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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0258-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMAR M. MCCOY, a/k/a
JASON M. MCCOY,

Defendant-Appellant.

Submitted November 7, 2022 – Decided January 30, 2023

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey,
Law Division, Mercer County, Indictment No. 17-05-
0248.

Kelly Anderson Smith, attorney for appellant.

Matthew J. Platkin, Attorney General, attorney for
respondent (Daniel Finkelstein, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant Jamar McCoy appeals from a May 17, 2019 judgment of conviction for first-degree murder, N.J.S.A. 2C:11-3(a)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1). Following the jury verdict, he was sentenced to a term of forty-seven years imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, with an eighty-five percent parole eligibility bar. We affirm.

Defendant raises the following arguments:

POINT I

THE TRIAL COURT FAILED TO SUPPRESS IMPROPER, HIGHLY PREJUDICIAL [N.J.R.E.] 404(B) EVIDENCE, CONTRARY TO ITS OWN RULING WHEN THE STATE IGNORED THE ORDER.

POINT II

THE COURT FAILED TO SUPPRESS WITNESS IDENTIFICATION WHEN OFFICERS ENGAGED IN IMPERMISS[I]BLY SUGGESTIVE PROCEDURES.

POINT III

THE JURY SELECTION/VOIR DIRE PROCESS WAS [SO] INADEQUATE AND IMPROPER THAT

IT VIOLATED DEFENDANT'S
CONSTITUTION[AL] RIGHTS TO A FAIR TRIAL.

POINT IV

IMPROPER DIGITAL ENHANCEMENT OF
PHOTOGRAPHS/VIDEO ALONG WITH
PROSECUTOR COMMENTARY UNFAIRLY
BIASED THE JURY.

A. THE TRIAL COURT'S FAILURE TO
PROVIDE CURATIVE INSTRUCTIONS
PREJUDICED DEFENDANT, RESULTING IN
AN UNFAIR TRIAL.

POINT V

THE CUMULATIVE ERRORS COMMITTED BY
THE TRIAL COURT DENIED THE DEFENDANT A
FAIR TRIAL AND RESULTED IN A MANIFEST
INJUSTICE.

The record informs our decision. In the middle of the afternoon on April 29, 2016, brothers Jermaine and Jayshawn Johnson, along with Jermaine's five-year-old son, Jermaine Jr., were standing in their front yard when a tan SUV pulled up nearby. A man, who Jayshawn later testified he recognized as defendant, emerged from the SUV, said "what's up," and produced a gun and began to fire at the Johnsons. Jayshawn testified that he knew it was defendant, because he had seen him once before, when defendant stopped in

front of his house and pointed at him. Defendant had also previously been in a relationship with Jayshawn's cousin.

Jermaine grabbed Jermaine Jr. and fled, along with Jayshawn, to the neighbor's driveway. Defendant pursued them and continued firing. Jermaine fell to the ground, his body shielding his son. Jayshawn observed defendant fire his last bullet into Jermaine's back.

Jayshawn then tackled defendant in an attempt to prevent him from reloading his weapon. Defendant pinned Jayshawn to the ground and struck him repeatedly in the face with the butt of the gun. Jayshawn let go, and defendant then ran back to the SUV and got in the passenger side door. The vehicle fled the scene.

An eyewitness, Joseph Revell, who testified at trial, observed the attack from his car and pursued the SUV as it drove away. Revell called 9-1-1 and reported the vehicle's license plate number. He then watched as the SUV stopped some distance away, defendant exited, and the SUV drove away without him. Revell provided a physical description of defendant to the 9-1-1 operator as he saw him exit. Revell did not pursue defendant, fearing he was still armed.

Jermaine and Jayshawn were taken to the hospital via ambulance. Jayshawn had numerous lacerations, a fractured skull resulting in hemorrhage, and fractured facial bones. Jermaine was in cardiac arrest when he arrived at the hospital. There was one gunshot wound in his chest and another close to his right shoulder. He died shortly after arriving.

A police investigation followed. The evening of the attack, detective Scott Rich of the Mercer County Prosecutor's Office reported to the trauma bay to question Jayshawn. Shortly after arriving, he asked: "Who did this to you?" Jayshawn replied: "Jamar McCoy." Jayshawn then elaborated on a family controversy that he believed motivated the attack.

Detective Rich testified he was concerned that Jayshawn could die due to his skull hemorrhage. Therefore, he subsequently obtained a photograph of defendant, and showed it to Jayshawn. Jayshawn again confirmed the defendant's identity.

That same evening, Detective Patrick Holt showed another eyewitness two photo arrays. Detective Holt did not create the arrays and did not know which image depicted defendant. The eyewitness was unable to identify defendant.

Revell also participated in an array identification after the shooting. Initially, Revell waited alone in a room of the Prosecutor's Office for a "good while" before an officer came in to speak with him. While he waited, he sketched an image of the attacker and the gun into a felt panel on the wall that was used to reduce sound in the interrogation room. At trial, Revell explained:

While I was sitting there[,] I was trying to keep my mind fresh of what I saw, especially of the individual that I saw. And I didn't want to make a mistake about identifying the wrong person so I used the panels because they had a texture that could be manipulated with a fingernail and I just drew on them to get the facts out in terms of his facial description, his body build, the type of clothes he had and I wanted to be able to describe him as best as possible so that I had positively identified the correct person.

Revell compared two or three photos in the array with his drawings and "was 100 percent certain" image number six was the attacker. Image six was a photo of defendant.

Initially, Detective Holt did not know that Revell had made the drawings. When he showed Revell the array, Holt said Revell "kept looking back at the panels" that were behind Holt, and Holt inquired as to what he was looking at. Revell then explained he had drawn the images to maintain his memory.

Other testimony supported the identification of defendant. The mother of defendant's children testified she owned a tan-colored Oldsmobile SUV with plates that matched Revell's description. Another woman, defendant's girlfriend, stated he frequently drove a tan SUV and identified a photograph of it in court. When police arrested defendant, they searched his girlfriend's car and found two license plates bearing matching numbers to the tan Oldsmobile.

Finally, the parties stipulated a handgun magazine was found in the driveway at the scene of the attack. It contained no identifiable fingerprints. Defendant did not have a permit to carry a firearm.

Defendant was arrested and charged with first-degree murder of Jermaine, N.J.S.A. 2C:11-3(a)(2) (count one); first-degree attempted murder of Jayshawn, N.J.S.A. 2C:11-3 and N.J.S.A. 2C:5-1 (count two); first-degree attempted murder of Jermaine Jr., N.J.S.A. 2C:11-3 and N.J.S.A. 2C:5-1 (count three); second-degree aggravated assault of Jayshawn, N.J.S.A. 2C:12-1(b)(1) (count four); second-degree unlawful possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count five); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count six); and second-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b) (count seven).

After a trial that spanned eleven days, the jury convicted defendant of counts one, four, five, and six. He was sentenced on May 17, 2019. This appeal followed.

I.

We note defendant consistently argues he was mistakenly identified as the shooter and address defendant's arguments through that lens. First, defendant contends he was denied a fair trial when the court allowed the State to offer bad acts evidence that it had initially excluded under N.J.R.E. 404(b). Specifically, defendant claims that Jayshawn's testimony regarding the prior incident in which defendant pointed his finger at him was improperly admitted, and the prosecutor inflated the seriousness of that incident by asking whether Jayshawn contacted the police at the time.

N.J.R.E. 404(b) prohibits the use of bad acts evidence to prove a propensity to commit crime. The rule provides such evidence is impermissible "to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." N.J.R.E. 404(b). However, the evidence may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake—provided such matters are relevant to a disputed issue.

Our Supreme Court has set forth a four-part test for purposes of determining admissibility under N.J.R.E. 404(b):

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[State v. Cofield, 127 N.J. 328, 338 (1992) (internal quotation omitted).]

A court must sanitize acts admitted under N.J.R.E. 404(b), to minimize prejudicial effect. State v. Barden, 195 N.J. 375, 390 (2008). Evidence is properly sanitized "by confining its admissibility to those facts reasonably necessary for the probative purpose" State v. Fortin, 318 N.J. Super. 577, 598 (App. Div. 1999), aff'd, 162 N.J. 517 (2000). The court must also instruct the jury on the proper use of the evidence. Cofield, 127 N.J. at 340-41 (citing State v. Stevens, 115 N.J. 289, 304 (1989)). Assuming these guidelines have been followed, we review a trial court's 404(b) ruling on an abuse of discretion basis. Id. at 339-40. We find no abuse here.

At a pretrial hearing, the court ruled Jayshawn would not be permitted to testify that on the morning of April 29, 2016, he contacted the police and reported nine days earlier someone who he believed to be defendant had shot at him while standing on a streetcorner. He was also prohibited from testifying that, on a prior occasion, defendant had driven past Jayshawn's home, opened the window of a vehicle he was in, and made a "finger gun" gesture, pointing at Jayshawn.

Prior to Jayshawn's trial testimony, the court reminded him he was not permitted to testify that in the past defendant had shot at him, or defendant had previously driven by his house and made a gun gesture. However, the court also said: "If you want to tell the jury [defendant] pointed a finger at you, that's okay."

During trial, on direct examination, Jayshawn testified he immediately recognized his attacker as defendant. He claimed he knew what the defendant looked like, because he had seen defendant previously, at a date he could not precisely recall, driving past his house and pointing at him. He testified that other family members were present at the time. He was also permitted to testify that someone called the police at the time, in order to lay a foundation

for a Computer Automated Dispatch (CAD) report, which established the date the finger pointing incident occurred.

We discern no abuse of discretion in the court's decision to sanitize and admit these portions of evidence. Jayshawn's previous interaction in which he saw defendant on a prior occasion was relevant to his ability to identify defendant during the later attack. To lessen the prejudicial effect of this testimony, the court limited its scope to simply allowing Jayshawn to say defendant "pointed" at him.

Similarly, the prosecutor's purpose in inquiring whether Jayshawn's family contacted the police was to lay a foundation on which to identify the date of the finger pointing incident. The CAD report was useful for this purpose, and the questioning did not indicate defendant had done anything beyond "pointing."

Pointing at someone is not a bad act. We also observe, had the court given a limiting instruction, it would have drawn special attention to a sanitized action that was not obviously threatening. This explains why the court did not issue—and the defendant did not request—a limiting instruction on this point. We find no error in the trial court's determinations on this point.

II.

Defendant next contends certain identification procedures used during the police investigation were impermissibly suggestive. Specifically, defendant asserts that Detective Rich erred by showing Jayshawn only one photograph, as opposed to a photo array.

"[S]howing . . . a single photograph is inherently suggestive" State v. Pressley, 232 N.J. 587, 595 (2018) (Albin, J. concurring). However, a "show up"—the presentation of a single suspect to a witness—is not impermissible so long as "it originate[s] from the victim's own observation of someone he believe[s to be the] assailant." State v. Romero, 191 N.J. 59, 78 (2007). In such a situation, the police are not "suggesting" anything, rather, they are confirming the information given to them so they may obtain information necessary to conduct an investigation. And when a "show up" takes place "on or near the scene" of a crime, the procedure is more "likely to be accurate, taking place . . . before memory has faded" State v. Jones, 224 N.J. 70, 87 (2016) (first alteration in original) (quoting State v. Herrera, 187 N.J. 493, 504 (2006)).

Here, Jayshawn's identification took place the night of the attack, while he was receiving emergency treatment for potentially life-threatening injuries

sustained as a result of the underlying crime. Jayshawn indicated straightaway he believed defendant was the attacker and told Detective Rich defendant was in a relationship with his cousin and had threatened him previously. Rich was understandably concerned Jayshawn might die given the severity of his injuries.

It is in this context that Jayshawn was shown the single photograph. Under these circumstances, we concur with the trial court and find the risk of unacceptable suggestion is not fatal to the admittance of this evidence because procedure merely confirmed Jayshawn's previous verbal identification. Romero, 191 N.J. at 78. The record adequately supported a finding that Jayshawn knew who defendant was and what he looked like.

III.

Defendant also contends, for the first time on appeal, that he was denied a fair trial because the court did not question potential jurors on whether trial counsel's drinking two glasses of wine during a jury selection lunch break affected their ability to impartially decide the case.

To protect a defendant's constitutional rights to a fair trial by an impartial jury, a trial court has a duty to "ensure the impaneling of only impartial jurors by ferreting out potential and latent juror biases." State v.

Fortin, 178 N.J. 540, 575 (2004). Our review of this issue, however, is limited to a cold record. Therefore, we review on a plain error standard, searching for those errors that "undermine the very foundation of a fair trial" Ibid. To that end, we disregard unchallenged errors or omissions unless they are "clearly capable of producing an unjust result." State v. Santamaria, 236 N.J. 390, 404 (2019) (citing R. 2:10-2).

We find no such error here. The record indicates a potential juror observed counsel drinking wine, reported to the judge that she believed this negated her ability to be impartial due to a history of alcoholism in her family, and the judge immediately excused her for cause. No other potential juror made a similar claim, and defendant did not request any of them be questioned.

We observe that defendant's assertion on appeal—the judge had an affirmative obligation to question other jurors—is not supported by our previous decisions, which place the onus on counsel to submit a request to charge or interpose a timely objection. State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999). This is because "[t]he mere fact that the problem is highlighted by a judge's question may be counter-productive and inject rather than remove . . . prejudice." State v. Long, 137 N.J. Super. 124, 129 (App. Div. 1975). We find defendant's argument unpersuasive.

IV.

Finally, defendant argues he was denied a fair trial due to the court's response to various jury requests. The court's response to a jury question or request during deliberations is a matter of discretion entitled to deference on appeal. State v. A.R., 213 N.J. 542, 555-56 (2013); State v. Wilson, 165 N.J. 657, 660 (2000). Fairness is our central concern when examining a judge's response to a jury's question or request. A.R., 213 N.J. at 560. Prior to responding, the court should consult with counsel, but failure to do so may not require a reversal, so long as the error was harmless. State v. Morgan, 423 N.J. Super. 453, 469-70 (App. Div. 2011).

Defendant first draws our attention to the fact the court provided the jury with a magnifying glass. As the Court held in Boland v. Dolan, 140 N.J. 174, 185 (1995), "a jury may use a magnifying glass to see or understand better a properly admitted exhibit" There is no error.

Next, defendant contends the court erred in permitting an enlargement of the replayed video when the video played during trial was not enlarged. Enlarging a video is similar to enlarging an image with a magnifying glass "to see or understand better" the evidence, and defendant made no objection before or during the replay. Similarly, we discern no abuse of discretion here.

Finally, defendant asserts that, in permitting this enlarged replay for the jury during deliberations, the court allowed the prosecutor to operate the controls required to slow down the video and gave basic orienting information as to what the jury was looking at, such as the time and location of the video. Defendant did not object to this practice during trial, and we cannot say that, in light of the trial as a whole, the incident resulted in undue prejudice required for our reversal on a plain error basis.

To the extent we have not addressed defendant's other arguments, we are satisfied they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(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