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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2882-18**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUIS RIVERA,

Defendant-Appellant.

Argued November 3, 2021 – Decided November 17, 2022

Before Judges Fisher, DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 17-11-1126.

Barry H. Evenchick, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Barry H. Evenchick, and Zachary A. Levy, Designated Counsel, on the briefs).

William P. Cooper-Daub, Deputy Attorney General, argued the cause for respondent (Andrew J. Bruck, Acting Attorney General, attorney; William P. Cooper-Daub, of counsel and on the briefs).

The opinion of the court was delivered by
DeALMEIDA, J.A.D.

Defendant Luis Rivera appeals from his conviction after a jury trial of seventeen counts, including five counts of first-degree attempted murder, arising from a shooting at a group of people socializing in the front yard of a house. We vacate defendant's convictions and remand for a new trial.

I.

The following facts derive from testimony and evidence presented at trial. On July 21, 2017, Brian Vidal, Jeffrey Tupete, and Gary Cabrera were gathered at a house in Paterson. They were in the front yard listening to music playing from Vidal's car, which was parked nearby. Luis Cabrera was with the group, but evidence of his exact location at the property was not introduced at trial. As another friend, Wilton Estrella, was on the sidewalk approaching the house, gunshots rang out.

People scattered. Estrella ducked for cover behind Vidal's car. Vidal, who had been leaning on a fence in front of the house, ran inside. He then realized he had been shot three times in the arm and back. Vidal ran back out to his car. Estrella jumped into the driver's seat and drove Vidal to a nearby

hospital. Vidal was hospitalized for three days with serious, but not life-threatening, injuries. The others were not physically injured.

Detectives responded to the scene. They found blood splattered outside and inside the house. A magazine loaded with six .380 caliber hollow-point rounds and an additional loose round were discovered in front of the neighboring house. The officers did not find any spent casings at the scene, indicating that the shots had been fired from a revolver. They noted that both the neighboring house and the house across the street had video surveillance systems.

The detectives interviewed Vidal, Estrella, Tupete, and the Cabreras. Vidal, who was in too much pain to talk at length with the officers, said he had not seen the shooter because he was focused on finding shelter from the gunfire. Estrella could not describe the shooter. Tupete reported that the shooter was "potentially Hispanic" and "potentially black," but could not provide any further descriptive information. Gary Cabrera described the shooter as possibly Hispanic or maybe black, but could not provide any further descriptive information. Luis Cabrera did not see the shooter.

Video footage recovered from the surveillance systems of the nearby homes captured, from various angles, pedestrian traffic before, during, and after the shooting. One recording depicts three men approach the scene on foot. One

is heavysset with long, thin braided dreadlocks. That man appears to pull a handgun from his pocket and fire shots in the direction of the house where the victims were gathered. He and the other two men, who appear to be armed, flee the scene after the initial shots are fired. At least one of the men appears to discharge a weapon in the direction of the scene as he fled.

Another recording, which is less clear in its depictions, shows what appears to be the same three men walking by the scene on the opposite side of the street about two minutes before the shooting. Other recordings show what appears to be the same three men walking past a building adjacent to the scene just before the shooting. In one recording, the men can be seen drawing weapons and at least one firing toward the scene.

Paterson police could not identify the perpetrators. About a month after the shooting, Detective Joehan Suarez showed the surveillance videos to officers at the neighboring Passaic Police Department. Detective David Cruz watched the recordings first. He immediately recognized the heavysset man as someone he knew as "Pretty Lou." Defendant has the words "Pretty Lou" tattooed across his knuckles. Cruz did not know "Pretty Lou's" given name.

Officer Ralph Merced, who heard Cruz say that he recognized "Pretty Lou," also watched the videos. Merced recognized the heavysset man as someone

he had stopped for jaywalking in June 2017 named Luis Rivera. He did not know Rivera as "Pretty Lou." Merced recalled that he had a surveillance photograph of Rivera standing with a group of "gang guys" at a dominoes tournament in Passaic a few months earlier. He recalled that the photograph was taken because the group was "giving officers a hard time." Merced downloaded the photograph from a communal database and printed a copy, which he gave to Suarez "right then and there." A copy of the photograph was also given to Cruz.

The information provided by the officers lead to defendant's arrest. The State found no eyewitnesses to the shooting, no physical evidence connecting defendant to the shooting, and no evidence of motive or a past relationship between defendant and the victims.

A grand jury indicted defendant, charging him with: (1) five counts of first-degree attempted murder, N.J.S.A. 2C:5-1(a) and 2C:11-3(a); (2) second-degree possession of an unpermitted handgun, N.J.S.A. 2C:39-5(b); (3) five counts of second-degree possession of a gun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); (4) second-degree aggravated assault causing serious bodily

injury, N.J.S.A. 2C:12-1(b)(1); and (5) five counts of fourth-degree aggravated assault recklessly causing bodily injury, N.J.S.A. 2C:12-1(b)(3).¹

The State offered defendant a plea agreement. In exchange for a guilty plea to charges not specified in the record, the State would recommend an aggregate five-year term of imprisonment, with an eighty-five-percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. The plea offer included another unrelated case for which defendant would receive a concurrent four-year term of imprisonment in exchange for a guilty plea to a charge not specified in the record.

On March 13, 2018, six days before the plea cut off, defendant filed an omnibus motion to, among other things, suppress testimony from Cruz and Merced identifying him in the surveillance videos.

On March 19, 2018, defendant appeared before the court for a plea cut-off hearing. At the hearing, the court discussed with defendant the risks of going to trial, and the prosecutor summarized the evidence against defendant. The summary did not mention the photograph of defendant at the dominoes tournament, a copy of which had not been produced to defense counsel. The

¹ The grand jury also indicted defendant for second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1). The trial court granted the State's motion to dismiss that count of the indictment after the jury rendered its verdict.

court also discussed scheduling the outstanding suppression motion. Defendant rejected the plea offer and elected to proceed to trial. His counsel did not ask to extend the plea cut-off date until after resolution of the suppression motion.

On April 24, 2018, the trial court held a N.J.R.E. 104 hearing on the motion to suppress. Cruz testified he recognized defendant in the videos based on his gait, stature, and shoulder-length braids. Cruz stated that he had investigated defendant in the spring of 2017 based on information he received that someone with the street name "Pretty Lou" was distributing marijuana. He surveilled defendant at a park two or three times after that. Cruz described defendant's gait as walking with "his feet a little wide, kind of like [a] waddle" Cruz identified defendant, who was in the courtroom, as "Pretty Lou."

Cruz acknowledged he was given a copy of the surveillance photograph after viewing the videos. He said he did not then have a copy of the photograph, but was attempting to obtain one. He stated, however, that a copy might be among papers on his desk. A copy of the photograph was not provided to defense counsel until a week prior to the start of trial, more than a month after Cruz testified at the hearing.

The N.J.R.E. 104 hearing was continued on June 7, 2018. Merced testified he was present when Cruz reviewed the videos and overheard him say "[Y]eah

that's . . . Pretty Lou." When Merced watched the videos, he recognized defendant, who he knew as Luis Rivera. He testified that when he and his partner stopped defendant for jaywalking, he reviewed defendant's identification. Merced said that he was able to identify defendant in the videos because of his thin braids, wide, side-to-side walk, and stature. Although Merced did not immediately recall defendant's name, he checked his records to determine he was Luis Rivera.

Merced also recounted that he showed Cruz the surveillance photograph when Cruz first viewed the videos. After viewing an enlargement of the photograph, which showed the tattoo on one of defendant's hands, Merced identified defendant as the person depicted therein.

After Merced's testimony, the State moved to admit the photograph, as well as two enlargements. Defendant did not object to the use of the photograph during the hearing, but objected to its admission at trial. He argued the photograph looks like an "undercover surveillance type photograph," which rendered it unduly prejudicial.

The court issued an oral opinion denying defendant's motion to suppress the officers' testimony. The court found Cruz and Merced credibly established that they were familiar with defendant from their experience with him prior to

viewing the videos. The court also found that although Merced heard Cruz identify defendant as "Pretty Lou," he was not influenced in his identification of defendant because he was not familiar with defendant's street name. Thus, the court concluded, the officers had sufficient personal knowledge of defendant to offer a lay opinion identifying him as the person depicted in the videos.

In addition, the court found that the officers' testimony was the only identification evidence available to the State, which militated in favor of admission. The court concluded that the officers' testimony would be helpful to the jury when it decides whether defendant is depicted in the videos because he looked "decidedly different" at the hearing than he did in 2017, given that he was thinner and had a different hairstyle and the officers had personal knowledge of how defendant appeared close in time to shooting.

Although the court permitted the officers to identify defendant in the videos, it ordered that Cruz not inform the jury that he knew defendant from a drug investigation. Instead, Cruz was directed to testify that he knew defendant from the neighborhood. The court explained,

this [c]ourt intends to fashion a . . . script with the assistance of [c]ounsel . . . to the extent possible [to] neutralize any inference even that could be made that the . . . officer[s'] knowledge or Mr. Rivera was in any way associated with [a] criminal investigation.

. . . .

[T]here will be some script effectively that will be elicited, that's consistent with case law too, so that there's no suggestion or inference that . . . these officers knew Mr. Rivera from any criminal conduct.

The court found the photograph to be "highly probative" because it showed defendant's hand tattoo, as well as his hairstyle and stature, as they appeared shortly before the shooting. The court concluded the photograph would not be unduly prejudicial, provided it is presented as a "random photograph," dispelling any notion it was the product of police surveillance.²

At trial, the State produced no evidence of defendant's involvement in the shooting other than the officers' testimony identifying him on the videos. Of the victims, only Vidal and Estrella testified. Neither could identify the shooters. Vidal testified he had no prior disputes that might account for the shooting.

Suarez testified with respect to the videos. He began his testimony without the videos playing. Referring to a police report he previously prepared after he viewed the videos, Suarez testified that on the recordings "we observed three male suspects . . . possibly Hispanic" With respect to the person in the videos the State contends is defendant, Suarez testified that he was heavysset,

² The trial court issued a written opinion after trial amplifying its decision to permit Cruz and Merced to identify defendant in the videos.

had long braids or dreadlocks and "was seen reaching into his right pocket retrieving what appeared to be a handgun." He also testified that the suspect "appeared to shoot in the direction of the victim and witnesses" and that "a muzzle flash was observed, appearing to come from the handgun used by the heavyside suspect with long hair."

With respect to the video of the suspects passing across the street from the scene prior to the shooting, Suarez testified that the three suspects were "looking in the direction of the victim and witnesses which were standing directly across the street, approximately two minutes [before] the shooting occurred." He further testified that "[t]hose camera angles also showed that the heavyside male suspect had a large distinct tattoo on the front of his right forearm, and he had a very distinct walk with a wide stride, appearing possibly bowlegged."

After Suarez's testimony regarding his observations on the videos, as recorded in his report, the videos were played for the jury, as Suarez testified regarding camera angles and locations. Suarez also identified defendant, who was sitting in the courtroom, as Luis Rivera, even though he had no interaction with defendant prior to the investigation of the shooting.

Merced also testified at trial, identifying defendant as one of the shooters in the videos. He said he recognized defendant from his weight, stature,

hairstyle and "thin little braids." He also testified that defendant had a distinctive "little walk-kind of wobbly, like a side to side" that he recognized in the videos.

Merced testified that the surveillance photograph was taken at a dominoes tournament at which the Passaic Mayor was speaking. He said police were present at the event "to show presence and to assist" and that "photographs were taken." Merced stated that he had a copy of the photograph on his cellphone.

At a sidebar, the court expressed concern that Merced testified that the photograph was on his cellphone. The court stated that this aspect of his testimony had "to be downplayed," apparently because the jury might infer that the photograph was taken as part of a criminal investigation. When Merced resumed testifying, he stated that as part of his duties he took "random photos at the mayor['s] events" and that "there's nothing nefarious about there being pictures in [his] phone." Merced described his stop of defendant for jaywalking as having an "interaction" with defendant "just from the neighborhood and through the course of [his] employment."

Merced also examined an enlargement of the photograph and testified that it depicted a tattoo on defendant's hand that says "Lou." Defendant subsequently was instructed to show the jury the tattoos on his hands.

Cruz testified that he was a detective in a unit that investigates narcotics, pirated movies, gambling, thefts, and burglaries, as well as "pretty much anything that goes on" in Passaic, and sometimes assists with homicides. Cruz stated he was familiar with defendant "through seeing him" five or six times "during the course of [his] employment as a police officer." He added that "there wasn't anything nefarious" or "criminal in nature" about his encounters with defendant, which were "just seeing [defendant] on the streets." He testified he identified defendant in the videos from "[t]he way he walked. The shoulder length braids types. And the – his body. It was, like, heavysset" He stated that defendant "walked, like, with a waddle, with his shoulders and his feet a little separated."

After the State rested, defendant moved for entry of an acquittal on all charges. He argued that no reasonable jury could conclude he attempted to murder Luis Cabrera, because there was no evidence that he was in the yard at the time of the shooting. In addition, defendant argued that no reasonable jury could find him guilty of attempting to murder Estrella who testified that he was not at the house when the shooting occurred. The trial court denied the motion. Defendant thereafter elected not to testify.

During jury instructions, the court mischaracterized Merced's testimony regarding the photograph taken at the dominoes tournament, which had been marked as S-27. The court stated:

Now, one witness, Officer Merced has testified about having obtained photographs, S-27 and S-27 (sic) in evidence, of Luis Rivera, as part of his responsibilities to document witnesses and defendants. The mere fact that these steps were taken to memorialize Mr. Rivera's physical attributes, after he was arrested and charged with these offenses, does not, in and of itself, constitute evidence of guilt.

Rather, memorializing the physical attributes of people who come into contact with law enforcement is simply part and parcel of the standard protocol of law enforcement agencies that they undertake, when processing persons following arrests and/or encountering witnesses who may be – who may need to be located at a future time.

It appears counsel noticed the court's error, interrupted jury instructions, and requested an in-chambers conference, which was recorded in part. The court agreed that it had misspoken, but appears to have been under the impression that it gave incorrect instructions regarding an exhibit marked S-30, a photograph of the tattoos on defendant's hands taken after his arrest in this matter. When the court returned to giving jury instruction it stated:

[T]o clarify, what I testified (sic) before about the police having certain photographs in their custody, what I should have said, at that point, and we'll have it

clear, so you can take it into the jury room with you, that was Officer Rosa who had testified about S-30. So, when you get inside, you look at S-30, and, then, it should click. Because I'm repeating to you, now, what I said last week, when Officer Rosa testified.

The court did not subsequently clarify that S-27, the photograph taken at the dominoes tournament, was not associated with defendant's arrest or that Merced had not arrested defendant in the past. The remainder of the instructions contained no limiting instruction with respect to the testimony of the three police officers, other than informing the jury that they had the responsibility of determining whether defendant was depicted in the videos.

The jury found defendant guilty on seventeen counts of the indictment. The court denied defendant's post-trial motion for an acquittal, a new trial, or to limit the sentence to the term included in the State's plea offer. The court later sentenced defendant to an aggregate term of thirty-six years of imprisonment, with an eighty-five-percent period of parole ineligibility.

This appeal follows. Defendant raises the following arguments.

POINT I

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE A HIGHLY PREJUDICIAL PHOTOGRAPH OF LUIS RIVERA AND OTHER TESTIMONY FROM POLICE WITNESSES THAT STRONGLY IMPLIED TO THE

JURY THAT MR. RIVERA HAD A CRIMINAL BACKGROUND.

A. The probative value of S-27 was substantially outweighed by its risk of undue prejudice and had a strong tendency to suggest Mr. Rivera was engaged in prior criminal activity.

B. The testimony of police witnesses would have caused the jury to infer Mr. Rivera has a criminal history and has been the subject of police investigations.

POINT II

THE IMPROPER ADMISSION OF LAY-WITNESS OPINION TESTIMONY AS TO THE CONTENT OF THE SURVELLAN[C]E VIDEO AND THE IDENTITY OF THE SHOOTER WAS PLAIN ERROR.

A. Suarez improperly narrated the surveillance video.

B. Suarez, Merced and Cruz should not have been permitted to identify Mr. Rivera.

POINT III

THE VERDICT OF THE JURY ON COUNTS THREE AND FOUR OF THE INDICTMENT NAMING LUIS CABRERA AND WILTON ESTRELLA AS THE VICTIMS OF ATTEMPTED MURDER WAS AGAINST THE WEIGHT OF THE EVIDENCE.

POINT IV

LUIS RIVERA'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS REQUIRED TO ACCEPT OR REJECT A PLEA OFFER BEFORE PRETRIAL MOTIONS WERE COMPLETED AND RULED UPON.

POINT V

THE CUMULATIVE IMPACT OF THE ERRORS DENIED MR. RIVERA DUE PROCESS AND A FAIR TRIAL.

II.

We begin with defendant's argument that the trial court erred when it permitted Cruz and Merced to identify him as one of the shooters in surveillance videos. Those witnesses gave lay opinions that defendant was the person depicted in the videos shooting at the victims. "The admissibility of opinion evidence rests within the discretion of the trial court." State v. LaBrutto, 114 N.J. 187, 197 (1989). We will not reverse a decision admitting lay opinion testimony unless it "was so wide of the mark that a manifest denial of justice resulted." State v. Singh, 245 N.J. 1, 13 (2021) (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

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." Singh, 245 N.J. at 14 (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)).

Lay opinion testimony by a law enforcement officer identifying a defendant based on the officer's past encounters with the defendant is problematic, given the prejudicial inference a jury can draw that the defendant

was previously involved in criminal activity. The recent Supreme Court opinion in State v. Sanchez, 247 N.J. 450 (2021), addresses these concerns and guides our analysis of the propriety of the identification testimony given by Cruz and Merced.

In Sanchez, police investigating a homicide and robbery obtained a still photograph from a surveillance video of two suspects no witness could identify. Id. at 460. They circulated the photograph to law enforcement officers. Ibid. A parole officer identified one of the men depicted in the photograph as a parolee she supervised. Id. at 461. She stated that Sanchez had met with her at least twice a month in the fifteen months since he was released from prison for aggravated manslaughter. Ibid.

The trial court denied a motion to admit the parole officer's identification of Sanchez in the surveillance photograph. Id. at 462. This court reversed. Id. at 462-63. The Supreme Court granted an interlocutory appeal. Id. at 463.

The Court concluded that the parole officer's proposed testimony satisfied the first prong of N.J.R.E. 701 because the officer "became familiar with defendant's appearance by meeting with him on more than thirty occasions during his period of parole supervision. Her identification of defendant as the

front-seat passenger in the surveillance photograph was 'rationally based on [her] perception,' as N.J.R.E. 701 requires." Id. at 469 (alteration in original).

With respect to the second prong of N.J.R.E. 701, the Court held that four non-exclusive factors are relevant to the analysis of whether lay opinion testimony by a law enforcement officer will be helpful to the jury: (1) "the nature, duration, and timing of the witness's contact with the defendant[,]" id. at 470; (2) a change in the defendant's appearance from the time of the alleged offense to the time of trial, if the lay witness was familiar with how the defendant appeared when the alleged offense was committed, id. at 472; (3) whether other witnesses not associated with law enforcement are available to offer a lay opinion identifying the defendant, id. at 472-73; and (4) the quality of the depiction of the defendant, given that a jury may be as capable as any other witness to determine if a defendant who is present in a courtroom is the person in a clear depiction. Id. at 473.

Applying those factors, the Court concluded the parole officer's testimony would assist the jury in determining whether Sanchez was depicted in the surveillance photograph. Id. at 474-75. The Court noted the length and frequency of the parole officer's contacts with Sanchez, the absence of any other witness who could identify him, and the fact that the photograph was neither so

clear as to be readily used by the jury to determine if Sanchez was depicted therein, nor so blurry as to make the perpetrator's features indistinguishable. Ibid.

Finally, the Court held the parole officer's testimony may not be admitted if its "probative value is substantially outweighed by the risk of . . . [u]ndue prejudice." Id. at 475 (citing N.J.R.E. 403(a)). Noting that "it would be highly prejudicial to [Sanchez] if the jury learned that [he] was on parole after serving a term of incarceration for aggravated manslaughter," the Court required the parole officer's testimony be sanitized. Ibid. Thus, the Court held that

the trial court should direct that [the witness] refrain from revealing that she is a parole officer or identifying herself as a law enforcement officer in her testimony on direct examination. [She] should explain her familiarity with defendant by stating that she and defendant had a professional relationship that required them to meet at least twice a month for fifteen months prior to the date on which she identified him in the surveillance photograph and providing other neutral relevant facts regarding the meetings. By virtue of that testimony, the jury will be in a position to assess [her] familiarity with [Sanchez's] appearance without being informed of [his] prior conviction.

[Id. at 476.]

In light of the principles set forth in Sanchez, we find adequate support in the record for the trial court's conclusion that Cruz and Merced were sufficiently

familiar with defendant to offer lay opinions identifying him in the surveillance videos. Cruz observed defendant during surveillance operations five or six times. During those operations, a few months before he was shown the videos, Cruz observed defendant's appearance and unusual gait. Merced stopped defendant for jaywalking shortly before he viewed the videos. During that encounter he observed defendant's appearance and gait. Merced also had previously seen the dominoes tournament photograph depicting defendant.

We also see no error in the trial court's conclusion that the lay opinion testimony of Cruz and Merced would be helpful to the jury in determining whether defendant is depicted in the surveillance videos. The officers have knowledge of defendant's appearance that is superior to that of the jury. In addition, the trial court found defendant's appearance at the N.J.R.E. 104 hearing was "decidedly different" from his appearance in the videos. The officers' knowledge of defendant's appearance close in time to the shooting would be helpful to the jury. No other witnesses were available to identify defendant as the shooter and our review of the videos reveals that they are neither so clear as to make the officers' testimony superfluous nor so blurry as to make it impossible for any witness to identify the persons depicted therein.

We are, however, constrained to conclude that the trial court, despite its stated intentions to the contrary, failed to sanitize the officers' testimony to eliminate the risk the jury would infer defendant was involved in criminal activity prior to the shooting. At trial, Cruz identified himself as a detective assigned to a unit that investigates narcotics, pirated movies, gambling, thefts, burglaries, and sometimes homicides. He informed the jury that he encountered defendant five or six times (he previously testified to two or three times) "during the course of [his] employment as a police officer." It was not necessary for Cruz to identify himself as a police officer. As was the case in Sanchez, his profession could have been kept from the jury. Nor was it necessary for Cruz to list the various criminal offenses his unit routinely investigated. The mention of those crimes could have raised a question in the jurors' minds regarding defendant's involvement in criminal activities not related to the pending charges.

We recognize that Cruz testified "there wasn't anything nefarious" or "criminal in nature" about his encounters with defendant who he just saw "on the streets." Those statements, however, were not true. Cruz was surveilling defendant as a suspected distributor of marijuana. We are hesitant to endorse the use of inaccurate testimony to dispel potential prejudice from a law enforcement officer's identification of a defendant.

Merced also unnecessarily identified himself as a police officer, noting that when he encountered defendant he was assigned to a unit that enforced the criminal laws. He described the photograph taken at the dominoes tournament as a "random photo" of the type taken at "the mayor[']s events." This testimony was not accurate. At the N.J.R.E. 104 hearing, Merced said the photograph was taken because defendant and the others in the photo were "gang guys" who were giving police officers "a hard time."

The potential prejudicial impact of Merced's testimony was compounded by the trial court's misstatement during jury instructions. As noted above, the trial court identified the dominoes tournament photograph as having been taken by Merced when he arrested defendant. The misstatement introduced three errors, each of which were highly prejudicial: (1) that defendant had been arrested at the dominoes tournament; (2) that Merced had arrested defendant; and (3) that the photograph at the tournament was associated with defendant's criminal activity. The court's attempt to correct its misstatement further confused matters, as it referred to S-30, the photograph taken by officer Rosa after defendant's arrest on the present charges, and did nothing to negate its erroneous statement that Merced had arrested defendant and that S-27, the dominoes tournament photograph, was taken incident to defendant's arrest.

We turn to defendant's argument the trial court erred by permitting Suarez to narrate the surveillance videos and identify defendant. Because defendant did not object to Suarez's testimony at trial, we review the record for plain error. State v. Ross, 229 N.J. 389, 407 (2017). Our inquiry is to determine whether the alleged error was "clearly capable of producing an unjust result" R. 2:10-2. "Not any possibility of an unjust result will suffice as plain error, only 'one 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. Coclough, 459 N.J. Super. 45, 51 (App. Div. 2019) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). "It may be fair to infer from the failure to object below that in the context of the trial the error was actually of no moment." Macon, 57 N.J. at 333.

At trial, Suarez, who did not witness the shooting, provided a detailed narrative of the events depicted in the surveillance videos.³ He offered his opinion of the ethnic background of the three men in the videos, that a muzzle flash can be detected on the videos, and that the muzzle flash was coming from the handgun held by "the heavysset suspect with long hair." He also opined that

³ We reject the State's argument that Suarez was not narrating the videos because they were not playing when he read to the jury from his written report. The record plainly establishes Suarez was offering his lay opinion of what was captured on the videos, as he previously recounted in his written report.

in the video of the suspects passing by across the street from the scene before the shooting they were "looking in the direction of the victims" and, in another video, that "the heavyset male suspect had a large distinct tattoo" on his forearm and a "very distinct walk with a wide stride, appearing possibly bowlegged."

The trial court made no finding, and the State made no attempt to establish, that Suarez had any information gained from his personal observations prior to reviewing the videos on which to base these lay opinions. Nor does the record contain evidence of, or a finding that, Suarez's lay opinions would assist the jury in deciding whether defendant is depicted in the surveillance videos. Each of the lay opinions offered by Suarez could just have easily been reached by the jurors through their review of the videos. While Suarez may have had personal knowledge of some facts that were admissible, such as the placement of the cameras that recorded the videos and when the videos were retrieved by law enforcement personnel, the record contains no evidence establishing the admissibility of the lay opinions he offered when narrating the videos.

While defendant did not dispute that a shooting occurred or that the videos depicted the shooting, he did dispute the State's contention that he was one of the shooters captured on the video. Suarez's lay opinion testimony that the men in the video were Hispanic and that the shooter was heavyset, had long hair, and

a distinctive walk, all tended to identify defendant as the person depicted in the videos, particularly in light of the testimony of the other officers who identified defendant on the basis of these physical characteristics. In fact, at the conclusion of his direct testimony, Suarez recounted Cruz's viewing of the surveillance videos, his identification of the shooter as "Pretty Lou" based on his heavysset appearance, and Merced's connecting that street name to Luis Rivera. Suarez, who had no prior encounters with defendant, then identified defendant as Luis Rivera in front of the jury. Suarez, in effect, identified defendant as the person depicted in the videos shown to the jury moments earlier, bolstering the identification testimony of the other officers, without any personal knowledge of defendant's appearance at the time of the shooting. The admission of Suarez's testimony was an error clearly capable of producing an unjust result.

In light of these errors, we are compelled to vacate defendant's convictions and remand for a new trial. On remand, the trial court shall ensure that the testimony of Cruz and Merced are sanitized to remove any reference to their positions as law enforcement officers, to preclude the jury from learning that Cruz surveilled defendant in a drug distribution investigation, to eliminate reference to Merced having stopped defendant for jaywalking, and to insulate the photograph taken at the dominoes tournament from association with criminal

activity. In addition, the trial court shall preclude both officers from giving inaccurate testimony to explain their familiarity with defendant. Suarez shall not be permitted to offer lay opinion testimony of what is transpiring in the surveillance videos or to identify defendant. Appropriate limiting jury instructions may be warranted.

Because these issues will be relevant at any retrial, we address the following. The mere fact that a defendant has a street name suggesting criminality may well be prejudicial, as it tends to suggest he is a member of the criminal class. State v. Paduani, 307 N.J. Super. 134, 137 (App. Div. 1998); see also State v. Salaam, 225 N.J. Super. 66, 73 (App. Div. 1988) ("[A]n alias in a criminal proceeding . . . implies that the defendant belongs to the criminal class and thereby prejudices the jury."). However, a defendant's street name may be presented to a jury when relevant. Salaam, 225 N.J. Super. at 72. Here, defendant has his street name tattooed on his hands, a fact that linked him to the photograph taken at the dominoes tournament and the video recordings associated with the shooting. In addition, the street name "Pretty Lou" is not necessarily indicative of criminality, lessening the potential for a prejudicial inference by the jury. We see no error in admission of testimony relating to defendant's street name.

In addition, we have carefully reviewed the photograph taken at the dominoes tournament and find nothing about it suggests defendant was engaged in criminal activity or under surveillance by the police. The photograph is relevant evidence, which may be admitted with properly sanitized testimony about its origin and appropriate limiting instructions, if necessary.

Finally, because we are ordering a new trial, we need not determine whether the State produced sufficient evidence to prove beyond a reasonable doubt that Estrella, who testified he had not yet arrived at the house when the shooting began, and Luis Cabrera, whose location at the property was not addressed by any witness, were intended targets of the shooter. Nor do we need to address defendant's remaining arguments.

Defendant's convictions are vacated and the matter is remanded for a new trial consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION