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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4290-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM GONZALEZ,

Defendant-Appellant.

Argued January 18, 2024 – Decided December 31, 2024

Before Judges Accurso, Gummer and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 18-01-0058.

Stefan Van Jura, Assistant Deputy Public Defender, argued the case for appellant (Joseph E. Krakora, Public Defender, attorney; Elizabeth C. Jarit, of counsel and on the briefs).

Viviana M. Hanley, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Amanda Frankel, Deputy Attorney General, of counsel and on the brief).

The opinion of the court was delivered by

WALCOTT-HENDERSON, J.S.C. (temporarily assigned).

Defendant William Gonzalez appeals from his conviction following a jury trial where he was found guilty of arson, terroristic threats, stalking, and invasion of privacy involving his former fiancée, S.N.[1] He argues he was denied due process and a fair trial based on several pre-trial and trial errors made by the court. For the reasons detailed below, we reverse and remand for a new trial.

I.

We summarize the pertinent facts from the trial record. Defendant and S.N. met online in the fall of 2016 and dated for less than one year. Defendant moved in with S.N., and the couple began making plans to get married in the summer of 2017.

S.N. testified that the relationship began to change, escalating from verbal arguments to physical assaults that prompted her to end the relationship. When she told defendant she wanted to end the relationship, he choked her, leaving bruises and injuries that compelled her to seek medical attention in a local hospital emergency room. Defendant moved out but began a series of harassing

[1] We use initials pursuant to Rule 1:38-3(c)(12) to protect the identity and safety of the victim and witness.

conduct, including sending S.N. hundreds of text messages from various phone numbers, many of which included threats to S.N., her father, and her son. S.N. also testified that within days of ending the relationship, she awoke early one morning to find her car, parked on the street outside her apartment, ablaze. S.N. suspected defendant was responsible for the arson, and a police investigation ensued.

Assistant Fire Chief Kenneth Skirkanish of the Manville Fire Department (MFD) responded to the scene of the car fire and observed S.N.'s car "fully engulfed" in flames. The MFD extinguished the fire, and Manville Police Department (MPD) Detective William H. Sampson, Jr., arrived approximately one hour later and observed that the interior of the car was "completely destroyed" while the "rear and the front were . . . not as badly charred."[2] Detective Sampson led the arson investigation, which resulted in the arrest and prosecution of defendant.

On January 31, 2018, a Somerset County grand jury indicted defendant on charges of second-degree aggravated arson, N.J.S.A. 2C:17-1(a); third-degree terroristic threats, N.J.S.A. 2C:12-3(a); fourth-degree stalking, N.J.S.A. 2C:12-10(b); third-degree invasion of privacy, N.J.S.A. 2C:14-9(b)(1); and third-

[2] Photographs of the car were admitted in evidence at trial.

degree invasion of privacy, N.J.S.A. 2C:14-9(c).[3] Simultaneously, defendant was also facing municipal complaints including simple assault, N.J.S.A. 2C:12-1(a)(1), and two counts of harassment, N.J.S.A. 2C:33-4(a).

Defendant filed several pre-trial motions; we address only those that are at issue in this appeal. Defendant moved to compel discovery of S.N.'s new address and phone number along with the same information for her friend and co-worker, E.V. E.V. became a witness for the State because defendant had sent her text messages when he could not reach S.N. The court issued a written order and opinion denying defendant's motion for discovery of S.N.'s and E.V.'s personal information. At the same time, the court granted the State's application for a protective order.

The court found good cause to deny defendant's application for S.N.'s address and phone number based on defendant's prior threats of harm to S.N. and that a final restraining order (FRO) was in place between defendant and S.N.

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[3] A privacy violation under N.J.S.A. 2C:14-9(b)(1) is committed when a person "photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed," and an additional privacy violation under N.J.S.A. 2C:14-9(c) is committed when a person, "discloses any photograph, film, videotape, recording or any other reproduction of the image, taken in violation of subsection b . . . ."

The court found sufficient the State's proffer that it would facilitate communications between the defense and S.N. if she was willing to meet with defense counsel. The court also found good cause to grant the State's application for a protective order with respect to E.V. based on its finding that defendant had posed a threat of harm to E.V. due to defendant's threatening messages to her about S.N. The court specifically relied on defendant's text messages to E.V. that stated, "my sniper will get her. Nobody will see it and nobody knows when it will come" and "I am going to kill her when I catch her, I am telling you that she is working there and enough of these lies and covering for her."

Defendant next moved to dismiss the indictment against him, or alternatively, to preclude testimony from the State's arson expert due to the destruction of S.N.'s car, which the State had failed to preserve, thereby depriving defendant of the opportunity to have his own expert examine the car. Defendant's motion required the court to consider three issues: "(1) whether the aggravated arson charge in the [i]ndictment should be dismissed, (2) whether the evidence of the [car] should be suppressed because of the State's failure to preserve the same, and (3) whether the [c]ourt should instruct the jury with the adverse inference jury charge."

The court held a Rule 104 hearing on July 29, 2019, and July 30, 2019, and issued an order and opinion on August 2, 2019, denying defendant's motion to dismiss the indictment. At the Rule 104 hearing, Detective Jeffrey Dockery, the State's fire investigation expert, confirmed he had released the car from his custody after processing it, but then, in reference to the "Storage of Motor Vehicles" provision, stated S.N.'s vehicle "was never in my possession."

After Detective Dockery took photographs of the car and took samples for testing, he turned the vehicle over to Detective Sampson, believing he would release it to the victim. Detective Sampson released the car to the victim and told her she needed to remove it within twenty-four hours. S.N. called a tow company and sold it to them for fifty dollars. The tow company told her they were going to destroy it. S.N. reported this information to the insurance company and police.

Neither Detective Dockery nor Detective Sampson notified the prosecutor when they released the car. However, Detective Dockery testified that it was important to process the car and examine it for evidence "as soon as possible" and opined that had the car been impounded, "[i]t would not be preserved . . . unless I took that vehicle and wrapped it in shrink-wrap, and stuck it somewhere where it was totally in a vacuum, it would not be the same as what I found on

that day." He stated that in the approximately five other vehicle arson cases he had worked on, every vehicle was released at the scene.

The court found that the State had failed to preserve S.N.'s vehicle and proposed a curative jury instruction:[4]

> You have heard arguments that law enforcement officers failed to maintain the motor vehicle involved in the alleged arson in this case in accordance with standard operation procedures of the Somerset County Prosecutor's Office. It is for you the jury to decide the credibility and relevance of all evidence presented at trial. In evaluating the officers' credibility and relevancy of evidence, you may consider that evidence not available to the defendant before trial may have arguably contained exculpatory information unfavorable or inconsistent with that officer's trial testimony or final report. In deciding same, you may consider all the evidence in the case, including any explanation given as to the circumstances under which the alleged arson vehicle was not available at a later date for inspection by the [d]efense. In the end, however, the weight to be given to the testimony, and to the unavailability of the alleged arson vehicle, is for you, and you alone, to decide.

The court found "defendant ha[d] failed to allege facts to establish the State acted in bad faith." The court, relying on State v. Mustaro, 411 N.J. Super. 91, 102 (App. Div. 2009), stated, "[w]hen evidence is destroyed in accordance

[4] The actual instruction given to the jury at the conclusion of the trial varied slightly — but not in any significant way — from the proposed jury instruction included here.

with departmental procedures, the State has not acted in bad faith." The court also found "[d]efendant ha[d] failed to establish the materiality of the lost evidence, such as any exculpatory value." The court further noted that because the vehicle had been destroyed, defendant was unable to retain an expert in order to conduct his own samplings but also noted that "the remnants [meaning the remnants of any samples the police preserved] are available for inspection by any expert [d]efendant retains and the State's forensic expert report is available for his review."

The court concluded that the State had failed to preserve the vehicle involved in the alleged arson and, because defendant should have had access to it, "[d]efendant [was] entitled to a jury instruction as to the circumstances and it is in the sole province of the jury to determine the weight given to any testimony on this issue and the unavailability of the alleged arson vehicle."

During jury selection, defendant made a Batson challenge regarding the prosecutor's use of peremptory strikes, arguing the only reason the State had challenged a potential juror was because his ethnicity was the same as the victim and defendant.[5] The court rejected defendant's Batson challenge and stated it

[5] Batson v. Kentucky "forbids the prosecutor to challenge potential jurors solely on account of their race." 476 U.S. 79, 89 (1986).

was going to exclude that specific juror "from the get-go because he did not know whether he had an indictable [conviction]." Thereafter, trial commenced on November 12, 2019, and continued for several weeks.

S.N.'s Testimony

S.N. testified she had decided to end her relationship with defendant when she saw defendant's "aggressiveness," and on the morning of January 31, 2017, she told defendant that she wanted him to leave her apartment immediately. According to S.N., defendant responded by choking her until she lost consciousness, fell, and hit her head on the footboard of her bed, which resulted in a gash on the right side of her head, "marks on [her] neck" and pain when she swallowed. S.N. drove to a local hospital where she was treated with pain medication and her head was bandaged. While in the emergency room, S.N. spoke with a Manville police officer and advised him that defendant had choked her.

S.N. testified that when she returned home later that day, defendant was gone from the apartment and she did not see him or have any contact with him for the next few days; however, from January 31 to February 3, 2017, defendant tried to contact her "[a]ll day every day . . . [t]wo hundred calls a day. Two hundred text messages a day. All day. It was ongoing." She also testified that

some calls came from defendant's own cell number, but that others came from "a whole bunch of different numbers." S.N. further testified that in some of the calls, defendant left threatening voicemail messages, "[s]aying . . . that he wanted to kill [her], [her] dad, [and her] son" and accusing her of giving him a variety of sexually transmitted diseases she did not have. And, when she tried blocking the calls, defendant used different numbers, and also contacted her via Facebook Messenger using a pseudonym. She reported the calls to the police who later examined her cell phone, which showed that between January 31 and February 8, 2017, she had received 725 calls from two numbers.

S.N. further testified that on February 4, 2017, she had returned home from work around 3:00 p.m. and parked her car, a silver Honda Civic, on the street in front of her house. She awoke around 6:10 a.m. the next morning and witnessed her car on fire. S.N. believed she had heard car doors slamming and a "boof" sound and saw "[b]right orange" light through the window. When she looked out the window, she saw the "[d]river's side" of her car on fire. She called 911 and watched as the fire spread to the passenger side and then to the back of her car. On redirect, S.N. stated that when she first had heard the commotion outside, she "had a feeling . . . [t]hat the defendant was going to do something like that[,] . . . [b]ecause he was grimy like that" and "[s]neaky like

that." S.N. further testified that defendant drove a Honda Civic, "same as mine, just a little older" and in a "maroon, plum" color.

On the morning of February 9, 2017, S.N. called Detective Sampson as she left for work and told him she had seen defendant parked on her street. Police did not locate defendant. Several days later, S.N. went to the MPD and reported she was "[g]etting threats from the defendant that he [. . .] was going to kill [her]." S.N. provided police with posts from a Facebook profile using her name that included photos of her in lingerie, with captions "saying I have HIV." S.N. testified the profile was "defendant's account . . . [w]ith my name on it," explaining that she recognized a posted photo as one defendant took "[t]he day we got engaged," which only defendant had access to.

S.N. and defendant briefly reconciled some time in February 2017 and on March 1, 2017, S.N. met with Detective Sampson and advised him that she did not want to pursue arson charges. She signed a waiver of prosecution to that effect.

The reconciliation between S.N. and defendant was short-lived, however, and according to S.N., defendant texted her in July 2017 while she was at work, "stating that he was tired of everything, that [she] had changed, that things weren't the same and he couldn't take it anymore." S.N. explained that she had

in fact changed and did not "want to do anything with him." When S.N. came home from work, defendant was gone from the apartment.

S.N. testified that following their second break-up, defendant began posting nude photos of her on her Facebook page and had sent them to her employer, News12, and elsewhere. S.N. also stated she had seen four men in a car outside her house watching her and thought defendant had sent them. She stayed in a hotel for several days and then quit her job, relocated and changed her phone number because defendant was texting and calling her "[a]ll day, every day." She did not tell defendant she had relocated. S.N. further testified defendant obtained her new number by calling her car insurance company and that he had cancelled her policy twice. Defendant resumed calling her "[o]ver 200" times per day and again threatened to kill her and members of her family. On August 2, 2017, S.N. called Detective Sampson and told him she had changed her mind about the waiver of prosecution.

S.N. testified that she had received a threatening voice message from defendant on August 15, 2017, a few days after receiving a photograph of a sniper rifle by text. In an audio recording played at trial, a man said S.N. would not leave him "even if it's my life and yours I've got to take," that she was "never going to have . . . peace" and if she was "with somebody you better get rid of

him because he's going to pay for it too as well as your dad and everybody else." S.N. identified the man's voice as that of defendant and testified she had received a text message that same day, stating: "[a]nd don't think about calling nobody to help you out because remember bullets don't have no eyes and whoever is there with you is going to die." A second text message received later that same day read "[l]isten to your voice and the recordings and I'm going for you. Dead or alive I'll take us both down and we both be dead, how's that?" A third message stated: "I'll see you at the house. I know you back in Manville. My boys are there. That's what money can do." S.N. testified that she was in fact back in Manville that day to retrieve some of her belongings and that there were men outside her apartment, in the same car she had seen before she left for Pennsylvania. The next day, defendant sent S.N. another text message:

> You so fucking dead, [S.N.]. I see you still at work today, huh, at PVH? You updated your credit report, right? I can see everything. Saw that you moved back then to your house. That's good, because I got you the house, the job (indiscernible) and find you and I'm going to kill you.

Detective Sampson's Testimony

Detective Sampson testified he had canvassed the area and obtained surveillance camera footage from a house at the corner of S.N.'s block and Washington Avenue that depicted the events near the time S.N.'s car was set

ablaze. He testified that video footage showed that at around 6:33 a.m., there was "a vehicle driving south on South 5th Avenue towards Washington, the intersection. It appeared to be . . . operating and moving in transit with the headlights off . . . . Once the vehicle was turning onto Washington Avenue, the headlights came on." Detective Sampson testified about his observation of the black and white video as it played for the jury, including that the vehicle depicted in the video was an "older Honda Civic." On cross-examination, counsel asked "[b]ut you couldn't really tell what kind of car it was"; Detective Sampson responded, "[i]t looked like an older Honda Civic," but agreed that he was not "really sure."

Detective Sampson photographed S.N.'s burned vehicle and later testified at trial that he had contacted the Somerset County Prosecutor's Office "because the fire was suspicious in nature" and that "[t]hey sent Detective . . . Dockery from Forensics to assist." Detective Sampson later took S.N. to police headquarters, where she provided a taped statement.

On recross, Detective Sampson stated that he believed S.N. was "credible," in the following exchange with defense counsel:

> COUNSEL: Did you rule out [S.N.] herself as a potential suspect since she had been in the car, you said, the week prior to the fire?

> SAMPSON: As a suspect? I think I gauged her more as a victim.
>
> COUNSEL: But did you rule her out specifically?
>
> SAMPSON: I believe she was credible. I've been a police officer 20 years and I think I have a pretty good gauge on reading people.
>
> COUNSEL: But my question to you, sir, is did you specifically rule her out? That's my question.
>
> SAMPSON: Yes. Do I think she intentionally set her own car on fire? No.

Detective Dockery's testimony

Detective Dockery testified for the State as an expert in fire investigations. He testified that some systems remain energized even when a car is off but stated that he did not observe any of the "arcing and beading" of the wiring that one would expect to see if there had been an electrical fire. Detective Dockery expressed confidence that this was not an electrical fire, explaining that "there's no wiring at all" in the "area of origin," which he determined to be the driver's seat and the floor in front of it. He concluded that this was an "incendiary fire," an intentional "human act," and that someone introduced an ignitable liquid onto the driver-side floor and/or seat "[a]nd then added an open flame to get it to ignite."

In reaching those conclusions, Detective Dockery considered, among other things: significant oxidization and burn patterns in the driver's seat area; a sample taken from the driver's seat area which "tested positive for a light to medium petroleum product and a medium petroleum distillate," as testified to by Forensic Scientist Melissa Balogh; and statements S.N. had made to police, which included that her driver's-side door was broken and did not lock, she had no mechanical issues with the car, the car had last been used sixteen hours before the fire, and she heard a car door slam and drive off, which indicated to Detective Dockery that there was "a human being present at the time that [the] fire started."

S.N. also testified that she smoked cigarettes in her car and would sometimes keep the butts in a cup, but Detective Dockery stated there was "no evidence of any smoking products in the car," including "any lighters," and explained that filters often survive fires because they are "really not made to burn." Detective Dockery further testified that after completing his examination, he had turned the car over to Detective Sampson so he could return it to S.N. In explaining why he had turned the car over, he stated "I determined that I [had] everything . . . of evidentiary value from that vehicle. The rest is just a hunk of burnt metal at this point." S.N. arranged with a tow company to retrieve her burned car the same day.

Testimony of Sergeant Jeanne Trillhaase

Sergeant Trillhaase testified for the State as to the forensic extractions of S.N.'s phone and defendant's phone, which she had performed using the Cellebrite program. According to Sergeant Trillhaase, the extraction of S.N.'s phone revealed many text messages, including violent messages and images threatening to harm her and her family, that S.N. asserted had come from defendant's phone. The extraction of defendant's phone revealed several nude images of S.N. and a threatening voice message that S.N. had previously reported to MPD.

Defendant objected to Sargeant Trillhaase's testimony about the forensic extraction process, arguing that testimony required an expert because it was beyond the ken of the jury. The court overruled defendant's objection.

Testimony of Detective Sergeant Randy Sidorski

Detective Sargeant Sidorski testified on behalf of the State that he had reviewed Sergeant Trillhaase's forensic extraction of defendant's phone and that his phone contained the voice message in which defendant threatened to "take" both S.N.'s life and his own. Sidorski also identified several photos of S.N. naked that had been sent to her employer, and a picture of a sniper rifle. Sidorski

opined that this evidence "refuted or contradicted" a statement defendant had made to police "that he doesn't take revenge out on people."

Further, Detective Sergeant Sidorski testified that the two numbers from which S.N. had received 725 phone calls between January 31 and February 8, 2017, were associated with defendant. He explained he had determined numbers belonged to defendant by looking at the subscriber information for each number.

Testimony of Officer John Cooper

Officer Cooper responded to the PVH building and spoke with S.N.'s friend and former co-worker, E.V., who told Officer Cooper that, the night before, she had received a voicemail from one of defendant's phone numbers. E.V. played him the voicemail, which was in Spanish. Officer Cooper testified that he read and spoke Spanish. Officer Cooper read his translation of the message at trial: "[S.N.] is dropped off at work, everything has been seen, this will be my victory. My sniper will get her, nobody will see it and nobody knows when it will come." The message itself was not played for the jury.

E.V. also showed Officer Cooper a text message she had received the day prior and a second text she received while she and Officer Cooper were speaking. Both messages were in Spanish. E.V. testified that the first message said, "Tell [S.N.] I'm waiting for her in the parking lot. I'm not her lap dog,"

and the second message said, "[t]ell her that I was around the house. Tell her that I was around her dad's house, and that I'm going to kill her when I grab her. That she's working there. . . . That she lied to cover it."

Testimony of Nicholas Palumbo

Nicholas Palumbo testified for the defense as an expert in fire-investigations. According to Palumbo, the car should have been impounded not only to allow the defense to have access to it, "but in case the prosecutor's office themselves need it again." He cited a Somerset County Prosecutor's Office general order stating "no evidence or contraband that is seized in connection with an arrest will be released without a written order from the [c]ourt or written approval by the assistant prosecutor." Palumbo disagreed with Detective Dockery's conclusions and criticized his methods. He testified that based on his review of the available evidence, the cause of the fire was "undetermined." He further testified that the petroleum distillate found on the driver's side could have resulted from "walk[ing] through something" at a gas station and that "the electrical system wasn't really considered enough in [his] opinion." He also opined the "boof noise" S.N. had heard may have been "the pressurized vessels that drive the airbags" exploding, which was contrary to Detective Dockery's

testimony that the noise S.N. overheard indicated "an open flame going to an ignitable liquid."

At the conclusion of the presentation of the evidence and summations of counsel, the jury found defendant guilty on all counts in the indictment. Defendant moved for a new trial; the court denied that motion in an order entered on May 19, 2020.

On June 17, 2020, the court sentenced defendant to an aggregate term of eight years' imprisonment with a four-year period of parole ineligibility, as well as a permanent stalking restraining order pursuant to N.J.S.A. 2C:12-10.1. Defendant was given a 966-day credit for time served. This appeal followed.

II.

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

> POINT I
>
> THE PROSECUTION'S REFUSAL TO PROVIDE THE CONTACT INFORMATION FOR TWO WITNESSES, INCLUDING [S.N.], TO DEFENSE COUNSEL DEPRIVED DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL AND THE OPPORTUNITY TO PRESENT A COMPLETE DEFENSE.

POINT II

THE STATE'S DESTRUCTION OF THE VEHICLE AT THE HEART OF THE ARSON CHARGE DEPRIVED DEFENDANT OF DUE PROCESS AND A FAIR TRIAL.

A. Defendant was denied due process by the destruction of [S.N.'s] car immediately after the State's expert conducted his investigation, requiring dismissal of that count.

B. Alternatively, the trial court failed to fashion a sufficient remedy for the discovery violation by declining to preclude the expert testimony and by providing an inadequate jury instruction.

POINT III

IN A CASE THAT HINGED ON CREDIBILITY DETERMINATIONS, THE REPEATED IMPROPER OPINION TESTIMONY BY THE STATE'S WITNESSES CONCERNING THE CREDIBILITY OF [S.N.], THE STRENGTH OF THE STATE'S EVIDENCE, AND THE GUILT OF THE DEFENDANT VIOLATED OUR RULES OF EVIDENCE AND DUE PROCESS, REQUIRING REVERSAL.

A. The investigating officers repeatedly gave their opinions concerning the credibility of [S.N.] and the significance of the State's evidence.

B. The State's fire investigator strayed far beyond the bounds of permissible expert opinion, opining on the credibility of the complainant and his belief that she was not a suspect for the car fire.

C. The State was permitted to elicit expert testimony from two detectives presented as "fact" witnesses, thus bypassing the requirements for the admission of experts.

D. [S.N.] and Dug[g]an gave their opinions about [defendant's] guilt that was not based on first-hand knowledge but rather based on inferences they had personally drawn.

E. Even if not individually capable of requiring reversal, the cumulative impact of the impermissible opinion testimony deprived [Defendant] of due process and a fair trial.

POINT IV

BECAUSE THE TERRORISTIC THREATS STATUTE USED TO CONVICT DEFENDANT HAS BEEN HELD UNCONSTITUTIONAL, THIS CONVICTION MUST BE VACATED AND THE COUNT DISMISSED.

POINT V

DEFENDANT WAS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR JURY DUE TO THE PROSECUTION'S DISCRIMINATORY JURY SELECTION PRACTICES, AND BECAUSE OF A NUMBER OF IRREGULARITIES THAT HAMPERED THE JURY'S ABILITY TO BE FAIR AND IMPARTIAL.

A. The trial court improperly denied the Batson motion where the prosecutor's use of peremptory strikes was grounded in impermissible bias.

> B. Several irregularities including the unexpected length of the proceedings, an illness that plagued multiple jurors, and the jurors' adorning of Christmas lights during trial operated to deprive [defendant] of his rights to due process and an impartial jury.

III.

A.

Our review of a court's discovery order is governed by the abuse of discretion standard. State ex. rel. A.B., 219 N.J. 542, 554 (2014). "[A]ppellate courts 'generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.'" State v. Brown, 236 N.J. 497, 521 (2019) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). "A court abuses its discretion when its 'decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). A trial court can abuse its discretion "by failing to consider all relevant factors." State v. S.N., 231 N.J. 497, 500 (2018). An order or judgment may nevertheless be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it. State v. Scott, 229 N.J. 469, 479 (2017).

An appellate court defers to a trial court's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). Under that standard, appellate courts "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). If, however, the trial court applied the wrong legal standard in deciding to admit or exclude the evidence, the court's evidentiary decision is reviewed de novo. State v. Trinidad, 241 N.J. 425, 448 (2020).

An error that was brought to the trial judge's attention will not be ground for reversal if it was "harmless error." Willner v. Vertical Reality, Inc., 235 N.J. 65, 80 (2018). That is, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. "[P]lain error not brought to the attention of the trial . . . court" is tested by the same standard. Ibid. An error is clearly capable of producing an unjust result if it is "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." State v. Daniels, 182 N.J. 80, 95 (2004) (alteration in original) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). "Therefore, [an] 'error must be evaluated in light of the overall strength of the State's case.'" Trinidad, 241 N.J. at 451 (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

In the context of a jury instruction, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Montalvo, 229 N.J. 300, 321 (2017) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). "The error must be evaluated 'in light of the overall strength of the State's case,'" Sanchez-Medina, 231 N.J. at 468 (quoting State v. Galicia, 210 N.J. 364, 388 (2012)), as well as the context of the whole charge, to determine its effect. State v. Garrison, 228 N.J. 182, 201 (2017).

However, "[a]ppropriate and proper charges are essential for a fair trial." State v. Scharf, 225 N.J. 547, 581 (2016) (alteration in original) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). "[E]rroneous instructions on material points" are therefore presumed to be prejudicial. State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Bunch, 180 N.J. 534, 542 (2004)). Stated differently, "[s]uch errors are 'poor candidates for rehabilitation under the harmless error philosophy.'" State v. Vick, 117 N.J. 288, 289 (1989) (quoting State v. Crisantos, 102 N.J. 265, 273 (1986)). In particular, "incorrect charges

on substantive elements of a crime constitute reversible error." State v. Rhett, 127 N.J. 3, 7 (1992).

B.

We first address defendant's assertion the court erred in its pre-trial determination barring the prosecution from sharing the contact information of S.N. and E.V. with defense counsel, thereby hindering defendant's ability to fully investigate the case and prepare for trial.

The State maintains that defendant was not entitled to the contact information of S.N. or E.V. because "[d]efendant was charged with serious domestic-violence-related offenses against S.N. . . . and [w]hen defendant could not reach her, he began targeting E.V." The State asserts that because S.N. had been granted an FRO, which remained in effect against defendant, it "endeavored to provide alternatives to make these [witnesses] available to balance legitimate safety concerns with defendant's discovery rights," and defendant rejected those alternatives.

In granting the State's application to withhold S.N.'s and E.V.'s contact information, the court reasoned that "good cause has been shown by the State that the victim is facing potential physical harm or threats of physical harm." The court noted that the State's facilitation of communications between defense

counsel and the victim were sufficient and concluded the previous threatening communications to E.V. were sufficient to find she "also faces threats of harm from [d]efendant . . . ."

A defendant's constitutional "right to present a complete defense encompasses access to adverse witnesses during the investigation phase of the defense." State v. Blazas, 432 N.J. Super. 326, 340 (App. Div. 2013). In a recent opinion, State v. Ramirez, 252 N.J. 277, 303-04 (2022), our Supreme Court addressed a similar issue involving the competing interest and rights of a sexual-assault victim to withhold her address from discovery and the right of the accused to have access to that information. In Ramirez, the issue arose after the prosecution had redacted the victim's address — where the assault had occurred — and declined to provide the victim's current or updated address in pre-trial discovery. 252 N.J. at 289. The prosecution had also moved for a protective order under Rule 3:13-3(e), which was supported by a certification from an assistant prosecutor asserting that the victim did not want her address to be provided to the defense because she was afraid that defendant would locate and harm her. Ramirez, 252 N.J. at 289.

Our Court set forth a framework of procedures and considerations to be applied when a prosecutor seeks an order of protection to exclude witness

information from discovery, including requiring the prosecution to file a motion under Rule 3:13-3(e), supported by a sworn statement from the victim attesting the victim does not want the address disclosed to the defendant or defense counsel. Ramirez, 252 N.J. at 309. The Court held that the defense may file a response stating why the motion should be denied and explaining why the victim's address is needed and the court hearing the motion "shall then consider various 'supervised pathways' and options designed to assure that the victim's decision is personal." Id. at 310. The Court lists various options, including: a written request from the defense that the court may permit to be conveyed to the victim through the prosecutor or court staff; an in camera interview of the victim by the judge; a limited telephone or video call between defense counsel and the victim, with advanced notice to the victim; and other court-ordered options that would fairly balance the victim's right to refrain from participation in the proceedings against the defendant's right to prepare a defense. Ibid. The Court further held that after implementing one or more of the options as discussed above, a motion court must rule on whether good cause has been shown for the protective order, and if so, what court-imposed restrictions or conditions shall be observed. Id. at 310-11.

"In New Jersey, an accused has a right to broad discovery after the return of an indictment in a criminal case." State v. Hernandez, 225 N.J. 451, 461 (2016). This includes the automatic discovery of the names and addresses of any witness. R. 3:13-3(b)(1)(F). Criminal discovery is not unlimited, however, and an "important limit on a defendant's right to discovery is 'the chilling and inhibiting effect that discovery can have on material witnesses who are subject to intimidation, harassment, or embarrassment.'" Ibid. (quoting State v. D.R.H., 127 N.J. 249, 256 (1992)). Moreover, "potential harm in the form of emotional trauma and mental distress is [also] an acute concern with respect to" certain witnesses, such as "a child sex[-]abuse victim who is required to be a witness in a criminal prosecution for a sexual offense." D.R.H., 127 N.J. at 256.

Rule 3:13-3(e) governs the issuance of protective orders to limit discovery. Subsection (e)(1) of the rule identifies the grounds for such an order:

> Upon motion and for good cause shown the court may at any time order that the discovery sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; confidential information recognized by law, including protection of confidential

> relationships and privileges; or any other relevant considerations.
>
> [R. 3:13-3(e)(1) (emphasis added).]

Moreover, Rule 1:38-3(c)(12), excludes from public access, records including the "[n]ames and addresses of victims or alleged victims of domestic violence or sexual offenses."

Additionally, the Legislature, through the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, has declared that "it is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting . . . by ordering those remedies . . . that are available to assure the safety of the victims and the public." N.J.S.A. 2C:25-18. The PDVA also expressly provides that "[t]he court in a criminal complaint arising from a domestic violence incident . . . [s]hall waive any requirement that the victim's location be disclosed to any person." N.J.S.A. 2C:25-25(c).

Applying these factors, we understand the court's desire to protect S.N. and E.V. as it was reasonable to conclude that dissemination of S.N.'s and E.V.'s contact information presented a risk of physical harm to them.

Nevertheless, the court's ruling was lacking in multiple ways, certainly by the standards subsequently established in Ramirez. The court did not expressly consider S.N.'s interests under relevant victim's rights legislation or

meaningfully distinguish between S.N. and E.V. on the basis of S.N.'s status as a victim. The court did not explain why providing defense counsel with the contact information while prohibiting its disclosure to defendant was an insufficient remedy. The court did not verify that the witnesses requested that their information be withheld or that they had declined to be interviewed by the defense. The court relied on a wholly "unsupervised pathway" option: it directed the State to communicate with the witnesses on behalf of defense counsel and determine if they would answer questions but did nothing to ensure (1) that communication was neutral and conveyed defense counsel's message fully, as the communication fairly should have, or (2) that the witnesses' responses were accurately conveyed back to defense counsel.

Granted, the Ramirez Court issued its guidance prospectively after defendant's conviction in this case. But the Ramirez decision is not entirely novel. The court's failure to place any safeguards on the prosecution's role as intermediary between the defense and witnesses demonstrates a lack of consideration for previously established principles, namely, a defendant's right of access to witnesses, that a witness's right to deny a defense interview is a "personal" one, and that prosecutorial interference with that choice can violate a defendant's constitutional rights. Blazas, 432 N.J. Super. at 343-46.

Although the record does not contain any evidence demonstrating the State improperly interfered with defendant's ability to prepare his defense, the court did not consider or put in place other procedures that could have addressed the concerns of defendant and the witnesses. For example, this court has previously encouraged disclosure of a threatened witness's address to defense counsel but not defendant when a trial court determines that disclosure is "necessary." State v. Postorino, 253 N.J. Super. 98, 109 (App. Div. 1991). The court in this case should have demonstrated consideration of that option. Thus, we conclude the court abused its discretion by failing to adequately consider and appropriately balance important factors in granting and designing the protective order. See Chavies, 247 N.J. at 257.

C.

Defendant next argues the court erred by denying his motion to dismiss the arson charge in the indictment based on spoliation related to the destruction of S.N.'s burned car prior to defendant's opportunity to examine it. Defendant contends that S.N.'s burned car was "the most critical piece of evidence concerning the arson charge," and its destruction prior to the close of discovery "violated not only our rules of discovery but denied [him] due process and a fair trial," by "depriv[ing] [him] of evidence that could have potentially established

his innocence." Defendant sought dismissal of the arson count in the indictment, arguing his "right to due process was violated."

Defendant further argues that in the alternative, even if the destruction of the car did not rise to the level of a due-process violation, the court erred in denying his motion to preclude the opinions of the experts offered by the State. Defendant further argues that the State's experts' examination of S.N.'s car was inadequate because in investigating the cause of the fire, the expert did not examine the car's engine and spent only five-to-ten minutes looking at the car's wiring, collected only five samples of debris based on his suspected original point of the fire, failed to sample other parts of the car that had significant damage, and incorrectly based his conclusion on S.N.'s statements to police. And, defendant contends the court erred in declining to preclude the testimony of the State's experts and in failing to provide an adequate curative instruction as a remedy to the discovery violation.

The State asserts that "the car's disposal did not deprive defendant of due process or a fair trial," arguing instead that the car and Detective Dockery's processing of it, did not conclusively tie defendant to the arson at the time the car was released to S.N. The State further asserts "[s]amples, and photographs were taken from the car, which was 'a shell, burned[-]out car' and a 'safety

issue,'" and Detective Dockery documented his processing and preservation of the evidence, and defendant was not deprived of the opportunity and benefit of examining the evidence because defendant had access to the evidence and heard the testimony of Detectives Sampson and Dockery and fully cross-examined them. Additionally, the State contends that at the conclusion of the case, the court gave a "balanced adverse-inference instruction" to the jury, and thus there was no violation of defendant's due-process rights.

On this issue, the court declined to find the State had failed to turn over the car to S.N. based on bad faith or that the State intended to subvert the defendant's rights. The court also found that "defendant 'failed to establish the materiality of the lost evidence, such as any exculpatory value,'" concluded that no due process violation had occurred, and declined to dismiss the arson charge or to suppress evidence. The court, however, determined that an adverse-inference charge was warranted and instructed the jury as follows:

> In evaluating the credibility of testimony and relevancy of evidence you may consider that evidence not available to the defendant before trial may have arguably contained exculpatory information unfavorable or inconsistent with the State's trial testimony and their expert's conclusions. In deciding [the] same[,] you may consider all the evidence in the case, including any explanation given as to the circumstances around which the alleged arson vehicle was not available at a later date for inspection by the

> defense. In the end, however, the weight to be given to the testimony and to the unavailability of the alleged arson vehicle is for you and you alone to decide.

"[A] defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed." State v. Hollander, 201 N.J. Super. 453, 478 (App. Div. 1985) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). In Hollander, the defendant argued the destruction of blood-stain evidence "was tantamount to non-disclosure of exculpatory evidence and was therefore a violation of his due process rights." Ibid. The court concluded the destruction of the blood stain evidence was in good faith and in accordance with the State's "normal practices" as the stains were destroyed by the consecutive running of tests to establish blood type, a procedure the laboratory chemist for the State testified was normal. Id. at 479. The court also concluded the blood stains were not sufficiently material to find a due-process violation. Ibid.

In this context, "bad faith" has been said to encompass "a calculated effort to circumvent . . . disclosure requirements," State v. Serret, 198 N.J. Super. 21, 26 (App. Div. 1984) (quoting California v. Trombetta, 467 U.S. 479, 488 (1984)), or "evil intent or purpose," in contrast to "mere negligence, however gross," State v. Peterkin, 226 N.J. Super. 25, 42-43 (App. Div. 1988). "The

presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Arizona v. Youngblood, 488 U.S. 51, 56 n.* (1988). For evidence to meet the standard of materiality, it must have both "exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Hollander, 201 N.J. Super. at 479-80 (quoting Trombetta, 467 U.S. at 489). And, "[i]n the absence of bad faith, relief should be granted only where there is a 'showing of manifest prejudice or harm' arising from the failure to preserve evidence." George v. City of Newark, 384 N.J. Super. 232, 243 (App. Div. 2006) (quoting State v. Dreher, 302 N.J. Super. 408, 489 (App. Div. 1997), overruled in part on other grounds, State v. Brown, 190 N.J. 144, 159 n.1 (2007)).

If, however, the defendant can show the lost evidence was only "'potentially' useful or exculpatory, the defendant can show a due process violation by establishing the evidence was destroyed in bad faith." Mustaro, 411 N.J. Super. at 103 (quoting Youngblood, 488 U.S. at 57-58). Moreover, "[t]he exculpatory value of the evidence should be analyzed in the context of the

nature and source of the evidence, and the strength of the state's case." State v. Hogan, 144 N.J. 216, 237 (1996).

In addition to a defendant's due process rights to discovery, "Rule 3:13-3(b)(1) codifies [a] criminal defendant's 'right to automatic and broad discovery of the evidence the State has gathered in support of its charges.'" State v. Desir, 245 N.J. 179, 193 (2021) (quoting State v. Stein, 225 N.J. 582, 594 (2016)). The Rule "obligates the State to provide full discovery when it makes a pre-indictment plea offer or when an indictment is returned or unsealed." State v. Robinson, 229 N.J. 44, 72 (2017). This court has also "read Rule 3:13-3(b)(1) to imply a duty to preserve evidence pre-indictment, at least where the item is clearly destined for post-indictment disclosure and a defendant timely requests its preservation." State v. Richardson, 452 N.J. Super. 124, 132-33 (App. Div. 2017).

Here, S.N.'s car was a critical piece of evidence pertinent to the arson charge in the indictment; however, we reject defendant's argument that that the State violated his rights to due process when under these circumstances it released the burnt-out car to S.N. and failed to preserve the vehicle for defendant's inspection. We note, as the court did, that Detectives Sampson and Dockery released S.N.'s car to her following their investigation on the same day

of the fire and did so prior to any charges having been filed against defendant. Detective Dockery testified the car was turned over to S.N. after examination because he believed he had collected the evidence from the vehicle and all that remained was "a hunk of burnt metal," and the car was S.N.'s personal property, and she would need it back to collect her insurance compensation. The State then produced several reports, records, samples, and photographic evidence documenting the investigation into the condition of the car. Under these circumstances, we perceive no support for the contention that the State made any deliberate effort to deny defendant the opportunity to examine S.N.'s burnt car. In other words, we discern no bad faith on the part of the State.

We also distinguish this case from others where evidence was destroyed following a timely and specific request that it be preserved. In Richardson, 452 N.J. Super. at 137, we determined that the basis "for such an adverse inference charge [was] just as strong" where the State destroyed relevant video evidence pre-indictment but after "defense counsel's timely request to preserve the evidence." Here, defendant could not have made such a timely request because for the preservation of the car because he had not yet been charged with arson.

As to bad faith, defendant does not contend that detectives believed that S.N.'s car had exculpatory value or that the release of the car to S.N. was ill-

motivated. Rather, defendant asserts that Detectives Dockery and Sampson were callously indifferent to defendant's "right to see this evidence" and that they "violated several standards and rules requiring the preservation of evidence" and, thus, acted in bad faith. However, bad faith is not defined by indifference and requires a showing of "a calculated effort to circumvent . . . disclosure requirements," Serret, 198 N.J. Super. at 26, or "evil intent or purpose," in contrast to "mere negligence, however gross." Peterkin, 226 N.J. Super. at 42-43.

Measured against those legal principles, we agree with the court's conclusion that defendant has not shown the State acted in bad faith. We reach this determination because the bad faith standard in this context requires more than negligence; it requires a deliberate effort to deny a defendant access to exculpatory evidence. Ibid.

Although law-enforcement officers were incorrect in their assessment that the car was simply a hunk of metal, and we agree with defendant that he should have had an opportunity to conduct his own arson investigation by having his expert witness examine the car, no matter its condition, we nevertheless conclude that absent a showing of bad faith defendant cannot establish that a due-process violation occurred. Mustaro, 411 N.J. Super. at 103. And, we are

further persuaded that the court's decision to provide an adverse-inference charge constituted an appropriate remedy under the circumstances to address defendant's spoilation claim. State v. Dabas, 215 N.J. 114, 140 (2013) (finding in cases where evidence is destroyed rather than withheld, an adverse-inference charge "to balance the scales of justice" is another "permissible remedy for a discovery violation."). Similar to the "spoliation inference which may be drawn when evidence has been concealed or destroyed in civil cases," the criminal "adverse-inference charge . . . 'allows a jury in the underlying case to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.'" Id. at 140 n.12 (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 401-02 (2001)).

In Dabas, a police officer destroyed his lengthy post-indictment, pre-interview notes in a murder investigation. 215 N.J. at 123-24. Even though this case does not involve the preservation of notes, our Court's reasoning in Dabas, that an adverse inference is a permissible remedy, is applicable and persuasive. Providing an adverse-inference instruction was appropriate notwithstanding that preservation of the car was not clearly required by court rule, caselaw or policy. After all, our courts' discovery powers are "not limited to the express terms of

the automatic discovery provisions of Rule 3:13-3(b)." Richardson, 452 N.J. Super. at 132.

In the adverse-inference charge, the court specifically instructed the jury that it could consider the circumstances and explanations around the car's unavailability "[i]n deciding" whether the car "contained exculpatory information unfavorable or inconsistent with the State's trial testimony and their expert's conclusions." This charge communicated the essential idea that the jury would not be merely speculating if it concluded that the car was exculpatory and that jurors could reach that conclusion based on the State's actions in making the car unavailable. This was, despite defendant's assertion to the contrary, an appropriate adverse-inference charge. We therefore find no support for defendant's assertion the court abused its discretion in declining to instruct the jury that the State was required to preserve the car.

D.

Defendant further argues he was denied his rights to due process and a fair trial in violation of Article I of the New Jersey Constitution because the trial was "replete with impermissible opinion testimony that went straight to the heart of the jury's inquiry" and "these opinions were admitted through multiple State's witnesses and concerned not only opinions on the credibility of S.N. and

[defendant], but also opinions concerning the strength of the State's case and defendant's guilt." Central to this argument is defendant's claim that "[i]n a case where the principal issue for the jury was to determine whether [S.N.'s] or [defendant]'s version of events occurred, and where credibility of the complainant was the central issue, the admission of this evidence cannot be deemed harmless." He specifically objects to: (1) Detective Sampson narrating "the surveillance video of a car driving down the street near the time of the fire" and opining on the make and model of the car, which he stated looked like an "older Honda Civic"; (2) Detective Sampson testifying that he believed S.N. "was credible. I've been a police officer [twenty] years and I think I have a pretty good gauge on reading people"; (3) Sergeant Sidorski testifying that evidence extracted from defendant's phone "refuted or contradicted" defendant's statement to police that "he doesn't take revenge out on people"; and (4) Detective Sampson describing the car fire as "arson" and "suspicious."

Relying on N.J.R.E. 701, defendant further argues that "[Detective] Sampson's narration of the video, and his identification of the make and model of the car, was inadmissible lay opinion because he had no personal knowledge about what the video portrayed, and thus, his opinion about what the video showed and how it was relevant was not based on his own perceptions."

The State urges us not to view the court's evidentiary rulings in a "vacuum" and asserts that defendant had every opportunity to cross-examine the State's witnesses and did so, including cross-examining Detective Sampson regarding his testimony about the video. The State contends Detective Sampson's testimony during the video presentation was neutral, purely descriptive and further that on cross-examination, he testified he did not in fact actually know what type of car was on the video.

The State further denies that Detective Sampson or Sidorski impermissibly vouched for S.N. or the State's evidence and argues Tung is distinguishable because in that case the court permitted the officer to testify about his personal belief that the defendant was a liar. See State v. Tung, 460 N.J. Super. 75, 103 (App. Div. 2019) (reversing a murder charge due to improper opinion testimony concerning credibility where an officer testified to his "truth-telling skills" enabling him to determine whether a witness was lying). The State maintains Detective Sampson did not call the defendant a liar and the testimony at issue was in response to a question posed by the defense on cross-examination. In response to defendant's claim that Detective Sampson improperly characterized the car fire as suspicious or arson, the State contends that admission of the testimony was "harmless." Again, the State argues the

evidence against defendant was overwhelming and the jury was properly instructed on how to evaluate the evidence.

Narration of the Video

In State v. Higgs, our Supreme Court addressed whether a detective's testimony was admissible where the detective was not an expert witness and was not on the scene, yet testified to a portion of dashcam footage that briefly showed a defendant on the front porch of a home prior to a shooting. 253 N.J. 333, 365-66 (2023). The video was of poor quality, but an item appeared to be visible in the defendant's back waistband, which the detective testified was a firearm based on his years of experience. Ibid. Our Supreme Court held the detective's testimony invaded the province of the jury because "[t]he jury was as competent as the detective to view the video and determine what the image did or did not show as to the important issue of the gun's placement. That task was for the jury alone." Id. at 366-67.

Moreover, under N.J.R.E. 701, lay witnesses may give relevant opinion testimony if that opinion "(a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." State v. McLean, 205 N.J. 438, 456 (2011) (quoting N.J.R.E. 701). The first requirement is that the testimony must "rest[] on the acquisition

of knowledge through use of one's sense of touch, taste, sight, smell or hearing," such that "lay opinion testimony is limited to what was directly perceived by the witness." Id. at 457, 460. The second requirement limits opinion testimony to that which "will 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 458.

Here, Detective Sampson's testimony that the car depicted on the video "appear[ed] to be an older Honda Civic traveling without its [headlights] on . . . " was improperly admitted because it consisted of his opinion on the make, model and movement of a car he observed on the surveillance video about which he had no personal knowledge, which is contrary to N.J.R.E. 701. In addition, the poor quality of the video made the detectives statements particularly problematic. Even the court queried "you testified that the headlights went back on but we don't see that in these frames, do we?" To which Detective Sampson responded, "[n]o. You can kind of faintly see the car . . . . It appears to have the lights on at that point."

The facts in Higgs are akin to those here insofar as it relates to a witness's narration of a video at trial. Thus, consistent with N.J.R.E. 701 and Higgs, the court erred in permitting Detective Sampson to testify about the video evidence

as it played for the jury. Higgs makes clear that the jurors were competent to view the video and draw their own conclusions without the need for the officer's running commentary describing the video. Ibid. We are also persuaded that the court's ruling constitutes reversible error because it was clearly capable of producing an unjust result: the inference that Detective Sampson's impressions about the vehicle were factual when the jurors were as competent as he was to view the video and discern for themselves the significance or insignificance of any of the facts. Daniels, 182 N.J. at 95.

Detective Sampson's and Dockery's Testimony as to S.N.'s Credibility

We reach the same conclusion with respect to defendant's objection to Detective Sampson's testimony about S.N.'s credibility, stating "I believe she was credible." Contrary to the State's argument that Detective Sampson's testimony was harmless because he did not call defendant a liar and the testimony was in response to a question posed on cross-examination from defense counsel, we nevertheless conclude the court erred in permitting such testimony.

Detective Dockery opined on S.N.'s credibility in a similar way when he testified that S.N. was credible in her testimony about the fire. Defendant argues Detective Dockery's references to S.N. and explanation that the information she

provided about hearing a car door slam was "significant" because it meant that there was a human being who started the fire. Defendant further argues that Detective Dockery improperly testified that he did not believe S.N. started the fire because it would not have been profitable for her to do so.

In Tung, the trial court allowed the admission of a detective's testimony regarding his personal belief the defendant was a liar. Id. at 102-103. Throughout the testimony, the detective frequently made comments on how the defendant responded, suggesting the detective possessed a specialized skill to determine the defendant was lying. Id. at 103. We concluded the jury's evaluation of the defendant's denial of guilty was tainted by the detective's clearly and repeatedly stated opinion the defendant was lying. Ibid. We held, when combined with the other errors, including the admission of evidence concerning the defendant's exercise of his right to counsel and to refuse a search warrant, the defendant was deprived of a fair trial. Id. at 103-104.

Applying Tung, we conclude that the testimony of Detectives Sampson and Dockery invaded the province of the jury in so far as they both opined on S.N.'s credibility. Testimony as to the veracity and credibility of a witness is solely within the province of the jury. Tung, 460 N.J. Super. at 102 ("[C]redibility is an issue which is peculiarly within the jury's ken and with

respect to which ordinarily jurors require no expert assistance.") (quoting State v. J.Q., 252 N.J. Super. 11, 39 (App. Div. 1991)). Hereto, we conclude the court erred.

Sargeant Trillhaase's Testimony On Forensic Extractions

Defendant next argues the court permitted expert testimony that violated several limitations imposed on expert testimony, requiring reversal, referring specifically to testimony from Sergeant Trillhaase's about the forensic extractions from S.N.'s phone, arguing that the State had failed to qualify this witness as an expert. Defendant maintains that Trillhaase was permitted to testify over his objection about the forensic extraction process and that such testimony required an expert because it was beyond the ken of the jury. The court overruled defendant's objection.

The admissibility of expert testimony is governed by N.J.R.E. 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The rule imposes three requirements for the qualification of an expert and the admission of his or her testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [State v. Jenewicz, 193 N.J. 440, 454 (2008) (citing N.J.R.E. 702).]

"Under the Rule, expert testimony is not appropriate to explain what a jury can understand by itself." State v. J.L.G., 234 N.J. 265, 305 (2018). "Matters 'within the competence of the jury' are for the collective wisdom of the jury to assess," while "issues that are beyond the understanding of the average juror may call for expert evidence." Ibid. (quoting State v. Sowell, 213 N.J. 88, 99 (2013)). "As the Rule states, expert testimony may be admitted if it 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" Id. at 304 (quoting N.J.R.E. 702).

Here, Sergeant Trillhaase gave a factual account and description of the process she used to extract data from S.N.'s and defendant's cell phones. N.J.R.E. 702 permits testimony covering "areas that [are of] the average person's knowledge," so long as she did not testify as to the interpretation of the data. We see no evidence to support defendant's argument Sergeant Trillhaase

testified beyond the boundaries of N.J.R.E. 702 and for this reason, we disagree that the court erred by allowing her testimony.

E.

Additionally, defendant further argues the court erred when it permitted another State witness, Officer Cooper, to translate a voicemail message from Spanish to English. We agree with defendant that the court erred in permitting a witness to serve as a translator at trial.

Translation or interpretation between languages could be accomplished through the testimony of an expert, see State v. Hyman, 451 N.J. Super. 429, 448-52 (App. Div. 2017) (holding testimony of an officer interpreting street slang based on his knowledge and experience was expert testimony), but would more appropriately be done by an interpreter qualified under N.J.R.E. 604, who must be neutral and "have no bias for or against any party or witness," Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 604 (2023). Further, it is the policy of the New Jersey judiciary that "all non-English [evidentiary] documents intended to be introduced into evidence must be accompanied by a certified translation," and "[i]f the intended evidence is in the form of a non-English audio/video recording or electronic message, a transcription in the original language should accompany the translation."

Admin. Off. of the Cts., Admin. Directive #01-17, New Jersey Judiciary Language Access Plan, at 39 (Sept. 30, 2022).

We therefore conclude that allowing Officer Cooper to effectively translate E.V.'s messages constituted error given that the defense had raised this issue pre-trial when it was provided with a disc of E.V. speaking in Spanish without the written English translation. The State's response was that the translation of the text messages is contained in Officer Cooper's report and that according to that report, E.V. had shown him the text messages at issue, and that he had transcribed or translated those text messages into English and placed the statements in his police report. The State also advised the court that Officer Cooper had provided the actual printout of the text messages themselves. Despite this fact, however, the messages were not transcribed into English by a certified translator or interpreter qualified under N.J.R.E. 604. Thus, the court committed reversible error by permitting Officer Cooper to translate E.V.'s messages at trial under Rule 2:10-2.

F.

Defendant next argues that his conviction for terroristic threats under N.J.S.A. 2C:12-3(a), must be reversed under State v. Fair, 256 N.J. 213, 233 (2024), which held that subsection (a) of the terroristic threats statute N.J.S.A.

2C:12-3, violated the First Amendment. N.J.S.A. 2C:12-3(a) makes a person guilty of a crime only if "he threatens to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror." He asserts that our terroristic-threat statute has been found unconstitutional and his conviction on this charge amounts to a violation of his First Amendment rights under Virginia v. Black, 538 U.S. 343 (2003), holding that "a state can punish threatening speech of expression only when the speaker 'means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" Id. at 550. He argues reversal is warranted because of an error in the jury instructions in light of Fair.

The State maintains that although Fair clarified the portion of the model charge providing that "[o]ne is said to act recklessly if one acts . . . heedlessly or foolhardily," 256 N.J. at 233, should no longer be used because it insufficiently conveys that "reckless defendants have done more than make a bad mistake" — "[t]hey have consciously accepted a substantial risk of inflicting serious harm," Ibid. (quoting Counterman v. Colorado, 600 U.S. 66, 80 (2023)), defendant did not object to the jury charge about which he now complains, and the instructions provided did not constitute reversible plain error under Rule 1:7-

2; or Rule 2:10-2, citing State v. Williams, 254 N.J. 8, 47 (2023) (stating even where model charge should be changed, there was no plain error stemming from use of charge below).

Moreover, the State seeks to distinguish this case from Fair, arguing that "S.N. suffered not only physical violence, but also was terrorized by defendant's constant threats against her and her family," highlighting defendant's threats to kill S.N. and her family, set her car on fire, invade her privacy, and how he called and texted her hundreds of times.

The defendant in Fair became agitated when police responded to a 911 call at the defendant's home where he lived with his elderly mother. 256 N.J. at 220. The defendant's girlfriend advised police the defendant had thrown her out of the home, but she wanted to retrieve her television. Id. at 221. Officers repeatedly knocked on the door of the home, but the defendant refused to open the door. Ibid. Eventually, the defendant stuck his head out of a window and asked police to leave his property. Ibid. Officers, still addressing the defendant's girlfriend, moved from the defendant's front yard onto the sidewalk. Ibid. The defendant, however, began yelling obscenities at Officer Healey, repeatedly calling him the "f---ing devil." Ibid. Officer Healey remarked that they would be back with a warrant, and the defendant grew more agitated and

yelled various obscenities, including: "F---ing thirsty a — [epithet]. You thirsty. Worry about a head shot, [epithet]. Ibid. Hours later, Officers viewed defendant's social media posts, which included a litany of other comments. Id. at 222. One of the posts stated, "YU WILL PAY . . . WHOEVA HAD ANY INVOLVEMENT . . . WE WILL HAVE THA LAST LAUGH #JUSTWAITONIT." Ibid. Police issued a terroristic-threats complaint against the defendant based on his statement to Office Healey and the social media posts. Ibid. A grand jury subsequently indicted the defendant on one count of third-degree terroristic threats, N.J.S.A. 2C:12-3. Ibid.

The defendant moved to dismiss the indictment, arguing among other things, that subsection (a) of the terroristic-threats statute, was unconstitutionally overbroad because it criminalizes terroristic threats made with a mens rea of recklessness. Id. at 223. The trial court denied the motion, finding the defendant's statements including those about the headshot and his subsequent social media posts were a true threat that was not protected by the First Amendment. Ibid. Adopting the standard enunciated by the Supreme Court in Counterman v. Colorado, 600 U.S. at 79, our Court held that in a criminal prosecution for a true threat of violence under N.J.S.A. 2C:12-2(a), a mens rea of recklessness suffices for purposes of both the First Amendment to

the United States Constitution and Article 1, Paragraph 6 of the New Jersey Constitution. Id. at 232-33. Our Court explained that under this standard, to be found guilty of a violation of N.J.S.A. 2C:12-3(a), a defendant must have consciously disregarded a substantial and unjustifiable risk that his or her the threat to commit a crime of violence would terrorize another person, and that conscious disregard must be a gross deviation from the standard of conduct that a reasonable person in the defendant's situation would observe. Ibid. The Court also held that "[i]n addition to a subjective mens rea of at least recklessness, . . . an objective component is necessary for a prosecution for a threat of violence under N.J.S.A. 2C:12-3(a) to survive First Amendment and Article 1, Paragraph 6 scrutiny." Id. at 237.

The Court further held that the objective inquiry "must be undertaken not from the perspective of an anonymous ordinary person, but from the perspective of a reasonable person similarly situated to the victim. Id. at 238. And, the Court stated, "[t]he inquiry in [that] case is thus not whether any ordinary person would have feared for their safety, but whether a reasonable police officer in Officer Healey's position would have feared for [his] safety, given the entire interaction with defendant." Id. at 238-39.

Applying the Court's holding in Fair, we note the model jury charge on terroristic threats provided to the jury in this case is inconsistent with our Supreme Court's holding. In this case, the court used the model jury charge, including the "ordinary person" and "heedlessly or foolhardily" language. Id. at 239. The question becomes whether that instruction, which is erroneous in light of Fair, constitutes reversible error in this case.

In the context of a jury instruction, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" Montalvo, 229 N.J. at 321 (quoting Chapland, 187 N.J. at 289). "The error must be evaluated 'in light of the overall strength of the State's case,'" Sanchez-Medina, 231 N.J. at 468 (quoting Galicia, 210 N.J. at 388), as well as the context of the whole charge, to determine its effect. Garrison, 228 N.J. at 201.

However, "[a]ppropriate and proper charges are essential for a fair trial." Scharf, 225 N.J. at 581 (alteration in original) (quoting Reddish, 181 N.J. at 613). "[E]rroneous instructions on material points" are therefore presumed to be prejudicial. McKinney, 223 N.J. at 495 (quoting Bunch, 180 N.J. at 542).

Stated differently, "[s]uch errors are 'poor candidates for rehabilitation under the harmless error philosophy.'" Vick, 117 N.J. at 289 (quoting Crisantos, 102 N.J. at 273). In particular, "incorrect charges on substantive elements of a crime constitute reversible error." Rhett, 127 N.J. at 7.

We turn to our Court's holding in Vick, 117 N.J. at 290, to address this issue. In Vick, the defendant was charged with unlawfully possessing a handgun without a permit after a police officer lost his service weapon while responding to a bar brawl, and the weapon was later found on the defendant's person. At trial, the "court refused defense counsel's request to charge the jury that the State bore the burden of proving that the gun was unlicensed," an element of the crime. Ibid. On appeal, we held that the error was harmless, reasoning that "[b]ased upon the defense offered at trial"—that the defendant "merely held the gun in safekeeping" for the officer—the "defendant could not possibly have had a permit for the weapon." Id. at 290-91. Our Supreme Court reversed, explaining: "We realize that it is difficult to explain why juries should be required to make a finding of what seems to be the obvious. The short answer is that there is simply no substitute for a jury verdict." Id. at 291. Although the Court suggested that a case where the defense wholly and "inescapably posit[ed] guilt of the offense" might be different, ibid., it ultimately concluded that the

requirement to prove "the essential elements of the offense charged . . . is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances." Id. at 293.

In State v. Docaj, 407 N.J. Super. 352, 361 (App. Div. 2009), we considered an error in the model jury charge on "passion/provocation manslaughter" used by the trial court. The charge incorrectly stated that the State had to prove "that the time between the provoking event and the acts which caused death was inadequate"—rather than "adequate"—"for the return of a reasonable person's self-control." Ibid. The court found the error harmless for several reasons. First, the jury was correctly instructed as to the State's burden on this factor three times, and only once incorrectly instructed. Id. at 365.

Second, we concluded that this factor was not crucial to the jury's deliberations, and thus that the presumption of reversible error did not apply, because "the arguments made by the prosecutor and defense counsel clearly show[ed] that the key . . . factor for both sides was" not whether the defendant had a reasonable time to "cool off," but "whether there was adequate provocation." Id. at 366. Third, overwhelming evidence supported the State's theory that defendant's crime was a "deliberate murder" rather than provocation manslaughter, which strongly militated against "a conclusion that the error in

the charge contributed to a verdict that the jury might not otherwise have reached." Id. at 369. Fourth, the jury's questions "reveal[ed] no indication that the jury was misled by the error." Ibid. Fifth and finally, "[t]he lack of prejudicial impact [was] further evinced by the absence of an objection." Id. at 370. Thus, we concluded that this previously unnoticed "one word" error in an "otherwise correct" charge was harmless. Ibid.

Here, the court charged the jury that

> [t]he second element that the State must prove beyond a reasonable doubt is that the threat was made with the purpose to terrorize another or in reckless disregard of the risk of causing such terror.
>
> A person acts recklessly with respect to a result of his conduct if he consciously disregards a substantial and unjustifiable risk that the result will occur from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, his disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. One is said to act recklessness if he acts with recklessness, with scorn for the consequences, heedlessly or foolhardily.
>
> The terms purposely or recklessly are conditions of the mind. A condition of the mind cannot be seen. It can only be determined by inference from the defendant's conduct, words or acts. A state of mind is rarely susceptible to direct proof but must ordinarily be inferred from the facts. Therefore[,] it is not necessary for the State — that the State produce witnesses to

> testify that an accused said that he had a certain state of mind when he did a particular thing. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts or conduct and from all he said or did in a particular time and place and from all surrounding circumstances established by the evidence.
>
> [Emphasis added.]

The "heedlessly or foolhardily" language is inconsistent with the standard of recklessness which, unlike lay usage of the word "reckless," always requires that a defendant consciously understood a substantial risk. Fair, 256 N.J. at 233. Instead, the jury was instructed recklessness requires a "conscious[] disregard[]" of a "substantial and unjustifiable risk."

Having considered defendant's arguments and the record pursuant to these principles, we are convinced that reversal is warranted because "the essential elements of the offense charged . . . is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances." Id. at 293.

Fair requires a subjective mens rea of at least recklessness and an objective component for a prosecution for a threat of violence under N.J.S.A. 2C:12-3(a) to survive First Amendment and Article 1, Paragraph 6 scrutiny. Id. at 230. Here, the jury heard evidence of defendant's multiple threats of harm, threats to kill S.N. and her family, that defendant had pursued S.N. in violation

of the FRO and had even engaged his friends to follow her and to go to her home. The State urges us to consider that defendant had communicated his intent to harm and or kill S.N. and there is no doubt he satisfied the reckless standard adopted in Fair, that the overwhelming evidence supported the State's theory that defendant had committed the crime of terroristic threats against S.N., and although the court's instruction misstated the standard, it is unlikely that a Fair-compliant charge would have changed the verdict given the overwhelming evidence of defendant's guilt. However, the failure of the court to deliver a correct instruction calls for reversal of defendant's conviction. Vick, 117 N.J. at 293.

In Fair, our Court expressed its Constitutional concerns as the geneses for adopting "a mens rea of recklessness": to correctly balance "the need to avoid chilling protected speech with the need to protect individuals and society from the profound harms that threats of violence engender." Id. at 234. Critically, however, as our Court stated in Vick, "there is simply no substitute for a jury verdict." Vick, 117 N.J. at 291. Thus, because there is no dispute the charge to the jury is inconsistent with our Court's ruling in Fair, we conclude the court's incorrect charge on substantive elements of the crime of terroristic threats constitute reversible error. Rhett, 127 N.J. 3, 7 (1992).

In sum, despite the evidence of defendant's guilt, the trial errors are numerous and too significant in the aggregate to permit defendant's conviction to be affirmed. See State v. Gibson, 219 N.J. 227, 241 (2014) ("A single error or a combination of errors in a pre-trial proceeding or a trial or both may require an appellate court to reverse the conviction and to remand for a new trial."). We therefore conclude reversal is warranted based on the jury charge on the terroristic threat charge, the reversible error of permitting Officer Cooper to translate E.V.'s messages at trial, and Detective Sampson's narrative testimony regarding the surveillance video.

Because we reverse and remand for a new trial, we need not address defendant's remaining arguments.

Reversed and remanded for a new trial on all charges in the indictment and for a corrected jury charge on both the objective and subjective components of N.J.S.A. 2C:12-3(a) consistent with the Court's instructions in Fair[6] and in accordance with this opinion. 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

[6] In Fair, the Court instructed the Model Criminal Jury Charges Committee to revise the model charge for N.J.S.A. 2C:12-3(a) as to the subjective recklessness standard — including by removing the terms "heedlessly" and "foolhardily" — and the objective standard as discussed therein.