SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0165-22

STATE OF NEW JERSEY,

    Plaintiff-Appellant,

v.

DARIUS K. BURGESS,

    Defendant-Respondent.

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Submitted March 21, 2023 – Decided July 11, 2023

Before Judges Sumners and Susswein.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 21-01-0007.

Esther Suarez, Hudson County Prosecutor, attorney for appellant (Kevin Robert Sipe, Assistant Prosecutor, on the brief).

Terry Law Group, LLC, attorneys for respondent (Rasheedah R. Terry, on the brief).

PER CURIAM

On leave to appeal granted, the State challenges the trial court's evidentiary order denying its motion to admit still images from a police officer's body camera depicting defendant Darius K. Burgess's interaction with police following an investigatory stop, which did not lead to defendant's arrest. Because we conclude the court did not abuse its discretion in finding the probative value of the still images and the officer's foundational testimony was substantially outweighed by their undue prejudice, we affirm.

Two men robbed a man of his iPhone, some cash, and house keys by threatening him with a chainsaw. In investigating the crime, Jersey City Police Detective Jose Santana used surveillance video footage from the vicinity of the robbery to track the men to a bodega. Santana then used still images from the footage to create a "Be On the Lookout" (BOLO) flyer depicting the men.

Five days after the robbery, Jersey City Police Officer Melange Ramirez, who did not know defendant, saw him on the street and stopped him based on the BOLO. She recognized his face and the same pants (jogger style black Puma pants with a half patterned/half solid white stripe on the sides) he was wearing in the BOLO. After verifying there were no outstanding arrest warrants for

defendant, Ramirez did not arrest him. The interaction was captured on Jersey City Police Officer Rajon Martinez's body camera.[1]

Prior to Ramirez's investigatory stop of defendant, Jersey City Police Detective Keith Jackson and Police Officer Michael De Bari recognized defendant in the BOLO from their prior investigations.

Some months later, defendant and Jahmil LeGrande were arrested and indicted for robbery, possession of a weapon for an unlawful purpose, unlawful possession of a weapon, and conspiracy to commit robbery. The record does not reveal what lead to their arrest.

During pretrial proceedings, the trial court granted defendant's Wade[2] motion to suppress Jackson's and De Bari's out-of-court identifications in which they recognized defendant from prior investigations as one of the men in the BOLO. In its written decision, the court reasoned: (1) the BOLO and surveillance videos are of a high enough quality that De Bari and Jackson are not in a better position to make the identification than the jury, so they do not satisfy N.J.R.E. 701 or State v. Sanchez, 247 N.J. 450, 470-73 (2021), which

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[1] Martinez was the first backup officer to respond to Ramirez's interaction with defendant.

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

provides four factors for assessing whether an out-of-court identification will assist the jury; and (2) De Bari's and Jackson's testimony would be "highly prejudicial" and could not be sanitized. The court found the prejudice that would result by revealing the officers recognized defendant from prior investigations outweighed the probative value of their out-of-court identifications from the BOLO given that the robbery victim is available to testify. The court also denied the motion because there was no written record concerning the identification as required by State v. Delgado, 188 N.J. 48 (2006) and Rule 3:11(c).

The State later moved to admit Martinez's body camera footage pursuant to Rule 104(c). During testimony and argument, the State narrowed its request, seeking only to admit still images of defendant and his pants from the footage. The court denied the motion.

The State argued Ramirez's identification of defendant in the still images is probative of defendant's identity and not unduly prejudicial because defendant was being investigated at the time, later indicted, and a jury would know a police officer investigates crimes. The State added that Ramirez's stop was "inherent to this crime" and based on her investigation of the robbery. The State offered to sanitize Ramirez's testimony by having her testify that she: (1) is a Jersey City patrol officer; (2) interacts daily with people on the street while wearing a

bodycam;  (3) interacted with defendant; (4) sees the person—defendant—she interacted with that day in the courtroom; and (5) has personal knowledge that the still image is an accurate reflection of the body camera footage.

The court rejected the State's arguments and denied the motion.  The court again noted the BOLO picture is clear, and permitting Ramirez to testify that she encountered defendant five days after the robbery wearing the same pants "tip[s] the scale in the State's favor" when compared to simply letting the jury examine the BOLO and surveillance video of the robbery to identify defendant. Acknowledging that all evidence is prejudicial, the court reasoned Ramirez's identification is unduly prejudicial because she did not know him previously, she did not arrest him, and the jury would be able to determine without her testimony whether it is defendant in the BOLO and surveillance video.  The court added, "to put an officer on the stand on a separate interaction to just bolster [the identification] or to assist the trier of fact is not only unnecessary but it is substantially prejudicial and it does outweigh any probative value." According to the court, sanitizing Ramirez's testimony would be ineffective because it still raises questions as to why defendant was interacting with police.

In its appeal, the State contends that sanitizing Ramirez's identification testimony is an appropriate way to negate any undue prejudice to defendant

because police officers "interact[] with members of the public on a daily basis and . . . some of those interactions [are] caught on body-worn camera." The State maintains the image's prejudicial effect does not substantially outweigh its probative value "as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation." State v. Thompson, 59 N.J. 396, 421 (1971). Moreover, the State contends an image of defendant wearing the same pants as the robbery suspect is materially relevant to the case because it "speaks directly to the identity of the assailant."

Pursuant to N.J.R.E. 401, evidence is relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See also Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 58 (2019) (evidence has probative value if it tends "to establish the proposition that it is offered to prove") (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)). Under N.J.R.E. 403, relevant evidence may be inadmissible if the risk of undue prejudice substantially outweighs its probative value. We review a trial court's evidentiary rulings for an abuse of discretion. See Sanchez, 247 N.J. at 465-66.

Here, Ramirez's identification of defendant from both the BOLO and her recorded interaction with him as captured on the body camera is relevant

because it has "a tendency in reason to prove" the "fact of consequence" that he is the robber in the surveillance video. N.J.R.E. 401. The court, however, did not abuse its discretion in ruling that Ramirez's purported testimony to identify defendant in the still images from the body camera video is unduly prejudicial. She did not observe defendant rob the victim. She did not know defendant prior to receiving the BOLO and did not arrest him during their interaction. Her testimony boils down to defendant having an interaction with a police officer in which the officer identifies him as looking like the man in the BOLO in large part because he is wearing the same commonly worn pants as the suspect.

We also discern no abuse of discretion in the court's rejection of the State's proposed sanitization of Ramirez's testimony. To not inform the jury of the context of Ramirez's contact with defendant due to investigating the robbery, her testimony would only evince a prior unrelated law enforcement interaction that is unduly prejudicial. Under these circumstances, Ramirez's testimony would only serve to bolster the victim's first-hand identification of his assailant. Furthermore, the BOLO and surveillance footage are sufficiently clear to allow the jury to fulfill its role in making its own identification of defendant.

The State's merits brief also argues Ramirez's proffered testimony should not be barred as inadmissible lay opinion testimony under N.J.R.E. 701 and

<u>Sanchez</u>. However, unlike its reasoning in granting defendant's motion to bar the out-of-court identifications of Detective Jackson and Officer De Bari, the court did not consider the evidentiary rule or the decision as it pertains to Ramirez's proffered testimony. Hence, we do not.

To the extent that we do not address any arguments raised by the State on appeal, we find they lack sufficient merit to warrant discussion in this written opinion. <u>R.</u> 2:11-3(e)(2).

Affirm.

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

CLERK OF THE APPELLATE DIVISION

A-0165-22