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June 18, 2024

SUPREME COURT OF NEW
JERSEY DOCKET NO. 088970

STATE OF NEW JERSEY, :

Plaintiff-Respondent

CRIMINAL ACTION

On Certification From a Final Order of
the Superior Court of the New Jersey
Appellate Division

v. :

Docket Number: A-000377-20T5

Sat Below:
Appellate Division
Sabatino, P.J.A.D.
Marczyk, J.A.D.
Chase, J.A.D.

FUQUAN K. KNIGHT, :

Defendant-Petitioner.

Law Division
Hon. Siobhan A. Teare, J.S.C.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-PETITIONER

PETITIONER IS CONFINED

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PRELIMINARY STATEMENT

This matter comes as an appeal of Fuquan Knight's conviction for second-degree robbery and other charges. Mr. Knight submits that he was denied a fair trial when the trial court allowed the jury to replay a six-segment of a surveillance video in slow motion and pause it multiple times. The issue at trial was whether defendant was one of the men who robbed Thaddeus Osbourne and whether defendant carried a weapon. A surveillance video showed four men behind a food store where the robbery occurred with an individual the State claimed was defendant carrying a gun. However, at normal speed the object appeared as an unidentified "a black and brown object in one hand."

Recent scientific studies have found that replaying surveillance videos in slow motion is unduly prejudicial to criminal defendants, leading to higher conviction rates. Slow motion playing distorts reality and allows viewers to see content and images that may or may not exist in reality. It is this distorting effect that requires scrutiny. At trial, the defense presented several scientific studies to support a defense objection that the jury not be allowed to play the same segment of a surveillance video multiple times at various slower speeds. In one instance the video was played five times slower than normal speed.

The trial court allowed the jury to place undue focus on a single segment of the surveillance video. By replaying the video fifteen times in slow motion the jury believed that it saw what it could not see at normal speed. In effect, there were two trials. The first trial included the State's case-in-chief where the video was played at normal speed. The second trial was during jury deliberations. The prejudice was further compounded by the trial court's failure to sua sponte instruct the jury on the potential distorting effects of slow motion. Under these circumstances, Fuquan Knight submits that he did not receive a fair trial.

STATEMENT OF PROCEDURAL HISTORY.

On January 9, 2019, an Essex County Grand Jury charged Fuquan Knight (defendant-petitioner) with four counts under Indictment No. 19-01-00010-I. (Da1-Da6)¹. Count One charged second-degree conspiracy to commit robbery against

¹ Da-Defendant's Appendix.

Transcripts:

- 1T-Wade Hearing, October 22, 2019;
- 2T-Hearing, October 23, 2019;
- 3T-Jury Selection, October 24, 2019;
- 4T-Jury Selection, October 31, 2019;
- 5T-Jury Selection, November 7, 2019, Vol. 1 of 2;
- 6T-Jury Selection, November 7, 2019, Vol. 2 of 2;
- 7T-804 Hearing, November 13, 2019;
- 8T-Motion, November 18, 2019;
- 9T-Trial, November 19, 2019, Vol. 1 of 2;
- 10T-Trial, November 19, 2019; Vol. 2 of 2;
- 11T-Trial, November 20, 2019;
- 12T-Trial, November 21, 2019;
- 13T-Trial, December 3, 2019, Vol. 1 of 2;

Thaddeus Osborne, contrary to N.J.S.A. 2C:5-2A(1) and N.J.S.A. 2C:15-1A(2). Count Two charged that on October 18, 2021, in the City of East Orange, defendant committed first-degree armed robbery, contrary to N.J.S.A. 2C:15-1A(2). Count Three charged third-degree unlawful possession of shotgun, contrary to N.J.S.A. 2C:39-5C(1). Count Four charged second-degree possession of a shotgun for an unlawful purpose, contrary to N.J.S.A. 2C:39-4A(1). (Da1-Da6).

On October 22, 2019, the Honorable Siobhan A. Teare, J.S.C., held a Wade² evidentiary hearing on defendant's motion to suppress the out-of-court identification of defendants made by Thaddeus Osborne. (1T; Da7).

On October 23, 2019, in a written order, the trial court denied defendant's suppression motion. (Da7).

On November 13, 2019, following the death of Thaddeus Osborne, the trial court granted the State's motion to admit at trial his testimony from the Wade/N.J.R.E. 104 Hearing under N.J.R.E. 804(a) and N.J.R.E. 804(b)(1)(a). (Da97-Da98).

14T-Trial, December 3, 2019, Vol. 2 of 2;
15T-Trial, December 4, 2019; Vol 1 of 2;
16T-Trial, December 4, 2019, Vol. 2 of 2;
17T-Trial, December 5, 2019;
18T-Trial/Verdict, December 6, 2019;
19T-Sentencing, February 18, 2020.

² United States v. Wade, 388 U.S. 218 (1967).

Defendant was tried before Judge Teare and a jury, on November 19, 20, 21, December 3, 4, 5, and 6, 2019. (9T-18).

On December 6, 2019, the jury found defendant guilty on all counts charged under Indictment No. 19-01-00010-I. (18T; Da113-Da116).

On February 19, 2020, the trial court sentenced defendant to an aggregate term of 16 years in State prison, with an 85% period of parole ineligibility. (Da121-Da123).

On October 8, 2020, defendant filed a Notice of Appeal. (Da124-Da127).

On December 21, 2023, the Appellate Division affirmed the judgment of conviction and remanded the matter for resentencing pursuant to State v. Roach, 146 N.J. 208, 232 (1996). See State v. Knight, et al, A-0377-20 (App. Div. December 21, 2023).³

On May 7, 2024, the New Jersey Supreme Court ordered that defendants “petition for certification is granted, 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.” The Court further order that “Certification is denied as to all other issues.” See Order State v. Knight, et al, Docket No. 088970.

³ The portion of the Appellate Division’s opinion related to the issue of playing a surveillance video multiple times at slow speeds was published.

STATEMENT OF FACTS

To prove its case, the State intended to mainly rely upon the testimony of the victim Thaddeus Osborne. However, on November 3, 2019, Osborne passed away. (6T5-1 to 7)⁴. The State moved under N.J.R.E. 803(a) to admit Osborne's October 22, 2019 Wade hearing testimony. (1T; 6T5-10 to 17). Over defendant's objection, the trial court allowed a redacted version of Osborne's prior testimony to be played before the jury. (7T89-15 to 97-12; 15T58-6; Da97-Da98). The Appellate Division denied defendant's emergent application. (8T4-18).

At the Wade hearing, Osborne testified that on October 11, 2017, he went to Poppy's⁵ Deli, located at 520 Central Avenue in East Orange, to cash a betting slip where he had won \$500. (9T; 15T). While in the store, Osborne conversed with co-defendant Shaquan Knight. (15T65-8). Although he did not know his name, Osborne knew Shaquan as he had previously purchased marijuana from him and had seen him about five or six times before. (15T66-2; 15T66-6 to 12; 15T66-15 to 16). Shaquan asked whether Osborne wanted to buy some "weed." (15T65-8). Osborne agreed and the two men decided to do the transaction outside around the back of the store. (15T65-11 to 66-1). The store surveillance video, clocked at 11:35 a.m.,

⁴ Osborne's body was found near a Fedex facility in Woodbridge where he worked. The cause of death was unclear. Nothing suggested that Osborne's death was related to defendants. (5T7-9 to 9-12).

⁵ The name of the deli appears as "Poppys" and as "Poppies" in the record. Defendant adopts "Poppys" as the naming convention for purposes of this brief.

showed Osborne greeting Shaquan with the two men laughing and talking. (13T86-6 to 13). Later in the same video, Osborne is seen reaching into his pocket and handing something to Shaquan. (13T89-19 to 25; 13T91-22). Osborne failed to disclose this to the lead detective when later questioned. (13T91-25).

Besides Osborne and Shaquan, also seen in the store surveillance tape were co-defendants Kyler Knight and defendant. The store video tape showed one of the suspects wearing a grey skull cap, dark colored Nike hooded sweatshirt with white lettering on the left sleeve and white lettering on the back of the sweatshirt, black pants with white lines alongside the pants legs, and black & white sneakers. (11T15-20 to 24). Osborne identified the suspect as Shaquan Knight. (13T33-17).

The other suspect, identified as Kyler, is seen with a “sunni beard,” with a burgundy hooded sweatshirt with a gold design on the front of the sweatshirt. (11T15-25 to 16-2; 11T37-9 to 37-17).

The third suspect is seen in the video at 11:39:30 a.m., wearing a black baseball cap with “Chicago White Sox” and a black jacket with gold lettering and black pants. (13T16-3 to 5; 13T38-20 to 39-7). Osborne identified the third suspect as defendant. (13T38-20 to 39-7).

Once outside the store, Osborne and Knight walked towards a parking lot around the back of the store. (15T67-23 to 68-8). Osborne claimed that Kyler came up from behind him and put a knife to his throat. (15T69-21 to 23). Osborne said

that defendant brandished a compact shotgun in his face. (15T71-21 to 72-9). While the two men held weapons on Osborne, Shaquan went through his pockets. (15T70-11 to 12; 15T74-17 to 18). He took Osborne's wallet, cash, car keys, and identification card. Ibid. Shaquan kept asking Osborne for more money. (15T75-9 to 17). Osborne estimated that Shaquan took from him about \$550-\$560. (15T75-20 to 21).

During the robbery, a man in the parking lot yelled "stop." (15T73-7). Kyler told the man that Osborne owed them money and to mind his own business. (15T73-10). As the three men left, Osborne asked if they could leave him his car keys. One of the men tossed the keys onto the sidewalk. (15T76-1 to 7).

After the robbery, Osborne ran across the street to the Auto Zone parking lot where he had parked his car. (15T76-19). At first he "kind of followed them to see where they went." (15T76-13 to 14). Osborne observed the men walk towards Princeton Street. (15T77-1 to 2). While driving home, he used his cell phone to call the police to report the incident. (15T77-20 to 22). Over defendant counsel's objection, the trial court allowed the jury to hear the 9-1-1 call as non-testimonial evidence and as an excited utterance. (9T159-2 to 160-16; 10T258-2 to 263-11). The robbery occurred at 11:42 a.m. and the 9-1-1 call was received at 11:45 a.m. (9T177-13 to 18).

Osborne told police that he knew the robber from the neighborhood. He provided a description of the suspects. (15T79-11). Osborne identified Shaquan from the store surveillance tape. (15T79-2 to 3). Later that day at the police station, Osborne identified Shaquan and defendant as two of the men who robbed him from single shot photos. (11T69-6 to 70-11; 15T81-23). Osborne said he had seen defendant one time before the incident at a local chicken shack maybe “months or weeks before” but he “was not sure.” (15T84-12 to 13). Osborne had never spoken to defendant before. (15T84-23). At a subsequent meeting with police on October 16, 2018, Osborne identified co-defendant Kyler as the man who held a knife against his throat from a photo array. (11T79-5 to 6).

Based on Osborne’s identifications, on October 18, 2018, police executed a warrant search of defendants’ residence located at 21 Princeton Street, Apartment Number One. (11T87-15 to 89-4). In a bedroom, police found clothing similar to that worn by Shaquan and Kyler in the store video. (11T88-11 to 89-4). They also found Osborne’s wallet, debit card, and employer identification card in the bedroom. (11T89-9 to 10). Nothing found in the apartment directly linked defendant to the incident. (11T119-17).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO A FAIR AND RELIABLE TRIAL WHEN IT PERMITTED A SURVEILLANCE VIDEO RECORDING TO BE REPLAYED IN SLOW MOTION AND PAUSED MULTIPLE TIMES DURING JURY DELIBERATIONS OVER DEFENDANT'S OBJECTION AND THEN FAILED TO PROVIDE A LIMITING INSTRUCTION TO THE JURY ON THE DISTORTING EFFECTS OF PLAYING A VIDEO IN SLOW MOTION . (17T134-13 to 14).

During deliberations the jury asked to see a surveillance video replayed. (17T125-15 to 18). The jury's note further asked that the video be played in slow motion at different speeds and that it be paused at certain time stamps. Trial counsel objected. (17T125-19 to 22). Counsel argued that playing the surveillance video in slow motion was inherently prejudicial to his client. Counsel provided the trial court with several academic studies that found playing surveillance videos in slow motion tended to prejudice criminal defendants. (17T135-1 to 136-7; see also Da100-Da112).⁶ The trial court overruled the objection stating that there was no case law in support of trial counsel's objection. (17T134-13 to 14). The court ordered the video

⁶ Slow Motion Increases Perceived Intent, May 17, 2016 (Da100-Da105); How Slow-Motion Video Footage Misleads Juries, August 2, 2016 (Da106); Showing People Slow Motion Video of Crime Found to Distort Perceived Intent, August 2, 2016 (Da107-Da109); Caught on Tape: Is slow-motion video biasing jurors, February 1, 2017 (Da110-Da112).

played at normal speed once and then at slower speeds and paused. (17T144-12 to 147-3). The trial court accepted that Juror Number 8 would speak for the jury. The video was played in slow motion several times. (17T150-13 to 156-6; 18T89-21 to 101-7). The Appellate Division found that the same segment of the surveillance video was replayed in slow motion at least fifteen times. Knight, slip op. at 20. The appellate panel reviewed the video evidence and observed “the approximate six-seconds in which the four men are filmed passing by Poppy’s rear door was most pertinent.” Id. at 17, FN 8. The video had no audio track. Id. at 17. The same video segment was played at normal speed during the State’s case-in-chief. Ibid. During closing remarks, the trial prosecutor replayed “numerous sections of the videos, mostly at normal speed, and with a few sections fast-forwarded. Without objection, the State also played in slow motion and with pauses the video showing the rear of Poppy’s.” Id. at 18.

At one point during jury deliberations, the six-second video segment was played at the slowest possible speed technically available. (17T155-18 to 156-6). The defense renewed its objection to the procedure. (18T94-12). The trial court overruled the objection. The surveillance recording was played at various slow speeds and paused multiple times on the instruction of Juror Number 8. Knight, slip op. at 20.

The courts have long recognized that criminal law must account for

developments in science. For example, Rule 3:20-2 "presents a viable means by which a defendant can seek a new trial if he can now show that recently improved scientific methodology, not available at the time of trial, would probably have changed the result." State v. Halsey, 329 N.J. Super. 553, 559 (App. Div. 2000). Courts understand that "[s]cience moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded." State v. Behn, 375 N.J. Super. 409, 429 (App. Div. 2005). Thus, the "judicial system, with its search for the closest approximation to the 'truth,' must accommodate this ever-changing scientific landscape." Ibid. New Jersey courts have not shied away from debunking problematic scientific theories and providing appellate relief where an individual's due process rights to a fair proceeding may have been compromised. See, e.g., State v. Nieves, 476 N.J. Super. 405 (2023) (dismissing criminal indictment for aggravated assault on the grounds that shaken baby syndrome, with or without impact, without corroborating biomechanical evidence, is not scientifically supportable); State v. Rochat, 470 N.J. Super. 392 (App. Div. 2022) (finding certain DNA testing procedures are not scientifically reliable); State v. J.L.G., 234 N.J. 265, 272 (2018) (held "that expert testimony about CSAAS [Child Sexual Abuse Accommodation Syndrome] in general, and its component behaviors other than delayed disclosure, may no longer be admitted at criminal trials."); State v. Henderson, 208 N.J. 208 (2011) (recognizing that as scientific studies show the

unreliability of eyewitness identifications greater scrutiny is required to protect a defendant's right to a fair and reliable trial).

The courts have also long understood that video evidence plays a unique role in trials. As Justice Clifford observed in Jenkins v. Rainer, 69 N.J. 50 (1976), some forty-five years ago:

The camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angles, speed, editing and splicing, and chronology. Hence, "that which purports to be a means to reach the truth may be distorted, misleading, and false."

[Id. at 57, quoting Snead v. Amer. Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D.Pa. 1973).]

In State v. Dixon, 125 N.J. 223, 278 (1991), the Court said that showing a film is qualitatively different from showing still photographs. The Court observed: "A fortiori, it is qualitatively different from a narrative description. There is a danger that a jury will place inordinate weight on the moving pictures." Ibid.; see also Balian v. General Motors, 121 N.J. Super. 118, 128 (App. Div. 1972), (stating, "The danger of undue prejudice as a result of the jury's placing inordinate weight on the moving pictures is always present in light of the tremendous dramatic impact of motion pictures"), certif. denied, 62 N.J. 195 (1973); accord Wagi v. Silver Ridge Park W., 243 N.J. Super. 547, 559-560 (Law Div. 1989). The Appellate Division acknowledged the distorting effect of playing a video at slow motion. The court said, "that the extreme slow motion gives the impression of much less movement and thus

less impact than would be the case if the video was at normal speed.” Suarez v. Egeland, 330 N.J. Super. 190, 195 (App. Div. 2000).

The Pennsylvania Supreme Court found that, “[i]n a sense, all slow motion and freeze frame video distorts reality,” and that “such distortions may enhance the jury’s understanding or it may do the opposite.” Com. v. Lewis, 65 A.3d 318 (Pa. 2013). An earlier Pennsylvania court found:

In a sense, all slow motion and freeze frame video distorts reality. It distorts it in the same way that magnification of a photograph distorts reality.

[Com. v. Hindi, 429 Pa. Superior Ct. 169, 171, 631 A.2d (1341) (1993).]

New Jersey has recognized the prejudicial effect on defendants when a jury is permitted to unduly focus on videotaped evidence. The Appellate Division said that “videotaped evidence is unique.” State v. Michaels, 264 N.J. Super. 579, 643 (App. Div. 1993), aff’d on other grounds, 136 N.J. 299 (1994). While addressing the issue of recorded testimony, the appellate court’s observation that replaying video evidence increases the “risk that the jury would unduly emphasize the videotaped testimony” applies equally well to surveillance video evidence. Id. at 644-645. So concerned about the prejudice that would accrue to a defendant, the panel held that such evidence must only be played in open court and that the trial court must provide a limiting instruction. Ibid. The Appellate Division instructed:

If the request for a replay appears reasonably necessary to the jury’s

deliberations, the trial court should then exercise its discretion to balance that need against any possible prejudice to the defendant.

[Ibid.]

In State v. Burr, 195 N.J. 119, 135 (2008), the Court expanded Michael's ruling to include videotaped testimony that had been introduced as an exhibit and not as evidence at trial. Ibid. The common theme of all the above enumerated cases is the recognition that videotaped evidence plays a unique role in criminal trials. As such, the courts have shown increasing concern when the jury is allowed to place undue focus on video evidence.

These concerns have been borne out by scientific studies that have demonstrated that repeatedly showing video evidence in slow motion is prejudicial to criminal defendants. See (Da100-Da112). A 2016 study of four experiments involving “real surveillance footage from a murder or broadcast replays of violent contact in professional football demonstrate that viewing an action in slow motion, compared with regular speed, can cause viewers to perceive an action as more intentional.” (Da100). The study further concluded that even if the same video is played at normal speed after the slow-motion version was shown, the bias was not mitigated. (Da100). The study’s authors found that there was a significant increase in the risk of a guilty verdict when a jury was shown a slow-motion version as opposed to a jury shown the video at regular speed. (Da101). Slow-motion videos increase the likelihood that juries will find premeditation. (Da101). The authors

cautioned: “If jurors perceive video as a particularly ‘objective’ representative of true events, its biasing potential may be especially pernicious.” (Da101). The study found that “even when viewers were reminded that the video was artificially slowed, they were more likely to vote guilty and more frequently imposed a harsher sentence.” (Da110). Co-author Zachery Burns, assistant professor at the University of San Francisco, said: “We found that the odds ratio of a unanimous jury for convicting for first-degree was more than four times larger than those who did not watch the slow-motion video.” (Da111).

Cognitive neuropsychologist Ashok Jansari from Goldsmiths University of London echoed the above finding. He observed “perception information” is now being added to trials. (Da106). Jansari concluded: “In the case of slowed-down video evidence, jurors feel that the criminal is using the more calculated decision-making process – even when the time taken shows this is unlikely.” (Da106). Forensic psychologist Jacqueline Wheatcroft of Liverpool University said “even minor changes can affect perception,” and urged that caution and more “evidence based-research, is needed, “before we rush in and make changes that can have an impact on people’s lives.” (Da106).

In this case, the same six-second segment of the surveillance video was replayed multiple times at different slower speeds. The segment was then paused several times and replayed at least fifteen times at the direction of a single juror. This

was not how the State presented its case at trial. There the same segment of the surveillance video was played at normal speed without the distorting effect of slow motion coupled with multiple pauses. Here, the trial court permitted the jury to place an “inordinate weight on video” evidence. Dixon, 125 N.J. at 278. It is reasonable to infer that the jury had doubts whether defendant was carrying a shotgun during the incident based on the jury’s requests concerning the surveillance video. The repeated playing of the surveillance tape at different motion speeds indicated that the jury had been unable to reach a verdict by solely relying on the case as it had been presented by the State. By permitting the same segment of the surveillance to be replayed multiple times in slow motion and with numerous pauses, the trial court allowed the jury to perceive something that it had not seen able to see during trial. In effect, the jury saw a distorted reality. Hindi, 429 Pa. Superior Ct. at 171; Dixon, 125 N.J. at 278. Thus, the trial court’s ruling further encouraged the jury to place an “inordinate weight” on the video evidence. Dixon, 125 N.J. at 278.

Defendant submits that the trial court erred by allowing a distorted version of the video evidence to be played to the jury and further failed to provide any limiting instruction to the jury that playing a video in slow motion can distort perception. Proper jury charges are essential to a fair trial, Reynolds v. Gonzalez, 172 N.J. 266, 288 (2002), and the failure to provide clear and correct jury charges may constitute plain error, Das v. Thani, 171 N.J. 518, 527 (2002); see also State v. Concepcion,

111 N.J. 373, 379 (1988) (stating that in appropriate circumstances trial courts should “mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case”). Although the trial court had been provided with scientific studies by the defense calling into question the prejudicial effect of playing slow motion videos to a jury, it failed to provide any cautionary instruction to the jury. The Model Jury charge provides a foundation by which to instruct juries on the potential prejudice of relying on problematic scientific unreliable evidence. The Court crafted a limiting instruction for eyewitness testimony based on scientific studies that have shown that suggestive influences can distort out-of-court identifications. Henderson, 208 N.J. 208. The Henderson model provides a basis for a model jury charge when surveillance videos are played in slow motion. Under Henderson the trial court is required to instruct juries as follows:

Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications.

That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.⁷ The process of remembering consists of three stages:

acquisition -- the perception of the original event; retention -- the

⁷ Henderson, 208 N.J. at 245.

period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.⁸

[Model Jury Charge, Revised 5/18/2020, IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS.]

In this case, the State argued that the scientific studies presented by the defense were "junk science." Knight, slip op. at 19. The trial court disagreed. Ibid. Nonetheless, the trial court overruled defendant's objection based on its reason that there was no supporting case law to support defendant's arguments and that it was not in a position to create new law. Ibid. Defendant submits that this was error. The trial court would not be creating new law but rather it would be exercising its discretion that undue prejudicial and potentially unreliable evidence was not presented to the jury. As this Court has held before, a trial court has an affirmative

⁸ State v. Romero, 191 N.J. 59, 76 (2007).

obligation to ensure that only reliable evidence is presented to the jury. See State v. Chen, 208 N.J. 307 311 (2011) (“[T]he court’s traditional gatekeeping role [is] to ensure that unreliable misleading evidence is not presented to the jurors.”). The trial court’s assumption that it lacked jurisdiction to rule in favor of defendant’s objection was error that led to an unjust result.

The appellate panel said, “we recognize there is a potential for undue prejudice that can result from repetitive showings of the videos if they are incriminating.” Knight, slip op. at 19. The panel observed that in the video defendant is seen holding “a black and brown object in one hand.” Id. at 18. The issue at trial was whether defendant was holding a weapon. The video was played “fifteen additional times, mostly at slower speed and sometimes with intermittent pauses.” Id. at 20. Nonetheless, the appellate court found that defendant was not unduly prejudiced by the multiple playing of the surveillance video notwithstanding contrary scientific studies demonstrating how defendants are prejudiced by the multiple playing of surveillance videos in slow motion. Id. at 29-30. The panel relied on several foreign court decisions to support its opinion. Id. at 27. However, none of the cases cited by the Appellate Division discussed or appeared aware of recent scientific studies showing the inherent prejudice on criminal defendants of playing and pausing a surveillance video multiple times at different motion speeds. Ibid.

Defendant further submits that he was effectively convicted after two trials.

The first trial included the State's case-in-chief. There the State presented witness testimony, documentary evidence, and played the surveillance video at regular speed. However, the State was unable to convince the jury that defendant was armed or otherwise involved in the robbery. Only during the "second trial," after the jury was permitted to replay the same segment of the surveillance video multiple times at various speeds, was the jury able to reach a guilty verdict. What happened in this trial was the very prejudicial phenomena that experts have warned about - playing videos at slower speeds increases the conviction rate as jurors see images that may or may not exist in reality. Not only was the surveillance video played at different speeds multiple times but it was paused several times as well.

It is worth considering the effect of playing the slow motion video within the context of the State's evidence against defendant. As this Court has said before on a defendant's claim of prejudice from an ineffective assistance of counsel claim, the alleged error should be considered within the context of the strength and weakness of the State's case. State v. Pierce, 223 N.J. 560, 579 (2015). "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." State v. Marshall, 148 N.J. 89, 157, cert. denied, 522 U.S. 850 (1997) (quotation citation omitted). These same principles are relevant as to whether defendant received a fair trial.

The State's case against defendant primary relied on the hearsay evidentiary

testimony of the victim Thaddeus Osborne where the trial judge limited the scope of cross-examination. As Osborne had passed away before trial, the trial court allowed the jury to hear Osborne's Wade evidentiary testimony. As defendant has argued elsewhere, the trial court's decision to admit Osborne's evidentiary testimony denied him his Confrontation Rights. The Appellate Division disagreed. Knight, slip op. at 37-38. However, the cumulative effect of both Osborne's hearsay testimony as well as playing the same six-second video segment fifteen times at various slow speeds with numerous pauses, was prejudicial. See State v. Jenewicz, 193 N.J. 440, 473 (2008) ("[E]ven when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal."). The fact that the jury was unable to reach a verdict based on Osborne's evidentiary testimony and after watching the video at normal speed, shows that the jury felt compelled to view the six-segment video fifteen times before it could render a verdict. This was the prejudicial effect that concerns science.

Defendant further submits that a proper foundation for altering the mode of video playback was not laid during trial through witness testimony. A video should not be played in slow motion or zoomed-in for the first time in summation or during deliberations the moving party without a proper evidential foundation being laid by. In State v. Watson, 254 N.J. 558 (2023), the Court said:

Specialized knowledge would not ordinarily be required for other types of adjustments, like adjusting the speed of a video or creating a straightforward composite video, a screenshot, or an enlarged photo from a video.” A lay witness can testify about those basic techniques, and parties can, of course, stipulate to admissibility in this and other areas. Once again, though, more elaborate forensic techniques should be presented by a qualified expert consistent with N.J.R.E. 702. As video technology advances, such expertise may become more prevalent.

[Id.] at 606.]

While Watson did not require an expert for alterations like slow motion, it anticipated that a lay witness would testify to the techniques in the absence of a stipulation. This did not happen in this case. Given the scientific studies presented to the trial court, expert testimony would have informed the jury about the distorting effects of repeated slow motion playing of the same video segment. Here the same segment was replayed at multiple speeds at different speeds.

Defendant submits that under these circumstances he was denied the right to a fair and reliable trial. As such the only constitutional and fair remedy is to remand the matter for a new trial.

CONCLUSION

For the foregoing reasons, Fuquan Knight respectfully asks this Court to vacate the judgment of conviction and remand the matter for a new trial.

Respectfully submitted,

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Designated appellate counsel

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