FILED, Clerk of the Supreme Court, 14 Aug 2024, **088970**

Supreme Court of New Jersey

DOCKET NO. 088970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FUQUAN K. KNIGHT,
a/k/a FUQUAN K. KNIGHT, JR.,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAQUAN K. KNIGHT,
a/k/a SHAQUAN KYLE, and
SHAQUAN KYLE KNIGHT,

Defendant-Appellant.

Criminal Action

On Certification Granted from a Final Order of the Superior Court of New Jersey, Appellate Division.

Sat Below:
Hon. Jack M. Sabatino, P.J.A.D.
Hon. Joseph L. Marczyk, J.A.D.
Hon. Mark K. Chase, J.A.D. (t/a)

BRIEF AND APPENDIX ON BEHALF OF
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July 29, 2024

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PRELIMINARY STATEMENT

With nearly 100 million surveillance cameras in use nationwide, video surveillance systems have become an increasingly integral part of our society. These cameras are also omnipresent, with the ability to record nearly every facet of our daily lives. As a result, video footage has come to play a vital role in the truth-seeking function required for criminal justice: it gives both law enforcement and juries compelling evidence of a defendant's guilt or innocence.

But just a few seconds of video footage can contain crucial information that a jury may not be able to discern when watching it at normal speed. So, recognizing the important role these videos can play at trial, courts across the country have permitted their juries to watch relevant video footage in slow motion. Indeed, defendants have cited no authority to the contrary, nor is the Attorney General aware of any.

At issue in this case is whether this Court, which already relies on a jury's ability to re-watch a video "slowly" and "frame-by-frame" in deliberations, should rule similarly and explicitly hold that juries may re-watch video footage in slow motion if requested during their deliberations.

In arguing to the contrary, defendants offer a social science study and a few articles on the alleged "intentionality" bias that can result from watching videos in slow motion to support their position. But intentionality was not a

contested issue in this case, and moreover, defendants' sources fail to prove that slow-motion replay necessarily leads to less accurate perceptions of intent anyway. There are also significant and documented advantages to allowing a jury to re-watch a video in slow-motion, such as allowing jurors to see what happened during the event more clearly, allowing them to determine the identity of the individuals in the video and what role each person played, and providing potentially crucial context for the events that transpired. Allowing a jury to slow and pause video evidence during deliberations can thus increase the jury's ability to accurately analyze the evidence in arriving at a more accurate verdict.

Here, six relevant seconds of a single, non-audio surveillance video offered evidence of the identities of the perpetrators involved in a robbery as well as each of their actions during the crime, details that were not easily seen when the backlit, one-square inch segment of video was played at regular speed. The trial judge thus granted the jury's request to replay the video in slow motion, but followed the precautions established for replay of other types of video evidence: the video was replayed for the jury in open court, under court supervision, and with all counsel present. This was a proper exercise of her discretion, and on appeal, the Appellate Division agreed. This Court should thus afford the judge's decisions the same appropriate deference and affirm the slow-motion video replay using the precautions taken in this case.

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QUESTION PRESENTED

Should New Jersey, in line with courts across the country, permit a jury upon request during its deliberations to review in slow motion and pause a non-audio surveillance video that was admitted into evidence without objection if the court determines in its discretion it would assist the jury in reaching an accurate verdict?

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STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The Attorney General relies on the procedural history and facts set forth in the Appellate Division opinion and adds the following:

On December 23, 2023, the Appellate Division issued an opinion in this case, State v. Knight/Knight, A-0377-20, A-0437-21 (App. Div. Dec. 23, 2023). A redacted portion of the opinion was published. State v. Knight, 477 N.J. Super. 400 (App. Div. 2023). (DSa1-59).

On May 7, 2024, this Court granted defendants' Petitions for Certification, "limited to defendant's challenge to the trial court's determination to permit the jury to view the surveillance video multiple times in slow motion." (DSa60-61).

[1] For the Court's convenience and to avoid repetition, the State has combined the Statement of Procedural History and the Statement of Facts.

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LEGAL ARGUMENT

POINT I

THE TRIAL JUDGE PROPERLY EXERCISED HER DISCRETION WHEN GRANTING THE JURY'S REQUEST DURING DELIBERATIONS TO REVIEW SIX SECONDS OF NON-AUDIO VIDEO FOOTAGE USING THE SLOW MOTION AND PAUSE FEATURES.

There were over 70 million surveillance cameras nationwide in 2018, Stanislava Ilic-Godfrey, Beyond the Numbers, Bureau of Labor and Statistics, Vol. 10, No. 9 (May 2021), and today, there are likely over 100 million cameras in use.[2] Whether they are providing aerial footage from drones, recording crowds of people from a street corner, or using specialized vehicle- or facial-recognition software to capture someone's movements, these cameras can record nearly every facet of our daily lives.

Surveillance footage has thus "become a staple of criminal trials[.]" State v. Watson, 472 N.J. Super. 381, 472 (App. Div. 2022), rev'd on other grounds, 254 N.J. 558 (2023). In the hands of a jury, this video footage is a powerful tool, providing jurors with an opportunity to view "video of contemporaneously recorded events at the crime scene," State v. Garcia, 245 N.J. 412, 431 (2021), and providing "important context for the factual assertions" presented at trial.

[2] Available at https://www.bls.gov/opub/btn/volume-10/pdf/ investigation-and-security-services.pdf (last accessed July 26, 2024).

State v. Cole, 229 N.J. 430, 451 (2017). See also United States v. Escalante-Melgar, 567 F. Supp. 3d 485, 491–92 (D.N.J. 2021) (noting that videos can be extremely probative because they can preserve "the truth" and "ascertaining the truth is the jury's most critical function[.]") (citations omitted).

Just a few seconds of video footage can contain valuable information that jurors may not be able to see when watching it at normal speed. Recognizing this and the significant probative value of this footage, dozens of courts across the county have permitted their juries to watch and replay video footage in slow-motion. Contrary to defendant Shaquan's insistence, merely replaying video at a slower speed does not create "altered" evidence nor create new evidence.

Although this State has not squarely addressed the issue, this Court's recent opinion in State v. Higgs, relied on a jury's ability to replay video footage "slowly" during its deliberations as part of its holding on a different issue. 253 N.J. 333, 341 (2023). In Higgs, the State played dashcam video footage from an officer's patrol vehicle during the defendant's homicide trial for fatally shooting the mother of his child. Ibid. One of the State's witnesses, a police officer who was not present at the scene of the crime, narrated portions of the video and pointed out where he believed he saw the gun in Higgs's waistband. Ibid. In ruling that the officer's narration testimony was impermissible, this Court determined that the testimony invaded the province of the jury, which

could view the video for itself. Id. at 366. It stated, "The video was in evidence and the jury should have been permitted to view it slowly, frame by frame, to determine for themselves what they saw on screen[.]" Id. at 367 (emphasis added). This Court thus predicated its holding on the jury's ability during deliberations to re-watch video evidence in slow motion that had been introduced at trial.

The Appellate Division in its opinion in this case also cited law from the Supreme Courts of four states—Pennsylvania, North Carolina, Georgia, and Kentucky—and an opinion of the Seventh Circuit to highlight other courts' recognition of their trial judges' discretion to permit the prosecution to introduce slow-motion video footage at trial.[3] Knight, 477 N.J. Super. at 419-20. "The case law of other jurisdictions addressing the slow-motion replays have generally authorized the presentation of video evidence in that mode within the trial court's discretion, subject to offsetting considerations." Id. at 419.

In fact, courts a total of thirty different jurisdictions have permitted slow-motion replay of crucial video evidence during deliberations, allowed slow-motion versions of a video to be admitted as evidence at trial, or have upheld

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[3] Commonwealth v. Cash, 137 A.3d 1262, 1277 (Pa. 2016); State v. Brewington, 471 S.E.2d 398, 403 (N.C. 1996); Brown v. State, 411 S.E.2d 366, 367 (Ga. App. 1991); Burkhart v. Commonwealth, 125 S.W.3d 848, 850 (Ky. 2003); United States v. Plato, 629 F.3d 646, 652 (7th Cir. 2010), respectively.

convictions after the jury was shown slow-motion videos. See Jules Epstein, 36 Selective Science, Crim. Just., Spring 2021 at 65, 66 (2021) (noting that state and federal level courts nationwide at have "uniformly rejected" challenges to slow-motion replay: "[o]f those addressing admissibility, none found an abuse of discretion.").

Some of these courts have addressed slow-motion video replay in the context of jury deliberations. See Lard v. State, 431 S.W.3d 249, 265 (Ark. 2014) (acknowledging jury may review video "at slowed speeds" to better understand events of incident that "unfolded so quickly."); Phornsavanh v. State, 481 P.3d 1145, 1150 (Alaska Ct. App. 2021) ("The jury was provided with a playback device enabling the jury to watch the video in slow-motion or frame-by-frame."); People v. Herrera, 102 Cal.App.5th 178, 252 (Cal. Ct. App. 2024) (confirming no misconduct in jury repeatedly re-watching slow-motion videos during deliberations, with jurors stating videos were watched "at least 50 times" or "ad nauseum."); State v. Osbourne, 53 A.3d 284, 296 (Conn. App. Ct. 2012) (finding jury could "return to the courtroom as often as they wished to view and review the video, shown and reshown, in several different ways" and their watching of video during deliberations "first at full speed and then at one-half speed" was permitted); State v. Castaneda, 842 N.W.2d 740, 750 (Neb. 2014) (ruling trial judge did not abuse discretion in allowing jury to watch surveillance

video in "slow motion or frame-by-frame" at their request during deliberations); State v. Goins, 858 S.E.2d 590, 594 (N.C. 2021) (noting jury had watched slow-motion surveillance video during case-in-chief and asked to re-watch it during deliberations which "tends to show that the jury based its decision on the evidence[.]"); State v. Ratliff, 849 N.W.2d 183, 189 (N.D. 2014) (noting that jury had ability to "slow motion pause" video during deliberations).

Several other courts have not specifically addressed the issue of slow-motion replay during deliberations, but have confirmed the prosecution's ability to introduce slow-motion video footage into evidence during its case-in-chief or have upheld convictions after the prosecution has done so. See People v. Tardif, 433 P.3d 60, 68 (Colo. App. 2017) (remarking on admissibility of slow-motion recordings if they are "independently admissible under the applicable evidentiary rules[.]"); Barnes v. State, 858 A.2d 942, 943–44 (Del. 2004) ("The trial judge acted appropriately within his discretion by admitting the converted surveillance videotape" that "appeared to present events in slow motion."); Drejka v. State, 330 So. 3d 1055, 1062 (Fla. Dist. Ct. App. 2021) ("The State first played the surveillance video for the jury in real time. Thereafter, the State played the slowed-down video. The trial court's admission of the slowed-down surveillance video was proper."); State v. Mark, 210 P.3d 22, 41 (Haw. Ct. App. 2009) (finding court did not abuse discretion in finding probative value of videos

played at half and one-third speed was not substantially outweighed by potential prejudice.), aff'd, 231 P.3d 478 (Haw. 2010); People v. McKinley, 173 N.E.3d 233, 235 (Ill. App. Ct. 2020) (affirming defendant's conviction at trial during which jury shown was "slow-motion version" of video of defendant stabbing victim during trial); State v. Turk, 595 N.W.2d 819, 820 (Iowa Ct. App. 1999) (affirming defendant's conviction that was based, in part, on "[a] surveillance videotape [that] was admitted into evidence and played in slow motion" that showed incident that formed basis of charge.), overruled on other grounds by State v. Maring, 619 N.W.2d 393 (Iowa 2000); State v. Dale, 267 P.3d 743, 745 (Kan. 2011) (confirming validity of admission of "slow motion version of an earlier-admitted exhibit[.]"); State v. Ridgley, 7 So. 3d 689, 693 (La. Ct. App. 2009) (affirming robbery convictions where evidence introduced at trial included videos of robbery and were played for jury three different ways—in real time, in slow motion, and close up.), writ denied sub nom., State ex rel. Ridgley, 21 So. 3d 301 (La. 2009); Commonwealth v. Sanchez, 182 N.E.3d 975, 980 (Mass. App. Ct. 2022) (affirming defendants' convictions and pointing out that after State's introduction of "frame by frame" video, defense counsel used "slowed-down version of the video during his closing."), review denied, 186 N.E.3d 716 (Mass. 2022); Scott v. State, 390 N.W.2d 889, 892 (Minn. Ct. App. 1986) (rejecting defendant's argument that trial court abused discretion in

admitting into evidence actual video footage and copy of footage "played in slow motion and in reverse."); People v. Case, 199 N.Y.S.3d 633, 636 (App. Div. 2023) (noting court permitted defendant to play State's video in evidence "at a slowed-down speed."), leave to appeal denied, 232 N.E.3d 211 (N.Y. 2024); and see United States v. Begay, 42 F.3d 486, 502 (9th Cir. 1994) (finding admission of tape played in slow motion for jury was not abuse of discretion). Another seven states have accepted the jury's ability to watch or replay slow-motion videos or have upheld convictions after the jury was shown it in unpublished opinions.[4]

The Attorney General thus requests this Court hold as courts across the country have held and confirm the discretion of a trial judge to grant a jury's request to watch and re-watch video footage in slow motion.

Defendants can provide no in-state or out-of-state law, published or unpublished, to support their claim that courts should not permit juries to view

[4] Barefoot v. State, 2167 SEPT. TERM 2017, 2018 WL 4677564, at *3 (Md. Ct. Spec. App. Sept. 28, 2018); Evans v. State, 04-10-00798-CR, 2012 WL 848142, at *5 (Tex. App. Mar. 14, 2012); State v. Turcios, E202200711CCAR3CD, 2023 WL 3358655, at *9 (Tenn. Crim. App. May 11, 2023); Barnett v. State, 206 N.E.3d 405 (Ind. Ct. App. 2023); Walker v. State, 465 P.3d 217 (Nev. 2020); State v. Gleason, 129 Wash. App. 1023 (2005); State v. Alvarez, 2 CA-CR 2016-0242, 2017 WL 2376336, at *4 (Ariz. Ct. App. May 31, 2017). These unpublished decisions have been included in the Attorney General's appendix. (Aa1-49). The Attorney General is unaware of any contrary authority for the general propositions cited.

and re-watch videos in slow-motion. The limited, general law they do cite about the dangers of "moving pictures" also fails to support their position. For example, defendant Fuquan mistakenly claims this Court in State v. Dixon, 125 N.J. 223, 278 (1991), recognized the inherent prejudice of "moving pictures" due to the "inordinate weight" the jury may give them. (Db12). But the sentiment he quotes was in Justice Handler's partial dissent and the video involved in that case was a fictional movie about a murder, not actual footage of the crime.

And defendants' reliance on the cases of Balian v. General Motors, 121 N.J. Super. 118, 127-28 (App. Div. 1972), certif. denied, 62 N.J. 195 (1973); Suanez v. Egeland, 330 N.J. Super. 190, 193 (App. Div. 2000), and Rodd v. Raritan Radiologic Associates, P.A., 373 N.J. Super. 154, 167 (App. Div. 2004), is likewise misplaced. These civil cases involve hypothetical and recreated videos and images, not real-time video footage of the actual crime. See Balian, 121 N.J. Super. at 127-28 ("[T]he motion picture did not portray the actual automobile involved in the accident; nor did it show plaintiffs' actual operation[,]" and instead was "an artificial reconstruction of an occurrence[.]"); Suanez; 330 N.J. Super. 190 (describing video at issue as "a short video tape depicting a car crash dummy in an automobile being struck at five miles-per-hour" that was created by consulting company.); Rodd v. Raritan Radiologic

Associates, P.A., 373 N.J. Super. 154, 167 (App. Div. 2004) (reversing civil judgment where jury was told that computerized recreation of image was "an identical representation," when it was not, and recreation was to be used only for demonstrative purposes).

Because they have no direct law on the issue, defendants rely on one decade-old social science study (the Caruso study), two news articles, and a few periodical articles as support for their assertions. But these sources do not directly apply to this case and would not justify excluding slow-motion video replays even if they were.

Primarily, as the Appellate Division noted, these studies and articles are inapplicable because they discuss the potential impact of slow-motion videos on intent. (DFa100-12); Knight, 477 N.J. Super. at 421-22. Two articles and the Caruso study specifically have "intent" in their titles: "Slow Motion Bias: Exploring the Relation Between Time Overestimation and Increased Perceived Intentionality," "Showing People Slow Motion Video of Crime Found to Distort Perceived Intent," and "Slow Motion Increases Perceived Intent," respectively. (DFa100-09) (emphasis added). And the remaining articles discuss the impact of slow motion on intent within the first few sentences and throughout the article. See (DFa110a) ("But a new study has found that watching crimes at slower speeds leads viewers to falsely believe perps have more time to think

about their actions and act with intent[.]"); (DFa106a) ("When jurors are shown slowed-down footage of an event, the researchers said, they are more likely to think the person on screen has acted deliberately."); and see Spitz, J., et al., The Impact of Video Speed on the Decision-Making Process of Sports Officials, Cogn. Research, 3, 16 at 3 (2018) ("[W]e hypothesize that [slow motion replay] will lead referees to attribute more premeditation and intentionality to the actions they are reviewing[.]")

But at no point during defendants' trial in this case did either place the intentionality of their actions at issue. Instead, as the Appellate Division correctly noted, they tried to convince the jury that a robbery had not occurred at all and that the victim had fabricated or exaggerated the story:

> Defendants did not testify or present any witnesses. Through his attorney, Fuquan disputed whether Osbourne was robbed, and, if so, whether he took part in such a robbery. He also disputed possessing a firearm. Shaquan's counsel acknowledged that his client had an interaction with Osborne that day inside the deli, but that he denied taking part in robbing Osbourne outside.
>
> [Knight, 477 N.J. Super. at 411.]

So, defendants' sources, which discuss the impact of slow-motion replay on a jury's perception of intent, are not entirely relevant here.

Further, these sources actually contradict defendants' position that slow-motion replay detrimentally changes the audience's perception of the intentionality of an individual's actions. Notably, the sources acknowledge that

even in the experiments where the audience's perception of intentionality increased after they watched a video in slow motion, there was no evidence that their perception increased inaccurately. "[T]he [Caruso] researchers acknowledge that while slow motion increased people's perceptions of intent, these perceptions were not necessarily wrong." Aaron M. Williams, The Noisy "Silent Witness": The Misperception And Misuse Of Criminal Video Evidence, 94 Ind. L.J. 1651, Indiana Law Journal (Fall 2019) (emphasis added). Thus, slow-motion has not been shown to result in accuracies. Ibid. And the Spitz article acknowledges that "slow motion yields more accurate technical decisions" in foul/no foul situations and no change in accuracy for disciplinary decisions. Spitz, J., et al, The Impact of Video Speed, at 2 (emphasis). "Our results demonstrate that decisional accuracy of referees was not significantly different in slow motion compared to real time." Id. at 7. Hüttner and his colleges likewise admitted that they could not determine whether slow motion led to "less accurate evaluations." Norman Hüttner, et al., Slow Motion Bias: Exploring the Relation Between Time Overestimation and Increased Perceived Intentionality, Perception 52, 77-96 (2022).

Accordingly, even if intent had been at issue here, the slow-motion replay of the S-31 video might have increased the accuracy of the jury's perception of it. Defendants can hardly claim prejudice from the jury's arrival at a more

accurate judgment.

Also, defendants' sources highlight the other tangible and substantial benefits that watching videos in slow motion can produce. They note that slow-motion replay may "allow jurors to see what is taking place more clearly," and admit that crimes often occur very quickly, so "[t]o really see what happened requires slowing the video[,]" (DFa106a; DFa108a). The Caruso study also recognizes this advantage, stating, "Because video can be slowed down, it also provides the ostensible benefit of giving people 'a better look' at real-time events that happened quickly or in a chaotic environment." (Da100a).

The Spitz article does as well, noting, "For certain types of situations and decisions, slow-motion video can be a helpful tool and be of value to increase decisional accuracy." Spitz, J., et al., The Impact of Video Speed, at 9. And see Lard, 431 S.W.3d at 265 ("Because the incident unfolded so quickly, showing the events as they transpired from different perspectives and at slowed speeds allowed the actions of all involved to be clarified and placed in context."); Herrera, 102 Cal.App.5th at 252 ("[V]iewing the videos in slow motion allowed the jurors to better 'scrutinize' them[.]") (citations omitted); Dale, 267 P.3d at 745 ("Here, the admission of a single exhibit, a slow motion version of an earlier-admitted exhibit, enabled the jury to more carefully review the actual sequence of events and shots fired."). Slowing the speed of the video replay can

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thus increase the jury's ability to accurately analyze the evidence and arrive at a more just verdict.

Here, the S-31 video was undeniably relevant to determining the identities of the robbers and their actions during the crimes.[5] Knight, 477 N.J. Super. at 422. "[T]he video shows the physical appearances of the four men, their sizes, their features, and their clothing. The video also shows where each of three alleged culprits were walking in relation to the victim, and what they individually were doing at that time." Id. at 421.

But the jury could not easily ascertain these important details by watching the relevant six seconds of the video at regular speed. In addition to being only a few seconds long, the video was shot from inside Poppy's deli through a door to the outside, resulting in a backlit video that takes place in only a one-square-inch portion of the video frame.

There is also a lot of commotion in those few seconds of video. "Given the very short, rapid activity in the six-second segment that is not easy to follow at normal speed, the replays were reasonably allowed." Id. at 424. The slow

[5] Defendants do not dispute that the video is relevant under N.J.R.E. 401. Knight, 477 N.J. Super. at 422. Defendants also did not, and do not now, claim that the properly-admitted video itself is prejudicial. N.J.R.E. 403. In fact, defendant Shaquan's own counsel encouraged the jury in his closing to re-watch any video they felt they needed to. (15T173-16 to 18). Defendants on appeal thus assert only that playing the S-31 video in slow-motion prejudiced them.

motion replay "would have aided the jurors in discerning the appearances of the men who quickly walked by during the key six-second segment[,]" would have "assisted the jurors in resolving critical disputed issues of identification[,]" and "would have aided the jurors in resolving the parties' disputes over the robbers' identities and their respective actions with the victim behind the deli[.]" Id. at 405, 421, 423. Thus, the Appellate Division held, allowing the jury to re-watch S-31 in slow motion and with pauses was an appropriate exercise of the trial judge's discretion. "We are unpersuaded that the trial court misapplied its discretion in granting the deliberating jurors' requests to replay the surveillance video in slow motion and multiple times, with starts and stops." Id. at 422.

Because what if a defendant was the one who wished to slow down the video to substantiate his defense? Videotape evidence can be a critical piece of a defendant's trial strategy. See Garcia, 245 N.J. at 430 (ruling video offered by defense counsel was "critical evidence" that should have been admitted because it was extrinsic evidence that contradicted State's witness's testimony and supported defendant's witnesses' testimony). Viewing the video in slow motion might be the only way a defendant can show proof of his innocence. The Appellate Division gave an example of this in a footnote in its opinion, noting that slowing down a video might show "someone other than the defendant" was the aggressor "in a case involving a claim of self-defense (sic)." Id. at 426, n.

17. Several of the out-of-state cases also highlighted the defendant's use of slowed video. See, e.g., Sanchez, 182 N.E.3d at 980.

Even here, defendant Shaquan's defense was that he was "merely present at the time of the robbery" and that he did not have any weapons or take "any action in furtherance of the robbery." (DSb35-36). What if the truth of his claims of innocent surprise could only be discerned through slowing the S-31 video down for the jury to watch and re-watch as it felt necessary? Certainly, subject to the Rules of Evidence, justice would be better served by permitting a jury to re-watch in slow-motion a relevant video that a defendant claimed was necessary for his defense.

What is more, even though out-of-state law confirms the soundness of the trial judge's decision to grant the jury's request to re-watch the surveillance footage in slow motion, out of an abundance of caution, the judge also implemented additional precautions to safeguard against prejudice. Both the decision to permit the jury to replay the non-audio surveillance and the procedures by which it was done were thus an appropriate exercise of the judge's discretion.

As the Appellate Division noted, there is no New Jersey law establishing "standards for presenting to trial jurors surveillance video footage in slow motion[.]" Knight, 477 N.J. Super. at 417. So, in affirming the trial judge's

decision to permit the jury to replay the video in slow motion, the court looked to the precedent this Court established for video replay of a defendant's and witnesses' out-of-court statements and in-court testimony, far more prejudicial types of video evidence. See State v. Wade, 252 N.J. 209, 220 (2022) ("[S]elf-inculpatory statements are powerful evidence of guilt that is not easily overcome.); State v. Carrion, 249 N.J. 253, 285 (2021) ("[I]nculpatory remarks by a defendant have a tendency to resolve jurors' doubts about a defendant's guilt to his detriment.")

In cases with this testimonial replay, this Court has confirmed that although the decision to grant the jury's request ultimately rests within the "wide" discretion of the trial court, the judge should grant the jury's request to re-watch this prejudicial video evidence unless there is an extraordinary justification or circumstance requiring its denial. State v. Miller, 205 N.J. 109, 119-20 (2011); State v. Michaels, 264 N.J. Super. 579, 644 (App. Div. 1993), aff'd, 136 N.J. 299 (1994). A decision to deny the jury's request for testimonial video playback would also "require a showing that the consequential prejudice to the defendant from the playback could not be ameliorated through other means." State v. Burr, 195 N.J. 119, 135 (2008) (emphasis added).

Inherent in these holdings is the notion that justice requires that juries be permitted to playback audio or video evidence it deems necessary to its

deliberations. Miller, 205 N.J. at 122. Requests to review recorded testimony or statements "are a clear sign that the evidence sought is important to the deliberative process[.]" Id. at 119. Robust jury deliberation

> may produce disagreement or doubt or failure of definite recollection as to what a particular witness said in the course of his testimony. If they request enlightenment on the subject through a reading of his testimony, in the absence of some unusual circumstance, the request should be granted. The true administration of justice calls for such action.
>
> [State v. Wolf, 44 N.J. 176, 185 (1965).]

But "when the purpose of our procedure is full, fair and free exposure of all relevant evidence in a case both before and during the trial," all parties can benefit by having the doubt in the jurors' mind as to what was said removed by a replaying of the testimony. Ibid.

> There is no need to be chary for fear of giving undue prominence to the testimony of the witness. If under our system of trials a jury is to be considered intelligent enough to be entrusted with powers of decision, it must be assumed they have sense enough to ask to have their memories stimulated or refreshed only as to those portions of the testimony about which they are in doubt or disagreement.
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> [Id. at 185-86.]

But, to protect against overemphasis, this Court has held that juries should review such recordings in open court, with all parties present, and under the careful supervision of the trial judge, unlike other demonstrative evidence, which it may generally take into the deliberation room under Rule 1:8-8. State

v. Weston, 222 N.J. 277, 292–93 (2015); State v. A.R., 213 N.J. 542, 546 (2013).

Here, the judge allowed the jury to replay S-31 in deliberations using the slow-motion and pause features because the video was necessary in reaching an accurate verdict. The trial judge also then implemented additional precautions, even though the S-31 surveillance video contained no audio and "the specific dangers of jurors affording undue weight or attention to spoken content of the recordings" were thus not present. Knight, 477 N.J. Super. at 419. The judge ruled the jury could re-watch the salient six seconds of the S-31 video in slow motion with pauses, but only in open court, under her supervision, with counsel present, with a designated juror responsible for pausing and restarting, and only because the jury specifically requested it. (17T124-8 to 172-16); Id. at 419. As the Appellate Division noted, the judge "prudently required the videos to be replayed under her supervision in the courtroom in the presence of counsel, consistent with the case law governing other kinds of video replays." Id. at 423-24. "In short, the judge rightly endeavored to support the jurors in their manifest and conscientious effort to understand the proofs and consider them carefully." Id. at 424.

Defendants thus simply have not established any justifiable basis to warrant a reversal of their convictions. The judge appropriately granted the jury's request to replay the surveillance footage in slow motion and then, out of

an abundance of caution, imposed restrictions on the replay consistent with the replay of more prejudicial video. The Appellate Division found both of these decisions were appropriate: "We are unpersuaded that the trial court misapplied its discretion in granting the deliberating jurors' requests to replay the surveillance video in slow motion and multiple times, with starts and stops." Id. at 422.

> We further hold—again subject to offsetting concerns of undue prejudice—that trial courts in their discretion may grant a jury's requests during deliberations to replay the videos in such modes one or more times, provided that the playbacks occur in open court under the judge's supervision and in the presence of counsel.
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> [Id. at 405.]

This Court should confirm the soundness of the trial judge's decisions on appeal and deny defendants' attempt to overturn their convictions.

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POINT II

DEFENDANTS ARE PRECLUDED FROM RAISING IN THIS APPEAL THE ARGUMENT THAT THE STATE IMPROPERLY PLAYED S-31 IN SLOW MOTION DURING ITS CLOSING ARGUMENT, AND MOREOVER, THE ARGUMENT WOULD FAIL ON ITS MERITS.

A. Defendants Told the Jury During Their Closing Arguments to Expect to Watch Videos in Slow Motion.

Defendants told the jury during closing arguments that they were soon likely to watch slow-motion versions of the videos in evidence, but that even in slow motion, the State could not prove its case because the videos did not show what the State claimed they did. Defendants therefore cannot now—for the first time in this appeal—argue that the State playing a slowed-down version of the video in its closing constituted reversible error.

Under the invited-error doctrine, "trial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal[,]" even if counsel did so indirectly. A.R., 213 N.J. at 561 (citations omitted); State v. Corsaro, 107 N.J. 339, 345 (1987). "In other words, if a party has 'invited' the error, he is barred from raising an objection for the first time on appeal." A.R., 213 N.J. at 561.

Here, defendants' counsel acquiesced to the State playing during its closing argument the slow-motion version of S-31. Defendant Shaquan's

counsel told the jury, "[T]here was some footage that you watched and a lot of it you watched in fast speed, quite frankly, so we could get it done and use it when we come talk to you now. I expect you're probably going to watch some of that in much slower speed in a little while." (15T175-13 to 15). Defendant Fuquan's attorney then told the jury that even if the State played the videos in slow-motion, they still would not show what the State claimed they did. "They could show you the video, they could do it in slow-mo, they could do it in fast-mo, they could rewind[,]" he argued, but it would not prove the State's assertions. (15T200-1 to 5). Defendants thus fully anticipated the State would play a slow-motion version of the S-31 video in summation and acquiesced to it. They, therefore, cannot now claim they were unduly prejudiced and entitled to a reversal of their convictions because the State subsequently did so.

B. Because Defendants Did Not Object to the State's Use of S-31 in Slow Motion During its Closing Arguments, They Cannot Successfully Use the Issue to Overturn Their Convictions.

At no point before, during, or after the State played the slowed version of S-31 in its closing argument did either defendant object. This indicates they understood the State's use of the video was unobjectionable. See State v. Timmendequas, 161 N.J. 515, 576 (1999) (noting that when defense counsel does not object to statements made during the State's case that it now claims were improper, it intimates they did not believe at the time of trial that there was

an objectionable issue.).

And because defendants did not object, they have waived this argument on appeal. Shaw v. Bender, 90 N.J.L. 147, 150 (1917) ("A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal."). Defendants "may not present entirely new arguments to this Court." State v. Harris, 209 N.J. 431, 445 (2012).

Appellate review is also not intended to be limitless, so appellate courts generally will not consider on appeal issues which were not raised below. State v. Galicia, 210 N.J. 364, 383 (2012); State v. Robinson, 200 N.J. 1, 19 (2009).

> The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves. Although our rules do not perpetuate mere ritual, we have insisted that, in opposing the admission of evidence, a litigant must make known his position to the end that the trial court may consciously rule upon it.
>
> [Robinson, 200 N.J. at 19 (citations and punctuation omitted).]

A timely objection in the trial court would have given the judge the opportunity to create or enhance the record, and thus dissipate the claimed error, so appellate courts "will neither reverse on an assumption that there was error nor remand the matter to explore that possibility." State v. Macon, 57 N.J. 325, 333 (1971).

Where they have decided not to object, defendants claiming for the first time on appeal that there was an error in the State's case can obtain relief only

if the issue is jurisdictional, substantially implicates an area of public interest, or if they can carry the heavy burden of proving plain error. Weston, 222 N.J. at 295; Robinson, 200 N.J. at 19. That is, they must establish the error was of such a significant magnitude that it creates a reasonable belief that it led the jury to reach a result it would not have otherwise reached after consideration of all the evidence. State v. McGuire, 419 N.J. Super. 88, 142–43 (App. Div. 2011); R. 2:10-2. "We may reverse on the basis of unchallenged error only if the error was clearly capable of producing an unjust result." State v. Ross, 229 N.J. 389, 407 (2017). Without this showing, a defendant is not entitled to relief.

Here, neither defendant objected before, during, or after the State played during its closing argument a slow-motion version of S-31, a video which was already in evidence. (16T217-16 to 257-20); Knight, 477 N.J. Super. at 404. There is a fair inference given defense counsels' comments in summation, as discussed above, that they were aware of the State's intention to use the slow-motion version of the videos during its closing. Not only did they decide not to object, but in fact, they acquiesced in the State doing so in their own closings. The trial judge also conducted a brief side bar immediately after the State's closing to address a separate issue and neither defense counsel used that opportunity to object or raise any issue about the closing. (16T257-11 to 20). Neither defendant therefore believed the State's use of the slow-motion evidence

in its closing was even objectionable, let alone plain error.

And since playing the video in slow motion during deliberations was not an error, as outlined in greater detail in Point I, above, nor was playing it during the State's closings, see Point II, Subpoint D, below, it certainly was not an error capable of inducing the jury to reach a conclusion it would not have otherwise reached given the other evidence of defendants' guilt produced at trial. Defendants have thus waived this argument.

C. Defendants Further Waived This Summation Issue by Not Raising It in Their Petitions for Certification.

Defendants are precluded from arguing this separate issue for the first time in this appeal because they both failed to include it in their Petitions for Certification. Defendants raised separate legal arguments in their petitions and this Court granted certification to specifically review one of these on appeal. (DSa60-61). Defendants are thus barred from now addressing this unpreserved issue before this Court.

A defendant seeking reversal of his conviction "must present all arguments in support of his stand" and cannot later "argue points which he has in effect abandoned." State v. Lefante, 14 N.J. 584, 589 (1954); see State v. O'Shea, 16 N.J. 1, 7 (1954) ("[A] petitioner[-]allowed certification is limited on the appeal to argument of the questions presented and points raised on the petition for certification.") "[I]t would be manifestly unfair to use one set of

points to obtain certification and then to argue different grounds on appeal after certification had been granted." State v. Lefante, 14 N.J. 584, 589 (1954) (citations omitted).

Defendants here challenged in their petitions for certification the issues raised before the Appellate Division. They did not raise the issue now outlined in Point I of defendant Shaquan's brief regarding the purported need for a new foundational witness to testify because the video was used in the State's summation. Because they did not request this Court grant certification on this issue, and the Court did not, this argument is barred.

D. Even on the Merits, Defendants Cannot Establish Any Error in the State's Use of Admitted Evidence During Its Closing Argument.

In addition to being waived and barred, defendants' argument that the State could not play the S-31 video in slow motion during its closing has no legal merit. The State is given "broad latitude" during closing arguments. State v. Muhammad, 359 N.J. Super. 361, 378 (App. Div. 2003). It may use evidence that has already been admitted at trial during its closing, along with "charts and diagrams," PowerPoint presentations, and other visual aids. Id. at 378-79; State v. Williams, 244 N.J. 592, 617 (2021). The State may also emphasize and "pinpoint particular spots in a video" during its closing argument. State v. Watson, 254 N.J. 558, 600 (2023). And this Court echoed the sentiments of the Delaware Supreme Court in encouraging the use of visual aids: "This Court

does not seek to discourage the use of technology in closing arguments to summarize and highlight relevant evidence for the benefit of the jury." Williams, 244 N.J. at 617 (quoting Spence v. State, 129 A.3d 212, 223 (Del. 2015)).

Here, the State played in summation the S-31 video that had been properly authenticated and admitted into evidence during trial. (9T124-21 to 125-3). The State was permitted to replay this video in slow motion to highlight certain portions of it for the jury. But no new evidence was "created" when the prosecutor hit the button to slow the video, nor did the State permanently alter or modify the evidence in any way.[6] Thus, no new authentication was needed. See Boland v. Dolan, 140 N.J. 174, 187–88 (1995) ("The magnifying glass only highlighted or illustrated evidence properly admitted or testimony of witnesses properly allowed during the trial, and plaintiff had adequate time to rebut any negative inferences. The magnifying glass did not constitute new evidence.").

Further, defendants here knew or anticipated the State was going to play the video in slow motion, as both counsel referenced it during their own closings. Counsel could have used their own closings to argue that slowing the video distorts reality or manipulates the frames or that the video was not

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[6] Because no new evidence was created, it was not possible to "preserve a copy" of the video with alterations as defendant Shaquan claims should have been done. (DSb15).

authentic. They chose not to do so. Therefore, in addition to having waived this argument, defendants would also be unable to establish that it warranted a reversal of their convictions.

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POINT III

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY TO CONSIDER ALL OF THE EVIDENCE.

Recognizing that trial courts are already vested with broad discretion to determine the probative value and potential prejudice of every piece of evidence, going forward, the Attorney General agrees with the Appellate Division that future guidance from this Court about a trial judge's ability to grant a jury's request to watch or re-watch surveillance video in slow-motion or with pauses during deliberations would be beneficial. But these guidelines should not be based on the premise that there is a "documented perceptive bias on judgments of intent," in slow-motion videos as defendant claims, (DSb30); not only has this "intentionality bias" not been scientifically accepted, but any claimed bias may not affect the overall accuracy of a person's perception of the intent.

Instead, any guidance going forward should "acknowledge and embrace advances in technology" and "authoriz[e] the presumptive use of video playbacks" while also "addressing the practical concerns they raise." Miller, 205 N.J. at 125. This Court's guidance should thus include whether—and to what extent—trial courts should consider certain trial-specific factors, such as those outlined by the Appellate Division. Knight, 477 N.J. Super. at 425-26.

It should also establish the procedures a judge should follow when slow-motion replay is requested during deliberations. Specifically, the Attorney

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General suggests the procedures the trial court followed here are appropriate: the playback occurred in open court, under the judge's supervision, and with counsel present, in line with replay of testimonial video. Mandating any further limitations, such as a limit on the number of times a video may be re-watched or the speed to which it can be slowed down, would artificially and pre-emptively constrict the discretion of the trial court which is in the best position to confine playback of the video to appropriate limits.[7]

The Attorney General also agrees that a limiting instruction should be developed by the Model Criminal Jury Charge Committee for these situations. Any limiting instruction should also parallel the testimonial playback limiting instruction, which instructs the jury "to consider all of the evidence presented, and not give undue weight to the testimony you have heard [and seen] played back." Model Jury Charges (Criminal), "Playback of Testimony" (rev. Apr. 16, 2012). It should not remove from the jury's province its duty to afford it the weight it considers appropriate. And even once developed, such an instruction should be given only if requested, and, if, in the opinion of the trial court, it is

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[7] Although it appears defendants here fully anticipated the State's slow-motion playback, going forward, a rule requiring the State to alert the judge and defendants of its intention to do so would be unobjectionable. See Williams, 244 N.J. at 616 ("To avoid objection or possible error, we encourage counsel to disclose to each other and the court any visual aids intended to be used during closing argument, but we do not require that practice.")

relevant to the case.

Here, the judge was not required to sua sponte provide this type of instruction after the jury re-watched the S-31 video footage in slow-motion. "[N]o party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict" except as provided by R. 2:10-2. R. 1:7-2. Neither defendant objected or requested a limiting instruction when the jury watched the slow-motion playback for the first time during the State's closing. Although defendants objected when the jury requested to re-watch the slow-motion video during deliberations, after the judge granted the jury's request, they did not request she also provide the jury with a limiting instruction.

There was no plain error in this decision. R. 2:10-2. No jury instruction on slow-motion playback of non-audio surveillance video existed at the time of trial. And the judge repeatedly instructed the jury to consider all of the evidence in the case, telling the jury eight times in both her opening and closing charge they must do so. (9T22-4 to 7; 17T40-23 to 41-1; 17T43-19 to 24; 17T44-1 to 3; 17T48-3 to 5; 17T62-4 to 8; 17T62-8 to 14; 17T69-23 to 70-2). These instructions mirrored the precaution encompassed in the testimonial-playback instruction while appropriately recognizing that the jury is free to give some evidence more weight than it gives other evidence, or that it may choose to give

the evidence no weight at all if they do not find it credible. Model Jury Charges (Criminal), "Criminal Final Charge" (rev. September 1, 2022) ("In the course of your deliberations, . . . do not surrender your honest conviction as to the weight or effect of evidence[.]"). Thus, the trial judge cured any prejudice defendants now belatedly claim resulted from the jury's re-watching of the S-31 video during deliberations without a limiting instruction.

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CONCLUSION

For the foregoing reasons, the Attorney General urges this Court to affirm the Appellate Division ruling.

Respectfully submitted,

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