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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4941-18T1

INDICTMENT NOS. 16-04-0718, 18-06-0809
CASE NOS. 15004862, 18002174

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

v. :

:

EBENEZER BYRD,

Defendant-Appellant. :

CRIMINAL ACTION

ON APPEAL FROM A JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION (CRIMINAL), MONMOUTH COUNTY

SAT BELOW: Honorable Joseph W. Oxley, J.S.C., and a jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

On April 25, 2016, a Monmouth County Grand Jury returned Indictment No. 16-04-718, charging defendant Ebenezer Byrd, along with co-defendants Gregory A. Jean-Baptiste, Jerry J. Spraulding, and James Melvin Fair, with second degree conspiracy to commit armed burglary, in violation of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2 (Count 1); second degree armed burglary, in violation of N.J.S.A. 2C:18-2, with a sentencing enhancement for use or possession of a firearm under N.J.S.A. 2C:43-6c (Count 2); first degree armed robbery, in violation of N.J.S.A. 2C:15-1, with a sentencing enhancement for use or possession of a firearm under N.J.S.A. 2C:43-6c (Count 3); first degree felony murder, in violation of N.J.S.A. 2C:11-3a(3), with a sentencing enhancement for use or possession of a firearm under N.J.S.A. 2C:43-6c (Count 4); second degree possession of a weapon (firearm) for an unlawful purpose, in violation of N.J.S.A. 2C:39-4a (Count 5); and second degree unlawful possession of a weapon (handgun), in violation of N.J.S.A. 2C:39-5b (Count 6). (Da1-6).[1] Defendant and co-defendant Jean-Baptiste were also

[1] 1T refers to the hearing transcript dated September 28, 2018.
2T refers to the hearing transcript dated December 14, 2018.
3T refers to the hearing transcript dated January 14, 2019.
4T refers to the trial transcript dated January 17, 2019.
5T refers to the trial transcript dated January 23, 2019.
6T refers to the trial transcript dated January 24, 2019.
7T refers to the trial transcript dated January 29, 2019.
8T refers to the trial transcript dated January 30, 2019.
9T refers to the trial transcript dated January 31, 2019.
10T refers to the trial transcript dated February 5, 2019.
11T refers to the trial transcript dated February 6, 2019.
12T refers to the trial transcript dated February 7, 2019.

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charged with first degree witness tampering, in violation of N.J.S.A. 2C:28-5a (Count 7). (Da6). Defendant and co-defendant Sprauldin were also separately charged with second degree certain persons not to have weapons, in violation of N.J.S.A. 2C:39-7b(1) (Counts 8 and 9). (Da6-7).

A Monmouth County Grand Jury returned Indictment No. 18-06-0809, charging defendant Byrd with first degree witness tampering, in violation of N.J.S.A. 2C:28-5a (Count 1), and third degree witness tampering, in violation of N.J.S.A. 2C:28-5a (Count 2). (Da9-10).

On November 2, 2017, pursuant to a plea agreement, co-

13T refers to the trial transcript dated February 13, 2019.
14T refers to the trial transcript dated February 14, 2019.
15T refers to the trial transcript dated February 19, 2019.
16T refers to the trial transcript dated February 20, 2019.
17T refers to the trial transcript dated February 21, 2019.
18T refers to the trial transcript dated February 25, 2019.
19T refers to the trial transcript dated February 26, 2019.
20T refers to the trial transcript dated February 27, 2019.
21T refers to the trial transcript dated February 28, 2019.
22T refers to the trial transcript dated March 4, 2019.
23T refers to the trial transcript dated March 5, 2019.
24T refers to the trial transcript dated March 6, 2019 (AM session).
25T refers to the trial transcript dated March 6, 2019 (PM session).
26T refers to the trial transcript dated March 7, 2019.
27T refers to the trial transcript dated March 12, 2019.
28T refers to the sentencing transcript dated June 6, 2019.
29T refers to the remand hearing transcript dated September 10, 2020.
30T refers to the transcript of James Fair's plea hearing, dated November 2, 2017.
Da refers to the appendix to defendant's brief.
Pa refers to the appendix to this brief.

defendant Fair pleaded guilty to second degree conspiracy to commit armed burglary, in violation of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2. (30T5:4-11:23). The remaining charges against him under Indictment No. 16-04-718 were dismissed. Fair was sentenced to a ten-year term subject to an 85% parole ineligibility period under the No Early Release Act ("NERA"), and a three-year period of parole supervision, to be served concurrently with a sentence imposed under an unrelated Indictment No. 14-10-1876. (Pa12-15).[2]

From January 17, 2019 to March 12, 2019, defendant Byrd and co-defendants Jean-Baptiste and Sprauldin g were tried together before the Honorable Joseph W. Oxley, J.S.C., and a jury, on Counts 1 through 7 of Indictment No. 16-04-718 and Counts 1 and 2 of Indictment No. 18-06-0809. On March 12, 2019, the jury convicted all three defendants of Counts 1 through 6 of Indictment No. 16-04-718, convicted defendant and co-defendant Jean-Baptiste of Count 7, first degree witness tampering, and convicted defendant of Counts 1 and 2 of Indictment No. 18-06-0809, first and third degree witness tampering. (27T122:21-129:2; Da11-16). Following the verdict, defendant Byrd and co-defendant Sprauldin g were tried together to the same jury on Counts 8 and 9 of Indictment No. 16-04-718, second degree certain persons not to have weapons. (27T131:20-141:12). The

[2] James Fair has appealed his convictions under both indictments and that appeal remains pending before this Court under Docket No. A-2754-17T1.

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jury convicted defendant on Count 8 and co-defendant Sprraulding on Count 9. (27T141:17-142:13).

Defendant was sentenced by Judge Oxley on June 6, 2019. As defendant was already serving an extended term sentence for a previous offense at the time of sentencing, the court denied the State's motion to impose a discretionary extended term sentence. (28T27:18-28:5). However, the court granted the State's motion for a mandatory extended term sentence under N.J.S.A. 2C:44-3d. (28T28:6-31:4). The court merged defendant's conviction on Count 1, second degree conspiracy to commit armed burglary, into Count 2, second degree armed burglary, and merged defendant's conviction on Count 2 into Count 4, first degree felony murder. (28T21:23-22:8). The court further merged defendant's conviction on Count 5, second degree possession of a weapon (firearm) for an unlawful purpose, into Count 3, first degree armed robbery. (28T22:9-15).

Judge Oxley sentenced defendant to a life term with an 85% NERA parole ineligibility period and a five-year period of parole supervision on Count 4, felony murder. On Count 3, armed robbery, the court imposed a concurrent 20-year term with an 85% NERA parole ineligibility period, and on Count 6, second degree unlawful possession of a weapon, the court imposed a concurrent ten-year term with a five-year period of parole ineligibility under the Graves Act. (28T39:1-40:18). On Count 7, first degree witness tampering, the court imposed a 20-year term with a ten-year period of parole ineligibility, to run consecutively

to the life sentence for felony murder. (28T40:19-41:5). On Count 8, second degree certain persons, the court imposed a concurrent ten-year term with a five-year period of parole ineligibility under the Graves Act. (28T41:5-13; Da18-21; Da25-28).

For defendant's two witness tampering convictions under Indictment No. 18-06-0809, the court imposed a 20-year term with a ten-year period of parole ineligibility on Count 1, to run consecutively to the 20-year sentence for first degree witness tampering on Count 7 of Indictment No. 16-04-718. On Count 2, the court imposed a five-year term to run consecutive to the 20-year term imposed on Count 1. (28T41:14-42:2; Da22-24; Da29-31). The court further imposed the applicable fines and penalties. (Da18-31). The court clarified these sentences in amended judgments of conviction issued on August 26, 2019. (Da25-31)

On July 15, 2019, defendant filed his Notice of Appeal. (Da32-36).

COUNTERSTATEMENT OF FACTS

In the early morning hours of September 14, 2009, defendant Ebenezer Byrd (a.k.a. "EB" or "Storm"), along with co-defendants Gregory Jean-Baptiste (a.k.a. "GU") and Jerry Spraulding (a.k.a. "B.Me."), tortured and murdered Jonelle Melton after breaking into her apartment in the Brighton Arms Apartments in Neptune. As the State demonstrated at trial, defendants intended to steal a large sum of cash they believed was hidden in the Brighton

Arms apartment of drug dealer David James (a.k.a. "Munch"). But defendants' plan was thwarted when they broke into the wrong apartment, that of James's neighbor, Jonelle Melton, torturing her for information about the money that she could not provide and ultimately killing her by shooting her in the head.

At the time of her death, the victim was a fifth grade social studies teacher at Red Bank Middle School. (5T57:23-58:9). She lived alone in Apartment 208-A in the Brighton Arms complex, after amicably separating from her husband and fellow teacher, Michael Melton, in 2007. (4T57:15-65:8; 5T53:14-55:15). She was well liked and was friendly to her neighbors, to whom she often spoke about her love of teaching. (7T14:11-15:5).

David James, who later admitted to police that he sold large quantities of cocaine, lived in Apartment 206-A at the same complex. (8T166:3-25; 10T71:8-23; 14T108:1-109:4). In late August, early September 2009, James kept between $16,000 and $20,000 in cash in his apartment, hidden in a French toast box in a chest freezer in the kitchen. (8T127:18-129:15).

During the 2009 time frame, James's girlfriend Alicia Stewart routinely spent nights at his apartment, and was aware of the cash in the freezer. (8T129:16-21; 8T166:11-168:9). On one occasion in the summer of 2009, Stewart was at a party with her friends Raven Alston and Jazmine Aviles, and co-defendant James Fair (a.k.a. "Dough Boy"), with whom Aviles had an occasional sexual relationship. Alston and Fair overheard

Stewart having an argument on the telephone with James, in which James accused Stewart of "using him" and Stewart responded that, "if I wanted anything from you, I know your money was in the deep freezer." (8T170:1-171:23; 11T167:12-169:3; 11T187:1-13). Shortly after the party, Fair called Aviles to ask where David James lived, but Aviles refused to give him that information, finding his request "alarming." (8T172:17-174:20; 11T172:16-173:1). As Aviles called Alston to let her know about Fair's inquiry, Fair showed up at Alston's door asking the same question. Fair had never been to Alston's home before and she refused to give him that information. (11T172:16-174:3).

Fair "hung out" with co-defendant Jean-Baptiste, as Jean-Baptiste conceded to police in 2012. (14T64:4-65:13). Fair, Jean-Baptiste, Spraulding and defendant conspired to break into James's apartment and steal the cash hidden there. However, Fair did not ultimately participate in break-in, or the victim's murder. (30T10:14-11:19). Defendant and co-defendants Jean-Baptiste and Spraulding committed those crimes without Fair. (27T122:21-129:2).

Defendant and co-defendants Jean-Baptiste and Spraulding were good friends at the time of the murder. (8T246:9-247:7). Defendant was dating Elizabeth Pinto at that time. (8T246:1-14). One night in September 2009, Pinto drove defendant, Jean-Baptiste and Spraulding to the Brighton Arms apartments. Late that night, Pinto met defendant at his house on Sewall Avenue in Asbury Park, where he lived with his mother and sister. Jean-

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Baptiste and Sprauldding were already there. (8T245:14-25; 8T255:14-256:11; 8T267:21-24). Pinto knew defendants were planning to burglarize an apartment and steal money. (8T253:8-17). Defendants were talking about stealing a large amount of money. Pinto understood the location where the money was to be a "trap house," where no one lived, but where "transactions are done or people hang out during the day or things are kept or tossed." (8T257:3-258:5; 19T163:1-3). When Pinto arrived at defendant's house, she observed defendant, Jean-Baptiste and Sprauldding getting dressed in all black, and each put on two pairs of gloves, latex gloves covered by black gloves. (8T260:6-261:23; 19T161:5-162:14). Defendant armed himself with a handgun, and the three defendants, carrying a backpack, got into a white sedan with Pinto driving. (8T261:24-263:24). In the car, defendant, Jean-Baptiste and Sprauldding covered their faces with shirts. (8T260:22-261:5; 19T162:15-18).

Defendant directed Pinto as she drove to the Brighton Arms apartment complex. (8T266:8-11; 19T164:12-15; 19T175:10-177:14). He told her to stop and she parked across the street from Brighton Arms at a liquor store, which was closed, and the defendants got out of the car. They took the backpack with them, as well as Pinto's phone, which had a walkie talkie feature. Pinto saw them go into the apartment complex across the street. They were gone for a period of time, longer than twenty but less than ninety minutes. Then the three men came running back to the car "in a panic" and quickly got in the car

with the backpack. Defendant Byrd scooted Pinto over from the driver's seat and drove off, "full speed ahead." As defendant drove away at high speed, Jean-Baptiste and Sprаulding told him to "chill out" because driving too fast would attract attention. (8T267:3-272:18; 9T12:17-13:16). Pinto went home after they got back to defendant's mother's house. The next day she noticed a scratch on defendant's face, and defendant acted "depressed" and "shut down." (8T273:2-275:4).

In the days that followed, Pinto overheard defendant and Spraulding talking about "something that maybe would bring problems and that was hidden." (8T275:25-276:12). At some point in Fall 2009, defendant Jean-Baptiste came to Pinto's home in Keansburg. He had never been to her house before. He picked her up in his car and spoke to her "trying to figure out who was . . . snitching." (9T14:20-16:8). Jean- Baptiste told Pinto that she "needed to be quiet," which Pinto understood to be a threat. (9T16:8-18).

The body of Jonelle Melton was discovered on the morning of Monday, September 14, 2009. Jonelle failed to show up for work at Red Bank Middle School that morning, which was extremely unusual for her. (4T129:11-130:8). The school secretary, Michelle Case, contacted Michael Melton, who worked at the same school, in his classroom to see if he knew anything about Jonelle. Michael, who according to Case was "calm" and not "alarmed in any way," told her that he expected Jonelle to be in school that day. Case asked Michael to go and check on Jonelle,

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and arranged for his class to be covered. (4T134:4-135:23; 5T82:15-84:11).

Michael Melton drove from Red Bank to Jonelle's apartment in Neptune. Michael observed Jonelle's car in the parking lot and was initially "relieved" because it meant that she was home. As he tried to knock on her door, he observed that it was unlocked, so he entered the apartment and found Jonelle's body in the bedroom. She was lying on the floor by the bed next to a broken table. Her neck area was bloody. Melton immediately called 9-1-1, and then checked the victim's wrist for a pulse. He moved some duct tape on her wrist, but she had no pulse. (5T84:12-91:9).

Police investigation revealed that Jonelle's ground floor one bedroom apartment had been broken into through a window in the rear. (6T188:8-190:6). Defendants popped the window lock and cut the screen, leaving the screen outside on the patio. (6T196:9-20; 6T206:16-21). The rear sliding door to the kitchen was also found open. A chair was found underneath the window with shoe prints on it, and a lighter was found near the chair leg. All of the kitchen cabinet doors were open and both the refrigerator and the freezer were left open, indicating a search. (6T200:10-24; 6T208:1-209:25).

There was dirt in the hallway leading to the bedroom, and a piece of used duct tape stuck to the hallway floor.[3] (6T210:6-

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[3] Forensic testing revealed the presence of Michael and Jonelle Melton's DNA on this duct tape. (8T42:6-16).

22). Although the rest of the apartment was tidy, the bedroom, where the victim's body was found, showed signs of an extreme struggle. (6T201:2-6; 6T204:11-16). A table was overturned broken over the victim's body. A table leg was broken off. Magazines were strewn about with blood splattered on them. There was blood splatter in other areas of the room as well. The victim's laptop and television had not been stolen, and were found in the bedroom. (6T212:16-218:3). A torn white glove was found beneath the victim's wrist. (6T228:7-229:8). Blood transfer on the front door indicated that the assailants had left the apartment by that door. (17T157:20-25).

The victim had been brutally beaten, cut numerous times with a knife and shot twice. The autopsy revealed that the victim had been beaten about the face, and had several cuts made by a knife on her right scalp, right temple, just above the right ear, on her right cheek and lips and on the right side of her nose. Her eyelids were swollen and blood was coming out of her left ear. (17T182:10-184:25; 17T193:11-196:1). Her jaw was broken in two places. (17T204:10-205:5). The victim had numerous bruises on both arms and on her right wrist, indicating that she had been grabbed. She also had a bruise on her right leg. (17T189:21-191:23). The victim was shot in the right shoulder and in the back of the head, which was the fatal wound. (17T197:13-208:3; 17T211:16-212:7). There were no signs of sexual assault, and the soles of the victim's feet were clean, indicating that the victim did not walk around after she was

injured. (17T185:1-15). Toxicology results were negative, as there were no toxic substances found in the victim's system. (17T211:9-15).

The autopsy revealed that the time of death was approximately between 1:00 a.m. and 5:00 a.m. on September 14, 2009. (17T218:4-9). The police investigation revealed that the victim had spoken with a college friend on the telephone until approximately 12:50 a.m. on September 14, during which she was her normal "bubbly self." (5T8:5-10:5). Shirley Nelmes, a neighbor of the victim who lived in Apartment 211-A, reported to police that she had slept on her living room floor that night due to back issues. Nelmes reported that at 2:30 or 3:00 a.m., she was awakened by her dogs barking. She looked out her sliding glass door to see what the dogs were barking at, and saw a black male standing at the corner of the building behind her building, near the victim's building. This man was approximately 5'10" or 11" with short hair and was dressed in dark clothing. He was approximately 28 to 31 years old, and he was holding something in his hand. Nelmes watched the man stand there for approximately 15 minutes until she had to go to the bathroom. When she looked again, the man was gone. (7T6:21-16:12). Eric Luciano, who lived upstairs from the victim in Apartment 208-B, told police that he had been awakened in the middle of the night by his dog barking. He could hear muffled noises and then a "metallic clang" from downstairs. Luciano was "about 80 percent sure" that this was during the four o'clock

hour. (5T17:1-20:16).

The police investigated Michael Melton as a potential suspect, but were ultimately able to rule him out. Melton was cooperative throughout the investigation, providing a DNA sample and statements to police. Investigators confirmed that Michael Melton had been at the apartment of his girlfriend, Latrell Watts, with Watt's son and niece at the time of the murder. (4T200:7-204:16; 13T171:8-13). Police also discovered that, although they were getting divorced, Michael and Jonelle had a good relationship, and were still intimate. Although Michael Melton's DNA was found in the victim's apartment, this was not uncommon because he was a frequent visitor to that apartment, and he had been the one to discover her body. (13T171:13-23).

The police also investigated Jason Davis, the boyfriend of the victim's friend and co-worker Aisha Person Nesmith, as a potential suspect. At the time of the murder, Davis had recently been released from state prison. (4T168:6-14). Nesmith had plans with Davis on the night of September 13, 2009, but did not show up, and Davis had called the victim looking for Nesmith, aggravated that she had broken the plans. (4T171:13-22). Davis was cooperative with the investigators and provided a DNA sample and consent to search his phone and apartment. (13T173:9-176:6). Police were able to rule Davis out as a suspect as neither forensic evidence nor witnesses linked him to the crime scene, and he stayed cooperative throughout the investigation. (13T181:12-21).

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The police also investigated Kevin Brown, another associate of James Fair. Brown was cooperative with investigators and provided a DNA sample. Police were able to rule out Brown as a suspect because there was no evidence linking Brown to the crime, no DNA evidence, no witness statements, and no cell phone tower hits. (19T51:4-24; 19T55:5-14).

As part of the investigation, certain evidence collected from the crime scene was sent to the Office of the Chief Medical Examiner of New York City, as that office was able to perform "high sensitivity" DNA analysis on objects with low amounts of DNA. (12T145:7-146:5; 12T151:12-152:20). Defendant Jean-Baptiste was found to be a major contributor to the lighter that was found on the victim's kitchen floor. The victim was excluded from being a contributor to the DNA found on the lighter. (12T152:21-158:25; 12T175:18-183:8). When police spoke to defendant Jean-Baptiste in 2012, he denied knowing the victim, and denied using that type of cheap, "crackhead" lighter, although he admitted smoking "a lot of cigarettes." (14T59:6-62:3).

Investigating officers spoke to Elizabeth Pinto in January 2011, but she did not provide any information as to her involvement. She did provide telephone numbers for defendant Byrd and co-defendants Jean-Baptiste and Sprauldling, and police attempted to obtain telephone records for the three men. (14T24:4-30:23). Investigators met with Pinto two more times in 2014 and then in December 2015, when Pinto informed the

investigators of defendants' involvement in the murder of Jonelle Melton, and told them the full story of how Pinto transported defendants to the Brighton Arms apartments in September 2009. (19T20:23-46:16; 19T149:22-169:10). Pinto ultimately pleaded guilty to second degree conspiracy to commit armed burglary, and agreed to testify truthfully against defendants. (8T220:19-224:18).

Investigators were not able to obtain phone records for co-defendant Jean -Baptiste or Sprraulding, but were able to obtain defendant Byrd's phone records for the time period encompassing the murder. (14T29:17-30:22). Defendant's phone, like Pinto's phone, also had a walkie talkie "direct connect" feature, which was later discontinued by Nextel in June 2013. (11T34:25-35:17). These phone records, coupled with the records of the Sprint/Nextel cell towers near which the calls were made, demonstrated that on the night of September 13 going into the early morning hours of September 14, defendant's phone made numerous calls utilizing four Sprint/Nextel cell towers: (1) NNJ 0125R, located on the WRAT radio tower on 18th Avenue and Main Street in Belmar/Lake Como; (2) NNJ 1083R, located on the west side of Route 18 near Exit 10 in Neptune; (3) NNJ 1490T/R (two cell sites in a single location) located on top of the Asbury Park Press Building on Bangs Avenue in Asbury Park; and (4) NNJ 2992 located near Route 71 in Avon near the Bradley Beach First Aid Station. (11T42:4-47:3; 11T50:1-58:5). The victim's apartment was in the middle of this area. (11T47:4-10). From

1:00 a.m. to 7:00 a.m. on September 14, 2009, the records of the numerous calls made demonstrated that defendant's phone was using the more northerly of these four towers, then used more southerly towers, and then used more northerly towers again. (11T58:14-63:17).

Defendant's phone records further revealed numerous walkie talkie "direct connect" calls between defendant's phone and Pinto's phone between 2:38 a.m. and 3:04 a.m. on September 14, 2009. (15T178:10-181:7). As Pinto later testified at trial, defendant had taken her phone with its walkie talkie feature with him when he left the car after Pinto drove him and co-defendants Jean-Baptiste and Spraulding to the Brighton Arms. (9T12:17-13:16). Defendant's phone records also demonstrated numerous traditional calls and "direct connect" calls between defendant's phone and co-defendant Spraulding's phone (732-784-0072) during the late night/early morning hours of September 13 to 14. (15T151:13-152:11; 15T188:2-191:23).[4]

Defendant admitted his involvement in the victim's murder to Narika Scott, another of his girlfriends. (14T150:18-153:4). He told Scott that he was with Elizabeth Pinto at the time. (14T154:4-10). Defendant asked Scott to say defendant was with Scott at the time of the murder, for her birthday, which was

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[4] Although co-defendant Spraulding disputed at trial that 732-784-0072, which was not registered under his name, was his telephone number, the State produced multiple witnesses at trial who testified that this was Spraulding's telephone phone number at least as of October 6, 2009. (11T156:11-159:3; 13T73:9-77:2).

September 14. (14T155:6-13). On September 15, 2013, Scott visited defendant while he was incarcerated in Northern State Prison. (16T88:15-18). Three days later, on September 18, 2013, Scott contacted Pinto through Facebook. (14T157:15-158:15). Scott talked to Pinto by telephone and told her to "just be quiet." Scott wanted to meet up in person but Pinto "blew her off." (9T25:1-26:12; 9T27:24-28:2).

Scott visited defendant in jail on September 24, 2016, after he was charged in this case. ((16T87:1-17). On September 28, 2016, defendant sent a profanity-laced threatening email to Scott, stating, "Dropp dead fucker my lawyer going to rep your fucking ass on that stand N the whole hood going to watch." (14T162:2-163:25).

In 2016, following the return of the indictment against defendants, defendant's sister Brianna contacted Pinto through Facebook. Pinto knew Brianna from her time when she dated defendant. Brianna told Pinto that defendant wanted to speak to her. Pinto reported this contact to police. (9T28:3-32:8; 9T45:7-24).

Co-defendant Spraulding also asked his friend, Marisol Palermo in February 2010, to lie about Spraulding's whereabouts on the night of Jonelle Melton's murder. In February 2010, Spraulding told Palermo that he had rented a car and claimed his "friends took it" and "ended up going to Asbury" and "some teacher got murdered." Spraulding told Palermo that, if she was ever asked, to say she was with Spraulding that night.

(13T125:1-126:3).

The foregoing evidence was presented by the State at trial lasting ten weeks through the testimony of over forty witnesses. Based on the evidence presented, the jury convicted defendant of conspiracy to commit armed burglary, second degree armed burglary, first degree armed robbery, first degree felony murder, second degree possession of a weapon for an unlawful purpose, second degree unlawful possession of a weapon, two counts of first degree witness tampering, third degree witness tampering, and certain persons not to have weapons. (27T122:21-129:2; 27T141:17-142:13; Da18-31). This appeal follows.

LEGAL ARGUMENT

POINT I

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN EXCLUDING FROM EVIDENCE JAMES FAIR'S PATENTLY FALSE HEARSAY STATEMENTS.

Defendant asserts that the trial court's exclusion of unreliable out of court hearsay statements by James Fair deprived defendant of a fair trial by precluding him from presenting evidence of third party guilt. Defendant's claim has no merit, as the trial court's evidentiary ruling to exclude such patently false hearsay statements, based on the limited, contradictory proffer made by defendant in the middle of trial, was in no way an abuse of discretion.

On November 2, 2017, co-defendant James Fair pleaded guilty to second degree conspiracy to commit armed burglary in this

case. (30T5:4-11:23; Pa12-15). However, as Fair stated in his plea colloquy, he "ultimately [] did not commit" the burglary of Jonelle Melton. (30T11:13-15). At trial, one of the defense strategies was to allege that this was incorrect; that Fair himself had been an active perpetrator in the murder with other participants who were not the three defendants. However, as the trial court correctly found, defendants had only limited admissible evidence available upon which to base that argument.

The State had provided in discovery four statements taken by police investigating the Melton murder in 2013 and 2014 from Kyre Wallace, Kevin Clancy, Ciara Williams, and Jenay Henderson. Each of these individuals told police that James Fair had confessed to them at various times that he had been an active participant in the robbery and murder of Jonelle Melton. (Da44-49). However, these statements had been of limited investigational value, as they contained significant discrepancies with the physical evidence and both Fair and the declarants had significant credibility issues.[5] Ibid. Indeed, Fair himself prior to his guilty plea had told police that he "might have taken credit for the murder to people in the streets just to make himself look cool" and that he lied to Williams, his girlfriend, when he told her he committed the murder. (Da53-54). Fair also told police that he had passed the

[5] Clancy was a jailhouse snitch who had net Fair while incarcerated. Wallace provided his statement to police hoping to obtain leniency on an unrelated criminal charge. (Da46-49).

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information about David James' money in the freezer to co-defendant Jean-Baptiste and "probably" to defendant Byrd. (Da53).

It was the State's position that none of these four statements was admissible at trial, based as they were on two levels of inadmissible hearsay and because they were patently false. It appeared at the outset of trial that defendants planned to circumvent these evidentiary issues by calling James Fair himself as a witness. During opening statements, counsel for co-defendant Jean-Baptiste informed the jurors that they would be hearing from Fair during the trial. (4T40:16-20).

On the sixth day of trial, January 31, 2019, Judge Oxley noted certain "open issues" including that defendant Byrd's counsel had "indicated" that Fair's "plea itself was admissible" and "not hearsay" and requested that counsel brief the issue. (9T232:10-23). Defendant thereafter filed a brief asserting that "the defendant may be able to proffer statements allegedly made by Mr. Fair which not only incriminate himself (and exculpate the defendants" but also "destroy" the testimony of Elizabeth Pinto. (Da38). Defendant asserted that Fair "will be called to the witness stand in connection with these statements" and further posited that "[s]ome of the proffered statements will be through third-party testimony, while others were made" by Fair under oath when he pleaded guilty. Ibid.

However, on February 6, 2019, before the State's written response was filed, defense counsel admitted that he had made a

"mistake" in his brief, and that defendant did not intend to call Fair as a witness. (11T64:11-65:14). It was the State's understanding that defendant wished to introduce the statements of Wallace, Clancy, Williams, and Henderson through the testimony of the investigating detectives who spoke to these witnesses, including Detective Scott Samis of the Monmouth County Prosecutor's Office, and Detective Hoover Cano of the Neptune City Police Department, both of whom the State planned to call as witnesses. The State strenuously objected, as there was no exception to the rule against hearsay permitting such testimony. (Da59). The State further argued that, in any event, none of Fair's alleged out of court statements were admissible as they were patently false and Fair's plea colloquy was not relevant to defendants' assertion of third-party guilt. (Da44).

On February 13, 2019, the tenth day of trial, the parties argued the issues of the admissibility of Fair's statements before Judge Oxley. Defense counsel reiterated his intention not to call Fair as a witness "because he's too much of a loose cannon." (13T100:11-23). The assistant prosecutor represented that the State also had no intention of calling Fair, which Judge Oxley noted had been the State's position throughout trial. (13T106:14-18).

With respect to the evidence that defendant actually was seeking to admit, defense counsel conceded to Judge Oxley that it would be "reaching too far" to ask the law enforcement

witnesses what "Person A told them Fair told them." (13T104:2-4). Instead, defense counsel argued that certain unspecified statements by Fair would be admissible under N.J.R.E. 803(b)(5) as a statement of a party opponent and N.J.R.E. 803(c)(25) as a statement against interest through the testimony of certain unspecified witnesses who "either have been called or will be called that will say Fair told me this." (13T101:12-104:2). However, defense counsel did not identify any specific witnesses he wished to call, or make any sort of proffer that such witness(es) were available or willing to testify, or identify any testimony these witness(es) would provide.

The following day, February 14, 2019, Judge Oxley issued a written opinion and order denying defendant's "motion to admit statements by JAMES FAIR at trial." (Da62-63; Pa1-11). Noting that defendant could "avoid the hearsay issue entirely by calling Mr. Fair as a defense witness," the court found that defendant has "failed to demonstrate the Mr. Fair is unavailable to testify" and had "made no proffer that reasonable means were used to procure Mr. Fair's attendance at trial." (Pa10). The court further found that Fair's statements to Henderson, Williams, Clancy and Wallace "about his involvement in Ms. Melton's death are inherently unreliable." As the court found, Fair admitted that he lied about his involvement in the Melton murder on numerous occasions "to make himself look cool" and had sworn under oath that although he conspired to commit the

burglary, he ultimately did not do so. (Pa11). Now on appeal, defendant claims that this order constituted reversible error.

This Court must accord the evidentiary rulings of the trial court "substantial deference." State v. Morton, 155 N.J. 383, 453 (1998), cert. denied, 532 U.S. 931 (2001). "Trial court evidentiary determinations are subject to limited appellate scrutiny, as they are reviewed under the abuse of discretion standard." State v. Buda, 195 N.J. 278, 294 (2008). "[T]he decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Goodman, 415 N.J. Super. 210, 224-25 (App. Div. 2010) (quoting State v. Carter, 91 N.J. 86, 106 (1982)).

At the outset, it is clear that Judge Oxley in no way abused his discretion in denying defendant's motion to admit the hearsay statements of James Fair based on the extremely limited record presented to the court below. Indeed, given the lack of proof offered by defense counsel, Judge Oxley had no basis on which to grant such a motion. See State v. Baluch, 341 N.J. Super. 141, 196-97 (App. Div. 2001). It is well-settled that counsel who choose not to make a proffer of evidence "may be foreclosed on appeal from raising the question of the prejudicial effect of the exclusionary ruling unless the record or context of the excluded question clearly indicates or suggests what was expected to be proved by the excluded

evidence." Ibid. (citing Pressler, N.J. Court Rules, cmt. 2 on R. 1:7-3). Without such an offer of proof, "it is virtually impossible for the appellate court in reviewing the case to determine whether the exclusion had a prejudicial effect, and, the burden of such a showing being on the appellant, there can be no remand for a new trial because of the exclusion without an offer of proof." Duffy v. Bill, 32 N.J. 278, 294 (1960). Indeed, as this Court warned in the context of third party guilt claims in State v. Millet, 272 N.J. Super. 68, 100 (App. Div. 1994), "the 'proper ground work' for consideration of the question on appeal must be laid by counsel or the point can be forfeited on appeal."

Here, the only certainty in defendant's proffer below was that defendant would not call James Fair himself a witness. Defense counsel characterized Fair as a "loose cannon," (13T100:11-23), and Fair's criminal involvement with defendant Byrd and co-defendant Jean-Baptiste during the time frame of the Melton murder also likely factored into this decision. However, the incarcerated Fair was plainly available as a witness, as the lower court held. Presenting Fair as a witness would have made him "subject to the rigors of cross-examination [by the State], which in our system of justice is the 'greatest legal engine ever invented for the discovery of truth.'" State v. Cope, 224 N.J. 530, 555 (2005) (quoting California v. Green, 399 U.S. 149, 158 (1970)). Yet, defendant chose to prevent the jurors from being able to see and hear Fair and judge his credibility for

themselves. Instead, defendant sought to provide to the jury only Fair's hearsay, notwithstanding the well-settled "untrustworthy and unreliable" nature of such evidence. James v. Ruiz, 440 N.J. Super. 45, 59 (App. Div. 2015); see also N.J.R.E. 802.

Nor did defendant identify specifically which hearsay statements he wished to admit, nor explain for the court how he wished to admit them. Although defendant now claims on appeal that "he made clear that he intended to admit those statements by calling the lay witnesses to whom those statements were made," this is far from clear from the record. (Db37). Indeed, the only mention below of the names of the four witnesses defendant now claims were so crucial to his case was made by the State in its responsive brief to defendant's motion, in which the State correctly argued that the statements of such witnesses could not lawfully be admitted through the hearsay testimony of the law enforcement witnesses. (Da43-61). Defendant never once identified any of these witnesses by name, or gave any indication that any of these witnesses was available or willing to testify at trial, five and six years after they had spoken to police, to recount what Fair allegedly said to them.

Moreover, as the lower court expressly held, Fair's statements to these four witnesses were "inherently unreliable." This court must defer to the factual findings of the trial court in making this determination. See State v. Elders, 192 N.J. 224, 245 (2007) ("The motion judge was entitled to draw

inferences from the evidence and make factual findings based on his 'feel of the case,' and those findings were entitled to deference unless they were 'clearly mistaken' or 'so wide of the mark' that the interests of justice required appellate intervention.") (citation omitted). Further, the law is clear that a defendant may not be permitted to present evidence of third party guilt that is false or unreliable.

Although a defendant has "the right to introduce evidence that someone else committed the crime for the purpose of raising reasonable doubt about his own guilt," Cope, 224 N.J. at 552, the right is not unlimited. Three prerequisites must be met before evidence of third-party guilt may be admitted at trial. One, "a defendant's proofs must be capable of demonstrating 'some link between the third-party and the victim or the crime.'" State v. Cotto, 182 N.J. 316, 333 (2005) (quoting State v. Koedatich, 112 N.J. 225, 301 (1988)). Two, "when a criminal defendant seeks to cast blame on a specific third party, he or she must notify the State in order to allow the State an opportunity to properly investigate the claim." Cotto, 182 N.J. at 334. Three, third-party guilt evidence is substantive evidence which must "satisfy the standards of the New Jersey Rules of Evidence[.]" Ibid. (quoting State v. Fortin, 178 N.J. 540, 591 (2004); see also State v. Tormasi, 443 N.J. Super. 146, 153 (App. Div. 2015).

As the statements Fair allegedly made to Wallace, Clancy, Williams, and Henderson were unreliable, as determined by the

trial court, defendant failed to satisfy the first and third prerequisites. "[A] defendant cannot simply seek to introduce evidence of 'some hostile event and leave its connection with the case to mere conjecture.'" Cotto, 182 N.J. at 333 (quoting State v. Sturdivant, 31 N.J. 165, 179 (1959)). "Evidence tending to incriminate another must be competent and confined to substantive facts which create more than a mere suspicion that such other person committed the particular offense in question." Koedatich, 112 N.J. at 299-300. A confession by another to the crime of which the defendant stands accused is inadmissible at trial when, as here, the confessor's claim is patently false and, therefore, incompetent. Cope, 224 N.J. at 555. As such, none of Fair's statements allegedly made to Wallace, Clancy, Williams, and Henderson demonstrate a reasonable doubt as to the identity of the murderers. See Cotto, 182 N.J. at 333-34 (evidence of third-party guilt inconsistent with the actual crime); Koedatich, 112 N.J. at 303 (evidence of third-party guilt properly excluded where no evidence linked the third party to the victim).

Nor do any of the cases cited by defendant compel a different conclusion. In State v. Jorgensen, 241 N.J. Super. 345, 348-49 (App. Div. 1990), there was no issue raised as to the credibility of the testimony that defendant looked very similar to his roommate, who also used the defendant's car. Further, State v. Williams, 169 N.J. 349, 360-61 (2001), is plainly distinguishable from the instant case because in

Williams, the declarant who allegedly confessed to the shooting was deceased at the time of trial. Therefore, the only evidence available was the hearsay statement of the declarant to a third party, which the Court held should have been admitted and the jury permitted to determine the "weight given to the statement" given that "extrinsic circumstances" indicated its potential unreliability. Id. at 361. Here, in contrast, Fair was alive and well and, as Judge Oxley determined, available to testify. Yet, instead of calling Fair as witness and letting the jury judge his credibility, defendant only sought to admit the unreliable hearsay statements through third parties, with no proffer of which witnesses were available or what they would say. In light of this, Judge Oxley's denial of defendant's motion cannot be considered an abuse of discretion, or "so wide of the mark that a manifest denial of justice resulted." Goodman, 415 N.J. Super. at 224-25.

Finally, even if this Court were to determine that the lower court abused its discretion in completely precluding the admission of Fair's hearsay statements, it is clear that any such error was harmless. That Fair may have implicated himself in Melton's murder to "make himself look cool" does not exculpate any of defendants. See Williams, 169 N.J. at 361-62. Thus, even if this portion of Fair's hearsay statements was admissible as a statement against interest under N.J.R.E. 803(c)(25), it is clear that Fair's alleged statement that he committed the Melton murder with men other than defendants was

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not. Fair's own criminal liability did not depend on the identification of his purported confederates. State v. Nevius, 426 N.J. Super. 379, 393 (App. Div. 2012), certif. denied, 213 N.J. 568 (2013). Those parts of Fair's admissions inferentially exonerating defendant because Fair did not name defendant as a cohort neither strengthened nor bolstered Fair's penal exposure and, therefore, are inadmissible as a statement against Fair's interest under N.J.R.E. 803(c)(25).[6] Ibid. Therefore, the jury was not precluded from reviewing admissible evidence that could have "altered the outcome" here. Williams, 169 N.J. at 361-62.

In light of the foregoing, it is clear that defendant has failed to demonstrate any abuse of discretion in the lower court's decision to exclude the hearsay statements of James Fair from evidence. Even if such an abuse of discretion has been demonstrated, any error was harmless and defendant's convictions should be affirmed.

[6] Defendant's objection to the testimony of Detective Scott Samis regarding his investigation of Kevin Brown is therefore without basis. Fair's statement to Wallace that Brown had committed the crime with him was not admissible under N.J.R.E. 803(c)(25).

POINT II

THERE WAS NO ERROR, LET ALONE PLAIN ERROR, IN THE ADMISSION OF ANY OF THE EXPERT OR LAY OPINION TESTIMONY BY THE LAW ENFORCEMENT WITNESSES.

Defendant now objects for the first time to certain testimony by Detective Sergeant Shannon Kavanagh, Detective Hoover Cano, Detective Scott Samis, and Lieutenant Donna Morgan, arguing that each officer improperly offered an opinion on the ultimate issue in this case. Nothing in the record supports defendant's arguments, and, indeed, defense counsel made no objection to such testimony at trial.

Because defendant failed to object to the admission of this testimony below, this Court must apply the "plain error" standard. R. 2:10-2; State v. Burns, 192 N.J. 312, 341 (2007); State v. Macon, 57 N.J. 325, 337-38 (1971); State v. Frost, 242 N.J. Super. 601, 618 (App. Div.), certif. denied, 127 N.J. 321 (1990). Thus, only if the error were "clearly capable of producing an unjust result" should defendant's conviction be overturned. Burns, 192 N.J. at 341 (citing R. 2:10-2). Here, there was no error by the trial court in admitting the now-disputed opinion testimony, let alone plain error clearly capable of producing an unjust result.

A. Expert Testimony by Detective Kavanaugh, an Undisputed Expert in Crime Scene Processing Analysis and Fingerprinting, Was Properly Admitted.

Under N.J.R.E. 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand

the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form or an opinion or otherwise." The "well-known prerequisites" to the Rule are "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." Hisenaj v. Kuehner, 194 N.J. 6, 15 (2008); see also State v. Torres, 183 N.J. 554, 567-68 (2005); State v. Berry, 140 N.J. 280, 290 (1995); State v. Kelly, 97 N.J. 178, 208 (1984). Although N.J.R.E. 704 provides that "otherwise admissible" opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," our Supreme Court precludes the use of "ultimate-issue testimony" to usurp "the jury's singular role in the determination of defendant's guilt." State v. Cain, 224 N.J. 410, 424 (2016) (citing State v. Reeds, 197 N.J. 280, 300 (2009)).

Detective Sergeant Kavanaugh was qualified at trial, without objection, as an expert in crime scene processing analysis and fingerprinting, based on her extensive twenty years of law enforcement experience, and her specific experience in those areas. (6T167:5-180:20). Detective Sergeant Kavanaugh also testified as a fact witness, as she had personally acted as the lead Crime Scene Unit detective processing the victim's

apartment and surrounding vicinity after the discovery of her body. (6T182:1-185:12).

Defendant does not challenge Kavanaugh's qualifications as an expert, or that her field of crime scene processing analysis is a proper subject of expert testimony under N.J.R.E. 702. In fact, defendant only objects to Kavanaugh's testimony that, in her expert opinion, there were three perpetrators who broke into the victim's apartment. Defendant asserts that such conclusion was without "firm evidence," (Db47), but the record demonstrates that Kavanaugh carefully and extensively explained the basis for this opinion, which was based on the physical evidence found in the apartment. As the Detective Sergeant explained, the open window with the cut screen and broken slide, the open patio door, the placement of the kitchen table chair under the window with a footprint and dirt on the seat, the lighter found near the chair, and the path of soil and vegetation found in the apartment indicated that the first perpetrator entered the apartment head first through the window, inadvertently dropping the lighter out of his pocket. He then pulled the chair over to allow the second perpetrator to enter through the window, putting his foot on the chair, and then the patio door was opened to allow a third perpetrator inside. (7T200:5-202:14; 7T206:11-221:13; 8T73:9-74:2; 8T85:20-102:11). Much of this testimony was given during cross-examination, in which defense counsel vigorously explored the basis for Kavanaugh's opinion and elicited a lengthy description for the basis for her findings. (7T200:5-202:14;

7T206:11-221:13; 8T85:20-102:11).

In light of this clear explanation, defendant's challenge to Kavanaugh's opinion has no basis in fact. Nor was there any abuse of discretion by the lower court in allowing such expert testimony to be admitted. Kavanaugh never offered an opinion on defendant's guilt. No hypothetical situations were posited, and no opinion was given on defendant's state of mind, as criticized by the Supreme Court in State v. Cain, 224 N.J. at 420-28. Indeed, Detective Sergeant Kavanaugh never mentioned defendant Byrd or any of the co-defendants at all. The fact that, in her expert opinion, based on the physical evidence, the crimes here were committed by three perpetrators had no bearing on whether defendant was himself one of those perpetrators.

Moreover, it cannot be legitimately disputed that crime scene analysis is beyond the ken of the average juror. The "true test of admissibility of such testimony" is whether the witness has "peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue." State v. Zola, 112 N.J. 384, 450 (1988) (Handler, J., concurring in part and dissenting in part) (citations omitted). Here, Detective Sergeant Kavanaugh's knowledge and experience in interpreting the physical evidence of the crime scene to understand the sequence of events that occurred was plainly a proper subject for expert testimony. She made no comment on who took part in such events, and never opined

on the ultimate issue in this case. The admission of her testimony was not erroneous.

B. Lay Opinion Testimony by Detective Cano, Detective Samis, and Lieutenant Morgan Was Properly Admitted.

After making no objection below, defendant now asserts that testimony by Detectives Cano and Samis, and Lieutenant Morgan, was inadmissible lay opinion so erroneous as to deprive defendant of a fair trial. Defendant's claims must fail, as he has failed to demonstrate that the admission of any of these officers' testimony was in any way error, let alone plain error.

N.J.R.E. 701 permits the admission of a witness' non-expert opinion "if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact at issue." New Jersey courts have repeatedly affirmed the ability of police officers to offer lay opinions based on "the officer's personal perception and observation." State v. McClean, 205 N.J. 438, 459 (2011) (citing cases); see also State v. LaBrutto, 114 N.J. 187, 198 (1989) ("Courts in New Jersey have permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary"). However, police officers are not permitted under N.J.R.E. 701 to "opine directly on a defendant's guilt in a criminal case." State v. Trinidad, 241 N.J. 425, 445 (2020).

Defendant challenges the testimony of Detectives Cano and Samis, who explained why their investigation was able to rule out Michael Melton, Jason Davis and Kevin Brown as alternate suspects in the murder of Jonelle Melton. As the detectives testified, this conclusion was based on (1) Melton and Davis's cooperative attitude; (2) a review of the applicable phone records; (3) witness corroboration of Melton's whereabouts; and (4) a lack of any physical or forensic evidence or witnesses linking Davis or Brown to the crime. (4T200:7-204:16; 13T171:8-23; 13T181:12-21; 19T55:16-56:14).

There was nothing erroneous about the admission of such testimony by the detectives to explain "the course of their investigation." State v. Frisby, 174 N.J. 583, 592 (2002). Indeed, the testimony by each detective was "rationally based on the perception" of that detective, and assisted the jury "in understanding the witness' testimony" regarding the steps the detectives took in investigating the murder of Jonelle Melton, and in determining that these alternate suspects had not in fact committed the crime. N.J.R.E. 701.

This case is a far cry from Frisby, a child abuse case in which both parents were suspects. 174 N.J. at 592. The Frisby Court cautioned against police witnesses making a "wholly improper credibility determination" in favor of one parent based on hearsay, which allowed the witnesses to "essentially g[i]ve the jury their opinion regarding the innocence of [the non-defendant parent] and inferentially the guilt of" the defendant

parent. Id. at 593-94. Here, in contrast, detectives made no improper credibility determinations, but based their conclusions on physical and forensic evidence (or lack thereof), phone records, and witness statements. Nor was any improper hearsay relied upon. Indeed, the witness who confirmed Michael Melton's whereabouts, his girlfriend Latrell Watts, herself testified at trial. (4T200:7-204:16). Finally, and most importantly, this is not a case like Frisby, in which there were only two possible suspects who each accused the other. Rather, the detectives' rule out of Melton, Davis and Brown as suspects has no relevance whatsoever to defendants' guilt or innocence. Therefore, nothing in the detectives' testimony gave any opinion upon the ultimate issue in this case, or improperly infringed upon the province of the jury.

For the same reasons, there was no error in the admission of testimony by Lieutenant Morgan regarding the State's theory of the case. (17T144:1-146:2).[7] Indeed, such testimony was originally provided at the behest of counsel for co-defendant Jean-Baptiste, who asked Lieutenant Morgan during cross-examination whether she knew the State's theory of the case. (17T132:3-9). The assistant prosecutor on redirect then asked Lieutenant Morgan to elaborate, which she did, explaining that "several gentlemen broke into Ms. Melton's apartment" and further

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[7] Defendant's brief states that Lieutenant Morgan's testimony occurred on February 26, 2019 (19T). (Db48). However, the testimony to which defendant objects was given on February 21, 2019 (17T).

explaining the physical evidence that led to this conclusion. (17T144:1-146:2). As Lieutenant Morgan clarified on re-cross, she, as the supervising sergeant at the time, had been the person who developed this theory, based on what she saw at the crime scene and her many years of experience. (17T149:19-150:7; 17T156:2-157:2). The record therefore clearly demonstrates that Lieutenant Morgan's lay opinion testimony was based on her "personal perception and observation." McClean, 205 N.J. at 459. She did not opine on defendants' guilt or innocence, or even mention them at all. Such testimony was plainly admissible.

Finally, even if there was error in the admission of the expert and lay opinion testimony to which defendant now objects, such error does not rise to the level of plain error. There is simply no indication that any of the officers' testimony "led the jury to a result it otherwise might not have reached." Trinidad, 241 N.J. at 447 (citing Macon, 57 N.J. at 336). Indeed, given the strong weight of the evidence against defendants, presented over ten weeks of trial through forty witnesses, nothing in any of the opinion testimony, which did not mention defendants at all, "could have tipped the scales in the State's favor." Ibid. Defendant's convictions should therefore be affirmed.

POINT III

THERE WAS NO ERROR, LET ALONE PLAIN ERROR, IN THE JURY CHARGE. [Not Raised Below]

Defendant argues that the portions of the jury instruction

on robbery, felony murder, possession of a weapon for an unlawful purpose, and witness tampering, as well as the instruction on evaluating the testimony of a cooperating witness, were erroneous. As is demonstrated below, defendant's argument must fail, as the record demonstrates that no error, let alone plain error, occurred.

Below, defendant made no objection whatsoever to those portions of the jury charge to which he now objects, despite several opportunities to do so. (23T4:1-5:5; 24T105:24-107:15). As this Court has held, when defense counsel fails to raise an objection to jury instruction, "it may be presumed that the instructions were adequate and that defendant thought so at the time of trial." State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010), certif. denied, 205 N.J. 81 (2011). The Court's review of this claim is for plain error only. State v. Munafo, 222 N.J. 480, 488 (2015); State v. Singleton, 211 N.J. 157, 182 (2012); see also R. 1:7-2 ("no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict ...").

Plain error in the context of a jury charge "requires demonstration of legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." Singleton, 211

N.J. at 182-83 (quoting State v. Chapland, 187 N.J. 275, 289 (2006), and State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930 (1970)). Proper jury instructions are essential to a fair trial, but any alleged error must be viewed in the totality of the entire charge, not in isolation. State v. Clausell, 121 N.J. 298, 330 (1990); State v. Nero, 195 N.J. 397, 407 (2008). If, on examining the charge as a whole, prejudicial error does not appear, the verdict must stand. State v. Council, 49 N.J. 341, 342 (1967). It is clear that defendant has utterly failed to demonstrate the existence of any plain error here.

A. There Was No Plain Error in the Robbery Charge

The lower court instructed the jury on Count 3, first degree armed robbery, using language identical to the Model Jury Charge for Robbery in the First Degree (Revised Sept. 10, 2012). (25T54:5-62:10). Thus, the jury was instructed that a "person is guilty of robbery if, in the course of committing a theft, he knowingly inflicts bodily injury or uses force upon another." (25T54:10-13). The court further stated that "an act is considered to be in the course or committed a theft if it occurs in an attempt to commit the theft, during the commission of the theft itself, or in the immediate flight after the attempt or commission." (25T54:24-55:3). Although the Model Jury Charge contains a footnote stating, "[i]f attempt is involved, define attempt," the lower court here did not specifically define attempt for the jury. After reading the full Model Jury Charge

on first degree robbery, the court instructed the jury that the State alleged accomplice liability for the robbery count as to all three defendants. (25T62:2-10). The court had previously fully defined accomplice liability three times, for each of the three separate defendants, during the jury instruction for Count 2, second degree armed burglary. (25T38:19-54:4).

Defendant now asserts that this was plain error, citing State v. Gonzales, 318 N.J. Super. 527 (App. Div. 1999), and State v. Dehart, 430 N.J. Super. 108 (App. Div. 2013), in which this Court found a trial court's failure to charge attempt as part of a robbery charge to be reversible error. However, neither Gonzales nor Dehart is persuasive here. Rather, it is this Court's decision in State v. Belliard, 415 N.J. Super. at 66, that most relates to the facts of this case and demonstrates that no reversible error occurred.

In Belliard, defendant was convicted of felony murder and second degree robbery. Id. at 60. The evidence, including defendant's own statements, demonstrated that defendant had struck and pushed the victim in order to help his friend rob the victim. Id. at 61-63. The State "acknowledge[d] that defendant's participation in the robbery 'was limited to the attempt phase.'" Id. at 71. However, as here, the trial court charged the jury using the Model Jury Charge on robbery but omitting any definition of "attempt." Id. at 72.

The Belliard Court held that this omission was not reversible error because the trial court, in addition to

instructing the jurors on the elements of robbery, also instructed the jurors on accomplice liability, which required the jury to "determine[] that defendant possessed the required culpability and acted purposefully as an accomplice in the commission of the robbery." Ibid. Thus, "the judge's failure to instruct the jury as to the 'purposeful conduct' element and 'culpability' element of attempt was harmless error." Ibid. Further, although the jury had not been specifically instructed on the "substantial step" element of attempt, the Court found that the evidence demonstrated that defendant's conduct "was unmistakably beyond the stage of mere preparation and was a substantial step in the commission of the offense." Id. at 74 "Therefore, while the judge's failure to charge the jury with attempt was in error, this error was not sufficient to lead the jury to a result it would not have otherwise reached." Ibid.

In this way, the Belliard Court distinguished Gonzales, 318 N.J. Super. at 527, upon which defendant relies here. As the Belliard Court noted, Gonzales involved "conflicting versions" of the offense, and "defendant's actions were unknown and may not have constituted attempted robbery." Belliard, 415 N.J. Super. at 74 (citing Gonzales, 318 N.J. Super. at 534-35). It was "largely" for that reason that the Gonzales Court considered the failure to charge attempt to be plain error. Ibid. Those concerns did not apply in light of the evidence presented in Belliard. Id. at 74-75.

Nor do those concerns apply in this case. As in Belliard, the jury here was instructed comprehensively on accomplice liability for all three defendants just prior to the robbery instruction and was instructed that such instruction also applied to the robbery count. (25T38:19-54:4; 25T62:2-10). Specifically, the jury was instructed that

> If you find that the defendant Byrd, with the purpose of promoting or facilitating the commission of the offenses, solicited defendants Spraulding and/or Jean-Baptiste to commit the crimes and/or aided or agreed or attempted to aid defendant Spraulding and/or Jean-Baptiste in planning or committing them, then you should consider him as if he committed the crimes himself.
>
> [25T41:8-15.]

The jury was further instructed that

> Aid means to assist, support or supplement the efforts of another. Agree to aid means to encourage by promise of assistance or support. <u>Attempt to aid means that a person takes substantial steps in the course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of a substantive offense</u>.
>
> [25T41:1-7 (emphasis added).]

By instructing the jury not only on the "purposeful conduct" and "culpability" elements of attempt, but also that "substantial steps" specifically constitutes an attempt, the court incorporated even more of the elements of attempt than those contained in the instruction affirmed in <u>Belliard</u>. Further, all of the evidence presented plainly demonstrated that

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defendants took a "substantial step" in furtherance of the theft from Jonelle Melton by breaking into her apartment, beating, torturing and shooting her. Although there were no admissions by the defendant here (indeed, the identity of the perpetrators was vigorously disputed by defendants at trial), the facts of the crimes committed against the victim were for the most part undisputed. Thus, as in Belliard, there was no plain error in the jury charge on robbery, and no basis to reverse defendant's convictions on that offense. This Court's decision in Gonzales is simply inapplicable. Defendant's robbery conviction should therefore be affirmed.

B. The Trial Court's Use of "And/Or" Was Not Erroneous.

Defendant asserts for the first time on appeal that the trial court's use of the words "and/or" in the jury instructions for felony murder, accomplice liability and possession of a weapon for an unlawful purpose somehow deprived defendant of a fair trial. None of defendant's arguments have merit.

In this case, the State presented both second degree burglary (Count 2) and first degree robbery (Count 3) as alternate predicate offenses underlying the charge of felony murder (Count 4), in accordance with N.J.S.A. 2C:11-3a(3). Thus, in instructing the jury on the elements of felony murder, Judge Oxley stated:

> In order for you to find the defendant guilty of felony murder, the State is required to prove beyond a reasonable doubt from all the evidence in the case, all of

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> the essential elements of the crime charged. Accordingly, before you find defendants guilty of felony murder, the State must prove beyond a reasonable doubt that on or about September 14th, 2019, (sic) the defendants were engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crimes of burglary or robbery as charged in Count II and III of the indictment that the death of Jonelle Melton was caused by the defendant, and three, that the death of Jonelle Melton was caused at some time within the course of the commission of the crime of burglary or robbery, including the aftermath of flight and concealment efforts.
>
> [25T63:14-64:5].

No request for a unanimity charge was given, and all three defendants were found guilty of the burglary, robbery <u>and</u> felony murder counts. (27T122:21-127:2; Da12-14).

Despite failing to request a unanimity charge, or in any way objecting below, defendant now claims that that felony murder charge was fatally flawed because "[t]his Court simply cannot know what the basis of that [felony murder] verdict was." (Db58). Defendant's argument provides no basis for reversal and, indeed, was specifically rejected by the Supreme Court of New Jersey in <u>State v. Harris</u>, 141 N.J. 525 (1995). Harris, like defendant here, was convicted of felony murder and multiple predicate offenses, including burglary, robbery, kidnapping and sexual assault. <u>Id.</u> at 561. The <u>Harris</u> Court rejected defendant's contention that "the jury should have been charged that it had to agree 'unanimously on the predicate offenses which resulted in the victim's death.'" <u>Ibid.</u>

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Rather, the Court held that "when there is sufficient evidence to support two or more alternative felony theories, a jury need not designate which felony theory it relies on to convict one of felony murder so long as there is sufficient evidence to sustain each felony." Id. at 562. Further, "jurors need not always be unanimous on the theory of guilt, provided they are unanimous in the finding of guilt of the offense charged." Ibid. As that was precisely what happened in this case, there was no error, let alone plain error, in the felony murder charge.

Based on the same reasoning, there was no error in the jury instruction on possession of a weapon for an unlawful purpose. The jury was correctly instructed that, to convict defendant(s) of this offense, "the State must prove beyond a reasonable doubt" that "defendants' purpose in possessing the firearm was to use it against the person or property of another" and that "defendant had a purpose to use the firearm in a manner that was prohibited by law." (25T70:14-17; 25T71:12-15). Judge Oxley then told the jury that:

> the State contends the defendants' unlawful purpose in possessing the firearm was to facilitate the commission of a burglary or robbery. You must not rely on your notions of unlawfulness of some other undescribed purpose of the defendant. Rather you must consider whether or not the State has proven the specific unlawful purpose charge.
>
> [25T71:23-72:5.]

Again, defendant made no objection to this charge as given, nor

does defendant provide any legal basis for his claim that the lower court's use of the word "or" in this portion of the charge was error. Rather, because the jury found defendants guilty of both robbery and burglary, the lack of specificity as to which of those two offenses undergirded their convictions for possession of a weapon for an unlawful purpose was not erroneous. See Harris, 141 N.J. at 561-62.[8]

Finally, there was no error, let alone plain error, in the accomplice liability charge. Each of the three defendants was charged as an accomplice to the other two defendants in each of counts 2 through 6. At the charge conference, Judge Oxley and the parties discussed the potential difficulty and confusion for the jury to have the accomplice liability charge repeated for each defendant after each separate charge, for a total of twelve separate repetitions of the same accomplice liability charge. Instead, Judge Oxley proposed reading the accomplice liability charge in full once for each defendant, at the beginning of the jury instructions, and then referring back to that instruction after the instructions for each count to which it applied. The parties agreed that this was the best course of action, with

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[8] Defendant also makes a brief, belated objection to the fact that, during the jury instruction on conspiracy to commit burglary, Judge Oxley stated that "[a] person commits burglary if, with purpose to commit an offense therein," he "enters a structure" not open to the public without a license or privilege to do so. (25T26:3-8; 25T24:6-8). This instruction was a direct quotation of one of the statutory elements of burglary set forth in N.J.S.A. 2C:18-2(a)(1), and was in no way erroneous.

counsel for defendant Byrd stating, "Great minds think alike. No objection, your Honor." (22T5:9-6:10). That is how the court so instructed the jury, using the Model Jury Charge for Accomplice Liability. (25T38:19-54:4).

Defendant now asserts that this was plainly erroneous, and faults the lower court for using the phrase "and/or" in the accomplice liability charge, relying on State v. Gonzales, 444 N.J. Super. 61 (App. Div.), certif. denied, 226 N.J. 209 (2016). But Gonzales has no precedential value here, as the Supreme Court in denying certification expressly limited the Appellate Division's "criticism of the use of 'and/or'" strictly to those "circumstances in which it was used" in that case. Gonzales, 226 N.J. at 209.

Moreover, a review of the accomplice liability charge as given demonstrates that it was both "clear" and "understandable." State v. Walton, 368 N.J. Super. 298, 306 (App. Div. 2004). Judge Oxley did his best to eliminate confusion and repetition for the jury by reading the full charge only once for each defendant, which defense counsel expressly agreed was the best course of action. Nothing in these instructions, when viewed in their totality, was erroneous, let alone error that possessed "a clear capacity to bring about an unjust result." Singleton, 211 N.J. at 182-83 (citations omitted).

C. There Was No Plain Error in the Instruction on Elizabeth Pinto's Testimony

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Once again, defendant objects for the first time on appeal to the lower court's use of the exact language of the Model Jury Charge, arguing this somehow constitutes reversible error. Defendant's argument is utterly without merit.

As agreed by all parties, Judge Oxley instructed the jury on its consideration of the credibility of Elizabeth Pinto tracking the language of two Model Jury Charges, Credibility – Immigration Consequences of Testimony (Rev. June 6, 2016), and Testimony of a Cooperating Co-Defendant or Witness (Rev. Feb. 6, 2006). Thus, using the exact words of each of these Model Jury Charges, the jury was instructed that, "[i]f you believe this witness to be credible and worth of belief, you have a right to convict the defendants on her testimony alone, provided, of course, that upon consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendants' guilt." (25T14:1-6; 25T15:6-10).

Defendant cites no applicable caselaw in arguing that this instruction was somehow erroneous, nor can he, as none exists. Instead, defendant relies on solely on factually and legally irrelevant cases in which the use of other, unrelated Model Jury Charges did not preclude reversal of certain manslaughter and sexual assault convictions. None of these cases in any way supports defendant's claim that the trial court committed reversible error in using the language of the Model Jury Charges here to address issues relating to Pinto's credibility.

Nor was there any error whatsoever in the language used by

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the trial court. Defendant asserts that "[i]t was impossible for the jury to convict defendant beyond a reasonable doubt based only on Pinto's testimony." (Db60 n.30). But this is legally incorrect. Indeed, our Supreme Court has routinely recognized that "a defendant may be convicted solely on the uncorroborated testimony of an accomplice." State v. Adams, 194 N.J. 186, 207 (2008) (citing State v. Begyn, 34 N.J. 35, 54 (1961)). Moreover, the jury here was also instructed, in the same sentence, that conviction on Pinto's "testimony alone" was "provided, of course, that upon consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendants' guilt." (25T14:1-6; 25T15:6-10). There was nothing misleading in this instruction, and defendant has demonstrated no error, let alone plain error.

D. The Lower Court Did Not Err in Failing to Sua Sponte Provide an Accomplice Liability Instruction on the Witness Tampering Charge.

Defendant was charged with two counts of witness tampering with respect to Elizabeth Pinto, Count 7 of Indictment No. 16-04-718, and Count 2 of Indictment No. 18-06-0809. These charges arose out of the intentional contacts from Narika Scott and defendant's sister Brianna to Pinto, all at defendant's behest. (24T102:16-25). Notwithstanding the lack of any objection to the jury charge on either of these counts below, defendant now claims that the trial court's failure to sua sponte provide an accomplice liability charge with respect to these counts was

plain error.

Defendant's claim has no legal or factual merit. There was simply no basis for the court to have included an instruction on accomplice liability with respect to the witness tampering counts. Nothing in the State's case indicated that defendant committed these offenses as an accomplice. Rather, the facts presented by the State demonstrated clearly that defendant was the principal actor with respect to these offenses. The law is clear that, "[w]hen the State's theory of the case only accuses the defendant of being a principal, and a defendant argues that he was not involved in the crime at all, then the judge is not obligated to instruct on accomplice liability." State v. Maloney, 216 N.J. 91, 106 (2013); see also State v. Crumb, 307 N.J. Super. 204, 221 (App. Div. 1997) ("Needless to say, the obligation to provide the jury with instructions regarding accomplice liability arises only in situations where the evidence will support a conviction based on the theory that a defendant acted as an accomplice.").

That was precisely the factual scenario in this case. The State's theory was clearly that each of the contacts by Scott and Brianna to Pinto were at defendant's behest. Defendant was the principal actor, and Scott and his sister were his accomplices, not the other way around. In contrast, defendant, as in Maloney, simply argued that "he was not involved in the crime at all." Maloney, 216 N.J. at 106. There was therefore no basis for an accomplice liability charge on the witness

tampering counts. The lower court's failure to sua sponte provide such a charge was not error, let alone plain error.

In sum, in viewing the totality of the entire jury instructions as a whole, it is clear there was no prejudicial error here which "possessed a clear capacity to bring about an unjust result." Singleton, 211 N.J. at 182-83 (citations omitted); see also Clausell, 121 N.J. at 330 (1990). Defendant's convictions should therefore be affirmed.

POINT IV

DEFENDANT FAILED TO DEMONSTRATE ANY INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE CERTAIN PERSONS TRIAL.

Following their convictions for felony murder, armed burglary, conspiracy to commit armed burglary, armed robbery, possession of a weapon (firearm) for an unlawful purpose, unlawful possession of a weapon (handgun), and three counts of witness tampering, defendant Byrd and co-defendant Sprauldinge were tried together to the same jury on Counts 8 and 9 of Indictment No. 16-04-718, second degree certain persons not to have weapons. (27T131:20-141:12). As part of this trial, the State moved into evidence a stipulation in which all parties agreed that defendant had been convicted of an unspecified predicate offense "which makes it unlawful for him to purchase, own, possess or control a firearm." (27T132:9-13; 27T133:6-15). Defendant was thereafter convicted of that second degree offense. (27T141:17-142:13).

Defendant – now represented by new counsel – attacks his trial counsel's performance during the certain persons trial as prejudicially deficient. However, such "Monday morning quarterbacking" of trial counsel's strategy does not entitle defendant to relief on appeal. Indeed, appellate courts generally reject such ineffective assistance of counsel claims brought on direct appeal. See State v. Preciose, 129 N.J. 451, 460 (1992) (noting that "[o]ur courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record").

Even if this Court were to consider defendant's ineffective assistance of counsel claims on direct appeal, it is clear from the record that defendant can satisfy neither element of the "familiar two-prong test outlined in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by [the New Jersey Supreme] Court in State v. Fritz, 105 N.J. 42, 58 (1987)." State v. Pierre-Louis, 216 N.J. 577, 579 (2014). That is, defendant "must show both (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the outcome." Ibid. A defendant must "make[] both showings;" "[i]f defendant establishes one prong ... but not the other, his claim will be unsuccessful." Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58.

Defendant argues that trial counsel's actions during the certain persons trial were so grievous as to warrant application

of the presumption of prejudice recognized in United States v. Cronic, 466 U.S. 648 (1984). However, nothing in counsel's actions involved "the complete denial of the right to counsel altogether, actual or constructive" necessary to relieve defendant of his burden of establishing prejudice. See State v. Miller, 216 N.J. 40, 57-61 (2013) (citing State v. Tyler, 176 N.J. 171 (2003) (applying Cronic presumption where judge sanctioned a prospective juror who expressed bias against defendant by requiring her to sit through a day of trial as a non-deliberating juror); State v. Cottle, 194 N.J. 449 (2008) (presuming prejudice where attorney representing the defendant had a per se conflict of interest); State v. Bey, 161 N.J. 233, 310-12 (1999) (requiring death penalty defendant establish that prejudice resulted from trial counsel's failure to advise defendant of his constitutional right to testify at trial). Indeed, notwithstanding defendant's claims that counsel did "nothing" at trial, the record reflects that counsel in fact negotiated and agreed with the State on the stipulation to be provided to the jury regarding defendant's prior conviction, which sanitized the seriousness of that conviction before being presented to the jury.[9] Nothing in counsel's actions would warrant the application of the Cronic presumption.

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[9] Defendant was convicted in both 2000 and 2001 of two separate charges of possession of a controlled dangerous substance with intent to distribute within 1000 feet of a school. (Da7). Pursuant to the stipulation between the parties, the jury was not informed of the specifics of either conviction, or that defendant had more than one conviction.

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Counsel's actions, although limited, did not fall below the "objective standard of reasonableness" to which attorneys are held. Strickland, 466 U.S. at 688; State v. Paige, 256 N.J. Super. 362, 376 (App. Div.), certif. denied, 130 N.J. 17 (1992). Moreover, the record is clear that defendant himself suffered no prejudice as a result of any action (or lack thereof) by defense counsel during the certain persons trial. Indeed, the jury had already determined that defendant had possessed a firearm during the murder of Jonelle Melton. As even now defendant does not dispute, his possession of said firearm was illegal and violated N.J.S.A. 2C:39-7b(1) as a result of his two prior convictions. Defendant further fails to identify a single action that could have been undertaken by defense counsel to prevent his conviction on the certain persons charge. "Obviously, counsel cannot be deemed ineffective for failing to raise arguments that are ultimately deemed without merit." State v. Roper, 362 N.J. Super. 248, 252 (App. Div.), certif. denied, 185 N.J. 265 (2005).

In light of the foregoing, defendant has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." State v. Sheika, 337 N.J. Super. 228, 241 (App. Div.), certif. denied, 169 N.J. 609 (2001). The record demonstrates that trial counsel "met the constitutional threshold for effectiveness." State v. Nash, 212 N.J. 518, 542 (2013). Defendant's conviction of the certain persons offense should therefore be affirmed.

POINT V

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING SENTENCE.

Defendant asserts that the sentencing court erred in "fail[ing] to justify the extraordinarily long aggregate sentence" imposed upon defendant. (Db64). The court below correctly granted the State's extended term motion; the aggravating factors found by the sentencing judge were based upon competent and credible evidence in the record; and the court correctly applied the analysis and sentencing guidelines enunciated in the case law and Code of Criminal Justice, specifically taking into account the consecutive sentence requirement of N.J.S.A. 2C:28-5(e), and the factors set forth by the New Jersey Supreme Court in State v. Yarbough, 100 N.J. 627, 636, 643-44 (1985).

Appellate courts must affirm a sentence under review unless (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not supported by competent, credible evidence in the record; or (3) application of the guidelines to the facts of the case shocks the judicial conscience. State v. Bolvito, 217 N.J. 221, 228 (2014); State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Megargel, 143 N.J. 484, 493 (1996) (citing State v. Roth, 95 N.J. 334, 363-65 (1984)). Reviewing a sentence, an appellate court should not substitute its judgment for that of the lower court, and a

sentence imposed by the trial judge is not to be upset unless it reflects an abuse of the lower court's discretion. State v. Lawless, 214 N.J. 594, 606 (2013). "The test is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review." State v. M.A., 402 N.J. Super. 353, 370 (App. Div. 2008) (quoting State v. Tarver, 272 N.J. Super. 414, 435 (App. Div. 1994)); see also State v. Blackmon, 202 N.J. 283, 297 (2010) ("[O]ur trial judges 'need fear no second-guessing when they exercise their discretion in accordance with the statutory mandates and principles we have established"); State v. Dalziel, 182 N.J. 494, 500 (2005) ("[T]rial judges are given wide discretion so long as the sentence imposed is within the statutory framework").

Applying this standard of review to the sentence imposed here demonstrates that the court below did not abuse its sentencing discretion. The trial court granted the State's motion for a mandatory extended term sentence under N.J.S.A. 2C:44-3d. (28T28:6-31:4). Following the merger of Count 1, second degree conspiracy to commit armed burglary, into Count 2, second degree armed burglary, and Count 2 into Count 4, felony murder, Judge Oxley sentenced defendant to a life term with an 85% NERA parole ineligibility period and a five-year period of parole supervision. (28T21:23-22:8).

The court further merged defendant's conviction on Count 5,

second degree possession of a weapon (firearm) for an unlawful purpose, into Count 3, first degree armed robbery, and imposed a concurrent 20-year term with an 85% NERA parole ineligibility period on Count 3. On Count 6, second degree unlawful possession of a weapon, and Count 8, second degree certain persons, the court imposed two concurrent ten-year terms, each with a five-year period of parole ineligibility under the Graves Act. (28T22:9-15; 28T39:5-40:18; 28T41:5-13; Da18-31).

On Count 7, first degree witness tampering, the court imposed a 20-year term with a ten-year period of parole ineligibility, to run consecutively to the life sentence for felony murder, Count 4. (28T40:19-41:5). For defendant's two witness tampering convictions under Indictment No. 18-06-0809, the court imposed a 20-year term with a ten-year period of parole ineligibility on Count 1, to run consecutively to the 20-year sentence for first degree witness tampering on Count 7 of Indictment No. 16-04-718. On Count 2, the court imposed a five-year term to run consecutive to the 20-year term imposed on Count 1. (28T41:14-42:2; Da18-31).

On appeal, defendant does not dispute that he was subject to a mandatory extended term under N.J.S.A. 2C:44-3d, or that the sentencing court appropriately applied the aggravating and mitigating factors. Nor does defendant dispute that consecutive sentences on the witness tampering offenses were required by N.J.S.A. 2C:28-5(e) ("a conviction arising under this section shall not merge with a conviction of an offense that was the

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subject of the official proceeding or investigation and the sentence imposed pursuant to this section shall be ordered to be served consecutively to that imposed for any such conviction”). However, defendant faults the sentencing court for allegedly insufficiently explaining why “the overall length of the term imposed is warranted.” (Db64).

Here, the record is clear that the aggregate sentence imposed was the product of the court’s careful assessment of the statutory aggravating and mitigating factors, as well as the factors set forth in Yarbough. The court recounted such analysis at length in the record, taking almost thirty (30) full transcript pages to describe the court’s reasoning for the lengthy aggregate sentence imposed. (28T13:22-43:14). A clear review of this detailed analysis demonstrates that, notwithstanding defendant’s claims to the contrary, the court’s “focus” was “on the fairness of the overall sentence.” State v. Cuff, 239 N.J. 321, 352 (2019) (citing State v. Miller, 108 N.J. 112, 121 (1987). In fact, the record is clear that the court considered it fair and appropriate that defendant die in prison, given the heinous nature of his crimes and his lengthy criminal record, which qualified him for a mandatory extended term. (28T42:19-43:4). Moreover, referring to the length of each defendant’s sentence, the court noted its hope that “these cumulative sentences of over 305 years will serve as deterrence to future generations.” (28T43:5-8).

Given this lengthy and carefully reasoned explanation for

defendant's long sentence by the lower court, it appears that defendant's challenge to his sentence is based solely on the fact that he disagrees with this explanation. But that disagreement does not provide any grounds for appeal. In light of the full and complete record here, defendant's sentence can in no way been deemed to shock the judicial conscience. As there was no abuse of discretion by the lower court, defendant's sentence should be affirmed.

POINT VI

THERE WAS NO ABUSE OF DISCRETION IN THE TRIAL COURT'S VOIR DIRE OF JUROR NO. 8. [Partially Raised Below].

Defendant criticizes the trial court's voir dire of Juror No. 8 as insufficient, and argues for the first time that the court's failure to voir dire the other jurors somehow deprived defendant of a fair trial. As both the record at trial and on remand plainly reflects, defendant's arguments have no merit.

Our Supreme Court places the determination of how to resolve allegations of juror taint squarely within the sound discretion of the trial court. State v. R.D., 169 N.J. 551, 557-58 (2001). Determining whether a jury has been tainted requires consideration of the gravity of the misconduct, the demeanor or credibility of the jurors exposed to taint, "and the overall impact of the matter on the fairness of the proceedings." Id. at 559. Respecting the trial court's "unique perspective" as to these matters, an appellate court reviews its

decision how to manage juror irregularity under the deferential abuse of discretion standard. Id. at 559-60; State v. Brown, 442 N.J. Super. 153, 182 (App. Div. 2015); State v. McGuire, 419 N.J. Super. 88, 156 (App. Div.), certif. denied, 208 N.J. 335 (2011).

As the record demonstrates, on February 19, 2019, the trial court clerk received information, through the secretary for counsel for defendant Byrd, that "Stephanie" at the Public Defender's Office had received a telephone call from a "Ms. Worthy" who identified herself as a friend of a friend of a juror who worked at Monmouth Medical Center. "Ms. Worthy" claimed that this juror "has been Googling the case, showing articles to and talking about it with other people and has already decided she's going to find them all guilty and going to burn their asses." (29T21:11-22:21).

Juror No. 8 was determined to be the only juror who worked at Monmouth Medical Center. Judge Oxley questioned Juror No. 8 about the information the court had received. The following colloquy occurred:

> [THE COURT] At the beginning of this process we asked you a series of questions and those questions were designed to find out whether or not you could be fair and impartial.
>
> Is there anything that has happened throughout the course of this trial that would affect your answers to those questions?
>
> [JUROR NO. 8] No.

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> [THE COURT] Ma'am, where do you work?
>
> [JUROR NO. 8] At Monmouth Medical.
>
> [THE COURT] Where do you live?
>
> [JUROR NO. 8] In Red Bank.
>
> [THE COURT] Okay. And in terms of any posting or newspaper articles, is there anything outside of what's been in this courtroom that you have been in contact with?
>
> [JUROR NO. 8] No.
>
> [THE COURT] So is there anything that would change any of your other answers to those questions that we asked during voir dire?
>
> [JUROR NO. 8] No.
>
> [THE COURT] And you believe that you can listen to the evidence in this case, and as I have asked you certainly throughout the voir dire process, listen to the evidence, apply the law as I give it to you at the end of the case and render a fair and impartial verdict?
>
> [JUROR NO. 8] I can.
>
> [15T125:19-126:20].

Judge Oxley then instructed the juror not to discuss anything about the questioning. (25T127:1-8).

Following the voir dire, Judge Oxley ruled that no further inquiry was required. Counsel for co-defendant Sprauldіng asked that Juror No. 8 be excused for cause. Counsel for co-defendant Jean-Baptiste asked that the court further question Juror No. 8. Judge Oxley denied both requests. (15T128:1-129:2). As the

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court found, "clearly [Juror No. 8} was puzzled why she would even be up here answering these questions. In this Judge's opinion, she seemed very sincere and she seemed very straightforward with her answers." (15T128:1-5). She was "about as candid and straightforward as she could be." (15T129:8-10). The court also referenced the unclear nature of the claim of taint. Thus, the court was "satisfied" that trial "could move forward" without further inquiry. (15T129:3-130:1). No defendant requested that any other juror be questioned.

Notwithstanding defendant's failure to raise this issue below, he now challenges Judge Oxley's failure to voir dire the other jurors. He further asserts that the court's questioning of Juror No. 8 was insufficiently "probing," which deprived defendant of a fair trial. Nothing in the record demonstrates any abuse of discretion by Judge Oxley in his questioning of Juror No. 8. Nor was his decision not to sua sponte question the other jurors in any way erroneous, let alone plain error "clearly capable of producing an unjust result" should defendant's conviction be overturned. Burns, 192 N.J. at 341 (citing R. 2:10-2).

Judge Oxley had before him three allegations of taint: (1) that Juror No. 8 had received outside information about the case through "Googling"; (2) that she talked about the case with other unspecified people; and (3) that she had formed a premature opinion of defendants' guilt. It is important to note that none of these allegations, even if true, would warrant a

new trial for defendant. See R.D., 169 N.J. at 559 ("A new trial, however, is not necessary in every instance where it appears an individual juror has been exposed to outside influence."); State v. Scherzer, 301 N.J. Super. 363, 490 (App. Div.), certif. denied, 151 N.J. 466 (1997) ("Although some jurors may have formed premature opinions, this is not the sort of irregularity that automatically requires a mistrial or new trial.") (citing State v. LaFera, 42 N.J. 97, 109 (1964)). However, the record is clear that these allegations were not true, and, as the lower court found, there was no indication that Juror No. 8 was unable to continue to act impartially as a juror in this case.

The allegations against Juror No. 8 had no indicia of credibility, based as they were on hearsay upon hearsay information provided by an alleged friend of a friend of an unspecified juror. Even with these limitations, Judge Oxley correctly decided to question Juror No. 8, but was clearly within his discretion, once he observed her puzzlement as to the questions and sincerity in her answers, to determine that no further questioning was required. As our Supreme Court has held, "[u]ltimately, the trial court is in the best position to determine whether the jury has been tainted." R.D., 169 N.J. at 559. Indeed, even if the appellate court "would have preferred further inquiry" of the allegedly tainted juror, this does not give rise to reversible error. Id. at 562.

The facts of this case are a far cry from State v. Bisaccia, 319 N.J. Super. 1, 11-12 (App. Div. 1999), upon which defendant relies. A Bisaccia juror specifically told the trial court that "he could no longer be 'fair,'" yet the court refused to voir dire the juror. Ibid. This was clearly improper, as this Court held. Id. at 12. But that is not the case here, and there was nothing improper in Judge Oxley's determination that, in his discretion, no further questioning of Juror No. 8 was needed.

Nor was there any error in Judge Oxley's failure to sua sponte question the other jurors. The "decision to voir dire individually the other members of the jury best remains a matter for the sound discretion of the trial court." R.D., 169 N.J. at 561. The trial court's "own thorough inquiry of the juror should answer the question whether additional voir dire is necessary to assure that permissible tainting of the other jurors did not occur." Ibid. The trial court must be mindful, however, that it may in "some instances" be "more harmful to voir dire the remaining jurors because, in asking questions, inappropriate information could be imparted." Ibid.

The fact that Judge Oxley did not sua sponte voir dire the other jurors in no way means the court failed in its "gatekeeping function," as defendant alleges. Again, the facts here are markedly different from the facts in State v. Tyler, 176 N.J. 171 (2003), upon which defendant relies. In Tyler, the juror specifically confessed to her bias, yet the trial court

determined to keep the juror in contact with other jurors, apparently out of a wish to punish the biased juror. Id. at 177. Nothing even remotely approaching the egregiousness of the Tyler trial court's error occurred here. Rather, in light of Judge Oxley's determination, based on his questioning of Juror No. 8, that the juror was not tainted, there is "no reason to reject the trial court's judgment that additional questioning of other jurors was not necessary to ensure a fair trial for defendant." R.D., 169 N.J. at 562.

In light of the foregoing, there was no abuse of discretion by the lower court in its resolution of the accusation of juror taint. Defendant's convictions should therefore be affirmed.

CONCLUSION

For the above mentioned reasons and authorities cited in support thereof, the State respectfully submits that defendant's convictions and sentence should be affirmed.

Respectfully submitted,

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