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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0062-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSHUA M. GREEN,

Defendant-Appellant.

Argued December 7, 2022 – Decided February 10, 2023

Before Judges Currier and Puglisi.

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

Stefan Van Jura, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Stefan Van Jura, of counsel and on the brief).

David M. Liston, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; David M. Liston, of counsel and on the brief).

PER CURIAM

Following a remand from this court for a new trial, a jury found defendant guilty of second-degree kidnapping, second-degree attempted aggravated sexual assault, and second-degree attempted sexual assault. He was sentenced to a ten-year prison term subject to an eighty-five percent period of parole ineligibility. Defendant again appeals from his convictions, raising issues of improper prosecutorial comments and non-compliant identification procedures. We affirm.

I.

We derive our facts from the testimony presented during the second trial that took place in 2019. In September 2011, on the day of these events, Maria[1] arrived at the store where she worked at approximately 5:45 a.m. The store opened at 6:00 a.m. and Maria was the only employee in the store at this time.

Several minutes later, an individual entered the store, later identified as defendant. Defendant approached the counter, ordered a shake, and asked to use the bathroom. As Maria began to prepare the beverage, defendant went towards

[1] We use the same pseudonyms for the victim and eyewitnesses as denoted in our prior opinion, State v. Green, No. A-4392-13 (App. Div. Aug 21, 2017) (slip op. at 1 n.1).

the restroom. When he returned, defendant stood "by [Maria's] side" about "two feet" from her.

When Maria turned her back to defendant to make his shake, he grabbed her by the neck, covered her mouth, dragged her to the bathroom, and threw her against the sink causing her to fall to the ground. Defendant closed the door behind him, turned on the lights and fan, then ran the faucet and proceeded to pull his pants down. Maria tried to fight defendant off, telling him she would "give him whatever he wanted." Defendant told her "to keep quiet, that it would only take five minutes and that would be it."

According to Maria, the two were face-to-face with each other as defendant began to pull her pants down, take off her clothes, and hit her in the face with an "open hand." Defendant again grabbed Maria by the neck and pushed her head down towards the toilet. Defendant's pants were down around his knees, and he repeatedly attempted to put his penis into Maria's mouth, pulling her head up from the toilet by her hair, but Maria was able to cover her mouth with her hands, preventing defendant's penis from entering her mouth.

Defendant then began to choke Maria, telling her to "just [let] him do it because it was only going to take five minutes, that was it." Maria "stopped fighting" and "told him to do whatever he wanted to do to [her]." Defendant

then attempted to penetrate Maria's vagina with his penis but could not because "his penis never became hard." Defendant never ejaculated during the attack.

As defendant masturbated to achieve an erection, Maria heard the door of the store open and she began screaming. Defendant began "hitting [her] again," told her to "stay still" and left the bathroom, closing the door behind him. Defendant attempted to block the door with a broom and mop that were outside of the bathroom. He then fled from the store.

Maria was able to open the bathroom door, and when she came out, she saw two regular customers in the store. She told the two men that defendant had "wanted to kill [her]." The men ran outside to catch defendant, but he was already gone.

Maria testified she did not immediately call the police, because she was "in shock[,]" and "afraid" police would not "be able to catch [defendant]." She explained that in her home country of El Salvador, if a suspect accused of this behavior is not caught, the victim could be killed. She remained working at the store. When a co-worker arrived hours later, the co-worker noticed marks on Maria's neck. After Maria told her what had happened, the co-worker called the police.

Perth Amboy Police Department (PAPD) Detective Marcos Valera arrived at the store at approximately 9 a.m. Maria described her attacker as "a young black male, tall[,]" "skinny," between twenty-one to twenty-six years old, "frizzy hair," a face that looked as though it was "pulled back, . . . and a big mouth." She said he "was wearing black shorts and a . . . sports shirt." Valera said no physical or forensic evidence was collected at the scene because he did not believe there were any surfaces at the store that had not been contaminated by other persons' fingerprints, he did not observe any physical evidence, and Maria said defendant had not ejaculated.

Maria gave police a recorded statement. Although she was shown over 400 photographs of individuals who fit the description of her attacker, she did not identify any of the individuals as her assailant. Defendant's photograph was not included in the stack. Police also obtained recorded statements from the co-worker who had called the police and from the customer, Miguel, who saw defendant run out of the store.

In canvassing the area surrounding the store, Valera located a surveillance camera and obtained the footage showing the outside of the store at the time of the attack. According to Valera, the video showed Maria opening the store and an individual fitting the description Maria had given of her assailant first looking

into the store as he walked past the camera and out of frame, but then returning to the store and entering it. The footage further depicted two customers entering the store and an individual fleeing through the front door shortly after their arrival. The jury viewed the video during the trial.

The day after the assault, Maria reported to police that she saw defendant approximately seven blocks from the store. She said they made eye contact, Maria became very nervous, and defendant ran to a bus. The bus was stopped, and Valera was able to board it although the bus had already made stops after leaving Perth Amboy. Valera was unable to identify anyone matching Maria's description.

About a week after the assault, Maria was shown a photo array consisting of six photographs. She did not identify any of them as her attacker. Defendant's photograph was not included in the array.

That same day, still photographs of the assailant were taken from the surveillance footage and disseminated by PAPD Detective Sandra Rivera to the PAPD Patrol Division and other law enforcement agencies in the area. Valera explained the photographs were disseminated to other police departments using a TRAKs message, which the State defined at trial to be "a message that goes to . . . local law enforcement departments asking for assistance" in identifying an

individual from a photograph. South Brunswick Police Department (SBPD) Detective Roger Tuohy recognized defendant as the individual in these photographs and contacted Rivera. Tuohy told the jury he knew defendant "[t]hrough the community" and had met him "[f]our to five times." Tuohy also sent Rivera photos of defendant.

In November 2011, while she was working in plain-clothes, Rivera noticed defendant on a street corner bus stop, about two-and-a-half blocks from the store where Maria was attacked. Rivera recognized defendant from the photographs sent by Tuohy and observed that defendant fit Maria's description of her assailant. Rivera surreptitiously took pictures of defendant with her cell phone, spoke with him briefly, and confirmed his identity.

The bus stop was also within a few blocks of Diamond Staffing, where law enforcement learned defendant had been working as a temporary employee. The agency's records showed defendant had worked from 4:00 p.m. to 12:30 a.m. on the day of the attack. The parties stipulated that defendant was in Perth Amboy the day of Maria's attack for either a job "interview or to sign up for a job."

A few days later, Maria was shown a second photo array, this time including defendant's photograph. She identified defendant as her attacker.

Maria testified she was "100 percent" certain defendant was the man who attempted to rape her.

Police also showed Miguel a photo array that included defendant's photograph. Miguel stated that the photograph depicting defendant looked most like the man he saw run from the store. He testified at trial that during the photo array he was "[seventy] percent" sure the photograph depicted Maria's attacker but did not formally identify him because he "needed to be 100 percent that that was him." At trial, Miguel identified defendant as the man who he saw running from the store and the man shown in the surveillance footage entering and subsequently fleeing from the store.

The jury found defendant guilty of kidnapping and attempting to sexually assault Maria.

II.

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

> POINT I
> THE STATE BOOKENDED ITS CASE WITH ARGUMENT IMPLYING THAT DEFENDANT WAS A REPEAT SEXUAL PREDATOR. THIS TACTIC DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL, AND REQUIRES REVERSAL OF THE CONVICTIONS. U.S. Const. Amendments IV and XIV; N.J. Const. Article I, Paragraphs 1, 9, and 10.

POINT II

THE CONVICTIONS SHOULD BE REVERSED BECAUSE THE COURT COMMITTED THE SAME ERROR THAT LED THIS COURT TO REVERSE THE CONVICTIONS AT THE FIRST TRIAL; NAMELY, ALLOWING A DETECTIVE TO TESTIFY ABOUT WHY DEFENDANT'S PHOTO WAS PLACED IN A PHOTO ARRAY. IN ADDITION, ALLOWING ANOTHER DETECTIVE TO IDENTIFY DEFENDANT FROM SURVEILLANCE VIDEO COMPOUNDED THE ERROR.

A.

We first address defendant's contentions regarding prosecutorial misconduct during the State's opening statement and closing argument. During his opening remarks, the prosecutor stated:

> On September 15th of 2011, shortly after 6:00 in the morning, survivor had an added definition for [Maria]. [Maria] became a sexual assault survivor. On September 15th of 2011, Joshua Green did not see [Maria] as a survivor.
>
> What Joshua Green saw was that [Maria] was vulnerable. What Joshua Green saw was that [Maria] was his next victim, and what Joshua Green did was set out to sexually assault [Maria].
>
> [(emphasis added).]

The State repeated this comment in its summation:

> Members of the jury, on September 15th of 2011, shortly before 6 a.m., [Maria] entered the . . . store under the cover of darkness. She was alone. There was

> very little foot traffic in the area. And unbeknownst to [Maria], [Maria] was vulnerable. Vulnerable. And that is what Joshua Green saw on September 15th of 2011.
>
> Joshua Green saw that [Maria] was vulnerable. He chose her as his next victim, and he went in[,] and he set out to violate her. That's what he did on September 15th of 2011. Thankfully for [Maria], two of her regular customers interrupted his plan, and he ran out of that store.
>
> [(emphasis added).]

Defendant asserts that by improperly characterizing Maria as defendant's "next victim," the State wrongfully suggested to the jury that defendant was a repeat sexual predator, and that the comment, considering the lack of forensic evidence, deprived him of a fair trial.

Defense counsel did not object to the statements during the State's opening and summation. We therefore review the challenged comments for "plain error." R. 2:10-2; State v. Pressley, 232 N.J. 587, 593 (2018) (explaining where a defendant fails to object to a prosecutor's statements during trial, an appellate court "review[s] the challenged comments for plain error").

Under that standard, we will reverse only we find the error was "clearly capable of producing an unjust result." R. 2:10-2; State v. Cole, 229 N.J. 430, 458 (2017). A determination of plain error "depends on an evaluation of the overall strength of the State's case[,]" State v. Nero, 195 N.J. 397, 407 (2008)

(alteration in original) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)), and reversal is only appropriate where there is "some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. R.B., 183 N.J. 308, 330 (2005) (alterations in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)). "[D]efendant has the burden of proving that the error was clear and obvious and that it affected his substantial rights." State v. Koskovich, 168 N.J. 448, 529 (2001) (quoting State v. Morton, 155 N.J. 383, 421 (1998)).

"Our jurisprudence requires 'that prosecutors act in accordance with certain fundamental principles of fairness.'" State v. Williams, 244 N.J. 592, 615 (2021) (quoting State v. Wakefield, 190 N.J. 397, 436 (2007)). A "prosecutor[] should limit comments in the opening to the 'facts [they] intend[] in good faith to prove by competent evidence.'" State v. Echols, 199 N.J. 344, 360 (2009) (alterations in original) (quoting State v. Hipplewith, 33 N.J. 300, 309 (1960)). Similarly, "comments by a prosecutor in closing that stray beyond the evidence and the reasonable inferences therefrom are inappropriate and improper." Williams, 244 N.J. at 615. In general, prosecutors "should not make inaccurate legal or factual assertions during a trial[,] and . . . must confine their

comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." Echols, 199 N.J. at 360 (alterations in original) (quoting State v. Reddish, 181 N.J. 553, 641 (2004)).

We agree with defendant's assertion that the characterization of Maria as defendant's "next victim" was improper. The comments were unsupported by any evidence or inference from the evidence. The State's argument on appeal, that the use of "next victim" is "more reasonably understood as meaning 'nearest victim,'" is unpersuasive.

The common understanding of the word "next" presupposes a first or prior something, and in this context, suggests a prior victim. The Merriam Webster dictionary definition corroborates that understanding. See Merriam Webster, https://www.merriam-webster.com/dictionary/next (last visited Feb. 6, 2023) (defining the adjective "next" as "immediately adjacent (as in place, rank, or time)"). The use of the word "next" presupposed a prior victim and Maria was defendant's most recent victim. The State did not present any evidence or even a reasonable inference of defendant having committed any prior sexual assaults.

However, although these two remarks were improper, "'not every deviation from the legal prescriptions governing prosecutorial conduct' requires reversal." State v. Jackson, 211 N.J. 394, 408-09 (2012) (quoting State v.

Williams, 113 N.J. 393, 452 (1988)). We must "evaluat[e] the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial." Wakefield, 190 N.J. at 437 (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)). "Reversal is justified when the prosecutor['s] . . . conduct was 'so egregious as to deprive defendant of a fair trial.'" Echols, 199 N.J. at 360 (quoting Wakefield, 190 N.J. at 437).

We are satisfied the two references to Maria as defendant's "next victim," viewed in the context of the entire trial record, do not warrant reversal under the plain error standard, as they were not "clearly capable of producing an unjust result." R. 2:10-2.

"Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made." Echols, 199 N.J. at 360 (quoting State v. Timmendequas, 161 N.J. 515, 576 (1999)). See State v. Feal, 194 N.J. 293, 312 (2008) (explaining a failure to object "deprives the trial judge of the opportunity to ameliorate any perceived errors").

In addition, "a 'fleeting and isolated' remark is not grounds for reversal." State v. Gorthy, 226 N.J. 516, 540 (2016); see State v. Watson, 224 N.J. Super.

354, 362 (App. Div. 1988) (finding comments made by a prosecutor, although improper and "wholly inexcusable," were nonetheless "fleeting and isolated and could not possibly have prejudiced the defendant in the eyes of the jury"). The comments at issue were brief and isolated. There was no assertion during the trial of any prior crimes and no further elaboration on the remarks other than during the State's opening statement and summation, separated in time by eight calendar days.

Moreover, there was ample evidence to support the jury's finding of guilt. Multiple witnesses, including Maria, identified defendant as the assailant. Maria testified she saw defendant at close proximity before and during the attack, and she subsequently identified him from a photo array and at trial. Miguel testified that he saw the attacker leaving the store, he believed defendant's photo in the subsequent photo array most closely resembled the attacker, and he also identified defendant as the attacker at trial. Tuohy testified that he believed the man shown entering and then fleeing the store in the still photographs derived from the surveillance footage was defendant based on his prior interactions with him, and Tuohy also identified him at trial. This testimony, coupled with the surveillance footage and the stipulation that defendant was in Perth Amboy on the day of the attack, provides a strong basis

for a guilty verdict. Defendant cannot demonstrate the prosecutor's remarks were "clearly capable of producing an unjust result." R. 2:10-2.

In addition, the court instructed the jury regarding its consideration of the statements made by counsel in their opening statements and closing arguments. Prior to opening statements, the court explained, "I'm telling you right now, what they say during an opening statement is not evidence." Following summations, the court again instructed the jury, "[a]ny arguments, statements, remarks, openings, and summations of counsel are not evidence, and must be treated as such. That means, not evidence, okay? Just advocacy." It further instructed, "[a]ny comments by counsel are not controlling. And remember, it's your sworn duty to arrive at a just conclusion, after considering all the evidence which was presented during the course of the trial." It is presumed that juries will adhere to the court's instructions. State v. Loftin, 146 N.J. 295, 390 (1996).

The limited prosecutorial misconduct here was not "so egregious as to deprive defendant of a fair trial[,]" Echols, 199 N.J. at 360, and was not "clearly capable of producing an unjust result." Pressley, 232 N.J. at 593 (quoting R. 2:10-2).

B.

We turn to defendant's arguments regarding Tuohy's identification of defendant and the second photo array. Defendant asserts it was improper for Tuohy to identify defendant as the man seen in the surveillance video and, therefore, it was error to include defendant's photo in the second array. Defendant notes these errors resulted in the first reversal of his convictions and the remand court made the same mistakes in the second trial. We disagree.

During the first trial, Detectives Valera and Rivera testified they placed defendant's photo in the array because of the information Tuohy gave them. During the playback of the video footage, Valera stated that the person depicted in the video was defendant; Rivera testified that "defendant was depicted in stills from the video," and she "was permitted to opine on defendant's guilt, by responding that defendant was the perpetrator of the crime." Green, slip op. at 20-21. Relying on State v. Lazo,[2] we concluded the admission of the detectives' testimony was reversible error. Id. slip op. at 16-17, 24. However, the panel declined to address Tuohy's identification of defendant from the still photographs captured from the surveillance footage, because the issue was not raised on appeal. Id. slip op. at 17 n.6. We further found the trial court's error

[2] 209 N.J. 9, 21 (2012)

in permitting testimony as to why defendant's photograph was included in "the photo array was compounded by the improper admission of the Perth Amboy detectives' lay opinion that the man depicted in the video was defendant." Id. slip op. at 17 (emphasis added). We found the admission of this testimony was plain error and taken together with the impermissible photo array testimony, warranted reversal. Id. slip op. at 25-26.

Contrary to defendant's assertions, the compounding error previously found by this court is not implicated in the present appeal, because none of the State's witnesses identified the individual seen in the surveillance footage as defendant when it was played for the jury during the second trial.

The transcript reflects a lengthy discussion between counsel and the trial judge regarding this court's opinion and the reasons for reversal. In addition, the issue was explicitly addressed prior to Rivera's and Tuohy's testimony. Defense counsel agreed Rivera could testify she recognized defendant by the bus stop based on the photos provided by Tuohy in response to the TRAKs message and Tuohy could testify he recognized, but could not affirmatively identify, defendant based on the TRAKs message disseminated by the PAPD. Defendant did not object to Rivera's testimony regarding the photo array, nor to Tuohy's testimony regarding his belief defendant was depicted in the

surveillance footage based on his review of the still photos transmitted via the TRAKs message. Therefore, we review the testimony for plain error. Pressley, 232 N.J. at 593.

Unlike the first trial, there was no testimony regarding why defendant's photograph was included in the array. Thus, there was no hearsay relayed through any witnesses' testimony regarding the photo array that could have suggested to the jury the testifying officers possessed any "superior knowledge" than what was presented to the jury, State v. Medina, 242 N.J. 397, 415-16 (2020); "create[d] an 'inescapable inference' that an unavailable source has implicated . . . defendant[,]" id. at 415-17 (quoting Bankston, 63 N.J. at 271); or otherwise violated the prohibition on hearsay and defendant's rights under the Confrontation Clause.

In addition, only Tuohy testified regarding the still photographs. As stated, Tuohy testified he recognized defendant from the TRAKs message as he was familiar with defendant "from the community." "[T]he jury was free to discredit [Tuohy]'s testimony and find that" defendant did not resemble the individual pictured in the surveillance footage. See State v. Singh, 245 N.J. 1, 20 (2021).

C.

We are also unpersuaded by defendant's argument that Tuohy's testimony regarding his recognition of defendant was impermissible lay opinion.

Our Court recently provided guidance on the admissibility of lay opinion testimony from law enforcement witnesses regarding their identifications of a defendant from photographs in State v. Sanchez, 247 N.J. 450, 458-59 (2021). There, the Court found a defendant's parole officer's lay opinion testimony that she recognized the defendant from a photograph disseminated by law enforcement following a homicide and robbery was properly admitted under N.J.R.E. 701. Id. at 476-77.

Lay opinion testimony is admissible "if it falls within the narrow bounds of testimony that is based on the perception of the witness and . . . will assist the jury in performing its function." Sanchez, 247 N.J. at 466 (quoting Singh, 245 N.J. at 14). Rule 701[3] provides:

> If 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

[3] Though Rule 701 was "amended effective July 1, 2020[,] [t]he 2020 amendments were stylistic in nature." Singh, 245 N.J. at 14 n.1.

> (b) will assist in understanding the witness' testimony or determining a fact in issue.

This rule "imposes two distinct requirements for the admission of lay opinion testimony." Sanchez, 247 N.J. at 466.

The first requirement is that the testimony must be based on a witness's "perception," defined as "the acquisition of knowledge through one's own senses." Id. at 466 (quoting State v. McLean, 205 N.J. 438, 456 (2011)). "[P]erception . . . rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." McLean, 205 N.J. at 457.

Tuohy had met defendant four to five times prior to reviewing the still photographs, and his testimony regarding his recognition was based on his prior "acquisition of knowledge through [his] own senses." See Sanchez, 247 N.J. at 466. Thus, Tuohy's lay opinion testimony satisfied the requirements of Rule 701(a). See id. at 469 ("The witness need not have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony."). Tuohy's testimony is easily distinguishable from the impermissible testimony in Lazo, where a "detective told the jury that he believed [the] defendant closely resembled the culprit—even though the detective had no personal knowledge of that critical, disputed factual question." 209 N.J. at 22.

Rule 701's second requirement is that the "lay opinion testimony will assist the jury 'in understanding the witness' testimony or determining a fact in issue.'" Sanchez, 247 N.J. at 469 (quoting Rule 701(b)).

The Court has identified four factors which "inform a trial court's determination whether lay opinion testimony will assist the jury." Id. at 470. These "factors are not exclusive" and "no single factor is dispositive." Id. at 473-74.

The first factor is "the nature, duration, and timing of the witness's contacts with the defendant." Id. at 470. Tuohy testified he met defendant four to five times prior to his viewing the still photos and he believed the photos showed defendant based on his personal knowledge. The factor is satisfied.

The second factor under this analysis is whether "there has been a change in the defendant's appearance since the offense at issue," in which case, "law enforcement lay opinion identifying the defendant may be deemed helpful to the jury." Id. at 472. Maria's attacker was captured on the surveillance footage fleeing from the scene in September 2011 and defendant's second trial did not occur until Spring 2019. Because there is nothing in the record indicating a change in appearance, this factor offers little weight.

The third factor considers "whether there are additional witnesses available to identify the defendant at trial." Ibid. (quoting Lazo, 209 N.J. at 23). "[L]aw enforcement lay opinion identifying a defendant in a photograph or video recording 'is not to be encouraged[] and should be used only if no other adequate identification testimony is available to the prosecution.'" Ibid. (quoting United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977)). Here, two other witnesses identified defendant in addition to law enforcement. Maria identified defendant in the second photo array, Miguel described a resemblance between defendant and the assailant during his photo array, and they both identified defendant in the photograph as the man who attacked her, and as the man shown in the surveillance footage. This factor weighs in favor of admitting Tuohy's testimony under Rule 701.

Finally, the fourth factor of the analysis considers "the quality of the photograph or video recording at issue." Id. at 473. Where "the photograph or video recording is so clear that the jury is as capable as any witness of determining whether the defendant appears in it, that factor may weigh against a finding that lay opinion evidence will assist the jury." Ibid. "Conversely, if the photograph or video recording is of such low quality that no witness—even a person very familiar with the defendant—could identify the individual who

appears in it, lay opinion testimony will not assist the jury, and may be highly prejudicial." Ibid. Under this factor, "[a] witness's opinion concerning the identity of a person depicted in a surveillance photograph is admissible if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." Ibid. (alteration in original) (quoting United States v. Sanchez, 789 F.3d 827, 837 (8th Cir. 2015)).

Here, having reviewed the surveillance footage, it is neither "so clear that jurors unacquainted with defendant could determine as accurately as [Tuohy] whether" the man pictured in the video was defendant, nor "so blurry that the subject's features are indistinguishable." See id. at 475. The footage was taken before sunrise, on a street without streetlights, and though it offers a full-frontal view of the assailant and his face, it is a somewhat grainy, black-and-white image. While the footage does not offer a clear enough image that a juror unacquainted with defendant would be able to accurately determine whether defendant was pictured in the video, an individual, such as Tuohy, who had personal knowledge of defendant's likeness prior to when the video was taken, and who recognized defendant in the still photographs taken from the surveillance footage eight years earlier, would be helpful to the jury in identifying the person pictured.

Weighing all the factors, in consideration of the fact no single factor is dispositive and a factor's absence will not render Tuohy's testimony inadmissible, we discern no plain error "clearly capable of producing an unjust result." R. 2:10-2.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION