

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002287-22

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
	:	Court, Law Division,
v.	:	Passaic County
	:	
CHRISTOPHER REYNOSO,	:	Ind. No. 18-01-0078-I
	:	
Defendant-Appellant.	:	Sat Below
	:	
	:	Hon. Justine Niccollai, J.S.C. and a
	:	jury

AMENDED BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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Date: September 27, 2024

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1T — September 5, 2019 — Motion
2T — September 10, 2019 — Motion
3T — September 17, 2019 — Motion
4T — September 25, 2019 — Motion
5T — October 22, 2019 — Motion
6T — October 23, 2019 — Motion
7T — October 24, 2019 — Motion
8T — October 30, 2019 — Motion
9T — February 11, 2020 — Motion
10T — February 25, 2020 — Motion
11T — February 27, 2020 — Motion
12T — March 3, 2020 — Hearing
13T — March 11, 2020 — Trial
14T — March 12, 2020 — Trial
15T — May 13, 2022 — Hearing
16T — May 17, 2022 — Trial
17T — May 18, 2022 — Trial
18T — May 19, 2022 — Trial
19T — May 20, 2022 — Trial
20T — May 24, 2022 (Vol. 1) — Trial
21T — May 24, 2022 (Vol. 2) — Trial
22T — May 25, 2022 — Trial
23T — May 26, 2022 — Trial
24T — June 1, 2022 (Vol. 1) — Trial
25T — June 1, 2022 (Vol. 2) — Trial
26T — June 2, 2022 — Trial
27T — June 3, 2022 — Trial
28T — June 6, 2022 — Trial
29T — June 7, 2022 — Trial
30T — June 8, 2022 (Vol. 1) — Trial
31T — June 8, 2022 (Vol. 2) — Trial
32T — June 9, 2022 — Trial
33T — June 10, 2022 — Trial
34T — June 13, 2022 — Trial
35T — December 16, 2022 — Sentencing
PSR — Pre-Sentence Report

PROCEDURAL HISTORY

Passaic County Indictment 18-01-0078-I charged defendant Christopher Reynoso and co-defendant Nelson Vargas with first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2); first-degree attempted murder, N.J.S.A. 2C:5-1a(1), N.J.S.A. 2C:11-3a(1), N.J.S.A. 2C:2-6; first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2, N.J.S.A. 2C:11-3; two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a; and second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b). (Da 1-6)

After a multi-day hearing on defendant's motion to suppress his statement, the Honorable Justine Niccollai, J.S.C. denied the motion on February 11, 2020. (Da 7, 9T 9-9 to 41-24) On May 13, 2022, Judge Niccollai issued an order disposing of several motions; relevant to this appeal, she denied the joint motion to preclude the lay opinion testimony of Detective Rodriguez or alternatively for an adverse inference charge. (Da 8-9, 15T 56-14 to 58-25)

Reynoso was jointly charged with co-defendant Vargas in March 2020, ending with a mistrial because of the COVID pandemic. A subsequent jury trial was held between May 17 and June 13, 2022, resulting in a guilty verdict on all counts. (Da 10-12, 34T-83 to 88-11) Following the jury verdict, a non-deliberating juror sent a letter to the court indicating that he would not have voted to convict the defendants because the evidence did not establish that the

bullets could have come from Vargas's car. (35T 5-4 to 6-8) Defendants filed a motion for a new trial based on the juror's letter, among other grounds. Judge Nicollai denied the motion on December 16, 2022. (35T 11-6 to 36-13) That same day, the judge sentenced Reynoso to an aggregate prison term of 50 years with 42 years and nine months of parole ineligibility, comprised of 15 years with an 85% parole ineligibility term for attempted murder, to run consecutive to 35 years with a 30-year parole ineligibility term for murder. (Da 13-16, 35T 59-21 to 82-5)

A Notice of Appeal was filed on April 3, 2023. (Da 17-20)

STATEMENT OF FACTS

On May 15, 2017, a car drove past 37 Federal Street in Passaic, New Jersey and fired several shots. (16T 74-22 to 75-5; 16T 134-10 to 20; 17T 41-5 to 18) Hansel Castillo was fatally struck, and Bryan Cabrera was struck, but survived. (16T 89-6 to 91-14) Police responded almost immediately to the area. Although there were multiple witnesses at the scene at the time of the shooting, including Wanda Rodriguez, Roosevelt Avelino, Keery Maura, and surviving victim Ryan Cabrera, only a single eyewitness testified at the trial, Wilmer Avelino, and he could not identify the perpetrators, or the car involved. (16T 78-4 to 15; 85-6 to 18; 17T 49-7 to 25)

Officer Michele Merced met with Castillo at the hospital before he passed away. Merced testified that Castillo's friends and family who had gathered at the hospital were reluctant to speak to police. To convince them otherwise, Castillo's dad threatened, "Everyone is going to talk. If not, they're going to have problems with me." (17T 23-10 to 24-15) Castillo himself, as he laid on a hospital bed, refused to cooperate with police, telling Merced "he didn't want to talk to the police; he's not going to tell [her] anything." (25T 224-2 to 225-7) Merced cajoled Castillo to speak by telling him that he might die. (25T 225-9 to 10) According to Merced, Castillo then volunteered that the car involved in the shooting was a gray 1997 Nissan Maxima with "two males inside, or two people inside." (25T 225-14 to 226-2)

Wilmer Avelino lived at 37 Federal Street and was outside at the time of the shooting. (24T 11-21 to 12-7; 42-1 to 10) In his statement to police after the shooting, Avelino said that "he didn't really get to see the license plate or nothing" but that the first letter of the license plate may have been a Z; he later clarified that it may have been a Z or an S. (24T 138-15 to 17; 152-11 to 12) He described the car as a gray, old Nissan, and said that before the shooting, he saw the car drive by and stop to look at the group standing outside 37 Federal. (24T 144-23 to 145-19; 139-7 to 11) According to Avelino, no one in the group recognized the car. (24T 145-20 to 22) Avelino said the passenger side of the car

was closest to him but he did not see the passenger and could not offer a description. (24T 142-6 to 143-12) As for the driver, Avelino said he looked tall. (24T 141-16 to 23) At trial, Avelino could not recall the shooting or his statement to police. (24T 13-20 to 25) In his statement immediately after the shooting, he distinctly recalled that the car was playing the song of a Jersey City rapper, Albee Al. (24T 144-9 to 15)

Immediately after the shooting, law enforcement received information suggesting a potential motive: an ongoing dispute with the owner of a stolen car in Jersey City. (25T 252-16 to 25) Following that lead, police interviewed Patrick Torlao and Mehdi Hadjiedj, both from Jersey City, on May 16. Torlao testified at trial that in early 2017, he bought a 2000 Green Honda from someone he met on Instagram. He met with the seller at a Volkswagen dealership and then finalized the sale at the seller's house in Passaic. (20T 18-25 to 20-9)

In March 2017, Torlao's Honda was stolen. Torlao described himself and his best friend Hadjiedj frantically driving around, searching for the Honda in the surrounding neighborhoods, and posting about his stolen car on Instagram, Facebook, and other outlets. (20T 21-16 to 22; 25-8 to 26-7) He reported it stolen to police on March 18, 2017. (20T 24-4 to 7) Later that day, Torlao received an anonymous text with the address of the house where his stolen car was located; the text also said, "we're watching [the car] get taken apart." (20T 27-1 to 17;

97-13 to 21) According to Torlao, he and Hadjiedj raced to Passaic from Jersey City. They saw the Honda at the reported address. It was under a tarp; the front of the car was on bricks and the other half was on jacks; and several individuals at the home were “stripping the cars.” (20T 30-16 to 31-20) Torlao testified that when the individuals got into a car and left, he and Hadjiedj chased them for about a half block, until another car obstructed the route. (20T 31-4; 32-22 to 33-6) They then returned to the house to wait for the police to arrive. (20T 33-7 to 9)

While they were waiting, there was another altercation. Torlao testified that he saw four people walking down the block and suspected they were involved in the theft of his car. With his emotions “running high,” Torlao, when confronted by the group, told them that this car was underneath the tarp.(20T 33-17 to 25) The group told him to “get the fuck out of here.” Torlao refused. Eventually, someone in the group brandished a gun; Torlao, still unfazed, refused to leave until his car was recovered. (20T 34-1 to 12)

When the police eventually arrived, Torlao, considering it unimportant, did not tell them that moments before, someone potentially linked to his stolen car had brandished a gun. (20T 36-3 to 17) His car was towed and returned to him the following day. The car was nonoperational; it was missing its wheels, speedometer, middle console, and most of its seats, with only the driver's seat

remaining. (20T 32-4 to 9) When Torlao recovered his car, a valet key was in the ignition. (20T 47-22 to 48-2) This led Torlao to conclude that the person who sold the Honda to him was likely the person who stole it. (20T 81-14 to 16)

Immediately after recovering the car, Torlao and Hadjiedj posted on social media a video with a song -- “Don’t run, right” -- playing in the background. (20T 82-13 to 83-5) Hadjiedi also posted another video as a sort of “public service announcement,” broadcasting the address where the car was found and telling the public: “if your car is stolen, check here.” (20T 119-20 to 120-3) Torlao’s car was found at 408 Highland Avenue in Passaic, which is around the corner from the shooting at 37 Federal Street. (27T 28-3 to 7)

Two weeks after he got his car back, Torlao was still harboring a grudge. He returned to Passaic with two carloads of friends to confront “anyone in general that had something to do with getting my car stolen.” (20T 85-3 to 18) He claimed that no one in his car had a gun but someone in the other car could have been armed. (20T 71-20 to 72-4) Torlao drove by the block where his car was recovered. No one was there. (20T 45-1 to 3) The two carloads of friends ended up stopping at a nearby local business. As they waited outside, a car pulled up, rolled the windows down and continued driving. (20T 45-3 to 13) Torlao assumed that the occupants of the car knew that he and his friends were not locals. He also thought they “might have

something to do with the stolen car.” (20T 45-10 to 13) Torlao claimed however that he and his friends left Passaic that day without confronting anyone about his stolen car, and that as they were leaving the area, he heard what sounded like gunshots. (20T 45-21 to 25)

Police interrogated Torlao on May 16, 2017, in connection with the shooting at 37 Federal Street. (18T 68-2 to 17) During the interrogation, Torlao insisted that after recovering his car on March 18, he never returned to Passaic. He was asked at least four times, and each time, he denied that he had returned. (19T 69-16 to 70-15) After police told him that they were investigating a murder, Torlao finally mentioned the trip he made to Passaic, with the two carloads of friends, hoping to confront the car thieves. (20T 41-24 to 43-7) Torlao told police he was home with his mother on May 15 at the time of the shooting. Police did not corroborate his alibi with his mother, or through cell phone records. (19T 147-11 to 20, 152-19 to 153-3)

Hadjiedj was also interrogated. He told police that he was at a music studio one-and-a-half miles away from 37 Federal Street, at the time of the shooting, and provided police with the names of four witnesses who purportedly would confirm that. (20T 115-3 to 116-8) One of the witnesses, Richard Martinez, told police he was not at the studio that night, and two of the witnesses did not answer their phones when police called. (27T 81-7 to 21) The fourth witness, “Chemo,”

said that Hadjiedj was at the studio. (27T 82-6 to 83-5) The police never confirmed Chemo's identity, nor did they verify whether Chemo was his given name. (27T 83-16 to 84-6) Police established that Hadjiedj's father owned a 2002 Nissan. (27T 51-2 to 11) When confronted with this information, both Hadjiedj and his mother denied that the father owned such a car.¹ (27T 122-8 to 23)

The police also questioned Daniel Sierra about the shooting; Sierra was the person who had sold the Honda to Torlao and was suspected of stealing the Honda back. (20T 178-21 to 24) Although Sierra was ultimately cleared of any involvement, the interrogation revealed that Hadjiedj had threatened to retaliate against Sierra for stealing the car. (20T 178-21 to 24; 27T 47:23 to 48-1)

Detective Raymond Rodriguez and Alexis Flores, neither of whom knew Hadjiedj before the investigation, took a photo of Hadjiedi to the music studio and reviewed the studio's surveillance footage. (18T 135-11 to 138-21) Rodriguez testified that he concluded Hadjiedj was at the studio at the time of the shooting. (18T 136-8 to 11) Rodriguez did not preserve the surveillance

¹ The police searched the automatic license plate reader database to see if Mendhi's father's car had been in the area around the time of the shooting. There were no results. Automated license plate readers (ALPRs) are "high-speed, computer-controlled camera systems that are typically mounted on street poles, streetlights, highway overpasses, mobile trailers, or attached to police squad cars. ALPRs automatically capture all license plate numbers that come into view, along with the location, date, and time." <https://www.eff.org/pages/what-alpr>

footage because “the system wouldn’t allow [him] to do that.” (18T 141- 15 to 23) Flores testified that he watched the surveillance footage from the studio from the beginning to the end, approximately four to five hours and identified Hadjiedj on the video. (18T 130-6 to 131-4; 136-10 to 24) Besides the conclusory statement that the surveillance video confirmed Hadjiedj’s alibi, there was no testimony as to the video’s content, or any evidence that the video was from the night of May 15, 2017.

Police shifted their focus to locating the vehicle. From the pieces of information gathered, their search was focused on a “silver vehicle, light skinned male and a medium complexion Hispanic male, someone wearing a red hat.” (17T 78-16 to 25) The car was also variously described as a Nissan Ultima or Maxima, and as gray, silver, beige, and gold. (27T 23-12 to 14) In another description, the car was characterized as a late 1990s, early 2000 Nissan with high intensity discharge lights, and a two-toned hood. (20T 167-12 to 16)

Police searched the vehicle database and discovered a car that fit one of the colors described by witnesses; the license plate started with one of the two letters Avelino described, a Z, and it had a two-toned hood. (21T 220-10 to 21T 221-22) The car was registered to Robert Guzman. (21T 230-4 to 9) When the police searched Guzman’s residence, they recovered a license plate that started

with the letter Z.² (21T 247-1 to 7) From Guzman, the police developed Grandee Vargas, whose birth name is Nelson Vargas, as a suspect. (26T 22-1 to 8)

Police subsequently searched Vargas' home. They found a driver's license exam permit, car registration and insurance card for a 1997 Nissan Altima.³ (26T 27-19 to 28-2) Police believed Vargas's Altima, whose registration number started with Z and whose hood was two-toned, was the car involved in the shooting. Once the police located Vargas's vehicle, they set out to find surveillance of the vehicle and Vargas' home. Through their investigation, they determined that Reynoso was among several people Vargas had contact with that day.

The State's theory was that on the evening of May 15, 2017, Reynoso and a group of friends were at Vargas's home. At approximately 10:30 pm, Vargas and Reynoso get into the car, with Vargas driving and Reynoso in the passenger seat. They stopped for gas at 10:54 pm. Fifteen minutes after that, they committed the crime and returned to Vargas's home a short while later.

² The police did not clearly establish how the car went from Guzman to Vargas, but the implication was that Guzman sold Vargas the car. The State's presentation of the case at trial is vague about how Vargas became a suspect, likely because that information involved evidence that would not be admissible in court.

³ The police did not provide further testimony about the make and model of the Nissan registered to Vargas.

The police recovered four shell casings and one live bullet from the scene of the shooting that was sent for testing. (17T 43-8 to 15) No DNA evidence was found on the bullet. (26T 48-1 to 2; 26T 50-21) The gun used in the shooting was never found. (18T 43-1 to 2) The police were unable to determine a motive for the shooting, any connection between the codefendants and the victims, or even whether Cabrera or Castillo were the targets. The surveillance footage introduced in evidence did not capture the shooting or the car driving on Federal Street.

There were no witnesses who identified Reynoso in Vargas's car that night. While there was surveillance video showing two people getting into the car at 10:54pm, it was too dark and grainy to conclusively establish their identities. (Da 132 at 6:02-6:10) In Reynoso's statement to police, he did not deny that he was at Vargas's home that day; but he denied that he was the person who left in the car. (30T 89-4 to 90-23; 91-16 to 18; Da 100-101).

The sole piece of evidence the State relied on to rebut this statement was surveillance footage from earlier in the day. The video showed a person at an ice-cream truck wearing a pair of pants that were light gray in the front and black/blue in the back, and featuring two horizontal blue stripes, each bordered by a one-inch-wide white stripe. (Da 132 at 2:14-4:27) Detective Raymond Rodriguez identified Reynoso at the ice cream truck. Rodriguez was familiar with Reynoso

from his involvement in a week-long Junior Police Academy program for fifth graders, when Reynoso was ten or eleven years old. (18T 149-12 to 22; 150-8 to 11)

The State's case against Reynoso hinged on the assertion that the individual at the ice cream truck was the same person who entered the passenger side of the Nissan later that night. Although the person's face was obscured in the car footage, the State asserted that the distinctive pants in both videos was the crucial link. At the ice cream truck, the person suspected to be Reynoso wore pants with a multi-faceted design: light gray front, black/blue back, and two horizontal blue stripes edged with white. See (Da 132 at 3:30) In contrast, the car passenger's pants featured a simpler two-toned scheme, light above the knee and dark below. See (Da 132 at 21:30)

Reynoso was interrogated on June 1, 2017. His mother, Lorenza Montiel, was present during the interrogation. Because of her limited English proficiency, the police read her the Miranda warnings in Spanish. However, the bulk of the interrogation was conducted in English, with sporadic brief Spanish translations for Reynoso's mom. (5T 15-16 to 19; 20-18 to 21-8) Police sought the mother's consent to search Reynoso's room. Police recovered a pair of pants that they believed had evidentiary value. (21T 257-22 to 259-17; 26T 106-15 to 19; 27T 110-22 to 4)

During the interrogation, he repeatedly denied that he had anything to do with the crime or that he was the person seen getting into the car. Reynoso told police that he spent the night of May 15 at Vargas' house; that he hung out with Vargas and others that evening; he smoked marijuana and took a Percocet and fell asleep. (30T 89-4 to 90-23; 91-16 to 18; Da 100-101) When police asked Reynoso what he knew about the homicide, he said, "[t]hat the kid died supposedly, uh, for stealing cars or car pieces." (30 35-5 to 107; Da 49)

LEGAL ARGUMENT

POINT I

THE STATE FAILED TO PROVE A VALID MIRANDA WAIVER BECAUSE DEFENDANT DID NOT PRIVATELY CONSULT WITH HIS PARENT, THE INTERROGATION WAS PRIMARILY IN ENGLISH DESPITE HIS PARENT'S SPANISH FLUENCY, AND THE POLICE CONTRADICTED THE WARNINGS AND OBFUSCATED DEFENDANT'S TRUE STATUS. (9T 9-9 to 41-24)

On the day of the interrogation, police went to Christopher Reynoso's school, removed him from his classroom, and transported him to the police station where he was detained until his mother arrived and police could begin the questioning. (30T 143-17 to 147-17) At the time, Reynoso was a seventeen-year-old high school junior, whose only experience with the police was at a one-week Junior Police Academy program at the end of fifth-grade and when he was

taken to the police station -- but not arrested -- for some youthful misbehavior. When his mother arrived and the detectives asked what language she speaks, she said, "Spanish," without hesitation. (Da 27)⁴

Before waiving his Miranda⁵ rights, Reynoso was denied the opportunity to privately consult with his mother. Furthermore, the police exploited the language barrier, preventing his mother from effectively helping him decide whether to waive his Miranda rights or providing meaningful assistance during the interrogation itself. To make matters worse, police made a number of misleading statements that contradicted the Miranda rights and obfuscated his true status as a suspect in a murder. Under the totality of circumstances in this case, the State did not meet its burden of proving, beyond a reasonable doubt, that the statement Reynoso made to police was knowing, voluntarily, and intelligent. Thus, the entirety of his statement should have been suppressed,⁶ and because the

⁴ For ease of reference, this brief primarily relies on the State's Transcript of Reynoso's Redacted Interrogation Statement, which was provided to the jury as a reading aid. It's important to note that the transcriptions of the interrogation statement from the Miranda hearing and trial are incomplete and contain several indiscernible sections and that there are discrepancies between the trial transcripts and the State's Transcript. Thus, the most complete record of the statement is the State's Transcript cited at Da21-131. The recording of the defendant's interrogation statement has also been provided to the court, but some portions are in Spanish.

⁵ Miranda v. Arizona, 384 U.S. 436 (1966).

⁶ The trial judge excluded the portion of his statement made after he invoked his right to silence, as the police did not respect his request to cease questioning, and suppressed his statement from the point in which police failed to honor his unequivocal invocation of his right to silence. (9T 36-17 to 25) The State had

admission of the statement was not harmless beyond a reasonable doubt, Reynoso's convictions must be reversed. U.S. Const. amend. V, XIV.

The right against self-incrimination is “[o]ne of the most fundamental rights protected by both the Federal Constitution and state law.” State v. O’Neill, 193 N.J. 148, 167 (2007) . Because custodial interrogations are inherently coercive, to admit a custodial statement in New Jersey, the State bears a “heavy burden” to prove, beyond a reasonable doubt, that the defendant knowingly, intelligently, and voluntarily waived his Miranda rights. State v. O.D.A.-C., 250 N.J. 408, 413 (2022) . In addition to the protections afforded adults, it is well-settled law in New Jersey that juveniles “receive heightened protections when it comes to custodial interrogations.” State in Int. of A.A., 240 N.J. 341, 354 (2020) ; see also State ex rel. A.W., 212 N.J. 114, 128 (2012) . These “heightened protections” are necessary because juveniles “are typically less mature, often lack judgment, and are generally more vulnerable to pressure than adults.” State in Int. of A.A., 240 N.J. at 354.

Given the unique vulnerabilities of children, the presence of a parent or guardian is a critical safeguard during juvenile interrogations. Therefore, whenever possible, a parent or guardian must be present when a child is

also sought to introduce an extended private recorded conversation in the interrogation room between Reynoso and his older brother after the interrogation had ended. The court also excluded this statement.

questioned by police. To that end, police “must use their best efforts to locate a parent or legal guardian before beginning the interrogation.” State v. Presha, 163 N.J. 304, 316 (2000) . The voluntariness of a suspect’s statement is assessed by the totality of circumstances surrounding the arrest and interrogation, and for juveniles, the absence of an adult is a highly significant factor in this assessment. See id. at 315 (holding that highly significant factor means that “courts should give that factor added weight when balancing it against other factors”). The purpose of the parent is to serve as advisor to the juvenile, as “[p]arents are in a position to assist juveniles in understanding their rights, acting intelligently in waiving those rights, and otherwise remaining calm in the face of an interrogation.” Id. at 314-15. In addition, the “parent serves as a buffer between the juvenile” and “the police, whose investigative function brings the officers necessarily in conflict with the juvenile's legal interests.” Id. at 315. However, the “mere presence” of a guardian is “insufficient to protect a juvenile’s rights.” State ex rel. A.S., 203 N.J. 131, 148 (2010) . In order to serve as a buffer, the “parent must be acting with the interests of the juvenile in mind.” State in Int. of M.P., 476 N.J. Super. 242, 264 (App. Div. 2023) .

Despite his mother’s physical presence during the interrogation, Reynoso was effectively denied meaningful parental support for two reasons. First,

contrary to A.A.'s clear guidelines for facilitating a parent's advisory role during juvenile interrogations, Reynoso did not have the opportunity to privately consult with his mother before waiving his Miranda rights. See (Da27-40; Da 133 at 16:16:44 to 16:26:10). A.A. mandates that "[t]he police should advise juveniles in custody of their Miranda rights -- in the presence of a parent or legal guardian -- before the police question, or a parent speaks with, the juvenile." A.A., 240 N.J. at 358 (emphasis added). "Officers should then give parents or guardians a meaningful opportunity to consult with the juvenile in private about those rights." Ibid. "If law enforcement officers do not allow a parent and juvenile to consult in private, absent a compelling reason, that fact should weigh heavily in the totality of the circumstances to determine whether the juvenile's waiver and statements were voluntary. Id. at 359 (emphasis added). Although A.A. was decided by the Supreme Court shortly after the interrogation in this case, A.A. did not announce a new rule of law. As explained in State in Int. of M.P., 476 N.J. Super. at 293, A.A. is simply "a logical extension of Presha" and "[i]dentifying a particular factor to be considered as part of an inherently holistic test hardly 'breaks new ground.'"⁷

Additionally, due to the language barrier, Reynoso's mother was unable

⁷ Moreover, A.A. was decided before the trial court issued the decision on Reynoso's motion to suppress his statement.

to assist her son in understanding his rights and deciding whether to waive them. Police read each of the Miranda warnings to Reynoso, in English, and asked if he understood. When the officers told him that his mother could read the warnings on the form in Spanish, Reynoso replied that “she don’t know how to read that good.”⁸ (Da 36-37, 45) Then, minutes after Reynoso signed the waiver of rights, the police read the warnings aloud to his mother in Spanish and informed her that “the kid” had already indicated that he understood. (Da 45-47) Questioning then commenced.

Under these circumstances, Reynoso’s waiver of rights was not validly obtained. Not only did the waiver procedure eschew A.A.’s private consultation requirement, the lack of contemporaneous interpretation – either simultaneous or consecutive⁹ – effectively rendered Reynoso’s mother absent from the

⁸ After the police issued the fifth Miranda warning, the mother interjected in Spanish to ask if the form was for Reynoso to fill out. Reynoso then explained two of the warnings to his mother in Spanish: that he did not have to talk and that he could have a lawyer “for free” if he could not afford one. The officer then interjected in Spanish and said that no charges had been filed against Reynoso and that if he does want a lawyer, he can stop the conversation and “we’ll leave things as they are.” (Da 38)

⁹ There are two primary modes of interpretation, simultaneous or consecutive interpretation. Consecutive interpretation is done after the speaker is finished speaking; so the speaker pauses after completing a thought, to allow the translator to translate the words. Simultaneous interpretation involves listening to the speaker and translating their words almost concurrently. Consecutive interpretation is commonplace during interrogations. Defendant is not advocating for a specific type of interpretation, simply that the entirety the conversation between the police and Reynoso should have been interpreted in Spanish for his mother, ideally in a manner that allowed for near-contemporaneous understanding.

proceedings. Spanish was clearly established as the mother's primary language, and Reynoso requested that they read the warnings to his mother in Spanish. Reynoso communicated with his mother exclusively in Spanish, and whenever she spoke, it was always in Spanish. During the Miranda hearing, the interrogating detectives acknowledged their belief that the mother spoke Spanish, explaining why they spoke to her in Spanish occasionally and read her the warnings in that language. See (5T 15-16 to 19; 5T59-18 to 61-25; 6T 83-15 to 84-6; 6T 96-14 to 97-7; 6T 116-14 to 117-1)

Having a Spanish-speaking person in the interrogation room was unremarkable, especially in Passaic, where as, Detective Flores admitted, there is a large Spanish-speaking population. Indeed, Flores has experience interrogating Spanish-speaking residents. (6T 72-9 to 20) See also State v. Marquez, 202 N.J. 485, 510, 998 A.2d 421, 436 (2010) (noting that in 2007-2008, there were 87,766 court events translated and Spanish translations accounted for 85% of those translations). If Reynoso had been the one who primarily spoke Spanish, the standard practice would have been to provide consecutive translation between English and Spanish throughout the interrogation. See State v. A.M., 237 N.J. 384, 390 (2019) (“Because defendant spoke little English and stated that he was more comfortable with Spanish, Detective assisted in translating the interview from English to Spanish.”).

The failure to provide adequate interpretation for the defendant's mother, which was not limited to the advisement of rights but persisted through the entire interrogation, was not due to any impracticality. Rather, it was a calculated effort to keep Reynoso's mother in the dark while police pressured Reynoso to confess. Although there were three bilingual Spanish/English-speaking officers available at the time, police selectively interpreted only discrete portions of the proceedings, leaving the mother without a full understanding of what was happening. Clearly that was the officers' goal. As they told Reynoso, "That's a shame, because she's sitting here. She has no clue what the hell is going on and you keep thinking that we don't know" (1T 85-2 to 4)(emphasis added)

During the interrogation, police engaged in lengthy periods of questioning, conducted in English, followed by brief summaries in Spanish for Reynoso's mother. See (5T 64-9 to 68-5; 5T 20-18 to 21-8; 6T 84-15 to 20) For example, the police informed the mother in Spanish that they were investigating a shooting and that someone had already been arrested, but when she tried to ask questions about the charges, the detectives continued in English:

[Detective (Spanish)]: We've already arrested one. He's the second part.

[Mother (Spanish)]: He?

[Detective (Spanish)] Yes.

[Reynoso (English)]: What you mean by that?

[Detective (English)]: “You are the second person that we’re looking at in the homicide.

(Da 48)

What then followed was an almost 18-minute-long conversation with Reynoso in English. The police asked him about his whereabouts on the day of the shooting, what he was wearing and with whom he associates. When he answered their questions, they told him that everything he said was a lie and threatened that he was going to be charged with murder. (Da 133 at 16:33:38-16:50:25; Da 49-62) This 18-minute-long conversation was then summarized for his mother in Spanish into a 40-second blurb:

Ma’am, um, we’re explaining to him that we already know that he has a part on what we’re investigating. At this moment he’s telling us that he doesn’t have anything - anything to do with nothing. But we’re going to - going to show him video because there’s a video. You know, he says that he slept - he was sleeping and we know that he wasn’t sleeping.

(Da 62)

Through this substandard interpretation procedure, critical information was never translated in Spanish, including police threats and details about the severity of the charges. Throughout the interview, the officers threatened Reynoso in English, telling him, for example: “[y]ou’re going to be charged with murder and you’re going to remain in jail until your trial, . . . and that with the

evidence we have you're probably going to be convicted of murder" (1T 109-5 to 11); and "you're going to end up doing the rest of your life" in prison. (2T 45-4 to 45-8; 50-15 to 20)

Without a full grasp of the conversation as it was unfolding, Reynoso's mother could not detect any shift in the police tone and tactics; she could not gauge the import of the precise questions asked and her son's answers to them; and she could not intervene if and when she realized her son's rights were at stake.

For parental presence to truly protect a juvenile's constitutional rights during interrogation, it is essential that the parent understands the language being used. See State v. Belliard, 415 N.J. Super. 51, 81 (App. Div. 2010) (holding that because the entire interview was translated for defendant's mother as defendant spoke, the language barrier did not render the defendant's statements involuntary); State v. Marquez, 202 N.J. 485, 508 (2010)(restating common sense proposition that the goal of informing someone of their rights cannot be achieved if those rights are communicated in a language they do not understand). That did not happen in this case.

While the trial judge acknowledged that there was "no simultaneous translation" and that portions of the interrogation were not translated at all (9T 31-6 to 16), she found that these deficiencies in the interrogation procedure had

no impact on the validity of the waiver. Noting Reynoso’s “previous contact with the police through the Junior Police Academy when he was in fifth grade” (9T 27-3 to 4) and that Reynoso was able to explain two of the Miranda rights to his mother the judge inferred that Reynoso not only understood rights, but “was more sophisticated than [his mother] when dealing with these issues.” (9T 26-21 to 22) That inference is unfounded.

First, participation in a Junior Police Academy program seven years prior, which likely did not include instruction on Fifth Amendment rights, is not a substitute for a parent during a custodial interrogation. Moreover, the State failed to present any evidence that the Academy provided Reynoso with the knowledge and understanding necessary to navigate a custodial interrogation without the guidance of a parent. If anything, participation in the Academy may have led Reynoso to underestimate the seriousness of his situation or to view the police officers as allies rather than adversaries.

Second, the court’s reasoning that Reynoso’s ability to understand his Miranda rights negated the necessity of his parent’s presence is flawed. (9T 26-16 to 18). A juvenile’s right to have a parent present during interrogation is not contingent upon their understanding of the Miranda warnings. This right stems from the inherent vulnerability of minors, as established in Presha. See also State in Int. of A.A., 240 N.J. at 354 (reiterating that the heightened

protections afforded to juveniles are necessary because teenagers are typically “less mature, often lack judgment, and are more vulnerable to pressure”). Even if a juvenile comprehends their rights, parental presence offers an additional layer of protection throughout the interrogation. The role of the parent envisioned in Presha goes beyond merely helping the juvenile understand their rights. It also involves aiding them in making a knowing and intelligent waiver, and providing a sense of support in the unfamiliar and potentially intimidating environment of a police station.” See Presha, 163 N.J. at 315.

Additionally, the trial court incorrectly interpreted Reynoso’s mother’s interjection about camera placement, during questioning in English, as proof that she understood the language. (9T 32-9 to 17) Recognizing the word “camera” does not demonstrate English proficiency, particularly because “camera” in Spanish is “cámara,” an almost identical translation. And, prior to the mother’s interjection about the camera, she and her son had previously been talking about the camera in Spanish (Da 105, 107). She just continued on that note by saying “[a]lso the camera on the other side,” in response to the word camera in English. (2T 64-13 to 14) The fact that she could understand a single word that is almost identical between the two languages does not speak to her ability to understand legal terms or situations in English. Again, the burden of proof lies with the State to demonstrate the mother's English language

proficiency. The entire interrogation suggests that she was fluent in Spanish only; the police officers conducted the interrogation as if she were fluent, and they never attempted to confirm her understanding of English. In light of this overwhelming evidence, singling out one word from the interrogation fails to establish her English proficiency and is insufficient to meet the State's burden.

When a parent is unable to understand the back-and-forth during an interrogation, the fundamental purpose of parental presence is defeated. The parent becomes a mere passive observer, unable to meaningfully assist the child, to intervene, or to ensure the fairness of the interrogation process. In State in Int. of J.F., the court agreed that defendant's Spanish-speaking guardian was "effectively excluded from his custodial interrogation" because, despite the initial waiver of Miranda rights being read in Spanish, the remainder of the interview was conducted entirely in English. 286 N.J. Super. 89, 96 (App. Div. 1995) .¹⁰ Here, Reynoso's mother was effectively excluded from both the

¹⁰ In State in Int. of J.F., the court found the Miranda waiver valid under the totality of circumstances. 286 N.J. Super. at 100("[A]side from the circumstances ... which served to undermine any meaningful role or participation by J.F.'s guardian during his interrogation and the questionable nature of the Miranda waiver, the record contains none of the other circumstances that have compelled courts to suppress a juvenile's confession"). However, J.F. was decided prior to Presha, which established parental absence is a "highly significant circumstance" in the totality of circumstances. Presha, 163 N.J. at 315. Thus the importance of parental absence is now given more weight, rendering J.F.'s ultimate holding dubious.

questioning and the waiver portion of the interrogation.

The lack of parental support in this case was particularly concerning because police engaged in other deceptive tactics that impact the validity of the waiver: detectives contradicted the Miranda warnings and obscured Reynoso's true legal status during the waiver process.

At the beginning of the interrogation, when Reynoso reunited with his mother in the room, they shared with each other that neither knew why he was being interrogated. (Da 21-22) When the interrogating detectives entered the room, after collecting Reynoso's pedigree information, the detective twice volunteered that there were no charges. (Da 33)¹¹ He continued, "But you are being, uh, part of our investigation. Your name came up. So, I'm here basically to clear things up and see what your involvement if you have any. If not you have a good day." (Da 34) The detective stated twice more that no charges had been filed. Reynoso then tried to clarify his status, asking,

REYNOSO: So, at any point in time if I wanna leave I can leave?

DETECTIVE: At any given - any given time, well, like, right now I don't have charges for you.

REYNOSO: But I can leave with my mom here, right? 'Cause I'm not being detained and

¹¹ The first time the detective mentioned that there were charges, he cast his role "as just investigating . . . but I want to read [the] rights so he'll know his rights in case he says something I need regarding my case." (Da 33)

I'm not being arrested. Something like that, right?

DETECTIVE: You're not - well, I do- well, let me make sure you understand this completely.

(Da 39)

Instead of clarifying Reynoso's understanding of his status, the detective simply moved on to complete the form. (Da 40) The detective told Reynoso that his "My job - my job here is not to make you guilty. My job is to take you out of what we're investigating...and show that you have nothing to do with what I'm investigating. (Da 39) When the police read the waiver of rights portion of the form, Reynoso expressed that he did not understand. (Da 38) In response, the detective said: "Basically what that part is . . . saying is that nobody's forcing you to talk to me. You understood the top portion of it . . . and you wish to continue. So, you find out what we're doing . . . If not, you can say, "Listen, I want my lawyer. I don't want nothing to do with this." (Da 38-39) Reynoso immediately responded, No. No. No. I wanna know what . . . I'm here for." (Da 39) As directed, he then signed the waiver portion. (Da 39)

Shortly thereafter, Reynoso's mother left the interrogation room to answer a phone call while the detective continued to speak with Reynoso, who sought further clarification on whether he could leave:

REYNOSO: So, if I wanna go - if I wanna leave I could leave, right?

DETECTIVE: If you wanna leave you can leave but you must understand that when I leave this room...

REYNOSO: Yeah.

DETECTIVE: ...once you say you want a lawyer I gotta talk to my bosses to see what they gonna do with you.

REYNOSO: No. I kn- I don't need a lawyer. I'm - I'm sayin', like, if I wanna go home, I wa- I wanna leave, like, right - right here...

(Da 42)(emphasis added) As they continued the conversation in his mother's absence, the police told him that he was being interrogated for a reason and that they did not just pick up "any Spanish kid;" that he should not follow the street code ; to "say the truth and get yourself out of whatever we're lookin at "; and if he allows others to talk for him "they are going to make [him] look guilty. (Da 41-44)

The exchange between Reynoso and the police during the waiver portion of the interrogation is fraught with error. The detective's statement that their job was to take Reynoso out of what they were investigating contradicted the Miranda warnings and was deceptive. "Courts have long recognized that '[a] police officer cannot directly contradict, out of one side of his mouth, the Miranda warnings just given out of the other.'" State v. L.H., 239 N.J. 22 (2019) (citation omitted). The statement was at direct odds with the Miranda warning that "anything he said in the interview could be used against him in a court of law." The police suspected Reynoso in a fatal shooting. The purpose of

the interrogation was to get a confession from him or at least some inculpatory admissions, it was not to “take him out of” what they were investigating.

While the police were not required to inform Reynoso about the specific subject of the interrogation, it was evident that he was deeply concerned about the reasons for his questioning and his custodial status, repeatedly inquiring about both. Yet, he never received a clear answer about either. While the police's statement that there were no pending charges may have been technically accurate, it was also incomplete and misleading. This created a false sense of security, potentially minimizing the gravity of the situation in Reynoso's eyes.

The New Jersey Supreme Court has acknowledged that there are some cases in which “explicit knowledge of one’s suspect status” might be a useful piece of information in exercising a waiver of rights. State v. Nyhammer, 197 N.J. 383, 407, 963 A.2d 316, 330 (2009) ; State v. Sims, 250 N.J. 189, 213 (2022). Here, the record demonstrates that Reynoso did not understand that he was a suspect in a crime nor did he understand his custodial status, as evidenced by his repeated inquiries about leaving, which were never met with a direct “no.” Several factors could have contributed to Reynoso's lack of understanding regarding his true status: his youth, the misleading statements from the police about the absence of charges and their desire to clear him, and their evasive responses to his questions about leaving. In clarifying the waiver of rights, the

detective told him that waiver would enable him to “find out what we’re doing.” Reynoso's statement, "I wanna know what I'm here for," made just as he waived his rights, clearly shows how important it was for him to understand his situation. This case illustrates the type of scenario mentioned in Nyhammer, where the failure to be told of one’s suspect status is a significant factor in the totality of circumstances.

Even more troubling, on one of the occasions when Reynoso inquired about his ability to leave, the police responded with a statement that implied negative repercussions for requesting a lawyer: "You can leave, but once you say you want a lawyer, I gotta talk to my bosses to see what they gonna do with you." (Da 42) The response was designed to discourage Reynoso from exercising his constitutional rights by suggesting that invocation could delay or escalate matters. A simple “yes” or “no” answer would have sufficed without volunteering that superiors would have to be consulted.

As discussed above, Reynoso’s mother was functionally excluded from the interrogation by the use of a language she did not understand. And, for several minutes, she was literally absent from the interrogation. As Reynoso was trying to understand his status and his rights more clearly, his mother was out of the room taking a phone call. During that critical period of time, the police officers tried to induce him to speak, exhorting him to tell the truth and ignore

the street code. Parental presence throughout an entire interrogation is critical, but arguably the most critical period is when the juvenile is actively questioning their rights and seeking guidance, as was the case here when Reynoso's mother was absent.

Moreover, although Reynoso indicated that he understood the discrete Miranda rights, when presented with the waiver of rights, he clearly said that he did not understand. (Da 38) The police response failed to clarify the waiver portion and presented his choices as speaking or obtaining a lawyer. See (Da 38) (“Basically what that part is . . . saying is that nobody’s forcing you to talk to me. You understood the top portion of it . . . and you wish to continue. So, you find out what we’re doing . . . If not, you can say, “Listen, I want my lawyer. I don’t want nothing to do with this.”). However, Reynoso could have also chosen to remain silent without requesting a lawyer. The officer's explanation mislead him as to his choices, potentially leading him to believe that his only options were to speak or get a lawyer, when silence was also a valid option. The detective’s response also oversimplified the waiver process, reducing it to whether Reynoso “understood the top portion” and wanted to continue. The response failed to capture the knowing, intelligent, and voluntary standard required for a valid waiver.

In sum, considering all the circumstances, the State did not prove beyond a reasonable doubt that Reynoso knowingly, intelligently and voluntarily waived his Miranda rights. The admission of Reynoso's unconstitutionally secured statement at trial was not harmless beyond a reasonable doubt. Constitutional errors are considered "fatal error, mandating a new trial," unless [the court] can determine that the error was "harmless beyond a reasonable doubt." State v. Cabbell, 207 N.J. 311, 338 (2011) (citation omitted). Thus, the State must establish beyond a reasonable doubt that there was "no reasonable possibility" that the statement "might have contributed to the conviction." State v. Sanchez, 129 N.J. 261, 278 (1992). The State cannot meet that burden.

The State's case was purely circumstantial. No witnesses identified Reynoso as one of the shooters people in the car nor did any witnesses identify the car involved. There was no physical evidence connecting Reynoso to the shooting – no DNA, fingerprints, or ballistics evidence – and the gun was never recovered. The police never established a motive much less a connection between Reynoso and/or his co-defendant and the victims. The surveillance footage played at trial did not directly implicate Reynoso because the shooting is not captured on the video. There was a credible and comprehensive third-party guilt defense presented.

While Reynoso did not confess during the interrogation, the State clearly saw the statement as inculpatory, given their decision to play it in its entirety at trial. See Miranda, 384 U.S. at 477 (“If a statement made were in fact truly exculpatory, it would, of course, never be used by the prosecution.”). In addition, and as detailed in Point II, the statement's value to the State lay not only in what Reynoso said or did not say, but also in the prejudicial opinions expressed by the police officer throughout the interrogation.

Thus, the admission of the statement was not harmless beyond a reasonable doubt and Reynoso’s convictions must be reversed.

POINT II

THE FAILURE TO REDACT STATEMENTS FROM THE INTERROGATION THAT VIOLATED THE CONFRONTATION CLAUSE AND EXPRESSED THE DETECTIVES' BELIEF THAT VIDEO EVIDENCE SUBSTANTIATED DEFENDANT'S GUILT, DEPRIVED REYNOSO OF HIS RIGHT TO A FAIR TRIAL. (28T 66-12 to 178-14; 29T 14-6 to 20-18)¹²

Reynoso incorporates by reference Point II of co-defendant's Nelson Vargas' plenary brief, challenging the failure to redact law enforcement's inadmissible lay opinion testimony from his interrogation statement, and adds the following.

Reynoso's statement is riddled with two categories of inadmissible evidence. First, during Reynoso's interrogation, detectives repeatedly expressed their belief that the surveillance footage indisputably established that Reynoso was in the car from which the shots were fired, at various points that day and at the time of the shooting :

- I have another video showing you coming out of the car. You're either the shooter or the driver. (Da 71; 30T 28-23 to 25)

¹² During the trial, the judge, in consultation with the attorneys, reviewed the interrogation transcript and made decisions on redactions. Approximately 30 lines, totaling about one page, were removed from the interrogation. (29T 14-1 to 3) Regarding the remaining objected-to lines that were not redacted, the trial court determined "that striking every single reference where one of the detectives discusses his/her opinion of what he/she sees on the video when questioning the veracity of a suspect's account would wholly eviscerate and undermine law enforcement's legally permissive ability to use an interrogation as an investigative tool." (29T 17-17 to 23) And that a curative instruction could sufficiently address the prejudice. (29T 17-24 to 18-2)

- So the video's lying? (responding to Reynoso's statement that he did not go out that night) (Da 79; 30T 69-2 to 5)
- We have clip after clip after clip daytime video ... nighttime video of you wearing the same clothing. (Da 90; 30T 80-3 to 8)
- I showed you – I showed you a video of you getting the car – which you think that's not gonna be clear on a big screen – and I showed you a video of your getting out of a car at 11:20 – somethin' and you said you were, uh, sleepin' at 10:30. You're not. (Da 111; 30T 99-19 to 24)
- Well, I mean, I don't know how you're gonna dispute a video. I don't understand in your brain how you think that's not gonna be you. Don't go by the video because of that screen, once you superimpose that shit you're gonna see clear as day. It's you. We know it's you, that why you're sittin' here. (Da 112; 30T 100-8 to 15) (emphasis added)
- . . . I know for a fact the driver came out – and the other guy that came outta that car was you. You were in it - you were in that car like this. . . . (Da 115; 30T 105-1 to 4) (emphasis added)
- [T]he best camera of all was right there . . . he parks the car and you get out of the car. So you weren't sleepin'. (Da 117; 30T 107-5 to 8)
- Because you think [the co-defendant] gonna say you shot the gun. . . . if he's seen parkin' the car, he's seen getting into the car driving the whole time, where are you sittin' in the car? What are you done lookin' at when you're parkin' the car? Guess what you're lookin' for? . . . A bullet – a round, that's what you're lookin' for. You ain't lookin' for a quarter, you're lookin' for a fucking round . . . And that's on camera. (Da 123; 30T 116-14 to 117-3) (emphasis added)
- And we followed that car everywhere it went. Every minute on fucking video we have it and you . . . comin' outta that car. (Da 123; 30T 117-4 to 9)

Whether the car on the surveillance footage was involved in the shooting and whether Reynoso was in that car at the time of the shooting were the central issues for the jury to determine. The detectives' statements about what the video

showed, coupled with their confidence that it was defendant, improperly “encroached upon the jury’s ‘province.’” State v. Frisby, 174 N.J. 583, 595 (2002). Had the detective offered those same opinions from the witness stand, N.J.R.E. 702 would have barred it. Thus, by failing to redact those opinions from Reynoso’s statement, the judge improperly permitted the State to circumvent Rule 702.

In a similar vein, the judge also failed to redact numerous other remarks which improperly conveyed that detectives had amassed significant evidence of Reynoso’s guilt, including statements by non-testifying witnesses, implicating Reynoso in the shooting. The police framed the interrogation by telling Reynoso that “you’re not sitting here by mistake . . . You’re not sittin here . . . cause we’re looking for any Spanish kid. No. You’re here for a reason.” (Da 42-43; 30T 31-2 to 6) Similarly, they told Reynoso’s mother that “he has to understand . . . and you too . . . we are not going to get your son’s name out of the 2000 kids that there are in the city of Passaic and simply say, ‘Him’ . . . without any reason . . . before coming here, there is proof.” (Da 65) (emphasis added) Later in the interrogation, they told Reynoso:

This is your one and only opportunity for you to clarify whatever went down that night. Because like he said, you’re here for a reason . . . And for us to have you here under investigation for a shooting; that reason is substantial. It’s big. It’s big enough. There’s video. There’s evidence that brought us to you. Your name . . . was brought up multiple times. Remember what I told you before. When shit goes down and people are behind bars it becomes a game of survivor. Everybody’s pointin’ fingers at everybody else.

(Da 54; 30T 40-2 to 22) (emphasis added)

The inescapable inference from the detectives’ remarks was that Reynoso’s name was circulating – among “multiple” people on the street, as well as members of the criminal milieu – as one of the individuals involved in the shooting. As such, the detective’s testimony ran afoul of the rule against hearsay and violated Reynoso’s constitutional right to confront the witnesses against him. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. When ““the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt,”” the right to confrontation is violated. State v. Branch, 182 N.J. 338, 349 (2005) (quoting State v. Bankston, 63 N.J. 263, 271 (1973) (reversing conviction where detective's testimony led to the “inescapable inference” that the detective received information from an unknown source implicating the defendant in the crime)).

The trial court’s curative instruction was insufficient to remedy the harm caused by the highly prejudicial opinion evidence and inferential hearsay that littered Reynoso’s interrogation. The trial judge instructed the jury:

So ladies and gentlemen, when you last left off with the trial, you were watching S-90, the video recording of Defendant Christopher Reynoso's statement to the police.

I have previously given you instructions on how you can consider that statement. I'm further instructing you that during the course of

this statement you may hear a detective's subjective opinion regarding what is depicted in S-97, the surveillance video.

I'm instructing you that Detective Flores and Detective Valari (phonetic) do not possess any specialized knowledge or information and thus their subjective opinion as to what S-97 may depict, is not evidence in this case.

It is simply an interrogation technique used by law enforcement during the questioning of a suspect. I am instructing you that the fact that a law enforcement officer may insert his or her subjective belief into a question or statement during the interrogation is not evidence and must not be considered by you in any manner whatsoever as proof of a defendant's guilt.

As I have continuously emphasized throughout this trial, you and you alone are the sole fact finders in this case. You will have the video, S-97, for your independent consideration during your deliberations.

As the sole judges of the facts, you and you alone are to determine whether the State has proven beyond a reasonable doubt the identification of the perpetrators.

(30T 27-28 to 29-3)

First, the curative instruction solely addressed the detective's lay opinion testimony about the surveillance footage. It did not provide any guidance concerning the confrontation clause/hearsay embedded in the interrogation.¹³

¹³ At the previous day's proceedings, the trial court mentioned that it would advise the jurors that they had "the same information that the police had in deciding to charge the defendant." (29T 19-9 to 15) While such an instruction might have helped dispel the notion that the police had additional evidence and non-testifying witnesses had implicated defendant, the court neglected to include that language in final curative instruction delivered to the jury.

Consequently, the jury was permitted to make the exact types of inferences that Branch and Bankston forbid. Given the stark contrast between the detectives' confident claims during the interrogation and the evidence actually presented at trial, it was even more likely that the jury would infer that detectives had evidence against Reynoso to which it was not privy.

Second, the curative instruction regarding the surveillance video was inadequate. While the court told the jury that the “detective's subjective opinion regarding what is depicted in [] the surveillance video” is not evidence, the court failed to identify the offending opinion with any specificity. See State v. Vallejo, 198 N.J. 122, 136–37 (2009)(criticizing the curative instruction for failing to identify “what was ‘blurted out’ or what information was ‘not part of this case’”). The interrogation was lengthy and the detectives' subjective opinions were pervasive. The jury should have been explicitly directed to disregard any opinions regarding the identification of the defendant or the alleged vehicle involved in the shooting, as well as any general interpretations of the video's content.

Even if the instruction had been more specific, there is significant doubt that it could have effectively remedied the prejudice because the detective's clear and repeated lay opinion directly addressed the ultimate issues in the case: whether the car on the surveillance footage was involved in the shooting and whether Reynoso

was in that car at the time of the shooting. “[E]vidence that bears directly on the ultimate issue before the jury may be less suitable to curative or limiting instructions than evidence that is indirect that requires additional logical linkages.” See State v. C.W.H., 465 N.J. Super. 574, 595–96 (App. Div. 2021) (citation omitted). This is especially true when that opinion is “clearly and repeatedly stated.” Id. at 595–96 (finding curative instruction inadequate where officer's opinion testimony on ultimate issue was “clearly and repeatedly stated”).

Given the absolute certainty of the detectives’ opinions, their direct relevance to the disputed facts, and the poor quality of the surveillance footage, it is unlikely that any instruction would have enabled the jury to disregard the detective’s opinion that Reynoso was involved in the shooting and that the surveillance footage showed that. State v. Boone, 66 N.J. 38, 48 (1974) (recognizing “[t]here are undoubtedly situations in which notwithstanding the most exemplary charge, a juror will find it impossible to disregard such a prejudicial statement.”). Undoubtedly, once the jurors heard the detective's clear and repeated interpretation of what the video footage showed, it would have been difficult for them to see it differently. Social science research supports this, showing that once expectations are set, people tend to interpret ambiguous evidence in line with those expectations. See, e.g., Sofia Yakren, Removing the Malice from Federal “Malicious Prosecution”: What Cognitive Science Can Teach Lawyers About

Reform, 50 Harv. C.R.-C.L. L. Rev. 359, 382 (Summer 2015) (“Once expectations, among other factors, have led us to conclude we perceived one thing rather than another, it becomes more difficult to perceive details that contradict the original perception.”). In this case, where the quality of the video was poor, there was no eyewitness identifications, and no physical evidence connecting Reynoso to the crime, the judge’s failure to redact the interrogation video and the lack of a comprehensive curative instruction addressing both categories of improper evidence prejudiced Mr. Reynoso’s right to a fair trial and requires reversal.

POINT III

THE TRIAL COURT COMITTED REVERSIBLE ERROR BY GRANTING THE JURY UNFETTERED ACCESS TO THE STATE’S SURVEILLANCE VIDEO COMPILATION DURING DELIBERATIONS, WITH NO RECORD OF HOW OFTEN THE VIDEO WAS PLAYED OR WHETHER IT WAS MANIPULATED. (31T 216-16 to 217-5; 32T 117-14 to 18)

After both sides concluded their presentations, the trial judge addressed the matter of which evidence the jury could take into the deliberation room and which it would have to view in open court. Regarding the compilation of surveillance footage—the cornerstone of the State's case—the judge ruled that the jury should have unrestricted access to it:

They have to ask for everything but the surveillance video. They can watch the surveillance video as much as they want because there's no sound. There's no nothing. It's the equivalent of a picture. So they can do with that what they want.

(32T 117-14 to 18)

As a result of this ruling, there is no record of how many times the jury played the surveillance footage and whether they adjusted the playback speed.¹⁴ Additionally, any viewing of the footage during deliberations was not accompanied by the relevant direct and cross-examination to contextualize the video, and no jury instruction was given to caution against overemphasizing this single piece of evidence. Consequently, Reynoso was deprived of his right to a fair trial and his convictions must be reversed. U.S. Const. XIV.

The New Jersey Supreme Court has, on multiple occasions, promulgated guidelines governing the playback of audio and video testimony during jury deliberations. See State v. Burr, 195 N.J. 119, 134 (2008) (requiring trial court to inquire if readback would suffice, and if not, to consider whether additional direct and cross-examination should be played to provide proper context; and to conduct playback in open court); State v. Miller, 205 N.J. 109, 122 (2011) (requiring judges to make a precise record of what was played and to instruct juries to

¹⁴ State v. Knight, 257 N.J. 248 (2024), is currently on certification before the Court on the issue of whether it was error to let the jury view a surveillance video, in open court, multiple times in slow motion.

consider all of the evidence presented). See State v. A.R., 213 N.J. 542 (2013)(endorsing decision in Burr and noting that playbacks of audio and video-statements both “compromise the fairness of a trial). These guidelines stem from the Court's recognition of the inherent dangers of playbacks: the potential for juries to overemphasize such evidence, the risk of decontextualization when isolated from direct and cross-examination, and the lack of transparency when played during private jury deliberations.

Although the Court has not explicitly addressed the replay of surveillance footage during deliberations, such evidence possesses a similarly potent ability to influence juror perceptions and decision-making as video and audio testimony. Surveillance footage is now ubiquitous at criminal trials and “[t]he power of a video of contemporaneously recorded events at the crime scene can hardly be disputed.” State v. Garcia, 245 N.J. 412, 431 (2021). “[A] video recording is a valuable tool[,]” and can “enhance[] a judge or juror's assessment of credibility by providing a more complete picture of what occurred.” State v. Cole, 229 N.J. 430, 450-51 (2017) (internal citations omitted).

Just recently, a panel of the Appellate Division suggested that replays of “non-testimonial video evidence” may not raise identical concerns as replays of testimonial video evidence. State v. Knight, 477 N.J. Super. 400, 419 (App. Div. 2023), certif. granted, 257 N.J. 248 (2024). Nonetheless, the Panel

acknowledged the potential risks of replaying surveillance footage during deliberations,¹⁵ and instructed the Model Criminal Jury Charge Committee to draft a model charge addressing this issue, specifically cautioning jurors “to afford such evidence only appropriate and not undue weight in comparison with the other evidence at trial.” Id. at 420.

Although surveillance footage does not involve spoken testimony, jurors need to exercise their judgment as factfinders in reviewing video evidence just the same as when they review testimonial evidence. On its own, surveillance video may present an incomplete picture of events. Actions depicted on the footage must be explained or put into context by other evidence. For a number of reasons, the video footage may not provide a conclusive answer to the questions jurors need to resolve, even after many replays. These reasons may include contextual information that the video does not provide, the length of the video, the quality of the footage, the angle of the camera, or objects obstructing the view of the camera.

Without guidance, during the course of contested deliberations, jurors might allow video evidence to overshadow facts testified to witnesses but not captured on video. See Balian v. Gen. Motors, 121 N.J. Super. 118, 128 (App.

¹⁵ In Knight, the jury’s fifteen viewings of the surveillance video occurred in open court. Id. at 415.

Div. 1972) (noting “danger of undue prejudice as a result of the jury’s placing inordinate weight on the moving pictures”). A juror who draws different conclusions from surveillance video than her fellow jurors may be pressured to adopt the consensus view – even if she still does not see what the other jurors see. Therefore, as the Supreme Court has held in the context of playback of testimony, “judges should instruct jurors to consider all of the evidence presented and not give undue weight” to surveillance footage during their deliberations, and to replay any footage in open court. See Miller, 205 N.J. at 123.

In this case, the trial judge’s decision to permit the jury unrestricted and unsupervised access of the surveillance video compilation rested on a false premise: that as long as there was no audio, video evidence is akin to a still photo. The judge reasoned, because the jury would be permitted to take a still photo introduced as evidence into deliberations, it should likewise be permitted to take an audio-less video. The judge was wrong.

Some of the differences between a still photo and a video are obvious. A photo captures a moment frozen in time; a video represents a collection of moving images unfolding over time. And other differences relate to how the brain processes visual stimuli. [O]ur brain prioritizes visual information.” Yael Granot et. al., In the Eyes of the Law: Perception Versus Reality in Appraisals of Video

Evidence, 24 Psychol. Pub. Pol'y & L. 93, 94 (2018). Research demonstrates that visual input processing utilizes more cortical area and neural resources than other senses, leading to faster and more accurate interpretation and recall. Complex visual stimuli, like videos, activate a wider range of brain regions, including those involved in interpreting social cues. Due to this neurological prioritization, “[v]ideo, as compared with other forms of evidence, has unique persuasive power to communicate legally relevant facts. Video is more cognitively and emotionally arousing and vivid than other forms of evidence, giving jurors the impression that they are perceiving relevant information directly.” Ibid. (internal citations omitted)

Providing the jury access to a 28-minute -long video that purports to establish the timeline for the car involved in the shooting was not tantamount to providing still photographs. Research and anecdotal evidence consistently demonstrate that videos are distinct from still photographs in their impact and potential for influence. Ask any parent which resonates more deeply: a single photograph capturing their child's first step, or a video showcasing the entire sequence? The more apt analogy for the trial court was not a still photo but testimonial video evidence governed by Burr, Miller and A.R. Thus, the jury should not have had unrestricted access to the 28-minute video. Rather, the video should have been provided to the jury, upon request, and played in open court, along with the relevant testimony to put the video in context. For example, the

testimony about the time on the camera from which the individual videos were collected and the location of the camera from which the videos were collected.¹⁶

The surveillance video compilation was the cornerstone of the State's case.

As the prosecutor emphasized in summation:

Despite time, despite memory loss, despite changes in life circumstances, there's one constant in the world of evidence: And that is video.

Videos find us when we are unaware. Videos find us when we don't see them. And in their case, when you don't want to be seen the videos found them. The videos found them in the beginning, in the middle, and at the end.

They were seen clip after clip after clip.

...

I stood up here and told you -- and I tell you again -- no eyewitnesses. No DNA. No physical gun. And video after video after video for you to watch over and over and over again, if you so please. Because these videos are now yours. They're evidence to do what you will.

(32T 96-16 to 25; 97-15 to 20)(emphasis added)

¹⁶ The surveillance footage was introduced in evidence during Detective Michelle Merced's trial testimony, where she also explained the process of calculating time discrepancies between the actual time and the time displayed on the various cameras. During deliberations, the jury asked for the "real time recording of Merced's testimony of the camera at Burgess and Federal Street between Burgess and Summer and Spruce and Summer". (33T 157-19 to 22) They also asked for "Merced's testimony transcript" and her police report that "includes time discrepancies," and for clarification of the difference between "red and blue cameras." (33T 144-6 to 10) The jury's request for this testimony clearly indicates that the surveillance video was an important factor in their deliberations.

Because the State's other evidence was weak, providing the jury with a video that vividly encapsulated the State's entire case – without any record of the number of times it was viewed and what modifications to playback speed were available, and with no cautioning instructions regarding the risk of overemphasis – prejudiced defendant's right to a fair trial and requires reversal.

POINT IV

THE IMPROPER ADMISSION OF A POLICE OFFICER'S IDENTIFICATION OF DEFENDANT FROM SURVEILLANCE FOOTAGE REQUIRES REVERSAL. (Not Raised Below)

Our rules of evidence generally do not permit a police officer to opine that a photo or video depicts the defendant. State v. Singh, 245 N.J. 1, 17 (2021). The exception to this prohibition is when the police officer's opinion is based on their prior encounters with the defendant that enable the officer to identify the defendant "more accurately than a jury could." State v. Watson, 254 N.J. 558, 593-94 (2023) (citing State v. Sanchez, 247 N.J. 450, 474-75 (2021)).

In this case, Detective Raymond Rodriguez's identification of Reynoso near the ice cream truck did not meet the narrow exception allowing police identifications, as Rodriguez was in no better position than the jury to determine who was depicted in the surveillance footage. The State's case hinged on the identification of the individual at the ice cream truck. They argued that the person seen standing by the truck was wearing the same distinctive pair of pants as the person who entered the car later that night, leading them to conclude that it was Reynoso who got into the car with the co-defendant on the night of the shooting. Thus, Rodriguez's inadmissible opinion testimony deprived Reynoso of his rights to due process and a fair trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. Reynoso's convictions should be reversed.

Rule 701 governs the admissibility of lay opinion testimony. The rule provides that “testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness’ perception; and (b) will assist in understanding the witness’ testimony or determining a fact in issue.” N.J.R.E. 701. In a series of recent cases, our Supreme Court has clarified the scope of Rule 701, particularly as it relates to law enforcement officers opining as to what videos or photos depict. In State v. Singh, the Supreme Court held that it was an improper lay opinion under N.J.R.E. 701 for a detective “to refer to an individual depicted in the surveillance video as ‘the defendant.’” 245 N.J. at 17. Although the detective had seen the defendant before in real life when he arrested him, id. at 17-18, the detective’s opinion that the surveillance video depicted the defendant was inadmissible.

In contrast, in State v. Sanchez, the Supreme Court held that the defendant’s parole officer could opine that a surveillance still depicted the defendant. 247 N.J. at 475. The Court explained that the parole officer’s opinion satisfied the “perception” prong of N.J.R.E. 701 because she “became familiar with defendant’s appearance by meeting with him on more than thirty occasions during his period of parole supervision.” Id. at 469 (emphasis added). Regarding the helpfulness prong, the Court set forth several factors to consider in determining whether a non-eyewitness’s identification could assist the jury.

First, “the nature, duration, and timing of the witness’s contacts with the

defendant are important considerations.” Id. at 470. Applying this factor, the Court explained that the witness’s repeated prior meetings with the defendant “were more than sufficient to enable her to identify him in the surveillance photograph more accurately than a jury could.” Id. at 474. Specifically, the witness had met with the defendant “at least twice per month in the fifteen months preceding her review of the photograph” making her sufficiently “familiar with his appearance over that period, which included the date of the alleged offenses.” Ibid. The Court further explained that if, unlike the parole officer, a “witness has had little or no contact with the defendant, it is unlikely that his or her lay opinion will prove helpful.” Id. at 471 (citing State v. Lazo, 209 N.J. 9, 24 (2012)).

Second, “if there has been a change in the defendant’s appearance since the offense at issue, law enforcement lay opinion identifying the defendant may be deemed helpful to the jury.” Id. at 472. Third, when there are other witnesses available to identify the defendant at trial, “law enforcement lay opinion identifying a defendant in a photograph or video recording is not to be encouraged.” Id. at 472 (internal quotation marks omitted). Instead, such law enforcement identification testimony “should be used only if no other adequate identification testimony is available to the prosecution.” Ibid. Fourth, “the quality of the photograph or video recording at issue may be a relevant consideration,” with both very clear and very blurry photos weighing against the helpfulness of the lay witness’s identification. Id.

at 473.

Here, Detective Rodriguez identified Reynoso from surveillance footage that showed a person standing next to an ice-cream truck on the day of the shooting. (18T 149-19 to 22) Rodriguez's prior familiarity with Reynoso consisted of two sets of interactions: the first occurring when Reynoso was a member of the Junior Police Academy six or seven years earlier; and the second from undated interactions at a local laundromat. Rodriguez testified that the Junior Police Academy was a one-week long summer program for fifth graders (generally 10 and 11 years old). (18T 149-12 to 15) Approximately 60-80 participated each week. (19T 155-18 to 21; 156-1 to 3)) Rodriguez could not recall his specific interactions with Reynoso, simply that he had interactions. (18T 150-8 to 11) When he was specifically asked for more detail about the interaction, Rodriguez responded that he "assisted with the group" and did not recall whether Reynoso was in his group or not. (18T 15-12 to 15) Rodriguez could not identify Reynoso from the Junior Police Academy Graduation photo from 2011. (19T 157-16 to 158-7)

As for the interactions at the laundromat, Rodriguez could not date those interactions; he remembered that he would see Reynoso at the laundromat selling corm to the patrons on "numerous occasions." (18T 151-1 to 5) On one occasion, Reynoso recognized Rodriguez as a police officer. (18T 151-8 to 11) Rodriguez

said: I can't remember what age bracket was or what that time span was." (19T 154-15 to 19) Even when Rodriguez was asked where he was living when he visited that laundromat, he could not recall. (18T 151-17 to 24)

Rodriguez's prior interactions with Reynoso fall woefully short of the level of familiarity a law enforcement witness needs to satisfy both the personal perception and helpfulness prongs of N.J.R.E 701. In stark contrast to the parole officer in Sanchez, who had personally met with and spoken to the defendant more than 30 times over the course of more than a year, including on the date of the offense, Rodriguez interacted with Reynoso six years prior when he was a mere 10 or 11 years old. Rodriguez had no recollection of the specific timeframe of the laundromat encounter. First, looking at the interactions at the junior police academy, they are too remote to provide sufficient familiarity. Not only are the interactions distant in time, but they occurred when Reynoso was a child; the period between 10 and 17 years-old represents a significant period of adolescent growth and dramatic physical transformation. Reynoso's most salient physical features would have changed significantly from the junior academy to Rodriguez's identification, including his height, his weight, facial features, his hair, and his skin. Moreover, while it's plausible that prolonged intimate interactions with a ten-year-old would allow a lay witness to identify that person at 17, there is nothing in the record to support that the interactions at the Junior Academy were anything but superficial. Rodriguez testified

that there were 60-80 kids who attended the program each week and that it was a three-week program. He could not even recall if Reynoso was in his group and when probed about specific interactions with Reynoso, he could offer none.

The subsequent interactions at the laundromat could conceivably bridge the gap between the Junior Academy and the in-court identification, except those interactions are undated. Rodriguez was unable to provide a timeframe for these interactions, not even an estimated one, nor could he place them in context with events in his personal life, such as his residence at the time. Given the haziness of Rodriguez's recollection, it is plausible to infer that these laundromat interactions occurred a while back, in close temporal proximity to the Junior Police Academy. Without detail about the timing and frequency of the laundromat interactions, their value as evidence for establishing familiarity is worthless.

Detective Rodriguez's identification also falls short when considering the other factors from Sanchez. There was no information presented that Reynoso's appearance had changed between the shooting and the trial. Id. at 472. Regarding the quality of the surveillance videos, the ice-cream truck footage was crisp and clear. The State believed the video to be sufficient enough for Rodriguez to identify Reynoso, so the jury should have been permitted to make this assessment themselves, without testimony from a law enforcement witness with passing familiarity.

Finally, the Supreme Court in Sanchez explained that “law enforcement lay opinion identifying a defendant in a photograph or video recording . . . should be used only if no other adequate identification testimony is available to the prosecution.” Id. at 472 (emphasis added, internal quotation marks omitted). Here, the record is not clear if there were non-law-enforcement witnesses who could have identified Reynoso in the video. However, as the proponent of the opinion evidence, the State was responsible for establishing its admissibility. State v. Hyman, 451 N.J. Super. 429, 441 (App. Div. 2017). But even if there were no non-law-enforcement witnesses who could have made an identification, all of the other factors militate against the admissibility of Rodriguez’s lay opinion testimony. In other words, sufficient familiarity is a threshold issue so a police officer with insufficient familiarity would not be permitted to make an identification simply because there were no available non-law-enforcement witnesses who could. Detective Rodriguez’s inadmissible lay opinion testimony was clearly capable of producing an unjust result. R. 2:10–2. The detective’s identification of Reynoso at trial is the only identification presented as evidence. Although the State alleges that Reynoso entered the car with Vargas later that night, the surveillance footage does not show the passenger’s face. The detective’s identification was critical for the State’s case, as it linked Reynoso to a specific pair of pants that can be seen on the video of the ice cream truck. The State then argued that these same pants were

worn by the person entering the car, implying it was Reynoso, despite the fact that the individual's face is not visible in the video. In other words, the State's theory hinged on the detective's identification linking Reynoso to the specific pair of pants seen in the ice cream truck video, which they then used to argue, by inference, that he was the same person entering the car later that night.

Because he met Reynoso when he was a child and could not recall their subsequent encounters at the laundromat, Detective Rodriguez lacked sufficient familiarity to identify him at trial. The jury was equally able to review the surveillance footage and make its own determination if the person shown was Reynoso or not. The improper admission of the identification deprived Reynoso of his rights to due process and a fair trial and requires reversal of his convictions.

POINT V

TWO DETECTIVES WITH NO PRIOR KNOWLEDGE OF THE THIRD-PARTY GUILT SUSPECT IMPROPERLY TESTIFIED THAT UNPRESERVED SURVEILLANCE FOOTAGE THEY REVIEWED CORROBORATED THE SUSPECT'S ALIBI, THEREBY PREJUDICING DEFENDANT'S RIGHT TO A FAIR TRIAL. (15T 56-14 to 58-25)

Reynoso presented a robust and credible third-party guilt defense involving Torlao and Hadjiedj. The men were best friends and Hadjiedj had aided Torlao in looking for and retrieving his stolen vehicle from an address in Passaic, within yards of where the shooting occurred. Even after Torlao recovered his car, there

was lingering bitterness. Hadjiedj uploaded a video on social media, accusing the people at the address where the car was found of stealing vehicles. Essentially, he broadcasted the criminal activity of the people living there to a wide audience.

Two weeks after getting his car back, Torlao returned to Passaic—a fact he consistently lied about—accompanied by two carloads of people. His intention was to "confront" the suspected car thieves, despite being fully aware that they might be armed.

The best friends denied any involvement in the shooting. Torlao claimed that he was home that evening. The police did not corroborate his claim by speaking with his mother or checking his cell phone location data. Hadjiedj claimed that he was at a music studio in Clifton, about 1.5 miles away from the shooting location. Detectives Rodriguez and Flores testified that they went to the music studio and watched hours of surveillance footage and confirmed Hadjiedj's alibi. (27T 138-22- 139-11; 27T 140-22 to 22) The footage was not played at trial because it was not preserved. (18T 141-15 to 21) The detectives were not familiar with Hadjiedj before the investigation; they were working off a photograph of him to compare to the surveillance footage. (18T 1380- 13 to 21)

Over the defense's objection, the trial court permitted the State to elicit testimony from both detectives that unpreserved surveillance footage confirmed

one of the third-party suspect's alibi. The court also denied the defense's request for an adverse inference instruction. (15T 56-14 to 58-25)

The admission of this testimony violated N.J.R.E. 701 because neither detective was an eyewitness to the events shown on the video or had previous familiarity with Hadjiedj. N.J.R.E. 701; State v. Singh, 245 N.J. 1, 17 (2021); State v. Lazo, 209 N.J. 9 (2012); State v. McLean, 205 N.J. 438 (2011). The improper admission of testimony confirming the alibi of one of the third-party guilt suspects severely undermined the defense's case and requires reversal. U.S. Const. amends. VI, XIV

; N.J. Const. art. I, ¶¶ 1, 9, 10.

Our Supreme Court recently established rules governing and stringently limiting video narration testimony in State v. Watson. 254 N.J. 553 (2023). Drawing on several evidentiary rules, the Court reaffirmed that video narration testimony from a lay witness must satisfy two fundamental requirements: it must (1) be based upon the witness's firsthand knowledge; and (2) be helpful to the jury. Id. at 599-600 (citing N.J.R.E. 701, 602, and 403). Witnesses who did not experience the events depicted on a video are subject to substantial limitations when testifying about the video's contents. Police witnesses "can describe what appears on a recording but may not offer opinions about the content." Id. at 603. These witnesses are prohibited from offering "subjective interpretations" of videos. Ibid. Witnesses are equally

prohibited from “offer[ing] their views on factual issues that are reasonably disputed” because “[t]hose issues are for the jury to decide. Ibid. (citing State v. Higgs, 253 N.J. 333, 366-67 (2023)). Finally, police witnesses “should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence.” Ibid. Thus, as the Supreme Court explained, an investigator “could not say . . . ‘that’s the same blue car’ or ‘that’s the defendant,’ if those facts were disputed.” Id. at 604.

In this case, had the police preserved the surveillance footage from the music studio and played it at trial, two things are clear. First, neither detective would have been permitted to identify Hadjiedj on the video. Second, the detectives would not have been permitted to conclude that the video confirmed Hadjiedj’s alibi. If this testimony would have been prohibited if the video were played at trial, it was equally inadmissible under the circumstances here, and the resulting prejudice was even more severe.

Additionally, Rodriguez and Flores’ opinion that Hadjiedj appears on the studio’s surveillance footage was not based on personal knowledge. Neither detective was present at the music studio on the night in question and neither had sufficient prior familiarity with Hadjiedj before the incident. See Sanchez, 247 N.J. at 475 (sufficient prior familiarity where parole officer met with defendant on 30 occasions over the course of the year). Having had personal contact with Hadjiedj

on only one prior occasion, the detectives' recollection of Hadjiedj was so limited that they needed to bring a photo of him for comparison when they viewed the video.

The detective's testimony that the video confirmed the alibi was also inadmissible. Even when a witness is qualified to offer lay opinion testimony under N.J.R.E. 701, they are prohibited from commenting on "facts that are reasonably in dispute." Such matters should be left to the jury to decide. In this instance, even if Rodriguez and Flores were qualified to identify Hadjiedj in the surveillance video, they were not allowed to offer their conclusive opinion that the video supported Hadjiedj's alibi. That was a question for the jury to resolve, as it directly related to a central dispute in this case: who were the two people involved in the shooting.

Under the second prong of N.J.R.E. 701, Rodriguez and Flores' testimony was not helpful to the trier of fact. Video narration testimony cannot be helpful without the accompanying video evidence. The Supreme Court has explained that when a video is played at trial, narration testimony can help the jury understand "chaotic or confusing recorded events"; help the jury follow "potentially confusing, complex or unclear videos that might otherwise be difficult to grasp"; focus the jurors on small or nuanced details that might otherwise be missed; or help decipher unclear or grainy footage when the contents of the footage is not reasonably in dispute. See Watson, 254 N.J. at 601 ("Even though it is for the jury

to determine what a recording depicts, there are times when narration testimony can help jurors better understand video evidence and aid them in ‘determining a fact in issue.’”).

Without the surveillance footage, the detective’s testimony was not helpful; it entirely usurped the jury’s role. The jury was solely reliant on the detective’s subjective account of the content of the video. The testimony did not aid the jurors in determining what was on the video. Rather, it told them what the video showed, without any way for the jury to independently verify or confirm that what the detectives claimed was accurate.

Beyond the violation of N.J.R.E. 701, the failure to preserve the video while testifying about its contents hampered the defense’s ability to effectively cross-examine the detectives about the specific details or to even challenge their interpretation of the video. The defense was left to challenge the detective’s testimony in a vacuum, without a concrete basis to discount their opinion that the video confirmed the suspect’s alibi.

The trial judge's decision to deny the defense's motion to exclude lay opinion testimony rested on two rationales: (1) that prior cases concerning video narration dealt with narration of “the actual crime itself,” and (2) that the defense effectively presented their third-party guilt defense without allowing the State to testify about the music video evidence as an alibi. (15T 46-20 to 47-5)

Both rationales are flawed. There is nothing in the language of N.J.R.E. 701 or the relevant precedents that suggests the rule's application is limited to video of the actual crime scene. Rule 701 concerns apply broadly to any lay opinion testimony that intrudes on the fact-finding province of the jury. The trial judge's second rationale presented a false choice, conditioning the defense's ability to present its third-party guilt theory on the State's ability to introduce potentially prejudicial lay opinion testimony. In reality, excluding this inadmissible testimony would not have interfered with the presentation of the third-party guilt defense. The defense would have been presented in the exact same manner; the exception is that the detective would not have been able to testify that the music studio video corroborated the alibi. Instead, as defense counsel suggested, the detectives could have testified that they investigated the alibi at the music studio, and based on their findings, the investigation shifted focus. (15T 50-2 to 6)

Alternatively, Defendant adopts co-defendant's Nelson Vargas' argument that the trial court erred in denying the defense's request for an adverse inference charge. The charge would have allowed the jury to infer that the State's failure to produce the video suggests it might have contained evidence unfavorable to the State's case. See State v. Dabas, 215 N.J. 114, 132 (2013).

The prejudice from the inadmissible lay opinion testimony is manifest. The defense was third-party guilt; the improper lay opinion testimony gutted that

defense. The defense maintained that some combination of Torlao or Hadjiedj, individually or together, were involved in the shooting. The police never corroborated Torlao's alibi. Instead, they accepted at face value that he was home on the night of the offense. Thus, the inadmissible testimony about the video was the only evidence at trial corroborating the third-party guilt suspects' alibi. Without the ability to view the video themselves, the jury was forced to rely on the detectives' untested and biased interpretation of the video. Given the State's weak case—no DNA, no gun, no eyewitness identification, no motive, no connection, no admissions—the inadmissible testimony cut to the heart of Reynoso's defense and warrants reversal.

POINT VI

THE PROSECUTOR ENGAGED IN MISCONDUCT BY MAKING TWO SPECIOUS CLAIMS: ASSERTING, WITHOUT EVIDENCE, THAT REYNOSO HANDLED A GUN IN THE CAR, AND IMPROPERLY VOUCHING FOR THE OFFICER'S CREDIBILITY BY IMPLYING THAT DISCOUNTING THEIR TESTIMONY WOULD BE TANTAMOUNT TO ACCUSING THEM OF A CONSPIRACY. (Partially raised below at 33T 5-6 to 11-3)

During his summation, the prosecutor replayed segments of the surveillance video compilation, providing his own narration alongside the footage. When showcasing the clip of the suspected car at a gas station before the shooting, the prosecutor asserted that Reynoso was handling a firearm inside the vehicle:

Ladies and gentlemen, I submit to you right now, as this is happening, that Defendant Reynoso is sitting in this vehicle, he had something in his hand. I submit to you that I want you to look at the way his hand is positioned, and you determine whether or not my submission to you that that is a gun is accurate.

And then I want to show you something that you're probably going to miss. Right there. Hand positioning. Gas is already paid. He's already got what he needed. They're sitting there. Right there. That's what I want you to look at.

Ladies and gentlemen, I want you to focus on Defendant Reynoso's left hand. It's going to happen quick. See he's opening his hand? See that little shine? What can shine in light? I'm going to show it to you one more time. See it? I submit to you it could be a shell casing. It could be a bullet. I submit to you that it is exactly that, that you're seeing in this video.

(32T 149-3 to 22) (emphasis added)

This comment significantly exceeded the permissible boundaries of summation, as it lacked an evidentiary basis in the record. “[W]hen summing up the State’s basis for asking a jury to convict a defendant, a prosecutor is obliged to confine summation remarks to the evidence in the case and only those reasonable inferences that may be drawn from that evidence.” State v. McNeil-Thomas, 238 N.J. 256, 283 (2019). Prosecutors should not ask jurors to draw conclusions that do not have any support in the record. See State v. Atwater, 400 N.J. Super. 319, 336-337 (App. Div. 2008).

Prosecutorial argument asking the jury to draw reasonable inferences from evidence introduced at trial is fair game. For example, in McNeil-Thomas

case, the prosecutor, during closing arguments, connected a five-second video clip—shown earlier during the lead detective's testimony depicting traffic at the shooting scene—with the neighbor's testimony about the car the defendant was driving on the night of the incident. 238 N.J. 272-73. Because this argument was based on the evidence, defense counsel had the ability to “vigorously” challenge the neighbor’s recollection during cross-examination. Id. at 277. Our Supreme Court found this argument did not constitute misconduct because it was “reasonably related to the scope of the evidence presented.” Id. at 280.

The Court in McNeil-Thomas contrasted the facts before it from those in State v. Feaster, 156 N.J. 1, 59 (1997), where it had previously concluded a prosecutor’s comments were beyond the scope of the trial evidence. Ibid. In Feaster, the prosecutor claimed in summation that the defendant had loaded and cocked the hammer of the shotgun used to shoot the victim during his car ride to the scene of the murder. 156 N.J. at 62. The Court found these comments were “highly improper” because they lacked any support in the evidence. Ibid. There was substantial evidence that the defendant had shot the victim and therefore it could be inferred that the defendant loaded the gun prior to the shooting. Ibid. However, “[e]vidence presented to the jury established neither that defendant loaded the gun during the car ride nor

cocked the hammer of the weapon en route.” Ibid. (affirming conviction given overwhelming nature of other evidence).

As the Court in McNeil-Thomas explained, the prosecutor in Feaster “had no evidential support for his assertion,” whereas the prosecutor in McNeil-Thomas “invited jurors to adopt ‘inferences’ . . . ‘that [they] could draw from proven facts.’” McNeil-Thomas, 238 N.J. at 279 (quoting State v. Carter, 91 N.J. 86, 125 (1982)). In this case, the prosecutor had no basis in the record to claim Reynoso was handling a gun or bullet minutes before the shooting.

Throughout the trial, no witness testified to seeing Reynoso with a gun on the day of the shooting, nor was the weapon used in the incident ever recovered. The sole assertion that Reynoso possessed a gun came from the prosecutor during closing arguments. The prosecutor’s statement was based on a grainy pixelated video, in which it is impossible to discern what the passenger is doing or handling. The video is captured from an elevated perspective, looking down at an angle on the car. There is almost no light illuminating the passenger. At best, the relevant portion of the video shows the silhouette of an arm and hand on the passenger side of the vehicle. (Da 133 at 12:17 to 15:15) At one point, a glimmer of light appears, possibly from an object inside the car. (Da 133 at 13:13 to 14:50) The shape, size, and character of the object is totally unclear – it could be a wrapper from a candy

bar, or any other light-color or reflective item. The prosecutor's summation argument, asserting that "the defendant [was] handling the gun...handling bullets... [a] minute before he commits this murder," relies entirely on this ambiguous and indecipherable video snippet.

The surveillance footage is so unclear that the prosecutor could have attached any narrative to the blurry image. For example, had this been a poisoning case, the prosecutor could have argued that that's the passenger handling the poison in the car; or if explosives were involved, the prosecutor could have argued that explosives were being stuffed into a bag. Any theory would have plausible because the footage is completely indecipherable. Of course, sometimes surveillance footage will be ambiguous and a prosecutor will be permitted to draw inferences from ambiguous images. However, in this case, the court need not establish the precise boundary between fair and unfair commentary based on what is discernible in surveillance footage, as the footage in question is simply too unclear to support the prosecutor's interpretation.

Turning to the other instance of misconduct, the prosecutor improperly argued that Detective Flores and Rodriguez truthfully testified about the content of the unpreserved music studio video and to believe otherwise would be tantamount to accusing the police and the witness of conspiring together. Specifically, the prosecutor argued:

Mr. Hadjiedj's alibi . . . Detective Rodriguez went to the studios, watched the video. Detective Flores watched the video. They both said three to four hours. He was sitting, smoking, drinking, watching, and listening to music. Ray said it, Flores said it, and then Mehdi said it. The Defense wants you to believe that this is a lie. That because there's no video to show that –

And if that's the case, then Detective Flores, Detective Rodriguez -- both detectives of the Passaic Police for upwards of 20 years -- Mehdi Hadjiedj, a 25-year-old from Jersey City, and the So Fresh Studio in Clifton were all in a conspiracy to fabricate that Mehdi was there. That's the only logical (indiscernible).

Again, is this a conspiracy? Do you believe that all these individuals were wrapped up and that's why this video was not preserved and brought to you?

I mean, you see all the clips. You heard thousands of hours of clips that Detective Merced went through, but she's going to disappear that clip. Does that sound reasonable? Does that make sense?

(32T 113-3 to 119-2)(emphasis added)

This line of argument violated multiple precepts. First, the prosecutor presented a false dichotomy: either the surveillance footage existed exactly as described or the third-party guilt suspect and the police fabricated its existence. In reality, there were multiple reasons to question the detective's testimony without resorting to a conspiracy theory – faulty memory, unfamiliarity with the suspect, or even watching the wrong footage. Second, in presenting this dichotomy, the State improperly shifted the burden of proof onto defendant to disprove a conspiracy. See generally State v. Jones, 364 N.J. Super. 376, 382, 836 A.2d 814, 818 (App.

Div. 2003)(reaffirming that “a defendant has no obligation to establish his innocence” and finding argument that defendant could have dusted the gun for prints constituted impermissible burden shifting). By insinuating that only a conspiracy could explain away the unpreserved footage, the prosecutor essentially forced the defendant to prove a negative – the absence of a conspiracy.

Third, imbedded in the prosecutor’s argument that the defense’s position was unreasonable was improper vouching on behalf of the police officers. In arguing that the defense’s claim was incredulous, the prosecutor referenced both detectives’ positions and experience in the police department: “And if that’s the case, then Detective Flores, Detective Rodriguez- both detectives of the Passaic Police for upwards of 20 years . . .” (32T 118-14 to 17) The import of this argument is clear: by referencing their decades of experience, the prosecutor implicitly conveyed that the accounts of these two experienced detectives should be inherently trusted over the defense’s. State v. Rivera, 437 N.J. Super. 434, 446, (App. Div. 2014)(prohibiting prosecutors from bolstering a witness’s credibility); State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993)(reversing for multiple instances of misconduct, including a statement that a witness had been “a police officer for over 20 years” and that he wouldn’t sacrifice his career by testifying falsely).

The prosecutor also committed misconduct when he misrepresented that the third-party guilt suspects had appeared at trial voluntarily when, in fact, they had been subpoenaed. The prosecutor argued:

Let me ask you this. Mehdi Hadjiedj and Torlao; if you were them and you were responsible for this murder -- which they are absolutely not -- where's the last place on earth you would walk into?

Right here. In the murder trial. In a trial of a murder that at some point the detectives thought you were involved in. I submit you would have to be dragged in, handcuffed, tied down, and pulled into this courtroom before volunteering to testify in the court.

(32T 135-6 to 14)

Defense counsel objected to this mischaracterization and corrected the record that the suspects were subpoenaed --- to which all parties agreed. (33T 5-6 to 6-25) However, the jury was not provided with a corrective instruction. (33T 10-9 to 11-3) In tune with the obligation to be fair, a “prosecutor[] should not make inaccurate legal or factual assertions during a trial and . . . must confine [her] comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.” State v. Smith, 167 N.J. 158, 178 (2001). During trial, there was no testimony about how the third-party guilt suspects came to be witnesses at the proceeding. Describing them as voluntary witnesses grossly mischaracterized their actual status, as they had been compelled to appear under subpoena.

The prosecutor clearly intended to bolster the witnesses' credibility by arguing that, if they were the actual murderers, they would not have willingly subjected themselves to such scrutiny by appearing at trial. This argument likely resonated with the jury, as the average person would assume that only an innocent person would willingly appear at a trial to proclaim their innocence, while the guilty would avoid such scrutiny -- an assumption that was potentially reinforced by the fact that neither co-defendant testified at trial.

In the context of the State's weak case, these instances of misconduct deprived defendant of a fair trial and requires reversal. The misconduct played a substantial role in compensating for gaps in the State's case. With no murder weapon or suggestion that Reynoso possessed a firearm, the prosecutor's baseless assertion that Reynoso handled a bullet and gun minutes before the shooting unfairly prejudiced him by falsely implying that he had the means to commit the crime.

The remaining instances of misconduct – suggesting that the suspects testified voluntarily that rejecting the officer's testimony would amount to accusing them of conspiracy – undermined defendant's third-party guilt defense. As previously discussed, Reynoso, who had no apparent motive for the shooting, presented a compelling third-party guilt defense. These instances of misconduct, which served to patch holes in the State's argument that the third-party suspects

were not the perpetrators, could easily have tipped the scale in favor of the State in a case where the evidence of guilt was far from compelling. Therefore, Reynoso was denied his right to a fair trial and his convictions must be reversed.

POINT VII

A RESENTENCING IS WARRANTED BECAUSE THE COURT DID NOT MEANINGFULLY CONSIDER DEFENDANT’S YOUTH AND IMPOSED CONSECUTIVES SENTENCES WITHOUT ADEQUATE CONSIDERATION OF THE OVERALL FAIRNESS. (35T 59-21 to 82-5)

At the time of the offense, Reynoso was a juvenile and his co-defendant was an adult, seven years his senior. Yet the trial court imposed a sentence of similar length on the co-defendants: an aggregate sentence of 50 years subject to NERA on Reynoso – and an aggregate sentence of 55 years subject to NERA on the co-defendant. In doing so, the trial court failed to meaningfully consider Reynoso’s youth and the overall fairness of the sentence as required under Miller v. Alabama, 567 U.S. 460 (2012), State v. Zuber, 227 N.J. 422 (2017), and their progeny, and State v. Torres, 262 N.J. 246 (2021). Additionally, the court’s assessment of aggravating factor 3 was flawed because it penalized Reynoso for his “substance abuse issues” and because there is no reason to believe that those issues will persist after he serves the minimum 30-year sentence. A re-sentencing is required.

Under the New Jersey Constitution, the trial court was required to consider the Miller factors in sentencing Reynoso because he was a juvenile facing a

lengthy sentence of 30 years to life. In State v. Zuber, the Court examined the impact of federal jurisprudence on the sentencing of juveniles in New Jersey. Noting that the prohibition against cruel and unusual punishment contained in our State Constitution “can offer greater protection . . . than the Federal Constitution commands,” 227 N.J. at 438, the Court gave broad application to “Miller's command that a sentencing judge ‘take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’”¹⁷ Id. at 446- 47 (quoting Miller, 567 U.S. at 480). The Court stated: “To be clear, we find the force and logic of Miller's concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases.” Id. at 448.

As the Court explained,

¹⁷ Specifically, Miller requires the sentencing court to consider what are now referred to as the “Miller factors”: (1) the juvenile's chronological age and its hallmark features, such as immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's family and home environment; (3) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; (4) the incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; and (5) whether the circumstances suggest a possibility of rehabilitation. Id. at 477-78.

The focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence. To that end, judges must evaluate the Miller factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense[,] . . . [and] in a case that involves multiple offenses at different times—when judges decide whether to run counts consecutively, and when they determine the length of the aggregate sentence.

[Id. at 447.]

Accordingly, a sentencing court “must consider not only the factors in Yarbough but also the ones in Miller when it decides whether to impose consecutive sentences on a juvenile which may result in a lengthy period of parole ineligibility,” and is “required to exercise a heightened level of care before imposing multiple consecutive sentences on juveniles.” Id. at 450.

At Reynoso’s resentencing, the trial court did not evaluate the Miller factors or take heightened care in imposing consecutive sentences. Rather, at the conclusion of the sentencing proceeding, after deciding to impose virtually the same sentence on Reynoso as his adult co-defendant, the trial judge gave a passing nod to Miller’s constitutional mandate:

The record shall reflect that the State[sic] was extremely mindful of State v. Comer and the other case law specifically addressing the sentencing of youthful offenders in determining its sentence and making its decision.

(35T 81-4 to 8)

This after-the-fact statement, representing the full sum of the trial court’s consideration of the Miller facts, was inadequate. It is not enough to merely

mention that certain factors have been considered. There must be a record of how the factors were evaluated and weighed against other factors to ensure faithful application of the law and to facilitate appellate review. See State v. Comer, 249 N.J. 359, 404 (2022) (imploring trial courts “to explain and make a thorough record of their findings to ensure fairness and facilitate review”); State v. Fuentes, 217 N.J. 57, 70 (2014) (“When the trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, an appellate court may remand for resentencing.”); State v. Kruse, 105 N.J. 354, 363 (1987)(noting that without “the benefit of the court’s reasoning,” the matter must be remanded for resentencing). Here, the record is completely silent on how the court evaluated and weighed the Miller factors, and what impact, if any, they had on the length of Reynoso's sentence.

The judge also failed to consider the Miller factors alongside the Yarbough factors and explain the overall fairness of imposing consecutive sentences. Torres, 246 N.J. at 268 (“[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding”). In imposing consecutive sentences on the murder and attempted murder convictions, the trial court reasoned that although the crimes occurred at the same time and place, there were “multiple gunshots” resulting in two “different harm[s]” and because five of the six offenses were crimes of violence, “defendant should not

receive the benefit of a ‘free crime’ with the imposition of a concurrent sentence.” (35T 117-13 to 25) As is evident, the trial court's determination of consecutive sentences lacked any consideration of the Miller factors.

Similarly, the court neglected its responsibility to provide a reasoned justification for imposing consecutive sentences, offering instead a conclusory assertion that fairness had been considered: “the Court finds that in qualitatively reviewing the Yarbough factors against the principle of proportionality and fairness in sentencing and overall fairness in the aggregate sentence, the Court is satisfied that imposing a consecutive sentence is warranted.” (35T 118-4 to 9) This statement, much like its purported consideration of the defendant's youth, is inadequate. Therefore, a remand for resentencing is required.

At resentencing, the trial judge should also reevaluate its weighing of aggravating factor 3, the risk of reoffending.¹⁸ In giving this factor “some weight,” the court cited defendant’s “admitted substance abuse issues,” without explicitly explaining the connection. (35T 68-14 to 20) It is reasonable to infer that the court believed these issues increased the defendant's likelihood of reoffending.

However, as drug addiction is recognized as a mental illness, the court erred in penalizing the defendant for his substance abuse issues by considering them in

¹⁸ The trial court found that aggravating factors 3, 6, and 9 preponderate over mitigating factors 7, 9, 11, and 14. (35T 75-7 to 12)

aggravation at sentencing. In keeping with evolving views about addiction, the Supreme Court has acknowledged that addiction may be mitigating if it is causally linked to the offense. State v. Clarke, 203 N.J. 166, 182 (2010) (in an appeal of a denial of Drug Court, findings of the aggravating and mitigating factors were adversely influenced by the sentencing court's failure to appreciate the defendant's drug dependency at the time of the offense). Moreover, addiction is mitigating for many of the same reasons that youth is mitigating. United States v. Walker, 252 F. Supp. 3d 1269, 1292–93 (D. Utah 2017), aff'd, 918 F.3d 1134, 1175 (10th Cir. 2019). “Just as there are fundamental differences between the juvenile and adult brain, so too are there fundamental differences between the addict and non-addict brain.” Ibid.

Additionally, Reynoso was facing a mandatory minimum sentence of 30 years. The trial court had no basis to conclude that whatever substance abuse issues defendant faced at 17-years-old will persist three decades into the future and affect his risk of reoffending upon his release. In conclusion, his substance abuse issues should have been used to mitigate, rather than aggravate the weight accorded to aggravating factor 3.

CONCLUSION

For the reasons set forth in Point I, defendant's interrogation statement should be suppressed, and his convictions reversed. Alternatively, for the reasons set forth in Points II-VI, defendant convictions must be reversed because he was denied his right to a fair trial. If defendant's convictions are not reversed, the Court should remand for a resentencing.

Respectfully submitted,

Respectfully submitted,
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Dated: September 27, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002287-22

STATE OF NEW JERSEY,	:	<u>Criminal Action</u>
	:	
Plaintiff-Respondent,	:	
	:	ON APPEAL FROM A
	:	JUDGMENT OF CONVICTION IN
	:	THE SUPERIOR COURT OF NEW
v.	:	JERSEY, CRIMINAL PART,
	:	PASSAIC COUNTY
CHRISTOPHER REYNOSO,	:	
	:	
	:	
Defendant-Appellant.	:	
	:	

Sat Below: Honorable Justine A. Niccollai, J.S.C. and a Jury.

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COUNTERSTATEMENT OF FACTS

Nelson Vargas and Christopher Reynoso

At approximately 10:54p.m. on May 15, 2017, Christopher Reynoso (“Defendant”) (“defendant”) and co-defendant Nelson Vargas (“Vargas”) entered Vargas’ vehicle, a Nissan bearing the license plate number [REDACTED]” located at 362 Howe Avenue, Passaic, New Jersey. (32T:146-18 to 22; Ra1; Da24).¹ At 11:04p.m., they arrived at a Power Gas Station located at 901 Main Ave, Passaic, about a five-minute drive away from the residence at 37 Federal Street, Passaic. (26T:153-3 to 155-3; 18T:124-4 to 19, 109-8 to 12; 125-5 to 16; 32T:148-2 to 11; Da24). Surveillance cameras located at the Power Gas Station captured Defendant sitting in the passenger’s seat of Vargas’ vehicle and appearing to manipulate an object in his left hand. (26T:149-9 to 22; Da24).

At 11:08p.m., Vargas drove down Federal Street, Passaic, passing the residence at 37 Federal to the right and then turning right onto Burgess Street at

¹ References are as follows:

Da: Defendant’s Appendix
Db: Defendant’s Brief
Ra: Respondent’s Appendix
PSR: Pre-sentence Report

For purposes of this appeal, the State adopts the same numbering of transcripts designated in defendant’s brief. (Db “X”).

11:16p.m. (32T:150-13 to 151-18; Da24). Vargas circled back and passed the residence at 37 Federal Street twice more, first at 11:18p.m. and again at 11:20p.m. (32T:151-18 to 24; Da24). As defendant drove past 37 Federal Street, Defendant fired a .22 semiautomatic caliber handgun at a group of individuals gathered in front of the residence, injuring twenty-year-old Bryan Cabrera and fatally injuring twenty-three-year-old Hansel Castillo. (Da24; 24T:84-23 to 88-11; 16T:80-5 to 82-17). At 11:22p.m., Vargas began driving back towards 362 Howe Avenue, arriving at 11:27p.m. and entering the residence. (Da24; 32T:152-1 to 22). Defendant and Vargas returned to the vehicle at approximately 11:47p.m. to search the passenger's seat. (Da24; 32T:152-23 to 153-6).

At approximately 11:21 p.m. on May 15, 2017, Passaic Police Department ("Passaic PD") Officer Llamal Gerda and Sergeant Roberto Cancel were dispatched to the residence at 37 Federal Street on reports of shots fired. (16T:74-22 to 75-5, 134-10 to 20, and 136-16 to 23; see also 17T:41-5 to 18 and 61-24 to 62-2). Responding Officers from the Passaic PD recovered four spent shell casings and a live round ejected from a semiautomatic .22 caliber handgun on the roadway in front of 37 Federal Street. (16T:80-5 to 19, 81-12 to 23, 84:15 to 22; 17T:43-8 to 18 and 115:2 to 6). A suspected bullet impact was discovered on the garage doorframe at 37 Federal Street. (17T:143-14 to 17).

Mr. Cabrera was transported to St. Joseph's Hospital in Paterson to receive treatment for the gunshot wound to his shoulder, while Mr. Castillo, who received a life-threatening gunshot wound below his right breast, was transported to St. Mary's Hospital in Passaic. (16T:85-25 to 91-20; 24T:167-5 to 6, and; 33T:44-16 to 24). Mr. Cabrera was discharged from the hospital at approximately 2:00a.m. on May 16, 2017. (33T:43-25 to 44-15).

Passaic PD Detective Michele Merced was assigned as the lead investigator of the shooting. (25T:216-15 to 23). At approximately 11:25p.m., Det. Merced spoke with Mr. Castillo as he lay on a hospital bed, struggling to breathe. (25T:222-15 to 22, 224-2 to 25, and 226-7 to 10). Mr. Castillo told Det. Merced that he had been shot by one of two males inside of a four-door 1997 gray Nissan. (25T:225-12 to 226-2). Mr. Castillo was pronounced dead at 7:18a.m. the following day. (33T:44-25 to 45-1).

After speaking with Mr. Castillo, Det. Merced asked the civilians in the emergency room of St. Mary's Hospital to accompany her to the Passaic PD to give a statement. (25T:228-13 to 229-6). Various eyewitnesses stated that the shooter's vehicle, which passed by them in the night, was gold, beige, silver, and gray. (27T:22-20 to 23-14). Though the color of the shooter's vehicle varied between witnesses, it was consistently reported to be a Nissan. (27T:104-14 to 23).

Wilmer Avelino, one of Mr. Castillo's friends, indicated that he had been present at 37 Federal Street at the time of the shooting. (24T:29-4 to 25 and 13-1 to 5). Det. Merced interviewed Avelino at the Passaic PD in the early hours of May 16, 2017, less than twenty-four hours after the shooting. (24T:28-3 to 29-1). Mr. Avelino stated the shooter's vehicle had passed his home at 37 Federal Street twice in quick succession that night; he took notice of it the first time it passed because the passengers had stopped in front of his residence to look around. (24T:11-7 to 12-7 and 102-21 to 103-6, 105-15 to 23). Avelino observed that the passenger side of the shooter's vehicle was facing 37 Federal Street. (24T:100-4 to 13 and 142-7 to 11). He described the driver as "tall" and could not see the passenger because his view was obscured by another vehicle. (24T:141-16 to 143-25). Avelino heard three or four gunshots as the vehicle passed his residence a second time. (24T:146-23 to 148-7). He described the shooter's vehicle as gray with HID lights and a New Jersey license plate with the letter "Z" or "S" as its first registration number. (24T:138-10 to 141-3 and 157-16 to 158-6).

While canvassing the area near 35 Federal Street, Det. Rodriguez discovered that the individuals residing at 356 Howe Avenue in Passaic may have possessed surveillance footage relevant to the shooting and obtained that footage via a search warrant. (18T:145-21 to 146-22). The footage depicted several individuals, including Defendant, gathered near an ice-cream truck in the area of Howe Avenue

from approximately 6:42p.m. to 7:15p.m. on May 15, 2017, about four hours before the shooting. (18T:147-7 to 18, 149-16 to 24 and 19T:17-9 to 20). Det. Rodriguez recognized Defendant from their mutual attendance at a Junior Police Academy and their interactions in a Passaic laundromat. (18T:149-23 to 151-5). The footage depicted Defendant wearing two-tone pants. (30T:154-7 to 155-17). The handrail of the residence at 362 Howe Avenue was visible in the upper right corner of the footage. (19T:27-13 to 28-15).

Over the course of their investigation, Passaic PD officers canvassed the area surrounding 37 Federal Street to locate cameras which could have captured footage relevant to the homicide. (See, e.g., 18T:145-21 to 146-22). Det. Merced thereafter reviewed the surveillance footage recovered from several locations in Passaic, including: 209 Summer Street, 180 Myrtle Street, 155 Summer Street (School 7, an elementary school), 901 Main Ave (a Power Gas Station), 512 Gregory Avenue, 412 Oak Street, 18 Federal Street, 333 Broadway Street (Empanada Delicious, a restaurant), 355 Howe Avenue, 9 Delaware Ave, 12 and 48 Krueger Place, and 231 Lexington Ave. (25T:259-11 to 18, 260-13 to 21, 275-10 to 276-7, and 280-6 to 160; 26T:23-24 to 25-11). The earliest footage was captured at 1:55p.m. at 355 Howe Ave. (26T:118-4 to 12). These videos and relevant screenshots were edited into a single compilation lasting approximately thirty-eight minutes and twenty seconds. (27T:9-20 to 11-16). The video compilation depicted the shooter's vehicle traveling

from 362 Howe Ave. to the Power Gas Station at 901 Main Ave, then driving to the area of Federal Street, turning right from Federal Street onto Burgess Place twice at 11:18p.m. and 11:20p.m., then returning to 362 Howe Ave. (See generally Da24).

At one point, Det. Rodriguez received information relating to the Facebook profile of “Grandee Vargas” relevant to his ongoing investigation. (18T:144-17 to 145-18; 26T:8-25 to 9-15 and 21-23 to 22-15). He relayed this information to Det. Merced on May 19, 2017. (26T:8-25 to 9-15 and 21-23 to 22-15). Det. Merced searched for and located Grandee Vargas’ Facebook page and discovered that its owner was Vargas.² (26T:21-23 to 22-15). Det. Merced had obtained defendant’s driver’s license photo, which she preserved in her investigation and shared with other detectives. (26T:22-13 to 22).

On May 20, 2017, Passaic County Prosecutor’s Office Detective David Posada entered queries into two automatic license plate reader (“ALPR”) programs, BOSS and the Vigilant Solutions System, which store images of scanned license plates to a database with data regarding the date, time and location of those scans for future review. (20T:162-24 to 163-2, 186-19 to 23, and 191-5 to 192-10; 21T:223-21 to 224-10). Det. Posada testified that ALPR images were generally taken by license plate readers affixed to light posts, traffic cameras, police vehicles, and vehicles used for repossession throughout Passaic County. (20T:194-10 to 195-7).

² The transcript erroneously spells defendant’s name as “Nelson vs.” (26T:22-8).

Posada conducted a “location of interest” search via BOSS centered on 37 Federal Street, which returned approximately 4,300 license plates. (21T:219-22 to 8). One of those results revealed a beige-colored Nissan with the license plate number [REDACTED],” a spoiler, and a two-toned hood. (21T:220-9 to 221-22). That vehicle had been captured in the intersection close to the shooting, Burgess Place and Federal Street, twice on May 11, 2017. (21T:220-19 to 221-15). The vehicle was also parked on Howe Avenue on May 16, 2017, the day after the shooting. (21T:221-12 to 15).

Det. Posada learned that the registered owner of the Nissan was Robert Guzman, whom he interviewed on May 22, 2017. (21T:243-24 to 244-23). Mr. Guzman provided the Passaic PD with his license plates bearing the tag “[REDACTED]” which he obtained the day after the shooting. (21T:244-24 to 245-7). Mr. Guzman was not arrested as there was no evidence linking him to the homicide. (21T:243-24 to 251-5).

On May 23, 2017, Det. Rodriguez aided Det. Merced and Sergeant Samuel Rivera in the execution of a search warrant at the residence located at 362 Howe Avenue in Passaic. (18T:18-2 to 14, 19-13 to 22, 21-24 to 22-5, and 26-8 to 10). Det. Rodriguez secured the rear perimeter of the residence and observed items being thrown out of the top rear window. (19T:30-9 to 31-15). Officers recovered two hard drives from the exterior of the residence, one hard drive from the interior, and a DVR

system connected to the residence's cameras which was missing a hard drive. (21T:253-23 to 254-14). Officers obtained search warrants for the hard drives, one of which contained footage depicting Defendant and Vargas. (21T:254-15 to 255-19). Officers also recovered a New Jersey registration and insurance card for a Nissan with the registration number [REDACTED] and a New Jersey driver's license exam permit, all of which belonged to defendant. (18T:27-13 to 18 and 28-17 to 19; 21T:255-23 to 256-3; Ra1).

After reviewing the surveillance footage collected during the investigation with Vargas' driver's license photo, Merced decided to charge Vargas on May 24, 2017 at approximately 4:10a.m. (26T:45-16 to 46-3).

Defendant was identified as a person of interest after the execution of the search warrant at 362 Howe Ave. (21T:257-5 to 21). He was interviewed by Detectives Alexis Flores and Velarde at approximately 4:15p.m. on June 1, 2017. (27T:147-9 to 23). Defendant stated that he was wearing grey and blue pants on May 15, 2017, and that no other individual he was hanging out with was wearing the same clothing, but denied appearing on the surveillance footage procured by the Passaic PD detectives. (32T:164-5 to 165-19; 30T:82-9 to 83-1 and 106-11 to 13). He stated that he had "passed out no later than 10:00p.m." at a friend's house that night. (30T:44-2 to 45-24 and 51-13 to 22). Defendant was arrested in connection with the homicide investigation. (See 35T:60-16 to 18).

Pursuant to this interview, Passaic PD officers and Det. Posada searched Defendant's residence with his mother's consent. (21T:257-24 to 258-21). Officers located a pair of multicolored sweatpants from Defendant's laundry bag which he was depicted wearing during the 356 Howe Avenue surveillance footage. (21T:259-15 to 21 and 262-1 to 2;30T:155-1 to 15).

Vargas later turned himself in to the Passaic PD on June 1, 2017. (26T:106-20 to 107-14).

Patrick Torlao and Mehdi Hadjiedj

During their investigation of Mr. Castillo's homicide, Passaic PD officers noted Messrs. Patrick Torlao and Mehdi Hadjiedj as potential suspects. As there was insufficient evidence linking either to the homicide, however, investigators declined to arrest or charge them.

On March 18, 2017, Torlao notified the Jersey City Police Department ("Jersey City PD") that a four-door green Honda Accord he had recently purchased from Passaic was stolen. (19T:4 to 16;20T:22-1 to 5 and 24-8). Torlao purchased the vehicle from a seller on Instagram whom Passaic PD detectives later identified as Daniel Sierra³. (20T:18-13 to 21-9 and 178-14 to 24). After meeting at a Volkswagen

³ Detectives Merced and Possada later interviewed Mr. Sierra at Passaic PD headquarters, where he was open and "[not] evasive," and it was determined that no evidence existed to link him to the homicide. (20T:178-18 to 180-1).

dealership near Route 22, Passaic, Torlao followed Sierra to a residential address in Passaic to purchase the vehicle with cash. (20T:18-13 to 21-9).

On March 18, Torlao told his friend Hadjiedj about the stolen vehicle and the two drove around the nearby cities of Newark and Kearney to search for it. (20T:24-9 to 25-17). As their efforts were unsuccessful, both men created posts on social media requesting information about Torlao's stolen vehicle. (20T:26-4 to 27-2). Specifically, Hadjiedj submitted his post with his personal phone number to a Honda Facebook group where it was common for members to ask for information regarding stolen vehicles. (20T:98-23 to 100-4). Hadjiedj received an anonymous call advising that Torlao's vehicle was located in the driveway of 408 Highland Avenue, Passaic.⁴ (19T:194-17 to 195-18; 20T:26-24 to 28-15). Torlao had not been to the residence at 408 Highland Avenue prior to that date. (20T:28-7 to 15).

On March 19, 2017, Torlao and Hedjiedj drove past the address and observed Torlao's green Honda beneath a tarp, surrounded by a group of individuals who had and were in the process of stripping it of parts - including the wheels, odometer, and seats - rendering it inoperable. (20T:30-8 to 31-20 and 38-8 to 14). The individuals fled in a tan Honda Accord when Mr. Torlao turned around to pass 408 Highland Ave. a second time. (20T:30-8 to 33-12). After an unsuccessful attempt to follow the

⁴ Det. Rodriguez, who would later interview Mr. Torlao, was unaware that 408 Howe Ave. was Mr. Castillo's address. (19T:165-23 to 167-21).

fleeing Honda Accord, Torlao and Hadjiedj returned to 408 Highland Ave. and stood by Torlao's vehicle while Hadjiedj called the Passaic PD. (20T:32-10 to 33-12). Torlao discovered a valet key in the ignition of his vehicle which he did not own and which the seller, Daniel Sierra, had not advised him of.⁵ (20T:47-10 to 48-10 and 52-1 to 7).

As they waited for police to arrive, Torlao and Hadjiedj were approached by a group of people who told them to "get the fuck out of [t]here." (20T:33-17 to 34-12). Torlao said he and Hedjiedj were not leaving until Torlao's stolen car was recovered. (20T:33-17 to 34-12). The group became "rowdy" and "[went] back and forth" with Hadjiedj and Torlao before one of the individuals brandished a firearm. (20T:33-17 to 34-12 and 102-21 to 103-4). The individuals eventually left after Hedjiedj told them that Passaic PD officers were on the way. (20T:102-21 to 103-4). Passaic PD Officers arrived about twenty minutes later and took a statement from Torlao and Hedjiedj, neither of whom mentioned the firearm being brandished. (20T:33-17 to 34-12, 34-16 to 21, and 35-20 to 36-17).

Approximately one week later, Torlao and four of his friends, who were unarmed to Mr. Torlao's knowledge, returned to Passaic in two separate cars to find who stole his vehicle. (20T:43-23 to 44-24). Torlao followed a vehicle which he

⁵ Det. Rodriguez would testify at trial that he believed the person who sold Torlao his vehicle also stole it back from him. (19T:140-1 to 12 and 145-7 to 14).

suspected was involved in the theft, but passed it when it pulled over. (20T:45-8 to 46-24). Torlao's group heard what they believed to be gunshots and drove back to Jersey City without incident. (20T:45-8 to 46-24).

Mr. Torlao was at home with his family during the evening of May 15, 2017. (19T:146-13 to 147-6; 20T:74-3 to 75-23).

On May 15, 2017, Hadjiedj was at So Fresh Studios in Clifton from 9:35 p.m. to 12:50a.m. the following day, where he listened to music and smoked hookah with five or six individuals. (18T:138-2 to 141-13; see also 27T:138-22 to 139-11 and 140-18 to 22). Mr. Hadjiedj began writing and performing rap music in 2017 and was recommended So Fresh Studios in Clifton by a friend. (20T:92-7 to 94-6). Typically, Mr. Hadjiedj would call So Fresh Studios on the same day he wanted to reserve a room for a session which lasted three to four hours. (20T:94-25 to 95-10).

On May 16, 2017, the day after the shooting, Detectives Rodriguez and Danino and Sergeant Merkerson traveled to Jersey City to speak with Torlao. (18T:64-23 to 67-1 and 69-20 to 70-5; see 19T:130-11 to 22 and 149-19 to 150-5). Torlao was brought back to Passaic PD Headquarters at 7:45p.m. and interviewed by Detectives Rodriguez and Posada at 11:22p.m that day (18T:79-18 to 25 and 81-25 to 83-6). The interview lasted about three hours. (19T:18 to 25). Torlao was willing to speak with the detectives and answered questions with "an open posture."

(19T:119-10 to 120-1 and 20T:176-4 to 9). Torlao was properly Mirandized⁶. (18T:80-17 to 23). Rodriguez described Mr. Torlao's demeanor during the interview as "relaxed [and] calm," though he was "a little excited at times." (18T:84-7 to 13).

As Mr. Torlao believed his interview pertained only to his stolen vehicle, he was frightened to learn that he was suspected of being involved in a homicide. (18T:90-25 to 91-6; 20T:42-14 to 43-22). Torlao did not understand the seriousness of the situation, so he did not initially tell officers that he had returned to Passaic in March of 2017, about a week after his stolen vehicle had been recovered. (20T:42-14 to 43-22). Torlao disclosed his return to Passaic after the detectives clarified the situation for him. Torlao was not arrested or charged at the conclusion of his interview, as the detectives gleaned no evidence tying him to the homicide. (18T:105-11 to 106-1).

Hadjiedj also provided a statement to Passaic PD detectives in the early morning hours of May 17, 2017. (See 27T:131-17 to 133-15). He informed detectives Merced and Flores that he was at So Fresh Studios during the time of the homicide. (18T:130-4 to 25 and 27T:133-134-2 to 11). Hadjiedj also gave the detectives the names and phone numbers of four friends who were with him that night. (20T:115-3 to 20). Two did not respond to the detectives' phone call, which was made in the middle of the night, and the third asked to hear Hadjiedj's voice to

⁶ Miranda v. Arizona, 384 U.S. 436 (1966).

verify that officers were actually contacting him. (20T:115-3 to 20). He ultimately verified that Hadjiedj was at So Fresh studios the night of the murder. (20T:115-3 to 20). One of the individuals, concerned that he was in trouble with law enforcement, lied and stated that he was not at the studio that night. (20T:135-14 to 21).

At approximately 7:00p.m. May 18, 2017, Detectives Rodriguez and Flores traveled to So Fresh Studios to verify Mr. Hadjiedj's alibi. (18T:130-4 to 25 and 135-17 to 137-17' 27T:134-2 to 11). Det. Rodriguez was given a photograph of Hadjiedj before traveling to So Fresh Studios. (18T:138-18 to 139-3). The detectives met with an attendant from So Fresh Studios and reviewed the surveillance footage from the night of May 15, 2017 via a computer monitor. (18T:136-25 to 138-1). The detectives reviewed three and a half hours of footage from So Fresh Studios, which depicted Mr. Hadjiedj arriving at the studio at 9:35 p.m., listening to music and smoking hookah with five or six individuals, and leaving the studio at 12:50a.m. (18T:138-2 to 141-13; see also 27T:138-22 to 139-11 and 140-18 to 22). The recording software prevented Det. Rodriguez from preserving the footage, and the So Fresh Studios attendant did not know how to operate the software. (18T:141-15 to 142-17 and 27T:141-3 to 9). Det. Rodriguez informed Det. Merced of the footage immediately after leaving the studio. (18T:141-15 to 142-17 and 27T:141-3 to 9).

Hadjiedj provided additional information during his May 16th statement to Passaic PD detectives. He confirmed that in 2017, Hadjiedj's father, Mohammed

Hadjiedj, owned a black Nissan which he did not allow Hadjiedj to drive. (20T:111-16 to 25). When officers presented Hadjiedj with a list of vehicles registered to his father, he corroborated each entry except for a gray or silver Nissan, stating that his father never owned such a vehicle and no one in his family had ever driven one. (20T:112-14 to 113-16). Mehdi's mother also stated that Mohammed Hadjiedj did not have that vehicle. (27T:122-8 to 23; 25T:274-14 to 275-2).

Through Motor Vehicle Commission and other database inquiries, Detective Posada discovered that a 2002 gray Nissan Maxima with the registration number "[REDACTED]" was registered to Hadjiedj's father. (20T:193-14 to 25 and 23T:102-1 to 23). Posada conducted a county-wide ALPR search for Mehdi's plate through BOSS and a statewide search through Vigilant Solutions System (via the real-time crime center, an investigative assistant unit in Trenton). (23T:102-16 to 103-11). The searched spanned from January to May of 2017. (23T:107-2 to 6). All sixteen hits for Mehdi's plate occurred in Jersey City' accordingly, Det. Posada did not believe Mehdi's father's vehicle was the shooter's vehicle. (23T:108-24 to 111-9 and 112-16 to 113-7).

PROCEDURAL HISTORY

On January 19, 2018, a Passaic County Grand Jury returned Indictment No. 18-01-0078, charging defendants with: count one, first-degree murder in violation of N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2); count two, first-degree attempted murder in violation of N.J.S.A. 2C:5-1a(1), N.J.S.A. 2C:11-3a(1), and N.J.S.A. 2C:2-6; count three, first-degree conspiracy to commit murder in contravention of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3; count four, second-degree possession of a weapon for an unlawful purpose (concerning victim Hansel Castillo) in contravention of N.J.S.A. 2C:39-4a; count five, second-degree possession of a weapon for an unlawful purpose (concerning victim Bryan Cabrera) in contravention of N.J.S.A. 2C:39-4a, and; count six, second-degree unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5b. (Dca1 to 6).

On February 11, 2020, the Hon. Justine A. Niccollai, J.S.C. denied Defendant's motion to suppress the recording of the statement he gave to the State Police Department on June 1, 2017. (9T:8 to 12). Judge Niccollai found that Defendant, a juvenile at the time, validly waived his Miranda⁷ rights where his Spanish-speaking mother was present in the room, read the Miranda form in Spanish, had the interrogating officers speak in Spanish to ensure her understanding, and had Defendant translate the questions and answers from English and Spanish to her after

⁷ Miranda v. Arizona, 384 U.S. 436 (1966).

Defendant expressed his preference for the officers to speak to him in English. (9T:20-18 to 25-23). At no time was Defendant questioned without his mother present, pressured by interrogating officers, or suffering from exhaustion. (9T:27-15 to 28-22).

On February 25, 2020, Judge Niccollai denied Vargas' motion for severance, finding that the absence of either defendants' intent to blame the other for the underlying crimes made severance inappropriate. (See 10T:21-11 to 22-7).

On May 13, 2022, Judge Niccollai granted Vargas' application to explore third-party guilt and denied his motion to strike Det. Rodriguez's testimony concerning the unavailable So Fresh surveillance video. (15T:36-20 to 42-16 and 56-14 to 58-25). The court issued two findings as to the motion to strike: (1) there was no bad faith on the part of the State for failing to preserve the So Fresh video, and; (2) the So Fresh video did not address the underlying crime, distinguishing it from relevant caselaw regarding unavailable evidence. (15T:56-14 to 58-25).

The second⁸ trial for Defendant and Vargas was held from May 17 to June 13, 2022. (See generally 16T to 34T).

On June 3, 2022, the court and parties reviewed the redacted version of Defendant's video statement, which had been agreed upon by all parties. (27T:151-

⁸ The first trial, held from March 11 to 12, 2020, resulted in a mistrial on March 18th of that year due to the onset of the COVID-19 pandemic. (35T:98-22 to 99-2; see also 13T to 14T).

13 to 21). The Court and parties likewise reviewed and agreed to the court's jury instruction regarding Defendant's statement, which the court issued to the jury before the recording was played. (27T:153-14 to 157-22).

Proceedings resumed at 10:44 a.m. on June 6, 2022. (See generally 28T:4-1 to 5). Defendant's statement was played at 11:18 a.m. and paused at 11:53 a.m., when Vargas objected to the inclusion of a portion of the statement that he believed was redacted. (28T:23-9, 41-22 to 42-21). To avoid any potential issues with Defendant's statement in the future, the court dismissed the jurors at 12:03p.m. and spent the remaining four and a half hours reviewing that statement line by line with the parties. (28T:51-17 to 182-22). The parties painstakingly debated the admissibility of and inferences that could be drawn from numerous portions of the statement, which the court would then rule upon. (See generally 28T:51-17 to 182-22).

On June 7, 2022, outside the presence of the jury, the court issued a lengthy, detailed decision as to the redactions and limiting instructions relating to Defendant's statement. (29T:12-22 to 20-15). As it stated, the court "asked counsel to review the transcript and bring to the Court's attention each and every line/section where there was an objection. The court ruled on every single one that was brought to its attention." (29T:17-7 to 11). It declined to strike every single instance of the detectives questioning Defendant's account or discussing their opinion of what they

saw on the video, as it would “wholly eviscerate and undermine law enforcement’s legally permissive ability to use an interrogation as an investigative tool.” (29T:17-17 to 23).

The State requested that no further curative instructions be read, as the court had read multiple by that point, or in the alternative that the instruction be read after the video to prevent the jury from discounting the interview from the outset. (29T:22-6 to 20). The court declined both requests and chose specifically to issue the limiting instruction before the video “so that [the jury will be] mindful of how they can use this information. Telling them after the fact, this court does not feel [it] appropriate in these particular circumstances based upon this very important issue.” (29T:27-5 to 20). The court then read its proposed limiting instruction to the parties and encouraged them to submit feedback. (29T:27-22 to 30-5). The parties played the redacted video outside the presence of the jury again to ensure that all audio was properly redacted according to the court’s ruling. (29T:39-15 to 68-9).

On June 8, 2022, outside the presence of the jury, the court once again read its proposed limiting instruction regarding Defendant’s interview and asked the parties if it was satisfactory. (30T:4-22 to 6-12). Counsel for both defendants approved the court’s proposed instruction, which emphasized the jury’s role as the sole determiner of the perpetrators’ identities as well as the fact that the interviewing detectives would potentially insert their own subjective beliefs into a question or

statement. (30T: 6-13 to 25 and 27-12 to 29-3). The court issued the instruction to the jury before the video was played. (30T: 27-12 to 29-3).

After the State rested, both defendants moved for a directed verdict on all charges, arguing that no testimony or evidence definitively established that defendant and co-defendant committed the underlying offenses. (See 31T:219-11 to 222-5). The court denied defendants' joint motion, finding sufficient credible evidence in the record to support the jury's conclusion. (31T:223-17 to 232-4).

In its closing, the State emphasized the jury's role as the sole factfinders of the case, particularly as to the surveillance footage; "It's . . . your interpretation of the evidence that controls, not mine. Not [defendants' attorneys']." (32T:97-3 to 6). The State acknowledged its lack of direct eyewitnesses. (32T:97-15 to 17).

The following day, June 10, 2022, the court delivered its final instructions to the jury prior to deliberations. (See 33T:39-20 to 42-9). The court repeated portions of the instruction it gave regarding Defendant's statement – namely, that the interviewing officers may have asserted their subjective opinion and that the jurors were the sole factfinders of the case – and explicitly stated that those officers possessed no specialized knowledge, that their opinions were not evidence, and that said opinions were "simply an interrogation technique used by law enforcement during the questioning of a suspect." (33T:39-20 to 40-22). The court instructed the jury to determine for themselves the credibility of the witnesses and the weight to be

attached to their testimony, affording less weight to testimony they believed was false. (33T:21-14 to 22 and 27-3 to 9). The court also stated that the arguments, statements, remarks, openings and summations by counsel were not evidence. (33T:22-1 to 7). Crucially, the court reminded the jurors that the State had the burden to prove defendant guilty beyond a reasonable doubt, and that defendant was not required to prove that the crime was committed by someone else or that individual's identity for the jury to find defendant innocent. (33T:32-5 to 33-6).

On June 13, 2022, the jury returned its verdict finding defendant guilty on all counts. (24T:84-23 to 88-11).

Judge Niccollai presided over defendant's sentencing on December 16, 2022. (See generally 35T:58-22 to 83-5). The court qualitatively weighed the Yarbough⁹ factors and found, because there were two victims and multiple gunshots fired at those victims, the imposition of a consecutive sentence was warranted. (35T:116-22 to 118-9).

On April 3, 2023, defendant filed a Notice of Appeal.

⁹ State v. Yarbough, 100 N.J. 627, 647 (1985).

LEGAL ARGUMENT

POINT I

THE POST-MIRANDA STATEMENT MADE BY DEFENDANT CHRISTOPHER DEFENDANT IS ADMISSIBLE AS A VOLUNTARY AND INTELLIGENTLY WAIVED STATEMENT.

Defendant contends that he did not have an opportunity to privately consult with his mother and that due to the language barrier (that did not exist since both interviewers spoke Spanish) his mother was unable to meaningfully assist him in deciding to whether to waive his Miranda rights and during the interrogation in general.

The trial court properly found that the State complied with Presha and did comply with Miranda and that there was a meaningful exchange and that Defendant knowingly, intelligently and voluntarily waived his Miranda rights and spoke to the police.

On April 1, 2019, the New Jersey Supreme Court, in an unanimous opinion, reversed the Appellate Division's judgment in State v. A.M. (A-76-17), and held that the State proved beyond a reasonable doubt that defendant knowingly and voluntarily waived his rights against self-incrimination. State v. A.M. 237 NJ 384 (2019). In doing so, the Court heavily relied on the motion judge's factual findings -based on video evidence and testimony-that defendant

understood the waiver language on the form even though it had not been read aloud to him. Because the detective read aloud the individual rights, and defendant read the waiver language to himself before signing the form, the Court found that defendant had expressly waived his rights before confessing.

But the Court emphasized that the *better practice* to eliminate questions about a suspect's understanding is to read aloud to the suspect the entire form, or have the suspect read it aloud. And where that is not done, the suspect should be asked about his or her literacy and educational background.

The Court also rejected the argument that defendant, a Spanish speaker, should have had an independent neutral translator with him during the interview rather than a Spanish-speaking police officer. The Court similarly declined to require the State to obtain a certified translation before a statement may be admitted into evidence.

In reversing the Appellate Division, the Court rejected the argument that the State failed to prove defendant made a voluntary decision to waive his Miranda Rights. 452 N.J. Super. 587, 590 (App. Div. 2018). Also, it rejected the panel's finding that the trial judge's analysis improperly shifted the burden of proof to defendant to alert the interrogating officers about any

difficulty he may be having understanding the ramifications of a legal waiver. Id. at 599.

In A.M., the Defendant spoke little English and stated that he was more comfortable with Spanish, Detective Richard Ramos assisted in translating the interview from English to Spanish. The entire interview was video-recorded to a DVD and later transcribed in English by a clerk- typist employed by the Bergen County Prosecutor's Office.

Before the interview, Detective Ramos reviewed with defendant a Spanish-language form prepared by the Bergen County Prosecutor's Office, which listed each of defendant's Miranda rights and contained a waiver paragraph. Detective Ramos read defendant his Miranda rights from the Spanish-language form, pausing after reading each one to ask defendant in Spanish if he understood. Defendant replied "si" (yes) each time and initialed each line. Detective Ramos then handed the form to defendant to review the waiver portion and asked in Spanish, "Do you understand?" Defendant replied, "Si," and Detective Ramos told defendant to sign in two places, which defendant did.

Unlike in A.M., the Defendant here spoke English and Spanish, and preferred that the interview be conducted in English. (Da 133, Da21-131, 5T15-16 to 19, 5T20-18 to 21-8).

Q. Do you read and write and understand English?

A. I can't read it that good but I, a little bit.

Q. You want English or Spanish?

A. English.

Q. English? Okay. So you read and write a little bit of English, right?

A. Yeah.

Here however, Defendant's mother only spoke Spanish. Therefore, at times there were three (3) different Detectives in the room, all of whom spoke fluent Spanish. Moments after going through the basic information with the Defendant, Detectives verified all the information with Defendant's mother in Spanish. (See S8, Page 9 lines 382 through Page 11 line 460; 9T9-8 to 12-13). It should be noted that at all points during the interview, Officers spoke Spanish with Defendant's mother with no indication that she had difficulty understanding and communicating with everyone in the room.

At the onset of the interview, Detectives provided Defendant with an English version of the Miranda form, and a Spanish version was provided to Defendant's mother. Detectives also provided clear and concise instructions to Defendant's mother. (Da 21-131, Da133, S8 page 13 lines 559 to 568).

Q¹. I am going to read something to him. I want you to know what we're talking about.

A². Okay.

Q. At this moment he has no charges. I am just investigating you but I want to read

his rights so he'll know his rights in case he says something I need regarding my case. All right?

A. Okay.

Continued. (Da21-131, Da133, S8 page 14 lines 620 to page 15 line 632).

Q. At this moment there are no charges. This is just in case he says something that

I need to that paper is to help him.

A. Okay.

Q. The Miranda rights to he will understand more or less what is going on. If you

have a question about something...

A. All right.

Q. I can stop everything to explain to you more or less so you will understand too.

A. It's okay.

Detectives then proceeded to read the entire Miranda form to Defendant in English. Defendant's mother inquired as to what he was reading, and the Defendant himself explained the entire form to his mother, further verifying Defendant understood what the form meant. Detective immediately asked defendant's mother if she wanted him to read it aloud to her which she declined. Defendant indicated he understood each and every right and signed the form, followed by his mother.

After some brief discussion, Defendant's mother answered a phone call and exited the room. Within two (2) minutes of leaving the room, Defendant's mother re-entered the room. It was at this point that Detectives asked Defendant's mother a second time of whether or not she understood the Miranda form and decided to read it to her verbatim in Spanish.

(S 8 page 25 lines 1119 to page 28 line 1232).

Q. Okay. I just want to ask you if you understand this form that he, uh, filled. If you have questions.

A. No. You are good.

Q. Just with this paper.

A. Well, I since I have never filled that I don't really.

Q. No, but, what I am saying is that in this country you have rights. The police

cannot just do whatever they want to do and, you know, speak with a (lawyer) if you want.

Q. Do you want me to read it to her in Spanish?

A. Yes, please.

Finally, after reading the entire the Miranda form, Detectives proceeded to interview the Defendant directly.

Q. All right, Chris. Basically, I am investigating a murder, a homicide.

A. A what?

(In Spanish to Defendant's mother).

Q. I am investigating a homicide

A. Uh huh.

Q. that occurred in the Passaic area. I don't know if you see the news about what happened in Federal.

A Oh yeah, in Federal.

Q. Yes? Okay. This happened in May 15 on this year, time was 11:21 p.m. A Uhhuh.

Q. Okay? It was a shooting on the 37 Federal street and since then we are investigating what were that case. From that part, we have already anested one. He is the second paii.

A He?

Q. Yes.

Unlike the Detectives in A.M., whom failed to read the entire Miranda rights form aloud, Detectives here were very deliberate in making sure both Defendant in English, and Defendant's mother in Spanish, understood the rights. Defendant had the benefit of hearing the Miranda rights twice. Citing the Detectives failure in A.M., the Supreme Court still did not find that to be fatal towards suppression, yet added some safeguards to ensure a Defendant's understanding. The Court noted that the suspect should be asked about his or her literacy and educational background.

It should also be noted that Defendant's right to an attorney had been discussed approximately thirteen (13) times within the first 30 minutes of the interview, and at no point did Defendant, or his mother, indicate they did not understand or ask to speak to a lawyer.

As such, in order for a juvenile's confession to be admissible into evidence it must satisfy those same standards, that is it must be made knowingly, intelligently and voluntarily. Presha supra 167. In making its determination, this

trial court specifically made note of the multitude of circumstances it was taking into account prior to making its determination. Giving weight to the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, and whether physical punishment or mental exhaustion was involved as well as the suspect's previous encounters with the law. (9T14-19 to 15-2, citing Presha.)

In finding Detectives Rodriguez and Velarde credible, the trial court found that Rodriguez, a 17-year veteran and Velarde, a 15-year veteran of the Passaic Police Department had an excellent recall of the events, maintained a consistent tone, demeanor and testimony on direct and cross-examination, and that their testimony was not discredited by any other evidence. (9T19-10 to 20-2).

The trial court also noted that, prior to beginning any questioning Detective Flores had Detective Velarde read each and every question on S6 out loud to Ms. Montiel. Detective Velarde also gives Ms. Montiel Defendant Defendant's answers to each and every item on the Miranda form, including the waiver portion. The court finds this procedure fully satisfied A.M., even though it was not mandated procedure on June 1, 2017, when the interrogation occurred. (9T24-19 to 25-2). Further, the court adds, Defendant was not relying on his mom to understand his rights, quite to the contrary. For the most part Defendant Defendant had to explain to his mom what certain rights meant and what Miranda

warnings entailed as he was more sophisticated than her when dealing with these issues. Defendant was calm and composed the entire time he's at the Police Department. He does not appear to be fearful or phased when asked and answering questions. (9T26-16 to 27-2).

Defendant here did not need his mother to act as a buffer between him and the police. Quite to the contrary, his mother needed him to serve as that buffer due to her lack of sophistication and his clear confidence and grasp of the entire situation despite his being 17-years old. The Presha safeguards are in place to protect a juvenile from exploitation by police. The trial court agreed, "there is no doubt the Court finds that Defendant understood his right and understood his ability to exercise his rights whether his mother understood every single word of the conversation between her and the police. (9T31-2 to 31-5). In fact, the trial court did find that Defendant properly exercised his right to remain silent at a later part in his interview.

Finally, even after State in the Interest of A.A. was decided, it is without question that Presha remains the controlling case in matters of juvenile waivers. A.A. 240 N.J. 341 (2020). Defendant's reliance on A.A. is misguided both factually and as it relates to his knowing, intelligent and voluntary waiver of his Miranda rights.

The protections outlined in Presha remain good law. To reinforce them and avoid what took place here, we add the following guidance. A.A. at 358. The police *should* advise juveniles in custody of their Miranda rights -- in the presence of a parent or legal guardian -- before the police question, or a parent speaks with, the juvenile. Officers should then give parents or guardians a meaningful opportunity to consult with the juvenile in private about those rights. See Q.N., 179 N.J. at 182, 843 A.2d 1140 (Wallace, J., dissenting); A.A., 455 N.J. Super. at 505, 190 A.3d 551 ; see also D.M. v. State, 949 N.E.2d 327, 335 (Ind. 2011) ; Commonwealth v. Roane, 459 Pa. 389, 329 A.2d 286, 289 (1974) ; In re E.T.C., 141 Vt. 375, 449 A.2d 937, 940 (1982). That approach would enable parents to help children understand their rights and decide whether to waive them -- as contemplated in Presha. If law enforcement officers do not allow a parent and juvenile to consult in private, absent a compelling reason, that fact should weigh heavily in the totality of the circumstances to determine whether the juvenile's waiver and statements were voluntary. See Presha, 163 N.J. at 315, 748 A.2d 1108.

In A.A., the juvenile Defendant was placed in a holding cell while Detectives contacted his parent. A.A.'s mom arrived, visibly upset and asked to speak with her son, and they were allowed to speak through the gate of the holding cell. During these conversations, Detective overheard incriminating

information that was later admitted during the trial. At no point prior to these statements being heard was Miranda ever provided.

Unlike in A.A., here, the Defendant and his mother were left alone in the room for an extended period of time, free to speak, and although the camera was recording, none of the information discussed was both incriminating and used at any point during the interview. Further, a review of the statement will show that the interview room door was deliberately left open as Defendant repeatedly requested that it be left alone. In fact, the discussions between Defendant and his mother hear go right to the heart of any safeguard concerns as the Defendant tells his mother (in Spanish) that he has no idea why they are questioning him and that he also wants to know what is going on. As discussed above and noted by the trial court here, the review of the Miranda forms in English and Spanish was in line with Presha.

Much like the conclusion of the trial court, Defendant here was more in control and grasping the magnitude of the situation than his mother, negating any safeguard from intimidation potential and providing a compelling reasons as to why no further private time was needed. Defendant and his mother, unlike A.A., remained calm and showed no signs of confusion, discomfort or duress.

Most importantly, the Detectives here did not even mention the nature of the charges and ask any potentially incriminating questions until both the Defendant and his mother were thoroughly explained the Miranda forms, and both voluntarily and intelligently waived them.

In light of the above, the Defendant's waiver was intelligently, voluntarily and knowingly provided. Therefore, the Defendant's argument for reversal is without merit.

POINT II

THE ADMISSION OF DEFENDANT'S REDACTED STATEMENT TO PASSAIC POLICE DID NOT VIOLATE BANKSTON, INFRINGE ON DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, OR IMPERMISSIBLE LAY OPINION DEPRIVING DEFENDANT OF A FAIR TRIAL.

A. The Statements by Detectives Flores, Velarde, and Rodriguez Did Not Violate Bankston and Were Not Offered As Evidence of Guilt.

If not testifying as an expert, a witness' testimony consisting of opinions or inferences may be admitted if it "is rationally based on the witness' perception" and "will assist in understanding the witness' testimony or in determining a fact in issue." (N.J.R.E. 701). An officer may provide fact testimony, meaning what he "perceived through one or more senses," but cannot convey information about what he "'believed, 'thought,' or

‘suspected.’” (State v. McLean, 205 N.J. 438, 460 (2011)(citing State v. Nesbitt, 185 N.J. 504, 514-15 (2006); see also State v. Patton, 362 N.J. Super. 16, 31-36 (App. Div. 2003)(holding that an interrogating detective’s statements must comply with the rules of evidence)).

Here, as in State v. Cotto, 471 N.J. Super. 489, 540 (2022), the questions and statements posed by Detectives Flores and Velarde during Defendant’s interrogation video were not given “in the guise of assisting the jury, but rather . . . to prompt [the defendant] to reply in the course of the stationhouse interrogation.” The interrogating officers in the recorded statement in Cotto commented that they saw defendant on an incriminating surveillance video, which the Supreme Court deemed inadmissible because of the lack of a curative instruction. (Id. at 534, 538, and 541). The Court found that, at a minimum, the jury should have been instructed that the interrogating officers’ statements were not testimony and could only be considered in determining how a defendant responded to the accusations. (Id. at 540).

The trial court exceeded the “minimum” contemplated in Cotto by reviewing Defendant’s redacted statement with the parties outside the presence of the jury, pausing proceedings to conduct a meticulous four-hour review of Defendant’s statement and to issue rulings for each contested redaction, creating a limiting instruction with the aid and consent of all parties, confirming

multiple times that the statement was sufficiently redacted and that the limiting instruction was acceptable, and, finally, issuing its limiting instruction prior to the video being played. (See generally 27T:151-13 to 157-22 and 28T:23-9 to 30T:27-12 to 29-3). The limiting instruction informed jurors that the investigator's comments could contain subjective opinions not to be considered as evidence, that the investigators did not possess specialized knowledge, and that the jurors alone were to determine whether the State proved the identification of the perpetrators beyond a reasonable doubt. (30T:27-12 to 29-3). The court repeated this instruction immediately prior to jury deliberations. (33T:39-20 to 40-22).

The trial court and all parties successfully tailored Defendant's statement and the limiting instruction to ensure that the unredacted portions therein were admissible. The record does not support defendant's argument that the State "deliberately elicited hearsay" by "present[ing] the officers' statements as evidence of guilt; the jury were explicitly instructed not to interpret them as such. Requiring further redactions of the video would be to, as the trial court aptly stated, "wholly eviscerate and undermine law enforcement's legally permissive ability to use an interrogation as an investigative tool." (29T:17-17 to 23).

Defendant's assertion that the investigators' recorded statements violated Bankston is erroneous for reasons argued above. The investigators' comments

did not create an inescapable inference that they possessed knowledge outside of the record implicating defendant. (Bankston, 263 N.J. at 271). At most, the jurors may have inferred that the surveillance videos referenced by the investigators were those made available to the jury in the record. (See Medina, 242 N.J. at 416, 420)). As jurors are presumed to be rational and intelligent, defendant cannot establish that they relied on the investigators' conclusory statements in flagrant disregard of the court's repeated and detailed instructions. (State v. Daniels, 182 N.J. 80, 100 (2004)(internal citation omitted)).

Assuming arguendo that the disputed statements from the interrogation video were improperly admitted, their admission was not "clearly capable of producing an unjust result" mandating reversal. (R. 2:10-2; see Trinidad, 241 N.J. at 445).

B. The Investigators' Accusations in Defendant's Statement Did Not Constitute Improper Lay Testimony

As argued above, the questions and statements posed by Detectives Flores and Velarde during Defendant's interrogation video were not given "in the guise of assisting the jury, but rather expressing their opinion to defendant to prompt him to reply in the course of the stationhouse interrogation." (Cotto, 471 N.J. Super. at 540). In fact, the trial court abided by the very recommendations made by the Appellate Division in Cotto for reasons argued in subsection A above. (See generally 27T:151-13 to 157-22 and 28T:23-9 to 30T:27-12 to 29-3). The trial

court explicitly advised that the investigators' interrogation techniques were not to be considered "any matter whatsoever as proof of a defendant's guilt." (30T:28-12 to 19 (emphasis added)).

Defendant baldly asserts that the accusations made by the interrogating officers on Defendant's video were "no different than an officers' live opinion testimony" because they were impermissible expressions of their belief in defendant's guilt. (Db37). However, Cotto explicitly distinguishes statements made during a stationhouse interrogation from "cases that hold that trial witnesses may not opine on an ultimate issue that is to be decided by the jury . . . especially whether a defendant is guilty." (Cotto, 471 N.J. Super. 539). This case is not distinguishable from Cotto, as the officers' statements here did not suggest that they were aware of incriminating facts outside the record and the jurors were instructed that the officers did not possess such knowledge.

POINT III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE USE OF VIDEO EVIDENCE DURING DELIBERATIONS, FURTHER, THE JURY NEVER VIEWED THE STATE'S SURVEILLANCE VIDEO DURING DELIBERATIONS.

In Defendant's own brief, he concedes that they have no authority by the Court to cite any violation by the trial court as it relates to replay of surveillance footage during deliberations. Further, Defendant concedes that the footage has

no audio relinquishing any concerns of violating any guidelines governing the playback of audio and visual testimony pursuant to State v. Burr, 195 N.J. 119, 134 (2008) (requiring trial court to inquire if readback would suffice, and if not, to consider whether additional direct and cross-examination should be played to provide proper context; and to conduct playback in open court); State v. Miller, 205 N.J. 109, 122 (2011)(requiring judges to make a precise record of what was played and to instruct juries to consider all of the evidence presented).

The fact remains, the video was never viewed by the jury during deliberations as they did not have the means to view it as clearly shown in the record.

Assuming arguendo that the jury had the opportunity to view the video, the Judge's instructions were clear and in line with the model criminal jury charges and case law. (See 33T40-15 to 22).

“As I have continuously emphasized throughout this trial, you and you alone are the sole factfinders in this case. You will have the video S-97 for your independent consideration during your deliberations. As the sole judges of the facts, you and you alone are to determine whether the State has proven beyond a reasonable doubt the identification of the perpetrators.”

Later during the stipulations, the Judge added: (33T47-1 to 10).

“It is agreed by the parties that if Agent Henry Hernandez of the Passaic County Prosecutor's Office were to testify in this case, his testimony would be that he received all the DVD surveillance footage from the investigation regarding a fatal shooting that occurred on 30 -- I'm sorry, at 37 Federal

Street, Passaic, New Jersey, on May 15th, 2017 provided by the Passaic Police Department, and that he reduced the footage to a compilation video labeled as S-97.”

Finally, the Judge instructed the jury as to the procedure to ask questions and make

any requests from the Court: (33T111-25 to 112)

If, during your deliberations, you have a question or feel that you need further assistance or instructions from me, or wish to have certain testimony read or played back (or video or audio exhibit played back), write your question or request on a sheet of paper and give it to the sheriff's officer who will be standing at the jury room door who, in turn, will give it to me.”

In Defendant's brief, they improperly characterized inquiries between trial counsel and the Court regarding use of video instructions. Regardless of the mischaracterization, the Court properly explained the procedures so as to satisfy all parties prior to instructing the jury. (31T216-2 to 217-5).

“they have to send out a note. In other words they're told if they want something they'll send out a note and communicate with me about that. So it'll be in writing. I will mark it as AC exhibit. You will all be brought into the courtroom and I will tell you the juror sent out a note saying for example we wanna rewatch Mr. Defendant's video and then I will say council what is your position on that? And then I will make a ruling and then the ladies and gentlemen so I say yes the ladies and gentlemen will come back and we'll watch the video again. If they want to watch the surveillance video they will get a wiped computer. When I say wiped I mean there's nothing else on the computer what the ability to watch the surveillance video. They can do that because it's the equivalent of looking at photographs. They don't need to look at photographs in our presence right? Because what they're doing is supposed to be sacred. For them to all collectively discuss their opinions and to come to a determination. So the surveillance video and the case law is the equivalent of looking at pictures. And so they're allowed to do that so long as there is no sound there is nothing in this surveillance video as you've seen

as 97 the compilation video that's blank. So as I've stressed to them for them to determine when they watch that video what they see if anything right?

The transcript is also clear that the compilation video was never viewed during deliberations. The Jury submitted several questions throughout deliberations, none of which had to do with the video, whether it was how to play it, or rather manipulate it, as suggested by Defendant. They requested a printed copy of State's evidence #S-110B which was a digital map provided to them on a laptop specifically for this jury and this trial. (33T123-23 to 131-18). This laptop was reviewed by all parties and provided to the jury, *if* they desired to view any evidence that was admitted that existed and was shown in digital form. Although their second question inquired about a TV and an HDMI cable, they ultimately *withdrew* that request. (33T-133-24 to 137-12).

The State's surveillance video was never viewed by the jury during deliberations, Defendant's argument has no merit. Even if it was, the court's instructions were proper.

POINT IV

DETECTIVE RODRIGUEZ'S IDENTIFICATION OF DEFENDANT WAS PROPER PURSUANT TO RULE 701 AND DID NOT DENY DEFENDANT THE RIGHT TO A FAIR TRIAL.

N.J.R.E. 701, "Opinion testimony of Lay Witnesses," provides in part:

If a lay witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it is:

- (a) rationally based on the witness' perception; and
- (b) will assist in understanding the witnesses testimony or determining a fact in issue.

In State v. Bealor, 187 N.J. 574 (2006), the New Jersey Supreme Court found that “the purpose of N.J.R.E. 701 is to ensure that lay opinion is based on an adequate foundation.” The first prong of N.J.R.E. 701 requires the witness' opinion testimony to be based on his perception, or the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing. (State v. McLean, 205 N.J. 438, 457 (2011)).

The second prong of N.J.R.E. 701 requires that a lay-witness' opinion testimony be “limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.” (Id. at 458).

Det. Raymond Rodriguez was asked by Detective Merced to view surveillance footage to possibly identify individuals depicted, and unknown, on the video as is common practice in criminal investigations. (18T147-1 to 148-7). At no point was Det. Rodriguez provided any preliminary information or potential suspects in reviewing this footage as no parties had yet to be identified during this stage of the investigation. Immediately upon reviewing the footage of multiple individuals, Det. Rodriguez specified the Defendant. (18T148-15 to

23). Det. Rodriguez added that based on his role as group leader in the Junior Police Academy for several years he identified “Christopher or Chris” as one of the participants through his direct interactions. (18T149-1 to 150-18).

In addition, Det. Raymond Rodriguez testified that he had other interactions with the Defendant at the local laundromat that he frequented on numerous occasions where Defendant would be selling corn. (18T150-19 to 151-8). Also, he recalled specific conversations of Defendant inquiring about his status as a police officer. (18T150-9 to 11).

Any doubts about Det. Rodriguez’s perception of the Defendant prior to the identification on the surveillance video are eliminated from the Defendant’s own confirmations during his video statement to police. (Transcript of Defendant’s Redacted Statement – page 2, line 80 to page 3, line 113). In fact, Defendant’s own mother confirmed same as she was present during this part of the interview.

The State submits that Detective Rodriguez’s testimony regarding his identification of Defendant through surveillance footage was admissible under Rule 701, as the statements made were based on his perception and aided the jury in determining a fact in issue.

Assuming arguendo that the Detective’s testimony was improper, it was not clearly capable of producing an unjust result. Whether a given error is

harmless "must be evaluated in light of the overall strength of the State's case."

State v. Galicia, 210 N.J. 364, 388, (2012).

The testimony provided was consistent with Rule 701 and therefore Defendant's argument is without merit.

POINT V

DETECTIVES RODRIGUEZ AND FLORES' TESTIMONY REGARDING THE SO FRESH STUDIOS FOOTAGE DID NOT VIOLATE RULE 701 OR DENY DEFENDANT THE RIGHT TO A FAIR TRIAL.

Similar to Point IV argued above, N.J.R.E. 701, "Opinion testimony of Lay Witnesses," provides in part:

If a lay witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it is:

(a) rationally based on the witness' perception; and

(b) will assist in understanding the witnesses testimony or determining a fact in issue.

In State v. Bealor, 187 N.J. 574 (2006), the New Jersey Supreme Court found that "the purpose of N.J.R.E. 701 is to ensure that lay opinion is based on an adequate foundation." The first prong of N.J.R.E. 701 requires the witness' opinion testimony to be based on his perception, or the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing. (State v. McLean, 205 N.J. 438, 457 (2011)).

The second prong of N.J.R.E. 701 requires that a lay-witness' opinion testimony be "limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." (Id. at 458).

Det. Flores conducted an in-person interview of Hadjiedj on May 17, 2017, where Hadjiedj explained that he was at So Fresh Studios at the time of the shooting. (See 27T:131-17 to 134-11 and 20T:115-3 to 20). Det. Rodriguez, who had obtained a photograph of Hadjiedj to familiarize himself with Hadjiedj's appearance, and Det. Flores traveled to So Fresh Studios on May 18, 2017 to verify Hadjiedj's alibi. (See 18T:130-4 to 137-17; 27T:134-2 to 11). The State submits that these detectives' testimonies regarding the So Fresh Studios footage were admissible under Rule 701, as the statements made by both detectives were based on their perception and aided the jury in determining a fact in issue.

Assuming arguendo that the detectives' testimony as to the So Fresh Studios footage was improper, it was not clearly capable of producing an unjust result. Whether a given error is harmless "must be evaluated in light of the overall strength of the State's case." State v. Galicia, 210 N.J. 364, 388, (2012)) The testimony did not directly implicate defendant in the shooting. Unlike State v. Allen, 254 N.J. 530 (2023), in which an officer provided improper opinion

testimony as to the “sole issue determinative of defendant’s guilt on [his] most serious charge,” this testimony only affected defendant’s third-party guilt defense and there were multiple issues in dispute. The So Fresh Studios footage was not the only evidence demonstrating Hadjiedj’s innocence; the State demonstrated that he did not own a vehicle matching the description of the shooter’s vehicle, and the Nissan registered to his father had the registration number “[REDACTED]” which lacked a “Z” or an “S” as described in Mr. Avelino’s testimony. The State also possessed over thirty minutes of surveillance footage depicting defendant and Defendant driving from 362 Howe Ave. to the area of 37 Federal Street on the night of the homicide.

Additionally, both Det. Rodriguez and Flores had their credibility thoroughly impeached on cross, particularly where Det. Rodriguez did not memorialize what he observed on the footage in an investigative report and familiarized himself with Hadjiedj only through the latter’s driver’s license photograph. (19T:125-10 to 126-10). Defendant and Vargas each casted doubt on the existence and veracity of the So Fresh Studios footage in summation (32T:52-8 to 16). Defendant similarly contended that the So Fresh Studio did not exist, saying the jury “[hadn’t] seen evidence” proving Hadjiedj’s alibi and noting the studio’s close proximity to Federal Street as implicating Hadjiedj in Mr. Castillo’s death. (32T:81-12 to 19).

For the foregoing reasons, the Detectives' testimony as to the So Fresh Studios footage was not impermissible under N.J.R.E. 701 or, in the alternative, its inclusion was harmless error in light of the State's proofs implicating defendant, the multitude of issues in the case, and the additional evidence demonstrating Hadjiedj's innocence.

Defendant also argues that the detectives' So Fresh Studios footage testimony improperly bolstered Hadjiedj's testimony alibi in contravention of State v. Allen and State v. Lazo, 209 N.J. 9 (2012). (254 N.J. at 544-45; Db46 to 48). Lazo is distinguishable from the matter at bar. There, an officer's testimony improperly bolstered an eyewitness' identification of defendant, which was the "sole basis for defendant's conviction." (Lazo, 209 N.J. at 27). "Neither a police officer nor another witness may improperly bolster or vouch for an eyewitness' credibility and thus invade the jury's province." (Id. at 24).

No such improper bolstering occurred here. Det. Merced's statement that Hadjiedj was "cleared" because he was in Clifton "during the shooting" was provided to explain why Hadjiedj was not interviewed further. (25T:266-16 to 270-7). Her fleeting comment was followed by further testimony explaining that there were no results from an ALPR search which demonstrated that Hadjiedj's father's car was near the scene of the homicide. (25T:266-16 to 270-7). Merced explicitly stated that this was based in part on the report from Officer Rodriguez and Flores

regarding the So Fresh Studios footage, which was constantly disputed by defendant and Defendant before the jury.

Should this Court find that the testimony constituted impermissible bolstering, its inclusion was harmless error for the same reasons that their testimony as to the footage was harmless error. Further, the trial court's final instructions to the jury reasserted their singular role as factfinders, their duty to determine the credibility of all witnesses, and the burden of proof which never shifted to defendant or Defendant. (see generally 33T:21-14 to 27-9).

Both Defendants argue that they were denied a fair trial because the court declined their request to issue an adverse inference charge as to the State's failure to preserve the So Fresh Studios footage. (Db48 to 51).

Trial courts are afforded broad discretion in determining the appropriate sanctions for discovery-rule violations. (State v. Marshall, 123 N.J. 1, 134 (1991)). A trial court's decision to reject a request for an adverse inference charge is reviewed for an abuse of discretion. (State v. Dabas, 215 N.J. 114, 140-41)(2013)).

Under Brady v. Maryland, 373 U.S. 83 (1963), the State violates a defendant's due process rights if it withholds exculpatory evidence. (See State v. Carrero, 428 N.J. Super. 495, 515-16, (App. Div. 2012)(emphasis added). However, where the State fails to preserve only potentially useful evidence, a

defendant must demonstrate the police acted in bad faith to establish a due process violation. (Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988); see also State v. Reynolds, 124 N.J. 559, 569 (1991) (adopting the Youngblood standard in New Jersey). "Without bad faith on the part of the State, 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" (George v. City of Newark, 384 N.J. Super. 232, 243, (App. Div. 2006) (quoting Youngblood, 488 U.S. at 57).

The trial court did not abuse its discretion by refraining from issuing an adverse inference charge. (15T:57-4 to 58-25). Though defendant insists that the So Fresh Studios footage was "critical to the question of defendant's guilt," the footage was not exculpatory but merely potentially useful. (See Reynolds, 124 N.J. at 569; Db50). Had the video been preserved, its confirmation or refutation of Hadjiedj's alibi would not have definitely established defendant's guilt or innocence in the face of the State's multitude of proofs both implicating defendant and demonstrating Hadjiedj's innocence, as argued above. As such, and because the court found no bad faith on the part of Passaic PD detectives in their inability to preserve the footage, the trial court did not abuse its discretion by refraining from issuing the adverse inference charge. (See 15T:57-4 to 15).

Should this Court find that the trial court erred by not issuing the adverse inference charge, its exclusion was harmless error incapable of producing an

unjust result for reasons argued above. The defendants' thorough cross-examination of Detectives Rodriguez and Flores and insistence during summation that the footage either did not exist or did not verify Hadjiedj's alibi provided the jury with ample opportunity to conclude that the video was not produced because it was unfavorable to the State.

Defendant also argues that the trial court committed plain error by not issuing a third-party guilt charge. (the Model Criminal Jury Charge for Third Party Guilt). The State maintains that the trial court did not err in declining to issue this charge where it allowed defendant to admit third-party guilt testimony which was thoroughly and repeatedly brought to the jury's attention.

Assuming arguendo that the trial court erred by refraining from issuing the charge, it did not constitute plain error where the trial court's final jury instructions effectively contained the third-party guilt charge. To summarize the model charge's instructions: (1) the defendant contends that there is evidence that someone else committed the crime, raising a reasonable doubt as to the defendant's guilt; (2) the defendant is entitled to rely on any evidence at trial which has a rational tendency to raise a reasonable doubt as to his guilt; (3) the State still carries the burden of proving the defendant's guilt beyond a reasonable doubt, and; (4) the defendant does not have to produce evidence proving the guilt of a third party.

The trial court essentially reiterated the third-party guilt charge in its final instructions, stating: (1) defendant maintains that evidence was produced at trial indicating that a third party may have committed the crime, raising reasonable doubt as to defendant's guilt (33T:42-23 to 43-7); (2) a criminal defendant has the right to rely on evidence at trial that has a rational tendency to raise a reasonable doubt as to his guilt (33T:43-3 to 7); (3) the State's burden of proving defendant's guilt beyond a reasonable doubt never shifts to the defendant (33T:43-8 to 19), and; (4) a defendant has neither the burden nor duty to show that the crime was committed by another person or to prove that person's identity (33T:32-15 to 23). The court also provided guidance to the jury as to judging a witness' credibility. (33T:25-19 to 27-9).

Defendant cannot demonstrate that the denial of his request for a third-party charge constituted reversible error where that charge was, in everything but name, given to the jury prior to deliberations

POINT VI

THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT.

Defendant points to various remarks made by the prosecutor during summation which constitute egregious misconduct warranting reversal. (Db63 to 72). The State did not engage in prosecutorial misconduct, but assuming

arguendo that he did, any errors were not so egregious as to deprive defendant of his right to a fair trial.

A conviction based on prosecutorial misconduct will not be reversed unless it was “so egregious that it deprived the defendant of a fair trial.” (State v. Smith, 167 N.J. 158, 181 (2001)). “Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented. Indeed, prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries.” (State v. Mahoney, 188 N.J. 359, 376 (2006)(quoting State v. Frost, 158 N.J. 76, 82 (1999); see also State v. Williams, 244 N.J. 592, 610 (2021)(stating that prosecutors must limit summation to the evidence presented “and the reasonable inferences to be drawn therefrom.”)).

If a defendant fails to object to improper remarks at trial, those remarks will generally not be deemed prejudicial, as the lack of an objection implies that defense counsel did not believe the remarks were prejudicial at the time they were made, and the lack of an objection deprives the trial court of an opportunity to take curative action. (Frost, 158 N.J. at 83-84). When reviewing the State’s summation, appellate courts must “not only weigh the impact of the prosecutor’s remarks, but . . . also take into account defense counsel’s opening salvo” to determine whether the prosecutor responded substantially to counsel’s claims

“in order to ‘right the scale.’” (State v. Engel, 249 N.J. Super. 336, 379 (App. Div. 1991)(quoting United States v. Young, 470 U.S. 1, 12 (1985)).

Defendant first argues (Db64) that the trial prosecutor engaged in misconduct by effectively testifying as to certain aspects of the surveillance footage during summation in contravention of State v. Watson, 254 N.J. 558, 600 (2023). The holding in Watson is prospective and therefore not applicable to the trial at bar, which concluded on June 13, 2022. (See generally 34T).

Regardless, the prosecutor’s comments on the surveillance footage during summation constituted his “encourage[ment] [to] the jury to draw reasonable inferences from the evidence.” (State v. R.B. 183 N.J. 308, 330 (2005)).

Assuming arguendo this Court determines the comments constituted prosecutorial misconduct, they were not “so egregious that [they] deprived the defendant of a fair trial.” (Smith, 167 N.J. at 181). As argued repeatedly above, the jury was repeatedly and urgently reminded of their duty as the sole determiners of fact, particularly as to the identification of the perpetrators. (See 26T:96-14 to 103-9; 30T:27-12 to 29-3; 33T:21-14 to 40-22). The prosecutor himself preceded his comments as to the surveillance footage with a reminder that his interpretation of the evidence did not control. (32T:97-3 to 6). In light of these reminders, as well as the defendants’ arguments in summation disputing the identity of the perpetrators on the available surveillance footage, the impact of the

prosecutor's allegedly improper statements was minimal and defendant's right to "have a jury fairly evaluate the merits of his defense" was not substantially prejudiced. (Smith, 167 N.J. at 181-82 (quoting State v. Timmendequas, 161 N.J. 515, 575 (1999)).

Next, defendant argues that the prosecutor's remarks as to the missing So Fresh Studios footage were not reasonably related to the evidence and "undermined the sole defense at trial by telling the jury not to believe the defense." (Db67; 32T:118-3 to 119-2). The prosecutor's statements were clearly made in response to defendant's "opening salvo" which fervently discredited the veracity of Passaic PD's investigation, namely their purported failure to investigate witnesses such as Torlao's mother or provide any verification that the So Fresh Studios footage existed. (32T:48-21 to 53-13). The prosecutor's comments were reasonably related to the evidence. (Engel, 249 N.J. Super. at 379).

Further, instances of alleged prosecutorial misconduct must be evaluated in the "context of the entire trial, the issues presented, and the general approaches employed." (State v. Negron, 355 N.J. Super. 556, 576, (App. Div. 2002)). The disputed comments came at the end of a lengthy trial wherein the veracity of the State's witnesses was vigorously attacked by defendant on cross, and the court repeatedly informed the jury of their duty to determine the credibility of witnesses.

Defendant next argues that the prosecutor “misrepresented that the third-party guilt suspects had appeared at trial voluntarily when, in fact, they had been subpoenaed.” (Db70). However, those comments were reasonably related to the evidence and the manner in which both individuals testified during direct and cross-examination. Patrick Torlao testified about when he first learned of Passaic Police requesting to speak with him about a murder, “So I ended up coming back. I willingly, they told me what happened, what they were trying to do. They said they had a couple questions about my car being stolen. So, I willingly, you know, when with them. I jumped in a car with them, and they drove me back to Passaic.” (21T39-7 to 12). Although this relates to Torlao being questioned after the incident, both demonstrated a willingness to cooperate during their testimony.

Defendant contends that the court’s limiting instruction was insufficient “given the extent of prosecutorial misconduct and other trial errors.” (Db56 n29). For reasons argued in this brief, defendant has not established prosecutorial misconduct or other trial errors; assuming arguendo that these errors occurred, they were incapable of producing an ultimate unjust result.

Though it is improper for a prosecutor to express his personal opinion on the veracity of a witness, a prosecutor is permitted to argue that a witness is credible “so long as the prosecutor does not personally vouch for the witness or refer to matters outside the record [for] support.” (See State v. Rivera, 437 N.J. Super 434, 463 (App.

Div. 2014)) and State v. Walden, 370 N.J. Super. 549, 560 (App. Div. 2004)). A prosecutor's statements do not improperly bolster a witness' credibility where they are not "clearly contrary" to the evidence adduced at trial. (See State v. Jenewicz, 193 N.J. 440 (2008)).

Here, the prosecutor did not personally vouch for Hadjiedj's or his parents' credibility, but bolstered it based on reasonable inferences from the record, namely there could exist non-incriminating explanation for why both Hadjiedj and his mother denied knowledge that Mohammed Hadjiedj owned that vehicle. (See 32T:132-18 to 133-17). This was a rebuttal to the extended attacks on Torlao and Hadjiedj's credibility presented in both defendants' summations and was reasonably related to the scope of the evidence presented. (32T:44-5 to 53-9, 58-4 to 12, 68-14 to 77-5; see State v. McNeil-Thomas, 238 N.J. 256, 280 (2019)).

Even if the prosecutor's statement was improper, it was not clearly capable of producing an unjust result. As argued above, the jury was aware of their role as the sole determiners of fact, including the credibility of witnesses, and knew that it was ultimately their decision whether to draw the inferences urged by the prosecutor. (See State v. McNeil-Thomas, 238 N.J. 256, 275 (2019)(quoting State v. Carter, 91 N.J. 86, 125 (1982); 32T:97-3 to 6.). The prosecutor's brief comment came at the conclusion of a lengthy trial in which the credibility of Torlao and Hadjiedj was vigorously attacked and, as such, is clearly incapable of producing an unjust result.

Finally, defendant argues that the prosecutor's brief comment as to the voluntariness of Hadjiedj and Torlao's appearances at trial were "prejudicial" and "misstated the law." (Db57 to 58). Defendant has not and cannot cite to any authority demonstrating that the issuance of a subpoena is prima facie evidence that its recipient did not testify in court voluntarily. This is particularly so where the prosecutor in this matter informed the court during an in-chambers conference that each officer the State called at trial was subpoenaed. (33T:8-24 to 9-8).

Further, this matter is distinguishable from State v. R.K., which contained a "pitched credibility battle" between victim C.G. and her father, defendant, over whether defendant sexually assaulted C.G. (220 N.J. 444, 461 (2015)). In such a case, "[a]ny improper influence on the jury that could have tipped the credibility scale was necessarily harmful and warrants reversal." (Id.). The Court commented that the entire case "turned entirely on witness-believability." (Id. at 449). The credibility of Torlao or Hadjiedj was not so crucial to defendant's case. The jury was repeatedly informed that defendant was not required to prove the guilt of a third party to escape a guilty verdict, and that the the jury was required to could only find defendant guilty if said conclusion was beyond a reasonable doubt. (See 33T:25-19 to 43-7). Whether they found them more or less credible, the jury could have concluded that a third party committed the underlying offense instead of Torlao or Hadjiedj.

Assuming arguendo the remark was improper, its inclusion was harmless error. (See R. 2:10-2). The trial court properly concluded that it was a passing comment which was not immediately objected to and that the jury was repeatedly informed of their sole role as determiners of fact, as well as the fact that comments during summation did not constitute evidence. (33T:10-9 to 11-3). This brief comment came at the conclusion of a trial in which Torlao and Hadjiedj's credibility were consistently attacked on cross and both defendants dedicated a significant portion of their summation to their purported dishonesty. (32T:44-5 to 53-9, 58-4 to 12, 68-14 to 77-5). For those reasons, the prosecutor's comment was not capable of producing an ultimate unjust result.

For the foregoing reasons, defendant has not demonstrated that the prosecutor engaged in misconduct during summation or, in the alternative, that such misconduct was so egregious as to warrant reversal.

POINT VII

A REMAND FOR RESENTENCING IS UNWARRANTED WHERE THE TRIAL COURT PROPERLY IMPOSED CONSECUTIVE SENTENCES, AND BECAUSE DEFENDANT'S SENTENCE WAS BASED IN COMPETENT, CREDIBLE EVIDENCE IN THE RECORD.

The sentencing court's imposition of consecutive sentences resulted from a proper balancing of the Yarbough factors in its decision contained a statement of

overall fairness. (See Yarbough, 100 N.J. at 643-44). In addition, the court was “extremely mindful of State v. Comer, 249 N.J. 359 (2022) and the other case law specifically addressing the sentencing of youth offenders in determining its sentence and making its decision. (35T81-4 to 8).

Defendant’s crimes, though committed close in time and place and connected by unity of purpose, involved separate acts of violence. (State v. Swint, 328 N.J. Super. 236, 264 (App. Div. 2000). The acts constituted multiple gunshots fired at a group of individuals resulting in one person sustaining a gunshot wound and another sustaining a fatal injury. (35T:117-13 to 19). Even in cases where crimes occur at essentially the same place and time, or through a single act, the Supreme Court has recognized the multiplicity of victims as a justifiable basis for consecutive terms. (See, State v. Liepe, 239 N.J. 359, 374 (2019) and State v. Carey, 168 N.J. 413, 428 (2001). Further, defendant also received numerous convictions for the crimes he committed on May 15, 2017. (See 24T:84-23 to 88-11).

The sentencing court also gave a statement of fairness regarding the aggregate sentence despite not explicitly mentioning Torres. (State v. Torres, 246 N.J. 246 (2021)). Defendant’s sentence was within the statutory range for first-degree murder, the most serious of his convictions. (See N.J.S.A. 2C:11-3b).

The Appellate Division has recently affirmed a trial judge’s sentence wherein that judge found aggravating factor three based partially on the defendant’s “history

of substance abuse and significant criminal record.” (State v. Amer, 471 N.J. Super. 331, 357 (App. Div. 2022); see also State v. Bieniek, 200 N.J. 601, 610-12 (2010)). The sentencing court’s rejection of mitigating factor eight based on defendant’s substance abuse history was similarly proper. Assuming arguendo that it was improper to impose aggravating factor three based on defendant’s history of substance abuse, it is harmless error because aggravating factor three would still be supported by the violence of the offense at bar.

Defendant argues the sentencing court’s assessment of aggravating factor 3 was flawed because it penalized Defendant for his “substance abuse issues” and because there is no reason to believe that those issues will persist after he serves the minimum 30-year sentence”. (Db72). Predicting a condition thirty years in the future, with absolutely zero evidence or support to show that he is amenable to treatment is a far reach for requesting resentence. The trial court relied on the Defendant’s own admissions that were provided in the pre-sentence investigation report regarding his substance abuse. The court noted, “He further admitted to the frequent consumption of alcohol and the use of marijuana, Percocet and Xanax, as follows: Marijuana every day from age 13 to 2017; Alcohol every day from age 17 to 2017; Percocet a few times a week from age 17 to 2017; and Xanax a few times a week from age 17 to 2017.” (35T 63-5 to 13).

The trial court properly considered the Yarbough factors (35T78-1 to 7) (35T79-6 to 81-3); State v. Swint, 328 N.J. Super 236 (App. Div. 2000) as it relates to permission of consecutive sentences (35T78-8 to 16); and State v. Comer, , as it relates to the sentencing of youthful offenders (35T81-4 to 8).

The trial court did not therefore abuse its discretion and a resentence is not warranted.

CONCLUSION

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

Respectfully submitted,

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Dated: March 28, 2025