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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3528-21

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Cumberland County.
JULE HANNAH,	:	
		Indictment No. 18-03-0226-I
Defendant-Appellant.	:	
		Sat Below:
	:	
		Hon. Cristen D'Arrigo, J.S.C.,
	:	and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant was convicted for the inexplicable murder of Miguel Lopez. There was no known motive. Indeed, there was no evidence to suggest that defendant had ever met Lopez before January 15, 2017.

The evidence the State did adduce showed that defendant may have gotten a ride to Bridgeton from Lopez on that day, after crashing his own car about forty minutes up the road, in Monroe Township. Through various surveillance cameras, the State was able to trace Lopez's general path from Atlantic City to Monroe Township, and then to Bridgeton. Records from defendant's cell phone showed that his phone connected with towers in a manner consistent with travelling in Lopez's car from Monroe to Bridgeton. And a cigar butt with defendant's DNA was found on the floorboards of the front passenger seat. Thus, the evidence that defendant had been in the victim's car was substantial.

But it was surveillance video from near the scene of the homicide that was pivotal. Lopez's car veered off the road in Bridgeton, struck a parked car, and came to rest against a tree in the front yard of a Spruce Street home. Ballistics evidence revealed that Lopez was shot four times, likely by the person riding in the passenger seat beside him. Crucially, surveillance video from a neighboring home recorded a black man walk from the scene, who,

according to the lead detective in the investigation, walked with a distinctive limp. Although the court had already ruled that a different detective could not make an identification based on the purported limp depicted in the Spruce Street video because it was unclear whether it depicted a limp or stumbling, the detective repeatedly compared the Spruce Street video to known video of defendant, noting purported similarities and consistencies in his gait. Yet, the detective lacked the expertise to make this comparison – he was certainly not an expert in biomechanics or gait analysis – and he did not have any special knowledge of defendant that was not represented in the surveillance videos.

In this improper manner, the State portrayed defendant as the person who was last in Lopez's car – and was therefore the shooter – as opposed to the plausible alternative: that Lopez had dropped defendant off at his house, where the State itself proved Lopez had probably gone before he ended up on Spruce Street.

Similarly, the State used dubious proofs to try to show that defendant had been in the same area as the victim at the time he was killed. Through a lay witness whose expertise in historical cell site analysis extended little beyond his ability to plot cell tower locations on a map, the State elicited misleading testimony that was far less accurate than the jury was led to

believe. The testimony may have fit the narrative proffered by the State, but that was precisely why the jury likely overvalued it.

For these reasons – in addition to two additional points of error discussed below – the fairness of defendant's trial is in doubt. This Court should reverse the convictions and order a new trial.

PROCEDURAL HISTORY

Cumberland County indictment number 18-03-0226 charged the defendant, Jule Hannah, with: first-degree murder, contrary to N.J.S.A. 2C:11-3a(1) and (2) (count one); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a(1) (count two); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b(1) (count three); and second-degree possession of a weapon by a convicted person, contrary to N.J.S.A. 2C:39-7b(1) (count four). (Da 1-2)[1]

[1] The following abbreviations will be used:
Da – appendix to this brief
1T – transcript of October 12, 2018
2T – transcript of October 15, 2018
3T – transcript of November 6, 2020
4T – transcript of January 13, 2021
5T – transcript of June 22, 2021
6T – transcript of June 23, 2021
7T – transcript of June 24, 2021
8T – transcript of June 25, 2021
9T – transcript of June 29, 2021
10T – transcript of June 30, 2021
11T – transcript of July 1, 2021

On October 12 and 15, 2018, defendant appeared before the Honorable Cristen D'Arrigo, J.S.C., on motions to suppress his statement and evidence recovered from his cell phone. Judge D'Arrigo delivered an oral opinion on October 15, 2018, denying both motions. (2T 93-1 to 108-16; Da 3)

On January 13, 2021, defendant appeared before Judge D'Arrigo in opposition to the State's motion to admit opinion testimony purportedly identifying defendant from a surveillance video by a distinct limp. (4T) The court denied that motion but ruled admissible the surveillance video and additional video depicting defendant before and after the homicide. (Da 4-5)

On June 22, 2021, defendant appeared before Judge D'Arrigo in opposition to the State's motion to admit expert testimony on historical cell site analysis. After the court ruled that the State's proposed expert lacked the expertise to qualify as an expert, the State agreed to limit the testimony to just the location of the cell towers that defendant's phone connected to at given times. (5T 160-14 to 161-22; 6T 9-1 to 10) The court entered an order embodying that stipulation. (Da 6)

Trial on counts one through three began before Judge D'Arrigo and a jury on June 23, 2021. On July 2, 2021, the jury found defendant guilty as

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12T – transcript of July 2, 2021
13T – transcript of November 30, 2021

charged. (12T 9-15 to 25; Da 7-8) The State then moved to dismiss count four, the certain persons charge. (12T 16-1 to 9)

Defendant appeared before Judge D'Arrigo for sentencing on November 30, 2021. The court merged count two with count one. It then imposed a forty-five-year custodial sentence with a NERA[2] 85% period of parole ineligibility on count one, and a concurrent ten-year sentence with a five-year period of parole ineligibility on count three. (Da 9-12)

On July 19, 2022, a notice of appeal was filed on defendant's behalf, as within time. (Da 13-16)

STATEMENT OF FACTS

Trina Acevedo, resident of 407 Spruce Street in Bridgeton, testified that on January 15, 2017, she awoke to a loud bang at about 8:30 a.m. She looked from her bedroom window directly across the street to 406 Spruce Street, where she saw a gold two-door Chrysler Sebring that had crashed into her neighbor's tree. (6T 99-9 to 106-1; 116-18 to 25) She also saw a black male walking south toward Baltimore Avenue at a fast pace. Although she could only see the side of the man's face and only observed him for a few seconds, she described him as about 5'11" tall, with short hair, possibly sporting a short

[2] No Early Release Act, N.J.S.A. 2C:43-7.2.

beard, wearing a puffy camouflage jacket and matching pants, and walking with a "distinguished" limp.[3] (6T 107-3 to 112-2)

Acevedo believed that she had seen the man well enough to make an identification. However, when she was later shown a photographic array of six photos – one of which was of defendant – she was unable to identify any suspect with certainty. (6T 141-4 to 144-7) In fact, she identified one of the portrayed men, who was not defendant, with a 70% confidence level. (9T 68-70-1) Acevedo was expressly unable to identify defendant at trial. (6T 114-21 to 115-8)

When police arrived on the scene, they found that both car doors were open[4] and that the driver, seated in driver's seat, was leaning over the center console area. (6T 74-16 to 77-4) Emergency medical technicians arrived on the scene and determined that the driver – identified as Miguel Lopez – was dead. (6T 78-18 to 80-9) A subsequent autopsy revealed that he had been shot four times on the right side of his body, in his head, chest, abdomen, and shoulder. (11T 153-18 to 154-17) Two recovered projectiles were determined to have been fired from the same .40 caliber handgun, as were four shell casings found in the front passenger side area. Given the trajectory of the bullets, the absence

[3] The description Acevedo provided to police included no mention of facial hair or a limp. (9T 52-4 to 8)
[4] Police learned from the resident of 406 Spruce Street that the car was left running, so he entered it and turned off the ignition. (6T 85-11 to 15)

of any bullet damage to the exterior of the car, and the recovery of a bullet inside the interior driver-side door panel, the State theorized that the shooter must have been seated in the front passenger seat when Lopez was shot. (7T 30-17 to 32-14; 50-15 to 52-4; 9T 197-20 to 205-22)

Detective Anthony Calabrese of the Bridgeton police department testified that police recovered surveillance video from Acevedo's home. (6T 161-10 to 22) According to Calabrese, the video depicted a man with a heavy camouflage jacket and a "distinctive limp to his left leg" walking from the scene. Calabrese testified that the limp was "kind of like [a] dead foot"; "he had to throw his leg out…to lift the foot up to move it." (6T 162-15 to 163-1) The surveillance video was played for the jury. (6T 170-15) It lacked sufficient detail to see the man's face. (6T 163-25 to 164-2)

Calabrese issued a BOLO (be on the lookout) to the police department for a man walking with a limp, wearing a camouflage jacket. A patrol officer picked up a man named Ernest Jordan – who was wearing a camo jacket and walked with a limp – and brought him to the station for an interview. (6T 172-12 to 190-5) Jordan purportedly fit the description "to a T," including his height, weight, hairstyle, jacket, and limp. (6T 203-15 to 204-19) However, Jordan was released after the interview because it was determined that his jacket was lighter weight than that depicted in the surveillance video. Also,

Jordan allegedly had a limp in his right leg, whereas the man depicted in the video purportedly had a limp in his left leg. (6T 189-16 to 190-5)

Detective Kenneth Leyman testified that he was assigned to be the lead investigator on the case. (7T 178-19 to 181-24) According to Leyman, defendant became a suspect based on the Spruce Street surveillance video. (7T 238-1 to 10) That video depicted Lopez's car clip another car and then go out of frame. About thirty seconds later, it showed a man walk south wearing a puffy jacket. Leyman testified that the man walked with a distinct limp: he had to "flick the lower part of his leg out, almost as if he had like a dead foot or a dead leg." (7T 217-25 to 219-1; 231-17 to 235-1)

During Leyman's testimony the State was permitted to play surveillance video from the Cumberland County Courthouse from February 1, 2017, about two weeks after the homicide. The jury was informed that defendant had an "appointment" at the courthouse, and they were shown video of him entering the court and walking down the hallways. Leyman explained that he obtained the video to compare his gait to the gait of the person on the Spruce Street surveillance video footage. Leyman testified that the limps in both videos were "similar and consistent." Leyman testified that defendant "would lift his left leg and flick his lower half of his leg outward as if he had a dead leg or dead foot." (7T 219-11 to 221-5; 235-8 to 24)

The State also played surveillance video from a traffic stop from 2011, six years before the homicide. According to Leyman, defendant "at that time had a similar gait to what he [had] in the courthouse and a similar gait to the subject I observed on 407 Spruce Street's camera." Defendant purportedly "would lift his left leg and flick his lower half of his leg outward as he walked." (7T 221-7 to 222-22; 235-25 to 237-1)

In addition, the jury learned that Leyman had served a "warrant to seize" on defendant to take his phone on February 22, 2017. Leyman testified that, prior to serving the warrant, he surveilled defendant's house on about five different days. During that surveillance Leyman observed defendant walk, purportedly observing that he "would lift his left leg and flick the lower half out as he walked with a limp." The video of the phone seizure was shown to the jury as well. (7T 222-24 to 224-23; 237-2 to 24)

Leyman also testified about other facets of his investigation. He testified that he was able to determine that Lopez had gone to Caesar's Casino in Atlantic City with a friend named Omar Ramos on the morning before the homicide. Surveillance video from the casino depicted Lopez and Ramos arrive together at the casino at 3:30 a.m. (8T 36-12 to 38-6) Based on their behavior, Leyman believed Lopez and Ramos were under the influence of

drugs or alcohol.[5] Video from the casino showed them walking around the parking garage for forty-four minutes looking for their car until they decided to split up. (8T 38-22 to 39-25) About five minutes later, at 6:02 a.m., Lopez found his car and tried to call Ramos, but his calls were not answered. (8T 40-4 to 41-2) Lopez waited in the parking spot for seventeen minutes and then drove around the garage, apparently looking for Ramos, for the next eleven minutes. Lopez left the parking garage at 6:31 a.m., leaving Ramos behind in Atlantic City. (8T 41-3 to 43-15)

Using Lopez's cell phone records and surveillance video from a variety of businesses and residences, Leyman was able to trace Lopez's general path of travel from Atlantic City at 6:31 a.m. to Bridgeton at about 8:30 a.m. (8T 52-9 to 56-1) For example, Leyman located surveillance video from Cacia's Bakery in Williamstown depicting Lopez's car travelling towards Bridgeton at about 7:22 a.m. Leyman testified that his investigation revealed that defendant had been involved in a single-car accident at about 7:27 a.m. near the intersection of Williamstown-Franklinville and Tuckahoe Roads in Monroe Township, which was a couple of miles down the road from Cacia's Bakery. The obvious implication of this testimony was that this was how defendant and Lopez crossed paths. (8T 57-6 to 61-7)

[5] The toxicology report revealed that Lopez had THC and PCP in his system. (11T 154-18 to 155-11)

On this score, the State introduced the testimony of James Burnett, who saw a minivan in a ditch off the side of the road in Monroe. Burnett stopped at the scene and called the police. (6T 214-15 to 218-9) According to Burnett, a black male with a bald head approached his vehicle, walking with a limp. The man offered Burnett $100 to drive him to Bridgeton, but Burnett said that he was unable to accommodate him because he was working. The man walked away, and Burnett drove from the scene. (6T 220-15 to 224-21)

Burnett further testified that, about twenty-five minutes later, he returned to the scene. Police were on the scene, but the man he had seen earlier was not. Burnett was unable to identify the man when shown photos by the Bridgeton police, and he was unable to identify defendant in court. (6T 226-7 to 229-25) However, the State introduced the testimony of Patrolman Carmen Iacovone of the Monroe Township police department. Iacovone's testimony was vague. He testified that he responded to the scene of the disabled minivan, and that the driver was not at the scene, so he issued motor vehicle summonses to defendant for leaving the scene of an accident and failure to report an accident. (6T 252-2 to 258-6)

According to Leyman, his investigation uncovered additional surveillance video further tracing Lopez's path of travel. Surveillance video from a residence at 739 Parvin Mill Road in Elmer showed Lopez's car at 7:54

a.m. And surveillance video from a business at 60 Rosenhayn Avenue in Bridgeton showed it drive by at 8:06 a.m. (8T 72-17 to 93-7)

Perhaps most significant for the State's theory of the case, Lopez's car was captured on surveillance video at 181 North Burlington Road at 8:09 a.m., and then again at the Quick Plus convenience store at the intersection of East Commerce Street and Burlington Road at 8:20 a.m. According to Leyman, that distance would typically be traversed in a vehicle in about one minute, but it took Lopez eleven. (8T 95-21 to 102-9) Leyman testified that between the two points where Lopez's car was observed there are four streets that Lopez could have travelled down: Casarow Drive, Timber Road, Twin Oaks Drive, and Reeves Road. (8T 102-25 to 103-5) By sheer coincidence, a Bridgeton police car was parked on Casarow at that time and a review of the video from the MVR showed that Lopez's car did not drive on Casarow. (8T 109-5 to 112-19) Similarly, a review of surveillance video from a home on Twin Oaks showed that it had not driven there, either. (8T 105-5 to 107-11) And Leyman testified that Timber was a dead-end street with few homes. (8T104-13 to 105-1)

That left only Reeves Road, and Leyman testified that defendant lived at 25 Reeves Road at the time. Leyman testified that the police recovered video from a home at 52 Reeves Road, which was further down Reeves from the direction of Burlington Road. A review of that video did not depict Lopez's car.

(8T 113-21 to 116-17) Thus, Leyman acknowledged, Lopez may have stopped at 25 Reeves Road and dropped defendant off there. However, Leyman opined that it would have taken only two additional minutes to have simply dropped someone off at 25 Reeves Road, yet about ten minutes were unaccounted for. (8T 117-18 to 118-12)

To bolster the theory that defendant was in Lopez's car after passing the Quick Plus convenience store at 8:20 a.m., the State introduced a recorded phone call made by Ramos's father to Lopez, at 8:21 a.m., inquiring about the location of his son (who had been left in Atlantic City[6]). According to Leyman, three voices can be heard on the recording: Lopez, Ramos's father, and an unidentified third person. (8T 124-19 to 128-1)

As noted above, Leyman testified that his investigation began to focus on defendant after the police viewed the man limping in the Spruce Street video. (8T 8-12 to 19) For that reason, the police seized defendant's cell phone and obtained records showing which cell towers his phone connected to around the time of the homicide. The court ruled that Leyman was not an expert in historical cell site analysis, so he was only permitted to testify about the

[6] The State introduced medical records from a hospital in Atlantic City that showed Ramos was receiving treatment there at the time of the homicide in Bridgeton. (8T 49-20 to 52-7)

location of the cell towers that defendant's phone connected to at a given time between 7:12 a.m. and 8:25 a.m. (8T 139-3 to 145-23)

According to Leyman, at 7:12 a.m., defendant's phone connected with a tower in Franklinville in Franklin Township, which was near the area defendant purportedly ran off the road in his minivan. (8T 146-9 to 148-15) At 7:27 a.m., his phone connected to a tower approximately 3000 feet from the crash site. (8T 148-17 to 155-9) According to Leyman, between 7:34 a.m. and 7:53 a.m., a series of calls demonstrated a pattern of connecting to towers going south toward Bridgeton. (8T 156-11 to 165-25) Leyman noted that at 8:03 a.m., defendant's phone connected to tower on the Upper Deerfield Township water tower, which was the same time that surveillance video showed Lopez's car near Rite-Aid on North Pearl Street in Bridgeton, which was in proximity to the water tower. (8T 167-18 to 169-25) And, at 8:25 a.m., defendant's phone connected to tower at 110 East Commerce Street in downtown Bridgeton. (8T 171-20 to 173-10)

The State asserted that the general pattern of defendant's calls was consistent with him having received a ride from Lopez from crash site to crash site – that is, from defendant's disabled minivan in Monroe to Lopez's collision with a tree on Spruce Street in Bridgeton at 8:31 a.m. (11T 91-16 to 101-21) Indeed, Leyman observed that defendant's cell phone repeatedly connected

with tower 37 – which was in close proximity to the crime scene – between 8:07 a.m. and 9:37 a.m. However, Leyman acknowledged that tower 37 is also the tower that defendant would likely connect to if he was at his home at 25 Reeves Road. (9T 144-18 to 148-17) Perhaps anticipating this ambiguity, Leyman further testified that, in between the connections with tower 37, defendant's phone connected with tower 304 at 8:50 a.m.; that the presumed shooter walked south from the crime scene, as supported by the surveillance video and a scent-tracking dog; and that tower 304 was located south of the crime scene. (9T 148-18 to 151-12)

Leyman interviewed defendant on February 24, 2017, at the Bridgeton police department. Leyman showed defendant a picture of Lopez and asked him if he knew him. Defendant denied knowing him and denied being in his car. (8T 175-1 to 178-2) On that same day, police searched defendant's home. They found a gun cleaning kit in a dog pen area located at the edge of the property, abutting a forested area. (9T 106-1 to 107-2) But other than that, the police found nothing to link defendant to the homicide; no camouflage jacket, no gun, and nothing else of evidential value. (9T 107-4 to 108-3; 7T 103-11 to 15)

In addition to collecting ballistics evidence from Lopez's car, the crime scene detective dusted the vehicle for fingerprints and collected items for DNA

analysis. None of the prints belonged to defendant, and the only print of note was a palm print from a man named Gary Moore. (7T 106-7 to 107-17174-17 to 175-9) Leyman testified that there was a text message from Moore to Lopez on the day of the homicide saying, "on my way." (9T 123-20 to 126-1) Phone records also showed that there were three calls between them, which Leyman believed concerned Moore selling drugs to Lopez prior to Lopez travelling to Atlantic City. (9T 130-1 to 14) Nonetheless, Leyman testified that Moore was not suspected in the homicide because his phone records did not place him in Bridgeton at the time. Moreover, Leyman testified that Moore did not match the physical description of the suspect, although Leyman did not know whether Moore walked with a limp. (9T 126-16 to 24)

Leyman testified that he also ruled out a man named Brian Samuels. Lopez was known to travel to Bridgeton to buy his drug of choice – PCP – from Samuels. According to Leyman, Samuels was eliminated as a suspect because he presented Leyman with an alibi that was credited. (9T 120-10 to 122-15)

With respect to the DNA evidence, an expert from the State testified that DNA found on a fruit punch bottle recovered from the front passenger floorboard had at least two contributors, and defendant was excluded as a major contributor. (9T 251-10 to 25) From DNA obtained from Lopez's ring

and hand, defendant was excluded as a possible contributor. (9T 252-6 to 25) Conversely, defendant was determined to be the source of the DNA recovered from a cigar butt found on the passenger side floorboard. (9T 253-2 to 13) Yet, as is common with DNA evidence, the expert was unable to determine when the DNA was deposited on the items, nor whether it originated with the source or had been transferred from another item. (9T 268-14 to 269-22)

Accordingly, in summation, defense counsel reiterated that the State had not proven its case. True, counsel acknowledged, defendant may have been in Lopez's vehicle at some point. But Lopez may have had multiple passengers, and the evidence suggested that he had dropped defendant off at his home on Reeves Road before Lopez drove to, and was shot on, Spruce Street. (11T 15-18 to 23-6)

LEGAL ARGUMENT

POINT I

DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE IMPROPER INTRODUCTION OF LAY-OPINION TESTIMONY THAT DEFENDANT WALKED WITH THE SAME UNIQUE GAIT USED BY THE PERPETRATOR AS CAPTURED IN SURVEILLANCE VIDEO. U.S. Const. amends. V and XIV; N.J. Const. art. I, pars. 1, 9, and 10. (Not Raised Below)

At a pre-trial hearing, the State sought a ruling to admit Detective Anthony Calabrese's testimony at trial that he had known defendant for about twenty years, had known that defendant walked with a limp after a motorcycle accident, and had recognized defendant from the Spruce Street video based on his purportedly "distinctive limp." After hearing testimony and viewing the video, the trial court denied the motion, ruling that "the video is unclear … whether or not there's actually a limp or there is a stumble and there's a difference of opinion in the witnesses who saw it." (4T 182-21 to 25) The court ruled that whether there was a limp was a jury question, and that it would be impermissible opinion testimony for Calabrese to identify defendant based on the limp. (4T 183-9 to 184-6)

Despite this ruling as to Calabrese, Leyman essentially did the same thing at trial. Leyman testified that defendant's gait, as depicted in the

Cumberland County Courthouse video from February 1, 2017, about two weeks after the homicide, was "similar and consistent" with the perpetrator's gait. He testified that a video of a traffic stop six years earlier depicted defendant with "a similar gait to what he [had] in the courthouse and a similar gait to the subject I observed on 407 Spruce Street's camera." Leyman also testified that defendant would "would lift his left leg and flick the lower half out as he walked with a limp" when he surveilled him prior to executing the phone seizure warrant, the video of which was also played for the jury. Indeed, Leyman used this same verbiage to describe each of the videos. And, clearly, Calabrese and Leyman had collaborated on the language they would use at trial to describe the limp, using the term "dead foot." Thus, Leyman did exactly what Calabrese was expressly prohibited from doing: opining that the Spruce Street video depicted defendant, based on that purportedly distinctive limp.

As the trial court correctly ruled, this was impermissible lay-opinion testimony because the jury was just as capable as Leyman of making the determination of whether any of the four videos showed a man limping, and then whether any limp – in conjunction with any other observable characteristics of the subject – led them to believe the videos depicted the

same person.[7] On the unique facts of this case, admission of this testimony denied defendant of his rights to due process and a fair trial, and are "clearly capable of producing an unjust result." R. 2:10-2; U.S. Const. amends. V and XIV; N.J. Const. art. I, pars. 1, 9, and 10. This court should reverse the convictions.

In State v. Singh, our Supreme Court addressed the requirements of lay-opinion testimony. 245 N.J. 1, 14 (2021). The Court began its analysis by examining the purpose and boundaries of N.J.R.E. 701, which provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:
> (a) is rationally based on the witness' perception; and
> (b) will assist in understanding the witness' testimony or determining a fact in issue.

The Court in Singh stressed that "'[t]he purpose of N.J.R.E. 701 is to ensure that lay opinion is based on an adequate foundation.'" 245 N.J. at 14 (alteration in original) (quoting State v. Bealor, 187 N.J. 574, 586 (2006)).

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[7] To be sure, if Leyman was an expert in biomechanics or gait analysis, the testimony might have been admissible as expert testimony. But even then, the proffered evidence would be of secondary value to facial identification, which is not present in this case. See Vicki Bruce, Remembering Faces at 66, in The Visual World in Memory (2009) ("The most important source of information that we use to identify someone in daily life is the face."). See also Vicki Bruce et al., Matching Identities of Familiar and Unfamiliar Faces Caught on CCTV Images, 7 J. EXPERIMENTAL PSYCH. 207 at 66 (2001) (explaining that in studies "[o]ther information from clothing, gait, and body shape was much less important for recognition").

N.J.R.E. 701(a) "requires the witness's opinion testimony to be based on the witness's 'perception,' which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." Ibid. (quoting State v. McLean, 205 N.J. 438, 457 (2011)). "[U]nlike expert opinions, lay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." Id. at 27 (alteration in original) (quoting McClean, 205 N.J. at 460).

N.J.R.E. 701(b) requires that lay-opinion testimony be "limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Singh, 245 N.J. at 15 (quoting McLean, 205 N.J. at 458). A witness may not offer lay opinion on a matter "as to which the jury is as competent as [the witness] to form a conclusion." McLean, 205 N.J. at 459 (quoting Brindley v. Firemen's Ins. Co., 35 N.J. Super. 1, 8 (App. Div. 1955)); see also Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, cmt. 3 on N.J.R.E. 701 (2021).

Our case law illustrates the application of N.J.R.E. 701(a). In State v. Lazo, our Supreme Court held that "lay witness testimony is permissible where the witness has had 'sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful.'" 209 N.J. 9, 22 (2012)

(quoting United States v. Beck, 418 F.3d 1008, 1015 (9th Cir. 2005)). In Lazo, a detective who "had not witnessed the crime and did not know [the] defendant" testified that he chose the defendant's arrest photograph for a photo array because it looked like a composite sketch prepared based on a witnesses' descriptions of the suspect. Id. at 24. The Court observed that this testimony, which was not based on the detective's perception, made clear his approval of the victim's identification by relaying that "he, a law enforcement officer, thought defendant looked like the culprit as well." Ibid. The Court, therefore, concluded that the testimony failed to meet N.J.R.E. 701(a).

In Singh, a surveillance video captured an armed robbery, and the arresting officer was properly permitted to testify that the sneakers worn by the perpetrator in the surveillance video were similar to the sneakers worn by the defendant when the officer encountered him shortly after the robbery. 245 N.J. at 5-7. Although the officer had not witnessed the crime in Singh, he had firsthand knowledge of the sneakers in the immediate aftermath of the crime because he saw them as he was arresting the defendant. Id. at 19-20. The Court, therefore, concluded that the narration testimony met the requirements of N.J.R.E. 701(a). Id. at 19.

Here, unlike the officer's contemporaneous observation of sneakers in Singh, Leyman did not have any special knowledge of defendant that was not

captured in the various videos. And, because the Spruce Street video did not depict the perpetrator's face with any useful level of detail, the identification value was limited to the purportedly unique gait, which was on full display in the other videos the jury was shown. The jury was, therefore, just as "competent as he to form a conclusion." McLean, 205 N.J. at 459. In other words, the evidence held little probative value but significant risk of prejudice because it was offered by the lead investigator in the case, who, the jury would presume, had access to the best information. See, e.g., State v. Torres, 183 N.J. 554, 580 (2005) ("[W]hen the expert witness is an investigating officer, the expert opinion may present significant danger of undue prejudice because the qualification of the officer as an expert may lend credibility to the officer's fact testimony regarding the investigation."); State v. Hawk, 327 N.J. Super. 276, 285 (App. Div. 2000) ("Police occupy a position of authority in our communities … and thus ordinary citizens are more likely to believe them than a person on trial[.]").

In State v. Sanchez, 247 N.J. 450 (2021), our Supreme Court announced the factors that should be considered in deciding admissibility of lay-opinion identification testimony under N.J.R.E. 701. There, police investigating a homicide and robbery obtained a still photograph from a surveillance video of two suspects no witness could identify. Id. at 460. They circulated the

photograph to law enforcement officers. Ibid. A parole officer identified one of the men depicted in the photograph as a parolee she supervised. Id. at 461. She stated that Sanchez had met with her at least twice a month in the fifteen months since he was released from prison for aggravated manslaughter. Ibid.

The trial court denied a motion to admit the parole officer's identification of Sanchez in the surveillance photograph. Id. at 462. This Court reversed the trial court, and the Supreme Court granted an interlocutory appeal. Id. at 462-63.

The Supreme Court concluded that the parole officer's proposed testimony satisfied the first prong of N.J.R.E. 701 because the officer "became familiar with defendant's appearance by meeting with him on more than thirty occasions during his period of parole supervision. Her identification of defendant as the front-seat passenger in the surveillance photograph was 'rationally based on [her] perception,' as N.J.R.E. 701 requires." Id. at 469 (alteration in original).

With respect to the second prong of N.J.R.E. 701, the Court held that four non-exclusive factors are relevant to the analysis of whether lay opinion testimony by a law enforcement officer will be helpful to the jury: (1) "the nature, duration, and timing of the witness's contact with the defendant," id. at 470; (2) a change in the defendant's appearance from the time of the alleged

offense to the time of trial, if the lay witness was familiar with how the defendant appeared when the alleged offense was committed, id. at 472; (3) whether other witnesses not associated with law enforcement are available to offer a lay opinion identifying the defendant, id. at 472-73; and (4) the quality of the depiction of the defendant, given that a jury may be as capable as any other witness to determine if a defendant who is present in a courtroom is the person in a clear depiction. Id. at 473.

Applying those factors, the Court concluded that the parole officer's testimony would assist the jury in determining whether Sanchez was depicted in the surveillance photograph. Id. at 474-75. The Court noted the length and frequency of the parole officer's contacts with Sanchez, the absence of any other witness who could identify him, and the fact that the photograph was neither so clear as to be readily used by the jury to determine if Sanchez was depicted therein, nor so blurry as to make the perpetrator's features indistinguishable. Ibid.

Here, in contrast, the four Sanchez factors strongly weigh against admission of Leyman's testimony. First, regarding "the nature, duration, and timing of the witness's contact with the defendant," Leyman's pre-trial testimony did not address his particular familiarity with defendant's appearance. The court held a hearing at which the State elicited evidence about

Calabrese's extensive experience with defendant. (4T 6-13 to 213-4; Da 4) But that hearing concerned only Calabrese's familiarity, not Leyman's.

The second Sanchez factor is whether there had been a change in the defendant's appearance from the time of the offense to the time of trial, provided, of course, that the lay witness was familiar with how the defendant appeared when the offense was committed. Id. at 472. Here, there was no allegation that defendant's appearance had changed in any meaningful way.

The third Sanchez factor concerns whether other witnesses not associated with law enforcement were available to offer a lay opinion identifying the defendant. Id. at 472-73. It is respectfully submitted that this factor is misguided because the unavailability of proper identification testimony should have no bearing on the admissibility of otherwise improper opinion testimony. As Justice LaVecchia insightfully observed:

> The lay opinion testimony is either intrinsically helpful or it is not. Inadmissible lay opinion testimony should not be rendered admissible because one side or the other cannot present identification testimony.

Sanchez, 247 N.J. at 483 (LaVecchia, J., dissenting). But even accepting this factor as a valid consideration, there were four witnesses from the Spruce Street area who all provided the same general description of the man who walked from the scene of the homicide. (9T 65-9 to 12) There was no need for an opinion from a fifth lay witness who had not even observed the live event.

Finally, Sanchez instructs that courts must evaluate the quality of the depiction of the defendant, considering that a jury may be as capable as any witness to determine if a defendant who is present in a courtroom is the person in a clear depiction. Id. at 473. In this case, the videos have been submitted to this Court in the appendix. (Da 17) In three of the videos (courthouse, traffic stop, and seizure warrant service) there is no dispute that defendant is depicted. In the fourth video (the Spruce Street video) there is no dispute that nobody can identify the man by his face. Therefore, the Spruce Street video has no identification value unless there is something else remarkable about the person depicted – *i.e.*, a purportedly distinct way of walking. And on that point, the jury was just as capable as Leyman of reaching a conclusion. Thus, the admission of Leyman's testimony directly linking defendant to the person depicted in the Spruce Street video was erroneous.

Moreover, the admission was clearly harmful. As noted above, there was substantial evidence to support the claim that defendant was in Lopez's car at some point on January 15, 2017. That evidence included the likely crossing of paths in Monroe, the consistent phone records, a recorded phone call allegedly capturing an unidentified third party, and, of course, the DNA on the cigar butt. However, there was also substantial evidence that Lopez travelled down Reeves Road – to defendant's home – but not as far as 52 Reeves Road. And,

as Burnett's testimony revealed, defendant was seeking a ride home to Bridgeton. Thus, it is reasonably likely that defendant was dropped off at 25 Reeves Road, and that another passenger (whether picked up before or after defendant was dropped off) later shot Lopez on Spruce Street. The only significant evidence that would contradict that narrative was a finding that the Spruce Street video recorded defendant.

The trial court recognized the obvious prejudice of this testimony. In its final charge to the jury, the trial court instructed:

> the determination of whether the person depicted in the surveillance footage leaving the area of Spruce Street on January 15th is the defendant, Jule Hannah, is a question of fact for you, the jury, to decide. Witnesses testified that they reviewed video footage of Jule Hannah on other occasions. The limited purpose of this testimony is to show why the witness -- witnesses focused their attention on Jule Hannah. You may not use this testimony to conclude that the person in the surveillance footage is Jule Hannah. That is an independent question of fact that you must decide for yourselves. So, again, any conclusions they may have reached, either by directly telling you or implied, that's not evidence either. The ultimate determination is what you decide.

(11T 135-6 to 22)

Defendant respectfully submits that such an instruction was purely aspirational, not achievable, in a case like this. As pragmatic courts have recognized, "in some circumstances, a 'limiting instruction ... is a

'recommendation to the jury of a mental gymnastic which is beyond, not only [its] powers, but anybody's else.'" State v. Greene, 242 N.J. 530, 552 (2020) (quoting Bruton v. United States, 391 U.S. at 132 n.8 (1968) (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.))). It is inconceivable that the jury could put aside opinion testimony from the lead investigator on the most important facet of the case, emphasized by the State from its opening statement to its summation. (6T 56-7 to 20; 11T 62-19 to 64-25)

Accordingly, the improper admission of Leyman's testimony on exactly this point was "clearly capable of producing an unjust result." R. 2:10-2. The convictions should be reversed.

POINT II

WHERE EXPERT TESTIMONY ON HISTORICAL CELL SITE ANALYSIS WAS REQUIRED, THE INTRODUCTION OF UNRELIABLE LAY WITNESS TESTIMONY DENIED DEFENDANT HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. U.S. Const. amends. V and XIV; N.J. Const. art. I, pars. 1, 9, and 10. (5T 173-1 to 15; 6T 9-21 to 14-15; Da 6)

Prior to trial, the court ruled that Leyman lacked the qualifications to be admitted as an expert in historical cell site analysis. The court ruled that Leyman "shall be permitted to provide only lay witness testimony regarding his review, interpretation, and plotting of the location of cell towers on a map from the defendant's historical cell site data records." (Da 6) The court further ruled that "[t]here shall be no testimony concerning the azimuth of any antenna or any cell tower sector accessed by any call within the defendant's call detail records." (Ibid.) Although Leyman was correctly determined to not be an expert, and despite these express limitations, he provided testimony that only an expert was qualified to provide. The result is that the jury was presented with testimony of unknown reliability. And because defendant's location was the central facet in the State's case, he was thereby denied his rights to due process and a fair trial. U.S. Const. amends. V and XIV; N.J. Const. art. I, pars. 1, 9, and 10. His convictions should be reversed.

Our Supreme Court in McLean explained that there are three distinct categories of testimony a witness can give: (1) fact testimony; (2) lay-opinion testimony; and (3) expert-opinion testimony. McLean, 205 N.J. at 456-62. The first category, fact testimony, consists of what a witness "perceived through one or more of the senses." Id. at 460. Such testimony includes a description of what the witness did or saw, but does not include an opinion, "lay or expert, and does not convey information about what the [witness] 'believed,' 'thought,' or 'suspected.'" Id. at 460.

The second category, lay-opinion testimony, is only admissible if it falls within "the narrow bounds" erected by N.J.R.E. 701. Id. at 456. Thus, a lay witness may only give an opinion when it is rationally based on his or her "personal observations and perceptions" and will assist the jury in understanding the witness's testimony or determining a fact in issue. Id. Our Supreme Court has held that these requirements mean that a lay witness may offer opinion testimony only "on matters of common knowledge and observation." State v. Bealor, 187 N.J. 574, 586 (2006). As the Court explained, categories of appropriate lay-opinion testimony include the speed at which a vehicle was traveling, State v. Locurto, 157 N.J. 463, 471-72 (1999); the distance of a vehicle from the intersection where an accident occurred, State v. Haskins, 131 N.J. 643, 649 (1993); and signs and behaviors indicative

of an individual's intoxication, State v. Guerrido, 60 N.J. Super. 505, 509-11 (App. Div. 1960).

The third category, expert-opinion testimony, is governed by N.J.R.E. 702, 703, and 704, and allows experts to "explain the implications of observed behaviors that would otherwise fall outside the understanding of ordinary people on the jury." Id. at 460. Experts, unlike lay witnesses, use their special "knowledge, skill, experience, training, or education" to draw inferences from observed events. Id. at 449. Only those with appropriate qualifications may testify as experts, and a number of safeguards, including the use of careful jury instructions, must be employed by the trial court when expert opinion testimony is admitted. Id. at 455, 460. Moreover, McLean court made clear that these categories are mutually exclusive when it rejected the State's argument that there are categories of opinion testimony that lie between lay and expert. Id. 461.

N.J.R.E. 702 provides: "If 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 of an opinion or otherwise."

The party offering the expert testimony bears the burden of establishing its admissibility. State v. Harvey, 151 N.J. 117, 167 (1997) (citing Windmere, Inc. v. Int'l Ins. Co., 105 N.J. 373, 378 (1987)). Our Supreme Court has set out a three-part test for the admission of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

State v. Jenewicz, 193 N.J. 440, 454 (2008).

Here, there was no question that Leyman did not qualify as an expert, and the trial court correctly ruled that he did not. However, the testimony he provided was beyond the ken of the average juror, so it required an expert. It is a simple matter to understand that a cell phone communicates with cell towers through a radio signal, and that phone companies keep records of the cell tower that the phone connects to at origination and also termination of the call. It is an entirely different matter, however, to draw any inference about the phone's location based on its connection with a given tower.

"Cell phones work by communicating with cell-sites operated by cell-phone service providers. Each cell-site operates at a certain location and covers a certain range of distance." In re U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113, 115 (E.D.N.Y.

2011). "The geographic area covered by a particular tower depends upon 'the number of antennas operating on the cell site, the height of the antennas, topography of the surrounding land, and obstructions (both natural and manmade).'" Holbrook v. Commonwealth, 525 S.W.3d 73, 79 (Ky. 2017) (quoting United States v. Hill, 818 F.3d 289, 295 (7th Cir. 2016)). "When a cell phone user makes a call, the phone generally 'connect[s] to the cell site with the strongest signal,' although 'adjoining cell [towers] provide some overlap in coverage." Ibid. (alterations in original) (quoting Hill, 818 F.3d at 295). Other factors affecting which tower a cell phone connects to include the terrain, the antennae's angle, the phone itself, and environmental factors. Hill, 818 F.3d at 296. "As a cell phone user moves from place to place, the cell phone automatically switches to the tower that provides the best reception." State v. Johnson, 797 S.E.2d 557, 562 (W. Va. 2017) (quoting In re Application for an Order for Disclosure of Telecomms. Recs., 405 F. Supp. 2d 435, 436-37 (S.D.N.Y. 2005)).

"The tower with the 'strongest, clearest' signal is the one to which the cell phone will 'more than likely' connect." State v. Carrera, A-5486-16T2, 2019 WL 4009856, at *2 (App. Div. Aug. 26, 2019).[8] However, it "is not necessarily the closest in proximity to the cell phone, as the closest tower may

[8] This unpublished decision has been included in the appendix. (Da 18-25) Defendant is unaware of any contrary authority for the general propositions cited.

not be operative, or its signal may be blocked by an obstruction, such as a building or natural feature." Ibid.

Here, Leyman did not perform a drive test, which is the gold standard for determining the coverage area of a particular tower. See New York SMSA Ltd. v. Twp. of Mendham Zoning Bd. of Adjustment, 366 N.J. Super. 141, 150 (App. Div. 2004), aff'd sub nom. New York SMSA Ltd. P'ship v. Twp. of Mendham Zoning Bd. of Adjustment, 181 N.J. 387 (2004) ("In a drive test, a specially equipped vehicle travels throughout an area scanning and recording signal strengths over a given frequency range. The data obtained from the drive test is then processed by a computer and plotted in the form of a propagation map.") He would therefore not know the degree to which signals from neighboring towers overlapped. Nor did he have the expertise or knowledge to opine whether neighboring towers for any given tower were non-operational or obstructed at certain angles or elevations.

Thus, without knowing and explaining these limitations to the jury, Leyman's testimony purported to be more accurate than it was. The only thing that Leyman knew was that defendant's phone connected with a certain tower at a particular time. It might have connected with that tower over a vast distance, bypassing one or more closer towers that were non-operational, obstructed, or otherwise not the "strongest signal" detected by the phone. That

additional knowledge was essential to any useful conclusion about the location of the phone. See State v. Earls, 214 N.J. 564, 577–78 (2013) ("The accuracy of the location information depends in part on the size of the 'sector'—the area served by the cell tower. That area can range from miles to meters.") (citations omitted).

Leyman's testimony was unfairly prejudicial when he testified that defendant's cell phone connected with a particular tower because the inference the jury would draw that defendant's phone was in a particular geographic region at a given time was inescapable. The State sought to marry defendant's changing tower connections with Lopez's known path of travel – as determined through various residential and business surveillance cameras – to prove that defendant was travelling in Lopez's car from Monroe to Bridgeton. And if the jury believed that defendant was in Lopez's car on January 15, then it was unlikely to find that the cigar butt had been left in the car on a prior day.

But even more unfairly prejudicial was Leyman's testimony that defendant's phone briefly connected with a tower south of the crime scene after the time of the homicide and before it consistently connected with tower 37, which served both Spruce Street and Reeves Road. In this way, the State sought to identify defendant as the man who had fled south after the shooting – as demonstrated by the Spruce Street surveillance video and scent-tracking dog

– and discount the defense that defendant had been at Reeves Road the entire time the phone connected with tower 37. Simply put, the more Leyman's testimony sought to prove, the more the jury was misled as to its accuracy.

Moreover, there can be little doubt that the jury used the improper evidence in just this manner. The State's summation urged the jury to conclude that defendant must have been near the towers to which his phone connected:

> And the way we know that [a]t all points in time that the phone of the defendant was in close proximity to the towers is because you have two points of confirmation.
>
> Confirmation point number 1 is from the very first call that was highlighted to you. Again, going back to that Monroe Township call. You know the defendant was in very close proximity to that tower because you know where he was and you know where the tower was. In other words, you know he was at the Monroe Township crash site and you know he was hitting off of the tower in direct proximity to that crash site. Based on that it's fair to conclude that the defendant's phone had to hit off of the tower that he was close to at all other points in time.
>
> Confirmation point number 2 is common sense and your personal experiences. And I told you that from jump, when you go back into the deliberation room, when you sit down and talk to each other your common sense does not go out the window. Your personal experiences do not go out the window. So ask yourselves in 2021, we've all had cell phones, if you're in an area, an isolated area, where there's no towers, where there's limited towers, are you going to connect to a call? Or rather, is your phone going to have any service? No, because there's no towers around. There

> has to be a tower around in order for your phone to connect to a tower. Common experience dictates that you have to be close to a tower in order to connect to a call.
>
> Based on all of this, folks, I would say it's a fair conclusion that the defendant was in proximity to all of the towers, all of the towers that you see where he's moving, or rather -- rather, where the towers are going point by point by point by point, Monroe Township, moving, moving to the City of Bridgeton. That clearly shows that he was in the car with the victim and he was picked up by the victim.

(11T 91-12 to 92-24) (emphasis added).

Once again, apparently sensing the misleading nature of the State's evidence, the court issued the following instruction:

> All right. Ladies and gentlemen, you've heard some testimony here about a call connecting to a cell phone tower at a particular time and a particular location. In conjunction with that the state has also shown you a location where someone was purported to be or an event was purported to have happened sometime relevant to the proceedings here. I want to make it clear to you that while they can show you those locations and how far apart they are that evidence does not establish where that phone was at any -- at that time that that call connected. Do you understand? It doesn't -- just because there is a cell tower somewhere proximate to something else doesn't mean that that phone was located any particular spot within any particular distance from that tower. Does everybody understand that? So that is -- you should not consider that that evidence was that phone was there or here or any other particular place, only that there was a call received at that location and that at the same time something else was happening at another location and

> they were so far apart. But that's for you to determine, you know, where that information might be considered in the decisions you need to make here. But that fact that there was a phone call received at that tower does not mean that phone was in any particular location. You understand? So all you know is that a call connected at a certain time at that location and there was something else that happened somewhere around there. That doesn't mean that that phone was in any particular spot at the time that that phone call was made. Okay? All right.

(8T 152-2 to 153-9) But this instruction likely caused confusion; it is unclear what other possible purpose the cell tower evidence could serve if it was not evidence about the location of the phone.

The court attempted to clarify in its final charge to the jury that it could use the cell tower evidence to determine location, but not standing alone:

> you can't conclude that a phone was in any particular spot simply because it connected to a tower. You can, however, utilize that information along with other information if you think it's appropriate to do so. You understand? But that information alone doesn't mean that cell phone was in any particular spot. You'd have to have other evidence to rely upon and you could use that evidence in conjunction with it. Do you understand what I'm saying? So the cell phone tower alone just cause it's hitting off that tower doesn't mean it's in any particular spot. There has to be -- you'd have to be relying on some other evidence in connection with that to make that determination. Does everybody understand this? And, again, that's if you believe it is appropriate to do so. You understand? You're the finders of fact. You decide whether or not that's relevant to what you -- what you're determining. Okay?

(11T 139-1 to 24)

So, assuming that this instruction resolved any confusion from the prior instruction, the jury was expressly permitted to use Leyman's testimony – in conjunction with, for example, surveillance video or the path of a scent-tracking dog – to determine the location of defendant's cell phone. In other words, the jury was invited to do exactly what Leyman lacked the expertise to do: draw a conclusion on the probable location of defendant's phone at a given time. Yet the jury, much like Leyman, did not possess enough information to draw that conclusion with a reasonable degree of accuracy. Instead, they were likely to overvalue the supporting evidence (for example, the surveillance video that *somebody* walked south from the crime scene) in reaching the conclusion the State was proposing – that that somebody was defendant.

This Court has recognized that "[t]he objective of every trial is a search for the ultimate truth." State v. Clark, 381 N.J. Super. 41, 48 (App. Div. 2005), aff'd, 191 N.J. 503 (2007) (citing State v. Szemple, 135 N.J. 406, 413 (1994)). "More than in any other context, the criminal trial setting requires our most diligent effort to ensure that the truth emerges and that the right result is reached." In re Hinds, 90 N.J. 604, 617 (1982). Where seeking truth is the ultimate goal, faulty expert-opinion testimony masquerading as lay-opinion

testimony on the central contention in the case undermines the promise of due process and a fair trial. The convictions should be reversed.

POINT III

THE FAILURE OF THE TRIAL COURT TO VOIR DIRE A SLEEPING JUROR DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY, AND REQUIRES THE REVERSAL OF THE CONVICTIONS. U.S. Const. amends. VI, VII, XIV; N.J. Const. art. 1, pars. 9, 10 (11T 122-14 to 21; 13T 26-2 to 27-23)

Near the end of the trial, after summations, the court remarked, "And you know, and I think the jury's paying attention. Even juror number, whatever he is over there, he's paying attention. So remember the one I did this for[?]" (Judge banging on table) "So he woke up. He's paying attention now. So – alright. Bring the jury up." (11T 122-14 to 21) This was the totality of the court's corrective action although caselaw requires that the judge stop the proceedings and voir dire the juror to ascertain what portion of the trial had been missed, and then take further corrective action based on that answer. Because defendant is entitled to a fair and impartial jury – which, of course, includes conscious jurors – the court's failure to take curative action requires reversal of the convictions.

The constitutional right to a trial by a fair and impartial jury is "one of the most cherished rights in the long history of Anglo-American jurisprudence"

which has existed since "the Magna Charta and perhaps beyond ...." State v. Ingenito, 87 N.J. 204, 210 (1981) (citations omitted). This is a state and federal constitutional guarantee, U.S. Const. amends. VI, VII, XIV; N.J. Const. art. 1, pars. 9, 10, to be "scrupulously protected from encroachment or impairment with respect to a criminal defendant." State v. Simon, 79 N.J. 191, 199 (1979). The "fundamental right of trial by a fair and impartial jury" is to be "jealously guarded by the courts" because the jury is an "integral part of the court for the administration of justice, and on elementary principles its verdict must be entirely free from the taint of extraneous considerations and influences." Ibid. (quotations omitted); State v. Williams, 113 N.J. 393, 409 (1988) (Williams II) ("[A]n impartial jury is a necessary condition to a fair trial."). New Jersey courts have found that a defendant's right to be tried by an impartial jury is of "exceptional significance," so it must be as impartial "as the lot of humanity will admit[.]" State v. Singletary, 80 N.J. 55, 62 (1979); State v. Williams, 93 N.J. 39, 60 (1983) (Williams I).

Years ago, this Court has held that when a party alleges that a juror has been sleeping, a court must investigate that allegation. State v. Reevey, 159 N.J. Super. 130, 133-34 (App. Div. 1978); State v. Burks, 208 N.J. Super. 595, 611-12 (App. Div. 1986). In Reevey, defense counsel told the trial judge that a juror was sleeping during the summations and jury charge. Id. at 133. Defense

counsel "suggest[e]d that [the juror] be one of the alternates." Ibid. The judge made no finding about whether the juror was sleeping, but instead responded that he could not dismiss that juror because he believed he did not have the authority to do so. Ibid. This Court remanded for a hearing to determine whether the juror was, in fact, sleeping. Id. at 135. The panel stated that, "at the very least under the circumstances of this case the trial judge should have conducted a hearing and questioned this juror as to whether she was in fact dozing or sleeping, or whether she was listening to the summations and the charges but merely had her eyes closed." Id. at 134.

In Burks, this Court reversed on other grounds but, as in Reevey, noted its disapproval of the trial judge's summary dismissal of the defendant's allegations that jurors were sleeping. Id. at 611-12 ("Certainly the judge should have ascertained if the jurors were sleeping and if so considered proper corrective measures.").

More recently, our Supreme Court confronted the sleeping juror problem in State v. Mohammed, 226 N.J. 71 (2016). Synthesizing prior caselaw, the Court "provide[d] guidance in this area that, going forward:"

> When it is alleged that a juror was inattentive during a consequential part of the trial, if the trial court concludes, based upon personal observations explained adequately on the record, that the juror was alert, the inquiry ends. If the judge did not observe the juror's attentiveness, the judge must conduct

> individual voir dire of the juror; if that voir dire leads to any conclusion other than that the juror was attentive and alert, the judge must take appropriate corrective action.

Id. at 75.

Here, the record reveals that the judge was aware that a juror had been sleeping because he banged on the table to wake him up. It is not clear from prior transcripts precisely when this occurred. However, further context is available in the record from the defendant's motion for a new trial. There, counsel asserted:

> it appeared that one, possibly two, jurors had been falling asleep at points during the trial. We don't know how much they missed -- paying attention. At one point I think it was serious enough that Your Honor noticed it and, you know, tried to draw attention by striking, you know, making some noise and striking the bench.

(13T 6-4 to 10)

Believing that the claim concerned a female juror, the court ruled:

> This is something I actually raised during the trial and I brought to everyone's attention cause I was kind of facing that way. And I remember it was juror number 6. But I think I had also expressed that she had a habit of closing her eyes. But she also demonstrated that she was actually awake while these things were going on. I didn't like her closing her eyes and I would make -- one time or something like that, but she reacted, it was -- shows that she was, you know, actually paying attention. She -- I don't know, some people close their eyes, -- listen again. So I have no reason to believe she

> was not paying attention. It was simply her own personal idiosyncrasy that I could see. But like I said, I did -- had I perceived that she was nodding out, I would have done something more severe. But I didn't perceive her as not paying attention to the trial. It did happen on a couple of occasions, but she then would make movements that showed me that she was actually awake, even with her eyes closed she would make certain movements. And then when -- when other things happened in the courtroom she would, you know -- wasn't like passed out. She was simply sitting upright and she would close her eyes. And -- and like I said, I -- I did make some attempts to make some noise that might cause her to open her eyes -- reacted. So under those circumstances I -- to the individual counsel's -- trial -- but at no time did I feel that she was not -- . So had it -- had it been more I would have done something different. But I -- I was satisfied that she is, in fact, still paying attention. For whatever reason -- closed her eyes -- and then she would -- open them and then when some other things were happening -- testimony, sometimes she might close her eyes -- .

(13T 19-16 to 21-1)

At this point, defendant and defense counsel advised the court that the juror who was sleeping was a man, seated in the second row. (13T 21-3 to 25) The court acknowledged, "you may be right. Maybe I was thinking of a different juror." However, the court did not "remember making any noises for any other juror other than the one I referenced." (13T 22-3 to 9) After further discussion, the court observed:

> I think Mr. Hannah may be correct. I may be referring to a juror that was in a subsequent trial -- shortly after

> that, another homicide trial, where I referenced that. So to be -- I don't have a relect -- a recollection of any particular juror in this trial then having that issue. Even if I did make a noise, I didn't -- if it was a persistent -- did I bring it to your attention, counsel? Did I call counsel to sidebar with regard to this particular individual? Does anybody recall that?
>
> [Defense counsel]: No.

(13T 23-5 to 15)

The court then solicited defendant's recollection:

> THE COURT: Well, I'm going to -- I'm going to go with Mr. Hannah's -- cause he was in the better position to view it, my recollection of the courtroom configuration.[9] He would have been on my left. He's referring to a juror in the second row on my right in the gallery, is that correct, Mr. Hannah?
>
> MR. HANNAH: Yes, sir. What happened was the first day he nodded off.
>
> THE COURT: Um-hum.
>
> MR. HANNAH: And -- and I watched you look at him and you was look for something on your desk to try to figure out a way to get his attention and he popped up. Then the second day he had his head all the way down -- was all the sleep and you was looking around and then you banged on the desk three times and he popped up. That's exactly what happened. This guy was asleep two days in a row.
>
> THE COURT: All right. But that was it, correct, Mr. Hannah?

[9] The courtroom was specially configured to accommodate Covid distancing requirements.

> MR. HANNAH: Yes. No one said nothing about nothing – voir dire, or nothing happened.

(13T 23-21 to 24-16)

But, despite the court's lack of recollection, it denied the application, essentially ruling that it must have done the appropriate thing at the time:

> I was cognizant of it at the time. Had I received -- that that juror was not paying attention or was asleep, and I don't reach the same conclusions that Mr. Hannah does that he's sleeping. Just because he has his head down or something like that does not mean he's asleep. And I did not -- period of time that I think he didn't pay attention to the trial. Okay? The fact that a juror may close their eyes and put their head down for a moment or anything like that, even the fact that it attracted my attention, shows that I was paying attention as to what was going on. And if I felt that individual juror was not attentive, not paying attention, I would have brought that up. And that's why I questioned did I bring you guys to sidebar, because if I felt that there was a real issue there, I may have taken a break, brought you to sidebar, brought the juror up, are you having a problem, not feeling good, what's going on. But there was nothing like that. It didn't reach that level at the time. And sometimes you have to get jurors attention. Sometimes you have to do to do that -- that through the course of a trial, make sure that you can assess what it is that they're doing. And that's why I watched them.
>
> But in this particular case it didn't reach that level, I didn't see anything that caused me to -- to even suspect that they were not being attentive. The fact that juror may have had their head down momentarily. To be quite honest with you, my number one concern is that they're looking at their phone, not that they're

> falling asleep, because if that's one of the things in this particular configuration that I found from jurors might be tending to do is have their phone down, put their head down, and they're actually looking at their phone. That causes me great concern. But that is not what was occurring here. I did not perceive that the juror was asleep no matter what Mr. Hannah believes it. I perceived it at the time and I did not reach those conclusions even if I took steps to make him look up. Again, it was a kind of a dual purpose. My number one concern was -- cell phone or playing with their cell phone, whatever the case may be. That wasn't the case. And I did not perceive -- .
>
> So I am going to deny the application cause I had the ability to see it and I would have taken other action had that occurred.

(13T 26-2 to 27-23)

It is respectfully submitted that this rationale does not withstand scrutiny. The court's reasoning was that it would have taken appropriate corrective action if it had noticed a problem with juror attentiveness, and because the court did not need to take corrective action (beyond banging on the bench), there was therefore no problem with juror attentiveness. However, by the court's own admission, it appears that two cases had been conflated in the court's mind; either that, or there were two sleeping jurors in this case, one male and one female.

Perhaps the unique courtroom spacing of a Covid-time trial caused the court to deviate from its usual vigilance in watching over the jurors while

listening to testimony from witnesses and arguments from counsel. See (6T 24-4 to 22) (Court acknowledging that trial was proceeding without traditional jury box seating). But whatever the cause, it is clear that the court was relying on its usual practice, not a clear memory of what occurred in this case.

Given the court's lack of recollection – and indeed, its conflation of this trial with a later one – the trial court made no reliable findings "based upon personal observations explained adequately on the record, that the juror was alert." Mohammed, 226 N.J. at 75. In the absence of those expressed observations, the court was obligated to "conduct individual voir dire of the juror," ibid., but it did not do that either. Nor, of course, did the court take "appropriate corrective action." Ibid.

Due to the trial court's failure to act, it is unknown how long the juror had been sleeping. Defendant suggested that it had been two days, and nobody had a contradictory recollection. This was, therefore, not the situation where it can be said with confidence that "the question concerning the juror's attentiveness came at a point in the trial where there was no critical evidence being presented." State v. Glover, 230 N.J. Super. 333, 343 (App. Div. 1988) (Finding no prejudice in inattentiveness where "testimony that was being received at the time was merely of a mechanical nature.").

The "right to be tried by competent jurors," undoubtedly "'implies a tribunal both impartial and mentally competent to afford a hearing.'" Tanner v. United States, 483 U.S. 107, 134 (1987) (Marshall, J., dissenting) (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)). "Jury 'irregularity,' including sleeping, may violate a defendant's federal and state constitutional rights to a fair tribunal if it results in prejudice." Mohammed, 226 N.J. at 83 (quoting State v. Scherzer, 301 N.J. Super. 363, 486-87 (App. Div. 1997) (citing U.S. Const. amend. VI; N.J. Const. art. I, Para. 10)). Such a violation has occurred here, where a juror missed a critical portion of the trial and the trial court utterly failed to take any corrective action. Accordingly, the convictions should be reversed.

POINT IV

EVIDENCE DISCOVERED ON DEFENDANT'S CELL PHONE MUST BE SUPPRESSED BECAUSE THE "WARRANT TO SEIZE" WAS AN UNCONSTITUTIONAL GENERAL WARRANT THAT DID NOT SUFFICIENTLY DESCRIBE THE ITEMS TO BE SEIZED NOR PROVIDE ANY LIMITATION ON WHEN THE WARRANT COULD BE EXECUTED. U.S. Const. amends. IV and XIV; N.J. Const. art. I, par. 7. (2T 98-14 to 108-4; Da 3)

Because the phone seizure warrant issued here authorized the police to seize any "cellular device" from defendant at any time of their choosing, it was unconstitutionally overbroad, vesting the officers with too much discretion. The lower court erred in denying defendant's motion to suppress. This court should reverse that denial order and vacate the convictions.[10]

The defense moved prior to trial to suppress all evidence obtained from defendant's cell phone based on the order's "lack of any particularly … used to describe when, where, or how this order is to be executed." (2T 50-4 to 7) The defense elicited from Leyman that the order did not specify the make, model, or serial number of the phone to be seized, although the police knew the serial number of the specific device they sought. (2T 9-25 to 10-17) Leyman also

[10] It is unclear from the present record what incriminating materials were extracted from the phone as opposed to being obtained by subpoenaed from the service provider. If this Court agrees that the seizure order violates the particularly requirement, an evidentiary hearing may be required to assess the degree to which the phone records were tainted.

acknowledged that the order contained no time constraints – either as to the time of day or how long after issuance – limiting when it could be executed. Indeed, the order was issued on February 13, 2017 (Da 27), but it was not executed until a traffic stop was performed on February 22, even though the police had previously followed defendant's car and surveilled his home on about five prior days. (2T 13-16 to 19-1)

Nonetheless, the trial court ruled that the seizure order was valid. The court credited Leyman's explanation for omitting the serial number from the warrant: it was sometimes difficult to determine the serial number without powering on the device or removing the battery. (2T 100-1 to 102-4) The court also excused the lack of time constraints by noting that the order was executed within ten days, and it was executed at a normal hour while defendant was in public. (2T 102-5 to 103-6) Finally, the court found that, as opposed to "bricks and mortar," "when you're talking about technology it's far more difficult to nail down," so the State should be granted leeway in specifying the "time, place, and what you're looking for." (2T107-18 to 25) Defendant respectfully disagrees that technology warrants departure from the long-established principle that a warrant must describe with particularity what is authorized to be seized.

The Fourth Amendment to the United States Constitution guards against unreasonable searches and seizures. U.S. Const. amend. IV. It states that warrants must be supported by probable cause and must "particularly describ[e] the place to be searched, and the persons or things to be seized." Ibid. Article I, Paragraph 7 of the New Jersey Constitution contains nearly identical language. N.J. Const. art. I, par. 7. To satisfy that mandate, officers typically gather evidence to establish probable cause, but only a "neutral and detached magistrate" may authorize a warrant. See United States v. U.S. Dist. Court, 407 U.S. 297, 316 (1972); State v. Brown, 216 N.J. 508, 539 (2014).

The particularity requirement mandates that a warrant sufficiently describe the place to be searched so "that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." State v. Marshall, 199 N.J. 602, 611 (2009) (quoting Steele v. United States, 267 U.S. 498, 503 (1925)). The purpose of the requirement "was to prevent general searches." Maryland v. Garrison, 480 U.S. 79, 84 (1987). As the Supreme Court has explained,

> [v]ivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws.

Stanford v. Texas, 379 U.S. 476, 481 (1965). The Framers added the particularity requirement to the Bill of Rights to prevent such "wide-ranging exploratory searches." Garrison, 480 U.S. at 84; see also State v. Muldowney, 60 N.J. 594, 600 (1972).

In Marshall, the police had gathered evidence against a suspect, which included a series of controlled buys of narcotics. Marshall, 199 N.J. at 607. During the investigation, the police observed the suspect enter a building with two separate apartments. Id. at 606–07. The police applied for and obtained a warrant with conditional language that allowed them to search only if (1) the police secured the suspect outside the building and (2) a search of the suspect revealed documents or keys that identified the specific apartment to which the suspect had "possession, custody, control, or access," or the suspect himself revealed that information to the police. Id. at 608.

Our Supreme Court concluded that the warrant was deficient because it allowed the police to determine which apartment to search after the warrant was issued. Id. at 613. "[T]he role of the neutral and detached magistrate" to determine probable cause "was delegated to the police." Ibid. Accord Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant

describing another. As to what [or who] is to be taken, nothing is left to the discretion of the officer executing the warrant.").

Here, the seizure warrant authorized the police to seize "cellular device(s) belonging to and/or possessed by Jule L. Hannah," and it provided no limitations whatsoever about when it needed to be executed. (Da 26-27) There are several problems with this verbiage. First, "cellular device" is far broader than a cell phone. Laptops, tablets, smart watches, and myriad other electronic devices may contain circuitry to connect to cell networks. The order vested police with complete discretion to determine whether any given "device" had cellular connectivity. It permitted the police to seize an unlimited number of such "device(s)," restricted only by defendant owning or even merely possessing them. And it contained no limitation on what areas within the device that could be searched.

Second, the police knew the unique serial number assigned to the phone they sought to seize. Maybe that number would be evident through a quick visual inspection, maybe the battery would need to be removed from the back of the phone, or maybe it would be necessary to enter the settings section of the phone's operating system. But that minor uncertainty was not a reason to not describe the phone by its known, unique serial number. See State v. Evers,

175 N.J. 355, 384-85 (2003) (recognizing that a warrant should particularly describe electronic device where technologically feasible).

Third, the order vested the police with no limit on when or where they could seize defendant's devices. Our court rules provide that "[t]he warrant shall contain the date of issuance and shall identify the property to be seized, name or describe the person or place to be searched, and specify the hours when it may be executed." Rule 3:5-3 (emphasis added). See also Rule 3:5-5 ("The warrant must be executed within 10 days after its issuance and within the hours fixed therein by the judge issuing it, unless for good cause shown the warrant provides for its execution at any time of day or night.").

Thus, like in Marshall, the seizure order here permitted the police to determine which items to seize after the warrant was issued. They could seize an unlimited number of devices that they had reason to believe defendant owned or possessed without regard for a probable cause connection to the murder they were investigating. After scooping up those devices, they could then determine whether they held evidential value, not unlike an exploratory search for violations of British tax law. See Garrison, 480 U.S. at 84.

Accordingly, defendant's convictions should be reversed because his phone was seized pursuant to an unconstitutional seizure warrant that fails the particularity requirement.

CONCLUSION

The convictions should be reversed because defendant was denied his rights to due process and a fair trial by the introduction of two types of improper testimony attempting to portray defendant as the man who left Spruce Street after shooting Lopez. The convictions should also be reversed because the trial court's failure to voir dire the sleeping juror deprived defendant of his right to a fair and impartial jury, and issuance of the general warrant to seize his cell phone abridged his right to be free from unreasonable searches and seizures.

Respectfully submitted,

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