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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3166-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LONNIE ARRINGTON, a/k/a  
JAMES MILES, DARREN  
BATTLE, GREGORY SETASON,  
SHABOO, ANDRE WILLIAMS,  
and GREGORY STEVENS,

Defendant-Appellant.

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Argued September 20, 2023 – Decided October 20, 2023

Before Judges Currier, Firko, and Susswein.

On appeal from the Superior Court of New Jersey,  
Law Division, Essex County, Indictment No. 19-01-  
0056.

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

Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Matthew E. Hanley, of counsel and on the brief).

## PER CURIAM

After a four-day jury trial, defendant Lonnie Arrington was convicted of passion/provocation manslaughter, aggravated assault, unlawful possession of a handgun, and two counts of possession of a firearm for an unlawful purpose. The court imposed an aggregate thirty-year sentence subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2, granted the State's application for an extended sentence under N.J.S.A. 2C:44-3(a), and request for a consecutive sentence under State v. Yarbough, 100 N.J. 627 (1985).

Because we conclude the prosecutor made several improper comments during the closing argument, including commentary on the chain of custody of the crime weapon that was not supported by the evidence, which taken together deprived defendant of a fair trial, we vacate the convictions and remand for a new trial.

On appeal, defendant argues the following points:

### POINT I

[DEFENDANT] WAS DEPRIVED OF A FAIR TRIAL BY THE STATE'S PERVASIVE MISCONDUCT DURING SUMMATION.

a. The Prosecutor Repeatedly Claimed [Defendant] Was In "Control" Of The Evidence, Contrary To The Burden Of Proof And Presumption Of Innocence.

b. The Prosecutor's Comparison Of [Defendant] To Walter White From Breaking Bad Was Inflammatory And Unrelated To The Evidence Introduced At Trial.

c. The Prosecutor Effectively Testified In Summation By Claiming That Tariq Eckles Had Given [Defendant] A Gun Before The Shooting And Disposed Of It For Him Afterward, Claims For Which There Was No Support In The Record.

## POINT II

THE TRIAL COURT'S RESPONSE TO THE JURY'S REPORT OF A DEADLOCK AND SUBSEQUENT QUESTION REGARDING THE LACK OF UNANIMITY WERE IMPERMISSIBLY COERCIVE AND DEPRIVED [DEFENDANT] OF HIS RIGHTS TO A FAIR TRIAL AND UNANIMOUS VERDICT. (Not raised below).

a. The Court's Failure To Provide The Instruction On Further Jury Deliberations In Response To The First Note Announcing A Deadlock Was Coercive.

b. The Court's Response To The Jury's Note Regarding Its Lack Of Unanimity Erroneously Indicated That The Jury Did Not Need To Unanimously Agree Whether Defendant Had Committed Murder Or A Lesser-Included Offense

Listed Under "Count One-Murder" On The Verdict Form.

POINT III

THE CUMULATIVE EFFECT OF THE LEGAL ERRORS DENIED [DEFENDANT] A FAIR TRIAL. (Not raised below).

POINT IV

THE COURT ERRED IN FAILING TO CONSIDER THE OVERALL FAIRNESS OF THE SENTENCE WHEN RUNNING [DEFENDANT'S] SENTENCES CONSECUTIVE, RESULTING IN AN EXTREME SENTENCE.

I.

Factual Background

We derive the facts from the evidence presented at trial. Around 8:40 p.m. on September 22, 2018, Gary Irish and Michael Shendock checked themselves out of a drug rehabilitation program, and they went to a bar to get drinks. After they consumed alcohol for approximately four hours, Irish and Shendock headed towards some stores on Clinton Avenue to solicit prostitutes. Once there, they met a woman, identified as J.W.<sup>1</sup>, and defendant. Irish claimed defendant was conversing with J.W. and became "aggravated"

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<sup>1</sup> We refer to J.W. by her initials to protect her privacy.

when Shendock spoke to her. Shendock and defendant got into a verbal argument, which turned into a physical altercation in the parking lot that lasted less than a minute. Irish claimed that defendant "threw the first punch." The fight resulted in Shendock "knock[ing] out" defendant. After defendant got up, the two men "tussled" for about thirty seconds and went their separate ways. Irish noted that the area was "well lit," and he was ten feet away from defendant when the altercation occurred.

Irish, Shendock, and J.W. then walked toward Pennsylvania Avenue. While there, Shendock saw defendant again and began fighting with him. Irish claimed he recognized defendant "as being the same person that [Shendock] fought with over on Clinton [Avenue]." Irish did not notice "any objects in [defendant's] hand during that fight." According to Irish, he then walked to South Street with Shendock and J.W., which was "right around the corner" from Pennsylvania Ave. Once they arrived on South Street, Shendock and J.W. sat on a porch while Irish was standing. Irish claimed he "remember[ed] hearing something," "turned around," and observed defendant "had a gun pointed at [Shendock]."

Irish contended defendant shot Shendock four or five times. As defendant was shooting Shendock, Irish became "frozen." According to Irish,

defendant shot at him next. Irish called 9-1-1 after he was shot, but did not recall doing so afterwards. He was transported to the hospital. Irish contended defendant fled towards Pennsylvania Avenue after the incident. Irish admitted to heavily consuming alcohol prior to the incident. The police recovered video footage from two cameras on South Street, but the shooting was not captured on the video footage.

According to Dr. Gregory Conti, a medical examiner and forensic pathologist, Shendock died from "five gunshot wound holes on his body which correlated with three unique gunshots." Irish was shot in the chest and the right leg; he suffered a collapsed lung and fractured ribs; and he was sedated for "some time." Irish was in a coma at the hospital for two weeks after the incident and survived.

On October 5, 2018, Detective Taray Tucker conducted a photo array relating to the investigation. Detective Tucker, along with Detective Tanairi de los Santos and Sergeant Murad Muhammad, showed Irish photographs for identification in his hospital room. Irish selected a photograph of defendant.

On October 11, 2018, arrest warrants were authorized for murder, weapon, and assault offenses against defendant. Five days later, defendant was arrested for an unrelated matter by the New Jersey Transit Police. After

defendant's outstanding warrants were discovered, he was transported to the Newark Police Department for questioning. Detective de los Santos and Sergeant Muhammad interrogated defendant, and Sergeant Muhammad claimed he advised defendant of the charges pending against him.

During the interrogation, defendant stated he was sleeping outside of a store in Newark and woke up after hearing an argument between two men and J.W. The two men attempted to hire J.W. for sex and called her a "bitch" and "[n-word]." After defendant told J.W. to "just" leave, he claimed the two men jumped, kicked, and spat on him. After being attacked, defendant stated he "jumped up," "threw some punches," and went "around the corner" to seek assistance. According to defendant, he eventually saw one of the men sitting on a porch on South Street "with some girls" and approached him. However, before defendant got to the porch, defendant claimed he heard shots "ring out," which caused him to run away from the area without seeing the shooter.

On January 11, 2019, defendant was charged with first-degree murder, N.J.S.A. 2C:11-3(a)(1)(2) (count one); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count two); two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts three and five); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1)

(count four); and fourth-degree hindering apprehension or prosecution, N.J.S.A. 2C:3(b)(4) (count six).<sup>2</sup>

### The Trial

Detective Ramon Candelaria, Officer Hasan Shah, Detective Joseph Sapienza, Detective Karima Hannibal, Detective Antonio Badim, Lamar Melvin, Jody Napolitano, Dr. Conti, Detective Tucker, and Sergeant Muhammad testified for the State. Defendant did not testify and did not present any witnesses.

Detective Candelaria testified she retrieved video footage from Pennsylvania Avenue. The shooting was captured on video and was played for the jury. Officer Shah testified he responded to the shooting near South Street and Pennsylvania Avenue around 2:50 a.m. and observed a "male laying in a pool of blood" with shell cases nearby. Detective Sapienza also testified he responded to the scene in "the early morning hours" and recovered surveillance videos from South Street. Detective Hannibal testified he later arrived at the scene of the shooting and collected evidence. Detective Badim testified as an expert in ballistics and firearms.

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<sup>2</sup> The State dismissed this count prior to trial.



During his trial testimony, Irish identified defendant in court and was "certain" that he was the individual who shot Shendock and himself. Irish testified that he saw defendant's face "the entire time [he] was in a coma." Melvin testified as an expert in the field of firearms identification and examination. Napolitano testified she is employed by the Essex County Prosecutor's Office, where she downloads videos and conducts cellular phone exploitations. Dr. Conti testified about the autopsy he performed on Shendock. Detective Tucker testified as to the photo array that he conducted with Irish at the hospital.

The jury was also shown a video of defendant's police station interview, which was conducted by Detective de los Santos and Sergeant Muhammad. During his testimony, Sergeant Muhammad testified he spoke to several individuals in the areas of South Street and Pennsylvania Avenue, including one he identified as Mr. "Eckles," who was depicted on the surveillance video, which included Pennsylvania Avenue. According to Sergeant Muhammad, none of the individuals in the video provided useful information to the police, and none of them testified at trial except for Irish. Neither J.W. nor Eckles testified at trial.

Sergeant Muhammad testified the shell casings found at the scene of the shooting matched shell casings that were later discovered at the scene of another shooting approximately six weeks later. The gun was recovered from a sixteen-year-old individual who had no connection to defendant. Sergeant Muhammad claimed he attempted to speak with the juvenile but was unable to do so because the juvenile's mother would not consent to an interview.

During summation, the prosecutor used a PowerPoint presentation with video clips of the surveillance video and told the jury that defendant was "in control of the evidence you have." The prosecutor further stated:

Because in that moment, the defendant gets rid of the gun. Why would he want to keep that gun? Number one, it's not his gun. Number two, that gun was used to try and kill—to kill somebody and to try and kill somebody else. So he's getting that gun as far away from him as possible, which is exactly what [Eckels] does, later on, to get that gun away from him because we know when the gun's finally found, it's found with somebody else altogether who doesn't want to talk to us.

The prosecutor also told the jury:

Well, what we do is we look at the surrounding circumstances. The first one being, where did the act occur? Again, this is the defendant's turf. These are the defendant's people. They know him. They know him well enough to take a gun and give it to him. He knows them well enough to know that none of them are going to turn on him. And they don't. None of

them are going to go to the police and talk to them. And they don't. Nobody gives anything of substance or that's helpful to the police, and he knows that. Because that's his turf, he knows that area better than the victims do.

During her summation, the prosecutor compared defendant to Walter

White:

At one point, [defendant] said he ran from the shooting, which is what most people would do. They would run away from the shooting or do what that guy . . . did who was wearing the hoodie. They would take cover against the shooting.

He's not doing that. He's walking away from it calmly, deliberately. He's not scared of the danger. If any of you watched Breaking Bad, if you remember that . . . Walter White line where he says, "I am the danger," that's exactly what it is. He is the danger.

Defense counsel did not object to the prosecutor's remarks during the summation.

As stated, the jury found defendant guilty of the lesser-included charge of passion/provocation manslaughter in connection with count one and the remaining counts of the indictment. This appeal followed.

II.

A.

Defendant's "Control" of the Evidence

We begin with defendant's Point Ia, in which he asserts the prosecutor impermissibly claimed defendant was in "control" of the evidence contrary to the burden of proof and presumption of innocence. Defendant did not object to the comments when they were made.

In our review of the prosecutor's statement, we acknowledge that "prosecutors are given wide latitude in making their summations and may sum up 'graphically and forcefully.'" State v. Garcia, 245 N.J. 412, 435 (2021) (quoting State v. Johnson, 31 N.J. 489, 510 (1960)). A prosecutor is "afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. Frost, 158 N.J. 76, 82 (1999)).

This court should "reverse a conviction on the basis of prosecutorial misconduct only if 'the conduct was so egregious as to deprive defendant of a fair trial.'" Ibid. (quoting State v. Wakefield, 190 N.J. 397, 437 (2007)). "Only when the prosecutor's conduct in summation so 'substantially prejudice[s] the defendant's fundamental right to have the jury fairly evaluate the merits of his defense' must a court reverse a conviction and grant a new trial." Garcia, 245 N.J. at 436 (alteration in original) (quoting State v.

Bucanis, 26 N.J. 45, 56 (1958)). When an appellate court reviews a claim of prosecutorial misconduct with respect to remarks in summation, the issue presented is one of law. State v. Smith, 212 N.J. 365, 387 (2012). As such, we review defendant's arguments de novo. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Additionally, if a party did not object to a statement during the trial, the plain error rule applies. R. 2:10-2; State v. Clark, 251 N.J. 266, 286-87 (2022). "[A]n unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result.'" Id. at 287. "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated in light of the overall strength of the State's case.'" Ibid. (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (internal quotation marks omitted)). The burden is on the defendant to establish plain error "because 'to rerun a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.'" State v. Santamaria, 236 N.J. 390, 404-05 (2019) (alteration in original) (quoting State v. Ross, 229 N.J. 389, 407 (2017)).

"Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." Frost, 158 N.J. at 83. This is

because "when counsel does not make a timely objection at trial, it is a sign that 'defense counsel did not believe the remarks were prejudicial' when they were made." State v. Pressley, 232 N.J. 587, 594 (2018) (quoting State v. Echols, 199 N.J. 344, 360 (2009)).

Defendant contends the prosecutor's theme in her summation was that defendant was in "control" of the evidence. This statement improperly shifted the burden of proof. In particular, defendant asserts the prosecutor stated, "[t]he nature of the crime and the person who commits it controls everything that follows. He's the one that controls the evidence that you have and the evidence that you don't have." In her next sentence, the prosecutor mentioned that "[t]he State has a burden to meet [its] proof beyond a reasonable doubt" and "[t]hat burden can be met in various ways," through direct or circumstantial evidence, "or a combination of both." Later in her summation, the prosecutor reiterated, "[i]t's the defendant who controls the evidence that you have."

Defendant claims the prosecutor improperly suggested that defendant prevented witnesses and bystanders to the shooting—who were his "people"—from speaking with the State, in the absence of any evidence of such interference at trial. Defendant contends the prosecutor's "theme" in

summation regarding the lack of eyewitnesses to the shooting was evidence of defendant's control over them, and constituted further proof of defendant's guilt. In defendant's view, the prosecutor's comments were egregious because they insinuated defendant had control over "all" the evidence, not just one specific item in dispute, thereby violating his Fifth Amendment right to due process and to remain silent.

Defendant argues the prosecutor's comments impermissibly directed the jury to require defendant to prove his innocence rather than the State to prove his guilt. Defendant also avers that the prosecutor's argument to the jury asking it to draw a negative inference against defendant from the lack of eyewitness testimony implicating him as the shooter is contrary to State v. Black, 380 N.J. Super. 581, 594 (App. Div. 2005),<sup>3</sup> and State v. Sinclair, 49 N.J. 525, 549 (1967) (holding "[e]very time a prosecutor stresses a [defendant's] failure to present testimony, the facts and circumstances must be closely examined to see whether the defendant's right to remain silent has been violated").

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<sup>3</sup> In Black, we reversed the defendant's conviction because the prosecutor's comments on defendant's failure to provide "insight" into the circumstances surrounding the victim's injury "had the capacity to shift the burden of proof from the State to the defendant." Id. at 594-95.

Defendant cites in this regard to State v. Jones, 364 N.J. Super. 376, 382 (App. Div. 2003), in which we reversed the defendant's conviction because in summation, the prosecutor suggested defendant's failure to introduce fingerprint testing from a gun meant he "knows something we don't, that it is his gun." Id. at 382-83. We concluded, "[the] defendant had no obligation to perform fingerprint tests upon the weapon to establish that it was not his, and the prosecutor should not have implied to the jury that defendant's failure to perform such testing indicated a fear of the possible results." Id. at 383. In Jones, we emphasized that even though the prosecutor represented that the defense never has the burden of proof, this statement "in no way lessened" the prejudice of the suggestion that a negative inference could be drawn from the defendant's failure to introduce evidence. Ibid.

In her summation, defense counsel told the jury "[t]here's no evidence that . . . defendant shot anybody except the testimony of . . . Irish, and again, as I say, you [should] assess the credibility of . . . Irish's testimony." Then defense counsel mentioned "Irish indicated the person that shot [him] was light-skinned—was dark-skinned. Had on a light gray sweatshirt and was approximately 5 foot 11. Not . . . defendant." Defense counsel reminded the jury that they "heard all the testimony."



Defense counsel only mentioned Irish's testimony in his summation and did not focus on why no one else was produced or presented as an eyewitness to the incident. The prosecutor introduced the theory that the lack of such witnesses was further proof of defendant's guilt because the bystanders were his "people" since defendant had "control" over this evidence. The prosecutor's statement is problematic because it improperly suggests she possessed information beyond what was presented at trial about defendant's alleged influence over non-testifying witnesses and shifted the burden of proof to defendant by stating he was in "control" of the evidence.

Although these comments alone might not have warranted a reversal of the verdict, the improper comments combined with the additional inappropriate comments in the summation cumulatively deprived defendant of a fair trial, warranting reversal and a new trial.

## B.

### The Prosecutor's Comparison Of Defendant To Walter White

Defendant next argues in Point Ib the prosecutor improvidently compared him to the villainous Breaking Bad character, Walter White, the fictional drug kingpin. Defendant claims the "inflammatory reference" was gratuitous because Walter White was never mentioned during the trial.

Defendant contends the prosecutor compared him to Walter White to urge the jury to view him as a "threatening person prone to violence, like one of the most famous pop culture villains of recent memory." In her summation, the prosecutor referred to video surveillance footage from 9 Smith Street and argued defendant was "walking" rather than "running" from the area of the shooting, suggesting he was the shooter. After quoting Walter White describing himself as "the danger," the prosecutor said of defendant, "that's exactly what it is. [Defendant] is the danger." Because defense counsel made no objection to these comments at trial, we review for plain error. R. 2:10-2.

Defendant relies on State v. Williams, 244 N.J. 592, 599-600 (2021) in support of his argument. In Williams, our Court "reemphasized that prosecutorial misconduct warranting reversal of a defendant's conviction can be based upon references to matters extraneous to the evidence." Id. at 612. There, based on prosecutorial misconduct, our Court vacated the defendant's conviction for robbery, which stemmed from the defendant "pass[ing] a note to a young female teller which said, 'Please, all the money, 100, 50, 20, 10. Thank you.'" Id. at 599.

Noting that "[t]he central issue at trial" was whether the defendant committed robbery or theft, our Court found the prosecutor overstepped her bounds:

[B]ecause the prosecutor showed the jury a PowerPoint presentation in her closing that contained a still photograph from the movie The Shining and commented, "if you have ever seen the movie The Shining, you know how his face gets through that door." The PowerPoint slide depicted Jack Nicholson in his role as a violent psychopath who used an ax to break through a door while attempting to kill his family. The photograph contained the words spoken by Nicholson in the movie scene as he stuck his head through the broken door—"Here's Johnny!" The slide also bore the heading "ACTIONS SPEAK LOUDER THAN WORDS," a theme used by the State throughout the trial to suggest to the jury that defendant's conduct in the moments leading up to and following defendant's passing the note to the teller supported a finding of robbery when viewed in context. The photograph was not previously shown to the court or defense counsel and had not been used at trial or offered or admitted into evidence.

[Id. at 599-600.]

The Court held that by "improperly invit[ing] a comparison between defendant and Jack Nicholson's psychotic, ax-wielding character in The Shining," id. at 614, none of which was in evidence, "the prosecutor's comments and use of the PowerPoint slide amounted to prejudicial error." Id. at 600. The Court explained "[t]he use of a sensational and provocative image

in service of such a comparison, even when purportedly metaphorical, heightens the risk of an improper prejudicial effect on the jury." Id. at 617. "Weighing 'the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial,' [the Court] determine[d] the prosecutor's comments and the extra-evidentiary movie photograph 'made it more likely that the jury would reject the defense' that only a theft occurred." Id. at 616 (quoting Wakefield, 190 N.J. at 437).

Here, the prosecutor strayed from the permissible path by comparing defendant to Walter White—a fictional villain that "the jury associates with violence or guilt." Id. at 617. The prosecutor deviated "beyond the evidence and the reasonable inferences therefrom," see id. at 615, and the comparison was unnecessary in making her point to the jury, which was to infer defendant's involvement in the shooting based on his demeanor and actions in the surveillance video, and his calmly walking away from the scene of the shooting implicating he was guilty.

Our Court has previously directed prosecutors to confine their comments to "the evidence admitted at trial and reasonable inferences drawn therefrom." Id. at 613. Moreover, it is well-settled jurisprudence that prosecutors should not compare a defendant to an historical or fictional crime

villain. Cf. State v. Williams, 113 N.J. 393, 455 (1988) (noting in a capital case our Court and the United States Supreme Court have criticized the improper references to defendant as an animal and citing other cases involving derogatory name calling). The prosecutor's reference to Walter White here served no legitimate purpose, and the prosecutor strayed beyond the evidence. McNeil-Thomas, 238 N.J. at 275 (quoting State v. R.B., 183 N.J. 308, 330 (2005)). In the matter under review, we conclude it was plain error for the prosecutor to compare defendant to Walter White because it was unduly inflammatory and denied defendant of a fair trial warranting reversal and a new trial.

C.

The Prosecutor's Claims About Eckles Providing Defendant With the Gun  
and Disposing Of It Afterwards

For the first time, on appeal in Point Ic, defendant also contends the prosecutor "effectively" testified in summation, stating that the surveillance footage showed Eckles—who did not testify—give a gun to defendant before

the shooting and defendant returned the gun to Eckles after the shooting to dispose of it. Defendant claims the video did not depict such transfers and there was no evidence presented at trial supporting the proposition that Eckles provided or took a gun from defendant. According to defendant, the prosecutor's improper presentation of these unproven facts deprived him of any chance to respond and implied that the State possessed extraneous information regarding the gun's chain of custody.

Again, defendant did not object to the remarks at trial, and we review for plain error. R. 2:10-2. "In evaluating claims of prosecutorial misconduct and plain error the fundamental question we must answer is whether it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict if the questioned conduct had not occurred." State v. Walden, 370 N.J. Super. 549, 562 (App. Div. 2004).

Since prosecutors' comments are usually given special deference by jurors, we have highlighted that "courts have identified particular conduct that must be avoided." State v. Williams, 471 N.J. Super. 34, 44 (2022). For example, "prosecutors must refrain from opining 'in such manner that the jury may understand the opinion or belief to be based upon something which [the prosecutor] knows outside the evidence.'" Ibid. (quoting State v. Thornton,

38 N.J. 380, 398 (1962)) (alteration in original). "[I]n the prosecutor's effort to see that justice is done, the prosecutor 'should not make inaccurate legal or factual assertions during a trial.'" State v. Bradshaw, 195 N.J. 493, 510 (2008) (quoting Frost, 158 N.J. at 85). Rather, "prosecutors 'must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.'" Ibid. (quoting State v. Smith, 167 N.J. 158, 178 (2001)) (emphasis in original).

During her summation, the prosecutor narrated a surveillance video clip—marked S-12 in evidence<sup>4</sup>—of Pennsylvania Avenue. In his merits brief, defendant claims the video shows he walked by Shendock, who swung at him. Other individuals, including Irish, watched the men "briefly tussle." Two individuals are shown holding their cellular phones up, seemingly to provide a light source for defendant and Shendock while they tussled. Defendant contends after Shendock and defendant fought, the video shows defendant walked away toward a silver car in the upper left area of the camera frame, and a man with a gray sweatshirt enters the camera frame walking towards defendant. Shendock yelled after defendant, before backing away

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<sup>4</sup> The record is unclear as to whether the jury had the capacity to view S-12 in the jury room.

to the bottom left area of the camera frame, eventually disappearing with Irish. Defendant asserts the video footage is "unclear" because the area was poorly lit and obstructed by a ladder.

During summation, the prosecutor played the surveillance video clip for the jury and stated:

That person, as you remember in Detective Muhammad's testimony, he said that that person's [Eckles], tried to talk to him; he wasn't helpful.

Why wasn't he helpful? If you take a look carefully at what's going on over here, you'll see exactly why he isn't helpful. Because at this point, the defendant is walking around. He's not really engaging him. But what we do have is [Eckles], now walking up to the defendant, who's standing now behind that pole, that light pole, that telephone pole. You can't see them, but you can see that they're huddled together.

Let me forward this a bit because you see the two of them walking over into the corner. Top left-hand corner of the screen of S-12, walking towards the car together. And they're going to be over to the side, and you can tell that area's a little bit darker than the area that we have in the foreground where the fight happened. They're going to hang out there for a bit, and then the two of them are going to walk over to the car.

Now they're walking over, and we're at about 2 hours 46 minutes and 47 seconds. They're standing next to each other at this point. Now they're huddled up over here, right next to each other. . . . [Eckles] is



a big guy. [Defendant] not quite as big. And what we saw over here, if you look carefully, is [defendant] taking his right hand across his body towards where [Eckles] is. Then he walks over to his coat. He's going to pick up his coat. When he picks up his coat, take a close look at his right hand. A really close look at his right hand.

Let me play that part for you again because it looks, in that moment, like there's some object that he's holding in his right hand.

And then what does he do with that coat? He takes it and throws it over that right hand as he runs on Pennsylvania Avenue towards the direction of South Street, which is exactly where we saw the victims going. Ladies and gentlemen, the State submits in that moment what you just saw, was [Eckles] passing that handgun over to the defendant.

[emphasis added.]

Defendant argues on appeal that there was no evidence or testimony presented at trial to support the prosecutor's statement that Eckles provided or took a gun from defendant and at no point in the video is defendant holding a gun. According to defendant, Shendock and Irish were shot around the corner from the location depicted on the video, and the shooting was not captured on camera. While Sergeant Muhammad identified Eckles as the man with the gray sweatshirt, there was no testimony that Eckles handed a gun to

defendant during their interaction together. There was no testimony that Eckles had any role in this incident.

Moreover, in attempting to explain how the gun ended up in an unrelated juvenile's possession, the prosecutor told the jury Eckles assisted defendant with "get[ting] that gun away from him." There was no evidence to support that statement. Defendant claims he had no opportunity to challenge the State's assertion by way of cross-examination or rebuttal testimony because the statement was made during summation, depriving him of a fair trial.

In State v. Watson, our Supreme Court acknowledged the distinction between closing argument and narration testimony, recognizing

is it not reasonable to expect that jurors can perceive and understand all parts of a complex video, or even a fleeting gesture in a simple scene, that is depicted in a video. Counsel, of course, can pinpoint particular spots in a video during closing argument. But that is not a satisfactory solution in all cases. Not only would it be impractical with a confusing or complex video, but it might also invite objections that counsel is essentially testifying without being subject to cross-examination.

[254 N.J. 558, 600 (2023)].

Here, the prosecutor in effect testified to an important fact. In addressing this issue, we find helpful guidance in the majority and dissenting

opinions in State v. McNeil-Thomas, 238 N.J. 256 (2019). In that case, the State introduced nighttime surveillance videos that depicted cars passing by the crime scene area before and around the time of the shooting. In summation, the prosecutor replayed and highlighted a five-second snippet from a surveillance video which, the prosecutor argued, depicted a black Cadillac CTS passing the restaurant a few minutes before the shooting. A neighbor had testified that she observed defendant drive a black, four-door car that looked like a Cadillac, but she could not identify the model. Nor was the witness asked whether any cars depicted in any videos matched what she had seen.

The defendant claimed<sup>5</sup> that the State unfairly surprised the defense by associating him with the black Cadillac CTS, denying him a meaningful opportunity to present a complete defense. The majority of our Court concluded the prosecutor's comments during summation were reasonable and fair inferences supported by the evidence at trial and thus fell within "the boundaries of permissibly forceful advocacy." Id. at 280-81 (quoting State v. Marshall, 123 N.J. 1, 161 (1991)).

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<sup>5</sup> We note that the defendant objected to the prosecutor's summation and asked for a mistrial, which was denied. Id. at 268.

However, the dissenting Justices concluded the assistant prosecutor crossed that line when he, in effect, testified during closing argument about "vital evidence" that no witness had presented. Id. at 281 (LaVecchia, J. dissenting). The dissent stressed,

the manner and timing of this discussion of evidence—which had not been addressed at all before in the State's case—had the effect of ambushing defendant. By not raising the point sought to be gleaned from the videos until summation, the State prevented defendant from any opportunity to rebut the "evidence."

[Id. at 291].

The majority rejected defendant's assertion that the State unfairly surprised the defense, noting that "the State is under no duty to announce to the defense each inference it will ask the jury to reach during summation." Id. at 278-79. In reaching that conclusion, however, the majority did not adopt a categorical rule that prosecutors may always wait until summation to spring a new theory to support a guilty verdict. Indeed, in rejecting the defendant's unfair surprise argument, the majority stressed that the defendant,

makes this assertion notwithstanding defense counsel's vigorous cross-examination of the neighbor about her memory of the order of the vehicles as they pulled away from defendant's home, and his plea during closing that the jury disregard the neighbor's

testimony about defendant being inside the black sedan.

Clearly, defense counsel was aware of the video segment and its import.

[Id. at 278-79 (emphasis added)].

And, the majority added: "In this case, the inferences suggested by the prosecutor were ones that defense counsel's conduct at trial shows he was aware of and anticipated." Id. at 279.

The circumstances in the matter under review are starkly different. Here, there was no testimony regarding how and when defendant acquired or disposed of the gun used in the shootings. The acquisition of the gun was never disputed or even mentioned at any point in the course of the trial before the prosecutor's summation.

The impropriety of the prosecutor's summation comments regarding defendant's acquisition of the gun are underscored by her argument that defendant returned the gun to Eckles. There is nothing in the surveillance video or any other trial evidence to support that conclusion. See State v. Feaster, 156 N.J. 1, 62 (1998) (prosecutor strayed beyond the evidence by suggesting in summation that the defendant had loaded a gun during a car ride with "no basis [for that comment] in the record"). The Feaster Court also held

that the summation must be limited to the evidence presented "and reasonable inferences to be drawn therefrom." 156 N.J. at 58-59. In other words, the prosecutor cannot stray beyond the evidence without "any basis in the record." Id. at 62. "Failing to do so may imply that facts or circumstances exist beyond what has been presented to the jury and encroach upon a defendant's right to a fair trial." Williams, 244 N.J. at 568.

We thus conclude the prosecutor improperly sought to fill in missing pieces in the State's case concerning the chain of custody of the gun. Moreover, that error was amplified by the prosecutor's improper argument in summation that defendant "controlled" the evidence.

When reviewing a prosecutor's summation, we examine questionable comments "in the context of the entire trial" and taken as a whole. State v. Morton, 155 N.J. 383, 419 (1998). In sum, the State's unsupported rationale for the lack of eyewitness testimony, the inflammatory reference to Walter White, and unfounded claims about Eckles "substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." See Wakefield, 190 N.J. at 438 (quoting State v. Papasavvas (I), 163 N.J. 565, 625 (2000)).

### III.

In Point III, defendant contends the cumulative effect of the legal errors deprived him of a fair trial. "When legal errors cumulatively render a trial unfair, the Constitution requires a new trial." State v. Weaver, 219 N.J. 131, 155 (2014).

Because we have determined that the prosecutor engaged in misconduct by repeatedly claiming defendant was in control of the evidence, comparing defendant to Walter White, and stating in summation that Eckles gave defendant a gun before the shooting and disposed of it for him afterwards, we conclude defendant was denied a fair trial due to cumulative error, warranting reversal. Weaver, 219 N.J. at 155.

In light of our conclusion, we need not address defendant's contentions about issues raised during jury deliberations or his sentence (Points II and IV). The judgment of conviction is vacated, and the matter is reversed and remanded for a new trial. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION