SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3280-22
INDICTMENT NO. 19-11-01082-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Cumberland County.
FRANK J. BAKER,	:	
Defendant-Appellant.	:	Sat Below:
	:	Hon. William F. Ziegler, J.S.C., and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (Cont'd,)

PAGE NOS.

INDEX TO APPENDIX

JUDGMENTS, RULINGS AND ORDERS BEING APPEALED

TABLE OF AUTHORITIES

PAGE NOS,

CASES

STATUTES

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

STATUTES (Cont'd.)

RULES

RULES OF EVIDENCE

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS,

OTHER AUTHORITIES

TRANSCRIPT DESIGNATIONS

1T – September 17, 2021, pretrial motion
2T – December 6, 2022, pretrial motion
3T – January 6, 2023, trial
4T – January 10, 2023, trial
5T – January 11, 2023, trial
6T – January 12, 2023, trial
7T – January 13, 2023, trial
8T – January 18, 2023, trial
9T – January 20, 2023, trial
10T – January 24, 2023, trial
11T – January 25, 2023, trial
12T – January 27, 2023, trial
13T – January 31, 2023, trial
14T – February 1, 2023, trial
15T – April 25, 2023, motion for new trial and sentence

PROCEDURAL HISTORY

Cumberland County Indictment No. 91-11-1082-I charged defendant Frank J. Baker and codefendants Frank I. Baker III, Marquiis Wilson and Nisear D. Baker[1] as follows: Baker was charged individually with murder under N.J.S.A. 2C:11-3a(1)/(2) (count one), second-degree possession of a weapon for an unlawful purpose under 2C:39-4a(1) (count two); second-degree unlawful possession of a weapon under 2C:39-5b(1) (count three), and third-degree hindering apprehension under N.J.S.A. 2C:29-3b(1) (count six); Baker and Frank Senior were charged with first-degree witness tampering under N.J.S.A. 2C:28-5a(5) (count four); and Baker and the three codefendants were charged under N.J.S.A. 2C:5-2a(1) with second-degree conspiracy to commit various crimes, including tampering with witnesses and evidence (count five), fourth-degree obstructing administration under N.J.S.A. 2C:29-1b (count eight); and fourth-degree tampering with evidence under N.J.S.A. 2C:28-6(1) (count nine).[2] (Da 1-5)[3]

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[1] Frank I. Baker III and Nisear D. Baker are defendant's father and brother. To avoid confusion, defendant will be referred to in this brief as Baker, and his father and brother will be referred to as Frank Senior and Nisear, respectively.

[2] Frank Senior, Wilson and Nisear were also charged with third-degree hindering apprehension under N.J.S.A. 2C:29-3a(3) (count seven).

[3] Da – defendant's appendix
PSR—presentence report

Baker was tried separately on the indictment[4] before the Honorable William F. Ziegler, J.S.C., and a jury on various dates in January 2023 (3T to 13T), and on February 1, 2023, the jury found Baker guilty as charged. (Da 6-9; 14T 6-24 to 11-24)

On April 25, 2023, Baker appeared before Judge Zeigler for a hearing on his motion for new trial. Judge Zeigler denied the motion (Da 10; 15T 20-8 to 22-21), and proceeded to sentence Baker as follows. After merging counts five (conspiracy), eight (obstruction) and nine (tampering) into count six (hindering), and count two (possession of a weapon for an unlawful purpose) with count one (murder), Judge Zeigler sentenced Baker to three consecutive prison terms: 30 years with a 30-year period of parole ineligibility for murder; five years with a 42-month period of parole ineligibility for unlawful possession of a weapon, and five years for hindering. The requisite fines and monetary penalties were also imposed. (Da 11-14; 15T 75-9 to 78-5)

Baker filed a Notice of Appeal on June 30, 2023. (Da 15-17)

[4] With the exception of count four, which was ultimately dismissed by the State. (Da 11-14)

STATEMENT OF FACTS

Frank J. Baker was convicted of fatally shooting Jair Rennie. Baker and Rennie were involved in a "love triangle" with Anthonay McIver, the mother of Baker's daughter. Baker, who testified at trial, admitted that he shot and killed Rennie, but maintained that he acted in the heat of passion. Thus, with respect to the homicide, the only issue for the jury to decide was whether Baker was guilty of murder or passion provocation manslaughter.

The following facts are not in dispute.[5] Anthonay McIver and Frank J. Baker were involved in an "on-and-off" romantic relationship since January 2016.[6] (5T 99-2 to 99-10; 12T 70-24 to 71-12) Their relationship became more serious in June of 2016, and in November 2018, they had a child together. (5T 98-4 to 99-10; 12T 70-19 to 71-16) At the beginning of their relationship, McIver lived with her parents at 31 King Drive in Gouldtown and would sometimes stay with Baker at his grandmother's house in Seabrook. (5T 102-4 to 104-23; 5T 160-10 to 163-2; 9T 141-5 to 141-25; 12T 68-7 to 68-10) Around the time the baby was born, McIver moved in with Baker and his grandmother. Baker, McIver and the baby, who the couple referred to by the nickname "Yani,"

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[5] In addition to the trial testimony, the factual record was established through the prior written and/or recorded statements of Anthonay McIver and Frank Senior, introduced by the State under N.J.R.E. 803(a)(1).

[6] Baker testified that McIver had a history of cheating on him, but they always "work[ed] it out and g[ot] back together." (12T 154-16 to 154-18))

lived as a family in Seabrook until mid-June 2019, when McIver returned to her parents' house with Yani, because she and Baker had an argument.[7] (5T 108-21 to 109-3; 5T 163-4 to 164-21; 12T 77-7 to 77-15)

Upon her return to Gouldtown, McIver began a romantic relationship with Jair Rennie, a former classmate with whom she was "intimate" in high school.[8] (5T 100-10 to 101-2) Rennie, who had been living in Delaware, returned to New Jersey and was staying with friends at 23 Longview Drive, a block away from McIver's house. (5T 116-3 to 116-17; 9T 148-4 to 148-9) Although, according to McIver, her relationship with Rennie did not become physical until she moved back in with her parents, she reconnected with Rennie several months earlier. (9T 153-7 to 154-4) Baker learned that McIver and Rennie had reconnected when, sometime in February or March 2019, Rennie called the cellphone that Baker had bought for McIver at two o'clock in the

[7] According to Baker, he took McIver back to her parents' house on June 19, after hearing from a friend that McIver had been talking about him to a "guy that [McIver] . . . cheated on [Baker] with" in the past. Baker testified that when he confronted McIver with what he had heard, "she kept lying to me about it." Baker told McIver he "just want[ed] [her] to be honest about it" and that she should stay with her parents until she was able to "get [her]self together." (12T 76-16 to 77-15)

[8] Baker was aware that Rennie and McIver knew each other in high school and that Rennie was interested on McIver – he remembered two instances in 2016 when Rennie "grab[bed] [McIver's] butt." (12T 78-1 to 78-20; (12T 165-20 to 166-4) He was unaware, however, that Rennie and McIver had a sexual relationship during high school. (12T 165-15 to 166-4)

morning. (9T 154-23 to 155-8) Rennie's late-night call led to an argument between Baker and McIver during which Baker broke the phone. (9T 154-21 to 155-9; 12T 72-5 to 73-7) McIver continued to communicate with Rennie but kept it a secret from Baker, because, according to McIver, it was "not his business." (5T 166-22 to 167-14; 9T 153-10 to 155-24; 9T 164-14 to 164-22)

Baker learned that McIver had started spending time with Rennie on June 26, a week after McIver moved back to Gouldtown. (9T 154-16 to 155-8) Baker was driving past McIver's house and noticed that the doors of an inoperable Mustang she kept in her parents' yard were open. When he approached the Mustang, he saw that McIver was in the car with Rennie and had their daughter with her. (5T 105-10 to 106-8; 9T 149-21 to 154-18; 12T 73-8 to 75-10)

Baker was upset McIver had Yani with her while she was spending time with Rennie. Baker testified that he did not think McIver should bring their daughter around other men unless they discussed it first because that was something "parents [are] supposed to agree on." (12T 79-15 to 79-25) McIver confirmed that Baker asked her not to bring their daughter around other men without first discussing it with him.[9] (5T 127-3 to 127-22)

[9] Messages Baker sent to one of McIver's friends on social media also confirmed Baker's feelings on the matter. Baker told the friend: "I caught her with Jair and she had Yani [] out there with . . . with them"; "I'm just mad she -- she had Yani outside with them. She single, she can do what she wants, but

Baker was also upset McIver was with another man so soon after moving back with her parents; he expected their separation to be only temporary and that they would eventually get back together, because they always did. (12T 75-25 to 76-1; 12T 154-16 to 154-18; 12T 170-9 to 170-14) According to Baker, when he confronted Rennie, Rennie said that McIver told him she was single. Baker told Rennie that McIver says that whenever they separate, but that she always "come[s] back to me." (12T 75-19 to 75-22) Baker's encounter with Rennie ended when Baker asked Rennie if he wanted to fight and Rennie replied, "I'm not fighting over a female." (9T 154-12 to 154-18; 12T 76-2 to 76-12; 12T 166-5 to 167-5)

After Baker drove away, police responded to McIver's house on a call involving "a verbal dispute between two males." (8T 8-10 to 9-19) According to McIver, Rennie was the one who called the police. (9T 167-9 to 167-11) As the police were interviewing Rennie, Baker returned.[10] (8T 10-10 to 10-17) After speaking with Rennie and Baker, the officer determined there had been "a verbal argument in reference to a [] female." (8T 10-20 to 11-4)

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don't involve my daughter. You got to be a certain type of respect level." (10T 249-9 to 249-24)

[10] Baker testified that he was still in the area when he saw Rennie speaking to the police, so he walked over. (12T 175-2 to 175-9)

Baker had two more encounters with Rennie on June 26. Both occurred in front of 23 Longview Drive, where Rennie was staying.[11] McIver was inside the house during those encounters. (9T 152-3 to 153-3; 9T 160-4 to 164-13) According to McIver, after the incident with the Mustang, she went to Rennie's house on Longview Drive and had sex with Rennie for the first time since they reconnected. (9T 152-5 to 153-9) McIver had Yani with her. Baker did not know McIver was in the house with their daughter during his subsequent visits to Gouldtown. (9T 152-3 to 153-9; 9T 160-4 to 164-13)

The first time Baker went to 23 Longview Drive he was with friends; the second time he was alone. Rennie was there both times, along with family members and friends. (9T 160-4 to 164-13; 12T 167-6 to 169-25) According to Baker, he went there just to let his feelings be known: "[T]hey asked what's going on and I explained to them. I'm like, I done see Jair. He had been out there with my baby mama. . . . I feel like it's disrespectful in my relationship where he's steady [sic] trying to talk to her." (12T 170-1 to 170-8)

[11] According to Baker, he returned to Gouldtown later that day in response to messages he received from Rennie's friends and family who were at 23 Longview Drive; they heard that Rennie and Baker had words earlier that day. (12T 167-6 to 169-25) At trial, McIver confirmed that Baker did not show up on Longview Drive out of the blue, and that "messaging" had preceded his visit. (5T 211-16 to 212-6)

In her statement to police, McIver, who was watching the encounters from a window, confirmed that Baker did not try to fight Rennie, spoke mostly to the other people there, and was simply "expressing how he felt" about the situation. (9T 164-3 to 164-13) When Rennie came back into the house, he told McIver some of the things Baker had said: that McIver was still "with him" and "just came [back to Gouldtown] to get [her] shit together"; that McIver was going to return to Seabrook eventually; and that "he felt disrespected because [McIver] was out there with the baby." (9T 162-20 to 163-11)

At some point later that day, Baker contacted McIver to make arrangements to pick up Yani. McIver told him that she would be at the "hair store" and to pick up Yani there, because she did not want Baker to know that she and Yani were at Rennie's house. (9T 158-13 to 159-14)

There is no dispute that Baker was devoted to his daughter. (5T 167-15 to 167-24) While McIver was living in Gouldtown, Baker drove to King Street every day to pick up Yani and spend time with her. (9T 158-16 to 158-17; 12T 95-13 to 95-17) There is also no dispute that Baker was financially generous with both McIver and Yani. McIver acknowledged that Baker received payments from a personal injury annuity, which he spent on her and Yani. (5T 178-4 to 178-24) She also acknowledged that Baker had "a weak spot for [her]" and that her relationship with Rennie was "hurting" him. (9T 167-2 to 167-8)

The day after Baker's encounters with Rennie, the son of the woman who owned the house on Longview Drive sent Baker a message: "[W]hatever you and Jair got going on, bro, don't bring that shit to my mom crib, bro. She too old for that shit[.]" Baker responded: "You got it, bro." (10T 251-16 to 252-15)

Baker did not return to 23 Longview Drive until the day of the shooting.

A. The Weeks Immediately Following the Incident on June 26, 2019

In the days following the incident with the Mustang, Baker's social media activity indicated that Baker continued to spend family time with McIver and Yani, taking them to the zoo, aquarium, and county fair. (12T 83-12 to 88-5; 12T 177-13 to 178-10) It also indicated that McIver continued her relationship with Rennie; McIver's relationship with Rennie was painful and confusing to Baker, but he was trying to accept it; and Baker continued to object to Rennie spending time with Yani. Between June 27 and July 6, 2019, Baker's social media activity included the following posts and messages.

- On June 27, 2019, Baker posted: "When you love someone, you just don't -- you just don't treat them bad." (10T 251-6 to 251-11)
- On July 3, 2019, Baker and Rennie exchanged the following messages.

  > [Baker:] Don't show nobody this message, whether you want [her] or you just trying to fuck whenever you can? She a good girl that . . . just been through some shit. She don't need somebody trying to play with her feelings[.] . . . I ain't going to let nobody treat her bad[.]

> [Rennie:] That's the point, Nygee, know she been through a lot and I'm trying to show her some RS [real shit] because at the end of the day she worth it.
>
> [Baker:] Don't hurt her, you good though. I ain't going to bother you all. I just ask one thing[.] . . . Tell her don't bring you around the baby until I'm ready for that.
>
> [Rennie:] Respect, Nygee, wasn't offering no disrespect shit. That ain't my place.

(10T 252-25 to 254-19)

- On July 5, 2019, Baker messaged McIver: "I shot my shoots, but they wasn't that serious because I truly don't care. I wish you and him the best. You deserve better than me." (10T 230-23 to 231-10)

- On July 6, 2019, Baker messaged Rennie: "Yo, you with Bub, right?" and "Tell her if she want to be with them be with you. Leave me alone. She want her cake and want to eat it, too." (10T 256-23 to 257-8)

  On the same day, Baker sent several messages to McIver. In one, he said she was "disrespectful" for letting "this N-word" stay the night after "I told you not to have him around Yani." (10T 232-9 to 232-12)

  Other messages Baker sent to McIver on July 6 included:

  > I just got a lot of mixed emotions. You could go live your life, Shorty (phonetic). (10T 233-7 to 233-9)
  >
  > You don't think you did but once you did something for him that you wouldn't do for me, you picked him.
  >
  > I'm trying to let you be happy, but it's clear that you are not over each other so . . . just see what happens with y'all, he might be the one for you. (10T 233-2 to 234-1)

On July 12, 2019, about a week before the shooting, Baker had his last social media exchange with Rennie. In that exchange, Rennie told Baker that

McIver told him she was trying to work things out with Baker, and that he (Rennie) would leave McIver alone.

> [Baker:] Come to (indiscernible) crib, she trying to play a game with us, so let's make her pick who she want.
>
> [Rennie:] She already hit me on this, saying she trying to work it with you so I'm going to leave her alone.
>
> [Baker:] Nah, let's get in front of her so there's no confusion.
>
> [Rennie] "All right. . . . [W]henever I get out that way.

(10T 262-4 to 262-21)

According to Baker, his reconciliation with McIver occurred a few days earlier, when, at McIver's request, Baker drove to King Street to bring her marijuana. Baker said that they spent the evening in his van, smoking and drinking, and having sex. According to Baker, they also discussed McIver's infidelity, and, as McIver told Rennie, she wanted to work things out with Baker. (12T 88-6 to 90-4)

The following week, Baker and McIver went on two dates while family members watched Yani: on July 14, they went to Cloak and Dagger, an escape room (10T 266-12 to 266-25); and on July 17, 2019 – two nights before the shooting, they went to The Main Event, an arcade and amusement venue in Delaware. (5T 169-14 to 170-5; 9T 171-3 to 172-22) According to Baker, after

each of these dates, he and McIver picked up Yani, and they all went back to his home in Seabrook to sleep. (12T 90-9 to 94-11)

B. The Days Leading up to the Shooting

The morning after their trip to The Main Event, Baker drove McIver and Yani back to King Drive and dropped them off. (9T 172-1 to 173-3) There is no indication that Baker and McIver parted on anything other than good terms; McIver said they had a good time together on their date. (5T 177-25 to 178-3) The following morning, Rennie stopped at McIver's house to see her. McIver told Rennie she would come to his house later that night. (9T 174-4 to 175-1)

That afternoon, when Baker went to McIver's house to see Yani, he saw that McIver was texting Rennie again. They quarreled about it, and he left. (5T 177-15 to 178-3; 12T 96-7 to 97-6) McIver did not tell Baker that Rennie had visited her that morning or that she had a plan to visit Rennie later.

McIver told detectives that when she arrived at Rennie's house that night there was a truck parked in the yard. She and Rennie spent that evening – the evening before the shooting – inside the truck, drinking and having sex. (5T 200-17 to 201-6; 9T 174-25 to 176-16; 9T 184-1 to 184-4) McIver went back home late that night after helping Rennie, who drank too much alcohol, to his bed. (9T 176-20 to 177-13; 10T 13-5 to 13-6)

The next morning, McIver told police, her mother asked for a ride to work, but she could not start her mother's Hyundai Sonata because it had a breathalyzer installed on the ignition and she still had alcohol in her system from the previous night. After getting her niece to start the car for her, she dropped her mother at work, returned to King Street and got back into bed. (9T 177-14 to 177-17; 10T 13-5 to 13-13) She then exchanged messages with Rennie, who asked her to bring him some ginger ale. (9T 177-20 to 180-7)

According to McIver, Baker also called her several times that morning "trying to talk to the baby." McIver placed a video call to Baker so he could see the baby. After they hung up, Baker sent McIver a message, telling her that he would call "back for the baby." (10T 13-14 to 14-5) That afternoon, in addition to picking up her mother from work, McIver drove her mother's Sonata to a pawn shop, where she sold a ring Baker had given her for $21. (5T 110-12 to 112-22; 10T 14-4 to 14-7) With the money, she purchased ginger ale for Rennie and drove the Sonata to Longview Drive to see him. She went to see Rennie by herself; Yani stayed with her mother on King Street. (5T 110-12 to 110-22; 9T 177-14 to 181-4; 10T 14-3 to 15-3)

When she arrived, McIver parked the Sonata in the yard behind Rennie's house for "privacy," "so everybody else won't be in my business." (5T 129-22 to 129-5) As McIver explained, she did not want people to see that she was

visiting Rennie because she was "not [Rennie's] girlfriend" and he was "not [her] boyfriend." (5T 130-1 to 130-8; 5T 203-16 to 204-17; 9T 174-25 to 176-16) McIver did not even tell her best friend that she was in a romantic relationship with Rennie. (9T 8-13 to 9-2; 9T 20-6 to 21-22; 9T 25-19 to 26-2) McIver said she also wanted privacy because she thought she and Rennie might have sex in her mother's car. (9T 183-10 to 184-4)

Rennie came out of the house with two hefty bags of dirty clothes for McIver to wash and put in the Sonata. (10T 15-3 to 15-5) She and Rennie were in an out of the Sonata, smoking and talking, when McIver noticed Baker's van drive by. According to McIver, Rennie went in the house to look out the front window to see if Baker was still in the area. (9T 184-5 to 187-24; 10T 15-6 to 15-19) McIver told detectives that she got into the driver's seat of the Sonata when Baker walked up, looked through the driver's window, and began banging on it. (9T 188-19 to 191-24) She started the car and tried to back out of the yard, but Baker got behind the car and prevented her from leaving. Shortly thereafter, Rennie came out of the house and approached the driver's side of the car. According to McIver, Baker and Rennie had a "small conversation about me," but she could not hear exactly what was said because the windows were up. (9T 146-13 to 146-16; 9T 191-25 to 195-11) When asked by detectives if Baker and Rennie were "fighting or anything," McIver responded, "Un-un, they

weren't fighting." (9T 195-2 to 195-4) After "crack[ing]the window open," she heard Baker tell Rennie that he and McIver had been together two nights earlier. Rennie responded by shaking his head and asking McIver if that was true. (9T 194-6 to 194-20; 10T 16-8 to 16-13)

Baker then told McIver that she had to choose who she wanted to be with. McIver told detectives that she paused, and then looked directly at Baker and said, "Jair." (10T 16-12 to 16-16) In the moment that followed, Baker fired several shots at Rennie, and then fled the scene (9T 196-4 to 196-7; 9T 198-15 to 200-10) McIver told detectives, "I literally blinked, and then when I blinked, I heard the gunshot." (9T 196-13 to 196-17; 10T 16-16 to 16-18)

When a next-door neighbor heard what she described as "pow – pow – pow," she went to her back door, looked out and saw McIver kneeling over Rennie's body. (5T 84-10 to 84-19; 5T 87-14 to 88-3) McIver told police she touched Rennie and called his name, but he was unresponsive. (5T 200-7 to 200-16) McIver tried to open the backdoor of 23 Longview Drive but it was locked. When she banged on the door and no one answered, she got back in her mother's car and drove away, because, as she told detectives, she "need[ed] to do something." (9T 200-10 to 200-16) When asked where she went, McIver initially said she drove to "Frank's friend's house to try and use her phone." (9T 201-10 to 201-13) When pressed, McIver admitted that she did not drive to a

phone; rather, she drove directly to a nearby carwash, because, as she was getting into the car, she noticed that the driver's sideview mirror had a bullet hole in it and what appeared to be blood splatter on and around the door. (9T 202-5 to 205-12; 9T 220-8 to 220-18; 10T 37-3 to 37-18)

When the neighbor saw McIver drive off, she ran to 23 Longview Drive, banged on the door until someone answered, and let them know that a boy had been shot. (5T 84-10 to 84-19; 5T 88-6 to 91-5) Rennie was transported to the hospital, where he died from his injuries. (4T 168-5 to 200-20) Rennie had four gunshot wounds, to his cheek, the back of his head, his shoulder, and his lower back. (4T 175-23 to 176-14)

C. The Hours Between the Shooting and Baker's Surrender

After the shooting, Baker picked up his friend Marquis Wilson and drove to the house in Cedarville where Baker's father lived. When they arrived, Frank Senior was alone. He had heard that his son shot someone but did not believe it. (10T 127-14 to 131-21) Baker asked his father if he could leave his van with him and Frank Senior told him to park it in the garage. (10T 163-6 to 163-10)

When Frank Senior asked Baker if what he heard was true, Baker said he shot Rennie because Rennie "got aggressive." (10T 131-19 to 132-10; 10T 157-19 to 158-2) Frank Senior told detectives that he suspected Baker was not telling him what really happened because "I don't think he want me to be right

about that girl [referring to McIver]."[12] (10T 158-1 to 158-11; 10T 163-14 to 163-17) Baker's relationship with McIver was a source of tension between Baker and his father. (10T 52-5 to 52-6; 10T 128-2 to 128-22) Frank Senior thought McIver was "trouble" (10T 163-20) and did not like "the stuff [McIver] was doing to [Baker]," like "cheating on him." (10T 128-8 to 128-15; 10T 158-16) He also believed that McIver had "dealings" with another of his sons before she was with Baker, which did not sit well with Frank Senior.[13] (7T 263-18 to 264-5) Frank Senior told detectives that Baker is a "good kid," but "he act[s] stupid about that girl." (10T 131-9; 10T 137-10 to 137-12)

Baker told his father he needed bleach and Frank Senior went to the store to buy some. (10T 178-20 to 179-5) While he was gone, McIver showed up with Yani, in her mother's car. Wilson met McIver as she pulled in the driveway while Baker remained in the house. Wilson noticed blood on the door of the Sonata. McIver went into the house with Yani and Wilson began washing the Sonata. (10T 46-12 to 50-16; 10T 179-17 to 180-5) Wilson also took Baker and McIver's cellphones, smashed them with a sledgehammer, and threw them into the woods behind the house. (10T 63-14 to 63-16; 10T 206-7 to 206-10)

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[12] Baker confirmed that his father warned him about McIver and that he told his father Rennie "got aggressive with me" because he "didn't want to tell his father the truth." (12T 108-25 to 109-18)

[13] McIver admitted that she had a sexual relationship with Baker's brother Nisear when she was in elementary school. (5T 141-3 to 141-24)

When Frank Senior returned with the bleach, McIver and Baker got in the shower together, removed their clothing – they were still dressed in the clothes they were wearing at the time of the shooting – and washed their bodies with bleach. (10T 52-17 to 54-5) When they were finished, they gave the clothes they took off to Frank Senior, who, in his statement to police, admitted to burning them in the firepit in his yard. (10T 56-7 to 56-15; 10T 196-25 to 198-2) Frank Senior also admitted that he threw the damaged sideview mirror, which was removed from the Sonata by Frank Senior and/or Wilson, into the woods. (10T 19-17 to 19-19; 10T 61-21 to 62-11; 10T 181-4 to 181-10) When asked about the gun, Frank Senior told the detectives that Baker did not have the gun with him when he arrived and did not say what he did with it. (10T 211-9 to 212-20) When police searched Frank Senior's property, they located Baker's van in the garage. They also recovered the cell phones and sideview mirror from the woods and burnt clothing from the firepit. (3T 75-16 to 97-22; 5T 10-22 to 21-25; 8T 55-6 to 56-25) The gun was never recovered.

At some point, Baker's aunt Teresa and brother Nisear showed up, and Baker told McIver it was time for her and Yani to leave. (10T 19-20 to 19-25) Teresa testified that that she went to Cedarville to check on Frank Senior because she had heard that Baker shot someone. (9T 52-11 to 53-6) She said

the news was upsetting to her and the rest of the family because shooting someone was "not in [Baker's] disposition." (9T 74-25 to 76-17)

Frank Senior asked Teresa if she would take Baker to an address in Delaware and she agreed. Nisear rode with them. (9T 59-4 to 60-11) According to Teresa, Nisear was crying. (9T 63-10 to 63-19) While they were driving, Baker's mother and father called to talk to Baker, and along with Teresa and Nisear, Baker's family convinced him to turn himself in. At Baker's request, Teresa stopped at a liquor store and bought Baker a bottle of Hennessey before driving him to the police barracks in Bridgeton, where 25-30 family members and friends were waiting. Baker surrendered without incident. (9T 64-1 to 65-14; 9T 68-15 to 74-18; 9T 79-1 to 79-10; 9T 118-1 to 118-9)

D. McIver's Conflicting Statements to Police

McIver gave a recorded statement to police on the night of the shooting, and another recorded statement the next day. The first statement contained a number of inconsistencies, mostly about the events that occurred after the shooting, e.g., what she did with the clothes she was wearing (she initially told the detectives that the clothes were in her house), what happened to the sideview mirror (she initially told detectives that an unknown person came by and snapped the mirror off while the Sonata was parked in front of her parents' house), and where she went after going to the carwash (initially, she did not tell

police that she went to Frank Senior's house or that she saw Baker after the shooting). (9T 140-12 to 249-22)

The following day, when it became clear that McIver had not been completely truthful, she was transported to the police barracks to give a second recorded statement. (10T 7-7 to 10-9) Before they began the recording, McIver told detectives that she wanted to handwrite her story first. Her handwritten account of the shooting was substantially the same as the statement she gave the previous day, with one notable exception: the handwritten statement alleged that Baker made threats to kill her and any man with whom she cheated on him with. Specifically, McIver claimed that when Baker was banging on the window of the Sonata, before Rennie came out of the house, Baker "tells me that he'll really kill me." (10T 16-1 to 16-4) She also claimed that after Baker shot Rennie, "I watched Frank run, then Jair falls to the ground. I felt like Frank was going to run to the car and grab . . . more bullets. He always told me when we were arguing that I'll kill you and the 'N' word you fuck with. You'll never be able to leave me. We're -- we're in this together." (10T 16-19 to 16-25)

At trial, McIver gave the following testimony regarding the accuracy of the written statement:

> Q: Okay. And when you were writing it out, I expect that . . . you were putting down what you could remember as accurately as you could. Am I right?

A: No.

Q: Okay. And why am I not right?

A: Because I have different stories.

Q: Pardon me?

A: Because I have different stories.

(5T 190-6 to 190-14)

The written statement is the only time McIver alleged that Baker threatened to kill her and whomever she cheats on him with. In fact, during her first statement, detectives asked, "[O]nce you saw that he had a gun did you think something was going to happen, serious, when he was talking to Jair?" and McIver responded, "No." (9T 197-8 to 197-11)

E. Baker's Account of the Shooting

Baker testified that on the morning of July 20, 2019, he went to McIver's house to pick up Yani. When he arrived, he noticed that the Sonata was not in the driveway. He was told that McIver was not there – she had left with her niece to drive her mother to work – and he would have to come back to get Yani. (12T 98-11 to 100-23) About an hour later, he returned to McIver's house and saw that McIver's niece was back, but the Sonata was still missing; again, he was told he could not take Yani because McIver was not there. (12T 101-9 101-21) He felt that "something wasn't right" and wondered whether Yani was

really in the house. So, he went looking for the Sonata. (12T 101-24 to 102-1; 12T 125-3 to 125-25) He drove past the trailer park where he believed Rennie was living and did not see the car. He then headed to McIver's friend's house on Longview Drive to see if she was there. It was then that he spotted the Sonata in the yard of 23 Longview Avenue. (12T 102-2 to 102-24)

Baker said that when he saw the Sonata on Longview Drive he was "disturbed" because he knew there was a strong likelihood McIver was with Rennie and a possibility that Yani was there too. (12T 188-6 to 188-13; 12T 193-5 to 193-10) When he approached the Sonata, he looked through the window and saw that McIver was alone. (12T 103-1 to 103-7) Baker "was trying to have a conversation with her" but McIver refused to roll down the window and tried to drive away. Rennie then came out of the house. When Baker told Rennie that McIver was at his house only a couple of nights prior, Rennie shook his head. (12T 103-9 to 104-4) Baker told McIver that she had to decide who she wanted to be with. She first answered in a low tone and Baker could not hear. She repeated that she wanted Rennie, "[t]his time aggressively," and Baker "just blacked out." He came to when he heard McIver scream "stop." (12T 104-11 to 104-16; 12T 105-4 to 105-9; 12T 129-13 to 131-15)

Baker explained that although McIver had a history of cheating on him, it was still shocking to him when he realized it was happening again:

"Sometimes she'll cheat on me, but we'll work it out and get back together. So it's like, shocking when it happens, again, you know what I mean, once you work it out." (12T 154-16 to 154-20) He also said that hearing McIver say she wanted someone else was different; she had never said anything like that before. (12T 185-6 to 185-11)

Baker made clear that he did not arm himself that day with the intention of confronting Rennie or McIver. (12T 183-11 to 183-13) Baker testified that he often carried a gun for protection and has owned a gun since 2016, when he was robbed. (12T 104-17 to 105-3)

LEGAL ARGUMENT

POINT I

THE JURY INSTRUCTION ON PASSION/PROVOCATION MANSLAUGHTER FAILED TO ADDRESS THE EFFECT THAT A COURSE OF INFIDELITY, EMOTIONAL MANIPULATION AND DECEIPT CAN HAVE ON THE ISSUE OF PROVOCATION AND CREATED THE ERRONEOUS IMPRESSION THAT INFORMATIONAL WORDS CANNOT CONSTITUTE ADEQUATE PROVOCATION. THE DEFICIENT CHARGE, WHICH CUT TO THE HEART OF THE DEFENSE CASE, REQUIRES REVERSAL OF DEFENDANT'S MURDER CONVICTION. (Not Raised Below)

The passion/provocation manslaughter charge, which instructed the jurors that "words alone" could not constitute adequate provocation to kill and, "[o]n the other hand, a threat with a gun or a knife or a significant physical

confrontation might be considered adequate provocation," created the misleading impression that passion/provocation requires some threat of physical violence, and that words alone can never mitigate murder to manslaughter. (13T 119-11 to 119-14) This, however, is not true. A continuing course of ill treatment against the defendant or words that convey information that would arouse the passions of a reasonable person can constitute adequate provocation. When, as in this case, the provocation does not involve the presence of a weapon or physical confrontation, but rather a course of ill treatment or "informational" words, the jury must be instructed on those topics in order to properly determine what form of homicide the defendant committed. The passion/provocation charge in this case failed to address those topics.

The deficient charge, which was exacerbated by misleading remarks made by the prosecutor in summation, was clearly capable of producing an unjust result. R. 2:10-2. Defendant's rights to due process and a fair trial under the Fourteenth Amendment and the corresponding provisions of the state constitution were violated by this error, and, therefore, defendant's conviction for murder must be reversed.

Passion/provocation manslaughter is a purposeful or knowing killing "committed in the heat of passion resulting from a reasonable provocation." N.J.S.A. 2C:11-4b(2). It developed at common law as a lesser-included offense

of murder in "recognition that the average person can understandably react violently to a sufficient wrong and hence some lesser punishment is appropriate." State v. Mauricio, 117 N.J. 402, 410 (1990) (internal quotation marks omitted).

Passion/provocation has four elements that distinguish it from murder: "the provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying." Id. at 411. The first two elements are objective, while the last two are subjective. Ibid. Thus, one of the critical issues that the jury must consider is the adequacy of the alleged provocation, i.e., whether the provocation was sufficient to "arouse the passion of an ordinary man beyond the power of his control." Id. at 409 (internal quotation marks omitted).

The generally accepted rule is that "words alone," unaccompanied by some threat of physical violence,[14] do not constitute adequate provocation, "no matter how offensive or insulting" the words may be. State v. Crisantos, 102

[14] "[B]attery, except for a light blow, has traditionally been considered, almost as a matter of law, to be sufficiently provocative." Mauricio, 117 N.J. at 414; see also State v. Carrero, 229 N.J. 118, 129 (2017)("Words alone are insufficient to create adequate provocation, but the presence of a gun or knife can satisfy the provocation requirement.").

N.J. 265, 274 (1986). This rule, however, applies when the provocation arises from the words themselves, not from the information the words convey. "'Informational' as distinguished from 'insulting' words are treated differently." 2 Wharton's Criminal Law § 22:6 (16th ed. 2023); see also Commonwealth v. Bermudez, 348 N.E.2d 802, 804 (Mass. 1976)(noting "jurisdictions, which do not recognize offensive statements as constituting sufficient provocation to support a verdict of manslaughter, do recognize that information conveyed orally may be sufficient provocation"). While "[a] reasonable man can be expected to control the feelings aroused by an insult or an argument, [] certain incidents may be as provocative when disclosed by words as when witnessed personally." Ibid.; see, e.g., 2 W.R. LaFave, Substantive Criminal Law § 15.2(b)(5), at 500 (2d ed. 2003) ("a sudden confession of adultery" by a spouse or information from a third person that a spouse has committed adultery has sometimes been held to constitute a provocation "of the same sort as . . . an 'ocular observation'" of adultery).

"Obviously, abstract rules are only guides in defining the parameters of passion/provocation manslaughter." Crisantos, 102 N.J. at 275. "The issue of passion/provocation can arise in an infinite number of factual settings." Ibid. While the alleged provocation in a typical passion/provocation case involves a

threat of physical violence against the defendant, that is not a prerequisite. For instance, in State v. Guido, 40 N.J. 191 (1963),

> the defendant did not point to any specific event as the provocative one. Rather she claimed a course of ill treatment and oppression which closed in upon her so completely that her own death appeared for a whole to be the only way out. Within that course of conduct were incidents which could have constituted provocation but none in fact had evoked a homicidal response when it occurred.
>
> [Id. at 210.]

Notwithstanding the lack of physical threat or any specific provocative event, the Court concluded that a passion/provocation charge should have been given: "It seems to us that a course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation." Id. at 211. As the Court explained, "In taking this view, we merely acknowledge the undoubted capacity of events to accumulate a detonating force, no different from that of a single blow or injury." Ibid.

Similarly, in State v. Erazo, 126 N.J. 112 (1991), where defendant was charged with murder in the stabbing death of his wife, the jury was instructed on passion/provocation manslaughter even though the victim was unarmed and had not threatened defendant with violence on the night of the shooting or at any time in the past. (Defendant and his wife were in a strained relationship "fraught with violence," but the prior acts of violence were committed by the

defendant.) Id. at 124. On the night of the stabbing, defendant invited several people to his house for a party. There was already tension between the defendant and his wife; the tension began the day before when defendant brought the victim flowers and she threw them in the trash. On the night of the party, the tension continued to build: "Defendant chastised the victim for rearranging the furniture and disconnecting the stereo"; the victim "refused to join his guests in the living room and remained in the kitchen . . . until after dinner"; the defendant and the victim each partnered with other people "when dancing the merengue [which] may have fueled their mutual feelings of jealousy and suspicion." Ibid.

The provocation that led to the stabbing occurred when, after the guests went home, the victim deliberately cut her hand and told the defendant "she intended to have his parole revoked by telling the police that he cut her." Id. at 124. Infuriated by his wife's threat to lie to police, the defendant "lost his head" and attacked her with a knife. Id. at 124, 127. The defendant stated: "I couldn't react logically. My mind went blank: I only saw the time I was going to serve unfairly[.]" Id. at 128. The defendant thus maintained that he was guilty of manslaughter, not murder. Accordingly, without objection from the State, the jury was charged on passion/provocation. Id. at 123.

As in Erazo and Guido, Baker's defense was that he committed manslaughter, not murder – that he "blacked out" when McIver looked directly at him and, in an aggressive tone, told him that she was choosing Rennie. McIver, who was well-aware that Baker had "a weak spot" for her, had a long history of cheating on, and lying to, Baker and had been going back and forth between Rennie and Baker for months, even though she knew her lies and infidelity were "hurting" Baker. As Baker explained, although McIver had a history of cheating on him, it was still "shocking" to him when he realized it was happening again. But this time was different: Baker did not only learn that McIver was cheating on him with Rennie again; he heard McIver say she was choosing Rennie, something she had never said before. It was also different because just a week earlier, McIver told Rennie that she wanted to work things out with Baker, and Rennie told Baker that he was going to leave McIver alone. The shock, anger, and emotional pain of hearing McIver say, in an aggressive tone, that she was choosing Rennie when she and Baker had just gotten back together was heightened by the anger and frustration Baker already felt after being denied access to his child, twice.

In Guido the Court acknowledged that "a course of ill treatment" can cause a person to "experience a sudden episode of emotional distress which overwhelm[s] her reason." 40 N.J. at 211. In Erazo the Court acknowledged

that a history of marital strife and a course of rising tension between spouses is important context in assessing whether the words that led to the killing – in that case, the victim's threat to have her husband's parole revoked – would provoke an ordinary person to experience a sudden episode of emotional distress, causing him to "los[e] his head" and his "mind [to go] blank." 126 N.J. 120, 128. Thus, in cases like Guido and Erazo, the jury must be instructed on the effect that a course of ill treatment or a history of marital strife and building tensions can have on the issue of provocation. See Model Jury Charges (Criminal), "Murder, Passion/Provocation and Aggravated/Reckless Manslaughter" (revised 6/8/2015), n. 16 ("Where applicable, the jury must be instructed that a continuing course of ill treatment by the decedent against the defendant or a third person 'with whom the defendant stands in close relationship,' can constitute adequate provocation.").

In this case, the jury charge on passion/provocation failed to address the effect that McIver's history of infidelity, deceit and emotional manipulation had on the issue of provocation, and created the false impression that informational words, unaccompanied by the presence of a weapon or significant physical confrontation, cannot, under any circumstances, constitute adequate provocation. It goes without saying that jury instructions must be accurate and thorough on such critical matters and tailored to the needs of the individual

case. State v. Concepcion, 111 N.J. 373, 379 (1988)(manslaughter conviction reversed when explanation of "recklessness," which was pivotal in that case, did not explain the concept in light of the unusual facts); State v. Rhett, 127 N.J. 3, 5-7 (1992) (proper instructions are essential to a defendant's right to a fair trial and critical errors in jury instructions warrant reversal even when not objected to at trial); State v. Weeks, 107 N.J. 396, 410 (1987) ("[i]ncorrect instructions of law are poor candidates for rehabilitation under the harmless-error theory").

The adequacy of the alleged provocation was a critical question for the jury to determine. Because the alleged provocation involved informational words, a history of infidelity and emotional manipulation, and tension created when Baker was twice denied access to his child, a standard-issue instruction that "words alone" are not enough did not adequately explain the applicable law to the jury. This is an instance of plain error, worthy of reversal, because the error in question cut so deeply to the heart of the jury's evaluation of the defense case. This jury needed to understand that informational words, if they would trigger a sudden episode of emotional distress, can constitute adequate provocation. This jury also needed to know that the history of Baker's relationship with McIver and the rising tension that day were factors relevant to that determination.

The error created by the deficient charge was exacerbated by the prosecutor's misleading remarks in summation. The prosecutor ended her cross-examination of Baker with the following questions:

> Q: So you killed Jair Rennie because of some words that Anthonay said?
>
> A: Yes.
>
> Q: Only words?
>
> A: Yes.

(12T 192-10 to 192-14)

Then, in summation the prosecutor argued:

> So let's talk about some examples of passion provocation. You come home early from a business trip and you find your significant other in bed with another person, you grab the lamp that's sitting on the bedside table and you smash it over their head causing death. That is passion provocation.
>
> Or your child comes to you and tells you that for the last six months they've been sexually assaulted by a close friend or family member and before you had a chance to react or call the police or really do anything that person comes walking through your front door so you grab a kitchen knife off the counter and you cut their throat. That is passion provocation manslaughter.
>
> A woman telling the father of her child that she does not want to get back together with him is not reasonable provocation. Breakups happen every single day. Relationships end. People decide to move on with their lives.
>
> Imagine a world where it is justified to kill somebody or culpability is somehow reduced because one person made a choice to move on from a relationship.

***

> The Judge is going to instruct you again as to the law and part of that instruction is going to tell you that words alone do not constitute adequate provocation. On the other hand, a threat with a gun, a knife or a significant physical confrontation might be considered adequate provocation and Frank sat up here on the stand and he told us that there was no confrontation, there was no weapons that Jair had, Jair was not aggressive, he was not coming at him in any sort of way, there was no confrontation.

(13T 81-10 to 82-11; 13T 83-3 to 83-13)

First, not only did the prosecutor exacerbate the prejudice caused by the erroneous charge when she suggested that Baker's honest testimony – "that there was no confrontation, there w[ere] no weapons that Jair had, Jair was not aggressive" – was an admission that he was not adequately provoked, she grossly mischaracterized the alleged provocation in this case. McIver was not a "woman telling the father of her child that she does not want to get back together." McIver and Baker had been a couple, living together with their child as a family for months before McIver went back to Gouldtown. And McIver was not simply telling Baker that she does not want to get back together. Rather, McIver was engaging in emotional manipulation by telling Baker that she wanted to work things out with him – something Rennie confirmed – and then two days after having a good time with Baker on a date, telling Baker she is choosing Rennie.

To make matters worse, the prosecutor improperly tainted the jury's view of the alleged provocation in this case by providing three examples of what constitutes adequate provocation. By doing that, the prosecutor created a danger that the jury would view the alleged provocation as insufficient simply because it does not look like the three examples the prosecutor provided, when, under the law, "passion/provocation can arise in an infinite number of factual settings." Crisantos, 102 N.J. at 275. Without a tailored jury instruction to combat the prosecutor's misleading hypotheticals and the incomplete statement in the model jury instruction that words alone are insufficient, the jury lacked sufficient guidance to evaluate Baker's defense. Consequently, Baker's conviction for murder must be reversed and the matter remanded for retrial of that charge.

POINT II

THE COURT ERRED IN PERMITTING THE INTRODUCTION OF McIVER'S DUBIOUS CLAIM THAT BAKER WAS "ALWAYS" THREATENING TO KILL HER AND ANY MAN SHE WAS WITH, WITHOUT FIRST CONDUCTING A 404(b) ANALYSIS AND WITH NO INSTRUCTION TO THE JURY ON HOW TO EVALUATE SUCH EVIDENCE. (Not Raised Below)

In her handwritten statement to police McIver claimed for the first and only time that Baker "always told me when we were arguing that I'll kill you and the 'N' word you fuck with. You'll never be able to leave me. We're – we're in this together." (10T 16-19 to 16-25) These threats to kill that Baker allegedly made were prior bad acts that should not have been admitted without a 404(b) analysis. State v. Vargas, 463 N.J. Super. 598 (App. Div. 2020) (finding defendant's verbal threat to victim, "if you can't be with me, then you can't be with anyone," must satisfy N.J.R.E. 404(b) before it is admitted). Although the alleged threats are arguably relevant to motive, whether there is a non-propensity purpose is only part of the 404(b) analysis.

If a 404(b) hearing had been held, the State would not have met its burden to establish by clear and convincing evidence that Baker actually made these threats; and if the evidence were admissible, the jury should have been charged on how to use that evidence. In light of their clear capacity for prejudice, these errors were clearly capable of producing an unjust result, R. 2:10-2, and denied

Baker a fair trial and due process of law, requiring reversal. U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10.

N.J.R.E. 404(b) proscribes the admission of "other crimes, wrongs, or acts" when offered to prove a defendant's propensity for engaging in criminal conduct or other misconduct. If offered for other purposes, such as motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident, such evidence is admissible if it withstands the rigors of the Cofield test. State v. Cofield, 127 N.J. 328, 338 (1992). Recognizing the inherently prejudicial nature of other crimes evidence and its susceptibility to abuse, the Supreme Court established a four-prong test to determine its admissibility: (1) the evidence must be relevant to a material issue actually in dispute; (2) it must be similar in kind and reasonably close in time to the offense charged; (3) the evidence of the other crime must be clear and convincing; and (4) the probative value of the evidence must not be outweighed by the prejudice. Id. at 338 (emphasis added).

"The requirement that the State must produce 'clear and convincing evidence' of other-crime conduct before such evidence may be admitted is firmly rooted in New Jersey case law." State v. Hernandez, 170 N.J. 106, 119 (2001)(discussing New Jersey's rejection of the more lenient approach to the admissibility taken by the federal courts: evidence may be admitted if there is

proof to support a possible jury finding by a preponderance of the evidence). "Clear and convincing evidence is that which produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Id. at 127 (alterations in original)(internal quotation marks omitted). As the Court in Hernandez explained:

> The third prong of our Cofield test requires that the judge serve as gatekeeper to the admission of other-crime evidence. . . . [T]he third prong of Cofield requires the trial court to ensure that the jury hears only clear and convincing proof that the other crime or bad act occurred and that the defendant was responsible for the conduct. That rule is a necessary component of the fortification against the possibility of unfair prejudice when a court determines whether relevant other-crime evidence should be admitted in the trial of an accused.
>
> [Id. at 123-24 (internal citation omitted).]

Here, McIver's uncorroborated claim that Baker "always" threatened to kill her and any man she cheated on him with was not clear and convincing evidence that Baker actually made those threats. First, McIver was an admitted liar and cheat; she admittedly lied to police and she admittedly cheated on Baker. Second, with respect to her written statement in particular, McIver admitted that its accuracy was questionable "Because I have different stories." (5T 190-6 to 190-14) Third, McIver had a motive to make herself appear as a

victim who had reason to fear Baker: to engender sympathy from the detectives and deflect attention from her own bad conduct. During her first statement, detectives learned that McIver did not leave the scene to drive to a phone as she originally claimed; she drove to a carwash instead. And now, detectives were bringing her in for a second interview because they had since learned that she supplied them with other false information, e.g., what she did with the clothes she was wearing at the time of the incident.

Finally, McIver's claim that Baker was "always" threatening to kill her and any man she was with, which she made for the first and only time in her written statement, was inconsistent with the first recorded statement she gave. In the recorded statement, detectives asked, "[O]nce you saw that he had a gun did you think something was going to happen, serious, when he was talking to Jair?" and McIver responded, "No." (9T 197-8 to 197-11) Notably, while the jury presumably had the written statement – it was admitted into evidence – in the jury room and could easily refer to it during its deliberations, it did not have the ability to refer on its own to the recorded statements McIver gave. Without the ability to easily compare the written statement to the other statements, the jury may not have realized that (a) the alleged threats to kill appeared only in the written statement, and (b) were inconsistent with answers she gave in her first statement.

Under these circumstances, McIver's uncorroborated claim was not "evidence so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Hernandez, 170 N.J. at 127 (internal quotation marks omitted). Therefore, the admission of this prejudicial evidence requires reversal.

Even if the evidence was admissible, reversal is required because the jury was given no guidance on how to evaluate 404(b) evidence. Most importantly, the jury was not told before it could give any weight to the evidence, it must be satisfied that Baker actually made the threats McIver claimed he made, and if it was not so satisfied, it may not consider the evidence at all. Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts" (revised 9/12/2016)("Before you can give any weight to this evidence, you must be satisfied that the defendant committed the other [crime, wrong, or act]. If you are not so satisfied, you may not consider it for any purpose.").

While the jury was instructed on how to evaluate McIver's written statement in general, that instruction was not adequate. The jury was told:

> [T]here is for your consideration in this case, a written statement allegedly made by Anthonay McIver. It's your function to determine whether or not the statement was actually made by the witness. And, if made, whether the statements or any portion of them are credible. You may consider all the circumstances surrounding the statements in making that determination[.]

(10T 12-9 to 12-14) This instruction focused on the statements made by McIver. The statement at issue was allegedly made by Baker. Because that statement involved 404(b) evidence, which presents a unique potential for prejudice, the jury's attention should have been focused on the distinct question the jury had to answer in evaluating that evidence: whether it was satisfied that Baker actually made the threats McIver alleged.

Because the 404(b) evidence – that Baker "always" made threats to kill – undermined his testimony that he did not go to Gouldtown with the intention of shooting anyone and cut to the heart of his passion/provocation defense, the admission of the 404(b) evidence without a Cofield hearing or jury charge was clearly capable of leading the jury to a verdict it otherwise would not have reached.

POINT III

THE TRIAL COURT ERRED IN FINDING AGGRAVATING FACTOR (2) BASED ON THE "PERMANENT AND IRREVOCABLE" NATURE OF THE HARM CAUSED TO THE HOMICIDE VICTIM AND BY IMPOSING THREE CONSECUTIVE SENTENCES WITHOUT A PROPER YARBOUGH ANALYSIS. (Da 11-14; 15T 68-20 to 78-5)

The trial court imposed a sentence of 30 years without parole for murder, five years with a 42-month period of parole ineligibility for unlawful possession of a weapon, and five years for hindering. The sentences were ordered to run consecutively, resulting in an aggregate prison term of 40 years, with 33.5 years of parole ineligibility. (Da 11-14; 15T 68-20 to 78-5) The court committed sentencing errors that require a remand for resentencing.

First, the court erred in finding aggravating factor (2) and giving it "substantial weight." In doing so, the court stated: "Aggravating Factor 2 applies. That is the gravity of the harm inflicted on the victim. . . . I give this factor substantial weight. The gravity of the harm to Mr. Rennie is permanent and irrevocable. The impact on his friends and family cannot be mitigated or assuaged." (15T 73-13 to 73-22) Because death is inherently "permanent and irrevocable" and death is an element of murder, the court's finding of aggravating factor (2) constituted improper double counting. See, e.g., State v. Jarbath, 114 N.J. 394, 404 (1989)(death of a victim cannot be an aggravating factor in a manslaughter case because it is an element of the crime).

In imposing three consecutive sentences, the court, again, improperly relied on the "level of harm to the victim." (15T 77-1 to 77-5) It also paid lip service to the factors set forth in State v. Yarbough, 100 N.J. 627 (1985), stating that the crimes were "very distinct" and repeating the principle that "there can be no free crimes." (15T 70-23 to 71-12; 15T 77-12 to 77-18) A proper Yarbough analysis, however, requires more. Most important, the focus should be on the overall fairness of the sentence. Id. at 646.

This principle was recently reaffirmed in State v. Torres, 246 N.J. 246 (2021). There, the court held that when deciding whether to impose consecutive sentences, a sentencing court must give an explicit statement evaluating the overall fairness of the sentence to be imposed in light of (a) the purposes of sentencing stated in N.J.S.A. 2C:1-2(b) — especially deterrence and incapacitation — and (b) the defendant's age. 246 N.J. at 268, 271, 273.

Here, despite the fact that Baker was 25 years old and had no prior record, the court found a "moderate" risk that Baker will commit another crime and a "substantial" need to deter based largely on the fact that Baker "frequently carried a handgun on his person for his own protection." (15T 71-22 to 71-25) The court stated: "And while this is his first indictable conviction it's a serious offense. And the evidence adduced at trial demonstrates that the defendant has

on more than one occasion purchased illegal handguns and . . . carries those illegal handguns with him contrary to New Jersey law." (15T 74-3 to 74-12)

In light of the United States Supreme Court's decision in New York Rifle & Pistol Ass'n v. Bruen, 597 U.S. ——, 142 S. Ct. 2111 (2022), the trial judge placed undue consideration on Baker's history of carrying a gun for self-defense as a basis for finding a substantial need to deter Baker, a 25-year-old man with no prior record. The court's sentencing errors, which resulted in three consecutive sentences, require a remand for a new sentencing hearing.

CONCLUSION

For the reasons set forth in Points I and II, defendant's conviction for murder must be reversed. In the event that the Court determines such relief is unwarranted, for the reasons set forth in Point III, the matter must be remanded for resentencing.

Respectfully submitted,

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Dated: May 31, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3280-22T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Cumberland
v.	:	County.
FRANK J. BAKER,	:	Sat Below: Hon. William F. Ziegler, J.S.C.
Defendant-Appellant.	:	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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October 30, 2024

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

RULES

TABLE OF CITATIONS

1T – motion transcript dated September 17, 2021
2T – motion transcript dated December 6, 2022
3T – trial transcript dated January 6, 2023
4T – trial transcript dated January 10, 2023
5T – trial transcript dated January 11, 2023
6T – trial transcript dated January 12, 2023
7T – trial transcript dated January 13, 2023
8T – trial transcript dated January 18, 2023
9T – trial transcript dated January 20, 2023
10T – trial transcript dated January 24, 2023
11T – trial transcript dated January 25, 2023
12T – trial transcript dated January 27, 2023
13T – trial transcript dated January 31, 2023
14T – trial transcript dated February 1, 2023
15T – sentencing transcript dated April 25, 2023
Db – defendant's brief
Da – defendant's appendix
PSR – presentence report

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On November 6, 2019, a Cumberland County Grand Jury returned Indictment No. 19-11-1082-I, charging defendant, Frank J. Baker, with first-degree murder, in violation of N.J.S.A. 2C:11-3(a) (Count One); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a)(1) (Count Two); second-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b)(1) (Count Three); first-degree witness tampering, in violation of N.J.S.A. 2C:28-5(a)(5) (Count Four); second-degree conspiracy, in violation of N.J.S.A. 2C:5-2(a) (Count Five); third-degree hindering apprehension, in violation of N.J.S.A. 2C:29-3(b)(1) (Count Six); fourth-degree obstructing the administration of law, in violation of N.J.S.A. 2C:29-1(b) (Count Eight); and fourth-degree tampering with evidence, in violation of N.J.S.A. 2C:28-6(1) (Count Nine).[1] (Da1-5).

[1] The indictment also charged Frank Baker, III (defendant's father), Nisear Baker (defendant's brother), and Marquiis Wilson with conspiracy (Count Five), obstructing the administration of law (Count Eight), tampering with evidence (Count Nine), and a separate count of third-degree hindering apprehension in violation of N.J.S.A. 2C:29-3(a)(3) (Count Seven). (Da1-5). Baker III was also charged with witness tampering (Count Four). (Da2). Baker III pled guilty to Counts Seven and Nine and was sentenced to three years' imprisonment. (Sa1). Nisear Baker pled guilty to Count Five, amended to third-degree conspiracy, and Count Seven and was sentenced to five years' probation. (Sa4). Wilson pled guilty to Counts Seven and Nine and was sentenced to three years' imprisonment. (Sa7).

Defendant was tried by a jury before the Honorable William F. Ziegler, J.S.C., over twelve days from January 6 to February 1, 2023. (3T-14T). On February 1, 2023, the jury found defendant guilty of all charges, with the exception of Count Four, witness tampering, which was dismissed by the State. (14T7-20 to 11-24; Da6-9; Da11; Da13-14).

On April 25, 2023, Judge Ziegler sentenced defendant on Count One, first-degree murder, to the mandatory minimum sentence of thirty years' imprisonment without the possibility of parole, followed by five years of parole supervision. (15T75-15 to 24; Da11). He imposed consecutive sentences of five years' imprisonment with a three-and-a-half year period of parole ineligibility followed by two years of parole supervision, subject to the Graves Act, on Count Three, unlawful possession of a weapon, and five years' imprisonment on Count Six, hindering apprehension. (15T75-25 to 76-17; Da11). The remaining counts merged. (15T69-17 to 70-20; Da11). Defendant's aggregate sentence was thus forty years' imprisonment.

Defendant filed a notice of appeal on June 30, 2023. (Da15-17).

COUNTER-STATEMENT OF FACTS

Defendant Frank J. Baker fatally shot his former paramour's new boyfriend, Jair Rennie. Despite having known about the relationship between Rennie and Anthonay McIver for weeks before the murder, his defense at trial was that he acted in the heat of passion when McIver told him she wanted to be with Rennie instead of him. The following facts are derived from the testimony at trial, including the prior recorded statements of McIver and defendant's father.[2]

Defendant and McIver had a sporadic romantic relationship that resulted in the birth of a child in November 2018. (5T96-1 to 97-25; 4T102-4 to 14; 12T70-24 to 72-1). McIver lived with defendant at his grandmother's house for several months after their daughter was born. (Sa11 0:01:52-0:01:54). In February or March 2019, while McIver and defendant were living together, Rennie called McIver's cellphone in the middle of the night; defendant and

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[2] McIver and Baker III both testified at trial, but both largely professed not to remember most of the events of the day of the murder or their statements to police. (5T103-13 to 160-4; 7T268-16 to 292-4). As a result, those statements were played for the jury. (9T140-12 to 249-22; 10T33-11 to 89-1; 10T95-3 to 111-13; 10T122-15 to 183-20; 10T196-21 to 213-16). Although the recordings were transcribed into the record, much of the recordings were indiscernible to the court reporter. Thus, the recordings themselves, which were moved into evidence at trial and are part of the record on appeal, are in the State's appendix for the Court's consideration. See R. 2:5-4(a).

McIver argued about the call, and defendant became so enraged that he broke the phone.[3] (12T72-16 to 73-7; Sa11 0:16:42-0:18:00).

McIver moved back to her parents' house with the child in mid-June 2019. (12T70-24 to 72-1). On June 16, 2019, McIver unfriended defendant on Facebook. (10T246-5 to 7). A week later, defendant asked a person named Harron Miller on Facebook if he knew anyone selling "straps"—that is, guns. (10T247-2 to 19). McIver began seeing Rennie around that time. (Sa11 0:10:45-0:11:28). McIver told police she tried to end the relationship but defendant would not let her go and would drive by her house multiple times a day. (Sa11 0:18:26-0:18:44).

Defendant learned about McIver's relationship with Rennie around June 26, 2019, about a week after McIver moved home, when he drove past her house and saw her sitting in her car in the back yard with Rennie and McIver's daughter. (Sa11 0:10:45-0:11:28). Upset that McIver would allow his daughter to be around other men without his permission, defendant confronted her about it and posted about his anger on social media. (10T249-6 to 251-11; 12T79-10 to 25; Sa11 0:12:48-0:13:42).

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[3] McIver and Rennie had a romantic relationship in high school but there was no evidence at trial that they had rekindled their romance at the time of the telephone call. (Sa11 0:10:28-0:10:30).

Defendant also confronted Rennie on June 26 when he saw Rennie and McIver together, telling him that McIver always came back to him when they fought, and asked Rennie if he wanted to fight. (Sa11 0:14:03-0:14:25). Rennie said he was not going to fight over a woman. (Sa11 0:14:25). Police responded to a call about this encounter and asked defendant to leave. (8T8-10 to 11-3; Sa11 0:27:02-0:27:28). Later that same day, however, defendant returned to Rennie's house with several friends to make it clear to Rennie that he felt it was disrespectful for Rennie to be talking to the mother of his child. (Sa11 0:18:49-0:19:45; Sa11 0:22:02-0:24:16). Defendant returned alone several times that same day and was "back and forth" repeatedly that day to McIver's house, as well, making her feel uncomfortable. (Sa11 0:15:15-0:15:28; Sa11 0:23:45-0:23:49)

Over the course of the next few weeks, defendant spent time with his daughter, McIver, and often McIver's niece—they went to the zoo, the aquarium, and the county fair. (12T82-10 to 87-25). But defendant was aware that McIver was still involved with Rennie. He continued to drive by McIver's house numerous times a day. (Sa11 0:25:12-0:26:01; Sa11 0:28:02-0:28:35). Sometimes if she did not leave her bedroom light on, as was her habit, he would accuse her of spending the night with Rennie. (Sa11 0:26:03-0:26:22). Defendant frequently accused her of wanting to be with Rennie and called her

a whore and an unfit mother. (Sa11 0:26:38-0:27:03).

Defendant's social media history also showed that he was aware of the relationship between McIver and Rennie weeks before the murder. On July 3, 2019, defendant exchanged social media messages with Rennie indicating that he was okay with the relationship, but telling Rennie not to hurt McIver and to tell her not to bring the baby around until defendant was ready for that. (10T253-1 to 254-19). Defendant showed a screenshot of this message to McIver. (Sa11 0:58:29-0:58:57). On July 5, he messaged McIver and said, "I wish you and him the best. You deserve better than me." (10T231-4 to 10). He sent messages to McIver on July 6 that indicated he was upset she had allowed Rennie to be around the baby but that he knew "you picked him" and "I'm trying to let you be happy." (10T232-2 to 234-1). The same day, he messaged Rennie, asked him if he was with McIver, and said, "tell her if you want to be with them, be with you. Leave me alone. She want her cake and want eat it, too." (10T256-23 to 257-8). On July 12, defendant sent Rennie a message suggesting that McIver was "trying to play a game with us, so let's make her pick who she want[s]." (10T261-25 to 262-10). Rennie replied that McIver had indicated she was trying to work things out with defendant and he was going to leave her alone, but defendant said they should "get in front of her so there's no confusion." (10T262-11 to 16).

On July 20, 2019, the day of the murder, McIver went to visit Rennie and parked behind his house, where he put two bags of laundry in her car for her to wash. (10T15-2 to 5; Sa11 0:05:50-0:06:00). They were hanging around the car smoking and talking when McIver saw defendant's car pull down the street, but did not notice it pass the house. (10T15-6 to 13; Sa11 0:06:14-0:06:49; Sa11 0:42:20). Rennie went inside to see if defendant was out front, and McIver got into the car. (10T15-13 to 19; Sa11 0:07:01-0:07:15; Sa11 0:43:18-0:43:56).

As she did so, defendant walked up to the car, looked into the window, told McIver to get Rennie to come outside, and began banging on the window with what McIver later realized was a gun. (10T15-19 to 24; Sa11 0:07:15-0:07:30; Sa11 0:045:10-0:45:32; Sa11 0:46:26-0:46:27; Sa11 0:50:25). McIver started the car and tried to back up, but defendant stood behind the car. (10T15-25 to 16-4; Sa11 0:07:30-0:07:35; Sa11 0:47:21-0:47:37). Rennie came outside and started talking with defendant, but McIver could not hear the conversation because the windows were closed. (10T16-5 to 7; Sa11 0:07:35-0:08:00). When she opened the window, she heard defendant tell Rennie that she and defendant had "been together" two nights earlier. (10T16-8 to 12; Sa11 0:08:09-0:08:26).

Defendant then told McIver to choose who she wanted to be with.

(10T16-12 to 15; Sa11 0:48:09-0:48:26). McIver looked at defendant and said, "Jair." (10T16-16; Sa11 0:08:00-0:08:12; Sa11 0:49:44). Defendant then raised his arm and fired four or five shots at Rennie before fleeing. (10T16-17 to 22; Sa11 0:08:12-0:08:45; Sa11 0:51:11-0:51:16; Sa11 0:51:54-0:52:00). Rennie was hit four times, including in his face, the back of his head, and his back, and died at the hospital a short time later. (4T175-23 to 176-14).

McIver tried to get help from the other residents in Rennie's house but, when the door was locked and no one answered, she panicked and left. (10T17-1 to 11; Sa11 0:08:52-0:09:18; Sa11 0:53:00-0:53:25; Sa11 0:54:25-0:55:32). She went to several locations looking for defendant, ultimately finding him at the home of Dayna Williams, his father's girlfriend, in Cedarville. (10T17-12 to 19-3; Sa11 0:54:53-0:55:02; Sa11 0:57:23-0:57:29; Sa12 0:10:45-0:11:10; Sa13 0:03:59-0:04:00). When she arrived, defendant asked, "is he dead?" (Sa12 0:16:00-0:16:31).

When defendant got to Williams's house, he told his father he had shot somebody and asked if he could hide his van there. (Sa14 0:06:03-0:06:33; Sa14 0:06:53-0:06:57). When McIver arrived, defendant's friend, Marquiis "MoMo" Wilson, and his father tried to clean her car, which had some blood on it. (10T19-1 to 3; Sa14 0:54:27-0:54:40). While doing so, they noticed a hole in the casing of the sideview mirror and a bullet inside the hole, so they

broke off the mirror and tossed it and the bullet into the woods behind the house. (3T76-2 to 23; 10T19-17 to 19; Sa12 0:25:25-0:26:24; Sa14 0:55:40-0:55:48; Sa14 1:02:52-1:03:24; Sa14 1:03:54-1:04:30).

Defendant asked his father to buy bleach, which defendant and McIver showered with, at defendant's direction. (10T19-14 to 15; Sa14 0:18:20-0:20:57; Sa14 0:09:15-0:09:20; Sa14 0:53:53-0:54:00; Sa14 1:00:15-1:01:00). Defendant's father then took their clothes, as well as the bags of Rennie's clothes from the car, and put them in defendant's van, which was in a shed on the property. (10T19-7 to 13; Sa12 0:21:02-0:21:23). Defendant's father later burned defendant's and McIver's clothes, defendant's boots, and the rags used to wash the car in his firepit. (Sa14 0:58:35-0:58:39; Sa14 0:58:45-0:58:55; Sa14 0:59:40-0:59:52). Finally, defendant's father took McIver's and defendant's cellphones and gave them to Wilson, who smashed them; defendant's father tossed them into the woods as well. (Sa12 0:01:28-0:01:40; Sa12 0:26:55-0:27:15; Sa14 1:06:06-1:06:30). McIver left shortly thereafter. (Sa12 0:25:04-0:25:07).[4]

[4] When police searched the Cedarville property, they found defendant's van in the garage. (7T208-18 to 24; 8T56-23 to 57-4). Bags of clothing were inside the van. (8T57-24 to 58-5). Material believed to be burnt clothing was removed from the firepit in the backyard of the property. (8T203-9 to 14). A broken side mirror of a car and a part of a cellphone screen were found in the rear of the property, but a search for the rest of the cellphones was

Defendant's aunt, Theresa Baker, and brother, Nisear Baker, drove him to Delaware to stay with a cousin. (7T231-9 to 22; 9T60-11 to 22; Sa12 0:23:58-0:24:37). While he was fleeing the state, defendant's parents convinced him to turn himself in, and he returned to New Jersey and did so. (4T50-5 to 51-15; 7T232-8 to 11; 8T25-8 to 9; 9T63-23 to 64-9). On the way, however, he told his aunt that he did not feel bad about what he had done and that McIver was "worth it." (9T65-20 to 22).

Defendant testified at trial. He acknowledged that his relationship with McIver was "on and off" and testified that he took McIver back to her parents' house on June 19 because he believed she was cheating on him with an old boyfriend. (12T70-24 to 72-1; 12T76-16 to 77-9). He testified that he learned that McIver was seeing Rennie on June 26, when he saw them in Rennie's back yard together, and that he was upset that she was seeing someone else so soon after they broke up. (12T73-10 to 76-1). He admitted to going to Rennie's house five times that day because he felt disrespected. (12T170-1 to 14; 12T175-10 to 12).

Defendant testified that McIver and their daughter moved back in with him sometime around July 14, 2019. (12T9-11 to 92-10). But on July 18 she

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unsuccessful. (3T76-2 to 23; 4T69-15 to 70-22).

moved home again. (12T94-12 to 95-6).

The day of the murder, defendant stopped by McIver's house to see his daughter, and suspected that she had been texting with Rennie because she would not unlock her phone. (12T96-11 to 25). He and McIver argued and he left. (12T97-1 to 6). Defendant returned later in the day to get his daughter, but was not allowed in the house. (12T97-25 to 101-21). Upset at not being allowed to see his daughter and suspecting McIver was with Rennie, he went in search of them. (12T102-1 to 16). According to defendant, when he found McIver at Rennie's house, he tried to have a conversation with her, but she kept trying to drive away. (12T103-9 to 10). Although he had stashed the gun he admitted to owning illegally in his car earlier in the day, he had it in his pocket when he confronted McIver. (12T118-2 to 4; 12T124-9 to 17). When Rennie came out of the house, defendant asked McIver to choose one of them. (12T103-24 to 104-12). When she chose Rennie, defendant claimed he "just blacked out," only coming to when he heard McIver screaming. (12T104-15 to 16).

Defendant admitted that he disposed of the gun; that he asked his father to get bleach for him and McIver to shower with; and that his father, brother, and Wilson cleaned the car and broke off the mirror. (12T18-25; 12T111-1 to 24; 12T135-17 to 136-14). He then had his brother Nisear and his aunt drive

him to Delaware, where he intended to hide. (12T113-5 to 114-21). While in the car, he used a pocket knife to cut his hair in order to change his appearance. (12T146-24 to 147-24). His parents eventually convinced him to turn himself in. (12T114-23 to 116-16).

Based on this evidence, including defendant's own incriminating testimony, the jury rejected defendant's claim that he acted in the heat of passion resulting from a reasonable provocation, and convicted him of first-degree murder, as well as the weapons offenses, the charges related to his attempts to destroy evidence and evade arrest, and conspiracy. This appeal follows.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT WORDS ALONE CANNOT CONSTITUTE ADEQUATE PROVOCATION TO REDUCE MURDER TO PASSION/PROVOCATION MANSLAUGHTER.

Feeling angry and "disrespected" because the mother of his child was seeing another man, defendant armed himself and went in search of her. When he found her with her new boyfriend, demanded that she choose between them, and she chose the other man, defendant shot his romantic rival repeatedly, killing him. He now claims that the trial court erred in instructing the jury, consistent with the model jury charge, that words alone cannot constitute adequate provocation to kill for passion/provocation manslaughter. But that instruction, to which he did not object, was correct, and he is thus not entitled to relief on this claim.

At the outset, defendant did not object to the jury instruction given. Rather, he repeatedly expressed satisfaction with the instruction, both during the charging conference, where other aspects of the passion/provocation manslaughter charge were the subject of lengthy discussions, and at the conclusion of the jury charge. (12T211-18 to 238-22; 13T151-7 to 12; 13T91-8 to 11; 13T3-17 to 4-1). When a defendant does not object to the instructions

at trial, appellate courts review the jury charge for plain error, under which reversal is only appropriate for errors "of such a nature as to have been clearly capable of producing an unjust result." State v. Trinidad, 241 N.J. 425, 451 (2020) (quoting R. 2:10-2); see also State v. Adams, 194 N.J. 186, 206-07 (2008) ("Generally, a defendant waives the right to contest an instruction on appeal if he does not object to the instructions as required by Rule 1:7-2."). If the defendant fails to object to the charge when 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). Defendant has not met that burden.

The language to which defendant now objects directly tracks the model jury charge. The trial court told the jury that "words alone do not constitute adequate provocation. On the other hand, a threat with a gun or a knife or a significant physical confrontation might be considered adequate provocation." (13T118-11 to 14). This is identical to the language in the model jury charge for passion/provocation manslaughter. Model Jury Charge (Criminal), "Murder, Passion/Provocation and Aggravated/Reckless Manslaughter (N.J.S.A. 2C:11-3a(1) and (2); 2C:11-4(a), b(1) and b(2)" (rev. June 8, 2015). "[A] jury charge is presumed to be proper when it tracks the model jury charge because the process to adopt model jury charges is 'comprehensive and

thorough.'" State v. Cotto, 471 N.J. Super. 489, 543 (App. Div.), certif. denied, 252 N.J. 166 (2022) (quoting State v. R.B., 183 N.J. 308, 325 (2005)) (additional citation omitted).

The model charge directs that, where appropriate, the jury should be instructed that "a continuing course of ill treatment by the decedent against the defendant or a third person 'with whom the defendant stands in close relationship', can constitute adequate provocation." Model Jury Charge (Criminal), "Murder, Passion/Provocation and Aggravated/Reckless Manslaughter (N.J.S.A. 2C:11-3a(1) and (2); 2C:11-4(a), b(1) and b(2)" (rev. June 8, 2015). But the cases cited in the charge as examples all deal with continuing courses of physical abuse, not romantic infidelity. See State v. Coyle, 119 N.J. 194, 225-28 (1990); State v. Kelly, 97 N.J. 178, 218-19 (1984); and State v. Guido, 40 N.J. 191, 196 (1963).

Defendant nonetheless argues that "informational" words, such as a sudden confession of adultery, are treated differently than "insulting" words. (Db26). While some jurisdictions have recognized that a sudden confession of adultery or information from another that a spouse has committed adultery is comparable to catching the spouse in the adulterous act, New Jersey is not one of those jurisdictions. See 2 Wayne R. LaFave, Subst. Crim. Law, §15.2(b)(6) (3d ed. Oct. 2024 update). Moreover, even in those jurisdictions, the

exception for adultery is strictly limited to people who are married; it does not extend to former paramours who are not living together, even if, as here, they share a child and, as defendant claimed, still occasionally engage in sexual relations. See, 2 Sub. Crim. Law, §15.2(b)(5); 2 Wharton's Criminal Law, §22:11 (16th ed Sept 2023 update).

Guido and State v. Erazo, 126 N.J. 112 (1991), on which defendant relies, are readily distinguishable. In Guido, the defendant shot her estranged husband after years of marital abuse, including threats to kill their daughter if she did not abandon the child and move to Florida with him. 40 N.J. at 194-95. In Erazo, the defendant and the victim had a marriage "fraught with violence," and tensions built for several days, culminating in the victim cutting herself and threating to tell the defendant's parole officer he had caused the injury to get his parole revoked. 126 N.J. at 124-25. Thus, in both cases, there was preceding violence and threats to the defendants from the victims that merited the passion/provocation instructions.

But there was no such course of mistreatment or threats here. McIver was merely dating two men at once. Defendant may have been jealous and felt disrespected, but that is not the sort of course of conduct envisioned in Guido and Erazo. To the contrary, conduct "alleged to have been sexually frustrating" does not constitute adequate provocation. State v. Mauricio, 117

N.J. 402, 414 (1990).

Indeed, defendant was not even entitled to the passion/provocation instruction he received, much less a molded instruction he did not request. While defendant may have been upset when McIver told him she was choosing Rennie over him, there was nothing in the record to support a passion/provocation manslaughter charge. See, e.g., State v. Docaj, 407 N.J. Super. 352, 368-69 (App. Div.) (finding victim's "statements that she wanted a divorce and had 'another man lined up'" failed to meet adequate-provocation standard), certif. denied, 200 N.J. 370 (2009); State v. Darrian, 255 N.J. Super. 435, 447-52 (App. Div. 1992) (rejecting a passion/provocation manslaughter charge premised upon a jealous rage following an argument, absent evidence of physical abuse or threat of physical harm); State v. McClain, 248 N.J. Super. 409, 413-14, 419-20 (App. Div.) (finding evidence that McClain, who had been in long-term, intimate relationship with victim, knew victim fathered child with another, that victim told McClain shortly before she shot him that he never intended to marry her, and that McClain said she shot victim because she was tired of him "cheating" on and "f---ing over" her was not adequate provocation), certif. denied, 200 N.J. 370 (1991).

Because defendant was not entitled to the passion/provocation charge he received, much less a molded charge he did not request, the trial court did not

err in reading the model charge without modification. Indeed, the State's overwhelming evidence did not present any basis on which the jury could have acquitted defendant of first-degree murder and instead convicted him of manslaughter. Defendant's convictions thus should be affirmed.

POINT II

THE TRIAL COURT DID NOT ERR IN ALLOWING A DETECTIVE TO READ MCIVER'S STATEMENT THAT DEFENDANT HAD THREATENED TO KILL HER AND ANY MAN SHE WAS WITH.

In her written statement, which was read into the record after she professed a lack of memory, McIver wrote, "He always told me when we were arguing that 'I'll kill you and the n—a you f—k with. You'll never be able to leave me. We're in this together.'" (10T16-19 to 25). Defendant did not object to the admissibility of the statement—despite lengthy discussions about other redactions defense counsel wanted (9T84-1 to 110-7; 9T253-2 to 255-7)—and his claim that the trial court erred in admitting the statement is thus subject to plain-error analysis. See R. 2:10-2. In any event, the statement was properly admitted at trial as intrinsic evidence.

Generally, "evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith." N.J.R.E. 404(b). But, where evidence "is intrinsic to the charged crimes . . . even if it constitutes evidence of uncharged misconduct that would normally fall under 404(b)[,]" such evidence is not subject to a Cofield[5] analysis "because it is not 'evidence of other crimes, wrongs, or

[5] Other crimes evidence may "be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence

acts.'" State v. Rose, 206 N.J. 131, 177 (2011).

Intrinsic evidence is evidence that "directly proves" the charged offense or evidence of "acts performed contemporaneously with the charged crime . . . [that] facilitate the commission of the charged crime." Id. at 180 (quoting United States v. Green, 617 F.3d 233, 248-49 (3d Cir. 2010)). "[E]vidence that is intrinsic to a charged crime need only satisfy the evidence rules relating to relevancy, most importantly the [N.J.R.E.] 403 balancing test," which requires that relevant evidence be excluded if its probative value is substantially outweighed by undue prejudice, confusion, or delay. Id. at 177-78.

Here, the complained-of statement was direct evidence of defendant's motive and intent to deliberately kill Rennie. The threats bore a direct nexus to defendant's murder charge, and accordingly were intrinsic to one of defendant's alleged offenses. See State v. B.A., 458 N.J. Super. 391, 412 (App. Div. 2019) (holding that the defendant's pre-indictment threats after relationship with victim ended was intrinsic evidence in stalking trial because

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of mistake or accident when such matters are relevant to a material issue in dispute," subject to a four-part test under State v. Cofield, 127 N.J. 328, 338 (1992). Although the evidence would have satisfied the Cofield test, too, as admissible evidence of defendant's intent and motive under N.J.R.E. 404(b), a Cofield analysis need not be performed because the prior threats were intrinsic evidence.

they showed hostility toward victim).

Moreover, defendant cannot establish that the testimony about his prior threats to kill McIver and any man she was with was so prejudicial as to outweigh its probative value. Indeed, the Supreme Court has recognized that certain types of evidence "require a very strong showing of prejudice to justify exclusion. One example is evidence of motive or intent." State v. Skinner, 218 N.J. 496, 516 (2014) (quoting State v. Covell, 157 N.J. 554, 570 (1999)). As the Supreme Court has explained, the question is not whether the evidence is prejudicial, but whether it is unfairly prejudicial:

> [A]ll highly probative evidence is prejudicial: because it tends to prove a material issue in dispute. The determinative question is whether the evidence was unfairly prejudicial, that is whether it created a significant likelihood that the jury would convict defendant on the basis of the uncharged misconduct because he was a bad person, and not on the basis of the actual evidence adduced against him.
>
> [Rose, 206 N.J. at 164 (emphasis in original).]

Because the evidence that defendant had previously threatened to kill McIver and any man she was with was undeniably probative of defendant's intent and motive in shooting Rennie, defendant was required to make "a very strong showing of prejudice." Skinner, 218 N.J. at 516. He has failed to do so.

There was no risk that the jury convicted defendant based on uncharged misconduct because the other evidence of guilt was overwhelming.

Defendant's own testimony itself was damning. He admitted that he was aware of the relationship between McIver and Rennie for weeks before the shooting and felt disrespected by it. He testified that he was unarmed earlier in the day but retrieved his gun from his car after he discovered McIver was not home with their daughter, then searched for her because he suspected she was with Rennie, establishing premeditation. In light of this testimony alone, there was not a substantial likelihood that the jury convicted him based on the single mention that defendant had threatened to kill McIver and any man she left him for.

In addition, McIver's statements, admitted after she professed a lack of memory of the events surrounding the shooting, established that defendant had been aware of her relationship with Rennie for weeks before the shooting and was unhappy about it. According to McIver, he would frequently sit outside her house at night and drive by Rennie's house when she was there, get angry when he suspected she was communicating with Rennie, and demand that she not let Rennie spend time with their daughter. On the day of the shooting, he confronted her and demanded that she choose between them, then shot Rennie when McIver chose him over defendant.

Defendant's own social media activity, including messages to the victim, also corroborated his prior knowledge of the relationship between McIver and

Rennie. Finally, there was additional evidence, from multiple sources, that defendant conspired with his family and friend to destroy evidence, and attempted to flee the jurisdiction and change his appearance, all evidence of consciousness of guilt. State v. Williams, 190 N.J. 114, 129 (2007) (holding that evidence that defendant attempted to destroy and otherwise tamper with evidence and lied to police to avoid apprehension was admissible as evidence of consciousness of guilt); State v. Mann, 132 N.J. 410, 418-19 (1993) (holding that flight for the purpose of avoiding apprehension is generally admissible to draw an inference of guilt). In light of this overwhelming evidence of guilt, there clearly was not a significant likelihood that the jury convicted defendant based on the brief testimony of his prior threats to McIver.

Because the evidence was admissible as intrinsic evidence and not under N.J.R.E. 404(b), the trial court was not required to instruct the jury on how to weigh the evidence of other crimes. See Rose, 206 N.J. at 177 (intrinsic evidence "is not 'evidence of other crimes, wrongs, or acts.'"). This Court should thus affirm defendant's convictions.

POINT III

DEFENDANT'S 40-YEAR SENTENCE FOR MURDERING A ROMANTIC RIVAL, ATTEMPTING TO COVER UP THE CRIME, AND REGULARLY CARRYING A HANDGUN SHOULD BE AFFIRMED.

Angry that the mother of his child chose to pursue a romantic relationship with Jair Rennie, defendant shot Rennie four times, killing him. He now argues that Judge Ziegler erred in sentencing him to an aggregate term of forty years' imprisonment. Because Judge Zeigler properly exercised his discretion in imposing the sentence, including explaining his reasons for ordering that the sentences run consecutively, as required by the Supreme Court in State v. Torres, 246 N.J. 246 (2021), the sentence should be affirmed.

When reviewing a sentencing court's decision, an appellate court must avoid substituting its judgment for that of the trial court. State v. Roth, 95 N.J. 334, 365 (1984). An appellate court should affirm the sentencing court's findings and balancing of aggravating and mitigating factors if there is sufficient evidence in the record to support them. State v. O'Donnell, 117 N.J. 210, 215-16 (1989). As long as the court follows the sentencing guidelines, the sentence should be affirmed unless it shocks the judicial conscience. Ibid; Roth, 95 N.J. at 364-65. Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our

sentencing courts. State v. Case, 220 N.J. 49, 65 (2014).

Defendant first claims that the sentencing judge engaged in double-counting by finding aggravating factor two (the gravity of the harm inflicted), based solely on the fact that a young man was murdered. (15T76-13 to 22). While defendant is correct that the judge should not have found aggravating factor two for the murder charge on that basis because the death of the victim is an element of the crime, defendant was not prejudiced by that finding. Defendant was sentenced to the mandatory minimum sentence for first-degree murder despite the judge finding that the three aggravating factors outweighed the two mitigating factors.. See N.J.S.A. 2C:11-3(b)(1). Thus, even if Judge Ziegler had not found aggravating factor two, defendant's sentence would have been the same.

However, defendant was not just convicted of murder, which distinguishes this case from State v. Jarbath, 114 N.J. 394 (1989), on which defendant relies. Because death of the victim is not an element of either unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1), or hindering apprehension, N.J.S.A. 2C:29-3(b)(1), it was not double-counting for Judge Ziegler to find aggravating factor two for those counts. See State v. Fuentes, 217 N.J. 57, 74-75 (2014) (discussing a sentencing court's need to avoid double-counting facts that establish the elements of an offense). Thus, it was

appropriate for the judge to consider the victim's death as an aggravating factor in sentencing on those counts—particularly defendant's admitted habit of regularly carrying a gun without a license, without which he would not have been in a position to kill Rennie. Furthermore, because Judge Ziegler properly considered aggravating factor two in regard to Counts Three and Six, he also properly allowed it to inform his consideration of the overall fairness of the sentence under Torres, 246 N.J. at 271-72 (noting that a sentencing judge must be mindful that the aggravating and mitigating factors are relevant to the sentence's fairness).

Next, defendant claims that the sentencing judge did not adequately explain his reasons for imposing consecutive sentences for murder, unlawful possession of a weapon, and hindering apprehension, as required by Torres. There is no constitutional impediment to a trial court deciding whether a defendant should serve consecutive sentences under the standards governing sentencing. State v. Abdullah, 184 N.J. 497, 512-15 (2005); State v. Anderson, 374 N.J. Super. 419, 422 (App. Div. 2005). Nor is there a presumption in favor of concurrent sentences; the maximum potential sentence authorized by the jury verdict is the aggregate of sentences for multiple convictions that do not merge. Abdullah, 184 N.J. at 513-14.

A trial court is, however, expected to give a separate statement of

reasons that clearly explains any decision to impose consecutive sentences. State v. Molina, 168 N.J. 436, 442 (2001); State v. Carey, 168 N.J. 413, 422 (2001). When making its determination, the trial court should consider whether (1) the crimes and their objectives were predominantly independent of each other; (2) the crimes involved separate acts of violence; (3) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior; (4) any of the crimes involved multiple victims; or (5) the convictions for which the sentences are to be imposed are numerous. Carey, 168 N.J. at 422-23 (citing State v. Yarbough, 100 N.J. 627, 643-44 (1985)). These factors should be applied qualitatively, not quantitatively, and therefore the trial court may impose consecutive sentences even though a majority of the factors support concurrent sentences. Id. at 427. When the trial court properly evaluates the Yarbough factors in light of the record, the court's decision will normally not be disturbed on appeal. State v. Miller, 205 N.J. 109, 129 (2011); State v. Cassady, 198 N.J. 165, 182 (2009).

Defendant argues that Judge Ziegler merely "paid lip service" to the Yarbough factors in finding that the crimes of murder, unlawful possession of a firearm, and hindering apprehension were distinct. (Db42). To the contrary, the judge explained that defendant frequently carried a gun without a permit,

not just on the day he murdered Rennie, and that the hindering occurred at a different location and more than eight hours after the murder, when there had been time for reflection. (15T71-18 to 73-4). Our Supreme Court has held that a sentencing court may impose the sentence for unlawful possession consecutive to that for the substantive crime as long the sentencing court provides a detailed explanation of its reason for doing so. State v. Cuff, 239 N.J. 321, 351 (2019) (remanding on other grounds and directing sentencing court to provide a more detailed explanation of its reasons for imposing consecutive sentences for unlawful possession of a weapon and kidnapping). Judge Ziegler did so, and the facts on which he relied amply support his determination that the crimes were separate and justified consecutive sentences.

Defendant also asserts that Judge Ziegler's reliance on defendant's habit of carrying a gun for self-defense as a basis for finding a substantial need for deterrence was somehow improper in light of the United States Supreme Court's opinion in New York Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). But Bruen struck down New York's licensing scheme requiring individuals to show "proper cause" in order to obtain a license to carry a handgun. Id. at 39. It did not absolve individuals of the obligation to obtain a permit to carry, much less of their responsibility to refrain from killing

romantic rivals when snubbed by ex-girlfriends. Judge Ziegler was certainly justified in finding a substantial need to deter such conduct.

Torres requires that courts imposing consecutive sentences give an explicit statement explaining the overall fairness of the sentence imposed. 246 N.J. at 268. That is precisely what Judge Ziegler did here, acknowledging the aggregate length of the sentence and the total period of parole ineligibility, as well as defendant's age at the time of sentencing, and noting that the sentence was "genuinely fair . . . on an overall basis . . . ." (15T75-7 to 8; 15T76-18 to 77-17). While defendant may disagree with Judge Ziegler's assessment, to say that this statement did not comply with the dictates of Torres disregards the judge's detailed and thoughtful explanation of his reasons for imposing consecutive sentences.

CONCLUSION

For the foregoing reasons, the State urges this Court to affirm defendant's convictions and sentence.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

DATED: October 30, 2024

CERTIFICATION

1. Confidential Information / Confidential Personal Identifiers (must select one). I certify that I have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and:

☒ This document or pleading does not contain any confidential information or any confidential personal identifiers, **or**

☐ This document or pleading previously contained confidential information or confidential personal identifiers, which have been redacted or anonymized, including through the use of fictitious first names or initials. The cover of the redacted version of the document or pleading contains the word "REDACTED." I acknowledge that a non-redacted version must be filed contemporaneously with the redacted version in matters where the confidential information is necessary to the disposition of the matter.

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/s/*Regina M. Oberholzer*
Regina M. Oberholzer
Deputy Attorney General

DATED: October 30, 2024

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3280-22
INDICTMENT No. 19-11-01082-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Cumberland County.
FRANK J. BAKER,	:	
		Sat Below:
Defendant-Appellant.	:	
	:	Hon. William F. Ziegler, J.S.C.,

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

INDEX TO APPENDIX

PAGE NOS.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Frank J. Baker relies on the procedural history and statement of facts from his initial brief. (Db 1-22)[1]

[1] This brief uses the same abbreviations as Baker's initial brief. In addition, "Db" refers to Baker's initial brief, "Sb" refers to the State's brief, and "Rba" refers to the appendix to this reply brief.

LEGAL ARGUMENT

Baker relies on the legal arguments from his initial brief and adds the following:

POINT ONE

THE TRIAL COURT'S FAILURE TO PROPERLY TAILOR THE JURY CHARGE ON PASSION/PROVOCATION MANSLAUGHTER REQUIRES REVERSAL. WITH RESPECT TO THE STATE'S CONTENTION ON APPEAL THAT THE ALLEGED PROVOCATION DID NOT WARRANT SUCH A CHARGE IN THE FIRST PLACE, IT IS WELL-SETTLED THAT THE THRESHOLD FOR A PASSION/PROVOCATION CHARGE IS LOW, AND THAT THRESHOLD WAS MET IN THIS CASE. INDEED, THE PROSECUTOR DID NOT OBJECT TO THE CHARGE AT TRIAL.

In response to the arguments raised in Point I of his initial brief, involving the adequacy of the jury charge on passion/provocation manslaughter, the State argues that "there was nothing in the record to support a passion/provocation manslaughter charge" in the first place. (Sb 17) The State asserts that neither jealousy over infidelity nor a course of mistreatment is sufficient provocation unless the mistreatment includes physical abuse. (Sb 16-17) First, Baker did not shoot Rennie simply because he was "jealous and felt disrespected" (Sb 16), or because "McIver told him she was choosing Rennie over him." (Sb 17) The situation was far more complicated than that. As Baker explained in his initial brief, McIver's infidelity, emotional

manipulation and deceit, in the months leading up to the shooting, combined with the frustration he was feeling after being denied access to his daughter, played a significant role in the loss of control he experienced when McIver unexpectedly and in an aggressive tone, told Baker she was choosing Rennie. (Db 23-31)

Second, contrary to the State's assertion, the law in New Jersey does not clearly state that provocation is never sufficient where there has been no immediate threat of physical injury or history of violence by the victim against the defendant. (Sb 15) The State misapprehends the facts of Stated v. Erazo, 126 N.J. 112 (1991), which it cites in support of that contention. In Erazo, where passion/provocation was properly charged, there was no evidence of "preceding violence and threats to [Erazo] from the victim[]," as the State asserts. (Sb 16) The victim did not threaten Erazo with violence on the day of the incident; rather, she threatened to call Erazo's probation officer and falsely report that Erazo cut her with a knife. Id. at 124. Nor did the victim threaten Erazo with violence at any point prior to the day of homicide. As Baker noted in his initial brief, although Erazo's marriage to the victim was "fraught with violence," it was not violence by the victim against Erazo; rather, it was violence by Erazo against the victim. (Db 27-28)

The State also misapprehends the holding of State v. Docaj, 407 N.J. Super. 352 (App. Div. 2009). In that case, Docaj shot his wife of 19 years during an argument about her infidelity and plans to leave the marriage. The jury was charged on passion/provocation manslaughter as a lesser offense, even though the defense conceded that there was "no evidence of any physical provocation" that would qualify as adequate provocation. Id. at 367, 369. Instead, "the defense highlighted defendant's continuing and escalating emotional state throughout the month of February," during which Docaj became increasingly suspicious that his wife was having an affair, his wife did not acknowledge his birthday and told him she did not love him any longer, and when he bought his wife flowers for her birthday two days later, she told him she had "another man lined up" and wanted a divorce. Id. at 356-67; 366-67.

On appeal, Docaj argued that an error in the passion/provocation charge required reversal. Specifically, Docaj challenged a fleeting misstatement of law that the judge made in charging the jury on one of the four factors that distinguishes passion/provocation from murder: that the defendant did not have an adequate time to cool off. In affirming Docaj's conviction for murder, the Court did not find that there was insufficient provocation to warrant a passion/provocation manslaughter in the first place, as the State seems to

suggest. (Sb 17) In fact, the Court expressly declined to address whether a passion/provocation charge was required, noting that "[t]he threshold for a jury instruction for passion-provocation manslaughter is relatively low," and "the prosecutor did not object to the charge in the trial court." Id. at 368 n.4. While the Court observed that the "victim's statements that she wanted a divorce and had 'another man lined up'" alone does not qualify as adequate provocation, the Court acknowledged that the defense's theory of passion/provocation was not limited to those statements: "Defense counsel's summation emphasized the defendant's enduring 'emotional swirl' [over the course of a month] that allowed him to lose control," id. at 367, when, immediately before the shooting, he begged his wife not to leave the family, and she angrily responded, the "only thing you're getting are your walking papers" and slapped him. Id. at 359.

Thus, while the Court in Docaj noted the weakness of the defense's case for passion/provocation manslaughter, it did not find that the charge was not required because there was no sufficient threat of physical injury to Docaj. Rather, the Court found that given the weakness of the case for passion/provocation manslaughter, the fleeting misstatement of law regarding the adequacy of a cooling-off period was harmless. Id. at 367-68 (noting, "The relative strength of the evidence of passion/provocation manslaughter weighs

heavily in determining whether 'the error led the jury to a result it otherwise might not have reached.'"). Id. at 367. In reaching that conclusion, the Court emphasized that the adequacy of the cooling-off period – about which the fleeting misstatement of law involved – was not a material issue in dispute. The critical issue in dispute was the adequacy of the provocation. Id. at 361-65,

This case is distinguishable from Docaj in two major respects. First, Baker presented a much stronger case of provocation. Unlike Docaj, who was well aware that his wife intended to leave him for another man, Baker did not expect McIver to choose Rennie, because, after months of emotional manipulation and deceit, McIver told Baker that she wanted to work things out with him. Moreover, Baker had every reason to believe McIver, because (a) he and McIver had just been on successful "dates," and (b) Rennie told Baker that he would leave McIver alone because McIver expressed her desire to work things out with Baker. Not only was Baker caught off guard when he found McIver at Rennie's house and heard her say, in an aggressive tone, that she was choosing Rennie, he was already in an emotional panic because he had just been denied access to his daughter, something that had never occurred before.

Second, unlike in Docaj, Baker's challenge to the jury charge did not relate to an issue that was not in dispute. Baker's challenge involved the portion of the charge relating to the critical issue in this case: the adequacy of the provocation. Thus, for the reason's discussed in Baker's initial brief, the judge's failure to tailor the passion/provocation manslaughter charge to the facts of the case was clearly capable of producing an unjust result. "Errors in the jury instruction on matters or issues that are material to the jury's deliberation are presumed to be reversible error." Id. at 366 (internal quotation marks and citation omitted).

While the State correctly observes that a threat of physical violence by the victim is often present in cases where a charge on passion/provocation is required, that is not always the case. As Docaj and Erazo demonstrate, in New Jersey, the absence of physical violence against the defendant does not automatically mean that a passion/provocation charge is not warranted; whether there is adequate provocation requires a more nuanced analysis. Indeed, the adequacy of the provocation in a case where there was no threat of violence by the victim against the defendant is currently before the New Jersey Supreme Court in State v. Owens, No. A-1148-22 (App. Div. June 12, 2024),

notice of appeal as of right,[2] filed July 23, 2024, Sup. Ct. Dkt No. 089721. (Rba 1-38)

In that case, Owens became enraged when he discovered that the victim, a drug dealer, had been texting his girlfriend, with whom he had a child, and had been regularly selling heroin to his girlfriend for her personal use. The moment Owens saw the texts, he grabbed his girlfriend by the throat and began to choke her, and then grabbed her phone and car keys and drove off. Cell phone records showed that the Owens began continuously calling the victim up until the time he shot the victim at the victim's house. The State's theory of prosecution was that Owens killed the victim in a rage when he learned about his girlfriend's drug-based relationship with the victim. Slip op. 1-4, 14-15. (Rba 1-4, 14-15)

The majority found that the trial court's failure to sua sponte charge the jury on passion/provocation manslaughter required reversal. The Court reasoned:

> The lethal consequence of drug use, particularly heroin use, is well known. The information defendant discovered and to which he swiftly reacted struck at the core of his romantic and familial relationship with M.L. and their minor child. Learning that M.L. was a heroin addict whose drugs were supplied by [the victim] threatened the health of his romantic relationship and the continuance of their family structure. More abstractly, discovering

[2] Judge Gilson dissented from the Court's decision reversing Owens' murder conviction.

> the involvement of a loved one in drug use bears direct resemblance to a classic scenario, where one reacts violently to the surprise discovery of one's romantic partner in a sexual liaison. Determining that the impact of a discovery of this kind would provoke an impassioned reaction, as here, does not require a "meticulous[ ] ... sift[ing] through the entire record." [citation omitted] Rather, the evidence "jump[s] off the page." [citation omitted]
>
> [Slip op. 13-14. (Rba 13-14)]

The majority noted that while "'[t]he generally accepted rule is that words alone, no matter how offensive or insulting, do not constitute adequate provocation . . . the Supreme Court has acknowledge[d] and embrace[d] the trend away from the usual practice of placing the various types of provocatory conduct into pigeon-holes." Slip op. 11 (alterations in original)(internal quotation marks and citations omitted). (Rba 11) The majority also noted that "words conveying information of a fact that would constitute adequate provocation had that fact been observed constitutes sufficient provocation." Slip op. 15 (citing 2 LaFave & Scott, Substantive Criminal Law § 7.10 at 657-58 (2d ed.1986).

The dissent disagreed that Owens' discovery of the text messages "would reasonably provoke an ordinary person into a passionate rage to kill another person. There is a difference between becoming angry and being passionately provoked." The dissent noted that "Defendant did not walk in and find his girlfriend using drugs that the victim had sold her." Slip op 4, 5

(Gilson, P.J.A.D., dissenting). Notably, Judge Gilson did not hinge his dissent on the absence of physical violence by the victim against Owens.

POINT TWO

WHETHER THERE WAS A NON-PROPENSITY PURPOSE TO ADMIT THE PRIOR THREATS TO KILL IS NOT THE ISSUE. THE PRIOR THREATS SHOULD NOT HAVE BEEN ADMITTED BECAUSE THE STATE DID NOT PRESENT CLEAR AND CONVINCING EVIDENCE THAT THE THREATS WERE ACTUALLY MADE. ALTERNATIVELY, THE JURY WAS NOT INSTRUCTED THAT BEFORE IT COULD GIVE ANY WEIGHT TO THE ALLEGED PRIOR THREATS, IT MUST BE SATISFIED THAT BAKER ACTUALLY MADE THOSE THREATS.

The State argues that the prior threats to kill were admissible under Rule 404(b) because there was a non-propensity purpose: motive. (Sb 19-20) Baker's complaint, however, was not that there was no non-propensity purpose for the admission of the prior bad acts evidence. Baker's complaint was that the evidence was admitted without a finding by the judge that there was clear and convincing proof that the prior threats were actually made, as required under Cofield. (Db 35-40) Again, as the Court in State v. Hernandez explained:

> The third prong of our Cofield test requires that the judge serve as gatekeeper to the admission of other-crime evidence. . . . [T]he third prong of Cofield requires the trial court to ensure that the jury hears only clear and convincing proof that the other crime or bad act occurred and that the defendant was responsible for the conduct.

> That rule is a necessary component of the fortification against the possibility of unfair prejudice when a court determines whether relevant other-crime evidence should be admitted in the trial of an accused.
>
> [170 N.J. 106, 123-24 (2001) (internal citation omitted).]

Baker maintains, for the reasons set forth in his initial brief, the prior threats would not have been admitted if the judge had conducted a Cofield analysis because the State had not presented clear and convincing evidence that the threats were made. (Db 37-39)

Alternatively, Baker argued that reversal is required because the jury was not given any guidance on how to evaluate 404(b) evidence. Most importantly, the jury was not told, in accordance with the model charge on prior bad acts, that it must be satisfied that Baker actually made the threats McIver claimed he made, and if it was not so satisfied, it may not consider the evidence at all. Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts" (revised 9/12/2016)("Before you can give any weight to this evidence, you must be satisfied that the defendant committed the other [crime, wrong, or act]. If you are not so satisfied, you may not consider it for any purpose."). (Db 39-40)

Again, because the 404(b) evidence – that Baker "always" made threats to kill – undermined his testimony that he did not go to Gouldtown with the intention of shooting anyone and cut to the heart of his passion/provocation

defense, the admission of the 404(b) evidence without a Cofield hearing or jury charge was clearly capable of leading the jury to a verdict it otherwise would not have reached.

POINT THREE

THE MATTER MUST BE REMANDED FOR RESENTENCING .

Baker relies on the sentencing arguments made in Point Three of his initial brief.

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CONCLUSION

For the reasons set forth here and in defendant's initial brief, defendant's conviction for murder must be reversed. In the event that the Court determines such relief is unwarranted, for the reasons set forth in Point III, the matter must be remanded for resentencing.

Respectfully submitted,

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