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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3106-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIMOTHY PUSKAS, a/k/a  
TIMOTHY J. PUSKAS,

Defendant-Appellant.

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Argued May 8, 2023 – Decided May 17, 2023

Before Judges Haas and Mitterhoff.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 16-07-1220.

Joseph M. Mazraani argued the cause for appellant (Mazraani & Liguori, LLP, attorneys; Joseph M. Mazraani, of counsel and on the briefs).

Nancy A. Hulett, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Nancy A. Hulett, of counsel and on the brief).

## PER CURIAM

In 2021, this court reversed the convictions of defendant Timothy Puskas for murder and related offenses, and remanded the matter to the Law Division for re-trial. State v. Puskas, No. A-4314-16 (App. Div. May 14, 2021), certif. denied, 249 N.J. 337 (2021). On leave granted, defendant now appeals from the trial court's pre-trial evidentiary ruling admitting surveillance videos from two locations near the murder scene.

According to defendant, the court erred because the videos are so unclear that they are not relevant, and cannot be properly authenticated. Defendant further argues that any probative value of the videos is outweighed by the undue prejudice that will result if the State is permitted to argue at trial that the videos depict the victim and defendant.

We have considered defendant's contentions in light of the record and the applicable law. For the reasons that follow, we conclude that the State has sufficiently demonstrated both the relevance of the videos and a prima facie showing of their authenticity, and because the videos are not unduly prejudicial, we find no abuse of discretion by the trial court. Accordingly, we affirm the court's decision to admit the surveillance videos at trial.

## I.

On July 26, 2016, a Middlesex County Grand Jury returned Indictment No. 16-07-1220, charging defendant with first-degree murder, in violation of N.J.S.A. 2C:11-3(a) (count one); fourth-degree unlawful possession of a weapon (blunt object), in violation of N.J.S.A. 2C:39-5(d) (count two); third-degree possession of weapon (firearm or imitation firearm) for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(d) (count three); third-degree hindering his own apprehension by concealing or destroying evidence of a crime, in violation of N.J.S.A. 2C:29-3(b)(1) (count four); and third-degree hindering his own apprehension by giving false information to a law enforcement officer, in violation of N.J.S.A. 2C:29-3(b)(4) (count five).

Prior to trial, the State sought to admit a video presentation incorporating portions of surveillance video taken from eleven separate New Brunswick locations, and related testimony by proposed expert witness New Brunswick Police Sergeant Brandon Epstein. The trial court held an N.J.R.E. 104 hearing on this issue over six separate court days from October 25 to December 13, 2016, at which Epstein and defense expert George Reis testified. Ultimately, the court allowed the State to present the video presentation to the jury, but ruled that Epstein could not testify as an expert and could not give a lay opinion regarding

the identity of the figures in the video alleged by the State to be the victim and the defendant.

The court also granted the State's motion to admit and play for the jury surreptitiously recorded telephone and text conversations between defendant and an informant, Wayne Stoecker, who died prior to trial.

Defendant was tried before a jury over thirty-five separate trial days from November 15, 2016, to January 17, 2017. On January 5, 2017, the court granted defendant's motion for a judgment of acquittal on count four, hindering by destruction of evidence. On January 17, 2017, the jury convicted defendant on the remaining four counts.

On March 20, 2017, the court sentenced defendant to a forty-year term of imprisonment for murder, subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, and consecutive to a sentence defendant was then serving for an earlier offense. Defendant received shorter, concurrent terms of imprisonment on the remaining counts.

Defendant appealed, challenging, among other things, the admission of his recorded conversations with Stoecker, and the admission of certain of the surveillance videos, which were allegedly "not properly authenticated and were

so grainy that the persons in them could not be identified." Puskas, (slip op. at 3-4).

On May 14, 2021, this court reversed defendant's convictions and remanded for re-trial, ruling that "the trial court erred by permitting the State to play the recorded conversations between defendant and Stoecker to the jury" which violated defendant's rights under the Confrontation Clause and the rules against hearsay. Id. at 7. The court did not address defendant's argument regarding the surveillance videos, but instructed the trial court on remand "to consider defendant's contentions concerning the admissibility of . . . the surveillance videotapes in the context of a new trial, which may or may [sic] involve new or additional proofs and legal arguments." Id. at 72.

After the Supreme Court denied the State's petition for certification, the State filed motions in limine seeking to admit certain evidence at trial, including various surveillance videos, and defendant's statements during his recorded conversations with Stoecker. A hearing was held on these motions on January 14 and February 9, 2022, before Judge Andrea Carter, at which no testimony was taken but the video footage was played for the court.

On April 25, 2022, Judge Carter issued a thorough written opinion, accompanied by an order granting in part and denying in part the State's motions.

With respect to defendant's recorded statements to Stoecker, the court denied the State's motion, finding the statements inadmissible. However, the court granted the State's motion to admit all of the requested surveillance video footage. On May 3, 2022, the court issued a clarifying letter regarding the limitations of Epstein's testimony regarding such video footage at trial.

On May 16, 2022, defendant moved for leave to appeal that portion of the court's ruling regarding the admission of surveillance footage from 210 Hamilton Street and 78 Easton Avenue. On June 10, 2022, this court granted defendant's motion for leave to appeal.

## II.

These are the salient facts. At approximately 10:30 a.m. on February 15, 2014, the body of twenty-two-year-old William McCaw was found by New Brunswick police "lying in the snow-covered backyard of a residence on Hartwell Street." Puskas, slip op. at 7-8. An autopsy revealed that his skull had been fractured, with lacerations to the back of his head and on his face, and signs of a brain hemorrhage. Id. at 8. According to the medical examiner, McCaw's death was caused by "multiple blunt force injuries to the head delivered by blows from a two-pronged instrument like a crowbar or wrench." Ibid. The murder weapon was never found. Id. at 8 n.5.

The police investigation revealed that McCaw attended two fraternity parties on the night of February 14 and was heavily intoxicated when he left the second party at approximately 2:30 a.m. Id. at 8. New Brunswick police obtained surveillance video showing McCaw leaving the fraternity house and attempting to get into a car in the parking lot, which was already full of other people. Id. at 9. The video shows McCaw, after being unable to get in the car, walking on Easton Avenue toward Hamilton Street. Ibid.

McCaw had several friends in New Brunswick and "would frequently show up on one of their doorsteps and ask to spend the night." Id. at 8. It is the State's theory that McCaw was killed while walking to the Robinson Street house of a friend, which could be "accessed from the rear by cutting through the backyard of the home on Hartwell Street where McCaw's body was found." Id. at 9.

Defendant lived on Plum Street, less than a quarter mile from where McCaw's body was found, in a house he co-owned with his mother. Ibid. Stoecker lived in the house as a tenant. Id. at 10.

Following Stoecker's arrest for unrelated burglary and theft charges, he gave a recorded statement to police, and police seized Stoecker's cell phone and a grey hooded sweatshirt (hoodie) that he had with him at arrest. Id. at 12.

Human blood was found on the hoodie, but it matched Stoecker, not defendant or McCaw. Id. at 22. It is the State's theory that defendant wore the hoodie on the night of the murder, which was supported by the now-excluded telephone and text communications between Stoecker and defendant. See id. at 14-19.

Police reviewed approximately 400 hours of surveillance video from area businesses taken from the night of murder into the next day. Id. at 9. After obtaining the hoodie from Stoecker, Epstein was tasked with reviewing the available video "to look for anyone wearing an item that matched the hoodie." Id. at 20. At trial, during Epstein's testimony, the State presented to the jury "a forty-five minute, composite presentation of the surveillance video obtained from area businesses." Id. at 22. The trial judge permitted the introduction of the videos "even though he found their quality was 'not good' and 'stinks.'" Ibid. The State argued that the videos showed McCaw, after he walked away from the car on Easton Avenue, turning onto Hartwell Street. Id. at 9. The videos also depicted an individual in a grey hooded sweatshirt, who the State maintained was defendant. Id. at 22. However, "[n]one of the videos clearly depicted this individual on Hartwell Street, and did not show McCaw interacting in any way with anyone." Ibid.



Hasani Gordon, another tenant of defendant's Plum Street house, testified that, on the night of the murder, he heard "Stoecker and defendant having a loud discussion." Id. at 21. Gordon saw Stoecker give defendant a "brand new 'whitish-grey sweatshirt'" that was not a hoodie and did not have pockets, which defendant put on. Ibid. Later, Gordon "heard the back door to the house close and then he heard it close again about thirty to forty-five minutes later" and "believed it was defendant who had left and come back, but he only heard the door and did not see him." Ibid.

Danica Harpster testified that she saw defendant leave the Plum Street house on the night of the murder, and she believed the time was between 1:30 a.m. and 2:30 a.m. Ibid. According to Harpster, "defendant was wearing dark winter clothes 'like a hat, coat, all that stuff.'" Ibid.

Police searched defendant's house "but found no physical evidence linking him to the crime scene or McCaw." Id. at 20. Defendant was excluded by the State's DNA expert as the source of any DNA recovered from McCaw's hands and fingernails. Id. at 22.

### III.

Defendant argues that the trial court abused its discretion in admitting surveillance videos from both 78 Easton Avenue and 210 Hamilton Street, which

according to defendant depict "shadowy figures in the distance, barely recognizable as human beings" which the State asserts are defendant and the victim. Defendant argues that the videos cannot meet the threshold for relevance under N.J.R.E. 401, and that the videos should have been excluded under N.J.R.E. 403, as their admission "would result in insurmountable prejudice" because the State should not be permitted to argue that defendant or the victim can be seen. Defendant further argues that the videos cannot be properly authenticated, as they are so unclear.

On remand, the State sought to introduce nineteen separate video exhibits, SE-5 through SE-22, which were recorded in the early morning hours of February 15, 2014.<sup>1</sup> One exhibit (SE-12) was obtained from the camera at 78 Easton Avenue, while seven exhibits (SE-13, SE-14, SE-15, SE-16, SE-20, SE21 and SE-22) were obtained from three separate cameras at 210 Hamilton Street.<sup>2</sup>

At the outset, we note that it is unclear as to which specific exhibits defendant objects since he merely states in the sole point heading of his brief

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<sup>1</sup> The State has provided all of these videos to the court.

<sup>2</sup> SE-13, SE-14 and SE-21 are identical copies of the same video footage, as are SE-20 and SE-22, with the State referring to different relevant portions under each exhibit number.

that "surveillance video taken from 78 Easton Avenue and 210 Hamilton Street must be precluded." Defendant does not identify the videos to which he objects by exhibit number, but has provided two videos to the court, listed as "Da101-78 Easton Ave." and "Da102-210 Hamilton." "Da101-78 Easton Ave." is identical to the video identified by the State as SE-12. However, "Da102-210 Hamilton" is a one minute and forty-one second clip of what appears to be portions of SE-13/SE-14/SE-21, and SE-15, that runs from 2:45:39 a.m. to 2:47:20 a.m., and does not encompass certain of the relevant portions identified by the State. For the sake of completeness, we will address the admissibility of all of the exhibits arising from video obtained from both 78 Easton Avenue and 210 Hamilton Street.

The State played each of these videos at the February 9, 2022 hearing before Judge Carter. No testimony was presented at that hearing, but the State relied on the testimony of Epstein that had been introduced at the N.J.R.E. 104 hearing prior to the first trial, and offered to have him testify again if the court found it necessary.

At the initial N.J.R.E. 104 hearing, Epstein testified that over four hundred hours of surveillance video was obtained from eleven separate locations in New Brunswick. Epstein was personally involved with retrieving video from the Zeta

Psi fraternity house at 18 College Avenue, the Golden Rail Bar at 66 Easton Avenue, a doctor's office at 78 Easton Avenue on the corner of Hamilton Street, and the Kam Fung Chinese Restaurant at 210 Hamilton Street. In particular, Epstein testified that both the video from 78 Easton Avenue and 210 Hamilton Street "fairly and accurately depicted" what "it should."

Epstein testified as to how he retrieved each video from its original location, which was ultimately transferred to "a single hard drive for storage in evidence." Some of the video was from cameras with infrared filters, which provide "better night vision capability in low lighting scenarios." Epstein used various digital forensic tools to enhance the videos, but nothing he did changed the visual content of the videos in any way.

Epstein was responsible for "identifying and tracking" McCaw on the videos, "as well as identifying a suspect and tracking them through the same time period, and their movements." In doing so, Epstein determined that the relevant video was recorded between 2:02:33 a.m. and 2:48:02 a.m.

Epstein testified regarding the time discrepancy on the various videos, which "natively store time values in uniform time code, UTC, which is the same as Greenwich Mean Time." The time on the video from 78 Easton Avenue was four minutes fast. The time on the video from 210 Hamilton Street was off by

eight minutes and eight seconds. The time on the video from 246 Hamilton Street was accurate. Epstein testified that he may have taken notes about the time discrepancies on "a scratch piece of paper" which he discarded before he wrote his expert report.

Epstein provided specific testimony regarding the video footage used in the forty-five-minute presentation the State was then seeking to admit at trial, which included drone footage taken by Epstein to show the jury the path allegedly taken by the victim and defendant that night. On remand, the State did not seek to reintroduce this presentation, or the drone footage, neither of which has been provided to this court. Instead, the State sought to admit the full video clips obtained from each camera as a separate exhibit, ranging in length from eight seconds (SE-11) to twenty-seven minutes and six seconds (SE-13/SE-14/SE-21). However, a careful reading of Epstein's testimony demonstrates that the portions of the video presentation he discussed correspond in large part to the State's nineteen post-remand video exhibits.

Epstein testified how he located McCaw in the interior and exterior video footage he obtained from the fraternity house at 18 College Avenue, in which McCaw could be seen wearing a bandana, red shirt, jeans and a "dark-colored" hooded jacket with overlong sleeves. McCaw can be seen in the parking lot

behind the fraternity house, as he tries unsuccessfully to get into a vehicle and then walks off down Easton Avenue, where he is recorded by Rutgers University surveillance cameras. This testimony corresponds with video exhibits SE-5 through SE-9, to which defendant does not object.

According to Epstein, McCaw can then be seen from the rear crossing the street in the middle of the intersection of Condict Street and Easton Avenue and continuing on Easton Avenue. This corresponds with video exhibits SE-10 and SE-11, to which defendant does not object.

With respect to the video obtained from 78 Easton Avenue, which corresponds with SE-12 to which defendant objects, Epstein testified that he identified McCaw "at the top of the screen" by "the similar gait, the wide tailed jacket" as McCaw crossed the intersection of Hamilton Street and Division diagonally.

Epstein testified that he spent "hours and days . . . looking" at the video obtained from 210 Hamilton Street, to try to identify McCaw or a suspect. Epstein also reviewed video taken from the "Ale 'N 'Wich, another bar at the corner of Hamilton Street and Lewis Street." Based on that video, he determined that McCaw did not reach the intersection of Hamilton Street and Lewis Street.

In discussing the video from 210 Hamilton Street, Epstein testified that he personally walked from 78 Easton Avenue to 210 Hamilton Street and that it took "roughly" three and one-half minutes. Epstein testified that McCaw can be seen "at the top right of the screen" identified by "the arm swing, the jacket." According to Epstein, McCaw can be seen to "make a right-hand turn and turn up Hartwell Street" by looking at his "shadow in the snow." This testimony corresponds to SE-13, to which defendant objects.

Epstein also testified about video obtained from another camera at 210 Hamilton Street, which shows Plum Street and Hamilton Street. On that video, a person can be seen "walking with a hood" and "you can see the left arm that's stuck at the front of the body . . . not moving, while his right hand is swinging." There is "a dark object at his right hand, a light appearing stripe on the pants, and a dark appearing shoe with a light appearing heel." Because the video was taken with an infrared camera, the specific colors could not be identified. According to Epstein, this man was the "suspect." Epstein testified that the suspect could also be seen walking in front of 210 Hamilton Street from the inside camera looking out the windows. This testimony corresponds to SE-14 and SE-16, to which defendant objects.

Epstein testified that he saw the suspect on the video obtained from the Ale 'N 'Wich at 246 Hamilton Street. The Ale 'N 'Wich video shows "a clear view of a pointed hairline, left arm that's frozen in the front of the body, a point at the front of the shirt where the left arm ends" with a "light appearing object at the right hand with a dark appearing accent, and a dark appearing shoe." As Epstein explained, the difference in the light and dark colors from the 210 Hamilton Street video was a result of "two different IR [infrared] cameras with two different ambient lighting conditions." The suspect "rounds the corner, walks directly towards the camera, same left arm frozen, the same right arm" showing a "view of his face." The suspect then "does an about face and walks back toward Hamilton Street." This testimony corresponds to SE-17, SE-18, and SE-19, to which defendant does not object.

Epstein testified that he then reviewed the video from 210 Hamilton Street "start[ing] at the exact time we ended the previous clip from the Ale 'N 'Wich" to track the people, including the suspect, who can be seen walking down Hamilton Street. This video was recorded just before McCaw was seen on Hamilton Street.

According to Epstein, the video shows the suspect, who he identified by his "one arm swinging[.]" "approaching Hartwell Street on Hamilton Street"



when he steps out of view behind a street sign. The suspect then turns up Hartwell Street on the opposite sidewalk. Epstein stated that the video shows McCaw "about at that exact moment is turning off Hamilton Street onto Hartwell Street." The court noted that, next, two other pedestrians "look[] across the street" indicating "something happened." This corresponds to SE-20, SE-21, and SE-22, to which defendant objects.

Reis, defendant's expert, testified that the 78 Easton Avenue video gave a "very limited amount of information" as the individual who the State asserted was McCaw was "quite a distance away from the camera" and the viewer could not identify a "bandana" or "color of a shirt." According to Reis, other "facts . . . would need to be in play in order to" demonstrate that the person on the 78 Easton Avenue video was the same man as in the earlier videos from the Rutgers cameras, specifically "you have to be certain . . . to seconds of the timing between the two different videos" and "you would need to know that this couldn't have been somebody that came . . . down Easton and turned onto Hamilton or that was walking on Hamilton already and continued on" or someone that "walked up Easton and turned onto Hamilton."

Reis also testified that McCaw could not be identified on the video from 210 Hamilton Street because there was no demonstration of "tracking"; that is,

the route McCaw took from Easton Avenue to Hamilton Street, and because the video quality was such that "we could barely even see that there's a person walking." However, Reis testified that he had not done a "full analysis" of the video evidence, which was "dozens of hours' work."

In admitting the State's video exhibits on remand, Judge Carter relied on Epstein's testimony at the N.J.R.E. 104 hearing, as well as her own review of the videos themselves. In her written opinion, Judge Carter found that "the video surveillance footage, video clips, and still frames, viewed together, are highly relevant as they support the State's theory regarding the route taken by McCaw and the location of the [d]efendant in the morning hours of February 15, 2014."<sup>3</sup> As well, the videos "provide the jury with a better understanding of the area and the level of street activity during the late hours."

With respect to SE-12 and SE-13, Judge Carter held that "the videos are not the clearest." However, the judge found that the State's theory that the videos depict McCaw "is plausible, and the jury is in the best position to determine whether" this is factually correct. The judge further accepted the

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<sup>3</sup> No still frames have been provided to this court in the appellate record.

State's argument that defendant "can be identified in his gait, facial features, and clothing" in SE-14 through SE-19.

Judge Carter found SE-20 and SE-21 to be "[l]ess clear" as the "videos are dark, from a distance and difficult to distinguish." As the judge noted, although the State contends that defendant "can be seen traveling on Hamilton Street, then turning onto Hartwell Street moments after McCaw[,] on SE-21, "all you can see are a pair of feet turning onto Hartwell" and "[y]ou cannot see any characteristics, such as clothing or facial features, to identify the individual." Nonetheless, as the judge held, "viewing all the videos together, one could accept the State's theory that the individual in SE-21 is the same individual in SE 14-19" but "[w]hether or not that individual is in fact Puskas is best left for the jury to determine." The judge did not specifically address SE-22, which is the same video footage as SE-20.

Judge Carter rejected defendant's challenge to the admission of the videos on authentication grounds, distinguishing State v. Nieves, No. A-2034-12 (App. Div. Aug. 15, 2013), an unpublished opinion on which defendant relied. The judge found that a "review of the record provided allows the [c]ourt to reasonably conclude that the State will authenticate the video footage with the testimony of" Epstein, noting that Epstein "previously testified that each camera

view produced for the court fairly and accurately depicted the areas that are contained therein." As the judge stated, Epstein's knowledge came "not only from his personal experience as an officer in the city, but also from the videos themselves" many of which he "personally retrieved."

Regarding the videos from 210 Hamilton Street, Judge Carter relied on Epstein's testimony regarding the eight minute and eight second "time stamp difference" and found that "each of the State's videos have a working time stamp, although some cameras had time differences." As the judge found,

[a]dditionally, Epstein was able to identify specific characteristics to track the movements of both the victim and the suspect. Thus, his conclusions were not based upon intuition and judgment alone. Sgt. Epstein was able to use his personal observations of the time difference and the totality of the videos to accurately address the time difference on each video.

Thus, the judge held that the State could properly identify the video exhibits.

Finally, Judge Carter addressed the limits of any trial testimony by Epstein regarding his identification of defendant, who Epstein knew personally. Although the judge originally ruled that Epstein could "testify that the individual in SE-18 bears a resemblance" to defendant as seen in his booking photo, the judge stated in her May 3, 2022 letter that "this would be an improper identification." Thus, the judge limited Epstein's trial testimony "to the

identification of the defendant in his booking photo[,]" stating that "[i]t will be the jury's responsibility to determine whether the person in the booking photo is the person in the surveillance videos."

#### IV.

An appellate court defers to a trial court's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021) (citing State v. Nantambu, 221 N.J. 390, 402 (2015)). Appellate courts review the trial court's evidentiary rulings "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that deferential standard, an appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Garcia, 245 N.J. at 430 (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

Defendant challenges the relevance and the probative value of the video exhibits. However, we detect no abuse of discretion in the trial court's ruling that the video exhibits from 78 Easton Avenue and 210 Hamilton Street were relevant and probative of the State's theory of the case.

N.J.R.E. 401 defines "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." As a minimum, the videos at issue would, as Judge Carter found, "provide the jury with a better understanding of the area and the level of street activity" at the time McCaw was undisputedly walking the New Brunswick streets while heavily intoxicated, just prior to the attack that resulted in his death. Further, we are satisfied that the State has provided a sufficient basis on which the jury could determine that the figures seen in the videos are McCaw and defendant.

Reviewing exhibits SE-14, SE-15, and SE-16, it would clearly be reasonable for the jury to conclude that the man wearing a hood walking in view of the 210 Hamilton Street cameras is the same man wearing a hood seen in SE-17, SE-18 and SE-19 walking in view of the 246 Hamilton Street cameras. As can be seen in all six videos, the man is wearing the same clothing and walks in the same manner, with his left hand tucked into his waist, and his right arm swinging. Notably, defendant does not challenge admission of video from the 246 Hamilton Street cameras, in which the man is seen from the front and certain facial features are visible. Whether this man is defendant is a question for the

jury to answer, but these six videos are sufficiently clear to permit the jury to make this determination.

The remaining videos to which defendant objects are less clear. The State contends that McCaw can be seen walking in SE-12 (78 Easton Avenue). The relevant portion of SE-12 clearly shows a person walking alone on the far sidewalk down Easton Avenue, and crossing Louis Street diagonally. The person's jacket appears to be open and flapping, which is similar to how McCaw's jacket appeared in the earlier videos. However, this person is too far from the camera for any other identifying features to be seen.

With respect to SE-13/21 (210 Hamilton Street Camera 3-Outside), the person the State contends is McCaw can be seen walking along the sidewalk, across Hamilton Street from where the camera is located. The person continues walking from right to left out of the screen until only his feet are visible at the corner of Hamilton and Hartwell Streets. On SE-20/22 (210 Hamilton Street Camera 1-Outside), a person the State contends is defendant can be seen approaching the corner of Hamilton and Hartwell Streets from the opposite direction as the person in SE-13/21, but on the same side of the street, at approximately the same time. Very few identifying characteristics are visible;

indeed, the viewer can tell that each of the figures is a person, wearing pants, and walking alone, but little else.

Defendant asserts that because so few identifying characteristics of the people on these videos are apparent to the viewer, these videos lack probative value and should not have been admitted. But, as the State argues, SE-12, SE-13/21 and SE-20/22 should be viewed in the context of the other videos admitted, in which McCaw and a person alleged to be defendant can clearly be seen. As Epstein testified, he tracked both McCaw and the suspect through the numerous available videos to determine their movements on the night of the murder. Although defendant raises arguments challenging the accuracy of Epstein's tracking of the two men through the various video exhibits, those arguments go to the weight of the evidence, not its admissibility, as the State asserts.

Defendant further relies on the principles identified in State v. Driver, 38 N.J. 255, 287 (1962), regarding the admission of sound recordings. The Driver Court held that "[a]s a condition to admissibility" of a sound recording:

the speakers should be identified and it should be shown that (1) the device was capable of taking the conversation or statement, (2) its operator was competent, (3) the recording is authentic and correct, (4) no changes, additions or deletions have been made, and (5) in instances of alleged confessions, that the



statements were elicited voluntarily and without any inducement.

[Id. at 287.]

Driver requires that, before admitting a sound recording, the trial judge should listen to it "out of the presence of the jury" to determine "whether it is sufficiently audible, intelligible, not obviously fragmented, and . . . whether it contains any improper and prejudicial matter which ought to be deleted." Id. at 288.

The videos at issue here do not contain any audio or sound element. Defendant argues that because the "people depicted . . . are unidentifiable[.]" these videos are the effective equivalent of an inaudible sound recording, and should be precluded under Driver. However, defendant points to no caselaw in which the Driver principles were applied to a video recording that contains no sound. Defendant relies on State v. Harte, 395 N.J. Super. 162, 164, 169-70 (Law Div. 2006), in which the Law Division held that the admission of a police motor vehicle recording, which included "video and audio segments," should be evaluated under Driver, 38 N.J. at 288. That is not the case here.

Further, unlike an inaudible sound recording, the videos at issue here provide some relevant information to the jury even if the people depicted in them are too far away to be identified, as the trial court found. Therefore, we decline to apply Driver here.

V.

Defendant also argues that the video exhibits cannot be properly authenticated, and are therefore inadmissible. We disagree.

"Once a videotape is established as relevant evidence, it is generally admissible under [N.J.R.E.] 801(e)" as a "writing." State v. Wilson, 135 N.J. 4, 16 (1994). However, like other types of writing, prior to being admitted as evidence, "the videotape must be properly authenticated." Id. at 17. Authentication can be established by direct or circumstantial proof at trial if the proponent makes a "prima facie showing of authenticity" under the standard set forth in N.J.R.E. 901. State v. Hannah, 448 N.J. Super. 78, 89-90 (App. Div. 2016) (quoting State v. Tormasi, 443 N.J. Super. 146, 155 (App. Div. 2015)). Under N.J.R.E. 901, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims."

"This burden was not designed to be onerous[,]" and may be satisfied by "[a]ny person with knowledge of the facts represented . . . ." State v. Hockett, 443 N.J. Super. 605, 613 (App. Div. 2016) (alteration in original) (quoting State v. Joseph, 426 N.J. Super. 204, 220 (App. Div. 2012)). "'Courts are inclined to assess their role in authentication as that of a screening process[,]' and 'will

admit as genuine writings which have been proved prima facie genuine . . . leaving to the jury more intense review of the documents.'" Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012) (alteration in original) (quoting Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 901 (2011)).

Nevertheless, to authenticate video evidence, "a witness must identify the persons, places, or things shown in the . . . videotape." Wilson, 135 N.J. at 14. "[A]ny person with the requisite knowledge of the facts represented in the . . . videotape may authenticate it," irrespective of whether the authenticator was present at the time the video was taken, "so long as the witness can verify" that it "accurately represents its subject." Ibid. In other words, the "testimony must establish that the videotape is an accurate reproduction of that which it purports to represent and the reproduction is of the scene at the time the incident took place." State v. Loftin, 287 N.J. Super. 76, 98 (App. Div. 1996).

In asserting that the videos at issue here cannot be authenticated, defendant argues that this case is distinguishable from Loftin, which involved the murder of a hotel chambermaid at Harrah's Casino. Id. at 84. With the help of a bellman, police in Loftin prepared a composite sketch of a "suspicious" individual who had followed the bellman, and reviewed "hundreds of hours" of

Harrah's surveillance video looking for that individual. Id. at 86. At trial, a "composite videotape" was shown to the jury, which showed the suspect at various places in Harrah's from 6:18 p.m. to 9:00 p.m., in chronological order, on the evening of the murder. Id. at 87, 99. The bellman testified at trial that the defendant was the man who had followed him. Id. at 88.

On appeal, the Appellate Division rejected the defendant's challenge to the authenticity of the composite videotape. Id. at 98-99. As the court noted, the Harrah's employee "in charge of storing videotapes" had "testified as to the mechanical aspects of the casino's surveillance procedures" and that he personally set aside twelve hours of video from the date of the murder. Id. at 99. As well, the detective who made the composite videotape testified that, other than editing the various videos into single composite video, "no other alterations, deletions or changes of any kind were made to the videotapes." Ibid. This was sufficient for the composite videotape to be authenticated. Ibid.

Here, Epstein testified that he had retrieved the video footage from 78 Easton Avenue and 210 Hamilton Street personally. He further testified that the video from both locations "fairly and accurately depicted" what "it should." As the trial court noted, Epstein was a New Brunswick police officer with a familiarity with the area. As Epstein stated, he used various digital forensic

tools to enhance the videos, but nothing he did changed the visual content of the videos in any way. Although defendant emphasizes that, in Loftin, the State presented the bellman as a witness to place the defendant in the hotel, but no witness will testify similarly here, the court did not find the bellman's testimony dispositive to the authentication issue. Loftin, 287 N.J. Super. at 98-99. Therefore, we agree with Judge Carter that the State has presented a prima facie case of the videos' authenticity.

Defendant next argues that the differences in the time stamps from the different cameras at issue preclude authentication, relying on the Appellate Division's unpublished opinion in Nieves, slip op. at 13-14, notwithstanding Rule 1:36-3, which provides that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." In Nieves, defendant was indicted for shooting the victim at approximately 3:40 a.m. near the railroad tracks in Newark. Id. at 2. Police obtained surveillance video from several locations, including the Player's Lounge, a bar near the crime scene, which video "clearly depicted the victim and [the] defendant talking" inside the bar, but was not time stamped (video A); a restaurant across the street from the Player's Lounge, which video showed the exterior of the bar (video B); and the Newark resident who heard the gunshots, whose video showed the shooting, but from a vantage

point so far away that the images on the file were "basically only 'stick figures'" (video C). Id. at 2-4. Video C's time stamp was "an hour off because it had not been adjusted when daylight savings time ended." Id. at 3.

The State's expert, who had not collected the video, testified that he created a composite video from parts of videos A, B and C "based on the time stamps he was able to extract, and his own observations of pedestrian and vehicular traffic flow" using his "intuition" and "judgment . . . ." Id. at 6. The defendant's expert testified that "without the corresponding time codes" no "chronology could be accurately put together." Id. at 7.

Both the trial court and the Appellate Division held that videos B and C could not be authenticated, and were therefore inadmissible. Id. at 13-14. As the Appellate Division noted, the videos "do not have accurate time stamps or other indicators of reliability" and the "chronological accuracy of the composite here depends on" the State's expert's "subjective observations." Id. at 13. Further, the State "did not present any witnesses whose testimony could authenticate the events" in those videos, nor did any witnesses testify "as to the identity of the individuals purported to be the suspect and victim in videos B and C." Id. at 13.

Unlike in Nieves, the State is not seeking to introduce a composite video here. Although the State did use a composite video at the first trial, the exhibits sought to be admitted on remand are all stand-alone videos taken from separate cameras. Further, all of the videos to which defendant objects have time stamps. Defendant argues that the time stamps on the videos from 78 Easton Avenue and 210 Hamilton Street are not accurate. However, Epstein testified as to the specific time discrepancies he observed on the video from those cameras. He further testified that the time stamp on the 246 Hamilton Street video was accurate, which defendant does not dispute. Thus, the State can reasonably use the time on the 246 Hamilton Street video to help demonstrate the correct time on the 210 Hamilton Street video, as both videos show what appears to be the same man, who the State asserts is defendant.

Further, there is no dispute that McCaw is seen on SE-5 through SE-11. Testimony by Epstein regarding the timing of the SE-12 video in relation to the timing that McCaw was last seen on the earlier videos makes the State's theory that the person on SE-12 is McCaw plausible, as the trial court found.

Defendant's challenges to accuracy of the time stamps on the videos, and whether the persons depicted are McCaw and defendant, are all proper subjects for cross-examination at trial. In addition, these objections do not preclude

authentication of the videos by Epstein, whose personal knowledge of the videos and the subjects depicted is sufficient to make out a prima facie case for authentication under N.J.R.E. 901.

## VI.

Finally, defendant argues that, even if relevant and authenticated, the videos should be excluded because they are unduly prejudicial. Again, we disagree.

Under N.J.R.E. 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of: (a) [u]ndue prejudice, confusion of issues, or misleading the jury or (b) [u]ndue delay, waste of time, or needless presentation of cumulative evidence." "Evidence claimed to be unduly prejudicial is excluded only when its 'probative value is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation' of the issues in the case." State v. Koskovich, 168 N.J. 448, 486 (2001) (alteration in original) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)). In particular, "[b]ecause of the indelible impressions that are likely to result from videotaped and other filmed evidence, such evidence must be subject to careful scrutiny" under N.J.R.E. 403. Wilson, 135 N.J. at 20-21.



As a general matter, "[i]n deciding whether to exclude evidence based on its potential for prejudice, 'a court must consider the availability of other evidence that can be used to prove the same point.'" State v. Long, 173 N.J. 138, 164 (2002) (quoting State v. Covell, 157 N.J. 554, 569 (1999)). Accordingly, while the availability of other evidence proving the same facts diminishes the probative value of challenged evidence, its "[p]robative value is enhanced by the absence of such other evidence." Ibid.

Here, the videos at issue are probative as to the whereabouts of McCaw and the suspect on the night of the murder. Indeed, it appears that the videos are the only pieces of evidence supporting the State's theory of the route McCaw took that night. Further, the videos are significant to the State's theory that defendant was also in the area and encountered McCaw.

There is no inherent prejudice to the videos themselves. None of the videos at issue depict the occurrence of any crime, but rather just show people the State alleges to be defendant and the victim walking on the streets of New Brunswick in the early hours of the morning. Defendant contends that if the State is permitted to present this identity argument to the jury, he will suffer "insurmountable prejudice." But, as the trial court found, the State's identity argument is plausible, and therefore any attempt by the prosecutor to make such

an argument in summation could be considered fair comment on the evidence presented. See State v. Timmendequas, 161 N.J. 515, 587 (1999) (prosecutor "is entitled to be forceful and graphic in his summation to the jury, so long as he confines himself to fair comments on the evidence presented." (quoting State v. DiPaglia, 64 N.J. 288, 305 (1974) (Clifford, J., dissenting))). Furthermore, "[d]amaging evidence usually is very prejudicial. . . ." State v. Cole, 229 N.J. 430, 448 (2017) (quoting State v. Morton, 155 N.J. 383, 453-54 (1998) (alteration in original)). The question is always "whether the risk of undue prejudice was too high." Ibid.

The lack of clarity in the videos does not make them unduly prejudicial. Rather, the videos' flaws have "the potential of reducing the prejudice to defendant" as the jury may be less likely to believe the State's theory as to the identity of the people seen. Long, 173 N.J. at 165. Moreover, the "absence of less prejudicial evidence" in the possession of the State to establish the same point "enhances the probative value" of the videos. Ibid. Therefore, we reject defendant's claim that the videos' probative value is substantially outweighed by the risk of undue prejudice under N.J.R.E. 403.

In sum, we find no abuse of discretion by the trial court in determining that the surveillance videos from 78 Easton Avenue and 210 Hamilton Street are admissible at trial.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION