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Date: August 16, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1158-23T1

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Bergen County
SUI KAM TUNG,	:	Ind. No. 13-06-0793
	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Christopher R. Kazlau, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX (VOL. 1 of 2 (DA 1-72)) ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

The Bergen County Grand Jury returned Indictment 13-06-0793 charging defendant Sui Kam Tung with: purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2) (Count One); two counts of felony murder (one during burglary, one during arson), contrary to N.J.S.A. 2C:11-3a(3) (Counts Two and Three); second-degree burglary, contrary to N.J.S.A. 2C:18-2a(1) (Count Four); second-degree aggravated arson, contrary to N.J.S.A. 2C:17-1a(2) (Count Five); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Six); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Seven); second-degree desecration of remains, contrary to N.J.S.A. 2C:22-1a(2) (Count Eight); third-degree hindering apprehension, contrary to N.J.S.A. 2C:29-3b(1) (Count Nine); fourth-degree tampering, contrary to N.J.S.A. 2C:26-6(1) (Count Ten); and fourth-degree stalking, contrary to N.J.S.A. 2C:12-10b (Count Eleven). (Da 1 to 5)[1]

Defendant was first tried before a jury in 2015, acquitted of Counts Two, Three, and Four, convicted of the remaining eight counts, and sentenced to serve an aggregate sentence of life plus ten years, 68.5 years without parole. (Da 6 to 14) This Court reversed those convictions in an unpublished opinion (Da 15 to

[1] Da – defendant's appendix to this brief.

60) that also was published in a slightly truncated form, State v. Tung, 460 N.J. Super. 75 (App. Div. 2019), and remanded the case for retrial.

When the matter was remanded, the Honorable Christopher R. Kazlau, J.S.C., entered an order renumbering the remanded counts of the indictment (Da 61), and in June and July 2023 the retrial took place before Judge Kazlau and a jury and resulted in convictions on all eight of those counts. (Da 62 to 65) On November 3, 2023, after mergers, defendant was sentenced to serve an aggregate prison term of life, 85% without parole and ordered to pay the usual fees and penalties. (Da 66 to 69)

On December 15, 2023, defendant filed his notice of appeal. (Da 70 to 72)

STATEMENT OF FACTS

Defendant Sui Kam ("Tony") Tung was convicted of the murder of Rob Cantor -- the boyfriend of defendant's estranged wife -- and of related offenses, such as aggravated arson, weapons offenses, stalking, desecration of a body, hindering apprehension, and tampering with evidence. As noted in the Procedural History, defendant was originally tried in 2015, but the convictions were reversed by this Court and the matter remanded for retrial. (Da 15 to 60) As discussed in more detail in Point I, infra, the evidence presented at the retrial was heavy on proof of motive and generic proof of opportunity, but utterly lacking any proof that defendant, who lived in New York: actually killed the

victim, was present at the site of the crime in Teaneck at the time of the murder, or was even in the State of New Jersey on the night in question. Thus, it fell woefully short of what is necessary for the State's case to survive a motion for a judgment of acquittal on most of the counts when the State rested. The State presented the following evidence at the retrial.

Scott Robinson, who lives at 210 Elm Avenue in Teaneck, about "ten feet" from Cantor's house at 212 Elm, testified that, while he was inside his home at about 11:45 p.m. on March 6, 2011, he heard a loud "bang" outside from the direction of Cantor's house. (12T 57-14 to 59-11; 12T 60-1 to 4) But it was very rainy and "miserable" outside, so Robinson decided to "figure it out tomorrow" and did not go outside to look for the source of the noise. (12T 59-11 to 23) However, about 30 minutes later there was a pounding on his door, Robinson testified, and, when he answered, there was "a guy" asking him to turn on his exterior water faucet on the 212 Elm side of the house. (12T 60-12 to 61-15; 12T 76-15 to 23) When Robinson went outside, he saw that Cantor's house was on fire and that the man who had asked for the water to be turned on was trying to spray water onto the flames. (12T 63-20 to 65-12) Eventually, when the fire department and police arrived, Robinson and his family were ordered to evacuate their home, and he saw Cantor's estranged wife, Susan Kirschenbaum, "running up" the sidewalk from a southerly direction, and "she was in a panic." (12T 70-20 to 72-25) Robinson also called Cantor's phone but got no answer

and he initially assumed that Cantor was not in the house. (12T 73-6 to 21) Robinson did not see an Asian man outside at any point. (12T 87-25 to 88-2)

Henry Rodzen identified himself as the man who had banged on Robinson's door and futilely tried to extinguish the fire at the Cantor house with a garden hose, and he testified that he did so after noticing the fire at 12:10 to 12:15 a.m. on March 7, 2011. (12T 97-12 to 99-19; 12T 104-24 to 105-23) Rodzen never saw any suspicious person near the home. (12T 107-23 to 108-9)

Lieutenant Steven Van Mater of the Teaneck Fire Department testified that he responded to the fire based on a 12:15 a.m. 911 call, and that, eventually, when the fire was extinguished, the body of Rob Cantor was found face-up on a bed in the basement of the home. (12T 113-12 to 14; 12T 119-6 to 121-3; 12T 131-22 to 132-19) That body was "burned beyond recognition," according to Lieutenant Gregory Wright, a police officer. (12T 158-12 to 13) When Wright responded to the scene, the front door of Cantor's home was locked. (12T 154-23 to 25) He noted that it takes about 10 to 15 minutes to drive from the George Washington Bridge to Teaneck, if there is no traffic. (12T 149-15 to 24)

Sergeant James Costello of the prosecutor's office testified that an x-ray of the decedent prior to the autopsy revealed a bullet in his skull. (13T 13-12 to 24) A shell casing was discovered under the bed frame in the basement, and a bullet fragment was recovered from Cantor's skull during the autopsy. (13T 22-16 to 18; 13T 30-2 to 9) No fingerprints were recovered from the shell casing

and it was not tested for DNA. (13T 47-2 to 48-8) Costello admitted that while there were "a lot" of footprints outside the house, police made no attempt to find out whose they were. (13T 49-6 to 15) The most fire damage, according to Costello, was in the basement of the house. (13T 25-17 to 20) Costello also agreed that while police considered defendant to be a suspect within a short time after the incident, and had executed search warrants at his home and business shortly after the incident, they did not arrest him until over a year later: May 4, 2012. (13T 53-18 to 57-17) He also agreed that two other local people -- one in Teaneck and one in Palisades Park -- around the same time were murder victims in cases that also involved suspected arson, but said that finding a link among those cases and this one "wasn't in my job description," despite stating that that it is "always a thought" that similar cases in the same time period might involve a serial killer, and "[o]f course we're all curious." (13T 74-6 to 75-24) Costello claimed to know nothing about the fact that, during the investigation, friends of the victim were demonstrating outside the courthouse in Bergen County demanding that a suspect be arrested. (13T 71-24 to 72-4)

Detective Charles Rokosny testified as a firearms expert that the shell casing found under the bed in Cantor's basement was .380 caliber, and that the bullet fragments recovered in the autopsy were consistent with that caliber as well. (21T 13-12 to 14-3) He agreed that a .380 handgun is a "very common" weapon and is smaller than a 9-mm. and can fit into a "pocketbook." (21T 23-

23 to 25-6) He also testified that a Walther .380 without a magazine can be loaded by directly placing one bullet into the chamber. (21T 15-1 to 3)

Dr. Jennifer Swartz, the medical examiner, testified that Cantor was "not visually recognizable" because of the fire, so he was identified using dental records. (14T 12-10 to 13) He had fractures of the facial bones, wrists and right thigh. (14T 14-14 to 16) The bullet entered his brain at the base of the skull, but the wound was not a contact wound. (14T 16-22 to 23; 14T 18-2 to 15) Swartz had no idea from what distance the shot was fired. (14T 21-9 to 25) The gunshot wound was the cause of death and the trajectory of the bullet "could be" consistent with the victim's head "leaning down." (14T 19-5 to 20-4)

Defendant's estranged wife, Sophie Meneut, testified that she and defendant met in 1996 and moved in together in New York City in 1999, living in an apartment on the Upper East Side until 2010. (15T 72-22 to 75-15) They had three children together. (15T 78-6 to 82-17) She claimed that defendant was unemployed for a number of years and that in 2008 he opened a generally unsuccessful computer store in Manhattan that drained a lot of money from their savings. (15T 83-4 to 97-20) Eventually, in 2008 and 2009, Meneut testified, she felt she was "suffocating" in the marriage and had "given up." (15T 98-13 to 99-24)

Meneut then met Rob Cantor for the first time at a lecture in Manhattan in September 2009, and they began exchanging emails. (15T 101-15 to 104-5)

By sometime in October, Cantor was expressing romantic interest in Meneut, and, while, she testified, she initially told him she was married and not interested in a romantic relationship, her position changed not long thereafter when she began "to develop feelings for him as well." (15T 104-9 to 105-3) By late November 2009, they had dinner at a restaurant and kissed afterwards, and Meneut told Cantor in an email that night -- sent from a special address she had created recently to communicate with him -- that she loved him, to which Cantor replied "very dramatic[ally]" that he shared the same feeling for her. (15T 107-9 to 108-9)

In December 2009, Meneut testified, she told defendant that she was thinking of moving out of their New York apartment to another location in Manhattan, and he "was not wild about it." (15T 111-4 to 11) Meneut claimed that meeting Cantor gave her the "courage" to end her marriage, but she also claimed that by that point Cantor and she had still not had sex. (15T 113-22 to 114-2) Meneut testified that the first time she and Cantor had sex was on February 13, 2010, on a bed in the basement of Cantor's home in Teaneck after meeting in the early morning in Central Park. (15T 128-3 to 25) At that time, Cantor and his wife were still living in the same house, albeit sleeping in different rooms, but "were discussing separation," according to Meneut. (16T 28-20 to 29-4) Eventually, on March 6, 2010, Meneut moved to an apartment at 475 FDR Drive in Manhattan, about 15 to 20 minutes from defendant's

residence. (15T 114-12 to 18)

Meneut also testified that the next day after she and Cantor had sex, she and Cantor exchanged emails, and then defendant gave her a Valentine's Day card that seemed in one part of the card to use similar language from one part of those Cantor/Meneut emails. (15T 129-6 to 13-15) Then, the following day, Cantor told her he had received a concerning anonymous email from a Gmail user named "eoralld" that "frightened" him. (15T 130-16 to 131-2; 15T 134-14) That same day, Meneut testified, she snooped into defendant's email account that he had left open on his computer, and she found emails from defendant to his friend Sandra in which he discussed the "bad news" that Meneut was seeing someone and was "madly in love" (15T 136-9 to 139-19), and referenced the fact that Meneut and Cantor had recently had sex. (15T 140-20 to 141-7) Also on that same day, she noticed in her own email account that two of her emails had been forwarded to defendant, and she found what appeared to be spyware on her computer registered to "Lord 168 Khan," which reminded her of a similar username that defendant sometimes used: "Lord Tung." (15T 136-1 to 8; 15T 141-13 to 142-8)

Then, on February 16, 2010, Meneut testified, defendant confronted her with printouts of emails between her and Cantor that he said arrived anonymously via FedEx. (15T 148-13 to 149-21) In that same conversation, defendant allegedly asked where she and Cantor had slept together and told

Meneut that the "eoralld" Gmail user had been emailing him (i.e., defendant) and then visiting him at his computer store, telling stories about Rob Cantor that involved "the Israeli mafia." (15T 149-22 to 151-15) Meneut described defendant as "upset" about this "eoralld" person -- because he said he did not know "what this person wanted" -- and she testified that defendant tried to "forbid" her from contacting Cantor as a result. (15T 151-18 to 153-13) Meneut claimed that defendant was saying that he was "not allowed to tell" her about these contacts from this anonymous person. (15T 152-21 to 153-13) She also testified that, when asked, she told defendant that she and Cantor had sex in the basement bedroom at Cantor's house. (15T 153-21 to 22)

According to Meneut, defendant continued to express fear for their collective safety in the ensuing days, telling her to take their daughters to France and reiterating that Cantor must have underworld-crime connections. (15T 156-3 to 159-15) Defendant claimed to be receiving more emails from the "eoralld" user, and, on February 18, 2010, defendant told her he was withdrawing $2000 from one of their accounts to buy a gun for protection. (15T 161-6 to 164-13) That night, according to Meneut, defendant showed her a handgun in a brown paper bag, but she told him to get rid of it and she never saw it again. (15T 165-8 to 168-6) She noted that in the late 1990s defendant had a lawful New York gun permit and owned a gun that he got rid of in 2000, but she did not think he had a permit in 2010 any longer. (15T 168-9 to 14; 16T 30-10 to 31-24)

Meneut testified that she initially believed defendant's claims that they were in danger from organized crime, because defendant was acting scared and, on February 19, 2010, was saying that he needed $5000 for "protection money." (15T 169-1 to 24) Defendant was also telling her that Cantor "was dangerous" according to his anonymous source. (15T 174-1 to 5) Nevertheless, Meneut continued to see Cantor occasionally in March and April 2010, and eventually, she and defendant tried couples therapy even though she wanted to remain separated from him. (15T 178-14 to 181-3) While they were initially split, Meneut paid defendant $1500 per month in support from March through October 2010. (15T 177-9 to 15) She stopped paying support in November 2010 when defendant refused to sign a separation agreement that had been drafted during their therapy. (15T 188-2 to 191-6)

In the summer of 2010, Meneut saw Cantor more frequently while her daughters were with relatives in France, and she and Cantor even vacationed in Mount Tremper, New York, at one point. (15T 183-18 to 186-8) By the fall of 2010, Meneut testified, she would visit Cantor at his home in Teaneck and, by then, Cantor's wife had moved out and Cantor was again sleeping upstairs in a bedroom there. (15T 186-9 to 187-4)

Meneut also testified that she learned that defendant had, at some point, visited Cantor at Cantor's home to discuss everything together and that defendant had, during one of those visits, removed a photo of Cantor that had

been on Cantor's refrigerator. (15T 192-1 to 195-8) She asked defendant to return the photo, but cannot recall how he responded. (15T 194-2 to 195-8)

Eventually, Meneut filed for divorce, and defendant was served with those divorce papers on March 3, 2011, three days before Cantor's death. (15T 197-4 to 23) Meneut testified that on March 6, 2010, her daughter Cleo met Cantor for the first time, and defendant learned about that meeting that evening at about 8 p.m. when defendant was returning one of his other two daughters to Meneut at Meneut's apartment building after a scheduled visit. (15T 199-5 to 203-16; 16T 56-9 to 11) Meneut testified that the last time she spoke to Rob Cantor on the phone was sometime after 8:30 p.m. that night. (15T 211-14 to 21)

Meneut admitted that she told police on March 7, 2011, the day Cantor's body was found, that defendant had never threatened her or Cantor. (16T 50-7 to 53-16) She claimed on redirect that defendant had once referenced that he had twice been "very close" to hitting her, but she agreed on recross that that statement was made almost a year before Cantor's death when defendant initially "found out about me and Rob." (16T 90-8 to 93-15) She also admitted that she had no knowledge that defendant was upset about anything that any of their girls had told him on the evening of March 6, 2011. (16T 58-20 to 59-8) Finally, on cross-examination, at defense counsel's urging, Meneut read the entire content of defendant's February 14, 2010, card to her, and it conveyed mostly an apologetic/remorseful/regretful tone regarding the deterioration of

their marriage. (16T 101-25 to 104-15)

Ted Finkelstein, a close friend of Cantor, testified that Cantor was not a gambler and was not in debt to anyone that Finkelstein knew of. (14T 45-2 to 15) He repeated many details of the Meneut/Cantor relationship in his testimony, and testified, over objection, as addressed in Point III, infra, to obvious inadmissible hearsay from Cantor: that Cantor was "very upset and somewhat frightened and somewhat intimidated" when defendant visited him at his home to discuss the relationship. (14T 52-12 to 53-8; 14T 113-17 to 18; 14T 138-5 to 6) It also became clear from Finkelstein's testimony that he helped organize protests in front of the prosecutor's office in Hackensack shortly after Cantor's death, urging that defendant be arrested. (14T 99-21 to 102-18) Finkelstein claimed he was not aware that Cantor had an account on a dating website for married people called Ashley Madison, where the motto is: "Life is short. Have an affair." (14T 78-7 to 10)

Susan Kirschenbaum, Cantor's estranged wife, also testified to many of the details of Cantor's relationship with Meneut, and they are not recounted here to avoid repetition. She also testified that she knew of no "enemies" of Cantor and that she did not know him to be in debt or to gamble. (14T 154-21 to 24) She also noted that once, in the "spring or summer" of 2010, and before she moved out (September 2010), she saw a "tall Asian man" standing "by the hedges in front of my house." (14T 171-12 to 24) She also testified that someone

with a user name of "eoralld" sent her a Facebook message in October 2010 to tell her that Cantor "has been cheating on you with a younger woman for the past year." (14T 179-6 to 180-11) On cross-examination, she admitted that a key to Cantor's house was always outside under a flower pot or a propane grill, that workers at the home had access to those keys at one point, and that "friends" also had an extra set of keys to the house. (14T 199-19 to 201-23)

There was also extensive cross-examination about Kirschenbaum's potential for a significant financial payoff to her, via insurance and retirement savings, from Cantor's death because they had never actually gotten divorced. (14T 204-18 to 210-5; 15T 24-15 to 31-10) Cross-examination also focused on emails from Cantor to Kirschenbaum in November 2010 that seemed to indicate the two were arguing over money during their marital separation. (15T 17-13 to 23-23) Kirschenbaum testified that she was unaware that in 2009 Cantor had an Ashley Madison dating account. (15T 36-11 to 37-2) Cross-examination also focused on the fact that Kirschenbaum brought an attorney with her when she was questioned by prosecutors about Cantor's death, and that the attorney was not merely there as a friend, but "participated" in that meeting on her behalf. (15T 33-6 to 34-24; 15T 56-6 to 62-11)

Sergeant Terrence Lawler testified as an expert on the origin and cause of fires, and concluded that because all the "heaviest fire damage" at Cantor's house "was in the area of the bed" in the basement, the fire started in that area.

(13T 143-3 to 20) He also concluded, based on burn patterns, that the fire was fast-moving. (13T 165-23 to 166-2) He agreed that arson-detection canines found no accelerant at the scene, but testified that later forensic analysis revealed ethanol on the comforter that was on the basement bed. (13T 144-9 to 23) A New Jersey State Police forensic scientist, Anthony Mazarella, also testified about finding ethanol on the comforter (13T 181-5 to 14), and he explained that even though ethanol would evaporate during a fire, if "mass quantities" of ethanol were used, it might not all evaporate. (13T 184-10 to 25) But then on cross-examination, Mazzarella could not quantify what he meant by "mass quantities" of ethanol other than "[j]ust enough to survive the fire" -- which he admitted was not a figure he could estimate at all -- rendering that part of his opinion fairly useless. (13T 185-4 to 186-23)

Ki Lee, who said he had known defendant since the fourth grade, testified that defendant had previously owned a 9-mm. Beretta handgun when he belonged to a gun club. (20T 169-4 to 12) Lee also claimed that in November 2010 defendant asked him to purchase him a magazine for a Walther .380 handgun, but Lee declined to do so. (20T 166-6 to 167-13) Defendant responded that it was "no big deal," and he never brought up the issue again; indeed, the men never spoke of guns again and, to Lee's knowledge, defendant never acquired a gun or magazine thereafter. (20T 170-6 to 21)

Lieutenant James Brazofsky testified that after police picked up defendant

at his Manhattan computer store on March 7, 2011, they transported him to the 23rd Precinct in Manhattan at 3 pm for an interview/interrogation. (20T 184-15 to 186-1) There was no audio- or video-recording equipment in that precinct, so Brazofsky memorialized the interrogation using his handheld recorder. (20T 187-19 to 188-3) The defendant's statement was as follows.

Defendant admitted knowing that Sophie Meneut was seeing Rob Cantor and defendant admitted speaking to Cantor previously "on the phone and in person." (21T 57-10 to 23) Defendant described the difficulties that he and Meneut had been having in their marriage, including her affair with Cantor (21T 59-23 to 62-15), and described an unspecified prior time when he knocked on Cantor's door in Teaneck and asked Cantor to "redeem" himself by ending the relationship with Meneut, but Cantor declined. (21T 64-4 to 66-3) Defendant said that when he had asked Meneut a few months before Cantor's death whether their daughters had met Cantor, the answer was no, but that he learned that one of his daughters had met Cantor just a day before the interrogation, on March 6, 2011. (21T 66-18 to 67-18)

When asked about his whereabouts on March 6, 2011, defendant told police he had dropped off his daughter with Meneut that night at "probably say more like 8:30ish," and had gone home, where he drank between two and four beers, while spending time on his computer and watching television, before walking to a local deli that is "between 75th and 76th on 23rd Street" at 1 a.m. to

buy more beer. (21T 67-10 to 74-17) Defendant also said he was washing dishes during two hours of that time after he arrived home from Meneut's apartment, and was "watching TV back and forth." (21T 99-1 to 5) He told police he did not go anywhere else between arriving home after dropping the girls off and 1 a.m. (21T 75-13 to 17) He also made clear that he did not leave Manhattan on March 6, 2011. (21T 79-14 to 20; 21T 90-15 to 18) As discussed in far more detail in Point II, infra, police spent a lot of time accusing defendant of having been in New Jersey, repeatedly offering their opinion, over and over, that, indeed, he was there -- e.g., "I know you went over there last night" -- but defendant never changed his statement that he did not leave Manhattan that night, and, as noted elsewhere in this brief, the State never found any evidence to contradict him about that point. (21T 94-13 to 17; 21T 133-24 to 25; 21T 134-17 to 135-14; 21T 136-8 to 9; 21T 137-8; 21T 138-3 to 8; 21T 141-7 to 8; 21T 145-17 to 18; 21T 147-3 to 21; 21T 149-6 to 10; 21T 151-9 to 12; 21T 157-12 to 13; 21T 158-17 to 18; 21T 169-20 to 21) Indeed, Brazofsky admitted that by the close of the interrogation, he had not obtained probable cause to charge or arrest defendant, and, defendant was not arrested until May 2012. (22T 171-5 to 179-5; 17T 147-20 to 23)

Defendant admitted that, in total, he went to Cantor's house previously three times to speak with Cantor, with the third and final time being "before last summer," i.e., summer of 2010. (21T 123-12 to 21; Da 142) The first time, he

asked Cantor to see the bed where Cantor and Meneut had sex, and Cantor showed him the bed in the basement; however, defendant could not recall the exact conversation that they had when Cantor did so. (21T 128-6 to 129-9) The second time he visited Cantor, it was not "confrontation[al]" and defendant said he "just wanted to gauge what the situation is" and left the encounter not having "excuse[d]" Cantor, but "understand[ing]" him. (21T 80-11 to 81-21)

Defendant admitted that he learned of the affair via Meneut's email, which he accessed via a "key logger" that he placed on her computer. (21T 84-1 to 85-25) He then copied and saved the emails. (21T 85-5 to 19) Defendant also admitted that he owned a Beretta 9-mm. handgun "like ten years ago" but surrendered that one to police when his daughters were young, and "kept the magazines" for it. (21T 124-14 to 125-24) He also admitted showing Meneut another gun ("a small Beretta") that he borrowed from a friend in February 2010 when defendant was receiving threatening emails, but he told police that he got rid of that gun by giving it back to his friend after only "a day or two." (Da 189 to 194; 21T 179-24 to 185-11)

Cross-examination of Brazofsky focused on the lack of any evidence of the following: that defendant drove to New Jersey via a bridge or tunnel on March 6, 2011; that defendant went to New Jersey that date via any other method like cab, rail, bus, or car-for-hire; phone records, DNA, or any other forensic evidence to indicate defendant's presence in Teaneck on the night in question;

or any evidence that defendant's car ever moved after defendant parked that car upon returning home at about 9 p.m. on March 6, 2011, after dropping his daughter off with Meneut. (22T 160-3 to 166-13; 23T 93-4 to 7) Finally Brazofsky agreed that while police reviewed surveillance video from locations in Manhattan and claim to have seen defendant on a surveillance video at about 10:30 p.m. walking in the area of his Manhattan apartment, there is no time after that point when police claim defendant can be seen on video. (23T 109-10 to 20)

Lieutenant Michael Guzman testified that he and other law-enforcement searched defendant's Manhattan apartment pursuant to a warrant on the evening of March 8, 2011. (17T 113-8 to 115-1) They seized computers, a gun-cleaning kit for a .357 or a 9-mm. handgun, 9-mm. bullets, and two 9-mm. magazines. (17T 119-6 to 131-5) Guzman admitted that the bullets, cleaning kit, and magazines have nothing to do with the Cantor case because they do not match the caliber of the bullet that killed Rob Cantor. (17T141-8 to 146-10) No gun was recovered, and the search took four hours with police searching "through everything." (17T 145-18 to 20; 17T 150-12 to 17) Police were not looking for trace or forensic evidence. (17T 151-2 to 4)

Also on March 8, 2011, police executed a search warrant at defendant's Manhattan computer store, according to Detective James McMorrow. (17T 163-3 to 164-18) Police seized a number of computers and hard drives in that search. (18T 62-8 to 65-5) McMorrow admitted that police "used every resource that's

available" to find some evidence that defendant was in New Jersey at the time of Rob Cantor's death, but they found none. (18T 83-16 to 84-1; 18T 78-18 to 80-14) In the search police also found notes and search results for contact information -- i.e., phone numbers, addresses, and email addresses -- for Rob Cantor, Ted Finkelstein, and Susan Kirschenbaum, along with a notation of the names of Cantor's two children. (17T 173-14 to 177-3) Also found were printouts of emails between Cantor and Meneut along with a copy of the separation agreement between defendant and Meneut, and Google directions from Meneut's 475 FDR Drive apartment in Manhattan to Cantor's Teaneck house. (17T 183-7 to 185-22) Finally, the police also found a November 2010 email from defendant to Ki Lee with the subject "Thing" and the email linked to a web page for a .380-caliber Walther handgun. (17T 188-5 to 189-22)

Detective Cecelia Love testified that a combination of video surveillance and a mobile license-plate reader that is affixed to some New York patrol cars shows defendant's Honda Pilot parked on East 76th Street near First Avenue from at least 10:10 p.m. (the video surveillance) on March 6, 2011 to 1:31 a.m. (the plate reader) on March 7, 2011. (19T 40-16 to 41-19) In other words, defendant's car did not move from that spot in Manhattan at any time during which neighbors heard a loud bang or saw a fire at Rob Cantor's house in Teaneck. Police also confirmed that, just as defendant had told them, he was at a Manhattan deli near his apartment buying beer between 1 and 2 a.m. (19T 42-

1 to 21) When Detective Love drove on a Sunday night "at about the time of the murder," it took her 20 minutes to drive from the vicinity of defendant's Manhattan apartment to Cantor's house, but she is "not 100 percent" on that timing. (19T 43-17 to 44-1) Indeed she could not even recall the month or year that she did that test drive. (20T 154-22 to 24) Love also noted that onboard computers seized from defendant's vehicle on March 7, 2011, provided no evidence regarding his travel on the night of Cantor's death. (19T 46-1 to 47-15)

Love also acknowledged that there is no DNA or fingerprint evidence against defendant. (19T 47-6 to 19) Police viewed video from the George Washington Bridge to no avail as well. (19T 49-23 to 25) A check of taxi, limousine, and black-car services showed one trip by someone from La Guardia Airport to Teaneck that night -- but at 1:30 a.m., after the crime. (19T 48-18 to 49-6) Love testified that police found no communications between Rob Cantor and the "Israeli mafia" when they searched emails. (19T 71-7 to 12) She also testified, as addressed further in Point II infra, that a search of Cantor's computer in her opinion yielded no evidence of any other suspects. (19T 66-15 to 70-11) Love testified that when police viewed video from Sophie Meneut's apartment building, defendant could be seen walking in the door of that building with his daughter at 7:59 p.m., meeting another daughter, and leaving at 8:20 p.m., and he was next seen on another surveillance video at 10:10 p.m. parking his car

near his apartment. (19T 98-3 to 101-13; 19T 106-22 to 25) Defendant had told police that he went home and arrived about 9 p.m., leaving some time that evening unaccounted for in the State's estimation, but that time is over two hours before the "bang" and fire at Cantor's house. (19T 102-16 to 17) Love also testified that defendant is seen on a surveillance video walking toward his parked car at 10:30 p.m. with a bag in his hand (19T 111-9 to 12), and when he arrives at the car he spends two minutes inside, and then closes the car door, and walks away with a bag in his hand, across East 76th Street, until he is last seen at 10:35 p.m. (19T 114-15 to 117-19) Defendant's car remained parked in that same spot from 10:10 p.m. through the next morning, according to Love. (20T 96-2 to 5)

Love testified that a search of a storage unit that was in defendant's name revealed nothing related to Rob Cantor's death. (20T 8-8 to 15) Love agreed that call records for defendant's cell phone did not show that phone connecting to any New Jersey cell towers around the time of Cantor's death, but she testified that police suspected that defendant had a new phone number as of March 8, 2011, i.e., after Cantor's death, because that number -- registered to a "Sam Lee" -- was a frequent caller thereafter to defendant's brother, Jimmy Tung. (20T 14-7 to 19-14) The last contact that defendant's regular cell phone had on March 6, 2011, was a call to Sophie Meneut at about 8 p.m., right before his interaction with his daughters at Meneut's apartment building, and his phone made no

contact with anyone for the next 24 hours. (20T 14-14 to 25)

Love admitted that police reviewed 17 CDs of cars going over the George Washington Bridge at the times in question and did not see defendant or his car. (20T 96-6 to 23; 20T 103-13 to 104-24) Love also agreed that no witnesses place defendant anywhere near Rob Cantor's house on the night of his death. (20T 120-6 to 7) She also admitted that a neighbor of Cantor saw a "suspicious" white male in the area of ("just a couple of houses away from") Cantor's house around the time of the crime, but police "did not make any effort" to locate that man. (20T 125-7 to 133-23) Love further agreed that police did not show photos of defendant to workers at toll booths at bridges or tunnels from New York even though "I suppose we could have." (20T 145-13 to 20)

Heather Norman, an expert in cell-site analysis, testified that call records showed defendant's phone only connecting once to a New Jersey cell tower: on May 21, 2010. (23T 144-12 to 16) But the call records she analyzed would not show anything in that regard unless a call or text was sent or received. (23T 145-8 to 12) Norman confirmed that the last call to or from defendant's phone on March 6, 2011 was at 7:47 p.m. (23T 146-12 to 18) She also reiterated Detective Love's claim that a comparison of calls from defendant's regular cell to his brother with calls from the "Sam Lee" phone account that started on March 8, 2011, led police to believe that defendant started using that new phone himself as of March 8, 2011. (23T 146-19 to 158-10)

Detective Kristine Paxos testified as to what the State believed was defendant's internet and computer usage from the time he learned of Meneut's affair with Rob Cantor through the time shortly after Cantor's death. The gist of her email-related testimony was that the State believed defendant set up anonymous email accounts around the time he learned of the affair in February 2010 in an effort to persuade Meneut and Cantor to end their relationship, and that that effort also involved defendant pretending to receive threatening emails from an anonymous source. (16T 127-7 to 133-25)

Paxos testified that an emails from an address associated with defendant were sent on February 13, 2010, to defendant's friend Sandra Tesilapitanos complaining, and seeking advice, because Meneut was "madly in love with" someone who is married and she was planning on moving out. (16T 141-9 to 143-21) That same day, a Gmail user named "eor247" -- whom the State believed to be defendant based on the IP address at issue -- sent an email to Cantor's friend Lawrence Bush that feigned interest in making professional contact with Cantor. (16T 145-9 to 25) Then, again that same day, the "eoralld" Gmail account, which the State also claimed was defendant's based on the IP address, began emailing Rob Cantor, signing the emails as "E," with references to Cantor's affair with Meneut, and how "uncool" that affair was because "she is married and has three little kids." (16T 146-10 to 148-5) On February 15, 2010, defendant was emailing his friend Sandra stating that he had learned that

Meneut and Cantor had sex but that he still gave Meneut a Valentine's Day card. (16T 148-13 to 24)

Paxos testified that by February 16, 2010, the "eoralld" account was sending emails to defendant asking to "meet," and to Cantor asking him to stop the affair (one was entitled "Time to stop"), and that Cantor responded the next day, telling "eoralld" that the affair was "over" and that he was "sorry" for "the pain it has caused." (16T 150-19 to 23) Then Paxos detailed November 2010 emails, mostly from "eoralld" to defendant, which the State believes were sent by defendant to himself, intended to allow defendant to urge to Meneut that she, defendant, and their daughters were all in danger from some unknown outsider that had a connection to Rob Cantor. (16T 154-21 to 156-12) Paxos also testified that when she went through Rob Cantor's emails, she was of the opinion that he received no other "concerning" or "threatening" communication from anyone else, an improper lay opinion that is addressed in Point II, infra. (16T 158-15 to 161-1) On October 29, 2010, a then newly-created Facebook account associated with the "eoralld" email account also sent a Facebook message to Susan Kirschenbaum telling her that Cantor "has been cheating on you with a younger woman for the past year," and offering "more information" if she wanted it. (16T 164-1 to 166-20)

Paxos testified that on February 16, 2010, well over a year before Cantor's death, defendant's personal email sent Bing driving directions to defendant's

work email and those directions were from defendant's Manhattan apartment to Cantor's Teaneck address and indicated the drive would take 24 minutes. (16T 170-17 to 173-7) Paxos also testified that in February 2011 defendant appeared to start using a program to "randomize" his computer's IP address to different locations around the world. (17T 27-18 to 30-19) She also detailed the November 2010 email that Ki Lee received from defendant about the Walther .380 magazine, and she noted that defendant had some bookmarks in his internet browser for gun manufacturers. (17T 32-2 to 35-4) However, on cross-examination defense counsel got Paxos to admit: that she did not know defendant was a lawful gun owner at one point, that there is nothing to indicate that defendant made any gun-related purchases via any of those websites, and that there were many non-gun-related bookmarks on defendant's computer. (17T 95-8 to 106-4) Cross-examination also sought to demonstrate how non-damning any of the email evidence really was by getting Paxos to admit that while she turned over that evidence to the prosecutor in May 2011, it was not until a full year later, in May 2012, that defendant was arrested. (17T 88-1 to 89-1) Paxos further admitted that while some of the emails that the State believed were from defendant raised a "concern," or were "important," none of them contained any direct threats of harm to anyone. (17T 82-1 to 84-3) Paxos also admitted that she would not have opened any of Cantor's emails from the Ashley Madison dating website because, while she knows what that website caters to, she did not

view her job as trying to figure out who killed Rob Cantor, but, rather, to try to prove that defendant killed him. (17T 75-3 to 20)

Paxos testified that most of the gun bookmarks on defendant's computer were made in February 2010, around the time he learned of the affair, and that the last of them was dated August 24, 2010. (24T 90-7 to 94-17) She also noted that on one of defendant's computers was a file called "Sophie" that contained keylogging software and emails between Cantor and Meneut. (24T 30-5 to 32-17) There was also information on that computer about Susan Kirschenbaum's business, a photo of Rob Cantor, a search for driving directions to Mount Tremper, where Cantor and Meneut vacationed in 2010, and another set of driving directions to Cantor's home from defendant's apartment; that one indicated that the drive would take 22 minutes. (24T 34-5 to 37-24; 24T 46-1 to 2; 24T 67-15 to 22) When Paxos searched defendant's home computer for activity from the evening of March 6, 2011 to the next day, she found: a Windows user named "Lord Tung" used the computer from 6:21 p.m. to 7:25 p.m.; the computer in "sleep mode" from 9:48 p.m. until 1:11 p.m. when it then performed "internal operating systems activities" until about 2:18 a.m., whereupon a program called CCleaner was used to delete some files. (24T 105-18 to 108-7) Also around that same time, some unidentified emails were "recycled" which Paxos equated with "thrown in the trash." (24T 116-7 to 123-11) Paxos tried hard to convince the jury that a significant "wiping" of "a

portion" of defendant's hard drive occurred via the CCleaner program, referencing "over one million lines of [wiped] files," but she admitted, in light of the fact that "lines" is not really a meaningful measure of computer data, that she does not know how many "bytes" of data were wiped, even saying directly, "I cannot tell you how much qualitatively data was wiped." (24T 213-17 to 20; 24T 129-5 to 10; 24T 134-16 to 18; 24T 166-3 to 167-5) Paxos also admitted that despite that "wipe," her office still found a lot of data on the defendant's computer, and that defendant owned a computer business in which he frequently used such software and would do work at times like 2:30 a.m. (24T 169-9 to 12; 24T 176-18 to 181-1)

Paxos admitted that any computer inactivity on the night of March 6, 2011, does not demonstrate what defendant was doing at that time, and that he could very well have been doing dishes and watching TV like he told police. (24T 182-11 to 183-9; 24T 192-14 to 193-7) Paxos noted that on March 9, 2011, two days after his interrogation, defendant searched for news articles online regarding Cantor's death. (24T 170-6 to 15) Paxos also admitted that law enforcement never found in their computer searches: any evidence that defendant was trying to cover up a crime; any evidence that he arranged transportation to Teaneck; any evidence of a plan to kill Cantor by himself or by anyone he might have encouraged or hired; any plan to commit arson or even research regarding accelerants or fires; or any evidence of a purchase of a gun,

bullets, or a magazine. (24T 202-12 to 203-25)

Finally, because the defense called two witnesses to try to demonstrate to the jury that a press release from Bergen County Prosecutor John Molinelli during the investigation seemed to indicate that law enforcement might have considered a suspect/assailant other than defendant at one point (25T 72-3 to 78-16; 25T 9-5 to 6), the State called Molinelli to testify that he meant only that the State at the time was not ruling out the involvement of an accomplice (25T 109-6 to 111-15), but that was not ultimately a theory that the State pursued at trial.

LEGAL ARGUMENT

POINT I

THE STATE PRESENTED INSUFFICIENT EVIDENCE OF DEFENDANT'S GUILT; AS DEMONSTRATED BY THE RECENT OPINION IN STATE V. LODZINSKI, THE MOTION FOR A JUDGMENT OF ACQUITTAL, AT THE CLOSE OF THE STATE'S CASE, SHOULD HAVE BEEN GRANTED WITH REGARD TO: MURDER, ARSON, THE WEAPONS COUNTS, AND DESECRATION. (RULING AT 24T 226-10 TO 242-1)

The State attempted to prove this case by focusing the proofs on why it suspected defendant of murder and related offenses, rather than any proof that he actually committed the most serious crimes charged. The State introduced evidence of: defendant's motive to commit the crime because of his wife's affair with the decedent, defendant's anger over that affair, and defendant's

opportunity (timewise) to commit the crime, along with the fact that the State did not have anyone else to point to as a suspect, nor any idea where defendant was at the time of the death of the decedent (but particularly no proof that he was even in New Jersey, let alone anywhere near Teaneck). The State's theory of guilt amounted to, "If not defendant, then who else would have done it?" Indeed, at the motion for a judgment of acquittal at the end of the State's case, the trial prosecutor opposed that motion and described the State's theory of guilt in almost exactly those terms: "You either believe that, you know, drawing all favorable inferences, that defendant would be the only one who would want to kill Robert Cantor and he's unaccounted-for during the murder, or you don't." (24T 225-22 to 25) (emphasis added) In summation, the prosecutor said, "[T]his case is all about motive." (26T 73-15 to 16) (emphasis added) In other words, the State's theory was that a murder/arson victim plus a lot of proof of motive -- but no proof that the defendant was even in the state of New Jersey at the time -- is sufficient proof of murder, arson, the weapons counts,[2] and desecration.

Unbelievably, the judge's ruling denying the acquittal motion on those counts essentially accepted that theory and was not much different in its reasoning. (24T 226-10 to 242-1) The judge cited the following evidence as

[2] Notably, the weapons counts were focused only on the time immediately surrounding the date of the decedent's death, March 6, 2011, not earlier dates. (Da 3)

sufficient proof of defendant's guilt to allow the case to go to the jury on those counts: someone clearly shot and killed Cantor and burned the house down (24T 10 to 228-21); in the past, defendant had "personal contact with Mr. Cantor on more than one occasion" and sent anonymous emails to Cantor, Meneut, and Kirschenbaum (24T 228-22 to 229-19); defendant was trying at one point to buy a gun magazine of the same caliber as the bullet that killed Cantor (24T 229-24 to 230-9); defendant had the opportunity to travel to Teaneck on the night of the killing, even if there is no proof that he did so, and he may have lied to law enforcement when he told them he was home that night as early as 9 p.m. (24T 230-12 to 231-24; 24T233-18 to 234-6); defendant put spyware on Meneut's computer and learned of the affair that way (24T 232-1 to 10); and defendant had a clear motive to kill once he learned of the affair. (24T 234-7 to 235-3)

That's it. Neither the judge nor the prosecutor could point to any evidence that defendant was even in New Jersey, let alone in Teaneck at Rob Cantor's house, when Cantor was murdered. What the State's case was missing was any proof, forensic or otherwise, that defendant committed the murder of Cantor and the other charged crimes. Their proofs were only demonstrative of why one might suspect the defendant of murder. Thus, when defense counsel moved for a judgment of acquittal at the close of the State's case, under State v. Reyes, 50 N.J. 454 (1967) (24T 218-18 to 223-4), the judge should have granted that motion with respect to the charges of murder, arson, the weapons counts, and

desecration. Instead, after the State cited only the reasons to suspect defendant might have killed Rob Cantor, as opposed to proof that he actually did so (24T 223-6 to 226-9), the judge denied the motion. (24T 226-10 to 242-1)

Because, in fact, the State's evidence fell far short of any proof that defendant committed those crimes, instead focusing only on why the State suspected him of doing so because of his motive and opportunity, the State's proofs fell short of the Reyes standard and the motion for a judgment of acquittal on murder, arson, the weapons counts, and desecration should have been granted. Defendant was denied due process under the Fourteenth Amendment and the corresponding provisions of the state constitution, and his convictions for those counts should be reversed and judgments of acquittal entered.

The constitutional guarantee of due process is violated if, when the State's proofs are viewed in a light best for the State, those proofs do not support a guilty verdict on all elements of a crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-319 (1979); Reyes, 50 N.J. at 459.

When addressing a motion for a judgment of acquittal at the end of the State's case,

> the question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

Reyes, 50 N.J. at 458-459. Notably, there "must be not only presence upon the scene," but proof, direct or circumstantial, of "an actual participation" in the crime charged. State v. Fox, 70 N.J.L. 353, 355 (Sup. Ct. 1904) (emphasis added).

Obviously, resolution of an acquittal motion at the end of the State's murder case is going to depend entirely on the evidence that was offered in the State's case. Reyes, 50 N.J. at 458. Often, it will be easy to properly deny the motion. Where, as in Reyes itself, there is clear proof that the defendant shot someone, and the only question is one of criminal intent, the acquittal motion should be denied. Reyes, 50 N.J. at 460-462. Similarly, a motion for acquittal is properly denied when: even though the victim's body is never found, the last person seen with the victim is the defendant, in his car; the defendant has been trying to lure young girls into his car; that car has bloodstains in the trunk and on the rear bumper; underwear and hair clips similar to those used by the victim are found in the defendant's car; the defendant bragged that he dumped the victim's body after she died; and the defendant told someone, "They'll never find that stinking broad." State v. Zarinsky, 143 N.J. Super. 35, 46-48 (App. Div. 1976), aff'd on other grounds 75 N.J. 101 (1977)[3]; see also State v. Loray,

[3] Notably, however, Justin Albin, describes Zarinsky as "arguably near the outer limits of a sustainable verdict." State v. Lodzinski [II], 246 N.J. 331, 401 (2021).

41 N.J. 131, 138 (1963) (confession by defendant, no matter how potentially fraught with credibility issues, is enough to deny an acquittal motion); State v. Wilder, 193 N.J. 398, 410-412 (2008) (evidence that the defendant used a heavily-booted foot to kick the victim's head, causing the victim's death, was sufficient to prove serious-bodily-injury murder).

But other murder cases can be closer calls, and the manner in which the Supreme Court resolved the issue in State v. Lodzinski[III], 249 N.J. 116 (2021) (hereinafter "Lodzinski"[4]), particularly underscores the line in the sand regarding acquittal motions in murder cases: as the Fox Court said over one hundred years ago, there must be some proof in the State's case that leads to the conclusion not merely that the defendant was present or had a motive to kill, or even covered up the victim's death, but that the defendant actually participated in purposely or knowingly causing the death of the victim. 70 N.J.L. at 355. As will be seen in the discussion that follows, it is that proof that the State's case

[4] The Lodzinski case was heard twice in the Supreme Court within a few months. After an Appellate Division affirmance, State v. Lodzinski [I], 467 N.J. Super. 447 (App. Div. 2019), the first Lodzinski opinion in the Supreme Court was a 3-3 split, and, hence, an affirmance of the conviction, Lodzinski [II], 246 N.J. at 339, but reconsideration led to a 4-3 reversal of the conviction in the third Lodzinski opinion, which, as noted, is simply referred to as "Lodzinski" in the rest of this brief, as opposed to Lodzinski [III]. The two earlier opinions are not cited any further.

was missing, even falling well short of what was insufficient in Lodzinski.[5]

Michelle Lodzinski was convicted of the murder of her young son, Timmy, whose partial remains were found not far from Lodzinski's former place of work. There was no evidence of a cause of death and very little evidence against her, but there was just enough for three members of the Supreme Court of New Jersey to conclude in dissent that the post-trial motion for a judgment of acquittal was properly denied. 249 N.J. at 162-168 (Patterson, J., dissenting). Conversely, the four-member majority characterized the evidence of murder as insufficient, and held that when the State "offered no direct or inferential evidence that Lodzinski purposely or knowingly caused Timothy's death. . . [b]ootstrapped inferences cannot substitute for the proof necessary to satisfy an element of the offense" of murder. Lodzinski, 249 N.J. at 157.

Justice Patterson's dissent for the three members of the Court that voted to uphold the conviction pointed to the following evidence as proof of Lodzinski's guilt: (1) someone killed Timmy and left his body in or near the creek at the Raritan Center on property where Lodzinski was employed; (2) Lodzinski was the last person seen with Timmy; (3) some witnesses identified a blanket that was deposited in the woods near Timmy's remains as having come

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[5] Lodzinski addressed a post-trial motion for a judgment of acquittal, not one at the end of the State's case, as here, but that procedural difference does not affect the Court's discussion of the evidence in that case or what is, or is not, sufficient evidence to pass muster under Reyes.

from Lodzinski's home; (4) Lodzinski gave law enforcement a number of false and contradictory accounts of his supposed abduction; (5) Lodzinski had a pecuniary motive to kill her son. 249 N.J. at 162-168 (Patterson, J., dissenting). In sum, Justice Patterson's dissent found the reasonable inferences from the evidence to support findings of motive, presence, intent, consciousness of guilt, and, because of the blanket, a critical connection between Lodzinski and her son's dead body. Id.

As noted, despite that evidence, the Lodzinski majority disagreed, finding nothing but "speculation or conjecture" to suggest that Lodzinski purposefully or knowingly murdered her son. Id. at 158. The majority noted the absence of any direct evidence that Lodzinski killed her son, but agreed that circumstantial evidence could, in theory, be sufficient to convict in a given case, but not in Lodzinski. Id. at 146. However, the Court noted that "giving the State the benefit of reasonable inferences does not shift or lighten the burden of proof, or become a bootstrap to reduce the State's burden of establishing the essential elements of the offense charged beyond a reasonable doubt. Speculation, moreover, cannot be disguised as a rational inference." Id. at 145 (internal quotation marks and citations removed).

The Lodzinski majority further acknowledged that the blanket from Lodzinski's house that was found near Timmy's remains entitled the State to an inference against Lodzinski, including that she had lied to authorities more than

once about taking Timmy to a carnival on the night of his disappearance. Id. at 150. But even so, without any forensic or physical evidence beyond the blanket, and even with Lodzinksi's statements and behavior as consciousness of guilt, the majority was struck by one simple fact: there was nothing to show Lodzinski purposely or knowingly murdered her son. "Viewing the inferences to be drawn from Lodzinski's inconsistent statements in the light most favorable to the State, a reasonable trier of fact could conclude that she was deceptive -- and that her false accounts were evidence of consciousness of guilt. But the question remains, guilty of what?" the majority wrote, noting that the "testimony did not shed light on exactly what happened to Timothy, and the medical examiner" -- while opining that the manner of death was homicide, but that there was an undetermined cause of death -- "did not indicate that Timothy's death was purposely or knowingly caused." Id. at 151-152.

The majority further held that "even when Lodzinski's inconsistent statements are viewed in the light most favorable to the State, without more -- without proofs establishing Lodzinski's precise conduct -- the inconsistent statements do not illuminate whether Lodzinski was responsible for a negligent, reckless, or purposeful or knowing act of wrongdoing." Id. at 152. Even lies and inconsistent statements do not allow a conclusion reached by "speculation" that a person possesses the mens rea necessary for murder. Id. Ultimately, the Lodzinski majority even conceded that "[a] rational jury considering that

evidence in the light most favorable to the State could conclude that Lodzinski did not take Timothy to the carnival and that she had some involvement in his disappearance, death, and burial," but without proof that she intentionally killed him, a murder verdict could not survive. Id. at 157 (emphasis added).

Lodzinski was, obviously, a close call. The same simply cannot be said here. The State's proofs in Lodzinski -- although legally insufficient to pass a Reyes motion -- substantially dwarf the proofs here, and the ultimate ruling in the instant case should be much easier to reach: that there was insufficient proof presented by the State of murder and related crimes. In Lodzinski, there was proof of motive, physical presence both with the victim at the last time and place he was seen and at the place where the body was found, opportunity, actual physical evidence (the blanket) tying the defendant to the victim's dead body, and evidence of consciousness of guilt (repeated lies to law enforcement during the investigation). Yet that was not enough. Here, there was no evidence even of defendant's presence in the state of New Jersey, let alone near the scene of the crimes, no forensic evidence, no eyewitness identification of the defendant, and literally no proof that defendant killed the victim. All the State could prove was: (1) a motive to kill because of the Meneut/Cantor affair; (2) defendant's frustration and anger over that affair along with his attempts to both learn about the affair via the keystroke logger and then dissuade Meneut and Cantor from continuing it via anonymous emails; (3) his attempts to fool Meneut into

believing that Cantor or those around him might be dangerous via anonymous emails; (4) that about four months before Cantor died, defendant tried to buy a magazine of the same popular caliber as the bullet that killed Cantor; and (5) what can only be described at best as the most meager of evidence of consciousness of guilt (the fact that defendant did not tell police about going out to his car at 10:30 p.m., but not moving that car, and the fact that he, a computer-store owner, ran a disk-cleaning program on his computer at an hour when he often did computer work). The proofs here were not even Lodzinski-level; they were far short of Lodzinski. Again, the State could not even demonstrate that defendant was in the state of New Jersey; in fact, all evidence seemed to show that he was not.

While the Lodzinski majority was forced to reach a close call in a case where the evidence showed the defendant in that case may have "played a role in" the victim's "disappearance and death," but there was no proof that she purposely or knowingly killed him, id. at 158, here there was much less evidence than that. There was no proof that defendant had anything to do with the death of the victim. Motive, opportunity, a failure to be fully truthful with police, and a dead victim in another state do not add up to proof that defendant killed that victim. Under Lodzinski, there has to be something to prove defendant was at the scene of the crime. What the State possessed (and presented to the jury) was the evidence of why it suspected defendant of murder. What the State was

missing was the necessary proof under Lodzinski and Reyes that their suspicions were correct. This Court should reverse the convictions for murder, arson, the weapons counts, and desecration and remand for entry of judgments of acquittal on those counts.

POINT II

THE STATE IMPROPERLY PRESENTED THE JURY WITH MULTIPLE UTTERLY INADMISSIBLE EXPRESSIONS OF LAY OPINION FROM ITS WITNESSES. (PARTIALLY RAISED BELOW; RULING AT 19T 70-5)

Notably, one of the principal reasons that defendant's convictions were reversed in his appeal from his first trial was that the jury heard, over and over, from Detective Brazofsky that he personally believed defendant was lying to him and that he had the opinion that defendant was present at Rob Cantor's home "four times" -- meaning the three prior times that defendant admitted, plus a fourth time on the night of the murder. State v. Tung, 460 N.J. Super 75, 100-104 (App. Div. 2019). The opinion made quite clear that it was not merely Brazofsky's expression of his impermissible lay opinion from the witness stand that was improper, but also the fact that the playback of the defendant's statement contained the very same improper expressions of the same opinions from both Brazofsky and his partner. Id. at 102-103 (referencing not merely the impropriety of Brazofsky's lay-opinion testimony but also of the "multiplicity

of times during the playback when the officers expressly stated they knew defendant was lying and firmly believed in his guilt") (emphasis added).

At the retrial -- unbelievably, in light of the reversal -- while the trial judge made sure to prevent Brazofsky from offering these opinions from the witness stand, and even instructed the jury briefly to disregard any opinions "from the witness" regarding defendant's credibility (23T 12-7 to 14) (emphasis added), the defendant's statement to police containing Brazofsky's and Detective Mark Fisco's opinions was played for the jury without redacting those opinions from the statement. Thus, the jury heard Brazofsky and Fisco telling defendant over and over during the interrogation that they were both of the opinion that he was in New Jersey at Rob Cantor's house on the night in question -- the very point about which the State's case was completely lacking in proof, and the very thing the jury was not supposed to hear according to the opinion of this Court. (21T 94-13 to 17; 21T 133-24 to 25; 21T 134-17 to 135-14; 21T 136-8 to 9; 21T 137-8; 21T 138-3 to 8; 21T 141-7 to 8; 21T 145-17 to 18; 21T 147-3 to 21; 21T 149-6 to 10; 21T 151-9 to 12; 21T 157-12 to 13; 21T 158-17 to 18; 21T 169-20 to 21) Then, the jury heard it all again right before they returned a verdict. Seizing upon the prosecutor's invitation in summation to ask for a playback of the statement during jury deliberations (26T 163-10 to 14), the jury did exactly that (28T 4-24 to 5-1), and the entire statement was replayed for them, allowing jurors to hear all of those improper opinions again -- shortly after which guilty

verdicts were returned. (28T 6-24 to 141-1; 28T 143-2 to 3)

The introduction of improper lay opinion did not stop there at the retrial. Detective Paxos testified that she reviewed the content of 20,000 emails and that, in her opinion, none of the emails Rob Cantor received from anyone else contained any content that she believed to be "concerning" or "threatening." (16T 158-15 to 161-1). Similarly, over an objection by defense counsel that the judge overruled (19T 70-5),[6] Detective Love told the jury that in her opinion -- after "reviewing the computers and flash drives that were seized from Robert Cantor's residence and business" -- she believed there was nothing "identifying any potential suspects" other than defendant. (19T 70-7 to 11)

Because, as this Court acknowledged in part in its prior opinion reversing the guilty verdicts in the first trial, the lay-opinion evidence outlined above violated the applicable evidence rules and did so in a manner that had the clear capacity to affect the verdict, defendant's rights to confrontation under the Sixth Amendment and to due process and a fair trial under the Fourteenth Amendment, as well as under the corresponding provisions of the state constitution, were violated, and his convictions should be reversed, and the matter remanded for

[6] Because this was the only objection lodged at the retrial to any of this improper opinion evidence, defendant has labeled this point "Partially Raised Below" and he agrees that the legal merit of the point should be analyzed under the plain-error rule, R. 2:10-2, i.e., whether its admission was clearly capable of causing an unjust result.

retrial of any counts that are not the subject of acquittals pursuant to Point I.

As this Court held in the prior appeal in this case, Tung, 460 N.J. Super. at 100-104, and then again on the identical error, as a matter of plain error in State v. C.W.H., 465 N.J. Super. 574, 593-598 (App. Div. 2021), the State should not, under any circumstances, be putting before the jury testimony or other evidence – including an interrogation recording, as in Tung or C.W.H. -- that offers an opinion about the guilt of the defendant or about other matters that invade the fact-finding province of the jury. See State v. McLean, 205 N.J. 438, 443 (2011) (interpreting N.J.R.E. 701, governing lay-opinion testimony, to forbid such evidence on matters); State v. Higgs, 253 N.J. 333, 365-367 (2023) (same). In McLean, 205 N.J. at 443, the Supreme Court held that "permitting an officer" that was not an expert witness "to testify about his [lay] opinion" that he believed he had observed a drug transaction violated N.J.R.E. 701 because it crossed the line from merely describing what the officer saw, as a factual matter, to offering an opinion regarding the significance of what the officer saw, which "invaded the fact-finding province of the jury," and therefore was reversible error. Similarly, in State v. Reeds, 197 N.J. 280, 286 (2009), the Supreme Court held that an expert improperly offered the opinion that everyone in a car had constructively possessed drugs, rather than letting the jurors make up their own minds about the facts. In both instances, the Court criticized the State for offering opinion evidence where the jury is perfectly competent to reach a

conclusion about the significance of what took place without the undue influence of lay (McLean) or expert (Reeds) opinion testimony. See McLean, 205 N.J. at 459; Reeds, 197 N.J. at 296-297. Likewise, in State v. Frisby, 174 N.J. 583, 594-595 (2002), the Court held it to be reversible plain error when police officers opined that they believed an account of the crime that inculpated the defendant.

There is no significant distinction between cases like McLean, Frisby, Reeds, Tung, C.W.H. and the instant case in regard to the improper opinions that were offered here, except that this case involved multiple types of such errors, and, thus, the basis for reversal here is even stronger. The opinions of Detectives Brazofsky and Fisco were again improperly played for the jury as part of the interrogation. Moreover, the improper opinions of Detectives Love and Paxos do not only violate the due-process and N.J.R.E. 701 concerns of McLean; rather, they additionally violate defendant's confrontation rights because they refer to matters not in evidence: the computer evidence that the State did not introduce because, in the stated opinion of those detectives, it contained nothing inculpatory against any other suspect. See State v. Watson, 254 N.J. 558, 610 (2023), quoting State v. Branch, 182 N.J. 338, 351 (2005) ("a police officer may not imply that he possesses superior knowledge, outside the record, that inculpates the defendant").

But the simple reason to reverse is ultimately the same as in those

improper-opinion cases: there was a pitched credibility battle here that the jury had to resolve, and the State should not have been offering improper opinion evidence to the jury to tip that balance. Here, that opinion evidence took multiple forms -- that law-enforcement officers are of the opinion: that defendant was at the scene of the crime when it occurred (repeated over and over in the interrogation); that 20,000 emails revealed no other potential suspect; and that the victim's computers also revealed no other suspect. Under McLean, Frisby, Tung, C.W.H., and Reeds, those improper opinions were -- just like the opinion that was the basis for the reversal in the first appeal in this case -- clearly capable of affecting the verdict. As noted in Point I, supra, the State had a serious problem in its proofs. Where there was no direct evidence to prove defendant committed these crimes, the improper admission of this opinion evidence was clearly capable of influencing the verdict. Any improper tipping of the credibility scales toward the State's version of events warrants reversal. Frisby, 174 N.J. at 596; C.W.H., 465 N.J. Super. at 596-598; Tung, 460 N.J. Super. at 100-104; State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995) (evidentiary errors in close cases regarding matters that could affect the verdict will necessarily require reversal);); see also State v. Hedgespeth, 249 N.J. 234, 253 (2021) (same), citing State v. Scott, 229 N.J. 468, 484-485 (2017). Defendant's convictions should be reversed and any convictions for which defendant is not acquitted under Point I

should be remanded for retrial of those counts.

POINT III

OVER DEFENSE OBJECTION, THE TRIAL JUDGE IMPROPERLY ALLOWED THE STATE TO ELICIT EVIDENCE FROM A WITNESS REGARDING THE HOMICIDE VICTIM'S ALLEGED FEAR OF THE DEFENDANT; SUCH EVIDENCE OF A VICTIM'S STATE OF MIND IS INADMISSIBLE HEARSAY UNLESS IT IS OFFERED TO REBUT A CLAIM OF SELF-DEFENSE, SUICIDE, OR ACCIDENT; ADDITIONALLY, NO LIMITING INSTRUCTION WAS GIVEN REGARDING THAT EVIDENCE. (EVIDENTIARY ISSUE RAISED BELOW WITH RULING AT 14T 52-12 TO 53-8; INSTRUCTIONAL ERROR NOT RAISED BELOW)

When Rob Cantor's friend Ted Finkelstein was on the stand for the State, the prosecutor asked him to "describe to us, um, Rob's demeanor and his reaction to those three visits by Tony Tung," and Finkelstein responded: "[Rob] was very upset by the visits, very concerned. Somewhat afraid, somewhat frightened." (14T 52-12 to 16) Defense counsel objected and the objection was first sustained by the judge, who told the jury to disregard that answer, but then the judge immediately allowed the prosecutor to ask again what Cantor's "demeanor" was regarding the visits from defendant and allowed Finkelstein to respond: "Rob was very upset and somewhat frightened and somewhat intimidated." (14T 53-3 to 8) (emphasis added)

Because Cantor's fear of defendant and his alleged feelings of intimidation from these visits was utterly inadmissible hearsay that could well have affected the jury's verdict, the admission of this testimony was in violation of the applicable evidence rules and denied defendant due process and a fair trial under the Fourteenth Amendment and the state constitution. Consequently, defendant's convictions should be reversed and the matter remanded for retrial.

Obviously, hearsay is inadmissible unless one of the hearsay exceptions applies. N.J.R.E. 801; N.J.R.E. 802. Equally obvious is that Finkelstein learned from a conversation with Cantor that defendant's visits had caused Cantor to fear defendant and feel intimidated. That conversation with Finkelstein was intertwined with Cantor's "demeanor" during that conversation. In other words, his demeanor in that regard had no independent existence; it was necessarily tied to hearsay utterances of Cantor's regarding defendant's visits to him. Thus, despite the State's clever trick of asking only about Cantor's "demeanor" on the second question, obviously hearsay rules were implicated in the answer and the judge should have realized that. The real question on appeal is whether there was any hearsay exception that might have applied. There was not, but, anticipating that the State will assert the "state of mind" exception of N.J.R.E. 803(c)(3), defendant will briefly address why that exception has absolutely no applicability here. This evidence was rank hearsay of the worst kind and had the clear capacity to influence the verdict.

While the state-of-mind hearsay exception in N.J.R.E. 803(c)(3) permits the admission, if relevant, of a "statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed," it could not be clearer from the case law that hearsay declarations of an alleged victim's fear of a defendant are generally not admissible because, very simply, the decedent's fear of a defendant is not relevant to prove any matter at issue in a homicide trial, where the principal question is whether the defendant killed with the requisite state of mind. The decedent's state of mind is irrelevant to that inquiry, yet highly prejudicial if it raises in the jurors' minds the specter of a frightening defendant worthy of the decedent's fear. See State v. Machado, 111 N.J. 480, 484-489 (1988) (decedent's fear of defendant in a homicide case was irrelevant to defendant's state of mind; further, decedent's state of mind was both irrelevant to any other issue in the case and highly prejudicial); State v. Benedetto, 120 N.J. 250, 260-261 (1990) (same); State v. Downey, 206 N.J. Super. 382, 391 (App. Div. 1986) (same); State v. Prudden, 212 N.J. Super. 608, 613 (App. Div. 1986) (same). The principal exception? If the defense is one of accident, suicide, or self-defense, then hearsay evidence of the decedent's fear of the defendant may be deemed relevant to rebut that defense. State v. Scharf, 225 N.J. 547, 570-571 (2016). Similarly, if the

decedent's state of mind directly demonstrates a motive for the defendant to kill, hearsay evidence of that state of mind may be relevant and admissible. State v. Calleia, 206 N.J. 296-297 (2011). Indeed, the first question in any case involving N.J.R.E. 803(c)(3) is whether the state of mind of the declarant is even probative of an issue in the case. State v. McLaughlin, 205 N.J. 185, 198-212 (2011); Calleia, 206 N.J. at 296-297.

New Jersey criminal-law decisions in applying this hearsay exception to a statement by a non-defendant adhere to these strict limitations on the scope of the state-of-mind hearsay exception. None of the decedents' statements of fear of the defendants in Benedetto, Downey, Prudden or Machado were deemed relevant to the issues in those cases, and hence those statements were deemed inadmissible hearsay. Similarly, in McLaughlin, when a declarant coconspirator told his girlfriend that he and defendant were planning a robbery, that hearsay statement was deemed inadmissible because the declarant was not on trial; the defendant was, and the declarant's state of mind could not be imputed to the defendant. 205 N.J. at 198-212.

In contrast, in Calleia the Court held the victim's hearsay statement regarding her intent to file for divorce to be admissible -- because her intent/state of mind in that regard demonstrated her likely future conduct, i.e., that she would file for divorce, which, if known to the defendant (and there was proof that he knew) would provide the defendant with a motive to murder her. 206 N.J. at

296-297. In Calleia, the proffered evidence of someone else's intent truly shed light on the defendant's motive -- because the declarant's intent provided defendant a motive for murder. Id. Similarly, in Scharf, evidence of the decedent's state of mind -- the fact that she feared the defendant and thought he was out to harm her -- was deemed relevant to rebut a defense of accident. The defendant "opened the door" by asserting that defense. 225 N.J. at 574.

Obviously here, defendant did not open any doors to evidence of Rob Cantor's state of mind. It was, like in Machado, utterly irrelevant to the actual issues before the jury, but highly prejudicial. 111 N.J. at 484-489. Additionally, even if the evidence had been somehow vaguely relevant, which it was not, Scharf makes it clear that even admissible hearsay evidence regarding the victim's state of mind in a homicide case can only be admitted with a careful limiting instruction explaining the narrow grounds on which the evidence was admitted and cautioning the jury not to use the evidence impermissibly against defendant. 225 N.J. at 580-581. The absence of such an instruction here was further error, clearly capable of influencing the verdict in a case where there was no proof of defendant's presence at the murder scene.

Here, the State padded its otherwise lacking case against defendant -- see Point I, supra -- with this irrelevant, but prejudicial, testimony that was necessarily hearsay because it clearly came from a conversation that the witness had with the decedent. Then, in direct conflict with Scharf, no limiting

instruction was delivered. Because such errors cannot be deemed harmless beyond a reasonable doubt in a case where the State's proofs were so thin, any convictions that are not the subject of acquittals pursuant to Point I should be reversed and remanded for retrial. See State v. Hedgespeth, 249 N.J. 234, 253 (2021) (any error that tips the credibility scale in favor of the State's proofs is reversible error), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (same).

CONCLUSION

For all of the foregoing reasons, defendant's convictions should be reversed. For the reasons in Point I, judgments of acquittal should be entered on the murder, arson, weapons, and desecration counts, and, for the reasons in Points II and III, the matter should remanded for retrial of any counts not the subject of acquittals pursuant to Point I.

Respectfully submitted,

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Date: August 16, 2024

New Jersey Superior Court
Appellate Division

DOCKET NO. A-001158-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Bergen County.
SUI KAM TUNG,	:	
Defendant-Appellant.	:	Sat Below: Hon. Christopher R. Kazlau, J.S.C., and a jury.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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OF COUNSEL AND ON THE BRIEF

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4T - transcript of jury selection dated May 9, 2023
5T - transcript of jury selection dated May 10, 2023
6T - transcript of jury selection dated May 11, 2023
7T - transcript of jury selection dated May 16, 2023
8T - transcript of jury selection dated May 17, 2023
9T - transcript of jury selection dated May 18, 2023
10T - transcript of jury selection dated May 31, 2023

[1] The State submits this brief pursuant to Rule 2:6-1(a)(2), as the question of whether an issue was raised in the trial court is germane to the appeal.

11T - transcript of motion dated May 31, 2023
12T - transcript of trial dated June 1, 2023
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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On June 4, 2013, a Bergen County grand jury returned Indictment Number 13-06-00793, charging defendant Sui Kam "Tony" Tung with count one, first-degree murder, N.J.S.A. 2C:11-3a(l) and (2); counts two and three, first-degree felony murder, N.J.S.A. 2C:11-3a(3); count four, second-degree burglary, N.J.S.A. 2C:18-2; count five, second-degree aggravated arson, N.J.S.A. 2C:17-1a(2); count six, second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a; count seven, second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b; count eight, second-degree desecration, N.J.S.A. 2C:22-la(2); count nine, third-degree hindering, N.J.S.A. 2C:29-3b(l); count ten, fourth-degree tampering, N.J.S.A. 2C:28-6; and count eleven, fourth-degree stalking, N.J.S.A. 2C:12-10b. (Da1 to 5).

Following a lengthy trial in 2015, a jury found defendant guilty of murder and seven other counts. The jury acquitted defendant of burglary and two counts of felony murder. The court sentenced defendant to life plus ten years, subject to a sixty-eight year parole disqualifier. (Da16 to 17).

Defendant appealed. On June 28, 2019, this Court reversed and remanded for a new trial due to the "cumulative error" of the court admitting "evidence concerning defendant's exercise of his right to counsel and his right to refuse a search" as well as "testimony of a detective . . . that defendant was

not truthful" during his interview with police. State v. Tung, 460 N.J. Super. 75, 104 (App. Div. 2019).

The Honorable Christopher R. Kazlau, J.S.C. presided over the retrial proceedings. Prior to trial, defendant and the State consulted and agreed to redact certain parts of his statement. On January 25, 2023, the court ruled on additional redactions where the parties could not reach agreement. (30T). Shortly thereafter, the court presided over the retrial, which lasted three months. (1T to 28T). On July 11, 2023, the defense moved for a judgment of acquittal. The court denied the motion. (23T281-6 to 228-23). On July 27, 2023, the jury returned a guilty verdict on all eight remaining charges: murder, aggravated arson, stalking, desecration, hindering, tampering, and the weapons crimes. (28T143-22 to 146-8; Da66 to 69).

On November 3, 2023, the court sentenced defendant to a life term with an eight-five percent parole disqualifier and five years of parole supervision on the murder conviction. The court either merged or ran the terms on the remaining convictions concurrently to the life term for murder. The court also imposed several fines and fees. (29T45-14 to 47-22; Da66 to 69).

COUNTER-STATEMENT OF FACTS

On March 6, 2011, after stalking Rob Cantor for over a year, defendant shot him in the head and set his body on fire. The evidence presented at trial proved defendant's guilt beyond a reasonable doubt.

A. Rob's Marriage to Susan Kirschenbaum; Defendant's Marriage to Sophie Meneut

Rob met Susan Kirschenbaum in 1976, and they married six years later. (14T151-8 to 19). They initially lived in Queens, but eventually moved across the Hudson River into Teaneck. (14T36-10 to 37-3). They had two daughters together. (14T151-7). Kirschenbaum testified that she and Rob drifted apart in the years preceding Rob's death. They tried therapy, but by late 2009 or early 2010 they accepted that their marriage was over. Rob started sleeping in the basement of their home, although they still ate meals together and shared a bathroom. During this period, Kirschenbaum informed Rob of her romantic interest in somebody else. (14T164-2 to 170-14; 15T35-23 to 36-2).

In September 2010, Kirschenbaum moved out of the house, and Rob slept upstairs again. (14T166-17 to 166-24). They agreed to sell their home and file for divorce. Kirschenbaum described the situation as "amicable." (14T167-7 to 21). For example, they still intended to spend holidays together as a family. (14T168-4; 15T48-17 to 23).

In 1996, Sophie Meneut met defendant in New York City while they were working for a language translation company. (15T72-23 to 73-7). They went on a few dates, rekindled the relationship years later, and eventually lived together in defendant's studio apartment on the Upper East Side of Manhattan. (15T73-17 to 75-7). Meneut and defendant married in 2004; they had three daughters from 2000 to 2005. (15T84-19 to 22, 220-14 to 221-9).

Amid having three children in five years, Meneut worked as a controller at a company, eventually rising to the position of director of finance. (15T70-5 to 71-8). Defendant stopped working in 2000, around the time Meneut became pregnant with their first daughter. (15T78-13 to 22). Defendant remained unemployed for all but two weeks between 2000 and 2008. In 2008, he opened a computer repair store near their apartment. The business failed. Defendant and Meneut lost $45,000 from the venture in three years. (15T78-11 to 83-13, 90-19 to 97-19; 16T70-2).

Their marriage suffered during this time. Meneut resented that all the childcare and financial responsibilities fell on her. In the fall of 2009, Meneut told defendant that she only stayed with him due to their children. (15T98-16 to 106-14). By December 2009, Meneut told defendant that she wanted to move out. (15T111-4 to 7).

B. Rob and Meneut Begin a Relationship; Defendant Harasses Rob and Obtains a Firearm

Meneut met Rob during a lecture at the New York Academy of Sciences in September 2009. (15T101-17 to 102-17). Meneut gave Rob her email; Rob sent her and one of his friends an academic article the next day. (15T103-1 to 22). Their relationship started with friendly emails. (15T104-1). In October, Rob told Meneut in an email that he had romantic feelings for her, but he apologized after Meneut demurred. (15T104-9 to 23). Following the exchange, Meneut developed feelings for Rob, and they met for lunch. They kissed in late November 2009. (15T105-1 to 3, 107-12 to 25).

On February 13, 2010, Rob and Meneut had sex for the first time, using a bedroom in the basement of Rob's home. (15T128-5 to 19). On that same day, defendant emailed a friend claiming that Meneut was "madly in love" with a married man in New Jersey. Defendant said that he had uncovered a new email address for Meneut, and she had sent "hundreds" of emails back and forth with this man. This caused defendant to shake and shed "non-stop" tears. (15T122-3 to 12; 16T141-13 to 22, 143-2 to 21).

Still on February 13, 2010, Rob received the first of a flurry of emails over a five-day period from the address "eoralld@gmail.com," which law

enforcement later tied to defendant.[1] One email stated that "eoralld" had seen Rob and Meneut together on the Upper West Side. A second email assured Rob that his secret was safe. A third email asked Rob how he felt about Meneut and asked, "She is French, yes?" A fourth email stated, "Man, this is so uncool. I didn't know she is married and has three little kids." A fifth email told Rob, "Time to stop." A sixth email replied to an apology from Rob, and asserted that "there is no justification." (16T146-10 to 152-3 to 7).

The next day defendant gave Meneut a Valentine's Day card. The card contained a message that parroted language she had used in emails with Rob. (15T130-4 to 15). On February 16, 2010, Meneut discovered that two of her emails from Rob had been forwarded to defendant's email account. (15T135-25 to 136-8). She also discovered that defendant had installed a spyware program on her computer with a keystroke logger. (15T141-13 to 143-13).[2] Later that day, defendant left his email account open on his computer. Meneut saw emails to his friend about her and Rob. Meneut also saw another email,

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[1] The email account was created using an internet-protocol (IP) address registered to defendant's computer store. The username for this IP address incorporated defendant's name and initials. (16T146-10 to 14).

[2] The account registration for the spyware program incorporated defendant's usernames from other online accounts. (15T141-13 to 143-13). Defendant set the program to record a screenshot every ten seconds. The police later found hundreds of screenshots saved on defendant's external hard drive, including emails between Rob and Meneut. (24T49-1 to 51-8, 55-15 to 18).

dated February 15, 2010, which informed the friend that Meneut and Rob "finally had sex" and "[i]t was great for [Meneut]." (15T136-11 to 141-7).

When defendant came home from work that evening, Meneut confronted him. Defendant claimed that a month ago he had received a box of emails between Meneut and Rob from an anonymous sender and that he had also received an email from "eoralld@gmail.com." Defendant asked Meneut questions about the relationship, including where she had sex with Rob for the first time. Meneut told him they slept together in Rob's basement bedroom. Defendant became very upset. He claimed that "eoralld" had been patronizing his store and may be connected to the Israeli mafia. Defendant forbade Meneut from calling Rob. (15T149-3 to 154-12).

During the subsequent police investigation, detectives discovered that on the same day, February 16, 2010, defendant received emails with a background report disclosing Rob's home address and family members. (16T170-1 to 172-4). Defendant also received an email with directions to Rob's home address. (16T172-8 to 173-15).

The next day, Meneut told defendant that she had called Rob. Defendant became hysterical telling Meneut, "You fucking kidding me?" and "[Y]ou fucking kill me!" Defendant showed Meneut an email purportedly sent to him from "eoralld," inquiring about what defendant told Meneut. He claimed that

he and Meneut may be in danger from this mysterious emailer, and that Rob may be dangerous and was connected to the Israeli mafia. He suggested that Meneut should flee to France with their kids. During the argument, defendant continued to fixate on the location where Meneut and Rob had sex. (15T156-1 to 161-21, 173-22 to 174-11). Defendant also remarked around this time that the relationship between Meneut and Rob "didn't start right and it cannot end right." (16T92-14 to 18).

On February 18, 2010, defendant told Meneut that he needed to protect himself from "eoralld." (15T165-22 to 166-1). Defendant said he planned to make a cash withdrawal to purchase a gun. Bank records showed that at 10:03 a.m. on that day, there was a withdrawal of $2000 from their joint savings account. (15T164-4 to 165-6). Later on defendant showed Meneut a brown paper bag containing a handgun that he had purchased. (15T165-8 to 9, 166-10). Meneut encouraged defendant to go to the police about his safety concerns. Defendant refused. Meneut asked him to return the gun. Defendant again refused, saying he could not return it. Defendant told Meneut the next day that he "took care" of the gun, though he declined to say what he did with it. Meneut never saw the gun again. (15T167-8 to 168-6).

The police later found data on defendant's computer indicating that on February 20, 2010, he created bookmarks on his web browser to websites for

firearms manufacturers, including Walther Arms. (24T89-12 to 18, 91-19 to 94-17). After buying the gun for alleged security reasons, defendant later told Meneut that he needed $5000 to buy "protection." The reason again related back to defendant's previous claims that Rob and "eoralld" were dangerous. (15T169-1 to 24, 171-13 to 20).

C. Meneut Tries to End Marriage; Defendant Grows More Desperate

On March 6, 2010 – exactly one year before Rob was killed – Meneut moved to an apartment on the Lower East Side of Manhattan. (15T114-21). With decent traffic, it took approximately twenty minutes to drive between this new apartment to her prior apartment with defendant. (15T119-7; 19T37-4). The children primarily lived with Meneut after the move. Defendant only agreed to see them one at a time on weekends, thus ensuring that Meneut always had two kids with her. (15T178-11, 182-10 to 18). This curtailed the time Meneut could spend with Rob. (15T183-13). Despite moving, Meneut voluntarily paid defendant $1500 per month, which covered the $750 per month cost of his rent-controlled studio apartment. (15T75-13, 177-1 to 15).

Despite Meneut moving out, she and defendant attended couples therapy: Meneut hoped therapy would lead to a better divorce but defendant wanted to stay together. (15T180-12 to 181-3). Meanwhile, Meneut continued

to see Rob. She did not meet him as much due to work and family obligations. (15T178-14 to 180-8).

Defendant would later admit to detectives that, beginning in or around March 2010, he showed up at Rob's home three separate times over the course of the spring. (Da93 to 94, 113, 142).[3] Defendant stated that he spoke with Rob for three hours during the first visit, and that Rob refused his request to stop seeing Meneut. (Da98 to 99). Defendant asked to see where Rob and Meneut had sex for the first time, and Rob brought him down to the basement. Meneut confronted defendant about the first meeting when he returned to New York City. (Da100 to 101, 146 to 147). Rob's demeanor with a friend when discussing these visits was "very upset and somewhat frightened and somewhat intimidated." (14T53-7 to 8).

In August 2010, Meneut's kids visited her parents in France. (15T183-22 to 25). Meneut spent the week with Rob vacationing in the Catskills. Meneut did not tell defendant about this trip, although detectives later discovered Google Maps searches for the address where they stayed on the external hard drive of defendant's computer. (15T185-2 to 7; 24T67-21 to 22). Around this same time, on August 24, 2010, data from defendant's computer

[3] The court transcript of defendant's statement contains many inaudible phrases. The State therefore cites to the transcript of defendant's statement, which was provided to the jury as an aide. (21T34-9 to 20).

showed that he again accessed a bookmark to the Walther Arms website. (24T91-19 to 94-17).

By the end of the summer in 2010, defendant and Meneut stopped couples therapy and started meeting with a divorce mediator. In October 2010, defendant refused to sign the divorce agreement, and Meneut stopped paying him $1500 per month. Defendant was angry when Meneut cut him off. Meneut recalled a phone call when he demanded that she continue the payments. (15T188-5 to 191-12).

On October 28, 2010, Rob's wife received a Facebook message from "Eor Alld" – a Facebook account that investigators would later determine was accessed from defendant's business and residential addresses – stating the following:

> Hi Susan, I'm not sure if you know that your husband (Rob), has been cheating on you with a younger woman for the past year. I just can't stand it anymore. I feel that you should know. Please don't blame yourself for the marriage. Let me know if you want more information.
>
> [(14T179-23 to 180-24; 16T163-11 to 166-4).]

On November 9, 2010, defendant sent an email to a friend, Ki Lee, who resided in Texas. The email included a link to a Walther Arms webpage with a particular kind of seven-round magazine for a .380 caliber firearm. Defendant called Lee and requested that Lee order the firearms magazine and ship it to

him. Lee declined to order the magazine because he was unsure about the legality of mailing it from Texas to New York. (17T33-18 to 35-4, 187-3 to 189-22; 20T161-8 to 163-23, 166-9 to 167-13).

In February 2011, defendant took steps to coverup his computer activity. (17T27-5 to 8, 29-24 to 30-19). On February 6, 2011, at 10:21 p.m., defendant's computer downloaded a browser that obfuscates a user's IP address when accessing the internet. Specifically, the browser works so that instead of providing a stable IP address associated with the user's physical location when accessing a website, the browser shows a random IP address from somewhere else in the world. (24T95-6 to 97-9). Subpoenaed records suggested that defendant used this browser. For example, on February 7, 2011, a user accessed defendant's email from an IP address at his home location, and then two minutes later his email was accessed from an IP address purportedly located in Sweden. (17T28-10 to 15). Defendant's computer abruptly stopped using the covert browser on February 21, 2011. (24T99-5).

During the winter of 2010 into 2011, Meneut continued to stay romantically involved with Rob. (15T195-15). She also retained a divorce attorney, eventually serving defendant with a divorce complaint on March 3, 2011. (15T197-17; 16T157-4 to 19).

D. Rob Is Murdered

On March 6, 2011 – three days after Meneut served the divorce papers – Rob, Meneut, one of Meneut's daughters, and two of Rob's friends attended a museum event in New York City. Rob met Meneut's daughter for the first time that evening. He had not met any of Meneut's children prior to that day. (14T56-16 to 25; 15T199-7 to 201-4). The group split up around 6:00 p.m. (15T201-6 to 16). Rob and his two friends went out to dinner. Rob dropped off one of his friends in Teaneck at 7:30 p.m. (14T57-1 to 2, 59-4).

At approximately 8:00 p.m., Meneut and her daughters met defendant in the lobby of Meneut's building. Defendant spent twenty minutes with all three kids before leaving alone. (15T201-22 to 203-6, 207-16; 16T56-8; 19T101-6). During the visit, Meneut's daughter told defendant that she had met Rob. (15T203-12 to 16; 16T56-14 to 16; 19T101-25 to 102-3).

Rob and Meneut spoke on the phone that evening. The call ended at 9:11 p.m. Rob sounded happy. (15T15T206-10, 211-23; 23T141-9 to 15). Rob's phone records show that he did not receive another call until 12:20 a.m., which is when his neighbor tried to alert him that his house was on fire. (23T141-24 to 142-3).

At approximately 11:45 p.m. on March 6, Henry Rodzen, a volunteer firefighter for many years, returned to a truck that he had left parked on the

street near Rob's home in Teaneck. The truck had a flat tire earlier in the day, but Rodzen and his girlfriend were on their way to a christening so they did not change it earlier in the day. (12T91-1 to 93-18). After Rodzen started to change the tire that evening, he saw smoke billowing. He then saw a nearby house on fire. Rodzen ran to the front door; there was no answer to his furious knocking. (12T95-11 to 97-11). There were no lights on inside the home. (12T97-9 to 98-1). Rodzen's girlfriend called 9-1-1. (12T97-13 to 98-1).

Rodzen next banged on the door of Rob's next-door neighbor, Scott Robinson. Robinson recalled that it was wet, rainy, and chilly that evening. (12T55-12 to 13, 57-9 to 10, 98-18 to 23). He had been watching television in his home, and he heard a "bang" or "thud" at approximately 11:30 p.m. The noise was unusual, but he suspected that something had fallen and struck his or Rob's house due to the heavy storm. (12T58-4 to 19). Approximately thirty minutes later, he heard a man, who turned out to be Rodzen, banging and yelling on his door, at which point he looked outside and saw Rob's house on fire. They both tried to extinguish it with a garden hose as flames breached the windows. They only stopped when a responding police officer told them to leave. (12T63-20 to 64-8, 66-6 to 10, 70-20 to 71-3, 98-18 to 23).

The Teaneck Fire Department received a transferred 9-1-1 call at 12:15 a.m. (12T113-8 to 25). When the firefighters and other emergency personnel

arrived on scene, the fire was intense in the basement and visible on the back deck and side of the home. (12T116-18 to 117-1). No windows were open, except for the ones broken by fire department personnel. (12T117-5 to 6, 157-18; 13T115-3). The front and rear doors were locked, although only the bottom lock of the front door was engaged. (12T154-16 to 156-17; 13T117-10 to 118-3 to 12).[4] Lieutenant Steven Van Mater, a firefighter in the Teaneck Fire Department, used an axe to break down the locked basement door. (12T117-12 to 21). Responding personnel did not locate any other entrances outside of the front, rear, and basement doors. (12T157-14).

After the firefighters gained control of the fire, Lieutenant Van Mater found the remains of a body in the basement, which was later confirmed to be Rob. (12T119-22 to 120-20; 14T12-8 to 13). There was no skin left on much of Rob's body, only bones and muscle tissue; he was burned beyond recognition. (12T122-20 to 21, 158-12 to 13). Part of his body was on a bed with a down comforter and the other part of his body was on the floor. (12T131-22 to 25, 138-4; 13T26-23 to 27-3). Investigators found his body face up. (12T132-19, 138-7). They found ethanol alcohol (the kind commonly used in adult beverages) on the comforter, which an expert explained could

[4] Kirschenbaum testified that all three doors into the home were routinely locked. (14T160-17). The only way to lock the back door and the rear door leading to the deck was with keys. (14T199-4 to 13).

serve as a fire accelerant. (13T143-23 to 144-23, 181-4, 183-23). A member of the Bergen County Arson Task Force opined that the fire started at the top of the bed and that Rob was laying on his back on the bed while it burned. (13T142-15 to 143-20).

The medical examiner identified Rob's body through dental records. (14T12-8 to 13). She found a bullet lodged in Rob's skull, and the entrance wound in the back of his head. (13T13-24; 14T12-22 to 17-1, 18-18 to 19-4). The medical examiner concluded that Rob died from a gunshot wound to the back of his head. (14T19-13 to 25).

A search of Rob's home following the fire turned up a wallet containing $575 in an upstairs bedroom. (13T20-8 to 14). The clothes in the drawers of the upstairs bedroom did not have any smoke damage, indicating that they were closed at the time of the fire. (13T121-6 to 122-10, 123-3 to 11). Investigators found a .380 caliber shell casing underneath the bed in the basement where emergency personnel had found Rob's body. (13T27-16 to 30-9; 17T190-6 to 7). A firearms expert opined that the bullet fragments retrieved from Rob's skull were consistent with a .380 caliber. (21T13-12 to 14-3). The expert testified that there are hundreds, if not, thousands of different calibers in the market, but at least seven common calibers including the .380. (21T14-9 to 15).

E. Defendant Repeatedly Lies to Detectives About His Whereabouts and Activities on the Night of the Murder

Detective James Brazofsky of the Bergen County Prosecutor's Office (BCPO) was assigned to interview defendant in the afternoon following Rob's murder. (20T184-17). Brazofsky went to defendant's business with other officers and told him that his name had come up as part of an investigation. Defendant agreed to speak with the police at the NYPD's 23rd Precinct, and he spent a few minutes closing the store before leaving. (20T186-4 to 15; 22T185-20 to 23).

At the beginning of the interview, which was recorded only in an audio format due to the NYPD's technological limitations, defendant waived his Miranda rights. (20T187-22 to 189-25). Brazofsky noticed a cut on defendant's left hand. When asked about the cut, defendant said that he bumped into a table a day earlier. (Da177; 21T187-15 to 188-8). Early on during the questioning, defendant said he knew about Meneut's relationship with Rob and that Meneut had "initiated" the divorce. (Da90 to 93). In fact, defendant told the detectives that he planned to call Rob as a witness at the divorce proceeding to make him admit to the adulterous relationship under oath. (Da116, 148).

Defendant also admitted that he travelled to Rob's house after Meneut moved out. (Da93 to 95). He claimed that Rob refused to stop seeing Meneut

during their three-hour discussion. (Da98 to 99). Defendant asked to see where Rob and Meneut had sex, and Rob brought him down to a basement bedroom. (Da146 to 147). Defendant revealed later that he showed up at Rob's home on two other occasions, claiming the visits occurred before the summer of 2010. (Da113, 142).

In addition to going to Rob's home, defendant admitted that he installed a spyware program on a computer used by Meneut, which enabled him to hack into her new email account. He said that he obtained emails sent between Rob and Meneut from February to May 2010. (Da116 to 118). Contrary to virtually all the evidence in the case, defendant claimed that discovering his wife's infidelity did not make him sick; rather, he "underst[oo]d" it. (Da167). Defendant also told police that he had owned a handgun, although he claimed that he had surrendered it to the NYPD when his children were born. (Da143). When confronted with Meneut's assertion that he recently acquired a gun, he admitted that he briefly possessed a second handgun. (Da184 to 185).

Defendant acknowledged that on the day of the murder he found out that one of his daughters had met Rob for the first time. (Da101). When asked where he was that evening, defendant said that he dropped off one of his children at 8:30 p.m. He drove from Meneut's apartment to his neighborhood and parked on the street near his apartment. He returned to his apartment,

drank two to four beers, watched television, read from a book, read emails, and surfed the web. He also told the detectives that he washed dishes for an hour and a half to two hours. He claimed no fewer than five times that he stayed at his apartment the entire evening, except that he purchased a six pack of beer from a local store at approximately 1:00 a.m.[5] He claimed that he did not go anywhere else. (Da103 to 108, 120, 124 to 125, 133, 174).

F. Surveillance Footage and a Forensic Analysis of Defendant's Computer Refute His Alibi

Surveillance footage acquired during the subsequent investigation contradicted defendant's alibi. Despite defendant's claim that he drove home after dropping off his child at 8:30 p.m., surveillance footage shows that defendant did not park on the street near his apartment until 10:10 p.m. Defendant exited the driver's side door and walked east on 76th Street. (19T106-17 to 25). Approximately one minute later, additional surveillance footage shows him walking on York Avenue toward his apartment building. (19T110-16 to 18).

Twenty minutes later, at 10:30 p.m., defendant reemerged on the surveillance footage walking on 76th Street away from his apartment and holding a bag in his left hand. (19T111-10 to 12). At 10:34 p.m., surveillance

[5] The police confirmed that defendant purchased beer at a deli between 1:00 a.m. and 2:00 a.m. (19T42-21).

footage captured defendant walking to his vehicle, opening the front door, and remaining inside for two minutes. He exited his vehicle holding two bags in his hand, and then he walked toward First Avenue away from his apartment and vehicle. (19T113-20 to 114-25; 20T29-10 to 12).[6] Thus, defendant had plenty of time to make it from his location on the Upper East Side to Rob's residence in Teaneck by 11:30 p.m., which is the approximate time Rob's neighbor heard a loud bang. Indeed, the evidence at trial showed that a person could drive from defendant's apartment to Rob's residence in Teaneck in twenty minutes during late-evening Sunday traffic. (19T43-22 to 44-1, 118-2).

A search of defendant's computer also contradicted his alibi that he was at home surfing the web and checking his email during this critical time window. No user-generated activity was logged on defendant's computer from 7:25 p.m. on March 6 to 2:18 a.m. on March 7. At 2:18 a.m., the username "Lord Tung" logged into the computer. (24T106-14 to 107-10, 109-4 to 8). When the user engaged in his first activity at 2:21 a.m. – only two to three hours after Rob's death – the user clicked on a folder containing PDF copies of emails between Meneut and Rob. (24T60-11 to 61-25, 107-14 to 25). The folder had not been accessed for almost a year prior to this activity. (24T120-

[6] The parties stipulated that on March 6, 2011, defendant did not move his car after 10:10 p.m. (26T22-10 to 19).

17). Almost immediately thereafter, the user placed documents inside of the recycle bin. (24T122-21 to 123-11).

At 2:46 a.m., defendant's computer launched a program to permanently delete files. (24T107-14 to 108-7, 126-6 to 127-14). The program wiped approximately one million logged events from defendant's hard drive, effectively making them unrecoverable forever. (24T126-6 to 127-14, 132-23, 166-14 to 22). The erasure of the files lasted several hours, not finishing until after 7:51 a.m. (24T132-20). Before this massive data erasure, the program only wiped one event in 2010 and three events in 2009. (24T133-17 to 24).

G. Defendant's Phone Records Show No Activity During the Period Before and After Murder; Defendant Activates a Prepaid Phone Account with a Fake Name After the Murder

Defendant's cell phone records did not show any incoming or outgoing calls from 7:57 p.m. on March 6 to 7:57 p.m. on March 7, 2011. (23T146-12 to 18, 199-15 to 16). Defendant did not have a smartphone with a data plan, and the police could not track the location of his "flip" phone unless he used it to make or a receive a call. (20T14-1 to 25; 23T144-20 to 23; Da111).

On March 8, 2011, a subscriber with the name "Sam Lee" activated an account from a prepaid phone account using an address from a Burger King in the Bronx. (23T147-9, 157-13 to 16). The State presented substantial evidence at trial that defendant activated this prepaid account under this fake

name,[7] and defense counsel conceded that the account belonged to defendant in his summation. (26T28-9 to 13).

In the time after the murder, defendant essentially ceased communicating with his brother using his normal cell phone and instead used this prepaid phone. For example, from February 1 to March 10, 2011, there were twenty-one phone calls between defendant's phone and his brother's phone. From March 11 to April 25, 2011, there is only one call between defendant's phone and his brother's phone. However, during that same period, there were eighteen calls between the prepaid phone and defendant's brother's phone. (23T154-8 to 21).

H. Police Searches

Defendant's apartment was very messy when the police searched it on March 8, 2011. (17T139-7 to 10). This contradicted defendant's assertion to detectives during his interview that he spent two hours doing dishes late into the evening on March 6. (Da107 to 108). Indeed, a photograph admitted into evidence showed a dirty kitchen with unwashed dishes on the stove. (Pa16; 17T125-1 to 10).

[7] For example, the prepaid phone most frequently accessed a cell tower located two blocks from defendant's home, and his second-most accessed tower was a block from defendant's business. The prepaid phone's contacts shared thirteen numbers in common with defendant's cell phone contacts. (23T155-3 to 156-11).

As part of a search of defendant's computer store, the police found pieces of paper containing Rob's telephone number and email address, the names of Rob's children and one of his friends, and Kirschenbaum's phone number and work address. (14T157-13 to 15, 162-20 to 25; 17T175-6 to 176-17). The police also found the results of a background search with information about Rob's home and property, including a map of the area. The police found a news article about Rob and Kirschenbaum. (17T176-20 to 179-8). Finally, the police found copies of emails between Rob and Meneut, many of which were also found in in a folder titled "Sophie" on defendant's external hard drive. (17T183-14 to 15; 24T31-17, 33-17 to 38-3).

LEGAL ARGUMENT

POINT I

THE STATE PRESENTED COMPELLING EVIDENCE OF DEFENDANT'S GUILT.

Defendant argues that no reasonable juror could have found defendant guilty. He posits that the evidence did not prove that he committed the crime; it only proved why the State suspected him. (Db30 to 31). The State disagrees. For decades, our courts have instructed jurors that direct evidence is not required to prove facts, and that circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence. This deep-rooted principle – imparted at the beginning and end of every jury trial – goes all but ignored by the defense. Instead, defendant overstates the inculpatory evidence in State v. Lodzinski, 249 N.J. 116 (2021), in which a deeply divided Supreme Court overturned a jury's verdict, and understates the inculpatory evidence in this case. Defendant is right that Lodzinski was "a close call." (Db37). He is also right that "[t]he same simply cannot be said" here. (Db37). But defendant is wrong as to why: this case is nothing like Lodzinski because the evidence of defendant's guilt saturated this trial.

A. The Court Denies Defendant's Motion for a Judgment of Acquittal

On July 11, 2023, the State rested its case and defense counsel told the court that he needed to "just very briefly" make a motion for a judgment of

acquittal. (24T216-19, 218-16 to 18). Following the perfunctory oral argument, the court denied the motion, finding "significant direct evidence" that Rob was murdered and "an incredible amount of circumstantial evidence" pointing to defendant as the perpetrator. (24T228-9 to 24). In an oral opinion, the court highlighted some of the circumstantial evidence, including: defendant's strong motive, particularly the end of his marriage and his knowledge that Rob met one of his children; defendant's apparent struggle to accept the end of his marriage; defendant's stalking of Rob; defendant attempting to secure a magazine of the same caliber as the murder weapon; surveillance footage showing defendant leaving his apartment with time to travel to the victim's home on the night of the murder; the absence of activity on defendant's computer until later that evening; and evidence that defendant destroyed a massive amount of data from his computer immediately after the murder. (24T228-22 to 242-1).

B. The Compelling Evidence that Defendant Murdered Rob

On a defendant's motion for a judgment of acquittal, a court must ask whether the State's evidence viewed in its entirety, and giving the State the benefit of all favorable testimony and all favorable inferences, is such that a reasonable jury could find defendant guilty beyond a reasonable doubt. State v. Reyes, 50 N.J. 454, 458-59 (1967). The nature of the review is highly deferential toward allowing

a jury to resolve factual issues, as the motion merely requires a court to determine if "any rational trier of fact could" find the "essential elements of the crime beyond a reasonable doubt." State v. D.A., 191 N.J. 158, 163 (2007) (quoting Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)). This is so because "[t]he jury is the preeminent factfinder in our system of justice, and the rendering of a jury verdict is entitled to the greatest deference." Lodzinski, 249 N.J. at 143.

Our courts have reinforced that the standard "is the same though the testimony is circumstantial rather than direct"; after all, "circumstantial evidence may be 'more forceful and more persuasive than direct evidence.'" State v. Mayberry, 52 N.J. 413, 437 (1968) (quoting State v. Corby, 28 N.J. 106, 119 (1958)); accord State v. Tindell, 417 N.J. Super. 530, 549 (App. Div. 2011). Consistent with this principle, juries are instructed at the beginning and end of every trial that direct evidence is not necessary to prove facts, and that circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence. Model Jury Charges (Criminal), "Criminal Final Charge" (rev. September 1, 2022); Model Jury Charges (Criminal), "Instructions After Jury is Sworn" (rev. September 1, 2022). Juries are also told that a "verdict of guilty may be based on direct evidence alone, circumstantial evidence alone[,] or a combination of direct evidence and circumstantial evidence." Model Jury Charges (Criminal), "Criminal Final Charge" (rev. September 1, 2022).

Here, as explained by the trial court, there is substantial evidence proving a murder. Specifically, Rob died of a single gunshot wound to the back of his head. (14T19-13 to 25). The evidence indicated that Rob's assailant burned his body beyond recognition. (13T142-15 to 143-20). There was no evidence of a theft or similar crime at Rob's home suggesting that the perpetrator wanted to do anything but end Rob's life and cover it up. (E.g., 13T20-8 to 14, 121-6 to 123-11).

In addition, as found by the trial court, there is "an incredible amount of circumstantial evidence" pointing to defendant as the perpetrator. (24T228-9 to 24). That evidence includes, but is by no means limited to, the following:

- Defendant was angered and deeply disturbed by Meneut's infidelity and decision to leave him for another man;
- Defendant stalked Rob for months, including traveling to Rob's home three times and demanding that Rob end his relationship with Meneut;
- Defendant engaged in bizarre schemes to interfere with Rob's relationship with Meneut: for example, he fabricated a sinister character supposedly tied to the Israeli mafia and urged Meneut to flee to France;
- Meneut, who was the breadwinner, cut off defendant from voluntary support payments when defendant refused to agree to the divorce;
- Meneut served the divorce complaint three days before Rob's murder;
- Defendant learned on the same evening that Rob was murdered that one of his kids had met Rob for the first time;

- Rob was shot and killed in the basement bedroom – the same place that defendant had fixated on when he found out that Rob and Meneut first had sex there;

- Rob was killed with a .380 caliber firearm, and four months prior to his killing, defendant contacted a childhood friend in Texas, requesting that the friend purchase and mail defendant a .380 caliber magazine;

- Defendant initially told police that he owned a firearm many years ago and disposed of it; he only admitted that he obtained a firearm in the past year when confronted with Meneut's statement to police;

- Defendant's alibi for the hours before and after Rob's murder was patently false: a search of his computer showed that he was not surfing the web or reading emails like he told police and surveillance footage showed him leaving his apartment the night of the murder despite him telling police a half-dozen times that he stayed home until 1:00 a.m.;

- At 2:21 a.m. on the night as the murder, defendant's first action on his computer – following hours of inactivity – involved him opening a folder containing emails between Rob and Meneut and then accessing the computer's recycling bin; he then wiped one million logged events from his computer over the course of many hours, which was highly irregular computer activity for him (or anyone).

Given the straightforward evidence that Rob was murdered, and the compelling evidence that defendant was the perpetrator, it follows that the court correctly denied defendant's motion for a judgment of acquittal. Defense counsel below seemingly thought very little of the likelihood of success on the motion – he asked the court to "just very briefly" make the argument in support of his application. (24T218-16 to 18). This Court should similarly dispatch with defendant's argument in short order.

To this end, the State could hardly disagree more with defendant's claim that the inculpatory evidence in Lodzinksi "dwarfs" the evidence in this case. (Db37). The opposite is true. In Lodzinski, a sharply split Supreme Court held that the trial court should have granted the defendant's motion for a judgment of acquittal on her conviction for murdering her son. 249 N.J. at 157. In so holding, the majority acknowledged that Lodzinski's shifting explanations of her son's disappearance and the discovery of his partial remains in a creek .4 miles from her former place of employment, combined with other circumstantial evidence, would have allowed a rational jury to find that she was involved in his "disappearance, death, and burial." Id.

However, the majority found fault in the conviction for murder because the prosecution "offered no direct or inferential evidence that [the defendant] purposefully or knowing caused [her child's] death." Id. In particular, the medical examiner saw no signs of fracture or injury in the victim's bones recovered in the creek, and neither she nor any other witness could shed any light on "how," "when," or "where" the victim died. Id. at 138, 157. While the medical examiner ruled that the death was not accidental, she could not say whether the victim's death was caused by negligent, reckless, knowing, or purposeful conduct. Id. at 157. In sum, as the dissent succinctly characterized it, the "sole basis" for the majority granting the defendant's motion for a

judgment of acquittal was based on the conclusion that the record lacked any evidence proving the defendant's purposeful or knowing mental state. Id. at 173 (Patterson, Fernandez-Vina, and Solomon, JJ., dissenting).

The evidence in this case is radically different from Lodzinski. Most pertinently, the State offered convincing evidence that Rob's assailant acted purposefully. The evidence that he was killed by a single gunshot to the back of the head and then set on fire unquestionably points toward purposeful murder. So, too, does the lack of any evidence in Rob's home that his assailant stole anything or entered the home with any other criminal intent. Unlike in Lodzinski, the State's evidence answered the "how," "when," and "where" Rob was killed – and the answers to those questions pointed to murder.

While that distinction alone is enough, there are other distinguishing characteristics. In Lodzinski, the Court rejected the supposed motive evidence – that the defendant was a single mother burdened by the responsibility of providing her son – as proof that she intentionally killed him. The Court reasoned that the theory rested "on questionable tropes and stereotypes about single working mothers" and observed that most of the witnesses said she "was caring and devoted to her son." Id. at 120, 153-54.

In sharp contrast, the classic motive evidence in this case – infidelity, divorce, financial ruin, and the natural resentment that arises when a child

meets a spouse's paramour – cannot be seriously questioned, in part because defendant so often engaged in conduct showing that he refused to move on with his life. Whether it was defendant stalking Rob, or pleading with his wife to stop seeing Rob, or devising bizarre schemes to disrupt their relationship, or demanding that she continue to support him financially, the State's evidence that defendant was deeply disturbed by Meneut's decision to leave him could hardly be more compelling. Any reasonable juror could conclude from such evidence that defendant knowingly or purposefully killed Rob.

And there are yet more reasons to distinguish Lodzinski. In Lodzinski, the majority reasoned that the defendant's "conflicting accounts . . . about her son's disappearance" evinced a consciousness of guilt, but it "did not shed light" on the precise crime committed. Id. at 149-51.

Here, the State's proofs established that defendant lied about being at home during the time window that Rob was killed: surveillance footage showed him walking off into the Manhattan night approximately one hour before Rob was killed and a forensic examination of defendant's computer showed he was not surfing the web or checking his email during this period like he told police. The same forensic examination showed him engaging in an extraordinary deletion of computer data in the middle of the night within hours

of Rob's death when defendant full well knew that his computer contained troves of evidence pointing toward him as the perpertrator.

The consciousness-of-guilt evidence in this case is thus more convincing than the defendant's shifting statements in Lodzinski, which the majority suggested could have been due to her being "under immense psychological pressure to give an account that satisfied her disbelieving interlocutors." Id. at 151. In any event, the Lodzinski Court observed that a reasonable factfinder could have concluded that the defendant's conflicting accounts evinced that she participated in a crime, but that did not prove which crime. As previously discussed, there is no such evidentiary gap here.

At bottom, defendant's appeal repackages a legal argument that our courts have always rejected: that direct evidence is necessary to sustain a conviction. Defendant argues, for example, that there was not "any proof, forensic or otherwise, that defendant committed the murder," but only "proof[] . . . why one might suspect the defendant of murder." (Db30). However, proof as to "why one might suspect" defendant is just circumstantial evidence by another name, and our law has always maintained that when enough circumstantial proof is piled together – like the mountain of evidence here – then the State has met its burden. A jury unanimously came to that conclusion. This Court should not overturn that just verdict.

POINT II

DETECTIVES ARE PERMITTED TO QUESTION A DEFENDANT'S CLAIM OF INNOCENCE DURING AN INTERROGATION, AND THE COURT DID NOT ADMIT ANY IMPROPER LAY OPINION TESTIMONY.

Defendant argues that the State introduced "inadmissible expressions of lay opinion." (Db39). The State disagrees. At trial, defendant failed to object to almost all the evidence he challenges in this point. The trial court correctly admitted the evidence for the reasons explained herein. Specifically, defendant's argument about the impropriety of the detectives' assertions during defendant's interview is contrary to the law, waived by the invited-error doctrine, and otherwise lacks merit. Defendant's additional argument about the testimony of two State witnesses also lacks merit, as such testimony was permissible lay opinion and responsive to evidence and claims pressed by defendant at trial.

A. The Assertions that Defendant Went to the Victim's Home on the Night of the Murder

Defendant first argues that the court improperly admitted questions by interviewing detectives during defendant's statement to police, mostly by Detective James Brazofsky, which expressly or impliedly asserted that defendant went over to Rob's home on the night of the murder. (Db40). The record reveals that defense counsel below chose not to raise all but two of the

fourteen assertions he complains about on appeal.[8] The State submits that the jury was correctly allowed to hear the detectives' assertions as context to the interview. In addition, defendant cannot show any undue prejudice from the admission of these assertions, and he certainly cannot surmount the invited-error bar applicable to most of the arguments in this point. Due to the fact-intensive nature of the analysis, the State will first summarize the pertinent procedural history, defense trial strategy, and instructions to the jury before setting forth the State's position.

1. Procedural Backdrop

On appeal following defendant's first guilty conviction in this case, the panel reversed and remanded for a new trial due to the "cumulative error" of the court admitting "evidence concerning defendant's exercise of his right to counsel and his right to refuse a search" as well as "testimony of a detective . . . that defendant was not truthful." Tung, 460 N.J. Super. at 104. The parties consulted prior to the retrial and agreed to a "significant amount of redactions" from defendant's statement to police in accordance with the appellate panel's decision. (30T13-17 to 18). Disagreements regarding nine excerpts from the statement could not be resolved, however, and the parties filed briefs with the

[8] The only assertions cited in defendant's brief that he raised prior to trial were at 21T145-17 to 18 and 21T151-9 to 12. Compare Db40, with Pa3 to 14.

trial court identifying the contested portions of the statement and their respective positions. (30T3-14 to 24; Pa3 to 14).

On January 25, 2023, the court conducted a line-by-line review of the parts of the statement in dispute. (30T). The State argued that this Court's opinion did not require redaction of the detectives challenging defendant's version of events or accusing him of guilt. (30T17-8 to 21, 21-7 to 22-1). The defense conceded that it was appropriate for an officer to accuse a suspect of being at the crime scene or tell the suspect that the officer does not believe the suspect's denials. (30T22-22 to 23-9, 73-21 to 25). But the defense asserted that problems as to admissibility arise when an officer references highly prejudicial topics or engages in lengthy "running commentary" regarding defendant's truthfulness or alleged guilt. (30T23-7 to 24-8, 43-2 to 24, 64-7 to 66-8, 73-11 to 74-7).

The trial court synthesized these two positions in its ruling. On the one hand, the court found that the panel's opinion did not require a redaction every time the officers' alleged defendant went to Rob's home or questioned his credibility. On the other hand, the court redacted statements by the detectives referencing unduly prejudicial facts, opining as to the language a credible denial would employ, or commenting on defendant's credibility or culpability where those statements were unimportant for context. For example, the court

redacted the detective's discussion about his work in child abuse cases, the detective's opinion of what truth sounds like, and an assertion by the officer that defendant should "stop lying." (30T37-19 to 38-5, 53-15 to 54-22, 68-21 to 69-8; Pa7 to 9). In total, the court granted defendant's redaction requests with respect to at least a dozen parts of defendant's interview that the parties could not resolve on their own. (30T37-19 to 38-5, 51-14 to 58-17, 68-21 to 69-8, 78-16 to 79-1, 91-14 to 92-6, 93-21 to 95-21, 98-14 to 99-18, 100-4 to 14, 101-1 to 25, 102-2 to 103-12, 104-8 to 105-3, 123-21 to 124-11).

2. The Defense's Trial Strategy

During trial, the defense consistently sought to highlight that law enforcement zeroed in on defendant as a suspect from the very beginning of the case. This evidence supported two key pillars of the defense theory: first, counsel argued that the police investigation was tainted by an unwarranted rush to judgment[9]; and second, counsel alleged that the police uncovered

[9] For example, defense counsel argued in his summation that the rush to judgment in this case "is scary" and should not happen in the United States of America. (26T11-4 to 12-13). Counsel argued that, "[o]nce they had [defendant] in the crosshairs, they were going to make sure the information . . . points to him." (26T12-9 to 13). He further argued that the detectives did not follow other leads because defendant was their "only suspect." (26T5-5 to 15). He argued that the detectives acted during the interview as if defendant had to prove his innocence. (26T54-10 to 55-8; see also 26T15-9 to 16-2).

insufficient evidence and only charged him fourteen months later due to purported outside pressure. (26T27-8 to 25, 30-17 to 32-11).

The defense spent considerable time questioning about this alleged rush to judgment during the cross examination of Detective Brazofsky, in which counsel repeatedly focused on defendant's suspect status prior to and during the interrogation. Defense counsel asked the detective whether it was "fair to say" before the interview that "it was your belief . . . that [defendant] was the one who . . . killed Mr. Cantor?" The detective answered, "He was certainly a suspect in the case." (22T151-6 to 12). Defense counsel again asked, "[Y]ou were of the mindset . . . that Tony Tung did this. Yes?" The detective again replied that defendant was a suspect. (22T154-5 to 8). Defense counsel repeated questions regarding defendant's suspect status or the officer's suspicion about defendant at the time of the interview at least six other times during the cross examination, including highlighting that he was the only suspect. The officer answered these fraught questions with care, but nonetheless had to acknowledge that law enforcement suspected defendant. (22T151-15 to 52-8, 154-12 to 16, 191-2 to 6, 219-23 to 220-4; 23T59-10).

Defense counsel also used the interview of defendant, itself, to make this same point. Specifically, counsel pointed out during cross examination that, during defendant's interrogation, the detective alleged that defendant was in

New Jersey at the time of the crime. (22T238-15 to 19). Defense counsel observed in another question that the detective made this allegation "many times" during the interview. (23T8-1 to 8).

After establishing that defendant was a suspect, defendant also asked the detective whether he had sufficient evidence to charge defendant at the time of the interview. The detective conceded that he did not have sufficient evidence at the time. (22T169-19 to 170-2). Defense counsel then repeatedly tried to elicit purported information about the "tremendous amount of pressure" to solve the case, (23T34-6 to 46-22), and brought out that defendant was not arrested until fourteen months later. (23T56-15 to 17).

Though these various lines of inquiries were most pointed with Detective Brazofsky, defense counsel by no means saved these questions for him alone. Counsel sought to elicit with virtually any witness who plausibly had relevant knowledge that (1) defendant was suspected from very early in the investigation, (e.g., 13T54-1 to 56-9, 159-16 to 160-2; 17T135-7 to 25; 20T37-11 to 38-4, 58-6 to 19, 119-2 to 120-3); (2) the investigators and prosecutors were purportedly under pressure to solve the case, (e.g., 14T132-6 to 134-9; 17T147-8 to 148-8; 20T55-13 to 58-7, 63-10 to 66-2); and (3) defendant was not charged for fourteen months, (e.g., 13T57-17; 17T147-20 to 23; 20T66-18 to 23).

3. The Jurors Are Repeatedly Told They Are the Sole Arbiters of Guilt and Credibility

The court and parties informed the jurors in this case that they were exclusively responsible for judging credibility and determining defendant's guilt or innocence. As for the many court reminders, immediately upon swearing in the jury, the court instructed that they were the sole judges of the facts. (11T5-19 to 25). Due to the topics of cross examination raised by the defense, the court reminded the jurors at various points during the trial that "[y]ou, and you alone, will determine whether or not the State has proven any of the charges beyond a reasonable doubt" and that they were the sole arbiters of credibility. (e.g., 17T145-9 to 15, 23T9-4 to 6). Then, at the end of trial, the court again instructed the jury in its final jury charge that the jurors were the sole judges of the evidence, which encompassed determining both the facts and witness credibility. (27T8-17 to 24).

The parties, for their part, also reminded the jurors of their exclusive function. The State reminded the jurors during its summation that the only relevant opinion as to defendant's guilt was that of the jury. (26T82-19 to 20, 85-10 to 15). Defense counsel, too, in his opening statement and summation, emphasized the primacy of the jury in providing a check and balance to a prosecutorial judgment. (12T49-20 to 50-22; 26T13-21 to 24).

Importantly, the court also issued limiting instructions addressing the interviewing detective's opinion as to the credibility of defendant's denials during the interview. When defense counsel's questioning of Detective Brazofsky elicited the officer's belief about defendant's truthfulness, the court told the jury to "disregard" Brazofsky's "opinion as to whether or not Mr. Tung was being truthful." (23T12-8 to 13). The court added that judging credibility was the jury's "function" and "[y]ou will determine whether or not the statement was actually made by the [d]efendant and, if made, whether the statement or any portion of it is credible." (23T12-10 to 13). The court also instructed the jury in accordance with the model jury charge for a defendant's statement, which again emphasized that it was the jury's role to determine credibility issues pertaining to the statement. (23T114-6 to 115-25; 27T15-21 to 17-12).

4. The Court Correctly Allowed the Jury to Hear the Detectives' Questioning of Defendant During the Interview

Defendant's claims about the detectives' assertions during the interview are contrary to the law, procedurally barred, and otherwise lack merit.

It is true that a testifying law enforcement officer is generally not permitted to opine regarding a suspect's guilt or innocence, State v. Landeros, 20 N.J. 69, 74 (1955), or assess a witness's or suspect's credibility while testifying. State v. Frisby, 174 N.J. 583, 595-96 (2002). However, this Court

has repeatedly distinguished between a law enforcement officer opining about defendant's guilt or credibility at trial and the officer weighing in on those topics during an interrogation. As to the latter, it is permissible for a jury to hear an officer accusing defendant of guilt or doubting a defendant's claim of innocence as part of an interrogation. See State v. Howard-French, 468 N.J. Super. 448, 464 (App. Div. 2021); State v. A.H.-S., No. A-1489-22, 2024 N.J. Super. Unpub. LEXIS 2813, at *6-11 (App. Div. Nov. 15, 2024); State v. Reynolds, No. A-5494-16, 2021 N.J. Super. Unpub. LEXIS 2243, at *25-27 (App. Div. Sept. 28, 2021); State v. Quackenbush, No. A-0411-16, 2019 N.J. Super. Unpub. LEXIS 1693, at *24-35 (App. Div. July 29, 2019).[10]

In Howard-French, 468 N.J. Super. at 464, this Court held that a law enforcement officer's "questioning of the veracity of [the] defendant's account . . . was a legitimate exercise of police authority and allowing the jury to hear it provided context to the interrogation." While this Court acknowledged that it "would have been improper" for a "law enforcement officer [to testify] at trial that they did not believe defendant's account," the Court rejected the argument that a law enforcement officer challenging a suspect's credibility during an interrogation was "tantamount" to the officer testifying to that effect.

[10] In accordance with Rule 1:36-3, the State has provided copies of the unpublished opinions in defendant's appendix.

Id. This Court found nothing "in the record suggesting the jury relied on the detective's comments" during the interrogation and therefore found no plain error in the admission of the unredacted statement. Id. at 465.

The weight of the out-of-state authority is in accord with this Court's approach: a jury may hear law enforcement accusing a suspect of guilt or doubting an alibi during an interrogation. See, e.g., State v. Boggs, 185 P.3d 111, 121 (Ariz. 2008); People v. Maciel, 304 P.3d 983, 1017-18 (Cal. 2013); Butler v. State, 738 S.E.2d 74, 81-82 (Ga. 2013); State v. O'Brien, 857 S.W.2d 212, 221-22 (Mo. 1993); State v. Castaneda, 715 S.E.2d 290, 294-95 (N.C. Ct. App. 2011).

Defendant argues that the parties and the court did not comply with a sentence of the opinion in Tung, 460 N.J. Super at 102, which explained that a general limiting instruction was "inadequate to address the multiplicity of times during the playback when the officers expressly stated they knew defendant was lying and firmly believed in his guilt." But defendant's brief does not point to any example of the detectives "expressly stat[ing] they knew defendant was lying" or telling defendant that they "firmly believed in his guilt." Defendant merely cites to the detectives' assertions that defendant traveled to New Jersey or Rob's home in connection with them trying to persuade defendant to tell them what occurred.

It also bears emphasis that the Court catalogued its reasons for reversal at the beginning and end of the opinion: the panel reversed due to the cumulative error of the trial court admitting "evidence" concerning defendant's exercise of his right to counsel and his right to refuse a search as well as "testimony" of a detective that defendant was not truthful. Tung, 460 N.J. Super. at 80, 104. The Tung Court did not cite the detectives' assertions in the interview that defendant traveled to New Jersey in its analysis. This makes sense because the Court was not concerned with statements by the detectives during the interrogation, but how the detective's trial testimony elevated those exchanges by commenting on them and casting doubt about defendant's truthfulness in front of the jury. See 460 N.J. Super. at 87-91.

In contrast to the original trial in this matter, the court in this case established tight boundaries around the State eliciting commentary about the statement from the witness stand, (20T179-9 to 181-7; 21T189-13 to 192-5), and redacted from the statement defendant invoking his right to silence and exercising his Fourth Amendment rights to refuse a search. Where the parties could not agree to redactions regarding the detectives challenging defendant's alibi, the court sided with defendant as to many of his requests, particularly when the redaction would shield defendant from prejudicial references to extraneous matters or not rob the statement of context. (Sb34 to 36, supra).

For example, the court redacted where the detectives told defendant to "stop lying" and the passage where a detective encouraged defendant to explain "how everything went bad." (30T68-21 to 69-8, 101-1 to 25, 104-8 to 105-3) In short, there were massive differences between defendant's statement in the original trial versus this trial.

What is more, the court also ensured that the jury was properly instructed. The court instructed time and time again that the jurors were responsible for judging witness credibility and determining defendant's guilt or innocence. (11T5-19 to 25; 17T145-9 to 15; 23T9-4 to 6; 27T817 to 24). The parties also reminded the jurors of their exclusive role in this regard. (12T49-20 to 50-22; 26T13-21 to 24, 82-19 to 20, 85-10 to 15). And the trial court additionally instructed the jury to "disregard" Brazofsky's testimony opining "as to whether or not Mr. Tung was being truthful." (23T12-7 to 13). In connection with this instruction, the court reminded the jurors yet again that only they "will determine whether or not the statement was actually made by the [d]efendant and, if made, whether the statement or any portion of it is credible." (23T12-10 to 13; see also 23T114-6 to 115-25; 27T15-21 to 17-12).

This all to say that a careful reading of Tung, in combination with a close examination of the record in this case and other applicable authority,

reinforces the propriety of the court allowing the jury to hear the detectives challenging defendant's alibi during certain parts of his statement.

Indeed, defendant cannot show any error in the admission of defendant's redacted statement, let alone meet the high bar for relief where the alleged error was invited. The doctrine of invited error recognizes that court rulings that "were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." State v. A.R., 213 N.J. 542, 561 (2013) (citation and internal quotation marks omitted). Accordingly, a defendant is barred from even raising claims pertaining to an invited error, unless he can show that the alleged error "cut mortally into [his] substantive rights." Id. at 562.

In this case, even if there was error – which the State vigorously contests – the doctrine of invited error applies to much of defendant's argument in this section because the State and defense counsel agreed to make a "significant amount of redactions" prior to trial, (30T13-17 to 18), and defense counsel successfully convinced the court to redact yet more parts of the statement with respect to the areas where the parties could not agree. (Sb36, supra). What is more, as a matter of strategy, defense counsel continually tried to emphasize through testimony that law enforcement suspected defendant from the outset. (Sb36 to 38, supra). The case thus fits comfortably within the invited error

paradigm because defendant acquiesced and made offensive use of almost all the assertions he now challenges on appeal. See A.R., 213 N.J. at 562.

However, whether the standard of review is invited error, plain error (as defendant urges, Db41 n.6), or harmful error, the reality is that there was no error, and even if there were, defendant cannot show any cause for reversal based on evidence that defendant, himself, amplified with virtually any chance he got during trial. For these reasons, defendant's claim here must be rejected.

B. The Court Properly Admitted Relevant Lay Opinion Testimony

Defendant also disputes the admissibility of lay opinion testimony of two State witnesses. Specifically, defendant challenges the testimony from Forensic Analyst Kristen Paxos that she reviewed emails sent to Rob and that, notwithstanding the emails already shown to the jury, she did not flag anything as concerning or threatening. (Db41; 16T160-4 to 161-1).[11] Defendant also challenges testimony from the case detective that a review of Rob's computer data did not yield evidence of additional suspects. (Db41; 19T70-7 to 11).

[11] Defendant incorrectly suggests that Paxos claimed she reviewed 20,000 emails sent to Rob, but that figure is the total number of emails in the entire investigation. (16T136-21, 158-19). Paxos did not specify the exact number of emails that she reviewed which were sent to Rob, and she used filters so that she only reviewed emails from individuals as opposed to emails from companies. (16T159-5 to 11).

This testimony, which was not objected to at trial,[12] is admissible lay opinion testimony based on first-hand observations. At any rate, it certainly does not constitute plain error. R. 2:10-2.

Lay witness testimony "in the form of opinions or inferences" is admissible if it "(a) is rationally based on the witness' perception" and "(b) will assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. "The first prong of N.J.R.E. 701 requires the witness's opinion testimony to be based on the witness's perception, which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." State v. Singh, 245 N.J. 1, 14 (2021) (citation and internal quotation marks omitted). For example, this Court has held that a law enforcement witness can state that a suspect "appeared aggravated" or was "clearly upset" so long as those opinions or inferences are based on first-hand perceptions. Tung, 460 N.J. Super. at 101.

The second prong requires that the testimony assists understanding by "either by helping to explain the witness's testimony or by shedding light on

[12] Defense counsel objected to the question of the case detective, although during a sidebar conference he clarified that his "concern" was that she would not address certain evidence recently turned over by the State. The prosecutor assured counsel that the witness would not discuss that evidence, which satisfied counsel. (19T69-5 to 20). In any event, defense counsel did not cite lay opinion testimony as the grounds for his objection. See R. 1:7-2.

the determination of a disputed factual issue." Singh, 245 N.J. at 15. As it pertains to the second prong, "[t]here is no requirement . . . that the testifying lay witness be superior to the jury in evaluating an item" or "offer something that the jury does not possess." Id. at 19. Accordingly, the rule does not prohibit testimony even if "the evidence in question has been admitted." Id.

Here, the court correctly admitted the testimony from Forensic Analyst Paxos that she did not flag certain emails as concerning or threatening. The testimony is based on the witness's first-hand perceptions – seeing the words written in emails to Rob – and it shed light on the disputed factual issue of whether somebody else had a vendetta against Rob. After all, defense counsel questioned Rob's wife about a purported dispute with a neighbor, suggesting that this person was responsible for killing Rob. (15T38-6 to 41-21). Defense counsel also spent significant time on cross examination suggesting that Rob's wife was upset with the divorce and had a financial motive to kill him. (Db13). To this end, defendant received the model jury charge for third-party guilt, which informs the jury that "defendant contends that there is evidence before you indicating that someone other than he may have committed the crimes, and that such evidence raises a reasonable doubt with respect to his guilt." (27T18-17 to 20).

Given defendant's claims, Paxos's testimony was relevant and in line with the holdings of other courts finding that similar language used by a witness falls under the lay opinion evidentiary rule. See United States v. Johnson, 117 F.4th 28, 52 (2d Cir. 2024) (holding that a law enforcement agent's testimony that certain social media posts were a "threat" and "concerning" constituted permissible lay opinion); State v. A.M.S., No. A-4098-19, 2023 N.J. Super. Unpub. LEXIS 1590, at *22-23 (App. Div. Aug. 14, 2023) (holding that testimony characterizing defendant's text messages as "threatening" satisfied both prongs of N.J.R.E. 701).[13]

For the same reasons, the testimony from the case detective that a review of Rob's computer data did not yield evidence of additional suspects is also admissible lay opinion. It is based on the case detective's review of data and sheds light on the issue of whether anybody else had a vendetta against Rob. But it is also admissible for an additional reason: it was directly responsive to defendant's argument that law enforcement engaged in a rush to judgment singularly focused on defendant. (Sb36 to 38). Defendant cannot argue that

[13] But see State v. Keogh, No. A-0565-22, 2025 N.J. Super. Unpub. LEXIS 322, at *25 (App. Div. 2025). The case is distinguishable because in that case the social media posts were admitted into evidence, whereas here the jury did not review every personal email sent to Rob. In any event, the Keogh Court found the evidence harmless despite defendant preserving the objection for appeal. Id.

the State conducted a tunnel-visioned investigation, but then claim error when the State introduces evidence of the unsuccessful searches for other suspects.

For all these reasons, the lay-opinion testimony, challenged for the first time on appeal, was properly admitted, and the admission of the evidence in no way constituted plain error.

POINT III

THE VICTIM'S STATE OF MIND WAS HIGHLY RELEVANT.

Defendant argues that the court improperly admitted hearsay revealing that the victim feared defendant. (Db45). The State disagrees. The court did not admit hearsay. The court admitted testimony limited to the victim's demeanor, specifically that he appeared very upset, somewhat frightened, and somewhat intimidated when discussing defendant's visits to his home. Defendant did not object or request a limiting instruction, most likely because it was plainly relevant to the stalking charge and rebutted defendant's claims that Rob was dangerous and connected to the Israeli mafia.

A. Factual Background

Defendant did not dispute at trial that he travelled to Rob's home three times after learning about his relationship with Meneut. Meneut testified that defendant visited Rob three times. (15T192-3 to 193-1). Defendant, himself, told police that they spoke for three hours during the first such visit, and he

visited on two subsequent occasions. Defendant claimed that he did not "confront[]" Rob and that their conversation included discussion of redemption and principles of Buddhism. (Da93 to 95, 98 to 99, 113, 142).

In addition to the above evidence, the State asked Rob's longtime friend to describe Rob's "demeanor and . . . reaction" to the visits "[w]ithout telling us what was said," to which the witness stated that "[h]e was very upset by the visits, very concerned[,] [s]omewhat afraid, somewhat frightened." Defense counsel lodged a hearsay objection to the testimony, which the Court sustained, directing the jury to disregard that answer. In response to the State's explanation that it was not asking about statements, the court permitted the State to rephrase the question. (14T52-12 to 53-8). The State then asked only about Rob's "demeanor during any discussions" the witness had with Rob about defendant's visits. The witness responded that Rob's demeanor was "very upset and somewhat frightened and somewhat intimidated." Defendant did not object to this question or answer. (14T53-3 to 8).

B. Rob's State of Mind Was Unquestionably Relevant

Contrary to defendant's claim, the evidence of Rob's state of mind was relevant to the charge of stalking and defendant's fabricated claim that Rob was dangerous and connected to the criminal underworld.

N.J.S.A. 2C:12-10(b) provides that "[a] person is guilty of stalking . . . if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety or the safety of a third person or suffer other emotional distress." The element of causing reasonable fear "refers to persons in the victim's position and with the victim's knowledge of the defendant." H.E.S. v. J.C.S., 175 N.J. 309, 330 (2003). It "means to cause fear which a reasonable victim, similarly situated, would have under the circumstances." N.J.S.A. 2C:12-10(a)(4).

In this case, Rob's demeanor after defendant's visits – upset, somewhat afraid, somewhat intimidated – was unquestionably relevant to count eleven of the indictment charging defendant with stalking. "'Relevant evidence'" has a "tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Rob's demeanor when discussing these visits suggested they were unwelcome and contentious, which would have weighed heavily in a jury's assessment of whether the conduct constituted stalking. Similarly, Rob's demeanor was at odds with defendant's one-sided version of events. That is, defendant claimed that there was discussion of Buddhist principles and no "confrontation" during the first visit. (Da97 to 98, 113).

And, more generally, though a jury must ultimately assess how a reasonable victim would have felt under the stalking statute, N.J.S.A. 2C:12-10(b), a victim's subjective feelings are always relevant to the jury's assessment. That is, how a target of stalking feels in response to the alleged conduct – negative or positive – tends to shed light on how a reasonable person may have felt. For example, if Rob had indicated that he was unbothered by the visits, a jury could have inferred that no reasonable person would have been scared, either. See United States v. Wooten, 689 F.3d 570, 576-78 (6th Cir. 2012) (concluding that bank teller's subjective fear during robbery is relevant to reasonable-person standard assessing fear; collecting cases from "many other circuits" in support of this proposition).

Separate and apart from the issue of stalking, the evidence of Rob's reaction to these visits also tended to rebut defendant's assertion to Meneut that Rob was dangerous and connected to the criminal underworld, (15T159-1 to 5, 174-8 to 11), which the defense sought to bolster by emphasizing that Rob's work computer was encrypted. (24T153-16 to 154-18). Defendant's fanciful claims could not be squared with the reality of Rob's reaction to his visits. In this way, the evidence served at least two relevant purposes and was properly considered by the jury.

The State disputes defendant's claims to the contrary. Initially, it must be underscored that defense counsel did not object to the testimony admitted at trial; he only objected to the initial testimony on hearsay grounds, which the court struck. (14T52-12 to 53-8). Accordingly, at minimum, defendant must show that the court abused its rather broad discretion on evidentiary matters, Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999), and that the error was clearly capable of producing an unjust result, R. 2:10-2.

In this case, there are multiple reasons why defendant cannot show any error, let alone one clearly capable of producing an unjust result. First, the challenged evidence is not hearsay, which is defined as an out-of-court statement offered for the truth of the matter asserted. N.J.R.E. 801(c). Following the resolution of the defense's initial objection, the prosecutor asked the witness to "describe" Rob's "demeanor during any discussions you had with him about the visits of [defendant]." (14T52-12 to 53-8). According to Merriam-Webster, "demeanor" means "behavior toward others" or "outward manner." See Merriam-Webster, "Demeanor," https://www.merriam-webster.com/dictionary/demeanor. It is thus not hearsay. See N.J.R.E. 801(a) (defining "statement" under hearsay rules). Defendant seemingly concedes that a person's demeanor is not hearsay, but argues in his brief on appeal that Rob's "demeanor" had "no independent existence" from what was said.

(Db46). This is speculative and certainly no reason to find that the court abused its rather broad discretion in ruling on evidentiary matters. See Green, 160 N.J. at 492. In fact, defendant's failure to object deprived the court of the opportunity to explore the very argument that he is making on appeal – that when the witness said demeanor, he really meant statements. For this reason alone, this Court should find that defendant waived the hearsay argument on appeal. See State v. Witt, 223 N.J. 409, 419 (2015). And this waiver ought to include his newly-minted complaint about the lack of a limiting instruction, which he again deprived the court of the opportunity to issue by waiting to raise the request until the appeal. See State v. Scharf, 225 N.J. 547, 578-79 (2016) (finding no plain error in defendant's attacks on the adequacy of the limiting instruction when arguments not previously raised with the trial court).

Second, even if the State had admitted Rob's out-of-court statements regarding his concern or fear or intimidation resulting from these visits, such testimony would have been admissible. N.J.R.E. 803(c)(3) allows for the admission of statements regarding a declarant's "then-existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health)." While defendant points to cases establishing that a victim's fear of defendant is generally not admissible to prove defendant's motive and intent to kill the victim, that is not the

justification for admission in this case. And, in the very cases cited by defendant, our courts recognize that a victim's statement of fear may be admissible for a variety of reasons, including when "relevant to assessments of [the victim's] own actions, and . . . the assessment of the truth of another's stated reasons for conduct that occurred with that victim." Scharf, 225 N.J. at 570; see also State v. Benedetto, 120 N.J. 250, 260 (1990) ("Expressions of fear may be admissible when the victim's state of mind is a relevant issue."). Accordingly, in Scharf, the Supreme Court approved of the admission of numerous hearsay statements by the victim-decedent to her therapist and four friends, in which she claimed that she feared defendant, that he physically abused her, and that he will hurt or kill her. Id. at 561-64, 575. The statements were admitted to "counter" the defendant's claim that the victim "willingly went with [the] defendant, whom she was divorcing, to an isolated and dangerous spot where she allegedly accidentally fell to her death." Id. at 573.

Here, the observations about Rob's demeanor were similarly relevant to "assessments of [the victim's] own actions" and the "assessment of the truth" of defendant's versions of events. See id. at 570. Rob appearing upset and somewhat afraid regarding defendant's visits tended to show that they were unwelcome and undercut defendant's sanguine depiction of those visits as well as his claim that Rob was connected to the Israeli mafia. What is more, all the

cases cited in defendant's brief do not involve a charge of stalking. While in other cases fear of defendant may be irrelevant and thus unduly prejudicial, in this case the State had to prove that a person in the victim's position would have reasonably feared defendant. See N.J.S.A. 2C:12-10(b). The victim's state of mind regarding the alleged stalking events is thus probative to the State's case. See Wooten, 689 F.3d at 576-78.

Finally, in addition to the point that this case contains no hearsay, there are dramatic differences between the testimony in the cases cited by defendant and the relatively pedestrian single line of testimony that Rob looked "very upset and somewhat frightened and somewhat intimidated." (14T53-3 to 8). See Scharf, 225 N.J. at 561-64 (addressing testimony from a therapist and four friends regarding the victim's statements of fear, predictions the defendant will hurt her, and revelations that the defendant abused her); State v. Machado, 111 N.J. 480, 483-85 (1988) (involving evocative testimony from five friends and the admission of a letter authored by the deceased victim all stating that the victim feared defendant and that he committed serious acts of domestic violence against her); Benedetto, 120 N.J. at 253 (ruling on testimony from the deceased-victim's girlfriend that defendant told her he had been threatened over a debt, followed for two to three weeks, and received strange phone calls).

In all three of these Supreme Court cases, the defendant objected to the testimony, and yet only the Machado Court found that the admission of the evidence required reversal. In this case, the State submits that there was no error in the admission of this evidence, and, to the extent that the claim is not waived, there are certainly no grounds upon which this Court could find plain error. R. 2:10-2.

CONCLUSION

Based on the foregoing, the State respectfully requests that the judgment below be affirmed.

Respectfully submitted,

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