Supreme Court of New Jersey
DOCKET NO. 090237

June 6, 2025

	:	CRIMINAL ACTION
STATE OF NEW JERSEY	:	
	:	In Response to Certification Granted from
Plaintiff-Respondent,	:	a Final Judgment of the Superior Court of
	:	New Jersey, Appellate Division.
v.	:	
	:	Indictment No. 18-03-266
GERALD W. BUTLER,	:	
	:	Sat Below:
Defendant-Petitioner.	:	
	:	Hon. Allison E. Accurso, P.J.A.D.
	:	Hon. Francis J. Vernoia, J.A.D.
	:	Hon. Katie A. Gummer, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

On March 28, 2018, a Cumberland Grand Jury returned Indictment No. 18-03-226 charging the defendant Gerald Butler with second-degree conspiracy to possess controlled dangerous substances with the intent to distribute in violation of N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:35-5(b)(2) (Count One); third degree conspiracy to distribute controlled dangerous substances in violation of N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:35-5(b)(3) (Count Two); third degree distribution of controlled dangerous substances in violation of N.J.S.A. 2C:35-5(b)(3) (Count Three); two counts of third degree possession of controlled dangerous substances in violation of N.J.S.A. 2C:35-10(a)(1) (Count Four and Count Seven); second degree possession of controlled dangerous substances with the intent to distribute in violation of N.J.S.A. 2C:35-5(b)(2) (Count Five); second degree possession of a weapon while committing a controlled dangerous substance offense in violation of N.J.S.A. 2C:39-4.1 (Count Six) and possession of a weapon by a convicted person in violation of N.J.S.A. 2C:39-7(b)(1) (Count Eight). (Da39-41)[1]. The State had

[1] Dsa refers to the defendant's Supplemental Brief Appendix.
Dpa refers to the appendix to the defendant's Petition for Certification.
Db refers to the defendant's brief on appeal.
Da refers to the appendix to the defendant's brief on appeal.
Sb refers to the State's brief on appeal.
PSR refers to the Presentence Report.
1T refers to the transcript dated September 10, 2018.
2T refers to the transcript dated February 22, 2022.
3T refers to the transcript dated May 24, 2022.
4T refers to the transcript dated June 10, 2022.
5T refers to the transcript dated June 14, 2022.
6T refers to the transcript dated June 15, 2022.
7T refers to the transcript dated June 28, 2022.

indicted the defendant twice previously with those charges ultimately being dismissed. (Da1-15; Da27-29; Da35-38).

On May 24, 2022, the court held a hearing on various evidentiary issues. (3T). On May 31, 2022, the court entered an order: (1) denying the defendant's motion to bar the lead detective's testimony but prohibiting him from mentioning the confidential informant (CI) or "comment[ing] or opin[ing] on whether he believes a narcotics transaction took place"; (2) denying defendant's motion to compel the identity of the CI, (3) denying defendant's motion to prohibit the officers from testifying that they work for the "Organized Crime Bureau"; (4) granting the defendant's motion to bar the State from referencing the "search warrant"; and (5) granting the defendant's motion to prevent the State's expert from opining on whether the defendant possessed CDS with an intent to sell. (3T).

A bifurcated trial was held concerning Counts One through Seven on June 10, 14, 15, 28 and 29, 2022. (4T-8T). On June 29, 2022, the jury acquitted defendant of Count Six, charging possession of a weapon while committing a CDS offense, and found him guilty on the remaining counts. (8T; Da146-148). In light of the jury's acquittal, the judge dismissed the certain persons charge. (Da151).

8T refers to the transcript dated June 29, 2022.
9T refers to the transcript dated August 29, 2022.
10T refers to transcript dated October 3, 2022.
11T refers to the transcript dated November 7, 2022.

On July 1, 2022, the State filed a motion for a mandatory extended term pursuant to N.J.S.A.2C:43-6(f), which was granted on November 7, 2022. (Da149-150). Defendant was sentenced to an extended term of 15 years imprisonment with 7.5 years of parole ineligibility for second-degree possession of controlled dangerous substances with intent to distribute (Count Five), and a concurrent sentence of 5 years imprisonment with 2.5 years of parole ineligibility for third-degree distribution of controlled dangerous substances (Count Three). The remaining convictions were merged. (Da152-155). On December 28, 2022, defendant filed a Notice of Appeal. (Da156-159). On December 31, 2024, the Appellate Division reversed the defendant's conviction as to the offense of third degree conspiracy to distribute controlled dangerous substances but affirmed his remaining convictions. (Dpa 2, 27-28, 39). The Appellate Division also remanded for resentencing. (Dpa2, 32-29).

On April 1, 2025, the defendant's petition for certification to the Supreme Court of New Jersey was granted, "limited to the issues identified in Point 1 in defendant's letter petition... including generally (i) defendant's challenges to statements by the State referencing the television show The Wire; testimony elicited by the State that defendant was the subject of a search warrant; and references to the 'Organized Crime Unit,' gun violence, and trafficking in the City of Millville; and

(ii) whether the cumulative effect of the purported errors deprived defendant of a fair trial". (Dsa1).

COUNTERSTATEMENT OF FACTS

In April of 2016, Sergeant Ryan Breslin of the Organized Crime Bureau served as the lead agent on a weapons trafficking and narcotics investigation out of the City of Millville known as "Operation That's All Folks". (4T 101-5, 103-17 to 22, 104-21 to 23, 105-1 to 9; 107-17). As part of the investigation, the police obtained wiretaps and began intercepting phone calls on three different lines of suspected individuals. (4T 109-6 to 12, 114-5 to 8).

In late August or early September, the police attempted to conduct a firearm purchase using an undercover officer with one of the targets of the investigation. (4T 108-1 to 109-5). Though this purchase was not completed, the suspected seller called another number on September 6, 2016, asking "when can I go get that from old boy?" (4T 109-16 to 22; 117-21 to 23; 119-14 to 25; Da48). Sgt. Breslin searched the phone number on Facebook, which linked to a profile with the name "Fast Life Blizzy Ho". (4T 117-24 to 118-1; 124-21 to 125-10). Breslin would later twice testify that the photo associated with this profile matched the defendant and made an in-court identification of the defendant as the person depicted in the profile. (4T 124-11 to 25; 128-21 to 25). Another member of the Organized Crime Bureau, Lieutenant Steven O'Neill also identified the voice heard on this call as belonging to the defendant, Gerald Butler. (5T 60-18; 61-19 to 23; 63-17 to 22; 65-17 to 66-4). He maintained that he was familiar with the defendant's voice because he had had a conversation with him years prior. (5T 64-20 to 65-6; 67-25). During this prior conversation, the defendant had said that his nickname was Blaze. (5T 65-9 to 13).

The police obtained authorization to intercept this line, which became another target of the investigation. (4T 120-21 to 122-17). These recorded telephone calls appeared to contain the defendant arranging the sale of contraband. (4T 136-13 to 137-18; 139-18 to 140-7; 140-24 to 141-16; 142-14 to 143-18; 144-7 to 145-4; 145-20 to 146-21; 148-16 to 149-14). Numerous text messages from the defendant were also intercepted apparently evidencing the defendant engaging in the distribution of contraband. (5T 8-17 to 22-20). Further, on one call, the defendant affirmatively identified himself as "Mr. Butler". (Da53).

During the weeks of September 11th and 18th of 2016, Breslin conducted surveillance of the Delsea Gardens apartment complex during which he twice observed the defendant entering Apartment 16D. (5T 22-21 to 24; 23-5 to 11; 24-7 to 16). He also saw the defendant driving a Nissan Maxima. (5T 24-7 to 16; 28-23 to 29-16; 30-25). On September 23, 2016, Lieutenant Joseph Hoydis, also of the Organized Crime Bureau, conducted surveillance of Delsea Gardens wherein he observed the defendant engage in a narcotics transaction. (6T 16-25; 18-8 to 22; 20-11 to 15; 6T 21-6 to 22-9; 46-4 to 7; (6T 20-23 to 25; 21-22 to 23; 22-5 to 6).

Sergeant Christopher Rodriguez proceeded to conduct a motor vehicle stop of the individual who had engaged in that transaction with the defendant. (7T 12-13 to 16; 14-16 to 18; 17-7 to 19). He arrested the driver, Joshua Phillips, who was found to be in possession of two wax bags containing suspected heroin and one colored rock substance suspected to be cocaine. (7T 20-6 to 21-24; 22-17 to 19). One of the seized items was later tested and determined to be heroin. (6T 204-18 to 22). Phillips told the police that he had bought narcotics from a person he knew as "B". (7T 91-8 to 92-13; 102-21 to 103-9; 95-1 to 13). At trial, Phillips later testified that he bought drugs from a person named Blaze and made an in-court identification of defendant as the seller. (7T 86-5; 87-1 to 15).

A search warrant was executed on the residence of Apartment 16D, where defendant had been sleeping for months (6T 116-14 to 24), which produced controlled dangerous substances in the form of heroin and cocaine (5T 36-6 to 9), located in the designated cabinet where defendant had been storing his belongings. (6T 117-13 to 119-7). The entirety of the search produced narcotics and handguns (6T 30-17 to 22), specifically one plastic bag containing 5.3 grams of heroin, one blue wax fold bag which was empty, one plastic sandwich bag containing four live rounds of ammo, a .38 caliber handgun, five live rounds of .38 ammo, a .22 caliber handgun along with six live rounds of ammo, one plastic bag containing 3.7 grams of cocaine, one plastic bag containing 2.3 grams of suspected controlled dangerous substances in the form of brown powder, numerous empty blue wax folds, two digital scales, three empty blue wax fold bags, one clear plastic bag, one clear plastic bag containing suspected cocaine weighing 15 grams, one plastic bag containing cocaine weighing 7.4 grams, one plastic bag containing suspected heroin weighing .8 grams, numerous empty wax fold baggies, and three spent shell cases for a .38, as well as multiple cell phones. (7T 37-4 to 38-23).

The firearms discovered were .22 caliber and .38 caliber revolvers, wherein the .22 caliber revolver was recovered in the bedroom closet and the .38 caliber revolver was located underneath the cushion on the couch. (6T 31-4 to 6; 35-16 to 17; 7T 40-21 to 24). The apartment's contracted tenant, Rafael Gonzalez, testified that while the .22 caliber revolver belonged to him, he had never seen the .38 caliber firearm before. (6T 69-1 to 4). He further testified that while the defendant would sleep in his apartment whenever he wanted, he had not known about any of the drugs in his apartment. (6T 70-1 to 7; 6T 70-8 to 10). His prior statement was ultimately read into the record at trial which recounted that the defendant had been staying at his apartment at that point for months and that he slept during this time on the couch. (6T 116-14 to 24). The portion of Gonzalez's prior statement that the cabinet in which the drugs were found in was defendant's designated cabinet where he kept his food was also read into the record. (6T 117-13 to 119-7). The witness Adam Yurdock also testified at trial as to the fact that the defendant had spent the night at the location just prior to the search and that he had slept on the couch, placing the defendant at the scene of the contraband and on the couch where the .38 revolver was subsequently recovered. (7T 149-14 to 21; 7T 150-1 to 2).

On the same day that Apartment 16D was searched, Sergeant Raymond Cavagnaro located a Nissan Maxima parked outside of a doctor's office. (5T 81-2 to 82-22). Officers observed the defendant and his girlfriend exit the office and drive away in the vehicle, and officers ultimately stopped the vehicle and arrested defendant. (5T 81-2 to 82-22; 5T 82-19 to 83-19; 5T 84-16 to 85-13). A search of the vehicle pursuant to a search warrant produced two phones. (5T 124-5 to 21). Extractions of the phones discovered messages from September 28, 2016 saying: "they behind your house with dog and gun" and "they just raided 16D". (5T 94-1; 98-16 to 99-1; 110-3 to 24). A message from the day prior read: "bro, this my new number... Blaze". (5T 111-12 to 15). The Facebook messenger account on the phone was for the username 'Fast Life Blizzy Ho'. (5T 114-16 to 25).

As ultimately presented to the jury at trial, these phones contained texts from the defendant to his girlfriend that she should "come sell the shit" when she informed him that she was lonely in his absence. (5T 118-4 to 14). This phone had defendant's social media account logged in (5T 118-20 to 119-7) and contained further text messages evidently discussing the distribution of controlled dangerous substances. (5T 123-8 to 12).

LEGAL ARGUMENT

POINT I

THE PROSECUTOR'S REFERENCE TO THE TELEVISION SHOW "THE WIRE" DURING HER OPENING STATEMENT WAS NEITHER IMPROPER NOR UNDULY PREJUDICIAL, AND IT DID NOT DENY THE DEFENDANT A FAIR TRIAL.

The defendant's first basis of argument is asserting that the prosecutor improperly referenced the television show "The Wire" during her opening statement while explaining the concept of a wiretap and its functionality to the jury. (Db18). In support of the defendant's present position that invoking the existence of such a television show in the presence of the jury would prejudice the jury against the defendant, the defendant currently articulates that the show takes place in the city of Baltimore, "one of the most dangerous cities in the country", portrays characters such as a manipulative detective, a criminal mastermind, and a shotgun-wielding outlaw, and that the Wikipedia page for the television show uses the word "murder" several times. (Db22).

In contrast to the defendant's current contention that the prosecutor's opening statement "encouraged the jury to associate Butler with the 'ruthless crew of drug dealers in West Baltimore'" (Db23), the entirety of the prosecutor's reference to "The Wire" can be found in her opening statement, wherein she stated the following:

> "This is... a case about a phone intercept, what's also known as a wire. And there was a few years ago, many years ago now, that show on tv called The Wire. And in that show the community. It seemed very organized. People were always at certain locations. They seemed to be following a hierarchy, or someone's orders. And they were trying to figure out how guns and drugs were coming into their community. And while they were trying to surveil all these different locations, they used all of the investigative means that they had available to them, they still weren't able to really crack down.
>
> But they were eventually able to realize that there was a person they needed to focus on. The only way to really find out how the guns and drugs were flowing in the community was to get on that person's phone. So they got an intercept known as the wire.
>
> That's similar to this case. Back in August to September 2016, in the City of Millville, the county prosecutor's office, specifically the Organized Crime Unit, got their own wire. And they did this because there was a rash of violence that was happening throughout Millville and throughout the summer of 2016. And they wanted to know what was the emphasis of that, what was the origin? Where was it coming from? Who was involved?
>
> And so much happening that they finally decided they needed to get on a wire. So as they narrowed down their investigation, they narrowed it down to four individuals. And the names of those individuals are not important to you because none of them are Butler. But do understand that that's how the investigation began." (4T 18-17 to 20-2).

The prosecutor then recounted the evidence to be presented in this case, including the results of the wiretap producing recordings of arranged sales of contraband and meetings, what kinds of guns were being discussed for sale, and where these guns were coming from. (4T 20-3 to 8). The prosecutor recounted that these recordings led police to listen to a specific call wherein a male sought to illegally purchase a firearm, and how that wiretap resulted in law enforcement identifying defendant Gerald Butler as the person on the call selling the firearm. (4T 20-9 to 21-11). The prosecutor then recounted how subsequent surveillance of defendant observed him engaging in the sale of controlled dangerous substances (4T 23-1 to 15), and how a subsequent search was conducted of defendant's residence where he was staying which resulted in the discovery of heroin, cocaine and evidence of distribution of controlled dangerous substances, as well as two firearms - one owned by the owner of the residence, and the other a firearm that did not belong to the owner located under the couch where the defendant slept. (4T 23-16 to 25-1). The prosecutor concluded her summation with the following:

> "I end with this. That very much like the show The Wire, sometimes the targets tell on themselves. So as you're listening to all of the other witnesses, and you're going to listen to the calls, you're going to hear the texts and also listen to the calls, what is he telling you about what he's doing? (4T 32-15 to 20).

It remains the position of the State that the prosecutor merely invoked the existence of the television show "The Wire" to introduce the jury to the concept of what a wiretap is and the purpose for which it is used. To the extent that the prosecutor made any statement about the defendant with regard to how wiretaps are utilized in the television show, the prosecutor specifically confined the line she drew to the defendant's specific act of "telling on himself" via making incriminating statements on a recorded line, as was the demonstrated functionality of a wiretap on the show "The Wire". This statement did not inflame the jury or distract them from focusing on the evidence at trial, and instead merely explained how the State compiled the evidence that it would present against the defendant and reasonably introduced them to the concept of a wiretap. The purpose of mentioning the television show was to illustrate the shape and character of the intercepts, and the manner in which investigators were able to uncover evidence that the State would rely on in seeking the defendant's conviction, where the complexities of the evidence presented and the way it was obtained warranted illustration through comparison to something to which the jury may be more familiar.

As to opening statements from the State, "a prosecutor's opening statement 'should provide an outline or roadmap of the State's case' and 'should be limited to a general recital of what the State expects, in good faith, to prove by competent evidence.'" State v. Land, 435 N.J. Super. 249, 269 (App. Div. 2014) (quoting State v. Walden, 370 N.J. Super. 549, 558 (App. Div. 2004)). "[W]hile prosecutors, 'within reasonable limits, are afforded considerable leeway in making opening statements,' ultimately prosecutors are 'obligat[ed]... to seek a fair trial,' ... not just convictions.'" Id. at 272 (first quoting State v. Williams, 113 N.J. 393, 447 (1988); then quoting State v. West, 29 N.J. 327, 338 (1959)).

Notwithstanding the prosecutor's obligation to ensure that justice is served, even when a prosecutor's remarks stray over the line of permissible commentary, the court's inquiry does not end. Rather, the court must weigh "the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial," State v. Wakefield, 190 N.J. 397, 437, 921 A.2d 954 (2007), and reverse a conviction on the basis of prosecutorial misconduct only if "the conduct was so egregious as to deprive defendant of a fair trial". State v. Papasavvas, 163 N.J. 565, 625, 751 A.2d 40 (2000). A prosecutor's contested conduct will only result in the reversal of a conviction when the prosecutorial conduct was "clearly and unmistakably improper" and "so egregious" in the context of the trial as a whole that it deprived the defendant of a fair trial. State v. Pressley, 232 N.J. 587, 593 (2018). In making that assessment, the court is to "take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred." State v. Williams, 244 N.J. 592, 608 (2021) (quoting State v. Frost, 158 N.J. 76, 83 (1999)).

The defendant's contention that the prosecutor's words during her opening which referenced "The Wire" were outside of the evidence, "far from a fair comment on the evidence", and "drew a parallel between Butler and... violent drug-dealing" (Db24) plainly stretches the conceivable impact of the words actually utilized by the prosecutor, which were explicitly tied to the evidence and did not connect the defendant to any violent elements of "The Wire". The prosecutor here did not generally compare the defendant to any character from any television show, nor did she even refer to any character from any television show. Instead, the prosecutor merely utilized a cultural touchstone to better articulate the concept and functionality of wiretaps and their consequential usefulness as investigative tools to the jury, wherein a defendant resultingly "tells on themselves" via making incriminating statements on a recorded line. The reference served the permissible purpose of explaining the investigative techniques that led to the defendant's arrest and helping the jury understand how the evidence to be discussed throughout the course of trial had been gathered.

A thorough understanding of the record adduced at trial in this case plainly demonstrates that the prosecutor stayed within the bounds of her good-faith proffer where the State did, in fact, introduce extensive evidence of intercepted communications and surveillance throughout trial. Thus, the comment was part of a fair “roadmap” of the case that an opening statement is meant to provide. State v. Land, 435 N.J. Super. 249, 269 (App. Div. 2014) (openings should give a general recital of what the State expects to prove in good faith). While prosecutors must “seek a fair trial and not just win a case,” Williams, 244 N.J. at 607, the isolated mention of well-known crime media to illustrate the nature of complex investigatory techniques used by the police in this case as a means of putting the collected data used as evidence into context for the jury did not undermine the fairness of defendant's trial.

The defendant's primary reliance on this Court's recent decision in State v. Williams, 244 N.J. 592 (2021) further demonstrates the propriety of the State's reference in this case when considered in conjunction with the reasoning employed in Williams. In Williams, the State attempted to emphasize the argument that "actions speak louder than words", by drawing a direct comparison between that defendant communicating seemingly innocuous words via a note handed to a bank teller while contextually threatening the bank teller as part of a robbery, and the murderous character Jack Torrence from "The Shining" brandishing an axe at his wife during a violent act while repeating an innocuous catch phrase. Id. This was improper because it specifically equated the defendant with a homicidal axe murdering character who says innocuous things while committing violent actions.

In this case, however, the prosecutor did not compare the defendant to a character from a violent television show - she instead simply invoked the concept of the show "The Wire" to articulate what a wiretap is and what it is used for, and specifically confined her comparison to the defendant to his specific act of "telling on himself", via making incriminating statements on a recorded line, as was the demonstrated functionality of a wiretap on the show "The Wire". Stated otherwise - the State in this case at trial did not invite an open general comparison between the defendant and a violent character. Instead, the State merely referenced the premise of a popular television show in order to articulate to the jury what the concept of a wiretap is and what it is used for. To the extent that the prosecutor can be argued to have made any statement allowing for *any* connection to be made between the defendant and any actual characters from the show "The Wire", the Prosecutor merely inferred that the defendant "told on himself" via making incriminating statements on a recorded line, "much like the show The Wire". (4T 32-15 to 16).

To be sure, any attempt of the prosecutor to draw a direct line between the defendant in this case and the notable criminally oriented characters of any television show would be improper in line with State v. Williams, 244 N.J. 592 (2021), akin to the prosecutor in that case's comparison of the defendant to Jack Nicholson in "The Shining". The prosecutor in this case, however, instead discussed a complex tool used by police to solve crime as it would most easily be understood by an uninformed jury. This would be more equivalent to the prosecutor referring to "The Shining" to demonstrate the severity of cold winters in the Northeast, which is a far cry from the facts of Williams. Here, the prosecutor set the stage for evidence that would be introduced at trial by describing the investigatory techniques used by local police and illustrated those techniques by articulating an appropriate parallel that would assist the jury's understanding.

Challenging the prosecutor's reference in this case is thus equivalent to problematizing any use of cultural references to simplify complex topics for a jury merely where it is arguably possible to scrutinize the reference sufficiently to draw any connection to any questionable characters associated with that reference. Again for illustrative purposes, this would be like problematizing a prosecutor's reference to the movie "The Social Network" in explaining how one leaves a digital trail via social media presence, because it could conceivably lead a jury to equate that defendant to the morally questionable actions of Mark Zuckerburg.

Problematizing the prosecutor's actions in this case then would be functionally equating the prosecutorial overstep of Williams to any case in which a cultural reference is made to a jury which can merely be conceivably linked to negatively depicted characters. This would undermine the use of familiar examples that are intended to clarify and contextualize legal concepts for jurors. Williams is an appropriate example of the extreme end of this problem and what the Court should absolutely be wary of - a prosecutor directly comparing a defendant to a criminal character to express the argument that the defendant is of a similar criminal disposition to that character. This case, however, is not that case, where the prosecutor in this case merely invoked the concept of a wiretap and relied upon a cultural reference that could help the jury understand the use and function of a wiretap (i.e., to lawfully catch the subjects of investigations "telling on themselves").

(A) THE PROSECUTOR'S COMMENT WAS OTHERWISE APPROPRIATE AS IT REASONABLY RELATED TO THE EVIDENCE AND PRESENTED AN ACCURATE ROADMAP FOR THE STATE'S CASE AT TRIAL.

Furthermore, the prosecutor’s comments were properly tied to the evidence of wiretaps and intercepted communications that were presented in the trial, including messages and phone calls that suggested the defendant's involvement in the distribution of contraband, thus rendering the comment in either case reasonably related to the evidence presented. The defense's argument that this reference implied an additional layer of criminality thus is without merit because the prosecutor did not introduce any facts via her reference to "The Wire" (that the defendant was discovered via wiretap to be involved in the distribution of contraband, as is the premise of the television show and the circumstance of the characters within) beyond the evidence presented to the jury, which amply supported the assertion that the defendant was observed via wiretap surveillance methods engaging in the distribution of contraband.

Testimony at trial established that the defendant was heard on a recorded line being contacted by an individual seeking to purchase a firearm. (4T 109-18 to 23). Testimony further established that the defendant's identity as the individual on the recorded line was known due to a testifying officer recognizing the defendant's voice (4T 123-25 to 124-2; 5T 63-9 to 14; 5T 64-18 to 65-21), as well as the number itself the defendant was being reached at being placed into Facebook and turning up the defendant's profile containing a photo of him, which was further verified in court as a photo of the defendant. (4T 124-21 to 125-18). The defendant also identified himself as Mr. Butler on the recorded line. (5T 6-4 to 5).

Critically, the defendant’s connection to the recovered narcotics and contraband was established through multiple threads of proof. Numerous recorded telephone calls recovered via wiretap were played for the jury, further evidencing the defendant arranging the sale of contraband. (4T 136-13 to 137-18; 139-18 to 140-7; 140-24 to 141-16; 142-14 to 143-18; 144 - 7 to 145-4; 145-20 to 146-21; 148-16 to 149-14). Numerous text messages from the defendant were also relayed to the jury establishing the defendant engaging in the distribution of contraband, all also obtained via wiretap. (5T 8-17 to 22-20). Law enforcement officers also testified at trial as to observing the defendant engaged in a drug transaction during the course of a surveillance operation. (5T 22-21 to 23-9; 6T 21-20 to 23). Most notably, a witness also testified as to having been sold controlled dangerous substances by the defendant in this case (7T 86-24 to 87-12), further establishing the evidence presented in this matter that the defendant was discovered via a wiretap to be engaging in the distribution of contraband, as properly suggested by the prosecutor.

Further, the record at trial established that a search warrant of the residence where defendant had been sleeping for months (6T 116-14 to 24) produced controlled dangerous substances in the form of heroin and cocaine (5T 36-6 to 9), located in the designated cabinet where defendant had been storing his belongings while staying at the location. (6T 117-13 to 119-7). The entirety of the search produced narcotics in the form of heroin and cocaine, various distribution paraphernalia including baggies and digital scales, as well as handguns. (6T 30-17 to 22; 7T 37-4 to 38-23).

The firearms discovered were .22 caliber and .38 caliber revolvers, wherein the .22 caliber revolver was recovered in the bedroom closet and the .38 caliber revolver was located underneath the cushion on the couch. (6T 31-4 to 6; 35-16 to 17; 7T 40-21 to 24). The apartment's contracted tenant, Rafael Gonzalez, testified that while the .22 caliber revolver belonged to him, he had never seen the .38 caliber firearm before. (6T 69-1 to 4). He further testified that while the defendant would sleep in his apartment whenever he wanted, he had not known about any of the drugs in his apartment. (6T 70-1 to 7; 6T 70-8 to 10). His prior statement was ultimately read into the record which recounted that the defendant had been staying at his apartment at that point for months and that he slept during this time on the couch. (6T 116-14 to 24). The portion of Gonzalez's prior statement that the cabinet in which the drugs were found in was defendant's designated cabinet where he kept his food was also read into the record. (6T 117-13 to 119-7). The witness Adam Yurdock also testified at trial as to the fact that the defendant had spent the night at the location just prior to the search that was conducted and that he had slept on the couch, placing the defendant at the scene of the contraband and specifically on the couch where the .38 revolver was subsequently recovered. (7T 149-14 to 21; 7T 150-1 to 2).

Despite defendant's current insistence that Rafael Gonzalez effectively recanted his earlier police statement at trial (Db14), in actuality, Gonzalez stated that he had been in a "shocked state of mind" during his prior statement, had been high on marijuana at the time, and had simply been in "the wrong state of mind" for the interview. (6T 72-8 to 13; 6T 81-11 to 12). He further clarified that by the "wrong state of mind", he meant that he was in a "traumatized state from losing [his] best friend" several months prior to the interview. (6T 83-2 to 8).

Further testimony adduced at trial established that the defendant had been arrested after this time after being observed traveling in a vehicle, wherein several cell phones were seized. (5T 81-2 to 14; 5T 97-21 to 25). As further presented to the jury at trial, these phones contained texts from the defendant to his girlfriend that she should "come sell the shit" when she informed him that she was lonely in his absence. (5T 118-4 to 14). This phone had defendant's social media account logged in (5T 118-20 to 119-7), and contained further text messages discussing the distribution of controlled dangerous substances. (5T 123-8 to 12).

In short, the State’s case did not hinge on any speculative inference or prejudice, but on concrete evidence, which included the defendant's presence, communications, and interactions demonstrating his role in the drug operation and involvement in the sale of contraband. Accordingly then, the prosecutor's comments were properly tied to the evidence of wiretaps and intercepted communications that were presented in the trial. The defense's argument that the reference to "The Wire" implied an additional layer of criminality is thus without merit.

(B) ANY ERROR WAS HARMLESS AND OTHERWISE ATTRIBUTABLE TO THE DEFENDANT.

While the position of the State remains that the prosecutor's reference was properly within the confines allowed by the State during opening remarks and otherwise reasonably related to the evidence presented, it is also worth noting that even if error had occurred in this case, any possible error was harmless. The prosecutor's remarks about "The Wire" were isolated and brief, occupying only a few lines in a multi-day trial and were not repeated on summation, and they were immediately followed by testimony about the wiretap's role in the investigation. The jury was explicitly instructed to base their findings on the evidence alone, and there is no indication in the trial record that the jury disregarded this instruction or allowed the analogy to cloud their judgment. The jury's verdict, which included acquitting the defendant of the weapons charge (8T 138-17 to 19), indicates that they were able to sift through the evidence carefully and apply the law to the facts presented, rather than being influenced by the reference or any perceived implications of the defendant's involvement in organized crime. This suggests that the prosecutor's analogy did not significantly affect the jury's impartiality or lead them to an unfair conclusion. Accordingly then, the prosecutor's analogy did not lead the jury to a result it otherwise might not have reached, and it provides no basis for reversal. State v. Dunbrack, 245 N.J. 531, 544 (2021); State v. Trinidad, 241 N.J. 425, 446-47 (2020).

Further, in contrast to the defendant's current characterization of the evidence tying the defendant to the recovered contraband as "weak" (Db30), as previously established, at trial the defendant was identified through a recorded call in which he was contacted about purchasing a firearm (4T 109-18 to 23). His identity was confirmed by voice recognition (4T 123-25 to 124-2; 5T 63-9 to 14) and the phone number linked to his Facebook profile (4T 124-21 to 125-18), as well as defendant identifying himself as "Mr. Butler" on the recorded call. (5T 6-4 to 5).

Defendant's involvement in narcotic distribution was shown through wiretap calls where he arranged drug sales (4T 136-13 to 137-18; 139-18 to 140-7; 140-24 to 141-16; 142-14 to 143-18; 144-7 to 145-4; 145-20 to 146-21; 148-16 to 149-14) and text messages discussing the sale of controlled substances. (5T 8-17 to 22-20). Law enforcement also observed him in a drug transaction (5T 22-21 to 23-9; 6T 21-20 to 23), and a witness testified that he bought drugs from the defendant. (7T 86-24 to 87-12). A search of the defendant's residence, where he had been staying for months (6T 116-14 to 24), found heroin, cocaine, and drug paraphernalia in a cabinet where he kept his belongings (6T 117-13 to 119-7; 5T 36-6 to 9). Rafael Gonzalez, the apartment's tenant, testified that of the two firearms also recovered, the .22 caliber revolver was his, but he had never before seen the .38 caliber revolver recovered from under the couch cushion wherein the defendant slept. (6T 69-1 to 4; 6T 30-17 to 22; 6T 31-4 to 6; 7T 40-21 to 24). Gonzalez also testified that the defendant had stayed at his apartment for months but denied knowing about the drugs (6T 70-1 to 7; 6T 70-8 to 10), though his prior statement, implicating the defendant, was read into the record. (6T 116-14 to 24). The defendant was also arrested after being observed in a vehicle with cell phones containing messages about drug distribution. (5T 81-2 to 14; 5T 97-21 to 25; 5T 118-4 to 14). One phone had the defendant's social media account logged in and contained further text messages discussing drug sales. (5T 118-20 to 119-7; 5T 123-8 to 12).

Accordingly then, the evidence here was not weak, where significant evidence was presented establishing the defendant's involvement in the distribution of contraband and his ties to the contraband recovered from his residence. A fleeting remark from the prosecutor confined to her opening, then, simply did not have the capacity to prejudice the jury in the face of substantial evidence in this case linking the defendant to the crimes alleged.

In that way, this case is particularly noteworthy in light of <u>State v. Feaster</u>, 156 N.J. 1, 716 A.2d 395 (1998), where in that case the prosecutor made several statements explicitly *outside* the evidence presented to the jury implying further evidence of guilt, including dramatic assertions regarding the defendant in that case loading his gun and cocking the weapon's hammer on the ride to the scene of the crime and approaching the victim from 'the blind side' and 'shoulder[ing] the door' of the crime scene. Id. at 56-58. In that case, where the court explicitly noted that these remarks were unsupported by the evidence submitted to the jury, and defense counsel even posed a timely objection to some of the prosecutor's comments, the court nevertheless determined that while the prosecutor's comments were improper, in light of the evidence adduced at trial, the prosecutor's comments did not deprive the defendant of a fair trial. Id. at 63-64. Similarly then in this case, where substantial evidence supported the defendant's link to the distribution of contraband and the contraband located in the apartment where he had been staying for months, a fleeting comment from the prosecutor acknowledging the existence of a television show about wiretap techniques would not have deprived the defendant of a fair trial.

Once more, the Court repeatedly instructed the jury that statements made by counsel were not evidence, stating that "[r]egardless of what counsel said or I may have said recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts. Arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence". (8T 84-21 to 85-1). The jury was informed of this repeatedly, including immediately prior to hearing the prosecutor's opening, wherein the court also belabored for the jury: "What is said in an opening statement is not evidence. The evidence will come from the witnesses who will testify and from whatever documents or tangible items are received in evidence". (4T 4-19 to 22). The contested, fleeting singular statement made by the prosecutor was thus bookended by repeated reminders to the jury that said statement was not evidence and not to be treated as such.

The jury is presumed to follow instructions. State v. Burns, 192 N.J. 312, 335 (2007). The court gave the jury a clear instruction that they were to decide the case based solely on the evidence presented and that the opening statements were not evidence. The defendant has presented nothing to counter this presumption, and in fact, every apparent reason exists in this case to believe that the jury *did* abide this instruction, where the defendant was specifically acquitted of solely the firearms charge - a particularly difficult aspect of this case to reconcile with the defendant's current contention that the jury, who acquitted the defendant of the firearms charge, was also simultaneously irreparably biased against the defendant as being of a criminal disposition similar to characters from any crime procedural television show, such that they would have been so overwhelmingly biased as to improperly convict the defendant of the drug related offenses but simultaneously not so biased as to similarly convict the defendant of the firearm offenses. (8T 138-17 to 19).

Finally on this point, the defendant is not entitled to relief as, although he objected at the time of the remark, he neither requested a curative instruction nor moved for a mistrial following the prosecutor's comment to which he presently opposes. By failing to take sufficient remedial action at trial, the defendant arguably invited any error that may have occurred. A defendant cannot knowingly forgo available remedies during trial, hoping to capitalize on the issue later as a basis for appeal. To allow such a strategy would undermine the integrity of the trial process and encourage strategy that neglects the opportunity for proper corrective measures.

On this point, this court's decision in State v. Jackson, 211 N.J. 394, 48 A.3d 1059 (2012) is particularly illuminating. In that case, where the State presented testimony from three different police officers that touched upon matters extraneous to the criminal charges against the defendant, including a civil lawsuit against the police department, and during his summation commented on those extraneous matters before concluding his summation by stating that the defendant simply "want[ed] to be a millionaire", referring to his civil lawsuit, this court ultimately concluded that reversible error had not occurred because the prosecutor's statements were "fully grounded in evidence" that was admitted without objection from defense counsel. Id. at 412-13.

Accordingly then, while the prosecutor's remarks were proper, any error that could have flowed from them would clearly be harmless when recognized as fleeting remarks made in the context of a trial replete with evidence linking the defendant to the crimes alleged. Once more, any error that could have occurred would arguably be the result of defense counsel's failure to pose a timely request for the relevant curative instruction or otherwise move for a mistrial, thus depriving the lower court of the opportunity to remedy any perceived error in the usual course.

POINT II

REFERENCES AT TRIAL TO THE "ORGANIZED CRIME BUREAU" AND THE INVESTIGATION'S FOCUS ON VIOLENCE IN MILLVILLE WERE LIMITED AND RELEVANT FOR CONTEXT, AND OTHERWISE DID NOT IMPROPERLY IMPLY THAT THE DEFENDANT WAS A GANG MEMBER OR RESPONSIBLE FOR UNCHARGED CRIMES, AND DID NOT RISE TO THE HIGH BAR OF PLAIN ERROR.

Defendant next contends that various references to the name of the investigating unit (the Organized Crime Bureau) and reference made to the violence in Millville that led to the investigation and use of wiretaps in this case as an investigative tool cast him as a violent gang criminal by association. (Db33). Significantly, however, a careful review of the record plainly shows that these references were part of the background narrative of the police investigation ("Operation That's All Folks") and were accompanied by clear testimony that ***the defendant himself was not implicated in those other incidents***.

The brief mention of a "rash of violence… in the city of Millville" during the State's opening (4T 19-16 to 17) was immediately tied to the origin and scope of the investigation, not to the defendant's personal conduct, and notably was referred to in the same breath as the clarifying statement from the prosecutor that this initial investigation ***did not involve Mr. Butler***. (4T 19-25 to 20-1). Similarly, in summation the prosecutor reminded the jury that the overall operation that gave rise to the initial investigation in this case was "a huge, wide-scale operation" about addressing gun violence in Millville (8T 56-24 to 25), but she specifically noted simultaneously with this statement that "***you also know that Mr. Butler was not the initial target of that investigation***" (8T 56-24 to 57-2) (emphasis added).

Thus, the State itself explicitly told the jury that the defendant was not involved in the early violence that prompted the investigation. Far from painting him as a mastermind of organized crime, the State's evidence showed that the defendant "came up… out of the blue" later in the probe, as one of many persons swept into an existing narcotics investigation (8T 57-2). This context was important for the jury to understand why law enforcement was monitoring communications, executing searches, and how the defendant came to be arrested, and it was thus properly admitted background information.

Moreover, the defense had raised this issue pretrial, seeking to bar any mention that the investigating unit was the "Organized Crime Bureau." The trial court denied that motion, finding that the unit name alone would not mislead the jury or cause undue prejudice (3T 27-20 to 21). That ruling was well within the court's discretion under N.J.R.E. 401 and 403. Identifying the officers' bureau and operation name provided the jury truthful context and it would have been artificial and potentially confusing to scrub all such references, especially when multiple witnesses were involved in this coordinated investigation.

The jury was furthermore never told that the defendant was in a gang or that he committed any violent acts. In fact, when the lead detective, Sergeant Ryan Breslin, described the 2016 investigation on the record, he explained that it targeted violent individuals in Millville, ***but that the defendant was not among the initially targeted individuals.*** (4T 108-24 to 109-15). This testimony simultaneously delivered necessary limiting information where the jurors learned that although the initial impetus to the investigation was reports of shootings, those events *"**did not involve Mr. Butler**"* (4T 109-2 to 5). Four other officers testified about their roles in Operation That's All Folks and their affiliation with the Organized Crime Bureau, but none linked the defendant to any prior violence. Defense counsel further did not object during those testimonies to any mention of the name of the operation or the investigating unit, which demonstrates that the references were not perceived as unfairly prejudicial in context at trial. (5T 38-1 to 123-3; 5T 67-11 to 73-16; 5T 90-10 to 93-15; 6T 13-20 to 15-1; 6T 43-6 to 63-1).

To the extent that the prosecutor reiterated the investigation's context in her closing argument by mentioning "gun violence in the City of Millville" (8T 57-7), that remark was unobjected-to and, in any event, harmless. The Appellate Division aptly characterized that comment as "unnecessary" but "fleeting," and it noted that it did not approach the "high bar" of plain error. State v. Santamaria, 236 N.J. 390, 404 (2019).

Indeed, if the jury had been improperly swayed by this fleeting comment to believe that the defendant was a "criminal gang member" (Db33), one would expect a guilty verdict on the weapons count - and the opposite, in fact, occurred in this case. (8T 138-17 to 19). This demonstrates that the jury carefully weighed the actual evidence of the defendant's guilt on the drug charges, while apparently harboring reasonable doubt that he personally possessed any firearm - a result inconsistent with the notion that they were inflamed by the backdrop of "gun violence" in the community to conclude that the defendant had any sort of predisposition to criminal activity in the form of gun violence or gang activity, as presently alleged by the defendant. (Db33). In short, the references to the Organized Crime Bureau and the broader criminal activity under investigation were relevant explanatory facts and were not offered to prove the defendant's propensity or bad character, and thus they did not deprive defendant of a fair trial.

Similarly, the defendant's identified unobjected-to trial testimony from Sergeant Breslin was clearly incapable of producing an unjust result. Sergeant Breslin made it clear that the unsuccessful undercover gun purchase that brought defendant to the attention of police "did not involve Mr. Butler" and was related to another target. (4T 108-25 to 109-5). The witness was in fact specifically asked on this point for the sake of ensuring that the jury did ***not*** have any such confusion: "Sergeant Breslin, going back to the sale of the weapon, that did not involve Mr. Butler?" and then "That is a separate target?", to which the lead investigator responded: "Correct". (4T 108-25 to 109-5). The State then further ensured the jury's understanding by having the witness explicitly clarify that prior to this defendant's involvement in this case: "So these initial three phone lines, were any of those Mr. Butler's phone lines?" to which the witness responded: "No". (4T 109-13 to 15).

The contested statements on this point thus more broadly described only the impetus for the investigation that led to the defendant's arrest. The State did not otherwise argue or suggest that defendant was involved in the matters that instigated the initial investigation - and in fact explicitly clarified multiple times through testimony that this subject matter ***did not refer to the defendant***, emphasizing once again the exact opposite of the defendant's currently contended hypothesis conclusion that this could have led the jury to believe that the defendant was involved in these incidents that gave rise to the investigation.

Furthermore, as to the entirety of the defendant's presently challenged testimonial moments from trial, the defendant provided the court no opportunity to address their admission with an objection. State v. Marshall, 123 N.J. 1, 153 (1991). These references were also brief and defendant has not made a meritorious showing that the testimony was clearly capable of producing an unjust result.

Once more, it is imperative to note on this point that any error occurring from the permitted references to the name of the investigating unit came from the actions of defense, thus constituting invited error. When the discussion of whether to utilize the name of the investigating unit occurred, including whether or not reference to the name should be made accompanied by a limiting instruction from the Court, the Court specifically offered to provide said limiting instruction to the jury, stating:

> "THE COURT: There could be - there could be a limiting instruction there. If you want to take a shot at putting it together.
>
> MR. REILLY: Okay.
>
> MS. SASU: I'm not - I'm not averse to that, Your Honor.
>
> THE COURT: I mean, because I could literally look at the jury and say okay look, they're with the Organized Crime Unit, but that doesn't mean that this is organized crime. The state still has to prove all the elements of these offenses beyond a reasonable doubt. (3T 28-20 to 29-6).

Defense however, instead of requesting - or indeed, even passively permitting such an instruction to be given to the jury in order to obviate his presently raised argument that the usage of the name of the investigating unit in this case prejudiced him, the defense instead simply responded at the time that it wanted time to "think about that". (3T 29-8). At the resulting charge conference, defense counsel did not raise any further comment on the matter, and thus said charge was ultimately not delivered to the jury. (7T 125-10 to 162-17; 8T 79-5 to 132-4).

Furthermore, it should be noted that defense counsel even utilized the term himself and weaponized the usage of the term to his attempted advantage during his closing argument, reiterating for the jury that the testifying witnesses for the State "had worked in their organized crime bureau" in support of his argument that the testifying witnesses thus, despite their purported expertise in not only "drug distribution but also about investigating it" were not able to testify "anything about fingerprints". (8T 24-13 to 21). Accordingly then, not only did defense actively cause the trial court to not provide a limiting instruction as to the use of the defendant's currently contested term, but the defense at trial even ***used the term itself*** in an attempt to use the witness's expertise and training in narcotics distribution to his advantage in arguing that despite this training and specialized knowledge the witnesses were not able to sufficiently testify regarding fingerprint evidence.

Where the defendant poses that he suffered prejudice due to the usage of potentially prejudicial terminology in the form of the name of the investigating unit that led to his arrest, but both caused the trial court to not accompany usage of the name with a limiting instruction to prevent any said harm, and once more utilized the terminology himself to his attempted advantage in closing, it would be the position of the State that the defendant is not entitled to disturbing the conclusion of the jury before the lower court based on an argument of prejudice resulting from terminology that he both permitted and weaponized himself.

Furthermore, to the extent that the defendant also argues that he suffered prejudice that resulted from the State's reference to the factual circumstances that gave rise to the investigation in this case involving violence in the City of Millville, it is respectfully the position of the State that where such references were explicitly accompanied by clarifying remarks that these circumstances that gave rise to the investigation ***did not involve the defendant***, then the remarks did not prejudice the defendant. Moreover, as previously articulated, the holding of the jury specifically acquitting the defendant of the gun charges seems to bely the defendant's current contention that any fleeting reference to individuals involved with "gun violence in the City of Millville", where specifically "***none of them are Mr. Butler***", could have prejudiced the defendant. (4T 19-25 to 20-1) (emphasis added).

POINT III

TESTIMONY THAT THE DEFENDANT WAS THE "TARGET" OF THE SEARCH CONDUCTED WAS A FAIR DESCRIPTION OF THE INVESTIGATION AND DID NOT SUGGEST UNDISCLOSED EVIDENCE OR IMPERMISSIBLY BOLSTER THE STATE'S CASE, AND OTHERWISE TO THE

EXTENT THAT IT WAS UNNECESSARY THE TESTIMONY WAS NOT PREJUDICIAL TO THE DEFENDANT IN LIGHT OF THE SURROUNDING TESTIMONY PROPERLY ADDUCED AT TRIAL.

Defendant next challenges the fact that certain law enforcement witnesses referred to the defendant as the "target" of the search conducted at Apartment 16D, arguing that this told the jury about evidence not in the record and thereby bolstered the State's case. (Db39). When placed in context, however, the "target" references were simply explaining why the police conducted the searches that uncovered the evidence against the defendant.

Once more, it must be noted that these references as made by the prosecutor were not to the existence of a search warrant, but to the mere fact that a lawful search was conducted. While it is the case that testifying officer witnesses mistakenly did utter the word "warrant" when referring to the search in three passing instances (6T 26-11 to 15; 7T 33-14 to 34-3; 49-19 to 22) and to an arrest warrant in one passing instance (5T 85-7 to 12), the term "search warrant" was only said by the prosecutor ***one*** time in this case, which was immediately in response to the witness's usage of the term and was plainly fleeting in the context of a multi-day trial. (6T 26-16).

In that context it is important to note that the crux of the defendant's current argument is not that the prosecutor repeatedly emphasized the existence of a search warrant to the jury - but instead that the prosecutor's repeated reference to the mere fact that a search occurred at all created the improper inference that the search was supported by a finding of probable cause from a judge because the search that occurred did occur as result of a search warrant having issued, even if that fact was not stressed to the jury by the prosecutor but instead passingly revealed through mistaken utterances in a small spattering of fleeting instances throughout the course of this multi-day trial comprised of numerous witnesses. (Db44).

Crucially, to the extent that these fleeting instances of testimony referring to the defendant as the target of a search were unnecessary or arguably improper in and of themselves - it is important to note that by the time the jury heard that the defendant was the intended subject of the search that was conducted, they had already learned of the investigative steps pointing to the defendant. As a result, it would be the position of the State that such testimony was not capable of resulting in prejudice to the defendant where the fact that a search was conducted in this case and the defendant was capable of being inferred by the jury as the subject of that search otherwise plainly existed here as a result of the totality of the testimony adduced at trial up until the defendant's currently contested instances of testimony.

As to the contested testimony, defense counsel appears to have placed timely objections on the record, which were overruled. (6T 26-7 to 27-5; 7T 35-11 to 23). However, "[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." State v. Patterson, 435 N.J. Super. 498, 507 89 A.3d 616 (App. Div.

2014) (quoting State v. Feaster, 156 N.J. 1, 82, 716 A.2d 395 (1998). In reviewing for abuse of discretion, courts will reverse if the underlying court acted unreasonably or the defendant's right was substantially impacted (and thus the defendant was prejudiced by the ruling).

As to the propriety of the prosecutor eliciting testimony regarding the existence of a search warrant generally, where the jury could likely resultingly make the same problematic conclusion that a judge approved the search warrant that existed - it has been firmly established that a prosecutor has the right to convey to the jury that the police were authorized to search a home. While every juror surely knows that the police typically cannot search a home without a warrant, the courts have held that juries should not be left guessing whether the police acted arbitrarily by entering a home without a search warrant. Testimony about the mere existence of a search warrant, then, despite this arguably problematic inference existing at the outset of the first reference to any such search occurring in any matter, is not necessarily automatically grounds for reversal. See State v. Marshall, 148 N.J. 89, 240, 690 A.2d 1, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997) ("[T]he fact that a warrant was issued might necessarily be put before a jury in order to establish that the police acted properly".) While it is true that repeated references to the issuance of a search warrant becomes more likely to be deemed improper, it stands to reason that where the references made were *not* to the existence of search warrant, but merely to a lawful search having been conducted, the possible impropriety of such limited references would be considered in conjunction with the surrounding testimony adduced at trial that otherwise properly made clear to the jury at that point that defendant was invariably the subject of the search conducted, which would arguably negate the notion that but-for the challenged testimony, the jury would not have been exposed to the potentially prejudicial conclusion that if a search warrant existed that a court authorized that search.

Indeed, in this case the fact that a search was conducted and that that search was instigated as a result of the investigation into the defendant was an inescapable conclusion for the jury to have reached at trial before the currently challenged terminology of defendant being a "target" of that search was utilized at trial, where said testimony occurred **after** the jury had learned that the defendant had been recognized by his voice speaking on a recorded line about being contacted to purchase a firearm. (4T 109-18 to 23; 4T 123-25 to 124-2; 5T 63-9 to 14; 5T 64-18 to 65-21). The jury had also just learned that the defendant had identified himself as "Mr. Butler" on this line, and that this number had been placed into Facebook and returned a profile bearing the defendant's photograph. (4T 124-21 to 125-18; 5T 6-4 to 5). Numerous recorded calls from that number were then played for the jury evidencing the defendant's own voice arranging the sale of controlled dangerous substances. (4T 136-13 to 137-18; 139-18 to 140-7; 140-24 to 141-16; 142-14 to

143-18; 144 - 7 to 145-4; 145-20 to 146-21; 148-16 to 149-14). Numerous text messages from the defendant were also relayed to the jury establishing the defendant engaging in the distribution of controlled dangerous substances. (5T 8-17 to 22-20).

With that foundation laid, it defies reason to suggest that the jury was provided any new information or insight upon learning that the search of Apartment 16D, where the defendant had been residing for months (6T 116-14 to 24), was aimed at finding evidence regarding the defendant. Stated differently, the jury would have assumed that the defendant was a focus of the search regardless of whether any witness used the word “target”. Thus, the testimony at issue did not inject some novel, prejudicial idea to the jury, but was instead an accurate reflection of the investigation’s course given the foundation of testimony that had been laid previously in the trial up to that point.

Moreover, the witnesses’ handling of the “target” questioning undermines the claim that the State in this case stressed a prejudicial point to the jury via these contested instances of testimony. When asked who was the target of the search of Apartment 16D, Sergeant Breslin answered: “Mr. Butler” (5T 32-11 to 13). But when Lieutenant Joseph Hoydis was asked a similar question regarding the same search, he initially responded that he knew the apartment belonged to Rafael Gonzalez but that he did not recall a name in terms of a person who was the identified subject. (6T 26-9 to 15). Detective Lynn Wehling’s testimony was even more equivocal - when asked if there had been a target for that search, she said that she believed multiple people had been involved and that she "c[ouldn't] recall specifically whose name" was identified as the subject of the search, though the defendant had been involved in the investigation. (7T 35-24 to 36-3).

As to the witness's fleeting erroneous references to an actual warrant for the search existing, the jurors were simply well aware prior to that point that a warrant had been executed. The physical evidence seized from the apartment was relayed to the jury, and it is standard practice in a criminal trial for officers to mention that they had a search warrant and to explain its execution. See State v. Cain, 224 N.J. 410, 433, 133 A.3d 619, 632 (2016), wherein the Court confirmed that a prosecutor may appropriately convey to the jury that the police were authorized to conduct a search, so the jurors are not left with the impression that the police acted unlawfully. Here, the witness's fleeting remarks that the defendant was the warrant's target stayed within the permissible bounds of such background testimony.

In State v. Cain, this Court warned that police witnesses should not repeatedly emphasize the existence of warrants or investigations targeting a defendant in a manner that suggests a judicial endorsement of the defendant's guilt. The Cain scenario - where such references "went well beyond what was necessary to inform the jury that the officers were acting with lawful authority" and risked the inference that a judge found the evidence credible - is not mirrored here. Unlike in Cain, the

State in this trial did not belabor the point of the existence of any warrant when they were fleetingly mistakenly referred to by the officers. Beyond that, the few contested "target" references that were made by the prosecutor served to identify the object of particular searches (the apartment, the vehicle, and the arrest) in a routine way and clearly did not become a theme of the prosecution, as was the issue in Cain.

The defendant's reliance on Milton and Alvarez is similarly mistaken, where they are factually distinguishable where the reference to a warrant in those cases "did not imply that the State had any evidence in addition to which was heard by the jury". State v. Williams, 404 N.J. Super. 147, 404 (2008). In State v. Milton, 255 N.J. Super. 514 (App. Div. 1992), the defendant was charged with drug offenses based on evidence obtained in a search of a house that he occupied with others. The defense was that the drugs found in the search belonged to one of the defendant's brothers. The court concluded that the reference during the State's case to a warrant to search the house was **not** objectionable**,** but still reversed because the State in that case also presented testimony concerning an unexecuted warrant to search the defendant's person, which was likely to mislead the jury where it implied that the State had undisclosed evidence that had been presented to the issuing judge. In this case, no similar capacity for misleading the jury has been articulated by the defendant - instead, the defendant appears to squarely rely on the inference that was later explicitly rejected by the court in State v. Marshall, 148 N.J. 89, 239-40 (1997), that the mere reference to an arrest and search warrants during a trial is error capable of producing an unjust result.

In State v. Alvarez, 318 N.J. Super. 137 (App. Div. 1999), the defendant was convicted of various weapons offenses based on evidence obtained in a search of a house where the defendant resided with others. The court found that the State's reference to the existence of a search warrant specifically for the defendant's room in the house "suggest[ed] that a judicial officer with knowledge of the law and the facts believed that evidence of criminality would be found in defendant's room" and furthermore that "the repetitive references to the arrest warrant for defendant suffer[ed] the exact infirmities... condemned in Milton". Alvarez at 148. The evidence of the warrants in Milton and Alvarez not only indicated that a judge had found sufficient basis to justify their issuance, but also implied that the State had presented evidence to the judge that was not introduced at trial.

In this case, however, the references to the existence of warrants did not suggest that the State had any other evidence of the crimes before the jury, and was in fact prefaced by a substantial showing from the State as to the evidence collected regarding the defendant. In any event, the Supreme Court's ruling in Marshall was not conditioned on that distinction. Rather, the Supreme Court in Marshall definitively rejected "the proposition that the jury should be shielded from knowledge that search warrants have been issued in a criminal matter because the prior judicial determination of probable cause may influence the jury to assume guilt". Ibid. Furthermore, none of the testifying witnesses nor the prosecutor directly mentioned the probable-cause determination associated with the issuance of any warrant during the course of the examination or during opening or closing remarks.

The defendant's current reliance on State v. McDonough, 337 N.J. Super. 27 (2001) is also particularly misplaced, where McDonough would appear to most specifically reflect the issue with the defendant's current argument that the passing references made in this case to the existence of a search warrant in and of themselves create an impermissible inference for the jury. In McDonough, the court noted that the Supreme Court of New Jersey in Marshall squarely rejected the argument that "references to arrest and search warrants suggested that a judge had found that the defendants were involved in criminal activity and that this was clearly capable of producing an unjust result". Id. at 302.

The court further noted in McDonough that only passing reference in that case had been made to the warrants for the defendant's arrest and for the search of defendant's home, which plainly did not imply that the State had presented any evidence to the issuing judge that was not also heard by the jury. The court in McDonough further specifically distinguished the case from Milton and Alvarez via the fact that "[t]he jury heard extensive evidence concerning the evidence obtained in the lengthy police investigation that preceded issuance of the warrants". As previously stated, the jury in this case was similarly presented with the wealth of evidence previously collected against the defendant that demonstrated his connection with the sale of contraband, including that the defendant had been recognized by his voice, associated social media profile bearing pictures of the defendant, and the defendant identifying himself on a recorded line being contacted to purchase a firearm and otherwise engaging in the sale of contraband (4T 109-18 to 23; 4T 123-25 to 124-2; 5T 63-9 to 14; 5T 64-18 to 65-21; 4T 124-21 to 125-18; 5T 6-4 to 5). This included numerous recorded calls played for the jury evidencing the defendant arranging the sale of controlled dangerous substances. (4T 136-13 to 137-18; 139-18 to 140-7; 140-24 to 141-16; 142-14 to 143-18; 144 - 7 to 145-4; 145-20 to 146-21; 148-16 to 149-14). Numerous text messages from the defendant were also relayed to the jury establishing the defendant engaging in the distribution of controlled dangerous substances, all also obtained via wiretap. (5T 8-17 to 22-20). Evidence was also relayed to the jury of law enforcement officers directly observing the defendant engaging in a drug transaction. (5T 22-21 to 23-9; 6T 21-20 to 23).

In McDonough, the court ultimately concluded that "the jury heard a wealth of compelling evidence against defendant... which obviously had been obtained before the warrants were issued. Therefore, this case is controlled by the Court's holding in Marshall that the jury does not have to be 'shielded from knowledge that warrants have been issued in a criminal matter because the prior judicial determination of probable cause may influence the jury to assume guilt'" McDonough at 303.

Furthermore, counsel for the defense chose to bring up the existence and execution of the search warrant multiple times themselves in summation. (8T 11-15 to 12-3; 8T 18-16 to 17). It further appears that defense counsel did not request a cautionary instruction be delivered regarding the contested testimony at any point. Under the settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal...'" State v. A.R. 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)).

In sum, the "target" testimony was not improper, but merely assisting the jury's understanding where this case started with many other unnamed individuals and regarded the search of a home that was leased and occupied by other individuals - and once more, did not prejudice the jury's ability to fairly judge the evidence in light of the substantial evidence presented up until that point at trial.

POINT IV

THE ALLEGED ERRORS, WHETHER CONSIDERED INDIVIDUALLY OR CUMULATIVELY, DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL WHERE THE EVIDENCE OF GUILT ON THE DRUG OFFENSES WAS SUBSTANTIAL, AND ANY IRREGULARITIES AT TRIAL WERE HARMLESS.

The defendant finally contends that the cumulative effect of the prosecutor's reference during her opening statement, testimony utilizing the term "Organized Crime Unit", and the instances of testimony referring to the defendant as the target of the search conducted merits a new trial. (Db48). It is well established, however, that a series of minor errors, none of which individually warrant reversal, will rarely collectively amount to a denial of justice. State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) ("Even if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial.") (citation omitted). Here, the record as a whole reveals that defendant received a fundamentally fair trial. The jury's verdict was amply supported by direct evidence of the defendant's guilt, and nothing about the now challenged remarks or testimony subverted the reliability of that verdict.

Against the backdrop of the weight of the evidence introduced against the defendant in this case, as previously recounted, the claimed errors were, at most, peripheral. None of the prosecutor's comments or the contextual background testimony introduced any new facts for the jury to consider in determining whether the defendant possessed and distributed contraband. The jurors were tasked with deciding whether the defendant's actions - as proven by testimony and recordings - met the elements of the charged offenses. There is no reason to believe that the jury abandoned this fact-focused analysis in favor of a biased or preconceived judgment about the defendant.

The trial court properly instructed the jury on the law, including the requirement that their verdict be based solely on the evidence and that any stray remarks not supported by the evidence must be disregarded. It is presumed that the jury followed those instructions. State v. Burns, 192 N.J. 312, 335 (2007). Accordingly, even if one or more of the now challenged statements were arguably improper, they did not collectively tip the scales or create a real possibility of an unjust result. State v. Jenewicz, 193 N.J. 440, 473 (2008).

It bears emphasis that the Appellate Division, in a thorough review of the record, found that no trial errors occurred warranting reversal of the defendant's convictions (aside from an unrelated issue regarding the conspiracy count). While the defendant takes issue with the appellate court’s reliance on the acquittal of the gun charge to deem the errors harmless, even setting that consideration aside, the remaining drug convictions stand on a strong independent footing. The defendant was convicted of the CDS offenses because the jury was convinced of his guilt beyond a reasonable doubt based on the evidence presented. Nothing about the cumulative effect of the challenged comments undermines that confidence in the verdict. See State v. Weaver, 219 N.J. 131, 155 (2014) (reiterating that only where the probable effect of cumulative errors is to render the trial unfair should a conviction be reversed). In sum, viewing the trial in its entirety, the State's brief rhetorical flourish referencing "The Wire", the minimal background evidence about an operation targeting violent crime (from which the defendant was explicitly referenced as not a part of), and the passing mentions of the defendant as a "target" of the search that occurred did not collectively prejudice the defendant.

This Court has affirmed convictions in cases with far more serious trial errors when the overall evidence of guilt was compelling – for example, in State v. Trinidad, 241 N.J. 425, 228 A.3d 1243 (2020), the Court upheld the verdict despite acknowledging the improper admission of certain prejudicial testimony, because the proof of the defendant's guilt was overwhelming. Id. at 447-48. Likewise here, any errors were harmless beyond a reasonable doubt in light of the substantial evidence against the defendant. The cumulative error doctrine does not apply because the trial errors alleged by defendant, whether viewed individually or together, never permeated the trial or diverted the jurors from a rational appraisal of the evidence. The defendant was thus not deprived of due process or a fair trial and was convicted by a jury that carefully evaluated the proofs and, most notably, acquitted the defendant where it found the State lacking on specific charges.

For all the foregoing reasons, the State respectfully submits that the defendant's claims are without merit. The judgment of the Appellate Division (affirming the defendant's convictions, except for the conspiracy count) should be affirmed, and the defendant's remaining convictions should stand. The cumulative impact of the claimed errors does not remotely approach the standard necessary to overturn the verdict in this case. The interests of justice are best served by bringing finality to this matter and holding defendant accountable for the offenses the jury found him to have committed.

CONCLUSION

The prosecutor's opening analogy to "The Wire", the references to the Organized Crime Bureau and violence occurring in Millville in September of 2016, and testimony regarding the "target" of the search that occurred were either appropriate or harmless in context. Individually and collectively, they did not prejudice the defendant's substantial rights. Accordingly, the defendant's convictions (with the exception of the conspiracy charge vacated by the Appellate Division) should be upheld. The State respectfully asks this Court to affirm the defendant's convictions and the rulings of the courts below on the issues certified for review.

Respectfully submitted,

By: Stephen C. Sayer
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