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

Jennifer N. Sellitti, Public Defender
Attorney for Defendant-Appellant
31 Clinton St., 8th Floor
Newark, NJ 07102

Date: April 9, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2529-22T2

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Union County
CHARLES E. LEACH,	:	Ind. Nos. 21-02-0031 and
	:	21-02-0032
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Thomas K. Isenhour, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

TABLE OF CONTENTS

Page Nos.

PROCEDURAL HISTORY 1

STATEMENT OF FACTS 2

LEGAL ARGUMENT 16

POINT I

WHEN AN EXPERT WITNESS OFFERS NO LEGITIMATE BASIS FOR A CONCLUSION THAT A PARTICULAR CELL-PHONE TOWER HAS A PARTICULAR RANGE, THE SUPREME COURT OPINION IN STATE V. BURNEY UNEQUIVOCALLY BARS THAT EXPERT FROM TESTIFYING THAT CELL-PHONE CALLS USED PARTICULAR CELL TOWERS IF THE PURPOSE OF THAT TESTIMONY IS TO SHOW THE LOCATION OF THE PHONE BEING USED AT THE TIME. BECAUSE SUCH TESTIMONY WAS ADMITTED HERE OVER OBJECTION AND COULD HAVE INFLUENCED THE VERDICTS, THE CONVICTIONS SHOULD BE REVERSED. (RULINGS AT 8T 141-4 TO 146-15; 8T 148-14 TO 151-9; 8T 163-25; 8T 165-20) 16

POINT II

A DETECTIVE IMPROPERLY OFFERED LAY OPINION OVER OBJECTION THAT HE BELIEVED DEFENDANT TO BE ACTING SUSPICIOUSLY IN FLEEING AN ACTIVE SHOOTING SCENE AS HE DID AND THAT THE DETECTIVE FEARED, AS A RESULT, THAT DEFENDANT WAS AN ARMED SUSPECT. (RULING AT 2T 56-6 TO 8) 24

POINT III

THE JUDGE IMPROPERLY IMPINGED UPON THE JURY'S FACTFINDING ROLE WHEN HE SUA SPONTE INFORMED THE JURORS THAT, OUTSIDE OF THE PRESENCE OF THE JURY, THE DEFENSE HAD OBJECTED TO THE ADMISSION OF THE PHOTOGRAPHIC REENACTMENT OF CERTAIN SURVEILLANCE VIDEO, BUT THAT THE JUDGE "HAS DETERMINED THAT IT IS PROPERLY ADMISSIBLE" AND "APPROPRIATE FOR THE JURY TO VIEW" THAT EVIDENCE. (NOT RAISED BELOW)..... 28

POINT IV

THE RECORD APPEARS TO CONTAIN NO FINDING OF GUILT ON THE CHARGE OF SECOND-DEGREE POSSESSION OF A WEAPON BY "CERTAIN PERSONS." A TRIAL WAS NOT HELD ON THAT COUNT AND THE TRANSCRIPTS CONTAIN NO GUILTY PLEA TO THAT CHARGE. (NOT RAISED BELOW)..... 33

POINT V

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE. (RULING AT 11T 18-1 TO 27-22; DA 7 TO 9)..... 35

CONCLUSION 37

INDEX TO APPENDIX

Page Nos.

Indictment 21-02-0031 ..... Da 1 to 3

Indictment 21-02-0032 ..... Da 4

Verdict Sheet ..... Da 5 to 6

Judgment of Conviction 21-02-0031 ..... Da 7 to 9

Judgment of Conviction 21-02-0032 ..... Da 10 to 12

Amended Notice of Appeal ..... Da 13 to 17

Flash Drive Containing Surveillance Video (S-210) and Photos (S-257) .. Da 18

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Judgments of Conviction ..... Da 7 to 12

Rulings on Point I..... 8T 141-4 to 146-15; 8T 148-14 to 151-9; 8T 163-25; 8T 165-20

Ruling on Point II ..... 2T 56-6 to 8

Points III and IV were not raised below

Rulings on Point V ..... 11T 18-1 to 27-23; Da 7 to 9

TABLE OF TRANSCRIPTS

1T – trial dated 1/18/23
2T – trial dated 1/19/23 (Vol. 1)
3T – trial dated 1/19/23 (Vol. 2)
4T – trial dated 1/20/23
5T – trial dated 1/24/23
6T – trial dated 1/25/23
7T – trial dated 1/26/23
8T – trial dated 1/27/23
9T – trial dated 1/31/23
10T – trial dated 2/1/23
11T – sentencing of defendant dated 3/21/23
12T – sentencing of codefendant Bashir Pearson dated 3/21/23

TABLE OF AUTHORITIES

CASES

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 19

In Re Yaccarino, 117 N.J. 175 (1989) 18

Rosenberg v. Tavorath, 352 N.J. Super. 385 (App.Div. 2002) 19

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 33

State v. Bowman, 165 N.J. Super. 531 (App. Div. 1979) 30, 31

State v. Burney [I], 471 N.J. Super. 297 (App. Div. 2022) 16, 20

State v. Burney [II], 255 N.J. 1 (2023) 17, 19, 22

State v. Butler, 27 N.J. 560 (1958) 32

State v. Case, 220 N.J. 49 (2014) 36

State v. Cassidy, 235 N.J. 482 (2018) 19

State v. Concepcion, 111 N.J. 373 (1988) 32

State v. Cuff, 239 N.J. 321 (2019)..... 35

State v. Derry, 250 N.J. 611 (2022)..... 26

State v. Hampton, 61 N.J. 250 (1972) 30

State v. Harvey, 151 N.J. 117 (1997) 19

State v. Hedgespeth, 249 N.J. 234 (2021) 23, 28, 33

State v. Hyman, 451 N.J. Super. 429 (App. Div. 2017) 26, 27

State v. J.L.G., 234 N.J. 265 (2018)..... 19

State v. Jackson, 272 N.J. Super. 543 (App. Div. 1994) 34

State v. Kelly, 97 N.J. 178 (1984)..... 18

State v. Labrutto, 114 N.J. 187 (1989) 26

State v. Martin, 119 N.J .2 (1990)..... 32

State v. McLean, 205 N.J. 438 (2011)..... 25

State v. Papasavvas, 163 N.J. 565 (2000)..... 18

State v. Ragland, 105 N.J. 189 (1986)..... 34

State v. Rhett, 127 N.J. 3 (1992)..... 32

State v. Ridout, 299 N.J. Super. 233 (App. Div. 1997)..... 30, 31

State v. Scott, 229 N.J. 468 (2017).....23, 28, 33

State v. Simms, 224 N.J. 393 (2016)..... 26

State v. Smith, 436 N.J. Super. 556 (App. Div. 2014) 26

State v. Torres, 246 N.J. 246 (2021) 35

State v. Townsend, 186 N.J. 473 (2006)..... 19

STATUTES

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

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

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

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

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

N.J.S.A. 2C:39-7b(1) 1, 33

RULES

N.J.R.E. 104(c) 30

N.J.R.E. 702 ..... 17, 18

N.J.R.E. 703 ..... 17, 18

R. 1:8-1(a) 34

R. 2:10-2 ..... 29, 32

PROCEDURAL HISTORY

The Union County Grand Jury returned Indictment 21-02-0031 charging defendant Charles Leach[1] with: purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2) (Count One); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Two); and second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Four). (Da 1 to 3)[2] The same grand jury also returned Indictment 21-02-0032 charging defendant with one count of second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7b(1). (Da 4)

After trial before the Honorable Michael K. Isenhour, J.S.C. and a jury in January and February 2023, defendant was convicted of all the counts against him. (Da 7 to 12) On March 21, 2023, after merger, Judge Isenhour sentenced defendant to serve the following prison terms, concurrently: 60 years, 85% without parole, for murder, and 10 years, five without parole for the certain-persons conviction. Defendant was also ordered to pay the usual fees and penalties. (Da 8; Da 11)

On April 21, 2023, defendant filed his notice of appeal, and then filed an amended notice of appeal on May 11, 2023. (Da 13 to 17)

---

[1] Codefendant Bashir Pearson was charged with the same crimes as defendant, but in Counts One, Three, and Five.

[2] Da – defendant's appendix to this brief
PSR – presentence report

STATEMENT OF FACTS

Defendant Charles Leach and his codefendant -- defendant's nephew, Bashir Pearson -- were tried and convicted for murder and weapons offenses for the shooting death of Tyshun Kearney on the night of January 22, 2020, in Elizabeth. The State presented the following evidence at trial.

Jerry Williams testified that he is a barber who works at a barbershop at the corner of Jackson and Bond in Elizabeth. (2T 26-10 to 14) Between 6:30 and 7:30 p.m. on January 22, 2020, Williams claimed, there were four people inside the barbershop, including Tyshun Kearney and himself. (2T 29-10 to 21) Kearney had been there for 15 minutes or so talking to Williams when they heard a "loud noise" outside the shop and Kearney went outside to investigate. (2T 30-10 to 31-25) Then over the next five to ten seconds, Williams estimated, he heard five gunshots of two different types. (2T 32-5 to 21; 2T 35-2 to 5) Everyone inside "[r]an for cover," and, when the shooting stopped, Kearney walked back into the shop and collapsed, causing Williams to call 911. (2T 35-10 to 36-19) Police appeared to arrive in "seconds," Williams claimed, which was "startling" to him. (2T 39-13 to 19) Williams never saw a shooter, but when he went outside, he saw a black Honda that he associated with Kearney, and that Honda had a "smashed out" window. (2T 39-7 to 41-7) Albert Cosaj, a responding EMT, testified that Kearney was neither conscious nor responsive before being

transported to the hospital, and that Kearney had suffered multiple gunshot wounds. (2T 169-17 to 24) At the hospital, Detective Sonia Rodriguez testified, Kearney was pronounced dead at 7:19 p.m., and she collected his clothing and personal items and also retrieved one spent bullet that hospital staff had retrieved from his body. (5T 58-11 to 21)

The medical examiner testified that the cause of Kearney's death was "multiple gunshot wounds." (6T 159-22 to 24) Kearney was shot five times, three of which resulted in recovered bullets from his body at the autopsy. (6T 135-6 to 145-9) There was no evidence that the shots were fired at close range. (6T 134-11 to 13)

Detective Alex Gonzalez testified that at 6:54 p.m. on January 22, 2020, he and his partner Detective Nicholas were on Magnolia Avenue at the traffic light at Jackson and Magnolia when they heard gunshots from the direction of Jackson and Bond (one block northeast), and they turned right onto Jackson to approach the scene. (2T 51-22 to 53-1) He testified that as they got "about a quarter way through the block" on Jackson, he saw "an individual wearing a light-colored hoody running across the street and making his way towards this rear yard" that adjoins rear yards on the next street to the west: Madison Avenue. (2T 53-14 to 22) Gonzalez also claimed that when they drove further down the block, he saw what appeared to be a "plume of gun smoke" closer to the intersection of Jackson and Bond. (2T 54-21 to 55-2) He admitted, however, that

he wrote no report and that the report written by his partner made no mention of a plume of smoke. (2T 114-18 to 20; 2T 118-4 to 16) Gonzalez testified, over objection of defense counsel,[3] that he found "it suspicious that someone would choose to run through rear yards" to avoid the shooting scene, "as opposed to seeking shelter, whether it's inside the businesses" on Jackson, or inside a "house." (2T 55-9 to 16) Gonzalez specifically said that he "suspect[ed] that that individual had just been involved with the shooting" and that the person was armed. (2T 57-18 to 19; 2T 65-9 to 11) However, he admitted on cross that "multiple people" were running from the shooting scene at the time he and his partner pulled up, but, he claimed, only the one man was running into the backyards across the street on Jackson. (2T 149-14 to 23) Gonzalez then made his way into the rear yards on Jackson and Madison, while Detective Nicholas "proceeded [on foot] to the right [i.e., east] side of Jackson Avenue towards the barbershop." (2T 57-4 to 25) Gonzalez also radioed into headquarters that he was in pursuit of a person wearing a light-colored hoody and that backup units should be sent to "Madison, Jackson, Mag[nolia]." (2T 58-1 to 64-7)

Gonzalez testified that at that time he was not able to make his way through the backyards of Jackson and Madison, so he went to the barbershop, where he saw the victim receiving treatment. (2T 74-4 to 12; 2T 76-4 to 11) By

[3] This issue is addressed more in Point II, infra.

this time, just "a couple of minutes" after his radio broadcast, Gonzalez testified, "basically any available law enforcement personnel" had set "perimeters" around the general area and "anything believed to be part of a crime scene was being secured." (2T 76-18 to 23)

Thereafter, just after 7 p.m., Gonzalez went to Madison Avenue to follow what he perceived to be the route of the person wearing the light-colored hoody. (2T 78-15 to 22) There, police searched the yards of properties at 427 and 431 Madison that were adjoining one another, as well as adjoining the backyards of properties on Jackson, but they did not find any evidence of note at that time. (2T 82-14 to 83-19) Around that same time, Gonzalez learned that police had detained defendant, who was wearing a gray hoody, in the parking lot at U.S. Chicken, a business two blocks southwest of 427 Madison, at the three-way intersection of East Broad, Jefferson, and Magnolia. (2T 83-23 to 84-22; 2T 195-6 to 10) Officer John Londono testified that defendant was "agitated" -- but Londono admitted that he was "pushed up against a car and getting stopped" at the time -- and that defendant was also "out of breath," but Londono admitted that he had not seen defendant running when they followed him into the parking lot. (2T 195-22 to 196-2; 3T 205-8 to 12) Rather, he was merely "walking up Magnolia near the chicken restaurant" when they first saw him. (3T 203-16 to 19) Defendant had no gun in his possession and had blood on his shirt, which later turned out to be his own. (3T 205-5 to 15) Londono admitted that the only

description given out over the radio was of a male wearing a "light colored hoody," with no description of height, weight, build, or other clothing. (3T 203-20 to 204-21)

Gonzalez testified that when he saw defendant after he was detained, Gonzalez believed he "matched the physical build" of the person with the light-colored hoody. (2T 85-20 to 24) He then went back to the barbershop, and, after three to four hours in the area, he returned to the yards at 427 and 431 Madison Avenue, allegedly to search again for evidence. (2T 86-3 to 13) There, between the two properties, "alongside a parked SUV," Gonzalez testified, he found a "black mask" that he seized as evidence. (2T 89-17 to 91-20) Right around the same time, Gonzalez testified, Officer Alexander Melendez called out to Gonzalez, and said that he had found a semiautomatic handgun in a small trash can that was next to a larger can at 427 Madison. (2T 94-3 to 96-19) Gonzalez claimed that there "appeared to be some sort of red substance" on the gun, either blood or paint, and it was seized as evidence by a crime-scene unit. (2T 96-21 to 97-16) Gonzalez denied that he, Melendez, or any other officer at the scene at the time touched the gun. (2T 97-3 to 9; 2T 100-13 to 19)

Because officers were reviewing surveillance footage from nearby cameras at the time, they noticed that another suspect had at one point been in the rear yard of 427 Madison. (2T 101-16 to 21) Eventually, another search there uncovered a second handgun -- a revolver -- behind a "patio storage box,"

according to Gonzalez. (2T 101-23 to 111-21) Again, he claimed not to have touched that weapon, instead leaving it for the processing team. (2T 111-22 to 112-4) Officers also noticed that surveillance footage seemed to show a man wearing a light-colored hoody and bending down to the area where Melendez claimed to have found the semiautomatic handgun. (2T 106-10 to 107-12)

However, Gonzalez admitted that the man with the hoody that he initially saw, on Jackson headed toward Madison, did not appear to be carrying a gun in his hand or in his clothing. (2T 119-7 to 120-8) He also admitted that when he initially went into the backyard on Jackson, he did not see that person, let alone see them hopping a fence, and did not find anything of evidentiary value. (2T 121-3 to 122-2) He also agreed that his radio description that was limited to a male with a light hoody was "not very specific" and that he has "seen lots of males wearing light-colored hoodies" in Elizabeth. (2T 123-13 to 24) Gonzalez further admitted that when he re-entered the backyards, he did not "know what route this person took" and "could not confirm which direction he went." (2T 127-11 to 24) Indeed, he agreed, he never even saw that person jump a fence and never saw any blood on the ground -- admissions that resulted from further cross-examination intended to demonstrate that Gonzalez was guessing where that person had gone once they left Jackson Avenue. (2T 127-16 to 130-9) Indeed the backyard that Gonzalez went into at 418 Jackson does not back up to the yards at either 427 Madison or 431 Madison. (2T 130-24 to 133-20)

Gonzalez further admitted that Officer Melendez was alone when he claimed to first find the semiautomatic handgun, and that Melendez had not turned on his body camera at the time. (2T 134-23 to 136-16) He agreed that "lots of officers" had been searching those yards for hours and not found either gun, before Melendez and Gonzalez claimed to have found them. (2T 136-17 to 137-18) Additionally, Gonzalez admitted that his partner's report said nothing about the semiautomatic gun having a red stain on it. (2T 138-4 to 15; 2T 140-5 to 21) He also agreed that night-vision cameras make every hoodie appear to be light-colored. (2T 141-5 to 142-22)

Officer Melendez similarly testified about the recovery of the semiautomatic handgun (3T 211-7 to 214-24), and admitted that he did not write a report on the matter and should have. (3T 218-14 to 220-4) He claimed to be surprised that no one else had found the gun in the hours before he did, because the gun was "in plain view" for "anyone to walk by and see." (3T 226-18 to 227-3) Melendez claimed to be wearing a body camera but testified that the footage was not preserved. (3T 223-2 to 9) But then he claimed the camera was not turned on and said that turning it on "didn't come to mind, to be honest." (4T 13-1 to 14) Significant cross examination then covered in detail the fact the camera was operational that day and that his failure to turn that camera on was a violation of established policy and procedure. (4T 14-7 to 18-19; 4T 21-22 to 22-1) Cross-examination also covered the fact that in the surveillance video,

Melendez appears to go straight for the trash can in which he found the gun. (4T 22-7 to 23-9)

Sergeant Vincent Powers testified that he and his partner searched the crime scene at about 8 p.m. on January 22, and found no shell casings or projectiles, and no blood outside the shop, but they did not search Kearney's black Honda that was parked outside. (4T 57-14 to 24) The front passenger window of that car was "shattered inward," Powers testified. (4T 60-21 to 61-14) Powers also testified that the semiautomatic handgun found at the property on Madison was a 9-mm. and was sitting on top of the magazine for that weapon, which had three bullets inside while the gun still had one in the chamber. (4T 72-6 to 9; 4T 82-18 to 22; 4T 84-18 to 21) The revolver that was found had three discharged shell casings in it. (4T 76-20 to 22; 4T 86-2 to 5) Powers further noted that when defendant was detained, Powers noticed defendant's right thumb was injured, and defendant had blood on his hand. (4T 91-10 to 12) Police obtained a buccal swab from defendant and seized his clothing and sneakers. (4T 91-18; 4T 93-9 to 94-5) They also eventually obtained swabbings: from the codefendant, from the box behind which the revolver was located, and from a fence that someone was seen climbing over. (4T 97-11 to 14; 4T 98-8 to 102-17)

Sergeant Anthony Zignauskis testified that he searched the yards adjoining the area of 431 Madison shortly after the shooting, and did not find

any weapons. (6T 171-2 to 177-19) Sheriff's Officer Vitally Kutsyy testified similarly and noted that the distance from Jackson Avenue to Madison Avenue is two backyards. (6T 192-25 to 193-8) To access those yards right after the shooting, he had to hop fences and, when he did so, he recovered no shell casings, projectiles, or weapons, and saw no blood. (6T 198-16 to 199-13)

Mayasha Scott testified that defendant is the father of her children and that she sometimes lets him borrow a 2017 silver Chevy Malibu that she owns. (5T 13-18 to 14-24) She claimed that he borrowed that car about 6 p.m. on January 22 and that his cousin, Marquis Little, returned it to her at about 10:30 p.m. by parking it at her sister's house on Community Lane in Elizabeth. (5T 16-17 to 18-7)

Brandon Little, brother of defendant, testified that he gave a statement to police shortly after the shooting in which he said that he saw defendant in the silver Malibu at 3 or 4 p.m. on January 22. (5T 52-20 to 23) Niam Kearney, brother of Tyshun Kearney, testified that defendant -- whom he already knew -- called him an hour or less before his brother was killed, and asked Niam about doing body work on his car, a Honda, after which defendant and Niam agreed that defendant was "going to leave the car on Bond Street if [Niam] can get to it later." (2T 157-3 to 160-5)

Julisa Sims testified that she was Tyshun Kearney's girlfriend at the time of the shooting, and that Kearney and defendant were friends. (4T 26-8 to 28-8)

She testified that on the day of the shooting, defendant -- who did not normally message her -- sent an Instagram message to her asking her to call him, after which she spoke to him on the phone between 1 and 2 p.m. (4T 37-9 to 40-15) In that call, Sims testified, defendant said he "was trying to flag [Sims] down," and she replied that she was "out of the area right now," because she was driving on Route 22. (4T 40-14 to 24) Defendant replied, "Oh ok. I'll see you later," Sims testified, and "that was it." (4T 40-20 to 21)

Deannia Little -- defendant's sister and mother of the codefendant -- testified that she and the codefendant live on the third floor of 431 Madison. (5T 126-10 to 14) She testified further that she could not recall if her cousin, Marquis Little, was at her house on the afternoon of January 22, but when shown a prior statement of hers, she said, "He might have been there. I'm not sure," and admitted that she apparently told police that he was there. (5T 132-22 to 134-21) Then she claimed she "heard his voice. That's how I knew he was there." (5T 136-7 to 8) She also testified that she does not know whether defendant, the codefendant, or Brandon Little were at her home that day. (137-17 to 24) Mustafa Williams testified that he was with the codefendant at a Quick Fair store at Madison and Magnolia on January 22, after which they went to the codefendant's home. (6T 108-17 to 114-22)

Police officer Ramiel King testified that on January 22 at 9:45 p.m., he stopped a Malibu driven by the codefendant at a checkpoint in East Orange for

a seatbelt violation, and that there were two passengers in the car: Marquis Little and Branden Little. (4T 186-4 to 188-23; 4T 196-2 to 8) Marquis Little testified that sometime after 5 p.m. that day he borrowed the Malibu from Mayasha Scott and picked up the codefendant and Branden Little (5T 31-5 to 32-13) They then picked up Marquis's girlfriend, and the codefendant drove them all to East Orange where they dropped her off and then returned the car to Mayasha Scott on Madison Avenue "sometime around 11 or 10" p.m. (5T 38-9 to 40-12) Marquis Little admitted that he wore a light-colored hoody that day. (5T 43-12 to 14)

Tara Halpin from the Crime Scene Unit of the sheriff's department testified that she processed both Mayasha Scott's Malibu and Tyshaun Kearney's Honda after the incident. (5T 72-2 to 3) She recovered two shell casings from inside the Honda, and paperwork associated with both defendant and Ms. Scott from inside the Malibu. (5T 88-22 to 23; 5T 92-20 to 24; 5T 101-12 to 14; 5T 111-24 to 112-4) Halpin admitted that she did not process a baseball bat in the Honda for prints even though there was no other baseball equipment in the car. (5T 112-23 to 113-4) She swabbed the Malibu for DNA and fingerprints and found one useable fingerprint from a passenger-side door of the Honda. (5T 77-14 to 15; 5T 79-24; 5T 91-17 to 25)

Sergeant Matthew Schaible, a ballistics expert, testified that the two spent shell casings found in the Honda and the one bullet recovered at the hospital

were fired from the semiautomatic handgun that police found, and that two of the three bullets recovered from the autopsy were fired from the revolver, but that the third bullet recovered in the autopsy was inconclusive as to the revolver but was not fired by the semiautomatic. (5T 171-15 to 24; 5T 179-5 to 181-20; 5T 196-5 to 8)

Khaliah Douglas, a sheriff's officer, testified that she swabbed the two guns for DNA and tested them for fingerprints, but found no prints. (4T 182-10 to 12) She claimed that there were red stains on the semiautomatic when she received the gun, but that the gun by the time of trial had no such stains because her DNA swabbing removed all of those stains from the gun. (4T 177-20 to 179-14)

Amanda Margolis testified as a DNA expert that swabs taken from the revolver, a fence at 427 Madison, and the bin on the side of 427 Madison produced an insufficient amount of DNA to test. (6T 54-19 to 55-25) DNA from the face mask revealed three contributors: the codefendant and two other unknowns -- which excluded defendant or the victim from contributing to the DNA on that mask. (6T 57-12 to 58-3) Defendant's DNA was found in the swabbing from the semiautomatic handgun, as well as on his own sneakers and clothing. (6T 58-9 to 62-6) Margolis testified that she has "no control over the methodology of swabbing," and she cannot tell how defendant's DNA got onto that gun. (6T 71-23 to 25; 6T 74-15 to 20)

Detective Ryan Kirsh testified that in order to confirm what the Malibu would look like on surveillance footage -- at various spots on Bond, Magnolia, and Madison avenues where the State believed it had been seen in Elizabeth on the evening of the shooting (8T 44-19 to 22) -- on January 29, 2020, he did a "reenactment" video of the Malibu driving past those same surveillance cameras between 6:42 and 7:02 p.m. which then resulted in a series of side-by-side photos (S-257; Da 18) taken from that reenactment and from the original surveillance footage and then admitted into evidence (8T 43-9 to 46-18) The propriety of what the judge told the jurors about the side-by-side surveillance/reenactment photos (8T 46-19 to 23) when they were admitted into evidence and shown to the jury is addressed in Point III, infra. Cross-examination focused extensively on the methodology used to create that reenactment, especially the fact that Kirsh agreed there is no "policy or procedure on how to do that" and the fact that he also agreed that there are "[m]ultiple variables between what was going on on those streets where those cameras were on the [date of the shooting] compared to [January] 29." (8T 56-10 to 58-8) Cross-examination also focused on: the fact that "almost all" the cars in the photos are black and white, and one cannot tell the make or model of the car that police suspect to be the Malibu (8T 78-17 to 79-19); that Marquis Little wore a light-colored hoody on January 22 (8T 69-14 to 24); that police had defendant's bloodstained clothes in their possession as soon as they seized him

at U.S. Chicken, and, thus, even though he was temporarily released, they retained those clothes, giving them the opportunity to transfer blood from the clothes to the semiautomatic gun (8T 73-1 to 17); and that there is no evidence that any perpetrator of this shooting wore a mask; yet police found a mask outside the codefendant's residence and tested it. (8T 74-22 to 77-7)

Michael Buchanan, a deputy sheriff in South Carolina, testified that on April 12, 2020, he stopped a car in South Carolina in which the codefendant was a passenger, and that the codefendant gave him a false name. (6T 7-7 to 17-13) The codefendant was arrested on July 29, 2020 in Elizabeth. (5T 202-20 to 203-12)

Sergeant Nicholas Falcicchio testified as an expert in the analysis of cell-phone records. His testimony sought to show two things: (1) a record of communications -- the fact of them, not their content -- that occurred around the time of the offense between the defendant and codefendant, and (2) the fact that on the date of the offense those phones were connecting to certain cell towers in the area, in order to show the phones' "general location." Point I, infra, addresses the propriety of the admission of that evidence for the latter purpose and the facts related to it, so those facts are not recounted here. Falcicchio testified that the call records, however, showed multiple calls between three numbers -- allegedly belonging to defendant, the codefendant, and Marquis Little (7T 54-20 to 65-22) -- between 6:44 and 7:04 p.m. on January 22, 2020.

(8T 171-3 to 172-15)

LEGAL ARGUMENT

POINT I

WHEN AN EXPERT WITNESS OFFERS NO LEGITIMATE BASIS FOR A CONCLUSION THAT A PARTICULAR CELL-PHONE TOWER HAS A PARTICULAR RANGE, THE SUPREME COURT OPINION IN STATE V. BURNEY UNEQUIVOCALLY BARS THAT EXPERT FROM TESTIFYING THAT CELL-PHONE CALLS USED PARTICULAR CELL TOWERS IF THE PURPOSE OF THAT TESTIMONY IS TO SHOW THE LOCATION OF THE PHONE BEING USED AT THE TIME. BECAUSE SUCH TESTIMONY WAS ADMITTED HERE OVER OBJECTION AND COULD HAVE INFLUENCED THE VERDICTS, THE CONVICTIONS SHOULD BE REVERSED. (RULINGS AT 8T 141-4 TO 146-15; 8T 148-14 TO 151-9; 8T 163-25; 8T 165-20)

Because, as noted, the video evidence in the case was far from clear, the State attempted to use other evidence to reinforce the notion that the defendant and codefendant were in the proximity of the barbershop at the time of the shooting there. At the time of trial, the opinion of this Court in State v. Burney [I], 471 N.J. Super. 297, 320-323 (App. Div. 2022), seemed to allow a cell-phone expert to testify for the State, from that expert's overall experience, about the "general" range of urban cell towers without actually providing any evidence that that estimate was accurate for the towers involved in the particular case. But

the Supreme Court of New Jersey held otherwise when it issued its own ruling in State v. Burney [II], 255 N.J. 1 (2023).

In Burney [II], the Court held that the cell-phone expert's testimony that in his experience, the cell towers involved in that case had about a one-mile range was inadmissible because he offered no "factual evidence or other data" -- other than his general experience and training -- to support his conclusion that a "rule of thumb" one-mile range was correct for that area. Id. at 12-14, 23-25. Thus, that evidence was inadmissible to demonstrate the general range of the cell towers at issue. Id.

In the instant case, the State offered an expert to opine, over vigorous defense objection -- and with no basis other than the expert's general experience -- that the callers involved (i.e., defendant, the codefendant, and Marquis Little) were: (1) "in the general area of the crime scene" at the time of the shooting "based upon the location of the cell site[s]" used in particular calls or (2) with respect to the 9:45 p.m. stop of the codefendant, "in the area of the general area [sic] of that traffic stop." (8T 167-23 to 25)

Because Sergeant Falcicchio's opinion as to the range of the cell towers in question plainly violated Burney [II] and, thus, failed the most basic standards of N.J.R.E. 702 regarding the admissibility of expert opinions, and because, additionally, in violation of that same rule and N.J.R.E. 703, the opinion was therefore an inadmissible "net opinion," the witness's opinion about the cell

tower's general range should have been excluded. Consequently, because the improper admission of that evidence was not harmless beyond a reasonable doubt and denied defendant a fair trial, defendant's convictions should be reversed and the matter remanded for retrial.

Expert testimony is admissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the proposed expert has the "knowledge, skill, experience, training, or education" to form an expert opinion. N.J.R.E. 702. The rule creates a three-pronged test for the admission of expert testimony: "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." State v. Kelly, 97 N.J. 178, 208 (1984).

Additionally, N.J.R.E. 702 permits a qualified expert to testify "in the form of an opinion or otherwise," and N.J.R.E. 703 addresses what forms the "bases of opinion testimony by experts" may take. However, the corollary to Rule 703 is that evidence of an opinion which is not supported by factual evidence or other data before the jury is not admissible and is considered a "net opinion." State v. Papasavvas, 163 N.J. 565, 607 (2000); In Re Yaccarino, 117 N.J. 175, 196 (1989). The net-opinion rule requires an expert to tell the jury

"the why and wherefore of his or her opinion, rather than a mere conclusion." State v. Townsend, 186 N.J. 473, 494 (2006), quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002).

New Jersey courts apply the general "acceptance within a scientific community" test set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), to determine the admissibility of expert testimony in criminal cases. The Supreme Court of New Jersey "has not altered [its] adherence to the general [Frye} acceptance test for reliability in criminal matters." State v. Cassidy, 235 N.J. 482, 492 (2018). "[T]he State's burden is to prove that the. . . test and the interpretation of its results are non-experimental, demonstrable techniques that the relevant scientific community widely, but perhaps not unanimously, accepts as reliable." State v. Harvey, 151 N.J. 117, 171 (1997). "Whether expert testimony is sufficiently reliable to be admissible under N.J.R.E. 702 is a legal question [that appellate courts] review de novo." State v. J.L.G., 234 N.J. 265, 301 (2018).

While there is no doubt that the witness here was an expert in the field and that expert testimony would indeed be necessary to admit evidence of the range of these cell towers, the problem here is the same as was addressed in Burney [II]: the expert gave no basis for his range-based assertions other than his own training and experience, and, thus, "because the testimony was based on nothing more than [the expert's] personal experience, the trial court erred in

allowing the jury to hear this testimony" because it amounted to an impermissible "net opinion." 255 N.J. at 25.

The issue arose as follows. The State offered Falcicchio as an expert to testify as to the direction from which a cell tower in question would receive a signal from a phone, and the judge overruled initial objections by both defense counsel (8T 141-4 to 146-15) to the witness and the testimony, holding that Burney [I] allows such testimony -- which it did before it was reversed by Burney [II] -- and noting that State was claiming that the testimony was only intended to show direction of the towers, not their ranges. (8T 146-16 to 18; 148-14 to 151-9) Indeed, Falcicchio's testimony began with his brief assertion that he was not claiming to testify to the range (or "RF coverage" as he called it) of the towers. (8T 155-14 to 18; 8T 161-10 to 14) If only he had maintained that position. But he most definitely did not.

Almost immediately, Falcicchio asserted that his opinion from the cell-phone evidence in the case was that the phones of defendant, the codefendant, and Marquis Little were "in the general area" of the crime scene at the barbershop at the time of the shooting. (8T 162-2 to 3) Defense counsel's objection to that testimony was temporarily sustained. (8T 163-25) But then, soon thereafter, the prosecutor tried again to do the same thing, and succeeded. He asked: "Is there generally a range of coverage that this tower [would] be accepting calls from phones two miles away. . . three miles away, or is there a

general range?" (8T 165-14 to 19) Defense counsel's objection this time was overruled by the judge. (8T 165-20) Falcicchio responded: "It depends on how that particular tower is configured," and, when asked by the prosecutor to "explain that further," Falcicchio said that while it would be possible to have a two- or three-mile range, because this is "an urban area," it is far more likely that in an area like this with a "large quantity of cell sites," the range of the towers would be a shorter distance. (8T 165-25 to 166-16) Ultimately, over defense objection, Falcicchio opined that Mayasha Scott's phone was "not in the area of the crime scene" at the time of the incident, but that defendant's, the codefendant's, and Marquis Little's phones were "in the general area of the crime scene based upon the location of the cell site." (8T 167-9 to 168-10) Falcicchio then offered a similar opinion that the codefendant's phone and Marquis Little's phone were "in the general area of the [East Orange] traffic stop" based upon the cell-tower data at 9:45 p.m. (8T 168-21 to 169-8)

On cross-examination, Falcicchio conceded that he never tested the range of the towers in question, never went to those towers to make sure he was correct about their location, and never checked whether physical obstructions might change the coverage areas of those towers. (8T 175-2 to 177-9) Falcicchio even conceded that "there's always going to be" some obstructions, that the evidence that he used to determine coverage direction did not determine coverage area, and that the closest cell tower is not always used by a phone in a given situation,

but he refused to concede that directional evidence is "incredibly deceiving" as to coverage distance, and never withdrew his opinions regarding the presence of defendant and others near the crime scene. (8T 177-4 to 178-10; 8T 191-12 to 20)

Burney [II] makes this case an easy decision: this evidence could not have been more inadmissible for a simple reason: because it was not based upon anything but the expert's guesswork which itself was rooted only in his experience and training. 255 N.J. at 16-25. It was, thus, an improper "net opinion." Id. The only distinction between the two cases is one without a meaningful difference: that the expert in Burney put an exact distance figure on his guess/estimate of the tower's range -- one mile, 255 N.J. at 16 -- whereas this expert told the jury that the phones of defendant and two others were "in the general area of the crime scene based upon the location of the cell site" that they used. (8T 167-23 to 25) (emphasis added) But the damage done was the same. In both cases the State was bolstering[4] its "location" claims for the defendant and codefendant with expert testimony that was wildly inadmissible.

Reversal of the resulting convictions is necessarily required where, as

[4] The State spent considerable time in summation on the phone-call evidence, and even conceded in summation that its video evidence was not "the clearest," a tacit admission that the State was bolstering its less-compelling evidence with this cell-phone location evidence. (9T 49-24 to 51-1; 9T 58-7 to 8; 9T 59-5 to 7; 9T 68-10 to 13; 9T 78-15 to 79-14)

here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Hedgespeth and Scott are clear that it is not for a reviewing court to determine the weight or worth of a particular piece of evidence when evaluating harmless error. That "is in the sole province of the jury. '[Appellate j]udges should not intrude as the thirteenth juror.'" Hedgespeth, 249 N.J. at 253, quoting Scott, 229 N.J. at 485. The jury could have more readily accepted the defense arguments regarding reasonable doubt had the judge properly barred the testimony of Falcicchio regarding the location of the phones. When the judge was so clearly wrong to allow that testimony and that error cannot be deemed harmless beyond a reasonable doubt, Hedgespeth, 249 N.J. at 253; Scott, 229 N.J. at 485, defendant's resulting convictions should be reversed, and the matter remanded for retrial.

POINT II

A DETECTIVE IMPROPERLY OFFERED LAY OPINION OVER OBJECTION THAT HE BELIEVED DEFENDANT TO BE ACTING SUSPICIOUSLY IN FLEEING AN ACTIVE SHOOTING SCENE AS HE DID AND THAT THE DETECTIVE FEARED, AS A RESULT, THAT DEFENDANT WAS AN ARMED SUSPECT. (RULING AT 2T 56-6 TO 8)

One of the principal credibility calls that the jury had to make in this case was to decide if police properly detained defendant and properly found his DNA on one of the murder weapons, or whether, in fact, police focused inappropriately on defendant and then, when they did not have any forensic evidence to tie him to the shooting, transferred his blood onto that gun.[5] When Detective Alex Gonzalez was on the stand, he tried, quite inappropriately, to influence that decision by offering his lay opinion that defendant's actions right after the shooting -- in fleeing the scene by running across the street and into backyards rather than ducking into a nearby business on the street where the shooting occurred -- were "suspicious" and by telling the jury that, as a result, the detective "suspect[ed] that that individual had just been involved with the shooting" and was armed. (2T 55-9 to 16; 2T 57-18 to 19; 2T 65-9 to 11) Defense counsel objected (2T 55-17), but the judge overruled the objection and allowed

[5] The prosecutor acknowledged on the record that that planted-evidence theory was one he was fighting in the case. (7T 9-11 to 20)

the testimony. (2T 56-6 to 8)

Because the New Jersey Supreme Court has been very clear that such opinion testimony, from a lay witness, is utterly inadmissible when the topic is a matter, such as the characterization or interpretation of a particular person's actions, that is exclusively within the province of the jury to decide based merely on the evidence it has heard, and because this particular improper opinion was offered to bolster the State's case, not only was N.J.R.E. 701 clearly violated, but defendant was also denied due process and a fair trial under the Fourteenth Amendment and the state constitution. Consequently, defendant's convictions should be reversed, and the matter remanded for retrial.

N.J.R.E. 701 provides: "If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." That rule has been clearly interpreted in State v. McLean, 205 N.J. 438, 457-458 (2011), to only allow a "narrow" category of lay opinion: that which will "assist the trier of fact by helping to explain the witness's testimony or by shedding light on the determination of the disputed factual issue"; moreover, such lay opinion is specifically "limit[ed] to the perceptions of the testifying witness." Id.

McLean held that it went beyond that narrow area of permissible lay opinion for an officer to testify that he believed he had witnessed a drug deal. Id. at 461. The Court held that the construction of the "perception" requirement is strict: lay opinion is admissible only if it is "firmly rooted in the personal observations and perceptions of the lay witness in the traditional meaning of the [sic] N.J.R.E. 701," id. at 459. Citing State v. Labrutto, 114 N.J. 187, 199-200 (1989), the McLean Court defined the "perception" requirement as "rest[ing] on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell, or hearing." (Emphasis added).

Consequently, the Court in McLean stated that permissible lay opinion testimony is "an ordinary fact-based recitation by a witness with firsthand knowledge," and "does not convey information about what the officer 'believed,' 'thought,' or 'suspected.'" Id. at 460 (emphasis added); see also State v. Derry, 250 N.J. 611, 632-634 (2022) (lay opinion under N.J.R.E. 701 by an FBI agent -- about the meaning of slang terms used in a conversation in which he did not participate -- was improper under McLean because it was not based on perception, but instead on the officer's belief or understanding); State v. Hyman, 451 N.J. Super. 429, 450-452 (App. Div. 2017) (same as Derry); State v. Simms, 224 N.J. 393, 404 (2016) (detective, like in McLean, improperly opined that he believed he witnessed a drug deal); State v. Smith, 436 N.J. Super. 556, 574-575 (App. Div. 2014) (reversing for plain error when police officer offered the

lay opinion that defendant's actions were typical of a suspect trying to dispose of evidence after a crime; the officer was improperly "interpreting facts for the jury" rather than simply testifying to facts).

Detective Gonzalez's testimony ran grossly afoul of these principles. He was trying to make himself look like a law-enforcement officer who properly pursued a suspect rather than one who pursued the wrong person and then chose to frame that person. He was entitled to offer facts to support such a conclusion -- e.g., "I saw a man cross the street away from the crime scene and I followed him" -- but, under McLean and its progeny, he was not allowed to offer an opinion interpreting those facts: telling the jury that defendant's actions in fleeing the area of the shooting in that manner were "suspicious" and led him to believe defendant was armed and had been involved in the shooting. Yet that is precisely what Detective Gonzalez did here.

Nothing was more important in this case than whether jurors had a reasonable doubt that police arrested the actual criminals. Part of that determination involved assessing whether police properly focused on defendant or whether, in fact, their actions in pursuing defendant were misplaced and they later decided to frame him. Detective Gonzalez's improper lay-opinion testimony that defendant's actions were suspicious and indicated to Gonzalez that he was an armed suspect in the shooting were a grossly improper attempt to put a thumb on the scale of that credibility and reasonable-doubt determination.

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

POINT III

THE JUDGE IMPROPERLY IMPINGED UPON THE JURY'S FACTFINDING ROLE WHEN HE SUA SPONTE INFORMED THE JURORS THAT, OUTSIDE OF THE PRESENCE OF THE JURY, THE DEFENSE HAD OBJECTED TO THE ADMISSION OF THE PHOTOGRAPHIC REENACTMENT OF CERTAIN SURVEILLANCE VIDEO, BUT THAT THE JUDGE "HAS DETERMINED THAT IT IS PROPERLY ADMISSIBLE" AND "APPROPRIATE FOR THE JURY TO VIEW" THAT EVIDENCE. (NOT RAISED BELOW)

As noted in the Statement of Facts, the State chose to try to bolster its case by admitting into evidence side-by-side photos (S-257; Da 18) -- of original surveillance footage that was allegedly of Mayasha Scott's Chevy Malibu and

new surveillance footage, created by the State, of that Malibu driving by the same cameras -- in order to try to prove that it indeed was the Malibu in both. (8T 43-9 to 46-18; 8T 78-17 to 79-19) Out of the presence of the jury, the defense objected to the admission of those "reenactment" photos, but the judge overruled the objection. (8T 25-13 to 38-10) The propriety of that ruling is not challenged here, but what the judge did in front of the jury when it came time for the State to ask questions of Detective Kirsh about the reenactment photos was outrageous.

In direct contravention of case law that makes it clear that a judge has no business informing a jury that the court has made a ruling on admissibility out of the jury's presence, the judge sua sponte told the jurors: "Ladies and gentlemen, there was an objection to the admission of this. The court has determined that it is properly admissible, and it is admitted into evidence. It is appropriate for the jury to view the photos." (8T 46-19 to 23) (emphasis added) In doing so, the judge severely impinged upon the jury's factfinding role in assessing the proper weight to give this evidence, thereby violating defendant's Sixth Amendment right to an impartial jury, his Fourteenth Amendment right to due process, and his corresponding state-constitutional rights. Consequently, as a matter of plain error, R. 2:10-2, defendant's convictions should reversed and the matter remanded for retrial.

It is black-letter law that a judge may not tell a jury that he or she has

ruled a statement to be voluntary or otherwise admissible. State v. Hampton, 61 N.J. 250, 272 (1972). That rule is codified in N.J.R.E. 104(c), and it functions to make sure that the jury's fact-finding is "unhampered by knowledge of the court's prior" admissibility ruling. State v. Bowman, 165 N.J. Super. 531, 537 (App. Div. 1979). It applies equally to judges and to prosecutors -- who have caused convictions to be reversed when they inform the jury that the judge has ruled a statement to be admissible. Bowman, 165 N.J. Super. at 537-539. Moreover, this Court has properly held that the Hampton rule logically applies in other evidentiary contexts as well.

In State v. Ridout, 299 N.J. Super. 233, 238-239 (App. Div. 1997), this Court reversed convictions for plain error when the judge instructed the jury that he had found an identification to be admissible -- because, the Appellate Division held, it was up to the jury to determine its credibility, and such an instruction impinged on the jury's fact-finding role. "We think the fundamental defect in these instructions" -- and the clear analogy to Hampton -- "is obvious," the Ridout panel held. Id. at 238.

This point here is a simple one: the judge ran roughshod over the Hampton/Ridout rule when he instructed the jury that the "court has determined that [the photographic reenactment] is properly admissible, and it is admitted into evidence. It is appropriate for the jury to view the photos." (8T 46-19 to 23) In doing so, the judge severely impinged upon the jury's factfinding role in

assessing the proper weight to given this evidence, thereby violating defendant's Sixth Amendment right to an impartial jury, his Fourteenth Amendment right to due process, and his corresponding state-constitutional rights.

Defendant had the right to unfettered jury determination of the appropriate weight -- ranging from a lot to none at all -- to be given the reenactment photos, but no reasonable juror could be expected to make such a determination unaffected by the knowledge that the judge was telling the jury that those photos were "properly" in evidence and "appropriate" for the jury to view. Yet it is that very unfettered jury deliberation to which defendant is guaranteed. Ridout, 299 N.J. Super. at 239. "If the evidence is admitted, the jury must determine its credibility based on essentially the same circumstances that the judge considered, and, of course, without a judicial seal of approval." Id. (emphasis added). Here, that "judicial seal of approval" was improperly stamped onto this evidence, and, thus, the defense's efforts to dispute the credibility and worth of the reenactment photos were hampered. One must wonder: of what use is it to have an N.J.R.E. 104 hearing to determine admissibility, as here, out of the presence of the jury, if the judge is going to then tell the jurors what he determined out of their presence?

As noted in other points in this brief, the State's case was far from airtight. Videos were grainy. The manner in which evidence was handled allowed law enforcement considerable opportunity to transfer defendant's blood onto the

semiautomatic gun. This "reenactment" evidence was intended by the State to bolster its case, but the judge had no business telling the jury that he placed his stamp of approval on that evidence. This instruction unwittingly put the judge's thumb on the scale of credibility, thereby tainting the entire jury deliberation in a manner that had the clear capacity, R. 2:10-2, to have affected the verdict.

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. McKinney, 223 N.J. 475, 495 (2015); State v. Concepcion, 111 N.J. 373, 379 (1988) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial"). "[T]he trial court has an absolute duty to instruct the jury on the law governing the facts of the case." State v. Butler, 27 N.J. 560, 595 (1958). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations. Thus, the court must explain the controlling legal principles and the questions the jury is to decide." State v. Martin, 119 N.J. 2, 15 (1990). Therefore, instructional errors on essential matters, even in cases where those errors are not raised below, are traditionally deemed prejudicial and reversible error because they interfere with the jury's proper assessment of the defendant's culpability. State v. Rhett, 127 N.J. 3, 5-7 (1992); Concepcion, 111 N.J. at 379. Moreover, reversal of the resulting convictions is necessarily required where, as here, the error has the clear capacity to affect the jury's consideration of the credibility or evidentiary worth

of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's evidence or the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Defendant's convictions should be reversed, and the matter remanded for retrial. This erroneous and wildly prejudicial instruction should never be given in a criminal trial.

POINT IV

THE RECORD APPEARS TO CONTAIN NO FINDING OF GUILT ON THE CHARGE OF SECOND-DEGREE POSSESSION OF A WEAPON BY "CERTAIN PERSONS." A TRIAL WAS NOT HELD ON THAT COUNT AND THE TRANSCRIPTS CONTAIN NO GUILTY PLEA TO THAT CHARGE. (NOT RAISED BELOW).

Defendant has raised three points in this brief that address all of his convictions, but one of those convictions requires an additional legal point. Why? Because the record contains no valid finding of guilt on the charge of second-degree "certain persons" not to have a weapon. N.J.S.A. 2C:39-7b(1). Obviously, defendant has a Sixth Amendment right to a jury trial unless he waives it and either has a bench trial or pleads guilty. Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973); see also State v. Jackson, 272 N.J. Super.

543, 550 (App. Div. 1994); R. 1:8-1(a). The record presently indicates that there simply was never a jury waiver here, never a trial held on that count, and defendant never pled guilty to this charge. Consequently, his conviction on that count violates the Sixth Amendment right to a jury trial, the Fourteenth Amendment right to due process, and defendant's corresponding state-constitutional rights, and that conviction should be reversed and the matter remanded.

The "ordinary" manner for adjudicating this type of offense is to hold a "second" trial on this count after the first trial on all the other counts, in order to prevent the jury at the first trial from learning about defendant's prior conviction. See State v. Ragland, 105 N.J. 189, 193-196 (1986). Here, when the first trial concluded on the other counts, the parties seemed to agree that defendant would plead guilty to the "certain persons" charge, thereby avoiding a Ragland trial. (10T 29-15 to 17) But there is no plea on the record. The February 1, 2023 transcript ends with no resolution of the certain-persons charge. (10T 32-16) The judgment of conviction indicates the matter was adjudicated by a "jury trial" that simply did not happen, and defendant was sentenced on that charge. (Da 10 to 12) Thus, the present record requires a reversal of the "certain persons" conviction and a remand for other proceedings. There appears to be no valid finding of guilt on that charge.

POINT V

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE. (RULING AT 11T 18-1 TO 27-22; DA 7 TO 9).

The trial judge imposed a sentence for murder of 60 years, 85% without parole. (11T 18-1 to 27-22; Da 7 to 9) In doing so, he claimed to find four factors in aggravation -- the nature and circumstances of the offense, the defendant's prior record, the likelihood of recidivism, and the need for deterrence. (11T 19-10 to 21-20) He also claimed to find one mitigating factor -- that defendant's imprisonment would cause his family great hardship. (11T 23-12 to 18), and he claimed to give that factor "moderate weight." (11T 26-24) Defendant urges that a resentencing remand is necessary -- if for some reason his convictions are not otherwise reversed -- for the following reasons.

Twice recently, the Supreme Court has made clear that above and beyond a finding and balancing of relevant factors, every sentencing decision must make clear why the judge independently believes the overall length of the term imposed is warranted. State v. Cuff, 239 N.J. 321, 347-352 (2019); State v. Torres, 246 N.J. 246, 270 (2021). Here, the judge, beyond reciting the factors, said little about why a 60-year term -- effectively a life sentence for a man sentenced at age 38 as was defendant -- as opposed to some lesser sentence of 50 or even 40 years, was needed, especially in a case where the mitigating factor

was worth "moderate" weight. The judge's failure to do a real Torres/Cuff analysis warrants a remand. The Court has made clear in State v. Case, 220 N.J. 49, 65-68 (2014), that the sentencing court "must explain" every finding that it makes related to sentencing. Because that clearly was not done here with respect to the length of the overall term, a remand for resentencing is necessary if defendant's convictions are not reversed.

CONCLUSION

For all of the reasons set forth in Points I through IV, the defendant's convictions should be reversed and the matter remanded for retrial. Alternatively, for the reasons in Point V, a remand for resentencing should be ordered.

Respectfully submitted,

Jennifer N. Sellitti
Public Defender
Attorney for Defendant-Appellant

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

Date: April 9, 2024

WILLIAM A. DANIEL
Prosecutor of Union County
32 Rahway Avenue
Elizabeth, New Jersey 07202-2115
(908) 527-4500
Attorney for the State of New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2529-22T2

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	Criminal Action
v.	:	On Appeal from a Final Judgment of Conviction of the Superior Court
CHARLES E. LEACH,	:	of New Jersey, Law Division, Union County
Defendant-Appellant	:	
	:	Sat Below: Hon. Thomas K. Isenhour, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-RESPONDENT

MILTON S. LEIBOWITZ
Assistant Prosecutor
Of Counsel and
On the Brief
Attorney ID No. 082202013

michele.buckley@ucpo.org

DATED: July 23, 2024

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF PROCEDURAL HISTORY	1
COUNTER-STATEMENT OF FACTS	3
LEGAL ARGUMENT	18
POINT I	
DETECTIVE SERGEANT FALCICCHIO'S TESTIMONY WAS PROPERLY ADMITTED BY THE COURT. (RULINGS AT 8T141-4 to 146-15; 8T148-14 to 151-9; 8T163-25; 8T165-20)	18
POINT II	
THE TRIAL COURT PROPERLY PERMITTED DETECTIVE GONZALEZ TO EXPLAIN WHY HE CHOSE TO PURSUE A PARTICULAR INDIVIDUAL, WHO WAS LATER IDENTIFIED AS DEFENDANT. (Ruling at 2T56-6 to 8).	32
POINT III	
THE TRIAL COURT DID NOT ERR BY INFORMING THE JURY THAT HE OVERRULED DEFENDANT'S OBJECTION (Not Raised Below).	42
POINT IV	
DEFENDANT WAS FOUND GUILTY AFTER A TRIAL. (13T)	47
POINT V	
THE TRIAL COURT PROPERLY SENTENCED DEFENDANT. (11T18-1 to 27-22; Da7 to 9).	47
CONCLUSION	50

INDEX TO APPENDIX

Detective Sergeant Nicholas Falcicchio's PowerPoint Presentation Pa1

TABLE OF CASES

Page

FEDERAL OPINIONS CITED

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)..... 26

NEW JERSEY STATE OPINIONS CITED

Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115 (2013) 21
Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561 (2002)..... 19
Neno v. Clinton, 167 N.J. 573 (2001) 34
Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973)..... 42
Polzo v. County of Essex, 196 N.J. 569 (2008) 21
Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344 (2011).....20, 21
Reynolds Offset Co. v. Summer, 58 N.J. Super. 542 (App. Div. 1959)..... 42
State v. B.H., 183 N.J. 171 (2005). 19
State v. Bealor, 187 N.J. 574 (2006) 34
State v. Brown, 170 N.J. 138 (2001) 33
State v. Buda, 195 N.J. 278 (2008) 33
State v. Burney, 255 N.J. 1 (2023) 18, 26
State v. Chavies, 247 N.J. 245 (2021) 19
State v. Cole, 229 N.J. 430 (2017) 43
State v. Cuff, 239 N.J. 321 (2019)..... 48
State v. Derry, 250 N.J. 611 (2022).....20, 39, 40
State v. Frisby, 174 N.J. 583 (2002)..... 19
State v. Frost, 158 N.J. 76 (1999)..... 46
State v. Fuentes, 217 N.J. 57 (2014) 47, 48
State v. Garcia, 245 N.J. 412 (2021) 18
State v. Gonzalez, 249 N.J. 612 (2022) 19

State v. Harris, 209 N.J. 431 (2012) 33
State v. Hyman, 451 N.J. Super. 429 (App. Div. 2017) 39, 40
State v. Jabbour, 118 N.J. 1 (1990) 48
State v. Jenewicz, 193 N.J. 440 (2008)..... 20
State v. Johnson, 118 N.J. 10 (1990)..... 48
State v. LaBrutto, 114 N.J. 187 (1989)..... 35
State v. Marrero, 148 N.J. 469 (1997) 33
State v. McLean, 205 N.J. 438 (2011)..... 32, 33, 34, 35, 37, 39
State v. Muhammad, 359 N.J. Super. 361 (App. Div. 2003) 33
State v. Nantambu, 221 N.J. 390 (2015)..... 33
State v. O'Donnell, 117 N.J. 210 (1989) 48
State v. R.Y., 242 N.J. 48 (2020) 19
State v. Ridout, 299 N.J. Super. 233 (App. Div. 1997) 43, 44
State v. Roth, 95 N.J. 334 (1984)..... 48
State v. Simms, 224 N.J. 393 (2016)..... 39
State v. Smith, 436 N.J. Super. 556 (App. Div. 2014) 39
State v. Sowell, 213 N.J. 89 (2013)..... 19
State v. Torres, 183 N.J. 554 (2005) 19, 20
State v. Torres, 246 N.J. 246 (2021) 48
State v. Yarbough, 100 N.J. 627 (1985) 48
Townsend v. Pierre, 221 N.J. 36 (2015) 20, 21

NEW JERSEY COURT RULES CITED

R. 2:10-2 43

NEW JERSEY RULES OF EVIDENCE CITED

N.J.R.E. 104 45
N.J.R.E. 104(c)..... 43

N.J.R.E. 701 ..... 32, 34, 35, 39
N.J.R.E. 702 20
N.J.R.E. 703 ..... 20, 21

NEW JERSEY STATUTES CITED

N.J.S.A. 2C:11-3(a)(1) 1
N.J.S.A. 2C:39-4(a)(1) 1
N.J.S.A. 2C:39-5(b)(1) 1
N.J.S.A. 2C:39-7(b)(1) 1, 47

COUNTER-STATEMENT OF PROCEDURAL HISTORY[1]

On February 4, 2021, a Union County Grand Jury returned Indictment No. 21-02-00031, charging defendant-appellant Charles E. Leach with first-degree murder, in violation of N.J.S.A. 2C:11-3(a)(1) (count one); second-degree possession of a weapon (firearm) for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a)(1) (count two); and second-degree unlawful possession of a weapon (handgun), in violation of N.J.S.A. 2C:39-5(b)(1) (count four).[2] (Da1 to 3). A Union County Grand Jury also returned Indictment No. 21-02-00032, charging defendant with second-degree certain person not to have a weapon, in violation of N.J.S.A. 2C:39-7(b)(1). (Da4).

---

[1] Da refers to defendant's appendix on appeal.
Pa refers to the State's appendix on appeal.
1T refers to the trial transcript, dated January 18, 2023.
2T refers to the trial transcript, dated January 19, 2023. (Vol. 1).
3T refers to the trial transcript, dated January 19, 2023. (Vol. 2).
4T refers to the trial transcript, dated January 20, 2023.
5T refers to the trial transcript, dated January 24, 2023.
6T refers to the trial transcript, dated January 25, 2023.
7T refers to the trial transcript, dated January 26, 2023.
8T refers to the trial transcript, dated January 27, 2023.
9T refers to the trial transcript, dated January 31, 2023.
10T refers to the trial transcript, dated February 1, 2023.
11T refers to the sentencing transcript, dated March 21, 2023. (Defendant)
12T refers to the sentencing transcript, dated March 21, 2023. (Co-defendant)
13T refers to the trial transcript, dated February 1, 2023. (p.m. session).

[2] Co-defendant Bashir Pearson was charged in counts one, three, and five of the indictment. (Da1 to 3).

From January 18, 2023 through February 1, 2023, defendant and co-defendant appeared before the Honorable Thomas K. Isenhour, J.S.C., and a jury, for a joint trial. (1T to 10T). On February 1, 2023, the jury found defendant guilty as charged on all counts. (Da5 to 6; 10T26-18 to 28-13).

On March 21, 2023, defendant appeared before Judge Isenhour for sentencing. (11T). As to Indictment No. 21-02-00031, the judge merged counts two and four into count one and sentenced defendant to sixty years in prison, with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), followed by five years of parole supervision. (Da7; 11T25-23 to 26-2; 11T27-5 to 12). As to the certain persons conviction in Indictment No. 21-02-00032, the judge sentenced defendant to a term of ten years in prison, with a five-year period of parole ineligibility, followed by three years of parole supervision. (Da10; 11T26-16 to 22). The judge ordered the sentence in Indictment No. 21-02-00032 to run concurrently to Indictment No. 21-02-00031. (Da11 to 12; 11T27-25 to 28-6). The court also imposed the appropriate fines and penalties for each offense. (Da8 to 12).

On April 27, 2023, defendant filed a Notice of Appeal. An amended Notice of Appeal subsequently was filed on May 11, 2023. (Da13 to 17). This appeal follows.

COUNTER-STATEMENT OF FACTS

On January 22, 2020, defendant and co-defendant Pearson murdered the victim, Tyshun Kearney, by shooting him multiple times. That evening, between 6:30 p.m. and 7:00 p.m., Jerry Williams was working at the Jackson Avenue barbershop, located at 421 Jackson Avenue, in Elizabeth, New Jersey. (2T26-8 to 14; 2T28-5 to 6; 2T29-10 to 16). There were four or five people inside the shop: Ibn, Jerry, the victim Tyshun Kearney, Mr. Williams, and another customer. (2T29-17 to 30-9). They suddenly heard a loud noise "right out the front door," at which time the victim, Mr. Kearney, looked outside and exited the barbershop. (2T31-20 to 32-2). Five or ten seconds later, Mr. Williams heard five gunshots; some were "very loud noises" and others were "low noises." (2T32-3 to 12).

Mr. Williams ran for cover and ran into the closet that was in the back of the barbershop. (2T35-10 to 15). Ibn went into the bathroom, while Jerry "was just scrambling around," ultimately choosing to brace himself behind the door. (2T35-16 to 20). Eventually, Mr. Williams exited the closet and went to check on Jerry. (2T35-21 to 36-1). As he did, Mr. Williams heard a banging on the door and when he asked, "who is it," Mr. Kearney said, "it was me." (2T36-1 to 5). Jerry opened the door and Mr. Kearney walked in. (2T36-5). Mr. Kearney took four or five steps, walking approximately ten feet, and then

collapsed. (2T36-6 to 8). Mr. Williams immediately picked up the phone and called 9-1-1. (2T36-9 to 14). He then tried to talk to Mr. Kearney, who was mumbling something; when Mr. Williams turned Mr. Kearney over, Mr. Williams saw dark, red blood. (2T36-11 to 19).

Union County Sherriff's Officers Richard Brattole, Elizabeth Police Officer Kutsyy, and Detective Heller quickly arrived and began to render aid. (2T39-13 to 19; 2T175-6 to 9; 2T176-10 to 18; 2T177-9 to 178-18). They rolled Mr. Kearney over, used shears to cut off his shirt and attempted to find any bullet wounds. (2T179-4 to 9). They observed a chest wound in Mr. Kearney's left upper chest area below his shoulder, and attempted to apply a chest seal. (2T179-14 to 180-4).

At 6:56 p.m., Albert Cosaj, an Emergency Medical Technician with the Elizabeth Fire Department, was dispatched to the scene. (2T164-16 to 19; 2T165-21 to 25; 2T167-13 to 20; 2T168-4 to 6). Upon his arrival, he located Mr. Kearney, who had sustained a gunshot wound to his left shoulder, right side/back, lower abdomen, left knee, and right knee. (2T169-9 to 24; 2T170-9 to 18). Mr. Cosaj's supervisor indicated that Mr. Kearney had a pulse, so Mr. Cosaj moved Mr. Kearney onto a stretcher and brought him to the ambulance for further assessment. (2T170-2 to 8). In the ambulance, Mr. Kearney became pulseless and was not breathing, so Mr. Cosaj initiated chest

compressions and started CPR. (2T171-7 to 21). Mr. Kearney was then transported to Trinitas Hospital. (2T171-3 to 6). CPR was continued all the way to the hospital. (2T171-24 to 172-2).

Union County Prosecutor's Office Detective Sonia Rodriguez responded to Trinitas Hospital and was advised that Mr. Kearney was pronounced dead by Dr. Hague at 7:19 p.m. (5T55-12 to 16; 5T57-10 to 59-5). Detective Rodriguez then collected a projectile that was found in the body, and Mr. Kearney's wallet, sneakers, jogging pants, sweatshirt, and some other clothing articles. (5T58-14 to 21). She then brought the items back to the Union County Prosecutor's Office and secured them in the vault. (5T59-12 to 21).

On January 23, 2020, Dr. Junaid Shaikh, an expert in the field of forensic pathology and autopsies, conducted the autopsy on Mr. Kearney. (6T128-9 to 129-3). Dr Shaikh identified five gunshot wounds. (6T135-3 to 145-3). Wound number one was located on the chest region below the collar bone and perforated the pulmonary arteries. (6T135-3 to 7; 6T136-20 to 137-8). Inside the wound, Dr. Shaikh recovered a projectile. (6T137-14 to 21). Wound number two was located in the left upper part of the arm and exited the left upper scapula region. (6T138-3 to 9). Wound number three was located below the second exit wound, the left lower region of the victim's torso. (6T141-18 to 142-4). Dr. Shaikh was able to recover a projectile from the

wound, located in the dorsal muscle. (6T141-24 to 142-4). Wound number four was located in the abdominal region; it entered on the left side and exited on the right side. (6T142-23 to 144-7). Wound number five entered right above the victim's knee and exited through the rear of the victim's right thigh. (6T144-16 to 145-9). Dr. Shaikh recovered a projectile from the wound. (6T145-4 to 9). As a result of his examination, Dr. Shaikh concluded that the cause of death was multiple gunshot wounds. (6T159-18 to 24). He further concluded that the manner of death was a homicide. (6T160-3 to 4).

Elizabeth Police Detective Alex Gonzalez was working with his partner Detective Nicholas on the day of the homicide. (2T44-19 to 23; 2T45-14 to 20). At 6:54 p.m., they were stopped at a red traffic signal located at Magnolia Avenue and Jackson Avenue, when they heard gunshots within a very close distance to their location, in the direction of Jackson Avenue and Bond Street. (2T46-1 to 3; 2T51-16 to 52-4). They immediately proceeded in the direction of Bond Street and, as they turned onto Jackson Avenue, Detective Gonzalez observed an individual wearing a light-colored hoody darting away from the right side of the street, where Jackson Avenue Barbershop is located, and towards backyards that were located across the street from the barbershop. (2T52-23 to 53-9). The person in the hoody was the only person that Detective Gonzalez saw running across the street. (2T54-9 to 12).

In response, Detectives Gonzalez and Nicholas proceeded down Jackson Avenue, whereupon Detective Gonzalez's attention was drawn to what appeared to be gun smoke underneath one of the lampposts closer to the intersection of Jackson Avenue and Bond Street. (2T54-21 to 55-3). Detective Gonzalez notified police headquarters via his police radio that he was in pursuit of someone as a result of hearing shots fired, and then he pulled over his police vehicle, exited the car, and gave chase after the individual. (2T56-21 to 57-1; 2T58-1 to 7; 2T61-3 to 66-7). Detective Nicholas also exited the vehicle, but he proceeded to the right side of Jackson Avenue, towards the barbershop. (2T57-2 to 6). Surveillance video captured the detectives' arrival, the suspect Detective Gonzalez described, and Detective Gonzalez's initial pursuit. (2T70-17 to 74-2). Detective Gonzalez eventually stopped his chase and returned to the barbershop. (2T74-4 to 76-2).

Meanwhile, Elizabeth Police Officer John Londono, who was working in the community services division as a patrolman, also responded to the scene. (2T190-10 to 22). As he turned left onto Magnolia Avenue, Officer Haverty, who was adjacent to Officer Londono's vehicle, advised Officer Londono that he observed a male matching the description Detective Gonzalez provided. (2T191-25 to 192-6). The officers followed the suspect down Magnolia Avenue and made a left. (2T192-6 to 7). They entered the U.S. Fried Chicken

parking lot and apprehended the suspect, who was later identified as defendant. (2T192-7 to 193-3). Officer Londono collected a gray hoody from defendant. (2T195-6 to 12). He also observed that defendant was wearing a white thermal shirt that had blood on the right side. (2T195-16 to 21).

Eventually, Detective Gonzalez heard that an individual who fit the description that Detective Gonzalez had provided had been detained at the U.S. Fried Chicken restaurant. (2T83-23 to 84-5). Detective Gonzalez responded to that location. (2T84-16 to 18). When Detective Gonzalez arrived, he spoke with the officers who had detained the individual, and they presented him with that person. (2T84-19 to 22). Detective Gonzalez believed the person matched the physical build of the individual with the light-colored hoody. (2T85-18 to 24). Detective Gonzalez was then presented with a light-colored gray hoody that the detained individual was holding at the time he was apprehended. (2T85-24 to 86-2).

Detective Gonzalez then returned to the area of the barbershop and helped other law enforcement officers, including Detective Heller and Officer Melendez, canvass for evidence. (2T86-5 to 112-4). While canvassing, Detectives Gonzalez and Heller observed a discarded mask on the curbside, alongside a parked SUV that was located in between 427 and 431 Madison Avenue. (2T89-17 to 90-6). While Detective Gonzalez was by the SUV,

Officer Melendez, who also was canvassing, located a semiautomatic handgun near the walkway of 431 Madison Avenue. (2T92-25 to 93-19; 2T95-6 to 14; 3T212-10 to 213-8). The handgun was inside a small trash can on the side of the home. (2T95-17 to 96-4; 3T212-10 to 213-8). Video surveillance footage depicts an individual in a light-colored hoody placing the black semi-automatic handgun in the small trash can. (2T107-7 to 12). Detective Gonzalez observed a red substance that appeared to be blood or paint on the handgun. (2T96-16 to 97-2). Detective Gonzalez then notified his sergeant that the handgun was located and his sergeant advised Detective Gonzalez that the Crime Scene Identification Unit would respond and process the firearm. (2T97-10 to 16).

Detective Gonzalez continued to canvass for evidence and eventually re-entered the rear yard of 427 Madison Avenue. (2T101-12 to 21). While searching that area, Detective Gonzalez attempted to look between two fences that abutted each other. (2T102-3 to 13). Detective Gonzalez lifted himself up and did not see any items of evidence. (2T102-14 to 15). However, when he attempted to jump down, he rolled his ankle in the yard of 427 Madison. (2T102-15 to 18). He then went inside of 427 Madison to look at surveillance video from the home. (2T102-21 to 103-4).

After watching the video, Detective Gonzalez returned to the side

walkway of 427 Madison Avenue to inspect a storage box. (2T107-25 to 108-2). Detective Gonzalez observed and located a "black with brown handle revolver handgun." (2T109-4 to 6; 2T110-23 to 111-2). Detective Gonzalez then notified his sergeant that he had located a second handgun and his sergeant advised Detective Gonzalez that the Crime Scene Identification Unit would respond and process that firearm as well. (2T109-8 to 13). The pain from Detective Gonzalez's rolled ankle became too much, so he ceased his search and went to the hospital. (2T112-7 to 12).

Union County Sherriff's Office Sergeant Vincent Powers and Officer Vanessa Lang, who work in the Crime Scene Identification Unit, responded to the scene at approximately 7:25 p.m. (4T46-22 to 23; 4T47-14; 4T52-21 to 53-15). They photographed the scene and collected physical evidence. (4T55-25 to 88-22). At 431 Madison Avenue, they found a black mask and a black semi-automatic firearm with suspected blood, which was photographed, made safe, and secured. (4T65-5 to 13; 4T66-18 to 17; 4T69-5 to 10). They also recovered a gun magazine that was under the firearm. (4T72-3 to 9). At 427 Madison Avenue, they found another firearm, a revolver, which was photographed, made safe and secured. (4T73-23 to 74-9; 4T75-2 to 16). Discharged casings were also recovered. (4T76-23 to 25). They then returned to the original scene, where they photographed and documented the removal of

the victim's car. (4T88-20 to 89-3).

Sergeant Powers and Officer Lang then went to the Elizabeth Police Headquarters where they photographed and document defendant, his clothes and his personal items. (4T90-2 to 24). Defendant had a white shirt with red stains, consistent with blood, on the lower left, and sneakers that also had a reddish stain on the heal, which also was consistent with blood. (4T93-9 to 94-5). While photographing defendant's person, Sergeant Powers noticed defendant had an injury to his right thumb and there was blood on his hand. (4T91-10 to 14). A buccal swab was then taken from defendant. (4T91-15 to 18).

After documenting defendant, Sergeant Powers returned to 427 Madison Avenue. (4T95-12 to 16). He watched surveillance video and then searched the area where the revolver was found for latent prints or ridge detail. (4T95-22 to 96-10). Sergeant Powers noticed fingermarks on the top of the deck box that was in the area. (4T96-19 to 21). Sergeant Powers did not attempt to lift any fingerprints because the area was not conducive to fingerprint recovery, but he collected swabs for possible contact DNA. (4T97-3 to 14). Sergeant Powers then examined the fence and applied black fingerprint powder to the top of the fence. (4T99-13 to 17). Sergeant Powers noticed a friction ridge, but it was insufficient for fingerprint comparison. (4T100-2 to 20). As a

result, Sergeant Powers only collected a swab of the area for possible contact DNA. (4T100-21 to 25).

On January 23, 2020, Union County Sherriff's Officer Tara Halpin, who was assigned to the Crime Scene Identifications Unit and the Bureau of Investigations, responded to the Union County Prosecutor's Office garage and sally port with her partner, Detective Suter, to process the victim's Honda Accord. (5T68-19 to 69-2; 5T72-16 to 73-13). Officer Halpin noticed the front passenger window was broken and mostly leaning inward into the vehicle and that there was no exterior damage of note. (5T74-19 to 24). Inside the vehicle, they recovered two discharged cartridge casings, one on the front driver floor and the other in the rear driver floor. (5T81-2 to 18). They then photographed the vehicle. (5T75-3 to 8).

After photographing the vehicle, Officer Halpin and Detective Suter applied black powder to surfaces to look for fingerprints. (5T75-9 to 18). They were able to lift one print that was "useable" and several other impressions that were not usable for a fingerprint comparison. (5T77-11 to 15; 5T79-15 to 21). They then swabbed areas of the vehicle for DNA. (5T78-18 to 21; 5T79-16 to 24).

Four days later, on January 27, 2020, Officer Halpin and Detective Carew processed defendant's Chevy Malibu for items of evidentiary value and

DNA latent impressions. (5T90-5 to 18). There were several impressions on the exterior of the vehicle that were conducive for fingerprint comparisons that were photographed and lifted. (5T91-14 to 22). There were other impressions that were not useable and were swabbed. Ibid. A search of the vehicle revealed "official State of New Jersey paperwork associated with [defendant]" inside the vehicle. (5T92-20 to 24).

On multiple occasions from February 5, 2020 through June 10, 2020, law enforcement officers attempted to detain co-defendant Pearson to conduct an investigatory detention. (7T41-1 to 42-22). During that time, on April 12, 2020, co-defendant Pearson was stopped in South Carolina and provided the officer with a false name. (6T7-7 to 17-13). Eventually, he was arrested in July 29, 2020, in Elizabeth. (5T202-20 to 203-12).

At trial, the State introduced the testimony of several experts. Union County Police Sergeant Matthew Schaible testified as an expert in ballistics and firearm identification. (5T147-17 to 19). He testified that both the semi-automatic firearm and the revolver were operable. (5T170-6 to 11). He further testified that the bullet that was recovered from the hospital was fired from the semi-automatic handgun that was recovered. (5T171-9 to 172-4). He also testified that the two shell casings that were recovered from the victim's Honda were ejected by the semi-automatic handgun. (5T172-5 to 9).

Additionally, Sergeant Schaible testified that the three casings recovered from the revolver were, in fact, fired by that revolver. (5T178-10 to 17). He also found that two of the three bullets that were recovered from the victim's body during autopsy, specifically, the ones recovered from Mr. Kearney's chest and back, were fired from the revolver. (5T178-18 to 179-12; 5T180-21 to 25; 5T181-7 to 15). Sergeant Schaible also testified that the third bullet that was recovered during the autopsy, the one that came from the victim's knee, rendered inconclusive results, but that it could not be excluded as having come from the revolver. (5T178-18 to 179-12; 5T181-1 to 6; 5T181-7 to 15).

Amanda Margolis, an expert in the field of DNA analysis, testified for the State at trial. (6T37-8 to 10). She testified that serology was conducted on a black mask, white Nike sneakers, jeans from defendant, a gray Puma hooded sweatshirt from defendant, swabs of suspected blood from a semiautomatic firearm, swabs from a revolver, and swabs from the cylinder release pin from the revolver. (6T52-11 to 17). Blood was indicated on the heel area of the right sneaker, the right front area of the jeans that were seized from defendant, the right front pocket of the jeans that were seized from defendant, the right sleeve near the thumb hole of the sweatshirt that was seized from defendant, the front left chest area of the sweatshirt that was seized from defendant, and the swabs of suspected blood from the semi-automatic firearm. (6T53-3 to 9).

Saliva was discovered on the black mask. (6T53-14 to 17).

The items were also tested to determine if there was comparable DNA. Numerous items had an insufficient amount of DNA detected for purposes of comparison. (6T54-18 to 24; 6T55-12 to 25). However, Ms. Margolis was able to obtain a DNA profile from the mask and determined that given the mixture of DNA obtained from the mask, it is approximately 45,500 times more likely if the DNA is a mixture of co-defendant Pearson and two unknown individuals than a mixture of three unknown individuals, which "provides strong support that [co-defendant Pearson] is a contributor to this DNA profile." (6T56-12 to 57-17). Defendant and the victim were excluded as possible contributors to the mixture. (6T57-22 to 58-3).

Ms. Margolis also testified that she was able to obtain a single source DNA profile from the heel area of defendant's sneaker. (6T58-9 to 12). She stated that, given the DNA profile obtained from this item, it was "approximately 26.1 quadrillion times more likely if [defendant] is the source of the DNA than an unknown individual[,]" which provides very strong support that defendant is the source of the DNA profile obtained. (6T58-13 to 21). Ms. Margolis similarly testified that a single profile was obtained from defendant's jeans and his sweatshirt and that given the DNA profile obtained from these items were, respectively, approximately 25.8 quadrillion times

more likely and 25.7 quadrillion times more likely if defendant was the source of the DNA than an unknown individual, which provides very strong support that defendant was the source of the DNA profile. (6T59-5 to 61-16).

Additionally, Ms. Margolis testified about the DNA results that were obtained from the semi-automatic handgun. (6T61-17 to 20). Specifically, she testified that a single DNA profile was obtained and given the DNA obtained from the firearm, it was approximately 25.9 quadrillion times more likely if defendant was the source of the DNA than an unknown individual. (6T62-1 to 5). Ms. Margolis stated that his value provides very strong support that defendant was the source of the DNA from the semi-automatic firearm. (6T62-5 to 6; 6T94-1 to 10).

Union County Prosecutor's Office Detective Sergeant Nicholas Falcicchio testified as an expert in the field of cellular telephone record analysis. (8T151-21 to 24). He plotted the cellphone activity among the four target cellphones shortly before and after the homicide, identifying which towers were in use by each phone. (8T160-4 to 15; Pa9). Detective Sergeant Falcicchio did not opine on the distance that any of the phones were from the towers that he identified, and he explicitly stated, multiple times, that the shaded areas of his demonstrative aid represented an antenna's directionality and not radio frequency coverage. (8T160-21 to 161-14; 8T178-6 to 25;

8T184-12 to 19; 8T190-25 to 191-11; 8T194-9 to 20; Pa1 to 15).

In addition to the aforementioned evidence, the State admitted numerous clips of surveillance video footage from the night of the homicide and a compilation of relevant segments that were obtained. (7T39-24 to 40-25; 7T74-9 to 77-8; Da18). The videos captured defendants before the shooting, the shooting itself, defendants fleeing, the search for evidence, and the discovery of the firearms and mask. (Da18).

The video also showed that a silver sedan was relevant to the investigation. Specifically, a review of the video showed defendant arrive at the scene of the shooting in a silver vehicle that was consistent with a silver 2017 Chevy Malibu, which is owned by Mayasha Scott, the mother of defendant's children, and which she testified defendant drove on the night of the homicide. (5T16-24 to 17-9; Da18). And, co-defendant Pearson was stopped later that night at 9:45 p.m., in East Orange driving the Chevy Malibu. (4T186-4 to 188-23; 4T196-2 to 8). Jurors were shown side-by-side photo comparisons of stills from the video surveillance and the reenactment of Mayasha Scott's silver 2017 Chevy Malibu vehicle driving through the area of the shooting. (7T195-7 to 22; 8T42-12 to 54-9).

LEGAL ARGUMENT

POINT I

DETECTIVE SERGEANT FALCICCHIO'S TESTIMONY WAS PROPERLY ADMITTED BY THE COURT. (RULINGS AT 8T141-4 to 146-15; 8T148-14 to 151-9; 8T163-25; 8T165-20)

Defendant claims the trial court's introduction of Detective Sergeant Falcicchio's expert testimony was contrary to State v. Burney, 255 N.J. 1 (2023). Defendant's claim is without merit. Detective Sergeant Falcicchio's testimony, which was based upon his training, his experience, and the records that he was provided, was properly admitted and did not violate the holding of Burney. Indeed, Detective Sergeant Falcicchio's demonstrative aid and his testimony clearly and unequivocally explained that he could not opine how close a phone was to a cell phone tower, but rather could state which towers were used and which antenna was utilized. Accordingly, the trial court did not abuse its discretion in permitting Detective Sergeant Falcicchio to testify. Moreover, even if the trial court's ruling was improper, in light of the overwhelming evidence of defendant's guilt, any error was harmless.

Appellate courts generally "defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "A court abuses its discretion when its 'decision is made without a rational

explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020) (internal quotation omitted)). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." R.Y., 242 N.J. at 65 (alteration in original) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

The proponent of expert testimony bears the burden of proof on admissibility. State v. Torres, 183 N.J. 554, 567 (2005). Expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." State v. Gonzalez, 249 N.J. 612, 633-634 (2022). The expert witness must have sufficient expertise to offer the intended testimony. State v. B.H., 183 N.J. 171, 194 (2005). Additionally, "[a]s gatekeepers, trial judges must ensure that expert evidence is both needed and appropriate, even if no party objects to the testimony." State v. Sowell, 213 N.J. 89, 99-100 (2013). And witnesses may not base their testimony on inadmissible evidence. See State v. Frisby, 174 N.J. 583, 592 (2002) (finding that the defendant's trial was tainted by a testifying witness's reliance on inadmissible evidence).

Indeed, these requirements are set forth in N.J.R.E. 702 and N.J.R.E. 703, which govern the admissibility of expert testimony. Townsend v. Pierre, 221 N.J. 36, 53 (2015).

> Expert testimony must be offered by one who is "qualified as an expert by knowledge, skill, experience, training, or education" to offer a "scientific, technical, or . . . specialized" opinion that will assist the trier of fact, see N.J.R.E. 702, and the opinion must be based on facts or data of the type identified by and found acceptable under N.J.R.E. 703.
>
> [Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011) (omission in original).]

Stated differently, Rule 702 imposes three requirements for the admission of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [State v. Derry, 250 N.J. 611, 632-33 (2022) (quoting Torres, 183 N.J. at 567-68).]

"Those requirements are construed liberally in light of Rule 702's tilt in favor of the admissibility of expert testimony." State v. Jenewicz, 193 N.J. 440, 454 (2008).

In addition to these requirements, "a court must ensure that the proffered expert does not offer a mere net opinion." Ibid. The net opinion rule, a corollary of N.J.R.E. 703, "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Townsend, 221 N.J. at 53-54 (quoting Polzo v. County of Essex, 196 N.J. 569, 583 (2008)). "The rule requires that an expert 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. 221 N.J. at 54 (quoting Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115, 144 (2013)); see also Pomerantz Paper Corp., 207 N.J. at 372.

In this case, Detective Sergeant Falcicchio was properly qualified as an expert and aptly testified which towers were utilized by the relevant cell phones in this case. Detective Sergeant Falcicchio is a certified wireless analyst and a communications network specialist, with two certifications in telecommunications and two certifications in mobile forensics. (8T115-10 to 13). In order to obtain those certifications, Detective Sergeant Falcicchio took classes on how telephones work as a network, radio fundamentals, radio spectrum modems and modulations, and mobility and cellular fundamentals. (8T125-17 to 127-11). He also has attended the FBI's historical cell site analysis training course and a course on cellular WIFI analysis. (8T128-13 to 25). Additionally, he attended a course on cellular technology and mapping

analysis taught by a radio frequency engineer, where they discussed "mapping of records analysis, advanced reports, technology, statistical and link analysis and call detail records mapping analysis." (8T129-1 to 8). He continues to take training in the field of analyzing cell phone data and has analyzed cell phone data hundreds of times. (8T116-6 to 18). Detective Sergeant Falcicchio has spent numerous hours attending these courses and obtaining these certifications. Moreover, he has testified approximately seven times as an expert in this field. (8T136-17 to 25).

Before addressing the facts of this case, Detective Sergeant Falcicchio explained generalized concepts that apply to this field. Specifically, he explained that a cell phone tower is a structure that has antennas for cell phone service, that it can come in varying shapes and sizes, that the coverage from towers overlap, and that the coverage can be affected by a variety of things, including a customer's distance from the tower, any obstructions that might be in the way, or just a particular way that the phone company structure or configured that network. (8T118-20 to 119-17). He also testified that historical cell site information usually cannot provide very specific location data indicating that a phone was at a particular address. (8T120-11 to 16).

Detective Sergeant Falcicchio then explained the PowerPoint slides that he created to assist the jurors in understanding the cell phone records that the

cell phone providers produced. (8T153-12 to 162-3; 8T164-13 to 172-23). Detective Sergeant Falcicchio explained that the call detail records provide the location of a cell phone tower, which is the physical location of the cell site. (8T153-21 to 154-3). He further explained that he plotted those points on a map and the shaded area on his depiction only establishes the direction of the antenna that was being utilized by a call. (8T154-4 to 5). He clarified that "there's no estimation of any coverage with that. It's simply a graphical representation of the direction from the antenna that that antenna faces." (8T154-5 to 8). He then reiterated that he was not "saying that that particular area covers any particular area to a certainty where as if you aren't standing in that exact area, you wouldn't be using that cell phone tower." (8T155-19 to 22). He also explained that the shaded area on the PowerPoint slides was not intended to say a particular phone was in the darker color, that it does not represent radio frequency coverage, and that it merely showed directionality of the antenna. (8T160-18 to 161-14).

Utilizing the information provided by the cell phone companies and his training and experience, Detective Sergeant Falcicchio transformed that data into a visual representation and plotted the information on a map. (8T153-18 to 154-8; Pa1 to 15). This transformation was not a net opinion, but rather a recreation based on specific facts that were in evidence.

Indeed, there are only a few comments in the entirety of Detective Sergeant Falcicchio's testimony to which defendant objects. First, defendant claims it was improper for Detective Sergeant Falcicchio to state, "three of the devices are located in the general area of [the map] that's been marked 'crime scene.'" (8T161-24 to 162-3).[3] But, as previously stated, the data essentially spoke for itself: the cell phone towers that were utilized by three of the phones around the time of the crime were located a few blocks away from where the murder occurred. Moreover, as Detective Sergeant Falcicchio then testified, slide nine of his PowerPoint presentation contained the locations of the cell towers utilizing the data provided by the cellular providers, but did not represent coverage. (8T164-13 to 165-1; Pa9). It also did not represent specifically where the cell phones making the calls were located. Indeed, nearly all of the Detective Sergeant's slides indicate that the graphics do not represent coverage area. Thus, Detective Sergeant Falcicchio's testimony was proper and defendant's claim is without merit.

Defendant also claims it was error for the Prosecutor to ask Detective Sergeant Falcicchio if there was a general range of coverage of two to three miles and that the Detective Sergeant's response was likewise improper.

[3] Defense counsel objected and the court sustained the objection, but the answer does not appear to be stricken.

(8T165-14 to 19). Defendant's claim is without merit. Notably, Detective Sergeant Falcicchio did not say "yes," but rather responded that "[i]t depends on how that particular tower is configured." (8T165-25 to 166-1). He further stated, "[i]f that tower is configured to cover that distance, which would not be typical in an urban environment, that could be possible." (8T166-3 to 5). He then explained that "typically, in an urban environment where there's a need for a large amount of cell sites, there are large quantity of cell sites that cover a smaller distance. In an area that might not be as densely populated, cell sites might cover further distances in miles." (8T166-6 to 13). Such testimony was accurate and was not an opinion about the specific location of the defendants' phones. Thus, defendant's claim is meritless.

Defendant also claims it was improper for the Detective Sergeant to have opined that the last device, Ms. Scott's phone, was not in the area of the crime scene and that the other three numbers were in the general area of the crime scene because it was a net opinion. Defendant's claim similarly is without merit. As Detective Sergeant Falcicchio testified, his opinion was based on a review of the call detail records, the distance from the crime scene, and the cell sites that are in the area between the two locations. (8T167-9 to 25). These are specific facts and conclusions that can be replicated and, thus, the Detective Sergeant's opinion was not a "net opinion."

Indeed, contrary to defendant's assertion, this case is distinguishable from State v. Burney, 255 N.J. 1 (2023). In Burney, the trial court held a Frye[4] hearing to determine the admissibility of Special Agent Ajit David's testimony. Id. at 11. At the end of the hearing, Special Agent David was qualified as an expert in historical cell site analysis, which he explained "is the use of cell phone companies' business records to approximate where a user may have been at a particular time of interest." Ibid.

The Supreme Court described Special Agent David's testimony as follows:

> [he] testified at the Frye hearing that he obtained defendant's phone records from Sprint, which cataloged the date and time of calls and text messages, the cell towers and sectors that the phone used, and the locations of those towers. Based on this information, Special Agent David created maps depicting the towers pinged by the defendant's phone on the evening of December 25, and which sectors the defendant's phone utilized. Special Agent David plotted the cell towers and drew two lines -- 120-degree pie-shaped wedges -- extending from each of the cell towers' pinged sectors. Critically, Special Agent David testified that each of the lines had an approximate length of one mile, with the space in between them representing his estimated coverage area of the cell tower's sector.
>
> Special Agent David opined that the towers likely had this one-mile range based on a "rule of thumb" for towers in the area. When asked how he

[4] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

> determined the length of the two lines or "arms" that comprised the 120-degree coverage area for the cell towers, he explained:
>
> So . . . the length that was used for these arms is, again, an estimate and these are one mile, which is a rule of thumb for this particular technology and this particular frequency in this particular area. So just based on my training and experience, one mile is a good estimate of the tower range for Sprint in this area. It's also further kind of supported by the location of the adjacent towers. We can infer, based on how the network is laid out and the fact that Sprint has designed this to avoid coverage gaps, that the tower needs to extend out to a certain distance that obviously doesn't cross over other towers, but that provides enough overlap between adjacent sectors so that there's no drops, no call drops, no dead zones in between. So just using a one-mile approximation, which has been a good approximation in my experience in this area.
>
> [Id. at 11 to 12 (emphasis added)].

With this foundation, Special Agent David testified that on December 25 at 8:02 p.m., defendant's phone used a tower in Orange, the "Parkway Tower," to receive a text message. Id. at 12. Using his maps, Special Agent David gave his opinion that the Parkway Tower's coverage radius "would reasonably include the crime scene." Id. at 12-13. Special Agent David acknowledged that the crime scene is slightly less than one mile from the Parkway Tower and is at the "outer boundary" of his estimated coverage area. Id. at 13. Special

Agent David also acknowledged, however, that two other cell towers were closer to, and within range of, the crime scene. Ibid.

The Supreme Court also noted that Special Agent David testified that he did not test the actual range of the Parkway Tower and further noted that a tower's range and coverage area can be affected by many factors, including the height of the antenna, surrounding terrain and buildings, signal frequency, transmitter and phone power ratings, and antenna direction, but he did not offer measurements or data as to those specific factors when testifying as to his estimated range for the Parkway Tower. Ibid. Special Agent David similarly did not measure the actual coverage area of the Parkway Tower through either "drive testing" or "propagation maps." Ibid.

The trial court and Appellate Division both found Special Agent David's testimony to be admissible. The Supreme Court disagreed. The Court found that "Special Agent David's 'rule of thumb' testimony constitutes an improper net opinion because it was unsupported by any factual evidence or other data." Id. at 25.

Although there admittedly are similarities between Detective Sergeant Falcicchio's testimony and that of Special Agent David's testimony, they differ in two important respects: Detective Sergeant Falcicchio's map did not depict coverage areas and the majority of his testimony did not address the cell

phones' proximity to the towers. His demonstrative exhibit, (Pa1 to Pa15), and his testimony clearly and explicitly set forth that the map shows the location of the cell sites and the directionality of the antennas, not coverage. Moreover, Detective Sergeant Falcicchio admitted that he could not tell how close a cellphone was to a particular tower and did not attempt to do so. Rather, the Detective Sergeant simply plotted cell towers on a map and acknowledged the towers, which were several blocks from the crime scene, were in the general area of the crime scene. Accordingly, this case is distinguishable from, and does not run afoul of, Burney.

However, even if the admission of the testimony was improper, its admission was harmless. Defendant's guilt was proven beyond a reasonable doubt by the overwhelming evidence that established his guilt. Police were in the area at the time of the shooting and responded almost immediately to the location. (2T46-1 to 3; 2T51-16 to 52-4). Detective Gonzalez observed the shooter, who was a male wearing a light-colored hoody, flee from the scene and gave chase. (2T64-5 to 7). That person was the only individual the detective saw running to backyards and not to stores for safety. (2T52-23 to 53-9). And, that person, defendant, was captured that evening, holding a light-colored sweatshirt. (2T83-23 to 86-2).

Moreover, almost everything defendant did that evening was captured on

video surveillance. The shooting was recorded, the flight can be seen, and defendant's attempt to discard the murder weapon, namely a semi-automatic firearm, was visible for the jury to see. Notably, expert testimony revealed the semi-automatic firearm was operable and the bullet and two casings recovered from the victim's Honda matched the semi-automatic firearm. (5T170-6 to 11; 5T171-9 to 172-4; 5T172-5 to 9). And, expert testimony showed that defendant's DNA was on that semi-automatic firearm. (6T61-17 to 20). Specifically, Ms. Margolis testified that a single DNA profile was obtained from the semi-automatic weapon and given the DNA obtained from the firearm, it was approximately 25.9 quadrillion times more likely if defendant was the source of the DNA than an unknown individual. (6T62-1 to 5).

All of this evidence proved, beyond a reasonable doubt, that defendant was one of the shooters responsible for Mr. Kearney's murder. Furthermore, none of the aforementioned evidence depended on the cell site locations. Accordingly, even if the trial court abused its discretion by admitting Detective Sergeant Falcicchio's testimony, any error was harmless.

Indeed, the probative value of the testimony and any harm that defendant can attribute to same was minimized by defense counsels' cross-examination. Counsel asked whether Detective Sergeant Falcicchio drove to the locations of the towers, to which the Detective Sergeant responded that he did not, but

looked at the locations on Google Earth for indication that they exist. (8T175-14 to 23). He also testified that he could not tell if there were any physical obstructions to the cell towers or what the conditions of the towers were in 2020. (8T175-24 to 176-25). Counsel even asked whether the slides were "incredibly deceiving," to which Detective Sergeant Falcicchio disagreed and reiterated that he was not opining about proximity or cell site coverage, but rather directionality. (8T178-6 to 179-23). Indeed, defense counsel asked whether Detective Sergeant Falcicchio could state whether a cell phone was two blocks, twenty blocks, or two miles away, and Detective Sergeant Falcicchio admitted that he could not. (8T185-11 to 22). Thus, even if the admission of his testimony was improper, it was harmless. As such, defendant's conviction should be affirmed on appeal.

POINT II

THE TRIAL COURT PROPERLY PERMITTED DETECTIVE GONZALEZ TO EXPLAIN WHY HE CHOSE TO PURSUE A PARTICULAR INDIVIDUAL, WHO WAS LATER IDENTIFIED AS DEFENDANT. (Ruling at 2T56-6 to 8).

Defendant claims the trial court abused its discretion by permitting Detective Gonzalez to explain why he chose to run after defendant instead of the other people who were running at the scene of the crime. Specifically, defendant claims that Detective Gonzalez's answer why he chased the person running across the street was an inappropriate lay opinion. Defendant's claim is without merit. Indeed, defendant's claim would effectively preclude officers from ever offering lay opinion testimony and would limit an officer's testimony to "fact testimony." That is not what N.J.R.E. 701 or State v. McLean, 205 N.J. 438 (2011), require. As such, defendant's claim must fail. However, even assuming the admission of Detective Gonzalez's explanation for why he chose to chase "the man running across the street" was improper, the error was harmless. Therefore, defendant's conviction should be affirmed on appeal.

"[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of

judgment." State v. Nantambu, 221 N.J. 390, 402 (2015) (alteration in original) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). Accordingly, such rulings "are subject to limited appellate scrutiny," State v. Buda, 195 N.J. 278, (2008), as trial judges are vested "with broad discretion in making evidence rulings," Harris, 209 N.J. at 439 (quoting State v. Muhammad, 359 N.J. Super. 361, 388 (App. Div. 2003)).

There are two forms of testimony: "fact testimony" and "opinion testimony." "Fact testimony" is a description of what an individual perceives through his or her senses. See State v. McLean, 205 N.J. 438, 460 (2011).

> Fact testimony has always consisted of a description of what the officer did and saw, including, for example, that defendant stood on a corner, engaged in a brief conversation, looked around, reached into a bag, handed another person an item, accepted paper currency in exchange, threw the bag aside as the officer approached, and that the officer found drugs in the bag. Testimony of that type includes no opinion, lay or expert, and does not convey information about what the officer "believed," "thought" or "suspected,"

> but instead is an ordinary fact-based recitation by a witness with first-hand knowledge.
>
> [Ibid.]

Alternatively, testimony that contains an "opinion" or "belief" is "opinion testimony." A lay witness's opinion testimony is governed by N.J.R.E. 701, which provides:

> If a witness is not testifying as an expert, the witness' 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.

"The purpose of N.J.R.E. 701 is to ensure that lay opinion is based on an adequate foundation." Neno v. Clinton, 167 N.J. 573, 585 (2001). See also State v. Bealor, 187 N.J. 574, 586 (2006). Lay opinion testimony only can be admitted "if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function." State v. McLean, 205 N.J. 438, 456 (2011).

The first prong of N.J.R.E. 701 requires the witness's opinion testimony to be based on the witness's "perception," which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." McLean. 205 N.J. at 457. "[U]nlike expert opinions, lay opinion testimony is

limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." McLean. 205 N.J. at 460. Although based on what a witness perceived, it is not limited simply to what was observed, but includes an opinion. See State v. LaBrutto, 114 N.J. 187, 191 (1989) (An officer's lay opinion about the point of impact was permissible because it was rationally based on what he observed at the scene of the accident and it was helpful to the jury's full comprehension of the facts in question.).

The second requirement of N.J.R.E. 701 is that 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." McLean, 205 N.J. at 458.

The seminal case addressing these concepts is State v. McLean, 205 N.J. 438, 456 (2011). In McLean, a police officer conducting a surveillance operation witnessed two transactions. Id. 205 N.J. at 443. Each time, the defendant was approached by a second individual, left, went to a car, and returned within a brief period of time. Id. 205 N.J. at 443-44. The defendant handed some small items to the second person, and that second person then handed defendant what appeared to be money. Ibid. At trial, the officer testified as to what he saw during the surveillance, identified defendant by name, and stated he saw "hand-to-hand drug transactions." Id. 205 N.J. at 445.

The Court concluded that the officer's testimony in McLean went beyond the bounds of acceptable fact testimony and was improper as lay opinion testimony. In reaching its conclusion, the McLean Court stated:

> In this appeal, the State suggests, and the appellate panel agreed, that there is a category of testimony that lies between those two spheres, governed by the lay opinion rule, that authorizes a police officer, after giving a factual recitation, to testify about a belief that the transaction he or she saw was a narcotics sale. We do not agree. Were we to adopt that approach, we would be transforming testimony about an individual's observation of a series of events, the significance of which we have previously held does not fall outside the ken of the jury, see Nesbitt, supra, 185 N.J. at 514-15, 888 A.2d 472, into an opportunity for police officers to offer opinions on defendants' guilt. To permit the lay opinion rule to operate in that fashion would be to authorize every arresting officer to opine on guilt in every case.
>
> Our decisions describing the permitted realm of expert testimony in narcotics prosecutions are careful to caution that experts may not intrude on the province of the jury by offering, in the guise of opinions, views on the meaning of facts that the jury is fully able to sort out without expert assistance and that expert opinions may not be used to express a view on the ultimate question of guilt or innocence. See Reeds, supra, 197 N.J. at 300, 962 A.2d 1087; Odom, supra, 116 N.J. at 80, 560 A.2d 1198. Applying those clear rules to the testimony in this matter, we cannot escape the conclusion that were we to authorize the testimony

> challenged in this appeal, we would allow, as a lay opinion, testimony that we have found is otherwise impermissible.
>
> [State v. McLean, 205 N.J. 438, 461 (2011)].

Ultimately, the McLean Court found that the officer's testimony was not "fact testimony" and to the extent that it was "lay testimony" it was improper "both because it was an expression of a belief in defendant's guilt and because it presumed to give an opinion on matters that were not beyond the understanding of the jury." Id. 205 N.J. at 463 (emphasis added).

Applying these principles here, it is clear that defendant's claim is without merit. Defendant claims the following testimony was improper:

> Q And how many people did you see running across the street at that point?
> A At that point, I only observed one person running across the street.
> Q Now, what if anything did you do at that point?
> A So --
> Q I'm going to put this down. It will be more comfortable for you to face this way.
> A I appreciate it.
> Q This way you talk to the jury instead of over your shoulder.
> So what if anything did you do?
> A So having observed the individual running away from the direction of the barbershop through the yards, we proceeded down the block, down Jackson Avenue, where then my attention was drawn to what appeared to be gun smoke -- a plume of gun smoke underneath one of the lampposts closer to the intersection of Jackson

and Bond.

Q Now, was there something about the fact that he was running into yards that was different from what other people were doing?

A Yes.

Q Why did you focus on this person?

A The reason I focused on the individual running across the street through the yards was due to the fact that having just heard shots being fired and being familiar with the area and knowing that there were two businesses that were open, well-lit businesses, I find it suspicious that someone would choose to run through rear yards as opposed to seeking shelter, whether it's inside the businesses or the house.

[…]

Q So your attention was drawn to this individual. Now, what did you do at that point?

A At that point I continued my way directly to the area where I observed the individual running towards the yard and I pulled my police vehicle over to the side of the road closest to that yard, at which point I exited my vehicle and gave chase after the individual.

[2T54-9 to 57-1 (emphasis added)].

Contrary to defendant's claim, Detective Gonzalez's testimony that he focused on the man running across the street because he thought the man's actions were "suspicious" did not exceed the bounds of permissible lay opinions. The testimony was rationally based on Detective Gonzalez's perception and served to inform the jury why he chose to pursue that specific

individual. The testimony consisted of what he saw, what he did during his investigation, and why he took those steps. Moreover, the testimony was the "product of reasoning processes" familiar to the jury, as they were later able to view the videos, which corroborated what Detective Gonzalez stated occurred. Detective Gonzalez's testimony was not offered to provide an opinion on defendant's guilt, but to explain why Detective Gonzalez followed that specific individual as part of his investigation. Accordingly, it was properly admitted in accordance with N.J.R.E. 701 and it did not offend McLean.

Indeed, defendant's reliance upon and reference to McLean, State v. Derry, 250 N.J. 611 (2022), State v. Simms, 224 N.J. 393 (2016), State v. Hyman, 451 N.J. Super. 429 (App. Div. 2017), and State v. Smith, 436 N.J. Super. 556 (App. Div. 2014), is misplaced. Each of these cases is distinguishable from the present matter. In McLean, Simms, and Smith, the court held the officer provided an inappropriate lay opinion because the officers' testimony amounted to an expert opinion interpreting facts for the jury that directly bore on defendant's guilt. McLean, 205 N.J. at 463; Simms, 224 N.J. at 399-400, 403-04; Smith, 436 N.J. Super. at 575-76. Unlike those cases, Detective Gonzalez's testimony in this case did not bear on the ultimate issue, but rather merely explained why he followed the person he chose to chase.

Similarly, the testimony at issue is distinguishable from the issue that arose in Derry and Hyman. In both of those cases, the Court ruled that it was improper for a law enforcement officer to offer a lay opinion interpreting slang unless he participated in the conversations at issue. Derry, 250 N.J. at 623, 635-36; Hyman, 451 N.J. Super. at 449. The interpretation was particularly prejudicial because it gave meaning to terms that bore directly on each defendant's guilt. Detective Gonzalez's does not suffer from the same infirmity. Detective Gonzalez was testifying about his own actions and why he engaged in the behavior that he did. His testimony explaining why he chased a particular individual did not indicate, on its face, that defendant was guilty. It also did not address the ultimate issue of fact. Accordingly, the rulings in Derry and Hyman do not require this Court to find that Detective Gonzalez's testimony was improper.

Finally, even assuming the detective's comment was improper, any error was harmless because it was not capable of producing an unjust result. Foremost, the comment at issue did not go to the ultimate issue of fact. Detective Gonzalez did not state that he thought defendant was the murderer, or even that he thought defendant was the shooter. The comment did not even reference defendant, but rather related to the man running across the street. Although the State eventually proved beyond a reasonable doubt that that man

was defendant and that he was the shooter, it was not because of this comment, but rather the overwhelming proof that was introduced at trial. See POINT I, supra.

Additionally, this comment did not undermine defendant's ability to claim the State failed to prove he was the man in the light-colored hoody or assert that the officers misidentified the shooter that night and then framed defendant to justify their actions. Indeed, Detective Gonzalez's testimony that he focused on the man running across the street furthered defendant's theory of the case: that Detective Gonzalez chose him from the outset, even before the State had other proofs, without any reason. Thus, if this comment had any potential for prejudice, it was minimal.

Simply stated, between the overwhelming proof of defendant's guilt and the minimal, if any, prejudice that could be produced by the fleeting comment, it is clear that the comment was not capable of producing an unjust result. Accordingly, defendant's conviction should be affirmed.

POINT III

THE TRIAL COURT DID NOT ERR BY INFORMING THE JURY THAT HE OVERRULED DEFENDANT'S OBJECTION (Not Raised Below).

For the first time on appeal, defendant claims the trial court deprived him of a fair trial by informing the jury that the court overruled defendants' objection to the admission of the recreation evidence and the "Court has determined that it is properly admissible and it is admitted into evidence. It is appropriate for the jury to view the photos." (8T46-19 to 23). Because defendant did not object below, this Court should not consider this claim. However, even if this Court does consider defendant's assertion, it should be denied because it is without merit. The trial court's statement did not infringe upon the jury's fact-finding authority and, thus, it was not improper. However, even assuming the court's comment was inappropriate, it was harmless and, therefore, defendant's conviction should be affirmed on appeal.

> It is a well-settled principle that . . . appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest."
>
> [Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)).]

Here, where defendant did not object to this instruction below, this Court should decline to consider the issue on appeal. However, if this Court nevertheless chooses to consider defendant's claim, it should be rejected because it does not amount to plain error. See R. 2:10-2. Under that standard, an appellate court can reverse only if it finds that the error was "clearly capable of producing an unjust result." Ibid.; State v. Cole, 229 N.J. 430, 458 (2017). Here, the alleged error does not have that capacity and, thus, defendant's conviction should be affirmed on appeal.

Although the State recognizes that N.J.R.E. 104(c) explicitly precludes a trial court from informing the jury that it conducted a hearing outside of their presence and that the Court found a defendant's statement was admissible, the Rule does not provide guidance regarding other evidence. Nevertheless, in State v. Ridout, 299 N.J. Super. 233, 238-40 (App. Div. 1997), this Court appears to have expanded N.J.R.E. 104(c)'s preclusion to other circumstances where a trial judge must make a preliminary finding of admissibility. In those circumstances, a trial court "cannot tell the jury anything that would preempt its fact-finding function." Because the instruction here merely advised the jury that the recreation was admissible and not why the court reached that conclusion, the commentary did not run afoul of Ridout. Therefore, defendant's claim of error is without merit.

Indeed, the instruction here is completely distinguishable from the offending commentary of Ridout. In Ridout, the critical issue in the case was identification. Ridout, 299 N.J. Super. at 234. Both the victim and the doorman identified the defendant in a pretrial photographic area but were unable to make an in-court identification. Ibid. Accordingly, the out-of-court identifications made by each witness constituted the primary evidence against the defendant. Ibid. Following an evidential hearing, the judge found that the two out-of-court identifications met the conditions for admissibility stated by the rule. Id. at 235. However, the trial court then made the fatal error of "telling the jury what his finding was, namely, that he had determined that the out-of-court identification procedure was not suggestive and that the conditions of fairness and reliability had been met." Ibid. The court reiterated its findings at the close of the State's case and in its general instruction at the end of the case. Id. at 237-38.

The Appellate Division reversed the defendant's conviction. The Court did not take issue with the hearing or fault the trial court's conclusion that the photographs were not suggestive. Id. at 238-39. However, the court in Ridout stated, "[t]he problem is in his having told the jury that he had determined that the conditions of admissibility had been met and that he had thus specifically determined that the identifications were not only not suggestive but also had

met the reliable and trustworthy conditions stated by the rule." Id. at 239. The court found this was a problem because the judge's comments preempted the jury's fact-finding function. Ibid. The court further noted that

> while the judge here may have obliquely suggested to the jury that they were the final arbiters of the facts, we are persuaded that the jury must necessarily have been influenced in its weight and credibility determinations by the judge assuring it he had already found the identifications to be reliable and trustworthy--precisely the determinations the jury had to make. The defendant was, consequently, deprived of her right to have the jury make unfettered and undirected critical findings of fact.
>
> [Ibid.]

The concerns expressed in Ridout are not present in this case. Indeed, the trial court's comment did not explain why it deemed the recreation was admissible. More importantly, the comment did not infringe upon the jury's fact-finding function. The trial court did not advise the jurors that the images were sufficiently reliable or trustworthy and it did not tell the jurors that it found the image of the car in the recreation was sufficiently similar to the image of the car from the video surveillance footage to be probative. Rather, the trial court simply informed the jurors that there was an objection, the court overruled the objection, and it found the video was admissible and could be presented. Accordingly, it did not violate N.J.R.E. 104 or Ridout.

Finally, even assuming the detective's comment was improper, any error was harmless because it was not capable of producing an unjust result. As argued in POINT I, supra, there was overwhelming proof of defendant's guilt. Unlike Ridout, where the out-of-court identifications were the primary pieces of evidence against the defendant, here, the recreation was merely a small piece of a much larger pie of evidence against defendant. The comment, which did not infringe on the juror's fact-finding function, did not have the capacity to change the jury's evaluation of the evidence, let alone, their finding of guilt. Moreover, counsel's failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. State v. Frost, 158 N.J. 76, 82-84 (1999). Accordingly, even if this Court finds the trial court's comments were improper, they do not amount to plain error and, thus, defendant's conviction should be affirmed on appeal.

POINT IV

DEFENDANT WAS FOUND GUILTY AFTER A TRIAL. (13T)

Defendant claimed the record failed to establish that he was found guilty of second-degree certain person not to have a weapon, in violation of N.J.S.A. 2C:39-7(b)(1). After defendant filed his brief, the afternoon session of the February 1, 2023 proceeding, which contained the certain persons trial, was obtained and defendant withdrew this point. Accordingly, his certain persons conviction and sentence should be affirmed on appeal.

POINT V

THE TRIAL COURT PROPERLY SENTENCED DEFENDANT. (11T18-1 to 27-22; Da7 to 9).

Defendant claims the sixty-year sentence that was imposed for his murder conviction is manifestly excessive. Defendant's claim is without merit. The trial court aptly considered the aggravating and mitigating factors, and after properly finding and weighing same, imposed a sixty-year term of imprisonment. Moreover, the trial court properly considered the overall fairness of the sentence, which does not shock the judicial conscious. Accordingly, defendant's sentence should be affirmed on appeal.

"Appellate courts review sentencing determinations in accordance with a deferential standard." State v. Fuentes, 217 N.J. 57, 70 (2014). The reviewing

court must not substitute its judgment for that of the sentencing court. State v. O'Donnell, 117 N.J. 210, 215 (1989).

The sentence must be affirmed unless:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Fuentes, 217 N.J. at 70 (quoting State v. Roth, 95 N.J. 334, 364-65 (1984))].

Additionally, trial courts may impose consecutive sentences after considering the Yarbough[5] factors and stating the reasons for imposing consecutives sentences. State v. Torres, 246 N.J. 246 (2021); State v. Cuff, 239 N.J. 321, 347-52 (2019). Those reasons also must address the overall fairness of the sentence. Id. at 267-68. Ultimately, an appellate court may not modify a defendant's sentence unless it is convinced that the sentencing judge was clearly mistaken. State v. Johnson, 118 N.J. 10, 15 (1990); State v. Jabbour, 118 N.J. 1, 6 (1990).

Defendant does not challenge the court's finding of aggravating factors or mitigating factors. Rather, he claims the court failed to conduct a real

[5] State v. Yarbough, 100 N.J. 627 (1985).

"Torres/Cuff" analysis. Defendant's claim is belied by the record. Foremost, the court did not impose consecutive sentences. Accordingly, the concerns of Torres are not implicated.

Furthermore, the trial court explicitly acknowledged Torres in crafting a sentence. (11T24-13 to 19). Specifically, the trial court commented upon how a heavy sentence on an older defendant, such as defendant, can in essence be a life sentence, compared to such a sentence on a younger defendant. (11T24-20 to 25-6). The trial court then stated that it nevertheless found it was appropriate to go "considerably above" to the very top end of the sentence, that it "could go to life," but that it would not. (11T25-7 to 13). Thus, although defendant may disagree with the court's findings, the record clearly belies his assertion that the trial court failed to consider the overall fairness of the sentence.

Indeed, the record establishes that the trial court aptly considered the aggravating and mitigating factors and properly found and weighed same. The court then considered the permissible range, and aptly imposed a sixty-year term of imprisonment. This sentence does not shock the judicial conscious and was not an abuse of discretion. Accordingly, defendant's sentence should be affirmed on appeal.

CONCLUSION

For the foregoing reasons, the State respectfully requests that defendant's conviction and sentence be affirmed.

Respectfully submitted,

WILLIAM A. DANIEL
Prosecutor of Union County

s/ Milton S. Leibowitz

By: MILTON S. LEIBOWITZ
Assistant Prosecutor
Attorney ID No. 082202013

MSL/bd