played before the jury—to Detective Warren Rivell of the Gloucester County Prosecutor's Office concerning defendant's conduct at the Franklinville Skating Center, which defendant owned and operated. Ann, who was fourteen years old when she testified at trial, was a regular skating center

[1] We use initials and pseudonyms to protect the privacy and preserve the confidentiality of the victims and this proceeding. N.J.S.A. 2A:82-46(a); R. 1:38-3(c)(9).

patron but stated she attended less often because she saw pornography on defendant's computer in his office on two separate occasions and he had recorded her and her friends doing gymnastics at the center.

The first time Ann saw pornography on defendant's computer was when she was in defendant's office months before she gave her police statement. She said that when she walked into the office to get her skates where they were kept, she saw a video of a black man and a white woman having sex on defendant's computer. After defendant said, "Oh, I didn't know that was playing," she retrieved her skates and left the office.

The second time occurred on July 8, 2015, in the skating center's box office where defendant was collecting patron's admission fee. Ann had a brief conversation with him when he "swiped" the screen of his laptop "and [there] was porn" on the screen. She told Rivell that she saw a still image of a naked girl "looking up with her mouth open" and "a penis up in the corner" ejaculating "in[to] her mouth." The image was on the screen for about five seconds until defendant "went on another [screen] . . . and there was a video [of a] girl . . . crawling around the living room with a whole bunch of naked guys sitting around her." There were two men sitting on a loveseat and three on a sofa. "[O]ne [man] had a hat on and . . . had pants on but the rest didn't." All the men

were white. Referring to the girl in the video, defendant asked Ann, "Does that look like [Hillary]?" Hillary, an employee at the skating rink, had blond hair and blue eyes similar to the girl in the video. Defendant turned the video off and walked out of the box office. Ann then left the office and told M.A. (Mimi), her older sister by three years, who worked at the skating center.

At trial, Ann testified that one day she went into defendant's office—the door would always be open—and saw a video playing on the computer with naked men and a woman having sex. She saw the video and still image for "maybe like three or four seconds." When asked to describe the pornography that she saw "months" prior to this, Ann replied, "I don't remember exactly, but I knew what it was."

On cross-examination, Ann said defendant was not in his office the first time she saw pornography on the computer, but when they both went into his office to retrieve her skates, she saw the pornography playing while she stood in the doorway. Defendant said something like "didn't know that was playing" and turned it off. She did not tell anyone because it did not seem "like a big deal at the time." After seeing pornography on defendant's computer a second time, she stopped going to the skating center as often as she had gone before and kept

her distance from him because she feared that he might do something inappropriate, but he never did.

Ann also testified that defendant had recorded and photographed her doing gymnastics and dancing in the carpeted area of the skating center. She said he had tried to conceal what he was doing by holding his cell phone at his waist. On one occasion, he told her that he could get her into a dance class but that he needed photos of her dancing. As far as Ann knew, defendant did not teach dance or gymnastics, and she was never contacted by any dance teacher.

Mimi testified that Ann told her she had seen pornography playing on defendant's office computer: a video of a naked woman crawling on the floor with a group of naked men around her. Mimi stated that after Ann said she saw pornography a second time, she and Ann told their grandmother,[2] who contacted the police. Mimi also believed defendant recorded her sister doing gymnastics, stating, "I would always notice that he would hold his [cell phone] camera down near his leg with his [cell phone] camera facing towards . . . her, facing out. I mean I never seen [his cell phone] camera on but I just always thought that that's what it was. I'm not sure if that's what it was, but . . . that's what I thought."

[2] The sisters, along with a younger sister, lived with their grandmother.

Rivell testified that after he interviewed Ann, he executed a search warrant and seized defendant's cell phone and computer. The cell phone had two videos of Ann, which were played for the jury, performing gymnastics in defendant's office while he directed her what to do.

An October 2014 recording captured the following dialogue:

> DEFENDANT: Okay. Can you get on the floor? Oh, do a straddle. Yeah, do a straddle. Okay. Do them on the floor now. Hands on your hips. Face that way.
>
> [Ann]: This way?
>
> . . . DEFENDANT: Yep. Okay.
>
> [Ann]: Straddle?
>
> . . . DEFENDANT: Yep. Okay. Now I want you to sit like this, slowly put your legs to the side, okay? Well first start with them together. Okay, to the sides. And hold. Okay. Now on your elbows, and with no back, on your back. Lay on your back. . . . On [y]our elbows, legs apart. Can you pull them back by your head? Hold. And now standing.
>
> [Ann]: (inaudible)
>
> . . . DEFENDANT: Hold that. And now the other side. Okay. Good.

In the November 2014 video, while Ann was doing a handstand with her legs split apart, Rivell testified it was at that point that defendant's genital area touched Ann's genital area. Rivell stated: "[T]he person holding the [cell]

phone, who I believe was . . . [defendant], is still videoing and his body comes close to hers and I observed his genital area, that was clothed, make contact with her genital area while she was in that position, which was also clothed . . . ."

On the following day of trial, the State replayed the same portion of the video, and had Rivell again tell the jury where he believed defendant's and Ann's genital areas touched.[3] The following colloquy occurred between the prosecutor and Rivell:

> Q[uestion:] . . . . During your testimony [yesterday] you stated that there was a video that you believe that there was sexual contact that was involved. Could you explain for the jury which particular video you believe the sexual contact occurred in?
>
> A[nswer:] The [November 2014] video.
>
> Q[uestion:] And that particular video, is there any place in particular that you can point to where you believe that sexual contact actually happened?
>
> A[nswer:] Yes.
>
> Q[uestion:] Could you explain it and I can help the jury see it as you explain the video?
>
> A[nswer:] Okay. When [Ann] goes into the pose with her legs—she's standing with her arms, and her legs are

[3] Defense counsel objected to the replaying, stopping, and restarting of the video, but he did not raise the argument now made on appeal that Rivell's testimony was improper lay opinion testimony.

spread apart. And you can see the contact between the defendant's—

(Whereupon Videorecording Played 10:27:06)

. . . DEFENDANT: Can you do a handstand with your—

(Videorecording Paused 10:27:08)

A[nswer:] —clothed area where his penis would be and her genital area . . . where you could see on the video.

(Whereupon Videorecording Played 10:27:42, Paused 10:27:45)

. . . .

Q[uestion:] Now Detective Rivell, is this the location that you believe the contact occurred?

A[nswer:] Yes.

(Whereupon Videorecording Played 10:28:00)

. . . .

A[nswer:] Right there.

(Videorecording Paused 10:28:20)

. . . .

Q[uestion:] And based on that image, you believed that there was sexual contact that was actually made?

> A[nswer:] Yes. Rivell also stated that he did not believe that Ann knew defendant was recording her at the time.

Rivell testified that defendant's cell phone also had "numerous videos of young girls at the skating center," which "[a]ppeared to [him] that [the girls] weren't aware that they were being [recorded]." He believed that at least one of the photos was created when defendant sat across from a girl at a table and held his cell phone "below the table where you would only see the young woman's legs and shorts area." He also noted he had found "multiple" videos and photographs of a girl who was clothed and "[c]learly . . . was a juvenile." In one video, defendant and the girl appeared to be in defendant's office, and defendant instructed her to lay down on her back and open her mouth. Despite his department's media release sent out asking the public "if there [were] additional witnesses," Rivell was not able to identify the girl.

As for the pornography that Ann allegedly saw on defendant's computer in July 2015, Rivell stated he identified the video on a website but did not show the video to Ann to confirm that it was the same one she saw on defendant's computer because "that would be a crime," and his office's policy was to limit the number of times a child was asked to discuss an inappropriate event. Rivell testified that he found internet searches on defendant's computer for

"adolescent-type pornographic topics." He also stated the computer contained several photographs of young girls, including photos that were not from the rink, which the court had ruled were inadmissible.[4] Defendant's motion for mistrial due to that testimony was denied.[5]

Rivell then testified that defendant's computer also contained recordings of girls doing gymnastics at the skating center. Defendant objected, arguing the State had not established the age of the girls at the center or whether they had consented to the photos. The court ruled that it was a jury question whether the girls were children or adults.

On Rivell's cross-examination, defense counsel highlighted the differences in the July 8, 2015 video that Ann claimed she saw on defendant's computer and the website video that Rivell stated was the one Ann saw. Rivell agreed that Ann said one man wore a hat and pants and everyone was white, but in the website video played for the jury, no man wore a hat or pants, and one or two men appeared to be African American. Rivell believed that Ann's

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[4] The court ruled the images from defendant's home and the skating rink bathroom were inadmissible because the charged crimes took place in the public area of the skating rink, not in the bathroom or defendant's home.

[5] The court gave the jury a limiting instruction to mitigate any unfairness the testimony would have on defendant.

inconsistencies were due to her age and the trauma she experienced from viewing the pornography. Rivell further maintained the website video had been played on defendant's computer at the time Ann was at the rink on July 8, 2015.

Following defendant's objection to the State's presentation of photos in his computer—that were not taken at the skating center—of naked women in poses similar to the gymnastic poses Ann performed for him at the center, a Rule 104 hearing was conducted to determine when the photos were accessed by defendant. The State's forensic expert, Brian Perticari, a detective in the Gloucester County Prosecutor's Office, testified he could not determine the date the images were accessed because they had been deleted from defendant's computer.[6] The court reversed its initial decision and ruled that the jury had to decide whether defendant saw the adult images before he made the November 2014 video of Ann.

Perticari subsequently testified regarding four pornographic images of adult females in poses that the State claimed mimicked those that defendant had Ann do in the November 2014 video. He also stated the gymnastics searches

[6] Defendant did not know he was under investigation until the police executed the search warrant. Thus, there was no allegation that he attempted to destroy or conceal evidence.

conducted on defendant's computer from April to July 2015 likely would not have resulted in any illegal material because the searches were done through popular search engines which he doubted would permit the search of illegal material.

II

We first address defendant's arguments in Point I that the trial court erred in denying his motion for judgment of acquittal of the invasion of privacy charge. He argued dismissal was appropriate because the images he took of fully clothed women in a public location that the State presented to support this charge did not constitute an invasion of privacy. We agree.

At the close of evidence, a defendant may move for the entry of a judgment of acquittal on the grounds that "the evidence is insufficient to warrant a conviction." R. 3:18-1. In considering a motion for a judgment of acquittal,

> [t]he trial [court] must decide whether the evidence is sufficient to warrant a conviction. More specifically, the trial [court] must determine whether the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt. On such a motion the trial [court] is not concerned with the worth, nature or extent (beyond a scintilla) of the

> evidence, but only with its existence, viewed most favorably to the State.
>
> [State v. DeRoxtro, 327 N.J. Super. 212, 224 (App. Div. 2000) (quoting State v. Kluber, 130 N.J. Super. 336, 341 (App. Div. 1974)).]

The same standard applies to appellate review. "In deciding whether the trial court was correct in denying [a Rule 3:18-1] motion, we . . . take into account only the evidence on the State's case, unaided by what defendant later developed at trial." State v. Lemken, 136 N.J. Super. 310, 314 (App. Div. 1974).

In order to be found guilty of third-degree invasion of privacy, the State must prove beyond a reasonable doubt that the defendant, knowing that he or she is unlicensed to do so, photographs or records

> another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.
>
> [N.J.S.A. 2C:14-9(b)(1).]

"Intimate parts" are defined as "sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person." N.J.S.A. 2C:14-1(e).

Even accepting the State's evidence that defendant took some cell phone video recordings and photos without Ann's or the other girls' knowledge, none of the images revealed the subject's exposed intimate parts, their engagement in

acts of sexual penetration, or sexual contact.[7] Defendant recorded and photographed Ann doing gymnastics and dancing in the carpeted area of the skating center where there was no reasonable expectation of privacy. Thus, the State's proofs did not satisfy the plain language of N.J.S.A. 2C:14-9(b)(1).

Because there is no ambiguity or absurd result in the applying the plain language of N.J.S.A. 2C:14-9(b)(1), we need not look outside the statute's plain language. See Tasca v. Bd. of Trs., Police & Firemen's Ret. Sys., 458 N.J. Super. 47, 56 (App. Div. 2019). Yet, our interpretation of the statute is clearly supported in its legislative history. In the bill that introduced N.J.S.A. 2C:14-9(b)(1), it was explained:

> This legislation creates a new criminal offense, video voyeurism. It is designed to help shut the electronic blinds on modern peeping toms. . . .
>
> . . . This bill would supplement the criminal trespass statute to make it a crime of the third degree if a person surreptitiously photographs or films an individual in a place where he or she would have a reasonable expectation of privacy—for example, a home, bathroom or dressing room—for the purpose of sexual arousal or gratification for the photographer or anyone else.

[7] Although the images forming the basis of the State's evidence are not included in the record before us, there are adequate descriptions in the record enabling us to consider the parties' arguments.

> [Sponsor's Introduction Statement to S. 2366 2-3 (Mar. 10, 2003).]

Later, it was stated that the bill

> recognizes that people have a right to control the observation of their most intimate behavior under circumstances where a reasonable person would not expect to be observed. The [bill] . . . provides for punishment of a person who, without license or privilege, observes another person with knowledge that the person may expose intimate parts or engage in sexual penetration or sexual contact, or who videotapes or otherwise records the image of that person or discloses such images.
>
> [Senate Judiciary Comm. Statement to Senate Comm. Substitute for S. 2366 (Nov. 24, 2003).]

This Statement further provides the new law would also protect the privacy of those in dressing or fitting rooms. Ibid.

The Legislature's explanation of the conduct that N.J.S.A. 2C:14-9(b)(1) was meant to criminalize strengthens our conclusion that defendant's behavior was not a violation of the statute. Defendant was not a peeping tom, photographing or video recording others in private settings such as a bathroom, bedroom, or dressing room; and he did not photograph sexual behavior or intimate body parts that were otherwise shielded from public view. We appreciate the State's concern that some of the images portrayed the upper legs and thighs of girls wearing short shorts and closeups of their clothed intimate

parts. We further appreciate the State's concerns about the immoral purpose that defendant may have planned to use these images. Nevertheless, defendant was charged with invasion of privacy under N.J.S.A. 2C:14-9(b)(1), and he did not violate the law by taking images from a public setting of Ann and others where their intimate body parts were not exposed. This is unlike the situation in State v. Nicholson, 451 N.J. Super. 534, 544 (App. Div. 2017), where we upheld the defendant's conviction under N.J.S.A. 2C:14-9(b)(1) because he positioned his cell phone camera under a female victim's skirt to capture images of her body's intimate parts that were "shielded or protected" from public view. Hence, the trial court erred in not granting defendant's motion for acquittal of the invasion of privacy charge, thus we vacate the conviction.

III

As for the remaining convictions of second-degree sexual assault of a child under age thirteen, third-degree endangering the welfare of a child under age sixteen by engaging in sexual conduct, third-degree showing obscene material to a minor, and second-degree endangering the welfare of a child by photographing a child in a sex act or the simulation of a sex act, defendant argues in Point IV that they should be reversed because plain error occurred when the trial court allowed Rivell to give improper opinion testimony regarding: (1)

defendant's sexual contact with Ann; (2) the pornographic video that Ann saw on defendant's computer; (3) whether the images of girls' legs and shorts on defendant's cell phone were taken without their knowledge; and (4) whether the unidentified girls were juveniles.[8] Defendant argues the testimony invaded the jury's province in deciding the facts and guilt related to these charges. We agree.

Plain error is "error possessing a clear capacity to bring about an unjust result and which substantially prejudiced the defendant's fundamental right to have the jury fairly evaluate the merits of his [or her] defense." State v. Timmendequas, 161 N.J. 515, 576-77 (1999) (quoting State v. Irving, 114 N.J. 427, 444 (1989)). "[A]ny finding of plain error depends on an evaluation of the overall strength of the State's case." State v. Chapland, 187 N.J. 275, 289 (2006). The unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). Harmless errors should be disregarded by the court, even where the trial court is found to have abused its discretion in admitting evidence and failed to properly instruct the jury. See State v. Prall,

[8] Defendant also argues Rivell's lay opinion testimony undermines the invasion of privacy conviction. However, because we have concluded he should have been acquitted of the charge and thus vacate the conviction, we do not address defendant's argument.

231 N.J. 567, 581, 587-88 (2018); R. 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .").

Lay opinion testimony is permitted when it is "rationally based on the witness' perception" and "will assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. Lay opinion testimony "is not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence." State v. McLean, 205 N.J. 438, 462 (2011) (reversing the defendant's possession with intent to distribute convictions because a testifying police officer, who observed the defendant hand an item to an individual in exchange for money, expressed the opinion that a drug transaction had occurred). "[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." Ibid. "[N.J.R.E. 701] does not permit a witness to offer a lay opinion on a matter . . . as to which the jury is as competent as [the witness] to form a conclusion." Id. at 459 (internal quotation marks omitted). Opinion testimony "is subject to exclusion if the risk of undue prejudice substantially outweighs its probative value." State v. Summers, 176 N.J. 306, 312 (2003).

In the context of police testimony, an officer may provide testimony about facts observed firsthand, but may not "convey information about what the officer 'believed,' 'thought' or 'suspected.'" McLean, 205 N.J. at 460. A police officer's testimony cannot imply to jurors that he "possesses superior knowledge, outside the record, that incriminates the defendant." State v. Branch, 182 N.J. 338, 351 (2005). 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 opining innocence of one person and inferentially the guilt of the defendant); State v. Landeros, 20 N.J. 69, 74-75 (1955) (holding that a police captain's testimony that defendant was "as guilty as Mrs. Murphy's pet pig" caused "enormous" prejudice warranting reversal).

We conclude the restricting principles of N.J.R.E. 701 as articulated in McLean and Frisby were violated by Rivell's lay opinion testimony, which caused undue prejudice to defendant depriving him of a fair trial. Rivell's testimony that defendant made "sexual contact" with Ann directly related to the charges of second-degree sexual assault and second-degree endangering the welfare of a child by photographing a child in a sexual act or the simulation of a sexual act.

Second-degree sexual assault occurs when "the actor commits an act of sexual contact with a victim who is less than [thirteen] years old and the actor is at least four years older than the victim." N.J.S.A. 2C:14-2(b).

> "Sexual contact" means an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present[.]
>
> [N.J.S.A. 2C:14-1(d).]

Second-degree endangering the welfare of a child by photographing the child in a sexual act or the simulation of a sexual act occurs when an actor

> photographs or films a child in a prohibited sexual act or in the simulation of such an act or for portrayal in a sexually suggestive manner or who uses any device, including a computer, to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act or for portrayal in a sexually suggestive manner.
>
> [N.J.S.A. 2C:24-4(b)(4).]

The State argued in summation that the video of Ann doing a handstand and split showed sexual contact with defendant and constituted a simulation of a sexual act that mimicked the four pornographic images on defendant's computer of naked adult women in gymnastics poses, including one of whom

who was having sex. Defendant denied any inappropriate contact with Ann and claimed that the adult images were lawful and did not establish a sexual act for purposes of second-degree sexual assault and second-degree endangering the welfare of a child by photographing the child in a sexual act or the simulation of a sexual act.

Rivell's testimony that the November 2014 video shows defendant having "sexual contact," proscribed by N.J.S.A. 2C:14-2(b), with Ann by touching his genital area with Ann's genital area, expresses his belief of defendant's guilt. This should have been left to the jury's own assessment of defendant's conduct without Rivell's unneeded opinion. The prejudice was further exacerbated by the State's replaying the video to emphasize where Rivell believed sexual contact occurred. Moreover, given that neither Ann nor any other witness testified that defendant made sexual contact with Ann, the jury was permitted to be swayed by a law enforcement officer's lay opinion testimony. Whether the video portrayed sexual contact was solely for the jury to decide without Rivell's opinion.

Rivell's testimony also directly related to one of the theories the State relied upon to prove third-degree endangering the welfare of a child by engaging in sexual conduct. The offense occurs when a person who is not responsible for

the child's care "engages in sexual conduct which would impair or debauch the morals of the child." N.J.S.A. 2C:24-4(a)(1). The State asserted this charge was proved by both gymnastic videos of Ann, one showing sexual contact and the other showing a simulated sex act. Rivell's testimony invaded the jury's decision-making province by asserting the video depicted sexual conduct.

Finally, Rivell's testimony that the pornography video shown to the jury was the same video that he believed defendant showed Ann in July 2015, supported the State's charge that he was guilty of third-degree showing obscenity for minors. The offense is defined as:

> b. Promoting obscene material.
>
> (1) A person who knowingly sells, distributes, rents or exhibits to a person under [eighteen] years of age obscene material is guilty of a crime of the third degree.
>
> (2) A person who knowingly shows obscene material to a person under [eighteen] years of age with the knowledge or purpose to arouse, gratify or stimulate himself or another is guilty of a crime of the third degree if the person showing the obscene material is at least four years older than the person under [eighteen] years of age viewing the material.
>
> [N.J.S.A. 2C:34-3(b).]

Pursuant to N.J.S.A. 2C:34-3(a)(1):

> "Obscene material" means any . . . display, depiction of a specified anatomical area or specified sexual activity

> contained in, or consisting of, a picture or other representation, . . . which by means of posing, composition, format or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the area or activity.

In stating the video shown at trial was the video defendant showed Ann, Rivell resolved a factual question for the jury to decide. He then testified to defendant's guilt by saying that he did not confirm with Ann that this was the video because showing it to her "would be a crime."

We disagree with the State that Rivell's testimony was proper because it was based on his personal observations of the evidence. It was for the jury to evaluate the evidence because there was nothing complex or beyond its understanding. Rivell did not testify about his personal knowledge. His testimony as the investigating police officer added a cloak of undue suggestibility to the State's prosecution that was "clearly capable of producing an unjust result," R. 2:10-2, and denied defendant a fair trial.

Because of Rivell's lay opinion testimony, we reverse the convictions for second-degree sexual assault of a child under age thirteen, third-degree endangering the welfare of a child under age sixteen by engaging in sexual conduct, third-degree showing obscene material to a minor, and second-degree

endangering the welfare of a child by photographing a child in a sex act or the simulation of a sex act, and remand for retrial.

IV

Considering our decision, we need not address defendant's remaining arguments.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.