REDACTED VERSION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1279-23

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, Passaic County.
DONQUA THOMAS,	:	
		Indictment No. 21-05-00172-I
Defendant-Appellant.	:	
		Sat Below:
	:	Hon. Justine A. Niccollai, J.S.C., and a jury
	:	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
P.O. Box 46003
Newark, NJ 07101
(973) 877-1200

ETHAN KISCH
Assistant Deputy Public Defender
Attorney ID: 349152020
Of Counsel and On the Brief
Ethan.Kisch@opd.nj.gov
December 11, 2024

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

A jury convicted Donqua Thomas of murder and weapons offenses in the shooting death of [redacted]. The State presented a circumstantial case. With no recovered murder weapon and no testifying eyewitness who saw Thomas shoot [redacted], the State repeatedly turned to improper methods to fill holes in its case. These errors -- individually and cumulatively -- require a new trial.

First, the State improperly bolstered its case by presenting cumulative dying declaration testimony. Before trial, the State notified the court and defense counsel that it would offer two witnesses to testify that [redacted] identified Thomas as her assailant soon after being shot. During trial, however, the State unfairly surprised the defense with two additional dying declaration witnesses. These witnesses provided redundant testimony that the trial court should have excluded. Instead, their testimony became the centerpiece of the State's case.

Second, the State's expert offered inadmissible net opinion testimony on the location of Thomas's cell phone. In State v. Burney, 255 N.J. 1 (2023), the State Supreme Court held that a State expert witness improperly relied on an unverified distance estimate to opine on a cell tower's coverage area and place a defendant's phone at a crime scene. The State's expert witness here made the same fundamental errors. But the trial court allowed the expert's net opinion testimony anyway.

Third, the State repeatedly committed misconduct during summation. The prosecutor began by testifying about forensic facts not in evidence -- telling the jury, without any factual basis, that it should excuse the State's failure to test recovered ballistics evidence for fingerprints and DNA because, even if police had done the requisite forensic tests, nothing would not have been recovered. Then, the prosecutor shifted the burden of proof by advising the jury that Thomas -- not the State -- controls the evidence in the case. And on top of that, the prosecutor disparaged Thomas's prosaic third-party guilt defense by calling it a "conspiracy" theory that there was another "man on a grassy knoll" who killed the victim.

Finally, the trial court failed to provide three crucial jury instructions. Thomas argued that testimony and ballistics evidence proved that he did not shoot the victim, so someone else must have. The State claimed that Thomas shot [redacted] and emphasized that [redacted] identified him at the crime scene. These theories of the case plainly required tailored instructions concerning third party guilt, out-of-court identifications, and dying declarations. The trial court provided none.

These errors -- individually and cumulatively -- require a new trial.

PROCEDURAL HISTORY

On May 5, 2021, a Passaic County grand jury returned Indictment 21-05-172-I charging Donqua Thomas with four counts: first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (Count One); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (Count Two); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (Count Three); and second-degree certain person not to possess a weapon, N.J.S.A. 2C:39-7(b)(1) (Count Four). (Da 1-4)

Before trial, the Honorable Justine A. Niccollai, J.S.C., denied Thomas's motion to preclude dying declaration testimony from two witnesses offered by the State. (Da 5; 2T3-19 to 19-25) Trial then proceeded over seven days before Judge Niccollai and a jury. (4T to 10T) On June 21, 2023, the jury found him guilty on all four counts. (Da 6-8; 10T22-10 to 24-17, 32-14 to 33-5)

On November 16, 2023, Judge Niccollai denied Thomas's motion for a new trial. (11T9-8 to 22-19) That same day, the court imposed sentence. On Count One, the court ordered a life sentence, subject to NERA. After merging Count Two into Count One, the court imposed a concurrent 10-year prison sentence with five-year parole bar under the Graves Act on Count Three; it levied the same sentence on Count Four. (Da 9-12; 11T44-2 to 67-18)

On December 29, 2023, Thomas filed a notice of appeal. (Da 13-15)

STATEMENT OF FACTS

The State alleged that shortly after 1:30 p.m. on October 29, 2020, Thomas shot [redacted] in the parking lot of her Paterson apartment complex. (4T21-19 to 27-1; 9T89-23 to 90-1, 94-25 to 95-3, 111-9 to 10) The State claimed that Thomas shot [redacted] from a red car and then drove away. (4T24-5 to 25-2; 9T90-25 to 91-4, 96-10 to 101-1, 103-22 to 24, 107-7 to 109-10, 110-13 to 18) The State presented the following evidence to support its theory of the case.

A. [redacted] is shot and killed on October 29, 2020.

On the morning of October 29, 2020, [redacted] left her Paterson residence on [redacted] to attend two doctor appointments. (4T158-16 to 159-24) [redacted] was nine months pregnant with Thomas's child. (4T100-12 to 101-16) [redacted]'s mother, [redacted], remained at [redacted]'s residence to watch [redacted]'s seven-year-old daughter. (4T157-18 to 158-18) A little after 1:30 p.m., [redacted] was upstairs with [redacted]'s daughter when she heard a gunshot, followed by two additional gunshots moments later. (4T161-2 to 162-11) After coming downstairs, [redacted] looked out the front door but did not see anything. (4T162-12 to 20) Moments later, [redacted] heard her neighbor banging on the front door screaming her name and saying "it's [redacted]." (4T162-21 to 163-7) [redacted] ran outside and found [redacted] laying on the ground next to her car "on her right side with her left foot inside the car door." (4T163-8 to 164-15) When

[redacted] arrived, there were people already attending to [redacted] and others observing. (4T164-16 to 165-8)

Latressa Green, an off-duty sheriff's officer who lived on the same street, also heard the first gunshot and immediately looked out the window of her upstairs bedroom. (6T7-24 to 9-20) She saw "a lady screaming and falling, like dropping" to the ground "in the parking lot in between the cars next to the sidewalk." (6T9-21 to 25) Green then went to her closet, retrieved her firearm, and headed downstairs. At that point, Green heard two additional gunshots. (6T11-25 to 13-14) Like [redacted] Green testified that, after hearing the first gunshot, there was a gap in time before hearing the second and third gunshots. (Ibid.) Green then ran outside and began attending to [redacted]'s wounds. (6T13-22 to 15-14)

Della McCall, another neighbor who was upstairs in her residence, also heard the three gunshots and screaming. (4T38-5 to 40-21) She went outside and saw a crowd congregating around a woman on the ground. (4T40-22 to 45-6) McCall, who was chief of staff to the mayor of Paterson, called Paterson Director of Public Safety Jerry Speziale to alert him of the shooting. (4T41-19 to 22, 43-1 to 10) Speziale arrived on scene minutes later and began cutting through [redacted]'s clothes, attending to her wounds, and telling her to calm down. (5T48-8 to 49-24)

Each of these witnesses provided divergent accounts of what [redacted] said while she was on the ground after being shot. McCall testified that a woman named Melissa kept telling [redacted] to ask [redacted] what happened and who shot her. (4T44-5 to 45-4) McCall heard [redacted] respond "Quay" three times. (4T83-16 to 86-2) McCall also heard [redacted] later say to Speziale "why did he do this to me?" and "Why would my baby father do this to me?" (4T88-22 to 89-20) [redacted] testified that she repeatedly asked [redacted] who did this to her. Although [redacted] did not immediately respond, [redacted] testified that eventually [redacted] said "Qua." (4T165-18 to 166-5)[1] [redacted] also heard [redacted] say "he's in a red car" or "he ran to a red car," "Ma, Qua shot me," and "I can't breathe." (4T166-20 to 166-24) [redacted] understood "Qua" to be Donqua Thomas. (4T166-25 to 167-5) Green testified that [redacted] said the name "Qua" when Green asked who shot her. (6T16-17 to 17-14) Speziale testified that [redacted] twice said "I'm going to die, I can't breathe." (5T49-20 to 50-10) Then, according to Speziale, [redacted] repeated three times "why did he do this to me, my baby father." (Ibid.)

[redacted] died shortly after arriving at the hospital; her baby survived. (5T16-5 to 17, 52-25 to 53-4) An autopsy revealed that [redacted] suffered four gunshot wounds and died from "multiple gunshot wounds of the torso and right upper extremity." (5T94-15 to 101-5)

[1] The trial transcripts use the spellings "Qua" and "Quay."

B. Police investigate [redacted]'s death.

Police received several 911 calls after the shooting. (7T142-6 to 143-6) One person called 911 to report that a caller on [redacted], a nearby street to the crime scene, saw someone with a yellow hoodie crawling out of the bushes and heading towards [redacted]. (7T175-15 to 24) Police, however, did not follow up on that information. (Ibid.)

Police recovered two shell casings at the scene of the shooting and three bullets from [redacted]'s body; police did not recover a firearm. Neither casing was found in the parking lot where [redacted] was shot; one casing was found on a sidewalk, the other on a lawn area nearby. (5T141-10 to 21) A State Police firearms identification examiner determined that the two shell casings came from the same firearm. (7T35-7 to 15) The expert also determined that the three bullets recovered from [redacted]'s body were also shot by a single firearm. (7T39-4 to 12) However, the expert testified, because police did not recover a firearm, there was no way to determine whether the bullets came from the shell casings. (7T39-13 to 40-9) The Paterson Police Department directed that the ballistics evidence should not be tested for fingerprints or DNA. (7T43-4 to 46-6) Carl Leisinger, III, the defense firearms expert, testified that, based on where the casings were found, the shooter could not have been inside the red

car. (9T39-6 to 43-6) He explained that if [redacted] had been shot from the vehicle, the shell casings would have landed in the shooter's vehicle. (Ibid.)

Surveillance footage from multiple locations throughout Paterson revealed a red car with dark tinted windows driving to [redacted]'s neighborhood the morning of the shooting. (7T61-10 to 108-5) Police also recovered outside surveillance footage from [redacted]'s apartment complex. (6T134-15 to 155-12; 7T60-14 to 61-9) That footage showed that at 10:43 a.m. a red car arrived and parked at the apartment complex next to where [redacted] was later shot. (6T140-23 to 151-20) At approximately 1:33 p.m., video showed [redacted]'s black car pulling into a parking space next to the red car. (6T151-22 to 151-25) At approximately 1:36 p.m., video showed the red car leaving the scene. (6T152-4 to 6)

From some of the video footage, police were able to identify a partial plate match. That information led them to contact Asasha Thomas, Donqua Thomas's first cousin. (7T114-14 to 117-7) Asasha testified that she owned a 2013 red Dodge Dart vehicle with tinted windows. (6T46-5 to 47-9) According to Asasha, she had given possession to the red car to Donqua in September 2020. (6T47-8 to 49-4; 7T116-10 to 16) On the morning of the shooting, Asasha and Donqua helped move Asasha's girlfriend out of Asasha's Paterson apartment; Asasha and her girlfriend had plans to drive to Florida with her

belongings that day. (6T49-5 to 50-21) After helping pack boxes, Donqua drove Asasha and her girlfriend to multiple car rental dealerships -- including LaGuardia Airport and Wayne -- in the red Dodge Dart. (6T50-22 to 61-8) After renting a vehicle between 9:30 a.m. and 10:00 a.m. in Wayne, the group finished packing and Asasha then began driving to Florida with her girlfriend in the rental car. (6T61-11 to 62-14)

During the investigation, police obtained records related to Thomas's cell phone. At trial, State Police investigator Jessica Otzhy was qualified as an expert in historical cell site analysis and testified that, based on her analysis of call detail records from Thomas's cell phone, "between 11:40 a.m. and I believe it was 12:15 p.m. on 10/29 the device connected to a cell site that provided service to the homicide location of [redacted] in Paterson." (6T120-13 to 123-9)

On October 30, 2020, police filed a criminal complaint against Thomas. The next day, he voluntarily surrendered. (7T124-9 to 125-4)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE CUMULATIVE AND PREJUDICIAL DYING DECLARATION TESTIMONY. (4T73-4 to 74-2, 11T13-20 to 19-2)

At a pretrial Rule 104 hearing, the State proposed two witnesses -- Jerry Speziale and [redacted] -- to testify at trial that they each heard [redacted] identify Thomas as her assailant. (2T3-19 to 19-25; Da 5) But during trial, and without notice to the court or defense, the State asked two additional witnesses -- Della McCall and Latressa Green -- to recount [redacted]'s dying declarations. (4T45-7 to 11, 73-4 to 76-4, 84-5 to 85-9; 6T16-17 to 17-14) These two witnesses were cumulative, prejudicial, and unfairly surprised the defense. The trial court should have barred their testimony. Because it did not, Thomas's convictions must be reversed. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. Factual Background

Thomas moved pretrial to bar testimony concerning [redacted]'s alleged dying declarations under N.J.R.E. 804(b)(2) and N.J.R.E. 403. (1T3-24 to 4-13) The State identified Speziale and [redacted] as dying declaration witnesses for trial. (1T4-11 to 17) After hearing testimony from both witnesses (1T4-10 to 80-5), as well as argument from counsel (1T81-17 to 105-23), the court ruled that

Speziale and [redacted] could testify at trial (2T3-19 to 19-20; Da 5). These two witnesses, the court held, would provide testimony that satisfied the dying declaration hearsay exception because [redacted]'s purported statements identifying Thomas were made voluntarily and "in good faith while the victim declarant believed" her death was imminent, per N.J.R.E. 804(b)(2). (2T15-12 to 16-22) The court also found that "the probative value of the statements are not substantially outweighed by the risk of undo prejudice, confusion of the issues, or misleading the jury" under N.J.R.E. 403. (2T19-12 to 20)

Della McCall, the State's first trial witness, had not been pre-cleared to provide testimony about [redacted]'s dying declarations. Nevertheless, the State asked McCall, who had arrived on scene shortly after [redacted] had been shot, "did you hear the person lying on the ground [i.e., [redacted]] say anything?" (4T45-7 to 8) McCall answered "Yes." (4T45-9) The State then asked "What did you hear her say?" (4T45-9 to 10) Defense counsel immediately objected and argued that the State had not previously indicated that McCall would provide dying declaration testimony. (4T45-11 to 51-24) Counsel argued that such testimony from a third witness would be impermissibly cumulative. (4T67-12 to 68-4)

At the ensuing Rule 104 hearing (4T53-19 to 76-4), McCall testified that after someone asked [redacted] what happened, [redacted] said "Quay" three to four times. (4T54-22 to 55-7, 60-21 to 61-21) She also overheard [redacted] say to Speziale, "I

don't know why he did this to me" and "why would my baby father do this to me?" (4T55-8 to 22)

The court permitted McCall's testimony, but issued a stark warning:

> This is three witnesses. But I would strongly, counsel the State, that -- you know, three witnesses is giving the jury the benefit of all the information that they need on this particular point. So, if there are four, five, or six witnesses that the State is going to attempt to elicit this information from then the defense's point that this is cumulative would have a lot more bearing on this Court's decision. So, as to Ms. McCall's testimony I do find that it meets all of the requirements of the dying declaration and I am going to permit the State to elicit that testimony from her.
>
> [4T73-4 to 22]

After a short break, the State notified the court that, "in light of your ruling, I did get some clarification from [Latressa] Green" -- another fact witness the State planned to call later at trial. The prosecutor explained that, although Green was previously unsure whether she heard [redacted] say anything at the crime scene, Green now recalled that she "heard something and it didn't sound like a real name and then she said Quay." "I understand where the counsel[']s position is and the Court's position," the prosecutor told the court, "[a]nd so, it might take a delicate touch to make sure we don't do anything that would constitute error." (4T75-11 to 76-3) That is, the State understood that eliciting any additional dying declaration testimony would be cumulative.

Back in front of the jury, McCall told the jury she heard [redacted] say "Qua" three times (4T84-5 to 86-2), and that [redacted] later said to Speziale "why did he do this to me?" and "why would my baby father do this to me?" (4T88-22 to 89-20) Later, [redacted] and Speziale also testified to their recollections of [redacted]'s dying declarations. [redacted] testified that [redacted] said "Qua" (4T165-18 to 166-5), "he's in a red car" or "he ran to a red car," and "Ma, Qua shot me." (4T166-20 to 166-24) Speziale testified that [redacted] twice said "I'm going to die, I can't breathe" and three times said "why did he do this to me, my baby father." (5T49-20 to 50-10)

During Green's testimony later at trial, despite the trial court's earlier warning, the State asked her: "prior to the victim's mother getting there -- were you talking to [redacted]?" (6T16-17 to 20) Green responded, "Yes. I was asking her questions. I was asking her who -- who shot her, did she see anything. And she did -- she did whisper like a name, and I wasn't sure what it was." (4T16-21 to 17-2) The State followed up: "So you didn't hear the victim say anything"? (6T17-3) Green then responded:

> I -- I did hear say. I wasn't -- she said -- she said Qua, but I wasn't exactly sure what I was hearing because I wasn't familiar with him. I didn't know the name, I wasn't sure. And I asked again. And by that time her mother had came out and she spoken to her mom and her mom repeated the name because I started asking the mom to ask her, you know, who did it, you know, what -- what -- what were they driving, what were they

> wearing, you know. I didn't know if they were on foot. I didn't have any information. And I was trying to get that information while she was still conscious.
>
> [6T17-4 to 14 (emphasis added)]

The defense did not submit a contemporaneous objection.

B. The dying declaration testimony was cumulative and resulted in undue prejudice.

Referred to as a "dying declaration," a statement "by a victim unavailable as a witness" is admissible as an exception to the hearsay prohibition "if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death." N.J.R.E. 804(b)(2). Although long debated, "[t]he exception continues to apply today based on the belief that persons making such statements are highly unlikely to lie." State v. Williamson, 246 N.J. 185, 200 (2021) (quotation omitted).

But satisfying the hearsay exception is just the first hurdle. In addition, "[a] careful balancing of probative value and prejudicial effect is always required under N.J.R.E. 403." State v. Cole, 229 N.J. 430, 459 (2017). The Rule provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of . . . [u]ndue prejudice" or "needless presentation of cumulative evidence." N.J.R.E. 403(a), (b). To qualify as unduly prejudicial, the evidence's probative value must be "so significantly outweighed by its inherently inflammatory potential as to have a probable

capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues." Cole, 229 N.J. at 448 (quotation omitted) (cleaned up).

As the trial court recognized below, the probative value of evidence is "greatly diminished as it becomes merely cumulative and redundant." State v. Taylor, 350 N.J. Super. 20, 37 (App. Div. 2002); see also N.J.R.E. 611(a)(1), (2) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to: . . . make those procedures effective for determining the truth" and "avoid wasting time"). If the prejudice of unnecessary repetition eclipses its usefulness, N.J.R.E. 403 "mandates the exclusion of evidence that is otherwise admissible[.]" Cole, 229 N.J. at 448. "If other less prejudicial evidence may be presented to establish the same issue," our courts require that "the balance in the weighing process will tip in favor of exclusion." State v. Barden, 195 N.J. 375, 392 (2008). To put it simply: "evidence of an inflammatory nature must be excluded under [N.J.R.E.] 403 if probative, non-inflammatory evidence on the same point is available." State v. Wilson, 135 N.J. 4, 20 (1994) (emphasis added) (citations omitted).

Our courts have repeatedly "caution[ed]" that judges "must serve as gatekeepers when repetitive corroborating hearsay evidence is proffered[.]" State v. Smith, 158 N.J. 376, 391 (1999); e.g., State v. Johnson, 120 N.J. 263,

298 (1990) (excluding testimony because they were "largely corroborative of other, essentially unchallenged testimony" and therefore "only minimally probative of defendant's guilt"); State v. Muhammad, 359 N.J. Super. 361, 378 (App. Div. 2003) (recognizing "significant potential for abuse" in allowing prosecutor to present a "repeat performance" of witness testimony during summation).

Although evidentiary rulings are generally reviewed for abuse of discretion, legal determinations are reviewed de novo. State v. Buckley, 216 N.J. 249, 260-61 (2013). An erroneous evidentiary ruling is not harmless if there is "some degree of possibility that the error led to an unjust result." State v. Ingram, 196 N.J. 23, 49 (2008) (quotation omitted) (cleaned up); State v. Hedgespeth, 249 N.J. 234, 252 (2021).

Rule 403 balancing applies to dying declaration testimony. State v. Brown, 236 N.J. 497, 523 (2019). For example, in Taylor, 350 N.J. Super. 20, this Court held that presenting a victim's dying declaration to a jury for the fourth time violated the defendant's right to a fair trial. During trial, the State presented three eyewitnesses who recounted the victim's dying declaration -- two responding police officers and the victim's mother. Id. at 36-37. So far so good. But prosecutors also twice played a three minute and ten second surveillance videotape that, in its final seconds, depicted the victim's dying

declaration. Id. at 35-36. This Court held that the State's playing the videotape deprived the defendant of a fair trial. Id. at 38. "In view of the availability of [ ] testimonial evidence to prove the same point," this Court explained, "the probative value of the tape's last few seconds containing the dying declaration is greatly diminished as it becomes merely cumulative and redundant." Id. at 37. At the same time, the prejudicial effect of the video depicting the end of the victim's life, the Court observed, "is enormous and substantially outweighs whatever residual or collateral evidential value there remained to the tape's depiction of defendant's last words." Ibid.

Here, testimony from two eyewitnesses – [redacted] and Speziale -- was more than sufficient for the jury to grasp the State's version of events, greatly diminishing the third and fourth witnesses' probative value. At the same time, the State's additional witnesses caused real prejudice. "[D]escribed as 'devastating' in its impact," "[i]t must be borne in mind that a dying declaration is often terrible in its consequence and well nigh impossible to counter." State v. Hegel, 113 N.J. Super. 193, 202 (App. Div. 1971) (quoting State v. Yough, 49 N.J. 587, 598 (1967)); see Shepard v. United States, 290 U.S. 96, 104 (1933) ("The reverberating clang of those accusatory words would drown all weaker sounds."); Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev.

1357, 1374 (1985) ("Unreliable as it may be, the dying declaration has great dramatic appeal."). And when a dying declaration is repeated by multiple witnesses at trial, its effect is multiplied. This type of repeated evidence is solidified in "a juror's memory to a degree not reflective of its true probativeness," so "[c]ourts have recognized and attempted to limit the prejudicial impact of such evidence by using their powers to control the order of proof and exclude cumulative evidence." Victor J. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Wash. L. Rev. 497, 517 (1983).

Importantly, both the trial court and the State recognized below the danger of cumulative dying declaration testimony. Indeed, the trial court rejected Thomas's argument that the third witness was cumulative in part because there would be no more. (4T73-4 to 22) Given this warning, the State appeared to acknowledge that eliciting dying declaration testimony from a fourth witness "would constitute error." (4T75-11 to 76-3) The State did it anyway.

The fact that the cumulative testimony was an unfair surprise to the defense made it even worse -- leaving Thomas's counsel ill-prepared for cross examination of the two additional witnesses. See State v. Zola, 112 N.J. 384, 418 (1988) ("By enabling each party to be informed of the other's case, our

rules of discovery ensure fairness and avoid unfair surprise."); R. 3:13-3(f) (imposing a "continuing duty to provide discovery" and empowering trial courts, among other remedies, to "prohibit the party from introducing in evidence the material not disclosed").

In the end, any single witness recounting a dying declaration is incredibly powerful. The State's original two witnesses presented more than enough testimony about the victim's dying declarations. Knowing it had other holes in its circumstantial case, the State presented two additional witnesses to try to divert the jury. Because these additional witnesses deprived Thomas of his rights to due process and a fair trial, reversal is required.

POINT II

THE STATE'S EXPERT OFFERED INADMISSIBLE NET OPINION TESTIMONY CONCERNING THE LOCATION OF MR. THOMAS'S CELL PHONE. (Not raised below)

In State v. Burney, 255 N.J. 1 (2023), the Supreme Court held that a State expert offered an improper net opinion when he relied on a "rule of thumb" and his "training and experience" to estimate that a cell tower had a one-mile range that included a specific crime scene. Id. at 5, 21-25. In order to testify, the Court ruled, the expert would need to first verify the estimated range and account for factors that affect a cell tower's coverage area. Ibid. Here, expert witness Jessica Otzhy, a State Police investigator, provided nearly

identical net opinion testimony. First, Otzhy relied solely on a 1.5-mile "industry average" "set by the [F]BI" to opine that the crime scene was within a specific cell tower's coverage area. (6T103-8 to 11, 124-19 to 23) That is, just like the "rule of thumb" in Burney, Otzhy's estimate "was unsupported by any factual evidence or other data." 255 N.J. at 25. Second, Otzhy used her unsubstantiated 1.5-mile estimate to create demonstrative maps, shown to the jury during trial, that purported to show the coverage areas of cell towers near the crime scene. (6T119-12 to 123-1; 8T30-12 to 31-8; Da 22-25) But again, "[g]iven the lack of data to support the [expert's] approximation of the cell tower's coverage area," Burney deemed these types of demonstratives improper. 255 N.J. at 25. Third, Otzhy finished her testimony with the "key findings" "that between 11:40 a.m. and I believe it was 12:15 p.m. on 10/29 the [defendant's] device connected to a cell site that provided service to the homicide location[.]" (6T123-5 to 9) But, yet again, Burney barred this type of conclusion without strong factual support. 255 N.J. at 25.

Because Otzhy's net opinion testimony purporting to place Thomas's cell phone at the crime scene was plainly capable of producing an unjust result, depriving him of due process and a fair trial, reversal is required. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; R. 2:10-2.

A. Expert testimony about cell phone location cannot be based on unverified distance estimates.

"For an opinion to be admissible under N.J.R.E. 702, the expert must utilize a technique or analysis with a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth." State v. J.R., 227 N.J. 393, 409 (2017) (quotation omitted). Likewise, "[t]he net opinion rule, a corollary of N.J.R.E. 703, forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Burney, 255 N.J. at 23 (quotation omitted). "The rule requires that an expert give the why and wherefore that supports the opinion, rather than a mere conclusion." Ibid. The expert must "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Townsend v. Pierre, 221 N.J. 36, 55 (2015) (quotation omitted). "Given the weight that a jury may accord to expert testimony," it is vital that "[a]n expert's conclusion is excluded if it is based merely on unfounded speculation and unquantified possibilities." Ibid.

In Burney, the Supreme Court considered whether a State expert qualified in historical cell site location analysis could permissibly testify that a crime scene was within a cell tower's range, and that the defendant's phone was at or near the crime scene. The expert's opinion was based on what the

expert called a one-mile "rule of thumb." That figure, he testified, was a "good approximation" and "good estimate" of the tower's range based on his training and experience. 255 N.J. at 5, 12. Relying on the rule of thumb, the expert created a demonstrative map with shaded areas to illustrate the coverage area for the cell tower and opined that it was highly unlikely that the crime scene fell outside of the shaded coverage area. Id. at 25. Therefore, the expert told the jury, the defendant's phone -- which had connected to that tower -- had been near the crime scene. Id. at 5, 30.

The Supreme Court noted that, although less precise than data from GPS, some courts have accepted "expert testimony about cell site analysis for the purpose of placing a cell phone within a 'general area' at a particular time." Id. at 21-22 (citing cases). But there are important limits, including that the expert must verify their estimate by collecting and analyzing data. For example, the Court cited approvingly to a federal case that held "estimating the coverage area of radio frequency waves of a cell tower requires more than just training and experience, it requires scientific calculations that take into account factors that can affect coverage." Id. at 24 (cleaned up) (quoting United States v. Evans, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012)).

Accordingly, Burney held that the State expert's "rule of thumb" approximation was an improper net opinion "because it was unsupported by

any factual evidence or other data." Id. at 24-25. The expert failed to account for the host of factors that can affect a cell tower's range and coverage area -- including, per Burney, "the towers' technical aspects, including geography and topography, the angle, number, and directions of the antennas on the sites, the technical characteristics of the relevant phone, and environmental and geographical factors." Id. at 21 (quotation omitted). Although an expert need not consider all these factors, the Supreme Court held that "because the testimony was based on nothing more than [the expert's] personal experience, the trial court erred in allowing the jury to hear this testimony." Id. at 25.[2]

B. The State's expert used an unverified distance estimate to determine the range and coverage areas of cell towers, create coverage maps, and ultimately place Thomas at the crime scene.

Here, Otzhy's testimony was nearly identical to the impermissible net opinion testimony in Burney.

First, Otzhy used a 1.5-mile estimate to determine the range and coverage area of several cell towers around the crime scene without any data to support it. Otzhy solely relied on what she called "the industry average" of "a mile and a half out from the antenna." (6T103-8 to 11) That distance, she explained, is "an average that has been set by the [F]BI" (6T103-8 to 11)

[2] Because Burney did not announce a new rule of law, there is no need for this Court to undertake a retroactivity analysis. See State v. Cummings, 184 N.J. 84, 97-98 (2005).

because "[t]hat's what [an] average cell site, the radius that it can cover" (6T124-19 to 23). In other words, Otzhy applied an impermissible "rule of thumb" by another name. See Burney, 255 N.J. at 24-25.

Like in Burney, Otzhy did nothing to test or verify her 1.5-mile assumption. She explained that a particular tower's coverage area would, in actuality, be longer or shorter than the 1.5 mile-average depending on several factors. (6T103-12 to 23, 128-4 to 10) "For example," she testified, "if you're in a city, you have a lot more people, who have a lot more demand for a connection to be made, so there's going to be more cell sites available. So the individual coverage of some of those sites might be shorter since there's more of them around." (6T103-14 to 23, 127-8 to 11) And yet, Otzhy simply applied her 1.5-mile estimate to all the towers in the Paterson area. The Supreme Court criticized this exact type of generalized estimate of tower range and coverage area "unsupported by any factual evidence or other data." Burney, 255 N.J. at 25; see also Townsend, 221 N.J. at 55 ("[W]hen an expert speculates, he [or she] ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." (quotation omitted)).

Otzhy's conclusory testimony failed to consider any facts or reliable data from which the actual range and coverage areas of the cell towers in Paterson could be calculated. Burney, 255 N.J. at 21 (listing several factors that affect

range and coverage area). In this case, verification would have been especially easy: Otzhy testified that "information . . . about the individual coverage area of each cell site" can be obtained directly from T-Mobile "if you ask them to complete a survey." (6T125-11 to 15) Otzhy simply declined to do so. Burney disapproved this type of shortcut analysis. 255 N.J. at 24-25. With no support for her guesstimate, Otzhy's testimony was no more than "unsubstantiated personal beliefs couched in scientific terminology" rather than "based on scientifically sound reasoning[.]" Townsend, 221 N.J. at 54 n.5 (quotation omitted); id. at 57-59 (excluding expert's testimony because he "took no measurements" and did not "present empirical evidence" to support opinion).

Otzhy also failed to show that her "average that has been set by the [F]BI" (6T103-8 to 11) has been recognized outside the law enforcement community. See Evans, 892 F. Supp. 2d at 957 (barring similar testimony because expert's method had "received no scrutiny outside the law enforcement community."). To make matters worse, cases reflect that there is not even a consistent view among FBI experts. Compare (6T103-8 to 11 (Otzhy applying 1.5-mile "average that has been set by the [F]BI")), with Burney, 255 N.J. at 5-6, 12, 24-25 (FBI agent applying one-mile "rule of thumb" "based on his training and experience"), Carpenter v. United States, 585 U.S. 296, 324 (2018) (Kennedy, J., dissenting) ("The FBI agent . . .

testified that a cell site in a city reaches between a half mile and two miles[.]"), and United States v. Machado-Erazo, 47 F.4th 721, 736-37 (D.C. Cir. 2018) (Rogers, J., concurring) (FBI agent "testified that a cell phone 'had to be within a half mile' of a particular cell tower for the phone to connect to that tower"). In short, Otzhy's use of a 1.5-mile estimate to determine the range and coverage area of cell towers around the crime scene, without any data to support it, should have been excluded.

Second, compounding her net opinion testimony, Otzhy used a discredited mapping technique to create deceptive demonstratives shown to the jury during trial. (Da 16-26)[3] Using her unverified 1.5-mile rule of thumb,

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[3] Otzhy's 11-page report was turned into a PowerPoint presentation and shown in its entirety to the jury during trial. (; 8T30-12 to 20; Da 16-26) Over Thomas's objection, which took place at the close of the State's case, the court admitted into evidence pages 5 to 10 of the report. (8T17-21 to 21-11, 25-17 to 31-8; Da 20-25)

The demonstrative slides are replete with plain factual inaccuracies and internal inconsistencies. For example, the presentation twice suggests that Thomas's cell phone was near the crime scene until 2 p.m. (Da 23, 25) But that is directly contrary to Otzhy's testimony that the cell phone was near the crime scene until 12:15 p.m. (6T123-2 to 9) And the report itself shows that a cell tower the State says is near the crime scene picked up Thomas's phone at 12:15:32 p.m., and that a different tower further from the crime scene picked up his phone at 1:53:24 p.m. (Da 23) Otzhy had no data between those events, so there was no way for Otzhy to conclude that Thomas's cell phone was near the crime scene until 2 p.m. In another example, the report states that "[t]he homicide takes place at 1:37 PM. [Thomas's cell phone] receives an incoming call at 1:53 PM that places it just east of [redacted] [i.e., the crime scene]." (Da 18) But Otzhy had no way of determining whether Thomas's cell phone was "just east" of the scene; that was pure speculation. (See Da 23)

Otzhy drew straight 1.5-mile lines to depict the purported range and coverage areas of the towers near the crime scene. (6T119-12 to 123-1) In effect, this created a 120-degree wide, 1.5-mile long shaded wedge-shaped sectors emanating from the towers. Each shaded wedge, Otzhy testified, "represents the sector and the coverage of the sector that the [cell phone] device connected to[.]" (6T119-12 to 16, 121-1 to 3) Otzhy then placed the crime scene with a red "X" within the cell tower's purported coverage area -- in effect, placing Thomas's cell phone at or near the crime scene. (6T119-17 to 19, 122-1 to 3) But, same as in Burney, Otzhy used nothing more than the 1.5-mile "industry average" to create the pie-slice shaped coverage areas. She did nothing to determine the actual coverage areas of the towers or whether the crime scene was within range. (6T121-10 to 22); see Burney, 255 N.J. at 12, 25 (criticizing the State's expert for using the same technique).

If Otzhy had obtained data about the actual coverage areas, the demonstratives would have looked nothing like her wedge-shaped depictions. There is widespread criticism of Otzhy's technique of drawing wedge-shaped coverage areas because, in reality, coverage areas look more like uneven paint splotches than neat pie-slices. For that reason, "[n]o knowledgeable expert in this day and time should be using pie-slices to show cell phone location evidence." Larry Daniel, Cell Phone Location Evidence for Legal

Professionals 53-57 (2017) ("[U]nless there is a radio propagation map or drive testing map . . . no information about radius or coverage should be assumed.").

Even federal courts that have otherwise permitted testimony concerning the "general or approximate" location of a cell phone have made clear that any indication "as to the size of the radius of a particular cell tower's sector [must] provide a specific and reliable basis therefor." United States v. Nelson, 533 F. Supp. 3d 779, 795 (N.D. Cal. 2021); United States v. Jones, 918 F. Supp. 2d 1, 5 (D.D.C. 2013) (allowing testimony under the condition that the expert "does not purport to portray the 'coverage area' of any particular cell tower or antenna"). Otzhy told the jury she made "accurate maps." (6T116-15 to 17) But they were not, and she had no reliable basis to claim that.

Third, despite the uncertainties inherent in her analysis, Otzhy capped her testimony by confidently placing Thomas at the crime scene a little more than an hour before the shooting. "My key findings," Otzhy told the jury, "were most importantly that between 11:40 a.m. and I believe it was 12:15 p.m. on 10/29 [Thomas's cell phone] connected to a cell site that provided service to the homicide location of [redacted] in Paterson." (6T123-2 to 9; see also 9T120-13 to 17) But Otzhy's conclusion was, again, based on the

same impermissible 1.5-mile average. (6T119-12 to 16, 121-9 to 122-3)[4] The expert in Burney provided a similar conclusion; it was deemed improper. 255 N.J. at 5, 25, 30.

To be sure, defense counsel did not make a contemporaneous objection to Otzhy's testimony. But "[t]he failure of a defendant to object to expert testimony does not relieve the trial court of its gatekeeper responsibilities[.]" State v. Nesbitt, 185 N.J. 504, 515 (2006). "As gatekeepers, trial judges must ensure that expert evidence is both needed and appropriate, even if no party objects to the testimony." State v. Sowell, 213 N.J. 89, 99-100 (2013) (citation omitted). Burney made clear that a "court must ensure that the proffered expert does not offer a mere net opinion." 255 N.J. at 23 (quotation omitted). When expert testimony clearly runs afoul of the Rules of Evidence, a court commits plain error by allowing its admission. See, e.g., State v. Reeds, 197 N.J. 280, 298 (2009); State v. Pasterick, 285 N.J. Super. 607, 621-22 (App. Div. 1995).

Ultimately, the admission of Otzhy's impermissible net opinion testimony on the coverage area of the cell towers and the location of Thomas's

[4] The federal government has conceded that this type of conclusory testimony is irresponsible given the limitations in cell phone location data. In Carpenter, 585 U.S. 296, the federal government admitted that "[i]nferences about location drawn from cell site information . . . do not permit a detailed reconstruction of a person's movements" and provide estimates "as much as 12,500 times less accurate than GPS data." Appellant Brief for the United States, 2017 WL 4311113, at *12-13, *24 (U.S. 2017) (quotation omitted).

cell phone was an essential part of the State's circumstantial case. Although surveillance video showed a red car at the crime scene, there was no video of Thomas at the crime scene. Nor was there any testifying witness who saw Thomas there. Acknowledging this significant omission in its case, the prosecutor's summation pointed directly to Otzhy's testimony to fill the gap, arguing to the jurors that, "if you're not convinced that Donqua Thomas is in the car based on the surveillance footage, his phone is there too." (9T107-7 to 108-4) Later, the State made clear that its case hinged on Otzhy's testimony, imploring the jurors that it could ignore all the other evidence because, according to the prosecutor, "[i]t's not knowing where the car came from, it's not knowing who was driving that car, it's about knowing where the defendant's cell phone was." (110-13 to 18)

In sum, Otzhy used an unvalidated method to estimate the coverage areas and ranges of the cell towers near the crime scene and failed to take any steps to validate her guess. Then, she compounded these errors by creating demonstratives that placed the crime scene within a tower's coverage area. And to finish it off, she opined that Thomas was at the crime scene before [redacted] was killed. Like the testimony in Burney, Otzhy's testimony should have been rejected. Instead, it became a centerpiece of the State's case. For these reasons, reversal is required.

POINT III

THE STATE'S REPEATED MISCONDUCT DURING SUMMATION DEPRIVED MR. THOMAS OF A FAIR TRIAL. (Not raised below)

The State's summation crossed the line in three respects. First, the prosecutor testified about facts not in evidence. Then, the prosecutor shifted the burden of proof to Thomas to prove his own innocence. And on top of that, the prosecutor twice denigrated the defense's theory of the case. These transgressions -- both individually and cumulatively -- denied Thomas a fair trial and require reversal. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; R. 2:10-2.

A. New Jersey courts hold prosecutors to a high bar -- especially during summation.

"New Jersey courts have commented repeatedly on the special role filled by those entrusted with the responsibility to represent the State in criminal matters, observing that the primary duty of a prosecutor is not to obtain convictions but to see that justice is done." State v. Smith, 212 N.J. 365, 402-03 (2012). Prosecutors must "adhere to the high ethical standards of their office" and keep in mind that "a trial is not a gladiatorial contest; it is a forum where justice must be done." State v. Garcia, 245 N.J. 412, 435 (2021) (citation omitted). Simply put, "[p]rosecutors are required to turn square corners because their overriding duty is to do justice." Id. at 418. "It is as

much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Frost, 158 N.J. 76, 83 (1999) (quotation omitted).

Upholding these ethical standards is especially imperative during summation -- when jurors hang on every word of the State's final argument. See State v. Williams, 471 N.J. Super. 34, 44 (App. Div. 2022) (noting that "jurors are likely to accord special deference to the comments of the prosecutor"). While prosecutors are "entitled to argue the merits of the State's case graphically and forcefully," they must remain within proper bounds to avoid misconduct. Smith, 212 N.J. at 403 (quotation omitted).

"When an appellate court reviews a claim of prosecutorial misconduct with respect to remarks in summation, the issue presented is one of law" and "review is plenary and de novo." Id. at 387.

B. The State testified about forensic facts not in evidence to fill a significant hole in its case.

Our law governing the scope of summation is clear: "[I]n closing, prosecutors are obliged to confine their comments to the evidence admitted at trial and reasonable inferences drawn therefrom." State v. Williams, 244 N.J. 592, 613 (2021) (citing cases). The State's summation may "connect interrelated pieces" of trial evidence for the jury, but a prosecutor cannot "seek to provide some of the missing pieces." State v. McNeil-Thomas, 238 N.J. 256,

279-80 (2019) (quotation omitted). Prosecutors must also "refrain from opining in such manner that the jury may understand the opinion or belief to be based upon something which the prosecutor knows outside the evidence." Williams, 471 N.J. Super. at 44 (quotation omitted) (cleaned up). In the end, a prosecutor's "duty is to prove the State's case based on the evidence" -- nothing more and nothing less. State v. Blakney, 189 N.J. 88, 96 (2006).

Prosecutors must hew to the trial proofs because "[f]ailing to do so may imply that facts or circumstances exist beyond what has been presented to the jury and encroach upon a defendant's right to a fair trial." Williams, 244 N.J. at 613; see State v. Supreme Life, 473 N.J. Super. 165, 175 (App. Div. 2022) (advising that the Rules of Professional Conduct "apply to assistant prosecutors" and "specifically prohibit[ ] an attorney in trial to 'assert personal knowledge of facts in issue'" (quoting RPC 3.4(e)). The same goes for "making inaccurate factual assertions to the jury." Garcia, 245 N.J. at 435 (citation omitted). "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." State v. Wakefield, 190 N.J. 397, 437 (2007) (quotation omitted). Thus, "[r]eferences to matters extraneous to the evidence may constitute prosecutorial misconduct." Williams, 244 N.J. at 607 (quotation omitted); see also Charles Allen Wright, et al., 3 Fed. Prac. &

Proc. Crim. § 588 (5th ed. 2024) ("It is misconduct for a prosecutor to make an assertion to the jury of a fact, either by way of argument or by an assumption in a question, unless there is evidence of that fact.").

Here, defense counsel's summation reminded the jury that the Paterson Police Department specifically instructed the crime lab not to test for fingerprints or DNA on the ballistics evidence. Counsel argued to the jury that State expert Gerald Burkhart

> testified to exactly how you load a semi-automatic handgun. How do you put those bullets and the shells into the handgun? You use your thumb. Right? You put each individual bullet into the slide with your hand. Now, whoever put those bullets into that -- into that slide, it's a pretty good chance that that person is the person who fired the shots at [redacted]. Now, Gerald Burkhart testified to what he received. Not only to the bullets and the projectiles and the shell casings, but also the -- the request for the examination. And he testified that the reports that he received were to specifically, with these instructions, do not test for fingerprints, do not test for DNA. Now it may seem like, okay, we'll just do that next test. But what's actually going on there is the detectives from the Paterson Police Department are telling the lab to not look for biological evidence that can prove who held the bullets that shot [redacted].
>
> [9T84-10 to 85-8]

Defense counsel's argument was permissible. "During closing arguments, a criminal defendant certainly is entitled to direct the jury's attention to what he believes are loopholes in the government's case and to

argue that these loopholes establish the non-existence of facts which the government would have proven if it had the evidence." United States v. Brown, 765 F.3d 278, 296 (3d Cir. 2014) (quotation omitted)). The argument was also predictable. During trial, the State's expert specifically testified that the lab would have done fingerprint and DNA analysis if the State had requested it. (7T45-1 to 12) Indeed, the expert explained that such testing is often the first step the laboratory undertakes with new evidence. (7T45-14 to 23) Yet, police specifically instructed the lab not to test for fingerprints or DNA. (7T44-6 to 13)

To be sure, the State was permitted to respond to Thomas's argument. Such a response, however, "cannot be considered a foray beyond the evidence adduced at trial." State v. Johnson, 287 N.J. Super. 247, 266 (App. Div. 1996). The State ignored this cardinal rule. During summation, the prosecutor told the jury -- with no facts or testimony (expert or otherwise) to support his assertion -- that such testing would have been futile because DNA and fingerprints could not have been recovered from the shell casings:

> [Defense counsel] also made mention of fingerprints or DNA analysis on the shell casing I showed you. Well think about how the gun works. It's an explosion out of a gun, it's hot. And to think where the shell casing was found and the conditions that were out there with a whole bunch of people outside, raining, what do you think you're going to find on a shell casing? This isn't CSI.

[9T102-20 to 103-2]

This testimony is reversible error. The State's message was clear: even if it had tested the shell casings, it was obvious that fingerprints and DNA could not be recovered. The heat of the gun explosion, the rain, and the number of people at the crime scene rendered that evidence impossible -- at least according to the prosecutor. But the State had not introduced expert testimony or other evidence to support this baseless factual assertion. So the prosecutor improperly supplied his own testimony instead.

Our courts have repeatedly held that similar references to purported scientific facts not in evidence denied defendants of a fair trial. Take State v. Adames, 409 N.J. Super. 40 (App. Div. 2009). In a haphazard attempt to counter defendant's insanity defense, the Adames prosecutor rhetorically asked the jury during summation:

> We've been here for a long time and we've had opportunities to observe [defendant] sitting over there and in terms of any type of schizophrenic behavior have you seen him acting like he's responding to internal stimuli? Have you seen him reacting to people that aren't there? Reacting to voices that are up here in his head? Which I submit are not inner thoughts, but what sounds like I'm talking to you?
>
> [Id. at 56-57 (cleaned up).]

This Court reversed on plain error, holding that the references to the defendant's demeanor and the prosecutor's "direct attack on [defendant's] defense through the use of her own unsworn testimony rises to a level of impropriety sufficient to deny [the defendant] his right to a fair trial." Id. at 63.

Similarly, in State v. Bradshaw, 195 N.J. 493 (2008), the prosecutor told the jury that "people with handicaps have stronger sensory perception," and so the victim -- who was deaf and mute -- was therefore "a lifelong 40-year-old trained observer" whose "whole world is about her ability to recognize things." Id. at 510 (cleaned up)). Although the Court had already ordered a new trial on other grounds, it held that the summation was improper because "the State did not present evidence that the victim had a stronger sensory perception because of her condition." Ibid. The Court made clear that, "at any retrial, the prosecutor should neither argue facts that are not in the record, nor expressly or implicitly vouch for the credibility of the victim." Ibid.

Federal courts, too, prohibit references to scientific assertions not in evidence. United States v. Brown, 765 F.3d 278 (3d Cir. 2014), is squarely on point. During summation, defense counsel argued that there was a gap in the prosecution's unlawful gun possession case because there was no fingerprint evidence connecting the defendant to the recovered gun. Id. at 286. And just like in Thomas's case, the prosecutor responded by telling the jury that no

fingerprints would have been recovered even if police had tested the gun. After asking the jurors to rely on "your own common sense in your daily experience about fingerprints," the prosecutor argued that on glass surfaces like coffee tables, "you find only smears and smudges, you do not find fingerprints." Id. at 287. The prosecutor "then extrapolated this point to the firearm recovered by law enforcement, arguing that the jurors' common sense should inform them that a gun with a 'microtextured surface' is equally unlikely to hold fingerprints." Ibid. And like the State here, the prosecutor rhetorically asked the jurors: "Is it likely that you're going to find fingerprints on [a firearm with a microtextured surface], from your own experience, from your common sense?" Ibid. (alteration in original).

The federal court of appeals, which had already reversed on other grounds, nevertheless held that "the prosecutor's remarks during rebuttal were improper." Id. at 295. "It was not appropriate . . . to suggest or speculate that the particular firearm at issue was incapable of retaining identifiable fingerprints -- at least not without evidence to substantiate that claim." Id. at 296. Such facts would require an expert, the court cautioned, because "[w]e seriously doubt that jurors possess a common understanding of the circumstances under which investigators can extract fingerprints from a weapon, a glass table, or any other surface." Id. at 297. "While the prosecution

in rebuttal may explain why it has not proven certain facts or respond to the interpretation which the defense has placed on its failure to present evidence, it may not use the defense's comments to justify the reference to facts or the assertion of claims which it could have, but did not, introduce at trial." Id. at 296 (quotation omitted). "Yet by electing not to present such evidence explaining its inability to obtain fingerprints from the firearm, the Government could hardly then argue that issue to the jury." Ibid. "In short," the Third Circuit concluded, "the prosecutor was testifying." Ibid.

The same is true here. The State's frustration with Thomas's argument that there was no DNA or fingerprint evidence on the ballistics evidence was understandable. It was a significant, and potentially determinative, shortcoming in the State's case. The State had several permissible options to respond. During its case in chief, the State could have called its own expert to testify. Or, during summation, the State could have conceded its oversight and argued that other evidence nevertheless proved its case beyond a reasonable doubt. Instead, the State introduced new scientific evidence that it did not elicit at trial. The State had no justification for testifying during summation regarding matters not in evidence. Brown, 765 F.3d at 296-97; Bradshaw, 195 N.J. at 510; Adames, 409 N.J. Super. at 63. The prosecutor's assertions, which

a reasonable juror would accept as established fact, plainly had the ability to sway the jury -- especially because defense counsel had no chance to reply.

Thomas's conviction should therefore be reversed, and his case remanded for a new trial.

C. The State shifted the burden of proof to Mr. Thomas by incorrectly asserting that he controlled the evidence.

It is axiomatic that the burden of proof rests with the State. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 9, 10. That is, "it is the duty of the Government to establish guilt beyond a reasonable doubt." In re Winship, 397 U.S. 358, 362-64 (1970) (cleaned up); State v. Anderson, 127 N.J. 191, 200-01 (1992). Conversely, it is "a basic tenet of our criminal jurisprudence that a defendant has no obligation to establish his innocence" by testifying or "proffering affirmative evidence on his own behalf." State v. Jones, 364 N.J. Super. 376, 382 (App. Div. 2003); State v. Hill, 199 N.J. 545, 559 (2009) (explaining that a defendant "need not call any witnesses, choosing instead to rely on the presumption of innocence"). Our Supreme Court has thus condemned any "language that misstates or dilutes the State's burden to prove guilt beyond a reasonable doubt." State v. Medina, 147 N.J. 43, 59 (1996).

One especially pernicious method of burden shifting is suggesting that the defendant is withholding evidence from the jury. Of course, a defendant "has no obligation to provide information to assist the State in its prosecution

of him." State v. Black, 380 N.J. Super. 581, 594 (App. Div. 2005). So courts must "be mindful of the effect of a prosecutor's suggestions that the defendant possesses critical information about the offense." Ibid. "Every time a prosecutor stresses a [defendant's] failure to present testimony, the facts and circumstances must be closely examined to see whether the defendant's right to remain silent has been violated." State v. Sinclair, 49 N.J. 525, 549 (1967).

Here, the lack of forensic evidence tying Thomas to the murder was a crucial part of the defense's case. And, as explained above, the State improperly testified to fill this gap in its case. (Supra Point III.B.) But the State went even further afield when it told the jury that Thomas controlled the physical evidence in the case. The prosecutor argued to the jury:

> Now we already talked about how no gun was recovered. Ask yourselves, well, why is that? Who controls the evidence in a case? Is it the victim? Is it the police? No. It's the defendant. And no defendant is going to want to be caught with a gun on him. This happened on October 29th. He surrendered himself October 31st. What do you think he did in that time? Do you think he just held onto the gun? No. Of course not. When did we get to go into the vehicle? Not until December, months later. Do you think there's going to be any evidence in there? No. Of course not.
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> [9T102-9 to 19 (emphasis added)]

This explicit burden shifting deprived Thomas of a fair trial, so reversal is required. Jones, 364 N.J. Super. 376, is instructive. In that case, the State's

summation suggested the defendant's failure to introduce fingerprint tests from a gun meant that the accused "knows something we don't, that it is his gun." Id. at 382-83. This Court reversed, holding that the defendant "had no obligation to perform fingerprint tests upon the weapon to establish that it was not his, and the prosecutor should not have implied to the jury that defendant's failure to perform such testing indicated a fear of the possible results." Id. at 383. Even though the prosecutor also warned the jury that "the defense never has any burden of proof," this Court nevertheless found that this admonition "in no way lessened" the prejudice of the prosecutor's suggestion that defendant controlled the evidence. Ibid.; see also Black, 380 N.J. Super. at 594-95 (reversing conviction because prosecutor's comments on defendant's failure to provide "insight" into the circumstances of the victim's injury "had the capacity to shift the burden of proof from the State to defendant").

The prosecutor's comments here were even more egregious than those in Jones because they suggested Thomas not only controlled the gun -- but also the red car. These comments inverted the burden of proof by directing the jury to look to Thomas to prove his own innocence rather than to the State to prove his guilt. The argument also suggested that Thomas was depriving the jury of critical evidence against him -- something the jury should hold against him during deliberations. A proper application of the burden of proof would mean

that any gaps in the State's circumstantial case would be held against the State. The prosecutor's comments flipped this burden on its head and told the jury that it should instead view the holes in the State's case -- including the failure of the State to produce the murder weapon -- as further evidence that Thomas had committed the offenses.[5]

Because the prosecutor's burden shifting deprived him of a fair trial, reversal is required.

D. The State disparaged Mr. Thomas's prosaic third-party guilt defense as a "conspiracy" theory that there was another "man on a grassy knoll" who killed the victim.

Our courts have repeatedly "reaffirmed the principle that prosecutors are prohibited from casting unjustified aspersions on the defense or defense counsel" during summation. State v. Nelson, 173 N.J. 417, 461 (2002) (citation omitted). Defense counsel does not open the door to misconduct "for simply

[5] Our courts have long denounced any type of argument that shifts the burden to the defendant. These include arguments that the State's evidence stands "uncontradicted," Sinclair, 49 N.J. at 549; State v. Irizarry, 270 N.J. Super. 669, 675-76 (App. Div. 1994) (similar); that defendant failed to produce character witnesses, State v. Welsch, 29 N.J. 152, 158 (1959); that "[t]here hasn't been one scintilla of evidence on behalf of the defendant to contradict" the State's proofs, State v. McElroy, 96 N.J. Super. 582, 584-86 (App. Div. 1967); that "[n]ormally, we have two sides to a story [but] [h]ere, we have one side," State v. Persiano, 91 N.J. Super. 299, 301-02 (App. Div. 1966); that "[i]t was the defendant only that was there and the defendant only can give us certain answers," State v. Pickles, 46 N.J. 542, 579 (1966); and asking "[w]hat does [defendant] have to hide?" State v. Ferrell, 29 N.J. Super. 183, 186 (App. Div. 1954).

trying to discredit the State's case." State v. Acker, 265 N.J. Super. 351, 356 (App. Div. 1993). For example, the State has been admonished for characterizing a defense theory as "absolutely preposterous" and "absolutely outrageous." Ibid. So too, the State committed misconduct when it called defense counsel's closing arguments "lawyer talk." Frost, 158 N.J. at 86. Nor could a prosecutor argue that "defense's role in this case is to try to confuse you." State v. Pindale, 249 N.J. Super. 266, 286 (App. Div. 1991). Likewise, a prosecutor crossed the line by suggesting that testimony was fabricated with the assistance of defense counsel. State v. Rose, 112 N.J. 454, 518-19 (1988). Here, in an attempt to rebut Thomas's third party shooter theory, the prosecutor followed in this long line of improper conduct.

Defense counsel argued during summation that the State failed to prove that Thomas, and not another person, killed the victim. Counsel pointed to testimony showing that the State did not investigate a 911 call that there was a "person crawling out of the bushes onto the street that goes behind [redacted] [redacted]." (9T82-13 to 84-9) [redacted] was the location of the shooting. (5T105-17 to 23) Police ignored that potential suspect because, according to the defense's argument, "[i]t was clear from the very beginning that the police didn't want to hear anything other than Donqua Thomas." (9T82-13 to 15)

Dissatisfied with relying on its own proofs to rebut Thomas's third-party guilt theory, the State instead denigrated the defense's theory:

> The key point is when you see [redacted]'s car and the red car next to each other there's no one else out there. It's just them. There's no one else there. There's no -- no one in the grassy knoll with -- you know, this is not a conspiracy.
>
> [9T100-4 to 8 (emphasis added)]

Moments later, the prosecutor repeated the same point: "Again, this is not about a man on a grassy knoll. This is not a case of coincidences. This is a case of cold blooded murder. (9T110-19 to 111-5 (emphasis added)).

These comments improperly maligned the defense and further shifted the burden to Thomas to prove his innocence by establishing such a conspiracy. The point of the prosecutor's argument was clear: the defense team was obfuscating the facts and offering the jury a preposterous theory of the case. The prosecutor's sarcastic comparison to "the grassy knoll" trivialized the import of defendant's legitimate third-party guilt argument.[6]

[6] It is common knowledge that "[i]n conspiracy theories of the death of John Fitzgerald Kennedy, it is suggested that the real assassin was an unidentified gunman on a grassy knoll overlooking the route of the motorcade in Dallas." "Grassy Knoll," Oxford Dictionary of Phrase and Fable. Experts have consistently debunked the "grassy knoll" conspiracy theory. E.g., Fred Kaplan, Killing Conspiracy: Why the best conspiracy theories about JFK's assassination don't stand up to scrutiny, Slate (Nov. 14, 2013).

Defense counsel never suggested that there was any type of conspiracy or unethical conduct by the State's investigators. Thomas's counsel simply argued that the evidence and testimony showed that the State had not proven Thomas was the shooter, and that the police did not look for any other suspects -- including the person reportedly crawling out of the bushes near the crime scene. Comparing that prosaic defense theory to a debunked JFK assassination tale exceeded the bounds of permissible argument. On top of that, the prosecutor's words insinuated that defense counsel was trying to distract the jury with a baseless conspiracy theory. See State v. Lockett, 249 N.J. Super. 428, 433-35 (App. Div. 1991) (holding the State committed misconduct when it argued that defense counsel was obscuring the truth by directing the jury to ignore the evidence and instead "look at some smoke in the corner of the room").

Worse still, the prosecutor's comments, yet again, shifted the burden to Thomas by suggesting that he needed to demonstrate that the State engaged in a conspiracy to prove his innocence -- rather than the burden remaining with the State to prove Thomas's guilt. See Supreme Life, 473 N.J. Super. at 175-76 (reversing, on plain error, after prosecutor told the jury that it must believe a liar to credit defendant's self-defense claim); State v. Singh, 793 A.2d 226, 237 (Conn. 2002) ("[C]ourts have long admonished prosecutors to avoid statements

to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied." (collecting cases)).

The consequences of the prosecutor's arguments were all the greater because the State's case was purely circumstantial. In Frost, the Supreme Court found that because "[c]redibility was the critical issue in the case" and the jury was tasked with "choos[ing] which of two opposing versions to credit," the prosecutor's disparaging comments during summation about defense counsel's argument required reversal because "the prosecutor improperly impugned the credibility of defendants' version of the facts." 158 N.J. at 87-88; see Supreme Life, 473 N.J. Super. at 174-176. The same is true here.

Because the prosecutor's statements denigrating Thomas's defense theory and counsel deprived him of a fair trial, reversal is required.

E. Taken together, the State's repeated misconduct during summation deprived Mr. Thomas of a fair trial.

Even if this Court finds that each of the prosecutor's statements do not independently require a new trial, their combined effect was not harmless beyond a reasonable doubt. Thus, a new trial is warranted. See State v. Weaver, 219 N.J. 131, 155 (2014); State v. Rivera, 437 N.J. Super. 434, 444-45 (App. Div. 2014). Indeed, our courts "have not hesitated to reverse convictions where we have found that the prosecutor in his summation over-stepped the bounds

of propriety and created a real danger of prejudice to the accused." Smith, 167 N.J. at 178 (quotation omitted).

It is important to place the prosecutor's statements in the context of the entire trial. Here, the parties presented two competing theories. The jury's determination hinged on which story to believe. Defense counsel argued that the State had failed to test the shell casings and did not look for any other suspects. The prosecution, realizing these were significant gaps in its case, resorted to inappropriate measures to patch these holes in its circumstantial case. The prosecutor's misconduct tipped the scales.

To be sure, defense counsel did not interrupt the prosecutor's summation to protest. But our courts have repeatedly ordered new trials on plain error for improper statements made in summation. E.g., Adames, 409 N.J. Super. at 63 (commenting on facts not in evidence); Supreme Life, 473 N.J. Super. at 173-76 (denigrating defense and shifting burden); Welsch, 29 N.J. at 158 (shifting burden of proof). And ultimately, "[e]ven if the evidence were overwhelming, that could never be a justifiable basis for depriving a defendant of his or her entitlement to a constitutionally guaranteed right to a fair trial." Frost, 158 N.J. at 87. For "[t]he impact of violating a defendant's right to a fair trial cannot be measured by, or weighed against, the quantum of evidence bearing upon his or her guilt." Ibid. (citations omitted). "If fairness and justice are forgotten in the

pursuit of a guilty verdict, the integrity and authority of our criminal justice system is challenged." Williams, 244 N.J. at 607 (quotation omitted).

In the end, there is "fine line at which prosecutorial zeal ripens into prosecutorial misconduct[.]" State v. Jenewicz, 193 N.J. 440, 470 (2008). The prosecutor's statements repeatedly crossed the line. Because the misconduct was persistent and deprived Thomas of a fair trial and due process, this Court should remand for a new trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; R. 2:10-2.

POINT IV

THE TRIAL COURT FAILED TO PROVIDE PROPER JURY INSTRUCTIONS ON THREE CRUCIAL MATTERS. (Not raised below)

The parties offered divergent theories of the case and pointed to different evidence to support their arguments. Thomas argued that the facts and ballistics evidence proved that he did not shoot the victim, so someone else must have. The State claimed that Thomas shot [redacted] from the red car, and emphasized [redacted]'s identifications of Thomas at the crime scene. These theories plainly required two well-established model jury instructions: third party guilt and out-of-court identification. See Model Jury Charges (Criminal), "Third Party Guilt Jury Charge" (approved Mar. 9, 2015); Model Jury Charges (Criminal), "Identification: Out-Of-Court Identification Only" (effective Sept.

4, 2012). The trial testimony also required the court to instruct the jury on how to consider [redacted]'s dying declarations. But the trial court provided none of the required instructions, so reversal is required. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; R. 2:10-2.

A. Reversal is presumed for improper jury instructions on material issues.

"It is difficult to overstate the importance of jury instructions[.]" State v. Scharf, 225 N.J. 547, 581 (2016) (quotation omitted) (cleaned up). Indeed, "[a]ppropriate and proper charges to a jury are essential for a fair trial[.]" State v. Carrero, 229 N.J. 118, 127 (2017) (quotation omitted). "The judge should explain to the jury in an understandable fashion its function in relation to the legal issues involved." State v. McKinney, 223 N.J. 475, 495 (2015) (quotation omitted). The "charge is a road map to guide the jury and without an appropriate charge a jury can take a wrong turn in its deliberations." State v. Martin, 119 N.J. 2, 15 (1990). A trial court errs when it fails to provide a jury charge that, although unrequested by the parties, is nevertheless "clearly indicated from the record." State v. Alexander, 233 N.J. 132, 143 (2018).

Normally, unpreserved issues are reviewed for plain error. See R. 2:10-2. But "[i]t is the independent duty of the court to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party." Scharf,

225 N.J. at 580 (quotation omitted). Defendants "may justifiably assume that fundamental matters will be covered in the charge." State v. Green, 86 N.J. 281, 288 (1981). For that reason, our Supreme Court has also warned that instructional errors "are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." McKinney, 223 N.J. at 495-96 (quotation omitted). In the end, "erroneous jury instructions constitute reversible error where the jury outcome might have been different had the jury been instructed correctly." Washington v. Perez, 219 N.J. 338, 351 (2014) (quotation omitted) (emphasis added) (cleaned up).

Here, the trial court's failure to instruct the jury on third party guilt, out-of-court identifications, and dying declarations requires a new trial.

B. The trial court failed to instruct the jury on third-party guilt.

Thomas's defense was consistent throughout trial: someone else shot and killed [redacted]. It was the defense's theory from opening through summation. So the trial court was required to provide the jury charge on third-party guilt. See Model Jury Charges (Criminal), "Third Party Guilt Jury Charge" (approved Mar. 9, 2015). But it did not. Because the court's failure to provide the instruction was plain error, reversal is required.

During opening statements, defense counsel repeatedly emphasized that a third party shot and killed [redacted] (4T27-16 to 19 ("Donqua Thomas did not kill

[redacted]. He did not possess a gun. Thomas did not shoot [redacted]. He certainly did not kill her. Donqua Thomas is not guilty."), 28-2 to 5 ("This was a senseless death and whoever was responsible deserves to be held accountable. But that is not Mr. Thomas. Mr. Thomas was not the person who shot [redacted].")) The State's theory that Thomas shot [redacted] while he was seated in the red car, defense counsel argued, was impossible because the "physical evidence of the shooting, the timing of the gunshots, and the shell casings found at the scene do not fit with what the State is saying." (4T30-24 to 31-6 ("The evidence of the actual shooting does not fit with the State's theory because Mr. Thomas did not shoot [redacted] The shooter was not in that car."), 32-22 to 34-8 (similar))

Thomas's defense remained consistent throughout trial. And ultimately, defense counsel's summation argued that three categories of evidence -- ballistics, eyewitness testimony, and surveillance videos -- revealed that a third party shot and killed [redacted]. (9T71-8 to 72-13) Concerning the ballistics evidence, counsel explained that it was impossible that the shooter was in the red car because the shell casings were found on the ground. (9T72-17 to 74-14) Counsel argued that the eyewitness accounts and surveillance video also proved Thomas could not have been the shooter. (9T73-6 to 17, 76-6 to 22) Further, Thomas's counsel pointed to eyewitness testimony that there was a

significant gap between the first gunshot and second/third shots. (9T77-13 to 80-6) "When you listen to that testimony and you watch the video from this incident," counsel appealed to the jury, "it is abundantly clear that the red car is not even in the picture during the second and third gunshots." (9T79-11 to 15) Importantly, Thomas's counsel further highlighted that police failed to follow-up on the 911 call reporting a person crawling out of the bushes onto the street behind [redacted]. (9T82-13 to 84-9) Police ignored that potential suspect because "[i]t was clear from the very beginning that the police didn't want to hear anything other than Donqua Thomas," counsel argued. (9T82-13 to 15)

In the end, Thomas's counsel weaved these threads together, summarizing the defense's argument that "Donqua Thomas did not kill [redacted]":

> The entire focus of the State's investigation in this case was to put Donqua Thomas in that red car. But all of the evidence that you've heard here in court and the evidence that you can see on this screen and that you can bring into the jury room with you proves that the shooter was not in that red car.
>
> [9T88-9 to 89-14]

Defense counsel's argument that a third party shot [redacted] was so forceful that the State found it necessary to respond directly. Indeed, as discussed

above, the State twice explicitly (and improperly) criticized the defense's third-party shooter theory. (9T100-4 to 8, 111-3 to 5)

Taken together, the jury was presented two competing theories. The State argued that Thomas was the killer. The defense claimed it was someone else. Faced with these divergent accounts, the record "clearly indicated" that the jury needed to be instructed how to consider third party guilt. Instead, the jury was left without the essential information included in the model charge. Specifically, the jury needed to be instructed that the State retained the burden of proving that Thomas killed [redacted] The omitted instruction provides exactly that: "You must decide whether the State has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime(s)." Model Jury Charges (Criminal), "Third Party Guilt Jury Charge" at 1. Even more critically, especially considering the State's impermissible burden shifting, the jury also needed to understand that Thomas was not required to identify the real shooter. That is, Thomas could raise a reasonable doubt that he committed the killing without proving that someone else killed [redacted]. Again, the omitted charge lays out this legally essential -- but potentially counterintuitive -- principle in plain language: "The defendant does not have to produce evidence that proves the guilt of another, but may rely on evidence that creates a reasonable doubt. In other words, there is no

requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime." Ibid. The jury was deprived of this important guidance.

Because the court's failure to provide the third party guilt instruction was plain error, reversal is required.

C. The trial court failed to instruct the jury on how to assess [redacted]'s purported out-of-court identifications of Mr. Thomas.

As detailed in Point I, the trial court permitted four witnesses to recount [redacted]'s identifications of Thomas. Once [redacted]'s statements were admitted, the trial court was required to provide the model identification charge, which instructs the jury on how to properly consider [redacted]'s alleged statements identifying Thomas as the perpetrator. See Model Jury Charges (Criminal), "Identification: Out-Of-Court Identification Only" (effective Sept. 4, 2012). The trial court failed to deliver this charge. The omitted instruction was especially vital here because [redacted] was not subject to cross-examination. Admission of [redacted]'s identifications, without any guidance to the jury, was reversible error.

"When identification is a 'key issue,' the trial court must instruct the jury on identification, even if a defendant does not make that request." State v. Cotto, 182 N.J. 316, 325 (2005) (citations omitted); State v. Sanchez-Medina, 231 N.J. 452, 467 (2018). Identification is a key issue "when it is the major thrust of the defense, particularly in cases where the State relies on a single

victim-eyewitness." Cotto, 182 N.J. at 325-26 (quotation omitted) (cleaned up); e.g., State v. Frey, 194 N.J. Super. 326, 329 (App. Div. 1984) ("The absence of any eyewitness other than the victim and defendant's denial of guilt, made it essential for the court to instruct the jury on identification.").

During trial, identification was undoubtedly a key issue. With only circumstantial evidence and no motive presented, the State's case focused heavily on [redacted]'s dying declarations identifying Thomas as her assailant. The State's opening began with one of [redacted]'s identifications: "Qua. Qua shot me. I can't breathe. Those were the last words [redacted] heard her daughter [redacted] say as [redacted] was lying in the parking lot outside her house with four gunshot wounds that ultimately caused her death." (4T22-19 to 23-3; 4T24-15 to 22 ("There were other people that were present that will tell you what they heard[.]")) The State's summation likewise focused on [redacted]'s identifications, arguing that "what Remy said was very powerful" because "[i]t was her last means of holding accountable someone that did something horrible to her." (9T95-4 to 6; 9T91-7 to 95-6 (prosecutor recounting [redacted]'s statements as heard by [redacted] McCall, Speziale, and Green)) But even though this was an identification case, the court failed to provide the jury any tools to assess [redacted]'s identification or Thomas's defense of misidentification.

The model identification charge provides critical information. It begins with a stark warning: "Eyewitness identification evidence must be scrutinized carefully" because "research has shown that there are risks of making mistaken identifications." Model Jury Charges (Criminal), "Identification: Out-Of-Court Identification Only" at 2. The charge then provides jurors with the scientific background necessary to consider the identification testimony. Id. at 2-5 (detailing estimator variables). Jurors are instructed that "[i]n deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself." Id. at 2. At least five of the listed scientific factors -- none of which the jury had the chance to consider -- potentially undermined the reliability of [redacted]'s identifications:

- Stress: "Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification." Id. at 3. Undoubtedly, being shot caused [redacted] extremely high levels of stress.

- Weapon focus: "[T]he presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration." Ibid. [redacted] was shot with a gun and police found shell casings nearby.

- Duration: "The amount of time an eyewitness has to observe an event may affect the reliability of an identification." Ibid. In the State's version of events, the shooting took place over a short period of time, potentially limiting [redacted]'s ability to make a reliable identification.

- Distance: "The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification." Id. at 3-4. The medical examiner testified that [redacted]'s injuries were consistent with being shot from the side (5T95-4 to 100-3), likely limiting her ability to clearly see the shooter.

- Lighting: "Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case." Model Jury Charges (Criminal), "Identification: Out-Of-Court Identification Only" at 4. The shooting occurred on a rainy day (5T106-23 to 25; 6T20-23 to 24) and the State claimed that the perpetrator fired shots from inside a vehicle with dark tinted windows.

- Unconscious transference/familiarity: Although not included in the model charge, because [redacted] knew Thomas beforehand, her identification may have been tainted by unconscious transference -- a process by which "a person encountered in an innocent context becomes associated with the actions of a perpetrator of a crime." Alan W. Kersten & Julie L. Earles, Feelings of familiarity and false memory for specific associations resulting from mugshot exposure, 45 Memory & Cognition 93, 94 (2017); Jonathan P. Vallano et al., Familiar Eyewitness Identifications: The Current State of Affairs, 25 Psychol. Pub. Pol'y & L. 128, 129-31 (2019) ("[F]amiliar identification accuracy is additionally impacted by system and estimator variables, including familiarity itself."); James E. Coleman, Jr., et al., Don't I Know You? The Effect of Poor Acquaintance/Familiarity On Witness Identification, The Champion 52-53 (April 2012) ("Scientifically-designed research studies have consistently shown that prior familiarity can adversely affect the reliability of an eyewitness identification in nuanced, complex, and often counterintuitive ways. In short, familiarity does not guarantee reliability."); Report of the Special Master, State v. Henderson (June 18, 2010) at 46 (summarizing that a "positive identification indicates that the person identified is familiar to the witness, but the familiar person may not be the culprit").

Nor did the trial court ultimately caution the jury that,"[a]lthough nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken." Model Jury Charges (Criminal), "Identification: Out-Of-Court Identification Only" at 2. As well, the jury needed a final reminder that the "burden of proving the identity of the person who committed the crime is upon the State" and Thomas "has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person." Id. at 1. That the jury was deprived of these critical details undermines Thomas's convictions, especially since [redacted] was not able to be cross-examined in court.

The consequences of omitted identification instructions are weighty. "[E]yewitness misidentification is the leading cause of wrongful convictions across the country." State v. Henderson, 208 N.J. 208, 218 (2011). And jurors need to critically consider the reliability of an identification. Without proper guidance, jurors do not have the "inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." Ibid. Therefore, one of the core protections against misidentifications and wrongful convictions are jury instructions about how to properly assess identifications. Trial courts must focus "the jury's attention on how to analyze and consider

the trustworthiness of eyewitness identification." Id. at 296. Jurors cannot be left to "divine" how to assess identifications themselves or "glean them" through trial. Ibid.

As with all jury instructions, especially as to crucial matters, "it is the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial." Id. at 297. The current instructions, promulgated in response to Henderson, stretch nine pages and detail information that jurors cannot be assumed to possess on their own. For that reason, the court's failure to provide an identification instruction -- despite not being raised below -- constitutes plain error and requires reversal. See State v. Davis, 363 N.J. Super. 556, 559-61 (App. Div. 2003) ("[T]he trial court's failure to instruct the jury on identification constituted plain error."); Sanchez-Medina, 231 N.J. at 455, 465-67 (same); State v. Pierce, 330 N.J. Super. 479, 487-90 (App. Div. 2000) (same); Frey, 194 N.J. Super. at 329-30 (same).

Because the trial court's failure to provide an identification charge deprived the jury of critical information to assess the identification testimony, Thomas's convictions must be reversed.

D. The trial court failed to provide the jury tailored guidance on how to evaluate dying declarations.

As discussed in Point I, the State offered four witnesses who recounted [redacted]'s purported dying declarations. Given the inherent unreliability of dying

declarations, this testimony required special instructions to the jury. But the trial court provided none.

To be sure, New Jersey currently has no model jury charge addressing dying declarations and counsel did not request such a charge. But "it is not always enough simply to read the applicable provision of the Criminal Code, define the terminology, and set forth the elements of the crime." State v. Concepcion, 111 N.J. 373, 379 (1988). Particularly in a "protracted trial with conflicting testimony," the "better practice is to mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case." Id. at 379-80. There is a "judicial obligation" to assure deliberation upon the evidence via "proper and adequate instructions[.]" State v. Grunow, 102 N.J. 133, 148-49 (1986) (quotation omitted). "So paramount is the duty to insure a fair trial that a jury must deliberate in accordance with correct instructions even when such instructions are not requested by counsel." Ibid.

To begin, the trial court should have told the jury that dying declarations are inherently unreliable. As a general matter, longstanding academic literature and caselaw makes clear that dying declarations lack the traditional hallmarks of reliability. See, e.g., Bryan A. Liang, Shortcuts to "Truth": The Legal Mythology of Dying Declarations, 35 Am. Crim. L. Rev. 229, 259 (1998) ("Aside from significant logical arguments against the reliability of dying

declarations, . . . medical and scientific evidence would appear to show the weakness of these statements' reliability[.]"); United States v. Mayhew, 380 F. Supp. 2d 961, 966 n.5 (S.D. Ohio 2005) ("The Court doubts the inherent reliability of [dying declarations]."). [7] Thus, jurors need to be instructed to scrutinize dying declaration testimony carefully.

New York, for example, requires a specific charge that instructs jurors that a dying declaration "is not always true," "that dying persons have made self-serving declarations," and -- most strikingly -- that such testimony should "not be accorded the same value and weight as the testimony of a witness, given under oath, in open court, and subject to cross-examination." N.Y. Jury Instruct. of Gen. Applicability, "Dying Declaration"; see People v. Liccione, 407 N.Y.S.2d 753, 759 (N.Y. App. Div. 1978) ("In cases involving dying declaration evidence, the defendant is entitled to have the jury instructed . . .

[7] See, e.g., United States v. Jordan, 66 Fed. R. Evid. Serv. 790 (D. Colo. 2005) (concluding that "[t]he reliability argument fails"); Justin Sevier, Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance, 103 Geo. L.J. 879, 931 n.65 (2015) (noting that rationales for the dying declaration exception "do not rely on empirical evidence"); Michaele J. Polelle, The Death of Dying Declarations in a Post-Crawford World, 71 Mo. L. Rev. 285, 301-04 (2006) ("Although the imminence of death no doubt creates psychological pressure, it is a leap of logic to assume that the pressure is only the pressure to tell the truth."); Stanley A. Goldman, Not So "Firmly Rooted": Exceptions to the Confrontation Clause, 66 N.C. L. Rev. 1, 24-26 (1987) (concluding that dying declarations "lack sufficient likelihood of trustworthiness" and "untruths by the dying are far from a rare occurrence").

that dying declarations are not to be regarded by the jurors as having the same value and weight as sworn testimony given in open court, the accuracy of which the defendant may challenge by cross-examination."), aff'd, 407 N.E.2d 1333 (N.Y. 1980). In Tennessee, the required instruction similarly warns jurors that dying declaration testimony "should be received by you with caution." 7 Tenn. Prac. Pattern Jury Instr. T.P.I. Crim. 42.15 (Sept. 2024 ed.). Such instructions are particularly important because "there is no effective way to challenge [a dying declaration's] truth and it is more than just likely that the jury will attach undue importance to it and give it undue weight in arriving at a verdict." Kidd v. State, 258 So. 2d 423, 430 (Miss. 1972) (Smith, J., concurring).

The trial court should have provided a similar warning to the jurors in this case -- especially because [redacted]'s purported dying declarations became the focus of the State's case. Because the jurors were left with no way to accurately assess the dying declarations, reversal is required.

POINT V

THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DENIED MR. THOMAS DUE PROCESS AND A FAIR TRIAL. (Not raised below)

"[E]ven when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." Jenewicz, 193 N.J. at 473. "Where the aggregation of legal errors renders a trial unfair, a new trial is required." State v. T.J.M., 220 N.J. 220, 238 (2015). Here, the several errors distracted the jury from considering whether the properly admitted evidence proved Thomas's guilt. The errors, taken together, were "clearly capable of producing an unjust result." R. 2:10-2; see Blakney, 189 N.J. at 96-97 (reversing based on cumulative error of prosecutorial misconduct and inadequate jury instructions); Burney, 255 N.J. at 29-31 (reversing based on improper cell location testimony and another cumulative error). Therefore, Thomas's convictions must be reversed and the matter remanded for a new trial. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

CONCLUSION

For the reasons stated above, this Court should reverse Mr. Thomas's convictions.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: */s/ Ethan Kisch*
ETHAN KISCH
Assistant Deputy Public Defender
Of Counsel and on the Brief
Attorney ID: 349152020

Dated: December 11, 2024

	: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	: DOCKET NO. A-1279-23
STATE OF NEW JERSEY	
	C R I M I N A L A C T I O N
Plaintiff-Respondent,	:
	Indictment. No. 21-05-00172-I
v.	: Sat below: Hon. Justine A. Niccollai, J.S.C.
DONQUA THOMAS,	:
Defendant-Appellant.	:

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

Donqua Thomas, Pro Se
SBI296669E/1321883
New Jersey State Prison
Trenton, NJ 0862

DEFENDANT IS CONFINED

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

The trial court denied defendant's motion to exclude the dying declaration testimony. There were six witnesses that was intwerviewed by Paterson police department. At least four of the witnesses questioned the victim an extensive amount of time while lying on the ground after being shot.

First, the trial court erred for not taking the voluntariness of what the victim said into consideration. The precise statements said "to" and "by" the declarant during the time surrounding the declarant are significant. Although, the victim eventually answered the questions, the answers wasn't given voluntarily, but because of the undue pressure by repeated questioning of the witness.

Second, the trial court erred for not taking the inflammatory potential of the dying declaration into consideration. It is known that a dying declaration is almost impossible to challenge or counter. The statement should be closely examined to make sure it can be received without undue prejudice to the defendant.

Last, without prior opportunity for cross-examination of the victim testimonial statement, is a violation of the confrontation clause. The defendant did not have an opportunity to defend against the State's accusations, which is a violation of the Due Process clause of the Fourteenth Amendment. With the dying declaration as inadmissible, these errors require a new trial.

LEGAL ARGUMENT

POINT I

TRIAL COURT ERRED TO ALLOW THE DYING DECLARATION AT TRIAL WHICH SHOULD HAVE BEEN RULED INADMISSIBLE. (Raised below)

N.J.R.E 804(b)(2) commonly referred to as a "dying declaration". Regularly entered by the courts and scholars. The dying declaration exception to the prohibition against hearsay has been characterized as "the most mystical in its theory and traditionally among the most arbitrary in its limitations." 2 McCormic on evidence 309, at 363 (Kenneth S. Broun. ed., (6th ed. 2006); See also Thurston v. Fritz, 138 P. 625,627 (Kan. 1914)("We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason, and continued without justification").

N.J.R.E 801(c) defines hearsay as "a statement other than one made by he declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible unless an exception applied. N.J.R.E. 802. One exception to the rule against hearsay is a declaration made "under belief of imminent death", commonly known as a dying declaration. N.J.R.E. 804(b)(2).

New Jersey has codified the dying declaration exception in N.J.R.E. 804(b)(2), when states that, "in a criminal proceedings, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending

death." The language of this rule set out its requirements: (1) it is available only in a criminal proceedings; (2) the statement must be one made by a victim who is... (3) unavailable as a witness; (4) the statement must be made voluntarily; (5) in good faith; (6) and while the declarant believed in the imminent of his or her death.

Prior to admission, trial court should determine in a preliminary hearing whether the inferences and conclusions were drawn from facts known or observed by the declarant and whether considering all the circumstances the statement can be received without undue prejudice to the declarant. State v. Hegel, 113 N.J. Super. 193 (App. Div. 1971), cert. den., 58 N.J. 596 (1971) The admissibility of any such statement will depend upon the totality of the relevant circumstances surrounding the articulation of the dying declarant, including: any weapon which may have wounded the declarant; the nature and extent of the declarant injuries; the physical condition of the declarant when the statement was made; the declarant's conduct; and the precise statements said to and by the declarant during the time surrounding the declarant. Id. at 201-204.

The preliminary held by the court should include, in addition to testimony supporting or negating the requirements genumerated in the rule, evidence illuminating all relevant circumstances surrounding the utterance, and the trial judge should examine and weigh all such testimony to determine whether, in his sound judgment, the defendant statement of declarant can be received without prejudice to the defendant. Id. at 201-207.

It must be borne in mind that a dying declaration is often terrible in its consequence and almost impossible to counter. It has been described as "devastating" in its impact. Id. at 202, quoting State v. Yough, 49 N.J. 587,598 (1967).

A. Dying Declaration should have been inadmissible under N.J.R.E. 804(b)(2), because it was not made voluntary but as a result of undue pressure.

N.J.R.E. 804(b)(2) provides that "in a criminal proceedings, a statement by a victim unavailable as a witness is admissible if it is made "voluntarily". A dying declaration must have been made voluntarily before it may be admitted as proof of the truth of the statement therein. A statement is clearly inadmissible if it was the product of undue pressure, which in this case was not made voluntarily but as result of undue pressure from several individuals who were at the scene and questioned the victim repedeatly with the same question on the same subect: "who did this to you?"

Voluntariness of a statement has been described by the courts at length in the Miranda context. Miranda v. Arizona, 384 U.S. 436, Id. at 457-58 (1966). "To determine whether a statement was made voluntarily, both the Federal and New Jersey courts consider whether it was, 'the product of an essentially free and unconstrained choice by its maker,'... or whether the [individual's] will has been overborne and its capacity for self determination critically impaired'. State v. P.Z. 152 N.J. 86 (1997); Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973).

There were a total of six individuals at the scene, that was interviewed by the Paterson Police department; Ms. Fisher, Ms. Green, Ms. Perkins, Ms. Rensaw, Mr. Keeling, and Director Speziale. There were numerous things, said to and asked of the victim, before she responded with answers. The entire interview of those individuals is contained in the typed version of the interviews (pp. 11-74) submitted here as Defendant's supplemental Appendix in support of his Supplemental brief and identified as (DSA-00 to DSA-68). Because pages **1** through **10** of the typed interviews were not provided to the defendant in discovery, the entire transcripts of interviews are designated as (DSA-00 DSA-79), with the the cover letter from Thomas McQuillan, the Assistant Deputy Public Defender designated as (DSA-00).

Ms. Fisher in her interview stated that Director Speziale asked the victim twice: "Do you know who did this to you?" (DSA-3). Ms. Green in her interview stated that she asked the victim "who did it?, what did they look like?, who did it?"... and asked again "who did it?, who did it?, who did it?". A total of six questions with no response from the victim (DSA-8). Ms. Perkins in her interview stated that she asked the victim "who shot you?, who shot you"? Then stated "but she didn't tell me"... and asked again "who shot you?, who shot you?" Then stated "but she just kept screaming." She "kept" asking the victim: "who shot you? At least five times back to back. Then stated "I kept asking her, she couldn't get it out." Ms. Perkins also stated her mother (the victim mother, Ms. Keeling) "kept asking her." (DSA-43) Ms. Ransaw in her interview stated: "She heard the victim's mother

(Ms. Keeling) asked the victim "who did this to you?", at least four times back to back (DSA-60).

During the dying declaration hearing Ms. Keeling was asked "how many times would you say you asked her?" (1T45-1 to 3). Her answer was "I asked her a few times" (1T62-15 to 17) She was asked: "Did Remy respond right away?", she answered "she didn't responded right away".

As explained, at least four of the six individuals questioned the victim a tremendous amount of times. On each occasion the victim was flooded with minimum of two or more questions at once, before getting an answer from her. This is a prime example of a statement being made in response to a "prodding or interrogation". (quoting Commonwealth v. Knable, 369 P.A. 171, 85 Ad. 2d 114, 117 (PA 1952).

The victim was pressed and effectively overborne by repeated questioning by the time she responded with the name "Quay" and her "baby father". These statements were not the produuct of a "free and unconstrined choice". Therefore, the State did not meat its burden under the voluntariness prong of the N.J.R.E. 804(b)(2), and as such the statement should have been inadmissible.

B. Dying Declaration should have been inadmissible under N.J.R.E. 403, because it's probative value was substantially outweight by undue prejudice.

Evidence thought to be admitted under Rule N.J.R.E. 804(b)(2) is subject to N.J.R.E. 403, State v. Taylor, 360 N.J. Super. 20, 36-37 (App. Div.) cert. den. 174 N.J. 90 (2002). In

other words an otherwise admissible dying declaration may be excluded under Rule 403. Id. N.J.R.E. 403 provides that "relevant evidence may be excluded if its probative value is substantially outweight by he risk of: a) undue pressure, confusion of issues, or misleading the jury; or b) undue delay, waste of time, or needless presentation of cumulative evidence".

Under Rule 403 the facts favoring exclusion must be shown to "substantially outweight the probative value of the contested evidence. State v. Cole, 229 N.J. 430, 448 (2017). The evidence claimed to be unduly prejudicial should be excluded where its probative value "is so significantly outweight its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation" of the basic issues of he case. State v. Thompson, 59 N.J. 396, 421 (1971).

Since these statements were elicited before the jury, the undue prejudice to the defense was so substantial that they should have been ruled inadmissible under Rule 403. Where the jury heard that the victim, while lying on the ground suffering from multiple gun shots wounds, claimed that the defendant, the father of her unborn child, shot her. In addition to have heard testimony from the victim's mother Ms. Keeling regarding the dying declaration. The victim only responded to her eventually, her testimony is highly emotional due to the circumstances of the case. There is no way a jury to hear this testimony from Ms. Keeling about what her daughter stated before dying, was able to judge fairly without being prejudicial to the defense. A fair

examination of the evidence, is more then likely ceased once the jury heard that a pregnant victim claimed her unborn child father was the assailant. The probative value of this hearsay statement is so significantly outweighed by its inflammatory potential that it should have been excluded.

C. Defendant incorporate herein, in its entirety brief, by trial counsel Thomas McQuillan, Esq., the Assistant Deputy Public Defender dated July 7, 2022, in support of pre-trial motion to suppress the Dying Declaration (DSA-65 to DSA-79), with the emphasis on sub-point **c.** (DSA-76) in support of his Supplemental Brief to the appellate division.

CONCLUSION

Considering the foregoing and the Appellate counsel Ethan Kisch, Esq., argument to the Appellate Division the only reasonable conclusion that can be reached from the facts of this case, is that the defendant's sacred constitutional rights were so blatantly infringed upon, that such infringement mandates a reversal and a new trial.

Respectfully, Submitted,

Danqua Thomas

Danqua Thomas, Pro Se

Dated: 3-20-25 , 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1279-23T5
INDICTMENT NO. 21-05-00172-I

STATE OF NEW JERSEY,	:	Criminal Action
	:	
Plaintiff-Respondent,	:	
	:	ON APPEAL FROM A
	:	JUDGEMENT OF CONVICTION OF THE SUPERIOR COURT OF NEW JERSEY, LAW
	:	DIVISION, PASSAIC COUNTY
	:	
v.	:	
	:	
DONQUA THOMAS:		
	:	
Defendant-Appellant.	:	

Sat Below:

Hon. Justine Niccollai, J.S.C., and a jury

BRIEF FOR PLAINTIFF-RESPONDENT

CAMELIA M. VALDES
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT
ADMINISTRATION BUILDING
401 GRAND STREET
PATERSON, NEW JERSEY 07505-2095
(973) 881-4800

Leandra L. Cilindrello
Assistant Prosecutor
Attorney I.D. 387062021
Of Counsel and on the Brief

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PROCEDURAL HISTORY & COUNTER-STATEMENT OF FACTS

The State adopts the Procedural History as set forth in the Defense Brief. (Db3).[1] At approximately 1:37 p.m. on October 29, 2020, the Paterson Police Department received a report of shots fired near the [redacted] residential community at [redacted] in Paterson, New Jersey. Eyewitness accounts and surveillance video from [redacted] indicated that Donqua Thomas (hereinafter "defendant") murdered R[redacted] L[redacted] as she exited her car. L[redacted], nine months pregnant with defendant's child, was returning home from a routine doctor's visit. (9T:90-12 to 14). L[redacted] did not survive, but her unborn child did. (5T:52-5 to 10).

At approximately 1:38 PM, Della Fischer, the Paterson mayor's chief of staff at the time and the victim's neighbor, called Jerry Speziale, Paterson's

[1] Db – Defendant's Brief
Da – Defendant's Appendix
1T – October 25, 2022, pre-trial transcript
2T – November 1, 2022, pre-trial transcript
3T – May 24, 2023, pre-trial transcript
4T – June 6, 2023, trial transcript
5T – June 7, 2023, trial transcript
6T – June 13, 2023, trial transcript
7T – June 14, 2023, trial transcript
8T – June 15, 2023, trial transcript
9T – June 20, 2023, trial transcript
10T – June 21, 2023, trial transcript
11T – November 16, 2023, sentencing transcript

Director of Public Safety, on her cell phone to inform him of the shooting and request assistance. (5T:46-16 to 17). Director Speziale attempted to render aid until Emergency Medical Services and Advanced Life Support personnel arrived and subsequently transported L[redacted] to St. Joseph's Hospital. (5T:51- 7 to 12). While Director Speziale administered first-aid treatment, L[redacted] said to him, "I can't breathe. I'm going to die," and asked "why did he do this to me" three times, and frequently repeated "my baby father." (5T:49- 16 to 24).

During their investigation, detectives obtained surveillance footage from the [redacted] housing complex depicting a red Dodge Dart sedan parking across the street from [redacted] at approximately 10:43 a.m. and relocating to a parking spot in front of [redacted] at 11:00 a.m. where it remained until the victim, R[redacted] L[redacted], arrived at 1:30 p.m. in her vehicle. As Ms. L[redacted] exited her vehicle, she was in between her vehicle and the Dodge Dart. (4T:163-20 to 23). Ms. L[redacted] suddenly falls to the ground and the Dodge Dart flees at a high rate of speed. (6T:134-7 to 18; 140-5 to 155-12).

Detectives connected the Dodge to the defendant through additional surveillance video from the surrounding area and Asasha Thomas's statements. (6T:26-9). Initially, detectives used the footage to trace the Dodge's route back to 253 Hamilton Avenue in Paterson. Then, on December 12, 2020, Paterson Police Department detectives learned that the Wallington Police Department had

located the Dodge. (7T:117-8 to 13). The detectives arranged to have the car towed as part of their investigation, which prompted a response from the car's owner, Asasha Thomas. (7T:117-14 to 118-2). In her statement to police on December 12, 2020, Asasha Thomas confirmed that her cousin, defendant Donqua Thomas, routinely drove her car and that he was the only person in possession of the keys on the day of the shooting. (6T:47-21 to 48-12). Additionally, she confirmed that her cousin parked the car at 253 Hamilton Avenue on the morning of October 29, 2020. (6T:60-13 to 15).

As part of their investigation, detectives took statements from multiple witnesses who eventually testified at trial, including Charlene Keeling, the victim's mother; Latressa Greene, a neighbor and off-duty police officer; and Della Fischer (now Della McCall), the chief of staff who called Director Speziale. Greene also heard the victim answer Keeling but could not remember the exact name the victim said. Keeling recounted that her daughter stated, "mom, Quay did this." (4T:16-19 to 22) Additionally, Keeling stated that R[redacted] L[redacted] knew defendant by his nickname as "Quay" or "Qua." (4T:144-9 to 11). Lastly, McCall confirmed hearing the victim say "my baby father" to Director Speziale as he rendered aid. (4T:55-17 to 22).

The victim, R[redacted] L[redacted] was transported to St. Joseph's University Medical Center after sustaining three gunshot wounds to her right arm and two gunshot

wounds to her abdomen. (5T:14-20 to 15-4). She was pronounced deceased at the hospital. (5T:53-2 to 4). However, doctors also performed an emergency C-Section where her baby was successfully removed and survived. Dr. Anita Rajkumar of the Northern Regional Medical Examiner's Office conducted the victim's autopsy and determined the cause of death to be multiple gunshot wounds of the torso and upper right extremity. (5T:100-25 to 101-1). The manner of death was determined to be homicide. (5T:101-4 to 5).

Based on eyewitness statements and surveillance video identifying defendant as the shooter, defendant Donqua Thomas was charged with murder on October 30th, 2020. A grand jury indicted defendant on first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (Count One); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (Count Two); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (Count Three); and second-degree certain person not to possess a weapon, N.J.S.A. 2C:39-7(b)(1) (Count Four). (Da1-4). A Passaic County petit jury found defendant guilty of all indicted charges following a full jury trial. (Da6-8).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED DYING DECLARATION TESTIMONY.

Hearsay, "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asse1ied in the statement," is typically inadmissible. N.J.R.E. 801(c); N.J.R.E. 802. Exceptions apply, including instances in which the declarant is unavailable. N.J.R.E. 804. One such instance includes statements made under the declarant's belief of imminent death, generally known as a "dying declaration." State v. Williamson, 246 N.J. 185, 189 (2021) (citing N.J.R.E. 804(b)(2)). A trial court may admit a deceased victim's declaration if the statement was "made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death." N.J.R.E. 804(b)(2).

In addition to its codification in N.J.R.E. 804(b)(2), the dying declaration exception is firmly established by long-standing federal and state case law. See, e.g., Mattox v. U.S., 156 U.S. 237, 243-44 (1895); Kirby v. U.S., 174 U.S. 47, 61 (1899); Donnelly v. State, 26 N.J.L. 601, 617-18 (1857). In Mattox, the United States Supreme Court recognized that dying declarations are an exception to a person's constitutional rights because they existed "long before the adoption of the constitution, and [are] not interfering at all with its spirit." Mattox, 156 U.S. at 243. The court explained that dying declarations are constitutionally permissible because "the sense of impending death is presumed

to remove all temptation to falsehood," and admitting such testimony would "prevent a manifest failure of justice." Id. at 244. Similarly, the court in Kirby explained that dying declarations are "equivalent to the evidence of a living witness upon oath" due to the compromised condition of the declarant and were "well established before the adoption of the constitution." Kirby, 174 U.S. at 61. The Court in Donnelly stated that "an abiding impression of almost immediate dissolution," not the actuality of death, governs the admissibility of dying declarations. Donnelly, 26 N.J.L. at 618.

More recently, the New Jersey Supreme Court held that, based on federal and state precedent, a court's analysis of the admissibility of a dying declaration depends on the declarant's subjective state of mind. Williamson, 246 N.J. at 203. In Williamson, the victim died months after her statement, but the court held that her injuries, doctor's opinion, severe distress, and overall condition evinced her "settled hopeless expectation that death [was] near at hand." Ibid. (alteration in original) (quoting Shepard v. U.S., 290 U.S. 96, 100 (1933)). To determine an unavailable declarant's state of mind at the time of the relevant statement, a court should consider the attendant circumstances, including "the words spoken to and by the declarant, the weapon used, and the declarant's injuries, physical condition, and demeanor." Id. at 201.

New Jersey case law looks to federal precedent in analyzing whether a victim believes in their imminent death. Williamson, 246 N.J. at 201 (quoting State v. Prall, 231 N.J. at 585). For a declarant to have the requisite belief in the imminence of their own death, they must have "a settled hopeless expectation that death is near at hand, and what is said must have been spoken in the hush of its impending presence." Ibid. (quoting Shepard, 290 U.S. at 100). The admissibility of a dying declaration depends on the "impression upon the mind" of the victim, not the "quick succession of death after the declarations." Ibid. (quoting Donnelly, 26 N.J.L. at 618).

According to the New Jersey Supreme Court's recent decision in Williamson, admissible dying declarations do not violate the constitutional rights provided to a defendant by the Confrontation Clause. Williamson, 246 NJ. at 211. Both the federal and state constitutions include a Confrontation Clause, which guarantees a defendant the right to confront the witnesses against him. U.S. Const. amend. VI; N.J. Const. 1, 10. The Court in Williamson examined federal precedent as well as the historical record of English common law to determine that dying declarations were "an established exception to a defendant's right of confrontation at the time of the founding." Williamson, 246 N.J. at 211.

Here, the trial court properly admitted dying declaration testimony at trial. Defense counsel argues that testimony from eyewitnesses Keeling and Speziale was more than sufficient for the jury to grasp the State's version of events, greatly diminishing the third and fourth witnesses' probative value, causing prejudice to defendant. (Db17). The State maintains that the facts deduced at trial clearly show that a group of people came to the victim's aid after she was shot. It is illogical to assume that only one or two people will have heard the victim's dying declarations when a group was forming around her trying to help her. The State made very clear in chambers that Della McCall's statement included that she heard the victim make a dying declaration. The pretrial motion that was heard prior to trial regarding this issue was to determine whether dying declaration testimony should be precluded at trial. The Court, after a comprehensive decision, found this testimony to be admissible under the dying declaration hearsay exception. Therefore, defendant's motion to preclude this testimony as to the victim's dying declaration was denied, and the victim's declaration were to be admissible at trial. (3T).

This pretrial hearing did not preclude the State from eliciting dying declaration testimony from anyone other than the two witnesses who testified at it- Jerry Speziale and Charlene Keeling.

> THE COURT: Okay. I don't have the statement in front of me, unfortunately. Okay. Victim, unavailable. Voluntary. Good faith. The --

> the only thing that's a little bit different about this is I don't know here in the time-line this particular statement occurred. Like, at this particular time, Jerry is not there, according to her, and Mom is not there.
>
> Now, at the time that Jerry is there and Mom is there, which we assume is minutes later, I've already ruled that she knew she was dying; she knew that she didn't have time, you know, fabricate or anything. I've already made my ruling on that.
>
> []
> THE COURT: -- I can tell the jury to take 15 minutes and I can do a 104 Hearing to get the time line, but Mr. Nawrocki is correct in that it doesn't necessarily go to this witness. It goes what the witness who is making the statement. But I also understand that it may not be fair to you guys if you -- if you don't know what it is that she's going to say. So I would do a 104 Hearing. But I would be inclined, if everything goes according to what I believe is going to be said, I would be letting it in.

(4T:47-8 to 20, 48-12 to 22)

Upon hearing that witness Della McCall might touch on dying declaration testimony and upon defense counsel's objection, the Court excused the jury and conducted a 104 Hearing. In the interest of fairness, the court conducted this hearing and conferenced the matter so defense counsel can know exactly what Della would testify to. (4T) Again, Della's formal statement already made mention to this testimony and defense counsel was aware that it existed. The court then ruled on the 104 Hearing:

> In looking at the testimony of Ms. McCall; I call her that now; I know that she was formerly Ms. Fischer; the Court does find that one, it is hearsay. Two, it falls under the gamut of 804(b)(2) in which it was a statement made by the victim who's unavailable. The victim, Ms. L[redacted], is deceased. I find that the statements that were made were, one, Quay I believe the witness said –- well I shouldn't say that. The testimony reveals that the witness says she heard that at least three to four times. She cannot

> say whether it was in direct response to anyone specifically asking her a question or whether it was just that she overheard –- Ms. L[redacted] overheard Ms. Melissa telling people to ask questions like, who did it, and did she see who did it.
>
> The witness testified that the victim was not in and out of consciousness. That she was awake at all times. She also heard the witness say –- strike that. The victim say, why did he do this to me? Why would my baby fathers do this to me? In having had the benefit of hearing what the other two witnesses said that is also consistent of what Ms. Keeling said and also Director Speziale.
>
> Nevertheless, I do find that the statement was not a product of undue pressure. Again, the mere fact that it may have been made in response to the questioning is not the witness –- as to admissibility. I do find that under 401 it is relevant to an issue. And, as to 403, I do not find that the probative value is outweighed by the risk of undue pressure. I'm sorry, undue prejudice, confusion of the issues or misleading the jury, or undue delay, a waste of time or needless presentation of cumulative evidence. This is three witnesses. But I would strongly, counsel the State, that -- you know, three witnesses is giving the jury the benefit of all the information that they need on this particular point. So, if there are four, five, or six witnesses that the State is going to attempt to elicit this information from then the defense's point that this is cumulative would have a lot more bearing on this Court's decision.
>
> So, as to Ms. McCall's testimony I do find that it meets all of the requirements of the dying declaration and I am going to permit the State to elicit that testimony from her. The record will reflect that defense counsel had an opportunity to have a 104 hearing outside the presence of the jury, and they were able to cross examine this witness, and they know exactly what it is that she is going to say.

(4T:72-2 to 74-2). The trial court properly admitted this testimony under N.J.R.E. 804(b)(2) and the hearsay statement was made by the victim who is unavailable, it is relevant under N.J.R.E. 401, and even conducted a probative value analysis under N.J.R.E. 403, finding that the statement may come in as

it's probative value is not outweighed by undue prejudice. For all these reasons, the trial court properly admitted Della McCall's testimony.

As to Latressa Green, the State never anticipated any dying declaration testimony from Latressa Green nor did it elicit any dying declaration testimony from Latressa Green on the stand. Instead, after receiving the ruling on Della McCall, the State took preventative measures to ensure there was no surprise to defense regarding Latressa Green's testimony. The prosecutor acknowledged that it would take a delicate touch to make sure no error is committed and did exactly that. (4T:76-1 to 3). The prosecutor got clarification as to what Green would testify to, and provided that information to the court and defense counsel. (4T:75-14 to 24). During Green's actual testimony, no dying declaration testimony actually came out.

> Q: Prior -- prior to the victim's mother getting there --
> A: Okay.
> Q: -- were you talking to R[redacted]?
> A: Yes. I was asking her questions. I was asking her who -- who shot her, did she see anything. And she did -- she did whisper like a name, and I wasn't sure what it was. By that time her mom -- her mom was -- her mom had came outside and started to attend to her and she put her ear to her -- to her face and then her mom repeated the name.
> Q: So you didn't hear the victim say anything.
> A: I -- I did hear say. I wasn't -- she said -- she said Qua, but I wasn't exactly sure what I was hearing because I wasn't familiar with him. I didn't know the name, I wasn't sure. And I asked again. And by that time her mother had came out and she spoken to her mom and her mom repeated the name because I started asking the mom to ask her, you know, who did it, you know, what -- what -- what were they driving, what were they wearing, you know. I didn't know if they were on foot. I didn't have

> any information. And I was trying to get that information while she was still conscious.
> Q: What other treatment did you provide R[redacted] while you were out there?
> A: I only applied pressure -- only look -- I only applied pressure to the wounds that I found.

(6T:16-17 to 17-14). The prosecutor then immediately changes the line of questioning to discuss the victim's clothing and positioning in the parking lot. Aside from the one mention of the defendant's nickname "Qua," ***possibly*** being what the defendant said, Green did not testify as to any dying declarations, and defense counsel did not object to this line of questioning. Green made very clear to the jury that she wasn't sure what she heard. Therefore, defense counsel's argument that the prosecutor elicited dying declaration testimony from green to divert the jury is meritless. The State was well aware to avoid any cumulative dying declaration testimony after McCall, and therefore cautiously and skillfully lead Green's testimony away from it. Further, defense counsel had ample opportunity to cross-examine this witness.

Finally, any prejudice that may have occurred as to how many witnesses testified to the dying declaration was remedied by the trial court's instructions.

> "I will now give you some information on the final part of these instructions on conducting your deliberations.
> There is nothing different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any questions depending upon evidence presented to them. You are expected to use your own good judgment and common sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in light of your knowledge of how people behave.

It is the quality of the evidence, not simply the number of witnesses that control."

(9T:151-14 o 152-2; Emphasis Added). For all these reasons, there was no unfair surprise to the defense. Outside the presence of the jury, a 104 Hearing was conducted regarding Della McCall's testimony, and defense counsel was able to cross-examine both Della McCall and Latressa Green. As to Latressa Green, no dying declaration testimony was elicited. At the first sight of it, the prosecutor changed the line of questioning and stopped any dying declaration testimony. Any mention to such statement was so miniscule that defense counsel did not even object. Therefore, the defendant suffered no prejudice, and the dying declaration testimony was properly admitted.

POINT II

THE STATE'S EXPERT OFFERED ADMISSIBLE EXPERT TESTIMONY CONCERNING THE LOCATIN OF DEFENDANT'S CELL PHONE.

"A trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Nantambu, 221 N.J. 390, 402 (2015) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). Only those evidentiary rulings that "undermine the confidence in the validity of the conviction or misapply the law" should be reversed. State v. Weaver, 219 N.J. 131, 149 (2014). With regard to the trial court's conclusions of law, however, no deference is given. Nantambu, 221 N.J. at 402.

The Rules of Evidence distinguish between fact witnesses and expert witnesses. See N.J.R.E. 701; N.J.R.E. 702. First, an expert witness may testify to "a relevant subject that is beyond the understanding of the average person of ordinary experience, education, and knowledge." State v. Sowell, 213 N.J. 89, 99 (2013). An expert must be qualified by "knowledge, skill, experience, training, or education." N.J.R.E. 702; see also State v. McLean, 205 N.J. 438, 449 (2011). Expert testimony is used to explain the evidence or determine a fact in issue to the jury that would be beyond their comprehension. State v. Miller, 339 N.J. Super. 460, 470–71 (App. Div. 2017).

Here, the State offered expert testimony from Jessica Otzhy, an investigator at the New Jersey State Police Crime Center. (6T:96-11 to 97-2). Otzhy was admitted as an expert without objection from defense counsel. (6T:106-7 to 11). The Court then immediately instructed the jury on expert testimony.

> THE COURT: All right. So, ladies and gentlemen, I'm going to read you the instruction again. You've heard it three times now, but just -- so that we make sure. As a general rule witnesses can testify only as to facts known to them. This rule ordinarily does not permit the opinion of a witness to be received as evidence. However, an exception to this rule exists in the case of an expert witness who may give his or her opinion as to any matter in which he or she is versed which is material to the case. In legal terminology an expert witness is a witness who has some specialized knowledge, skill […]
>
> Some special knowledge, skill, experience or training that is not possessed by the ordinary juror who -- and who, thus, may be able to provide

> assistance to the jury in understanding the evidence presented and determining the facts in the case.
>
> In this case the State is now calling our witness as an expert in the field of historical cell site analysis. You are not bound by such expert's opinion, but you should consider each opinion and give it the weight to which you deem is entitled, whether that be great or slight, or you may reject it. In examining each opinion you may consider the reasons given for it, if any, and you may also consider the qualifications and credibility of the expert. It is always within the special function of the jury to determine whether the facts in which the answer or testimony of any expert is based actually exists. The value or weight of the opinion of the expert is dependent upon and is no stronger than the facts on which it is based. In other words, the probative value of the opinion will depend upon whether from all of the evidence in the case you find that those facts are true.
>
> You may, in fact, determine from the evidence in the case that the facts that form the basis of the opinion are true, are not true or are true in part only, and in light of such findings you should decide what effect such determination has upon the weight to be given to the opinion of the expert. Your acceptance or rejection of the expert opinion will depend, therefore, to some extent upon your findings as to the truth of the facts relied upon. The ultimate determination of whether or not the State has proven a defendant's guilt beyond a reasonable doubt is to be made by you, the jurors, only. So with that you may continue.

(6T:106-12 to 108-18). Defense counsel did not object at any point during the State's direct examination of Otzhy. Defense counsel conducted a thorough cross-examination of Otzhy, and her testimony concluded. The only objection which was raised regarding Otzhy's testimony was when the State was seeking to admit Otzhy's maps into evidence for the jury to use during deliberations. Defense counsel's objection was based on the documents having alleged hearsay contained in them because Otzhy did not testify to every aspect of them. The

court admitted these documents over defense counsel's objection because Otzhy testified to everything that's contained in them.

> THE COURT: The map was displayed to the jury without objection.
> MR. MCQUILLAN: It was.
> THE COURT: This map was shown to the jury --
> MR. MCQUILLAN: It was.
> THE COURT: -- without objection.
> MR. MCQUILLAN: I'm sorry, Judge. What was -- what was the Court's question. I apologize.
> THE COURT: No worries. My question was, you're asking that we redact the two statements at the top of the map and the map just go in as is?
> MR. MCQUILLAN: I think -- no, Judge, what I'm asking is that the report not go into ev -- not go into evidence based upon the fact that it contains hearsay and -- and information that was not testified to by Ms. Ochie in front of the jury.
> MR. NAWROCKI: Judge, it's based on information that's been stipulated to in the call detail records. That's all this is. And it's her interpretation of such. She authenticated the report. She certainly went through each diagram that we've been referring to. And she was qualified as an expert in this field.
> (Pause in Trial)
> THE COURT: All right. My notes indicate that she went through her report. She indicated that this is her report, how she gets the information in her report. She went through all of the slides, they were displayed to the jury without objection. She went through the slides. At points in time she stepped down off the stand and she got closer to the map so she could explain where the particular pages that were displayed on the map. My notes indicate that she talked specifically about page eight, meaning location to the device from 10:30 a.m. to 2 p.m. The language at the top of the screen says the following, "The device returns to New Jersey and begins traveling towards the location of the homicide. The device is in the area from at least 10:40 to approximately 2 o'clock p.m." That was the exact information that she testified to on the stand. Because this diagram was already shown to the jury with the information that she testified to I'm going to allow it. So the pages seven eight, nine, and ten are in evidence over the State's -- over the Defense's objection.

(8T:29-13 to 31-8).

It is the State's position that the trial court properly admitted all of Otzhy's expert testimony at trial. The thrust of defense counsel's argument focuses solely on excluding the expert's testimony based on State v. Burney, 255 N.J. 1 (2023). It is the State's position that defendant's arguments concerning Burney should not be considered as they are without merit, considering that the jury returned a verdict in this matter on June 21, 2023. (10T). Burney was not decided/published until August 2, 2023. Otzhy's testimony was concluded on June 13, 2023. It would be unfair to hold the State to a standard set forth in a decision published three (3) months after testimony was already concluded in the matter. Further, defense counsel argues in footnote 2 of his brief that "because Burney did not announce a new rule of law, there is no need for this Court to undertake a retroactivity analysis. See State v. Cummings, 184 N.J. 84, 97-98 (2005)." (Db23). However, for arguments sake, if the Burney decision were to be considered a new rule of constitutional law, its retroactive application would depend on whether the New Jersey Supreme Court explicitly made it retroactive. Under U.S. Supreme Court precedent, new rules are generally not applied retroactively to cases that have already reached a final judgment unless they fall under specific exceptions, such as rules that place certain conduct beyond the power of the government to proscribe or rules that are fundamental

to the fairness of a criminal proceeding. Solem v. Stumes, 465 U.S. 638, Teague v. Lane, 489 U.S. 288.

To expect the State to comply with a decision that was not released until three months after testimony concluded, and the defendant was found guilty goes beyond the fundamental fairness of a criminal proceeding. But to address defendant's arguments in his brief, it is the State's position that Otzhy's testimony would comport with the new standards set by Burney.

Burney holds that the State's expert's "rule of thumb" approximation was an improper net opinion because it was unsupported by any factual evidence or other data. State v. Burney, 255 N.J. 24-25. Here, the expert did not base her calculations on her own "rule of thumb" that she merely created on her own and applied. Instead, the testimony reveals that she uses a 1.5 mile radius that has been approved by the F.B.I., which is now an industry standard.

> Q There also seems to be an angle created with the shading. Can you explain that?
> A So that angle is the sector, the representation of the sector. It comes out 120 degrees from the center of the cell site antenna.
> Q You had mentioned earlier the -- the shading industry standard and it's 1.5 miles.
> A Correct.
> Q And so this whole shading is 1.5 miles.
> A Yes.
> Q Now, if there's a location within the shading, did that signify a closer further distance from the cell site?
> A For the shading itself, no, that doesn't signify anything. But the homicide location is well within that mile and a half coverage.

> Q And you referred to those as industry standard from the FBI?
> A Yes. The FBI set this standard of a mile and a half coverage. That's what on average cell site, the radius that it can cover.

(6T:121-13 to 122-3; 124-19 to 23). The expert's testimony was based on factual evidence and data, and took into account a host of factors that could affect the cell tower's range and coverage area, in accordance with Burney. (DB22-23).

> Q So you know the -- the location of the incident before you run your Geo -- before you create a GeoTime report.
> A Yes.
> Q And the environment that a cell tower is - is located affects, as you said, it -- it's like a rural area could mean that a cell tower services a much wider area.
> A Yes, it could mean that.
> Q And an urban area could mean that, or an urban area, may have a cell tower that services of a smaller area.
> A Yes, possibly.
> Q For instance, like if you were walking around on the streets of Manhattan there would be I mean hundreds of people on their phone maybe in any given square block, right?
> A Right.
> Q So it wouldn't -- you wouldn't necessarily assume that a -- a cell phone was -- was reaching a -- a couple or -- or a mile and a half away to grab a -- a cell site, correct?
> A Not necessarily.
> Q Okay. Would it be a fair assessment to say that the coverage area of every single cell site and sector on earth is unique?
> A That I could not speak to. I don't work for a software carrier. I really don't know ones who have that information.
> Q But in all -- in all of your experience with this cell site data, you can't say for certain that there are any that are actually exactly the same, right? They're -- like two cell towers could have totally different areas that they're actually grabbing calls from.
> A Yeah. I guess that's possible.
> Q And you also stated on direct that the -- one of the analysis that you do is what's the first cell site that a -- a cell phone connects to, right?

A Those are the locations that we map in our report. That's typically the data that the carrier provides to us. Sometimes they will also provide the last cell site that a device connected to, not always. But we only map the event, the cell site that the device connected to at the start of whatever the event was.
Q So in other words, if a cell phone makes a call and it connects to a particular tower, that would be the call that -- or that would be the -- the cell site data that you're analyzing, right?
A Yes. If it's the first cell site.
Q So if that cell phone moved say three, four miles after it had connected to that one cell site, the only -- the analysis that you would complete would only deal with that first cell site that it connected to?
A Yes, because we don't receive any information you could see in the records about the other tow -- the other cell sites it might have connected to.
Q So if I made a cell phone call say here in Paterson and I connected to a cell phone tower and I drove three hours north to upstate New York, the information that you would be analyzing would deal with the first cell tower that the phone connected to?
A Yes. But it would also be labeled with the time that the event started.
Q So you would know that an event started in Paterson and lasted for say two hours, right?
A Yes. It does provide the duration of the event.
Q But you would -- I'm sorry. -- but you wouldn't know where that cell phone call ended, right?
A Not necessarily, no.
(6T:126-24 to 129-19).

Further, contrary to defense counsel's assertions, the expert never once testified that the defendant was at the crime scene prior to R[redacted] L[redacted] being murdered. (DB30). This is an outright mischaracterization of what the witness testified to. Instead, her testimony was: "My key findings were most importantly that between 11:40 a.m. and I believe it was 12:15 p.m. on 10/29, the device

connected to a cell site that provided service to the homicide location of [redacted] in Paterson." (6T:123-5 to 9).

Defense counsel attempts to paint the State's expert as an someone without knowledge of the factual workings of GeoTime Reports and cell sit data when the testimony completely contradicts this. Every question she was asked on cross-examination was answered with a factual understanding of the data used. When the expert testified that she used "accurate maps," she explained that they are accurate as to the locations in Google Maps.

> Q -- the information is plotted on are -- are those accurate maps?
> A Yes, they are accurate maps. GeoTime uses a mapping software called -- . You can double check it, any data point within GeoTime. You can click on it and ask to view the location in Google Maps. It will automatically open up a browser window with the location mapped out so you can double check any of the locations against what's mapped in GeoTime and what's displayed on the call detail records.

(6T:116-15 to 24).

In conclusion, Burney was decided on August 2, 2023. The expert's testimony concluded on June 13, 2023, and a verdict was rendered on June 21, 2023, three months before the Burney opinion was decided. The opinion does not discuss retroactivity and therefore should not be considered as it was not in effect at the time this defendant was on trial, or when the testimony was offered. The expert offered appropriate expert testimony, and the jury was given jury

charges to hep them determine how to weigh expert testimony. For all these reasons, the trial court properly admitted this expert testimony.

POINT III

THE PROSECUTOR'S SUMMATION WAS NEITHER IMPROPER NOR EGRIRGOUS AND DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

Defendant argues that he was deprived of a fair trial as a result of the comments made during summation. These arguments were not raised at the trial level, therefore they should be reviewed under the plain error standard. Such an error must be "clearly capable of producing an unjust result." R. 2:10-2. "Not every possibility of an unjust result," however, will meet the plain error standard. State v. Jordan, 147 N.J. 409, 422 (1997). "Plain error must be sufficient to raise a reasonable doubt as to whether the error led the jury to a result that it otherwise might not have reached." State v. Feal, 194 N.J. 293, 312 (2008) (quoting State v. Daniels, 182 N.J. 80, 102 (2004)) (internal quotations omitted).

"Prosecutors can sum up cases with force and vigor and are afforded considerable leeway so long as their comments are 'reasonably related to the scope of the evidence presented.'" State v. Pressley, 232 N.J. 587, 593 (2018) (quoting State v. Timmendequas, 161 N.J. 515, 587 (1999)). "[W]hile a prosecutor's summation is not without bounds, so long as he stays within the

evidence ***and the legitimate inferences therefrom*** the [p]rosecutor is entitled to wide latitude in his summation." State v. Wakefield, 190 N.J. 397, 457 (2007) (quoting State v. R.B., 183 N.J. 308, 330 (2005), Emphasis Added). The New Jersey Supreme Court has emphasized that while "a prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence…[u]ltimately it [is] for the jury to decide whether to draw the inferences the prosecutor urged." Ibid. (internal quotation marks and citation omitted).

"A defendant's allegation of prosecutorial misconduct requires the court to assess whether the defendant was deprived of the right to a fair trial." Pressley, 232 N.J. at 593; see also State v. Ramseur, 106 N.J. 123, 322–23 (1987); State v. Siciliano, 21 N.J. 249, 262 (1956). "To warrant reversal on appeal, the prosecutor's misconduct must be 'clearly and unmistakably improper' and 'so egregious' that it deprived defendant of the 'right to have a jury fairly evaluate the merits of his defense.'" Id. at 594 (quoting Wakefield, 190 N.J. at 437-38).

Here, defense counsel argues that the prosecutor, in summation, relied on facts not evidence, which is enormously taken out of context of what the prosecutor actually said during summation. (DB32). In direct response to

defense counsel's argument in summation that the police "told the lab to not look for biological evidence," the State replied by stating:

> "Mr. McQuillan also made mention of fingerprints or DNA analysis on the shell casing I showed you. Well think about how the gun works. It's an explosion out of a gun, it's hot. And to think where the shell casing was found and the conditions that were out there with a whole bunch of people outside, raining, what do you think you're going to find on a shell casing? This isn't CSI."

(9T:85-4 to 8/ 9T:102-20 to 103-2). The prosecutor's statements are directly commenting on the facts already in evidence, in direct response to an argument made by defense counsel. Defense counsel here cannot logically argue that it's permissible for defense to comment on the lack of fingerprints on a shell casing (a fact in evidence) during summation, but not the prosecutor. The defendant's argument lacks merit and common sense. The prosecutor's comment was merely a comment directly related to facts already in evidence which urge the jurors to come to their own conclusion about why there wouldn't be fingerprints found on a shell casing. This statement therefore cannot constitute prosecutorial misconduct as it is neither improper nor egregious, and does not deprive the defendant of a fair trial.

Further, the prosecutor's comment that there was not "another man on a grassy knoll" was an offhand comment in regard to what the surveillance video showed, specifically that the when the jurors see R[redacted] L[redacted]'s car and "the red car next to each other, there's no one else out there. It's just them. There's no

one else there. There's no on in the grassy knoll with-you know, this is not a conspiracy." (9T:100-4 to 8). It was not "clearly and unmistakably improper" and it was not so "egregious" that it deprived defendant of his right to a fair trial. Pressley, 232 N.J. at 594. Rather, this remark was in the context of the evidence presented at trial, in direct regard to the surveillance video the jurors will have with them in the jury room. This remark was nothing more than "permissibly forceful advocacy." See State v. Acker, 265 N.J. Super. 351, 356 (App. Div. 1993) (quoting State v. Marshall, 123 N.J. at 160–61).

The cases that defendant relies on involved significantly more inflammatory statements than what was said here in the prosecutor's summation. In State v. Acker, the prosecutor warned the jury that it was their function to protect young victims of sexual assault. 265 N.J. Super. at 354–55. He also characterized the defense attorney as "outrageous." Id. at 354. He told the jury that it was their "job" to "vindicate the law" and to not feel guilty over "branding" the defendant a child molester. Ibid. This Court reversed the defendant's conviction for these comments. Id. at 358. Here, however, the assistant prosecutor made a passing comment encouraging the jury to come to their own conclusion of the facts presented at trial. His summation was focused on the evidence and not on pleading with the jury to convict defendant. In Acker, it is clear how prejudicial and inflammatory the prosecutor's statements were

there. His summation was centered on imploring the jury to find the defendant guilty. The present case is distinguishable from this type of behavior by the lack of egregiousness.

Of great significance, the jury was instructed that arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence. (4T/8T); see also Model Jury Charges (Criminal), "Criminal Final Charge" (revised May 12, 2014). Specifically, the Court stated:

> "At the conclusion of the testimony, the attorneys will speak to you once again in summation. At that time, they will present to you their final arguments based upon their respective recollections of the evidence. Again, this is not evidence but their recollection of -- of -- as to the evidence. It is your recollection as to the evidence presented that is controlling."

(4T:13-9 to 16).

Further, the prosecutor never shifted the burden to the defendant. Defense counsel argues that by stating the defendant controls the evidence in this case, He deprived defendant of a fair trial. (Db41). Defense counsel relies on unsupported delusions that the jurors will take one line from the prosecutor's closing to infer that defendant was depriving the jury of critical evidence against him. (Db42). This argument takes the prosecutor's statement extremely out of context. The prosecutor stated, in its entirety:

> "Now, Mr. McQuillan had argued that it's impossible for a shell casing to go and land outside of a vehicle. And even provided you with an expert, Mr. Leisinger. I'm going to show you, as an example, what's been marked S-358. Mr. Leisinger said it was impossible for that shell casing to be

> ejected outside of the car. And he based that on a review of a picture, on a review of this surveillance footage, and a police report. He didn't test anything. There was no gun to test. No gun was recovered in this case. It's -- it's kind of like if you went to a doctor, the doctor looked at you and diagnosed you with something, without even running any tests. When he testified you heard probably, usually. He is basing his conclusion on assumptions and generalities. When you heard from Gerald Burkhart, and I asked him about shell casings, what did he say? How can I make that determination without a gun? How can I make that determination without knowing all of the variables? He can't. Neither can Carl Leisinger. Now we already talked about how no gun was recovered. Ask yourselves, well, why is that? Who controls the evidence in a case? Is it the victim? Is it the police? No. It's the defendant. And no defendant is going to want to be caught with a gun on him. This happened on October 29th. He surrendered himself October 31st. What do you think he did in that time? Do you think he just held onto the gun? No. Of course not. When did we get to go into the vehicle? Not until December, months later. Do you think there's going to be any evidence in there? No. Of course not."

(9T:101-14 to 102-19). This statement regarding the defendant controlling the gun was in part of the prosecutor's argument that there was no gun to test, and therefore no fingerprints or DNA could be recovered, a crucial part of defendant's argument. As stated earlier, "Prosecutors can sum up cases with force and vigor and are afforded considerable leeway so long as their comments are 'reasonably related to the scope of the evidence presented.'" State v. Pressley, 232 N.J. 587, 593 (2018) (quoting State v. Timmendequas, 161 N.J. 515, 587 (1999)). "[W]hile a prosecutor's summation is not without bounds, so long as he stays within the evidence ***and the legitimate inferences therefrom*** the [p]rosecutor is entitled to wide latitude in his summation." State v. Wakefield, 190 N.J. 397, 457 (2007) (quoting State v. R.B., 183 N.J. 308, 330

(2005) Emphasis Added). The New Jersey Supreme Court has emphasized that while "a prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence…[u]ltimately it [is] for the jury to decide whether to draw the inferences the prosecutor urged." Ibid. (internal quotation marks and citation omitted). For these reasons, the prosecutor did not shift the burden of proof by making a comment that the defendant controlled the gun. Instead, the prosecutor was urging the jury to draw it's own inference as to why no gun was recovered, and therefore why no fingerprints nor DNA were recovered.

Moreover, defense counsel did not object at any point during the State's summation, demonstrating that they did not think these comments were prejudicial or egregious. In determining whether a prosecutor's misconduct was sufficiently egregious, a reviewing court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred. State v. Frost, 158 N.J. 76, 83 (1999) (citing State v. Marshall, 123 N.J. 1, 153 (1991)); *see also* State v. Scherzer, 301 N.J. Super. 363, 433 (App. Div.), certif. denied, 151 N.J. 466 (1997). Specifically, an appellate court must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Marshall, 123 N.J. at

153; Ramseur, 106 N.J. at 322–23; State v. G.S., 278 N.J. Super. 151, 173 (App. Div. 1994), rev'd on other grounds, 145 N.J. 460 (1996); State v. Ribalta, 277 N.J. Super. 277, 294 (App. Div. 1994), certif. denied, 139 N.J. 442 (1995). "In general, when counsel does not make a timely objection at trial, it is a sign 'that defense counsel did not believe the remarks were prejudicial' when they were made." Ibid. (quoting State v. Echols, 199 N.J. 344, 360 (2009)). The failure to object also deprives the court of an opportunity to take curative action. State v. Bauman, 298 N.J. Super. 176, 207 (App. Div.), certif. denied, 150 N.J. 25 (1997).

The prosecutor's comments do not rise to the level of being inflammatory or improper. His comment regarding the "man on the grassy knoll" was fleeting and was not representative of his summation. He did not testify to facts that were not in evidence, as he was merely inviting the jurors to come to their own conclusion as to the lack of fingerprints. These comments did not have the capacity to deprive defendant of a fair trial.

POINT IV

ALL JURY INSTRUCTIONS PROVIDED BY THE TRIAL COURT WERE PROPER AND AGREED UPON BY THE STATE AND DEFENSE COUNSEL.

Defendant argues that the court's failure to charge the jury with respect to third-party guilt, out-of-court identification and dying declarations constitutes

reversible error, as he asks this Court to reverse defendant's convictions on these grounds. (Db49). Where the defendant fails to object to the jury instructions at trial, the defendant must show plain error to prevail on appeal. R. 1:7-2. Plain error should be applied here because defendant did not raise this argument at the trial level. Such an error must be "clearly capable of producing an unjust result." R. 2:10-2. "Not every possibility of an unjust result," however, will meet the plain error standard. State v. Jordan, 147 N.J. 409, 422 (1997).

With respect to jury instructions, "plain error is legal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." Jordan, 147 N.J. at 422 (quoting State v. Hock, 54 N.J. 526, 538 (1969)). "Plain error must be sufficient to raise a reasonable doubt as to whether the error led the jury to a result that it otherwise might not have reached." State v. Feal, 194 N.J. 293, 312 (2008) (quoting State v. Daniels, 182 N.J. 80, 102 (2004)) (internal quotations omitted). When a defendant raises error in the jury charge, the charge must be examined as a whole to determine its overall effect, rather than considering in isolation only the portion alleged to be erroneous. State v. Wilbely, 63 N.J. 420, 422 (1973).

When considering the jury charge as a whole, the State maintains that the charges were fair and appropriate. Third party guilt and identification were not material issues in this case, but rather different tactics by defense counsel to divert the jury's attention away from the facts presented at trial. A comprehensive reading of the transcripts in this case shows that all witnesses who testified as to the dying declarations were thoroughly cross-examined, and after hearing this testimony coupled with the testimony from defendant's cousin Asasha Thomas, and the experts regarding ballistics and cell site location, the third-party guilt defense lacked merit.

Defense counsel asserts that the defense relied on this theory throughout trial but in reality, they referenced it in opening and summation but never provided any factual testimony that would cause a jury to believe a third party shot R[redacted] L[redacted] Defense counsel provided one witness that testified as to the ballistics he reviewed, without the recovery of the actual murder weapon, and merely opined that the shooter was outside of the car, instead of the State's theory that the defendant shot R[redacted] L[redacted] from inside the red Dodge Dart. (9T:40-3 to 13). Aside from this witness, the defense provided no other witness testimony that there might possibly be a third-party shooter. In fact, when asked on cross-examination, he never viewed the discharged shell casings or bullets until the State showed them to him at trial (S-357, S-358, S-359, S-60 and S-

361), and he never tested the actual firearm since it wasn't recovered, (9T:43-18 to 48-9). Further, he testified that he did not disagree with the findings of the State's ballistic expert, who's testimony revealed that the shooter was in the red Dodge Dart, and that environmental factors such as the number of vehicles and people present at the crime scene could have affected where the shell casings were found. (9T:5-9 to 12). For all these reasons, the third-party guilt defense was not a factual material dispute and should therefore be reviewed under plain error.

Further, it is the State's position that the jury charges appropriately encompass the defense of third-party guilt. Of importance, the Court had an entire conference with the attorneys on the record going through the proposed jury charges. In fact, almost the entirety of 8T, which is 83 pages, consists of the attorneys discussing evidence and jury charges, with the Court going through them one by one asking counsel if they have any objections to them. The Court even stopped to ask counsel whether there were any additional instructions that the Court may have missed, to which both the State and defense indicated there was not. (8T:55-11 to 14). Further, the instructions provided allow a jury to find the defendant not guilty by third-party guilt if they chose to.

> THE COURT: Any issue with the section talking about possession cannot be a merely a passive control fleeting or uncertain in its nature. In other words, to possess an item one must knowingly procure, receive it. I

> normally include all of the language and then I let you tell me if you want the pleading possession or the mere presence.
> MR. MCQUILLAN: I'm okay with it being there.
> THE COURT: Okay. So include -- and same with mere presence? Because maybe your argument is, "Well, his car was there doesn't mean he was the shooter."
> MS. MONTALBANO: Yes, Judge.

(8T:58-14 to 59-2).

Further, the out of court identifications during the dying declaration were all subject to 104 hearings conducted by the court as well as vigorous cross-examination by defense counsel. In a pretrial hearing, the court ruled admissible the dying declaration testimony from Jerry Speziale and Charlene Keeling. (1T-2T). The court specifically held, after an extremely fact specific and thorough decision, that:

> "Here, based upon a totality of the relevant circumstances, the Court finds that the statements unquestionably satisfy the elements of New Jersey Rule, I'm sorry, New Jersey Evidence Rule 804(B)(2) and are therefore admissible. Furthermore, the Court finds the defendant's argument that the Court must first determine the correct version of events before determining whether a statement or statements is admissible is without merit. Rather, the Court finds same goes to the weight of the evidence not the admissibility of same.
>
> During a 104 -- Rule 104 Hearing, the Court acts as a gatekeeper to determine the admissibility of evidence. Once the Court is satisfied that a statement or statements meet to the requisite elements it is up to the ultimate fact finder as to what weight, if any, the statement should be afforded. Moreover, the Court finds admission of these statements as dying declaration does not violate the Confrontation Clause. In particular, the Court finds that this issue is squarely decided by the New Jersey Supreme Court; in State v Williamson, 246 N.J. 185, 212 (2021); holding that dying declarations are admissible under New Jersey Rule of Evidence 804(b)(2) whether testimonial or not and do not violate the constitution,

> I'm sorry, Confrontation Clause of the U.S. Constitution or the New Jersey Constitution.
>
> Lastly, the Court finds that New Jersey Rule of Evidence 403 does not preclude the admission of same as the probative value of the statements are not substantially outweighed by the risk of undo prejudice, confusion of the issues, or misleading the jury.
>
> Accordingly, the defendant's Motion to Preclude the admission of the victim declarant statements to Director Speziale and Ms. Keeling as dying declarations is denied."

(2T:18-10 to 19-20). Further, at trial when the issue of a dying declaration came up through witness Della McCall, the Court immediately stopped the trial and conducted a 104 Hearing outside the presence of the jury, made a ruling, and ultimately admitted Della McCall's out of court identification as it relates to the dying declaration. (4T: 70-7 to 74-2). Further, all of these witnesses were thoroughly cross-examined at trial, and any inconsistencies or skepticism regarding these statements were clearly flushed out for the jury to consider in deliberations. Multiple times throughout the cross-examination of these witnesses, defense counsel was able to elicit testimony that the dying declarations may have been unreliable due to R[redacted] L[redacted] making them as she is bleeding out, pending death. They were able to flush out any biases that these witnesses may have against defendant on cross-examination. For all these reasons, jury instructions must be considered in their totality and not in isolation, and the jury charges which were imposed were sufficient.

New Jersey does not mandate that a jury be provided instructions on dying declaration testimony. In fact, defense counsel did not object to not including them in the final jury charges, as they clearly did not find such instructions to be necessary or warranted in this case. Defense counsel points to non-binding out of state opinions and asks this Court to rely on such opinions when it is already understood that New Jersey law does not mandate a dying declaration instruction. In fact, defense counsel asks that this Court take it one step further and find it to be reversible error, when the case law clearly states that jury instructions require a plain error review.

Finally, it also should be noted that all arguments made by defendant as to this point on appeal cite only to the summations of counsel, which are not facts in evidence. With respect to the third-party guilt strategy, the defense elicited testimony from only one witness and argued in openings and summation regarding the possible involvement of the other co-defendants who were not on trial. A defendant has the opportunity to present an affirmative defense of third-party guilt, so long as it is "capable of raising a reasonable doubt of defendant's guilt." State v. Jimenez, 175 N.J. at 486. Based ono the evidence elicited at trial, it did not. Defense counsel did not object to not instructing the jury on third-party guilt, nor the out of court identifications via dying declarations. The "failure to interpose a timely objection constitutes strong evidence that the error

belatedly raised here was actually of no moment." State v. Tierney, 356 N.J. Super. 468, 481-82 (App. Div. 2003) (quoting State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999)). Considering that jury instructions must be considered in their totality and not in isolation, the jury charges instructed were sufficient. Defendant's contentions are thus without merit, as the trial judge properly instructed the jury on all law that was relevant to the facts and circumstances of the crime committed, and the State and defense counsel agreed upon these instructions after given opportunity by the court to add any additional instructions they deemed fit.

POINT V

DEFENDANT RECEIVED A FAIR TRIAL AND WAS NOT DENIED DUE PROCESS.

Defendant next alleges that cumulative errors deprived him of a fair trial. (DB64). This argument should also be reviewed for plain error, as it was not raised at trial.

Both the Sixth Amendment of the United States Constitution and Article 1, paragraph 10 of the New Jersey Constitution guarantee a defendant the right to a fair trial. Fairness is "always" the goal, as "a defendant is entitled to a fair trial, but not a perfect one." State v. Wakefield, 190 N.J. 397, 537 (2007) (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)). Where the defendant raises myriad errors on appeal, this Court must "consider the impact

of trial error on defendant's ability fairly to present his defense." State v. Jenewicz, 193 N.J. 440, 473 (2008). "The predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." Wakefield, 190 N.J. at 538. Cumulative error, therefore, does not afford a defendant relief "where no error was prejudicial and the trial was fair." State v. Weaver, 219 N.J. 131, 155 (2014) (citing State v. D'Ippolito, 22 N.J. 318, 325–26 (1956)).

Here, there was no palpable error in the issues that defendant raised, so neither their individual impact nor their cumulative effect constitutes reversible error. Defendant's trial was fundamentally fair, in accordance with constitutional guarantees.

In conclusion, there is no plain error in the trial judge rereading the carjacking instruction to the jury in response to an inquiry about the definition of the crime or in the cumulative effect of the purported errors at trial.

CONCLUSION

For the above-stated reasons, the State respectfully requests that this Court affirm the defendant's convictions.

Respectfully submitted,

CAMELIA M. VALDES
PASSAIC COUNTY PROSECUTOR

By: /s/ Leandra L. Cilindrello
Leandra L. Cilindrello
Assistant Prosecutor
Attorney I.D. No. 387062021
lcilindrello@passaiccountynj.org

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