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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3443-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CALVIN L. GREEN, a/k/a
CALVIN L. GREEN, JR., and
CALVIN GREEB,

Defendant-Appellant.

Argued September 12, 2023 – Decided October 6, 2023

Before Judges Whipple, Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 18-06-0562.

Austin J. Howard, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Austin J. Howard, of counsel and on the briefs).

Jonathan I. Amira, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Christine A. Hoffman, Acting

Gloucester County Prosecutor, attorney; Jonathan I. Amira, of counsel and on the brief).

PER CURIAM

In this appeal of a judgment of conviction we have reviewed five asserted trial errors to ascertain whether any of them require a new trial. We conclude that only one asserted error does, thus we reverse.

The record informs our decision. On April 7, 2018, Washington Township police responded to an Express Mart after a store clerk reported a woman with gunshot wounds had entered the store. On arrival, a police officer observed victim Dawn Clark sitting in a chair by the cash register, bleeding from her stomach. She was transported to the hospital. Clark told officers she had driven there from an apartment complex down the road after being shot. According to Clark, she and defendant were friends who had a sexual relationship. On April 7, 2018, he sent her a text message at almost 2:00 a.m. saying she had less than twenty-four hours to live. She called him about the message, and defendant complained her ex-boyfriend had posted a photo of her on Facebook. After they talked, she said, "everything . . . seemed fine."

Later that day, defendant asked Clark to hangout and drink. They drove to defendant's brother's apartment and picked him up; then they all went to a liquor store and to defendant's apartment. Clark left defendant's apartment to

visit a friend but returned after defendant called and said they wanted to go back to his brother's apartment.

Clark drove defendant and his brother to pick up food and then back to the brother's apartment at the Millstream Apartments. According to Clark's account, the brother told defendant and Clark to come inside once they were done "bickering"; the brother then exited the car and went into his apartment.

According to Clark, once the brother was outside the car, defendant pulled out a Ziploc baggie with blue gloves and a gun in it and told her she was going to die today. Clark testified he held the gun on his lap while she was sitting in the driver's seat. She tried to grab the gun from him and asked him what he was doing. He put on the gloves, then shot her twice inside the car, hitting her leg and her chest, then he exited the car and shot her two more times. According to Clark, she then exited the car from the driver's seat, defendant went around her car, and tried to reach for her cell phone. Thereafter, she drove alone to the Express Mart, where she asked the store clerk to call the police. A surveillance video from the Millstream Apartments shows the brother was still in the car for much of this encounter.

Clark did not call the police after fleeing, even though she had her cell phone with her. When police responded to the Express Mart, Clark told them

that defendant had shot her. She was transported to a local hospital, where she stayed for treatment until later that night. Clark stated her body suffered eight holes as a result of gunshots: "four shots, and there's an enter and an exit for each shot."

Defendant Calvin L. Green was charged with first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1), 2C:11-3(a)(1); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree terroristic threats, N.J.S.A. 2C:12-3(b); fourth-degree aggravated assault by pointing a firearm, N.J.S.A. 2C:12-1(b)(4); and second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1).

Between January 14, and January 22, 2020, the trial judge conducted bifurcated jury trials with the first trial on counts one through six and the second trial on count seven. On the first day of testimony, the jury heard Detective Brian Peticari of the Gloucester County Prosecutor's Office testify Clark's car was parked outside the Express Mart, and he took photographs of what he suspected were bloodstains on the outside and inside of the car. Detective Peticari then went to the Millstream Apartments, from where Clark had

reportedly come. Other officers were already there securing the area, and they continued the investigation. Police later removed a copper projectile from a hole inside the driver's side front door of Clark's car.

Sgt. Leo DiPetro of the Washington Township Police Department testified about what he observed when he responded to the Express Mart and found Clark bleeding from a gunshot wound. Kinjal Patel, the Express mart employee who called the police, also testified. Anna Kapizzi, who lived at the Millstream Apartments, testified she heard arguing outside and "a loud bang." She looked out of her window and saw a man and a woman standing in the parking lot near a car and heard someone say, "[w]hy did you do this to me? Look at what you did to me." The woman then got into the car and quickly drove away. Kapizzi did not see anyone shooting, and she saw only two people. Defendant's cousin, Tiara Hoarce, testified that defendant walked up to her that evening at the apartments and asked for a ride to his home.

On the second day of testimony, the property manager for the Millstream Apartments provided the surveillance video of the incident, which the jury viewed without audio or witness narration. The surveillance video was entered into evidence as exhibit S-1; the jury watched the video during the property

manager's testimony, plus three more times during trial, and again during deliberations.

The next witness was Detective Sgt. Anthony Gabarino, who interviewed Clark at the hospital and collected her bloodstained clothing and cell phone as evidence. The jury next heard from Dr. John Porter from the hospital's Trauma Surgery Department, who treated Clark for gunshot wounds. According to Dr. Porter's medical chart, Clark reported being shot by a friend of hers: she and the gunman were in the front seat of her car, before he put gloves on and said, "[y]ou are about to die." The gunman shot multiple times, and Clark was shot from her left side. Clark exited the car and the gunman continued to shoot. Under cross-examination, Dr. Porter revealed that the medical chart contained notes stating that Clark denied knowing the gunman's motive, she got into a different car after being shot, and she called the medics herself. Dr. Porter explained that hospital staff do not classify the number of times a person is shot, but rather the number of bullet holes evident. His notes indicated Clark had six holes, but a picture drawn by a nurse showed seven holes, so he concluded that there were between six and seven holes. Dr. Porter said the number of holes indicated that there were at least three shots, maybe four, and up to seven. He

testified that the holes across Clark's abdomen "were all on the left side, going down in a line." The bullets did not cause any internal injuries.

The next witness was Detective Colleen McCausland, who responded to Millstream Apartments and obtained the surveillance video of the incident from the property manager. Detective McCausland summarized the video from the stand before it was shown to the jury for the second time. According to McCausland, the video showed: "The victim's car arrives at the apartment complex and the vehicle was [p]arked in front of [defendant's brother's] apartment"; "[y]ou see Calvin Green, who is in the passenger seat, he exits the vehicle"; "[i]t appeared to see [sic] that the victim was shot"; the victim "was frantic"; "[a]nother person was present, who was also in the back seat of the vehicle, which was [defendant's brother]"; and, after defendant exited the car, he "walked around to the side of the car and stood when [Clark] was exiting the car."

McCausland initially said the black object that defendant was holding in the video was a "black handgun," but the court sustained defense counsel's objection to that testimony; later, however, McCausland testified without objection that she "appeared to see a gun in the video."

Detective McCausland also summarized another surveillance video, from the Express Mart, which was not entered into evidence or played for the jury. According to McCausland, the Express Mart video showed: "the victim enter[ed] the store"; "[s]he appeared to be . . . frantic, panicked"; "it looked as if she was asking for help from the employees"; and "it appear[ed] as if she was bleeding and that she was like bloodstained on her shirt and pants." McCausland said she was not "aware of [defendant] being permitted to carry a gun." She revealed that police searched the apartments of both defendant and his brother but found no gun.

Finally, McCausland testified at trial about photographs of Clark's injuries showing wounds on her stomach or abdomen and on the left side of her upper thigh. McCausland said the video from the Millstream Apartments appeared to show that the only time defendant was on Clark's left side was when he exited the car and walked around to the driver's side.

Dawn Clark was the final witness. The surveillance video was also shown to the jury during her testimony.

Defendant did not testify. After the State rested, defendant attempted to call his mother, who was not on the witness list, but the court did not allow her to testify. Defendant's brother did not testify.

At the close of the State's case on counts one through six, defendant moved for an acquittal on attempted murder, which the court denied in an oral ruling. The surveillance video was played again during the prosecutor's summation. The jury asked to watch the surveillance video again during deliberations so they could compare the video with photographic evidence. They also requested audio playback of the testimony of Detective McCausland and Dawn Clark. On January 22, 2020, the jury found defendant guilty on all counts in both bifurcated trials.

The court sentenced defendant to an aggregate term of twenty-one years in prison with an aggregate parole disqualifier of seventeen years, nine months, and three days. The court merged counts two through six into count one, and sentenced defendant on count one (first-degree attempted murder) to fifteen years in prison with an eighty-five percent parole disqualifier pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. The court sentenced defendant on count seven (certain persons not to have a weapon) to six years in prison with a five-year parole disqualifier, to run consecutively to the sentence imposed on count one. Defendant filed a motion for reconsideration of his sentence. On June 4, 2021, the court denied the motion in an oral decision and corresponding written order. This appeal followed.

Defendant raises the following issues on appeal:

POINT I: THE TRIAL COURT DENIED DEFENDANT A FAIR TRIAL BY PERMITTING A DETECTIVE TO IMPROPERLY SUMMARIZE TWO SURVEILLANCE VIDEOS FOR THE JURY, INCLUDING THE STATE'S SELF-PROFESSED "MAIN PIECE OF EVIDENCE." (Partially Raised Below).

A. The Detective's Summary of the Main Video -- Which Jurors Saw for Themselves Five Times -- Was an Impermissible Lay-Witness Opinion that Unfairly Bolstered the State's Theory and the Victim's Shaky Account.

B. The Detective's Summary of the Video from the Convenience Store -- Which Was Not in Evidence -- Violated the Best Evidence Rule and Improperly Bolstered the State's Case.

POINT II: THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO PRESENT WITNESSES IN HIS OWN DEFENSE BY PREVENTING HIM FROM CALLING HIS MOTHER, EVEN THOUGH HER PROFFERED TESTIMONY WOULD HAVE DIRECTLY REBUTTED THE STATE'S MOTIVE EVIDENCE. (Raised Below).

POINT III: DEFENDANT'S CONVICTION FOR ATTEMPTED MURDER MUST BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY CHARGED THE JURY ON ATTEMPT. (Not Raised Below).

POINT IV: DEFENDANT'S CONVICTION FOR BEING A CERTAIN PERSON NOT TO POSSESS A WEAPON MUST BE REVERSED BECAUSE THE

TRIAL COURT FAILED TO GIVE TWO ESSENTIAL JURY INSTRUCTIONS DURING THE SECOND TRIAL. (Not Raised Below).

A. The Trial Court Denied Defendant a Fair Trial by Omitting a Charge on the Presumption of Innocence.

B. The Jury Did Not Find an Essential Element of the Certain Persons Offense Because the Trial Court Failed to Instruct the Jury that the Parties' Stipulation Was Not Conclusive.

POINT V: THE CUMULATIVE EFFECT OF THE NUMEROUS TRIAL ERRORS DENIED DEFENDANT A FAIR TRIAL BECAUSE THEY SIGNIFICANTLY BOLSTERED THE VICTIM'S SHAKY ACCOUNT AND LED THE JURY TO OVERLOOK HER INCONSISTENCIES. (Not Raised Below).

POINT VI: ALTERNATIVELY, THE SENTENCING COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES WITHOUT EXPLAINING ITS REASONING OR EXPLAINING WHY SUCH A LENGTHY PRISON TERM IS FAIR.

I.

"We defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021); see also State v. Jackson, 243 N.J. 52, 64 (2020); Rowe v. Bell & Gossett Co., 239 N.J. 531, 551 (2019); State v. Scott, 229 N.J. 469, 479 (2017); State v. Nantambu, 221 N.J. 390, 402 (2015); State v. Rochat, 470 N.J. Super. 392, 453 (App. Div. 2022). We review

"[t]he trial court's evidentiary rulings . . . 'under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion.'" State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). "Under that deferential standard, we review a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting Scott, 229 N.J. at 479).

We also apply the deferential standard of review to a trial court's fact-finding based on video or documentary evidence. State v. McNeil-Thomas, 238 N.J. 256, 271 (2019); State v. S.S., 229 N.J. 360, 379 (2017); State v. Hubbard, 222 N.J. 249, 270 (2015); State v. Carrillo, 469 N.J. Super. 318, 332 (App. Div. 2021). In the absence of objections, we review challenged evidentiary rulings for plain error. An error is plain if it is "clearly capable of producing an unjust result," R. 2:10-2, in that there is "a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached." State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)).

We first address the assertion that Detective McCausland's narration of video surveillance evidence was impermissible lay-witness opinion. Relevant to this case, are the recent Supreme Court decisions in State v. Watson, 254 N.J.

558 (2023), and State v. Allen, 254 N.J. 530 (2023). In Watson, the Court clarified that "narration evidence by a witness who did not observe events depicted in a video in real time may not include opinions about a video's content and may not comment on facts the parties reasonably dispute." 254 N.J. at 599.

In Watson, the individual was not an eyewitness to the crime, and instead commented on "an independent source of evidence—an objective recording of the event." Id. at 601. Furthermore, the testimony offered was based on the witness's direct perception of the video. The Court stated that although the fact an investigator has "reviewed a video a sufficient number of times prior to trial can . . . satisfy the rules' 'perception' and 'personal knowledge' requirements as to what the video depicts. . . . [Rule] 701 . . . contains a critical limiting requirement that . . . a lay witness may only present testimony that will be helpful to the jury." Ibid. In Allen, applying principles stated in Watson, the Court ruled the detective's testimony opining that the video showed defendant turning and firing his weapon should have been excluded from evidence. 254 N.J. at 549. However, that error was harmless given the strength of the State's evidence. Id. at 552.

Here, the trial judge permitted Detective McCausland to summarize two videos, including one which was not shown to the jury. As to the surveillance

video from the apartment complex, McCausland's testimony differed from Clark's account as to the timing of certain events, including when the blue gloves were put on. Notably, McCausland testified defendant exited the car "holding a black handgun." Defendant objected, and the judge sustained the objection but did not give a curative instruction to the jury.

The Express Mart video was not shown to the jury. Detective McCausland summarized the video in her testimony to the jury. Defendant argues this testimony violated the best evidence rule and the admission of "such highly inflammatory testimony by a police witness about Clark's alleged appearance in the moments after the shooting was clearly capable of producing an unjust result."

Both narrations were improper. The first video presented to the jury included a narration by Detective McCausland that involved statements which are at issue in this case and included her views on factual issues that are reasonably in dispute. See Watson, 254 N.J. at 603. Defendant objected to certain statements made by McCausland about the video but did not object to the entire narration testimony.

"[A]lthough lay witnesses generally may offer opinion testimony under Rule 701 based on inferences, investigators should not comment on what is

depicted in a video based on inferences or deductions" Id. at 604. Here, the first narration Detective McCausland provided included "subjective interpretations" and non-objective statements that "were capable of producing an unjust result." See State v. Dunbrack, 245 N.J. 531, 544 (2021).

The Express Mart video testimony was improper based on authentication issues rather than under the best evidence rule. Under N.J.R.E. 901, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims." The authentication rule "does not require absolute certainty or conclusive proof." State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999). "The proponent of the evidence is only required to make a prima facie showing of authenticity." Ibid. "Once a prima facie showing is made, the [item] is admissible, and the ultimate question of authenticity of the evidence is left to the jury." Ibid.

Since Detective McCausland had no personal knowledge of the video and was not present at the time the video was taken, her summary at trial was plain error.

Notwithstanding those conclusions, we must address whether the admission of McCausland's remarks about what she viewed to be defendant's

actions on the surveillance video constituted harmless error. Whether a given error is harmless "must be evaluated in light of the overall strength of the State's case." State v. Galicia, 210 N.J. 364, 388 (2012) (internal quotation marks omitted) (quoting State v. Walker, 203 N.J. 73, 90 (2010)); accord State v. Trinidad, 241 N.J. 425, 451 (2020); State v. Sanchez-Medina, 231 N.J. 452, 468 (2018).

The question for us is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict rendered here was unattributable to the error—no matter how inescapable the findings to support that verdict might be.

Viewing the record as a whole, we observe the evidence of defendant's guilt was compelling. There is no issue of identification or opportunity. Clark and defendant knew each other and were in a relationship. Clark testified defendant sent her a threatening text and later shot her. A shooting happened. Clark suffered gunshot wounds. There is no question Clark and defendant were together in the car just before the shooting. Surveillance video shows the encounter, including defendant standing outside the car with blue gloves on his hands and waving an object at the passenger window. A third person, Kapizzi,

heard a loud bang and observed Clark and defendant outside by the car. Projectiles were recovered. There were holes in the car door.

The problem that gives us pause is, during deliberations, the jury asked for a playback of the surveillance video as well as readbacks of the testimony of McCausland and Clark. Notwithstanding the strength of the State's evidence and the implausibility of defendant's assertions, we cannot rule out that the errant testimony of McCausland was a significant factor in the jury's determination of guilt. As such we cannot announce it was harmless and, for that reason, we order a new trial.

II.

As for the next issue—wherein defendant argues the trial court instructed the jury incorrectly on attempted murder, and the error requires reversal of his conviction—although we need not reach this issue, for the sake of completeness, we disagree for the following reasons.

There was an erroneous attempt charge. The trial judge instructed the jury under the attempt-impossibility section rather than either the attempt-when causing a particular result is an element of crime or attempt-substantial step. See N.J.S.A. 2C:5-1; N.J.S.A. 2C:11-3(a). During the charge conference, the court reviewed with counsel the instruction it intended to give on attempted

murder. Defendant did not object at the time, nor after the court instructed the jury. A defendant's failure to object at trial to the charge gives rise to "a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012) (citing State v. Macon, 57 N.J. 325, 333-34 (1971)). Thus, in the absence of a timely objection at trial, we review a defendant's challenge to a charge for plain error—that is, error which is "clearly capable of producing an unjust result." R. 2:10-2.

The New Jersey Code of Criminal Justice defines three categories of attempt: A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

- (1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;
- (2) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part; or
- (3) Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

. . . .

b. Conduct shall not be held to constitute a substantial step under subsection (a)(3) of this section unless it is strongly corroborative of the actor's criminal purpose.

[N.J.S.A. 2C:5-1(a) to (b).]

The trial court erroneously charged type (a)(1). The evidence did not support type (a)(1) attempt, commonly referred to as "impossibility" attempt, and he was thus deprived of his constitutional right to a unanimous verdict on every element of the crime of attempted murder. It was not, however, fatal to the verdict here.

In State v. Condon, we said:

In order to complete a criminal act under subsection (a)(1), a defendant would have to have taken a substantial step toward the commission of the crime under subsection (a)(3). Accordingly, under subsection (a)(1), where a defendant "purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be," we are satisfied that he or she could also be charged under subsection (a)(3).

[391 N.J. Super. 609, 617 (App. Div. 2007).]

Here, the jury could not have convicted defendant of type (a)(1) attempted murder without having found that he took the necessary substantial step toward commission of murder, plus the evidence that defendant committed attempted murder was overwhelming and unrefuted by defendant. There is no missing

element of proof of attempt. The victim testified that defendant threatened to shoot her, he did shoot her, and she suffered numerous gunshot wounds. Defendant has failed to overcome the presumption that the charge was unlikely to prejudice his case. See Singleton, 211 N.J. at 182. He certainly has not demonstrated a legal impropriety in the charge that prejudicially affected his substantial rights and was sufficiently grievous to convince us that, of itself, the error possessed a clear capacity to bring about an unjust result. See id. at 182-83; R. 2:10-2.

We note defendant's argument that the court did not provide a sufficient rationale for imposition of consecutive sentences has merit, however, because we order a new trial, defendant's sentencing arguments are moot. To the extent we have not addressed defendants' remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Reversed and remanded for a new trial.

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



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