STEPHEN W. KIRSCH, Esq.
3111 Route 38, Suite 11, #302
Mount Laurel, NJ 08054
e-mail: SteveKirschLaw@gmail.com
phone: 609-354-8402
Attorney I.D. 034601986
Designated Counsel

Joseph E. Krakora, Public Defender
Attorney for Defendant-Appellant
31 Clinton St., 8th Floor
Newark, NJ 07102

Date: December 6, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1796-22T1

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Hudson County
ALTERIK ELLIS,	:	Ind. No. 19-01-0118
	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Angelo Servidio, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

TABLE OF CONTENTS

Page Nos.

PROCEDURAL HISTORY 1

STATEMENT OF FACTS 2

LEGAL ARGUMENT 11

POINT I

THE MOTION FOR A JUDGMENT OF ACQUITTAL ON THE HOMICIDE, CONSPIRACY, AND UNLAWFUL-PURPOSE WEAPONS COUNTS SHOULD HAVE BEEN GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE IN THE STATE'S CASE TO PROVE THOSE CHARGES UNDER STATE V. REYES AND STATE V. LODZINSKI. (RULINGS AT 44T 15-20 TO 23; 44T 16-21 TO 22; 44T 19-16 TO 18) 11

POINT II

DESPITE THE FACT THAT THERE WAS NO FINGERPRINT EVIDENCE BEFORE THE JURY THAT LINKED DEFENDANT OR THE CODEFENDANT TO THE TOYOTA CAMRY THAT THE STATE CLAIMED WAS THE VEHICLE IN WHICH THE SHOOTER AND HIS ACCOMPLICE DROVE TO AND FROM THE SCENE, THE JUDGE IMPROPERLY PREVENTED DEFENSE COUNSEL FROM ARGUING THAT FACT TO THE JURY IN SUMMATION. (RULINGS AT 44T 92-24 TO 25; 44T 118-2 TO 119-2) 21

POINT III

THE PROSECUTOR STEPPED FAR OUTSIDE THE BOUNDS OF PROPRIETY WHEN HE BADLY MISSTATED THE TESTIMONY OF THE ONLY EYEWITNESS IN THE CASE, OVER THE OBJECTION OF DEFENSE COUNSEL. (RULING AT 44T 146-8 TO 10)..... 25

POINT IV

THE TRIAL JUDGE IMPROPERLY BARRED THE DEFENSE FROM QUESTIONING A LAW-ENFORCEMENT WITNESS ABOUT HIS PENDING INVESTIGATION FOR MISCONDUCT ON THE JOB, DESPITE THE FACT THAT THE PENDING INVESTIGATION MIGHT AFFECT THE JURY'S EVALUATION OF HIS BIAS AND CREDIBILITY AS A WITNESS. (RULINGS AT 36T 175-3 TO 176-1; 37T 18-14 TO 19-4)..... 29

POINT V

DESPITE HAVING PROVIDED THE JURY WITH INSTRUCTIONS ON LESSER-INCLUDED HOMICIDE OFFENSES, THE JUDGE'S INSTRUCTIONS ON ACCOMPLICE LIABILITY FAILED TO CONVEY THE CRITICAL PRINCIPLE, FROM STATE V. BIELKIEWICZ, THAT AN ACCOMPLICE AND A PRINCIPAL CAN BE GUILTY OF DIFFERENT HOMICIDE OFFENSES DEPENDING ON THEIR INDIVIDUAL STATES OF MIND; IN FACT, THOSE INSTRUCTIONS FAILED TO TELL THE JURY AT ALL THAT THE CONCEPT OF ACCOMPLICE LIABILITY APPLIED TO ANY HOMICIDE OFFENSE OTHER THAN MURDER. (NOT RAISED BELOW)..... 34

POINT VI

THE JURY INSTRUCTIONS ON CONSPIRACY TO MURDER FAILED TO RESTRICT THOSE CONSPIRACIES TO AGREEMENTS TO PURPOSELY KILL, INSTEAD EXPANDING THE DEFINITION OF THE CRIME TOO FAR TO INCLUDE AGREEMENTS TO KNOWINGLY KILL OR TO PURPOSELY OR KNOWINGLY SERIOUSLY INJURE SOMEONE. (NOT RAISED BELOW) 40

POINT VII

DEFENDANT'S CONVICTIONS SHOULD BE REVERSED FOR CUMULATIVE ERROR. (NOT RAISED BELOW)..... 45

POINT VIII

DEFENDANT'S CONVICTIONS FOR CONSPIRACY AND POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE SHOULD HAVE BEEN MERGED INTO HIS MURDER CONVICTION. (NOT RAISED BELOW) 46

CONCLUSION 47

INDEX TO APPENDIX

Page Nos.

Indictment ..... Da 1 to 5

Verdict Sheet ..... Da 6 to 8

Judgment of Conviction ..... Da 9 to 12

Notice of Appeal ..... Da 13 to 16

Model Jury Instruction on Accomplice Liability ..... Da 17 to 22

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Judgment of Conviction ..... Da 9 to 12

Rulings on Point I ..... 44T 15-20 to 23; 44T 16-21 to 22; 44T 19-16 to 18

Rulings on Point II ..... 44T 92-24 to 25; 44T 118-2 to 119-2

Ruling on Point III ..... 44T 146-8 to 10

Rulings on Point IV ..... 36T 175-3 to 176-1; 37T 18-14 to 19-4

Points V, VI, VII, and VIII were not raised below

TABLE OF TRANSCRIPTS

1T – motion dated 10/18/19
2T – motion dated 11/4/19
3T – motion dated 11/13/19
4T – final disposition conference dated 2/6/20 Vol. 1
5T – final disposition conference dated 2/6/20 Vol. 2
6T – motion dated 2/14/20
7T – motion dated 11/9/20
8T – motion dated 12/16/20
9T – motion dated 5/14/21
10T – motion dated 4/20/22
11T – motion dated 5/24/22
12T – jury selection dated 6/7/22
13T – motion dated 6/7/22
14T – jury selection dated 6/8/22 Vol. 1
15T – jury selection dated 6/8/22 Vol. 2
16T – jury selection dated 6/9/22
17T – jury selection dated 6/10/22
18T – jury selection dated 6/14/22
19T – jury selection dated 6/15/22
20T – trial dated 6/15/22
21T – jury selection dated 6/16/22
22T – trial dated 6/16/22
23T – jury selection dated 6/20/22
24T – trial dated 6/20/22 Vol. 1
25T – trial dated 6/20/22 Vol. 2
26T – jury selection dated 6/21/22
27T – trial dated 6/21/22
28T – jury selection dated 6/22/22
29T – trial dated 6/22/22
30T – jury selection dated 6/23/22
31T – trial dated 6/23/22
32T – jury selection dated 6/27/22
33T – trial dated 6/27/22
34T – jury selection dated 6/29/22
35T – trial dated 6/29/22
36T – trial dated 6/30/22
37T – trial dated 7/5/22
38T – trial dated 7/6/22

39T – motion dated 7/7/22
40T – trial dated 7/11/22
41T – trial dated 7/12/22
42T – trial dated 7/13/22
43T – trial dated 7/14/22
44T – trial dated 7/18/22
45T – trial dated 7/19/22
46T – trial dated 7/20/22
47T – trial dated 7/21/22
48T – motion dated 10/14/22
49T – motion dated 12/7/22
50T – sentencing dated 1/27/23

TABLE OF AUTHORITIES

CASES

Davis v. Alaska, 415 U.S. 308 (1974) 31

Jackson v. Virginia, 443 U.S. 307 (1979) 13

State v. Abrams, 256 N.J. Super. 390 (App. Div.), certif. den. 170 N.J. 395 (1992) 41, 43

State v. Afanador, 151 N.J. 41 (1997) 37, 44

State v. Baker, 133 N.J. Super. 394 (App. Div. 1975) 31

State v. Bass, 224 N.J. 285 (2016) 31

State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993) 34

State v. Bradshaw, 195 N.J. 493 (2008) 27

State v. Briggs, 279 N.J. Super. 555 (App. Div. 1995) 24, 28, 33

State v. Burney, 255 N.J. 1 (2023) 45

State v. Butler, 27 N.J. 560 (1958) 37

State v. Castagna, 400 N.J. Super. 164 (App. Div. 2008) 42

State v. Concepcion, 111 N.J. 373 (1988) 37, 44

State v. Cook, 300 N.J. Super. 476 (App. Div. 1996) 38, 39

State v. Darby, 200 N.J. Super. 327 (App. Div. 1994) 42

State v. Diaz, 144 N.J. 628 (1996) 46

State v. Downey, 206 N.J. Super. 382 (App. Div. 1986) 42

State v. Fornino, 223 N.J. Super. 531 (App. Div.), certif. den. 111 N.J. 570 (1988) 42

State v. Fort, 101 N.J. 123 (1985) 22

State v. Fox, 70 N.J.L. 353 (Sup. Ct. 1904) 14

State v. Frost, 158 N.J. 76, 86 (1999) 27

State v. Green, 86 N.J. 281 (1981) 37

State v. Hardison, 99 N.J. 379 (1985) 46

State v. Harmon, 104 N.J. 189 (1986) 41

State v. Hedgespeth, 249 N.J. 234 (2021) 24, 28, 33

State v. Higgs, 253 N.J. 333 (2023) 31

State v. Hines, 109 N.J. Super. 298 (App. Div. 1970) 42

State v. Jackmon, 305 N.J. Super. 274 (App. Div. 1997) 38, 45

State v. Landano, 271 N.J. Super. 1 (App. Div. 1994) 31

State v. LeFurge, 101 N.J. 404 (1986) 43

State v. Lodzinski [I], 467 N.J. Super. 447 (App. Div. 2019) 15

State v. Lodzinski [II], 246 N.J. 331 (2021) 15

State v. Lodzinski[III], 249 N.J. 116 (2021) 15, 16, 17

State v. Loray, 41 N.J. 131 (1963) 15

State v. Loyal, 386 N.J. Super. 162 (App. Div. 2006)..... 22

State v. Madden, 61 N.J. 377 (1972)..... 42, 43

State v. Martin, 119 N.J. 2 (1990)..... 37

State v. McKinney, 223 N.J. 475 (2015) 37, 44

State v. McLaughlin, 205 N.J. 185 (2011)..... 38

State v. Norman, 151 N.J. 5 (1997)..... 38

State v. Orecchio, 16 N.J. 125 (1954) 45

State v. Phillips, 322 N.J. Super. 429 (App. Div. 1999)..... 38, 39

State v. Reyes, 50 N.J. 454 (1967) 12, 13, 14

State v. Rhett, 127 N.J. 3 (1992)..... 37, 41

State v. Robinson, 136 N.J. 476 (1994)..... 42

State v. Ross, 249 N.J. Super. 246 (App. Div.), certif. den.
126 N.J. 389 (1991) 27

State v. Rue, 296 N.J. Super. 108 (App. Div. 1996) 38

State v. Scott, 229 N.J. 468 (2017).....24, 28, 33

State v. Sette, 259 N.J. Super. 156 (App. Div.), certif. den.
130 N.J. 597 (1992) 45

State v. Smith, 167 N.J. 158 (2001) 27

State v. Sugar, 100 N.J. 214 (1985)..... 31

State v. Vick, 117 N.J. 288 (1989) 45

State v. Wilder, 193 N.J. 398 (2008)..... 15

State v. W.L., 278 N.J. Super. 295 (App. Div. 1995).....24, 28, 33

State v. Zarinsky, 143 N.J. Super. 35 (App. Div. 1976), aff'd
on other grounds 75 N.J. 101 (1977) 15

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993) 45

STATUTES

N.J.S.A. 2C:1-8a(2) 46

N.J.S.A. 2C:5-1 41

N.J.S.A. 2C:5-2a 43

N.J.S.A. 2C:5-4a 4

N.J.S.A. 2C:11-3 41

N.J.S.A. 2C:11-3a 1

N.J.S.A. 2C:11-3a (1) 1

N.J.S.A. 2C:11-3a (2) 1

N.J.S.A. 2C:12-1b(1) 1, 43

N.J.S.A. 2C:20-3a 1

N.J.S.A. 2C:39-4a 1

N.J.S.A. 2C:39-5b 1

PROCEDURAL HISTORY

The Hudson County Grand Jury returned Indictment 19-01-0118 charging defendant Alterik Ellis[1] with: purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2) (Count One); conspiracy to commit murder, contrary to N.J.S.A. 2C:5-2 (Count Two); three counts of second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (Counts Three through Five); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Six); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Seven); and third-degree theft of an automobile, contrary to N.J.S.A. 2C:20-3a (Count Eight). (Da 1 to 5)[2]

After trial before the Honorable Angelo Servidio, J.S.C. and a jury in June and July 2022, defendant was acquitted by the judge at the end of the State's case of Counts Three through Five as well as of Count Seven (44T 17-11 to 18-24; 44T 22-8 to 16), and convicted by the jury of all other counts against him. (Da 6 to 8)

On January 27, 2023, Judge Servidio sentenced defendant to serve the following prison terms, all concurrent: 35 years, 30 without parole, for Count

[1] Codefendant Travis Defoe was charged with the same crimes as defendant.
[2] Da – defendant's appendix to this brief
PSR – presentence report

One; 20 years, 85% without parole for Count Two; seven years, three years without parole, for Count Six; and four years for Count Eight. (Da 9 to 12) Defendant was also ordered to pay the usual fees and penalties. (Da 9 to 12)

On February 21, 2023, defendant filed his notice of appeal. (Da 13 to 16)

STATEMENT OF FACTS

Defendant Alterik Ellis and his codefendant Travis Defoe were tried and convicted for murder and lesser offenses for causing the shooting death of a 17-year-old female, J.S., late on the night of October 26, 2018, in Jersey City. The trial was unusual, to say the least. It involved the playing of a lot of surveillance video, which will be discussed here, but none of that video showed the homicide at issue, or even the discharge of a firearm. Indeed, no witness identified either defendant or the codefendant as having fired the fatal shot; nor did any witness even identify either man as having been at the scene, nor provide either man with a possible motive for committing these offenses. The State presented the following evidence at trial.

Detective Mike Burgess testified that he responded to a dispatch to the scene, at 76 Brinkerhoff Avenue, where J.S.'s "lifeless" body was lying in a pool of blood inside the vestibule of the apartment building at that address, "right behind the front door." (35T 100-5 to 102-1) When he arrived, he testified, he was "directed" to a "dark-colored" car parked on the north side of

Brinkerhoff, and that car contained four occupants: Jayden Boyd, Addison Bansraj, Dionte Spell, and Lomell Farmer. (35T 100-12 to 101-9) Those men were "patted down for weapons and temporarily "secured," according to Burgess, but he ultimately did not get any contact information, or even dates of birth, from any of them, he admitted. (35T 101-1 to 12; 35T 102-18 to 103-22) There were as many as 15 officers at the scene, but nothing more was done to follow up with those four men, as far as Burgess knows. (35T 105-10 to 18; 35T 110-1 to 13) Police radio recordings of that night were not preserved, and Burgess did not even note the make or model of that dark-colored car. (35T 111-21 to 23; 35T 113-21 to 25)

The medical examiner, Dr. Gregory Conti, testified that J.S. died of a "gunshot wound of the head" where the bullet entered the left side of her head and exited the right side. (40T 27-12 to 14; 40T 28-1 to 4; 40T 22-4 to 5; 40T 24-6 to 10) Cross-examination established that the lack of irregular appearance to the entrance wound could mean that the bullet did not ricochet off another object. (40T 29-11 to 22) The wound also contained no evidence, such as soot or stippling, of a close-range shot. (40T 30-21 to 31-15) The victim was wearing a wig at the time of her death, but the medical examiner did not test the wig for evidence. (40T 32-7 to 33-15) The positioning of the entrance and exit wounds indicated a downward trajectory of the bullet, from left to right, Dr. Corsi testified. (40T 33-18 to 35-9)

Detective Scott Rogers testified that he also was dispatched to the scene, and, when he arrived, there was a "small crowd in front at 76 Brinkerhoff" and J.S.'s body was inside the vestibule "on her side" with her feet towards the exit door and her head toward the interior of the vestibule. (35T 120-6 to 21) He testified that Brinkerhoff is a one-way street headed westbound and is "relatively narrow." (35T 125-14 to 15) Rogers claimed that "four females" were transported to a local police station to be interviewed as witnesses (35T 128-11 to 23) But he admitted that he did not follow all protocol with regard to retaining and preserving his contemporaneous notes from the scene, and that he did not get contact information from everyone that he spoke to. (35T 131-12 to 135-6) He also did not go into any of the apartment units at 76 Brinkerhoff and did not speak to anyone who was inside those units. (35T 132-1 to 6)

Detective Daniel Bellini testified that police recovered nine 9-mm shell casings from the street outside 76 Brinkerhoff, one projectile from the vestibule, and one projectile fragment as well. (36T 121-18 to 19; 36T 63-5 to 24; 36T 73-21 to 24) Multiple "apparent projectile defect[s]" were also noted on the building and on the stairs leading up to it. (36T 46-3 to 59-9; 36T 71-20 to 22) Bellini conceded that more shell casings than projectiles were recovered and that police nevertheless did not not enter any of the apartments to look for more projectiles. (36T 127-25 to 128-5) No gun was recovered, but a black mobile phone and a white Apple iPhone were found at the scene. (36T 128-6 to 130-1)

Bellini conceded that while a cigarette butt was lying near one of the shell casings, police did not seize it even though it could have contained DNA. (36T 139-15 to 140-20) The same was true of tire tracks, bottle caps, cups, and water bottles seen at the scene; none were seized by police. (36T 141-22 to 145-15) Bellini admitted that police also did not insert a "protrusion rod" into any of the bullet holes/projectile defects in order to determine the trajectory of the shots. (36T 166-1 to 18)

The only testifying eyewitness was Tacora Gordon, a resident of an apartment that is on the second and third floors of the three-story building at 76 Brinkerhoff. (41T 159-5 to 162-4) Shortly after 11:30 p.m. on October 26, 2018, Gordon testified, she was on the third floor while her brother Asmar was "on the porch." (41T 162-5 to 14) She heard both male and female voices, so she assumed Asmar was "outside with people." (41T 162-17) She "heard gunfire" involving an indeterminate number of shots, but she believes there were more than five. (41T 162-23 to 163-13) She ran to the window when she heard the first shots, because her brother was out there, and she saw a black vehicle as well as two white vehicles. (41T 163-16 to 164-24) One of the white cars was "a Pontiac," she testified and the other was a Toyota Camry that prosecutors had her identify via a photo. (41T 164-23 to 165-3; 34T 167-3 to 11; 41T 169-12 to 16) She saw a "person shooting" while "hanging mid-waist" out of one of the two white cars -- but she is not sure which white car. (41T 164-24 to 165-15;

41T 169-17 to 20) She does not recall how the person was dressed. (41T 165-16 to 18) She acknowledged giving a statement[3] to the prosecutor's office within a few days of the incident, but she reiterated at trial that she does not know which white car the shots were fired from and said so in her statement. (41T 165-21 to 166-10; 41T 169-17 to 170-3) She also testified that one of the white cars "was riding toward Bergen" Avenue via Brinkerhoff, and that Bergen "turns into another block, which is Bentley." (41T 174-7 to 8; 41T 175-9 to 10)

Son Doan testified that he is the owner of the same 1999 white Toyota Camry that Tacora Gordon identified as one of the two white cars on the street at the time of the shooting. (41T 145-8 to 9) He testified that the car was stolen in "September or October" when he parked it at a restaurant and then found it missing when he returned to it after 10 to 15 minutes. (41T 144-20 to 145-3; 41T 150-18 to 23; 41T 152-24) He could not recall if he had left the keys inside, but he testified that when the car -- which was recovered and processed by members of the Hudson County Prosecutor's Office on October 30, 2018 -- was returned to him, there was no damage to the windows. (41T 150-24 to 151-10; 41T 146-3 to 5; 41T 47-15 to 48-14; 41T 69-10 to 13) He testified that most of the items found in the car belonged to him, but he said that while he is a smoker, he never would use the ashtray in the car, so whatever was found in the ashtray,

[3] There is no indication from the record that that statement was admitted into evidence.

plus recovered two cigarette lighters, were not his. (41T 147-9 to 150-3)

Detective Risheem Whitten testified that when he processed the vehicle, he recovered a "burnt marijuana roach" and 26 fingerprints[4] from the vehicle, but he admitted that none of those prints were from the gearshift lever, and that, despite the fact that a person would need to handle that gearshift lever in order to drive the car, that lever was not swabbed for DNA. (37T 90-14 to 22; 37T 137-21 to 22; 37T 143-3 to 24) He also did not swab any of the interior of the car for gunshot residue. (37T 135-11 to 23) He further admitted that he did not process a cigar wrapper that he found in the car, and that no firearm or ammunition was found in the vehicle. (37T 153-4 to 5; 37T 156-16 to 157-1) Detective Anthony Espaillat testified that additional fingerprints were recovered from various items in the car, like a document holder, a bottle of Windex, and a bottle of Listerine. (37T 164-21 to 23; 37T 170-11 to 171-4; 37T 173-11 to 12) There was no damage discovered that indicated that the car had been broken into or hot-wired. (37T 184-1 to 186-24)

State Police Forensic Scientist Christopher Szymkowiak testified that a swabbing of the steering wheel of the Camry was "not suitable" for DNA comparison to buccal swabs from defendant or the codefendant. (40T 65-21 to

[4] No testimony linked any fingerprints in the case to either defendant or the codefendant. Yet, as addressed in Point II, infra, defense counsel was barred during summation from arguing that point.

22) The marijuana roach contained a mixture of DNA from two people, but Szymkowiak was only able to create a DNA profile for the major contributor to that mix; the minor profile was not suitable for DNA comparison. (40T 65-23 to 66-2) The major contributor to that mixed DNA sample was not either defendant or the codefendant, but a CODIS (Combined DNA Index System database) "hit" matched the DNA from the major contributor to a man named David Simmons. (40T 66-25 to 69-5)

Detective Guershon Cherilien testified that on November 5, 2018, police searched defendant's apartment at 16-20 Lexington in Jersey City and seized a dark Polo hooded sweatshirt, size large. (42T 32-1 to 18; 42T 35-7 to 23)

The rest of the State's case was based on surveillance video[5] that was

[5] Video was played from approximately 17 different locations, mostly from Jersey City, but some from Newark. Ordinarily, appellate defense counsel would provide that video to this Court, but he cannot do so for reasons that are explained in more detail in a motion that has been filed contemporaneously with this brief. That motion seeks to compel the State to supply that video footage to the Court and appellate counsel. What was supplied in discovery to defendant by the State, and then given to appellate defense counsel through the Public Defender's office, was a series of Blu-Ray discs that contains what appears to be hundreds of lengthy surveillance videos shot at those locations, often from multiple camera angles. What was played by the State at trial was not played from those discs. Instead, the State played the videos directly from a server and gave the video snippets State exhibit numbers like "S-194." There is, as explained in the motion, no way to match up the lengthy computer-file videos on the Blu-Ray discs, from many different cameras at different angles at a given location, with the brief video snippets that were actually played in Court and given "S-" exhibit numbers. Which videos were played? From which camera?

seized from multiple locations in Jersey City. Because the court ruled that the videos could not be narrated by the law-enforcement officials who obtained them, the only description that the jury heard regarding what those videos depict is in the State's summation, which described the video evidence as follows, obviously in a light best for the State. At 11:19 p.m., the two men are allegedly seen in video from the Bergen and Lexington apartments "walking together" in what the prosecutor called "virtually in lockstep." (44T 141-19 to 142-8) In the prosecutor's estimation, that video showed "that they're walking with purpose," which he deemed "evidence of a conspiracy." (44T 142-9 to 15) Then at 11:22 p.m. they are seen on opposite sides of the street in a video at 110 Oak. (44T 142-16 to 25) They are, according to the prosecutor, walking "almost parallel to each other" after which they get into the white Camry, with defendant in the front passenger seat. (44T 143-1 to 22) The prosecutor urged: "They stay there for a little while longer, another few minutes, and essentially, again, nobody is around, time to go." (44T 143-23 to 25)

At 11:32 p.m., in a video from 75 Harrison, the Camry is seen making a turn, and then a video from Monticello and Brinkerhoff shows the car making a left onto Brinkerhoff. (44T 144-1 to 7) Then, at 11:34 p.m. -- after the shooting,

---

Appellate defense counsel has no idea. The motion asks this Court to order the State to provide a flash drive or disc to the Court and to counsel with only the video segments that were played at trial, labeled with the corresponding "S-" exhibit numbers.

according to the State's theory -- video from 38 Bentley shows defendant exiting the Camry (44T 146-11 to 17), and video from 11:37 p.m. from 2380 Kennedy Boulevard shows defendant at a 7-Eleven store. (44T 146-19 to 147-7) At 11:39 p.m. "two minutes after he's seen at the 7-Eleven," according to the prosecutor, defendant is seen on video from the first-floor hallway of his apartment building at 16-20 Lexington, wearing the same hooded sweatshirt that police later seized from his apartment. (44T 147-17 to 24) The prosecutor argued to the jury that in that video defendant is seen "[e]xtending his hand as if mimicking gunshots." (44T 148-3 to 5) Then, at 11:44 p.m., video from that same building shows defendant entering his apartment on the fourth floor, and heading back out -- after "a few minutes" inside -- wearing different clothing. (44T 148-9 to 24)

Meanwhile, again according to the State, the codefendant is seen on a video from 39 Fleming Avenue in Newark, making a turn in the Camry at 11:46 p.m. and then walking in that area at 11:52 p.m. (44T 149-6 to 19) Later, the codefendant is seen in video at Penn Station in Newark, where, according to the State, he "gets on a train" and then is seen at the station at Journal Square in Jersey City. (44T 150-8 to 24)

The time stamps on those videos were not always accurate, the State's witnesses admitted; sometimes they were as much as 14 hours, 38 minutes off, while some others were only incorrect by minutes. (41T 12-14 to 15; 41T 21-22 to 23; 41T 38-25 to 39-6; 41T 60-12; 41T 145-3 to 7; 42T 86-15 to 17; 42T 90-

15 to 17; 43T 12-2; 36T 18-2) Moreover, the State could not say how accurate the timestamps were when the videos were recorded, but rather only how accurate they were when retrieved. (41T 117-6 to 15) One video skipped so much that 20 minutes of what should have been an hour of it were missing. (41T 186-10 to 188-7) State's witnesses admitted that they knew little about the video equipment that recorded the surveillance videos that were played for the jury and they could not tell the jury details like the make or model of the cameras, resolution of the videos, or the level of compression that was used, if any, when they were saved. (41T 63-19 to 67-24; 41T 72-10 to 76-6; 41T 190-1 to 190-7; 42T 37-19 to 38-21; 42T 93-5 to 94-24; 42T 133-17 to 134-4) Sometimes the State could not even say where on a particular building a surveillance camera was located or in which direction that camera pointed. (43T 23-17 to 25)

LEGAL ARGUMENT

POINT I

THE MOTION FOR A JUDGMENT OF ACQUITTAL ON THE HOMICIDE, CONSPIRACY, AND UNLAWFUL-PURPOSE WEAPONS COUNTS SHOULD HAVE BEEN GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE IN THE STATE'S CASE TO PROVE THOSE CHARGES UNDER STATE V. REYES AND STATE V. LODZINSKI. (RULINGS AT 44T 15-20 TO 23; 44T 16-21 TO 22; 44T 19-16 TO 18)

The State attempted to prove this murder case by proving defendant's

opportunity to commit the crime via his proximity to the victim, but what the State's case was missing was not merely proof of motive, but any proof, forensic or otherwise, that defendant (or the codefendant) murdered J.S., conspired to murder her, or possessed the murder weapon with an unlawful purpose. Thus, when defense counsel moved for a judgment of acquittal at the close of the State's case, under State v. Reyes, 50 N.J. 454 (1967) (43T 164-9 to 170-25), the judge should have granted that motion on those counts. Instead, after the State cited only defendant's alleged consciousness of guilt (the supposed "shooting" gesture made while standing alone in the hallway of his own apartment building about ten minutes after the actual shooting, after which he changed his clothes) and his alleged presence/opportunity -- because the sum of video evidence in the case could lead to the conclusion that defendant and the codefendant were present in a white Toyota Camry at the scene (43T 150-5 to 164-7) -- the judge denied the motion. (44T 15-20 to 23; 44T 16-21 to 22; 44T 19-16 to 18) In denying the motion with respect to the murder count, the judge said, without a shred of reference to any particular evidence (because there was not any such evidence): "The jury was presented with some evidence that just after 11:30 p.m. on October 26, 2018, Alterik Ellis and Travis Defoe drove past 76 Brinkerhoff Avenue and shot a firearm toward the porch area of residence." (44T 15-20 to 23) (emphasis added) He then made similar incorrect statements -- that unspecified evidence actually showed that the two men shot a firearm

toward the porch -- when denying the acquittal motion with respect to the charges of conspiracy to murder and possession of a weapon for an unlawful purpose. (44T 16-21 to 22; 44T 19-16 to 18)

Because, in fact, the State's evidence was only consistent with a theory that defendant and the codefendant were in the Toyota Camry on Brinkerhoff Street, but there was no actual evidence that either man murdered the victim, conspired to murder her, or possessed the murder weapon at all (let alone with an unlawful purpose), the State's proofs fell short of the Reyes standard and the motion for a judgment of acquittal on those three counts should have been granted. Consequently, defendant was denied due process under the Fourteenth Amendment and the corresponding provisions of the state constitution, and his murder, conspiracy, and unlawful-purpose convictions should be reversed and an acquittal entered on those counts.

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

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

> the question the trial judge must determine is whether,

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

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

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

Div. 1976), aff'd on other grounds 75 N.J. 101 (1977)[6]; see also State v. Loray, 41 N.J. 131, 138 (1963) (confession by defendant, no matter how potentially fraught with credibility issues, is enough to deny an acquittal motion); State v. Wilder, 193 N.J. 398, 410-412 (2008) (evidence that the defendant used a heavily-booted foot to kick the victim's head, causing the victim's death, was sufficient to prove serious-bodily-injury murder).

But other murder cases can be closer calls, and the manner in which the Supreme Court resolved the issue in State v. Lodzinski[III], 249 N.J. 116 (2021) (hereinafter "Lodzinski"[7]), particularly underscores the line in the sand regarding acquittal motions in murder cases: as the Fox Court said over one hundred years ago, there must be some proof in the State's case that leads to the conclusion not merely that the defendant was present or had a motive to kill, or even covered up the victim's death, but that the defendant actually participated in purposely or knowingly causing the death of the victim. 70 N.J.L. at 355. As will be seen in the discussion that follows, it is that proof that the State's case

---

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

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

was missing, even falling well short of what was insufficient in Lodzinski.[8]

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

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

---

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

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

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

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

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

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

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

Lodzinski was, obviously, a close call. The same simply cannot be said here. The State's proofs in Lodzinski -- although legally insufficient to pass a Reyes motion -- substantially dwarf the proofs here, and the ultimate ruling in the instant case should be much easier to reach: that there was insufficient proof presented by the State of murder, conspiracy to murder, and possession of the murder weapon for an unlawful purpose. In Lodzinski, there was proof of motive, physical presence (and, thus, opportunity) both with the victim at the last time and place he was seen and at the place where the body was found, actual physical evidence (the blanket) tying the defendant to the victim's dead body, plus substantial evidence of consciousness of guilt (repeated lies to law enforcement during the investigation). Yet that was not enough. Here, there was no evidence of motive, no forensic evidence,[9] no identification of the defendant or codefendant as the shooter, and no identification of the Toyota as the car from which shots were fired. All the State had in its arsenal of proof was: (1) video

[9] No fingerprint or DNA evidence tied defendant or the codefendant to any of the evidence in the case and the only DNA match that was presented was to David Simmons.

evidence that would allow for an inference that defendant and the codefendant were in the Toyota that drove to Brinkerhoff Avenue before the shooting and left that scene after the shooting, and (2) what can only be described at best as the most meager of evidence of consciousness of guilt (the supposed "shooting" gesture after the fact, at a different location, and the changing of clothes). The proofs here were not even Lodzinski-level; they were Lodzinski "light." The only way the judge got the State past the Reyes/Lodzinski motion on the charges of murder, conspiracy, and unlawful-purpose weapons possession was to cite to evidence that simply did not exist: that the "jury was presented some evidence" that defendant and/or the codefendant "shot a firearm toward the porch area of the residence." (44T 15-20 to 23) That simply did not happen.

While the Lodzinski majority was forced to reach a close call of a conclusion -- that while the evidence showed the defendant in that case may have "played a role in" the victim's "disappearance and death," there was no proof that she purposely or knowingly killed him, id. at 158 -- here there was much less evidence than that. There was no proof that defendant or the codefendant had anything to do with the death of the victim or the possession of the murder weapon. This Court should reverse the murder, conspiracy, and unlawful-purpose convictions and remand for entry of a judgment of acquittal on those counts.

POINT II

DESPITE THE FACT THAT THERE WAS NO FINGERPRINT EVIDENCE BEFORE THE JURY THAT LINKED DEFENDANT OR THE CODEFENDANT TO THE TOYOTA CAMRY THAT THE STATE CLAIMED WAS THE VEHICLE IN WHICH THE SHOOTER AND HIS ACCOMPLICE DROVE TO AND FROM THE SCENE, THE JUDGE IMPROPERLY PREVENTED DEFENSE COUNSEL FROM ARGUING THAT FACT TO THE JURY IN SUMMATION. (RULINGS AT 44T 92-24 TO 25; 44T 118-2 TO 119-2)

As noted in the Statement of Facts, the State obtained 26 fingerprints from the Toyota Camry and more fingerprints from items found inside the car. (37T 137-21 to 22; 37T 164-21 to 23; 37T 170-11 to 171-4; 37T 173-11 to 12) Apparently no matches to anyone were found, but the jury never learned that fact because when the State proffered a lay-opinion witness, Detective Marrero from the Bergen County Sheriff's Department, to testify that the fingerprints were "not suitable for comparative analysis" (37T 120-1 to 5), the judge barred that witness because the witness was not a fingerprint expert. (37T 135-17 to 137-3) Thus, in keeping with the theme that the State had simply not proved its case, in summation defense counsel began to argue to the jury that there were "[o]ver 30 latent prints" in the case, yet "no evidence before you" that those prints matched anyone. (44T 92-21 to 22) The judge sustained the State's objection to that argument at that point, barring the argument -- without giving

any reasons for that ruling. (44T 92-24 to 25) Then, when both defense counsel urged immediately after summation that the judge had made a serious mistake in barring the argument (44T 117-16 to 118-14), the judge sustained the State's objection again, and once again provided no reasoning. (44T 118-25 to 119-2)

Defendant urges on appeal that by refusing to allow that defense argument regarding the lack of proof of any fingerprint match, the judge denied defendant his Sixth Amendment-based right to present a defense as well as his rights to due process and a fair trial under both the Fourteenth Amendment and the corresponding provisions of the state constitution. Consequently, the defendant's convictions should be reversed, and the matter remanded for retrial.

It is clear that a defendant has a right -- under the Sixth and Fourteenth Amendments -- to present a defense, and to exercise that right by presenting evidence, calling witnesses, and arguing appropriately to the jury to support his version of events. State v. Fort, 101 N.J. 123, 128-129 (1985). In this case, the manner in which this issue arose is extremely similar to what occurred in State v. Loyal, 386 N.J. Super. 162, 167-176 (App. Div. 2006), and the result -- reversal and remand for a new trial -- ought to be the same as in Loyal.

In Loyal, the State's proposed expert witness concluded in a report that the fingerprints that were found on a gun were of "insufficient evidentiary value," and -- after defense counsel objected that the report was too vague to allow the expert to testify -- that expert did not testify, leading defense counsel

to argue to the jury in summation that the State's proofs were lacking any demonstration that defendant's fingerprints had been found. Id. at 167-169. But the judge barred that argument, telling the jury to ignore it because there had been no testimony at all about whether there was a match, and ruling that there is "no way of knowing" what "may or may not have been on that gun." Id. at 168. This Court reversed and remanded for retrial, holding that defense counsel's argument was proper. Id. at 173-176. While "the State had a strong case, it was by no means overwhelming," id. at 173, and "while it is entirely possible the jury could reach the same result," had the defense argument about the absence of fingerprint proof in the case not been improperly barred, it was by no means a certainty, and thus, reversal was required. Id. at 176.

The only meaningful difference between this case and Loyal is that the State's evidence here was not remotely "strong." See Point I, supra. Thus, the possibility that the error in barring counsel's argument about the lack of fingerprint proof may have led the jury to a result it would not have otherwise reached is even stronger than in Loyal. The entire defense in this case was based upon the absence of evidence in the State's case. Moreover, much of the State's case was based on the State's assertion that defendant was in the Toyota Camry. The argument that was improperly barred here cut straight to that critical question of the sufficiency of the State's proof that defendant was in that car. There was no more important issue.

Reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). The State will likely tell this Court that defendant otherwise had opportunity to argue the insufficiency of the State's proofs, but Hedgespeth and Scott are clear that such an appellate argument must be rejected, every time. It is not for a reviewing court to determine the weight or worth of a particular piece of evidence or of a particular barred argument when evaluating harmless error. That "is in the sole province of the jury. '[Appellate j]udges should not intrude as the thirteenth juror.'" Hedgespeth, 249 N.J. at 253, quoting Scott, 229 N.J. at 485. The jury could have more readily accepted the defense had the judge allowed this argument about the lack of fingerprint proof. That was a critical aspect of the defense attack upon the State's argument that defendant was in the Camry. When the judge was so clearly wrong to preclude the defense argument and that error cannot be deemed harmless beyond a reasonable doubt, Loyal, 386 N.J. Super. at 176, defendant's resulting convictions should be reversed, and those counts

remanded for retrial.

POINT III

THE PROSECUTOR STEPPED FAR OUTSIDE THE BOUNDS OF PROPRIETY WHEN HE BADLY MISSTATED THE TESTIMONY OF THE ONLY EYEWITNESS IN THE CASE, OVER THE OBJECTION OF DEFENSE COUNSEL. (RULING AT 44T 146-8 TO 10)

As noted in the Statement of Facts, Tacora Gordon was the only eyewitness to the shooting, but she was very clear that she could not tell from which of two white cars the fatal shots were fired. Gordon testified that she ran to the window when she heard the first shots, because her brother was out there, and she saw a black vehicle as well as two white vehicles. (41T 163-16 to 164-24) One of the white cars was "a Pontiac," she testified and the other was a Toyota Camry that prosecutors had her identify via a photo. (41T 164-23 to 165-3; 41T 167-3 to 11; 41T 169-12 to 16) She saw a "person shooting" while "hanging mid-waist" out of one of the two white cars -- but she was not sure which white car. (41T 164-24 to 165-15; 41T 169-17 to 20) She acknowledged giving a statement to the prosecutor's office within a few days of the incident, but she reiterated at trial that she does not know which white car the shots were fired from and said so in that statement. (41T 165-21 to 166-10; 41T 169-17 to

170-3) She also testified that one of the white cars "was riding toward Bergen" Avenue via Brinkerhoff, and that Bergen "turns into another block, which is Bentley." (41T 174-7 to 8; 41T 175-9 to 10)

Nevertheless, the prosecutor argued in summation, claiming to directly quote Gordon's testimony: "And she [i.e., Gordon] said, 'If you keep going that way the white car that I saw this person shooting out of goes to Bentley." (44T 146-1 to 3) (emphasis added) When both defense counsel immediately objected to that gross distortion of what Gordon had actually testified to at trial (44T 146-4 to 7), the prosecutor claimed -- out loud in front of the jury -- "That's what she said." (44T 146-6) (emphasis added) The judge overruled the objection and simply told the jury: "The jurors' memory of the testimony will prevail. You are to determine what the facts are." (44T 146-8 to 10)

Because the prosecutor's argument about one of the most important issues at trial -- the content of the testimony of the only eyewitness in the case -- was a blatant distortion of that testimony, and was, because of its positioning in the State's summation, impossible for the defense to counter, the prosecutor's misconduct deprived defendant of a fair trial and due process under the Fourteenth Amendment and the corresponding provisions of the state constitution. Consequently, defendant's convictions should be reversed and the matter remanded for retrial.

"[P]rosecutors should not make inaccurate legal or factual assertions," and

"they must confine their comments to evidence revealed during the trial and the reasonable inferences to be drawn from that evidence." State v. Smith, 167 N.J. 158, 178 (2001), citing State v. Frost, 158 N.J. 76, 86 (1999). Prosecutors should not present argument to the jury about "facts that are not in the record." State v. Bradshaw, 195 N.J. 493, 510 (2008). This Court has reversed convictions when a prosecutor argued to the jury that an alleged child victim would have no sexual knowledge from which to fabricate a claim of sexual abuse, when in fact that prosecutor knew that the child had been a previous victim of such abuse, State v. Ross, 249 N.J. Super. 246, 292-293 (App. Div.), certif. den. 126 N.J. 389 (1991), and again where the prosecutor argued that a gun used in a shooting belonged to the defendant when the State had "actual knowledge that it did not." State v. Sexton, 311 N.J. Super. 70, 80-81 (App. Div. 1998).

Although not all improper comments are grounds for reversal, courts "have not hesitated to reverse convictions where [they] have found that the prosecutor in his summation overstepped the bounds of propriety and created a real danger of prejudice to the accused." State v. Smith, 167 N.J. 158, 177 (2001) (internal quotation marks omitted); Frost, 158 N.J. at 83 (reversal was required where a prosecutor's comments "were so egregious as to deprive a defendant of a fair trial"). In determining the appropriate response to a prosecutor's improper comments in summation, courts must look to three factors: (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether

the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Id. at 87.

Here, first of all, there can be no doubt that the argument of the prosecutor was grossly improper. Tacora Gordon simply did not testify in the manner that the prosecutor pretended to quote her: "If you keep going that way the white car that I saw this person shooting out of goes to Bentley." (44T 146-1 to 3) (emphasis added) She never said that at trial; indeed she was quite clear that she did not know from which white car the shots were fired. That was not a matter of debate, and the trial judge should have sustained the objections of both counsel and stricken the comment from the record. Moreover, every single one of the Frost factors weighs in favor of reversal. The improper argument was objected to, was not withdrawn, and was not stricken. 158 N.J. at 87.

Most importantly, the improper argument went straight to the heart of the case -- stating that Gordon had identified the Toyota at trial as the car from which the shots were fired, but she had not. Reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors

which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). The prosecutor had no business making this argument, and the judge should have sustained the objections and stricken the comment from the record. When he did not do so, and the improper argument could well have affected the verdict, reversal is required. Defendant's convictions should be reversed, and the matter remanded for retrial of those counts.

POINT IV

THE TRIAL JUDGE IMPROPERLY BARRED THE DEFENSE FROM QUESTIONING A LAW-ENFORCEMENT WITNESS ABOUT HIS PENDING INVESTIGATION FOR MISCONDUCT ON THE JOB, DESPITE THE FACT THAT THE PENDING INVESTIGATION MIGHT AFFECT THE JURY'S EVALUATION OF HIS BIAS AND CREDIBILITY AS A WITNESS. (RULINGS AT 36T 175-3 TO 176-1; 37T 18-14 TO 19-4).

As noted in the Statement of Facts, Detective Bellini testified to his actions at the scene, specifically regarding the preservation of ballistics evidence. At the time, Bellini was under investigation[10] by the FBI "relating to his ability to handle and properly store evidence" in an unrelated case and he had already "been demoted to the Fugitive Unit" as a result, according to defense

[10] Defense counsel described Bellini as one of five Hudson County law-enforcement officials being investigated. (36T 171-12 to 18)

counsel, who wanted to cross-examine him about the pending investigation in order to demonstrate his potential bias in this matter. (36T 170-12 to 175-17) However, despite defense counsel's argument that Bellini "has every incentive in this case to testify exactly how the State wants him [to], whether or not it is, in fact, the truth in this case" (36T 173-8 to 11), the judge focused not on the fact that Bellini was under investigation and, thus, had an incentive to be biased in his testimony, but, rather, only on whether the FBI allegations against Bellini had any factual "relation" to the "specific actions" he took "in this case." (36T 175-3 to 22) When the judge learned that they did not, he sustained the State's objection and barred the cross-examination on that topic. (36T 175-3 to176-1) The next day of trial, when the defense revisited the issue with the judge (37T 8-17 to 18-13), the judge affirmed the prior ruling and threatened sanctions against the defense if they brought up the matter in front of the jury. (37T 18-14 to 19-4)

Because the defense had an absolute right to cross-examine Bellini on matters of bias, the judge's ruling violated defendant's right of confrontation under the Sixth Amendment, his right to due process under the Fourteenth Amendment, and his corresponding rights under the state constitution. Consequently, defendant's convictions should be reversed, and those counts remanded for retrial.

"The Confrontation Clause protects a defendant's right to cross-examine

a witness on the 'possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.'" State v. Higgs, 253 N.J. 333, 361 (2023), quoting Davis v. Alaska, 415 U.S. 308, 316 (1974). "Defendants 'must be afforded the opportunity through effective cross-examination to show bias on the part of adverse state witnesses.'" Higgs, 253 N.J. at 361, quoting State v. Sugar, 100 N.J. 214, 230 (1985).

One of the most fertile grounds for cross-examination regarding bias is if a witness has (or even imagines) a figurative Sword of Damocles hanging over them during their testimony because the witness is either facing pending investigation or charges, or is on probation or parole. State v. Bass, 224 N.J. 285, 303 (2016). The Bass Court noted: "Indeed, '[i]n an unbroken line of decisions, our courts have held that the pendency of charges or an investigation relating to a prosecution witness is an appropriate topic for cross-examination.'" Id., quoting State v. Landano, 271 N.J. Super. 1, 40 (App. Div. 1994); see also State v. Baker, 133 N.J. Super. 394, 396 (App. Div. 1975) (noting that bias can arise from either a witness' expectations of favorable treatment if the witness testifies in a particular manner, or from apprehension of unfavorable treatment if the witness does not so testify).

Thus, it should have been clear to the judge that the fact that Detective

Bellini was under FBI investigation might cause him to want to "perform" as a very successful witness for the prosecution, doubly so because the subject matter of the FBI investigation was his handling of and preservation of physical evidence at a crime scene -- the very same type of thing he was testifying to in this case. Bellini's potential for bias was extreme and, because witness bias is always relevant and never collateral, Higgs, 253 N.J. at 361, the defense should have been allowed to cross-examine him on the matter.[11]

Moreover, "the denial of effective cross-examination when it should have been allowed 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Higgs, 252 N.J. at 362, quoting Davis, 415 U.S. at 318. But here, there can be no question that defendant was prejudiced. His defense was already focused on the shortcomings of the State's case, and one of the primary witnesses against him -- supposedly collecting evidence at the scene which would indicate the location of the shooter and the number of shots fired, allegedly all from the same gun -- was potentially biased to give pro-State testimony, but that bias could not be explored because of the judge's improper ruling.

[11] That is not to say that the judge had no power to appropriately limit the extent of cross-examination, so as not to turn this trial into a mini-trial on the allegations against Bellini. Of course, the judge had that power. See Higgs, 253 N.J. at 362-363. But the ruling here had nothing to do with appropriate limitations. This ruling forbade any mention of the pending investigation, with the threat of sanctions to those who dared cross that line.

As noted in other points in this brief, reversal is required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Defendant's convictions should be reversed and the matter remanded for retrial on those counts.

POINT V

DESPITE HAVING PROVIDED THE JURY WITH INSTRUCTIONS ON LESSER-INCLUDED HOMICIDE OFFENSES, THE JUDGE'S INSTRUCTIONS ON ACCOMPLICE LIABILITY FAILED TO CONVEY THE CRITICAL PRINCIPLE, FROM STATE V. BIELKIEWICZ, THAT AN ACCOMPLICE AND A PRINCIPAL CAN BE GUILTY OF DIFFERENT HOMICIDE OFFENSES DEPENDING ON THEIR INDIVIDUAL STATES OF MIND; IN FACT, THOSE INSTRUCTIONS FAILED TO TELL THE JURY AT ALL THAT THE CONCEPT OF ACCOMPLICE LIABILITY APPLIED TO ANY HOMICIDE OFFENSE OTHER THAN MURDER. (NOT RAISED BELOW).

Because there is no video of the shooting, and only one vague eyewitness account -- the details of which the jury could choose to believe in full, in part, or not at all -- and because the jury could have doubted the mens rea of either the shooter or the other person in the car, the judge instructed the jury on the lesser-included homicide offenses of aggravated and reckless manslaughter. (44T 176-3 to 182-15) Because the jury also could easily find that there was only one shooter -- and thus only convict the non-shooter as an accomplice, not a principal -- the judge also instructed the jury on accomplice liability. (44T 200-13 to 206-11) But the accomplice-liability instruction went very wrong when the judge failed to explain the critical concept -- from State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993) -- that each actor's liability must be measured on his own state of mind and that, therefore, it is possible to return a

guilty verdict for one level of homicide offense against a principal and for a different level of homicide offense against an accomplice, depending on their individual states of mind. Indeed, the judge even failed to let the jury know that the accomplice instruction applied at all to aggravated or reckless manslaughter, instead telling the jurors that it applied only to "murder, possession of a weapon for unlawful purposes, and . . . theft." (44T 205-14 to 17)

Because the accomplice-liability instruction was grossly deficient in failing to convey these basic Bielkiewicz concepts regarding how accomplice liability is affected by multiple defendants and lesser-included offenses, defendant was deprived of due process and a fair trial in violation of his rights to due process and a fair trial under the Fourteenth Amendment and the corresponding provisions of the state constitution. Consequently, his murder conviction should be reversed and that count remanded for retrial.

In Bielkiewicz, 267 N.J. Super. at 528-534, this Court held that a jury instruction, in a case where the accomplice might be guilty of a lesser crime than the principal, must tell the jury: that while the principal may have committed a greater offense, the accomplice should only be convicted of a lesser offense if that lesser offense is all he intended to "promote or facilitate." The model jury instruction, drafted to comply with that aspect of Bielkiewicz, specifically spells out three related concepts: (1) "that this defendant can be held to be an accomplice with equal responsibility [to the principal] only if you find as a fact

that he/she possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act" (Da 19); (2) "that two or more persons may participate in the commission of an offense but may participate therein with a different state of mind" (Da 21); and (3) that "[t]he liability or responsibility of each participant for any ensuing offense is dependent on his/her own state of mind and not on anyone else's." (Da 21)

It is the latter two concepts that are so important in the context of lesser-included offenses, for it is those concepts that allow a jury to convict an accomplice of a less-serious homicide offense than the principal. The instant instruction omitted those concepts entirely. (44T 200-13 to 206-11) Indeed, the instant instruction said nothing at all about accomplice liability even applying to lesser-included offenses, let alone spelling out that principals and accomplices are to be judged on their own state of mind, not someone else's and that accomplices can be guilty of less-serious crimes than principals depending on their individual states of mind. In the realm of homicide offenses, the jury was incorrectly told the accomplice instruction only applied to "murder" (44T 205-14 to 17), and never told that an accomplice could be guilty of, for instance, aggravated manslaughter, if he had a lesser state of mind than the principal -- the most basic of Bielkiewicz concepts. This was Bielkiewicz error of the most serious kind. The only question is whether that error could somehow be harmless beyond a reasonable doubt. The answer is simple under these facts: it could not.

Reversal is required for the following reasons.

First, more generally, one of the most basic principles of New Jersey criminal law is that "[a]n essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. McKinney, 223 N.J. 475, 495 (2015), quoting State v. Afanador, 151 N.J. 41, 54 (1997); State v. Concepcion, 111 N.J. 373, 379 (1988) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial"). "[T]he trial court has an absolute duty to instruct the jury on the law governing the facts of the case." State v. Butler, 27 N.J. 560, 595 (1958). The charge must provide a "'comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.' State v. Green, 86 N.J. 281, 287-288 (1981)." Concepcion, 111 N.J. at 379. "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations. Thus, the court must explain the controlling legal principles and the questions the jury is to decide." State v. Martin, 119 N.J. 2, 15 (1990). Therefore, instructional errors on essential matters, even in cases where those errors are not raised below, are traditionally deemed prejudicial and reversible error because they interfere with the jury's proper deliberation on an appropriate verdict. State v. Rhett, 127 N.J. 3, 5-7 (1992); Concepcion, 111 N.J. at 379.

More specifically to this case, Bielkiewicz principles "are particularly

important when multiple participants engage in a violent assault with the potential for differing states of mind." State v. Cook, 300 N.J. Super. 476, 486 (App. Div. 1996). Whenever a jury could have rationally believed that the defendant was an accomplice, not a principal, and could have had a different state of mind than the principal, a Bielkiewicz instructional error is plain error, warranting reversal and remand for a new trial. Id. at 486-488; State v. Jackmon, 305 N.J. Super, 274, 295 (App. Div. 1997); State v. Phillips, 322 N.J. Super. 429, 443 (App. Div. 1999). The Supreme Court has stressed the need for full Bielkiewicz jury instructions on accomplice liability for lesser-included offenses "even without a request by defense counsel." State v. McLaughlin, 205 N.J. 185, 196 n.6 (2011).

Only in cases where either the defendant could not possibly have been an accomplice, or could not possibly have acted with a lesser state of mind if he were an accomplice, can a Bielkiewicz error be deemed harmless beyond a reasonable doubt. See, e.g., State v. Norman, 151 N.J. 5, 37 (1997) (Bielkiewicz error is harmless when there is no question that all of the actors intended a murder); State v. Rue, 296 N.J. Super. 108, 116 (App. Div. 1996) (same as Norman). But where the jury could find that one actor was an accomplice, not a principal, and that that accomplice may have had a lesser state of mind than the principal toward the commission of the homicidal act, a Bielkiewicz error is never harmless. Cook, 300 N.J. Super. at 486-488; Jackmon, 305 N.J. Super. at

295 ; Phillips, 322 N.J. Super. at 443. Here, while it was the State's theory that defendant was the shooter, that was certainly not the only conclusion that a rational juror could reach on the meager evidence before the jury. Additionally, while the shooter may have intended death, the accomplice could well have intended merely to menace those outside the apartment building -- especially when so many shots missed hitting anyone. The only evidence of injury in the case was to J.S.; yet nine total shots were fired. A juror could well conclude, or at least have a reasonable doubt that, the accomplice did not share an intent to kill the victim.

As in Jackmon, "[t]his is not a scenario in which only one mental state on the part of defendant was possible, or in which the jury could have only concluded that defendant acted as a principal," and, thus, the Bielkiewicz error warrants reversal. 305 N.J. Super. at 295. Nor does it matter that defendant was denying any responsibility at all. Once the jury decided defendant was involved, thereby rejecting the defense's denial of any liability, the jury's job was to "apply correct legal principles to assess [defendant's] liability under the State's own version of the events." Cook, 300 N.J. Super. at 488. Without a correct Bielkiewicz instruction -- indeed without an instruction that accomplice liability even applied at all to aggravated manslaughter -- the jury could not properly do that job and reversal of the murder conviction and remand for retrial of that count is required. Id. Under the jury instruction as delivered, defendant was

improperly denied the opportunity for a jury verdict that, as an accomplice, he was guilty of a lesser homicide offense, via Bielkiewicz, than the principal.

POINT VI

THE JURY INSTRUCTIONS ON CONSPIRACY TO MURDER FAILED TO RESTRICT THOSE CONSPIRACIES TO AGREEMENTS TO PURPOSELY KILL, INSTEAD EXPANDING THE DEFINITION OF THE CRIME TOO FAR TO INCLUDE AGREEMENTS TO KNOWINGLY KILL OR TO PURPOSELY OR KNOWINGLY SERIOUSLY INJURE SOMEONE. (NOT RAISED BELOW)

The actual evidence in this case of a conspiracy -- i.e., an agreement -- to commit a crime was either, as argued in Point I, non-existent, or at least extremely thin. The evidence of what specific crime they actually agreed to commit was even thinner. It was a jury question, but it was one that had to be properly explained to the jury, because, as will be discussed in this point, conspiracy to murder is a very narrowly defined crime -- much narrower than the substantive crime of murder. Conspiracy to murder is limited to agreements to purposefully kill, not to do so knowingly or to cause serious bodily injury that happens to result in death.

Unfortunately, here, the jury instruction on conspiracy to murder allowed the jury to convict for levels of criminal intent that fall well short of what is necessary to convict for conspiracy to murder. (44T 182-16 to 186-21)

Consequently, defendant's Fourteenth Amendment and state-constitutional rights to due process and a fair trial were violated, and his convictions for murder and conspiracy should be reversed and that count remanded for retrial.

Conspiracy, N.J.S.A. 2C:5-2, like a criminal attempt, N.J.S.A. 2C:5-1, is an inchoate offense. Both require a purposeful state of mind toward accomplishing the criminal result. State v. Harmon, 104 N.J. 189, 203 (1986). Thus, while "murder" under N.J.S.A. 2C:11-3 can be committed in any of five ways -- i.e., (1) a purposeful killing; (2) a knowing killing; (3) a purposeful infliction of serious bodily injury (SBI) that then results in death; (4) a knowing infliction of SBI that then results in death; or (5) the causing of death during a felony -- an attempted murder can only be a purposeful attempt to kill. State v. Rhett, 127 N.J. 3, 7 (1992). "Although an actor may be guilty of murder if he or she intended to kill or was practically certain that his or her actions would cause or would be likely to cause death, the actor is guilty of attempted murder only if he or she actually intended the result, namely, death, to occur." Id. The Criminal "Code requires that to be guilty of attempted murder, a defendant must have purposely intended to cause the particular result that is the necessary element of the underlying offense -- death." Id.

The same is true of a conspiracy. A conspiracy to murder is an agreement only to purposely kill. State v. Abrams, 256 N.J. Super. 390, 399-401 (App. Div.), certif. den. 170 N.J. 395 (1992); see also State v. Madden, 61 N.J. 377,

395 (1972) (equating a conspiracy to murder with a "conspiracy to kill") (emphasis added); State v. Castagna, 400 N.J. Super. 164, 188 (App. Div. 2008) (same as Madden); State v. Fornino, 223 N.J. Super. 531, 536-537 (App. Div.), certif. den. 111 N.J. 570 (1988) (when analyzing the sufficiency of evidence to prove a conspiracy to murder, the appellate court was focused on whether the evidence showed that the conspirators "planned to kill the [victims]") (emphasis added); State v. Downey, 206 N.J. Super. 382, 395 (App. Div. 1986) (same as Madden); State v. Hines, 109 N.J. Super. 298, 302 (App. Div. 1970) (same as Madden).

Thus, it follows that there is no such thing as an attempt or conspiracy to commit any of the following homicide crimes because they all require less than a purpose to kill: a knowing murder, a purposeful SBI murder, a knowing SBI murder, a felony murder, or an aggravated or reckless manslaughter. Rhett, 127 N.J. at 7, citing State v. Darby, 200 N.J. Super. 327, 331 (App. Div. 1994); see also State v. Robinson, 136 N.J. 476, 485-486 (1994) (rejecting as a "commonsense" matter the idea of less than a purposeful intent to kill for an attempted homicide, but finding that attempted passion/provocation manslaughter where the defendant intended the victim's death while in the heat of passion, but the victim did not die, is an offense because passion/provocation manslaughter in such a circumstance "is an intentional [i.e., purposeful] crime").

Yet, despite the clear limitation that a conspiracy to murder is only an

agreement to purposely kill, the jury instructions never told the jury that limitation. Instead, the jurors were told over and over the wrong law: that the question before them for the count charging conspiracy was whether there was an agreement to promote or facilitate the "crime of murder" (or "such crime" which referred to the "crime of murder"), which they were then told includes, purposeful, knowing and SBI murder -- as opposed to just a purposeful killing. (44T 182-16 to 187-6; 44T 169-21 to 176-2) This jury was, thus, incorrectly told to return a verdict of guilty for conspiracy to murder if the jury found an agreement to do any of the following: purposely kill, purposely cause serious injury (SBI) that happened to kill the victim, knowingly kill, or knowingly cause serious injury (SBI) that happened to kill the victim. (44T 182-16 to 187-6; 44T 169-21 to 176-2) Obviously, when only an agreement to purposely kill is a conspiracy to murder, Abrams, 256 N.J. Super. at 399-401; Madden, 61 N.J. at 395, jury instructions that said otherwise -- effectively allowing a conspiracy to cause serious injury[12] or to knowingly (rather than purposely) kill -- were a fundamental misstatement of the law that allowed verdicts for conspiracy to murder on less than the elements required by law.

[12] A conspiracy to cause serious injury is only a second-degree conspiracy to commit aggravated assault, not a first-degree conspiracy to kill. See N.J.S.A. 2C:5-2a; N.J.S.A. 2C:5-4a; N.J.S.A. 2C:12-1b(1); State v. LeFurge, 101 N.J. 404, 421 (1986) ("[T]he Code grades conspiracy as a crime of the same degree as the most serious crime that is its object." (Emphasis added).

Such an error was particularly devastating to the defense in this case because there was no evidence whatsoever about the "agreement" between defendant and the codefendant. A reasonable juror that believed that defendant and the codefendant agreed to do something together to scare or terrorize or even seriously injure the victim could doubt whether that "something" was an agreement to purposely kill her. Yet the jurors not only had no idea that only such a narrow definition of conspiracy to murder applied; in fact, they were told specifically the wrong law: that an agreement to seriously injure the victim after which she happened to die would still be a conspiracy to murder, when it plainly is not.

Proper and comprehensive jury instructions are critical to preserving a defendant's right to due process and a fair trial, even when no objection is lodged. State v. McKinney, 223 N.J. 475, 495 (2015) (reversing for plain error in the robbery instruction). One of the most basic principles of New Jersey criminal law is that "[a]n essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." Id., quoting State v. Afanador, 151 N.J. 41, 54 (1997); State v. Concepcion, 111 N.J. 373, 379 (1988) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial"). It is "structural error," irremediable by harmless-error analysis, for a jury to deliberate under the wrong burden of proof, Sullivan v. Louisiana, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 2080 (1993), or

the wrong elements. State v. Vick, 117 N.J. 288, 292 (1989).

Indeed, improperly failing to confine the crime of attempted murder to purposeful attempts to kill was the cause of reversals and remands for retrial in Rhett, 127 N.J at 3-7; State v. Sette, 259 N.J. Super. 156, 192 (App. Div.), certif. den. 130 N.J. 597 (1992); and State v. Jackmon, 305 N.J. Super. 274, 298 (App. Div. 1997). The result should be no different for a jury instruction on conspiracy to murder that fails to confine the crime to agreements to purposely kill the victim. This jury was not properly instructed on the law in a fundamental and critical way that robs the Court of any ability to trust that the verdict resulted from the jury's unanimous agreement on the correct elements of the crime. Defendant's conspiracy conviction should be reversed and that count remanded for retrial.

POINT VII

DEFENDANT'S CONVICTIONS SHOULD BE REVERSED FOR CUMULATIVE ERROR. (NOT RAISED BELOW)

Recently, in State v. Burney, 255 N.J. 1, 31 (2023), the Supreme Court once again affirmed the time-honored notion from State v. Orecchio, 16 N.J. 125, 129 (1954), that if one error standing alone is not enough to reverse a conviction, an accumulation of two or more errors may nevertheless require

reversal. Here, the errors discussed in Points I through VI, if somehow deemed insufficient to reverse when standing on their own, should nevertheless be deemed to require reversal as a matter of cumulative error. Defendant's convictions should be reversed, and the matter remanded for retrial of those counts.

POINT VIII

DEFENDANT'S CONVICTIONS FOR CONSPIRACY AND POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE SHOULD HAVE BEEN MERGED INTO HIS MURDER CONVICTION. (NOT RAISED BELOW)

The judge imposed separate sentences on the crimes of conspiracy to murder and possession of a weapon for an unlawful purpose. (50T 68-18 to 71-1; Da 9 to 12) That was clearly error. Those two convictions should have been merged into the murder conviction. A conviction for conspiracy always merges into a conviction for the substantive crime that is the object of the conspiracy. N.J.S.A. 2C:1-8a(2); State v. Hardison, 99 N.J. 379, 386-391 (1985). Likewise, a conviction for possession of a weapon for an unlawful purpose always merges into a conviction for the crime that is itself the unlawful purpose. State v. Diaz, 144 N.J. 628, 636-639 (1996). Those mergers should be ordered if defendant's convictions are not otherwise reversed based upon the arguments made in Points I through VII, supra.

CONCLUSION

For all of the reasons set forth in Points I through VII, the defendant's convictions should be reversed and the matter remanded for retrial. Alternatively, for the reasons in Point VIII, merger of the conspiracy and weapons convictions with the murder conviction should be ordered.

Respectfully submitted,

Joseph E. Krakora
Public Defender
Attorney for Defendant-Appellant

BY: /s/Stephen W. Kirsch
STEPHEN W. KIRSCH
Designated Counsel
Attorney I.D. No. 034601986

Date: December 6, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1796-22T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALTERIK ELLIS,

Defendant-Appellant.

Criminal Action

On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Hudson County.

Sat Below:
Hon. Angelo Servidio, J.S.C., and a Jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

ESTHER SUAREZ
HUDSON COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT
595 NEWARK AVENUE, 6TH FLOOR
JERSEY CITY, NEW JERSEY 07306

PATRICK F. GALDIERI, II
ATTORNEY ID NO. 134052014
ASSISTANT PROSECUTOR
HUDSON COUNTY PROSECUTOR'S OFFICE
(201) 795-6400
pgaldieri@hcpo.org

OF COUNSEL AND ON THE BRIEF

Dated: July 1, 2024

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF PROCEDURAL HISTORY 1

COUNTERSTATEMENT OF FACTS 3

LEGAL ARGUMENT 8

POINT I

DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED 8

POINT II

THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTION TO DEFENSE COUNSEL'S REMARKS IN SUMMATION CONCERNING THE FINGERPRINTS 15

POINT III

THE PROSECUTOR'S REMARKS IN SUMMATION WERE PERMISSIBLE AND, IN ANY EVENT, DID NOT DENY DEFENDANT A FAIR TRIAL 19

POINT IV

THE TRIAL COURT PROPERLY RESTRICTED DEFENDANT'S CROSS-EXAMINATION OF DETECTIVE BELLINI REGARDING A PENDING FBI INVESTIGATION 27

POINT V

THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN INSTRUCTING THE JURY ON ACCOMPLICE LIABILITY 32

POINT VI

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSPIRACY TO COMMIT MURDER 39

POINT VII

THE ERRORS ALLEGED BY DEFENDANT DID NOT INDIVIDUALLY OR CUMULATIVELY DEPRIVE HIM OF A FAIR TRIAL 44

POINT VIII

THE JUDGMENT OF CONVICTION SHOULD BE CORRECTED TO REFLECT THE MERGER OF COUNTS TWO AND SIX INTO COUNT ONE 45

CONCLUSION 46

TABLE OF APPENDIX

Table of video clips played at trial[1] Pa1-9

Judgment of conviction,
entered February 8, 2023 ..... Pa10-13

Judgment of conviction,
entered February 9, 2023 ..... Pa14-17

TABLE OF AUTHORITIES

Cases

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 29

[1] In accordance with this court's January 22, 2024 order on defendant's motion to compel production of video evidence, the State has included in its appendix a list of the video clips played at trial, labeled with the corresponding State exhibit numbers, and has provided a flash drive containing those video clips.

Eley v. State, 419 A.2d 384 (Md. 1980) 16

State v. A.L.A., 251 N.J. 580 (2022) 32

State v. Abrams, 256 N.J. Super. 390 (App. Div.),
certif. denied, 130 N.J. 395 (1992) 41

State v. Bass, 224 N.J. 285 (2016) 29

State v. Berry, 254 N.J. 129 (2023) 8, 9, 39

State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993) ..... passim

State v. Brown, 80 N.J. 587 (1979) 9

State v. Brown, 463 N.J. Super. 33 (App. Div.),
certif. denied, 244 N.J. 351 (2020) 9

State v. Burns, 192 N.J. 312 (2007) 33

State v. C.H., 264 N.J. Super. 112 (App. Div.),
certif. denied, 134 N.J. 479 (1993) 21

State v. Cagno, 211 N.J. 488 (2012) 11

State v. Camacho, 218 N.J. 533 (2014) 33

State v. Carbone, 10 N.J. 329 (1952) 11, 41

State v. Carrero, 229 N.J. 118 (2017) 33

State v. Carter, 91 N.J. 86 (1982) 20

State v. Cook, 300 N.J. Super. 476 (App. Div. 1996) 37

State v. Corby, 28 N.J. 106 (1958) 10

State v. Cotto, 471 N.J. Super. 489 (App. Div. 2022),
certif. denied, 252 N.J. 166 (2022) 39, 44

State v. Crumb, 307 N.J. Super. 204 (App. Div. 1997),
certif. denied, 153 N.J. 215 (1998) 35

State v. Dancyger, 29 N.J. 76 (1959) 9

State v. Dekowski, 218 N.J. 596 (2014) 9

State v. Denofa, 187 N.J. 24 (2006) 13

State v. Diaz, 144 N.J. 628 (1996) 45

State v. Feaster, 156 N.J. 1 (1998) 21

State v. Fornino, 223 N.J. Super. 531 (App. Div.),
certif. denied, 111 N.J. 570 (1988) 41

State v. Frost, 158 N.J. 76 (1999) 20, 21

State v. Galicia, 210 N.J. 364 (2012) 33

State v. Gorthy, 226 N.J. 516 (2016) 21

State v. Graziani, 60 N.J. Super. 1 (App. Div. 1959),
aff'd o.b., 31 N.J. 538 (1960) 11, 12

State v. Hardison, 99 N.J. 379 (1985) 45

State v. Hyman, 451 N.J. Super. 429 (App. Div. 2017),
certif. denied, 232 N.J. 301 (2018) 45

State v. Ingram, 196 N.J. 23 (2008) 34

State v. Jackson, 243 N.J. 52 (2020) 28, 29

State v. Jones, 242 N.J. 156 (2020) 10

State v. Jones, 308 N.J. Super. 174 (App. Div.),
certif. denied, 156 N.J. 380 (1998) 15

State v. Kamienski, 254 N.J. Super. 75 (App. Div.),
certif. denied, 130 N.J. 18 (1992) 11

State v. Kille, 471 N.J. Super. 633 (App. Div.),
certif. denied, 252 N.J. 228 (2022) 33

State v. Lavary, 152 N.J. Super. 413 (Law Div. 1977), rev'd on other grounds, 163 N.J. Super. 576 (App. Div. 1978), certif. denied, 81 N.J. 54 (1979) 43

State v. Lodzinski, 249 N.J. 116 (2021) 8, 9, 14

State v. Loftin, 146 N.J. 295 (1996) 15, 17

State v. Loyal, 386 N.J. Super. 162 (App. Div.), certif. denied, 188 N.J. 356 (2006) 16, 17

State v. Macchia, 253 N.J. 232 (2023) 33

State v. Madden, 61 N.J. 377 (1972) 41

State v. Maloney, 216 N.J. 91 (2013) 35, 37

State v. Mayberry, 52 N.J. 413 (1968) 9, 10

State v. McNeil-Thomas, 238 N.J. 256 (2019) 20, 21

State v. Miller, 205 N.J. 109 (2011) 24

State v. Muhammad, 359 N.J. Super. 361 (App. Div.), certif. denied, 178 N.J. 36 (2003) 15

State v. Munoz, 340 N.J. Super. 204 (App. Div.), certif. denied sub nom. State v. Pantoja, 169 N.J. 610 (2001) 21

State v. Nelson, 173 N.J. 417 (2002) 28, 33

State v. Norman, 151 N.J. 5 (1997) 34, 38

State v. Oliver, 316 N.J. Super. 592 (App. Div. 1998), aff'd, 162 N.J. 580 (2000) 37, 38

State v. Papasavvas, 170 N.J. 462 (2002) 9

State v. Pontery, 19 N.J. 457 (1955) 29

State v. Pressley, 232 N.J. 587 (2018) 19, 20

State v. R.B., 183 N.J. 308 (2005) 20, 39

State v. Ramirez, 246 N.J. 61 (2021) 40

State v. Reyes, 50 N.J. 454 (1967) 8

State v. Reynolds, 41 N.J. 163 (1963) 15

State v. Rodriguez, 365 N.J. Super. 38 (App. Div. 2003),
certif. denied, 180 N.J. 150 (2004)..... 19

State v. Rue, 296 N.J. Super. 108 (App. Div. 1996),
certif. denied, 148 N.J. 463 (1997).....passim

State v. Samuels, 189 N.J. 236 (2007).....10, 11, 12

State v. Sanchez-Medina, 231 N.J. 452 (2018)..... 44

State v. Santamaria, 236 N.J. 390 (2019) 24

State v. Savage, 172 N.J. 374 (2002) 34

State v. Scherzer, 301 N.J. Super. 363 (App. Div.),
certif. denied, 151 N.J. 466 (1997)..... 43

State v. Scott, 229 N.J. 469 (2017).....29, 30, 31

State v. Smith, 167 N.J. 158 (2001) 19

State v. T.J.M., 220 N.J. 220 (2015) 44

State v. Tate, 216 N.J. 300 (2013)..... 45

State v. Thomas, 256 N.J. Super. 563 (App. Div. 1992),
aff'd, 132 N.J. 247 (1993) 9

State v. Timmendequas, 161 N.J. 515 (1999)..... 19

State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011) 8

State v. Wakefield, 190 N.J. 397 (2007)..... 20

State v. Walker, 203 N.J. 73 (2010) 33

State v. Walton, 368 N.J. Super. 298 (App. Div. 2004) 34

State v. Watson, 224 N.J. Super. 354 (App. Div.),
certif. denied, 111 N.J. 620 (1988)..... 21

State v. Whitaker, 200 N.J. 444 (2009) 34

State v. Williams, 244 N.J. 592 (2021) 20

State v. Zembreski, 445 N.J. Super. 412 (App. Div. 2016) 9

United States v. Abel, 469 U.S. 45 (1984) 29, 30

Statutes

N.J.S.A. 2C:5-1 42

N.J.S.A. 2C:5-2 .....1, 40, 42

N.J.S.A. 2C:11-3 1

N.J.S.A. 2C:12-1 1

N.J.S.A. 2C:20-3 1

N.J.S.A. 2C:39-4 1

N.J.S.A. 2C:39-5 1

N.J.S.A. 2C:43-7.2 2

Rules

Rule 1:7-2 33

Rule 2:10-2.....33, 39

Rule 3:18-1..... 8

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On January 30, 2019, defendant Alterik Ellis was charged in a sixteen-count Hudson County indictment, No. 19-01-0118, with first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (count one); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:11-3(a) (count two); three counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts three through five); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count six); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count seven); and third-degree theft, N.J.S.A. 2C:20-3(a) (count eight). (Da1-5). Codefendant Travis Defoe was charged in counts nine through sixteen with the same offenses as defendant. (Da3-5).

Over eleven days from June 29 to July 21, 2022, defendant and Defoe were tried together before the Honorable Angelo Servidio, J.S.C., and a jury. (35T to 37T, 40T to 47T). At the close of the State's case, defendant moved for a judgment of acquittal on all eight counts against him. (43T164-9 to 170-23). Judge Servidio granted the motion as to counts three through five and count seven, but denied it as to counts one, two, six, and eight. (44T7-20 to 24-19). Following deliberations, the jury returned a verdict finding defendant guilty on counts one, two, six, and eight. (Da6-8; 47T16-11 to 20-16).

On January 27, 2023, Judge Servidio sentenced defendant to an aggregate prison term of thirty-five years, imposing four concurrent terms — a thirty-five-year term with a thirty-year parole disqualifier on count one; a twenty-year term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on count two; a seven-year term with a three-year parole disqualifier on count six; and a four-year term on count eight. (50T69-18 to 71-1). A memorializing judgment of conviction was entered on January 31, 2023, and amended on February 8 and 9, 2023. (Da9-12; Pa10-17).[2]

On February 21, 2023, defendant filed this appeal from his convictions. (Da13-16).

[2] "Pa" refers to the State's appendix.

COUNTERSTATEMENT OF FACTS

The following facts are derived from the trial record.

On October 26, 2018, at approximately 11:30 p.m., gunshots were fired toward the front porch area of 76 Brinkerhoff Street in Jersey City by a person leaning out of the open window of a white car. (35T100-5 to 10; 41T161-4 to 169-20). The Jersey City Police Department was dispatched to the address and members of multiple units responded. (35T100-5 to 7, 105-19 to 22). Upon arrival, officers found a small crowd of people in front of the building and seventeen-year-old Jane Saunders lying in a pool of blood in the entrance of the vestibule, dead from a gunshot wound to the head. (35T101-18 to 23, 120-13 to 21; 40T27-14, 29-1 to 4). Saunders's head was facing the interior of the vestibule, with her feet facing the exterior door; the bullet had entered her head from the left side, slightly above her ear, and exited on the right side of her head "behind her cheek." (35T120-13 to 21; 40T23-1 to 24-19). A second victim, who had been in 76 Brinkerhoff, Apartment 1, was taken from the scene by ambulance. (35T108-3 to 109-22).

The scene was turned over to the Hudson County Prosecutor's Office for investigation. (35T102-2 to 13). During the ensuing investigation, Detectives Daniel Bellini and Maegan Larsen of the Prosecutor's Office Crime Scene Unit recovered nine spent nine-millimeter shell casings from the street outside 76

Brinkerhoff Street, discovered a projectile and projectile fragment in the vestibule, and noted multiple bullet holes in and around the building's front door, vestibule, and staircase. (35T160-24 to 180-13; 36T8-22 to 63-25, 70-24 to 72-8, 121-18 to 19). It was later determined that all nine spent shell casings were fired from the same gun. (43T83-14 to 16, 93-23 to 94-16). In addition to the physical evidence recovered in and around the crime scene, detectives also recovered surveillance footage from various locations.

Surveillance video from the area of Bergen and Lexington Avenues in Jersey City showed defendant and Defoe together around 5:30 p.m. on afternoon of the shooting, and again shortly before the shooting later that night. (40T164-12 to 20, 165-4 to 12; Pa1 at Clips 1-3). Around 11:19 p.m. the two men were captured on surveillance videos walking down Lexington Avenue, turning onto Bergen Avenue, and walking toward Oak Street. Minutes later, the two men are captured on video on Oak Street, walking in lockstep but on opposite sides of the street before they each suddenly turn direction at the same time and walk toward a white car parked in the area of Oak Street and Sackett Street, where they are captured near a white car parked on the corner of Oak Street and Sackett Street. (43T7-15 to 24; Pa6 at Clip 42). The two men wait and, when the area is clear of bystanders, get into the white car — defendant in the passenger seat and Defoe in the driver's seat.

(43T7-15 to 24; Pa6 at Clip 42). The car starts but does not move for several minutes, until approximately 11:28 p.m. (43T7-15 to 24; Pa6 at Clip 42). This same vehicle is then captured on surveillance footage travelling several blocks toward 76 Brinkerhoff Street, turning onto Brinkerhoff just before the gunshots are heard, and then traveling away from 76 Brinkerhoff Street after the gunshots are heard. (Pa1-2, 6-7 at Clips 2, 8-10, 43-45).

At the time of the shooting, Tacora Gordon, a resident of 76 Brinkerhoff Street, was on the third floor when she heard gunshots. (41T159-5 to 160-6, 162-5 to 25). After hearing the first shot, she ran to the window to look for her brother, who had been out front. (41T163-16 to 22). In the chaos outside, she testified she saw three cars — one black car, one white Pontiac, and another white car that was later shown to her by police — and a man shooting toward 76 Brinkerhoff while hanging mid-waist from the window of a white car. (41T163-24 to 165-15). That car then drove off "towards Bergen. You go straight, it turns into another block, which is Bentley." (41T174-2 to 8, 175-9 to 10). When she was interviewed by the Hudson County Prosecutor's Office a couple days later, she was shown a picture of the white car that had been tracked through surveillance footage and identified it as one of the white cars she saw on the block the night of the shooting. (41T166-2 to 169-20). Though Gordon testified that she was not sure which white car she had seen the shooter

hanging out of, surveillance footage shows only one white car on the street at the time of the shooting — the white car that defendant and Defoe were captured getting into and that was thereafter captured traveling to the scene of the shooting. (41T164-23 to 165-3; Pa6-7 at Clips 43-45).

The same white vehicle was then captured stopping short on Bentley Avenue, where defendant got out. (Pa2 at Clip 12). Defendant is seen walking toward his apartment building at 16-20 Lexington Avenue, where he is captured on video at 11:39 p.m. in the hallway making a shooting gesture with his hands before going into his apartment, where he stays for a couple of minutes before leaving in different clothes. (Pa2-3 at Clips 14-23).

Meanwhile, the white car is captured on surveillance footage on Communipaw Avenue, a road that continues to Newark, and is later captured being parked on the corner of Lexington and Market Streets in Newark at 11:46 p.m. (41T39-2 to 40-11; Pa3-4 at Clips 24, 26). Additional footage from the area of Newark Penn Station shortly thereafter shows Defoe walking on Lexington Street toward Newark Penn Station and getting on a PATH train heading toward Journal Square in Jersey City. (Pa4, 6 at Clips 27, 38-41).

On October 29, 2018, the white car depicted throughout surveillance footage was recovered from Lexington and Market Street in Newark, the same location depicted in the surveillance footage where the vehicle was abandoned

by defendant. (37T48-12 to 14). The vehicle was found to belong to Son Doan, who had reported it stolen from a restaurant parking lot in Newark before the shooting. (37T79-6 to 8; 41T144-10 to 25). The car — a white 1999 Toyota Camry — was distinctive, as it was missing the front driver's side hubcap and the front driver's side door was missing a portion of the handle. (37T48-14, 65-12 to 17, 73-9).

Based on these facts, the jury returned its verdict finding defendant guilty on counts one, two, six, and eight of the indictment. (Da6-8; 47T16-11 to 20-16).

LEGAL ARGUMENT

POINT I

DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED.

Defendant argues that his "motion for a judgment of acquittal on the homicide, conspiracy, and unlawful-purpose weapons counts should have been granted because there was insufficient evidence in the State's case to prove those charges." (Db11). For the reasons discussed below, this argument lacks merit and should be rejected.

"Rule 3:18-1 provides that a court must enter a judgment of acquittal after the close of the State's case . . . if 'the evidence is insufficient to warrant a conviction.'" State v. Lodzinski, 249 N.J. 116, 143 (2021). The question on a motion for a judgment of acquittal under Rule 3:18-1 "is whether, viewing the State's evidence in its entirety, . . . and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Berry, 254 N.J. 129, 150 (2023) (quoting State v. Reyes, 50 N.J. 454, 459 (1967)). "No distinction is made between direct and circumstantial evidence," State v. Tindell, 417 N.J. Super. 530, 549 (App. Div. 2011), and "the court 'is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed

most favorably to the State.'" State v. Brown, 463 N.J. Super. 33, 48 (App. Div.) (quoting State v. Papasavvas, 170 N.J. 462, 521 (2002)), certif. denied, 244 N.J. 351 (2020). The court must be mindful "that jurors 'may draw an inference from a fact whenever it is more probable than not that the inference is true,' and that 'the veracity of each inference need not be established beyond a reasonable doubt.'" Lodzinski, 249 N.J. at 144 (quoting State v. Brown, 80 N.J. 587, 592 (1979)).

An appellate court "review[s] the record de novo in assessing whether the State presented sufficient evidence to defeat an acquittal motion," State v. Dekowski, 218 N.J. 596, 608 (2014), and "appl[ies] the same standard as the trial court." State v. Zembreski, 445 N.J. Super. 412, 430 (App. Div. 2016).

Here, as Judge Servidio properly found, there was sufficient evidence to defeat a motion for a judgment of acquittal on the murder, conspiracy, and unlawful-purpose charges. To be sure, the State's case against defendant was circumstantial, but "circumstantial evidence often can be as persuasive and powerful as direct evidence and sufficient to support a conviction." Lodzinski, 249 N.J. at 146-47. In fact, "[c]ircumstantial evidence may be 'more certain, satisfying and persuasive than direct evidence.'" State v. Thomas, 256 N.J. Super. 563, 570 (App. Div. 1992) (quoting State v. Dancyger, 29 N.J. 76, 84 (1959)), aff'd, 132 N.J. 247 (1993); see also State v. Mayberry, 52 N.J. 413,

437 (1968) ("[I]ndeed in many situations circumstantial evidence may be 'more forceful and more persuasive than direct evidence.'" (quoting State v. Corby, 28 N.J. 106, 119 (1958))). "In considering circumstantial evidence, [courts] follow an approach 'of logic and common sense. When each of the interconnected inferences [necessary to support a finding of guilt beyond a reasonable doubt] is reasonable on the evidence as a whole, judgment of acquittal is not warranted.'" State v. Jones, 242 N.J. 156, 168 (2020) (second alteration in original) (quoting State v. Samuels, 189 N.J. 236, 246 (2007)).

First, relevant to the charge of conspiracy to commit murder, the surveillance footage showed that defendant and Defoe had been together throughout the day of the shooting and in the minutes leading up to the shooting. In those final minutes, they were seen walking several blocks to the stolen car they used to commit the crime, and their actions during that leadup showed that they shared a common criminal plan. While they walked together and almost in lock step, they walked on opposite sides of the street, they abruptly changed course at the same time to head back toward the car, and they waited for the coast to be clear of bystanders and passersby before entering the car, with defendant in the passenger seat and Defoe in the driver's seat, then waited several more minutes before starting the car and driving off. They drove an exceedingly short distance to the scene of the murder, captured on

video arriving almost contemporaneous with its commission, then speeding off. Just a couple blocks away, the car stopped short, defendant got out, and each man took steps to cover their tracks: defendant went home to change his clothes, while Defoe drove to a desolate area of Newark to abandon the car before immediately returning to Jersey City.

While there were no definitive statements nor blueprints offered to prove conspiracy, no such thing is necessary for a jury to find defendant guilty of conspiracy to commit murder. Our courts have long held that "[a]n implicit or tacit agreement may be inferred from the facts and circumstances," State v. Kamienski, 254 N.J. Super. 75, 94 (App. Div.), certif. denied, 130 N.J. 18 (1992), as co-conspirators often act in silence and secrecy. State v. Cagno, 211 N.J. 488, 512 (2012). And, "[w]hile certain actions of each of the defendants, when separated from the main circumstances and the rest of the case, may appear innocent, that is not significant and undoubtedly appears in every case of criminal conspiracy." Samuels, 189 N.J. at 246 (quoting State v. Graziani, 60 N.J. Super. 1, 13-14 (App. Div. 1959), aff'd o.b., 31 N.J. 538 (1960)). Therefore, proof of a conspiracy need not be established by direct evidence, but is generally a matter of inference made by the jury from the circumstances of each case. State v. Carbone, 10 N.J. 329, 341-42 (1952).

In light of the evidence presented at trial, and with the benefit to the State of all favorable testimony and inferences that could have been drawn therefrom, there was ample circumstantial evidence to prove that defendant and Defoe engaged in a conspiracy to commit murder. That a walk with a known associate or speeding away from a crime scene could be interpreted innocently "is not significant." Samuels, 189 N.J. at 246 (quoting Graziani, 60 N.J. Super. at 13). Rather, when considered in light of the main circumstances in the case, the actions of defendant captured on video, including the coordination and nature of defendant's actions and interactions with Defoe before and immediately following the murder, undoubtedly provided enough evidence for a reasonable jury to conclude that the two men engaged in a conspiracy to commit murder. See ibid.

The evidence was likewise sufficient to establish that defendant did indeed commit that murder. In addition to the evidence discussed above, the State also presented the testimony of Tacora Gordon, who actually saw the shooter hanging from the window of the white vehicle in front of 76 Brinkerhoff. And while she testified that she saw two white cars — the white Camry and an unidentified white Pontiac — and could not be sure which the shooter was in, the video evidence showed only one white vehicle on Brinkerhoff at the time of the shooting: the white Camry that defendant and

Defoe were seen entering minutes before the shooting, that was then traced through surveillance footage driving to the scene, even turning on the block of the shooting at the time of its commission, and that defendant was seen getting out of moments after the shooting mere blocks away in the direction the shooter's vehicle was seen driving off in. And when police processed the scene, they recovered nine spent shell casings from the street in front of 76 Brinkerhoff and later determined that all nine were fired from the same gun. And while Defoe went to dump the vehicle in Newark and defendant went to change out of the clothes he had been wearing before once again leaving his house — itself an odd action for midnight — he was also seen making a shooting gesture. In short, the actions of defendant and Defoe leading up to and immediately following the shooting, combined with the excessive number of shots fired, were more than sufficient to establish that they committed the shooting and did so with the necessary intent. See State v. Denofa, 187 N.J. 24, 40 (2006) (noting that "[t]he material elements of murder that must be proved are that a defendant purposely or knowingly caused death or serious bodily injury resulting in death").

Finally, as to the charge of possession of a weapon with an unlawful purpose, the same evidence that established that defendant conspired to commit murder and indeed committed that murder — a shooting — was more

than sufficient to establish that he also possessed the gun necessary to commit that shooting and did so with the requisite unlawful purpose.

In sum, despite defendant's claims to the contrary, the evidence in this case is a far cry from that in Lodzinski and was more than sufficient to prove the crimes charged and defeat a motion for a judgment of acquittal. Indeed, while the actual shooting was not captured on video, almost every other step leading up to it and immediately following it was, and the evidence as a whole overwhelmingly established that defendant was guilty of conspiracy to commit murder, murder, and possession of a weapon for an unlawful purpose.

POINT II

THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTION TO DEFENSE COUNSEL'S REMARKS IN SUMMATION CONCERNING THE FINGERPRINTS.

Defendant contends that Judge Servidio "improperly prevented defense counsel from arguing" in summation "that there was no fingerprint evidence before the jury that linked defendant or [Defoe] to the Toyota Camry that the State claimed was the vehicle in which the shooter and his accomplice drove to and from the scene." (Db21). For the reasons discussed below, this contention lacks merit and should be rejected.

"Trial judges have broad discretion in setting the permissible boundaries of summations." State v. Muhammad, 359 N.J. Super. 361, 381 (App. Div.), certif. denied, 178 N.J. 36 (2003). "The scope of [a] defendant's summation argument must not exceed the 'four corners of the evidence.'" State v. Loftin, 146 N.J. 295, 347 (1996) (quoting State v. Reynolds, 41 N.J. 163, 176 (1963)). "The 'four corners' include the evidence and all reasonable inferences drawn therefrom." State v. Jones, 308 N.J. Super. 174, 185 (App. Div.) (quoting Loftin, 146 N.J. at 347), certif. denied, 156 N.J. 380 (1998). Therefore, "it is proper for a trial court to preclude references in closing arguments to matters that have no basis in the evidence." Ibid.

In State v. Loyal, this court found reversible error in the trial court's inclusion of a curative instruction that effectively neutralized a defense attorney's closing argument, which had asserted that the State's unexplained failure to present fingerprint evidence linking the defendant to the murder weapon gave rise to a reasonable doubt that the defendant had committed a murder. 386 N.J. Super. 162, 167-68, 175 (App. Div.), certif. denied, 188 N.J. 356 (2006). Noting that the issue was one of first impression in New Jersey, this court agreed "with the views expressed by the Maryland Court of Appeals, that if 'the State fail[s] to produce [fingerprint] evidence and fail[s] to offer any explanation for that failure . . . it is not unreasonable to allow the defendant to call attention to its failure to do so.'" Id. at 173 (alterations in original) (quoting Eley v. State, 419 A.2d 384, 387 (Md. 1980)). However, this court also recognized that

> [t]he right to comment on the lack of fingerprint evidence is, of course, not without limits. Thus, without evidence to support the contention, [a] defendant cannot argue that the failure to obtain fingerprints did not comply with good police practice, or that if fingerprints had been obtained, they would have exculpated [him].
>
> [Ibid.]

This case is distinguishable from Loyal, as here, fingerprint evidence was introduced and testified to; it was the explanation of the evidence that was

excluded on objection of defense counsel. (35T92-13 to 98-23, 101-3 to 120-15). Defense counsel here was not seeking to comment on the complete lack of fingerprint evidence as was done in Loyal, but was rather seeking to elude to the same statements which the excluded expert would have made. Counsel is not permitted to seek the exclusion of testimony from the four corners of the evidence and then refer to the same in its summation on the grounds that it did not exist. That is not the proposition which Loyal stands for. Thus, with Loyal inapplicable to this case, the overarching rule that summations must be confined to the "four corners" of the evidence controls. Loftin, 146 N.J. at 357. As a result, Judge Servidio properly sustained the State's objection to defense counsel's statement.

And, in any event, any error by Judge Servidio in sustaining the State's objection was harmless. In addition to the above-described overwhelming circumstantial evidence establishing defendant's guilt, immediately after sustaining the State's objection, defendant's trial counsel argued:

> [H]ow about this? You saw what Mr. Toth told you it takes to load a handgun. Bullets picked up meticulously placed into a clip, clip into the gun, hands, fingers all over them. Did anybody test the shell casings for fingerprints or DNA? Obviously, the answer is no. And around, and around we go. But honestly, that's enough. It's enough already. It's reasonable doubt[.]
>
> [44T93-4 to 11.]

Defendant's trial counsel was therefore able to argue to the jury about the lack of fingerprint evidence as to the shell casings found at the scene. There was no reversible error here.

POINT III

THE PROSECUTOR'S REMARKS IN SUMMATION WERE PERMISSIBLE AND, IN ANY EVENT, DID NOT DENY DEFENDANT A FAIR TRIAL.

Defendant argues that the prosecutor incorrectly quoted Gordon as testifying that "[i]f you keep going that way the white car that I saw this person shooting out of goes to Bentley," and that this misstatement is grounds for reversal. (Db25-29). However, as the prosecutor's statement was not intended to be a direct quotation of Gordon's testimony, there was no such error. And even if there were, any such error was harmless and is not grounds for reversal.

"Prosecutors can sum up cases with force and vigor, and are afforded considerable leeway so long as their comments are 'reasonably related to the scope of the evidence presented.'" State v. Pressley, 232 N.J. 587, 593 (2018) (quoting State v. Timmendequas, 161 N.J. 515, 587 (1999)). "Prosecutors may not make inaccurate factual or legal assertions during summation, and they must confine their remarks to evidence revealed during trial, and reasonable inferences to be drawn from the evidence." State v. Rodriguez, 365 N.J. Super. 38, 48 (App. Div. 2003) (citing State v. Smith, 167 N.J. 158, 178 (2001)), certif. denied, 180 N.J. 150 (2004). "In other words, as long as the prosecutor 'stays within the evidence and the legitimate inferences therefrom,'

'[t]here is no error.'" State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (alteration in original) (first quoting State v. R.B., 183 N.J. 308, 330 (2005); and then quoting State v. Carter, 91 N.J. 86, 125 (1982)). It is ultimately "for the jury to decide whether to draw the inferences the prosecutor urged." Ibid. (quoting Carter, 91 N.J. at 125).

Furthermore, "even when a prosecutor's remarks stray over the line of permissible commentary, [a reviewing court's] inquiry does not end." State v. Williams, 244 N.J. 592, 608 (2021) (quoting McNeil-Thomas, 238 N.J. at 275). "A defendant's allegation of prosecutorial misconduct requires the court to assess whether [he] was deprived of the right to a fair trial." Pressley, 232 N.J. at 593. To warrant reversal, "the prosecutor's misconduct must be 'clearly and unmistakably improper' and 'so egregious' that it deprived [the] defendant of the 'right to have a jury fairly evaluate the merits of his defense.'" Id. at 593-94 (quoting State v. Wakefield, 190 N.J. 397, 437-38 (2007)).

"In deciding whether prosecutorial conduct deprived a defendant of a fair trial, 'an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.'" Williams, 244 N.J. at 608 (quoting State v. Frost, 158 N.J. 76, 83 (1999)). Among the factors to be considered in making that decision are: "(1) whether defense counsel made timely and proper objections

to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Ibid. (quoting Frost, 158 N.J. at 83). "Notably, a determination as to whether a prosecutor's comments had the capacity to deprive [the] defendant of a fair trial must be made 'within the context of the trial as a whole.'" McNeil-Thomas, 238 N.J. at 276 (quoting State v. Feaster, 156 N.J. 1, 64 (1998)).

"Generally, remarks by a prosecutor, made in response to remarks by opposing counsel, are harmless." State v. C.H., 264 N.J. Super. 112, 135 (App. Div.), certif. denied, 134 N.J. 479 (1993); see also State v. Munoz, 340 N.J. Super. 204, 216 (App. Div.) ("A prosecutor is permitted to respond to an argument raised by the defense so long as it does not constitute a foray beyond the evidence adduced at trial."), certif. denied sub nom. State v. Pantoja, 169 N.J. 610 (2001). In addition, generally, a prosecutor's "'fleeting and isolated' remark is not grounds for reversal." State v. Gorthy, 226 N.J. 516, 540 (2016) (quoting State v. Watson, 224 N.J. Super. 354, 362 (App. Div.), certif. denied, 111 N.J. 620 (1988)).

After the jury was sworn but before the parties delivered their opening statements, Judge Servidio instructed the jury as follows:

> At the conclusion of the testimony the attorneys will speak to you, once again, in summation. . . . [A]t

> that time they will present . . . to you their final arguments based upon their respective recollections of the evidence. Again, this is not evidence, but their recollection as to the evidence. It is your recollection as to the evidence presented that is controlling.
>
> [35T41-8 to 15.]

In his summation, the prosecutor made the following remarks regarding Gordon's testimony:

> Now Tacora Gordon testified and, again, there's a credibility instruction that applies to all witnesses. You could draw your own conclusions about any witness and Miss Gordon, in particular. She is a resident of 76 Brinkerhoff Street. I would describe her testimony as demonstrating an imperfect memory. And there were other witnesses in this case with imperfect memories that had to be shown documents to refresh their recollection. She was one of them. She heard gunfire shortly after 11:30 p.m., and she didn't equivocate on that. She said gunfire. What you have to do is examine how Tacora Gordon's testimony fits in the facts of the case. Now, again, her testimony is part of the record. Consider all of it. Think about all of it. But these are a couple quotes from her. "I seen, um, I don't really remember exactly, but what I seen I seen two white cars, but when I looked out the window I seen someone hanging mid waist from -- I'm not sure whether it was the white and white Pontiac or the white car that you guys actually" -- I think the rest of that quote might be shown, but, again, your recollection of that testimony controls. She goes on to say, "That person was shooting. I backed up from the window after that." She says, "Yes, I said towards Bergen. Towards Bergen. You go straight, it turns into another block, which is Bentley." Put this evidence together now. Does one piece of evidence make sense of another piece of evidence. Does that

> make sense of other pieces of evidence? We're starting to see it. This is someone who lived on that street in 2018, who was able to testify about the configuration of the streets. And she said, "If you keep going that way the white car that I saw this person shooting out of goes to Bentley."
>
> [44T144-21 to 146-3.]

Both defendants objected, with Defoe's attorney specifying her belief that the prosecutor had "misstate[d] the testimony." (44T146-4 to 7). The judge immediately instructed the jury, "The jurors' memory of the testimony will prevail. You are to determine what the facts are." (44T146-8 to 10).

Shortly thereafter, in his final instructions to the jury, Judge Servidio again cautioned:

> Arguments, statements, remarks, openings and summations of [c]ounsel are not evidence, must not be treated as evidence. While the attorneys may point out what they think [is] important in this case[,] you must rely solely upon your understanding and recollection of the evidence that was admitted during the trial. Whether or not either defendant has been proven guilty beyond a reasonable doubt is for you to determine based on all the evidence presented during the trial. Any comments by [c]ounsel are not controlling. It is your sworn duty to arrive at a . . . just conclusion after considering all the evidence which was presented during the course of the trial.
>
> [44T157-20 to 158-7.]

In short, the jury was instructed several times that the attorneys' comments in summation were not evidence.[3] It is presumed "'that the jury faithfully followed [the] instruction[s]' it received, and was aware that the prosecutor's remarks were argumentative, not evidentiary, in nature." State v. Santamaria, 236 N.J. 390, 413 (2019) (alterations in original) (quoting State v. Miller, 205 N.J. 109, 126 (2011)).

When taken in its proper context, the language used by the prosecutor that was objected to is more properly interpreted as a summary of the significance of Gordon's testimony, not intended to be a direct quote of her testimony. As such, it is not an unfair interpretation of Gordon's testimony. In fact, a fair reading of Gordon's testimony shows that she did testify to seeing the white car from which the suspect shot from go towards Bergen:

> Q: -- did you testify before that you saw somebody shooting from a white car?
>
> A: Yes.
>
> Q: And that car, in particular, do you recall where it went?

[3] Shortly before the prosecutor commented on Ms. Gordon's testimony, Judge Servidio responded to a separate objection during the prosecutor's summation by instructing the jury that "the arguments and summations of all [c]ounsel is not evidence in the case, it's their theory of the case. It's your recollection and your determination of the facts, ultimately, that matter. Okay? And I'll instruct you on that later on." (44T135-2 to 7).

A: One of the white cars that I seen on the block, one was riding towards Bergen.

Q: Did you -- so where is Bergen in relation to Brinkerhoff?

A: Um --

Q: Let me rephrase it. You live at 76 Brinkerhoff?

A: Yes.

. . . .

Q: Did you see that car go anywhere else other than that street? If you remember.

A: No. I don't remember.

. . . .

Q: Would referring to your -- the transcript of your statement refresh your recollection? Or could it?

A: It -- it can.

Q: Showing you S-71 for identification. Please take a look at that, go through it, tell me if that refreshes your recollection as to may question?

(Witness complies.)

A: Yes. I said towards Bergen. You go straight, it turns into another block, which is Bentley.

[41T174-2 to 175-10.]

A clear, full, and fair reading of Gordon's testimony shows the prosecutor refreshing her recollection as to the direction she saw the white car

she "saw somebody shooting from" go after the shooting. It is true that Gordon expressed uncertainty during her testimony of which white vehicle she saw the shooting occur from, but she was clear about the direction the shooter's car went. The meaning of her testimony here is clear: she saw the particular white vehicle the prosecutor asked about — the vehicle she saw someone shooting from — go "towards Bergen" on a street that continues onto Bentley. (44T175-9 to 10).

But even if the single fleeting comment in the prosecutor's lengthy summation is interpreted as being an incorrect quotation of Gordon's testimony, any error is harmless. Even if it was an incorrect quotation, the "quotation" was a fair and accurate interpretation of the meaning of Gordon's testimony, thereby significantly minimizing any harm caused by any such error. And even so, the jury was repeatedly instructed that the arguments of counsel are not evidence and that it is their memory of the testimony that controls — in the initial instructions before closing, immediately after the complained-of language during the prosecutor's summation, and in the final jury instructions. It is presumed the jury followed those instructions.

In sum, there was no error in the prosecutor's characterization of Gordon's testimony in his summation but, even if there were, any such error was harmless and not grounds for reversal.

POINT IV

THE TRIAL COURT PROPERLY RESTRICTED DEFENDANT'S CROSS-EXAMINATION OF DETECTIVE BELLINI REGARDING A PENDING FBI INVESTIGATION.

Defendant argues that Judge Servidio's ruling precluding him and Defoe from cross-examining Detective Bellini about a pending FBI investigation into his alleged mishandling of evidence prevented them from probing Bellini's potential bias and thereby violated defendant's rights of confrontation and due process. (Db29-33). Because the investigation had no bearing on the relationship between Bellini and the State — only Bellini and the federal government — it presented no potential bias and the judge properly precluded Defoe and defendant from questioning him on the matter.

In her cross-examination of Detective Bellini, Defoe's trial counsel asked whether he was under investigation by the FBI. (36T170-12 to 13). The State immediately objected and asked to be heard at sidebar. (36T170-14 to 15). Defoe's trial counsel argued that the pending FBI investigation was within the proper scope of cross examination for two reasons: because Bellini was "under investigation relating to his ability to handle and properly store evidence, which goes to the heart of his role in this case" and because it spoke to Bellini's potential bias. (36T171-9 to 11, 172-10 to 173-25). Defendant's trial counsel did not present any additional argument, nor did he clearly join in

the arguments of Defoe's trial counsel. The State argued that cross-examining Bellini regarding the pending FBI investigation was an improper attempt to smear Bellini's reputation based on unsubstantiated claims of misconduct because the investigation was pending at the time and did not relate to the case at issue. (36T170-21 to 171-24, 174-11 to 25). Noting that Defoe's counsel had not proffered any evidence establishing their claims regarding the scope of the pending investigation that would justify cross-examination on the subject, the judge sustained the State's objection and instructed the jury to disregard the question by Defoe's counsel. (36T172-3 to 15, 175-3 to 176-9).

The State's re-raised the issue at the next day of trial, moving to bar any party from asking witnesses about any pending investigation, arguing that it was an improper attempt to impeach the credibility of a witness in the absence of a specific instance of misconduct. (37T15-15 to 16-23). Judge Servidio confirmed his prior ruling on the issue and admonished defense counsel not to attempt to raise the issue again with any witness. (37T18-2 to 19-4).

An appellate court "review[s] evidentiary rulings under an abuse of discretion standard." State v. Jackson, 243 N.J. 52, 64 (2020). "[A] trial court is afforded 'considerable latitude regarding the admission of evidence,' and [should] be reversed only if the court abused its discretion." Id. at 65 (alterations in original) (quoting State v. Nelson, 173 N.J. 417, 470 (2002)).

"The Confrontation Clause permits a defendant to explore, in cross-examination, a prosecution witness's alleged bias." State v. Bass, 224 N.J. 285, 301 (2016). Bias has been defined as "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." State v. Scott, 229 N.J. 469, 482 (2017) (quoting United States v. Abel, 469 U.S. 45, 47 (1984)). Thus, "[t]he query, as it relates to bias, is 'the relationship between [the State or the defendant] and a witness." Ibid. (quoting Abel, 469 U.S. at 52).

In the end, "a defendant's confrontation rights do not entitle counsel 'to roam at will under the guise of impeaching the witness.'" Bass, 224 N.J. at 302 (quoting State v. Pontery, 19 N.J. 457, 473 (1955)). Thus, a trial court may "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). "The trial court shall determine 'whether the circumstances fairly support an inference of bias' or whether the proposed examination raises any concerns." Jackson, 243 N.J. at 66 (quoting Bass, 224 N.J. at 303).

On appeal, defendant argues that the judge's ruling precluding the defense from cross-examining Bellini about the pending FBI investigation only

"because the defense had an absolute right to cross-examine Bellini on matters of bias." (Db30). He is mistaken.

Cross-examining Detective Bellini regarding the pending FBI investigation was not proper to establish bias for the simple fact that the investigation was being conducted by the FBI and not the State of New Jersey. After all, bias is "the relationship between a party and a witness," and the federal government was not a party to this state criminal action. Scott, 229 N.J. at 482 (emphasis added) (quoting Abel, 469 U.S. at 47). The State of New Jersey has no control over the actions or investigations of the FBI, and whether the State was or was not satisfied with Bellini's testimony could have no impact on the outcome of that investigation. This was not an instance in which the witness had entered into a plea deal for the reduction or dismissal of charges against him in exchange for his testimony, nor was it an instance in which the witness may have been hoping for such a deal, such that he would mold his testimony in an attempt to curry favor with the entity investigating him. In short, because the "figurative sword of Damocles" defendant relies on was not wielded by the State but by the FBI, if at all, there was no potential bias to be probed here. (Db31).

Moreover, to the extent that the defense sought to cross-examine Bellini on the pending FBI investigation to support their suggestion that he may have

mishandled evidence in this case, that too would have been improper. Scott, 229 N.J. at 481. And if this was the avenue the defense wished to go down — to suggest Bellini may have mishandled evidence in this case — they were free to do so by extensively cross-examining him regarding his handling of the evidence in this particular case, as they did. The defense therefore was not deprived of the opportunity to effectively cross-examine the State's witness or unduly prejudiced in any way by the judge's ruling.

As the judge was correct to preclude defense counsel from cross-examining Detective Bellini about the pending FBI investigation and defendant was not deprived of the opportunity to effectively cross-examine him, defendant's claim of error should be rejected and is not a basis for reversal.

POINT V

THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN INSTRUCTING THE JURY ON ACCOMPLICE LIABILITY.

Defendant argues for the first time on appeal that Judge Servidio erred in instructing the jury on accomplice liability because the charge lacked specific language required under State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993). (Db34-40). For the reasons discussed below, this argument lacks merit and should be rejected.

During the charge conference, defendant and Defoe both argued that only the "mere presence" portion of the accomplice-liability charge should be given, not the charge as a whole, because the State did not proceed on a theory of accomplice liability. (44T44-19 to 45-10). Nevertheless, the judge instructed the jury on the issue of accomplice liability consistent with the model charge, albeit that for cases not involving lesser-included offenses. (44T200-13 to 206-14); see Model Jury Charge (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6), Charge One" (rev. June 7, 2021). Neither defendant objected to this version of the accomplice charge being read at the charge conference, at the time it was given, or at any point thereafter

"Appropriate and proper jury instructions are essential for a fair trial," State v. A.L.A., 251 N.J. 580, 591 (2022), and "erroneous instructions on

material points are presumed to be reversible error." State v. Carrero, 229 N.J. 118, 127 (2017) (quoting Nelson, 173 N.J. at 446). But "a party may generally not 'urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict.' In the absence of such objections, [appellate courts] review challenged jury instructions for plain error." State v. Macchia, 253 N.J. 232, 251 (2023) (quoting R. 1:7-2).

Under the plain-error standard, an appellate court "may reverse only if the unchallenged error was 'clearly capable of producing an unjust result.'" State v. Camacho, 218 N.J. 533, 554 (2014) (quoting R. 2:10-2). In the context of jury instructions, "plain error requires demonstration of '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Kille, 471 N.J. Super. 633, 641 (App. Div.) (alteration in original) (quoting State v. Burns, 192 N.J. 312, 341 (2007)), certif. denied, 252 N.J. 228 (2022). "The error must be considered in light of the entire charge and must be evaluated in light 'of the overall strength of the State's case.'" State v. Galicia, 210 N.J. 364, 388 (2012) (quoting State v. Walker, 203 N.J. 73, 90 (2010)).

"When a defendant might be convicted as an accomplice, the trial court must give clear, understandable jury instructions regarding accomplice liability." State v. Walton, 368 N.J. Super. 298, 306 (App. Div. 2004) (citing State v. Savage, 172 N.J. 374, 388 (2002)). In such a case, the jury must be instructed that to find the defendant guilty of a crime as an accomplice, "it must find that he 'shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.'" Savage, 172 N.J. at 388 (quoting Bielkiewicz, 267 N.J. Super. at 528); see also State v. Whitaker, 200 N.J. 444, 458 (2009) ("An accomplice is only guilty of the same crime committed by the principal if he shares the same criminal state of mind as the principal." (emphasis omitted)).

"[J]ury instructions on accomplice liability must include an instruction that a defendant can be found guilty as an accomplice of a lesser[-]included offense even though the principal is found guilty of the more serious offense." State v. Norman, 151 N.J. 5, 37 (1997). Thus, "when an alleged accomplice is charged with a different degree offense than the principal or lesser[-]included offenses are submitted to the jury, the court has an obligation to carefully impart to the jury the distinctions between the specific intent required for the grades of the offense." State v. Ingram, 196 N.J. 23, 38 (2008) (alteration in original) (quoting Bielkiewicz, 267 N.J. Super. at 528).

However, "the obligation to provide the jury with instructions regarding accomplice liability arises only in situations where the evidence will support a conviction based on the theory that a defendant acted as an accomplice" and not a principal in the commission of a crime. State v. Crumb, 307 N.J. Super. 204, 221 (App. Div. 1997), certif. denied, 153 N.J. 215 (1998). "When the State's theory of the case only accuses the defendant of being a principal, and a defendant argues that he was not involved in the crime at all, then the judge is not obligated to instruct on accomplice liability." State v. Maloney, 216 N.J. 91, 106 (2013); see also State v. Rue, 296 N.J. Super. 108, 115 (App. Div. 1996) (finding that an accomplice-liability charge was not warranted where the prosecution was based on the "defendant's culpability . . . as a principal" and the defendant maintained he "was not guilty of a crime at all"), certif. denied, 148 N.J. 463 (1997).

Here, an accomplice-liability charge was not required because the evidence fails to support a finding that defendant did not share the homicidal state of mind with his co-conspirator. Rue, 296 N.J. Super. at 115. "The parties presented the jury with two scenarios." Id. The first was the State's version of the case: that defendant and Defoe actively conspired together to engage in the murder of the victim, where one party was responsible for driving the getaway car, and later discarding of it in another municipality to

avoid detection, and where the other was to shoot wildly into the crowd gathered outside of 76 Brinkerhoff. The second was the version the defense offered: that defendant was simply not involved in the crime at all. "Neither of those versions warranted a Bielkiewicz charge, the former because the defendant's culpability was as a principal; the latter because defendant was not guilty of a crime at all." Rue, 296 N.J. Super. at 115.

Defendant now suggests that the jury could have deduced a third scenario of which would have compelled a Bielkiewicz instruction: that "while the shooter may have intended death, the accomplice could well have intended merely to menace those outside the apartment building — especially when so many shots missed hitting anyone." (Db39). But "[t]he problem with this suggestion is . . . that there is absolutely no evidence whatsoever from which a jury, once having identified defendant as an actual participant" in the murder of Jane Saunders, "could differentiate between his culpability and that of the other perpetrator[] of this crime." Rue, 296 N.J. Super. at 116. Rather, the evidence only shows defendant's active participation in the offense: first entering and sitting inside the stolen vehicle for several minutes with Defoe before driving with him towards the crime scene, then leaning out of the car's window to fire at least nine shots toward the crowd outside 76 Brinkerhoff, then speeding away from the shooting and going to home to change his clothes

avoid detection. Defendant's culpability as a principal is further bolstered by the jury's choice to convict him of possessing a gun for an unlawful purpose. "In short, on the evidence presented, once having rejected defendant's claim of non-complicity," no reasonable jury could have concluded that defendant has the mens rea of a lesser crime than that of a principal. Ibid.

Moreover, defendant's own claim of innocence throughout the trial is further evidence that a Bielkiewicz instruction was not required. Though claims of innocence do not "eliminate[] the possibility that a faulty accomplice liability charge could have prejudiced him," State v. Cook, 300 N.J. Super. 476, 488 (App. Div. 1996), it does reduce the likelihood. Where "a defendant argues that he was not involved in the crime at all," that claim of innocence helps to show the "defendant suffered no prejudice" from a failure to instruct the jury on accomplice liability under Bielkiewicz. Maloney, 216 N.J. at 105-06, 109-10; Rue, 296 N.J. Super. at 115-16. Accordingly, Judge Servidio's accomplice-liability instruction was not erroneous for omitting the language of Bielkiewicz.

And, in any event, any error by Judge Servidio does not rise to the level of plain error because "the failure to give a Bielkiewicz charge is not plain error where a jury could not reasonably conclude that [the] defendant was an accomplice." State v. Oliver, 316 N.J. Super. 592, 597 (App. Div. 1998), aff'd,

162 N.J. 580 (2000). Here, the evidence showed that defendant, along with Defoe, planned this drive-by shooting, that defendant himself was the shooter, and that he fired nine shots at 76 Brinkerhoff before the men drove off and each took steps to conceal their involvement. No jury could have reasonably found that defendant was involved as anything less than a principal.

Accordingly, there was "simply no reasonable view of the evidence that would permit one to conclude that defendant[] fired the shots or aided in the firing of the shots with anything less than homicide in mind." Norman, 151 N.J. at 38. Therefore, "even if the judge should have more fully instructed the jury on accomplice liability, the error was harmless" since "there was no evidence presented that the principal may have acted with a different purpose than the accomplice." Oliver, 316 N.J. Super. at 597.

POINT VI

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSPIRACY TO COMMIT MURDER.

Defendant argues for the first time on appeal that Judge Servidio erred in instructing the jury on conspiracy to commit murder by "fail[ing] to restrict those conspiracies to agreements to purposely kill" and "instead expanding the definition of the crime too far to include agreements to knowingly kill or to purposely or knowingly seriously injure someone." (Db40). As explained below, this argument lacks merit and should be rejected.

Because defendant did not object to the conspiracy charge that was given at trial, the plain-error standard of review applies. R. 2:10-2.

Here, Judge Servidio instructed the jury on conspiracy to commit murder in accordance with the model jury charge, see Model Jury Charges (Criminal), "Conspiracy (N.J.S.A. 2C:5-2)" (rev. Apr. 12, 2010). (44T182-16 to 187-13). "[A] jury charge is presumed to be proper when it tracks the model jury charge because the process to adopt model jury charges is 'comprehensive and thorough.'" State v. Cotto, 471 N.J. Super. 489, 543 (App. Div. 2022) (quoting R.B., 183 N.J. at 325), certif. denied, 252 N.J. 166 (2022); see also Berry, 254 N.J. at 145 (reiterating that "[i]t is difficult to find that a charge that follows

the Model Charge so closely constitutes plain error" (alteration in original) (quoting State v. Ramirez, 246 N.J. 61, 70 (2021))).

Nevertheless, defendant argues that Judge Servidio's "jury instruction on conspiracy to murder" was incorrect in that it "allowed the jury to convict for levels of criminal intent that fall well short of what is necessary to convict for conspiracy to murder." (Db40). That is, defendant argues that the instruction incorrectly allowed the jury to convict based on states of mind other than purposeful. (Db40-45). But as shown in the record, the judge's instruction clearly provided that in order to find defendant guilty of conspiracy to commit murder, two elements needed to be proven beyond a reasonable doubt: first, that "defendant agreed with another person or persons that they or one or more of them would engage in conduct which constitutes a crime or an attempt or a solicitation to commit such a crime"; and second, that "defendant's purpose was to promote or facilitate the commission of the crime of murder." (44T184-6 to 18); see N.J.S.A. 2C:5-2.

As Judge Servidio made clear in his instructions, conspiracy to commit murder and murder are two separate charges, and consequently, must be considered separately. (44T183-25 to 184-5, 187-7 to 13). Although it is true that a person can be found guilty of murder whether they acted purposely or knowingly, the charge of murder is distinct from the charge of conspiracy to

commit murder, which the judge correctly instructed requires purpose to promote or facilitate a crime, in this case, murder. (44T185-18 to 24).

Defendant cites to a number of cases he claims stand for the proposition that "[a] conspiracy to murder is an agreement only to purposely kill." (Db41). That interpretation is mistaken. See, e.g., State v. Madden, 61 N.J. 377, 394-95 (1972) (holding that the conspiracy charge was inappropriate because there was no evidence of an "agreement" to kill); State v. Abrams, 256 N.J. Super. 390, 401 (App. Div.) ("The offense depends on the unlawful agreement and not on the act which follows it; the latter is not evidence of the former." (quoting Carbone, 10 N.J. at 337)), certif. denied, 130 N.J. 395 (1992); State v. Fornino, 223 N.J. Super. 531, 536 (App. Div.) (concluding that there was ample evidence of a "plan" sufficient to support a finding of guilt of conspiracy to commit murder), certif. denied, 111 N.J. 570 (1988).

Defendant maintains that conspiracy to commit murder and attempted murder are alike and points out that "improperly failing to confine the crime of attempted murder to purposeful attempts to kill was the cause of reversals and remands" in several cases. (Db45). But a charge for attempt is not the same as a charge for conspiracy, so those cases are inapplicable. While both offenses charge a purposeful state of mind, the acts involved are different. The attempt statute provides:

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> > (1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;
> >
> > (2) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part; or
> >
> > (3) Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.
>
> [N.J.S.A. 2C:5-1(a).]

The conspiracy statute, on the other hand, provides:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> > (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
> >
> > (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> [N.J.S.A. 2C:5-2(a).]

In sum, the purposeful nature of the offense of conspiracy applies to the agreement itself and not to the underlying offense.

> When the State prosecutes a defendant for conspiracy to commit a first[-] or second[-]degree crime, it need not prove that a defendant committed an overt act in pursuance of the conspiracy. Therefore, because [the] defendants were convicted of conspiracy to commit first[-] and second[-]degree crimes, the sufficiency of the evidence as to the commission of an overt act is not at issue. The only question [on a motion for acquittal] is whether a reasonable jury, viewing the State's evidence in its most favorable light, could find beyond a reasonable doubt that [the] defendants, acting with a purposeful state of mind, agreed to commit, attempted to commit, or aided in the commission of [a crime].
>
> [State v. Scherzer, 301 N.J. Super. 363, 401 (App. Div.) (citations omitted), certif. denied, 151 N.J. 466 (1997).]

Thus, contrary to defendant's argument, there is no "clear limitation that a conspiracy to murder is only an agreement to purposely kill." (Db42-43). The underlying crime — in this case, murder — does not have to be purposeful for the agreement to be purposeful. See State v. Lavary, 152 N.J. Super. 413, 418 (Law Div. 1977) ("A conspiracy is not the commission of the crime which it contemplates, and the conspiracy neither violates nor 'arises under' the statute whose violation is its object."), rev'd on other grounds, 163 N.J. Super. 576 (App. Div. 1978), certif. denied, 81 N.J. 54 (1979). Consequently, there was no error in Judge Servidio's instructions.

POINT VII

THE ERRORS ALLEGED BY DEFENDANT DID NOT INDIVIDUALLY OR CUMULATIVELY DEPRIVE HIM OF A FAIR TRIAL.

Defendant argues that the cumulative effect of the above alleged errors warrants reversal. (Db45-46). It is true that "[e]ven if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018). "However, this principle does not apply 'where no error was prejudicial and the trial was fair.'" Cotto, 471 N.J. Super. at 547 (quoting State v. T.J.M., 220 N.J. 220, 238 (2015)). As previously discussed, no error was prejudicial and the trial was fair, so this court should affirm defendant's convictions.

POINT VIII

THE JUDGMENT OF CONVICTION SHOULD BE CORRECTED TO REFLECT THE MERGER OF COUNTS TWO AND SIX INTO COUNT ONE.

The State agrees with defendant that a limited remand is necessary to correct the judgment of conviction to merge the conspiracy and possession-for-an-unlawful-purpose convictions into the murder conviction. See State v. Tate, 216 N.J. 300, 312 (2013) (explaining that "[w]hen the only unlawful purpose in possessing the [weapon] is to use it to commit the substantive offense, merger is required" (alterations in original) (quoting State v. Diaz, 144 N.J. 628, 636 (1996))); State v. Hyman, 451 N.J. Super. 429, 459 (App. Div. 2017) ("Generally, a conspiracy to commit an offense merges with the completed offense, when the latter 'was the sole criminal objective of the conspiracy.'" (quoting State v. Hardison, 99 N.J. 379, 386 (1985))), certif. denied, 232 N.J. 301 (2018).

CONCLUSION

For the foregoing reasons, the State urges this court to affirm defendant's convictions, except to the extent that a limited remand is necessary to correct the judgment of conviction to reflect the appropriate mergers.

Respectfully submitted,

ESTHER SUAREZ
Hudson County Prosecutor
Attorney for Plaintiff-Respondent

BY: 
PATRICK F. GALDIERI, II
Assistant Prosecutor

Dated: July 1, 2024