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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1452-19T4
INDICTMENT NOS. 16-04-0718
CASE NO. 15004862

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM A JUDGMENT
v.	:	OF CONVICTION IN THE SUPERIOR COURT OF NEW JERSEY,
GREGORY A. JEAN-BAPTISTE,	:	LAW DIVISION (CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable Joseph W. Oxley, J.S.C., and a jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

Defendant was charged, along with codefendants Jerry J. Spraulding, Ebenezer Byrd, and James Melvin Fair, under Indictment Number 16-04-718 with second-degree conspiracy, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2 (Count 1); second-degree burglary, N.J.S.A. 2C:18-2 (Count 2); first-degree armed robbery, N.J.S.A. 2C:15-1 (Count 3); first-degree felony murder, N.J.S.A. 2C:11-3a(3) (Count 4); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a (Count 5); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b (Count 6). Da1-6. Defendant was also charged in Count 7 with first-degree witness tampering, N.J.S.A. 2C:28-5a. Da6.

On November 2, 2017, Fair pled guilty to second-degree armed burglary conspiracy, N.J.S.A. 2C:5-2 and 2C:18-2, pursuant to an agreement that called for dismissal of the remaining counts of the indictment. (31T:5-4 to 11-23).[1] Fair was sentenced to 10 years prison, subject to NERA, to be served concurrently with a sentence imposed on an unrelated indictment.[2] Pa8-10.

From January 17, 2019 to March 12, 2019, defendant was jointly tried with his codefendants before the Honorable Joseph W. Oxley, J.S.C., and a jury. On March 12, 2019, the jury convicted all three on Counts 1 to 6, and defendant on Count 7. (28T:122-21 to 129-2); Da22-28.

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[1] Transcript citations match the key in defendant's brief at Db2, n.3. The State has included one additional transcript, the November 2, 2017 plea of James Fair, designated "31T."

[2] James Fair appealed his convictions under both indictments; that appeal is pending before under Docket Number A-2754-17T1.

On May 30, 2019, Judge Oxley sentenced defendant to a term of life in prison, subject to NERA, to run consecutively with the 20-year sentence, subject to 10 years parole ineligibility, imposed on Count 7 and with sentences defendant was already serving on unrelated indictments. (29T:18-13 to 23-2); Da29-40.

Defendant thereafter filed a Notice of Appeal with this Court. Da41-44. The State opposes this appeal, as follows.

COUNTERSTATEMENT OF FACTS

In the early morning hours of September 14, 2009, Spraulding (a.k.a. "B.Me."), Byrd (a.k.a. "EB" or "Storm"), and defendant (a.k.a. "GU"), tortured and murdered school teacher Jonelle Melton after breaking into her apartment in the Brighton Arms Apartments in Neptune. The three defendants had intended to steal a large sum of money they believed was hidden in the Brighton Arms' apartment of drug dealer David James (a.k.a. "Munch"). Defendants' plan was thwarted when they broke into the wrong apartment, that of James's neighbor, Jonelle, torturing her for information about money which she could not provide, and ultimately killing her by shooting her in the head.

At the time of her death, Jonelle was a fifth grade social studies teacher at Red Bank Middle School. She lived alone in Apartment 208-A, after amicably separating from her husband and fellow teacher, Michael Melton, in 2007. Jonelle was a well-liked and friendly neighbor, who often spoke of her love of teaching. (5T:57-15 to 65-8; 6T:53-14 to 55-15; 57-23 to 58-9;

8T:14-11 to 15-5).

James, who later admitted to police that he sold large quantities of cocaine, lived in Apartment 206-A in Brighton Arms. In late August to early September of 2009, James kept between $16,000 and $20,000 in cash in his apartment, hidden in a French toast box in a chest freezer. (9T:127-18 to 129-15; 166-3 to 166-25; 11T:71-8 to 71-23; 15T:108-1 to 109-4).

At this time in 2009, James's girlfriend, Alicia Stewart, routinely spent nights at his apartment and was aware of the cash in the freezer. In the summer of 2009, Stewart was at a party with friends Raven Alston and Jazmine Aviles, as well as codefendant Fair (a.k.a. "Dough Boy"), with whom Aviles had an occasional sexual relationship. Alston and Fair overheard Stewart arguing over the telephone with James, during which James accused Stewart of "using him;" Stewart responded, "if I wanted anything from you, I know your money was in the deep freezer." (9T:129-16 to 129-21; 166-11 to 168-9; 170-1 to 171-23; 12T:167-12 to 169-3; 187-1 to 187-13).

Shortly after the party, Fair called Aviles to ask where James lived. Aviles refused to give him this information because she found the question "alarming." While Aviles was calling Alston to warn her of Fair's inquiry, Fair showed up at Alston's door asking the same question. Fair had never been to Alston's home before; Alston she refused to give Fair this information. (9T:172-17 to 174-20; 12T:172-16 to 174-3).

Fair "hung out" with defendant, a fact defendant conceded to police in 2012. Fair, Spraudling, Byrd and defendant conspired to break into James's apartment and steal the money hidden there. Fair did not ultimately participate in burglary or Jonelle's murder; Spraulding, Byrd, and defendant committed these crimes without Fair. (15T:64-4 to 65-13; 28T:122-21 to 129-2; 32T:10-14 to 11-19).

Defendant, Byrd and Spraulding were good friends. Byrd was dating Elizabeth Pinto. One night in September 2009, Pinto drove Spraulding, Byrd and defendant to the Brighton Arms apartments. Pinto met Spraulding, Byrd and defendant at Byrd's house on Sewall Avenue in Asbury Park, where Byrd lived with his mother and sister.). Pinto knew defendants were planning to burglarize an apartment and steal a large amount of money. Pinto understood the location of the money was a "trap house:" no one lived there, but "transactions are done or people hang out during the day or things are kept or tossed." (9T:245-14 to 247-7; 253-8 to 253-17; 255-14 to 258-5; 267-21 to 267-24; 20T:163-1 to 163-3).

When Pinto arrived at Spraulding's house, she observed him, Byrd and defendant getting dressed in all black, with each putting on two pairs of gloves, specifically latex gloves covered by black gloves. Byrd armed himself with a handgun, and the three defendants, carrying a backpack, got into a white sedan with Pinto driving. In the car, Spraulding, Byrd and defendant covered their faces with shirts. (9T:260-6 to 263-24;

20T:161-5 to 162-18).

Byrd directed Pinto as she drove to Brighton Arms. When Byrd told Pinto to stop, she parked the sedan at a closed liquor store across the street from Brighton Arms; it was there the defendants exited the vehicle, taking with them the backpack and Pinto's phone, which had a walkie-talkie feature. Pinto saw them go into the Brighton Arms complex. They were gone for some time, longer than 20 but less than 90 minutes. Then all three men came running back to the car "in a panic" and quickly got in the car with the backpack. Byrd scooted Pinto over from the driver's seat and drove off, "full speed ahead." As Byrd drove away at high speed, defendant and Spraulding told him to "chill out" because they feared that driving too fast would attract attention. (9T:266-8 to 272-18; 10T:12-17 to 13-16; 20T:164-12 to 164-15; 175-10 to 177-14).

The next day Pinto noticed a scratch on Byrd's face and that he was acting "depressed" and "shut down." In the following days, she also overheard Spraulding and Byrd talking about "something that maybe would bring problems and that was hidden." In Fall 2009, defendant went to Pinto's home in Keansburg, which he had never done before. He picked her up in his car and spoke to her "trying to figure out who was . . . snitching." Defendant told Pinto she "needed to be quiet," which she understood to be a threat. (9T:273-2 to 276-12; 10T:14-20 to 16-18).

Jonelle's body was discovered on the morning of Monday, September 14, 2009. She had failed to show up for work at Red Bank Middle School that morning, which was extremely unusual for her. The school secretary, Michelle Case, contacted Michael Melton, who worked at the same school, to see if he knew about Jonelle. Michael, who according to Case was "calm" and not "alarmed in any way," told her he expected Jonelle to be in school that day. Case asked Michael to go and check on Jonelle and arranged for his class to be covered so he could do so. (5T: 5T:129-11 to 130-8; 134-4 to 135-23; 6T:82-15 to 84-11).

Michael drove from Red Bank to Jonelle's Brighton Arms apartment. When he saw her car in the parking lot, he was initially "relieved" because it meant she was home. When he tried to knock on the door to her apartment, he found it was unlocked and so he entered the apartment. There he found Jonelle's body in the bedroom. She was lying on the floor by the bed and next to a broken table. Her neck was bloody. Michael immediately called 9-1-1 and then checked Jonelle's wrist for a pulse, moving some duct tape on her wrist to do so. Jonelle had no pulse. (6T:84-12 to 91-9).

Police investigation revealed that Jonelle's ground-floor, one-bedroom apartment had been broken into through a rear window. Defendants popped the window lock and cut the screen, leaving the screen outside on the patio. A rear sliding door leading to the kitchen was also found open. A chair, found under

the window, had shoe prints on it; a lighter was found near the chair's leg. All cabinet doors in the kitchen were open, as well as doors to both the refrigerator and the freezer, indicating a search had taken place. (7T:196-9 to 196-20; 200-10 to 200-24; 206-16 to 206-21; 208-1 to 209-25; 8T:188-8 to 190-6).

There was dirt in the hallway leading to the bedroom and a piece of used duct tape[3] was stuck to the hallway floor. Although the rest of Jonelle's apartment was tidy, the bedroom, where her body was found, showed signs of a significant struggle. A table was overturned and broken over Jonelle's body. Magazines were strewn about, all with blood splattered on them. There was blood splatter over other areas of the room as well. Jonelle's laptop and television had not been stolen, and were still in the bedroom. A torn white glove was found beneath Jonelle's wrist. Blood transferred onto the front door indicated that Jonelle's murderers had fled her apartment by that door. (7T:201-2 to 201-6; 204-11 to 204-16; 210-6 to 210-22; 212-16 to 218-3; 228-7 to 229-8; 18T:157-20 to 157-25).

Jonelle had been brutally beaten, cut numerous times with a knife, and shot twice. An autopsy revealed that she had been beaten about the face, and had several knife cuts on her right scalp, right temple, just above her right ear, on her right cheek and lips, and on the right side of her nose. Her eyelids were swollen and blood was coming from her left ear. Jonelle's

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[3] Michael's and Jonelle's DNA was found on this duct tape. (9T:42-6 to 42-16).

jaw was broken in two places. She had numerous bruises on both arms and on her right wrist, indicating that she had been grabbed. She also had a bruise on her right leg. Jonelle had been shot in the right shoulder and in the back of the head, the latter of which was determined to have been the fatal wound. There were no signs that a sexual assault had taken place. The soles of Jonelle's feet were clean, indicating that she had did not walked around after she had been injured. Toxicology results were negative, indicating there were no toxic substances in her system. The autopsy revealed Jonelle's time of death to be approximately between 1:00 a.m. and 5:00 a.m. on September 14, 2009. Police investigation revealed that the victim had spoken with a college friend on the phone until approximately 12:50 a.m. on September 14, during which she was her normal "bubbly self." (6T:8-5 to 10-5; 18T:182-10 to 185-15; 189-21 to 191-23; 193-11 to 208-3; 211-16 to 212-7; 218-4 to 218-9; 19T:211-9 to 211-15).

Shirley Nelmes, the resident of Apartment 211-A, reported to police that she had slept on her living room floor that night due to back issues. At 2:30 or 3:00 a.m., Nelmes was awakened by her dogs barking. She looked out her sliding glass door to see what the dogs were barking at and saw a black male standing behind her building, near Jonelle's building. The man was approximately 5'10" or 5'11," with short hair and dressed in dark clothing. He appeared to be approximately 28 to 31 years

old and he was holding something in his hand. Nelmes watched the man stand there for approximately 15 minutes until she had to go to the bathroom. When she looked again, the man was gone. Eric Luciano, who lived upstairs from the victim in Apartment 208-B, told police he had been awakened in the middle of the night by his dog barking. He could hear muffled noises and then a "metallic clang" from downstairs. Luciano was "about 80 percent sure" that this was during the four o'clock hour. (6T:17-1 to 20-16; 8T:6-21 to 16-12).

Police investigated Michael Melton, but were ultimately able to rule him out. Michael was cooperative throughout the investigation, providing a DNA sample and statements to police. Detectives confirmed that Michael had been at the apartment of his girlfriend, Latrell Watts, with Watts' son and niece, at the time of the murder. Police also learned that although they were getting divorced, Michael and Jonelle had a good relationship. Thus, while Michael's DNA was found in Jonelle's apartment, he was a frequent visitor and he had been the one to discover her body. (5T:200-7 to 204-16; 14T:171-8 to 171-23).

Police also investigated as a potential suspect Jason Davis, the boyfriend of Jonelle's friend and co-worker Aisha Person Nesmith. At the time of the murder, Davis had recently been released from prison. Nesmith had plans with Davis on the night of September 13, 2009, but did not show up; Davis had called Jonelle looking for Nesmith, aggravated Nesmith had

broken their plans. Davis was cooperative with detectives, providing a DNA sample and consent to search his phone and apartment. Police were able to rule Davis out as neither forensic evidence, nor witnesses linked him to the crime and he was cooperative with the investigation. Police also investigated Kevin Brown, an associate of codefendant Fair. Brown was cooperative with detectives and provided a DNA sample. Police were able to rule out Brown because there was no evidence linking him to the crime, no DNA evidence, no witness statements, and no cell phone tower hits. (5T:168-6 to 168-14; 171-13 to 171-22; 14T: 173-9 to 176-6; 181-12 to 181-21; 20T:51-4 to 51-24; 55-5 to 55-14).

During the investigation, evidence collected from the crime scene was sent to the Office of the Chief Medical Examiner, New York City, where they were able to perform "high sensitivity" DNA analysis on objects with low amounts of DNA. Defendant was found to be a major DNA contributor to the lighter found on Jonelle's kitchen floor, while Jonelle was excluded from being a contributor to the DNA found on this lighter. When police spoke to defendant in 2012, he denied knowing Jonelle and denied using that type of cheap, "crackhead" lighter, although he admitted smoking "a lot of cigarettes." (13T:145-7 to 146-5151-12 to 158-25; 175-18 to 183-8; 15T:59-6 to 62-3).

Investigating detectives spoke to Pinto in January 2011, but she did not provide any information as to her involvement in

Jonelle's murder. She did, however provide telephone numbers for Spraulding, Byrd and the defendant. With these numbers, police attempted to obtain telephone records for the three defendants. Detectives met with Pinto two more times in 2014 and again in December 2015. Pinto eventually informed detectives of defendants' involvement in Jonelle's murder. She told police how she transported defendants to Brighton Arms in September 2009. Pinto pleaded guilty to second-degree conspiracy and agreed to testify truthfully against the defendants. (9T:220-19 to 224-18; 15T:24-4 to 30-23; 20T:20-23 to 46-16; 149-22 to 169-10).

Detectives were not able to obtain phone records for Spraulding or defendant, but were able to obtain Byrd's phone records for the time encompassing the murder. Byrd's phone, like Pinto's phone, had a walkie-talkie, "direct connect" feature; this feature was discontinued by Nextel in June 2013. Byrd's phone records, coupled with the records of the Sprint/Nextel cell towers near which calls from his phone were made, demonstrated that on the night of September 13 going into the early morning hours of September 14, Byrd's phone made numerous calls utilizing four Sprint/Nextel cell towers: (1) NNJ 0125R, located on the WRAT radio tower on 18th Avenue and Main Street in Belmar/Lake Como; (2) NNJ 1083R, located on the west side of Route 18 near Exit 10 in Neptune; (3) NNJ 1490T/R (two cell sites in a single location) located on top of the Asbury Park Press Building on Bangs Avenue in Asbury Park; and (4) NNJ 2992

located near Route 71 in Avon near the Bradley Beach First Aid Station. Jonelle's apartment was in the middle of this area. From 1:00 a.m. to 7:00 a.m. on September 14, 2009, the records of the numerous calls made demonstrated Byrd's phone was using the more northerly of these four towers, then using more southerly towers, and then using more northerly towers again. (12T:34-25 to 35-17; 42-4 to 47-10; 50-1 to 58-5; 58-14 to 63-17; 15T:29-17 to 30-22).

Byrd's phone records further revealed numerous walkie-talkie, "direct connect" calls between his phone and Pinto's phone between 2:38 a.m. and 3:04 a.m. on September 14, 2009. As Pinto later testified at trial, Byrd had taken her phone with its walkie-talkie feature with him when he left the car after Pinto drove the three defendants to Brighton Arms. Byrd's phone records also demonstrated numerous traditional calls and "direct connect" calls between his phone and Spraulding's phone (732-784-0072)[4] during the late night/early morning hours of September 13 to 14. (10T:12-17 to 13-16; 16T:151-13 to 152-11; 178-10 to 181-7; 188-2 to 191-23).

Byrd admitted his involvement in Jonelle's murder to Narika Scott, another of his girlfriends. He told Scott that he was with Elizabeth Pinto at the time, but asked Scott to say that he was with her then for her September 14th birthday. On September

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[4] While Spraulding disputed that this was his number, multiple witnesses testified this was his number as of October 6, 2009. (12T:156-11 to 159-3; 14T:73-9 to 77-2).

15, 2013, Scott visited Byrd while he was incarcerated in Northern State Prison. Three days later, Scott contacted Pinto via Facebook. Scott talked to Pinto on the phone and told her to, "just be quiet." Scott wanted to meet up in person, but Pinto "blew her off." Scott visited Byrd in jail on September 24, 2016, after he was charged with Jonelle's murder. On September 28, 2016, Byrd sent a profanity-laced email to Scott, stating, "Dropp dead fucker my lawyer going to rep your fucking ass on that stand N the whole hood going to watch." In 2016, following the return of this indictment, Byrd's sister, Brianna, contacted Pinto via Facebook. Pinto knew Brianna from her time dating Spraulding. Brianna told Pinto that Byrd wanted to speak to her. Pinto reported this contact to police. (10T:25-1 to 26-12; 27-24 to 32-8; 45-7 to 45-24; 15T:150-18 to 155-13; 157-15 to 158-15; 162-2 to 163-25; 17T:87-1 to 88-18).

Spraulding also asked friend, Marisol Palermo, to lie about his whereabouts on the night of Jonelle's murder. In February 2010, Spraulding told Palermo he had rented a car and claimed his "friends took it" and "ended up going to Asbury" where "some teacher got murdered." Spraulding told Palermo if ever asked she should say she was with him that night. (14T:125-1 to 126-3).

LEGAL ARGUMENT

POINT I

THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING PATENTLY FALSE HEARSAY STATEMENTS

Defendant asserts the court's exclusion of unreliable hearsay statements by codefendant Fair deprived him a fair trial by precluding the presentation of third party guilt evidence. Defendant's claim has no merit, as the court's evidentiary ruling excluding such patently false hearsay statements, based on the limited, contradictory proffer made by defendant in the middle of trial, was not an abuse of discretion.

On November 2, 2017, codefendant Fair pleaded guilty to second-degree conspiracy to commit armed burglary in this case. (31T:5-4 to 11-23). As Fair stated during his plea, he "ultimately [] did not commit" the burglary of Jonelle's apartment. (31T:11-13 to 11-15). At trial, one of the defense strategies was to allege this was false; that Fair had been an active participant in the murder with others who were not the three defendants. However, as the court correctly found, defendants had only limited admissible evidence available upon which to base that argument.

The State had provided in discovery four statements taken during the investigation of Jonelle's murder in 2013 and 2014 from Kyre Wallace, Kevin Clancy, Ciara Williams, and Jenay Henderson. Each told police James Fair had confessed to them at various times that he had been an active participant in the

robbery and murder of Jonelle. Da51-57. However, these statements had been of limited investigative value, as they contained significant discrepancies with the physical evidence and both Fair and the declarants had significant credibility issues.[5] Ibid. Indeed, Fair, prior to his guilty plea told police he "might have taken credit for the murder to people in the streets just to make himself look cool" and that he lied to Williams, his girlfriend, when he told her he committed the murder. Da61-62. Fair also told police he had passed the information about David James' money in the freezer to defendant and "probably" to codefendant Byrd. Da61.

It was the State's position that none of these statements would be admissible at trial, as they were based on two levels of inadmissible hearsay and were patently false. It appeared at the outset of trial that defendants planned to circumvent these evidentiary issues by calling Fair as a witness. During opening statements, counsel for defendant informed jurors they would hear from Fair during trial. (5T:40-16 to 40-20).

On the sixth day of trial, January 31, 2019, Judge Oxley requested counsel brief certain "open issues," including Byrd's counsel "indicat[ion]" that Fair's "plea itself was admissible" and "not hearsay." (10T:232-10 to 232-23). Byrd filed a brief asserting "the defendant may be able to proffer statements

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[5] Clancy was a jailhouse snitch who met Fair while incarcerated. Wallace provided his statement to police hoping to obtain leniency on an unrelated criminal charge. Da51-57.

allegedly made by Mr. Fair which not only incriminate himself (and exculpate the defendants)," but also "destroy" Pinto's testimony. Da46. Byrd asserted Fair "will be called to the witness stand in connection with these statements" and further posited, "[s]ome of the proffered statements will be through third-party testimony, while others were made" by Fair under oath when he pled guilty. Ibid.

However, on February 6, 2019, before the State's written response was filed, counsel for Byrd admitted he had made a "mistake" in his brief, and did not intend to call Fair as a witness. (12T:64-11 to 65-14). It was the State's understanding that Byrd wished to introduce the statements of Wallace, Clancy, Williams, and Henderson through testimony of investigating detectives who spoke to these witnesses, including Detectives Samis and Cano, both of whom the State planned to call as witnesses. The State objected as there was no exception to the hearsay rule permitting such testimony. Da67. The State also argued none of Fair's out-of-court statements were admissible as they were patently false and Fair's plea colloquy was not relevant to defendants' assertion of third-party guilt. Da52.

On February 13, 2019, the 10th day of trial, the parties argued the issues of the admissibility of Fair's statements. Counsel for Byrd reiterated his intention not to call Fair as a witness "because he's too much of a loose cannon." (14T:100-11 to 100-23). The prosecutor represented the State also had no

intention of calling Fair, which Judge Oxley noted had been the State's position throughout trial. (14T:106-14 to 106-18).

With respect to the evidence that defendant actually was seeking to admit, counsel for Byrd conceded it would be "reaching too far" to ask the law enforcement witnesses what "Person A told them Fair told them." (14T:104-2 to 104-4). Instead, counsel argued certain unspecified statements by Fair would be admissible under N.J.R.E. 803 (b)(5) as a statement of a party opponent and N.J.R.E. 803(c)(25) as a statement against interest, through the testimony of unspecified witnesses who "either have been called or will be called that will say Fair told me this." (14T:101-12 to 104-2). However, counsel for Byrd did not identify any specific witnesses he wished to call, or make any proffer that such witness(es) were available or willing to testify, or identify any testimony these witness(es) would provide. Counsel for Spraulding and defendant "rel[ied] on what" counsel for Byrd had submitted. (14T:104-11 to 104-16).

The following day, February 14, 2019, Judge Oxley issued a written opinion and order denying defendants' "motion to admit statements by JAMES FAIR at trial." Da9-21. Noting defendants could "avoid the hearsay issue entirely by calling Mr. Fair as a defense witness," the court found defendants had "failed to demonstrate Mr. Fair is unavailable to testify" and had "made no proffer that reasonable means were used to procure Mr. Fair's attendance at trial." Da20. The court further found Fair's

statements to Henderson, Williams, Clancy and Wallace "about his involvement in Ms. Melton's death are inherently unreliable." Da21. As the court found, Fair admitted he lied about his involvement Jonelle's murder on numerous occasions "to make himself look cool" and had sworn under oath that although he conspired to commit the burglary, he ultimately did not do so. Ibid. Now on appeal, defendant claims this order is error.

This Court should accord evidentiary rulings "substantial deference." State v. Morton, 155 N.J. 383, 453 (1998), cert. denied, 532 U.S. 931 (2001). "Trial court evidentiary determinations are subject to limited appellate scrutiny" and "are reviewed under the abuse of discretion standard." State v. Buda, 195 N.J. 278, 294 (2008). "[T]he decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Goodman, 415 N.J. Super. 210, 224-25 (App. Div. 2010) (quoting State v. Carter, 91 N.J. 86, 106 (1982)).

It is clear Judge Oxley did not abuse his discretion in denying defendants' motion to admit the hearsay statements of Fair based on the extremely limited record presented to below. Indeed, given the lack of proof offered by counsel for Byrd, upon which counsel for defendant and Spraulding chose to rely without supplement, Judge Oxley had no basis on which to grant such a motion. State v. Baluch, 341 N.J. Super. 141, 196-97

(App. Div. 2001). It is well-settled that counsel who choose not to make a proffer of evidence "may be foreclosed on appeal from raising the question of the prejudicial effect of the exclusionary ruling unless the record or context of the excluded question clearly indicates or suggests what was expected to be proved by the excluded evidence." Ibid. (citing Pressler, N.J. Court Rules, cmt. 2 on R. 1:7-3). Without such an offer of proof, "it is virtually impossible for the appellate court in reviewing the case to determine whether the exclusion had a prejudicial effect, and, the burden of such a showing being on the appellant, there can be no remand for a new trial because of the exclusion without an offer of proof." Duffy v. Bill, 32 N.J. 278, 294 (1960). Indeed, as this Court warned in the context of third party guilt claims in State v. Millet, 272 N.J. Super. 68, 100 (App. Div. 1994), "the 'proper ground work' for consideration of the question on appeal must be laid by counsel or the point can be forfeited on appeal."

Here, the only certainty in the proffer was that no defendant would call Fair as a witness. Counsel for Byrd characterized Fair as a "loose cannon," (14T:100-11 to 10-23), and Fair's criminal involvement with Byrd and defendant during the time of Jonelle's murder also likely factored into this decision. However, the incarcerated Fair was plainly available as a witness, as the lower court held. Presenting Fair as a witness would have made him "subject to the rigors of cross-

examination [by the State], which in our system of justice is the 'greatest legal engine ever invented for the discovery of truth.'" State v. Cope, 224 N.J. 530, 555 (2005) (quoting California v. Green, 399 U.S. 149, 158 (1970)). Yet, defendants chose to prevent jurors from being able to see and hear Fair and judge his credibility for themselves. Instead, defendants sought to present to the jury only Fair's hearsay, notwithstanding the well-settled "untrustworthy and unreliable" nature of such evidence. James v. Ruiz, 440 N.J. Super. 45, 59 (App. Div. 2015); see also N.J.R.E. 802.

Nor did any defendant identify specifically which hearsay statements he wished to admit, nor explain for the court how he wished to admit them. Indeed, the only mention below of the names of the four witnesses defendant now claims were so crucial to his case was made by the State in its responsive brief to co-defendant Byrd's motion, in which the State correctly argued that the statements of such witnesses could not lawfully be admitted through the hearsay testimony of the police witnesses. Da51-68. None of the defendants ever identified any of these witnesses by name, or gave any indication to the court that any of these witnesses were available or willing to testify at trial, five and six years after they had spoken to police, to recount what Fair allegedly said to them.

Although Fair's availability in and of itself would not preclude the admissibility of a legitimate "statement against

interest" under N.J.R.E. 803 (c)(25), it was well within the court's discretion to exclude such hearsay evidence, brought to its attention in the middle of trial, which the court determined was "inherently unreliable." Da21. This Court must defer to the factual findings of the trial court in making this determination. State v. Elders, 192 N.J. 224, 245 (2007) ("The motion judge was entitled to draw inferences from the evidence and make factual findings based on his 'feel of the case,' and those findings were entitled to deference unless they were 'clearly mistaken' or 'so wide of the mark' that the interests of justice required appellate intervention").

Further, the law is clear that a defendant may not be permitted to present evidence of third party guilt that is false or unreliable. Although a defendant has "the right to introduce evidence that someone else committed the crime for the purpose of raising reasonable doubt about his own guilt," Cope, 224 N.J. at 552, the right is not unlimited. Three prerequisites must be met before evidence of third-party guilt may be admitted at trial. One, "a defendant's proofs must be capable of demonstrating 'some link between the third-party and the victim or the crime.'" State v. Cotto, 182 N.J. 316, 333 (2005) (quoting State v. Koedatich, 112 N.J. 225, 301 (1988)). Two, "when a criminal defendant seeks to cast blame on a specific third party, he or she must notify the State in order to allow the State an opportunity to properly investigate the claim."

Cotto, 182 N.J. at 334. Three, third-party guilt evidence is substantive evidence which must "satisfy the standards of the New Jersey Rules of Evidence[.]" Ibid. (quoting State v. Fortin, 178 N.J. 540, 591 (2004)); State v. Tormasi, 443 N.J. Super. 146, 153 (App. Div. 2015).

As the statements Fair allegedly made to Wallace, Clancy, Williams, and Henderson were unreliable, as determined by the trial court, defendant failed to satisfy the first and third prerequisites. "[A] defendant cannot simply seek to introduce evidence of 'some hostile event and leave its connection with the case to mere conjecture.'" Cotto, 182 N.J. at 333 (quoting State v. Sturdivant, 31 N.J. 165, 179 (1959)). "Evidence tending to incriminate another must be competent and confined to substantive facts which create more than a mere suspicion that such other person committed the particular offense in question." Koedatich, 112 N.J. at 299-300. A confession by another to the crime with which defendant stands accused is inadmissible when, as here, the confessor's claim is patently false and, therefore, incompetent. Cope, 224 N.J. at 555. As such, none of Fair's statements allegedly made to Wallace, Clancy, Williams, and Henderson demonstrates a reasonable doubt about the identity of the murderers. Cotto, 182 N.J. at 333-34 (evidence of third-party guilt inconsistent with the actual crime); Koedatich, 112 N.J. at 303 (third-party guilt evidence properly excluded where no evidence linked the third party to victim).

Nor do any of the cases cited by defendant compel a different conclusion. The prosecutor in this case did not in any way "pursue[] a course that he knew was not consistent with the truth," or "portray a false picture of events," as in State v. Garcia, 245 N.J. 412, 435-36 (2021). Defendant criticizes the State's elicitation of testimony from Detective Samis that he "ruled out" Kevin Brown's involvement in the murder because there was "[n]o DNA evidence, no corroborating witness statements, nothing linking him to this crime at all, no phone tower hits. Nothing," see (20T:56-5 to 56-14), because Fair purportedly told two people Kevin Brown was involved in the crime. Da53-57. However, there was nothing untruthful in Detective Samis' testimony. The hearsay upon hearsay from Fair about others' involvement was clearly unreliable, as the court held, especially as the detective was unable to find evidence corroborating such a claim. This is far from the video evidence excluded by the court in Garcia, 245 N.J. Super. at 431-32.

The prosecutor in this case sought to do justice by presenting to the jury all reliable, available evidence that demonstrated who was actually involved in the murder of Jonelle: the three defendants on trial. In light of this, Judge Oxley's denial of defendant's motion cannot be considered an abuse of discretion, or "so wide of the mark that a manifest denial of justice resulted." Goodman, 415 N.J. Super. at 224-25.

Finally, even if this Court were to determine the lower court abused its discretion in precluding the admission of Fair's hearsay statements, it is clear any such error was harmless. That Fair may have implicated himself in Jonelle's murder to "make himself look cool" does not exculpate any of defendants. See State v. Williams, 169 N.J. 349, 361-62 (2001). Thus, even if this portion of Fair's hearsay statements was admissible as a statement against interest under N.J.R.E. 803 (c)(25), it is clear Fair's alleged statement he committed Jonelle's murder with men other than defendants was not. Fair's own criminal liability did not depend on the identification of his purported confederates. State v. Nevius, 426 N.J. Super. 379, 393 (App. Div. 2012), certif. denied, 213 N.J. 568 (2013). Those parts of Fair's admissions inferentially exonerating defendant because Fair did not name defendant as a cohort neither strengthened, nor bolstered Fair's penal exposure and, therefore, are inadmissible as a statement against Fair's interest under N.J.R.E. 803 (c)(25).[6] Ibid. Therefore, the jury

[6] Defendant's objection to Samis' testimony regarding his investigation of Brown is without basis. Fair's statement to Wallace that Brown had committed the crime with him was not admissible under N.J.R.E. 803 (c)(25). Similarly, the court correctly counsel's request to question Samis regarding hearsay statements made to him by Brown. (21T:141-15 to 153-22). After reviewing the portion of direct examination relied upon by counsel to open the door to admission of this hearsay, the court found the testimony distinctly different from that alleged by counsel, and therefore would not impeach Samis testimony and otherwise consisted of inadmissible hearsay. Ibid. Because the court correctly found this yet another veiled attempt at introducing third-party guilt via hearsay, rather than risk

was not precluded from reviewing admissible evidence that could have "altered the outcome" here. Williams, 169 N.J. at 361-62.

Moreover, the State presented overwhelming evidence defendants' guilt in Jonelle's murder. This included the testimony of Pinto, corroborated by telephone records, that she drove defendants to the Brighton Arms apartments late one night, during the time from of the murder, in order to steal a large amount of money, and her observations of defendants later that night as the three men came running back to the car "in a panic," driving off at high speed, with Spraulding and defendant urging caution so as not to attract attention. (9T:267-3 to 272-18; 10T:12-17 to 13-16). This also included testimony from Marisol Palermo that Spraulding asked her to lie about his whereabouts on the night "some teacher got murdered," defendant's direction to Pinto to remain quite, and the location of defendant's DNA on a lighter found at Jonelle's apartment. (10T:4-20 to 6-18; 13T:152-21 to 183-8; 14T:125-1 to 126-3).

In light of this overwhelming evidence, to the extent the lower court's ruling was erroneous, such error was clearly harmless. As our Court has repeatedly held, evidentiary errors "must be evaluated 'in light of the overall strength of the State's case'" and only warrant reversal when "those errors, singly or collectively, [] 'raise a reasonable doubt' as to whether they affected the result reached by the jury." State v.

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calling an available declarant, this Court should affirm.

Prall, 231 N.J. 567, 588 (2018) (citing State v. Macon, 57 N.J. 325, 336 (1971); State v. Sanchez-Medina, 231 N.J. 452, 468 (2018); State v. Galicia, 210 N.J. 364, 388 (2012)). In light of the "vast evidence" against defendants, reversal is not warranted; this conviction should be affirmed. Id. at 588-89.

POINT II

THERE WAS NO ERROR IN THE ADMISSION OF ANY OF EXPERT OR LAY OPINION TESTIMONY

Defendant objects for the first time to testimony by Sergeant Shannon Kavanagh, Detectives Cano and Samis, and Lieutenant Donna Morgan, arguing each offered an expert opinion that improperly bolstered the State's case. Nothing in the record supports defendant's arguments, and, indeed, defense counsel made no objection to much of this testimony at trial.

Because defendant failed to object to the admission of much of this testimony below, this Court should apply the "plain error" standard. R. 2:10-2; State v. Burns, 192 N.J. 312, 341 (2007); Macon, 57 N.J. at 337-38; State v. Frost, 242 N.J. Super. 601, 618 (App. Div.), certif. denied, 127 N.J. 321 (1990). Thus, only if the errors were "clearly capable of producing an unjust result" should defendant's conviction be overturned. Burns, 192 N.J. at 341 (citing R. 2:10-2). There was no error in the admission of the now-disputed opinion testimony.

A. Lay Opinion Testimony Was Properly Admitted.

After making no objection below, defendant now asserts testimony by Detectives Cano and Samis, and Lieutenant Morgan,

was inadmissible lay opinion so erroneous as to deprive him of a fair trial. Defendant's claims must fail, as he has failed to demonstrate the admission of any of this testimony was error.

N.J.R.E. 701 permits the admission of a witness' non-expert opinion "if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact at issue." New Jersey courts have repeatedly affirmed the ability of police officers to offer lay opinions based on "the officer's personal perception and observation." State v. McLean, 205 N.J. 438, 459 (2011) (citing cases); State v. LaBrutto, 114 N.J. 187, 198 (1989) ("Courts in New Jersey have permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary"). However, police officers are not permitted under N.J.R.E. 701 to "opine directly on a defendant's guilt in a criminal case." State v. Trinidad, 241 N.J. 425, 445 (2020).

Defendant challenges the testimony of Detectives Cano and Samis, who explained why their investigation was able to rule out Michael Melton, Jason Davis and Kevin Brown as alternate suspects in the murder of Jonelle. As the detectives testified, this conclusion was based on (1) Melton and Davis's cooperative attitude; (2) a review of the applicable phone records; (3) witness corroboration of Melton's whereabouts; and (4) a lack of any physical or forensic evidence or witnesses linking Davis or

Brown to the crime. (5T:200-7 to 204-16; 14T:171-8 to 171-23; 181-12 to 181-21; 20T:55-16 to 56-14).

There was nothing erroneous in the admission of such testimony to explain "the course of their investigation." State v. Frisby, 174 N.J. 583, 592 (2002). Indeed, the testimony of each was "rationally based on the perception" of that detective, and assisted the jury "in understanding the witness' testimony" regarding the steps each took in investigating the murder of Jonelle, and in determining these alternate suspects could not have committed the crime. N.J.R.E. 701. The detectives made no improper credibility determinations, but based their conclusions on physical and forensic evidence (or lack thereof), phone records, and witness statements. Cf. Frisby, 174 N.J. at 593-94.

Nor was this a case in which the detective testified about their factual observations of defendant and drew a conclusion about defendant's conduct, usurping the province of the jury. Cf. McLean, 205 N.J. at 461. Rather, the detectives testified about a subject that was plainly "outside the ken of the jury" – the conduct of a police investigation. Ibid. As nothing in the detectives' testimony gave any opinion on the ultimate issue in this case, or improperly infringed upon the province of the jury, there was no error in the admission of such testimony.

For the same reasons, there was no error in the admission of testimony by Lieutenant Morgan regarding the State's theory of the case. (18T:144-1 to 146-2). Indeed, such testimony was

originally provided at the behest of counsel for defendant, who asked Lieutenant Morgan during cross-examination whether she knew the State's theory of the case. (18T:132-3 to 132-9). The prosecutor on redirect asked Lieutenant Morgan to elaborate, which she did, explaining, "several gentlemen broke into Ms. Melton's apartment" and further explaining the physical evidence that led to this conclusion. (18T:144-1 to 146-2). As Lieutenant Morgan clarified on re-cross, she, as the supervising sergeant, had been the person who developed this theory, based on what she saw at the crime scene and her many years of experience. (18T:149-19 to 150-7; 156-2 to 157-2). The record therefore clearly demonstrates Lieutenant Morgan's lay opinion testimony was based on her "personal perception and observation." McLean, 205 N.J. at 459. She did not opine on defendants' guilt or even mention them at all. Such testimony was plainly admissible.

B. Expert Testimony Was Properly Admitted

Under N.J.R.E. 702, "[i]f 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 or an opinion or otherwise." The "well-known prerequisites" to the Rule are: "(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." Hisenaj v. Kuehner, 194 N.J. 6, 15 (2008); State v. Torres, 183 N.J. 554, 567-68 (2005); State v. Berry, 140 N.J. 280, 290 (1995); State v. Kelly, 97 N.J. 178, 208 (1984). Although N.J.R.E. 704 provides that "otherwise admissible" opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," our Court precludes the use of "ultimate-issue testimony" to usurp "the jury's singular role in the determination of defendant's guilt." State v. Cain, 224 N.J. 410, 424 (2016) (citing State v. Reeds, 197 N.J. 280, 300 (2009)).

Sergeant Kavanaugh was qualified, without objection, as an expert in crime scene processing analysis and fingerprinting, based on her extensive 20 years of law enforcement experience and her specific experience in those areas. (7T:167-5 to 180-20). Sergeant Kavanaugh also testified as a fact witness, as she had personally acted as the lead Crime Scene Unit detective processing the Jonelle's apartment and surrounding vicinity after the discovery of her body. (7T:182-1- to 185-12).

Defendant does not challenge Kavanaugh's qualifications as an expert,[7] or that her field of crime scene processing analysis

[7] Defendant also challenges another aspect of Kavanaugh's testimony, to which an objection was lodged, in which he claims she "was permitted to testify about DNA procedures and evidence even though she was not qualified as a DNA expert." Db31. In rejecting this objection, Judge Oxley found "absolutely no expert testimony" had been elicited. (8T:120-9 to 120-12). As Judge Oxley correctly noted, the objected-to testimony did not include Kavanaugh offering any opinion with regard to DNA

is a proper subject of expert testimony under N.J.R.E. 702. In fact, defendant only objects to Kavanaugh's testimony that, in her expert opinion, there were three perpetrators who broke into the Jonelle's apartment. However, the record demonstrates Kavanaugh carefully and extensively explained the basis for this opinion, which was based on the physical evidence found in the apartment. As the Sergeant explained, the open window with the cut screen and broken slide, the open patio door, the placement of the kitchen table chair under the window with a footprint and dirt on the seat, the lighter found near the chair, and the path of soil and vegetation found in the apartment indicated that the first perpetrator entered the apartment head first through the window, inadvertently dropping the lighter out of his pocket. He then pulled the chair over to allow the second perpetrator to enter through the window, putting his foot on the chair, and then the patio door was opened to allow a third perpetrator inside. (8T:200-5 to 202-14; 206-11 to 221-13; 9T:73-9 to 74-2; 85-20 to 102-11). Much of this testimony was given during cross-examination exploring the basis for Kavanaugh's opinion and elicited a lengthy description for the basis for her findings. (8T:200-5 to 202-14; 206-11 to 221-13; 9T:85-20 to 102-11).

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evidence, but instead Kavanaugh explaining why she sent certain evidence recovered from the crime scene for testing. (8T:113-14 to 120-20). The court's overruling of the objection to this fact testimony was factually correct and should be affirmed.

In light of this clear explanation, defendant's challenge to Kavanaugh's opinion has no basis in fact. Nor was there any abuse of discretion by the lower court in allowing such expert testimony to be admitted. Kavanaugh never offered an opinion on defendant's guilt. No hypothetical situations were posited, and no opinion was given on defendant's state of mind, as criticized by the Court in Cain, 224 N.J. at 420-28. Indeed, Sergeant Kavanaugh never mentioned any of the codefendants at all. The fact that, in her expert opinion, based on the physical evidence, the crimes were committed by three perpetrators had no bearing on whether defendant was himself one of those perpetrators.

Moreover, it cannot be disputed that crime scene analysis is beyond the ken of the average juror. The "true test of admissibility of such testimony" is whether the witness has "peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue." State v. Zola, 112 N.J. 384, 450 (1988) (Handler, J., concurring in part). Here, Sergeant Kavanaugh's knowledge and experience in interpreting physical evidence of the crime scene to understand the sequence of events that occurred was plainly a proper subject for expert testimony. She made no comment on who took part in such events, and never opined on the ultimate issue in this case. The admission of her testimony was not erroneous.

Finally, even if there was error in the admission of the expert and lay opinion testimony to which defendant now objects, such error does not rise to the level of plain error. There is simply no indication that any of the officers' testimony "led the jury to a result it otherwise might not have reached." Trinidad, 241 N.J. at 447 (citing Macon, 57 N.J. at 336). Indeed, given the strong weight of the evidence against defendants, presented over 10 weeks of trial through 40 witnesses, nothing in any of the opinion testimony, which did not mention defendants at all, "could have tipped the scales in the State's favor." Ibid. Defendant's convictions should therefore be affirmed.

POINT III

STRATEGY AND COMPLETENESS JUSTIFIED THE COMPLAINED-OF TESTIMONY FROM PINTO

Defendant asks this Court to find the lower court's refusal to elevate his rights and strategy over those of his codefendant constitutes reversible error. This Court should not so find.

Our courts have noted, "inadmissible evidence frequently, often unavoidably, comes to the attention of the jury." State v. Winter, 96 N.J. 640, 646 (1984); State v. Vallejo, 198 N.J. 122, 132 (2009). It is "axiomatic that '[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error ...; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently.'" Winter, 96 N.J. at 646 (quoting Bruton v. United States, 391 U.S. 123, 135 (1968)); Vallejo, 198 N.J. at 132.

Only those "errors that are deemed to be of such a nature as to have been clearly capable of producing an unjust result require reversal." State v. Alston, 312 N.J. Super. 102, 114 (App. Div. 1998); Macon, 57 N.J. at 335; see also R. 2:10-2. This possibility must "raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Alston, 312 N.J. Super. at 115; Macon, 57 N.J. at 336. Errors that do not meet this standard "will [be] disregard[ed]." State v. Kemp, 195 N.J. 136, 150, 156 (2008)(quoting State v. Castagna, 187 N.J. 293, 312 (2006)).

The doctrines of completeness and opening the door are related. "The 'opening the door' doctrine is essentially a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) admissible evidence that generates and issue, or (2) inadmissible evidence admitted by the court over objection." State v. James, 144 N.J. 538, 554 (1996). This doctrine "operates to prevent a defendant from ... selectively introducing pieces of evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context." Ibid.

However, "[w]hen a witness testifies on cross-examination as to part of a conversation, statement, transaction or occurrence," it is the doctrine of completeness that allows "the party calling the witness ... to elicit on redirect examination

'the whole thereof, to the extent it relates to the same subject matter and concerns the specific matter opened up.'" James, 144 N.J. at 554 (quoting Virgin Islands v. Archibald, 987 F.2d 180, 188 (3rd Cir. 1993)); State v. Lozada, 257 N.J. Super. 260, 270 (App. Div.), certif. denied, 130 N.J. 595 (1992); see also N.J.R.E. 106 ("When a writing ... or part thereof is introduced by a party, an adverse party may require the introduction at the time of any other part ... which in fairness ought to be considered contemporaneously"). The theory underlying the doctrine is fairness: "the opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." James, 144 N.J. at 554.

In allowing Spraulding's counsel to ask the question now complained of on recross, and the State to respond on redirect, the court properly both respected Spraulding's right to present his defense and applied the doctrine of completeness. When questioning Pinto regarding "black gloves," Spraulding's counsel was attempting to highlight Pinto's incredibility to pointing out discrepancies in her testimony and statements to Detective Samis. As defendant acknowledges, counsel was made aware his questions were out of context, and counsel made the "strategic" decision once on notice to continue with this questioning. (10T:220-7 to 222-6). While Byrd's counsel was not "happy" with

Spraulding's counsel's choice, such "hostility, conflict, or antagonism between defendants" is expected and accepted in joint trials. State v. Brown, 118 N.J. 595, 605-6 (1990).

Moreover, this strategic decision allowed the State, under the doctrine of completeness, to ensure that the entire context statement upon which Pinto was questioned was presented to the jury. In doing so, the State acted to mitigate the impact such questions would have on defendant by limiting questioning specifically to Spraulding. (10T:225-17 to 227-2). Prejudice warranting the grant of a new trial cannot be found here.

POINT IV

PRIOR CONSISTENT STATEMENTS WERE PROPERLY ADMITTED

Despite acknowledging that "challenge[s]" to "Pinto's credibility" were a staple of the defense (leading defendants to ask for a false-in-one, false-in-all charge, see POINT VI(B), infra), defendant contends Judge Oxley erred when permitting introduction of Pinto's prior statement under N.J.R.E. 803(a)(2). No such error occurred; no remand for a new trial is warranted.

"Considerable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." State v. Feaster, 156 N.J. 1, 82 (1998); State v. Muhammad, 359 N.J. Super. 361, 388 (App. Div.), certif. denied, 178 N.J. 36 (2003). Because "admissibility of evidence is fact sensitive,"

"review is deferential." Fortin, 178 N.J. at 591; Morton, 155 N.J. at 453; Koedatich, 112 N.J. at 300. An appellate court will not interfere "unless clear error and prejudice are shown." State v. Wakefield, 190 N.J. 397, 452 (2007), cert. denied, 552 U.S. 1146 (2008); State v. Barden, 195 N.J. 375, 390-91 (2008); Castagna, 400 N.J. Super. at 182-83.

The prohibition against hearsay does not require exclusion of "[a] statement previously made by a person who is a witness at a trial ... provided it would have been admissible if made by the declarant while testifying" where the statement "is consistent with the witness' testimony and is offered to rebut an express or implied charge against the witness of recent fabrication." N.J.R.E. 803 (a)(2); State v. Chew, 150 N.J. 30, 78-81 (1997), cert. denied, 528 U.S. 1052 (1999), Muhammad, 359 N.J. Super. 385-88; State v. Gomez, 246 N.J. Super. 209, 223 (App. Div. 1991).

In admitting Pinto's prior statements, the lower court properly exercised its discretion in finding the requirements of the Rule met. There can be no dispute on this record that "[d]efense counsel has implied through opening statements and cross-examination that Ms. Pinto is not credible;" Pinto's credibility was attacked "due to the fact that police bribed her, spoon-fed her information, or threatened her while she was pregnant." The Rule thus permitted, as the lower court properly found, the State rebut these allegations of coerced inculpation

of the defendants through the admission of Pinto's prior consistent statements. (19T:29-17 to 30-12). To the extent that prejudice could be wrought from the content of those statements, and with partial agreement of the parties, redactions were made to mitigate that risk. (19T:30-19 to 32-22).

POINT V

THERE WAS NO ABUSE OF DISCRETION IN THE COURT'S VOIR DIRE OF JUROR 8

Defendant characterizes the court's voir dire of Juror 8 as insufficient, and argues the court's failure to voir dire the other jurors deprived him of a fair trial. As the record at plainly reflects, defendant's arguments have no merit.

Our Court places determination of how to resolve allegations of juror taint squarely within the sound discretion of the trial court. State v. R.D., 169 N.J. 551, 557-58 (2001). Determining whether a jury has been tainted requires consideration of the gravity of the misconduct, the demeanor or credibility of the jurors exposed to taint, "and the overall impact of the matter on the fairness of the proceedings." Id. at 559. Respecting the trial court's "unique perspective," an appellate court reviews a decision on how to manage juror irregularity under the deferential abuse of discretion standard. Id. at 559-60; State v. Brown, 442 N.J. Super. 153, 182 (App. Div. 2015); State v. McGuire, 419 N.J. Super. 88, 156 (App. Div.), certif. denied, 208 N.J. 335 (2011).

As the record demonstrates, on February 19, 2019, the court clerk received information, through the secretary for counsel for Byrd, that "Stephanie" at the Public Defender's Office had received a telephone call from "Ms. Worthy," a friend of a friend of a juror who worked at Monmouth Medical Center. Ms. Worthy claimed this juror "has been Googling the case, showing articles to and talking about it with other people and has already decided she's going to find them all guilty and going to burn their asses." (30T:21-11 to 22-21).

Juror 8 was the only juror who worked at Monmouth Medical Center. Judge Oxley questioned Juror 8 about the information the court had received:

> [THE COURT] At the beginning of this process we asked you a series of questions and those questions were designed to find out whether or not you could be fair and impartial.
>
> Is there anything that has happened throughout the course of this trial that would affect your answers to those questions?
>
> [JUROR 8] No.
>
> [THE COURT] Ma'am, where do you work?
>
> [JUROR 8] At Monmouth Medical.
>
> [THE COURT] Where do you live?
>
> [JUROR 8] In Red Bank.
>
> [THE COURT] Okay. And in terms of any posting or newspaper articles, is there anything outside of what's been in this

> courtroom that you have been in contact with?
>
> [JUROR 8] No.
>
> [THE COURT] So is there anything that would change any of your other answers to those questions that we asked during voir dire?
>
> [JUROR 8] No.
>
> [THE COURT] And you believe that you can listen to the evidence in this case, and as I have asked you certainly throughout the voir dire process, listen to the evidence, apply the law as I give it to you at the end of the case and render a fair and impartial verdict?
>
> [JUROR 8] I can.

(16T:125-19 to 126-20). Judge Oxley instructed the juror not to discuss anything about the questioning. (16T:127-1 to 127-8).

Following voir dire, Judge Oxley ruled no further inquiry was required. Counsel for Spraulding asked that Juror 8 be excused for cause. (16T:128-6 to 128-20). Counsel for defendant asked that the court further question Juror 8. Judge Oxley denied both requests. (16T:128-1 to 129-2). The court found, "clearly [Juror 8] was puzzled why she would even be up here answering these questions. In this Judge's opinion, she seemed very sincere and she seemed very straightforward with her answers." (16T:128-1 to 128-5). She was "about as candid and straightforward as she could be." (16T:129-8 to 129-10). The court also referenced the unclear nature of the claim of taint. Thus, the court was "satisfied" that trial "could move forward"

without further inquiry. (16T:129-3 to 130-1). No defendant requested any other juror be questioned.

Notwithstanding defendant's failure to raise this below, he now challenges Judge Oxley's failure to voir dire other jurors. He further asserts the court's questioning of Juror 8 was insufficient, depriving him of a fair trial. Nothing in the record demonstrates any abuse of discretion in the questioning of Juror 8. Nor was the court's decision not to sua sponte question other jurors in any way error, let alone plain error "clearly capable of producing an unjust result." R. 2:10-2; Burns, 192 N.J. at 341; Macon, 57 N.J. at 337-38; State v. Frost, 242 N.J. Super. at 618.

Judge Oxley had before him three allegations of taint: (1) Juror 8 had received outside information about the case through "Googling;" (2) she talked about the case with other people; and (3) she had formed a premature opinion of defendants' guilt. None of these allegations, even if true, would warrant a new trial. See R.D., 169 N.J. at 559 ("A new trial, however, is not necessary in every instance where it appears an individual juror has been exposed to outside influence"); State v. Scherzer, 301 N.J. Super. 363, 490 (App. Div.), certif. denied, 151 N.J. 466 (1997) ("Although some jurors may have formed premature opinions, this is not the sort of irregularity that automatically requires a mistrial or new trial") (citing State v. LaFera, 42 N.J. 97, 109 (1964)). However, the record is clear

these allegations were not true, and, as the court found, there was no indication Juror 8 was unable to continue to act impartially in this case.

The allegations against Juror 8 had no indicia of credibility, as they were on hearsay upon hearsay information provided by an alleged friend of a friend of an unspecified juror. Even with these limitations, Judge Oxley correctly decided to question Juror 8, but was within his discretion, once he observed her puzzlement as to the questions and sincerity in her answers, to determine that no further questioning was required. As our Court held, "[u]ltimately, the trial court is in the best position to determine whether the jury has been tainted." R.D., 169 N.J. at 559. Indeed, even if this Court "would have preferred further inquiry" of the allegedly tainted juror, this does not give rise to reversible error. Id. at 562.

The facts here are very different from State v. Bisaccia, 319 N.J. Super. 1, 11-12 (App. Div. 1999), upon which defendant relies. A Bisaccia juror specifically told the court "he could no longer be 'fair,'" yet the court refused to voir dire the juror. Ibid. This was clearly improper, as this Court held. Id. at 12. That is not the case here. There was nothing improper in Judge Oxley's discretionary determination that no further questioning of Juror 8 was needed.

Nor was there any error in Judge Oxley's decision not to sua sponte question other jurors. The "decision to voir dire

individually the other members of the jury best remains a matter for the sound discretion of the trial court." R.D., 169 N.J. at 561. A court's "own thorough inquiry of the juror should answer the question whether additional voir dire is necessary to assure that ... tainting of the other jurors did not occur." Ibid. The court must also be mindful it may in "some instances" be "more harmful to voir dire the remaining jurors because, in asking questions, inappropriate information could be imparted." Ibid.

That Judge Oxley did not sua sponte voir dire other jurors does not mean the court failed in its "gatekeeping function," as defendant alleges. Again, the facts here are markedly different from the facts in State v. Tyler, 176 N.J. 171 (2003), upon which defendant relies. In Tyler, the juror specifically confessed her bias, yet the trial court determined to keep the juror in contact with other jurors, apparently out of a wish to punish the biased juror. Id. at 177. Nothing remotely approaching the egregiousness of the Tyler court's error occurred here. In light of the court's determination, based on its questioning of Juror 8, that the juror was not tainted, there is "no reason to reject the trial court's judgment that additional questioning of other jurors was not necessary." R.D., 169 N.J. at 562. There was no abuse of discretion by the lower court in its resolution of the accusation of juror taint. Defendant's convictions should be affirmed.

POINT VI

THERE WAS NO ERROR, LET ALONE PLAIN ERROR, IN THE JURY CHARGE

Defendant argues, almost exclusively for the first time on appeal, that certain portions of the jury charge were erroneous. As demonstrated infra, defendant's arguments fail, as the record demonstrates that no error, let alone plain error, occurred.

If an objection to a jury charge is not lodged, "it may be presumed that the instructions were adequate and that defendant thought so at the time of trial." State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010), certif. denied, 205 N.J. 81 (2011). A court's review of un-objected-to instructions is for plain error only. State v. Munafo, 222 N.J. 480, 488 (2015); State v. Singleton, 211 N.J. 157, 182 (2012); see also R. 1:7-2 ("no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict").

Plain error in this context "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." Singleton, 211 N.J. at 182-83 (quoting State v. Chapland, 187 N.J. 275, 289 (2006), State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930 (1970)). While proper instructions are essential to a fair trial, any alleged

error must be viewed in the totality of the entire charge, not in isolation. State v. Clausell, 121 N.J. 298, 330 (1990); State v. Nero, 195 N.J. 397, 407 (2008). If, on examining the charge as a whole, prejudicial error does not appear, the verdict must stand. State v. Council, 49 N.J. 341, 342 (1967).

A. No Plain Error in the Robbery Charge

The court instructed the jury on Count 3, first-degree armed robbery, using language identical to the Model Jury Charge for Robbery in the First Degree (Revised Sept. 10, 2012). (26T:54-5 to 62-10). Thus, it was instructed a "person is guilty of robbery if, in the course of committing a theft, he knowingly inflicts bodily injury or uses force upon another." (26T:54-10 to 54-13). The court further stated, "an act is considered to be in the course or committed a theft if it occurs in an attempt to commit the theft, during the commission of the theft itself, or in the immediate flight after the attempt or commission." (26T:54-24 to 55-3). Although the Model Jury Charge contains a footnote stating, "[i]f attempt is involved, define attempt," the court did not specifically define attempt. After reading the full Model Jury Charge on first-degree robbery, the court instructed the jury that the State alleged accomplice liability for the robbery count as to all three defendants. (26T:62-2 to 62-10). The court previously defined accomplice liability three times, for each of the three separate defendants, during the instruction for Count 2. (26T:38-19 to 54-4).

Defendant now asserts that this was plain error, citing State v. Gonzales, 318 N.J. Super. 527 (App. Div. 1999), and State v. Dehart, 430 N.J. Super. 108 (App. Div. 2013), in which this Court found the failure to charge attempt as part of a robbery charge to be reversible error. Neither Gonzales nor Dehart is persuasive here. Rather, it is this Court's decision in State v. Belliard, 415 N.J. Super. at 66, that most relates to the facts of this case and demonstrates the absence of error.

In Belliard, defendant was convicted of felony murder and second-degree robbery. Id. at 60. The evidence, including defendant's own statements, demonstrated defendant had struck and pushed the victim in order to help his friend rob the victim. Id. at 61-63. The State "acknowledge[d] that defendant's participation in the robbery 'was limited to the attempt phase.'" Id. at 71. However, as here, the court charged the jury using the Model Jury Charge on robbery, omitting any definition of "attempt." Id. at 72.

The Belliard Court held this omission was not reversible error because the court, in addition to instructing the jurors on the elements of robbery, also instructed the jurors on accomplice liability, which required the jury "determine[] that defendant possessed the required culpability and acted purposefully as an accomplice in the commission of the robbery." Ibid. Thus, "the judge's failure to instruct the jury as to the 'purposeful conduct' element and 'culpability' element of

attempt was harmless error." Ibid. Further, although the jury had not been specifically instructed on the "substantial step" element of attempt, this Court found the evidence demonstrated defendant's conduct "was unmistakably beyond the stage of mere preparation and was a substantial step in the commission of the offense." Id. at 74. "Therefore, while the judge's failure to charge the jury with attempt was in error, this error was not sufficient to lead the jury to a result it would not have otherwise reached." Ibid.

In this way, the Belliard Court distinguished Gonzales, 318 N.J. Super. at 527, upon which defendant relies. As the Belliard Court noted, Gonzales involved "conflicting versions" of the offense, and "defendant's actions were unknown and may not have constituted attempted robbery." Belliard, 415 N.J. Super. at 74 (citing Gonzales, 318 N.J. Super. at 534-35). It was "largely" for that reason that the Gonzales Court considered the failure to charge attempt plain error. Ibid. Those concerns did not apply in light of the evidence in Belliard. Id. at 74-75.

Nor do those concerns apply here. As in Belliard, the jury was instructed comprehensively on accomplice liability for all three defendants just prior to the robbery instruction and were told that instruction also applied to robbery:

> If you find that the defendant, with the purpose of promoting or facilitating the commission of the offenses, solicited Ebenezer Byrd and/or Gregory Jean-Baptiste to commit the crimes and/or aided or agreed to -- or attempted to aid Ebenezer Byrd

> and/or Jean-Baptiste in planning or committing them, then you should consider him as if he committed the crimes himself.

(26T:38-19 to 54-4; 62-2 to 62-10). The jury was instructed:

> Aid means to assist, support or supplement the efforts of another. Agree to aid means to encourage by promise of assistance or support. Attempt to aid means that a person takes substantial steps in the course of - in a course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of a substantive offense.

26T:51-6 to 51-14 (emphasis added).

By instructing the jury not only on the "purposeful conduct" and "culpability" elements of attempt, but also that "substantial steps" specifically constitutes an attempt, the court incorporated even more of the elements of attempt than those contained in the instruction affirmed in Belliard. Further, all of the evidence presented plainly demonstrated that defendants took a "substantial step" in furtherance of the theft from Jonelle by breaking into her apartment and then beating, torturing and shooting her. Although there were no admissions by the defendants here - indeed, the identity of the perpetrators was vigorously disputed by defendants at trial - the facts of the crimes committed against the victim were undisputed. Thus, as in Belliard, there was no plain error in the jury charge on robbery, and no basis to reverse defendant's convictions on that offense. Defendant's robbery conviction should be affirmed.

B. No Error in Not Giving False in One, False in All

The false in one, false in all charge advises the jury, "[i]f you believe that any witness or party willfully or knowingly testified falsely to any material fact in the case, with intent to deceive you, you may give such weight to his or her testimony as you may deem it entitled. You may believe some of it, or you may, in your discretion, disregard all of it." Model Jury Charge, "False In One - False in All" (rev. January 14, 2013). Provision of this instruction is optional; it may be given "in any situation in which [the court] reasonably believes a jury may find a basis for its application." State v. Ernst, 32 N.J. 567, 583-84 (1960), cert. denied, 364 U.S. 943 (1961).

The charge does "not apply unless the witness willfully testified falsely to some material fact." State v. D'Ippolito, 22 N.J. 318, 324 (1956). The charge should be given to "the jury as an aid when a witness has been discredited out of his own mouth either by cross-examination or by an unimpeached record." State v. Sturchio, 127 N.J.L. 366, 369 (1941); Capell v. Capell, 358 N.J. Super. 107, 111 n.1, (App. Div.), certif. denied, 177 N.J. 220 (2003); State v. Fleckenstein, 60 N.J. Super. 399, 408 (App. Div.), certif. denied, 33 N.J. 109 (1960).

Defendant asks this Court to order a new trial because the lower court rejected his request to have this instruction be provided to the jury as to Pinto. Nothing about the court's rejection of this request constitutes reversible error. As the

lower court noted as to Pinto, in addition to the general credibility charge "we are going to have a charge with regard to the immigration status of that witness and we're also going to have a charge with regards to her cooperating codefendant." (23T:8-9 to 9-2). The court did not err in finding "with everything we are going to be charging the jury in conjunction in how they can evaluate testimony ... I think that is sufficient at this point." (23T:9-2 to 9-7). This well-reasoned exercise of discretion should be affirmed.

C. The Use of "And/Or" Was Not Plainly Erroneous

Defendant asserts for the first time that the court's use of "and/or" in the instructions on accomplice liability deprived him of a fair trial. This argument is wholly without merit.

Each three defendant was charged as an accomplice to the other two defendants in each of Counts 2 through 6. At the charge conference, discussion was had regarding the potential difficulty and/or confusion that could result from having the accomplice liability charge repeated for each defendant after each separate charge, resulting in 12 separate repetitions of the same accomplice liability charge. Judge Oxley proposed reading the accomplice liability charge in full once for each defendant, at the beginning of the instruction, and then referring back to it after the instruction for each count to which it applied. The parties all agreed that this was best. (25T:5-9 to 6-10). That is how the court instructed the jury,

using the model charge. (26T:38-19 to 54-4).

"When a defendant might be convicted as an accomplice, the trial court must give clear, understandable jury instructions regarding accomplice liability." State v. Walton, 368 N.J. Super. 298, 306 (App. Div. 2004). Defendant asserts this did not occur, faulting the court for using the phrase "and/or" in the accomplice liability charge, relying on State v. Gonzales, 444 N.J. Super. 61 (App. Div.), certif. denied, 226 N.J. 209 (2016). Gonzales has no precedential value here, as the Supreme Court in denying certification expressly limited the Appellate Division's "criticism of the use of 'and/or'" strictly to those "circumstances in which it was used" in that case. State v. Gonzales, 226 N.J. 209 (2016).

Moreover, a review of the accomplice liability charge given demonstrates it was both "clear" and "understandable." Walton, 368 N.J. Super. at 306. Judge Oxley did his best to eliminate confusion and repetition for the jury by reading the full charge only once for each defendant, which counsel expressly agreed was the best course of action. Nothing in these instructions, when viewed in their totality, was erroneous, let alone error that possessed "a clear capacity to bring about an unjust result." Singleton, 211 N.J. at 182-83 (citations omitted).

D. Plain Error in the Instruction on Pinto's Testimony

Defendant objects for the first time to the court's use of the language of the Model Jury Charge, arguing this constitutes

reversible error. Defendant's argument is without merit.

As agreed by all parties, Judge Oxley instructed the jury on its consideration Pinto's credibility tracking the language of two model charges: Credibility - Immigration Consequences of Testimony (Rev. June 6, 2016); Testimony of a Cooperating Co-Defendant or Witness (Rev. Feb. 6, 2006). Using the exact words of each of these Model Jury Charges, the jury was instructed that, "[i]f you believe this witness to be credible and worth of belief, you have a right to convict the defendants on her testimony alone, provided, of course, that upon consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendants' guilt." (26T:14-1 to 14-6; 15-6 to 15-10).

Defendant's arguments do not demonstrate that these instructions, unmolded, were error. Defendant relies on solely on factually and legally irrelevant cases addressing tailoring in the context of other, unrelated Model Jury Charges. None of these cases support defendant's claim that the trial court committed reversible error by using appropriate, on-point model charges that directly addressed Pinto's credibility.

Nor was there any error whatsoever in the language used by the trial court. Defendant asserts, "Pinto's testimony alone did not allow the jury to convict any of the defendants of any of the charges." Db48. This is legally incorrect. Indeed, our Court has routinely recognized "a defendant may be convicted solely on the uncorroborated testimony of an accomplice." State v. Adams,

194 N.J. 186, 207 (2008) (citing State v. Begyn, 34 N.J. 35, 54 (1961)). Moreover, the jury here was also instructed, in the same sentence, that conviction on Pinto's "testimony alone" was "provided, of course, that upon consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendants' guilt." (26T:14-1 to 15-10). This instruction did not mislead. Defendant has demonstrated no error, let alone plain error.

POINT VII

THE LOWER COURT DID NOT ERR IN DENYING A JUDGMENT OF ACQUITTAL

A defendant may move for acquittal under R. 3:18-1 if "the evidence is insufficient to warrant a conviction." A court, however, "must deny the motion if 'viewing the State's evidence in its entirety, be that evidence direct or circumstantial,' and giving the State the benefit of all reasonable inferences, 'a reasonable jury could find guilt beyond a reasonable doubt.'" State v. Felsen, 383 N.J. Super. 154, 159 (App. Div. 2006) (quoting State v. Reyes, 50 N.J. 454, 458-9 (1967)); State v. Wilder, 193 N.J. 398, 406 (2008). "An Appellate Court will apply the same standard as the trial court to decide if a judgment of acquittal was warranted." Felsen, 383 N.J. Super. at 159; State v. Johnson, 287 N.J. Super. 247, 268 (App. Div.), certif. denied, 144 N.J. 587 (1996).

Defendant's argument that the lower court committed reversible error by denying his motion for a judgment of acquittal on Count 7, second-degree witness tampering, see

(22T:6-15 to 7-1), pays only lip service to this standard. To create error defendant does not allow the lower court, or this Court, to afford the State's evidence any favorable inferences, as the Reyes standard requires, and instead asks the court to rely upon all un-favorable inferences.

In his recitation of the facts that prove that the "employs force or threat of force" element of the second-degree crime could not meet the beyond reasonable doubt standard, defendant relies more on cross-examination regarding a prior statement to police Pinto admitted was not fully forthcoming than on her trial testimony and on factual assumptions, not evidence. N.J.S.A. 2C:28-5(a); compare (10T:14-20 to 16-18) with Db51. Elevating Pinto's cross-examination over her direct testimony is not providing the State with all favorable inferences; its asking this Court to do what the court below recognized it could not – engage in credibility findings that would elevate Pinto's prior out-of-court statement. The lower court also correctly recognized, as the defendant does not here, that assuming that Pinto "would have ... known" about defendant's lack of a "criminal history of violent crimes" was both not a fact of record, but an unsupported assumption, and also not in keeping with the governing standard of review.

Ultimately, the lower court did not commit reversible error in finding that the totality of the evidence, coupled with the favorable inferences required be given to the State, provided

sufficient evidence to sustain a request for acquittal. Pinto's testimony did not merely establish that defendant told her "to be quite about anything." (10T:16-7 to 16-10). The victim's perception that this was a threat was fully supported by the totality of the circumstances surrounding the direction to be quiet: defendant, who had never been to Pinto's residence before, came there in person and had her get into a vehicle with him and another person, he demanded to know who was "snitching" and directed Pinto to be quite. (10T:14-20 to 16-18). That Pinto knew defendant had been involved in Jonelle's murder and had, along with his codefendants, been in possession of a gun only served to further support the Pinto's perception and the inferences that could be drawn from these facts.

Defendant's reliance on State v. D.A., 191 N.J. 158, 171 (2007) does nothing to negate the correctness of Judge Oxley's denial of acquittal, Db50-51. Contrary to defendant's assertion, D.A. does not stand for the proposition that a "threat" must be "explicit" for a first-degree crime to be "charged." Ibid. As defendant's own parenthetical makes clear, the threat at issue in D.A. was not one that included force. Db51; D.A., 191 N.J. at 162. More damning of defendant's reliance on D.A. is that the issue addressed by the Court did not encompass the threat of force element (the defendant was only charged with third-degree witness tampering), but instead the defendant's believe that an official proceeding or investigation had commenced: "we are

asked whether a threat by a defendant against a person who has observed him in a crime, with the purpose to forestall official action, will satisfy" N.J.S.A. 2C:28-5(a). Id. at 161. Because D.A. does not support reversal, this Court should affirm.

POINT VIII

NO CUMULATIVE ERROR EXISTS

"[I]ncidental legal errors" necessarily "creep into" proceedings. State v. Orecchio, 16 N.J. 125, 129 (1954); see also State v. Marshall, 123 N.J. 1, 169 (1991), cert. denied, 507 U.S. 929 (1993). Where they do so in a manner that does "not prejudice the rights of the accused or make the proceedings unfair," "an otherwise valid conviction" will not be disturbed. Ibid. Only where "the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the [proceedings] unfair," do "fundamental constitutional concepts dictate" the grant of relief. Ibid.

Despite having failed to establish that any "error" detailed in POINT I through VII, supra, were, in fact, errors, defendant argues this Court should aggregate these non-errors into a "cumulative effect" that together render his "trial unreliable and unfair." Db53. There is no basis in law or fact to do as defendant requests. The individual alleged errors complained of by the defendant do not alone rise to the level of error, see supra, and, for that reason, cannot aggregate to cumulative error warranting reversal of defendant's conviction.

POINT IX

THE LOWER COURT'S SENTENCE DOES NOT CONSTITUTE AN ABUSE OF DISCRETION

"Appellate review of sentencing decisions ... is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). Under this standard, an appellate court is "bound to affirm a sentence, even if [it] would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." State v. Natale, 184 N.J. 458, 489 (2005); State v. Johnson, 118 N.J. 10, 15 (1990) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). To "facilitate" this deferential review, "trial judges must explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 65 (2014).

"When the aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced, [an appellate court] must affirm the sentence and not second-guess the sentencing court ... provided that the sentence does not 'shock the judicial conscience.'" Ibid. (quoting State v. Roth, 95 N.J. 334, 365 (1984)). Reviewing courts have assured trial judges they "'need fear no second-guessing' when they exercise their discretion in accordance with the statutory mandates and principles." Blackmon, 202 N.J. at 297 (quoting Roth, 95 N.J. at 365).

Defendant levels three attacks on the sentence imposed, each of which he (incorrectly) contends warrants remand. First, relying upon six words plucked from an 81-line sentencing statement, defendant argues, "the trial court failed to provide any analysis for the finding of the aggravating factors" 3, 6 and 9. N.J.S.A. 2C:44-1(a)(3), (6), (9). Defendant goes so far as to allege Judge Oxley provided "[n]o explanation or analysis" at all. Db56. These assertions are belied by the record.

Prior to those six words upon which defendant focuses, Judge Oxley makes plain he reviewed "defendant's prior criminal history" prior to sentencing. After confirming this, Judge Oxley also placed on the record the contents of this history not only by giving the aggregate number of interactions with various levels of the criminal courts, but also by detailing the specific nature (date, crime, sentence) of each of defendant's adult criminal convictions. (29T:16-1 to 17-16).

Judge Oxley then stated, "With regard to the instant offense, and clearly the reason that I bring this criminal history, because that is something that I need to weigh and balance as I come up with an appropriate sentence for this offense." (29T:17-17 to 17-21). It is only then that Judge Oxley utters the six words relied upon by defendant: "I do find aggravating factors 3, 6 and 9." (29T:17-21 to 17-22). Judge Oxley also explained his finding of no mitigating factors. While acknowledging that defendant's history contained "nothing ... of

violence," the court nonetheless could not find the mitigating factor contained in N.J.S.A. 2C:44-4(b)(7): "Clearly, there is a lengthy criminal history dating back to when he was a juvenile and that history continued throughout his adult years." (29T:17-24 to 18-6). After reviewing defendant's criminal history, and with knowledge of the criminal conduct obtained after presiding over the months-long trial, Judge Oxley found "no question in [his] mind that the aggravating factors substantially outweighed the mitigating factors." (29T:15-6 to 15-24; 18-7 to 18-12).

It is clear, viewing the entirety of the court's sentencing statement that its finding of aggravating factors 3, 6 and 9 were fully supported and lawfully found based upon the nature of defendant criminal conduct and history. Defendant's adult, indictable criminal history, as detailed by the court, contained a consistent commission of criminal conduct from 2008 until 2017. While most of the crimes did involve the possession and/or distribution of CDS, more importantly, this history made clear that the service of custodial terms in prison failed to deter defendant from the commission of future criminal behavior. Judge Oxley's findings that defendant presented the risk of commission of another offense, had a serious, extensive criminal history, and needed to be deterred from violating the law were well supported by the competent, credible facts contained in his criminal history. See N.J.S.A. 2C:44-1(a)(3), (6), (9). These findings, therefore, should be affirmed by this Court.

Second, defendant characterizes Judge Oxley's imposition of consecutive sentences here "mechanistic," resulting in an overall sentence that is "manifestly harsh and draconian." Db56, 58. This characterization is, similarly, unsupported by the record. Like all other sentencing determinations, whether multiple sentences should run concurrently or consecutively rests in the discretion of the sentencing court, as guided by the factors set forth by the New Jersey Supreme Court in State v. Yarbough, 100 N.J. 627, 636, 643-44 (1985). N.J.S.A. 2C:44-5; State v. Copling, 326 N.J. Super. 417, 441 (App. Div.), certif. denied, 164 N.J. 189 (1999); State v. Miller, 205 N.J. 109, 129 (2011) ("When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal").

These factors include: "there can be no free crimes;" "the crimes and their objectives were predominantly independent of each other;" "the crimes involved separate acts of violence or threats of violence;" "the crimes were committed at different times or separate places;" and "the crimes involved multiple victims." Yarbough, 100 N.J. at 643-44; State v. Russo, 243 N.J. Super. 383, 412 (App. Div.), certif. denied, 126 N.J. 322 (1991); State v. Molina, 168 N.J. 436, 441-42 (2001); see also State v. Johnson, 309 N.J. Super. 237, 271 (App. Div.), certif. denied, 156 N.J. 387 (1998) ("Consecutive sentences do not constitute an abuse of discretion where there are separate acts

of violence and separate victims"). The Yarbough factors are to "be applied qualitatively, not quantitatively." State v. Carey, 168 N.J. 413, 427-28 (2001). Indeed, our Court has "stress[ed] that the Yarbough guidelines are just that - guidelines." Id. at 427-28; State v. Torres, 246 N.J. 246, 269 (2021).

"When a trial court is faced with the decision whether to impose consecutive or concurrent sentences, the court must determine whether the Yarbough factor under consideration 'renders the collective group of offenses distinctively worse than the group of offenses would be were that circumstance not present.'" Id. at 428 (quoting People v. Leung, 7 Cal.Rptr.2d 290, 303 (Cal. Ct. App. 1992)). The court must also "focus on 'the fairness of the overall sentence.'" Torres, 246 N.J. at 270-72 (quoting State v. Miller, 108 N.J. 112, 122 (1987)).

The "four" consecutive sentences about which defendant complains were not solely the result of Judge Oxley's exercise of sentencing discretion. The sentences imposed on the indictments not the subject of this trial, Indictment Numbers 15-01-0135 and 14-03-457, resulted from guilty pleas entered by the defendant in 2017 pursuant to plea agreements negotiated with the State that contemplated imposition of consecutive sentences. See Da70-75. In 2017, the Honorable Thomas F. Scully, J.S.C., followed these negotiated agreements and imposed the called for consecutive sentences.[8] Ibid.

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[8] Only one of these consecutive sentences is currently extant. In an August 2020 unpublished opinion, this Court "vacate[d]

Likewise, the consecutive sentence imposed on defendant's witness tampering conviction, Count 7 of the indictment tried before Judge Oxley and a jury (16-04-0718), was outside of Judge Oxley's control. As Judge Oxley correctly appreciated, consecutive sentencing on this count was statutorily mandated: "Notwithstanding the provisions of ... N.J.S.A. 2C:44-5 ... the sentence imposed pursuant to [N.J.S.A. 2C:28-5, tampering with witnesses] shall be ordered to be served consecutively to that imposed for any such conviction." N.J.S.A. 2C:28-5(e).

Thus, the only aspect of the "four" consecutive features of defendant's sentence that rested in Judge Oxley's discretion was whether the sentences imposed on the counts of Indictment Number 16-04-0718 that survived merger (Counts 3, 4, and 6, see (29T:18-13 to 20-8)) should be imposed concurrently or consecutively to each other and to the prison sentences defendant was already serving. Judge Oxley imposed fully concurrent sentences on Counts 3 and 6, but found a consecutive sentence to be appropriate on Count 4, felony-murder, for which the court imposed a life sentence, subject to NERA. (29T:18-13 to 20-8). In support of this finding, Judge Oxley provided a statement of reasons consistent with Yarbough and which demonstrated a full appreciation of its real time consequences.

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defendant's guilty plea and the sentenced imposed by the court" on Indictment Number 15-01-0135. Pa6-7. PromisGavel records indicate prosecution of this indictment remains active, with a motion to proceed pro se pending a January 14, 2022 return date.

Judge Oxley appropriately found "no question" as to the "separate and distinct" nature of Jonelle's murder and the CDS distribution related crimes defendant pled guilty to in 2017. (29T:21-2 to 21-8). Judge Oxley additionally calculated the real time defendant would serve with regard to his life sentence subject to NERA (23,269 days), noted how these days would be served in conjunction with the consecutive sentences on defendant's CDS convictions, and found the overall length of sentence to be "reasonable." (29T:21-9 to 22-13). These findings, and the consecutive sentencing they fully support, should be affirmed by this Court.

Finally, defendant asks this Court for "a resentencing remand ... under N.J.S.A. 2C:44-1(b)(14)." Db58. In support of his request, defendant presents this Court with only two dates - his date of birth and the date of Jonelle's murder. Db58 n.6. Thus, according to defendant, these are the only relevant dates necessary to establish his entitlement to consideration of youth as a mitigating factor; defendant was under 26 when he participated in Jonelle's murder. This is not legally accurate. When defendant participated in Jonelle's murder in 2009 and when he was sentenced by Judge Oxley in May 2019, the youth mitigating factor was not a part of N.J.S.A. 2C:44-1(b). The §(b)(14) mitigating factor did not become effective until over a year after defendant's 2019 sentencing, on October 19, 2020. See State v. Bellamy, 468 N.J. Super. 29, 42-43 (App. Div. 2021).

As this Court made clear in Bellamy,[9] and contrary to defendant's claims, see Db58, the §(b)(14) mitigating factor does not apply retroactively to "cases in the pipeline in which a youthful defendant was sentenced before October 19, 2020." Id. at 48. The §(b)(14) mitigating factor is to be given "prospective application ... not retrospective." Id. at 43 (emphasis in original); cf. State v. J.V., 242 N.J. 432 (2020), and State in Interest of J.F., 446 N.J. Super. 39 (App. Div. 2016). Only "where, for a reason unrelated to the adoption of the statute, a youthful defendant is resentenced," is he "entitled to argue the new statute applies." Id. at 48. Because defendant is not unrelatedly entitled to resentencing, defendant is not entitled to a remand for resentencing solely to allow for the retroactive application of the §(b)(14) mitigating factor.

[9] The issue of retroactive application of the §(b)(14) mitigating factor is currently pending before our Supreme Court on certification granted in State v. Lane, 248 N.J. 534 (2021).

CONCLUSION

For the reasons and authorities set forth supra, the State respectfully requests this Court affirm defendant's conviction and sentence.

Respectfully submitted,

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MD/mc
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c Andrew R. Burroughs, Esq.