STATE OF NEW JERSEY, Plaintiff-Respondent, v. JOSEPH C. GRIECO a/k/a JOSEPH GRIECO, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002907-24 Team1 Criminal Action Docket No.: SSX-23-000439 Indictment No.: 23-12-00301-I Sat Below: Hon. Michael C. Gaus, J.S.C. **Defendant is confined.**

AMENDED BRIEF OF DEFENDANT-APPELLANT JOSEPH C. GRIECO

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PROCEDURAL HISTORY

John Kelly (decedent) died from a gunshot wound on July 26, 2023. A complaint and warrant were issued against Joseph Grieco on August 21, 2023, (Da1) and Grieco was ordered to be on pretrial release monitoring level III on August 22, 2023. (CDa107). Grieco was indicted for Aggravated Reckless Manslaughter on December 7, 2023. (CDa6). Grieco moved to dismiss the indictment on June 19, 2024. (Da14). Judge Michael Gaus denied the motion on August 15, 2024. (Da22). A Pre-Trial Memorandum was filed on August 6, 2024, which stated that Grieco was offered a plea agreement "to 2nd Reckless manslaughter with a sentence recommendation of 5 years NJSP w NERA." (Da19).

On December 31, 2024, the State filed a Statement of the case and witness list. (Da71). Trial commenced on January 6, 2025, with jury selection. The Court conducted a Rule 104 hearing on the State's motion to admit the video shot by Vernon Police officer, Harry Russo, at Grieco's residence soon after John Kelly had been shot, which contained statements by the defendant. (1T6-18 to 165-16[1]; 2T3-

[1] For ease of reference throughout this brief, the following abbreviations are used to cite to the trial transcripts:

- 1T refers to the proceedings on January 7, 2025;
- 2T refers to the proceedings on January 8, 2025 (Volume 1 of 2);
- 3T refers to the proceedings on January 8, 2025 (Volume 2 of 2);
- 4T refers to the proceedings on January 9, 2025 (Volume 1 of 2);
- 5T refers to the proceedings on January 9, 2025 (Volume 2 of 2);
- 6T refers to the proceedings on January 13, 2025 (Volume 1 of 2);

14 to 16-19). The judge ruled that Grieco's statements on the tape recording would be admissible for impeachment if the defendant testified. (2T16-25 to 29-20).

The State called the following witnesses: Jennifer Monteleon, (2T68-18 to 110-3), PTL. Joseph White (2T111- 18 to 144-20), and Brian Taylor (2T145-25 to 200-24) ;3T-202-2 to 266-19; 4T6-5 to 134-6), Dr. Margaret Prial (medical examiner) (4T136-7 to 162-13), Earl Williams (4T165-24 to 197-21), Det. Matthew Maines (4T198-21 to 200-24; 5T202-2 to 261-19), Sgt. Jason Garrigan (6T7-9- to 98-12). A motion for a directed verdict of acquittal was denied. (6T106-11 to 112-24).

The Defense called the following witnesses: Dr. Gary Lage (6T134-5 to 191-7), Shaun Jaikissoon. (6T192-24 to 200-12; 7T202-4 to 242-8). Defense moved for a mistrial (8T6-12 to 26-1), which was denied. (8T26-2 to 28-25). The defense called two character witnesses, Robert O'Malley (8T32-10 to 34-10) and Anne Ostrowski, the decedent's mother (T834-21 to 36-2), and rested (8T40-5). The defense presented its closing argument (8T67-18 to 100-5) followed by the Prosecutor. (8T104-23 to 124-13). The judge then charged the jury. (8T125-8 to

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- 7T refers to the proceedings on January 13, 2025 (Volume 2 of 2);
- 8T refers to the proceedings on January 14, 2025;
- 9T refers to the proceedings on January 15, 2025;
- 10T refers to the proceedings on January 16, 2025; and
- 11T refers to the proceedings on April 7, 2025.

158-22). The jury requested a video playback from Brian Taylor's testimony, which was done. (9T10-11 to 40-8; 10T24-20 to 25-8). The jury verdict was guilty of aggravated reckless manslaughter; the judge remanded the client. (10T27-17 to 33-8). Judge Gaus sentenced Grieco to 11 years, subject to NERA (11T67-6 to 81-10).

STATEMENT OF FACTS

Joseph Grieco was indicted for Aggravated Reckless Manslaughter on December 7, 2023. (CDa6).

1. Pre-Trial Motions

Grieco moved to dismiss the indictment on June 19, 2024, alleging that the grand jury was misled about the difference between "negligence (no crime), reckless manslaughter (2nd degree crime) and aggravated reckless manslaughter (1st degree crime)." (Da14). Grieco also argued that the State failed to define and prove intoxication or present expert testimony as to how the gun went off.

On August 6, 2024, the Pre-Trial Memorandum disclosed that: 1) the maximum sentence for Aggravated Reckless Manslaughter is 30 years with a parole ineligibility period 25.5 years and 2) that Grieco was offered a plea agreement to "2nd Reckless manslaughter with a sentence recommendation of 5 years NJSP w/ NERA." There are no further Pretrial Motions/Hearings was a checked box. (Da19). On August 15, 2024, Judge Gaus issued a 23-page opinion denying Grieco's motion to dismiss. (Da22).

2. <u>The Trial</u>

a. The State's Case

On July 25, 2023, Joseph Grieco and his husband, John Kelly, spent the evening celebrating favorable news about Grieco's disability pension approval. (3T236:4-13). They met friends Jennifer Monteleone and Brian Taylor at the Wallkill Valley VFW Post 8441 in Vernon, New Jersey. (2T72:7-16). Surveillance footage and testimony confirmed they remained at the VFW for several hours, drinking and socializing in a relaxed and non-confrontational atmosphere. (2T161:12-19; 2T164:4-6; 2T174:10-24).

Monteleone testified that Grieco and his friends were "having a good time" that night. (2T97:23-24). She stated that Grieco did not appear intoxicated and exhibited no signs of impairment (2T103:17-25; 2T104:1-20). She heard the sound of a gunshot. (2T79:13-21).

Brian Taylor also testified that Grieco was not drunk. (3T:228:11-17). Defense counsel argued that Taylor's trial testimony was inconsistent with his prior statements to police. Taylor told the jury that he warned Grieco the gun looked loaded, but Grieco insisted that the gun was not loaded. Taylor testified that he had observed Grieco pull the trigger with the gun pointed to towards his husband. (4T37:4-7). On cross-examination, the defense exposed multiple inconsistencies in Taylor's testimony. Taylor originally told police that Grieco was standing behind the

breakfast bar when the gun discharged but later testified at trial that he had a clear view of Grieco from the side. (4T44:1-14).

Taylor testified that he said to Grieco, "you fuckin' shot him. He's [Grieco] like, 'I didn't shoot him. It was empty.' I'm like, fuck you – It's not fuckin empty. You just fuckin' shot him." (4T53:7-13).

Officer Thomas White, among the first responders, testified that Grieco was rendering aid to John when he arrived. (2T130:16-18). White confirmed there were no field sobriety tests administered to Grieco (2T139:11-18); there was no breath test taken of Grieco, despite the availability of an Alcotest and Officer White's certification to operate that machine (2T140:1-15); and no one drew Grieco's blood. (2T140:16-24). Indeed, officers at the scene saw no indicators of intoxication warranting any type of testing for impairment and Grieco was fully cooperative with law enforcement. The Prosecutor asked, "Officer, is there any per se amount of alcohol that would be permitted to allow somebody to use a firearm?" The witness responded, "No." (2T144-16 to 19).

Detective Maines, the lead investigator, did not testify that any blood tests, breath testing, or urine analysis were conducted, and he offered no evidence of a warrant for toxicological analysis. Maines did not provide any evidence that Grieco was uncooperative; he did not testify about any signs of impairment, slurred speech, or imbalance.

Earl Williams, a forensic ballistics expert with the New Jersey State Police, testified that the Glock Model 23 Gen4 requires about 5.5 pounds of pressure to discharge. (4T182:25; 4T183:1-10). He conceded that no microscopic inspection of the firing mechanism was conducted and admitted that a mechanical malfunction of the firearm is possible; "if the firearm and the safeties inside the firearm are malfunctioning, it is possible" that there was a "slam fire." (4T191:1-10). He explained that a person could have his finger on the trigger, hit the slide release button, and the slide would go forward by way of a spring, the weight or power of that spring could then create sufficient force to cause the finger to the trigger back. (4T193:12-25).

Detective Sergeant Jasom Garrigan, a certified firearms instructor and Glock armorer, was qualified by the State as an expert in firearms. He testified regarding the mechanical operation and safety features of the Glock 23 handgun recovered in this case. (6T13:1-19). Garrigan testified that the Glock 23 is a semiautomatic .40 caliber pistol with a magazine capacity of thirteen rounds. (6T20:22-25). He identified the recovered weapon, marked S-66A, as a Glock 23 and explained its components, including the magazine well, ejection port, and the manner in which rounds are loaded and chambered. (6T20:11-25; 6T27:1-25).

As part of his demonstration, Garrigan loaded ten hollow-point cartridges (S-67) into the magazine and compared its weight with that of an identical empty

magazine (S-70). He stated there was a "considerable weight difference" between the two, and the jury was permitted to physically handle the magazines (6T22:5-25; 6T23:1-6; 6T26:1-17). Garrigan testified about the Glock's "Safe Action System," which incorporates three internal safeties: the trigger safety, the firing pin safety, and the drop safety. (6T31:2-13). He emphasized that the Glock is "very difficult to fire without pulling the trigger," and that all three safeties must be disengaged through trigger pull for the weapon to discharge. (6T31:1-25; 6T32-33).

On cross-examination, Garrigan acknowledged several points. First, Garrigan explained that stove pipe malfunctions (when a casing becomes jammed in the ejection port) can occur if the weapon is held loosely or improperly. In his test of Grieco's Glock, it stove piped on both test fires conducted under such conditions, which he attributed to how he was holding the weapon. (6T44:8-25; 6T45:1-4). Garrigan conceded that improper grip can interfere with normal operation and that he intentionally used incorrect handling techniques to simulate possible user error (6T45:1-5). Additionally, he acknowledged that when a round is chambered and "moderate trigger pressure" is applied while the slide is released, the gun may fire, which is (6T44:1-2) not standard firearms protocol. (6T39:17-25; 6T40:1-6).

Garrigan concluded that Grieco's weapon was not defective and that it did not fire during any test unless the trigger was pulled. He recognized that user error — particularly unintentional or partial trigger pressure during slide release — could

result in discharge, especially if the gun was held improperly or under stress. (6T45:7-25; 6T46:1-13).

After the State rested, Grieco moved for a directed verdict of acquittal (6T101). The trial judge denied the motion. (6T106).

b. The Defense case

Dr. Gary Lage was qualified as an expert witness in the field of toxicology and pharmacology, and of alcohol's ability to impair or intoxicate someone. (6T136:9-16). Dr. Lage opined based on the facts of the case and Grieco's height and weight "his blood alcohol level would have been .02 to .03 that's below any level that would have a significant impact on somebody's cognitive abilities or any other impact in terms of the shooting." (6T151:1-4).

Dr. Lage's report and testimony that a blood alcohol content (BAC) of .01 to .05 impacts the frontal lobe – more likely at .05 than at .01. (6T152:22-25). In that range, the alcohol influence is scientifically described as euphoria where inhibition is decreased and judgment diminished. If one's judgement is diminished, it could impact the ability to handle a firearm. Id.

Dr. Lage defined intoxication as a BAC of .08 for operating a motor vehicle. The Prosecution offered N.J.S.A. 2C:58-4.4(1) ("Safety Requirements Handgun Carry) "to show that intoxication impairment standards for vehicles don't apply …to show that there are laws that say an individual cannot consume alcohol while

carrying a handgun." (6T:162-163). Judge Gaus overruled defense counsel's objection. (6T:169-170).

N.J.S.A. 2C:58-4.4(2) states that a person carrying a handgun "shall not be under the influence of alcohol" without reference to BAC .08 that controls handling an automobile. (6T:172). While New Jersey sets no BAC limit for determining under the influence or intoxication for firearms, Dr. Lage was aware that "several states have set .08 as the level for correctly …using a firearm. (6T:183). Dr. Lage noted that there was neither a blood test nor a breath test given to Grieco by law enforcement. If a person was under the influence (over .08 BAC), the odor of alcohol would be on the person's breath or recordation of coordination difficulties. The other primary symptoms would be people become "more boisterous, bloodshot eyes." (6T:186-187). Dr. Lage confirmed his finding that Grieco was not under the influence of alcohol at the time of the shooting. (6T:191).

Shaun Jaikissoon was qualified as an expert in the field of firearms and operability. (6T196:20-22). He defined stove piping as the condition where the cartridge casing gets caught up in the ejection port causing the gun to malfunction. Stove piping will not cause the gun to go off, but it is indicative there might be other issues that need to be looked at; that gun would be deemed unsafe. (7T207:14-16). "Slam fire" is when the firing pin protrudes onto the cartridge, and if the slide goes forward it could strike the cartridge causing the gun to fire. A "slap shot" or "slide

drag" is when a person has moderate pressure on the trigger, not pulling it, and the slide rolls forward and it could cause the firing pin to protrude and strike the cartridge. (7T209:7-19). These events have all been known to happen. (7T:208-210).

It is difficult to determine by perceived weight if a gun is loaded or unloaded. (7T:212). Lasering is where the gun is safe to handle, but it is going to get into someone's direction or view, no matter how you try to point it in a safe direction. Someone could walk into your laser. Pointing a gun is intentionally pointing it at a person. (7T:215). Because of the possibility of a "slam fire" or that the slide went forward causing the gun to go off, it cannot be concluded that Grieco's finger pulled the trigger. (7T:216).

It is an important safety rule to make sure the gun is not loaded. Always assume it is loaded and check yourself. (7T:220).

***c. Defense Motion for Mistrial* (8T:6-9).**

Defense counsel argued that the Prosecution's use of 2C:58-4.4(1) was prejudicial because it insinuated that New Jersey's rule for guns is that no amount of alcohol is permitted with any gun use. The statute, not applicable to Grieco, bans *any* alcohol for firearms. This insinuation followed Officer Thomas White's testimony that no alcohol is permitted when using a firearm. Defense counsel argued that given the undisputed fact that Grieco had ingested several alcoholic beverages, the jury was led to believe that Grieco had committed an egregious violation of New

Jersey's law by having had some alcohol before he brought out his old service firearm. "Even if he's not charged it's almost as if it's improper prior bad acts or propensity evidence that my client is just disregarding the law or [is] a law breaker." (8T:7-8). "The jury will, in deliberations, conclude under Mr. Kabse's cross-examination you aren't supposed to drink at all and have a firearm. …they're going to think …he's not to drink at all and since that happened, he therefore violated the law, the law, must have violated the law here." (8T:15).

Judge Gaus denied Grieco's motion for a mistrial on the ground that the direct questioning of Dr. Lage opened the door, permitting the State to impeach Dr. Lage's opinion that a BAC of .08 was the correct dividing line for intoxication or being under the influence. The judge did not analyze or mention the prejudice to Grieco which would be grounds to grant the motion even if the cross-examination itself was not error[2]. (8T:26-28)

d. Character Witnesses

Robert O'Malley is a retired Special Agent in charge of New York for the U.S. Treasury Department, who knew Grieco as a friend for well over 20 years, and testified Grieco is "a very well-respected member of our friend circle." (8T:33).

Ann Ostrowski is the mother of decedent, John Kelly. Joseph Grieco is her son-in-law. She has known him since her son and Grieco started dating, a period of

[2] See NJ Evid. Rule 403.

about 15 years. She opined that Grieco had always been respectful, loving and had shown care. "I've always held him highly." (8T:33).

3. <u>Closing Arguments</u>

a. The Defense (8T:67-100)

Grieco argued that Brian Taylor's initial statements were factual, and his trial testimony was basically a fabrication.

The defendant's deviation from correct conduct must be beyond negligence and asked what mere negligence is. "It's not a crime; it's not reckless or aggravated reckless". (8T97:8-11). Defense counsel specifically stated he was not requesting a charge on negligence. (8T102:22).

Defense argued that the State had not proven that Grieco was under the influence or intoxicated. No police officer disclosed any signs that Grieco was intoxicated or under the influence. Nobody drew blood to test for BAC. No scientific evidence, which would have disclosed Grieco's BAC, was taken by the police at the scene or directly after at police headquarters. (8T87-99).

b. Prosecution (8T:104-124)

The evidence of drinking at VFW and in the Grieco-Kelly residence, plus the fact that Grieco was advised that the gun he brought into the small room was loaded constituted Aggravated Recklessness.

"There is nothing Mr. Taylor testified to …that would justify bringing a loaded handgun after drinking alcohol with other people that drank alcohol in that enclosed kitchen area. (8T111:19-23) … "I would submit to you even at .05 to .01 the frontal lobe is affected It's the …dulling of the attention, sedation, impaired coordination …[T]he consumption of alcohol is something for you to consider when you're determining whether his actions were reckless because when he brought the gun out, he knew he had drunk that alcohol." (8T119:4-13). "Common sense will tell you alcohol, guns don't mix." (8T122:15-17).

4. <u>The Jury Charge (8T:125 to 165)</u>

a. Intoxication or Under the Influence (8T:136-137)

"You may recall hearing testimony about what it means to be intoxicated for purposes of the drunk driving laws in New Jersey. This case does not involve New Jersey drunk driving laws. You may also recall hearing testimony during the cross-examination of Dr. Gary Lage about a New Jersey law that limits someone with a firearm carry permit from possessing or being under the influence of alcohol while exercising their right to carry. That testimony was allowed for the limited purpose of challenging Dr. Lage's credibility, often referred to as impeachment evidence, when it came to his opinions on the New Jersey laws regarding alcohol and firearms use…It was not offered as substantive proof that Mr. Grieco violated the law. In fact, if you find that Mr. Grieco had a firearm in his possession while in his residence

on the date in question, the carry permit law would not even apply because one does not need a carry permit when owning or possessing a firearm within their residence. In fact, New Jersey does not have a law that specifically deals with alcohol limits and firearms in a residence."

b. Recklessness (8T:148-153)

"In order for you to find Joseph Grieco guilty of aggravated manslaughter the State is required to prove …that the Defendant did so recklessly; and that the Defendant did so under circumstances manifesting extreme indifference to human life. …A person who causes another's death does so recklessly when he is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct. The risk must be of such a nature and degree that considering the nature and purpose of Defendant's conduct and the circumstances known to Defendant that disregard of that risk is a gross deviation from the standard of conduct that a reasonable person would follow in the same situation….you must determine whether in light of those factors Defendant's disregard of that risk was a gross deviation from the conduct a reasonable person would have observed in Defendant's situation. Another element the State must prove beyond a reasonable doubt is that Defendant acted under circumstances manifesting extreme indifference to human life. …If in light of all the evidence, you find that Mr. Grieco's conduct resulted in

a probability as opposed to a mere possibility of death then you may find he acted under circumstances manifesting extreme indifference to human life."

There were no defense objections to the charge.

5. <u>Relevant Jury Questions (9T:3-44)</u>

The Jury asked for Brian Taylor's entire testimony, the American Legion video (C-13), and the 9-1-1 transcript and audio call from Brian Taylor (C-14). C-18 asked to see the testimony from Brian Taylor rather than all the remaining testimony. C-24, "Can we please get clarification on the parameters of the charges?" (10T16)

6. <u>Guilty Verdict</u> (11T27-33)

The jury convicted at the end of the day.

7. <u>[Confidential] Final Presentence Report (PSR) (Exhibit 1)</u>

Diagnosis and comments: "Long Covid; symptoms included cardiac issues, neurological symptoms, vertigo, brain fog, severe panic attacks" (at p. 6). "Effexor – anti depressant – long covid – 1x daily" (at p. 7).

Assessment of factors contributing to present offense: "It appears the instant offenses can be attributed to a combination of defendant's poor judgment, negligence and lack of impulse control" (at p 11).

8. <u>Sentencing Memos</u>

The defense sentencing memorandum, filed April 3, 2025, raised objections to the PSR because there was no testimony that Mr. Grieco appeared impaired at the scene and there was no testimony at trial referencing "killing snakes." (11T26:12-15, CDa91).

It was undisputed that Mr. Grieco and the decedent were caring, supportive, and loving partners. Perhaps there is no more powerful indication of that reality than the unwavering support of Joe by John's parents, John and Anne Ostrowski, and the 22 eloquent endorsements of Joseph Grieco's character and life of helping people. (CDa25-88).

The State argued that the defendant should be sentenced to a custodial term of twenty (20) years in New Jersey State Prison subject to the No Early Release Act. The State also argued that the defendant's education and career as a police officer make his disregard of all the risks associated with firearms all the more egregious. The State advocated for Aggravating Factor (9), the need to deter the defendant and others. The State conceded Mitigating Factor 7 applied but argued that Mitigating factors 8, 9, and 11 were not warranted. The State objected to the defense's application for a sentence in the 3rd degree range.

9. <u>Post-Trial Motions</u>

Grieco moved for Acquittal or in the alternative a new trial on January 24, 2025. (Da92). The motion for a new trial was based on the Prosecutor's cross-examination of Gary Lage, making the same arguments as presented in his January 13, 2025, motion for a mistrial – that is, Grieco was irreparably prejudiced by the introduction of inapplicable law to suggest bad character, prior bad acts and propensity to violate the law.

On February 18, 2025, the State argued that the cross-examination was no more than an effort to refute an erroneous opinion by Dr. Lage that the DWI BAC limit applied in this case. The State challenged the basis of Dr. Lage's belief by using a New Jersey Law that addressed alcohol and the handling of firearms. The Court overruled the defendant's objection.

a. The Court's Ruling Denying the Motion (11T15 - 25)

"[T]he Defense opened the door to the credibility challenge that the State then mounted during the cross-examination … [Dr. Lage] equating the drunk driving limit of 0.08 BAC with an appropriate level for when someone should be utilizing a firearm. This is an incorrect statement of law. …I don't think there was anything wrong with the testimony. It was a limiting instruction for the jury to understand that it was introduced for a limited purpose and that was to challenge the credibility of the Defense expert. It was in no way offered, nor was there any suggestion that

this is something that would be considered by way of bad conduct or other Evidence Rule 404 (b) type evidence for the jury to take into consideration." (11T21-23).

b. Judge Gaus Sentenced Grieco to 11 years in State Prison Subject to the No Early Release Act (11T67- 82)

Before imposing sentence, the Court heard argument from defense counsel (11T27-35) essentially arguing the identical points raised in his sentence memorandum. "Given his lack of record … I submit given the circumstances surrounding this particular case, I would think a range of one degree lower in the second degree would be appropriate."

The Prosecution relied on a video shot by law enforcement at the scene of the shooting and the pre-sentence interview to argue that the defendant still did not appreciate the gravity of his conduct and deserved a sentence of 20 years. (11T44-54).

The Court heard glowing testimonials praising the defendant's character and past community service, requesting leniency from the parents of the decedent, John (11T36-40) and Anne (11T41-44).

10.<u>The Judge's Sentence</u>

Judge Gaus was shocked by Grieco's statement in the PSR that he did not have an opportunity to determine if the gun was loaded or unloaded. "To suggest that did not give him an opportunity to determine whether the gun was loaded or unloaded is an incredible statement that the Court could not possibly find true and

goes to show his inability to accept true responsibility for his actions in this case." (11T68).

The letters in support of Grieco were significantly moving and "assisted the Court in ultimately determining to go down to an 11-year sentence rather than something in the 15 to 20-year range. (11T72).

> Aggravating factor nine not only applies in the circumstances of this case but applies with tremendous weight, and that is the need for deterrence both individually as it relates to this Defendant, and as a general deterrence for others. … general deterrence is particularly important here to getting the message to the community that gunplay … is dangerous." (11T74-75). The Court acknowledged Mitigating factor 7 applies, but "receives little weight by the Court … because of the nature and circumstances of what has been described. The remainder of defense's proposed Mitigating factors are rejected because the Court does not believe Grieco has "true remorse". The Court concluded that the Mitigating factors and Aggravating factors "are in equipoise and declined to sentence as a second degree crime." (11T77-80).

ARGUMENT

I. PERMITTING OFFICER THOMAS WHITE'S TESTIMONY, OVER DEFENSE OBJECTION, WAS REVERSIBLE ERROR. (2T143-20 to 2T144-20).

It is an undisputed fact that Joseph Grieco consumed alcoholic drinks on July 26, 2023. Grieco's expert, Dr. Gary Lage, acknowledges as much in his testimony at trial and in his report, which was provided to the State pre-trial in discovery. If Grieco's previous consumption of any alcohol were to define recklessness, Grieco had no defense at trial. The State, through the testimony of Patrolman Thomas White and its cross-examination of Dr. Lage, which used N.J.S.A. 2C:58-4.4 to insinuate that Grieco's consumption of any alcohol on July 26, 2023, was reckless.

Vernon Township police officer, Thomas White, was the first law enforcement officer to arrive at the scene. He was not a qualified expert in any field although Officer White did have emergency medical training. The officer was responding "primarily for a medical call." (2T131-3 to 135-9). The defense cross-examination revealed that no police officer performed a "field test" on Grieco (2T139-5 to 139-18) and no police officer performed an Alcotest on Grieco. (2T139-23 to 140-7). The cross-examination also confirmed that Officer White had not drawn blood. (2T140-16 to 140-22).

On redirect, the prosecutor tried to tell the jury that any BAC testing of Grieco was unnecessary because any alcohol consumption was evidence of recklessness

with regard to possession of firearms. "Q. Is there any per se alcohol amount that could be consumed to make it safe to operate a firearm?"

The Judge overruled defense counsel's objection. "The Court: I don't think this is an opinion. It's within his training and experience. The objection is overruled. You can answer the question." The judge did not hold a Rule 104 hearing to determine if Officer White had had any training about alcohol and firearms or if Officer White had any relevant experience with rules for alcohol consumption with regard to use of a firearm. There is nothing in this record to suggest that Officer White had the training or experience that the judge used as his rationale for overruling the defense objection. Thus, the prosecutor was permitted to elicit this extremely prejudicial testimony, as if Officer White had been qualified as an expert witness, which is reversible error.

Even if White were a credentialed and qualified expert, he would have been prohibited from opining about the law. "Is there any amount of alcohol that would be permitted" is most certainly about the law. What else besides a law could forbid alcohol for a person from using a firearm? "On questions of New Jersey law, expert testimony is not admissible because it is the exclusive province of the judge presiding over the case to instruct the jury on the law of this State to be applied in the particular case." Biunno, "New Jersey Rules of Evidence" at 783, citing

Troxclair v. Aventis Pasteur, Inc., 374 N.J. Super. 374, 384-385 (App. Div. 2005) and Ptaszynski v. Atlantic Health, 440 N.J. Super. 24, 37 (App. Div. 2015).

Obviously, Officer White is neither qualified to be, nor proffered as, an expert witness. Opinion testimony of lay witnesses is governed by N.J.R.E. 701. To be admissible, the non-expert opinion must be "(a) rationally based on the witnesses' perception and (b) assist in understanding the witnesses' testimony or determining a fact at issue." Officer White's testimony fits neither of these two purposes. The prosecutor's redirect produced a response that not only violates the rule but also dramatically and unfairly prejudiced Grieco. The question and answer were: "Q. Is there any per se amount of alcohol that would be permitted to allow somebody to use a firearm? A. No." (2T143-20 to 2T144-20).

The inadmissible testimony's prejudice is even greater because what Officer White testified to is **not the law in New Jersey.** The State did not advocate that it is; nor did the judge charge that it is. Permitting the jury to use Officer White's testimony in deliberations over defense counsel's objection is reversible error.

II. THE STATE'S SUGGESTION THAT CONSUMING ANY ALCOHOL EQUALS RECKLESSNESS WAS MORE PREJUDICIAL THAN PROBATIVE. (6T:162-163); (6T169-9 to 170-9); (8T6-12 to 28-25), (8T:122); (11T20-17 to 25-10); (2T144-16 to 19)

Without pre-trial notice to the defense or Court, the Prosecution offered N.J.S.A. 2C:58-4.4(1) ("Safety Requirements Handgun Carry) "to show that intoxication impairment standards for vehicles don't apply …to show that there are

laws that say **an individual cannot consume alcohol while carrying a handgun.**" (6T:162-163). (Emphasis supplied). Office White was asked, "Officer, is there any per se amount of alcohol that would be permitted to allow somebody to use a firearm?" The witness responded, "No." (2T144-16 to 19). The Prosecutor aided the theme in closing argument: "Common sense will tell you that alcohol, guns don't mix." (8T:122)

The defense objected vociferously during the State's cross (6T160-1 to 169-8); and submitted a written motion for a mistrial during the defense case supplemented by oral argument (8T6-12 to 26-1), which pointed out the prejudice to Grieco from the State's use of N.J. S. 2C:58-4.4 (1). "Even if he's not charged [with violating N.J.S.A. 2C:58-4] it's almost as if it's improper bad acts or concurrent bad acts or propensity evidence that my client is just disregarding the law or a law breaker." (8T7-25 to 8-3). Defense counsel argued that if the State had given notice of this tactic,

> the Court would have to make a determination based upon the appropriateness of it versus the prejudicial -- my client's been prejudiced; right? Because now they [the jury] can go back in the jury room and they're …gonna say, well yeah, we heard … the defense expert. He said that, you know, under Mr. Kabse's cross-examination you aren't supposed to drink at all and have a firearm when you have a permit, right? …

> And then now they're gonna think that since he has a carry permit, he's not to drink at all and since that happened, he therefore violated the law, must have violated the law here. … The point being is that Mr. Grieco was prejudiced by this and I don't really see a good remedy (8T 15-1 to 16-3)

The defense again moved for a new trial after the verdict based on the prosecutor's cross-examination of Dr. Lage. In support of this post-trial motion, Grieco adopted the arguments previously made in his motion for a mistrial. The defense argued that Grieco was irreparably prejudiced by the introduction of inapplicable law to suggest bad character, prior bad acts, and propensity to violate the law.

Judge Gaus overruled the defense objection during the cross-examination (6T169-9 to 170-9), denied the motion for mistrial (8T26-2 to 28-25), and denied the post-trial motion for a new trial. (11T20-17 to 25-10). The judge's rationale was that Dr. Lage's opinion that a BAC of .08 (used to determine intoxication when driving) was the line for determining whether an individual was intoxicated or under the influence "opened the door" to the use of N.J.S.A. 2C:58-4.4 during the State's cross-examination. The judge failed to instruct the jury that, under the law, the mere consumption of alcohol does not, by itself, constitute reckless conduct, and did not address the resulting prejudice to the defendant from the State's reliance on N.J.S.A. 2C:58-4.4(1).

In applying the "opening the door" doctrine, the Court must still balance the undue prejudice to the defendant against the value of the proposed testimony.

> The "opening the door" doctrine is "a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) admissible evidence that generates an issue, (582). The "doctrine operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context." **The doctrine is limited, however, by weighing the probative value against the prejudicial nature of the evidence** under N.J.R.E. 403**. … Furthermore, even if defense counsel did "open the door" to testimony about defendant's threat, rendering it relevant, the probative value of that testimony would nevertheless need to outweigh its apparent prejudice to be admissible.** …
>
> Because of the "underlying danger" that a "jury may convict the defendant because he is a 'bad' person in general, to be admissible, such evidence must be 'relevant to a material issue,' and its **probative value 'must not be outweighed by its apparent prejudice."**

State v. Prall, 231 N.J. 567, 581-583 (2018) (reversing the Appellate Division on other grounds) (citations omitted) (emphasis supplied).

See also State v. James, 144 N.J. 538, 554, 562 (1996) ("The doctrine of opening the door can be used only to prevent prejudice; it cannot be subverted into a rule for injection of prejudice").

Thus, the trial judge's failure to weigh the prejudice to Grieco against the dubious use of N.J.S.A. 2C:58-4.4(1) to impeach Dr. Lage's opinion requires reversal of Grieco's conviction.

III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE DEFENSE OF MISTAKE OF FACT DEPRIVED DEFENDANT OF A FAIR TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION. (Not raised below)

A. Introduction

The trial court's failure to instruct the jury on the defense of mistake of fact denied defendant a fair trial. There was ample trial evidence that defendant believed the firearm was unloaded at the time of the shooting, which, if credited, could negate the mens rea required for the offense of conviction. Despite this, the court did not charge mistake of fact. This failure deprived the jury of the opportunity to consider a defense recognized and required by New Jersey law, and mandates reversal.

B. The Applicable Legal Standard

Under New Jersey law, a defendant is not guilty of an offense if they engage in conduct under a mistaken belief of fact that negates the mental state required to establish guilt. See Model Jury Charge (Criminal), Mistake of Fact (N.J.S.A. 2C:2-4(a)) (rev. June 14, 2010), at 1. The Model Jury Charge explains: "A person is not

guilty of an offense if he or she engages in conduct under a mistaken belief of fact which negates the required mental state of the offense." Id. In State v. Sexton, 160 N.J. 93, 104 (1999), the New Jersey Supreme Court held that "a defendant's mistaken belief that a gun was unloaded, even if unreasonable, may be a defense to a charge of reckless manslaughter." Id. The relevant question is whether the belief, if honestly held, could negate the mental state required by the offense. The Court made clear that whether the mistake was reasonable is a question for the jury. Id. at 111. Sexton reaffirmed that the mistake-of-fact defense applies where it negates any element of the offense, including knowledge, intent, or recklessness. Id. at 104-05.

Trial courts are obligated to tailor jury instructions to the facts of the case and the defense advanced. See State v. Wickliff, 378 N.J. Super. 328, 334 (App. Div. 2005). Indeed, trial courts must instruct the jury on any defense reasonably supported by the record, sua sponte, and failure to do so is reversible error. State v. Rivera, 205 N.J. 472, 489 (2011); State v. Garron, 177 N.J. 147, 180 (2003); State v. Walker, 203 N.J. 73, 89 (2010). The New Jersey Supreme Court has made clear that reversal is warranted as the "only appropriate remedy" where a trial court fails to charge the jury on a material issue. State v. Pena, 187 N.J. 297, 319-320 (2004). The Pena Court explained that despite the impact it might have on the outcome of the trial, it is a "well-established rule that presumes that a trial court's instructional error on a

material issue constitutes reversible error." Id; See also State v. Savage, 172 N.J. 374, 388 (2002); see also State v. Green, 86 N.J. 281, 287-88 (1981).

C. The Mistake of Fact Jury Instruction Was Required

A mistake of fact instruction was required in this case because the central issue at trial was the defendant's mental state and whether he acted recklessly and with extreme indifference to human life. The State's theory was that defendant Joseph Grieco acted recklessly when he pointed a firearm and pulled the trigger, causing the death of John Kelly. However, Grieco believed the gun was unloaded at the time. (1T29:12-13; 29:18-22).

The jury heard testimony from Brian Taylor that Grieco specifically stated that the gun was not loaded. (3T209:10-11). Taylor told the jury, multiple times, that Grieco "stated it was not loaded." (3T209; 11; 3T264:8; 3T264:24-25). Taylor explained to the jury, when questioned by the prosecutor on direct examination, that Grieco said, "I told you the gun was empty." (3T210:1-2). This belief—if credited by the jury—could have negated the aggravated recklessness element required to support the conviction. Taylor's testimony on this point is also consistent with his statements to law enforcement when they first responded to the scene. Taylor similarly stated that Grieco believed the gun was **not** loaded because he stated that fact; he claimed that Grieco said: "it's not loaded" and "I didn't shoot him, it was

empty." (3T215:21, 216:13, 232:16, 263:14-18, 264:5-8). Grieco himself told law enforcement that "I thought there was nothing in the magazine." (1T29:12-13).

Although this evidence warranted a jury instruction on mistake of fact, no such charge was given, and the record does not reflect a request from defense counsel. Nonetheless, a trial court is required to issue instructions on any defense "clearly indicated" by the evidence, even if not requested. State v. Walker, 203 N.J. 73, 89 (2010); State v. Garron, 177 N.J. 147, 180 (2003). The trial court's failure to instruct the jury sua sponte on mistake of fact deprived Grieco of a meaningful opportunity to have the jury consider the evidence under the proper legal framework.

Mistake of fact—the actual issue raised by the testimony—is a recognized and codified defense under N.J.S.A. 2C:2-4. Without a mistake of fact charge from the judge, the jury was not informed that it could acquit based on Grieco's mistaken belief that the gun was unloaded. That, in turn, eliminated a mental state inquiry critical to the recklessness standard and invited conviction without a proper finding of culpability.

Courts have repeatedly held that jury instructions must clearly explain the relationship between the defendant's mental state and the charged offense. Even in crimes involving recklessness, a mistake of fact—if it negates awareness of risk—can preclude a finding of criminal liability. State v. Sexton at 107-08. That is precisely the theory supported by the testimony here. As the Court explained: "If

defendant did not know the gun was loaded, then he would not have been aware of the risk that his conduct could produce death, and therefore could not have consciously disregarded that risk." Id. at 108.

By failing to charge the jury on mistake of fact, the trial court left the jury with no legal mechanism to evaluate a core defense theory. The jury was never told that a mistaken but honest belief that the gun was unloaded, even if unreasonable, could negate the aggravated reckless mental state required for conviction. The charge was critical because it went to whether defendant acted with aggravated recklessness or knowledge—states of mind required for conviction. The court's failure to issue this charge improperly removed the jury's ability to acquit on a valid and complete defense.

CONCLUSION

For all of the reasons expressed above, Joseph Grieco's conviction should be reversed.

Date: August 7, 2025

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Appellate Division
Docket No. A-002907-24

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff - Respondent,	:	
v.	:	On Appeal from a Final Order of the New Jersey Superior Court, Law Division.
JOSEPH C. GRIECO AKA JOSEPH GRIECO,	:	
	:	SAT BELOW:
Defendant-Appellant.	:	
		Hon. Michael C. Gaus, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTER PROCEDURAL HISTORY

On August 21, 2023, Joseph Grieco ("the Defendant") was charged under Warrant-Complaint Number W-2023-000078-1912 with one count of first degree Aggravated Manslaughter, in violation of N.J.S.A. 2C:11-4a(1) in connection with the death of his husband, J.K. ("the victim"). (Da1 to Da7). On August 22, 2013, the Defendant was released on Pretrial Monitoring Level III. (CDa107 to CDa111).

On December 7, 2023, a Sussex County Grand Jury returned Indictment Number 23-12-00301-I charging the Defendant with first degree Aggravated Manslaughter for recklessly causing the death of J.K., in violation of N.J.S.A. 2C:11-4a(1). (CDa6). On or about May 15, 2024, the Defendant, through counsel S. Emile Lisboa, IV, Esq., filed a brief in support of a Motion to Dismiss the Indictment. The Notice of Motion was subsequently filed on June 19, 2024. (Da14). Oral argument was conducted before the Honorable Michael C. Gaus, J.S.C. on August 6, 2024. At the conclusion of the hearing, the court denied the Defendant's Motion. A conforming Order with an accompany 22-page Statement of Reasons was issued on August 15, 2024. (Da22 to Da44; Da47 to Da69). On September 4, 2024, the Defendant filed a Motion for Leave to Appeal with the Appellate Division. (Da45). On September 20, 2024, the Motion was denied. (Da70).

Jury selection was completed on January 7, 2025. That same date, the court conducted a Rule 104 Hearing regarding statements attributed to the Defendant. (1T

6-17 to 165-9).[1] Trial commenced with opening statements on January 8, 2025 and continued on January 9, January 13, January 14, and January 15, 2025. (2T, 3T, 4T, 5T, 6T, 7T, 8T, 9T). At the close of the State's case, the Defendant filed a Motion for a Directed Verdict, which was denied. (6T 101-3 to -5; 106-11 to 112-24). Defendant's Motion for a Mistrial was also denied. (8T 6-12 to 28-25). On January 16, 2025, the jury returned a verdict of guilty. (10T 27-20 to 28-13; Da90 to Da91). The court then granted the State's application to remand the Defendant pending sentencing. (10T 31-11 to 33-7).

On January 24, 2025, the Defendant filed a Motion for a Judgment of Acquittal or in the alternative for a New Trial. (Da92 to Da93). On April 7, 2025, after hearing oral argument, the court denied the Defendant's Motion. (11T-15 to 25-14; Da102). Thereafter, the Defendant was sentenced as follows: Eleven (11) years incarceration with an 85% period of parole ineligibility pursuant to the No Early Release Act ("N.E.R.A."). (11T 81-6 to -10). A conforming Judgment of Conviction ("JOC") was entered on April 22, 2025. (Da104 to Da106).

Wherein, on May 19, 2025, the Defendant filed the instant appeal that is now the subject of the matter before the Court. (Da107 to Da110). An amended Notice of Appeal was filed on June 3, 2025. (Da112 to Da115). On August 8, 2025, the

[1] The State hereby adopts the transcript citations as set forth on pages ii and 1-2 of the Defendant-Appellant's brief.

Defendant filed a Motion for Bail Pending appeal with the Superior Court. After considering the submissions of the parties and hearing oral argument, the Motion was denied on August 26, 2025.

COUNTER STATEMENT OF FACTS

On July 25, 2023, Brian Taylor stopped by the Veterans of Foreign Wars ("VFW") in Vernon, New Jersey on his way home from work to have a drink. (2T 147-11 to -20; 151-15 to -23). He texted his friend, Jennifer Monteleone, to meet him there and arrived at approximately 8:00-8:30 p.m. (2T 152-1 to 153-2; 2T 71-4 to -9). Ms. Monteleone later arrived and they had a drink at the bar. (2T 153-5 to -25). While he and Ms. Monteleone were having a drink, at approximately 8:48 p.m., the Defendant and the victim arrived and sat with them at the bar. (2T 154-12 to 155-6; 168-16 to -18). Mr. Taylor explained that he first met the Defendant and his husband, J.K., through mutual friends in the summer of 2022. (2T 148-1 to -5; -19). He was aware that they resided together in Vernon, near the VFW and while he did not consider them "close" friends, Mr. Taylor explained that they became friends and would go out together every once in a while. (2T 150-1 to -12; 148-9 to -10; -24; 2T 173-2 to -3). Similarly, Ms. Monteleone testified that she met the Defendant and the victim through Mr. Taylor and that in January 2023, she had known them for approximately one (1) year. (2T 70-2 to 71-3).

The Defendant was a 14-year veteran of the Tenafly Police Department. (6T 133-8). Mr. Taylor was aware that the Defendant was a former police officer. (3T 235-11 to -22). He also described the victim as "a really good guy" and explained that he was the kind of person that when you met with him, you ended up making plans to "hang out again." (2T 173-10 to -11). While they were at the VFW, the Defendant and the victim ordered vodka drinks and they all had a "good time" joking, drinking, and having fun. (2T 156-3 to -4; 157-11 to -13; 174-20 to -24; 2T 72-7 to -22). Cameras located in the interior of the bar captured their interactions that evening. (2T 158-18 to -20; 2T 160-24 to 167-12; 170-18 to 171-7; 175-9; 176-10; 176-25 to 177-8; 178-6 to -23; S-55). Mr. Taylor testified, and the cameras corroborated, that between 8:48-10:00 p.m., the Defendant consumed two (2) vodka drinks and a Yuengling draft. (2T 168-13 to 169-1). This was also corroborated by the Defendant's bar tab receipt. (5T 236-5 to 238-15; S-56).

At approximately 10:30 p.m., the Defendant and victim invited Mr. Taylor and Ms. Monteleone to their home, which was located approximately ½ a mile away, for drinks. (2T 72-25 to 73-16; 2T 179-10 to -21). Ms. Monteleone had never been there before so the Defendant gave her a tour of the apartment, they then spent the majority of the time in the kitchen area. (2T 76-5 to -11; 77-20 to -22; 88-19 to -20; 190-10; 3T 259-19 to -25). Mr. Taylor testified that while they were at the Defendant's house, they discussed vacation, World War II, books, TV shows,

collectibles, politics, abortion, and homosexuality, among other things. (2T 183-23 to 184-21; 192-14 to 194-4; 3T 252-16 to -24). They were pleasant conversations and were not angry or heated. (2T 194-2 to -20). Ms. Monteleone also played with the Defendant's two (2) French bull dogs. (3T 253-6 to -15).

Mr. Taylor brought beers that he purchased at the VFW. (2T 194-18 to 195-3; 196-8 to 197-4). The victim made drinks with vodka and muddled strawberries for himself, the Defendant, and Ms. Monteleone, while Mr. Taylor drank the beer that he brought with him. (2T 78-7 to -25; 197-8 to 198-1). Ms. Monteleone observed the Defendant have at least one (1) drink while at his residence. (2T 103-10 to -12).

At some point, the Defendant walked out of the kitchen and "out of nowhere" returned in the doorway with a handgun saying, "I have a gun." (3T 202-11 to -24). Mr. Taylor is familiar with handguns and was able to identify it as a black Glock.[2] (3T 203-15 to 204-1). The Defendant was standing in an area between the victim and the counter, holding the gun by the pistol grip, and Mr. Taylor asked, "[W]hat are you doing with a gun, there's no need for a gun." (3T 203-7 to -9; 204-7 to -8). The victim also protested and asked what the Defendant was doing with a gun. (3T 205-20 to -21). Defendant then put the gun down on the counter and Mr. Taylor observed that it had a magazine in it, though he could not tell if it was loaded. (3T

[2] It was stipulated that that the Defendant owned a Gen4 Glock Model 23. It was his service weapon that he purchased from the Tenafly Police Department. (6T 133-8 to -16; 8T 146-11 to -16).

204-8 to -9; 205-22 to -23; 206-22 to -24). Up until that point, Mr. Taylor testified there was nothing in their conversation concerning handguns and no one asked the Defendant to retrieve a handgun. (3T 207-1 to -7; 262-1). Though, Mr. Taylor acknowledged that he did make a joke that he is the "guy who takes his gun to an abortion." (4T 30-16 to -17). Ms. Monteleone similarly testified that she did not recall them having any conversations about guns that night. (2T 79-16 to -18).

After Defendant put the gun down, they continued their conversation and discussed music. (3T 207-16 to 208-1; 2T 79-4 to -9). A few minutes later, Defendant picked the gun up again and Mr. Taylor stated, "That gun's f***in' loaded." (3T 208-4 to 209-7). The victim mirrored Taylor's statement and the Defendant stated, "No, it's not." (3T 209-8 to -11). Mr. Taylor explained that he knows the difference between a loaded Glock and an empty Glock because there is a "tremendous weight difference" and because "everything" is "just different." (3T 209-12 to -15). When the slide is released and it is empty, there is a quick hollow sound, whereas when there is a projectile, the sound is slower and more mechanical. (3T 214-11 to 215-13). Mr. Taylor also testified that he did not "know what sparked [Defendant] to pick the gun up . . . It was a very upbeat evening. It was very positive." (3T 208-6 to -9).

The Defendant then swung down and released the slide, at which point, Mr. Taylor observed "brass." (3T 209-16 to -18). The victim asked, "What the f*** you

doing?" and Defendant released the slide and turned in a manner that Mr. Taylor interpreted as the Defendant attempting to show that he was right and the weapon was not loaded. (3T 209-18 to -23). Mr. Taylor testified, "I feel like he was intending to dry fire it our direction to say, basically screw you. I told you the gun was empty, but that's not what happened." (3T 209-25 to 210-2). Mr. Taylor and the victim both told the Defendant at least two (2) or three (3) times that the gun was loaded and asked what he was doing. (3T 210-3 to -8). The Defendant then shot the victim. (3T 210-8). Mr. Taylor observed that the Defendant pointed the gun in the victim's direction. (4T 18-6 to -7; 19-6). He explained that the gun "actively went off because there was a bullet in the magazine." (3T 215-24 to -25).

After the gun went off, Mr. Taylor's ears were ringing and he asked the victim if he was shot. (3T 217-4 to -8). The Defendant stated, "Holy shit, the guns loaded." (3T 217-5). The victim then lifted up his shirt, there was no blood yet, but there was a perfect hole in his lower abdomen. (3T 217-12 to -15; 19-20; 4T 14-10 to -11). The victim stated, "[Y]ou shot me." (3T 217-15; -21). Mr. Taylor explained, "it just spiraled out of control from there" as the victim started bleeding. (3T 217-23 to -24). Mr. Taylor handed the Defendant a rag, told him to put pressure on the wound, and advised that he was going to call 9-1-1. (3T 217-25 to 218-6).

Ms. Monteleone heard the shot while she was on the other side of the kitchen, though she never saw the gun. (2T 79-19 to -21; 97-4 to -7). After hearing the shot,

she got up, walked around the counter, and observed blood on the floor. (2T 80-2 to -4). Ms. Monteleone then panicked, left the residence without her shoes, and started to run away. (2T 81-10 to -24; 107-14 to -18; 3T 233-9 to -18). The handgun ended up on the counter near the stove and Mr. Taylor did not see the Defendant handle the weapon again after the shot was fired. (3T 219-4-9; -20 to -22).

At approximately 1:00-1:30 a.m., Mr. Taylor called 9-1-1 and told dispatch that his "buddy just shot his husband" and requested medics. (3T 220-7 to -13). The 9-1-1 call was played for the jury. (3T 225-16 to 227-20; S-11). Mr. Taylor acknowledged on cross-examination that when asked how the gun went off, he told the 9-1-1 operator that he did not know and that "[Defendant] didn't think the gun was loaded." (4T 21-24 to -25). He also did not tell police that the Defendant was dry firing at his husband to prove the gun was not loaded. (4T 25-23 to 26-1). Mr. Taylor told the Defendant to keep direct pressure on the victim and observed that the Defendant was "hysterical" and said, "This can't be real." (3T 221-15 to -25).

Up until that point, Mr. Taylor observed the Defendant consume two (2) vodka drinks at the VFW, a Yuengling beer at the VFW, and the vodka strawberry drink at Defendant's house. (3T 228-1 to -7). In terms of intoxication, he testified that it was not "the worst [he'd] ever seen [Defendant]." (3T 228-14 to -17). Mr. Taylor further testified that he himself did not feel intoxicated. (3T 229-3). Though, in his mind, "it was just reckless handling" and Defendant "just happened to shoot

[J.K.] and not [him] or Jen." (3T 232-12 to -18). Taylor explained, "I'm saying that [Defendant] didn't mean to shoot [J.K.]. But I am saying that he absolutely put it in his direction and the gun went off and he pulled the trigger." (4T 36-10 to -13).

On July 26, 2023, at approximately 1:00 a.m., Patrolman Joseph White of the Vernon Township Police Department was dispatched to Defendant's residence in Vernon on report of an adult male with a gunshot wound. (2T 112-12 to 113-13; 136-1 to -3). Upon arrival, he met Mr. Taylor who escorted him inside the residence. (2T 113-24 to -25; 3T 229-16 to -19). When he entered the residence, he observed the Defendant rendering aid to the victim who was lying on the kitchen floor and appeared to have suffered a gunshot wound. (2T 114-1 to -8). Patrolman White observed a handgun on the kitchen counter with the slide open and the barrel visible. (2T 114-12 to -15; 118-5 to -15; S-66A). Specifically, the weapon was a black Glock handgun. (2T 117-20 to -22; 120-24).

Shortly thereafter, Sergeant Kuzicki and Corporal Russo of the Vernon Township Police Department arrived on scene as well as medical personnel that took over rendering aid to the victim. (2T 121-10 to -19). Medical personnel made Patrolman White aware of a shell casing on scene and Patrolman White took possession of it. (2T 121-20 to 123-25). Detective Matthew Maines of the Vernon Township Police Department then arrived on scene and observed that Sergeant Kuzicki, Corporal Russo, and Patrolman White were present with EMS personnel.

(5T 203-2 to -4). Detective Maines approached the Defendant and observed that there was blood on the Defendant's hand. (5T 211-2 to -8). Detective Maines also observed blood on the kitchen floor and counter. (5T 211-9 to -13; S-4). Through the course of his investigation, Detective Maines learned that there were firearms located in the residence. (5T 216-15 to -17). There was a gun safe in the bedroom and Sergeant Kuzicki provided Detective Maines with a handgun.[3] (5T 216-18 to -23; 218-5 to -5). Detective Maines observed that the handgun had the magazine inside it and the slide was locked to the rear. (5T 219-1 to -2). Detective Maines made sure the weapon was safe by taking the magazine out, and checking the chamber to see if there were any projectiles inside. (5T 219-7 to -11). He observed ten (10) rounds in the magazine. (5T 219-14 to -17 to 221-25; S-9; S-10). After ensuring that the firearm was safe, Detective Maines took possession of the firearm and magazine and secured them as evidence at the police station. (5T 222-22 to 227-13; S-66A; S-67). Detective Maines also took possession of a spent shell casing that was retrieved by Patrolman White and one live round of ammunition that had not been discharged and was located on the kitchen counter. (5T 228-2 to -19; S-66B; 5T 229-21 to 230-22; S-68).

[3] The parties stipulated that the Defendant was a 14-year veteran of the Tenafly Police Department and that the Gen4 Glock Model 23, serial number ZLZ915, was his service weapon. On September 2, 2022, the Defendant, Joseph C. Grieco, purchased said weapon from the police department. The State and Defense agreed to the admissibility of the handgun in evidence. (6T 133-8 to -16; 8T 146-11 to -16).

Patrolman White transported the Defendant back to the Vernon Police Department. (2T 139-19 to -22). Patrolman White testified that he did not administer any type of field sobriety testing or ask Defendant to submit to a breath test. (2T 139-11 to -18; 140-2 to -11). Patrolman White explained that while there is a per se amount of alcohol for a Driving While Intoxicated charge to be issued, .08% Blood Alcohol Content ("BAC"), there is no per se amount of alcohol that is considered in the context of allowing somebody to use a firearm. (2T 143-17 to 144-19). The victim was ultimately removed from the residence by EMS personnel. (5T 204-17 to 205-2).

Dr. Margaret Prial conducted an autopsy of the victim on July 26, 2023. (4T 141-2 to -4). Dr. Prial observed that the victim had a gunshot wound in his torso and a partial exit wound indicating that the bullet did not exit the body. (4T 141-17 to -23). The bullet passed through the victim's abdomen wall, through the small intestine, the mesentery tissue, the right iliac artery, through the urethras and muscle in the abdomen pelvic region before going through the left hip bone. (4T 142-6 to -22). The path of the bullet was front to back, right to left, and slightly downward. (4T 145-22 to -23). The victim suffered internal bleeding and, in her opinion, it would have taken approximately 2-3 minutes for the victim to bleed to death. (4T 143-1 to -3; 151-2 to -4). Dr. Prial was able to remove the bullet. (4T 149-6 to -8; -19 to -25; S-66C). Toxicology testing revealed that the victim had alcohol present in

his system and his Blood Alcohol Level was .216%. (4T 150-12 to -24; 152-2). Dr. Prial ultimately determined that the cause of the victim's death was a gunshot wound of the torso and the manner of death was homicide. (4T 151-9 to -12).

Earl Williams, an investigator in the Ballistics Unit of the New Jersey State Police testified that he examined the Defendant's .40 caliber Glock semi-automatic pistol in this case as well as a discharged bullet and discharged cartridge case. (4T 172-4 to -13; 173-4 to -5). In his examination, the weapon was in "normal condition" and there was no malfunction in the external, internal, or trigger safeties. (4T 175-18 to 177-11). In addition, the trigger safety, fire pin safety, and drop shelf safety were operable and would prevent the weapon from firing unless the trigger was pulled. (4T 179-4 to 180-2). After completing the safety checks, Investigator Williams was able to determine that the weapon was operable and capable of being discharged by firing a test fire. (4T 178-2 to -14). Investigator Williams was also able to conclude that the cartridge case and bullets submitted were discharged from the submitted Glock. (4T 181-19 to -24). Through a trigger pull analysis, it was determined that six pounds of pressure were necessary to pull the trigger. (4T 182-18 to 183-1). Based on his examination, he concluded that there was nothing that would cause the gun to fire without pulling the trigger. (4T 183-15 to -18).

Sergeant Jason Garrigan of the Sussex County Prosecutor's Office testified as an expert in the field of firearms. (5T 17-13 to -16). Sergeant Garrigan testified that

there is a considerable weight difference between a .40 caliber Glock 23 with a loaded magazine as opposed to an unloaded magazine. (6T 22-4 to -20). He further testified that if a magazine is loaded into the handgun while the slide is in the rear position, one would be able to see the casing through the ejection port, commonly referred to as "brass." (6T 27-22 to 28-1; 30-1 to -4). Sergeant Garrigan noted that the Glock is a common handgun in law enforcement due to its safe action system. (6T 30-16 to 31-1). He explained that the Glock has three (3) internal safeties – the trigger safety, the fire pin safety, and the drop safety that make it very difficult to fire without pulling the trigger. (6T 31-8 to -13). In order to pull the trigger, one would need to press the trigger safety or the weapon will not fire. (6T 31-21 to 32-1). The firing pin safety then needs to be depressed in an upward motion to allow the firing pin to clear and the drop safety locks the rear part of the firing pin until clicked down. (6T 32-6 to 33-18).

In connection with this case, on December 4, 2024, Detective Garrigan conducted an examination and testing of the Defendant's .40 caliber Glock 23 as well as a prosecutor owned Glock 23. (6T 20-8 to -13; 33-19 to -25; 35-1 to -4; 35-19 to -21). The purpose of the testing was to determine if the Glock would fire in any condition where the trigger was not pulled. (6T 34-1 to -4). The first condition involved inserting a loaded a magazine into the well of the gun and sliding the slide forward without depressing the trigger, neither gun fired under this condition. (6T

37-12 to -23). He explained that when a firearm discharges because of slide movement without a trigger pull, it is referred to as a "slam fire." (6T 37-24 to 38-2). In this case, the weapon did not fire because the trigger safety, fire pin safety, and drop safety all functioned as they should have. (6T 38-19 to -21). The second condition involved loading a round into the barrel with no magazine, and utilizing the slide without trigger manipulation – neither gun fired under this condition. (6T 39-11). The third condition involved putting a loaded magazine in the magazine well and applying moderate trigger pressure as the slide is released. (6T 39-17 to -21). The weapons did fire when pressure was applied to the trigger. (6T 39-21 to -23; 40-7 to -11). Detective Garrigan explained, however, that this condition involved improper handling of the firearm because "at no point in time in any kind of firearms instruction would you ever train a firearms handler to put their finger on the trigger while they're loading the weapon or manipulating the slide." (6T 40-3 to -6).

Another condition involved loading the weapon with no magazine in the well with the slide back and holding the gun in a loose fashion while firing causing the weapon to recoil improperly and create a "stovepipe" on the first shot fired. (6T 41-23 to 42-3; 43-1 to -15; -18 to 44-2). Detective Garrigan explained that a "stovepipe" is a situation where when the weapon recoils, it comes back and ejects the empty shell casing out of the gun causing the shell casing to get caught in the ejection port and stick out of the side, looking like a stovepipe. (6T 40-24 to 41-5). A stovepipe

may impact a second, third, fourth, or fifth round and the malfunction would need to be cleared to make the weapon operable again. (6T 41-11 to -14). Under this condition, because of the way Detective Garrigan held the gun, the weapon stovepiped twice. (6T 44-3 to -25). It did not, however, render the handgun in need of repair or render the handgun defective. (6T 45-6 to -12). Through all Detective Garrigan's testing of Defendant's firearm, it did not fire without the trigger being pulled. (6T 46-1 to -2; 6-8). Based on his testing and expertise, he concluded that on July 26, 2023, the trigger was pulled and the weapon went off. (6T 60-4 to -5).

Detective Garrigan further testified that there are certain safety rules regarding the safe handling of a firearm that are taught to everyone including, "Know your target and beyond[,]" "Never point your weapon at a human being" and "Never put your finger on the trigger unless you're ready to fire." (6T 93-23 to 94-1). He explained that "you never point your weapon in an unsafe direction" and that you should "[t]reat every gun as if it's loaded." (6T 81-16 to -20; 6T 94-7 to -11).

Defense Case

Dr. Gary Lage, an expert in the field of toxicology and pharmacology testified on behalf of the defense regarding the use of field sobriety tests to determine intoxication based on alcohol. (6T 139-2 to 141-15). Dr. Lage testified that after reviewing the evidence regarding the amount of alcohol the Defendant consumed between 8:45-10:30 p.m. at the VFW and between 10:30p.m.-1:00 a.m., the

Defendant had an estimated blood alcohol content of approximately .02 - .03 at 1:00 a.m. (6T 144-1 to -25; 147-17 to -19). Dr. Lage explained that the illegal blood alcohol for driving while impaired purposes is 0.08%. (6T 146-19 to 147-2). Dr. Lage opined that based on his estimate of the Defendant's blood alcohol level, that being .02 - .03, "that that's below any level that would have a significant impact on somebody's cognitive abilities or any other impact in terms of the shooting." (6T 151-1 to -4). When asked to define, "intoxication" Dr. Lage specifically testified as follows: "Our legislatures have determined that you're intoxicated for operating a motor vehicle when you're at .08." (6T 159-9 to -13). Though he acknowledged that this case did not involve driving a car. (6T 159-14 to -15).

On cross examination, Dr. Lage also acknowledged that a blood alcohol content in the range of .01-.05 would decrease inhibitions and diminish judgment. (6T 152-10 to 153-24; 189-24 to 190-2). Dr. Lage testified on cross-examination that exercising good judgment is an important facet of handling a handgun and that consuming alcohol to the point where judgment is diminished could impact a person's ability to handle a firearm. (6T 155-12 to -19). He also testified that the amount of ounces per serving would impact the blood alcohol level and that if there were more ounces in each serving, the blood alcohol level could increase to as high as .09%. (6T 178-1 to 183-1).

Shaun Jaikissoon, an expert in the field of firearms and operability testified that there can be malfunctions with any type of firearms due to "negligence of maintenance." (6T 198-22 to -23). In reviewing Detective Garrigan's report, Mr. Jaikissoon opined that there was no type of user error that would cause the gun to stovepipe three (3) times in the hands of someone who is trained and experienced. (7T 204-24 to 205-2; 207-8 to -10). As such, he testified that he would render the weapon "unsafe and it would be recommended for repair or some professional to look at it." (7T 216-19 to -22). Mr. Jaikissoon testified on cross-examination, that it is proper etiquette and training to ensure that a weapon is not loaded and that one should always assume a handgun is loaded. (7T 220-3 to -25). He further acknowledged that the during Detective Garrigan's testing, the weapon only stovepiped twice and not three (3) times as he testified to on direct. (7T 224-7 to -17). He also acknowledged that the only time the weapon stovepiped was when the weapon was fired without a magazine. (7T 228-10 to -21).

Robert O'Malley testified that he has known the Defendant for over 20 years and that he is a very well-respected member of his community. (8T 32-16 to 33-21). Ann Ostrowski, the victim's mother, similarly testified that she has known the Defendant for 15 years and that she has "always held him highly" noting that he has always been "respectful, loving, and always shows care." (8T 35-7 to -21).

LEGAL ARGUMENT

POINT ONE

THE LOWER COURT DID NOT ERR IN ALLOWING PATROLMAN WHITE TO TESTIFY ON REDIRECT EXAMINATION REGARDING PER SE BLOOD ALCOHOL LEVELS

The Defendant first submits that the trial court committed reversible error when it allowed Patrolman White[4] to testify concerning blood alcohol levels over defense objection. (Db20). Defendant argues that this testimony was impermissible because Patrolman White was not qualified as an expert and because it amounted to an impermissible opinion about the law. (Db21). The State submits that the lower court properly allowed the testimony on redirect examination after defense counsel opened to the door to such questioning, specifically, by asking Patrolman White on cross-examination about Driving While Intoxicated ("DWI") investigations. The State further submits that the lower court correctly determined that this was not impermissible opinion testimony.

On appellate review, a trial court's evidentiary rulings are "entitled to deference" and will not be reversed "unless the court not only abused its discretion but was also clearly wrong." State v. R.E.B., 385 N.J. Super. 72, 82 (App. Div. 2006)(citing State v. Marrero, 148 N.J. 469, 483-84 (1997)). Simply stated, "[A]n

[4] It should be noted that Patrolman White is referred to as "Patrolman Thomas White" in Defendant's submissions. (Db20). As reflected by the record, Patrolman White's first name is "Joseph." (2T 111-1 to -10).

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. at 484). In this case, the State submits that the lower court did not abuse its discretion in allowing Patrolman White to testify about per se blood alcohol levels over the defense objection.

As noted by defense counsel, it was undisputed at trial that the Defendant consumed alcoholic beverages on July 25-July 26, 2023. (Db20). During opening statements, defense counsel acknowledged this but indicated as follows:

> Not every accident is a crime. But what you're not gonna [sic] hear some of you, we'd ask questions about if you're familiar with alcohol. I think some people may have indicated that they're familiar with the DWI case.
>
> You're not gonna [sic] hear any proof that Joe was under the influence. You're not gonna [sic] see a lab test result. You're not gonna [sic] see a breath test result. You're not gonna [sic] see any field sobriety test.
>
> And it's not gonna [sic] be disputed that he went out to dinner. He was at the VFW. But you're not gonna [sic] hear any testimony that he was intoxicated.
>
> [2T 99-18 to 100-3.]

During the course of trial, Patrolman White then testified as to his response on the night in question and the actions he took at the scene. Patrolman White explained that he was the first officer to arrive on scene and when he entered the residence, he observed the Defendant rendering aid to the victim who was suffering

from a gunshot wound. (2T 114-1 to -8). As part of his investigation, he observed a handgun on the counter, though he did not touch it, and he recovered a shell casing. (2T 114-14 to -15; 117-6 to -13; 118-5 to -11; 120-3 to -4; 121-20 to 122-24).

On cross-examination, defense counsel confirmed that Patrolman White was responsible for transporting the Defendant to the Vernon Township Police Department that night. (2T 139-19 to -22). He also confirmed that he was familiar with handguns and trained regarding firearms. (2T 132-10 to 135-5). He then asked Patrolman White if he performed any type of field sobriety testing on Defendant. (2T 139-5 to -18). He also confirmed that Patrolman White was a certified Alcotest operator and asked him if he administered an Alcotest in this case or if Defendant's blood was drawn. (2T 139-23 to 140-24). Patrolman White indicated that he did not administer any field sobriety tests, administer an Alcotest, and Defendant's blood was not drawn. (2T 139-15; 140-2 to -18). On redirect, in response to defense counsel's questioning concerning field sobriety testing and administration of an Alcotest, the Assistant Prosecutor confirmed with Patrolman White that those tests are generally performed when there is a DWI stop. (2T 142-22 to -3). She confirmed with the officer that there was no motor vehicle stop or DWI charge in this case. (2T 144-4 to -8). The following colloquy then ensued:

QUESTION:	Officer, you indicated there was no DWI charges, correct?
ANSWER:	Correct.

QUESTION: Is there a per se amount of alcohol for a DWI charge to be issued?

ANSWER: .08.

QUESTION: Is there a per se alcohol amount charged or is there any per se alcohol amount that could be consumed to make it safe to operate a firearm?

[2T 143-14 to -22.]

Defense counsel objected as to foundation and on the grounds that the answer called for a legal conclusion. (2T 143-23 to -24). The Assistant Prosecutor countered that defense counsel opened the door by questioning the officer concerning blood alcohol content and the Alcotest. (2T 144-1 to -3). The court concluded that it did not ask for an opinion and that the officer was permitted to answer as it was within his training and experience. (2T 144-8 to -11). The Assistant Prosecutor then asked, "Officer, is there any per se amount of alcohol that would be permitted to allow somebody to use a firearm?" (2T 144-16 to -18). Patrolman White responded, "No." (2T 144-19). Defense counsel did not ask any questions on re-cross. (2T 144-23).

Defendant now submits that the lower court erred in allowing the testimony over his objection and argues that the court was required to conduct a Rule 104 hearing to determine if Patrolman White had "any relevant experience with rules for alcohol consumption with regard to the use of a firearm." (Db21). It is the State's position that this argument is without merit. "Trials, particularly criminal trials, are not tidy things. The proper and rational standard is not perfection; as devised and

administered by imperfect humans, no trial can ever be entirely free of even the smallest defect." State v. R.B., 183 N.J. 308, 333-34 (2005). As noted by our Supreme Court, "A defendant is entitled to a fair trial but not a perfect one." Id. at 333-24 (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)). Mistakes at trial are subject to the invited-error doctrine. State v. A.R., 213 N.J. 542, 561 (2013). "Under that settled principle of law, trial errors that were 'induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." Id. (quoting State v. Corsaro, 107 N.J. 339, 345 (1987); See also State v. James, 144 N.J. 538, 554 (1996)(The "opening the door doctrine" authorizes the admission or otherwise irrelevant or inadmissible evidence to respond to admissible evidence that generates an issue or inadmissible evidence admitted over objection). Moreover, when an alleged error was brought to the trial judge's attention, it will not be grounds for reversal if it was "harmless error." State v. Macon, 57 N.J. 325, 338 (1971). In such cases, the reviewing court should determine whether the error was capable of producing an unjust result. State v. Mohammed, 226 N.J. 71, 87 (2016)(quoting R. 2:10-2).

As set forth above, an appellate court will defer to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). Our Supreme Court explained that appellate courts review the trial court's evidentiary rulings "under the abuse of discretion standard because, from its genesis, the

decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." See State v. Prall, 231 N.J. 567, 580 (2018). Evidentiary decisions are reviewed de novo, however, if the trial court applies the wrong legal standard in deciding to admit or exclude the evidence. State v. Trinidad, 241 N.J. 425, 448 (2020). Further, if an abuse of discretion is found, the appellate court must determine whether the error was harmless or requires reversal. State v. Prall, 231 N.J. at 581.

Here, defense counsel established that Patrolman White was familiar with firearms and DWI investigations through his training and experience. (2T 133-3 to 135-9; 139-1 to 140-24). Defense counsel then proceeded to question Patrolman White about testing that is only performed in connection with DWI investigations. Defense counsel specifically asked whether the officer had performed any field sobriety testing in this case, confirmed that he was a certified Alcotest operator, and noted that he did not administer an Alcotest to the Defendant after transporting him to the police station. (2T 139-5 to 140-24). After opening the door to this line of questioning, on re-direct, the State was permitted to question the officer as to why field sobriety tests and/or an Alcotest would not be administered in a case that did not involve a motor vehicle stop or DWI investigation. The State, therefore, attempted to distinguish a DWI investigation from the Defendant's actions in this case which entailed consuming alcohol and handling a firearm. Specifically, by

confirming that no testing was required because there is no law setting a per se BAC limit in connection with the handling of firearms.

While Patrolman White was not qualified as an expert, his familiarity with firearms and DWI investigations was established at trial and defense counsel questioned him about these two (2) areas on cross-examination. The trial court, thus, correctly ruled that based on his established training and experience, Patrolman White was permitted to provide an explanation as to why certain tests were not performed in connection with his interaction with the Defendant on the night in question. The trial court's ruling in this regard did not amount to an abuse of discretion warranting reversal.

Further, as set forth in more detail below, any prejudice that may have arisen from this testimony was mitigated by a limiting instruction that was read to the jury regarding what impact, if any, the Defendant's alcohol consumption may or may not have had on his actions. (8T 136-8 to 137-25). The limiting instruction also specifically advised the jurors that New Jersey does not have a law that specifically deals with alcohol limits and firearms in a residence. (8T 136-18 to 137-1). Wherefore, the State respectfully submits that there is no basis to reverse the Defendant's conviction on these grounds.

POINT TWO

THE STATE'S EVIDENCE CONCERNING THE DEFENDANT'S CONSUMPTION OF ALCOHOL WAS APPROPRIATELY ADMITTED TO ESTABLISH THAT THE DEFENDANT ACTED RECKLESSLY, RESULTING IN THE VICTIM'S DEATH

The Defendant next submits that the State erred when it offered N.J.S.A. 2C:58-4.4(1) on cross-examination of the defense's expert, Dr. Gary Lage, without pretrial notice to the defense or to the court. (Db22). Defendant asserts that the lower court erred in denying his Motion for a Mistrial on these grounds and argues that he was "irreparably prejudiced by the introduction of inapplicable law" as it suggested "bad character, prior bad acts, and propensity the violate the law." (Db24). It is the State's position that it did not elicit any prior bad acts or bad character evidence in this case. The State further submits that the lower court properly held that the State was permitted to use the Carry Permit law to cross-examine the defense's expert after the expert testified regarding DWI law. The lower court also issued a proper limiting instruction about the permissible uses of this testimony, thereby eliminating any possibility of prejudice that may have resulted from the testimony itself.

A decision to grant or deny a motion for mistrial is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion that results in a manifest injustice. State v. Smith, 224 N.J. 36, 47 (2016); State v. Jackson, 211 N.J. 394, 407 (2012). "The grant of a

mistrial is an extraordinary remedy to be exercised only when necessary 'to prevent an obvious failure of justice.'" State v. Yough, 208 N.J. 385, 397 (2011) (quoting State v. Harvey, 151 N.J. 117, 205 (1997)). "If there is 'an appropriate alternative course of action,' a mistrial is not a proper exercise of discretion. State v. Smith, 224 N.J. at 47 (quoting State v. Allah, 170 N.J. 269, 281 (2002)). "For example, a curative instruction, a short adjournment or continuance, or some other remedy, may provide a viable alternative to a mistrial, depending on the facts of the case." Id. at 47. Moreover, appellate courts will defer to a trial court's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. at 430.

In the instant case, the Defendant called Dr. Gary Lage to testify as an expert in the field of toxicology and pharmacology. Dr. Lage testified regarding approved methods to determine intoxication including chemical tests from blood or indirect tests based on a Breathalyzer or an Alcotest. (6T 138-15 to -24). He testified regarding field sobriety tests explaining that they were developed by the National Highway Traffic Safety Administration to aid officers in developing probable cause to determine if a person is intoxicated for driving while intoxicated purposes. (6T 139-3 to -10). He described the three (3) field sobriety tests – the Horizontal Gaze Nystagmus, Walk-and-Turn, and the One-Leg Stand as well as other indicia of intoxication such as slurred speech; bloodshot, blurry eyes; an odor of alcohol; failure to maintain balance when exiting a vehicle; throwing up; and urination. (6T

139-13 to 141-8). Dr. Lage also testified that it is possible to provide an estimate assessment of a blood alcohol level by analyzing the amount of alcohol a person drank over a period of time while taking into consideration that person's height and weight. (6T 141-16 to 143-15). After reviewing the evidence in this case regarding the amount of alcohol the Defendant consumed between 8:45-10:30 p.m. at the VFW and between 10:30p.m.-1:00 a.m., and considering his height and weight, that the Defendant had an estimated blood alcohol content of approximately .02 -.03% at 1:00 a.m. (6T 143-21 to 147-19). Dr. Lage acknowledged that this was not a "car involved case" but explained that the legal blood alcohol for driving while impaired purposes is 0.08%. (6T 146-19 to 147-2). Dr. Lage opined that based on his estimate of the Defendant's blood alcohol level, that being .02-.03, "that that's below any level that would have a significant impact on somebody's cognitive abilities or any other impact in terms of the shooting." (6T 151-1 to -4).

On cross-examination, Dr. Lage testified that a BAC of .01 to .05 impacts the frontal lobe, is considered the "euphoria" stage, and would "absolutely" affect a person's inhibitions and diminish judgment. (6T 151-25 to 153-3). He testified that a BAC of .05 to .10 also impacts the frontal lobe, is considered the "excitement" stage, and results in dulled attention and impaired coordination. (6T 153-18 to 154-13). He explained that judgment is affected at a fairly low blood alcohol level, that exercising good judgment is an important facet of handling a handgun, and

consuming alcohol to the point where judgment is diminished "could" impact a person's ability to handle a firearm. (6T 155-7 to -19). He also testified that he was unaware of the specific amount of ounces Defendant consumed but the amount of ounces per serving would impact the blood alcohol level and that if there were more ounces in each serving, the blood alcohol level could increase to as high as .09%. (6T 178-1 to 183-1). When asked to define, "intoxication" Dr. Lage specifically testified as follows: "Our legislatures have determined that you're intoxicated for operating a motor vehicle when you're at .08." (6T 159-9 to -13). He then acknowledged that this case did not involve driving a car and that he was not aware of any laws in New Jersey regarding the consumption of alcohol and handling of firearms. (6T 159-14 to -19).

In response to this testimony, the State sought to impeach Dr. Lage by showing him the New Jersey Carry Permit Law under N.J.S.A. 2C:58-4.4 entitled "Safety Requirement Handgun Carry." (6T 160-8 to -25; 162-13 to -16). The State explained that throughout the direct examination of the witness, Dr. Lage testified regarding alcohol consumption, intoxication, and impairment while continuously relating back to the standard as related to DWI investigations, namely a legal limit of .08. (6T 162-17 to -24). The State, therefore, sought to impeach the doctor by showing him that there are laws that provide that an individual cannot consume alcohol while carrying a handgun in order to demonstrate that the legislature has not

deemed .08 to be the mark for impairment in firearms cases. (6T 162-25 to 163-11). The defense objected stating that "under the influence is very clear in New Jersey what that is and what it is not" noting that it is defined under the Vehicular Homicide statute and under the DWI statutes. (6T 163-13 to -25). He went on to argue that if the State wanted to ask Dr. Lage for a legal conclusion, the State would need to give him the "legal definition for under the influence in New Jersey, which is .08, which is clearly not what Mr. Grieco's level was." (6T 164-10 to -22; 166-1 to -3). Counsel also argued the Carry Permit law was not relevant to the facts of this case as the Defendant did not have a Carry Permit and was not required to have one given the circumstances. (6T 165-4 to -17; 166-8 to -13).

In allowing the State to impeach the witness using the Carry Permit law, the court explained that the State was permitted to use the statute, not specifically as it relates to the Defendant having a permit or not, but rather, to impeach and challenge the witness's testimony that intoxication equals .08 for purposes of impaired driving and to establish that there are other statutes that distinguish between driving and intoxication as opposed to intoxication in the context of handling a firearm. (6T 166-14 to -21; 169- 9 to 170-9). In so ruling, the court noted that "the Defense opened the door by eliciting testimony that equated being under the influence to .08 as it relates to operating a motor vehicle." (6T 169-9 to -12).

The State then questioned Dr. Lage as follows:

QUESTION: Then would you agree that the statute reads, "Safe carry require my -- requirements for authorized holders of a permit to carry a handgun. The holder of a permit to carry a handgun. The holder of a permit to carry a handgun issued pursuant to N.J.S.A. 2C:58-4 shall not use or consume alcohol, a cannabis item, or a controlled substance while carrying a handgun."

ANSWER: That's what it says.

QUESTION: Would you agree that the next line says -- again, going to the shall not -- "shall not be under the influence of alcohol, cannabis, or a controlled substance while carrying a handgun."

ANSWER: That's what it says.

QUESTION: Okay. And subsection 2 about talking about the influence makes no reference to .08; is that correct?

ANSWER: No.

QUESTION: And would you agree that .08 is the benchmark or per se for motor vehicles; correct?

ANSWER: Correct.

QUESTION: And we are not dealing with a motor vehicle in this case; correct?

ANSWER: Correct.

[6T 171-17 to 172-14.]

Despite this testimony, on re-direct, Dr. Lage maintained his opinion that the Defendant was not under the influence at the time of the incident at 1:00 a.m. based

on his definition of "under the influence" being the .08 range. (6T 188-22 to 189-2; 190-17 to 191-7).

On January 14, 2025, counsel made an application for a Mistrial arguing, among other things, that the statute does not apply to Defendant because he was not a carry permit holder. (8T 6-12 to 9-21). In denying the Motion, the court noted that defense counsel did argue that the statute did not apply to his client at the time of questioning and that the State was using it strictly for the purposes of impeachment. (8T 16-9 to -16). The court also noted that the defense did not request a limiting instruction at that time. (8T 16-17 to 17-14). When suggesting a limiting instruction, counsel agreed that an instruction was "possible" and asked the court to advise the jury that Defendant was not subject to the carry permit law. (8T 19-4 to -14). He also argued that Dr. Lage did not cite to the motor vehicle statute despite the fact that Dr. Lage did define intoxication in terms of the DWI statute, which the court explained "opened the door to this entire issue." (8T 23-5 to 24-11). The court noted that "under the influence can be many things other than 0.08 under the DWI statute" and counsel agreed. (8T 24-21 to -23). The court then ruled as follows:

> The defense application for a mistrial will be denied for the following reasons. The issue before the Court is the use N.J.S.A. 2C:58-4.4 as part of the Defense -- strike that -- the State's cross-examination of the Defense toxicology expert Dr. Gary Lage. The Court is satisfied that the issue of defining and describing and understanding intoxication was in fact opened -- the door was opened to that by the Def-, by the Defense in its direct questioning of Dr. Lage.

In responding to that questioning Dr. Lage described intoxi-, intoxication in New Jersey as he understands it as 0.08 under the motor vehicle DWI statute. The Defense -- and, and the, the clear implication and import of the testimony was that as far as Dr. Lage was concerned intoxication would not occur unless somebody was a level of 0.08. the State had every right to challenge his testimony and impeach his credibility when it came to that assertion.

First of all, it's an incorrect assertion under the DWI statute because, as I just referenced, there in fact is an entire second level of analysis under 39:4-50 that's commonly referred to as the observation standard where, without any BAC level or even a BAC level of below 0.08 a fact finder has the ability to conclude, based upon the totality of the circumstances, that somebody who has imbibed alcohol to a point where their, their ability to safely operate a motor vehicle was impaired can also be found guilty of driving under the influence, of being the under the influence of alcohol to an extent where they could not safely operate a motor vehicle.

So, the Court finds that it was fair and appropriate under those circumstances to challenge Dr. Lage's credibility when it comes to his assertion that intoxication in New Jersey is essentially equivalent to 0.08 based on the DWI statute. It was made clear on Mr. Lisboa's redirect that in fact there is no specific BAC limit that applies to the possession and use of firearms in New Jersey. The Defense was aware that the Court was allowing the cross-examination regarding the statute in question, 2C:58-4.4, for the limited purpose of challenging the -- or impeaching the credibility of Dr. Lage.

Under Evidence Rule 105 it had the right to make a request for a limiting instruction. It did not do so. That is something we can engage in further discussion in regarding or during the charge conference as to whether it would be appropriate to include as part of the credibility instructions, for example a limiting instruction as it relates to that particular testimony. I believe the record was clear that this statute did not specifically apply to Mr. Grieco, that it was introduced for a different purpose. It was appropriate for the State to challenge that witness's position as it relates to a definition of intoxication.

The Court does not find that the testimony was therefore wrongful or inappropriate in any way. The testimony did not suggest propensity evidence. It, it did not delve into -- it did not confuse legal issues. It did

> not delve into areas beyond Dr. Lage's expertise, particularly since the door was opened by the Defense to that definitional aspect of intoxication to begin with. It was appropriate for the State to challenge how that may apply as it relates to the lawful use of firearms -- this witness's understanding of intoxication as it relates to the lawful use of firearms.
>
> [8T 26-3 to 28-19.]

Defendant argues that the trial court improperly concluded that the defense opened the door to use of N.J.S.A. 2C:58-4.4 and erred in denying the motion. (Db24). In support of this position, defense submits that the court should have instructed the jurors that "the mere consumption of alcohol does not, by itself, constitute reckless conduct." (Db24). He further asserts that the court did not weigh the probative value of the evidence against its prejudicial effect warranting reversal. (Db26). The State submits that the lower court did not abuse its discretion in denying the mistrial motion and properly concluded that the State was lawfully permitted to question Dr. Lage using the carry permit statute for the very limited purpose of impeaching his credibility regarding his definition of "intoxication."

The State further submits that the court properly mitigated any improper use of the testimony and/or any prejudice that have may have resulted through the use of a carefully crafted limiting instruction that was consented to by both parties. (8T 58-8 to 65-10). Specifically, the court instructed the jurors as follows:

> There has been testimony during the trial regarding allegations that Mr. Grieco was consuming alcohol during the evening of July 25 and early morning time of July 26, 2023, and what impact, if any, such alcohol

> consumption may or may not have had on Mr. Grieco's actions. Whether Mr. Grieco consumed alcohol and, if he did, then how much he consumed and what effect, if any, the how -- the alcohol had on him and his actions are all factual questions for you, the jury, to decide.
>
> You may recall hearing testimony about what it mean [sic] to be intoxicated for purposes of the drunk driving laws in New Jersey, this case does not involve the New Jersey drunk driving laws. You may also recall hearing testimony during the cross-examination of Dr. Gary Lage about a New Jersey law that limits someone with a firearms carry permit from possessing or being under the influence, or being under the influence of alcohol while exercising their right to carry.
>
> That testimony was allowed for the limited purpose of challenging Dr. Lage's credibility, often referred to as impeachment evidence, when it came to his opinions on the interaction of New Jersey laws regarding alcohol and firearms use. It was merely offered for the very limited purpose as to whether or not it affects the credibility of Dr. Lage's testimony. It was not offered a [sic] substantive proof that Mr. Grieco had violated that law. In fact, if you find that Mr. Grieco had a firearm in his possession while in his residence on the date in question, the carry permit law would not even apply because one does not need a carry permit when owning or possessing a firearm within their residence.
>
> In fact, New Jersey does not have a law that specifically deals with alcohol limits and firearms in a residence. The issue of whether Mr. Grieco was under the influence of alcohol and, if so, what impact if any that may have had on the events in question is a fact question for the jury to decide under the totality of the circumstances, bearing in mind at all times that it is the burden of the State to prove each and every element of the offense charged beyond a reasonable doubt.
>
> [8T 136-8 to 137-25.]

The record, thus reflects, that the trial court properly addressed the issue and explained to the jurors that this case did not involve the New Jersey drunk driving laws nor did it involve the New Jersey carry permit laws. The court also reminded the jurors that they must "accept and apply the law for this case" as the judge

provides and that any ideas they have "of what the law is or what the law should be or any statements by the attorneys as to what the law may be must be disregarded… if they are in conflict with [the judge's] charge." (8T 126-12 to -17). There were no questions from the jurors expressing confusion regarding this instruction or how it applied to their deliberations.

To the extent that Defendant argues that it was prejudicial for the Assistant Prosecutor to argue in summation that alcohol and guns "don't mix" or to suggest that alcohol may be considered in determining whether the Defendant acted recklessly, the State submits that it was permitted to make these arguments especially in light of defense counsel's summation. (Db23; Db24). During Defendant's summation, counsel argued at length that the Defendant was not under the influence of alcohol. Defendant argued as follows:

> Mr. Grieco was not under the influence. Okay? Ask yourselves has the State shown you any proof that Mr. Grieco was under the influence.
> . . .
> Have you seen a single police witness come here on the stand to say, yes, we got a breath test? No. We got a blood test? No. How about we got field sobriety tests? No. The Prosecutor's gonna [sic] get up here and say, ladies and gentlemen, this is not a DWI. It's not. This is not a DWI. <u>But whether you're under the influence, whether you're walking or (inaudible) like driving, handling a firearm, or anything else it's the same. It's the same</u>. Have you heard any testimony from any credible witness, police, law enforcement who do this -- they do this; this is what they do -- come in here and tell you, you know what, he was falling down, he was stumbling, he was slurring his words, he smelled like alcohol? Anything like that? There is nothing. There's nothing.
>
> [8T 85-19 to -21; 85-25 to 86-14][Emphasis added.]

He then clarified that the gun permit law does not apply to the case stating as follows: "[T]he Prosecution did show Gar -- Dr. Lage a copy of the gun permit law. That doesn't apply in this case. This is not -- there's no gun permit violations. That law does not apply to Mr. Grieco. It does not apply to firearms in, in residences." (8T 88-2 to -9). He further argued, that the evidence reflected that "Joe is <u>not under the influence</u>. He's not. And [Dr. Lage] testified his understanding under the influence based upon his training. <u>And that's how they quantify alcohol is based upon what your levels are</u> -- that Joe at -- and this was giving all the drinks, within a .03 at best. That's <u>not under the influence</u>." (6T 87-3 to -9)(emphasis added). He then attacked the state's proofs regarding intoxication stating as follows:

> Look, if they wanted to prove to you that Mr. Grieco was under the influence, first of all, they have to believe he's under the influence; right? But there's been no testimony by anyone here that, yes, we believe alcohol was the cause of this <u>or contributed to it</u>. There's been no testimony about this and no opinion about that by an firearms expert, for example. Believe me, if they had proof of that they would have shown it you; right? If they had video of his falling down, stumbling, or something they would have shown that to you. They don't.
>
> . . .
>
> It's not a situation where they didn't have the resources, they didn't have the staff, they didn't have the talent. It's just not something they chose to do. Why didn't they choose to do it? Because they knew when they saw Joe that <u>Joe was not impaired. He was not under the influence</u>.
>
> [6T 87-14 to -24; 6T 95-5 to -10][Emphasis added.]

Despite this argument, it was undisputed at trial that the Defendant consumed alcohol. Intoxication is not an element of the offense of Aggravated Manslaughter

and the jury was not instructed to decide whether the Defendant was "under the influence" of alcohol on the date in question. Rather, the jury was able to consider the testimony concerning alcohol consumption, weigh the evidence presented, and determine whether the amount of alcohol consumed contributed in any way to the totality of Defendant's reckless conduct on the night in question. In fact, the defense's own expert opined that the Defendant had a BAC of between .02-.03 and that BAC levels between .01-.05 could impact a person's frontal lobe, reduce inhibitions, and diminish judgment. (6T 151-25 to 153-3). The State's comment that guns and alcohol don't mix was, therefore, a fair comment on the evidence and did not deprive the Defendant of a fair trial. See State v. Frost, 158 N.J. 76, 83 (1999); State v. Williams, 244 N.J. 592, 608 (2021). The State presented the jury with evidence that Defendant retrieved a handgun unprompted after consuming alcohol; failed to ensure that it was unloaded; lifted the firearm after being told numerous times that the gun was loaded; pointed it in the direction of his husband; and pulled the trigger, directly resulting in the victim's death. The jury was permitted to weigh this evidence against the defense theory of accidental discharge in determining whether the Defendant acted recklessly on the night he shot his husband.

The record reflects that the lower court did not abuse its discretion in its evidentiary rulings or in denying the motion for a mistrial. Moreover, because the court provided a detailed limiting instruction to the jurors regarding the permissible

use of the carry permit law, the State submits that the charge did not prejudicially affect the Defendant's rights or lead the jury to a verdict it might not otherwise have reached. There is nothing in the record to demonstrate that the jury improperly considered or relied on N.J.S.A. 2C:58-4.4 or found that the consumption of any amount of alcohol at all constituted reckless conduct in and of itself. Wherefore, the State respectfully submits that there is no basis to reverse the Defendant's conviction on these grounds.

POINT THREE

THE TRIAL COURT DID NOT ERR FOR FAILING TO SUA SPONTE INSTRUCT THE JURY ON THE DEFENSE OF MISTAKE OF FACT WHEN IT WAS NOT REQUESTED BY DEFENSE COUNSEL

Finally, the Defendant submits that the lower court erred for failing to instruct the jurors on "Mistake of Fact." (Db26). It is the State's position that the lower court did not err in failing to sua sponte charge the jury on Mistake of Fact without a request from defense counsel and that the absence of this instruction was not clearly capable of producing an unjust result to warrant reversal of his conviction.

It is a bedrock principle in our criminal justice system that appropriate and proper charges to a jury are essential for a fair trial. State v. Canfield, 470 N.J. Super. 234, 269 (App. Div. 2002)(citing State v. Carrero, 229 N.J. 118, 127 (2017), aff'd as modified, 252 N.J. 497 (2023)). Proper jury instructions are "crucial to the jury's deliberations on the guilt of a criminal defendant." State v. Jordan, 147 N.J. 409, 422

(1997). As such, trial courts have an "independent duty" to ensure that jurors receive "accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party." State v. Canfield, 470 N.J. at 169 (quoting State v. Reddish, 181 N.J. 553, 613 (2004)).

Improper instructions on material issues are presumed to constitute reversible error. State v. Jenkins, 178 N.J. 347, 361 (2004)(emphasis added). On appeal, the court must determine whether the trial court erred and if so, determine whether the mistake was "clearly capable of producing an unjust result such that a reasonable doubt is raised as to whether the error led the jury to a result it otherwise might not have reached." State v. Brims, 168 N.J. 297, 306 (2001). When a party does not object to a jury instruction, however, the instruction is reviewed for plain error. See R. 1:7–2; State v. Montalvo, 229 N.J. 300, 320 (2017); State v. Wakefield, 190 N.J. 397, 472-73 (2007), cert. denied, 552 U.S. 1146 (2008). Accordingly, any unchallenged errors or omissions should be disregarded unless they are "clearly capable of producing an unjust result." R. 2:10–2. If a defendant does not object to a jury charge at the time it is given, "there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012)(internal citation omitted). Plain error also requires a demonstration of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the

reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Montalvo, 229 N.J. at 321 (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

The prejudicial effect of an omitted instruction should be evaluated "in light of the totality of the circumstances – including all the instructions to the jury [and] the agreements of counsel." State v. Marshall, 123 N.J. 1, 145 (1991). The charge should be read as a whole to determine its overall effect. State v. Garrison, 228 N.J. 182, 201 (2017); State v. Wilbely, 63 N.J. 420, 422 (1973). Moreover, errors must be evaluated "in light of the overall strength of the State's case." State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)(quoting State v. Galicia, 210 N.J. 364, 388 (2012)).

In the instant case, Defendant submits that there was "ample evidence that defendant believed the firearm was unloaded at the time of the shooting, which, if credited, could negate the mens rea required for the offense of conviction." (Db26). Defendant acknowledges that this argument was not raised below. In fact, the record in this case demonstrates that not only did counsel not object to the jury charge, but that he consented to the jury instructions as written. (8T 57-18 to 59-20). Nevertheless, Defendant claims that the court should have issued the instruction regardless because the defense was "clearly indicated" by the record. (Db29). In support of this position, Defendant cites to Mr. Taylor's testimony that Defendant

responded to his statements that the gun was loaded by claiming that it was not. (3T 209- 9 to -11; 213-18 to -19; 213-25 to 214-1; 215-21; 216-13 to -14; 263-11; 263-17 to -18; 264-7 to -8; 264-24 to 265-2; 266-17). In further support of this position, defense counsel relies on the Appellate Division decision in State v. Sexton, 311 N.J. Super. 70 (App. Div. 1998) to argue that the conviction should be reversed. It is the State's position that the trial court was not required to provide the jurors with a Mistake of Fact instruction under the facts presented and as such, there is no basis for reversal.

N.J.S.A. 2C:2-4 provides that "mistake as to a matter of fact or law is a defense if the defendant reasonably arrived at the conclusion underlying the mistake and: (1) It negatives the culpable mental state required to establish the offense." N.J.S.A. 2C:2-4(a)(1)." See also, Model Jury Charges (Criminal), "Ignorance or Mistake (N.J.S.A. 2C:2-4)" (May 7, 2007). If the mistake is reckless, that recklessness satisfies the culpability element and there is no defense. If the mistake is not reckless, however, it may negate the recklessness to establish the offense. See State v. Sexton, 160 N.J. at 101-102. In other words, if the defendant's ignorance or mistake makes proof of a required culpability element impossible, the State will fail in its proof of the offense. State v. Pena, 178 N.J. 297, 206 (2004). Here, the State submits that the Defendant was reckless in his belief that the gun was unloaded. The State presented ample evidence at trial that the Defendant was warned multiple times

by Mr. Taylor, as well as the victim, that the firearm was, in fact, loaded. Mr. Taylor specifically testified that he and the victim told the Defendant at least two (2) or three (3) times that the gun was loaded. (3T 210-3 to -8). As such, the facts are distinguishable than those in Sexton.

In Sexton, the decedent handed the 16-year-old defendant a gun and told him it was empty. After confirming that there were no bullets in the gun, the defendant took possession of it and pulled the trigger, resulting in the victim's death. The defendant was indicted for first degree murder despite the absence of evidence that defendant intended to kill or seriously injure the victim. The Appellate Division reversed on multiple grounds, one being that the court failed to charge the jury that it was the State's burden to disprove the defendant's reasonable belief that the gun was not loaded, thus, depriving him of a fair opportunity for the jury to properly weigh the evidence of defendant's state of mind at the time of the shooting. Id. at 82. (emphasis added). In so ruling, the court noted that it was the defense theory that defendant reasonably believed that the gun was unloaded when he pulled the trigger. Id. at 83, 86-87. Here, the Defendant was provided with numerous warnings that the weapon was loaded, and Defendant even put down the weapon at one point, before picking the weapon back up and continuing his reckless course of conduct that ultimately resulted in the victim's death. Moreover, the defense theory at trial

was not simply that the Defendant did not know the gun was loaded, rather the defense argued that the Defendant's gun malfunctioned or accidentally discharged.

During his summation, counsel argued that the case was a "tragic accident" stating, "An accidental discharge of a firearm is not an aggravated manslaughter." (8T 67-22 to -25; 8T 68-6 to -8). He then went on to set forth his theory was that this was an "accidental discharge" case caused by a mechanical failure or mishandling of the firearm. (8T 68-9 to -17; 91-18 to -21). Defense counsel highlighted that Brian Taylor told the 9-1-1 dispatcher that Defendant "didn't think that it was loaded" and that the jury is "entitled to consider what Mr. Grieco was thinking, what he knew at the time that this accident happened." (8T 6 to -13). He also argued that Mr. Taylor's testimony as to the dry fire was inconsistent with what he told police and the dispatcher on the night of the incident and highlighted other inconsistencies in his testimony. (8T 69-18 to 84-24). He explained, "[I]f you believe what Brian says in the first statement, Joe did not believe that gun was loaded." (8T 77-5 to -7). Counsel highlighted the testimony of the State and defense's firearms experts to support his theory of accidental discharge. (8T 90-11 to 94-24). He then went through examples of accidental discharge. (8T 98-11 to -20). Counsel argued, "Accidents such as user error, mechanical failures, they don't meet the threshold of a manslaughter. Just because a person was injured or died from an accident does not mean it's a criminal

offense." (8T 97-17 to -21). The State submits that there was not "ample" evidence for the Defendant to reasonably believe the firearm was unloaded in this case.

Additionally, as the New Jersey Supreme Court explained in Sexton, "the better way to explain the concepts is to explain what is required for liability to be established." Sexton, 160 N.J. at 106. Here, the trial court did precisely that. The charge clearly outlined the requisite mental state and the defense was permitted to present its defense that the weapon discharged by accident due to malfunction and his belief that the weapon was not loaded despite being warned numerous times that it was, in fact, loaded. The jury, thus, was made aware of the possibility that the mistake could prevent defendant from possessing the requisite mental state, and the omission was not clearly capable of producing an unjust result. See State v. Drew, 383 N.J. Super. 185, 196-97 (App. Div.), certif. denied, 187 N.J. 81 (2006).

The charge correctly advised the jury that in order to convict, it had to find beyond a reasonable doubt, that defendant caused the victim's death, that he did so recklessly, and under circumstances manifesting extreme indifference to human life. (8T 148-16 to -25). The jury was also expressly instructed that if the State failed to prove beyond a reasonable doubt the requisite mental culpability, then it must find defendant not guilty of the offense charged. (8T 149-1 to 150-16). Specifically, the jury was instructed that the State had to prove beyond a reasonable doubt that the Defendant acted recklessly by being aware of and consciously disregarding a

substantial and unjustifiable risk that death will result from his conduct. (8T 149-1 to -6). The court explained, "In doing so you must consider the nature and purpose of Defendant's conduct and the circumstances known to Defendant, and you must determine whether in light of those factors Defendant's disregard of that risk was a gross deviation from the conduct a reasonable person would have observed in Defendant's situation." (8T 149-18 to -24). Read in its entirety, the State submits that the trial court's instruction was not misleading or prejudicial and adequately explained the controlling legal principles to the jury. Wherefore, the State submits that the Defendant has failed to establish that the court's failure to issue a Mistake of Fact instruction "removed the jury's ability to acquit on a valid and complete defense." (Db30) or that the court's failure to do so amounted to plain error.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the Court should affirm the Defendant's convictions and sentence.

Respectfully submitted,

SAHIL K. KABSE
Acting Sussex County Prosecutor

By:_____
Shaina Brenner
SDAG/Acting Assistant Prosecutor

cc: Alan Silber, Esq.
Remi L. Spencer, Esq.

STATE OF NEW JERSEY, Plaintiff-Respondent, v. JOSEPH C. GRIECO a/k/a JOSEPH GRIECO, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002907-24 Team1 <u>Criminal Action</u> Docket No.: SSX-23-000439 Indictment No.: 23-12-00301-I Sat Below: Hon. Michael C. Gaus, J.S.C.

JOSEPH C. GRIECO's REPLY BRIEF

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PRELIMINARY STATEMENT

The trial court committed reversible error in multiple respects. First, it permitted Officer White to misstate New Jersey law by testifying that no amount of alcohol is permitted in connection with firearm use (8T:7-8[1]). This testimony was false, prejudicial, and usurped the court's exclusive role to instruct the jury on the law. Defense counsel immediately objected, arguing the question "calls for a legal conclusion" (2T:143:23-24), but the objection was overruled. The court rationalized that White's answer reflected his "experience and training," yet his own testimony about his background demonstrated he had no training in alcohol-and-firearm standards (2T:129:1-6; 129:9-22; 131:1-3; 133:3-10; 135:6-9). Second, the State was allowed to cross-examine the defense expert with the Conceal Carry statute, N.J.S.A. 2C:58-4.4(1), a law wholly inapplicable to Grieco because he lacked a permit to carry a concealed weapon. Together, these errors misled the jury into believing that Grieco's admitted but lawful consumption of alcohol established criminality. The trial court compounded this prejudice by failing to correct or clarify that such testimony was legally wrong. The result was a trial skewed by a false rule of law.

That inexcusable error not only sent erroneous and prejudicial misinformation to the jury, but it also set up the state's additional false insinuation that New Jersey does not permit any alcohol use by one in possession of a firearm. The trial judge

[1] The transcription key is identical to Grieco's main brief.

permitted the State to cross-examine the defense expert using N.J.S.A. 2C 58-4.4 (no alcohol use by one carrying a concealed weapon pursuant to a concealed weapons permit) because the "defense opened the door" by having its expert explain that .08 was the blood alcohol content (BAC) required for one to be under the influence or intoxicated for an automobile accident. The statute, as the trial judge eventually charged the jury, did not apply to the defendant, who did not have a permit to carry a concealed weapon. Grieco did not have a concealed weapons carry permit.

The combination of White's erroneous and inadmissible testimony together with the State's use of an inapplicable statute deeply prejudiced Grieco, whose defense admitted alcohol consumption but presented evidence that Grieco was neither "under the influence" nor "intoxicated".

Defense counsel argued that the Prosecution's use of N.J.S.A. 2C:58-4.4(1) was prejudicial because it insinuated that New Jersey's rule for possession of firearms is that no amount of alcohol is permitted with any gun use. The statute, not applicable to Grieco, bans the consumption of any alcohol for firearms carried pursuant to a concealed weapons permit. This insinuation followed Officer Thomas White's wrongful testimony that no alcohol is permitted when using a firearm. Defense counsel argued that, given the undisputed fact that Grieco had ingested several alcoholic beverages, the jury was led to believe that Grieco had committed an egregious violation of New Jersey's law by having had some alcohol before he

brought out his old service firearm. "Even if he's not charged it's almost as if it's improper prior bad acts or propensity evidence that my client is just disregarding the law or [is] a law breaker." (8T:7-8). "The jury will, in deliberations, conclude under Mr. Kabse's cross-examination you aren't supposed to drink at all and have a firearm. …they're going to think …he's not to drink at all and since that happened, he therefore violated the law, the law, must have violated the law here." (8T:15).

Equally troubling, the trial court failed to instruct the jury on mistake of fact, despite overwhelming evidence that Grieco believed the firearm was not loaded. This omission deprived the jury of the opportunity to consider a defense codified in N.J.S.A. 2C:2-4 and expressly endorsed by the New Jersey Supreme Court in State v. Sexton, 160 N.J. 93, 104-05 (1999). Under Sexton, even an unreasonable mistaken belief that a firearm was unloaded can negate the reckless element necessary for aggravated manslaughter. The evidence at trial—from Brian Taylor's repeated testimony that Grieco insisted the gun was not loaded (8T:15) to Grieco's own statements to police—clearly supported this defense. The court's failure to charge mistake of fact stripped the jury of a critical framework for evaluating Grieco's state of mind and ability to acquit.

I. OFFICER WHITE'S TESTIMONY AND THE STATE'S USE OF AN INAPPLICABLE STATUTE CONSTITUTED REVERSIBLE ERROR. (2T143-20 to 2T144-20).

A. By Allowing Officer White To Deliver Improper Expert Testimony That Was Factually False and Legally Unauthorized, The Trial Court Committed Reversible Error. (2T143-20 to 2T144-20).

1) Officer White's Testimony Was an Impermissible Opinion Testimony. (2T144-24)

The State has argued that White's testimony that no per se amount of alcohol can be consumed and still make it safe to operate a firearm is not an opinion. The State's rationale is that the defense's cross-examination of Officer White opened the door by having White admit that Grieco gave no physical indication of being "under the influence" or intoxicated. (State Responding Brief ("SRB") at 18)

On cross-examination, defense counsel elicited that police officers were with Grieco for a substantial amount of time at the scene of the shooting and later at police headquarters. No officer reported Grieco appeared alcohol affected sufficiently to give him a field test, an Alcotest, or draw blood to get an accurate BAC. Neither that testimony nor Grieco's defense that he was not "under the influence" or "intoxicated" can be said to have opened the door to what is clearly opinion testimony – in White's opinion, no alcohol could be safely consumed when possessing a firearm, which clearly misstates the law in New Jersey. There is no such law.

The trial judge ruled White's testimony was not an opinion, but was a fact based on White's "experience and training". (SRB at 21). The State's erroneous claim "that defense counsel established White was familiar with firearms and DWI

investigations" (SRB at 23) is simply not supported by the transcript. All White did say about his training and experience is: 1) his police job was in his car and to "pull motorist over who present traffic infractions" (2T:129-1 to 6); 2) he had EMT training (2T:131-1 to 3); 3) "did not consider himself an expert just because [he was] a police officer and had training on how to use his firearm (2T:133-3 to 10); and 4); he was responding to a radio request because a man had been shot at that address (2T:129-9 to 22); and it was "primarily a medical call" (2T:135-6 to 9).

That is the full testimony of Officer White's training and experience in the record. It fails to support the trial judge's rationale for overruling defense counsel's objection and fully undermines the State's argument resisting a finding of error by this court. (SRB at 23, 24).

2) Officer White's Impermissible Opinion Testimony Misinformed the Jury About New Jersey Law. (2T143-20 to 144-21)

Grieco's main brief set forth an indisputable fact:

> Even if White were a credentialed and qualified expert, he would have been prohibited from opining about the law. "Is there any amount of alcohol that would be permitted" is most certainly about the law. What else besides a law could forbid alcohol for a person from using a firearm? "On questions of New Jersey law, expert testimony is not admissible because it is the exclusive province of the judge presiding over the case to instruct the jury on the law of this State to be applied in the particular case."
>
> (Grieco's Main Brief filed August 8, 2025 ("GMB") at 21)

The State's Responding brief does not address Grieco's assertion that White testified as to New Jersey law. This is understandable because there is no possible contradiction that White testified about New Jersey law, which is the exclusive domain of the trial judge. This leads to the conclusion that the State accepts that the inadmissible conclusion allowed by the judge was, in fact, an opinion on what New Jersey law was.

3) Officer White's Opinion Was Inadmissible. (2T143-20 to 144-21)

a. The Defense Objection Was Appropriate. (2T143-20 to 144-21)

Given the State's inability to dispute that White's testimony purported to describe operative New Jersey law, it is clear that defense counsel's objection to the lack of foundation and that White was concluding about New Jersey law should have been sustained.

b. Only the Trial Judge Could Instruct the Jury on the Law. (2T144-8)

Grieco set forth the New Jersey evidentiary rule that no witness may explain applicable New Jersey law to a jury. Only the trial judge may do so. (GMB at 21-22). The State does not offer any argument against that evidentiary rule and therefore should be deemed to accept that evidentiary rule.

c. Officer White's Opinion Testimony on the Law was Wrong.(2T144-19)

It is beyond dispute that the inadmissible legal opinion expressed by Officer White is dead wrong. As Grieco's main brief emphasized, there is no such New

Jersey law in existence. (GMB at 22). Moreover, the State's attempt to distinguish firearm impairment from the established .08 standard in driving cases is unsupported by any New Jersey case law, statute or rule. In State v. Stuart, No. A-3262-15, 2017 WL 3297468, *6 (App. Div. Aug. 3, 2017) (DRBa001-013), the state relied on the .08 BAC threshold as a benchmark for impairment in a shooting case ("the defendant's blood alcohol level was far above the .08 percent level at which driving a motor vehicle is prohibited"), without suggesting that a different standard applied. The facts in Stuart are remarkably similar. Stuart was an active police officer who was drinking with a friend. They returned to Stuart's apartment to watch a movie. Stuart and his friend discussed guns. Stuart believed his service revolver was unloaded but it accidentally fired and killed his friend. The Appellate Division reversed Stuart's conviction.

4) The Prejudice to the Defense Was Manifest. (6T:162-163); (8T:7-8)

Officer White's inadmissible and inaccurate opinion on applicable New Jersey law grievously prejudiced the jury against Grieco. Grieco's defense to aggravated recklessness included a contention that the defendant was neither "intoxicated" nor "under the influence" of alcohol when the gun accidentally discharged. White's inadmissible misstatement of New Jersey law wrongfully impeached that critical part of Grieco's defense as was eloquently set forth on the record by defense counsel, both orally and in writing. (GMB at 22 to 24).

The State created unfair prejudice and reversible error, misleading the jury to believe that New Jersey law prohibited any alcohol consumption by Grieco and that Grieco had conceded recklessness by his admitted alcohol consumption.

The prejudice caused by this error cannot be overstated. By answering that "no" amount of alcohol is permitted when using a firearm, White unequivocally told the jury that if they believed Grieco had any alcohol in his system, he was guilty. That single answer, coming from a uniformed officer on the witness stand, carried immense weight with the jury. The harm was threefold: (1) the testimony was incorrect as a matter of law, yet the jury had no reason to doubt it because it came from a law enforcement officer; (2) it suggested that merely having alcohol in one's body while handling a weapon is unlawful and inherently dangerous, which is not the law in New Jersey; and (3) the trial court provided no immediate correction or clarification. Without such correction, the jury was left to conclude that White's statement reflected actual New Jersey law. In effect, the jury was handed a shortcut to conviction: Grieco drank, therefore Grieco was guilty (8T:7-8).

This was not a minor misstatement. It went to the heart of the defense. Grieco admitted to consuming alcohol, but the defense expert testified that he was not intoxicated and did not act recklessly. By allowing White to testify that any alcohol consumption was impermissible, the trial court stripped Grieco of his defense and created an irrebuttable presumption of guilt. That error alone was sufficient to

change the outcome of the trial. Jurors who might otherwise have weighed Grieco's actual condition and intent instead were permitted to rely on White's false legal standard to convict. The prejudice was compounded when the prosecutor underscored this misstatement of law in summation, telling the jury that "guns and alcohol don't mix," thereby collapsing the elements of the charged offenses into White's erroneous rule of law.

This type of prejudice is precisely what the Supreme Court has warned against in the context of other-crimes or propensity evidence. In State v. Garrison, 228 N.J. 182, 193-194 (2017), the Court explained that when jurors are presented with improper evidence suggesting that a defendant has a disposition to break the law, there is a serious risk they will convict "not for the offense charged, but for the extrinsic offense[s]." Id. (citing State v. Skinner, 217 N.J. 496, 514 (2014). The same danger materialized here. White's testimony, combined with the prosecutor's questioning and argument in summation, told the jury that Grieco broke the law simply by drinking alcohol while possessing a firearm. That improper narrative encouraged the jury to convict based on perceived lawlessness rather than the actual elements of the charged offense.

The error in permitting Officer White to testify that New Jersey law prohibited any alcohol consumption by one in Grieco's circumstances was compounded by the State's cross-examination of Dr. Lage. The State's summation included "guns and

alcohol don't mix," further misleading the jury into believing that New Jersey law prohibited any alcohol consumption, creating reversible error.

B. The Trial Court Erred by Admitting Prejudicial Cross-Examination without Conducting the Required Balancing of its Minimal--or Nonexistent—Probative Value Against Its Substantial Risk of Unfair Prejudice, a Failure the State Does Not Address in Its Brief. (6T169-9 to 170-9); (8T6-12).

1) The Trial Judge Never Ruled on the Defense's True Objection.

The trial judge permitted the State to cross-examine Grieco's expert witness, Dr. Gary Lage about the terms of N.J.S.A. 2C 58.4-4 (a law which prohibits the use of any alcohol for one carrying a concealed weapon pursuant to a permit to do so, and did not apply to Grieco) ruling that Dr. Lage had "opened the door" to its admissibility by opining that the accurate BAC for concluding a person was intoxicated or under the influence was .08 as it is by statute for automobile accidents. The defense objected because the prejudice from such a cross-examination far outweighed the meager (or non-existent) probative value of such a cross. However, the judge "did not address the resulting prejudice to the defendant from the State's reliance on N.J.S.A.2C:58-4.4 (1)." (GMB at10 to 11; 22 to 24).

2) The State Never Answered the Defense's True Legal Argument.

Grieco's actual objection to the trial judge's ruling permitting the state to cross-examine Dr. Lage about the "no alcohol permitted" by 2C 58.4-4(1) was that "in applying the 'opening the door' doctrine, the Court must still balance the undue

prejudice to the defendant against the value of the proposed testimony," citing State v Prall, 231 N.J. 567, 581-583 (2018) (reversing the Appellate Division on other grounds). " Thus, the trial judge's failure to weigh the prejudice to Grieco against the dubious use of N.J.S.A. 2C:58.4-4(1) to impeach Dr. Lage's opinion requires reversal of Grieco's conviction." (GMB at 25 to 26). "The judge did not analyze or mention the prejudice to Grieco which would be grounds to grant the motion even if the cross-examination itself was not error." Citing N.J. Evidence Rule 403 in a footnote attached to the quote. (GMB at 11).

The State, recognizing that it had no response to Grieco's legal argument, misstated it: "Defendant argues that the trial court improperly concluded that the defense opened the door to use of N.J.S.A. 2C:58-4.4 and erred in denying the motion." (SRB at 33). Grieco's Appellate brief did not make that argument.

While acknowledging that the defense "asserts that the court did not weigh the probative value of the evidence against its prejudicial effect warranting reversal" (SRB at 33), the State never addressed the consequences of the judicial failure to do so, or the legal precedent cited by Grieco's main brief, State v Prall. (SRB 25 to 38).

3) By Ignoring Defendant's Argument, the State Effectively Concedes Reversible Error.

The State's failure to even address Grieco's only appellate argument with respect to the cross-examination of Dr. Lage is highly probative and a concession

that the trial courts failure to make the requisite (Rule 403) balancing test confirms that the State intellectually concedes that Judge Gaus's ruling was reversible error.

4) The Court's Failure to Address the Defense Objection Created Even More Extreme Prejudice When Combined With the Prejudice from Officer White's Inadmissible Testimony. (8T:122).

The State was permitted to present a highly misleading account concerning Grieco's moderate alcohol consumption, by wrongfully making it appear as per se aggravated recklessness: 1) White's completely false opinion on New Jersey law; 2) using for cross examination a New Jersey law that does not apply in the case, but forbids any alcohol use by one carrying a concealed weapon pursuant to a permit; and 3) in summation by the argument that "alcohol and guns do not mix".

II. THE FAILURE TO CHARGE MISTAKE OF FACT WAS PLAIN ERROR REQUIRING REVERSAL. (Not raised below.)

The State insists that no mistake-of-fact charge was warranted because defense counsel did not request one. That argument fails because New Jersey precedent is unequivocal: a trial court has an independent duty to instruct the jury on any defense "clearly indicated" by the evidence, even absent a request. State v. Rivera, 205 N.J. 472, 489–90 (2011); State v. Walker, 203 N.J. 73, 89 (2010). This duty is rooted in the principles of due process and the right to a fair trial. The omission of a defense instruction supported by the record is plain error requiring reversal. R. 2:10-2; State v. Jordan, 147 N.J. 409, 422 (1997).

The record manifestly confirms the existence of a mistake of fact defense, as it is replete with testimony that Grieco believed the gun was not loaded. Brian Taylor testified that when he warned that the gun was loaded, Grieco "stated it was not loaded." (3T:209-8 to 11; 3T264:8; 3T264:24-25). On direct examination, Taylor testified that Grieco said, "I told you the gun was empty." (3T210:1-2). This belief—if credited by the jury—could have negated the aggravated recklessness element required to support the conviction. Taylor's testimony on this point is also consistent with his statements to law enforcement when they first responded to the scene. Taylor similarly stated that Grieco believed the gun was not loaded because he stated that fact; he claimed that Grieco said: "it's not loaded" and "I didn't shoot him, it was empty." (3T215:21, 216:13, 232:16, 263:14-18, 264:5-8). Grieco himself told law enforcement that "I thought there was nothing in the magazine." (1T29:12-13). These witness statements leave no doubt that the evidence squarely supported a mistake-of-fact defense.

The State dismisses this evidence as insufficient, but that position cannot be reconciled with State v. Sexton, 160 N.J. 93, 104–05 (1999). There, the Court held that even an unreasonable mistaken belief that a gun is unloaded can negate recklessness, the core element of aggravated manslaughter. Sexton specifically rejected the notion that only a "reasonable" mistake warrants instruction; the key inquiry is whether the belief, however mistaken, could negate the mental state

required for conviction. Here, the jury was never advised of the existence of that relevant defense.

The State also misstates the law on a court's obligation to instruct the jury on the law. The State claims that because defense counsel did not request a mistake-of-fact instruction, the issue was waived. Not so as Rivera and Walker make clear. The court's duty is not dependent on defense counsel's vigilance. Failure to charge a clearly indicated defense sua sponte is plain error. See also State v. Canfield, 470 N.J. Super. 234, 271–72 (App. Div. 2022) (trial court erred by failing to charge defense sua sponte, even absent request). The jury here was denied the opportunity to consider Grieco's actual state of mind—the very crux of recklessness.

The Appellate Division decision in State v. Stuart, supra, underscored the precise error made in this case. (DRBa001-013.) In Stuart, the defendant police officer claimed that he was certain his gun was unloaded – just like Grieco – when it discharged and killed his friend. The Appellate Division held that "[t]his case cried out for a [mistake of fact] instruction" and that the failure to charge the jury on this defense constituted plain error requiring reversal. Id. at *11. The court emphasized that mistake of fact directly negates the mental state element of both knowing murder and aggravated manslaughter, and that the jury must be expressly told how to evaluate that defense. Id. at *13.

The parallels here are undeniable. Grieco, like Stuart, consistently told witnesses and police he believed the gun was unloaded. (3T:209-11, 264; 1T:29). As in Stuart, this evidence was not collateral—it went to the very heart of the State's burden to prove recklessness beyond a reasonable doubt. Just as the Appellate Division concluded in Stuart, the omission of the mistake of fact instruction "raised a reasonable doubt as to whether the jury was led to a result it might not otherwise have reached." Stuart, supra, at *11 (DRBa001-013).

This singular error was capable of producing the unjust result in this case. The State seeks to argue that the court's failure to charge the N.J.S.A. 2C:2-4 defense was harmless error. That position collapses under scrutiny. Recklessness requires conscious disregard of a known risk. N.J.S.A. 2C:2-2(b)(3). If the jury had been instructed on mistake of fact, it could have credited Grieco's belief that the gun was unloaded and found that he did not consciously disregard the risk. Instead, the jury was left with an all-or-nothing narrative: Grieco handled the gun, it fired, therefore he was reckless. That stripped the jury of the defense that Sexton holds is integral to the recklessness analysis. Reversal is required.

CONCLUSION

For all the reasons expressed in Grieco's main brief as well as this Reply brief, Grieco's conviction should be reversed and sent back to Sussex County for a retrial.

Date: October 7, 2025 *<u>/s/ Alan Silber</u>* *<u>/s/ Remi L. Spencer</u>*
ALAN SILBER REMI L. SPENCER