SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1666-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELIJARH HOGGES,

Defendant-Appellant.

———————————————

Argued January 19, 2022 – Decided December 2, 2022

Before Judges Fisher, DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 17-12-1231.

Stephen J. Natoli argued the cause for appellant.

Ali Y. Ozbek, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Ali Y. Ozbek, of counsel and on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Defendant Elijarh Hogges appeals from a judgment of conviction entered after a jury trial of four counts arising from a motor vehicle collision that resulted in serious bodily injury, as well as his aggregate sentence of twenty-three years in prison. We vacate defendant's convictions and remand for a new hearing on defendant's motion to suppress evidence and a new trial.

I.

The State alleges the following facts: In the early morning hours of May 27, 2017, defendant, who was intoxicated, was driving a white Audi on Dayton Avenue in Passaic, ran a red light at the intersection with the off-ramp of Route 21, and crashed into another vehicle. The driver of the second vehicle suffered serious bodily injuries, was hospitalized for eight days, and remained bedridden for one and a half months. Doctors placed a steel rod in his arm, requiring months of physical therapy to regain use of that limb. At the time of trial, the victim had not returned to work because of persistent pain from his injuries.

After the crash, defendant exited his car and walked past the driver's side door of the victim's car without rendering assistance and left the scene. A witness was driving a truck that proceeded through the intersection just prior to the crash and saw defendant's car pass at about sixty miles per hour. After the

crash, he made a U-turn and returned to the scene to assist the victim. He called police, gave a description of defendant, and reported that he fled on foot.

Officer Dino Bordamonte was dispatched to the collision. While enroute, he was informed one of the drivers was fleeing on foot. Searching the area, he saw defendant walking away from the crash at a fast pace with a limp.

Bordamonte's interaction with defendant was captured in a recording made by the officer's body camera. We rely on both Bordamonte's trial testimony and our review of the recording to describe what transpired. Bordamonte pulled his patrol car ahead of defendant and exited the vehicle. He saw defendant "was agitated, he was bleeding . . . a lot of blood, unresponsive to police commands . . . very irate and he was rambling and just mumbling . . . just rambling continuously." The officer heard defendant say that "it wasn't [his] fault" repeatedly.

Bordamonte ordered defendant to get on the ground. When he refused, Bordamonte resorted to yelling and profanity to get defendant to comply, shouting "I swear to God, I will fuck you." The officer explained his reasoning for ordering defendant to the ground:

> You have to understand when this person and by myself (sic), I have no back-up, the guy's not searched, I don't know what he's going to do, he's going to run, he's going to top tackle me, assault me. I don't have my

> weapon out, I do have my baton but I don't know if he has a gun. So – and from experience it's better to have him on the floor to basically – it's just for my safety and his safety, one, he doesn't fall, (indiscernible) get hurt himself and for me just to keep my distance and him to keep his distance from me.

At trial, Bordamonte testified that he could not remember asking defendant any questions. Yet, on his body camera recording, immediately after defendant got on the ground, Bordamonte asked him, "what happened?" After defendant said that the other driver "ran a red fucking light, so I hit him," Bordamonte asked a second question, "so why didn't you just stay over there?" Defendant replied that he was going to his house.

Bordamonte smelled a strong odor of alcohol on defendant, who was sweating. He did not conduct field sobriety tests because defendant was injured, which could affect the test results. At trial, Bordamonte testified he did not place defendant under arrest at that time. However, on his body camera recording, Bordamonte repeatedly either expressly stated that defendant was under arrest or referred to N.J.S.A. 39:4-50, the driving while intoxicated (DWI) statute. For example, Bordamonte said, "yeah, he's 4-50" and asked the dispatcher to arrange for a blood test kit to be at the hospital.[1] Bordamonte

[1] Evidence of the results of a blood test were not introduced at trial.

asked another officer, Llama Gerda, to "stay with him . . . he's going to be a 4-50 for me," while Bordamonte returned to the accident scene. He also told arriving EMTs that defendant was "going to be 4-50 okay? One of the officers will go with you."

After Bordamonte returned to the accident scene, he told another officer that he intended to ask a sergeant's permission to have Gerda accompany defendant "who's 4-50" to the hospital. He immediately thereafter said to the sergeant that defendant was "under arrest for 4-50." He also informed Gerda over the radio that defendant "is under arrest for 4-50."[2]

Gerda accompanied defendant on the ambulance ride to the hospital. We rely on both Gerda's trial testimony and our review of the officer's body camera recording to describe what transpired. In the recording, Bordamonte can be heard saying over Gerda's radio that defendant "is under arrest for 4-50." Gerda acknowledged Bordamonte's transmission and responded over the radio that

[2] The assistant prosecutor played for the jury a portion of the recording that contained some of Bordamonte's references to "4-50." Although she asked the officer if he had arrested defendant and the officer replied that he had not, the assistant prosecutor did not play for the jury the portion of Bordamonte's recording in which he twice stated defendant was under arrest. Defense counsel did not ask for the entire recording to be played to the jury and did not cross-examine Bordamonte with respect to whether he arrested defendant during their first encounter.

defendant admitted to driving the white vehicle involved in the accident. At trial, Gerda denied knowing who made the radio transmission concerning defendant's arrest, but conceded it likely was an officer involved in the investigation of the crash. During the transport, Gerda made a motion toward the EMTs signifying handcuffs by crossing his wrists while sitting behind the stretcher on which defendant was located.

Once at the hospital, defendant asked Gerda, "I ain't getting locked up for this bullshit, right?" Gerda replied that "it's not up to me . . . but . . . I'm here for a reason." Defendant asked, "you can get locked up for" an accident? Gerda responded by asking defendant, "you left the scene of the accident, right?" Defendant said that his "house is right there" and that he was "nervous." Gerda also told an unidentified police officer who stopped by defendant's examination room that defendant "was under for 4-50."

Gerda then engaged in a discussion with defendant regarding the officer's understanding of criminal liability for leaving the scene of an accident, telling defendant that if one leaves the scene of an accident with injuries "you're automatically . . . charged." Defendant asks if that is true "even if you leave and come right back," to which Gerda responds, "you get charged." Gerda then asks defendant, "were you drinking?" Defendant replied, "no."

During an interview with the assistant prosecutor a few weeks before trial, Gerda stated that, while at the hospital, defendant "was very agitated" and admitted that he had been at the Bonfire restaurant "having a good time" prior to the crash, that he was angry his new car had been totaled, that he "should have stayed home and never driven that night." Gerda conceded these observations did not appear in any police report prepared after the crash, were reported to the assistant prosecutor for the first time nearly two years later, and were not captured on the body camera recordings of either officer.

When Bordamonte returned to the hospital, he informed defendant he was under arrest for driving while intoxicated. Defendant refused to take a breathalyzer test or give a blood sample. He also would not answer questions on a DWI questionnaire asked by the officer. Bordamonte did not turn his body camera on while at the hospital. He later charged defendant with DWI and a several other traffic violations.

A grand jury indicted defendant, charging him with: (1) third-degree knowingly leaving the scene of a motor vehicle accident resulting in serious bodily injury, N.J.S.A. 2C:12-1.1; (2) second-degree assault by auto within 1,000 feet of a school while DWI or having refused a breath alcohol test, N.J.S.A. 2C:12-1(c)(3)(a); (3) second-degree aggravated assault, N.J.S.A.

2C:12-1(b)(1); and (4) third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2(a).

Prior to trial, defendant moved to suppress the inculpatory statements he made to Bordamonte and Gerda. He argued he was in custody from the time Bordamonte ordered him to get on the ground, the statements he made after that point were the result of custodial interrogation and, because he was not advised of his Miranda rights, were inadmissible.[3] The trial court denied defendant's motion after an evidentiary hearing.

At trial, defendant, although acknowledging he was driving the white Audi involved in the crash, argued he was not intoxicated and the victim ran the red light and caused the collision. Detective Kevin Conroy testified he found a video surveillance recording of the accident on a camera at a nearby school. The recording captured the intersection from a distance. As the video played for the jury, Conroy offered his lay opinion of what it depicted, including his opinion on the crucial question of whether defendant drove through a red light:

> Q. And once you see the collision just let – let us know, detective. Who has the green right now?
>
> A. People coming off of 21, the off-ramp. That would be (indiscernible). And here's the collision right there and their light went to green.

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

Q. So their light went to green after for Dayton Avenue.

A. Correct.

Q. So it was what color at the time of the collision?

A. It was red.

Q. But who has the red at that point?

A. At that point –

Q. At the point of the collision.

A. -- it would be the – Audi.

Conroy also offered his opinion on the cause of the crash:

Q. Now, Detective, based upon your investigation in this case were you able to ultimately come up with what the cause of this crash was?

A. Yes.

Q. And what was that?

A. That the white Audi did not stop at the control traffic device, the red light, and ran the red light into the intersection which resulted in the collision of the two vehicles.

After an in-chambers discussion with counsel that was not recorded, the court struck "the last question and answer," instructing the jurors that they were to

determine the cause of accident. The court, however, did not strike Conroy's testimony opining that defendant's vehicle proceeded through a red light.[4]

While defendant's counsel appears to have objected to allowing Conroy to offer his opinion on what caused the accident, on cross-examination he engaged in the following exchange with the detective, reading from a written report the officer prepared:

> Q. Please tell me if I read this correctly. "The video from the camera revealed that the Chevy Malibu entered the intersection and attempted to make a left turn from the off ramp onto Dayton Avenue[.] [T]he white Audi Q5 which appeared to be travelling at a high rate of speed as it traveled north on Dayton Ave. ran the red light and struck the Chevy Malibu." Did I read that correctly?
>
> A. Correct.
>
> . . . .
>
> Q. Okay. And just so we're perfectly clear. It's your testimony that the video played for the jury shows my client's car running a red light, crashing into the Malibu, that's your testimony, correct?
>
> A. Yes.

[4] Although Conroy testified that he is a certified accident reconstructionist, the State did not move to qualify him as an expert and produced no report prepared by Conroy explaining his opinion with respect to the cause of the accident.

Defendant offered the testimony of a physician who opined his behavior after the accident, which police and medical workers believed to be indicative of intoxication, could have been caused by a head injury. The expert conceded the evidence did not rule out the possibility that defendant was intoxicated.

The jury convicted defendant of all counts of the indictment, but acquitted him of DWI. The court sentenced defendant as a persistent offender to an aggregate twenty-three-year term of imprisonment.

This appeal followed. Defendant makes the following arguments.

> POINT I
>
> THE COURT COMMITTED REVERSIBLE ERROR WHEN IT PROCEEDED WITH A CRUCIAL TESTIMONIAL HEARING WITHOUT THE DEFENDANT PRESENT. (Not raised below)
>
> POINT II
>
> THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED THE STATEMENTS OF DEFENDANT IN VIOLATION OF DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF[-] INCRIMINATION. (Not raised below)
>
> POINT III
>
> THE PROSECUTOR'S USE OF DEFENDANT'S SILENCE WAS A PATENT VIOLATION OF DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION. (Not raised below)

POINT IV

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED DETECTIVE CONROY TO USURP THE PROVINCE OF THE JURY. (Not raised below).

POINT V

THE COURT'S FAILURE TO ADEQUATELY DISTINGUISH TO THE JURY THE REQUISITE STANDARDS OF RECKLESSNESS IN THE ASSAULT BY AUTO AND AGGRAVATED ASSAULT CHARGES CONSTITUTED REVERSIBLE ERROR. (Not raised below)

POINT VI

THE COURT'S SENTENCE WAS ILLEGAL AND EXCESSIVE. (Not raised below)

II.

We begin with defendant's argument that the trial court erred when it held a testimonial hearing on his motion to suppress without defendant being present or having validly waived his presence. The details of the events leading up to the hearing are critical to our analysis. The hearing at issue was held on Monday, October 7, 2019, after the jury was selected. Up until that day, defendant had been present at all court hearings and for each day of jury selection. He was also present at all court proceedings held after October 7.

The three proceedings immediately before the October 7 hearing took place in a number of courtrooms. The September 24 proceeding took place in Judge Niccollai's courtroom. On that date, Judge Niccollai granted defendant's motion for recusal. The September 26 jury selection took place in Judge Brogan's courtroom, although Judge Brogan did not preside. It is not clear in which courtroom the October 2 jury selection took place, but at the beginning of the proceedings the judge said to the prospective jurors, "Good morning, everyone. Be seated, please. We will continue to play our game of musical courtrooms." The October 3 jury selection took place in Judge Portelli's courtroom, although Judge Portelli did not preside.

On October 4, the Friday before the October 7 hearing, the court continued jury selection. The location of that proceeding is not clear. Defendant was present. After jury selection was complete, and before the jury was dismissed, the trial court made the following statement:

> THE COURT: Okay. As you may have guessed, we will not be here on Monday. We had only said that as a maybe, and we have complications, so we – we have other things we can do Monday.
>
> So we will – I won't expect you now until – we had to go Tuesday 2 o'clock, right?
>
> [DEFENDANT'S COUNSEL]: For openings.

[ASSISTANT PROSECUTOR]: We would start at 2.

THE COURT: Tuesday at 2 o'clock, right?

Okay. So we will see you Tuesday . . . .

. . . .

[J]ust to recap so there's no confusion, we're not coming here on Monday. We're coming on Tuesday.

The trial court, however, held the evidentiary hearing on the motion to suppress the following Monday. The courtroom location of the hearing is not clear from the record. Before the start of the hearing, the court had the following exchange with counsel:

THE COURT: All right.

[DEFENDANT'S COUNSEL]: I don't know where my client is.

THE COURT: Oh.

[DEFENDANT'S COUNSEL]: I don't know if he's with Judge Niccollai or not. I'll waive his appearance.

THE COURT: Are you sure?

[DEFENDANT'S COUNSEL]: Yeah.

THE COURT: Do you want to go down and look for him?

[ASSISTANT PROSECUTOR]: Can we call – can we call him, please, a moment.

THE COURT: Yes, go look for him.

[DEFENDANT'S COUNSEL]: I'm not getting up to look for my client who should be in the courtroom 25 minutes –

THE COURT: But he may be confused.

[DEFENDANT'S COUNSEL]: You pay the price for ignorance. I – I'm not getting up to find him. That's –

THE COURT: Well, that –

[DEFENDANT'S COUNSEL]: I was down there at 9:30 –

THE COURT: Yes. Oh, he wasn't there –

[DEFENDANT'S COUNSEL]: – he wasn't there.

THE COURT: – Then?

[DEFENDANT'S COUNSEL]: Right.

THE COURT: Okay.

[DEFENDANT'S COUNSEL]: So –

THE COURT: I assume they would have advised him there to come up here, you know?

[DEFENDANT'S COUNSEL]: They advised me.

THE COURT: Yes. Yes. All right. I think we can assume he's not around.

The court then proceeded to hold the hearing in defendant's absence, taking testimony from Bordamonte and Gerda. The officers recounted their encounter with defendant as detailed above. Their body camera recordings were not played during the hearing. The judge, however, stated that he had reviewed the recordings.

Defense counsel did not ask any questions of either witness. Nor did he request that body camera recordings be played during the officers' testimony. In fact, defendant's counsel appeared to express surprise that the court was able to view the recordings, suggesting he had not done so. When the court informed counsel it was necessary to take a short break prior to Gerda taking the stand to permit the court to finish viewing Gerda's body camera recording, defense counsel stated, "So you can watch it. It plays?" The court responded, "Oh, yes. It plays. It plays." Defense counsel did not ask for an opportunity to view the recording before the hearing continued, about forty minutes later.[5]

Defendant's counsel also appeared unaware that his predecessor counsel had filed the motion to suppress, expressing his belief that the State had moved for a decision with respect to the admissibility of defendant's statements.

[5] After the break, the assistant prosecutor asked defendant's counsel, "Did you call your guy or –," to which he responded, "Nope."

Although there are significant discrepancies between the officers' testimony and the events depicted in the recordings with respect to when defendant was placed under arrest and whether the officers interrogated him while in custody, those discrepancies were not brought to the court's attention by defendant's counsel.

After the close of testimony, the State argued defendant was not in custody until he was arrested by Bordamonte at the hospital. Defense counsel argued defendant was in custody as of the time he was told to get on the ground by Bordamonte. The court denied the motion, finding that when Bordamonte asked defendant "what happened?" he was not yet in custody. The court did not, however, make a finding of when defendant was put in custody, did not address Bordamonte's second question, "so why didn't you just stay over there?," the questions Gerda asked defendant, or the statements Gerda claimed defendant made while Gerda's body camera was turned off. The State used defendant's statements to the officers at trial.

Both the United States Constitution and the New Jersey Constitution guarantee a defendant "the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. Essential to this guarantee is the right of the accused to be present in the courtroom at every stage of a trial. Illinois v. Allen, 397 U.S. 337, 338 (1970); State v. Whaley, 168 N.J.

94, 99 (2001). Presence at trial allows a defendant to communicate with counsel, participate in trial strategy, assist with presenting a defense, and aid with cross-examination. State v. Finklea, 147 N.J. 211, 216 (1996). "The right to be present at trial is also significant for Fourteenth Amendment purposes because the right is a condition of due process to the extent that a defendant's absence would hinder a fair and just hearing." Ibid.

The right to be present at trial is not absolute and may be waived. Diaz v. United States, 223 U.S. 442, 455, 458 (1912). Rule 3:16(b) provides:

> The defendant shall be present at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by Rule. Nothing in this Rule, however, shall prevent a defendant from waiving the right to be present at trial. A waiver may be found either from (a) the defendant's express written or oral waiver placed on the record, or (b) the defendant's conduct evidencing a knowing, voluntary, and unjustified absence after (1) the defendant has received actual notice in court or has signed a written acknowledgment of the trial date, or (2) trial has commenced in defendant's presence.

"[W]here there is no express waiver, the touchstone is whether a defendant's conduct reveals a knowing, voluntary, and unjustified absence." State v. Luna, 193 N.J. 202, 210 (2007).

Our review of the record reveals no evidence of an express waiver by defendant of his right to appear at the evidentiary hearing. Although defendant's counsel "waived" defendant's right to appear, he did so after stating that he did not know where his client was and speculating that he may have gone to the courtroom where prior proceedings had recently been held. He did not state that defendant had authorized him to waive his appearance. Instead, defendant's counsel appears to have unilaterally decided to waive defendant's rights because he was "not getting up to look for [his] client" who, in his view, must "pay the price for ignorance." The attorney's remarks evince a hostility toward his client that should have alerted the court to the need to question whether defendant was aware of the hearing and the courtroom at which the hearing was to be held and had authorized the attorney to waive his appearance.

In addition, the record contains insufficient evidence on which to conclude defendant's absence from the hearing was knowing, voluntary, and unjustified. The proceedings in the days before the October 7 hearing, all of which defendant attended, took place in a number of different courtrooms. At the start of the October 7 hearing, defendant's counsel speculated that defendant might be at Judge Niccollai's courtroom, where defendant's counsel apparently had gone earlier that morning before being informed of where the evidentiary hearing

would be held. The judge urged counsel to go to Judge Niccollai's courtroom to look for defendant who, according to the court, "may be confused" about the location of the hearing. The assistant prosecutor also asked defendant's counsel to call defendant to ascertain his whereabouts. It is clear that all parties, including the trial court judge, were aware of the reasonable possibility that defendant had reported to the courtroom where prior proceedings had recently been held. Yet, the court "assumed" defendant had failed to appear at that courtroom because defendant's counsel did not see him there earlier in the morning and Judge Niccollai's staff would have given defendant directions to the correct courtroom had he appeared. The court's assumption, of course, does not account for the possibility that defendant had appeared at Judge Niccollai's courtroom, but had not been told where the hearing was going to be held, or had appeared at one of the several other courtrooms at which the prior proceedings had recently been held.

There is another reason to doubt the knowing and voluntary nature of defendant's absence. At the end of the Friday, October 4 hearing, where defendant was present, the court repeatedly said that the trial would continue on Tuesday, meaning October 8. While the court may have been referring to the date on which the newly selected jurors were to return for opening statements,

rather than the date on which counsel would appear for a hearing on the suppression motion, the court did not make that distinction clear. The court's only references to October 7 were that "we have other things we can do Monday" and "just to recap so there's no confusion, we're not coming here Monday." Defendant might well have believed the next date for a court hearing was Tuesday, October 8.

At the October 7 hearing, defendant's counsel did not state that he had informed defendant, after the October 4 hearing, that the next proceeding would be on Monday, October 7. The fact that defendant's counsel had notice of the October 7 hearing date cannot be imputed to defendant. Whaley, 168 N.J. at 103-07. Proof of actual notice to defendant is required for a valid wavier. Ibid. It was error for the trial court to conclude defendant had knowingly and voluntarily waived his appearance without exploring further whether he had actual notice of the October 7 hearing, including by taking the simple step initially suggested by the court and the assistant prosecutor that defendant's counsel call his client. The court should have engaged in an "on-the-record exploration of the reason for . . . defendant's mid-trial absence" and issued "a fulsome explanation of the . . . basis for ruling out an involuntary reason for the defendant's lack of presence." State v. Dellisanti, 203 N.J. 444, 461 (2010).

Defendant did not raise the issues of his absence from the suppression hearing during the trial or before sentencing. According to Rule 3:20-2, "[a] motion for a new trial based on a claim that the defendant did not waive his or her appearance for trial shall be made prior to sentencing." "[T]he absence of such a motion may normally support the finding of waiver under R[ule] 3:16(b)." State v. Mahone, 297 N.J. Super. 524, 530 (App. Div. 1997).

The record, however, supports relaxation of Rule 3:20-2's time limit. See Id. at 530 (Rule 3:20-2 relaxed where defendant did not receive actual notice of trial date from the court). The record of the October 4 hearing reflects significant ambiguity with respect to when the trial would continue. Defendant was not instructed on the record to appear on October 7, even though the court was instructing the jurors to return for trial on October 8. This ambiguity was acknowledged by the court and the assistant prosecutor at the October 7 hearing.

In addition, it is not reasonable to expect that in the days of trial that followed the October 7 hearing defendant's counsel, who "waived" defendant's appearance without even attempting to contact him, would move for a new trial based on defendant's absence from the hearing. The issue was first raised by defendant's new appellate counsel. In these circumstances, barring defendant's argument on timeliness ground would constitute a fundamental injustice.

We are not convinced by the State's argument that defendant's absence from the October 7 hearing was not prejudicial to him. "When the absence deprives a defendant of confrontation rights, prejudice can be readily assessed; when confrontational interests are not in play and participation in one's defense is the issue, prejudice is more critically examined." Dellisanti, 203 N.J. at 459; see State v. Byrd, 198 N.J. 319, 353-57 (2009) (affirming reversal of conviction on constitutional and procedural grounds where trial court made credibility determinations following in camera evidentiary hearing with witness from which defendant and his counsel were excluded); State v. W.A., 184 N.J. 45, 64-67 (2005) (remanding for new trial where defendant was excluded from sidebar conferences during voir dire and denied meaningful ability to challenge potentially unsympathetic juror).

Defendant was not present at a critical hearing at which two officers testified with respect to whether he was under arrest and subjected to custodial interrogation. He was denied the opportunity to convey to his counsel his version of events for purposes of cross-examination of the officers, including the admissions Gerda alleged defendant made at the hospital while the body cameras were turned off. Defendant also might have demanded that the body camera recordings, which contradicted the officers' testimony with respect to

both key issues at the hearing, be played when the officers were on the stand. In defendant's absence, his counsel asked not a single question on cross-examination and did not request that the recordings, which he appears to have not reviewed before the hearing, be played for purposes of challenging the officers' version of events.

The State's argument that defendant was not harmed because he had the opportunity to confront the officers at trial is inapposite. The object of the October 7 hearing was to determine whether defendant was in custody and subjected to interrogation without having been advised of his Miranda rights. Defendant's opportunity to cross-examine the officers on those subjects at trial was not meaningful, given that the trial court had already denied his motion to suppress the statements he made to the officers. Defendant's custody status and interrogation were not decided by the jury.

The trial court's error in proceeding with the October 7 hearing without determining whether defendant's absence was knowing, voluntary, and unjustified warrants vacating defendant's convictions. On remand, the trial court shall conduct an evidentiary hearing with respect to defendant's motion to suppress, after which it shall determine when defendant was placed under arrest and whether the statements he made to Bordamonte and Gerda were the products

of custodial interrogation without the benefit of being apprised of his Miranda rights. We offer no opinion on the outcome of the motion.

III.

Because the issue may be relevant at any retrial, we address defendant's argument that it was error to permit Conroy to offer lay opinion testimony of what was depicted in the surveillance video obtained from the school. N.J.R.E. 701, as it was amended effective 2020, provides that

> [i]f a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:
>
> (a) is rationally based on the witness' perception; and
>
> (b) will assist in understanding the witness' testimony or determining a fact in issue.

A witness may give a lay opinion that "falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function." State v. Singh, 245 N.J. 1, 14 (2021) (quoting State v. McLean, 205 N.J. 438, 456 (2011)). Perception is based on the acquisition of knowledge through one's sense of touch, taste, sight, smell, or hearing. McLean, 205 N.J. at 457. Lay opinion testimony must "assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Singh, 245 N.J. at 15 (quoting

McLean, 205 N.J. at 458). A lay witness may not give opinion testimony on a matter "as to which the jury is as competent as [the witness] to form a conclusion[.]" McLean, 205 N.J. at 459 (quoting Brindley v. Firemen's Ins. Co., 35 N.J. Super. 1, 8 (App. Div. 1955) (second alteration in original)). A law enforcement witness may not offer an opinion of a defendant's guilt. State v. Frisby, 174 N.J. 583, 593-94 (2002).

Conroy's narration of the video, in particular his testimony opining that defendant proceeded through a red light – a crucial fact at issue here – inappropriately invaded the province of the jury. Although Conroy has training in accident reconstruction, he did not apply those skills to create an expert report reconstructing the accident. The State did not ask that he be qualified as an expert witness. Instead, he conveyed to the jury his lay opinion of what was depicted on the recording. The jury was just as able as Conroy, who did not have first-hand knowledge of the crash, to view the recording and determine whether defendant drove through a red light prior to impact with the victim's car. While it was appropriate for Conroy to identify the location of the camera that made the recording, the intersection and its orientation, and street names, it

was error for him to offer an opinion that, in effect, equated with defendant's guilt – that he disregarded a red light and caused the crash.[6]

Because we are ordering a new trial, we need not address defendant's remaining arguments.

The judgment of conviction is vacated and the matter is remanded for a hearing on defendant's motion to suppress and a new trial consistent with this opinion. We do not retain jurisdiction.

[6] We acknowledge that defendant's counsel objected only to Conroy offering his opinion on the cause of the accident and, in fact, asked the officer during cross-examination to confirm for the jury his opinion that defendant drove through a red light and crashed into the victim's car. We view Conroy's opinion that defendant disregarded a red light immediately before the crash to be tantamount to an opinion that defendant caused the accident. At any rate, because the error with respect to defendant's absence at the suppression hearing, standing alone, warrants a new trial, we need not decide whether Conroy's testimony was plain error, State v. Ross, 229 N.J. 389, 407 (2017), or whether counsel's request that Conroy repeat the testimony is germane to that analysis. We address the question of Conroy's testimony only to provide guidance at any retrial.