SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2206-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMIL RAGSDALE, a/k/a
JAMAIL RAGSDALE,

Defendant-Appellant.

———————————————

Argued March 14, 2023 – Decided May 3, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-01-0032.

Zachary G. Markarian, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Zachary G. Markarian, of counsel and on the brief).

Kristen N. Pulkstenis, Assistant Prosecutor, argued the cause for respondent (William E. Reynolds, Atlantic County Prosecutor, attorney; Kristen N. Pulkstenis, of counsel and on the brief).

PER CURIAM

Defendant appeals from his 2014 jury trial convictions for armed robbery, conspiracy to commit armed robbery, and aggravated assault.[1] Defendant and two codefendants were charged with multiple robberies of pizza delivery drivers. Defendant was sixteen years old at the time of the robbery for which he was convicted. After being waived to adult court, defendant was tried alone and only for the robbery committed on January 16, 2012—the charges against the codefendants and resulting from other incidents were severed pre-trial. He argues his prosecution should not have been moved to adult court. He further contends the trial judge erred by allowing the jury to watch a cell-phone video recording that showed defendant and other conspirators sharing what appear to be marijuana cigars, rapping, and using vulgar language. Defendant also contends it was reversible error for a testifying detective to mention during cross-examination that videos of puppies fighting were found on the phone that recorded the marijuana-smoking episode.

After carefully reviewing the record in light of the governing legal principles and arguments of the parties, we conclude there was no abuse of

[1] The State consented to defendant filing a direct appeal rather than hearing this matter as a petition for post-conviction relief (PCR). We granted defendant's motion to file a notice of appeal as within time.

discretion in waiving the prosecution to adult court. However, we conclude defendant was unfairly prejudiced at trial by the recording that showed him and others smoking marijuana. The judge admitted the video based on the prosecutor's representation that it showed someone in the group "brandishing a black rifle"—the kind of weapon described by the victim of the January 16 robbery—thereby establishing the conspirators had access to a rifle.[2] But, in fact, the video does not show a gun; rather, it only shows someone briefly making a hand gesture of holding a rifle.

After considering all relevant circumstances—including the limiting instruction that was given the day after the jury watched the video and the strength of the State's case, which depended almost entirely on the victim's identification—we reverse defendant's convictions and remand for a new trial.

I.

Defendant was initially charged with juvenile delinquency in the Family Part. The State moved to have the prosecution waived to the Criminal Part pursuant to N.J.S.A. 2A:4A-26—the statute then in force. The Family Part judge granted the State's request on June 5, 2012.

[2] The record suggests the weapon used in the robbery was a paintball gun. See infra note 6.

Defendant, thereafter, was indicted with two counts of conspiracy to commit first-degree armed robbery, N.J.S.A. 2C:5-2 and 2C:15-1(a); conspiracy to commit second-degree robbery, N.J.S.A. 2C:5-2 and 2C:15-1(a); first-degree armed robbery, N.J.S.A. 2C:15-1(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(c)(1); two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7); attempt to commit armed robbery, N.J.S.A. 2C:5-1 and 2C:15-1(a); and second-degree robbery, N.J.S.A. 2C:15-1(a).

The indictment charged defendant and two codefendants, Shakeem Roberts and Donte Ford. The trial judge granted defendant's motion to sever defendant from the codefendants. The judge also granted defendant's motion to sever the counts of the indictment relating to the robbery that occurred on January 16, 2012 from the counts pertaining to the robberies committed on other dates.

A jury trial was convened in June 2014 on three counts pertaining to the January 16 robbery: conspiracy to commit armed robbery, armed robbery, and aggravated assault. The jury found defendant guilty on all counts. The remaining charges against defendant were subsequently dismissed by the State.

At the sentencing hearing in August 2014, the trial court merged the conspiracy and robbery convictions and sentenced defendant on the first-degree robbery conviction to a ten-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The judge sentenced defendant to a concurrent four-year prison term on the aggravated assault conviction.[3]

Defendant's trial attorney filed a notice of appeal in October 2014 but did not file a brief, resulting in dismissal of the appeal. On November 9, 2017, defendant petitioned for PCR. As we have noted, the State consented to defendant filing a direct appeal, and we granted defendant's motion to file a notice of appeal as within time.

We discern the following pertinent facts from the record. Around midnight on January 16, 2012, a pizza delivery driver was sent to a North Maryland Avenue address to make a delivery. The parking lot was dark, and the victim was not near the lone streetlight. He phoned the caller from the delivery address, but his call went unanswered. A codefendant exited the address, and he and the victim had a brief exchange. The victim described that person as a Black male, approximately nineteen or twenty years of age, with an average body size, dressed in black pants with a black hood.

[3] Defendant is no longer incarcerated.

At that point, a person later identified as defendant came out from behind a nearby SUV carrying what appeared to be a rifle. The codefendant who first approached the victim ordered, "[d]on't move, you're done." The victim testified the gunman appeared to be Black, about eighteen or nineteen years old, and of average build. The victim said he was wearing a black hood and a mask that only showed his eyes, part of his forehead, and part of his nose. The victim testified he was carrying what looked to be an assault-style rifle. The victim heard the gun make a sound that sounded like a "real rifle."

The victim then noticed that three or four other masked men had surrounded his vehicle. He testified he was very scared and told the robbers to take whatever they wanted but not shoot him. The robbers took the victim's money—between $400 and $500—his phone, his iPod, and the food to be delivered. A codefendant, who may have been wearing rings or brass knuckles, began punching the victim repeatedly. The victim's glasses were broken after the first punch, and his vision became "very blurry."

At some point, the victim was knocked unconscious and was taken away from his car. When he regained his senses, he was on the ground being kicked repeatedly. The victim was able to get away, get back in his car, and return to

the pizza store. Once there, a co-worker called the police. The victim was then taken to a hospital by ambulance.

At the hospital, a detective attempted to take a statement, but the victim was too seriously injured to talk to the detective at that time. Instead, the detective left papers with the victim at the hospital for him to fill out and return to the police station. One or two weeks after the robbery, the victim dictated a statement to his wife and delivered it to police.[4]

On February 20, 2012, about a month after the robbery, a detective administered three separate photo lineups—one for each codefendant—at which time the victim identified defendant as the robber who was holding what appeared to be a rifle. The victim's level of confidence in that identification was not recorded. In August 2012, about seven months after the robbery, police took a recorded statement from the victim.

Defendant raises the following contentions for our consideration:

> POINT I
>
> THE STATE ABUSED ITS DISCRETION BY SEEKING WAIVER WITHOUT ADEQUATELY EXPLAINING ITS CONSIDERATION OF THE FACTORS IDENTIFIED IN THE ATTORNEY

[4] Because English is not the victim's primary language, he had his wife write the statement that was given to police.

GENERAL GUIDELINES. THE FAMILY PART'S WAIVER DECISION MUST BE REVERSED.

POINT II

EXTENSIVE PREJUDICIAL EVIDENCE LINKING [DEFENDANT] TO DRUG USE, ANIMAL CRUELTY, AND A "LOW-INCOME," "HIGH-CRIME" MILIEU DEPRIVED [DEFENDANT] OF A FAIR TRIAL.

A. VIDEO THAT SHOWED UNIDENTIFIED TEENAGERS SMOKING MARIJUANA, SPEAKING VULGAR LANGUAGE, AND MIMICKING HOLDING AN IMAGINARY GUN IN [DEFENDANT]'S PRESENCE WAS UNDULY PREJUDICIAL.

B. DETECTIVE KANE'S TESTIMONY THAT VIDEOS NOT SHOWN TO THE JURY DEPICTED ANIMAL CRUELTY WAS EXTREMELY INFLAMMATORY AND UTTERLY IRRELEVANT.

C. TESTIMONY BY MULTIPLE WITNESSES THAT THE AREA WHERE [DEFENDANT] WAS DEPICTED HANGING OUT WAS A "LOW-INCOME" AREA KNOWN FOR A HIGH AMOUNT OF CRIME WAS IRRELEVANT AND UNDULY PREJUDICIAL.

D. THE COURT'S INSTRUCTION DURING THE JURY CHARGE DID NOT REMEDY THE PREJUDICE BECAUSE THE AMOUNT OF PREJUDICIAL EVIDENCE WAS OVERWHELMING, THE INSTRUCTION DID NOT ADDRESS ALL THE PREJUDICIAL TESTIMONY, AND THE STATE'S CASE WAS

OTHERWISE PREMISED ENTIRELY ON ONE UNRELIABLE IDENTIFICATION.

II.

We first address defendant's contention that his prosecution should not have been waived from the Family Part to the Criminal Part. Defendant was waived to adult court in 2012, prior to the 2016 adoption of the current waiver statute, N.J.S.A. 2A:4A-26.1. Defendant argues the waiver was invalid under the statute then in force, N.J.S.A. 2A:4A-26, because the State did not offer sufficient reasons.

Our review of the prosecutorial decision to waive a juvenile to adult court is limited, applying a "'patent and gross' abuse of discretion" standard. State ex rel. R.C., 351 N.J. Super. 248, 260 (App. Div. 2002). There is a "strong presumption in favor of waiver for certain juveniles who commit serious acts," and such juveniles bear a "heavy burden" in contesting a waiver motion. State ex rel. Z.S., 464 N.J. Super. 507, 519 (App. Div. 2020) (citing State v. R.G.D., 108 N.J. 1, 12 (1987)). In applying the abuse-of-discretion standard of review in this context, "it must be borne in mind that a juvenile seeking to avoid the 'norm' of waiver . . . must carry a heavy burden to clearly and convincingly show that the prosecutor was arbitrary or committed an abuse of his or her

considerable discretionary authority to compel waiver." State ex rel. V.A., 212 N.J. 1, 29 (2012).

The statute in force at the time of the waiver at issue, N.J.S.A. 2A:4A-26, provided in pertinent part that juveniles can be involuntarily waived to the Criminal Part after a finding that they were fourteen or older at the time of the charged act and that there is probable cause to believe they committed certain enumerated crimes—including first-degree robbery. N.J.S.A. 2A:4A-26(a)(1) and (2)(a). Our Supreme Court in V.A. noted, "[g]enerally, the Legislature has moved in one direction: easing the conditions for waiver for the State, and concomitantly rendering it more difficult for the juvenile to avoid waiver of jurisdiction by the Family Part." Id. at 10 (citing State v. J.M., 182 N.J. 402, 412 (2005)).

In accordance with N.J.S.A. 2A:4A-26(f), the Attorney General developed guidelines to standardize the application of the juvenile waiver statute throughout the State. See ibid. The seven primary considerations enumerated in those guidelines are: (1) the nature of the offense, with a focus on the severity of the crime and the level of the juvenile's involvement; (2) the need for deterrence; (3) the effect on codefendants "so as to avoid an injustice if similarly situated culpable individuals are tried in separate trials"; (4) the maximum

sentence and the length of time served; (5) the juvenile's prior record; (6) trial considerations, specifically the "likelihood of conviction and the potential need for a grand jury investigation"; and (7) the victim's input if there is an identifiable victim. Id. at 11–12 (citing Attorney General's Juvenile Waiver Guidelines, 5–6 (Mar. 14, 2000)). "The Guidelines require preparation of a written statement of reasons for waiver, in which the prosecutor must 'include an account of all factors considered and deemed applicable.'" Id. 12 (quoting Guidelines, at 7).

Defendant contends the prosecutor's statement of reasons failed to address the "trial considerations" and "victim input" factors. In this instance, we do not believe the prosecutor abused discretion by essentially deeming those factors to be inapplicable, having little or no bearing on the ultimate waiver decision. See id. at 12 (guidelines require a statement of reasons that "include[s] an account of all factors considered and deemed applicable." (emphasis added) (quoting Guidelines, at 7)). We do not believe the prosecutor committed an abuse of discretion warranting a remand or outright reversal by failing to explicitly articulate that these factors neither militate for nor against waiver.

We note with respect to trial considerations that the waiver decision pertained to all of the robberies with which defendant was charged, not just the

January 16, 2021 robbery that was eventually severed and tried separately. Relatedly, the waiver decision pertained to multiple separate crimes that involved multiple separate victims. We do not believe the prosecutor's failure to explain the positions taken by the victims constitutes an abuse of discretion warranting a remand, especially considering that "the waiver decision rests with the prosecutor, not the victim." V.A., 212 N.J. at 12 (citing Guidelines, at 6).

Defendant also argues that the prosecutor's statement regarding deterrence was inadequate. That portion of the statement of reasons reads, "[t]he maximum term of incarceration and application of the No Early Release Act (NERA) and the GRAVES Act[5] in the Criminal Part militate in favor of waiver in deterrence." Defendant contends the statement did not contain "conclusions about the respective merits of deterrence through adult versus juvenile proceedings." See V.A., 212 N.J. at 30. We disagree.

NERA and the Graves Act are enhanced sentencing features that only apply to adult convictions for violent crimes and gun crimes, respectively. We see no abuse of discretion in the prosecutor relying on those adult sentencing enhancement features to support a conclusion that the goals of special and

---

5 The Graves Act, N.J.S.A. 2C:43-6(c), generally requires that defendants convicted of certain gun offenses be sentenced to at least a forty-two-month prison term.

general deterrence would be better served by prosecuting defendant as an adult for the especially serious and dangerous crime of armed robbery. That is particularly true considering defendant was alleged to have been involved in three separate robberies. We are satisfied that by explicitly referencing the mandatory sentencing provisions of NERA and the Graves Act, the prosecutor essentially incorporated by reference the deterrence rationale that undergirds those sentencing enhancement features. Because those provisions do not apply to adjudications of juvenile delinquency, we are satisfied the prosecutor's statement of reasons adequately addressed the "respective merits of deterrence through adult versus juvenile proceedings." Ibid.

Nor are we persuaded by defendant's argument that the matter must be remanded to the Family Part because the judge did not analyze the prosecutor's statement of reasons for abuse of discretion. "[I]t is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001). The record before us shows the prosecutor's decision to waive defendant to the Criminal Part was not an abuse of discretion. The Family Part judge's order, while succinct, was ultimately

correct and we see no point in remanding for the judge to render a more detailed opinion to support the order.

III.

We next address defendant's contentions that the trial court erred in applying N.J.R.E. 404(b) by allowing the State to introduce "other crimes, wrongs, or acts" evidence in the form of a video that shows, among other things, defendant and others, including the codefendants, "hanging out" and smoking what appear to be marijuana cigars.

A.

We begin by recounting the pertinent facts leading up to the admission of the video. Police seized codefendant Roberts's phone after his arrest and obtained a communications data warrant to search its contents. Photos and videos were stored on that device, including a six-minute video of defendant and others socializing inside a house.

On the morning of the first day of the trial, the prosecutor advised defense counsel and the court that she planned to introduce the video as evidence. She argued that the video was "relevant because it indicates [the conspirators'] relationship [and] that they actually knew each other." She added:

> [I]n one of the videos that was taken from the phone of the defendants has them hanging out and someone is

> brandishing a black rifle. Detective Kane cannot say with certainty that it is [defendant], it appears to be him, but Detective Kane cannot say for certain, but someone in this group of friends is brandishing a rifle in the company of these other codefendants which in turn the victim identifies as a rifle as brandished when he was robbed, so the State would submit that it's relevant in that it demonstrates the relationship among these parties which is not only important for the case because they were all charged with the same offenses, but then you have on video the same group of males holding a rifle in addition to the rifle that was located in a shared parking lot with the defendant's residence.[6]

Defense counsel acknowledged that he had not yet seen the video. He nonetheless took issue with playing the video to the jury on the grounds that defendant's identity in the video was not properly established. Regarding the prosecutor's argument that the video shows the conspirators near the approximate location of where the robbery occurred, defense counsel responded, "[t]hat argument would make sense . . . if there was any evidence in the case that [defendant] was present." He continued, "there's . . . nobody in the world that testifies that this defendant was present on any occasion when whatever the object in the picture was also present. And the only way . . . you get to . . . the

---

[6] The rifle mentioned at the end of this quote was a paintball gun found near defendant's home weeks after the robbery. The trial judge ruled there was an insufficient connection between the paintball gun and this case to allow it into evidence.

inference that the State wants to offer is to speculate about it." With regard to the prosecutor's argument that the video shows defendant socializing with the other conspirators, defense counsel stated, "I'm not sure that there's a real dispute that Donte Ford and Shakeem Roberts knew [defendant]."

The trial judge ruled the video would be admissible, explaining:

> Evidence that any of the coconspirators had access to a gun is relevant, and if that is shown by a video where one or more of them are depicted in possession of a gun or what appeared to be a gun similar to that described by the victim in this case, I find it admissible. Whether the defendant would be seen in that video or not, he is charged as a conspirator, likely there'll be an accomplice charge given to the jury, so the fact that any one of the three had access to a gun in my view is relevant, material and admissible.
>
> As to the identity of him in the video, even if Detective Kane could say in his opinion it was the defendant, I don't know that . . . I would allow that because that's something a jury can decide on their own and need not be told by a witness. So, in the first instance I would find that the video itself is []admissible.

Despite the specific and unequivocal representation by the prosecutor, as it turns out, no rifle or weapon of any sort is visible in the video. The eventual testimony about the video was that there was "a male with a phone in his hand imitating as if he's carrying a rifle."

The next day, during Detective Kane's testimony, the prosecutor said, "I'm going to play [the video] completely and then I'll stop and ask you some questions about it." After playing the video, the prosecutor explained to the detective, "I'm going to play it for you again. I want you to stop me when you are able to identify the persons that I asked you about in the beginning." Shortly after, Detective Kane testified, "that opening sequence there, that first person there is known as Jamil."

At that point, defense counsel requested to be heard at sidebar. Counsel argued,

> I understand, Judge, the sole reason for playing this video is to identify the people who are in the video and show there's an association between this defendant and those people. The video has been shown once. I object to it being shown again because there's apparently stuff in this video that's not the subject of indictment but that could prejudice the defendant. It appears to be smoking marijuana which is a crime he's not charged with, and that could affect the jury's deliberation because of the fact that they may, rather than considering the evidence in this case, decide he's just a bad person. It's been played. I haven't made an issue of it. I don't want to underscore it, but I object to the video. I object to it going to the jury, but I object to it playing. There are stills of the people who are in the video, and if we're talking about the identification of those persons, since the prosecutor has the pictures here, they can be presented to the witness, he can indicate that these were pictures taken from the video, here are the persons and here's their identity.

The prosecutor responded, "[t]hat's fine with the exception of 2:22 in the video where one of the males holds up his hand like he's holding a rifle. Also in the video, when they go to the window, it is the same location where the robbery took place." After determining the prosecutor could use still photographs taken from the video to "identify the people," the judge said, "[o]kay. Then I'll let you play it for the point where you say goes [sic] looks like they have a gun and for a shot at the exterior."

The prosecutor went to the relevant time in the video and paused it. The prosecutor then asked the detective, "[w]hat's depicted in that photo?" The detective answered, "[i]t's a male with a phone in his hand imitating as if he's carrying a rifle." At that point, the defense attorney said, "I object. Can we be heard?" The judge responded, "[n]o, we don't need to do that. I think the jury understands the significance and they can draw their own conclusions as to what they're seeing."

The prosecutor proceeded to ask the detective to explain how he could identify the location where the video was taken as a house roughly 100 yards

away from the scene of the robbery. The detective also identified defendant and the codefendants depicted in stills from the video.[7]

The next day, while discussing the final instructions to be read to the jury, the defense counsel stated:

> I do have an issue that I probably should have brought up yesterday, but I thought about it last night and I thought I should raise it before it goes to the jury.
>
> Yesterday, when we had an opportunity to see the video, your Honor knows that I had some concerns about what was contained in the video particularly as it got toward the end of the video and the conduct that was being demonstrated by the people. I didn't ask yesterday for a limiting instruction about what uses the jury could have made for that video, but I make that application today . . . because I think the jury has to be instructed that . . . they cannot use the video to conclude that the defendant . . . is guilty of the offense, that the video is offered merely to show that this defendant had an association with other persons charged in the indictment which I don't have a problem with, but my concern is that if the jury sees this defendant engaged in conduct which they regard as bad conduct and, quite frankly, a group of teenagers in a room smoking marijuana is pretty bad conduct, the jury may conclude he's generally a bad person, and for that reason he's guilty of the offense as opposed to evidence in the case. So I'd ask for some sort of limiting instruction that advises them they can use that, and the video is not

[7] Defendant does not contend on appeal the trial court erred in allowing the detective to identify defendant as one of the persons in the video. Nor does defendant contend on appeal the detective rendered an improper lay opinion by narrating what appeared in the video. See State v. Higgs, ___ N.J. ___ (2023).

> going with them with their deliberations as I understand from the [c]ourt's ruling yesterday, but the video has been played, so they have a recollection of the fact that they have seen it, and I am concerned about the use they will make of the things that were seen in the video that are not charged against this defendant.

The judge "d[id]n't disagree" and asked what the defense counsel wanted him to say. Defense counsel responded,

> Well, that's always the problem with these 40[4](b)-type of situations. You don't want to underscore it, but something has to be said about it, so I would suggest some sort of instruction that provides you can consider that evidence for the limited purpose for which it was offered, that is, to show the defendant had some association with co-defendants charged in the case.

The judge suggested adding limiting language to the portion of the conspiracy charge regarding "mere acquaintance or association," to which defense counsel replied, "[t]hat's fine." Later that day, as part of the final charge, the judge instructed the jury:

> Mere association, acquaintance or family relationship with an alleged coconspirator is not enough to establish defendant's guilt of conspiracy, nor is mere awareness of the conspiracy, nor would it be sufficient for the State to prove only that the defendant met with others, that they discussed names and things in interest in common. However, any of these factors, if present, may be taken into consideration along with all other relevant evidence in your deliberations.

> Now while on the subject of the defendant's acquaintance or association with others allegedly or admittedly involved in the alleged crimes, I want to take a moment to give you a limiting instruction as to how you may consider the video evidence in this case. I permitted you to see that as evidence you may consider of the defendant's acquaintance, familiarity, association or friendship with those also depicted in the video. You may have seen in that video those engaged in conduct about which you may not approve. You may not during your deliberations consider such conduct as evidence of criminal wrongdoing or conduct indicating that the defendant is a person of bad character or one likely disposed to commit crimes in general, or the crimes charged in this indictment in particular. Again, the limited purpose of the video i[s to] show the relationship among alleged participants in this crime.

We note the limiting instruction did not permit the jury to consider the proximity of the home in which the video was made to the crime scene. Nor did the limiting instruction mention the gesture of holding a rifle.

B.

We next consider the governing legal principles. As a general matter, "[w]e defer to a trial court's evidentiary ruling absent an abuse of discretion," and "will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (first citing State v. Nantambu, 221 N.J. 390, 402 (2015); and then quoting State v. Medina, 242 N.J. 397, 412 (2020)). "In addition, sensitive

admissibility rulings regarding other-crimes evidence made pursuant to Rule 404(b) are reversed '[o]nly where there is a clear error of judgment.'" State v. Green, 236 N.J. 71, 81 (2018) (alteration in original) (quoting State v. Rose, 206 N.J. 141, 157–58 (2011)). "However, we accord no deference to the trial court's legal conclusions." Nantambu, 221 N.J. at 402.

N.J.R.E. 404(b) provides in pertinent part, "evidence of other crimes, wrongs, or acts is not admissible 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)(1). Such evidence is admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(2).

Our Supreme Court has recognized "[t]he underlying danger of admitting other-crime [or bad-act] evidence is that the jury may convict the defendant because he is 'a "bad" person in general.'" State v. Skinner, 218 N.J. 496, 514 (2014) (alterations in original) (quoting State v. Cofield, 127 N.J. 328, 336 (1992)). To limit the use of extrinsic evidence of other wrongs, the Court established a four-part test to evaluate N.J.R.E. 404(b) exceptions. Id. at 514. The factors to be considered—often referred to as the Cofield factors—are: (1)

"[t]he evidence of the other crime must be admissible as relevant to a material issue"; (2) "[i]t must be similar in kind and reasonably close in time to the offense charged"; (3) "[t]he evidence of the other crime must be clear and convincing"; and (4) "[t]he probative value of the evidence must not be outweighed by its apparent prejudice." Id. at 514–15 (quoting Cofield, 127 N.J. at 338).

We add that "strong and overwhelming evidence of the defendant's guilt" can mitigate the prejudicial effect of bad-act evidence. Id. at 513. Conversely, cases that are "far from overwhelming" are more susceptible to improper prejudice. State v. Herbert, 457 N.J. Super. 490, 511–12 (App. Div. 2019).

We next apply these general principles to the marijuana-smoking video. We note the trial court did not conduct a Cofield analysis when admitting the video. In assessing whether there was an abuse of discretion, moreover, we reiterate and stress that the prosecutor represented, and the court accepted, that the video shows someone "brandishing a black rifle." It does not. The record confirms the trial court relied on that representation. Indeed, the court stated at the outset of its admissibility ruling:

> Evidence that any of the coconspirators had access to a gun is relevant, and if that is shown by a video where one or more of them are depicted in possession of a gun

> or what appeared to be a gun similar to that described by the victim in this case, I find it admissible.
>
> [(Emphasis added).]

It appears that neither the prosecutor, defense attorney, nor judge were aware of the true contents of the video before it was played to the jury. The abuse of discretion standard that governs our review of the admission of evidence presupposes the exercise of discretion based on facts, not arguments made by an advocate that turn out to be factually erroneous.

Applying the Cofield factors, we conclude the marginal probative value of the video was outweighed by the potential for unfair prejudice. We acknowledge the State was permitted, indeed required, to prove a relationship between the conspirators. But—even putting aside that defendant did not dispute knowing the codefendants, see Cofield, 127 N.J. at 338–39 (emphasizing "the material issue must be genuinely disputed")—the conspirators' relationship could have been established by using still images from the video that did not display unlawful behavior not charged in the indictment. Here, defendant never argued that he was not friends with the codefendants. In fact, defense counsel elicited testimony regarding the close relationship between the codefendants. By needlessly showing defendant apparently sharing marijuana, the video showed he was willing to disregard the law.

The crude language used by defendant and his friends at the social gathering also presented a risk of prejudice. The recording is replete with racial slurs, derogatory language about women, and other vulgarities, none of which have any legitimate probative value. We are concerned that as a whole, the video portrays defendant as a youthful hooligan, creating a risk that jurors would fall prey to implicit bias and pernicious stereotypes about young, Black males. Cf. State v. Andujar, 247 N.J. 275, 303 (2021) ("It is important for the New Jersey Judiciary to focus with care on issues related to implicit bias.")

Nor are we persuaded the limiting instruction given the next day was adequate to preclude the jury from drawing inappropriate inferences from the unredacted video.[8] We recognize that jurors are presumed to follow instructions. See State v. Burns, 192 N.J. 312, 335 (2007). However, "[t]here are undoubtedly situations in which notwithstanding the most exemplary charge, a juror will find it impossible to disregard" prejudicial evidence. Herbert, 457 N.J. Super. at 504 (quoting State v. Boone, 66 N.J. 38, 48 (1974)).

[8] The judge instructed the jury in pertinent part, "[y]ou may not during your deliberations consider [conduct about which you may not approve] as evidence of criminal wrongdoing or conduct indicating that the defendant is a person of bad character or one likely disposed to commit crimes in general, or the crimes charged in this indictment in particular."

Here, the instructions were, at best, incomplete. We note the "limiting" instruction did not tell the jurors whether they could consider that the outdoor area shown in the video was close to the crime scene, even though that was the topic of substantial testimony. Importantly, the jurors were not instructed regarding the gesture of holding a rifle, which was also emphasized before the jury. We conclude that gesture—made while rapping—was itself prejudicial because it could be construed as glorifying gun violence, while in no way establishing that the group had access to a "black rifle" as the prosecutor had initially argued in support of the admissibility of the video. The lateness of the limiting instruction also weighs against its sufficiency. See Herbert, 457 N.J. Super. at 506 ("Delay [in providing a limiting instruction] may allow prejudicial evidence to become cemented into a storyline the jurors create in their minds during the course of the trial.")

Because defendant objected to the video, albeit in an untimely and imperfect manner, we review for harmful error. State v. G.E.P., 243 N.J. 362, 389 (2020). The critical question is "whether in all the circumstances there [is] a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." Ibid. (alteration in original) (quoting State v. Mohammed, 226 N.J. 71, 86–87 (2016)). The error must have been "clearly capable of producing

an unjust result" in order to be reversible. Mohammed, 226 N.J. at 87 (quoting R. 2:10-2).

In assessing the impact of the improperly admitted video, we conclude the risk of unfair prejudice was heightened because the State's case was "far from overwhelming." Herbert, 457 N.J. Super. at 512. The prosecution rested almost entirely on the victim's identification. Although defense counsel withdrew his pre-trial motion for a Wade/Henderson[9] hearing, the victim's identification presented difficult questions for the jury to resolve in assessing its reliability: the photo-array identification procedure was conducted a month after the robbery; the level of the victim's certainty was not documented, contrary to accepted practice, see Henderson, 208 N.J. at 254; the robbery occurred in a dark parking lot far from the nearest light; the robber was wearing a mask and hood that obscured much of his face; the robber was carrying what appeared to the victim to be rifle, adding to the stress inherent in the robbery and implicating the weapons-focus estimator variable; there were several perpetrators drawing attention; the identification was cross-racial; and the victim's vision was "very blurry" for at least a portion of the violent encounter during which the victim's

[9] United States v. Wade, 388 U.S. 218 (1967); State v. Henderson, 208 N.J. 208 (2011).

glasses were knocked off and he lost consciousness and required hospitalization.[10]

In sum, considering all relevant circumstances, we conclude there is reasonable doubt that the jury rendered a fair verdict solely on the merits of the State's evidence. See Mohammed, 226 N.J. at 86–87.

IV.

We turn next to Detective Kane's reference to dogfighting. While defense counsel was cross-examining the detective regarding the marijuana-smoking video, he asked "[o]ther than the video that was shown today, were there other videos on this phone?" The detective answered yes, after which defense counsel asked, "[w]hat other videos were on the phone?" The detective responded:

> There w[ere] at least five videos of pit bulls fighting, baby pit bulls, puppy pit bulls, and that was turned over to the Humane Society for investigation. I believe there's some other videos of them in the back courtyard pretty much, but I believe there's like [forty-one] videos. I can't off the top of my head, I apologize, I can't remember what all the videos were.

Importantly, defendant did not object to this remark and there was no curative instruction. See State v. Nelson, 173 N.J. 417, 471 (2002) (holding that

[10] The judge provided an instruction to the jury regarding the relevant system and estimator factors enumerated in Henderson.

a failure to object to testimony permits an inference that any error in admitting the testimony was not prejudicial); State v. Frost, 158 N.J. 76, 84 (1999) ("The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made."). There was no further discussion of dogfighting or other animal abuse.

The State on appeal does not contend the detective's comment was admissible but rather that it did not rise to the level of plain error warranting reversal under Rule 2:10-2. See State v. Singh, 245 N.J. 1, 13 (2021). Clearly, the remark had no relevance to the crime that was before the jury and was prejudicial. We do not disagree with defendant's characterization that evidence of irrelevant animal abuse is particularly capable of creating prejudice. See State v. Collier, 316 N.J. Super. 181, 194 (App. Div. 1998) (noting the "great potential for prejudice" stemming from evidence of animal abuse), aff'd o.b., 162 N.J. 27 (1999). The inherent prejudice was amplified by the detective's gratuitous comment that the videos were sent to the Humane Society for investigation.

However, the jury knew the phone containing the videos did not belong to defendant. The detective's comments regarding dogfighting did not refer specifically to defendant or directly suggest that defendant was personally

involved in animal cruelty. Importantly, moreover, it was a fleeting reference that was not expanded upon by either party. See State v. Harris, 156 N.J. 122, 173 (1998) (holding that "solitary, fleeting references will generally not constitute reversible error").

Accordingly, we conclude that standing alone, the brief reference to dogfighting did not rise to the level of plain error warranting a reversal. As we explained, however, the improperly admitted video evidence nevertheless requires reversal and a new trial.

V.

Finally, although we reverse and remand for a new trial based on the marijuana-smoking video, we address defendant's contention that he suffered unfair prejudice from comments elicited at trial regarding the unsafe nature of the neighborhood where the robbery took place—an area referred to as "Back Maryland." We do so to provide guidance at the new trial. The prosecutor was the first to comment on the character of the neighborhood in her opening statement when she told the jury, "[y]ou're going to learn [Back Maryland is] not a very nice area of the city. And [the victim] was instructed to leave his car running in case he had to leave quickly because it was a dangerous part of the city."

The next refence to the character of the neighborhood occurred during the prosecutor's direct examination of the victim. She asked him, "[c]an you describe for the jury the type of area . . . North Maryland Ave is?" The victim answered, "[i]t's [a] pretty bad area." Prompted by the prosecutor, he elaborated, "[i]t was like nobody wants to go there. It's like a lot of things happen like a robbery and that kind of stuff, you know, and they throw stones on your car and stuff." The prosecutor asked about any "special instructions" the victim had to follow in that area, as she referenced in her opening, but he did not mention any at that time.

On cross-examination, defense counsel asked the victim if delivery drivers "didn't want to go [to Back Maryland] because it was regarded as a dangerous location." The victim agreed. Defense counsel then led the victim into describing the safety precautions for that area, such as leaving the car running and parking "in the middle of the lot so that if you needed to make an escape, you'd have the ability to do that." Defense counsel continued to have the victim discuss the extra caution that was necessary when delivering to that area and the caution he would have been exercising on the night of the robbery.

The prosecutor also asked Detective Yarrow about the Back Maryland area. She asked him to describe the area and he said, "[i]t's a high-crime, high-

drug area, goes from Maryland Avenue over to Brigantine Boulevard in [a] section commonly known as Back Maryland, butts up against [two casino hotels] up to about Route 30." She asked Detective Yarrow about the housing there and he said, "[i]t's mostly low-income row-style homes."

Defense counsel, in his summation, commented that "[m]aybe Atlantic City is such a bad place that armed robberies happen all the time and it's just not a big deal anymore," in reference to Detective Yarrow's handling of the case. Specifically, defense counsel was criticizing the decision to leave a form with the victim to fill out instead of following up with the witness after he received treatment.

We are concerned that in the context of this specific prosecution, the references to a high-crime area might amplify the concern regarding implicit bias that we raised in Section III-B. However, there was no objection. Indeed, the most extensive commentary on the dangerousness of Back Maryland was elicited during the defense's cross-examination of the victim. Unlike the comparatively brief comments made or elicited by the prosecutor, defense counsel repeatedly asked the victim about why delivery drivers prefer to avoid Back Maryland, the specific rules his employer had for delivering food to that area, and the heightened caution he needed to exercise while there. In addition,

defense counsel commented on how dangerous the area is during his closing argument. Even accepting that this apparent defense strategy does not rise to the level of "invited error," see State v. A.R., 213 N.J. 542, 561 (2013), defendant is hard pressed to argue on appeal that those comments were so prejudicial that they were "clearly capable of producing an unjust result." R. 2:10-2. However, on remand, we expect the trial court to carefully consider the potential for undue prejudice arising from the State's reference to the nature of the neighborhood, provided defendant makes an objection along the lines of his argument on appeal. To avoid the need for a curative instruction, the decision whether to permit such comments should be made in limine.

In sum, we conclude the improper admission of the marijuana-smoking video requires us to reverse his convictions and remand for a new trial in adult court. We do not retain jurisdiction.

Reversed.