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	:	**SUPERIOR COURT OF NEW**
	:	**JERSEY—APPELLATE DIVISION**
STATE OF NEW JERSEY,	:	
	:	**No. A-001515-23**
	:	
	:	**ON APPEAL FROM SUPERIOR**
v.	:	**COURT, LAW DIVISION—**
	:	**MIDDLESEX COUNTY**
	:	
	:	**Honorable Andrea G. Carter, J.S.C.**
GARY P. PRICHARD,	:	**Honorable Pedro J. Jimenez, Jr., J.S.C.**
	:	**Sat below**
	:	
	:	

BRIEF OF APPELLANT GARY P. PRICHARD

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PRELIMINARY STATEMENT

This case exemplifies why, under certain circumstances, it is imperative to try counts of an indictment separately to prevent a manifestly unjust result. Appellant Gary P. Prichard (hereinafter, "Appellant" or "Gary") got into a verbal altercation with a woman he had never met before outside of a local restaurant on January 25, 2021, which serves as the basis for the underlying conviction in this matter. There were no eyewitnesses to this interaction and the evidence collected did nothing to shed any light on the precise nature of the interaction between Gary and the woman, or the words exchanged during the course of their argument. As such, this matter could be properly categorized as a "he said, she said" situation.

Trial in this matter should have involved the jury assessing the respective accounts of Gary and the young woman and making a calculated determination as to whose narrative they deemed to be more plausible. However, this once simple fact-finding endeavor into what occurred on the evening of January 25, 2021, took a sharp turn approximately nine months later when Gary's ex-girlfriend checked herself out of rehab and went straight to the police station to make various outlandish accusations against her former romantic partner. Specifically, Gary's ex-girlfriend claimed that he asked her to bribe the alleged victim in the original matter to drop the charges, and when the girlfriend said no, he asked her to find someone to kill the woman. Of course, Gary's ex-girlfriend did not provide any evidence to corroborate

this bizarre story, and law enforcement made no documented effort to investigate these accusations, but the State nonetheless elected to charge Gary with witness tampering. The Defense attempted to argue that the original allegations should be tried separately from the later-made accusations of witness tampering, but the trial court denied this request and allowed the original charges to be tried together with the fabricated allegations promulgated by Gary's scorned ex-girlfriend.

Based on this erroneous decision, the trial was effectively hijacked by the outlandish and dramatic allegations of a clearly unstable woman, and the Defense was forced to air out the couple's entire sorted past in order to discredit her testimony. Gary's ex-girlfriend purposely attempted to villainize him in the eyes of the jury by offering unprompted testimony about his prior conviction for DUI, and his affiliation with an outlaw biker gang with a reputation for criminality and violence. The entire trial became about Gary's history with his ex-girlfriend, losing sight entirely of the incident occurring on January 25, 2021.

Ultimately, the Defense successfully demonstrated to the jury that Gary's ex-girlfriend's claims of witness tampering were not credible, but doing so came at a considerable cost. Not only had the jury heard about Gary's previous DUI, and his alleged affiliation with a violent biker gang, but they were also made aware that Gary dated multiple women at the same time and may have engaged in illicit drug use. Further, Gary's ex-girlfriend presented as an unstable individual heavily affected by

drug use, barely resembling the woman Gary once knew, and the jury unavoidably would consider that this was the type of individual Gary associated with due to their previous relationship. None of this should ever have been before the jury, and its effect proved fatal. Gary became the womanizing gang-member involved in illicit activities whose account, regardless of how plausible it might be, could not possibly be more credible than the woman whose personal life had not been put on display. Contrary to the unsavory picture painted throughout the trial, Gary was merely a 44-year-old father and small-business owner, with a virtually nonexistent history with the criminal justice system.

Combining these two sets of charges unduly distracted from the primary issues at hand and unfairly painted Gary as someone involved in a broader, more sinister scheme than what was originally alleged. The prejudicial impact of this decision compromised the fairness of the proceedings, and as such Appellant Gary Prichard respectfully requests that this Court vacate his conviction and remand this matter for further proceedings.

PROCEDURAL HISTORY

On December 1, 2021, a Middlesex County Grand Jury returned a three-count indictment against Gary Prichard charging him with the following: (1) Attempted Kidnapping, in violation of N.J.S.A. 2C:5-1/N.J.S.A. 2C:13-1(b)(2)("Count I"); (2) Possession of a Weapon for Unlawful Purposes—Imitation Firearm, in violation of

N.J.S.A. 2C:39-4e ("Count II"); and (3) Witness Tampering, in violation of N.J.S.A. 2C:28-5a ("Count III"). (28a). Defense counsel subsequently filed a Motion to Sever Count III from the remainder of the Indictment on December 14, 2021. The Parties appeared before the Honorable Andrea G. Carter, J.S.C., on February 17, 2023 and March 17, 2023 to be heard on this motion. (1T;2T).[1] The trial court ultimately denied the Defense's motion. (27a).

The Honorable Pedro J. Jimenez, Jr., J.S.C., presided over the three-day trial in this matter occurring on June 9th, June 12th, and June 13th, 2021. (3T;4T;5T). The jury returned a verdict on June 14, 2021 finding Gary Prichard guilty on Count I (Attempted Kidnapping) and Count II (Possession of Imitation Firearm for Unlawful Purpose), and not guilty on Count III (Witness Tampering). (6T). On October 5, 2023, the trial court sentenced Gary Prichard to eight (8) years' incarceration, subject to an 85% parole disqualifier under the No Early Release Act ("NERA"). (8T21:22-22:3).

The Middlesex County Public Defender's Office filed a Notice of Appeal in this matter on January 23, 2024, along with a Motion to File a Notice of Appeal as

[1] 1T—Transcript of Proceedings on February 17, 2023 before the Honorable Andrea G. Carter, JSC.
2T—Transcript of Proceeding on March 17, 2023 before the Honorable Andrea G. Carter, J.S.C.
3T—Transcript of Proceeding on June 9, 2023 before the Honorable Pedro J. Jimenez, Jr., J.S.C.
4T—Transcript of Proceeding on June 12, 2023 before the Honorable Pedro J. Jimenez, Jr., J.S.C.
5T—Transcript of Proceeding on June 13, 2023 before the Honorable Pedro J. Jimenez, Jr., J.S.C.
6T—Transcript of Proceeding on June 14, 2023 before the Honorable Colleen M. Flynn., J.S.C.
7T—Transcript of Proceedings on September 25, 2023 before the Honorable Andrea G. Carter, J.S.C.
8T—Transcript of Proceeding on October 5, 2023 before the Honorable Pedro J. Jimenez, Jr., J.S.C.

Within Time. (1a-12a). Undersigned counsel subsequently entered their appearance in this appeal on June 19, 2024.

STATEMENT OF FACTS

I. Incident on January 25, 2021 and Arrest

On January 25, 2021, at approximately 11:30 p.m., Gary Prichard was driving home from a long day of work, intending to meet his date, Zoe, at his house later that evening. (5T101:13-19; 102:4-5). Gary headed down Bristol Street in New Brunswick, New Jersey when he approached the stop sign located at the intersection with Bristol and Easton Avenue. (5T108:11-17). Gary needed to make a left turn intersection in order to get home, but when he went to make this turn, he was halted by a young woman nearly stopped in the middle of the street distracted by her phone. (5T109:3-6). Admittedly annoyed, Gary honked his horn at the woman, causing her to drop her phone and began angrily cursing at him. (5T109:21-23). Gary laughed at what he felt was a ridiculous and uncalled for reaction, which seemed to only anger the woman more and she kept screaming and cursing as she walked past his truck. (5T110:4-25). When Gary made his turn, the woman kicked the rear passenger side of his truck. (5T111:1-3). Gary completed his turn and continued on his route home, but as he drove, he became increasingly annoyed and frustrated that this woman had the nerve to kick his car. (5T111:17-20). This is where Gary, by his own admission, made the worst decision of his life and turned around to give the

woman a piece of his mind. (5T112:14-20). Gary pulled up beside the woman in front of a local eatery, Wings over Rutgers, and cursed the woman out, demanding to know who she thought she was kicking his car. (5T113:6-21). After going back and forth for several seconds, the woman started coming toward Gary's parked truck and he thought she was going to kick his car again. (5T114:15-17). Gary made the extremely poor decision at this point to pick up the starter pistol he kept in his truck for protection, and say to the woman, "Get the f*** away from my car." (5T114:22-23). Gary did not point the starter pistol directly at the woman, but his holding the starter pistol caused the woman screamed and jumped behind a nearby pile of cardboard boxes. (5T115:1-16). Gary made no attempt to follow the woman and drove away. (5T115:21). Later that evening, Gary met up with Zoe as planned. (5T35:17-19).

A Wings over Rutgers employee, Nicole Hodges, heard screaming outside as she was closing up the restaurant. (3T47:1-23). She went outside and found the woman, Marilyn Contreras, hysterical. (3T48:2-5). Ms. Hodges brought Ms. Contreras into the restaurant and called the police. (3T48:2-49:4). Ms. Hodges reported to the 911 operator that Ms. Contreras told her that a white male in a red truck pulled a gun on her and tried to pull her into the car. (3T53:23-54:11).

Detective Keith Walcott (hereinafter, "Det. Walcott") of the New Brunswick Police Department reported to the scene and took a statement from Ms. Contreras.

(13a). Ms. Contreras told Det. Walcott that a white male wearing a black Covid-19 mask approached her in a red burgundy pickup truck while she was walking home from work, pointed a gun at her, and told her to get inside his car. *Id.* Ms. Contreras said that this did not immediately register with her and that the man in the car then again waved the gun at her and told her to "get into the f***ing car." *Id.* She then fled behind a pile of boxes, squatted down, and screamed. *Id.* Det. Wolcott subsequently identified the red pickup truck involved in the altercation through surveillance footage from local entities and ultimately linked the vehicle back to Gary. (13-14a). Notably, however, Det. Walcott did not obtain any footage of the actual incident despite the fact that it occurred on a heavily trafficked road with multiple businesses located on either side.

On January 29, 2021, New Brunswick officers picked up Gary and the woman he had been with the night of the incident, Zoe, and brought them both to police headquarters without incident. Gary elected not to give a formal statement. (14a). A search warrant was executed on Gary's truck later that evening and officers recovered the fake firearm, a black Bruni 84 9mm imitation handgun, also known as a starter pistol, in the center console. *Id.* Based on the above-referenced information, the Middlesex County Prosecutor's Office approved the following charges: (1) Attempted Kidnapping, in violation of N.J.S.A. 2C:5-1A(3)/2C:13-

1B(2); and (2) Possession of a Weapon for Unlawful Purpose—Imitation Firearm, in violation of N.J.S.A. 2C:39-4E. *Id*.

II. Relationship with Diana Perez

At the time of his arrest, Gary had been seeing two woman, Zoe Capaldo and Diana Perez, both of whom knew about the other. (4T117:20). Gary had been dating Zoe for a substantial period prior to his arrest, but the two never entered into an exclusive relationship because Gary knew that Zoe wanted certain things like children and marriage that he could not give her. (5T62:2-24). Against that backdrop, Gary met Diana Perez while out at a local bar in late September 2020. (5T60:20-23). Gary described Diana, an older woman more than ten years his senior, as a "party person," who liked to go out and dance. (5T63:4-5; 2T5:2). He never brought her to his house in New Brunswick or introduced her to his friends or family. (5T63:7-9). The pair would primarily meet at local bars or lounges and then go back to Diana's house. (5T63:10-12).

While Gary wanted something casual, it was clear that Diana did not feel the same way, despite knowing the pair was not exclusive. Diana would later offer the following at trial when asked about her early relationship with Gary:

> Let me put it to you like this, there was a function in my house and I [had] been in a 10-year relationship, 12-year relationship and five-year relationship. I've never been married.

> And in that party—in that surrounding with all these people, [Gary] said the magic words that I wanted to hear, you're definitely marriage material. I felt special. I felt loved. I felt just—appreciated.

(4T117:8-15).

After several months of dating, Diana reconnected with an old friend named "Lulu" and began doing hard drugs, such as cocaine and Molly. (5T66:10-17). Gary lost a family member in his teenage years to a drug overdose and has a younger brother who suffers from addiction, causing him to have a very firm stance against illicit substances. (5T68:7-14).

On January 29, 2021, after his arrest, Gary called his mother and stepfather from jail. (4T210:7-14). He instructed his stepfather, Imad Mohamad, to contact Diana and inform her that he had been arrested. (4T211:4-5). At the time, Gary's stepfather did not know who Diana was. (4T211:8). Diana hired an attorney to represent Gary and suggested that he move into her home following his release, as his truck had been impounded as part of the investigation. (5T71:20-23; 5T72:12-14; 5T123:17-19).

Within a few weeks of his release, Gary walked in on Diana doing cocaine in the bathroom. (5T76:24-77:1). This caused a huge argument between the pair, particularly given Gary's firm stance on illicit substance use and his status on pretrial release. (5T77:5-7; 5T79:4). Diana responded to Gary's frustration by issuing an ultimatum, if he did not like it, he could leave. (5T79:17-18). Despite not having a

vehicle, Gary chose to move back to his New Brunswick studio apartment. (5T79:20-24).

Gary and Diana did not see each other for approximately a month and a half after he moved out of her house. (5T82:22-24). Diana would consistently call and text Gary, and he would respond with brief replies, but their communication was fairly limited. (5T83:1-6). On April 18, 2021, Gary's birthday, Diana contacted Gary and told him that she was making Puerto Rican food and asked if she could come over. (5T84:13-20). Gary had recently moved to Princeton, New Jersey and welcomed the company, as he had been feeling down about his current situation. (5T85:10-14). Gary invited Diana to come over the following week, but her behavior when she arrived was agitated. (5T85:20-25). She suggested that they invite several people over. *Id.* Diana invited over four friends and her nephew, Gary invited two couples and one other friend. (5T86:6-8).

During this makeshift get together, Gary observed Diana's nephew hand her something which she put into her mouth. (5T86:18-19). Gary and Diana got into a heated argument about this, which made several guests feel uncomfortable and leave. (5T87:4-13). Diana asked Gary to come into the kitchen with her, at which point she tried to put cocaine in his nose, and he flipped out and told her to take her friends and get out of his house. (5T87:22-88:9). Gary went to bed and Diana's friends left shortly thereafter; however, Diana did not leave and attempted to get into

bed with Gary, but he rebuked her advances. (5T88:13-15). Even though Gary refused her advances, Diana slept at his house that evening, and the two were able to discuss the situation further in the morning. (5T88:20-25). Gary told Diana that he knew she had a drug problem, and that he could not be with her given everything he had going on at the moment. *Id*. Diana seemingly took this break up relatively well, telling Gary that she understood and that the pair could remain friends. (5T89:1-9).

Despite their breakup, Diana unexpectedly showed up to Gary's apartment two weeks later with barbeque and the two were intimate. (5T89:10-90:9). Diana then began bringing by expensive gifts, such as a speaker and a television. (5T90:12-14). Gary felt uncomfortable and attempted to pay Diana for these items, but Diana left the money on the counter when she left. (5T90:18-91:4). Gary subsequently had a conversation with Diana in which he reiterated that he did not want her coming by his apartment unannounced, and that he still did not want to continue their relationship. (5T91:7-18). On June 20, 2021, Father's Day, Gary awoke at around 7:00 a.m. to a knock on his door and opened the door to find Diana standing there. (5T91:19-24). Admittedly aggravated, Gary asked Diana what she did not understand and attempted to give her $1,400 for the cumulative gifts she had thrust upon him in recent weeks. (5T92:11-16). He told her not to call or text him anymore, that he was with someone else and did not want to be with her. (5T92:14-

16). Diana responded by throwing the $1,400 in Gary's face and telling him that he was going to regret breaking up with her. (5T93:2-3).

Approximately one month, on July 26, 2021, Diana showed up at a bar where Gary regularly played pool. (5T93:21-22; 5T95:8-15). Diana walked up to Gary while he was shooting pool, and he rejected her, told her to stop calling him, stop harassing him, and that he did not want to be with her. (5T95:13-18). Diana slapped him across the face. (5T95:24). Despite this negative interaction, Diana continued to call and harass Gary, and the more he blocked her the more insistent she became. (5T96:18-25).

Another month later, on August 25, 2021, Diana similarly appeared at a different bar where Gary played pool. (5T96:6-7). Gary approached her and she began crying. (5T97:12). Gary noticed that she appeared very thin and sickly, and told her that she needed to get help for her family and continuing to call him was not healthy. (5T97:10-16). He ultimately threatened to get a restraining order if she did not stop this behavior. (5T97:23-24). Diana hit Gary again and several other bargoers had to break up their fight. (5T98:2-3). Diana checked into rehab two days later. (4T163:24-164:1).

On September 16, 2021, Diana went into the New Brunswick Police Department intent on giving a statement against Gary. (15-26a). Diana spoke with

Det. Walcott and stated that approximately four months earlier, Gary asked her to find the alleged victim in the attempted kidnapping case and offer her $5,000 to $10,000 to drop the charges. (18a). Diana told Det. Walcott that she refused, because this could all come back to her. *Id*. After this, Diana claimed that Gary approached her a second time and asked her if she could find someone to "get rid" of his accuser in the attempted kidnapping case. (19a). Diana said that she told Gary she would look into it, because she wanted to please him since their relationship was not going well and he was not aware that she was doing drugs. (20a). Diana stated, "I wanted to be with him I just constantly wanted to be with him. I constantly just wanted to be with him." *Id*. However, Diana admitted that she did not have any knowledge regarding whether Gary ever actually attempted to "get rid" of the alleged victim. (21a).

The following month, on October 13, 2021, Gary returned home to find that his house had been vandalized in a very peculiar way. (5T100:6-8). The items that Diana bought him, such as the speaker and television, had been broken and thrown on the floor. (5T100:8-11). However, none of the other valuable items in his house were taken or rifled through. (5T100:12-14).

III. Court Proceedings

a. Motion to Sever

On December 1, 2021, a Middlesex County Grand Jury returned an indictment charging Gary with the previously mentioned charges, as well as an additional charge, Witness Tampering, in violation of N.J.S.A. 2C:28-5A, arising from the statement offered by Diana several months earlier. Defense counsel filed a Motion to Sever on December 14, 2021, contending that it would substantially prejudice the Defense to have to litigate the allegations of a scorned ex-girlfriend made months after the alleged incident together with the accusations made by Ms. Contreras.

The Parties appeared before Judge Carter on February 17, 2023 to address the Defense's motion. (1T). Defense counsel reiterated his argument that the allegations made by Gary's ex-girlfriend, who had a drug problem, could not be heard together with the other matter without this becoming a trial within a trial. (1T3:18-24). He explained that he would be forced to present additional testimony and witnesses regarding the former couple's relationship to expose her motivations for making these allegations. (1T3:25-4:6). He further explained that the prejudice in this matter would be substantial. As a "he said, she said" case, the verdict would likely come down to who the jury found more credible, and allowing this trial to become about Gary's tumultuous relationship with his ex-girlfriend would be detrimental. (1T4:7-23). The State countered that it believed the ex-girlfriend's statement would be admissible in the kidnapping trial regardless, making severance unnecessary. (1T4:25-5:9). Judge Carter indicated that she felt a Rule 104 hearing

would be appropriate to determine whether the ex-girlfriend's statement would be otherwise admissible as evidence of consciousness of guilt under Rule 404(b), which required analysis of the factors set forth in *State v. Cofield*, 127 N.J. 328 (1992). (1T7:5-14). Judge Carter stated that she felt the additional hearing necessary to address whether the ex-girlfriend's statement met the third prong, that evidence of the other crime was clear and convincing. (1T7:12-14).

Judge Carter presided over the Rule 104 hearing on March 17, 2023. (2T). The State presented the testimony of Diana Perez. (2T4:4-41:25). The trial court ultimately denied the Defense's motion to sever, finding that Diana's statement would have been admissible in the kidnapping trial, and it would be up to the jury to decide whether she was credible. (2T47:1-25). The trial court determined that this evidence was relevant to the defendant's motive in the context of the underlying offenses. (2T47:22-24). It found that the evidence satisfied the clear and convincing standard based on the fact that Diana's story remained substantially consistent, despite the fact that Diana admittedly reviewed her statement with the prosecutor the previous day. (2T48:11-49:9; 2T17:9-20). The trial court finally determined that the Defense would not be unduly prejudiced, because Diana could be cross-examined regarding her motive to fabricate and sobriety. (2T50:6-11).

b. Trial (June 9-13, 2023)

i. First Day of Trial—June 9, 2023

On June 9, 2023, Judge Jimenez presided over the first day of trial in this matter. (3T). The State offered the testimony of two witnesses: (1) Nicole Hodges, the Wings over Rutgers employee who called 911; and (2) Marilyn Contreras, the alleged victim. (3T). Ms. Hodges testified that while she was closing up the restaurant on January 25, 2021, she heard screaming and went outside to find Ms. Contreras hysterical. (3T47:16-48:4). Ms. Hodges then called 911 on Ms. Contreras' behalf. (3T49:3-4). The State introduced an audio recording of the 911 call through Ms. Hodges. (3T53:1-3).

Ms. Contreras testified that she was walking home from work when an individual wearing a black Covid-19 mask and driving a red pickup truck pulled up beside her and attempted to get her attention. (3T63:10-14; 3T64:17-18; 3T65:14). She ignored the man, but when he once again tried to get her attention, she turned to look at him and saw that he was holding a gun. (3T63:15-19). Ms. Contreras testified that he then demanded that she "get inside the f***ing car." (3T63:18-19). She said that when she did not respond, the man in the vehicle said, "I'm serious, get in the f***ing car." (3T63:20-23). Ms. Contreras then ran and ducked behind a pile of cardboard outside Wings over Rutgers and screamed for help. (3T63:24-64:4).

ii. Second Day of Trial—June 12, 2023

The trial continued on June 12, 2023 and the State presented the testimony of three individuals: (1) Keith Walcott, the New Brunswick detective who investigated this matter; (2) Andrew Winter, a Middlesex County Prosecutor's Office employee who testified regarding the fake firearm; and (3) Diana Perez. (4T). The Defense presented the testimony of Gary's stepfather, Imad Mohamad. (4T).

Det. Walcott testified that he responded to the scene of the incident on January 25, 2021, and took the statement of Ms. Contreras. (4T14:12-16). After obtaining Ms. Contreras' statement, Det. Walcott canvassed the area to locate any surveillance footage which might corroborate her story and help him identify the suspect. (4T14:24-15:3). The State entered into evidence several of these videos through Det. Walcott, none of which captured the actual incident, merely the movements of the red pickup truck after the altercation. (4T15:9-23:21; 4T43:17-19). Det. Walcott further testified as to how he linked Gary to the red pickup truck in the videos. (4T24:1-27:13). Once law enforcement received authority to search the truck, Det. Walcott located a starter pistol in the center console. (4T39:13-14). On cross-examination, Det. Walcott admitted that when he arrested Gary during a traffic stop, Gary did not attempt to flee or elude the police and did not resist arrest. (4T53:3-21). Det. Walcott attempted to posture that Gary was not compliant with the investigation but admitted that there was nothing in his report to suggest that he was anything but a perfect gentleman. (4T54:21-55:19).

The State next presented the testimony of Sergeant Andrew Winter, a Middlesex County Prosecutor's Office employee who testified as an expert in the field of firearms investigation in ballistics. (4T85:1-4). Sergeant Winter testified that the imitation handgun resembled a semiautomatic pistol. (4T90:18). He also testified that imitation firearms typically have an orange tip, but the one in question appeared to have the orange tip colored in with black marker. (4T93:11-15).

Finally, the State presented the testimony of Diana Perez. Diana testified that she met Gary at a club in 2020 and the pair dated for approximately eight (8) months. (4T112:11-25). She acknowledged that she knew he was dating other girls, and stated that she would see other women's clothes at Gary's house. (4T117:20-118:3). Diana was a recovering drug addict, and kept this fact from Gary for fear that he would break up with her if he found out. (4T143:22-24). Diana knew that Gary took a harsh stance on drugs due to a situation with a family member, and that he would not want to be with someone struggling with addition, regardless of whether they were in recovery. (4T119:5-14; 4T143:10-21).

Diana testified that shortly after the events in question, Gary's father, who she had never met before, showed up at her house and informed her that Gary had been arrested. (4T113:21-114:4). Gary allegedly asked his father to contact Diana, and that she would handle everything. *Id.* Diana testified that after she secured his release from jail, Gary told her that "he was driving down Easton Avenue and

[Marilyn Contreras] was crossing the street and they exchanged words[.]" (4T114:9-13). Diana stated Gary lived with her for approximately two months, until he spontaneously told her that he was moving to Princeton, but that she could still come over. (4T137:17-20). She conceded on cross-examination it was possible Gary returned to his house in New Brunswick for several weeks before ultimately moving to Princeton. (4T1138:2-18).

At some point, Diana testified that Gary wanted her to bribe Ms. Contreras with either $5,000 or $10,000 to drop the charges. (4T114:19-115:10). Diana stated that she refused, because there were going to be cameras where Ms. Contreras worked. (4T114:24-115:2). Several weeks later, Gary asked Diana if she could find out "who could rough [Marilyn Contreras] up, like, scare her, like, beat her up." (4T115:14-16). Diana indicated that she told Gary that she would find someone, because she loved Gary and wanted to see how far he would go with this. (4T115:16-20). Diana testified that during their next conversation, Gary asked her to find someone to kill Ms. Contreras. (4T115:23-25). Diana again indicated that she said yes. (4T116:2). This conversation allegedly occurred while the two were in bed at Gary's house in Princeton, New Jersey. (4T116:16-19).

Diana testified that after Gary asked her to find someone to kill Ms. Contreras, she began making excuses as to why she could not come over to his house and began locking herself in her room and doing drugs. (4T116:23-117:1). Diana's addiction

got to a point where her family hosted an intervention and forced her to go to rehab, where she had a stroke after about two weeks. (4T120:24-121:8). Diana stated that she reported what happened to the police as soon as she got out of the hospital, because she knew if she kept it to herself, she would use again. (4T121:22-25). Diana denied ever approaching Gary at a bar after their breakup. (4T163:1-17). She claimed that the two mutually parted ways, and that no words needed to be said. (4T171:23-172:4).

During her testimony, Diana made numerous statements pertaining to Gary that should never have been presented to the jury, including his prior conviction for DUI, alleged use of cocaine, and his affiliation with a known violent biker gang, the "Pagans." (4T144:23; 4T145:6-8; 4T155:17). After the third instance involving the affiliation with a biker gang, Judge Jimenez called counsel to sidebar. (4T155:22). Judge Jimenez acknowledged during the sidebar discussion that Diana "compromised this case three times" during her testimony. (4T156:25). Defense counsel requested a mistrial, and Judge Jimenez explicitly stated that he would reserve ruling on that motion. (4T158:21-22). Judge Jimenez offered the following instruction to the jury moments later when back on the record:

> Folks, I will need you to completely disregard that last answer given by the witness in this case.

(4T161:14-15).

After the State rested its case, the Defense presented the testimony of Gary's stepfather, Imad Mohamad. Mr. Mohamad testified that shortly after his arrest, Gary called his mother and asked them to get in contact with Diana, who was previously unknown to Gary's parents. (4T211:4-8). Mr. Mohamad went to Diana's house and described her behavior as very hyper and crazy. (4T213:11; 4T214:24). He noted the strong smell of marijuana and observed a white powder on the table and Diana rubbing her nose. (4T213:13-14; 4T215:8-13).

iii. Third Day of Trial—June 13, 2023

On June 13, 2023, the final day of the trial, the Defense presented the testimony of four witnesses: (1) Mauricio Robles, an acquaintance of Gary's who plays in the same pool league; (2) Zoe Capaldo, Gary's former girlfriend; (3) Ramona Thomas, an acquaintance Gary met at the North Brunswick Pub; and (4) Gary Prichard, who testified in his own defense. (5T).

The Defense offered the testimony of Mauricio Robles and Ramona Thomas to impeach Diana's previous testimony. Mr. Robles testified that he was present at McGuinn's Place on July 26, 2021 playing pool in a league along with Gary. (5T21:12-25). He recalled that later in the evening, a woman came into the bar and caused a scene. (5T22:6-7). The woman seemed angry and approached Gary. (5T23:7-9). Mr. Robles noted that Gary appeared calm, but at one point in the conversation the woman struck Gary across the face. (5T23:22-24; 5T24:14-16).

After this altercation, Gary tried to distance himself from the woman, who continued yelling but ultimately left. (5T24:20-25).

Ramona Thomas testified that she met Gary at the North Brunswick Pub in or around 2019. (5T52:22-53:2). Ms. Thomas testified that she had only met Gary one other time at this bar, and on that occasion, he was accompanied by Diana. (5T53:17-23). While in the bathroom that evening, Ms. Thomas testified that Diana asked her whether she wanted a bump of cocaine. (5T54:10). Ms. Thomas declined, but she observed Diana inhale the cocaine. (5T54:24).

The Defense also presented the testimony of Zoe Capaldo. Zoe testified that on January 25, 2021, the day of the alleged attempted kidnapping, she and Gary had plans to meet up that evening. (5T30:9-12). Zoe stated that she and Gary had been messaging throughout the day and determined that she would come over to his house after she finished work. (5T30:9-14). She anticipated she would be out of work sometime around midnight that evening. (5T35:12-13). Gary texted Zoe at 10:51 p.m. that night saying, "see you at my house." (5T35:22-25). He then texted Zoe again at 11:54 p.m. to say that the door was open and to come inside. (5T35:17-19). This would have been immediately prior to, and immediately after, the alleged attempted kidnapping. Zoe also testified that Diana called her on several occasions from blocked numbers in a very threatening and aggressive manner. (5T39:4-40:25).

Finally, Gary Prichard testified in his own defense. Gary testified that he started his own trucking business with a partner in or around 2016. (5T58:2-5). He explained that his company would pick up and transport big shipping containers that would arrive at the local port. (5T58:17-24). While working an overnight shift several years earlier, three individuals robbed Gary, and as a result he started carrying the starter pistol as a deterrent. (5T59:14-20). He estimated that he had been carrying the starter pistol for about four years prior to the incident in question. (5T60:1).

Gary also testified about the incident which occurred on January 25, 2021. He explained that while he was driving home from work that evening, he found his ability to make a left turn impeded by Ms. Contreras, who was nearly halted in the middle of the roadway staring at her phone. (5T109:3-6). Gary honked at Ms. Contreras, causing her to drop her phone and start cursing at him. (5T109:21-23). When he eventually made his left turn, Ms. Contreras kicked the passenger side of his truck. (5T111:1-3). He kept driving but found himself infuriated that this woman felt she could kick his car. (5T112:14-20). Gary testified that this was where he made the worst decision of his life and made a U-turn to confront Ms. Contreras. *Id.* He pulled up beside her and asked her who did she think she was to kick his car, and the two began screaming at each other. (5T113:18-21). After a few seconds, Ms. Contreras began to approach Gary's truck again, which was now parked. (5T114:15-

17). Gary believed she was going to try to kick his truck again, and he made the poor decision to grab the starter pistol out of his center console in order to deter her from coming any closer. (5T114:16-115:8). He did not point it at her, but he did grab it out of the console. (5T115:1-5). Gary acknowledged that when he did this, Ms. Contreras fled behind the pile of cardboard boxes. (5T115:13-16).

While acknowledging that what he did was wrong, Gary adamantly denied that he ever tried to kidnap or force Ms. Contreras into his vehicle that evening. He reiterated that he never said, "Get the f*** into my car," he said, "Get the f*** away from my car". (5T116:16-24). It is crucial to note that it is undisputed that Gary was wearing a Covid-19 face mask at the time of this interaction. Gary further explained that the State's narrative did not make sense. He was expecting to meet Zoe at his house that evening and would have no reason to ask another woman to get into his car. (5T116:7-8).

Gary also testified about his relationship with Diana that came to an end due to her drug use. (5T66:10-100:25). She did not take the breakup well, and continued to show up unannounced, harass him through constant phone calls and texts, and follow him to local bars. *Id*. Gary further denied ever asking Diana to bribe Ms. Contreras, and stated that when he was released from jail, he did not have two nickels to rub together, so this allegation made absolutely no sense. (5T98:14-20). He stated

that he also would never have asked Diana to find someone to harm Ms. Contreras, and that this was a made-up, delusional lie. (5T99:1-11).

iv. Verdict and Sentencing

On June 14, 2023, the jury returned a verdict in this matter. (6T). The Honorable Colleen M. Flynn, J.S.C., covered this matter for Judge Jimenez, who was out that day. (6T3:2-4). The jury found returned a guilty verdict with respect to Count I (Attempted Kidnapping) and Count II (Possession of an Imitation Firearm for Unlawful Purpose), but acquitted Gary on Count III (Witness Tampering). (6T9:4-10:11). When the State moved to revoke Gary's release pending sentencing, Defense counsel argued against the revocation and raised his earlier request for a mistrial. (6T14:11-17). Judge Flynn asked whether Judge Jimenez had already ruled on this motion, and Defense counsel stated that Judge Jimenez ruled that he was not going to issue a mistrial at that time, despite there being no evidence in the record to suggest that a formal ruling was ever made. (6T15-2-12). Judge Flynn stated that she would not override Judge Jimenez's ruling. (6T17:23-25).

The Parties appeared before Judge Jimenez for sentencing on October 5, 2023. (8T). The trial court found Aggravating Factor 3 present based upon Gary's municipal court offense history. (8T20:10-25). The trial court also found Aggravating Factor 9 present. (8T21:1-9). The trial court did not find any mitigating

factors present. (8T21:16). On Count I (Attempted Kidnapping), the trial court sentenced Gary to eight (8) years' incarceration, subject to an 85% parole disqualifier under the No Early Release Act ("NERA"). (8T21:22-22:3). The trial court further sentenced Gary to a term of one year (1) incarceration for Count II (Possession of an Imitation Firearm), to run concurrently with the sentence imposed for Count I. (8T22:4-9).

LEGAL ARGUMENT

I. Defense's Motion for Mistrial should have been Granted (4T158:21).

a. There is no trial court decision to afford deference.

When inadmissible evidence is presented before the jury, the trial court must determine whether the improper disclosure can be cured by a cautionary or limiting instruction, or requires the more severe response of a mistrial. *State v. Winter*, 96 N.J. 640, 646-47 (1984). This decision is particularly "within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." *Id.* As such, the appropriate standard of review for a trial court's decision to deny a request for mistrial is abuse of discretion. *State v. Herbert*, 457 N.J.Super. 490, 503 (App. Div. 2019).

While it is true that the decision as to whether to declare a mistrial is left to the sound discretion of the trial court, no such deference is warranted in this matter as the motion was never actually ruled upon. Judge Flynn, who stepped in for Judge

Jimenez to receive the jury's verdict, denied the Defense's motion out of deference to the decision she believed had already been made by Judge Jimenez. The issue being that Judge Jimenez never actually issued a formal ruling on the motion. He explicitly stated that he would reserve his decision on the issue, never to be directly raised again. (4T158:21-22). Judge Jimenez issued an extremely brief, one-sentence instruction to the jury to disregard the witnesses' last answer following Diana's comment about Gary's affiliation with the Pagans, but this does not reflect a formal ruling on the Defense's motion. Given that Judge Jimenez never formally ruled on the motion and acknowledged that the witness had compromised the case at least three separate times, the Appellate Court should review this issue under a *de novo* b

Diana Perez did everything in her power to portray Gary as a villain in the eyes of the jury. She raised that Gary previously had been convicted of DUI, that he engaged in illicit drug use, and that he was a member of a notoriously violent and criminal biker gang. These comments were undoubtedly prejudicial, but in the particular context of the attempted kidnapping case, the prejudicial nature of these comments could not be remedied through a curative or limiting instruction.

Whether a curative or limiting instruction will suffice to remedy an error, as opposed to granting a request for a mistrial, requires the assessment of the following three factors: (1) the nature of the inadmissible evidence heard by the jury, and its prejudicial effect; (2) assessment of whether the instruction's timing and substance

will affect its likelihood of success; and (3) the court's tolerance for the risk of imperfect compliance by the jury. *Herbert*, 457 N.J.Super. at 505-07. With respect to the first factor, it is relevant whether the curative or limiting instruction would be intended to remedy a single, only slightly improper remark, or whether it would be intended to cure the prejudice resulting from multiple cumulative errors at trial. *Id.* at 505. It is also relevant whether the inadmissible evidence bears directly on the ultimate issue before the jury, as such evidence may be less suitable for a curative or limiting instruction. *Id.*

The second factor identified in *Herbert* acknowledges that the timing and substance of an instruction affect its likelihood of success. *Herbert*, 457 N.J.Super. at 505. Curative and limiting instructions should be made swiftly and firmly, without delay which may allow prejudicial evidence to become cemented into the storyline created by jurors during the course of trial. *Id.* at 506. Curative and limiting instructions should also be specific and explanatory, as opposed to general and conclusory. *Id.* "An instruction can be curative only if the judicial medicine suits the ailment." *Id.* at 508. Due to the inherently prejudicial nature of the evidence sought to be struck from the juror's minds, the court's instruction must be formulated carefully to explain precisely the prohibited purposes of the evidence. *Id.* at 506. The instruction should also explain itself, and trial courts should refrain from "because I said so" instructions. *Id.*

Finally, the trial court must consider its tolerance for the risk that the jury will not comply with its instruction. *Id*. at 507. It is generally presumed that juries follow instructions. *Id.* at 503. However, "[t]here are some contexts in which the risk that the jury will not, or cannot, follow instruction is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id*. (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)). The relevant inquiry is whether there is a real possibility that the inadmissible evidence heard by the jury could produce an unjust result. *Id*. at 507.

Inappropriate disclosure to the jury of a criminal defendant's potential gang affiliation has been held to be particularly prejudicial. *Herbert*, 457 N.J.Super. at 509. When analyzed under N.J.R.E. 404(b) as evidence of other crimes and wrongs, membership in a gang is "'at the very least strongly suggestive of' criminal activity". *Id*. (quoting *State v. Goodman*, 415 N.J.Super. 210, 227 (App. Div. 2010)). The "mere allegation of gang membership carries a strong taint of criminality." *Id.* (quotations omitted). "Evidence of past criminality risks conviction because the jury may conclude defendant is a bad person with a propensity to commit crimes." *Id.* Other-crimes evidence has a unique propensity to turn the jury against a criminal defendant, and the "likelihood of prejudice is acute when the proffered evidence is proof of a defendant's uncharged conduct." *Id*. (quotations omitted).

This Court in *Herbert* considered whether a detective's inappropriate reference to a criminal defendant's gang affiliation could be cured by an instruction to the jury that there was no evidence to suggest that gangs were involved in the case and that the jury could not rely on this information. 457 N.J.Super. at 409, 509. This Court held that the instruction did not fully and clearly address the prejudicial aspects of the testimony, and as such could not be capable of curing the taint of the inadmissible evidence. *Id*. at 512.

Here, Diana Perez testified that Gary was a member the Pagan Motorcycle Gang, which according to Det. Walcott's investigation report has a reputation as "one of the most violent motorcycle gangs on the East Coast."[2] The Pagan Motorcycle Gang has been associated with a plethora of headline-worthy criminal activity, which the average juror would certainly have been exposed to.[3] For example, Pagan member Ferdinand "Freddy" Augello was convicted in 2018 for the high-profile murder of radio host April Kauffman.[4] Investigation into this homicide revealed a long-term deal between the victim's husband and the Pagans to use the husband's medical practice for illegal drug distribution. Additionally,

[2] Importantly, Appellant maintains that the particular faction he was affiliated with did not engage in criminal activity and operated solely as a group of individuals with a shared interest in motorcycles.

[3] While not traditionally recognized as a reputable source, Appellant would suggest that the Wikipedia page for the "Pagan's Motorcycle Club" sheds light on the public perception of the group in the event the Court is unfamiliar. *See*, https://en.wikipedia.org/wiki/Pagan%27s_Motorcycle_Club.

[4] Tracey Tully, *Court Affirms Conviction of Pagan Biker Who Helped Plot Radio Host's Murder*, NJ.COM (Apr. 14, 2021), https://www.nj.com/atlantic/2021/04/court-affirms-conviction-of-pagan-biker-who-helped-plot-radio-hosts-murder.html.

approximately six months after the arrest in this matter, eleven (11) members of the Pagan's Motorcycle Club were charged with narcotics distribution, firearms offenses, and violent crimes in aid of racketeering.[5] Other articles have also detailed the wide-spread, violent activities of the Pagans across the state.[6]

While it is clear that this comment would have unduly prejudiced any defendant in a trial unrelated to gang affiliation, the particular circumstances of this case rendered the prejudice even more severe. It is important to note that this was a classic "he said, she said" case.[7] The evidence in this matter did not support either account to the exclusion of the other. Gary did not dispute that he was involved in an altercation with Ms. Contreras on the evening in question, or that he grabbed his imitation firearm in the course of the argument. The only real dispute is whether Gary, who was undisputedly several feet from Ms. Contreras and wearing a Covid-19 mask, told Ms. Contreras to get *away* from his vehicle, or to get *into* his vehicle. There were no witnesses to this interaction, and it was not captured on camera. As such, the only remaining question is whose account the jury viewed as more credible.

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[5] *Eleven Members of The Pagan's Motorcycle Club Charged with Narcotics Distribution, Firearms Offenses, and Violent Crimes in Aid of Racketeering*, U.S. Attorney's Office, District of New Jersey (June 28, 2021), https://www.justice.gov/usao-nj/pr/eleven-members-pagan-s-motorcycle-club-charged-narcotics-distribution-firearms-offenses.

[6] *See*, *e.g.*, Alex Napoliello, *An inside look at the Pagans motorcycle club and the threat it poses to N.J.*, NJ.COM (Sept. 9, 2020), https://www.nj.com/crime/2020/09/an-inside-look-at-the-pagans-motorcycle-club-and-the-threat-it-poses-in-nj.html.

[7] The testimony of Diana Perez should not have ever been admitted into this trial, as discussed in the following section, and the jury acquitted Gary on the witness tampering charge demonstrating that the jury did not find her credible.

On the one hand, Ms. Contreras contends that Gary, a complete stranger up until this point, pulled up beside her on a well-trafficked road lined with several businesses and demanded she get into his truck at gunpoint. Gary did not have any admissible criminal history, nor was there any evidence suggesting a propensity for violence. This narrative was also undermined by the fact that the text messages between Gary and Zoe, as well as their respective testimonies, clearly demonstrated that they had plans to see each other that evening. Even if one were to buy into the idea that Gary, a middle-aged man with almost no criminal history, intended to kidnap a woman at random, why in the world would he do so when he had a date coming over to his house in a half-hour.

On the other hand, Gary's story makes much more sense. He did not attempt to make frivolous arguments about mistaken identity or claim he was not present that evening. Gary was present that evening and involved in an altercation with Ms. Contreas. He never attempted to deny this. He also did not paint himself as the innocent victim of this interaction, and Ms. Contreras as the villain. Instead, Gary offered a plausible narrative wherein he admittedly let his anger get the best of him and made the poor decision to turn around and confront Ms. Contreras over something that he should have let go. This is not to say that Gary's reaction to Ms. Contreras approaching his vehicle was reasonable, even if she did intend to kick his car again, but an individual overreacting in an admittedly heightened emotional state

still makes much more sense than the alternative version of events promulgated by Ms. Contreras. It is also possible under these circumstances that that the jury could have credited the testimony of both Gary and Ms. Contreras, believing it possible that Ms. Contreras truly thought Gary told her to get into the car when Gary actually said get away from the car while his mouth was obstructed by a face covering.

Regardless, it is clear that this case hinged on who the jury found most credible, as the remaining evidence did little to shed light on whose account should be believed. Inserting into this analysis that Gary is affiliated with a notoriously violent, criminal motorcycle gang changes the whole equation and improperly tilts the scale of credibility heavily in Ms. Contreras' favor. The jury could also have been improperly swayed by Diana's testimony about Gary's previous DUI and believed that Gary might have been intoxicated at the time of this incident, which might have explained his otherwise illogical behavior in Ms. Contreras' version of events.

The jury was tasked with listening to the accounts of two individuals and determining whose version of events should be believed. No one witnessed the incident or captured it on camera. Gary did not have any history of this type of behavior, or even inappropriate behavior toward women. As such, the jury faced the onerous task of relying merely upon their perception to determine guilt and ran the risk of either sending an innocent man to prison or setting free a man who tried to

kidnap a woman at perceived gunpoint. Given this impossible position, it is entirely unreasonable to believe that the jury could disregard Gary's affiliation with a notoriously violent, criminal enterprise. That is the entire answer served up on a silver platter. Even if the jurors consciously attempted to disregard this information and comply with the trial court's instruction, it would be impossible to not let this information prejudice their decision when the only reasonable basis for their conclusion would be their perception of each individual.

Should this have been a case where the non-testimonial evidence weighed heavily in the favor of the prosecution, there may have existed some argument that the comment regarding Gary's affiliation with the Pagans could be cured by an instruction by the trial court. However, that is not the case. This case rested entirely on who the jury felt deserved to be believed solely based on their testimony. As such, it is entirely unreasonable to believe that the jurors could disregard this information when reaching their decision, even if they acted in good faith and consciously attempted follow the trial court's brief, vague instruction.

II. The Trial Court erred by denying the Defense's motion to sever (27a).

This trial should have centered around whether Gary Prichard attempted to kidnap Marilyn Contreras using an imitation firearm on January 25, 2021. Instead, this matter was railroaded by the uncorroborated, uninvestigated, implausible allegations of a scorned ex-girlfriend. The entire trial became about Gary's tumultuous relationship with Diana, her substance abuse issues, who ended the relationship. While the jury ultimately saw through Diana Perez's false accusations, the damage had already been done as the Defense was forced to air the couple's dirty laundry in order to discredit her claims

Two or more offenses may be charged in the same indictment if the offenses are of the same or similar character, based on the same act or transaction, or on acts or transactions connected together or constituting part of a common scheme or plan. N.J. Ct. Rule 3:7-6. "Although joinder is favored, economy and efficiency interests do not override a defendant's right to a fair trial." *State v. Sterling*, 215 N.J. 65, 72 (2013). Relief from prejudicial joinder may be sought according to Rule 3:15-2(b), which provides that a criminal defendant may request that an indictment be severed if it appears that the defendant will be prejudiced by the joinder. Reviewing courts must generally defer to the trial court's decision regarding severance, absent an abuse of discretion. *State v. Chenique-Puey*, 145 N.J. 334, 341 (1996).

Prejudice in the context of improper joinder may be assessed by determining "whether, assuming the charges were tried separately, evidence of the offenses

sought to be severed would be admissible under N.J.R.E. 404(b) in the trial of the remaining charges." *Sterling*, 215 N.J. at 73 (quotations omitted). Admissibility of evidence of other crimes or prior bad acts under N.J.R.E. 404(b) requires a four-prong analysis, established in *State v. Cofield*, 127 N.J. 328, 338, 605 A.2d 230 (1992), and "the evidence of other crimes or bad acts must be relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue." *Id*. (quotations omitted). The *Cofield* factors are as follows: (1) the evidence of the other crime must be admissible as relevant to a material issue; (2) it must be similar in kind and reasonably close in time to the offense charged; (3) the evidence of the other crime must be clear and convincing; and (4) the probative value of the evidence must not be outweighed by its apparent prejudice. *State v. Fortin*, 162 N.J. 517, 529 (2000).

Evidence regarding prior bad acts, wrongs, or crimes by a criminal defendant must be examined cautiously, because such evidence "has a unique tendency to turn a jury against the defendant," and "poses a distinct risk of distracting the jury from an independent consideration of the evidence that bears directly on guilt itself[.]" *State v. Reddish*, 181 N.J. 553, 608 (2004)(quotations omitted). The inherent danger of admitting such evidence is that the jury may convict a defendant based on their perception that he or she is a "bad person," as opposed to guilty of the offense charged. *State v. Skinner*, 218 N.J. 496, 514 (2014). Based on this potential for

prejudice, "[o]ther-crimes evidence thus necessitates a more searching inquiry than that required by *N.J.R.E.* 403[,]" which precludes evidence "only if the risk of undue prejudice *substantially* outweighs its probative value." *Reddish*, 181 N.J. at 608 (emphasis in original).

a. Relevance to Material Issue in Genuine Dispute

The first prong of the *Cofield* analysis mandates that the evidence of a prior bad act, crime, or wrong must be relevant to material issue which is *genuinely* disputed in the case. *State v. Skinner*, 218 N.J. 496, 515 (2014). The trial court should "consider whether the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede." *State v. Rose*, 206 N.J. 141, 160 (2011) (quotations omitted).

While evidence that a defendant attempted to threaten a witness not to testify is generally relevant to reflect consciousness of guilt, it is worth noting that this case may be an exception. The only genuinely disputed issue in the original matter concerned whether the incident in front of Wings over Rutgers resulted from Gary confronting Ms. Contreras for kicking his car, or whether he was attempting to force her into his vehicle. Gary did not dispute that he was involved in an altercation with Ms. Contreras that evening. He also did not dispute that he possessed an imitation firearm and that he pulled this imitation firearm during the course of his argument with Ms. Contreras. As such, evidence of other crimes or prior bad acts should be

admitted only if it sheds light on whether Gary attempted to kidnap Ms. Contreras, as opposed to the two being involved in an argument wherein Gary pulled an imitation firearm.

One extremely important aspect of Diana Perez's statement is that she never contended that Gary admitted that he tried to kidnap Ms. Contreras, or that he was concerned regarding the kidnapping charges specifically. Gary admittedly pulled out an imitation firearm during an altercation with Ms. Contreras where she presented no reasonable threat, which could arguably still constitute possession of an imitation firearm for an unlawful purpose. This is also not a case where there is a question regarding whether the conduct was accidental or purposeful, in which case there may be a stronger argument for admission of such consciousness of guilt evidence. Even assuming *arguendo* that Gary did make these statements to Diana, which he adamantly denies, this evidence at best suggests consciousness of guilt with regard to some criminal activity, not necessarily the attempted kidnapping.

b. Clear and Convincing Evidence

The third *Cofield* prong mandates that trial court judges act as gatekeepers to the admission of such evidence, and "ensure that proof of the prior bad act is demonstrated by clear and convincing evidence." *Skinner*, 218 N.J. at 515-16. Clear and convincing evidence is such evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be

established, evidence so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *State v. Hernandez*, 170 N.J. 106, 127 (2001)(quotations omitted).

Diana Perez's implausible, uncorroborated, and uninvestigated allegations cannot reasonably constitute clear and convincing evidence of witness tampering. It is acknowledged that testimony alone can constitute clear and convincing evidence, but that does not mean that *any* testimony will constitute clear and convincing evidence. The trial court relied almost exclusively on the fact that Diana maintained that Gary asked her to bribe and subsequently kill Ms. Contreras as evidence of her credibility. This analysis was insufficient, *particularly* because Diana admittedly reviewed her statement with the prosecutor the day before testifying.

To be clear, Diana Perez made a bizarre accusation that her ex-boyfriend asked her to bribe the alleged victim in this matter with an unspecified amount of money from an unidentified source, and then when she said no to that he figured he would ask her to find someone to *murder* the alleged victim. Gary has virtually no criminal record, and it would be incredible to find that the State presented clear and convincing evidence that Gary attempted to order a *murder* based solely on the uncorroborated testimony of a scorned ex-girlfriend. Notably, Diana's testimony also appears to suggest that when she did not find someone to *murder* Ms. Contreras, Gary simply let this idea go.

The trial court should have further acknowledged the State's utter failure to investigate or even attempt to corroborate these allegations before attempting to consolidate these charges with those in the original indictment. This is not a case where the trial court can allow the veracity of these allegations to be sorted out at trial. The trial court had an obligation to ensure that this evidence satisfied the clear and convincing evidence standard, meaning that the evidence of such allegations must be "so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Hernandez*, 170 N.J. at 127. This is not the same low threshold as probable cause. It seems incredible that the trial court could be instilled with a firm conviction regarding the truth of uncorroborated allegations made by an individual with a clear motivation to fabricate, particularly when the State made absolutely no effort to determine the veracity of these allegations before bringing them before the court.

Diana Perez presented an unbelievable story that was not corroborated by any other facts or circumstances in this matter, yet the trial court determined that it constituted clear and convincing evidence of witness tampering because it remained substantially similar to her previous statement, which she admittedly reviewed prior to testifying. The trial court ignored all of the glaring issues in Diana's statement and her clear motivation to fabricate to determine that these were issues for cross-

examination. This was not appropriate and resulted in substantial prejudice to the Defense at trial.

c. Prejudice

The fourth and final *Cofield* factor requires the court to determine whether the probative value of the evidence is outweighed by its apparent prejudice. *Skinner*, 218 N.J. at 516. It is important to reiterate that this standard is "more exacting than Rule 403, which provides that relevant evidence is admissible unless its probative value is *substantially* outweighed by the risk of undue prejudice." *State v. Rose*, 206 N.J. 161 (2011)(emphasis in original). With respect to evidence of other crimes and prior bad acts, "the potential for undue prejudice need only outweigh probative value to warrant exclusion." *Reddish*, 181 N.J. at 608.

As an initial matter, it is clear that the trial court applied the incorrect standard when issuing a ruling on this factor. The trial court stated in its decision that the relevant "question is whether or not [the probative value of the evidence] is so outweighed…that essentially there's virtually no probative value to it[.]" (2T50:1-4). Our Courts have made abundantly clear that this factor is ***not*** akin to the Rule 403(b) analysis which requires the probative value to be substantially outweighed by the prejudicial effect. The scales merely need to tip in favor of the evidence being more prejudicial than probative in order to be barred under Rule 404(b). Based on the fact that the trial court applied the incorrect standard, and failed to provide any

substantive explanation for its ruling on this factor, this decision is not entitled to any deference.

It should have been abundantly clear that the prejudicial value of admitting this evidence outweighed any probative value it may have. The evidence in question is an improbable, uncorroborated, uninvestigated allegation made by Gary's ex-girlfriend. The probative value is extremely low, particularly given that it does not demonstrate consciousness of guilt specific to the only disputed issue in this case, as discussed at length above. By contrast, the potential for prejudice is incredibly high. The relevant question is whether evidence regarding the alleged witness tampering would be admitted if the counts of the indictment were tried separately, meaning that the focus must be on the unduly prejudicial nature of the allegations, not whether the evidence itself satisfies a criminal offense.

Ignoring momentarily the clear improbability of the allegations, the State sought to introduce uncorroborated accusations made by an ex-girlfriend that Gary wanted to *murder* the alleged victim in this matter. Gary does not have any history of violence, and his criminal history is virtually nonexistent, even if it was admissible. It cannot be ignored that whatever value these allegations may have had with respect to consciousness of guilt would be outweighed by the potential prejudice that jurors consider this evidence in support of a propensity for violence or criminal conduct.

The trial court further ignored that the potential prejudice posed by admitting this evidence, and thus consolidating these trials, extended far beyond the jurors hearing about the allegations of witness tampering. As thoroughly argued before the trial court, admitting this evidence and allowing these charges to be tried together would shift the focus entirely from the alleged attempted kidnapping to the relationship between Gary and Diana. The jury ultimately did not find Diana Perez credible, and acquitted Gary on the witness tampering charge, but that does not negate the fact the Defense was forced to place the ugly reality of the couple's relationship on display for the jury in order to discredit her testimony, resulting in substantial prejudice. Defense counsel argued in his motion to sever that allowing these counts to be tried together would shift the entire focus from the attempted kidnapping to the relationship between Gary and Diana, and that is precisely what occurred. Approximately one third of the testimony offered during trial pertained to the attempted kidnapping, with the remaining testimony airing out the details of the dramatic and tumultuous relationship with Gary and Diana, including Diana's drug addiction.

As previously discussed, excluding the testimony of Diana Perez, the State's case with respect to the attempted kidnapping charge hinged on the jury crediting the testimony of the alleged victim over that of the Defendant. The surveillance footage collected aligned with both sides' accounts, and there were no eyewitnesses

to their interaction. Gary did not have any admissible criminal history, and the State did not have any additional evidence to suggest that the alleged victim's testimony should be credited over that of the accused. Stated differently, both the accuser and the accused were placed on a fairly level playing field, and the result would depend on who the jury perceived to be more credible. The jury would be particularly susceptible to considering any indica of character evidence that might tilt the scales in this situation, even if subconsciously considered. For example, in addition to the comments which should have resulted in a mistrial, the jury should never have been exposed to the fact that Gary dated multiple women at a time, or that he was affiliated with individuals engaged in drug use, or that he allowed his girlfriend to buy him several expensive gifts. The jury may not have believed Diana Perez's testimony with respect to the allegations of witness tampering, but that does not mean that her testimony, as well as the testimony presented by the Defense in order to refute her claims, did not leave the jury with an overarching negative impression of Gary. This would have been an entirely foreseeable result at the time of the motion hearing, and the trial court's failure to consider this potential impact in light of the weight of the remaining evidence in the attempted kidnapping case constituted clear error.

III. The Trial Court's failure to consider any mitigating factors and imposition of a lengthy state prison sentence constituted an abuse of discretion (8T16:25-23:20).

Rule 3:21-4(h) provides that "[a]t the time sentence is imposed the judge shall state reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under *N.J.S.A.* 2C:44-1 to 2C:44-3; [and] the factual basis supporting a finding of particular aggravating and mitigating factors affecting sentence[.]" Requiring the sentencing judge to explain how he or she arrived at a particular sentence facilitates meaningful appellate review. *State v. Case*, 220 N.J. 49, 65 (2014).

When determining an appropriate sentence to be imposed on an individual convicted of a criminal offense, the trial court ***shall*** consider the relevant aggravating and mitigating factors. *N.J.S.A.* 2C:44-1(a). Mitigating factors which are supported by credible evidence on the record are required to be part of the trial court's deliberative process. *Case*, 220 N.J. at 64. "Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors." *Id.* The trial court is not required to consider all factors equally, but "must qualitatively assess the relevant aggravating and mitigating factors, assigning each factor its appropriate weight." *Id.* Appellate review of sentencing decisions is generally deferential. *Case*, 220 N.J. at 65. However, such deferential review only applies where the sentencing judge follows the relevant code and the basic precepts concerning sentencing discretion. *Id.*

Here, the trial court found Aggravating Factor 3 (risk of new offense), and Aggravating Factor 9 (need for deterrence) present, with Aggravating Factor 9 being afforded "strong" weight. (8T20:10-21:15). The trial court did not indicate what weight it afforded to Aggravating Factor 3, but stated that it based this decision on Gary's extremely limited criminal record. (8T20:10-25). The trial court further indicated that it did not find ***any*** mitigating factors present. (8T21:16). Despite this, the sentencing record suggests that the trial court had an obligation to at least address several mitigating factors that were supported by credible evidence presented before the court.

For example, the trial court failed to consider the application of Mitigating Factor 7, which instructs the court to consider a criminal defendant's lack of criminal history or the fact that a defendant has "led a law-abiding life for a substantial period of time before the commission of the present offense." *N.J.S.A.* 2C:44-1(b)(7). Gary has one prior 4th degree conviction involving possession of a firearm from 1997, which was conditionally discharged, and one petty disorderly persons' conviction from 2009. The remaining entries on his record are municipal court violations involving irrelevant or *de minimis* conduct, such as failing to comply with garbage disposal regulations. Importantly, the most recent criminal conviction, a petty disorderly persons' offense, was dated ***fourteen years prior*** to the trial and sentencing in this matter. Defense counsel explicitly noted that Gary's lack of

criminal record was his "strongest point" at sentencing. (8T3:23-25). The sentencing court's decision to use Gary's extremely limited history to support Aggravating Factor 3, while failing to even consider the application of Mitigating Factor 7, constituted a clear abuse of discretion.

The sentencing record also contains clear support for Mitigating Factor 11, which requires the sentencing judge to consider whether the imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents. Zoe Capaldo spoke on Gary's behalf and implored the sentencing judge that Gary needed to be home for his teenage daughter, who suffers from multiple disabilities, and to care for his sick mother. (8T5:24-7:7). Even if the trial court declined to afford this factor any weight, it constituted an abuse of discretion not to consider this factor.

Appellant presented the testimony of numerous loved ones at his sentencing hearing, who all testified to Gary's character and that this conduct does not represent who he is as a person. (8T5:15-8:16). Gary also spoke the sentencing, reiterating that while he maintains his version of events regarding what occurred that evening, he understands that what he did was wrong. He further explained that he attempted to take responsibility for this conduct and told the State from the outset that he would plead guilty to any charges consistent with what actually occurred that evening, but

the State was not interested. (8T12:2-4). The sentencing court did not feel these statements warranted addressing Mitigating Factors 9 and 12.

Ultimately, the trial court abused its discretion by sentencing Gary to a term of eight (8) years, which fell on the higher end of the sentencing range, without appropriate justification set forth on the record. Gary had never before been incarcerated, and the "strong" need for deterrence was not present where he had never before been afforded the benefit of a lesser sentence. The only other factor cited by the trial court in support of an aggravated sentence was Gary's record of violating garbage collection ordinances. There was no reason, absent abuse of discretion, why an individual with almost no criminal history, involved in an offense that did not result in any violence or physical harm, would deserve an aggravated sentence such as was imposed here.

CONCLUSION

For the reasons set forth herein, Appellant Gary P. Prichard respectfully requests that this Honorable Court reverse the October 6, 2023 Judgement of Conviction, or in the alternative, remand this matter for a new trial.

Respectfully submitted,

Date: September 11, 2024 *s/ Kaitlin C. McCaffrey*

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LETTER BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
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RE: STATE OF NEW JERSEY (Plaintiff-Respondent) v.
GARY P. PRICHARD (Defendant-Appellant)

App. Div. Docket No. A-001515-23

Criminal Action: On Appeal From a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Middlesex County.

Sat Below: Hon. Andrea G. Carter., J.S.C.; Hon. Pedro J. Jimenez, Jr., J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-2(b), this letter brief is submitted in lieu of a formal brief on behalf of the State of New Jersey.

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PRELIMINARY STATEMENT

Although defendant's appeal is comprehensive, it derives from a single fault line, along which the fissure of its argument radiates. While defendant argues that this is a chasm by which defendant's conviction must be swallowed, the damage is not so severe; the breach is not so wide. Trials are not perfect, and this was not a perfect trial. Yet, the law does not guarantee perfection, only fairness, and what this defendant received was fair.

The issues identified on appeal were begat by the State's witness during cross-examination. Neither party is at fault. During that examination, defense counsel inquired into discrepancies between the witness's testimony and her statements to police. He was trying to establish that the witness was a sour ex-girlfriend and that she was therefore motivated to fabricate her testimony on direct. All within bounds.

Answering perhaps a little too enthusiastically at times, the witness variously volunteered evidence that was objectively and admittedly irrelevant. However, the exposure to the jury of these facts was not lethal to the verdict and the record reflects their being unimpressed. The trial court handled these digressions appropriately and defendant's conviction and sentence should be affirmed.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

A Middlesex County grand jury returned Indictment 21-12-1099-I, charging defendant with Attempted Kidnapping, N.J.S.A. 2C:5-1/2C;13-1 (Count One); Possession of a Weapon for an Unlawful Purpose, N.J.S.A. 2C:39-4(e) (Count Two); and Witness Tampering, N.J.S.A. 2C:28-5(a) (Count Three). (Da28)[1].

On December 14, 2021, filed a motion to sever Count Three; this motion was denied by Hon. Andrea G. Carter, J.S.C. following briefing, argument, and an evidentiary hearing. (Da27). The trial was held before Hon. Pedro J. Jimenez, Jr., between June 9, 2023, and June 14, 2023. (3T, 4T, 5T). On June 14, 2021, the trial jury convicted defendant of Counts One and Two, acquitting him on Count Three. (6T). On September 25, 2023, defendant pleaded guilty to an unrelated theft count. (7T). On October 5, 2023, the trial court sentenced defendant to an eight-year period of incarceration with an 85% period of parole ineligibility subject to NERA to encompass both cases. (8T).

[1] The record is cited as follows:
Db = Defendant's brief
Da = Defendant's appendix
1T = Transcript of Motion, February 17, 2023
2T = Transcript of Motion, March 17, 2023
3T = Transcript of Trial, June 9, 2023
4T = Transcript of Trial, June 12, 2023
5T= Transcript of Trial, June 13, 2023
6T= Transcript of Trial, June 14, 2023
7T = Transcript of Plea, September 25, 2023
8T = Transcript of Sentence, October 5, 2023

This appeal followed. (Da1-12).

COUNTER-STATEMENT OF RELEVANT FACTS

On January 25, 2021, defendant encountered M.C. crossing the street in New Brunswick. (5T101-8 to 9; 108-7 to 109-6). Defendant was in his vehicle; M.C. was on foot. Ibid. M.C. was in the middle of the street, looking at her phone, and therefore preventing defendant from proceeding. (5T109-7 to 19). Defendant honked his horn at M.C. and startled her. (5T109-21 to 23). As a result, a verbal altercation began which culminated in M.C. kicking defendant's vehicle. (5T109-22 to 111-3).

Defendant drove off before returning and confronting M.C. (5T111-11 to 113-5). The verbal altercation continued, at which point defendant retrieved a starter pistol from his vehicle in the sight of M.C. (5T114-8 to 115-5). Defendant again shouted at M.C. before she fled in fear of defendant; ultimately hiding and seeking help from a nearby business. (5T115-13 to 16). M.C. stated that defendant told her to get into his vehicle. (3T63-17 to 19).

In the midst of this, defendant was engaged in a turbulent relationship with Diana Perez. (4T112-6 to 4T176-25). Following the termination of that relationship, Perez advised the New Brunswick Police Department ("NBPD") that defendant had asked her to bribe M.C. and, failing that, have her killed.

(5T114-19 to 115-25). This was the foundation of the witness tampering charge.

At trial, Perez testified for the State. During cross-examination, Perez volunteered at various times that defendant "did cocaine," was arrested separately for Driving While Intoxicated, and was a "Pagan." The first was directly responsive to counsel's question and passed without objection, the second was partially responsive and elicited an objection, and the third was unsolicited and objected. (4T144-18 to 145-8; 155-15 to 17).

After the third, the trial court summoned counsel to sidebar, whereupon defense counsel requested a mistrial. (4T155-19 to 158-21). The trial court reserved that decision and issued an instruction to the jury ordering that they "completely disregard [the] last answer given by the witness." (4T161-14 to 16). The application for mistrial was resurrected following the verdict, when defense counsel brought it to the attention of Judge Flynn, who was covering for Judge Jimenez. (6T14-14 to 15-5). Judge Flynn noted – without correction by defense counsel – that Judge Jimenez had "ruled on that" and that she would not disturb that decision. (6T17-21 to 24).

At sentencing, Judge Jimenez sentenced defendant to an eight-year term of incarceration, eighty-five percent of which must be served prior to parole

eligibility. (8T21-22 to 24-1). This sentence subsumed an unrelated, fourth-degree theft charge that defendant plead guilty to prior to sentencing. Ibid.

LEGAL ARGUMENT

POINT I

DEFENDANT'S MISTRIAL APPLICATION WAS APPROPRIATELY DENIED

A mistrial should only be granted "to prevent an obvious failure of justice." State v. Harvey, 151 N.J. 117, 205 (1997). "Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.'" Ibid. (citing State v. Dirienzo, 53 N.J. 360, 383 (1969). Indeed, "a mistrial is a drastic remedy [that] should be resorted to only where manifest injustice would otherwise result." Dirienzo 53 N.J. at 383; State v. Tillman, 122 N.J. Super. 137, 140 (App. Div. 1973). Mishaps at trial must be "clearly capable of producing an unjust result." State v. Frisby, 184 N.J. 583, 591 (2002).

"The primary issue to be determined is whether the trial court erred in denying defendant's motion for a mistrial…a trial is not a perfectly scripted and choreographed theatrical presentation; rather, it is an extemporaneous production whose course is often unpredictable given the vagaries of the human condition. Attorneys will sometimes pose inartfully crafted questions,

and even the most precise question may bring an unexpected response from a witness." State v. Yough, 208 N.J. 385, 397.

Indeed, in any trial, "inadmissible evidence frequently, often unavoidably, comes to the attention of the jury." State v. Winter, 96 N.J. 640, 646 (1984).

Here, the jury was exposed to inadmissible evidence. Namely, during one of many untethered responses to counsel's questioning, Perez volunteered information about defendant that was neither sought nor necessary. Yet, it is important to note that this testimony spanned 65 transcript pages and covered an expanse of material. This, sandwiched between a number of other witnesses offered by either the State or defense.

A few off-hand, unsolicited remarks were made about defendant's history from one of several witnesses whose testimony was uncolored by extraneous commentary. The jury had enough additional testimony and evidence to consider that these remarks could not have been material.

This notion is prominently manifest in defendant's acquittal on the single count that Perez was offered to support. Perez's testimony was limited to the Witness Tampering count of the indictment. She possessed no personal knowledge of the substantive offenses and would have been incompetent to testify thereto.

The Witness Tampering count, however, was entirely her creation. As defendant shrewdly observes, the acquittal on that count represents the jury's categorical disregard of Perez's testimony. It follows that if the jury disregarded her testimony on the issue for which she was summoned to testify, then they disregarded her testimony on tangential issues. It can be confidently inferred, then, that the jury was unconvinced by anything Perez had to say and were not therefore improperly influenced.

The trial court's refusal to grant a mistrial was not an abuse of discretion and should be affirmed.

POINT II

TRIAL COURT'S DENIAL OF MOTION TO SEVER WAS PROPER AND NONETHELESS RENDERED MOOT BY DEFENDANT'S ACQUITTAL

A. Joinder Was Proper

Two or more offenses may be charged in the same indictment if the offenses are of the same or similar character, based on the same act or transaction, or on acts or transactions together or constituting part of common scheme or plan. Rule 3:7-6. A defendant may request an indictment be severed if he will be prejudiced by its joinder. Rule 3:15-2. A reviewing court must defer to a trial court's decision regarding severance, unless that decision represents an abuse of discretion. State v. Chenique-Puey, 145 N.J. 334, 341 (1996).

What qualifies as prejudice is a question of both fact and law: would evidence of the charges for which severance is sought be admissible under N.J.R.E. 404(b) in the trial of the remaining charges? State v. Sterling, 215 N.J. 65, 73 (2013). This determination of admissibility is governed by the venerable four-prong test established in State v. Cofield, 127 N.J 328, 338 (1992). Cofield asks whether 1) the evidence of the other crime is relevant to a material issue; 2) it is similar in kind and reasonably close in time to the offense charged; 3) the proof thereof is clear and convincing; and 4) whether the probative value of the evidence is outweighed by the prejudicial impact.

An additional means of admission through N.J.R.E. 404(b), and perhaps the one more accurately applied here, is through the concept of "intrinsic evidence." Following the retirement of *res gestae* in State v. Rose, 206 N.J. 141 (2011), the Court determined that evidence "intrinsic" to a charged crime "need only satisfy the evidence rules relating to relevancy, most importantly the Rule 403 balancing test." Id. at 177-178. The definition of "intrinsic" the Court adopts derives from the Third Circuit's ruling in United States v. Green, which held that evidence is intrinsic if it either 1) directly proves the charged offense, or 2) is an uncharged act that was performed contemporaneously with, and helped to facilitate, the charged crime. Green, 617 F.3d 233, 248-249 (3d Cir. 2010).

Under either analysis, the evidence of the witness tampering would be admissible in the trial on the substantive counts. Under Cofield, evidence that defendant sought means to neutralize the participation of the sole witness to the crime would be relevant to whether he committed that crime; both the substantive act and the witness tampering share a threatening nature and were contemporaneous; the trial court, having held an evidentiary hearing for the purpose, determined that it was established by clear and convincing evidence; and the prejudice was not sufficient to overcome the apparent probative value.

The evidence could also be found to be intrinsic. Using Rose/Green, evidence that defendant tampered with the only witness for his prosecution is direct evidence that he committed the offense: if he did not do it, what would he have to tamper with? Likewise, any interference with his prosecution would represent a facilitation of the underlying crime, namely, his attempt to evade accountability.

B. Issue is Moot

Whether the trial court severed the Witness Tampering did not ultimately affect the outcome of the trial. Diana Perez was summoned to testify only to facts related to the Witness Tampering. The jury clearly did not believe her, because they acquitted defendant of that charge. A charge that derived only from her statements to law enforcement.

Defendant argues that the jury wholly discounted the substance of Perez's testimony, i.e., that the alleged witness tampering ever happened, but at the same time uncritically accepted her extraneous and unmoored commentary about defendant's character. This cannot be. Defendant won an acquittal on the count he initially sought to sever because the jury flatly reject Perez's testimony – her entire testimony.

There cannot therefore be a finding that defendant suffered any prejudice from the trial court's refusal to separate the trials: if they did not believe Perez's story about the witness tampering, they did not believe her accusations that he used cocaine, was arrested for DWI, or was a Pagan. It is as if she never testified.

III. DEFENDANT'S SENTENCE WAS APPROPRIATE

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). An appellate court "must not substitute its judgment for that of the sentencing court," State v. Fuentes, 217 N.J. 57, 70 (2014) and is bound to affirm the sentence absent a "clear abuse of discretion." State v. Roth, 95 N.J. 334, 363 (1984); see State v. Bolvito, 217 N.J. 221, 228 (2014).

As our Supreme Court has explained:

> Appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not "based upon competent credible evidence in the record;" or (3) "the

> application of the guidelines to the facts" of the case "shock[s] the judicial conscience."
>
> [Bolvito, 217 N.J. at 228 (alteration in original) (quoting Roth, 95 N.J. at 364- 65).]

In general terms, judges are given wide but not unconstrained discretion at sentencing. State v. Case, 220 N.J. 49, 53-54 (2014). The New Jersey Supreme Court has articulated the extent and limit of that discretion as follows:

> When the aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced, we must affirm the sentence and not second-guess the sentencing court, provided that the sentence does not shock the judicial conscience. On the other hand, if the trial court fails to identify relevant aggravating and mitigating factors, or merely enumerates them, or forgoes a qualitative analysis, or provides little insight into the sentencing decision, then the deferential standard will not apply.
>
> [Id. at 65 (internal citations and quotation marks omitted).]

The trial court sentenced defendant to an eight-year period of incarceration with an eighty-five percent parole disqualifier subject to NERA. The sentence globally resolved two outstanding cases: that for which defendant was convicted at trial and an unrelated, intervening case.

All in, defendant stood to be sentenced for one second degree count and two fourth degree counts, one of which stemmed from a separate scheme. This placed his practical exposure at anywhere between five and eleven-and-a-half years. The sentence would necessarily require an eighty-five percent parole ineligibility pursuant to N.J.S.A. 2C:43-7.2, because of the Attempted Kidnapping conviction.

Accounting for defendant's criminal history, the circumstances, and impact of the crime, the trial court found Aggravating Factors 3 and 9, applying "great weight" to the latter. (8T20-2 to 21-15). The trial court was not required to and did not find any Mitigating Factors. The trial court's sentence, therefore, was precisely centered within the authorized range.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm defendant's conviction and sentence.

Respectfully submitted,

YOLANDA CICCONE
Middlesex County Prosecutor

By: _____
ANTHONY J. ROBINSON
Assistant Prosecutor
Attorney No. 059632013

Date: October 22, 2024

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	:	**SUPERIOR COURT OF NEW**
	:	**JERSEY—APPELLATE DIVISION**
STATE OF NEW JERSEY,	:	
	:	**No. A-001515-23**
	:	
	:	**ON APPEAL FROM SUPERIOR**
v.	:	**COURT, LAW DIVISION—**
	:	**MIDDLESEX COUNTY**
	:	
	:	**Honorable Andrea G. Carter, J.S.C.**
GARY P. PRICHARD,	:	**Honorable Pedro J. Jimenez, Jr., J.S.C.**
	:	**Sat below**
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	:	
	:	

REPLY BRIEF OF APPELLANT GARY P. PRICHARD

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LEGAL ARGUMENT

I. The Trial Court should have granted the Defense's request for a mistrial, and the vague instruction given was inadequate to cure the admission of the prohibited evidence.

The State effectively concedes through its Counter-Statement of Relevant Facts that the judge who presided over the trial in this matter, the Honorable Pedro J. Jimenez, Jr., J.S.C., did not issue a ruling on the Defense's request for a mistrial. Instead, the State creatively asks the Court to apply the same deferential abuse of discretion standard to the trial court's so-called "refusal" to grant a mistrial. Judge Jiminez expressly reserved on the decision as to whether to declare a mistrial, and never revisited the issue on the record. It would further be pure conjecture to presume that Judge Jiminez intended to deny the Defense's request merely because the issue was never re-addressed, particularly given his comments during the side-bar discussion with counsel. (4T156:1-161:13). Judge Jiminez also did not address the offending statements during his final jury charge, which would be expected if Judge Jiminez actively decided to deny the Defense's request. As such, there is no decision to afford deference, and the Court should assess whether a mistrial was warranted under a *de novo* standard.

Further, the State's substantive arguments regarding why the trial court was correct in "refusing" to grant a mistrial miss the mark. When inadmissible evidence is presented to a jury, as the State concedes occurred, the trial court has two options:

(1) declare a mistrial; or (2) issue a curative or limiting instruction. *State v. Winter*, 96 N.J. 640, 646 (1984). Should the trial court in this matter have decided against declaring a mistrial, it should have issued a carefully formulated curative instruction which precisely explained "the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." *State v. Winder*, 200 N.J. 231, 255 (2009)(citing *State v. Stevens*, 115 N.J. 289, 304 (1989)). This instruction should have been specific and explanatory, as opposed to general and conclusory, and included more of an explanation than "because I said so." *State v. Herbert*, 457 N.J.Super. 490, 506 (App. Div. 2019).

The State failed to make any effort to argue that the instruction given by the trial court effectively addressed the potential prejudice, instead attempting to frame the inadmissible comments as *de minimis* in nature. This Court has previously rejected this approach. *See*, *Herbert*, 457 N.J.Super. at 508 (holding that a detective's references to gang affiliation could not be minimized as fleeting comments likely to have escaped the jury's notice). The trial court in the instant matter failed to issue any curative instruction in response to the first two instances in which Ms. Perez "compromised this case[,]"[1] by referencing Mr. Prichard's previous conviction for driving under the influence and alleged drug use. Following

[1] 4T156:25.

the third instance, in which the State's witness indicated Mr. Prichard was a member of the Pagan biker gang, the trial court issued the following instruction:

> Folks, I will need you to completely disregard that last answer given by the witness in this case. Okay? Thank you.

4T161:14-16.

No further instruction was given by the trial court. This constitutes the exact type of general, conclusory instruction cautioned against by this Court. *Herbert*, 457 N.J.Super. at 506. As such, the trial court's instruction to generally disregard the witness's last answer without any further explanation or clarification, and without any further discussion during the final jury charge, was largely insufficient to rectify the cumulative error.

Finally, the State cannot "confidently infer" that the jury failed to assign any weight to Ms. Perez's comments regarding Mr. Prichard's affiliation with a known violent biker gang, prior conviction for driving under the influence, or alleged prior drug use based solely on the fact that the jury acquitted Mr. Prichard of the witness tampering charge. Ms. Perez presented an implausible story that Mr. Prichard asked her to intimidate the witness in the other matter, despite the fact that no evidence of such plans existed beyond Ms. Perez's testimony. Defense counsel went to considerable lengths to refute each untrue aspect of Ms. Perez's testimony, such as the timeline of the relationship, her drug use during the relationship, his financial situation at the time of the alleged bribe, and her erratic behavior following the

breakup. However, the Defense never denied that Mr. Prichard and Ms. Perez had previously been involved in a romantic relationship, which would have afforded Ms. Perez some insight regarding Mr. Prichard's personal affiliations and history. It is reasonable to believe that the jury viewed the fact that the Defense did not refute Mr. Prichard's affiliation with the Pagans or his prior conviction for driving under the influence as conceding that these facts were true. Merely because the jury did not believe that Mr. Prichard engaged in witness tampering does not conclusively mean that the jury did not credit any aspects of Ms. Perez's testimony.

II. The Trial Court's improper joinder was not rendered moot by the jury's acquittal on the witness tampering charge.

As set forth in length in the principal brief, Mr. Prichard was unjustly prejudiced by the joinder of the witness tampering charge to the remaining counts of the indictment. The witness tampering charges were based solely on the testimony of a scorned ex-girlfriend, who claimed that Mr. Prichard (a man with no criminal history at the time) asked her to ***bribe and kill*** the witness in the other matter. This testimony was not supported by any extrinsic evidence, and by Ms. Perez's own account, no overt act was taken in furtherance of this alleged request. It was entirely foreseeable that allowing these incredible allegations to be adjudicated through the same proceedings as the other offenses charged in the indictment would shift the focus of the trial from the alleged attempted kidnapping to the chaotic relationship between Mr. Prichard and Ms. Perez, which is precisely what occurred.

The State contends that any arguments surrounding the improper joinder have been rendered moot by the jury's acquittal on the witness tampering charge. Appellant staunchly disagrees. Refuting Ms. Perez's nonsensical allegations came at a significant cost to Mr. Prichard. He was forced to delve into the embarrassing, unsavory, and unflattering aspects of his former romantic relationship in order to discredit Ms. Perez's claims and demonstrate why her story should not be trusted. The Defense may have successfully refuted Ms. Perez's claims, but this required Mr. Prichard to inadvertently portray himself to the jury as an unlikable womanizer who associates with addicts in the process.

When the trial court permitted all counts to be tried together, this resulted in an entirely foreseeable circus centered almost exclusively around Ms. Perez and her tumultuous past with Mr. Prichard. The interaction between Mr. Prichard and the alleged victim, Ms. Contreras, was not observed by any witnesses and the non-testimonial evidence presented did not support one version of events over the other. Therefore, the relative credibility of both the alleged victim and the accused constituted a crucial element of this case. The jury was not presented with any information regarding Ms. Contreras' romantic relationships, who she associates with, and other intimate details of her personal life, and rightfully so as this was not relevant to the case. Absent the improper joinder, the same would have been true for Mr. Prichard, and the jury would have been able to make a fair credibility

determination between the respective accounts of these two individuals. That is not what occurred. Instead, the State wedged Ms. Perez's testimony between that of Ms. Contreras and Mr. Prichard and exposed the jury to a variety of irrelevant, intimate details concerning Mr. Prichard's personal life. Mr. Prichard was also forced to spend an exorbitant amount of his time on the stand refuting the baseless allegations promulgated by Ms. Perez, and his testimony regarding his interaction with Ms. Contreras was buried amongst the chaos of his former relationship.

Should this have been a matter involving eyewitness accounts or other non-testimonial evidence indicating guilt, the State's argument regarding the limited prejudicial impact of the joinder may have some weight. However, given the ***serious*** charges against Mr. Prichard hinged entirely on the jury's assessment of each party's respective credibility, the trial court should have been particularly sensitive to the potential prejudice Mr. Prichard might incur by having his scorned ex-girlfriend testify. The harm that occurred as a result of the improper joinder was entirely foreseeable at the time of the Rule 104 hearing, and the jury's acquittal on the witness tampering charge does not un-ring the proverbial bell.

III. The State fails to address why the Trial Court should not have to address mitigating factors in arriving at a sentencing decision.

The State contends that this Court should not disturb the trial court's sentence because it fell within the appropriate range for the underlying offenses, and that the trial court was not required to find any mitigating factors. This is untrue. Sentencing

courts "***must*** identify any relevant…mitigating factors…that apply to the case." *State v. Case*, 220 N.J. 49, 64 (2014)(emphasis added). Further, mitigating factors "supported by credible evidence are ***required*** to be part of the deliberative process." *Id*. (quotations omitted)(emphasis added). Contrary to the State's proposition, the sentencing court does not have discretion to simply decline to consider mitigating factors supported by the record. *See*, *State v. Dalziel*, 182 N.J. 494, 504 (2005)(holding that trial court judges may afford mitigating factors weight they deem appropriate, but that is a far cry from suggesting that a judge may simply decline to take into account a mitigating factor supported by the evidence).

As such, the sentencing court erred by refusing to consider Mitigating Factor No. 7, whether the defendant has "led a law-abiding life for a substantial period of time before the commission of the present offense[.]" *N.J.S.A.* 2C:44-1(b)(7). The sentencing court placed substantial weight on the aggravating factor considering Mr. Prichard's "criminal history" of local ordinance violations, yet failed to acknowledge that the pre-sentence report indicated that Mr. Prichard's history for the nearly twelve years preceding the instant offense were unremarkable. *See*, PSR, pg. 4. Other than two instances involving drinking in public, Mr. Prichard's "criminal history" from 2010 through 2021 involved sporadic violations of garbage collection regulations and other innocuous items, such as not properly registering a dwelling unit. The Defense contends that these are not the types of offenses intended

when sentencing judges consider criminal history. While there may be local ordinance violations which relevant to a defendant's criminal predisposition, garbage disposal regulation violations clearly fall outside that scope.

CONCLUSION

For the reasons set forth herein, Appellant Gary P. Prichard respectfully reiterates his request that this Honorable Court reverse the October 6, 2023 Judgement of Conviction, or in the alternative, remand this matter for a new trial.

Respectfully submitted,

Date: November 7, 2024 *s/ Kaitlin C. McCaffrey*

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