SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3499-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEROY FRAZIER, a/k/a
LEROY FRAZIER, 3RD,

Defendant-Appellant.

Argued September 20, 2023 – Decided November 1, 2023

Before Judges Currier, Firko and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 18-12-1109.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; John P. Flynn, of counsel and on the briefs).

Jeffrey Krachun, Assistant Prosecutor, argued the cause for respondent (Jennifer Webb-McRae, Cumberland Country Prosecutor, attorney; Cody A. Dooley, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant raises numerous issues in this appeal from his convictions and sentence following a jury trial. Following our review of the contentions in light of the applicable principles of law, we are satisfied most of the asserted issues lack merit. However, because we conclude the trial court erred in charging the jury on accomplice liability, and the error was capable of producing an unjust result, we reverse the conviction for conspiracy to commit murder and remand for a new trial solely on that charge. Defendant will remain imprisoned under the sentence imposed for the remaining convictions.

In December 2018, a grand jury returned a fourteen-count indictment against defendant and three co-defendants in December 2018. The indictment charged defendant with one count of first-degree murder (count one), N.J.S.A. 2C:11-3(a)(1) and (2); one count of first-degree conspiracy to commit murder (count two), N.J.S.A. 2C:5-2(a) and N.J.S.A. 2C:11-3(a)(1); one count of first-degree attempted homicide (count three), N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1); one count of second-degree aggravated assault (count four), N.J.S.A. 2C:12-1(b)(1); one count of third-degree aggravated assault (count five), N.J.S.A. 2C:12-1(b)(2); one count of second-degree unlawful possession of a weapon (count six), N.J.S.A. 2C:39-5(b)(1); and one count of second-degree

possession of a weapon for an unlawful purpose (count seven), N.J.S.A. 2C:39-4(a)(1).

I.

We derive the facts from the evidence presented at trial on various days in December 2019 and January 2020. Bridgeton Police Department Patrolman Robert Robbins was sitting in a patrol vehicle with the engine turned off in the parking lot of a store on Irving Avenue and Church Street on July 17, 2018 at approximately 12:24 a.m. when Robbins "heard what sounded like gun[s]hots." Robbins advised dispatch he heard a gunshot and he started the vehicle and began driving in the parking lot in an attempt to locate the source of the noise. Robbins then heard a call reporting "a gunshot victim . . . at a residence on Church Street." Robbins drove his vehicle to Church Street and learned from his sergeant that a white pickup truck had left "the scene . . . at a high r[ate] of speed heading north on Church Street."

As Robbins was driving south on Church Street, a white pickup truck passed him, traveling northbound. He turned his car around, activated his lights, and stopped the vehicle. As Robbins approached the truck, he heard yelling coming from inside the vehicle and noticed a male driver and a passenger with "a little girl" on his lap. The child appeared "lifeless." The driver was crying

and told Robbins the child had been shot. Robbins noticed the girl's eyes were "rolled into the back of her head" and she was not moving. Robbins "told [the driver] to hurry up and get to the hospital, and [he] notified . . . dispatch" who notified the hospital of the situation. The child was pronounced dead at the hospital.

The child's father testified that on the night of the shooting, his nine-year-old daughter was sleeping in the back bedroom of their house on Church Street. The father was awakened by the sound of gunfire, and he heard his other daughter yelling for help. When he reached the living room, he found his nine-year-old daughter lying face down on the ground. The father called 9-1-1 but when no help arrived, his friend drove them in his truck to the hospital where his daughter was pronounced dead.

At the date and time of these events, Jordan Ratliff was hanging out with some friends on the front porch of a house at 17 Elmer Street, a street that intersects Church Street. The group was "[j]ust drinking, partying, [and] smoking." Included in the group was Lawrence Taylor-Brewer, who was standing on the sidewalk by the side of his car. At some point, Ratliff noticed some people who were not with Ratliff's group. He said they came "[f]rom the right side." Ratliff then realized someone had started shooting when his friend

"Ace" warned him to get down. Ratliff testified at trial that "[e]verything just happened so fast." No one from his group was hit, but Ratliff said he "was just in so much shock . . . [he] could[] [not] even move . . . ." In a statement given to police the day after the shooting, Ratliff said: "I felt like it was just one person there. Like, when I was the only person standing up, I just saw a hand and [gun]fire. That's all I s[aw]. . . . [A]fter that, it was over, after that." He did not see any clothing or a face, but he described the hand as "a regular brown hand like [Ratliff's]." He said the shooter was standing by the next-door neighbor's house.

Afterward, Ratliff learned Brewer "ran to the side of the house and got under a car." Although Ratliff saw the police looking at Brewer's car that night, he did not discover until the next day that Brewer's car had been hit by gunfire.

Brittany Burrison was outside at the time of the shooting, standing under a light post with a friend on a street approximately three blocks from Church Street. She testified she saw four people cross her street approximately a block away from her. The entire group had their hoods pulled up, three of which were black hoodies and one was "grayish." She stated the group "cut through . . . the side of an abandon[ed] house," and went into an alleyway. After "a good half hour or so," Burrison saw the group "running back" and said she "saw someone

look[ing] like he had dreads on." In her statement to police, Burrison said she thought about ten to fifteen minutes elapsed between her seeing the group of people cross her street and their return. Burrison could not identify any suspects in a photo array.

Bridgeton Police Officer Richard Morris testified regarding his investigation of the events, beginning at the home of the victim where police found a bullet hole through the wall of the back bedroom where the child was sleeping. Law enforcement determined the bullet came from the outside, down Elmer Street and they began searching on Elmer Street where they located eighteen shell casings in front of 13 Elmer Street. He also testified seeing an open gate that led to an alleyway and described it as a potential escape route the shooter could have taken to flee the scene. He described seeing Brewer's car that was hit by gunshot.

Sergeant Edward John Burek, Jr., of the New Jersey State Police ballistics unit, processed the forensic evidence—"[nineteen] shell casings, two bullets, and five projectile[] fragments"—that officers recovered from the scene. He discovered fourteen shell casings were "nine[-]millimeter Luger caliber discharged cartridge case[s], head stamped WMA18." Using that information—"the firing pin aperture shear marks, the firing pin, and the firing pin drag

marks," Burek determined the shell casings were all discharged from the same firearm. Three of the bullets of the same caliber and headstamp were fired from a different gun. The remaining cartridges, of the same caliber but with the headstamp "WIN" were inconclusive, meaning "there w[ere] [not] enough markings on the[] shell casings [for] [Burek] [to be] able to identify or eliminate them from each other—as having been discharged in the same firearm."

On August 24, 2018, law enforcement searched defendant's residence and discovered a spent shell casing in "a small cut floorboard that lifted up very easily." It bore the headstamp "WIN" and was a nine-millimeter Luger.

Detective Zachary Martorana testified regarding his responsibility in the investigation, including searching cameras in the area and obtaining surveillance footage. He provided an in-court identification of defendant, explained how defendant became a suspect in the investigation and how Martorana used social media to collect photographs of defendant that aided law enforcement in the investigation.

The State also produced Detective Daniel T. Bagley who testified he too searched for surveillance cameras. The results of his investigation were included in Detective Mark Yoshioka's report. Bagley obtained surveillance from a home on North Pearl Street that showed "four subjects walk[ing] right

past the house" taking a "little pathway" at around 12:16 a.m. He then noted seeing four "subjects" running back approximately eight minutes later (Pearl Street video). Bagley testified the video also showed a "house light . . . c[o]me on and then . . . a car light come on and the car . . . begin[ning] to pull out." The car drove to the home of Michael Elliot, one of the co-defendants.

Bagley then explained the infrared camera "changes colors all around. Blacks will be white and whites will be black, and sometimes blacks will be black. It just depends on your clothing and the materials that your clothing [is] made out of."

The detective was asked whether he made any observations regarding the clothing worn by the individuals seen for the second time in the Pearl Street video at approximately 12:24 a.m. He stated the first person was wearing a hooded sweatshirt that said "Jordan" on it; the second person "appeared to be wearing . . . a camo hooded sweatshirt;"[1] the third person's shirt had the words "Just Do It" on the front; and the fourth person appeared to be wearing "a zip up sweatshirt." Bagley testified he was familiar with Elliot from a prior encounter and had seen him wearing a Jordan sweatshirt. The jury was shown photos of

[1] Law enforcement later identified defendant as the second suspect wearing the camouflage hooded sweatshirt.

Elliot standing in front of defendant's residence wearing the black hooded Jordan sweatshirt.

Bagley then testified regarding the photo used by defendant as his profile picture on his Facebook page. In the photo, defendant is "wearing a camo hooded sweatshirt with the word Champion written across it." Bagley described how he compared that photo to the one seen in the Pearl Street video, stating:

> We did encounter difficulty with the Champion part at first. We matched up the cuffs of the sleeves, like I said, the camo, and then you can kind of see the inside of the hood is a, like a tan, and you could see that on the video also that the inside of the hood is like a—it's a lighter color or a different color other than camo. And then, like I said, we did have some difficulty with the Champion at first, but the more we looked at it, the more we kind of saw writing across the chest.

In addition, Bagley described defendant as holding his left arm up over his chest.

Detective Sergeant Kenneth Leyman then testified. He and Yoshioka interviewed defendant at the police station on August 24, 2018. Leyman said during the interview he only spoke about the shooting of the young girl and that defendant was placed at Elmer Street during the shooting, but he never provided a date of the incident. Despite not having the date, defendant told Leyman he was home all night with his daughter.

Leyman also described the information he found on defendant's Facebook page. Specifically, defendant told two co-defendants on July 21, 2018 to "throw [their] clothes away."[2]

The State also produced Detective Yoshioka. He testified he had known co-defendant Elliot since 2002 when they played in a football league together as children. He also knew Elliot lived at 111 North Pearl Street at the time of the shooting. Yoshioka arrived at the area at approximately 1:00 a.m. and began to canvas houses in the area to find witnesses and surveillance footage. A home which faced down Elmer Street towards Church Street had several cameras and Yoshioka described the surveillance footage (Walnut Street video):

> We[] [were] able to see what look[ed] like four people . . . run . . . just approximately five minutes prior to the time that police were dispatched. We have four people running or walking east across Walnut Street, a few house[s] or two north of . . . where the cameras are.

This footage was captured at 12:19 a.m. Yoshioka told the jury that shortly after 12:22 a.m., the Walnut Street video showed "four people go back west, now running." The video footage was admitted into evidence and shown to the jury without commentary from Yoshioka.

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[2] Defendant and one of the co-defendants used fictitious "vanity names" on their social media page. During his testimony, Leyman explained a "vanity name" is the term law enforcement uses when referring to a Facebook user's profile name.

As case detective, Yoshioka said he reviewed all of the surveillance footage collected from the residences in the area. In viewing the Pearl Street video, he stated he recognized Elliott and had seen him wear the Jordan sweatshirt before. He also recognized co-defendant McKoy in the photograph as the person wearing the hooded sweatshirt that read "Just do it." In replying to questions about his observations of the clothing worn by the suspect later identified as defendant, Yoshioka stated:

> You could tell it was a camo or, like, a camo pattern or hunter camo pattern, hooded sweatshirt, same thing with the hood on it. And as far as any labels on it other than the camo pattern, you couldn't necessarily see the chest because from our observations, the Subject Number 2 was walking. He had his left arm up—his right arm was swinging freely, but his left arm was up across his chest.

He added he had previously seen defendant wearing a similar camouflage hoodie. Police did not find any of the sweatshirts worn by defendant and co-defendants.

Yoshioka created a PowerPoint presentation to assist with his testimony that outlined the steps of his investigation and his findings. It was comprised of overhead and street view Google Earth images of the area of the scene. It also contained photographs from the actual scene.

Prior to the start of Yoshioka's testimony, defense counsel objected to the use of the PowerPoint, stating it was lay opinion testimony and an impermissible summary of the evidence. Defense counsel stated:

> [Yoshioka] can testify to [the information contained in the PowerPoint] and then [the State] can use that in . . . closing, but this is a summary of all the testimony that we[] [have] heard so far . . . and it[] [is] . . . lay opinion. I mean, these are not facts, this is the police officer's theory.

The court replied that "it[] [was] a demonstrative aid under [N.J.R.E.] 611 . . . where they[] [are] attempting to show what the evidence is and what the evidence is that they followed." The court advised it would permit the jury to see the PowerPoint and give instructions if warranted.

During Yoshioka's testimony before the jury, the prosecutor moved to admit the PowerPoint and defense counsel objected to the title: "Path Utilized by Shooting Suspect." The judge requested the prosecutor lay a foundation for the evidence and noted the map said "suspect[]" and not defendant's name. When the judge asked defense counsel to further explain her objection, counsel replied "it[] [is] a lay opinion . . . as to where [Yoshioka thought the suspects] went." Defense counsel further stated she was objecting "specifically to the slides being presented as evidence . . . ."

The court advised the exhibit would be marked for identification, and the witness could use it as an aid for his testimony. The discussion of whether the PowerPoint would be admitted into evidence would be discussed at a later time. However, the judge then decided to admit the exhibit into evidence as a visual aid. The judge stated:

> Well, it[] [is] a demonstrative aid, but it[] [is] going to be published to the jury. . . . But I think—I believe that my review of the PowerPoint slides, the print[o]ut, is that other than for maps where there are things that are drawn on there, which he can do right here on that other map if he wanted to— . . . same type of thing except now it[] [is] on the screen instead, is photographs that have already been admitted into evidence.

The court admitted the PowerPoint into evidence and Yoshioka discussed the slides. He described how he started his observations from 110 North Pearl Street, where the video revealed the group of four people and their clothing. Yoshioka described the path of travel the suspects took towards the site of the shooting and their return route based on his investigation and the surveillance footage.

Yoshioka pointed out the location of Burrison's home on the map and how her statements combined with the surveillance footage and his prior experience in the area helped him discern the suspects' path across North Pearl Street and through the block to Bank Street. Yoshioka identified and explained each slide,

describing where there were openings and paths for people to walk through. When they got to discussing the point where the shooting began, Yoshioka said he identified the spot based on the "the location of the shell casings that were found on scene and based o[n] the statements provided by witnesses on scene and where the people that were shooting were standing at the time." He described the flight path in the same manner.

The jury returned its verdict on January 16, 2020. The jury found defendant not guilty of murder, but guilty of the lesser-included offense of aggravated manslaughter. The jury also found defendant guilty of conspiracy, attempted homicide, both aggravated assault charges, and possession of a weapon for an unlawful purpose. He was found not guilty of unlawful possession of a weapon.

On count one, the court sentenced defendant to twenty-five years imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court sentenced defendant on count three to a term of seventeen years imprisonment subject to NERA, to run consecutively to the sentence on count one. Counts two, four, five, and seven merged into count three. The aggregate sentence for defendant was forty-two years of imprisonment, with a parole disqualification period of approximately thirty-five years. Defendant received

266 days of jail credit. An amended notice of conviction removed the 266 days of jail credit.

II.

On appeal, defendant raises the following points for our consideration:

> POINT I
> THE DETECTIVES' (A) SUBJECTIVE DESCRIPTIONS AND MATCHING OF THE SUSPECTS' CLOTHING, AND (B) LAY OPINIONS AS TO THE SUSPECTS' PATH OF TRAVEL, VIOLATED N.J.R.E 701, INVADED THE PROVINCE OF THE JURY, AND REQUIRE REVERSAL.
>
> A. The Detectives' Subjective Descriptions and Matching of the Suspects' Clothing and their Opinions that the Second Suspect Covered His Chest Were Impermissible.
>
> B. The PowerPoint Presentation of the Suspects' Path of Travel Was an Improper Lay Opinion and Should [N]ot Have Been Admitted into Evidence.
>
> POINT II
> THE ERRONEOUS INSTRUCTION ON ATTEMPT REQUIRES REVERSAL OF THE CONVICTIONS FOR ATTEMPTED MURDER AND AGGRAVATED ASSAULT.
>
> POINT III
> THE CONVICTION FOR CONSPIRACY TO COMMIT MURDER MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT [DEFENDANT]

COULD BE CONVICTED AS AN ACCOMPLICE TO THIS CRIME.

POINT IV
THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL.

POINT V
RESENTENCING IS REQUIRED TO CORRECT SEVERAL ERRORS.

A. The Court Improperly Considered Frazier's Youth in Aggravation of the Sentence Rather than in Mitigation.

B. The Trial Court Erred in Imposing Consecutive Sentences when the Yarbough Factors Supported Concurrent Terms and Without Considering the Overall Fairness of the Aggregate Sentence.

C. Frazier is Entitled to 266 Days of Jail Credits for Time in Custody Between Arrest and Sentencing.

A.

We begin our discussion with Point I in which defendant asserts the court violated N.J.R.E. 701 in permitting various detectives to present lay opinion testimony regarding the comparison of a camo sweatshirt seen in surveillance footage to one worn by defendant in other photographs, and Yoshioka's lay opinion in the use of the PowerPoint presentation to establish the shooters' path of travel.

"[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Singh, 245 N.J. 1, 12 (2021) (alteration in original) (quoting State v. Nantambu, 221 N.J. 390, 402 (2015)). Under the abuse of discretion standard, "an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" Id. at 13 (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

In turning to the assertions regarding the sweatshirt, defendant contends the descriptions of his clothing were impermissible because "an objective view of [the Pearl Street video] does not allow any reasonable person to describe [defendant's] clothing and arm movement in this degree of detail." Defendant acknowledges a camouflage pattern can be seen on the sweatshirt in the video, but it is not clear enough to permit a match to the pattern on the sweatshirt worn by defendant in his Facebook photo. Defendant asserts nothing offered by the officers was anything the jurors could not observe themselves.

Rule 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:

(a) is rationally based on the witness' perception; and

(b) will assist in understanding the witness' testimony or determining a fact in issue.

Non-expert lay opinion testimony, if offered in a criminal prosecution, "can only be admitted if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in forming its function." State v. McLean, 205 N.J. 438, 456 (2011). The McLean Court noted examples of permissible lay opinions, including law enforcement's perception of vehicle speed, law enforcement's interpretation of signs of intoxication, and an individual's personal knowledge of the value of certain personal property provided the estimate was not speculative. Id. at 457 (citations omitted). Similarly, citing to the training and experience of the officer is not an impermissible lay opinion, so long as the testimony is "firmly rooted in [the officer]'s observations and perceptions . . . ." See id. at 459.

In McLean, the Court discussed "the boundary line that separates factual testimony by police officers from permissible expert opinion testimony. On one side of that line is fact testimony, through which an officer is permitted to set forth what he or she perceived through one or more of the senses." Id. at 460. Fact testimony "consist[s] of a description of what the officer did and saw." Ibid.

However, "[t]he witness need not have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony." State v. Sanchez, 247 N.J. 450, 469 (2021). In Sanchez, the defendant's parole officer recognized the defendant in a flyer seeking information on three murder suspects. Id. at 460-61. The flyer included a still photo of the car a witness saw the men drive off in, and a photo of the faces of the front-seat passenger and a rear-seat passenger; the flyer stated the date and time of the homicide and described the size of the men. Id. at 460. The parole officer recognized the defendant because she had met with him more than thirty times. Id. at 469. Even though she did not witness the events and she was not present for the taking of the photograph, the Court found the amount of time she spent with the defendant was more than sufficient for her to make the identification. Ibid.

Under the second prong of Rule 701, the lay opinion "testimony must 'assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 469 (quoting Singh, 245 N.J. at 15). This lay opinion cannot be "on a matter 'as to which the jury is as competent as [the witness] to form a conclusion.'" Id. at 469-70 (alteration in original) (quoting McLean, 205 N.J. at 459). The Sanchez

Court set forth factors to assist in determining whether the lay opinion would be helpful. Id. at 470-73.

"First, the nature, duration, and timing of the witness'[] contacts with the defendant are important considerations." Id. at 470. The more contact the defendant and witness have, the more likely the opinion testimony would prove helpful, but only if the witness has knowledge of the defendant's appearance at the time of the offense. Id. at 470-72.

"Second, if there has been a change in the defendant's appearance since the offense at issue, law enforcement lay opinion identifying the defendant may be deemed helpful to the jury." Id. at 472.

"Third, '[c]ourts evaluating whether a law enforcement official may offer a lay opinion on identification also consider, among other factors, whether there are additional witnesses available to identify the defendant at trial.'" Ibid. (alteration in original) (quoting State v. Lazo, 209 N.J. 9, 23 (2012)). An officer's identification, however, "should be used only if no other adequate identification testimony is available to the prosecution." Ibid.; United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977).

"Fourth, the quality of the photograph or video recording at issue may be a relevant consideration." Id. at 473. When "the photograph or video recording

is so clear that the jury is as capable as any witness of determining whether the defendant appears in it, that factor may weigh against a finding that lay opinion evidence will assist the jury." Ibid. But, if the photograph is so low in quality that no one "could identify the individual who appears in it, lay opinion testimony will not assist the jury and [could instead] be highly prejudicial." Ibid. Therefore, if there is some basis to conclude the witness is more likely to be correct in identifying the individual than the jury, it may be admitted. Ibid. The Sanchez factors are not exclusive, and no single factor is dispositive. Id. at 473-74.

Applying the above principles, we discern no abuse of discretion in the admission of the officers' testimony regarding the camo sweatshirt. Bagley testified regarding his involvement in the investigation of the shooting. He retrieved and viewed footage from cameras in the area of the shooting. During his testimony, Bagley referred to "subjects," not "defendant." This testimony satisfied the first requirement of Rule 701 as it was based on his perception of video reviewed during the investigation. It was also helpful to the jury because, under the Sanchez and Watson[3] factors, no other witness identified defendant. The quality of the Pearl Street video was not completely clear but not entirely

[3] State v. Watson, 254 N.J. 558 (2023).

distorted either. Bagley informed the jury the infrared camera could distort images. Additionally, Bagley did not provide continuous commentary; he only answered questions. See ibid.

Bagley said the second individual in the Pearl Street video appeared to be wearing a camo hooded sweatshirt. Then, when asked to compare it to a Facebook profile picture, Bagley said he saw defendant wearing a hooded camo sweatshirt with the Champion logo on it in the post. Bagley explained the difficulty in comparing the sweatshirt in the video to the sweatshirt in the photo, but his testimony explained the steps of the investigation and what he perceived as he compared the two items. Bagley never said it was the same sweatshirt. We see no violation of our Court's recent guidance on such commentary or of Rule 701.

B.

We turn next to Yoshioka's testimony and the use and admission of the PowerPoint evidence. Defendant asserts the PowerPoint slides were improperly admitted because, although "Yoshioka provided competent testimony, based on his knowledge of the neighborhood, to support the admission of each slide without the superimposed arrows or the headers,"

> the ultimate conclusion as to the suspects' path of travel, as indicated by the arrows and testified to by

> Yoshioka, amounted to an improper lay opinion because it was not based on . . . personal knowledge, but rather on hearsay statements of witnesses and inferences that Yoshioka made from reviewing the evidence.

Defendant contends that because Yoshioka did not observe the suspects walk along the outlined path, he did not have personal knowledge to give a lay opinion and the jurors should have been allowed to make that determination themselves.

We consider defendant's assertions under Rule 701 and under the Supreme Court's recent guidance in Watson. There, the Court determined "[a]n investigator who has carefully reviewed a video a sufficient number of times prior to trial can . . . satisfy . . . [R]ules' [701(a) and 602] 'perception' and 'personal knowledge' requirements as to what the video depicts." Id. at 601. The question of whether the narration is helpful under the second prong of Rule 701, however, "depends heavily on the nature of the recording and the proposed comments." Ibid.

"Even though it is for the jury to determine what a recording depicts, there are times when narration testimony can help jurors better understand video evidence and aid them in 'determining a fact in issue.'" Ibid. (quoting N.J.R.E. 701(b). "Chaotic or confusing recorded events" typically could warrant narration, "[b]ut whether a narrator is needed is not the critical question. Rule

701(b) asks whether evidence is helpful, not whether it is necessary." Ibid. Short videos that have small or nuanced details that an investigator has analyzed may be helped by the investigator's narration; this would allow the jury to "make its own evaluation." Ibid. (quoting State v. Watson, 472 N.J. Super. 381, 465 (App. Div. 2022), rev'd and remanded, 254 N.J. 558 (2023)).

The quality of the video may also affect the analysis. "If footage is unclear or grainy, but not reasonably in dispute, testimony from investigators might help the jury. The opposite is true if a video is so unclear that it is difficult to decipher and the parties dispute its contents." Watson, 254 N.J. at 602. Similarly, narration may not be helpful if the "video is clear and not otherwise hard to follow or grasp." Ibid.

To assist in the fact-sensitive analysis, the Court provided the following guidance: "[N]either the rules of evidence nor the case law contemplates continuous commentary during a video by an investigator whose knowledge is based only on viewing the recording." Id. at 603. Counsel should avoid encouraging running commentary. Ibid. "Second, investigators can describe what appears on a recording but may not offer opinions about the content. In other words, they can present objective, factual comments, but not subjective interpretations." Ibid. "Third, investigators may not offer their views on factual

issues that are reasonably disputed." Ibid. And "[f]ourth, although 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, including any drawn from other evidence." Id. at 604.[4]

The Court added, "Consistent with those principles, an investigator who carefully reviewed a video in advance could draw attention to a distinctive shirt or to a particular style of car that appear in different frames, which a jury might otherwise overlook." Ibid. But factual conclusions, such as whether the car in the video is the defendant's or whether the defendant had been drinking heavily, are within the jury's province. Ibid.

On the same day that Watson was decided, the Court issued an opinion in State v. Allen, allowing "narration of a video by an investigating officer who was not present at the time of an incident captured in that video." 254 N.J. 530, 545, 552 (2023). The lead detective in the investigation testified to how the footage assisted his investigation of the crime scene, specifically pinpointing areas where there could be evidence by viewing the surveillance footage for locations where the video depicted muzzle flashes. Id. at 548. The Court found this did not invade the jury's province as the detective testified regarding the

[4] The Court explained the guidance is illustrative and not a comprehensive list.

steps he took to investigate, and his perception was helpful to the jury. Ibid. The Court did, however, find that the officer's testimony that a "white blip" on the video was "the defendant firing the handgun" and one frame of the footage showed the defendant "turning towards the officer" was improper as it was the officer's view of the defendant's actions. Id. at 548-49. But, the Court concluded, because the evidence against defendant was "compelling," the error in admitting the testimony was harmless. Id. at 550.

Yoshioka's testimony did not violate Rule 701. He stated he spent the night after these events reviewing footage and subsequently watched several videos multiple times. This satisfied Rule 701(a). As to 701(b), Yoshioka testified he was familiar with defendant from prior interactions. Yoshioka did not provide commentary on the video footage when it was played for the jury during his testimony. When discussing the Pearl Street video, Yoshioka stated he had seen defendant wear a sweatshirt similar to what was seen in the footage. This was the detective's perception regarding the clothing. See Singh, 245 N.J. at 17-18 (stating it was permissible for a detective to testify that sneakers he saw in a video recording were similar to those the defendant was wearing on the night of the arrest).

Additionally, Yoshioka's use of the PowerPoint did not violate Rule 701. It was a demonstrative aid that Yoshioka developed from his personal experience of the area, the use of surveillance footage and photographs, and his perceptions and observations from being at the scene on the night of the shooting. Although the detective referred to Burrison's statement, the primary basis for his testimony derived from his personal knowledge of the area and the review of the evidence. The demonstrative aid was properly used to aid the jury in understanding the investigative process. There was no clear abuse of discretion in permitting Yoshioka to use the PowerPoint as demonstrative evidence.

During trial defense counsel objected to the admission of the PowerPoint. That issue is not briefed separately on appeal. However, under N.J.R.E. 611(a), a judge has "reasonable control over the mode and order of interrogating witnesses" and the presentation of evidence. "Rulings on the admission of demonstrative evidence are within the discretion of the trial judge." State v. Scherzer, 301 N.J. Super. 363, 434 (App. Div. 1997) (citing Wimberly v. City of Paterson, 75 N.J. Super. 584, 608 (App. Div. 1962)). Moreover, the photographs used in the PowerPoint were each separately admitted into evidence. We see no reason to disturb the court's ruling.

C.

Turning to Point II, defendant asserts the trial court incorrectly charged the jury on attempt, requiring the reversal of the attempted murder and aggravated assault charges. Because there was no objection to the charge at trial, we review for plain error. R. 1:7-2; see State v. Montalvo, 229 N.J. 300, 320 (2017) (stating a jury charge is presumed to not be erroneous and reversible when there is a lack of an objection).

The judge charged the jury the following regarding attempted murder:

> [T]he State must prove beyond a reasonable doubt that it was . . . [d]efendant's purpose to cause the death of the victim. More specifically, the law provides that a person is guilty of an attempt to commit the crime of murder if the person purposely engaged in conduct which was intended to cause the death of the victim if the attendant circumstances were as a reasonable person would believe them to be.
>
> Thus in order to find . . . [d]efendant guilty of . . . [an] attempted murder, the State must prove the following elements beyond a reasonable doubt[:]
>
> First, it was . . . [d]efendant's purpose to cause the death of . . . Brewer.
>
> Secondly, . . . [d]efendant purposely engaged in conduct which was intended to cause the death of the victim if the attendant circumstances were as a reasonable person would believe them to be.

> First, the State must prove that the defendant acted purposely. I[] [have] already provided the definition of purposely and I refer you to my prior instructions when I charged you on the murder charge.
>
> Secondly, the State must also prove beyond a reasonable doubt that . . . [d]efendant purposely engaged in conduct which was intended to cause the death of the victim if the attendant circumstances were as a reasonable person would believe them to be.
>
> In order for you to find . . . [d]efendant guilty of attempted murder, the State must prove beyond a reasonable doubt that it was . . . [d]efendant's purpose to cause the death of the victim. The State, however, is not required to prove a motive.
>
> If the State has proved the essential elements of the offenses beyond a reasonable doubt, . . . [d]efendant must be found guilty of the offense, regardless of . . . [d]efendant's motive or lack of motive.
>
> If the State however proved a motive, you may consider that insofar as it gives meaning to other circumstances. On the other hand, you may consider the absence of motive in weighing whether or not . . . [d]efendant is guilty of attempted murder.
>
> [See Model Jury Charges (Criminal), "Attempted Murder (N.J.S.A. 2C:5-1; 2C:11-3(a)(1))" (approved Dec. 7, 1992) (emphasis added).]

In charging the jury on aggravated assault, the court used similar language:

> Now, as I previously instructed you, . . . [d]efendant can be found guilty [of serious bodily

> injury aggravated assault] if [he] either caused serious bodily injury to another or attempted to cause serious bodily injury to another and in this case, the State's allegation is that he attempted to cause serious bodily injury to . . . Brewer.
>
> So to find . . . [d]efendant guilty of attempting to cause serious bodily injury to another the State must prove beyond a reasonable doubt that . . . [d]efendant purposely attempted to cause serious bodily injury to another.
>
> If you find beyond a reasonable doubt that . . . [d]efendant attempted to cause serious bodily injury, it does not matter whether such injury actually resulted. The law provides that a person is guilty of attempt if . . . acting purposely he engaged in conduct that would constitute the offense if the attendant circumstances were as a reasonable person would believe them to be.
>
> [See Model Jury Charges (Criminal), "Aggravated Assault—Serious Bodily Injury (N.J.S.A. 2C:12-1(b)(1))" (rev. Jan. 9, 2012) (emphasis added).]

There are three types of attempt under N.J.S.A. 2C:5-1. The first is when the defendant "[p]urposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be." N.J.S.A. 2C:5-1(a)(1) (the impossibility theory). This was the section the court charged. The second type is when "[w]hen causing a particular result is an element of the crime, [the defendant] does or omits to do anything with the purpose of causing such result without further conduct on his part." N.J.S.A.

2C:5-1(a)(2) (the last proximate act). And the third type is when the defendant "[p]urposely 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." N.J.S.A. 2C:5-1(a)(3) (substantial step). Defendant contends the State proceeded on a theory of attempt under sections (a)(2) or (3) and the court erred in not providing the charges on those two sections rather than (a)(1).

Under the impossibility theory, a defendant can be convicted of attempt "where the defendant has done everything that would have constituted the crime if the circumstances were as a reasonable person would have thought them to be." Cannel, N.J. Criminal Code Annotated, cmt. 4 on N.J.S.A. 2C:5-1 (2023). An example includes the defendant "purposefully or knowingly [firing] what [the defendant] believe[d] [was] a properly functioning gun at another person . . ., intending to kill the other person, unaware that the gun [was] inoperable." Ibid.; State v. Condon, 391 N.J. Super. 609, 617 (App. Div. 2007) (citing State v. Sodders, 208 Neb. 504, 504 (1981)).

Although the court could have charged the additional sections, it was not plain error requiring reversal to only charge N.J.S.A. 2C:5-1(a)(1). There was no confusion, as in Condon, as to which theory the jury employed in convicting

defendant of attempted murder and attempted aggravated assault. The comment to N.J.S.A. 2C:5-1(a)(1) and the Condon court both refer to the scenario of an individual pointing a gun at a person and pulling the trigger with the intent to kill, unaware that the gun is inoperable, as sufficient actions to support a conviction of attempt under section (a)(1). This is analogous to the evidence presented here: nineteen bullets were fired in the direction of where the shooters appeared to believe Brewer was, hitting his car. Apparently unbeknownst to the shooters, Brewer was well-hidden under another car and shielded from the bullets. A reasonable juror could consider this a completed criminal act that would have resulted in Brewer's death or cause him serious bodily injury if the circumstances were what the shooters had believed. We are not persuaded the failure to charge the additional sections was "error clearly capable of producing an unjust result." Montalvo, 229 N.J. at 320-21 (quoting R. 2:10-2).

D.

We turn then to defendant's assertion that the trial court erred in instructing the jury that defendant could be convicted as an accomplice to the crime of conspiracy to commit murder. Because there was no objection to the charge, we review for plain error.

In charging the jury on accomplice liability, the judge stated, in pertinent part:

> The State alleges that the defendant is legally responsible for the criminal conduct of the others that have been mentioned throughout the course of the trial and that would be [Gamble, Elliott, and McKoy] in violation of law which reads in pertinent part as follows.
>
> A person is guilty of an offense if it is committed by his own conduct or the conduct of another person for which he is legally accountable or both. A person is legal[ly] accountable for the conduct of another person when he is an accomplice of such other person in the commission of an offense.
>
> A person is an accomplice of another person . . . if, with the purpose of promoting or facilitating the commission of the offense he aids, or agrees or attempts to aid such other person or persons in planning or committing it.
>
> This provision of the law means that not only is the person who actually commits the criminal act responsible for it, but one who is legally accountable as an accomplice is also responsible as if he committed the crime himself.
>
> In this case, the State alleges that . . . [d]efendant is equally guilty of the crimes committed by [Gamble, Elliott, and McKoy] because he acted as their accomplice. In order to find . . . [d]efendant guilty of the specific crimes charged, the State must prove beyond a reasonable doubt each of the following elements.

One, that [Gamble, Elliott, and McKoy] committed the crimes of murder, conspiracy to commit murder, attempted homicide, aggravated assault, unlawful possession of a weapon, and possession of a weapon for unlawful purpose. I[] [have] already explained or will explain the elements of these offenses when I get to there.

. . . .

Now, if you find that . . . [d]efendant, with the purpose of promoting or facilitating the commission of the offenses, aided or agreed or attempted to aid them in planning or committing them, then you should consider him as if he committed the crimes themselves. Please note that you should consider this accomplice status separately with regard to each crime which is charged.

. . . .

In sum, in order to find . . . [d]efendant guilty of committing the crimes of murder, conspiracy to commit murder, attempted homicide, aggravated assault, unlawful possession of a weapon, and possession of a weapon for an unlawful purpose, the State must prove each of the following elements beyond a reasonable doubt.

One, that [Gamble, Elliott, and McKoy] committed the crimes of murder, conspiracy to commit murder, attempted homicide, aggravated assault, unlawful possession of a weapon, and possession of a weapon for an unlawful purpose.

Two, that this [d]efendant did agree or attempt to aid them in planning or committing them.

> Three, that . . . this [d]efendant's purpose was to promote or facilitate the commission of the offenses.
>
> Four, that this [d]efendant possessed a criminal state of mind that is required to be proved against the person who actually committed the criminal act.
>
> Again, please be reminded that you are to consider the accomplice charge separately as to each charge.
>
> [See Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6)" (rev. June 11, 2018) (emphasis added).]

The court also charged jury on conspiracy, N.J.S.A.2C:5-2, tracking the Model Jury Charge (Criminal) "Conspiracy."

Defendant contends the court erroneously informed the jury that accomplice liability was applicable to the crime of conspiracy to commit murder. The State concedes the instructions were conflated but because there was "overwhelming evidence demonstrating an agreement between the defendant and the co-defendants to commit murder," it was harmless error.

"Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). Erroneous instructions, "[t]herefore, . . . 'are poor candidates for rehabilitation as harmless, and are

ordinarily presumed to be reversible error.'" Id. at 495-96 (quoting State v. Afanador, 151 N.J. 41, 54 (1997)). Moreover, "[t]his requirement of a charge on a fundamental matter is more critical in a criminal case when a person's liberty is at stake." Id. at 496 (quoting State v. Green, 86 N.J. 281, 289 (1981)). When determining whether a charge is correct, "[t]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." Ibid. (alteration in original) (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997)).

"A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable . . . ." N.J.S.A. 2C:2-6(a). A person can be legally accountable for another person's conduct when "[h]e is engaged in a conspiracy with such other person." N.J.S.A. 2C:2-6(b)(4). Conspiracy, as relevant here, occurs when a person,

> with the purpose of promoting or facilitating [a crime]'s commission []:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

> [N.J.S.A. 2C:5-2(a).]
>
> [T]he agreement to commit a specific crime is at the heart of a conspiracy charge. Such an agreement is central to the purposes underlying the criminalization of the . . . offense of conspiracy. Thus . . . '"the major basis of conspiratorial liability [is] the unequivocal evidence of a firm purpose to commit a crime"'. . . .
>
> [State v. Samuels, 189 N.J. 236, 245-46 (2007) (alteration in original) (quoting State v. Roldan, 314 N.J. Super. 173, 181 (App. Div. 1998)).]

Actual commission of the crime is not required and the conspiracy can be proven by circumstantial evidence. Ibid.

"When a prosecution is based on the theory that a defendant acted as an accomplice, the trial court is required to provide the jury with understandable instructions regarding accomplice liability." State v. Savage, 172 N.J. 374, 388 (2002) (citing State v. Weeks, 107 N.J. 396, 410 (1987)). Juries "must be instructed that to find a defendant guilty of a crime under a theory of accomplice liability, it must find that [the defendant] 'shared in the intent[,] which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.'" Ibid. (quoting State v. Fair, 45 N.J. 77, 95 (1965)). Accomplice liability in the jury charge must be tailored to the facts of the case. Id. at 389.

In charging the jury on accomplice liability, the court instructed the jurors to determine whether the State proved that "[co-defendants] committed the crime[]of . . . conspiracy to commit murder . . . . [And] [t]hat this defendant did aid or . . . attempt to aid in the planning or committing them." The court further directed the jury to "consider this accomplice status separately with regard to each crime charged." (emphasis added). This instruction was repeated a second time.

The instruction to consider accomplice liability as a part of the conspiracy charge improperly combined two distinct concepts. As the Samuels Court stated, "'conspiracy' and 'accomplice liability' are not interchangeable." 189 N.J. at 254. Because the instruction of accomplice liability was erroneous, we cannot be "assur[ed] that the jurors understood and applied the correct legal principles in reaching their verdict on the conspiracy count." Id. at 255. For those reasons, we are constrained to vacate the conviction on the conspiracy to commit attempted murder and remand solely for a new trial on that count.

E.

Defendant raises several issues regarding his sentence. He contends the trial court improperly considered his age as an aggravating factor rather than in mitigation of his sentence; and erred in imposing consecutive sentences and not

considering the overall fairness of the aggregate sentence. He also asserts he is entitled to 266 days in jail credits.

Our review of a trial court's imposition of sentence is limited. State v. Bolvito, 217 N.J. 221, 228 (2014). The Court has stated that "[o]nly when the facts and law show 'such a clear error of judgment that it shocks the judicial conscience' should a sentence be modified on appeal." State v. Roach, 146 N.J. 208, 230 (1996) (quoting State v. Roth, 95 N.J. 334, 364 (1984)).

During the sentencing hearing, the court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), six, N.J.S.A. 2C:44-1(a)(6), and nine, N.J.S.A. 2C:44-1(a)(9). There were no mitigating factors. The court found the aggravating factors "substantially outweigh[ed] the mitigating factors." The court denied the State's motion for an extended sentence. The conspiracy conviction merged with the conviction of attempted murder.

In considering the imposition of consecutive sentences, the court considered the Yarbough[5] factors and stated: "It is patently obvious and foreseeable that [nineteen shots being fired] could harm others. While it may be true that . . . [d]efendant did not intend to harm [the child], . . . his actions could almost certainly end with the death of someone other than . . . Brewer."

[5] State v. Yarbough, 100 N.J. 627 (1985).

The court concluded "the qualitative analysis of [Yarbough] . . . weighs heavily in favor of consecutive sentencing." The aggregate sentence imposed was forty-two years, of which defendant must serve 35.7 years in prison. Defendant received 266 days of jail credit. The jail credit was not noted on the amended judgment of conviction.

Defendant was twenty years old at the time of these offenses. He had several juvenile adjudications, and two convictions of indictable crimes and one disorderly persons offense as an adult. During the lengthy sentencing hearing, the judge stated: "This now represents [defendant's] third indictable conviction in the third year of obtaining the age of the majority," and defendant "has already established himself as a career criminal, not a professional criminal but a career criminal, at the tender age of [twenty-one]." Defendant contends these statements reflect the court impermissibly considered his youth to give heavy weight to aggravating factors three, N.J.S.A. 2C:44-1(a)(3), and six, N.J.S.A. 2C:44-1(a)(6). We disagree.

Defendant had a criminal background. The court properly noted the juvenile adjudications as well as the adult convictions, one of which involved a firearm. The mention of defendant's age referenced the number of convictions and the escalating severity of the offenses that occurred in a short period of time.

The judge did not speculate that defendant's young age was the only reason he had not committed more crimes, which is proscribed under State v. Rivera, 249 N.J. 285, 303 (2021). The findings of aggravating factors three and six were supported by the credible evidence in the record.

We turn to defendant's contentions regarding the consecutive sentences. He asserts the court erred in imposing consecutive sentences because the conduct occurred in one single period and only targeted Brewer; therefore, defendant argues the killing of the child and the attempted killing of Brewer should be treated as one incident. We are unpersuaded.

In Yarbough, our Supreme Court established several factors for a sentencing court to consider when determining whether to impose a consecutive sentence. 100 N.J. at 643-44. They include whether:

> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior; [and]
>
> (d) any of the crimes involved multiple victims;
>
> [Id. at 644.]

In State v. Torres, 246 N.J. 246, 270 (2021), the Court "reiterate[d] the repeated instruction that a sentencing court's decision whether to impose consecutive sentences should retain focus on 'the fairness of the overall sentence.'" (quoting State v. Miller 108 N.J. 112, 122 (1987)). The Court also emphasized "the severity of the crime is now the single most important factor in the sentencing process." Id. at 262 (quoting State v. Hodge, 95 N.J. 369, 378-79 (1984)).

We are satisfied the trial court supported its decision to impose consecutive sentences. Defendant was convicted of the aggravated manslaughter of the young girl and the attempted murder of Brewer. The crimes involved two victims. In addition, the court analyzed the Yarbough factors. Although the court did not expressly use the term "fairness" in its decision[6], the judge stated: "The fact that the shooting involved a single episode does not outweigh the need, on retributive grounds, that there can be no free crimes in a system for which the punishment shall fit the crime." In reviewing the court's statements in totality, defendant cannot demonstrate the court abused its discretion. To the contrary, we conclude the court properly assessed the overall

[6] We note the sentencing hearing occurred prior to the Court's decision in Torres.

fairness and proportionality of the sentence. See Torres, 246 N.J. at 272 ("Appellate courts employ the general shock-the-conscience standard for review of the exercise of sentencing discretion in the arena of consecutive-versus-concurrent sentencing.").

As to the issue of jail credits, the court did not provide defendant with any reasons for the deletion of the 266 days of jail credit when it entered an amended judgment of conviction. In light of our determinations regarding defendant's sentencing arguments, once the conspiracy count has been resolved, the court need not conduct a new sentencing hearing. The conviction was merged into the attempted murder conviction and did not affect the original sentence.

However, the court shall enter a second amended judgment of conviction reflecting the disposition of the conspiracy count. At that time, the court shall explain its decision to remove the 266 days of jail credit originally granted to defendant.

Vacated and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.