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		March 10, 2024 SUPERIOR COURT OF NEW JERSEY
	:	Appellate Division
STATE OF NEW JERSEY,	:	Docket No.: A-000359-23T2
	:	Criminal Action
Respondent,	:	On Appeal from the Judgment of
	:	Conviction Entered in the
vs.	:	Superior Court of New Jersey, Law
	:	Division, Essex County
ALBERTO PENA,	:	Indictment Number: 19-10-02948-I
	:	Sat Below:
Defendant-Appellant.	:	Hon. Christopher S. Romanyshyn, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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DEFENDANT-APPELLANT IS CONFINED

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PRELIMINARY STATEMENT

Who shot Andres Sosa? There should have been plenty of eyewitnesses, but none appeared in court -- so the prosecution had the lead detective refer to 'witness statements' and imply that the out-of-court declarants identified the shooter as Alberto Pena (see Legal Argument Point I). The trial court allowed this hearsay and denied Mr. Pena his right to confrontation, and failed to instruct the jurors that they should not consider the statements as proof of their contents; worse, when the jurors asked to see the statement the judge told them to instead rely on their recollection of the detective's testimony (see Point II). The only evidence against Mr. Pena was video which was 'authenticated' by someone who had not even watched all of the footage (see Point III). The defendant was entitled to an acquittal at the close of the State's case, but his motion was denied because of the improperly admitted video (see Point IV). Any chance at a fair trial was destroyed by inappropriate remarks made by the prosecutor during summation (see Point V).

For the foregoing reasons, Mr. Pena was improperly convicted and the judgment of conviction should accordingly be vacated. If the defendant is not entitled to an acquittal, this Court should at minimum grant him a new trial.

STATEMENT OF PROCEDURAL HISTORY

On October 22, 2019, the Essex County Grand Jury returned Indictment 19-10-02948-I charging Alberto Pena with first-degree attempted murder contrary to N.J.S.A. 2C:11-3(a)(1) and 2C:5-1(a)(1) (count one); second-degree aggravated assault contrary to N.J.S.A. 2C:12-1(b)(1) (count two); third-degree unlawful possession of a firearm without a permit contrary to N.J.S.A. 2C:39-5(b)(1) (count three); and second-degree possession of a firearm for an unlawful purpose contrary to N.J.S.A. 2C:39-4(a)(1) (count four). (Da 1-5) [1] A jury trial was presided over by the Honorable Christopher S. Romanyshyn, J.S.C., on June 6-7, 2023. The jury found Mr. Pena not guilty of attempted murder and second-degree aggravated assault, but did find Mr. Pena guilty of the lesser-included charge of third-degree aggravated assault, unlawful possession of a firearm and possession of a firearm for an unlawful purpose. (Da 6-7) On September 8, 2023, Judge Romanyshyn sentenced Mr. Pena to five years of imprisonment on his third-degree aggravated assault conviction and a concurrent six years of

[1] References to the record are as follows:

(Da) Defendant-Appellant's Appendix to this brief.
(1T) (Trial) June 6, 2023
(2T) (Trial) June 7, 2023
(3T) (Sentence) September 8, 2023

imprisonment, subject to forty-two months of parole ineligibility in accordance with the Graves Act (N.J.S.A. 2C:43-6(c)) for his second-degree possession of a firearm without a permit conviction. Count Four was merged into Count Two. (3T20-16 to 21-8; Da 9-12)

On October 4. 2023, Mr. Pena filed his notice of appeal. (Da 13-16) This brief now follows.

STATEMENT OF FACTS

On July 16, 2019, Newark Police responded to a shooting that took place in front of a storefront bodega (259 Orange Street) and a barbershop (261 Orange Street). (1T28-16 to 1T29-19 (Shakeel Johnson, Major Crimes Unit); 1T38-2 to 1T39-11 (Justin Dickerson, Crime Scene Unit); 2T24-4 to 2T24-25 (Shaheed Brown, Major Crimes Shooting Response Team); 2T36-2 to 2T36-16 (Brown)) This area is known for crime, (2T35-23 to 2T36-1 (Brown)), and shootings, (1T36-22 to 1T36-25 (Johnson)).

A single shell casing was supposedly found close to the curb abutting the street. (1T61-25 to 1T62-3 (Dickerson)) However, blood spatter from the shooting was located approximately 25 feet away from the shell casing with no explanation. (1T31-12 to 1T31-18 (Johnson)) The shell casing was located somewhere between the bodega and the barbershop. (2T26-13 to 2T26-17

(Brown)). Detective Dickerson testified that the photographs where the shell casing was found were corrupted and lost. As such, there were no photographs showing where the objects were in relation to each other. (1T54-9 to 1T54-22)

No eyewitnesses testified as to what they observed at the time of the shooting, nor did any eyewitnesses authenticate surveillance video footage the State sought to admit at trial. The victim, identified as Andres Sosa (Brown), did not testify. (2T27-22)

Over strenuous objection, the State was permitted to introduce video surveillance footage, as authenticated by an employee of the Newark Police Department. (1T69-11 to 1T72-2) Allen Faltz was part of the Technical Service Unit, and his job involves technical issues with such things as cell phones and videos. (1T73-9 to 1T74-4) Officer Faltz was not present at the shooting and was not in the bodega, the barbershop or any other nearby business; rather, he was dispatched to the scene because an unidentified detective was having trouble downloading video footage. (1T74-13 to 1T74-23) Faltz did not review the video before downloading it. (1T80-24 to 1T81-3) At the time of trial he had only reviewed a portion of same. (1T82-7 to 1T82-8) It should be noted that the timestamp on the video does not coincide with the time of the shooting;

Faltz assumed that the camera was off by twelve hours because it was set to military time. (1T81-14 to 1T82-2)

Exhibit S-23 (Da 17) is a portion of the video footage played for the jury from three different vantage points from two different locations. There is a video that depicts the inside of the store and outside sidewalk of the store located 259 Orange Street. The third video depicts the outside sidewalk of the barber shop located at 261 Orange Street. Two screen shots were presented to the jury and admitted in evidence as S-24A (1T89-11 to 1T90-2) and S24B (1T91-1 to 1T91-20). (Da 17) [2] The State's theory was that Alberto Pena is an individual seen near the shooting of Andres Sosa in that footage. There are numerous people depicted in the video. The actual shooting is not depicted. The prosecutor was allowed to publish Mr. Pena's mugshot to the jury (2T35-6 to 2T35-8), and he was required to lower his collar and let the jurors see a tattoo on his neck that was supposedly similar to that of the shooter. (see colloquy at 2T6-10 to 2T7-1; 2T11-12 to 2T19-8; decision at 2T21-20 to 2T22-22; directive that Pena "face the judge" at 2T43-24 to 2T44-2)

[2] The three videos (S-23) and two still photographs (S24A and S24B) are depicted in Da 17, which was provided to the undersigned by the Essex County Prosecutor's Office.

Over objection, the State insinuated that Pena was identified as the shooter in out-of-court statements made to Officer Brown made by the victim and alleged witnesses.

> Q. Mr. Brown, now, based on your investigation and following your interview with Mr. Sosa, what did you do next?
>
> A. I attempted to look for the suspect.
>
> Q. And did you identify who that suspect was?
>
> A. Yes.
>
> Q. Who was it?
>
> A. Alberto Pena.
>
> * * * *
>
> Q. When you say you looked for Mr. Pena, did you do anything official as far as looking?
>
> A. Yes. I took a few statements from witnesses. The store owner --
>
> MR. McGOVERN: Objection, Judge.
>
> THE COURT: Overruled.
>
> Q. Did you eventually file charges against Mr. Pena?
>
> A. Yes.
>
> Q. And that was again after your investigation, after your interview with Mr. Sosa, correct?
>
> A. Yes.

(2T32-8 to 2T33-11).

During his closing argument, the prosecutor twice alluded to Mr. Sosa's statement to Detective Brown. (2T70-14; 2T71-24) He also represented (at 2T77-8 to 2T77-10) that "Pena fled the scene and eventually was not arrested until a month later." Assuming that Mr. Pena is the person shown in the video (Exhibit S-23), the footage shows the individual casually walking to the bodega after the alleged shooting and taking his position behind the register, not running away from Orange Street. (Da 17) In addition, the police were not on a month-long manhunt searching for Mr. Pena -- the delay between the shooting and the charges was caused by Detective Brown taking statements of the 'witnesses' whose identification of Pena were admitted via Brown's innuendo.

LEGAL ARGUMENT

POINT I

MR. PENA WAS IDENTIFIED AS THE SHOOTER THROUGH HEARSAY AND AN IMPROPER INSINUATION ABOUT WHAT WAS IN DETECTIVE BROWN'S REPORT. (Ruling at 2T33-5)

Andres Sosa survived the shooting, which took place in front of a Newark storefront on a summer afternoon. The case against Mr. Pena was largely one of identity, and there were presumably many eyewitnesses as is depicted in the three videos played for the jury. (Da 17) The defense objected when the

prosecution introduced Detective Brown's 'investigation' instead of producing the witnesses.

> Q. When you say you looked for Mr. Pena, did you do anything official as far as looking?
>
> A. Yes. I took a few statements from witnesses. The store owner --
>
> MR. McGOVERN: Objection, Judge.
>
> THE COURT: Overruled.
>
> Q. Did you eventually file charges against Mr. Pena?
>
> A. Yes.
>
> Q. And that was again after your investigation, after your interview with Mr. Sosa, correct?
>
> A. Yes.
>
> (2T32-25 to 2T33-11)

State v. Branch, 182 N.J. 338 (2005), concerned a burglary investigation. A detective prepared a photographic array which included the defendant, "based on information received." The Court held that the allusion to 'information received' violated the hearsay rule and the constitutional right of confrontation.

> [A] police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant. In [State v. Bankston, 63 N.J. 263 (1973), and State v. Irving, 114 N.J. 427 (1989)], the officers' hearsay testimony permitted the jury to draw the inescapable inference that a non-

> testifying declarant provided information that implicated the defendant in the crime.
>
> Id. at 351.

See State v. Lazo, 209 N.J. 9, 20-24 (2012) (Bangston rule applied to police testimony that information received led to placing defendant's picture in array). In State v. Medina, 242 N.J. 397 (2020), the officer's reference to "the evidence" was deemed not improper because he did not imply that there was evidence other than what had been presented in court. The Court noted that,

> [u]nder Bankston and Irving, an officer may not disclose incriminating information obtained from a non-testifying witness. Even when an officer does not specifically repeat that information, the officer may not create an "inescapable inference" that an unavailable source has implicated the defendant. Bankston, 63 N.J. at 271. Either method of relaying hearsay generates "[t]he vice Bankston and its progeny seek to eradicate": "the implication that a testifying police officer somehow is in possession of superior knowledge than what is presented to the jury and, hence, his testimony is worthy of greater weight." State v. Kemp, 195 N.J. 136, 155 (2008).
>
> Id. at 415-16.

In the present case, Detective Brown said that he "took a few statements from witnesses" (2T33-2), drawing the inference that all of out-of-court declarants had identified Mr. Pena as the shooter. Brown testified that conducted his "interview with Mr. Sosa" (2T33-10) -- implying that Sosa

likewise identified Mr. Pena as the shooter -- then "eventually file[d] charges against Mr. Pena" (2T33-6 to 2T33-7).

> Q. Mr. Brown, now, based on your investigation and following your interview with Mr. Sosa, what did you do next?
>
> A. I attempted to look for the suspect.
>
> Q. And did you identify who that suspect was?
>
> A. Yes.
>
> Q. Who was it?
>
> A. Alberto Pena.
>
> (2T32-8 to 2T32-15)

It should be noted that, during deliberations, the jury "ask[ed] for the Detective's report of the victim and statement," (2T129-3 to 2T129-4) The trial court answered that the report

> was marked for identification, but not received into evidence. I therefore, cannot provide the report for you. I am instructing you as I instructed you earlier, that it is your recollection of the detective's testimony that controls. (2T132-13 to 2T132-18)

A statement can be characterized as hearsay if it introduced to prove the truth of the matter stated. State v. Coder, 198 N.J. 451, 464 (App. Div. 2015). The detective's testimony implied that the statements contained in his report and Sosa's statement identified Mr. Pena as the shooter, which is why he was charged

thereafter. See, State v. Alston, 312 N.J. Super. 102, 114 (App. Div. 1998) (officer's telephone conversation with an anonymous tipster was to show why the officer went looking for the defendant, not that defendant had committed a crime, but ultimately excludable under N.J.R.E. 403). The jurors' question proves that they were influenced by the out-of-court statements, and the judge compounded the problem by answering that "it is your recollection of the detective's testimony that controls."

The jury heard highly prejudicial hearsay, as Mr. Pena was placed at the crime scene and identified as the shooter by witnesses he had no opportunity to cross-examine. This Court should reverse and remand for a new trial.

POINT II

AT MINIMUM, THE TRIAL COURT SHOULD HAVE ISSUED A LIMITING INSTRUCTION REGARDING THE OUT-OF-COURT STATEMENTS IMPLICITLY IDENTIFYING MR. PENA AS THE SHOOTER. (Not raised below)

"When inadmissible evidence is admitted in error by the trial court, a curative instruction may sometimes be a sufficient remedy." State v. Prall, 231 N.J. 567, 586 (2018). "An effective curative instruction needs to be 'firm, clear, and accomplished without delay.'" Id. (quoting State v. Vallejo, 198 N.J. 122, 134 (2009)). After the trial court admitted Detective Brown's testimony that he took statements from Andres Sosa and others before charging Mr. Pena with the

shooting (2T33-5), the judge should have told the jury that it must not speculate as to the content of the out-of-court statement or otherwise infer that Andres Sosa, the bodega owner, etc., had identified Pena as the shooter. Even if defense counsel had insisted on including a witness-identification instruction at the end of the trial, see 2T47-24 to 2T48-9, the instruction had to have been "without delay" per Prall.

POINT III

THE STATE FAILED TO PROPERLY AUTHENTICATE THE SURVEILLANCE VIDEO AND ITS WITNESS WAS INCAPABLE OF DOING SO; S-23 AND THE STILL SHOTS SHOULD NOT HAVE BEEN ADMITTED. (The ruling is at 1T70-21 to 1T72-2; video admitted over objection at 1T88-14 to 1T88-20)

Mr. Pena objected to the admission of Exhibit S-23 (Da 17) as the video surveillance footage was not authenticated. "[E]videntiary rulings are 'entitled to deference absent a showing of an abuse of discretion . . . .'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). "Discretion, however, means legal discretion, 'in the exercise of which the judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly.'" Alves v. Rosenberg, 400 N.J. Super. 553, 562-63 (App. Div. 2008) (quoting State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966)). "Obviously, '[i]f the trial judge misconceives the applicable

law or misapplies it . . . the exercise of legal discretion lacks a foundation and becomes an arbitrary act.'" Id. at 563 (quoting Steele, 92 N.J. Super. at 507).

"It is well-settled that a videotape 'qualifies as a writing' under N.J.R.E. 803(e)." State v. Brown, 463 N.J. Super. 33, 51 (App. Div), certif. denied, 244 N.J. 351 (2020). "[T]o be admissible in evidence the videotape must be properly authenticated." State v. Wilson, 135 N.J. 4, 16 (1994) (citing N.J.R.E. 901). "To that end, any person with the requisite knowledge of the facts represented in the photograph or videotape may authenticate it." Id. at 14. "An authenticator need not even have been present at the time the photograph was taken, so long as the witness can verify that the photograph accurately represents its subject." Ibid. "[T]estimony 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 Loftin, the police investigating a murder in a hotel-casino obtained a bellman's (Rasheed) description of a suspect. Paris, employed by the casino's surveillance team,

> testified that it ultimately became apparent that an individual matching Rasheed's description appeared on various videotapes in various locations. After the police and Harrah's personnel segregated the twelve to fourteen videotapes in which the suspect

> appeared, Detective Friedrich then made a single composite videotape showing each appearance of the suspect in chronological order. He testified that other than this editing process, no other alterations, deletions or changes of any kind were made to the videotapes.
>
> Defendant's authenticity argument clearly has no merit.
>
> Id. at 99.

Wilson involved a filmed reenactment of a fatal store shooting. The detectives positioned people in the store based on what they had been told.

> Investigator Meyers could testify only that the video accurately represented what others had told him the scene of the crime looked like. Therefore, Meyers failed properly to authenticate the video because he was not a person present at the time the crime occurred who could testify that the videotape accurately depicted the events as he had seen them when they occurred.
>
> 135 N.J. at 19.

In attempting to properly authenticate the contents of S-23 in the present case, the prosecutor told the judge that he was "sending a team out right now to see if [the State] can find one of the lay witnesses," presumably the owner of the barber shop and the bodega. (1T72-5 to 1T72-6) Those efforts apparently failed, yet the judge allowed authentication via Alton Faltz. Sometime after the shooting, the Newark Police Department sent Faltz [3] to 261 Orange Street

[3] It is unclear whether Faltz is an officer or detective. See 1T80-14 to 1T80-15 (referring to the witness's badge number or ID number).

because one of the detectives was having difficulty downloading video surveillance footage. (1T74-13 to 1T74-23) Faltz did not know anything about the location other than that "[o]ne was a bodega, one was a barber shop next to it." (1T75-8 to 1T75-9) He did not speak with the owner of either business, but he "believe[s] the detective did." (1T76-10)

Mr. Faltz testified that he retrieved video from 259 Orange Street (1T79-14 to 1T79-23). He "maybe" reviewed footage at the scene, but he definitely did not review it before downloading. (1T81-1 to 1T81-3) At some point, he checked the date and time for accuracy, and they were "[i]naccurate." (1T81-10 to 1T81-18) He reviewed only 'part of' what he was authenticating:

> Q. So, you reviewed the videos, correct?
>
> A. *Part of it*, yes.
>
> Q. And we reviewed the videos in anticipation of your testimony today, as well?
>
> A. Correct.
>
> (1T82-7 to 1T82-11) (emphasis added)

If this were sufficient under N.J.R.E. 901, a proponent of surveillance video could literally pull anyone off the street to authenticate. There is no evidence that Faltz actually reviewed the portions of S-23 that were shown to the jury -- except for his review during a meeting with the prosecutor 'in

anticipation of the testimony.' While "[t]he authentication rule 'does not require absolute certainty or conclusive proof,'" Brown, 463 N.J. Super. at 51 (quoting State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999)), this incompetent witness was nothing more than the prosecutor's stand-in, 'testifying' to what RPC 3.7(a) prevented the prosecutor from saying.

Because the video should not have been admitted, the State likewise should not have been allowed to introduce the screen-shots taken from the video.

POINT IV

THE TRIAL COURT SHOULD HAVE GRANTED MR. PENA'S MOTION FOR A JUDGMENT OF ACQUITTAL. (Ruling at 2T56-17 to 2T59-9)

The R. 3:18-1 standard is well established.

> When evaluating motions to acquit based on insufficient evidence, courts must view the totality of evidence, be it direct or circumstantial, in a light most favorable to the State. More specifically, we must give the government in this setting "the benefit of all its favorable testimony as well as of the favorable inferences [that] reasonably could be drawn therefrom[.]" Within that framework, the applicable standard is whether such evidence would enable a reasonable jury to find that the accused is guilty beyond a reasonable doubt of the crime or crimes charged. [State v. Perez, 177 N.J. 540, 549-50 (2003) (alterations in original) (emphasis added) (quoting State v. Reyes, 50 N.J. 454, 459 (1967))].
>
> State v. Jones, 242 N.J. 156, 168 (2020).

But there is a difference between drawing inferences from evidence, and merely speculating in the absence of evidence. "A jury may not fill a missing element of an offense by resorting to 'conjecture' or 'pure speculation.'" State v. Lodzinski, 249 N.J. 116, 158 (2021) (quoting Curley v. United States, 160 F.2d 229, 232 (D.C. Cir.), cert. denied, 331 U.S. 837, rehearing denied, 331 U.S. 869 (1947)). Mr. Pena was charged with attempted murder, aggravated assault, unlawful possession of a firearm and possession of a firearm for an unlawful purpose. No gun was connected to Mr. Pena and no witnesses testified that they saw him shoot Mr. Sosa or that he admitted doing same. The video was not authenticated in any legal sense and the jury should not have been permitted to speculate about nature and content of out-of-court statements made by Sosa, the bodega owner, or the others.

Throughout its opinion, the trial court reasoned that the State satisfied its burden "if" the jury believed Mr. Pena was the person in the video footage. (2T57-21 to 2T58-25) Because the three videos (Exhibit S-23 at Da 17) and the screen-shots (S24A and S24B at Da 17) should not have been admitted, and because there was no other evidence identifying Mr. Pena as the shooter, he was entitled to an acquittal.

POINT V

THE PROSECUTOR'S SUMMATION WAS IMPROPER IN SEVERAL RESPECTS. (Not raised below)

"The duty of the prosecutor 'is as much . . . to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" State v. Smith, 212 N.J. 365, 403 (2012) (quoting State v. Frost, 158 N.J. 76, 83 (1999) (internal quotation marks and citation omitted). "While 'prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries' and are 'afforded considerable leeway,' 'their comments [should be] reasonably related to the scope of the evidence presented.'" State v. Williams, 244 N.J. 592, 607 (2021) (quoting Frost, 158 N.J. at 82). "Thus, prosecutors 'must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.'" State v. Williams, 471 N.J. Super. 34, 44 (App. Div. 2022) (quoting State v. Smith, 167 N.J. 158, 178 (2001)).

Twice during his closing argument (2T70-14; 2T71-24), the prosecutor reminded the jurors that Mr. Sosa made a "statement" to Detective Brown. Because Sosa never testified, and because the statement was never admitted in evidence, the prosecutor was improperly suggesting that the absent witness had identified Pena as the shooter. Recall that the jurors asked to see the statement

and the judge told them "that it is your recollection of the detective's testimony that controls." (2T132-16 to 2T132-18) The prejudicial effect of the prosecutor's argument is obvious.

Also improper was the representation (at 2T77-8 to 2T77-10) that "Pena fled the scene and eventually was not arrested until a month later." Assuming the video was properly admitted, the prosecutor was free to argue that Mr. Pena is the man in the footage -- but not that he 'fled the scene.' Exhibit S-23 shows the man calmly walking to the bodega and taking his position behind the cash register. And Pena did not go into hiding for a month. The police spent that time interviewing witnesses; Pena was in plain sight the whole time, and the prosecutor should not have portrayed him as a guilty man who was on the run and had to be tracked down.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the Indictment dismissed or, in the alternative, a new trial ordered.

Respectfully submitted,

/s/ Robert Carter Pierce
ROBERT CARTER PIERCE
Attorney for Defendant-Appellant

Dated: March 10, 2024

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May 29, 2024

LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v.
Alberto Pena (Defendant-Appellant)
Docket No. A-359-23T2

Criminal Action: On Appeal from a Judgment of Conviction, entered in the Superior Court of New Jersey, Law Division, Essex County

Sat Below: Hon. Christopher S. Romanyshyn, J.S.C., and a Jury

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Honorable Judges:

Pursuant to Rule 2:6-2(b) this letter brief is submitted on behalf of the State.

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Counter-Statement of Procedural History

For purposes of this appeal, the State adopts the defendant's Statement of Procedural History. (Db2). The State also adopts the defendant's abbreviations and transcript designation codes. (Db2 n.1).

Counter-Statement of Facts

On July 16, 2019, Newark Police responded to a shooting in progress at 261 Orange Street. (1T28:16-29:19). They observed multiple cars parked along the street and a blood splatter trail. (1T30:4-7). Police located a spent shell casing about 25 feet away from the blood splatter. (1T31:12-18).

Arriving on the scene, which was in front of a bodega, Detective Brown observed "an amount of blood," a hat lying on the sidewalk, and a single shell casing. (2T25:12-26:17). He found out the victim was already at the hospital, and learned his name was Andres Sosa ("victim"). The Detective went to see the victim at the hospital but was unable to speak to him due to his injuries and the pain medication he was given. So, a few days later, the detective spoke with the victim at headquarters, and testified that, "[h]e sounded muffled a little bit, but he was able to communicate. But his face was swollen, it was still swollen. It looked like it was swollen even more than I had seen initially," and saw "stitching, as if it's closing a hole, like near the bottom of his chin."

(2T28:5-30:12). Detective Brown attempted to look for the suspected shooter, after identifying him as Alberto Pena ("defendant"). He was arrested on August 13, 2019. (2T32:11-34:8).

Video surveillance footage, played at trial, shows the suspect speaking with the victim while brandishing a black handgun. The suspect holding the handgun, moments before defendant is shot, has a tattoo of red lips on the side of his neck. Defendant has a tattoo of red lips on the side of his neck, which was shown to the jury both in a photograph taken on the date of his arrest and displayed in court at trial. (Da17 24:20-26; 54:57-55:27; 2T35:6-8; 43:24-44:2; 71:16-21; 74:8-19). The victim can be seen running away, clutching at his face, moments after the suspect is seen holding a handgun. (Da17).

Legal Argument

Point I

Detective Brown's testimony did not imply to the jury that he possessed superior knowledge, outside the record, that incriminated defendant.

Defendant argues he was identified as the shooter through hearsay, specifically through Detective Brown's testimony that, through his investigation, defendant was identified as a suspect. While our courts have held "a police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant," State v. Watson, 254 N.J. 558, 610 (2023), the detective's testimony did not indicate that he was given information that was withheld from the jury. Detective Brown's testimony did not create an "inescapable inference" that a non-testifying witness incriminated defendant.

In State v. Bankston, 63 N.J. 263 (1973), the Court determined that "a police officer's testimony that he 'approached a suspect or went to the scene of the crime . . . upon information received' does not violate the hearsay rule." State v. Roach, 146 N.J. 208, 225 (1996). Only "'when an officer becomes more specific by repeating what some other person told him concerning a crime by the accused,'[does] that testimony violate[] both the hearsay rule and the defendant's Sixth Amendment right of confrontation." Ibid.

An officer may not disclose incriminating information received from a non-testifying witness, and "[e]ven when an officer does not specifically repeat that information, the officer may not create an 'inescapable inference' that an unavailable source has implicated the defendant. State v. Medina, 242 N.J. 397, 415 (2020). While defendant points to State v. Branch, the Court in Medina noted:

> In Branch, we were troubled not by the inherently inflammatory nature of the phrase "based on information received," but the use of that language given the lack of physical evidence in the case and the fact that the sketch and the witnesses' descriptions of the defendant resembled neither his appearance on the day of his arrest nor the picture of him in the array. In the absence of anything else tying the defendant to the crime, the jury could easily have inferred that the "information received" by the detective was from a non-testifying witness.
> [Id. at 419-20. (emphasis added)]

The Court also specified that the question was "whether Branch's embargo of the phrase 'based on information received' extends to other, broader explanatory phrases," and that answer depends on the context of the testimony. Id. at 419. "That is, whether a jury would likely be compelled by a lack of record evidence to infer from the officer's use of the phrase that the officer 'possesses superior knowledge, outside the record, that incriminates the defendant.'" Ibid.

Detective Brown testified about his interview with the victim a few days after the shooting, noting the victim's ability to speak and the injuries he sustained and authenticating photographs he took of the victim. (2T30:4-31:7). After publishing those photographs to the jury, the prosecutor asked, "based on your investigations and following your interview with [the victim], what did you do next?" (2T32:8-10). Detective Brown noted he attempted to look for the suspect, and when asked "did you identify who that suspect was," he identified defendant. (2T32:11-24).

Detective Brown did relay that "I took a few statements from witnesses," which defendant argues implied "that all of the out-of-court declarants had identified [defendant] as the shooter." (Db9). However, this single part of the detective's testimony did not create an "inescapable inference" that an unavailable source had implicated the defendant.

As the Court in Medina aptly noted, the question that the court must determine is, "whether a jury would likely be compelled by a lack of record evidence to infer from the officer's use of the phrase that the officer 'possesses superior knowledge, outside the record, that incriminates the defendant.'" 242 N.J. at 419 (emphasis added). This case was not lacking evidence.

Surveillance video was played during the trial, and the State argued that it was defendant portrayed in those videos, and he was holding a handgun.

(Da17; 2T74:2-17). Defendant has a tattoo of red lips on the side of his neck which was shown to the jury in a photograph taken on the date of his arrest and displayed to them in court, and that same tattoo is seen on the individual brandishing a handgun in the surveillance footage moments before defendant is shot. (Da17 24:20-26; 54:57-55:27; 2T35:6-8; 43:24-44:2; 71:16-21; 74:8-19).

Unlike as argued by defendant, that "[defendant] was placed at the crime scene and identified as the shooter by witnesses he had no opportunity to cross-examine," it was the surveillance video and screen shots that allowed the jury to identify him, not the detective's testimony.

Clearly, this is not a case like State v. Branch, where there was a lack of physical evidence and "the sketch and the witnesses' descriptions of the defendant resembled neither his appearance on the day of his arrest nor the picture of him in the array." Medina, 242 N.J. at 419. Furthermore, the detective's testimony, when looked at in context, did not create an 'inescapable inference' that an unavailable source had implicated defendant. Testifying about his interview with the victim and offhandedly noting he "took a few statements from witnesses" does not inescapably imply that he is withholding evidence from the jury. These are simply steps he took while investigating the shooting.

Even if the testimony was admitted in error, that error was not "clearly capable of producing an unjust result" as to require reversal because the mention of the statement was not crucial to the State's case. See State in the Interest of J.A., 195 N.J. 324, 350 (2008). The video evidence clearly shows defendant brandishing a handgun at the victim moments before he is shot. Defendant cannot demonstrate that the challenged testimony of the detective had any appreciable effect on the outcome of his case and any error in admitting it, assuming it occurred, was harmless. R. 2:10-2.

Point II

A limiting instruction was unnecessary because Detective Brown's testimony was not inadmissible hearsay.

Defendant's argument that a limiting instruction was necessary fails because Detective Brown's testimony did not improperly imply an unavailable witness had implicated the defendant. While it is true that "[w]hen inadmissible evidence is admitted in error by the trial court, a curative instruction may sometimes be a sufficient remedy," no inadmissible evidence was admitted in error in this case. State v. Prall, 231 N.J. 567, 586 (2018). A curative instruction was not required or appropriate in this situation.

"Whether testimony or a comment by counsel is prejudicial and whether a prejudicial remark can be neutralized through a curative instruction or

undermines the fairness of a trial are matters 'peculiarly within the competence of the trial judge.'" State v. Yough, 208 N.J. 385, 397 (2011) (quoting State v. Winter, 96 N.J. 640, 646-47 (1984). Again, Detective Brown's testimony was not improper in any way, See Point I, ante, and even if it had been, was not "clearly capable of producing an unjust result" as to require reversal and was harmless, R. 2:10-2.

Point III

The trial court properly admitted the video surveillance footage.

Defendant argues the video surveillance footage was not properly authenticated. The trial court below correctly held that the video surveillance footage was admissible. The Appellate Division reviews evidentiary hearing rulings under an abuse of discretion standard. State v. Sims, 250 N.J. 189, 218 (2022). "[T]rial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

"It is well-settled that a videotape 'qualifies as a writing[ ]' under N.J.R.E. 801(e) and must be 'properly authenticated' before being admitted."

State v. Brown, 463 N.J. Super. 33, 51 (App. Div. 2020). Under N.J.R.E. 901, "'[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.' The authentication rule 'does not require absolute certainty or conclusive proof.'" Ibid. (quoting State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999)).

Only a prima facie showing of authenticity is required. Id. at 52. "[R]eliability is the decisive factor in determining the admissibility of a recording." State v. Nantambu, 221 N.J. 390, 395 (2015). "'[T]estimony 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.'" Brown, 463 N.J. Super. at 52 (quoting State v. Loftin, 287 N.J. Super. 76, 98 (App. Div. 1996)).

The trial court cited State v. Bunting, which states, "film evidence which is introduced as independent evidence of the crime, should be admitted without corroborative testimony by an eyewitness if the film is otherwise authenticated." 187 N.J. Super 506, 509 (App. Div.), certif. denied, 95 N.J. 181 (1983). The trial court held the video admissible because "[u]nder the facts and circumstances proffered here, I am satisfied that the detective's response to the location and the obtaining of consent, as well as the review and

downloading of the video in close proximity to the events that it purports to depict is adequate authentication for admissibility purposes." (1T71:21-72:1).

Looking at the transcript, the State argued that the officer who retrieved the video:

> works for the City of Newark, at his regular assignment he responds to scenes to recover surveillance videos, on the date he responded to that, on that same date, a short time after the incident was processed and closed off, he received consent from the owner of the store. He then downloaded that video. He was told to download a specific time, time frame. He reviewed it at the time he was downloading it, him and I have reviewed it in preparation for his trial today, and his testimony. Judge, he can authenticate the location. He can authenticate that it's, in all candor it's going to be the supermarket. He can authenticate the supermarket, inside, the outside, that it does fairly and accurately depict what it looked like and what he downloaded on that date, Judge. [(1T69:25-70:14)].

After holding the surveillance footage admissible, Officer Faltz testified that he retrieved videos from 259 Orange Street and that consent was received from that location to retrieve the videos. (1T79:4-80:19). He noted the time and date were inaccurate by about 12 hours. (1T81:14-24). Officer Faltz also testified that the video was not altered or modified in any way. (1T82:9-14). The prosecutor went through still shots with the officer, and the officer explained the view from each camera angle. (1T85:25-88:15).

This was clearly sufficient to satisfy N.J.R.E. 901, and the officer provided more than enough information to establish a prima facie showing of authenticity. This video was introduced as independent evidence of the crime, and did not require corroborative testimony by an eyewitness since the film was otherwise authenticated. Bunting, 187 N.J. at 509.

Point IV

The trial court properly denied defendant's motion for a judgment of acquittal.

Judge Romanyshyn properly denied defendant's motion for a judgement of acquittal. A judgment of acquittal shall be entered "[a]t the close of the State's case . . . if the evidence is insufficient to warrant a conviction." R. 3:18-1. "When evaluating motions to acquit based on insufficient evidence, courts must view the totality of evidence . . . in a light most favorable to the State." State v. Perez, 177 N.J. 540, 549 (2003). Essentially, a court must determine if, "giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 459 (1967).

Defendant was charged with attempted murder, aggravated assault, unlawful possession of a firearm, and possession of a firearm for an unlawful

purpose.[1] The trial court noted that if the jury were to find beyond a reasonable doubt that it was defendant on the video and used a handgun to shoot the victim in the face, it would be reasonable "to infer from those actions alone, that his intent was either to kill or to seriously injure." (2T57:22-58:3). The court also found that if the jurors determined it was defendant in the video, "and that [defendant] had a handgun . . . then they could conclude beyond a reasonable doubt that he unlawfully possessed the handgun." (1T58:4-7).

The court appropriately found:

> At this point applying the standard that I must, giving the State all favorable inferences, which could reasonably be drawn from the evidence that they presented, I do find that a reasonable jury could conclude that it is Mr. Pena on the video and that he did use the handgun to shoot Mr. Sosa in the face.
>
> As the statement from Reyes indicates, whether the evidence is direct or circumstantial, and I am adding now my own characterization, whether that evidence is loosely woven together or more tightly woven together is a question of weight rather than admissibility. Unwoven gets a Reyes motion granted. I cannot find here that the State has not provided sufficient evidence. What a jury will do with it, I don't know. Motion for acquittal is denied.
> [(2T58:20-59:9)].

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[1] The parties agreed to a stipulation that defendant did not have a permit to carry a handgun at the time. (2T43:7-23).

Surveillance video was played at trial, which showed an individual with a red lips tattoo on the side of his neck brandishing a handgun towards the victim moments before the victim is shot. Defendant has a tattoo of red lips on the side of his neck which was shown to the jury in a photograph taken on the date of his arrest and displayed to them in court. (Da17 24:20-26; 54:57-55:27; 2T35:6-8; 43:24-44:2; 71:16-21; 74:8-19). Defendant argues that since the video "should not have been admitted," he is entitled to an acquittal. (Db17). As noted above in Point III, the video was properly admitted and firmly establishes a reasonable jury could find guilt of the charges beyond a reasonable doubt. Accordingly, defendant's motion for an acquittal was properly denied.

Point V

The Prosecutor's summation was proper.

The governing law in this area is well-settled. A prosecutor is entitled to make a vigorous and forceful presentation of the State's case. State v. Mahoney, 188 N.J. 359, 376, cert. denied, 549 U.S. 995 (2006). The Supreme Court recognized the seminal role prosecutors play in our criminal justice system, concluding:

> [W]ithin the legal profession the prosecutor's double calling – to represent vigorously the state's interest in

> law enforcement and at the same time help assure that the accused is treated fairly and that justice is done – is uniquely challenging. That challenge is what makes the prosecutor's mission such a difficult one and such an honorable one. A prosecutor willing to engage in proscribed conduct to obtain a conviction ... betrays his oath in both its respects. Not only does he scoff at rather than seek justice, he also represents the state poorly.
> [Id. (citing State v. Ramseur, 106 N.J. 123, 323-24 (1987)).]

Prosecutors are permitted to strike hard blows, but not foul ones. State v. Marks, 201 N.J. Super. 514, 535 (App. Div. 1985), certif. denied, 102 N.J. 393 (1986). Prosecutors are allowed to "fight hard, but they also must fight fair." State v. Wakefield, 190 N.J. 397, 437 (2007) (citing State v. Pennington,119 N.J. 547, 577 (1990)). For these reasons, our Supreme Court has gauged the consequences of prosecutorial error differently, in "evaluat[ing] the severity of its prejudicial effect on the defendant's right to a fair trial" and concluded that prosecutorial error "is not grounds for reversal of a criminal conviction unless the conduct was so egregious as to deprive defendant of a fair trial." State v. Papasavvas, 163 N.J. 565, 625 (2000) (quoting State v. Timmedenquas, 161 N.J. 515, 575-76 (1999), cert. denied, 534 U.S. 858 (2001)).

Thus, to justify reversal, "the prosecutor's conduct must have been clearly and unmistakably improper, and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his

defense." State v. Smith, 167 N.J. 158, 181-82 (2001) (citations and internal quotation marks omitted).

When mentioning the victim's statements during summation, the prosecutor stated Detective Brown "[c]ould not actually speak to the victim because he was being treated for a gunshot wound to the face. Had his face was covered up [sic], eventually about three days later on July 19th, the victim did, in fact, come in. Andres Sosa came in, he gave a statement and Detective Brown told you that he observed the victim with extreme swelling on his face and stitching underneath his mouth where it appeared that there were attempting to closing up a hole." (2T70:9-17). The prosecutor was describing to the jury what the victim's injuries were, and how Detective Brown's observations established that.

The second time a statement is mentioned is when the prosecutor stated, "[w]e know this is Andres Sosa, the victim. Here is a photo that Detective Brown took on the date he came in to give a statement." (2T71:22-24). Again, the prosecutor was explaining to the jury when and where the photograph he was displaying had been taken.

Nothing in either of these statements improperly suggests that the victim identified defendant as the shooter. Both were simple, offhanded comments

regarding where and when the victim's photograph was taken and the injuries the detective observed.

Secondly, defendant argues that the Prosecutor improperly stated defendant "fled the scene." (Db19). While the prosecutor did use that phrase, he was not implying that defendant went "into hiding," he explained:

> Now, we don't have a handgun. As Brown testified to, Pena was not arrested until almost a month later. Pena's actions are the reason why we don't have a handgun. Pena was not arrested on the scene. Pena fled the scene and eventually was not arrested until a month later. Plenty of time to get your gun, plenty of time to get a new haircut. Wasn't enough time, though, to get rid of his red lips tattoo on the side of his neck that is still here today.
> [(2T77:5-13)].

The prosecutor was not "portraying [defendant] as a guilty man who was on the run," (Db19) he was explaining to the jury why no handgun was presented to them as evidence, and why defendant's haircut was different than that shown in the surveillance footage.

Finally, even if deemed improper now – defendant never objected to these innocuous comments below – they were not clearly capable of producing an unjust result. R. 2:10-2. Any error was therefore harmless.

Conclusion

For the foregoing reasons and authorities cited in support thereof, the State respectfully requests that this Court affirm defendant's judgement of conviction in all respects.

Respectfully submitted,

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LETTER-BRIEF OF THE OFFICE OF PUBLIC DEFENDER AS AMICUS CURIAE

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0359-23T2
INDICTMENT NO. 19-10-02948-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from the Judgment of Conviction Entered in the Superior Court of New Jersey, Law Division,
v.	:	Essex County.
ALBERTO PENA,	:	Sat Below:
Defendant-Appellant.	:	Hon. Christopher S. Romanyshyn J.S.C.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

The Office of the Public Defender relies on the procedural history set forth by defendant. It adds only that it submits this amicus brief at the invitation of this Court.

STATEMENT OF FACTS

On July 16, 2019 at 6:22p.m., officers responded to 261 Orange Street in Newark, having received information that there was a shooting in progress there. (1T 29-3 to 16; 2T 42-1 to 19)[1] Officers apparently did not locate the victim when they arrived, but determined for reasons not clear from the record that his name was Andres Sosa and that he had been brought to the hospital. (1T 33-12 to 19; 2T 26-18 to 30-25)

Despite being subpoenaed, Sosa did not appear at trial. (2T 7-6 to 14) No eyewitness testified. It was undisputed that Alberto Pena, the defendant, works at a supermarket located at 259 Orange Street. (1T 23-22 to 24-2; 2T 69-9 to 16) Pena was arrested almost a month after the shooting. (2T 33-24 to 34-8) He did not confess to the shooting, no forensic evidence connected him to the crime, and no motive was presented at trial.

The central piece of evidence at trial was surveillance footage retrieved by Alton Faltz. Faltz testified that he was dispatched on July 16 to download

[1] OPD adopts the abbreviations used by the parties.

video because the "detective was having problems with downloading the video." (1T 74-13 to 21) Faltz testified that he "believe[d]" he downloaded videos from "two locations," but could not remember specifically. (1T 75-1 to 11) After a series of leading questions, Faltz seemingly confirmed that he downloaded video from 259 Orange Street. (1T 76-7 to 80-8) Faltz testified that when he downloaded the video he decided the "date and timestamp" were "inaccurate." (1T 81-11 to 22) Faltz said that "it" was "off by" "approximately 12 hours." (1T 81-22 to 25) The defense objected to the admission of the videotape through Faltz, arguing that it was not authenticated. (1T 69-23 to 69-6, 84-10 to 11) The judge ruled that "the obtaining of consent" by the owner of the surveillance system and the "review and downloading of the video in close proximity to the events that it purports to depict is adequate authentication for admissibility purposes." (1T 71-24 to 72-2)

The surveillance footage was played in court. The timestamps indicated that the footage was taken on July 17, with the moments allegedly leading up to the shooting at around 6:44a.m. (1T 90-10 to 91-4, 95-4 to 19; 2T 65-18 to 22) The parties disputed what is visible in the video: the State alleged that a person, whom it claimed to be Pena, raises a gun at another person, who it claimed to be Sosa. (2T 75-2 to 20) The defense claimed that it is not at all clear that the item in the first person's hand is a gun. (2T 63-22 to 64-5) The

shooting itself is not caught on film. (2T 75-24 to 76-11) Afterwards, the person alleged to be Sosa seems to walk away and get into someone's car. (Da 23)

The jury watched the videotape multiple times in deliberations, at various speeds. (2T 128-1 to 134-25) Pena was acquitted of attempted murder and second-degree aggravated assault and convicted of third-degree aggravated assault, unlawful possession of a firearm, and unlawful possession of a firearm for an unlawful purpose. (Da 6-7)

LEGAL ARGUMENT

THE STATE FAILED TO AUTHENTICATE THAT THE CENTRAL PIECE OF THE EVIDENCE IN THE CASE—THE VIDEOTAPE—ACTUALLY DEPICTED THE EVENTS ON THE TIME AND DATE OF THE OFFENSE. (1T 71-24 to 72-2)

Before videos can be admitted, their authenticity must be established by the party seeking to admit them. The State failed to authenticate the video in this case because it did not provide testimony by a person who was present at the scene supposedly depicted in the video or with the requisite knowledge to establish that the footage captured events and the time and date purported by the State. Therefore, the trial court's ruling admitting the video must be reversed.

An electronic record and its duplicates qualify as "writings" under N.J.R.E. 801(e) and therefore "must be properly authenticated" before being admitted. State v. Wilson, 135 N.J. 4, 17 (1994). Under N.J.R.E. 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." The burden to make that showing is on the proponent of the evidence. State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999).

There are two basic ways to authenticate a video, neither of which occurred in this case. The first is by the testimony of someone who was present at the scene who can testify that the video accurately depicted the events that were seen by that witness as they occurred. Wilson, 135 N.J. at 19 (holding a witness "failed properly to authenticate the video because he was not a person present at the time the crime occurred who could testify that the videotape accurately depicted the events as he had seen them when they occurred."); see also State v. Williams, 471 N.J. Super. 34, 48 n.5 (App. Div. 2022) (holding that because a witness "did not perceive the events as they occurred before he arrived at the scene, the first seven minutes of the video played during jury deliberations were not properly authenticated").

If the State seeks to admit video evidence when someone who was present at the scene is unavailable, it is allowed to do so only if the reliability and the accuracy of the system used to make the film and the reliability of the method used to retrieve the film are established. The requirements of this approach were discussed in State v. Bunting, 187 N.J. Super. 506, 509 (App. Div. 1983). In Bunting, this Court held that a video was properly admitted when the State introduced testimony concerning the installation, operation, and view of the camera, its "periodic testing," film removal, chain of custody, and method of activation during the robbery. Id. at 509-510. In instances such as

Bunting, what the State is able to authenticate is not the subject matter of the video, but the fact that the video itself was taken from a specific place from a well-maintained video-camera that was recording accurately at a certain date and time. In such a circumstance, the proponent demonstrates that the video was taken by a specific camera at a specific time and lets the video speak for itself as a "silent witness." See e.g., State v. Reeves, 967 N.W.2d 144, 148–49 (S.D. 2021) ("[U]nder the silent witness theory, a photograph or video is a silent witness which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness.") (internal quotation marks omitted); 2 McCormick On Evidence § 216 (Robert P. Mosteller ed., 8th ed. 2020) (under the silent witness theory, "[r]ecordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process").

The problem here is that the State failed to carry its burden to demonstrate that the video shown at trial was actually footage of July 16, 2019 at 6:22p.m. The footage itself bore a timestamp of July 17, 2019 at 6:44a.m., which obviously undermines the State's claim as to the time and date of the footage. It is possible, and common, for the proponent of a video to sufficiently explain such a discrepancy by comparing the date and time on the system when the officer goes to retrieve it with the actual time as well as

explaining the method of downloading. For instance, in Brannon v. Georgia, the Georgia Supreme Court held that a video was sufficiently authenticated when the officer who retrieved the footage testified about such details:

> The record shows that Curnutte testified that he had been trained in video surveillance and retrieved and captured video recordings as part of his work; that he downloaded videotape from surveillance cameras at the scene of the crime on the day the victim's body was discovered; that he retrieved the video using a system for which he was certified and also trained other officers to use; that at the time he downloaded the video the equipment appeared to be functioning properly except that the date-time stamp was inaccurate; that he was able to determine that the date-time entry on the video was two days, 12 hours, and 45 minutes fast by comparing it with the actual date and time; that he viewed the video on the day he downloaded it; and that the video being offered as evidence was the one he retrieved from the surveillance cameras at the scene of the crime.
>
> Brannon v. State, 783 S.E.2d 642, 650 (Ga. 2016) (emphasis added).

See also Young v. State, 198 N.E.3d 1172, 1180 (Ind. 2022) (explaining the process by which an officer "reviewed the accuracy of [a system's] timestamp" by comparing it with "'official U.S. government time'").

In contrast, in this case, there's no evidence that Faltz contemporaneously noted a discrepancy in the time used by the surveillance system and the actual date and time. No documentation is in the record to that effect. He did not provide an accurate accounting of the discrepancy, instead relying on an approximation. Faltz provided no evidence about how he

retrieved the video and whether that was in accordance with his training. Faltz wasn't even sure where he got the video from. Further, he testified that another officer had some sort of issue downloading the video, which raises concerns about the ability of officers to retrieve the correct footage in this case. In short, Faltz did not provide any evidence that at the time he retrieved the video he took sufficient steps to ensure that the video is actually what it purports to be: images taken by a surveillance camera at a certain location at around 6:22p.m. on July 16, 2019.

The failure of the State to provide sufficient evidence to authenticate this video matters. Pena works at the supermarket that this camera was apparently filming in and around. If it is Pena on the video, it is quite possible that the footage is from July 17 and not July 16—after all, he works at the supermarket. It is quite possible he had a conversation, or even an altercation, with a person outside of the supermarket on July 17. But it was on July 16 that Sosa was shot. If the footage is from July 17, there is no connection between Pena being outside with a person, as depicted in the footage, and Sosa being shot.

Moreover, it is also possible that the footage is actually from earlier on July 16 (or any other day, for that matter). What if the camera was 24 hours fast instead of 12 hours fast? The footage would then be from July 16 in the

morning. Even assuming that Pena and Sosa are on the footage—which should not be taken for granted given that no one identified either of them—the footage could be from a dispute earlier that day. If Sosa was shot in the evening, an earlier argument would not be probative of the question of who shot Sosa or under what circumstances the shooting occurred.

In short, the officer's bare assertion that the footage is in fact of a different date and time than the footage itself says, without taking any steps to appropriately demonstrate that, is insufficient to authenticate the video as being what the State purports it to be: footage of Sosa when he was shot on the evening of July 16, 2019.

That it is quite possible that Pena was at that location on both July 16 and July 17 distinguishes this case from others in which the failure to establish the proper retrieval and accurate determination of time and date has been condoned by courts. For instance, in Kirby v. State, 217 N.E.3d 575, 588-89 (Ind. Ct. App. 2023), although the detective who retrieved the surveillance video did not know how the system operated and admitted that the timestamp was not accurate, "[g]iven that the video depicted the ignition of the very same garage that was burned to the ground on the day in question, we also do not think that the inaccuracy of the time stamp renders the video unreliable." In other words: a particular garage can only burn down one time and therefore a

video showing that garage burning down depicts that singular event. But a person who works at a supermarket can be in that supermarket and outside that supermarket frequently. A video depicting those actions cannot be assumed to show a date and time other than those on the video itself merely because that time best fits with the State's theory of the case. See also United States v. Watkins, 388 Fed. Appx. 307, 312 (4th Cir. 2010) (affirming the authentication of a video despite a timestamp discrepancy because "the exact time of the events in question here was not a material issue in this case").

In sum, this video is the only evidence in the case that even purports to put Pena and Sosa together at the time of the shooting. But there is insufficient evidence that the video actually depicts the time of the shooting. Without the State meeting its burden to demonstrate that the video was really from July 16 at 6:44pm, there is no admissible evidence of Pena's guilt. The convictions must be reversed.

CONCLUSION

For the reasons set forth above, Pena's convictions must be reversed.

Respectfully Submitted,

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Public Defender
Attorney for Defender-Respondent

BY: 
Deputy Public Defender

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-0359-23T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Essex County.
v.	:	
ALBERTO PENA,	:	Sat Below: Hon. Christopher S. Romanyshyn, J.S.C., and a Jury
Defendant-Appellant.	:	

BRIEF ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY, AMICUS CURIAE

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March 7, 2025

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PRELIMINARY STATEMENT

Authentication of evidence is not an exacting standard. All that the proponent must do is make a threshold prima facie showing that the evidence is what he claims. It is ultimately for the jury to determine whether and to what extent to accept the proponent's claim.

Video recordings have long been admissible as substantive evidence in New Jersey. The proponent must demonstrate that the process that produced the video recording was reliable. This method of authentication is known in other state and federal courts as the "silent witness" theory of authentication. This theory holds that so long as the process that produced the recording is reliable, the recording "speaks for itself" and is admissible as substantive evidence at trial without corroborating testimony from an eyewitness.

In their various iterations of the silent-witness theory, some jurisdictions set forth specific criteria for consideration, whereas others impose no foundational requirements. Yet even those jurisdictions that enumerate specific factors do not make them exclusive or obligatory, recognizing that the proofs will vary with each case.

New Jersey applies a flexible standard, with no fixed requirements to establish the reliability of the recording process to admit a video recording as substantive evidence. Where a party seeks to introduce a video recording as demonstrative

evidence, New Jersey no longer requires proof of a reliable recording process for authentication. Instead, it is sufficient for the proponent of the demonstrative video evidence to present testimony that the recording accurately depicts phenomena perceived by the witness. That witness need not be the creator or owner of the video, nor even an eyewitness.

In substance, this is the approach that other jurisdictions follow for authenticating videos for use as substantive evidence, under their various forms of silent-witness authentication. No proof of the reliability of the recording process is required if other proof can establish the accuracy of the video. These other jurisdictions have thus held that a police officer who views surveillance video at the scene of the crime and testifies that the contents of the recording played in court are the same as the contents in the surveillance video he viewed at the scene and accurately depict the scene as he saw it is sufficient to authenticate the recording.

That is what occurred in this case, where Officer Alton Faltz of the Newark Police Department's Technical Service Unit responded to the scene of the shooting shortly after the shooting occurred to download the surveillance video. Officer Faltz viewed the surveillance video when he downloaded it and again before trial, testifying that it was not edited or altered. He further testified that the recording played in court, and the still shots derived from it, accurately depicted the scene as he witnessed it when he was there to download the surveillance video.

With no evidence or allegation that the surveillance video was altered, and with Officer Faltz's testimony that the video and the still shots accurately depicted the scene as he witnessed it on the day of the crime, the trial court appropriately exercised its discretion in admitting the surveillance video and still shots into evidence. Accordingly, this Court should affirm the trial court's ruling.

STATEMENT OF PROCEDURAL HISTORY

The Attorney General relies on the Counterstatement of Procedural History in the State's brief, with the following correction and addition. The offense of unlawful possession of a handgun, N.J.S.A. 2C:39-5b(1), as charged in Count Three of the Indictment, is a crime of the second degree. (Da4).[1]

On January 8, 2025, the Court invited the Attorney General and the Public Defender to participate as amici curiae "to address the significant legal issue raised in Point III of appellant's brief concerning the authentication of a surveillance video presented by the State at trial." (AGa1-2). This brief is submitted in response to that invitation.

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[1] "AGa" – Attorney General's appendix
"Da" – defendant's appendix
"1T" – trial, June 6, 2023
"2T" – trial, June 7, 2023
"3T" – sentencing, September 8, 2023

STATEMENT OF FACTS

The Attorney General supplements the State's Counterstatement of Facts, on which he relies, with the following. Prior to the testimony of Officer Faltz, defense counsel objected that the officer was not the proper witness to authenticate the surveillance video that he retrieved because he was not the owner of the video. (1T69-2 to 6). Observing that there is no requirement that the owner of surveillance video authenticate it, the prosecutor responded that Officer Faltz viewed the surveillance video when he downloaded it and in preparation for trial, and that the officer would testify that the scene as captured on the surveillance video accurately depicted the scene as he saw it when he downloaded the surveillance video soon after the shooting. (1T69-18 to 70-17).

The Honorable Christopher S. Romanyshyn, J.S.C., ruled that under the silent-witness theory of authentication, corroborative testimony of an eyewitness is not necessary to authenticate a video of the crime so long as the video is otherwise authenticated. Judge Romanyshyn held that because Officer Faltz downloaded and viewed the surveillance video at the scene close in time to the shooting, this was sufficient to establish that the surveillance video accurately depicts what it purports to represent. Accordingly, Judge Romanyshyn ruled that the surveillance video was admissible as evidence through the testimony of Officer Faltz. (1T70-21 to 72-2).

Officer Faltz proceeded to testify that he worked in the Technical Service Unit

of the Newark Police Department, where he assisted officers with technical issues regarding videos and cell phones. In that assignment, which he had held for seven of his eighteen years with the department, he had received training on video retrieval, which was one of his job functions. (1T73-18 to 74-12). Officer Faltz recounted that on July 16, 2019, he was dispatched to the scene of the shooting to retrieve surveillance video. (1T74-13 to 23). With the consent of the owner of the grocery store at 259 Orange Street, where the surveillance system was maintained, Officer Faltz downloaded the surveillance video. (1T76-7 to 25; 1T79-7 to 80-19). He testified that the timestamps on the video were ahead by approximately twelve hours, indicating the morning of July 17 instead of the evening of July 16, which is when the shooting occurred and when he watched and downloaded the video. (1T74-13 to 25; 1T81-7 to 82-8; 1T94-4 to 23). Asked by defense counsel on cross-examination whether the discrepancy was caused by the downloading, Officer Faltz answered that it was not attributable to the downloading, which had no effect on the timestamps. (1T93-5 to 23).

Officer Faltz testified that at the time he downloaded the video, and again in preparation for trial, he viewed the surveillance video, stating that the video was not modified or altered in any way. (1T81-7 to 13; 1T82-7 to 14). Officer Faltz identified the areas depicted in the surveillance video, which, he testified, accurately represented the scene on the day of the shooting. (1T85-25 to 86-12; 1T86-25 to 87-

9; 1T89-5 to 21; 1T91-1 to 15).

The surveillance video, moved into evidence as S-23, (Da17), is a composite of three camera angles: one depicting the interior of the grocery store (the second angle in the video), and two depicting the exterior (the first and third angles). (1T88-14 to 20). At 24:21 on the video, depicting the interior of the grocery store, defendant enters the frame and walks behind a customer. As he does so, he turns to his right, exhibiting his profile to the camera. A tattoo of red lips can be seen on the right side of defendant's neck, below his ear.

At 13:05, in the first camera angle, which depicts the entrance to the grocery store from outside, Andres Sosa enters the frame, opens the door to the store, and goes inside. At 13:30, Sosa leaves the store, followed seconds later by defendant. Sosa's leaving the store followed by defendant is depicted in the third camera angle, beginning at 54:43, when Sosa enters the frame. The two men begin arguing. As they do so, defendant has his right hand inside the right pocket of his shorts.

At 54:58, defendant removes a black handgun from his right pocket and points it at Sosa before returning the gun to his pocket. After another male tries to separate defendant and Sosa, Sosa moves out of view as he and defendant continue arguing. At 55:22 defendant appears to sustain a blow, the force of which causes him to fall back, out of camera view. A second later, at 55:23, Sosa hurriedly re-enters the frame, hunched over and holding the left side of his face with his left hand. He walks

into the street and around a Range Rover parked at the curb, removing his baseball cap and tossing it over the hood of the vehicle. At 55:45, Sosa picks up his baseball cap from the sidewalk and walks down the sidewalk, accompanied by another male.

That male and Sosa enter the frame of the first camera angle, depicting the entrance to the grocery store from outside, at 14:34. Sosa and the male walk toward a silver-colored sedan parked at the curb, where Sosa enters the front passenger seat. Another male leaves the grocery store, enters the driver seat of the silver-colored sedan, makes a K-turn, and drives away at a high rate of speed.

Police later found Sosa at the hospital, where he was treated for a gunshot wound to his face. (2T26-25 to 28-8).

LEGAL ARGUMENT

POINT I

AUTHENTICATION IS A LOW BURDEN, THE REQUIREMENTS OF WHICH DEPEND ON THE FACTS OF THE CASE.

To authenticate evidence, the proponent need only make a prima facie showing that the evidence is what he claims. The proofs vary with the facts of each case, for video evidence as for any other evidence. This standard as applied to video recordings finds formal expression in the silent-witness theory of authentication adopted by other state and federal courts. Some jurisdictions identify factors for

consideration, whereas other jurisdictions decline to specify factors. But all jurisdictions recognize that authentication depends on the particular facts of the case, not on any particular criteria. Thus, any evidence can supply sufficient indicia of the reliability of a video recording. This is the approach that New Jersey has long followed in substance, if not in name, and it can continue to ensure the threshold reliability of video recordings for presentation to the jury, which remains the ultimate arbiter of authenticity.

"[T]he burden of proof for authentication is slight[.]" United States v. Lingala, 91 F.4th 685, 696 (3d Cir. 2024). To authenticate an item of evidence, the proponent need only "present evidence sufficient to support a finding that the item is what its proponent claims." N.J.R.E. 901. Meeting this standard "does not require absolute certainty or conclusive proof" but only "a prima facie showing of authenticity." State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999). "This burden was not designed to be onerous," State v. Hockett, 443 N.J. Super. 605, 613 (App. Div. 2016), because "[a]ll that is required for authenticity is proof that the matter is what its proponent claims." State v. Loftin, 287 N.J. Super. 76, 99 (App. Div. 1996).

The trial court performs a gatekeeping function, ensuring that there is "sufficient indicia of reliability." Mays, 321 N.J. Super. at 628. This has been described as "a screening process" whereby the trial court "will admit as genuine

writings which have been proved prima facie genuine[,] leaving to the jury more intense review of the documents." State v. Hannah, 448 N.J. Super. 78, 89 (App. Div. 2016) (citation and internal text alterations omitted). Because the jury is the ultimate arbiter of authenticity, "'[t]he judge does not determine whether the proponent has incontrovertibly proven [authenticity]. The exercise of judicial discretion requires only a determination that there exists sufficient evidence for the jury to decide the condition in favor of the proponent of the evidence.'" State v. Marroccelli, 448 N.J. Super. 349, 367 (App. Div. 2017) (quoting Konop v. Rosen, 425 N.J. Super. 391, 413 (App. Div. 2012)).

Direct evidence is not necessary to authenticate evidence. "A prima facie showing may be made circumstantially." Konop, 425 N.J. Super. at 411. Thus, in the case of a letter, authenticity may be established from details contained in the letter that the alleged writer would be expected to know. Ibid. The same applies to telephone calls. See, e.g., Kalola v. Eisenberg, 344 N.J. Super. 198 (Law Div. 2001), and State v. Bassano, 67 N.J. Super. 526 (App. Div. 1961). More recently, this Court has held that circumstantial evidence is sufficient to authenticate social media posts. See Hannah, 448 N.J. Super. at 90-91.

These principles apply to photographs and videos, which are forms of writing. N.J.R.E. 801 defines "writing" to include photographs. Photographs are defined to "include still photographs, X-ray films, videos, motion pictures and similar forms of

reproduced likenesses." N.J.R.E. 1001(b). To authenticate a photograph "requires a witness to verify that it accurately reflects its subject, and to identify or state what the photograph shows." State v. Joseph, 426 N.J. Super. 204, 220 (App. Div. 2012). This does not require eyewitness testimony. Indeed, "[a]n authenticator need not even have been present at the time the photograph was taken, so long as the witness can verify that the photograph accurately represents its subject." State v. Wilson, 135 N.J. 4, 14 (1994). Therefore, "[a]ny person with knowledge of the facts represented in the photograph may authenticate it." Joseph, 426 N.J. Super. at 220.

The process is similar for video recordings. "Authentication of a videotape is much like that of a photograph, that is, 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." Loftin, 287 N.J. Super. at 98. This testimony need not come from the videographer but may be provided by "any person with the requisite knowledge of the facts represented in the [] videotape[.]" State v. Brown, 463 N.J. Super. 33, 52 (App. Div. 2020) (quoting Wilson, 135 N.J. at 14).

An early case addressing authentication of a video recording is Balian v. General Motors, 121 N.J. Super. 118 (App. Div. 1972), a product liability suit. At trial, General Motors presented a video produced by its expert, who filmed himself driving a vehicle with the alleged defect to establish that the vehicle remained

operable and, thus, was not the cause of the crash. Id. at 122-23. In considering whether the video was properly authenticated, this Court wrote:

> Authentication of motion pictures ordinarily includes (1) evidence as to the circumstances surrounding the taking of the film; (2) the manner and circumstances surrounding the development of the film; (3) evidence in regard to the projection of the film; and (4) testimony by a person present at the time the motion pictures were taken that the pictures accurately depict the events as he saw them when they occurred.
>
> [Id. at 125.]

Notwithstanding that not all of these factors were met, this Court held that the video was properly authenticated because the expert testified that he created the video, he was subject to cross-examination, and no technical objections to the film were raised. Id. at 125-26.[2]

In State v. Bunting, 187 N.J. Super. 506 (App. Div. 1983), this Court considered the admission into evidence of surveillance footage as substantive proof of a crime. The Court reasoned that unlike in Balian, which involved a staged experiment, "film evidence which is introduced as independent evidence of the crime[] should be admitted without corroborative testimony by an eyewitness if the film is otherwise authenticated." Id. at 509. Testimony concerning the installation, testing, operation, and activation of the camera was sufficient to authenticate the

[2] The Court ultimately held that the video was improperly admitted into evidence on grounds of undue prejudice to the plaintiff.

video. Id. at 509-10.

The Supreme Court addressed the admissibility of video recordings as demonstrative evidence of a crime in Wilson, where a video was filmed three days after the crime. Wilson was on trial for a robbery and murder that occurred at a meat market. 135 N.J. at 7. A police investigator went to the store three days after the crime to film the store from the suspect's point of view as he moved throughout the store during the crime, with employees and a stand-in appearing in the places that they and the victim occupied on the day of the murder. The video was introduced at trial by the testimony of the police investigator, who obtained his knowledge of the scene from other investigators. Id. at 9-10.

Because the investigator had no direct knowledge of the scene, the Supreme Court held that he was unable to authenticate the video, as he could not establish that the video accurately represented the scene when the crimes occurred. Id. at 18. Yet the Court recognized that the standard for authenticating video recordings was no longer as stringent as in the past. "As motion pictures have become less of a novelty, a trend has developed away from the more exacting method used to introduce motion pictures towards a simpler method much like that used for photographs[.]" Id. at 15. The question is whether "the motion picture accurately reproduces phenomena actually perceived by the witness." Ibid. (quoting II McCormick on Evidence § 214, at 17 (4th ed. 1992)). Authentication of photographs thus requires that testimony

establish that "(1) the photograph is an accurate reproduction of what it purports to represent; and (2) the reproduction is of the scene at the time of the incident in question, or, in the alternative, the scene has not changed between the time of the incident in question and the time of the taking of the photograph." Ibid.

This Court recently addressed authentication of video as substantive evidence of a crime in Brown, in which the defendant was on trial for arson after he set fire to his car in a parking lot near the Buell Apartments at Rutgers University. Police obtained surveillance video from a nearby bus stop, where a witness heard an explosion and saw a flash of light in the parking lot. Because the video could not be downloaded, a police officer recorded the surveillance video on his cell phone. The officer and an information-technology specialist testified as to why the surveillance video could not be downloaded and was recorded on the cell phone, and the witness identified herself in the video and the flash of light she saw. 463 N.J. Super. at 41, 45, 53. This testimony, as well as the absence of evidence that the cell-phone video was unreliable, was found sufficient to authenticate the cell-phone video. Id. at 53.

Police also obtained surveillance videos from the apartment building, where Brown appeared on camera entering and leaving the building numerous times before and immediately after the crime. Id. at 44-45. Brown did not object to the introduction of these videos into evidence at trial, and he did not challenge it on appeal. In recounting this evidence, this Court described how the officer "obtained

surveillance videos from Buell's surveillance system after he personally accessed the system, reviewed the recorded footage, supervised the downloading of the videos, and was present while they were transferred to a disk." Id. at 44. The officer identified Brown in two still photographs derived from the videos based on Brown's jacket, which was similar to the jacket the officer had seen in Brown's car. Id. at 45.

The different proofs used to authenticate the cell-phone video and the apartment-building videos exemplify the "'highly fact-sensitive analysis'" that authentication entails. Id. at 52 (quoting State v. Nantambu, 221 N.J. 390, 395 (2015)). Whereas the cell-phone video was supported by eyewitness testimony, the apartment-building surveillance videos were not and, indeed, could not have been supported by eyewitness testimony inasmuch as only Brown was captured in those videos. It was sufficient that the officer personally retrieved the surveillance videos from the apartment building and reviewed them. As the Court reiterated, "'Reliability is the decisive factor in determining the admissibility of a recording.'" Ibid. (internal brackets omitted) (quoting Nantambu, 221 N.J. at 395).

The recognition that the proofs supporting authentication of video evidence will vary in each case is reflected in the varied application of the silent-witness theory of authentication in other states. This was the method of authentication described in Bunting and applied there and in Brown with respect to the apartment-building videos. Originally conceived as a means of authenticating X-rays, which

represent phenomena that no witness can directly perceive, and surveillance videos that depict scenes where no witness was present, the silent-witness theory holds that a photograph or video recording is admissible as independent evidence of the events depicted upon demonstration of "an adequate foundation assuring the accuracy of the process producing it[.]" Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, 16 Am. Jur. Proof of Facts 3d 493, § 5 (Originally published in 1992). In such instances, the photograph or video recording "should then be received as a so-called silent witness or as a witness which 'speaks for itself.'" Ibid. (citation and internal quotation marks omitted).

Jurisdictions differ on the foundational requirements for silent-witness authentication. Some jurisdictions set forth various relevant factors for consideration, such as "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." People v. Taylor, 956 N.E.2d 431, 439 (Ill. 2011); see also People v. Tuncap, CRA12-032, 2014 WL 235471, at *7 (Guam Jan. 16, 2014) (five factors); United States v. Oslund, 453 F.3d 1048, 1054 (8th Cir. 2006) (seven factors); United States v. Harris, 55 M.J. 433, 439 (C.A.A.F. 2001) (three factors); Wagner v. State, 707 So. 2d 827, 831 (Fla. Dist. Ct. App. 1998) (five

factors); Ex parte Fuller, 620 So. 2d 675, 678 (Ala. 1993) (seven factors).

Other jurisdictions specify no particular factors but instead "allow[] a trial court to consider the unique facts and circumstances in each case—and the purpose for which the evidence is being offered—in deciding whether the evidence has been properly authenticated." State v. Haight-Gyuro, 186 P.3d 33, 37 (Ariz. Ct. App. 2008); see also State v. Luke, 464 P.3d 914, 927 (Haw. Ct. App. 2020) (adopting "a less formulaic approach that focuses on the facts of each case"); State v. Snead, 783 S.E.2d 733, 736 (N.C. 2016) ("Evidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence."); State v. Stangle, 97 A.3d 634, 638 (N.H. 2014) (declining to set forth specific factors for authentication, which "is a determination within the discretion of the trial court"); State v. Anglemyer, 691 N.W.2d 153, 162 (Neb. 2005) (authentication "may be made by any evidence that bears on whether the photographic evidence correctly depicts what it purports to represent"); Kindred v. State, 524 N.E.2d 279, 298 (Ind. 1988) (stating "it would be wrong to lay down extensive, absolute foundation requirements" because every case is different, and instead requiring a strong showing of the videotape's authenticity); Fisher v. State, 643 S.W.2d 571, 575 (Ark. Ct. App. 1982) ("It is neither possible nor wise to establish specific foundational requirements for the admissibility of photographic

evidence under the 'silent witness' theory, since the context in which the photographic evidence was obtained and its intended use at trial will be different in virtually every case.").

Yet even those jurisdictions that identify factors for authentication do not make them exclusive or dispositive criteria. Stangle, 97 A.3d at 638. "These jurisdictions neither require every factor be met nor rule out taking other circumstances into account in particular cases." Tuncap, 2014 WL 235471, at *7. Rather, the "factors are guidelines to be viewed in light of specific circumstances, not a rigid set of tests to be satisfied." Oslund, 453 F.3d at 1055.

Tuncap is instructive because the court there held that the surveillance video was properly authenticated despite no evidence bearing on the recording process. The defendant was tried for multiple burglaries, one of which occurred at a restaurant. 2014 WL 235471, at *1-2. The only evidence connecting the defendant with that burglary was a surveillance video, which the investigating officer viewed from the surveillance system at the restaurant the same day that the burglary occurred. The officer testified that the scene depicted in the surveillance video was the same as he saw it on the day of the burglary, and that the surveillance video played in court was the same one he had viewed at the restaurant. Id. at *2.

The court held that in the absence of evidence regarding the surveillance system, "the trial court should look to when and where the video was first viewed

by the testifying witness" in assessing the authenticity of the video. Id. at *7. The court explained:

> If the video is viewed at the scene soon after the event in question and is viewed not from a copy but directly from the system established on-site, there is little to no risk of tampering or editing the tape. To confirm this reasoning, there should also be an affirmance that the contents of the recording viewed contemporaneously with the recorded event are the same as the contents of the recording sought to be introduced into evidence. Authentication can be bolstered where the testifying witness was present at the scene of the recorded event soon after it happened and acknowledges that the recording depicts events that match with the scene observed. Such testimony would further corroborate that the surveillance video accurately depicts what occurred.
>
> [Ibid. (internal citations omitted).]

Because the officer in Tuncap viewed the surveillance video at the restaurant soon after the burglary occurred, testified that the recording he viewed in court was the same as the recording he viewed at the restaurant, and testified that the contents depicted in the recording matched those he saw at the scene, the court held that the video was properly authenticated. Id. at *8.

Similarly, in People v. Dennis, 956 N.E.2d 998 (Ill. App. Ct. 2011), on which Tuncap relied, the officer who responded to the scene authenticated the surveillance video that captured the crime. The case involved a robbery at a liquor store, where the officer found the injured victim. After tending to the victim, the officer called the proprietor of the company that had installed the surveillance system to assist him with transferring the surveillance video of the robbery to a disc. The proprietor

arrived at the store twenty minutes later, and he and the officer viewed the surveillance video on the monitor at the store. Id. at 1004-05. The proprietor downloaded two copies of the surveillance video to two CDs and printed three still photographs from the surveillance video. Id. at 1003, 1005. He gave the CDs to the officer, who brought one of them to the station and labeled it as evidence. The officer testified that the events depicted on the CD were the same events depicted in the recording he viewed at the liquor store. Ibid.

Affirming the trial court's admission of the CD and the photographs into evidence, the Dennis Court held that "[t]he State presented sufficient proof of the reliability of the process that produced the video recording and photographs for them to be admitted under the silent-witness theory." Ibid. The court added that because the defendant made no "colorable claim that the recording is not authentic or accurate . . . the State need only establish a probability that tampering, substitution, or contamination did not occur. Any deficiencies go to the weight rather than the admissibility of the evidence." Ibid. (citation and internal quotation marks omitted). Ibid.

The fact-sensitive nature of authentication exemplified in Tuncap and Dennis was displayed in this Court's opinion in Hannah, which involved authentication of a post on Twitter (now known as X). Hannah assaulted her ex-boyfriend's new girlfriend by striking the girlfriend in the face with her shoe. 448 N.J. Super. at 82.

Later, Hannah and the victim corresponded on Twitter, culminating in a tweet from Hannah's Twitter account that read: "No need for me to keep responding to ya stupid unhappy fake mole having ass.. how u cring in a corner with a shoe to ya face bitch." Id. at 85. The victim testified at trial to the "back and forth" communication with Hannah prior to the tweet, which was in response to her own tweets and bore Hannah's Twitter handle and profile photo. Id. at 86. In Hannah's own testimony at trial, she acknowledged that her Twitter handle and profile photo appeared in the tweet but denied that she wrote the tweet. Ibid.

Affirming the trial court's admission of the tweet into evidence, this Court held that Hannah's "Twitter handle, her profile photo, the content of the tweet, its nature as a reply, and the testimony presented at trial was sufficient to meet the low burden imposed by our authentication rules." Id. at 90-91. The Court rejected Hannah's contention that social media posts should be subject to a more stringent standard for authentication because such posts could be easily forged. The same is true of any writing, reasoned the Court, which found the traditional methods of authentication, including the use of circumstantial evidence, adequate to accommodate the new technology. Id. at 89. The Court added that "[o]ver the years authentication requirements have become more flexible, perhaps because the technology has become more commonplace." Id. at 89 (quoting Suanez v. Egeland, 330 N.J. Super. 190, 195 (App. Div. 2000)).

Surveillance videos, in particular, have become ubiquitous. As this Court recently observed, there has been an "explosive growth in the number of surveillance cameras in operation[,]" with "approximately 30 million surveillance cameras shooting about 4 billion hours of footage each week[,]" according to a 2018 study. State v. Knight, 477 N.J. Super. 400, 416 n.12 (App. Div. 2023), aff'd, 259 N.J. 407 (2024). That prevalence is of long vintage, and its effects have long been felt in the courtroom. It was more than thirty years ago that our Supreme Court wrote, "[V]ideotape evidence has now become commonplace in criminal cases." Wilson, 135 N.J. at 16.

As with social media posts, the circumstances of a surveillance video can establish the low burden of a prima facie showing of reliability. And because the circumstances of each case vary, "the requirements to guarantee the genuineness of the evidence[] will always differ." Taylor, 956 N.E.2d at 439. Indeed, this is why N.J.R.E. 901 does not include the ten examples of authentication contained in its federal counterpart, see Fed.R.Evid. 901(b)(1) to (10), "because they are not exclusive nor is the proof set out in them necessarily sufficient in all cases." Kalola, 344 N.J. Super. at 204 (quoting 1991 Supreme Court Committee Comment to New Jersey Rules of Evidence, *reprinted* in Biunno, *New Jersey Rules of Evidence* (2001 ed.) at 949).

For this reason, authentication is a "highly fact-sensitive analysis" where

"'any person with the requisite knowledge of the facts represented in the photograph or videotape may authenticate it.'" Brown, 463 N.J. Super. at 52 (quoting Wilson, 135 N.J. at 14). Thus, a police officer who views surveillance video from the surveillance system at the scene of the crime shortly after the crime occurred and testifies that the video played in court is a true and accurate copy of the video he viewed at the scene can establish the accuracy of the surveillance video, as in Tuncap and Dennis, as well as in Brown with respect to the apartment-building videos. Under these circumstances, "there is little to no risk of tampering or editing the tape." Tuncap, 2014 WL 235471, at *7. The officer's testimony that the scene depicted in the video corresponds to the scene as he witnessed it is likewise sufficient to establish that "the scene has not changed between the time of the incident in question and the time of the taking of the" surveillance video. Wilson, 135 N.J. at 15.

Because authentication is ultimately for the jury to decide, "absolute certainty or conclusive proof" is not required. Mays, 321 N.J. Super. at 628. Thus, "the proponent of the evidence is not required to rule out all possibilities inconsistent with authenticity[.]" United States v. Dhinsa, 243 F.3d 635, 658 (2d Cir. 2001) (citation and internal quotation marks omitted). Those possibilities can be explored on cross-examination as a means of influencing the weight ascribed to the video evidence by the jury. "Any concerns that the defendant ha[s] regarding the surveillance procedures, and the method of storing and reproducing the video material, [are]

properly the subject of cross-examination and affect[] the weight, not the admissibility, of the video." Stangle, 97 A.3d at 639 (citation and internal quotation marks omitted). It also bears remembering that "the fact that the tape exists at all is evidence that the tape recorder was functional and that the operator knew how to operate it." Taylor, 956 N.E.2d at 440 (citation and internal quotation marks and text alterations omitted).

From Balian to Bunting to Wilson to Brown, New Jersey courts have steadily increased the admissibility of video recordings. This is in accord with our sister states and the federal courts, which broadly admit video recordings as substantive evidence under their various iterations of silent-witness authentication. All that is necessary is for "any person with the requisite knowledge of the facts represented in the [] videotape" to testify "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." Brown, 463 N.J. Super. at 52 (first quoting Loftin, 287 N.J. Super. at 98, and second quoting Wilson, 135 N.J. at 14). This is "sufficient to meet the low burden imposed by our authentication rules." Hannah, 448 N.J. Super. at 91.

The purpose of those rules is to enable the trial court to make a presumptive determination of reliability, ensuring that there is "sufficient evidence" to enable the jury to make the final determination. Konop, 425 N.J. Super. at 413. This standard,

which has proved itself able to accommodate new technology, is no less able to accommodate the increased use of existing technology. Just as no "new test" was needed for social media postings, Hannah, 448 N.J. Super. at 89, the existing rules can continue to ensure the reliability of video evidence in New Jersey, as they have for decades.

POINT II

THE STATE PROPERLY AUTHENTICATED THE SURVEILLANCE VIDEO.

Defendant's claim that Officer Faltz was unfamiliar with the scene, did not speak with the store owner, and did not review all of the surveillance video is contradicted by the record. Officer Faltz testified that he responded to the grocery store shortly after the shooting, where he viewed the surveillance video at the scene with the consent of the store owner. He further testified that the video played in court was the same one he viewed at the store, and that the video accurately represented the scene as he witnessed it on the day of the shooting. Because this was sufficient to establish a prima facie showing that the video and the still shots derived from it were accurate reproductions of the scene at the time the shooting occurred, the video was properly authenticated. Judge Romanyshyn thus appropriately exercised his discretion in admitting the video and still shots into evidence.

"[A] trial judge's evidential rulings are entitled to a strong degree of deference and are reviewed under an abuse of discretion standard." State v. Howard-French, 468 N.J. Super. 448, 459 (App. Div. 2021). Under this "highly deferential" standard, the reviewing court will not reverse an evidentiary ruling unless it was "so wide of the mark" that it was "clearly capable of producing an unjust result." State v. Olenowski, 255 N.J. 529, 572 (2023) (citations and internal quotation marks

omitted).

Prior to Officer Faltz testifying, defense counsel objected that the officer could not authenticate the surveillance video, that the owner of the grocery store was required for that purpose. (1T69-3 to 6). The prosecutor responded that Officer Faltz went to the store "a short time after the incident" and "received consent from the owner of the store" to download the video. The officer "reviewed [the video] at the time he was downloading it" as well as in preparation for trial, and he "can authenticate the location . . . can authenticate the supermarket, inside, the outside, that it does fairly and accurately depict what it looked like and what he downloaded on that date[.]" (1T70-4 to 14). Judge Romanyshyn ruled that the video was admissible:

> Under the facts and circumstances proffered here, I am satisfied that the detective's response to the location and the obtaining of consent, as well as the review and downloading of the video in close proximity to the events that it purports to depict is adequate authentication for admissibility purposes. The video comes in.
>
> [(1T71-21 to 72-2).]

Officer Faltz testified that he responded to the grocery store on July 16, 2019, to download the surveillance video. (1T74-13 to 23). This was shortly after the shooting occurred in the 6:00 p.m.-hour on that date. (1T94-21 to 23). With the consent of the grocery store owner, Officer Faltz downloaded the video. (1T76-11 to 15; 1T80-1 to 6). The prosecutor asked Officer Faltz, "[W]hen you downloaded

the video, did you check for any dates and time to see if they were accurate?" The officer answered that he did. "So, to do that you had to review the video, correct?" "Yes," answered Officer Faltz, who added that he reviewed "[p]art of it." (1T81-7 to 13; 1T82-7-8). "And we reviewed the videos in anticipation of your testimony today?" the prosecutor continued. "Correct," Officer Faltz replied. "Was the video altered or modified in any way when you reviewed it?" "No," answered Officer Faltz. (1T82-9 to 14).

The prosecutor proceeded to show Officer Faltz still shots from the surveillance video:

> Q. I am showing you a still shot of what has been premarked as State Exhibit S-23. Is this one of the camera angles that you recovered?
>
> A. Yes.
>
> Q. Has this been modified or altered in any way?
>
> A. No.
>
> Q. And what exactly are we looking at on this camera angle?
>
> A. I believe this is the eastbound U, Orange Street. In front of the store.
>
> Q. And once again, this has not been altered in any way?
>
> A. No.
>
> Q. And this is the same still shot that you reviewed previously and you and I reviewed together?

A. Correct.

. . .

Q. Now, showing you a different still from the same Exhibit S-23 that's been premarked. Is this another angle that you recovered from the surveillance videos?

A. Yes.

Q. And has this been altered or edited in any way?

A. No.

Q. And what are we looking at here?

A. The inside of a supermarket facing, camera angle is facing the front door.

Q. Okay. And this is the same video that you previously reviewed and you and I reviewed together?

A. Correct.

. . .

Q. And in front of you I have another still. I fast[-]forwarded it through the player. Is this another camera angle that you recovered in your surveillance videos?

A. Yes.

Q. Has this been edited or altered in any way?

A. No.

Q. Is this also the video that you previously reviewed and you and I reviewed together in preparation for today?

A. Yes.

Q. And what are we looking at here?

A. Outside camera []view should be facing westbound.

[(1T85-25 to 86-15; 1T86-25 to 87-12; 1T87-22 to 88-9).]

This testimony established that Officer Faltz was familiar with the scene, that the video accurately represented it, and that the video that was played in court was the same video that Officer Faltz viewed at the store a short time after the shooting. It therefore provided sufficient indicia that the video "is an accurate reproduction of what it purports to represent" and that the scene depicted in the video "ha[d] not changed between the time of the incident in question and the time of the taking of" the video. Wilson, 135 N.J. at 15.

These are the same proofs that were sufficient to authenticate the surveillance videos in Tuncap and Dennis, and the apartment-building video in Brown. In those cases, officers responded to the respective scenes a short time after the crimes, viewed the surveillance videos from the systems on site, and downloaded or supervised the downloading of the videos. At trial, the officers testified that the videos played in court were accurate representations of the scenes when they witnessed them, and that the contents of the videos were the same as the contents of the recordings they viewed on the surveillance systems on the dates of the crimes. Tuncap, 2014 WL 235471, at *2; Dennis, 956 N.E.2d at 1003-05; Brown, 463 N.J. Super. at 44.

Moreover, Officer Faltz's testimony did not exceed his firsthand knowledge, which was the deficiency in Wilson, where the officer had only secondhand knowledge of where the employees, the defendant, and the victim were situated in the store when the crime occurred. See 135 N.J. at 18-19. Officer Faltz did not testify to the events depicted in the video, nor did he identify the persons involved. As Brown teaches, an authentication analysis requires consideration of "the evidential purposes for which the recording is being offered." 463 N.J. Super. at 52 (citation and internal quotation marks omitted). The officer in Brown was able to identify the defendant in the apartment-building videos because he was the officer who interviewed the defendant. Id. at 43-45. The eyewitness was needed to authenticate the cell-phone video because she identified herself in the video and testified to the contents of the video. Id. at 53.

Defendant offers no reason why Officer Faltz needed to speak with the store owner before viewing and downloading the surveillance video. The store owner completed a consent form after speaking with a detective. (1T76-7 to 10; 1T79-7 to 80-3). Defendant's contention that Officer Faltz did not view the entire surveillance video derives from the officer's testimony that he viewed "part of" the video with respect to determining the time and date of the video. (1T81-7 to 82-8). But this was immediately followed by the prosecutor's question whether Officer Faltz viewed the video with him in preparation for trial, which the officer confirmed he

did. (1T82-9 to 11).

That the date and time included in the video are inaccurate is irrelevant to the admissibility of the video. Officer Faltz testified that the timestamp on the video was approximately twelve hours ahead, indicating the 6:00 a.m.-hour of July 17, 2019, instead of the 6:00 p.m.-hour of July 16, 2019. (1T81-14 to 24; 1T94-4 to 23). The discrepancy in the time did not affect the admissibility of the video, but only its weight. See Dennis, 956 N.E.2d at 1005; Stangle, 97 A.3d at 639. As such, it was properly the subject of cross-examination, where defense counsel explored the issue with Officer Faltz, who testified that it could have been due to "a power outage" or to an incorrect manual entry by "[w]hoever installed it[.]" (1T93-15 to 17). Officer Faltz definitively testified that it was not caused by his downloading of the video, which had "[n]othing to do with it." (1T93-21 to 23); see also Brown, 463 N.J. Super. at 45 n.4 (finding the fact that "the time stamp was fast by twelve hours and eight minutes" for the still photographs derived from the apartment-building videos did not affect the admissibility of the photographs or the videos).

The record establishes that the events captured on the video occurred on July 16, 2019. On re-direct examination, Officer Faltz confirmed that he responded to the scene on July 16. (1T95-2 to 3). "So, you respond on the 16th and the date stamp is for the 17th, right?" asked the prosecutor. "Correct," answered Officer Faltz. (1T95-4 to 6). Because Officer Faltz viewed and downloaded the surveillance

video on July 16, and because he testified that the events depicted in the video he viewed in court were the same events that were depicted in the video he viewed at the store, those events could not have occurred on July 17. See (1T82-9 to 14; 1T85-25 to 86-15; 1T86-25 to 87-12; 1T87-22 to 88-9).

Defendant's claim that Officer Faltz was an expedient substitute for other witnesses whom the State was unable to obtain to authenticate the video is a spurious contention belied by the record. The State always intended to introduce the surveillance video and still shots through Officer Faltz. When defense counsel objected that the proprietor of the store needed to testify to authenticate the video, the prosecutor responded, "I don't see why I would need . . . the owner to say that he gave consent. There is nothing in the [] motion practice saying there was anything wrong with the way the videos were downloaded." (1T65-7 to 11). Confirming his intention to authenticate the video and photographs through Officer Faltz, the prosecutor stated that "there [are] going to be photo arrays presented through the detective after the testimony." (1T66-1 to 3). The prosecutor added, "There is nothing in caselaw or in our rules that requires the specific owner of the store or anything like that that [defense counsel] is suggesting to come here and to authenticate the video." (1T70-14 to 17). Based on the prosecutor's proffer of Officer Faltz's testimony, Judge Romanyshyn ruled that the video was admissible through the officer's testimony. (1T71-21 to 72-2).

It was after this that the prosecutor stated, "Oh, and Judge, we did confer with the lieutenant in my office, he is sending a team out right now to see if we can find one of the lay witnesses." (1T72-3 to 6). It is not clear from the record who these witnesses were or their anticipated testimony; all four of the State's witnesses were police officers. But it is clear that these lay witnesses would not be authenticating the video, which Judge Romanyshyn had just held was admissible through Officer Faltz's testimony.

Notably absent from this appeal is any claim by defendant that the video was inaccurate. Cf. Tuncap, 2014 WL 235471, at *8 ("Tuncap has not challenged the veracity, accuracy, or quality of the recording"); Dennis, 956 N.E.2d at 1005 (the defendant did not "make a colorable claim that the recording is not authentic or accurate"); Brown, 463 N.J. Super. at 53 (the "defendant presented no evidence undermining the reliability of [the] cell phone video"). As the court in Tuncap reasoned, "If the video is viewed at the scene soon after the event in question and is viewed not from a copy but directly from the system established on-site, there is little to no risk of tampering or editing the tape." 2014 WL 235471, at *7.

Because Officer Faltz testified that the surveillance video and still shots depicted the scene as he saw it on the day of the crime, and that the contents of the recording played in court were the same as the contents of the recording he viewed at the store, his testimony established a prima facie showing that the surveillance

video and still shots accurately depicted the scene at the time the shooting occurred. The State having presented sufficient evidence to meet the slight threshold burden of proof for authentication, Lingala, 91 F.4th at 696, Judge Romanyshyn appropriately exercised his discretion in admitting the surveillance video and still photographs into evidence.

CONCLUSION

For the reasons expressed, the Attorney General urges this Court to affirm the Law Division's admission of the surveillance video and still photographs into evidence.

Respectfully submitted,

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DATED: March 7, 2025

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March 17, 2025

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
R.J. Hughes Justice Complex
25 W. Market Street
Trenton, NJ 08625-0006

Re: STATE OF NEW JERSEY, Plaintiff-Respondent V.
ALBERTO PENA, Defendant-Appellant
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-359-23T2; ON APPEAL FROM JUDGMENT
OF CONVICTION ENTERED BY THE SUPERIOR COURT OF
NEW JERSEY, LAW DIVISION-CRIMINAL PART, ESSEX
COUNTY (19-10-02948-I); CRIMINAL ACTION; SAT BELOW:
HON. CHRISTOPHER S. ROMANYSHYN, J.S.C.;
SUBMITTED: MARCH 17, 2025; DEFENDANT IS CONFINED

Dear Honorable Judges:

Please accept Alberto Pena's letter brief [1] replying to the amici briefs.

---

[1] On the brief: Robert C. Pierce (# 030401994; robertcpierce@optonline.net). Of counsel: Jeff Thakker (#031811995), 215 Morris Ave., 2nd Floor, Spring Lake, NJ 07762. Phone: 732-610-4798. E-Fax: 309-413-5658. E-Mail: jthakker@thakkerlaw.com.

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REPLY TO OAG'S PRELIMINARY STATEMENT

The Office of Attorney General's contention that the admissibility of video footage is ultimately for the jury, was not raised by the parties to this appeal. The contention is in any event inconsistent with the requirement that the proponent authenticate the evidence prior to its admission.

The Attorney General's point about the standard for authentication being relatively low was conceded by the parties. The problem here is that the witness (Alton Faltz) knew nothing about the recording equipment, he responded

[2] "Drab_" refers to the Defendant's reply to the amicus briefs.

because of difficulties encountered by whoever was trying to download the footage earlier, he did not view the footage when he downloaded it, he subsequently viewed only an unidentified portion of it, and the ostensible date/time of the footage is inconsistent with the happening of the crime as represented by the State's other witnesses. Mr. Pena argued that accepting the State-Respondent's arguments would be tantamount to making authentication a jury question rather than a judge's responsibility – and the OAG is now trying to expand the appellate issues and suggest that it should indeed be a jury question. The Appellate Division is urged to consider the issues raised by the parties and not effectively rewrite a Rule of Evidence at the urging of the OAG as amicus curiae.

REPLY TO AMICI STATEMENTS OF PROCEDURAL HISTORY [3]

The Office of the Public Defender adopts Mr. Pena's procedural history. See OPDb1.

Regarding the Office of the Attorney General's comment at OAGb3, the judgment of conviction correctly reflects that Count 3 charged Mr. Pena with a second-degree crime. See Da9.

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[3] "OAGb_" (Office of Attorney General's brief)
"OPDb_" (Office of Public Defender's brief)

REPLY TO AMICI STATEMENTS OF FACTS

Mr. Pena agrees with and adopts the factual presentation at OPDb1 to OPDb3.

Mr. Pena objects to the Attorney General's "supplement[ation] [of] the State's Counterstatement of Facts" (OAGb4). "An amicus must accept the case as presented by the parties." S.C. v. Dep't of Children & Families, 242 N.J. 201, 240 n.10 (2020).

The Attorney General improperly relies on comments made by the prosecutor (1T69-18 to 70-17) regarding whether Alton Faltz "viewed the surveillance video when he downloaded it" (OAGb4). The OAG also claims that Faltz definitely viewed the footage at the scene. What Faltz's actual testimony is at 1T80-25 to 1T81-3:

> Q. * * * Now, when you responded to the scene, did you review the videos at the scene?
>
> A. Maybe.
>
> Q. Before downloading?
>
> A. Before downloading? No.

At some point thereafter, Faltz reviewed only an unknown part of the video:

> Q. So, you reviewed the videos, correct?
>
> A. Part of it, yes.
>
> (1T82-7 to 1T82-8)

As for the record supplementation at OAGb6, the prosecutor repeatedly advised the jurors that Mr. Pena was employed by the bodega where the shooting occurred (1T23-7 to 1T24-2; 2T69-14 to 2T69-16), and where the video footage was taken (1T75-1 to 1T75-9; 1T76-14 to 1T76-15). The video does not show the actual shooting even if it shows Mr. Pena. Which is why the supposedly "[i]naccurate" (1T81-18) date/time stamp is problematic.

REPLY TO AMICI LEGAL ARGUMENT

I. THE PUBLIC DEFENDER'S ARGUMENTS ARE PERSUASIVE, WHEREAS THE ATTORNEY GENERAL'S ATTEMPT TO REWRITE N.J.R.E. 901 IS IMPROPER AND BEYOND THE SCOPE OF THIS APPEAL.

Mr. Pena joins the Office of the Public Defender's cogent (and concise) analysis at OPDb4-OPDb10.

The Office of the Attorney General's submission is as long as the original appellate and respondent briefs combined. Given the 10-page limitation for this reply, the OAG's contentions cannot be addressed at great length.

At OAGb7 to OAGb8, the Attorney General begins its prolonged discussion about Evidence Rule 901 factors in other jurisdictions. N.J.R.E. 901 does not have subparts or factors. It simply states: "To satisfy the requirements of authenticating or identifying an item of evidence, the proponent must present sufficient evidence to support a finding that the item is what its proponent

claims." Mr. Pena has acknowledged that the standard is low. His argument is that the aforementioned Faltz testimony does not meet that standard for purposes of admitting video footage which does not actually show the shooting, and which has 'inaccurate' date/time stamping – especially when he would be expected to be in front of that camera a good portion of each day in connection with his job.

At OAGb10, the Attorney General quotes State v. Brown, 463 N.J. Super. 33, 52 (App. Div. 2020), for the proposition that "any person with the requisite knowledge of the facts represented in the [] videotape[.]" The question then becomes: Does Faltz have the requisite knowledge of the facts? Was he an eyewitness? No. Is he familiar with how the bodega's video-surveillance system works? No. Did he view the footage when he supposedly downloaded it? No. Did he view it at the scene? Maybe yes, maybe no. Did he ever watch the footage? Some of it. Do the date and time stamps match what he was supposed to have downloaded? No.

At Pb11, the OAG cites State v. Bunting, 187 N.J. Super. 506 (App. Div. 1983). That opinion serves only to distinguish the present case from those involving a person with relevant knowledge. "Specifically, the State introduced Wyatt's testimony regarding the installation and view of the camera; the testimony of Mr. Restaino, the loss/security representative for Quick Check, as to the camera's operation and his own 'periodic testing' of the camera, as well as

his removal of the film." Id. at 509.

At OAGb15- OAGb19, the Attorney General discusses opinions from other jurisdictions. None of the cases address the Faltz situation presented here. This 'witness' was sent to the bodega, not to investigate anything, but to provide tech support to someone who had been unsuccessful trying to download video footage. He was not looking at the footage he was downloading. The time and date stamps do not match when the shooting occurred, and so the 'witness' guesses that that means there must be something wrong with the time and date stamping.

At OAGb17, the Attorney General's analogy that the Faltz situation presented here was similar to the facts in People v. Tuncap, CRA12-032, 2014 WL 235471 (Guam Jan. 16, 2014) is misguided. The Attorney General contends that the surveillance video of a burglary in Tuncap was properly authenticated despite no evidence bearing on the recording process. In Tuncap, there was plenty of evidence presented. First, The investigating officer viewed the surveillance video the same day the burglary occurred at the restaurant, which did not occur in this matter. Second, the investigating officer confirmed that the video he viewed on the same day as the burglary is the same video now being played in court, which could not have occurred because Faltz could not confirm the video being played in court was the same video he viewed at the bodega

because he did not view the entire video at the bodega. And third, the video played in court was the same one the investigating officer viewed at the restaurant, which Faltz could not have known. Cleary there was evidence presented to authenticate the video in Tuncap, while there was no such evidence presented in the instant matter. One must remember, the investigating officer could not operate the surveillance video. Faltz was brought in to download it from the system, not to view it for evidential purposes. The Attorney General's reliance on Tuncap is misplaced and the holding supports Mr. Pena's position that the video was not properly authenticated.

The Attorney General returns to New Jersey law and discusses "a police officer who views surveillance video from the surveillance system at the scene of the crime shortly after the crime occurred and testifies that the video played in court is a true and accurate copy of the video he viewed at the scene" (OAGb22). This case does not involve even that threshold of evidence. Galtz testified that he definitely did not view the video while downloading. He said that he "maybe" viewed video at the scene.

The Attorney General resumes its argument that "authentication is ultimately for the jury to decide" (OAGb22). The prosecution did not go so far as to argue this. Amicus curiae cannot raise issues that the parties did not raise. C.T. v. M.T., 257 N.J. 126, 152 (2024). In any event, and to reiterate, N.J.R.E.

901 requires the proponent "[t]o satisfy the requirement of authenticating" prior to admissibility." While New Jersey may have "increased the admissibility of video recordings" (OAGb23), excising language from N.J.R.E. 901 is not a function of this Court.

At OAGb23, the Attorney General recognizes the duty of the "trial court to make a presumptive determination of reliability . . . ." However, the OAG had just argued that authentication is "ultimately for the jury" (OAGb22). The evidential standard being proposed is confusing and it would invite a free-for-all whenever the so-called 'silent witness' of video footage is involved. As written, N.J.R.E. 901 requires authentication before admission, and thus the jurors cannot be the ones who ultimately decide authentication. And the fact remains that the Faltz testimony cannot satisfy the rock-bottom existing authentication requirements.

At OAGb26-OAGb29, the Attorney General attempts to dispute what Faltz actually testified to about viewing video footage before preparation for trial. At OAGb30, the Attorney Generally backs off and asserts that "Officer Faltz viewed the video with [the prosecutor] in preparation for trial . . . ." Faltz lacked independent knowledge to authenticate required under N.J.R.E. 901. The State cannot circumvent the Rule by having its prosecuting attorney review the footage with the 'witness,' and then bootstrap the newly acquired 'knowledge'

for trial purposes.

At OAGb33, the Attorney General argues over when the prosecutor sought an alternative to Faltz in attempting to authenticate the footage. The contention is irrelevant. Faltz could not authenticate, he did not authenticate, and there was no other witness presented in order to satisfy the N.J.R.E. 901 threshold.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original merits brief, in the reply brief, and in the Office of the Public Defender's submission, the judgment of conviction should be reversed and vacated.

Respectfully Submitted,

s/ Robert Carter Pierce
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June 11, 2024

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
R.J. Hughes Justice Complex
25 W. Market Street
Trenton, NJ 08625-0006

Re: STATE OF NEW JERSEY, Plaintiff-Respondent V.
ALBERTO PENA, Defendant-Appellant
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NEW JERSEY, LAW DIVISION-CRIMINAL PART, ESSEX
COUNTY (19-10-02948-I); CRIMINAL ACTION; SAT BELOW:
HON. CHRISTOPHER S. ROMANYSHYN, J.S.C.;
SUBMITTED: JUNE 11, 2024; DEFENDANT IS CONFINED

Dear Honorable Judges:

Please accept this reply letter brief [1] on behalf of Alberto Pena.

TABLE OF CONTENTS

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REPLY TO COUNTERSTATEMENT OF PROCEDURAL HISTORY

The State adopts Mr. Pena's statement. See Pb1.

REPLY TO COUNTERSTATEMENT OF FACTS

At Pb1, the prosecution points out that law enforcement deemed "a hat lying on the sidewalk" to have evidential significance. There is nothing in the record associating the hat with either Mr. Pena or Andres Sosa.

At Pb1 to Pb2, the State mentions Mr. Sosa's ability to communicate and

the subsequent identification of Mr. Pena as the shooter. The defense cannot emphasize enough that this information was presented to the jury in a manner suggesting that Sosa identified Pena during the communication:

> Q. Mr. Brown, now, based on your investigation and following your interview with Mr. Sosa, what did you do next?
>
> A. I attempted to look for the suspect.
>
> Q. And did you identify who that suspect was?
>
> A. Yes.
>
> Q. Who was it?
>
> A. Alberto Pena.
>
> 2T32-8 to 2T32-15.

The content of Sosa's interview was hearsay.

At Pb2, the prosecution focuses on the video. However, the jury was focused on the hearsay. During deliberations, the jurors "ask[ed] for the Detective's report of the victim and statement" (2T129-3 to 2T129-4), which they would not have done if the video were as compelling as the State claims. It is not at all clear from the video that there is a gun. No gun is discharged in the footage. There is no visible tattoo in the outside video. The jury wanted Sosa's hearsay statement identifying Pena, and the judge "instruct[ed] you as I instructed you earlier, that it is your recollection of the detective's testimony that controls" (2T132-16 to 2T132-18).

REPLY TO LEGAL ARGUMENT

I. REPLYING TO POINT I, THE STATE MOST CERTAINLY DID IMPLY THAT SOSA IDENTIFIED PENA AS THE SHOOTER IN THE OUT-OF-COURT STATEMENT.

At Pb3, the prosecution flat out denies that which is set forth at 2T32-8 to 2T33-11. The State failed to produce Sosa and other witnesses who allegedly identified Pena as the shooter. The prosecutor circumvented the problem by eliciting Detective Shaheed Brown's testimony that he spoke with the people, then identified Pena.

The prosecution (at Pb3) misunderstands the holding in State v. Bankston, 63 N.J. 263 (1973). The issue there was not whether a testifying police officer may refer to 'information received.' The problem was that the witness went further and led the jury "to believe that . . . [the] informer, who was not present in court and not subjected to cross-examination, had told the officers that defendant [had] committ[ed] a crime." Id. at 271.

The reliance on State v. Roach, 146 N.J. 208 (1996), see Pb3, is unavailing. There, the Supreme Court reaffirmed that "it is the 'creation of the inference, not the specificity of the statements made,' that determines whether the hearsay rule was violated." Id. at 225 (quoting State v. Irving, 114 N.J. 427, 447 (1989)). The deprivation of the defendant's confrontation right was deemed harmless in that case. "'The question is whether there is a reasonable possibility

that the evidence complained of might have contributed to the conviction.'" Id. at 226 (quoting Bankston, 63 N.J. at 273). The jurors specifically requested Detective Brown's report and Sosa's statement, and was told that they had to rely on their recollection of Brown's testimony.

Quoting from State v. Medina, 242 N.J. 397, 419 (2020), the State (at Pb4) refers to "anything else tying the defendant to the crime[.]" The State appears to be suggesting that the use of hearsay and the deprivation of confrontation rights is irrelevant because of the video footage. The jurors obviously did not agree because they asked to see the Brown report and Sosa's statement.

The State refers to "the context of the testimony" (Pb4). The detective testified that he heard out-of-court declarations, then he identified the shooter. One is at a loss how Mr. Pena is taking the testimony out of context.

At Pb5, the prosecution paraphrases portions of the transcript regarding Detective Brown's investigation. At Db6, the defense directly quoted 2T32-8 to 2T33-11. The "inescapable inference" (Medina, 242 N.J. at 409 (quoting Bankston, 63 N.J. at 271)) was that the non-testifying witnesses told the detective that Pena shot Sosa. If the State did not intend that inference, then Brown's representation that he spoke with the declarants would have been pointless.

At Pb5 to Pb6, the prosecution continues to tout what it claims to have

seen on the video. The jurors saw the video -- and they asked the judge for Detective Brown's report and the witness statement. "'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" Bankston, 63 N.J. at 273 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). There is more than a reasonable probability that the jurors convicted Mr. Pena based on what they assumed Mr. Sosa had said to the detective.

At Pb7, the State cites R. 2:10-2. To the extent the prosecution is insinuating that Mr. Pena failed to object to the hearsay below, the claim is belied by the record. See 2T33-5.

II. REPLYING TO POINT II, THE COURT SHOULD HAVE INSTRUCTED THE JURORS REGARDING ASSUMPTIONS ABOUT WHAT WAS SAID TO DETECTIVE BROWN.

At Pb7 to Pb8, the State asserts that, because it does not believe the implicit hearsay was improperly admitted, the trial judge did not have to instruct the jury regarding same. When the jurors asked to review Detective Brown's report and the victim's statement (2T129-3 to 2T129-4), it was clear that they were influenced by Sosa's out-of-court declaration. Instead of instructing the jurors that the content of whatever Sosa may or may not have said was not evidence, the court compounded the problem by telling them to be guided by their recollection of Brown's testimony. This was plain error and it warrants

reversal.

III. REPLYING TO POINT III, THE VIDEO FOOTAGE WAS IMPROPERLY ADMITTED.

The defense will not repeat what is set forth at Db12 to Db16. The State (Pb8 to Pb11) sloughs off the admission of the video as an act of trial court discretion. The witness, Faltz, did not review the video before downloading it (1T80-24 to 1T81-3), and he 'authenticated' all of the footage even though he had only reviewed a portion of it (1T82-7 to 1T82-8).

IV. REPLYING TO POINT IV, MR. PENA WAS ENTITLED TO A JUDGMENT OF ACQUITTAL.

At Pb13, the State effectively admits that, if the video was inadmissible, there would have been insufficient evidence to survive a defense motion for acquittal.

V. REPLYING TO POINT V, THE PROSECUTOR'S SUMMATION WAS IMPROPER IN SEVERAL RESPECTS.

The State claims that the prosecutor mentioned Sosa's statement to Detective Brown, in order to "describ[e] to the jury what the victim's injuries were" (Pb15). If that were the case, Brown would only have testified as to what he saw. It was unnecessary for Brown to testify that Sosa said something. The prosecution intended the jury to deduce that what Sosa said identified Pena as the shooter.

At Pb16, the State defends the gratuitous statements made during

summations. The State does not pretend that the video shows anyone 'fleeing' the scene, or that Mr. Pena disappeared for a month before he was arrested.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original merits brief, the judgment of conviction should be vacated.

Respectfully Submitted,

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