FILED, Clerk of the Appellate Division, December 02, 2024, **A-001038-22**, **AMENDED**
FILED, Clerk of the Supreme Court, 27 Feb 2025, **090329**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1038-22T4

INDICTMENT NO. 18-07-0959-I
CASE NO. 18001842

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM A FINAL
	:	JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF NEW
	:	JERSEY, LAW DIVISION
KADER S. MUSTAFA,		(CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable, Vincent N. Falcetano, J.S.C., and a Jury

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REDACTED BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT PROCEDURAL HISTORY [1]

On July 30, 2018, a Monmouth County Grand Jury handed down Indictment No. 18-07-0959, charging defendant, Kader S. Mustafa, with first-degree murder, in violation of N.J.S.A. 2C:11-3(a) and/or (2) – with a sentencing enhancer (Count One); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a) (Count Two); two counts of second-degree unlawful possession of a weapon (handgun) without a permit (Counts Three and Four); and two counts of third-degree endangering another person, in violation of N.J.S.A. 2C:27-7.1 (Count Five and Six).

On September 27, 2021, trial commenced before the Honorable Vincent N. Falcetano, J.S.C. and a jury. (3T; 4T; 5T; 6T; 7T; 8T; 9T; 10T). On October 12, 2021, the jury returned a unanimous verdict, convicting defendant on every charge within the indictment. (10T:8-8 to 12-22).

On May 5, 2022, defendant moved for a new trial. After a thorough analysis placed on the record, the motion was denied. (11T:3-21 to 31-25).

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[1] 1T – Transcript of Motion, dated February 9, 2021;
2T – Transcript of Motion, dated August 20, 2021;
3T – Transcript of Trial, dated September 27, 2021;
4T – Transcript of Trial, dated September 28, 2021;
5T – Transcript of Trial, dated September 29, 2021;
6T – Transcript of Trial, dated September 30, 2021;
7T – Transcript of Trial, dated October 4, 2021;
8T – Transcript of Trial, dated October 5, 2021;
9T – Transcript of Trial, dated October 7, 2021;
10T – Transcript of Trial, dated October 12, 2021;
11T – Transcript of Sentence, dated May 5, 2022;
Db – Defendant's Brief in Support of Appeal;
Da – Defendant's Appendix;
Pa – State's Appendix.

Thereafter, the parties moved to sentencing. For Count one – first-degree murder – Judge Falcetano sentenced defendant to life in prison, subject to the No Early Release Act (NERA). As to Count Two – second-degree possession of a weapon for an unlawful purpose (for the 38 caliber revolver used in the murder), defendant was sentenced to a term of 10 years, with a five-year parole indelibility, to run concurrent to Count One. For Count Three, unlawful possession of a weapon (the same handgun used in the murder), defendant was sentenced to a term of 10 years, also with a five-year parole ineligibility and concurrent to Count One. With respect to Count Four, second-degree unlawful possession of a weapon (the 40 caliber Taurus handgun recovered in the trunk of defendant's car), defendant was sentenced to 10 years, with a five-year parole ineligibility, to run consecutive to the sentences imposed on Counts One, Two, and Three. On Count Five, third-degree endangering (victim H.M.), defendant was sentenced to four years flat; and for Count Six – third-degree endangering (victim A.M – the child), another four-year flat term – both to run concurrent to Count One. (11T:61-25 to 64-24). On December 5, 2022, defendant filed the instant appeal. (Da 15-18).

COUNTERSTATEMENT OF FACTS

On May 3, 2018, Herve Michel, his girlfriend of four years, Sciasia Calhoun and their baby, A.M. went to Sciasia's mother's house in Freehold Borough for some family time and barbecuing with Sciasia's whole family. (3T:75-7 to 76-13). Later that night, Herve told Sciasia that he needed to leave because he had traffic matter in Asbury Park municipal court the next day. Herve planned to take a bus to his father's house, who lived in Asbury Park;

however, Sciasia insisted on giving him a ride. (3T:76-25 to 77-23). Sciasia did not have a car, so she borrowed her mother's Mazda Protégé. The Protégé had a headlight that was out on the right side, but when the high beams were on, both lamps worked. (3T:78-3 to 13; 79-17 to 24; 66-6 to 20).

At around 11:00 p.m., Herve, Sciasia and A.M. left Freehoold Borough and took Route 33 towards Neptune heading to Asbury. Sciasia was driving, Herve was in the passenger's seat and little A.M. was in the back seat behind Herve, strapped in her car seat. During their drive, Herve decided he did not want to go to his dad's house in Asbury, but instead just wanted to "back home" to Sciasia's house in Freehold. So, they turned around. (3T:78-11 to 79-9; 80-12 to 19).

As they were driving down Route 33, they noticed the car in front of them pull over to the side of the road. Sciasia slowed down, drove passed the car and kept driving. Due to the right headlight being out, Sciasia was driving with the high beams on in order to have two working headlights. (3T:79-12 to 24). As they were talking softly about what they were going to do when they got home because A.M. was sleeping in the back seat, the same car that had pulled over raced up behind them flashing its high beams. The car continued to get very close and then "bumped" their car a couple of times. (3T:82-2 to 85-2; 110-14 to 111-9). Herve, in shock over what was transpiring, but also observing the concern on Sciasis's face, told her to "stay left" on Route 33 – to "stay straight" – instead of exiting off to the right because if they did, Herve knew they would have to stop at a red light. (3T:83-23 to 85-14). Sciasis stayed on Route 33; however, when she came upon the next exit to her right – Halls Mills Road – she exited off of Route 33 in order to get away from the car

behind them. When Sciasis exited, the car behind them did not follow, but continued straight on Route 33. (3T:85-15 to 87-4).

Once they exited, Herve "heard a big noise, boom" and ducked his head down. (3T:87-5 to 9). As their car came to a stop, Herve noticed that Sciasis had leaned to the right and onto his shoulder. Herve looked back to A.M., whose eyes were wide. He smelled smoke, but could not figure out what type of smoke he was smelling because they had not hit anything. He then pushed Sciasis's head up and off of his shoulder because she seemed to be trying to talk. Herve then noticed she was not talking, but was actually making groaning sounds, like "ah, ah." (3T:88-12). Herve got out of the car and grabbed A.M. out of her car seat. He went around to the driver's side, set A.M. down in the street and tried to aid Sciasis. At that point, blood was "bubbling and coming out hard" from a hole – a wound in her head. (3T:88-5 to 25).

When his aid did not work, Herve picked up A.M. and began running towards the road signs to see where on Route 33 he was located. In shock at this point, all Herve could think to do was call family, so he called Sciasis's mom, but she did not answer. He then called his sister and then his mother and spoke to them for about five minutes. After he hung up, Herve called 9-1-1. [2]

While Herve was speaking with the 9-1-1 operator, Sciasis was still alive and groaning. (3T:89-3 to 91-2). Herve told the operator that Sciasis had been shot in the head and that he did not know what to do. When asked where he was located, Herve told the operator he was on Route 33 in Freehold. The

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[2] It was stipulated by the parties that the 9-1-1 call was placed at 11:44 p.m. (3T:101-6 to 7).

operator tried to calm Herve, but he was pleading, "help me, help me," "please hurry up," and "I'm losing her." After getting his location, the operator told Herve that help was on the way. (3T:94-5 to 97-4).

Around this same time, Patrolman Christopher Makwinski, an eight-year veteran of the Manalapan Township Police Department, was on patrol and positioned on Route 33 westbound. At approximately 11:41 p.m., he observed occupants in a white Chevy Impala. He observed that they appeared to react to his presence. They looked startled and that caught his attention. (3T:117-20 to 25; 120-22 to 122-12). As Patrolman Makwinski focused in on the Impala, it approached a gas station and abruptly turned into its parking lot. Patrolman Makwinski was unable to safely pull into the same gas station parking lot due to the speed he was traveling, so he continued on down the road. After driving approximately three quarters of a mile, Patrolman Makwinski pulled to the side of the road to wait for the Impala to leave the gas station. Meanwhile, he ran the license plate on his MDT system. The search retuned information that the car was registered to Kader Mustafa. (3T:119-5 to 16; 122-13 to 124-21; 132-1 to 134-14; 139-19 to 25).

At 11:48 p.m. and while he was still parked on the side of the road, a dispatcher came over the radio and advised that there was a shooting in Freehold and that a Chevy Malibu was identified as being involved. At approximately 11:51 p.m., another call came over the radio advising that the vehicle leaving the scene of the shooting was not in fact a Chevy Malibu, but was actually an "older" Impala. (3T:124-20 to 126-3; 129-1 to 12).

Patrolman Makwinski responded back to the gas station where he had last observed the Impala he had come in contact with. He saw two other

Manalapan police officers in the parking lot; however, the Impala was gone. Patrolman Makwinski advised the other officers that he had just encountered an Impala that dispatch had just advised was suspected of being involved in a shooting in Freehold and how that vehicle had turned into the gas station parking lot. After briefly speaking with the gas station attendant, advising other officers in Manalapan and Freehold, along with any other responding officers of the necessary information regarding the Impala, Patrolman Makwinski and the officers left the gas station and continued their search for the Impala, but were ultimately unable to locate it. (3T:134-15 to 137-16).

Patrolman Adam Nimick of the Freehold Police Department was on patrol when he received a radio communication that there was a victim with a gunshot wound to the head on Route 33, westbound. (4T:7-1 to 12). When he arrived on scene, he observed a male subject, he would later identify as Herve Michel, holding a baby in his arms, extremely frantic. He also observed a female in the driver's seat of a car – Sciasis Calhoun – with a what appeared to be a gunshot wound to the back-side of her head. Inside the car, he observed blood and brain matter. (4T:9-2 to 15).

Patrolman Nimick took Herve off to the side, and away from the vehicle and Sciasis. He and two other officers who had arrived on scene – Officer Lasky and Officer Galaydick – then tried to administer aid to Sciasis. They tried to bandage her head and give her oxygen. They continued to give her aid until the ambulance and EMS arrived. (4T:9-17 to 10-23).

Both Patrolman Nimick and Officer Galaydick had their mobile video recorders (MVR) activated when they arrived at the scene.[3] On that footage,

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[3] The footage from both officer's MVR's was played for the jury. See (4T:12-5

Herve is heard identifying a white Malibu as the car he observed chasing them. However, as he continues to describe the events that transpired, Herve – mid sentence – says, "Officer, a Malibu, a (indiscernible) Malibu, ***a white, a white, not Malibu, Impala***, followed, and it shot through this car." (4T:23-18 to 24-7) (emphasis added).

At approximately 12:02 a.m., EMS arrived on scene and removed Sciasis from the driver's seat and onto a stretcher to be transported to the hospital. She had a weak pulse, but was not breathing on her own. (4T:50-7 to 54-17). At 12:13 a.m., her pulse slowed down even further. At 12:16 a.m., EMS lost all signs of life. EMS continued CPR and contacted the hospital seeking a TRE – termination of resuscitative efforts – due to the extensive brain injury. At 12:16 a.m., EMS received authorization to discontinue lifesaving efforts and Sciasis Calhoun died as a result of her injury. (4T:58-7 to 59-7).

Detectives from the Monmouth County Prosecutor's Office (MCPO) became involved in the investigation at around 2:00 a.m. and were seeking information regarding the suspect vehicle, a white Chevy Impala. They were assigned to check transient areas, places such as hotels, gas stations or any other location where someone driving around the county could be found. (4T:93-9 to 23; 140-1 to 141-4). Detectives were also trying to gather information about the Impala's suspected registered owner, defendant, Kader Mustafa. They located defendant's brother, Ali Mustafa, who lived in Freehold. (4T:64-13 to 18; 65-5 to 66-14).

At approximately 5:30 a.m., detectives went to Ali Mustafa's home. At that time, he did now know the whereabouts of his brother. However, at

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to 8; 13-6 to 30-8).

approximately 6:30 a.m., Ali Mustafa contacted detectives and informed them that his brother was at a cousin's house in Manalapan, and gave police the address. (4T:69-9 to 71-1; 72-7 to 73-15). Detectives immediately went to that location. Upon arrival, police observed a long driveway leading up to the residence and protruding from behind a horse trailer was a white Impala. Police believed this was the Impala they were looking for. (4T:73-19 to 74-3; 95-2 to 98-5). Detectives contacted the owner of the residence and told him to remain inside. (4T:81-1 to 14).

Due to the seriousness of the investigation, officers from surrounding jurisdictions, such as Manalapan and Freehold, along with officers from the New Jersey State Police arrived to provide backup to MCPO detectives. Dressed in full tactical gear, including raid vests with bold lettering saying "POLICE," ballistic shields, and in formation, officers carefully approached the Impala from the rear and observed two individuals asleep inside the vehicle. Officers yelled, "I want to see your hands." (4T: 98-6 to 99-19; 115-2 to 119-7; 124-2 to 7). A female, later identified as Nicole Fiore, who was in the passenger's seat, immediately raised her hands in the air upon the command. Defendant, seated in the driver' seat, did not follow the command, even after it was announced numerous times. Since defendant would not follow any of the police instructions or commands, they were forced to use a ram to break the driver's side window. Police then pulled defendant out of the vehicle. While doing so, a flare gun was recovered from between defendant's legs. Once on the ground, defendant was handcuffed and searched for weapons to ensure police safety. (4T:99-18 to 101-25; 125-2 to 22).

Defendant was wearing a baseball hat and also a hard hat. In between

each hat was tin foil. He also had a "runners" type blanket, which was a silver garbage bag type material, wrapped around him and was fully clothed. When asked about the type of clothing he was wearing, defendant responded he was trying to lose weight. (4T:102-1 to 12). Defendant was given Miranda[4] warnings and was calm and cooperative. Police transported him to the Monmouth County Prosecutor's Office. (4T:102-16 to 103-25; 143-9 to 144-4). The outside of the Impala was photographed and items that were located outside the vehicle were processed. Defendant's vehicle was then towed to a secured facility at the Prosecutor's Office. (4T:104-1 to 17; 5T:88-15 to 99-4).

Once at the Prosecutor's office, defendant was searched again and items from his person removed. More specifically, a black wallet containing defendant's New Jersey Driver's License and a New Jersey Firearms Purchaser Identification Card, in the name of John Franolich III. (4T:144-5 to 8; 147-5 to 18).

The passenger found in the vehicle with defendant was identified as Nicole Fiore. She was also taken from the scene for questioning. A freelance hairdresser, Ms. Fiore was defendant's girlfriend for five years, but most importantly, she was a passenger in the Impala on the night of the shooting, his flight from the scene immediately afterward, and was found asleep with defendant in the vehicle when discovered by police. In fact, prior to the shooting, Ms. Fiore and defendant were actually living in his Impala. (7T:64-9 to 24).

Ms. Fiore struggled with addiction stemming from prescribed pain killers and was seeing a doctor who prescribed her Suboxone to help with her

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[4] Miranda v. Arizona, 384 U.S. 436 (1966).

cravings for other drugs. Ms. Fiore had previously been admitted to the hospital crisis unit, but she eventually landed in a short-term rehab facility because she was "coming off" her dosage of Suboxone. When defendant told her wanted a prescription for Adderall because he liked the way it made him feel and he no longer wanted to purchase it on the street, Ms. Fiore introduced defendant to her doctor, who had given her prescriptions for Adderall and Suboxone. Nevertheless, defendant researched the doctor prior to seeing him in order to make sure he could be easily manipulated. Along with taking Adderall, Ms. Fiore also witnessed defendant's daily use of marijuana (7T:68-25 to75-7; 76-1 to 78-12). Despite his drug use, defendant physically worked out daily – either at a Planet Fitness Gym, or outside at a park doing calisthenics or something similar. (7T:100-12 to 24).

As his constant companion, Ms. Fiore also witnessed defendant's various rantings and conspiracy theories regarding law enforcement, government, history and "things of that nature." To further his theories, defendant would often conduct Internet searches and do research on either his smart phone or by going to a local library to use the computer. (7T:75-8 to 24). Defendant believed that people were out to hurt or harm him, cause an upheaval in his life, or possibly try and kill him. As a result, defendant believed he was the subject of "gang stalking." So much so that while driving around in his Impala, defendant required Ms. Fiore to take her phone apart so he could not be "tracked" and frequently made her change her telephone number. Importantly, defendant was very familiar with firearms. Ms. Fiore, who had only been to a firing range with her dad and defendant a sum total of two times, was not. (7T:91-12 to 93-96-5; 187-23 to 187-21; 191-3 to 22; 193-

15 to 17).

On May 2, 2018 – the day before the shooting – defendant and Ms. Fiore went to a park in Jackson so defendant could work out. Typically, while defendant exercised, Ms. Fiore would edit pictures on her phone, draw, paint or listen to music. On that particular day, they ended up sleeping in the park. (7T:101-100-25 to 101-12). The following morning, they got up, went to get food, and then decided to go to the beach in Asbury Park. The arrived at the beach around lunch-time and spent the day there. They left the beach around 5:30 p.m. and went to the laundromat in Neptune City. They left the laundromat at approximately 8:30 p.m. and then drove around for a while.

Defendant needed to use the bathroom, so he parked at the boardwalk in Asbury Park to use a Port-a-John. Ms. Fiore stayed inside the car. (7T:121-11 to 124-18). Notably, Ms. Fiore observed defendant take Adderall when they were leaving the beach. He took more when they were doing laundry and then even more prior to getting out of the car to go to the bathroom. At one point, Ms. Fiore observed defendant take two pills at once. (7T:125-2 to 10).

They continued to drive around. Defendant was talking, sometimes yelling, that people (other drivers on the road) were trying to "hit him" with radiation and trying to "fuck with him," follow him, and record him. Ms. Fiore tried to block him out by listening to music through her earbuds, but to no avail. At some point in time, after they had left the bathroom, defendant got upset and ripped her earbuds out. He yelled for her to "look at a specific vehicle," to "look at what they were doing," "they were high-beaming him." (7T:125-21 to 126-24). The specific vehicle defendant was yelling about was in fact the Mazda Protégée, driven by Sciasis Calhoun, who had the high

beams on because she knew one of the headlights were out.

In his fit of anger, defendant pulled over to the shoulder of the road to let Sciasis's vehicle pass by. Ms. Fiore, confused, asked defendant what he was doing? Defendant did not respond and she noticed he was breathing very heavy and exhibiting very high anxiety. He was "flipping out." When defendant pulled back out onto the road, he sped up to Sciasis's bumper and began flashing his high beams. Ms. Fiore had resumed listening to her music, but defendant was screaming so loud she could hear him over the music that was playing directly in her ears. He was screaming that he could not take it anymore and the this is why his life was so messed up. This was why he could not get a job and how he had to fight back. (7T:127-1 to 128-16).

Ms. Fiore, who was very focused on defendant at this point and staring right at him, observed defendant reach down on the left side of his seat and pull out a gun. At first, defendant pointed the gun at Ms. Fiore's face and she began to scream, "what the fuck are you doing? Are you going to try and shoot me?" Defendant then switched hands and with his elbow he put his window down. He then put the car in neutral. When the car began to slow down, Ms. Fiore screamed at defendant, "Why are we slowing down? What are you doing? Like do you want to get arrested? What the fuck is wrong with you? Why are you driving like this? We're going to get pulled over." To which, defendant responded, "I'm sorry. I just can't take it. I have to fight back. I'm not dealing with this anymore." (7T:128-18 to 129-11).

Defendant then physically took himself out of his seat, sat on the window sill and using his left hand, he fired a shot over the windshield. Ms. Fiore saw the spark as he fired the gun. She screamed, "What the fuck are you

doing? You're going to get arrested." When she turned around, she saw Sciasis's vehicle veering to the side and thought she was pulling over to call the police. At this point, defendant "took off" and told her to take the battery out of her phone or he was going to blow her brains out. (7T:129-12 to 130-2). Ms. Fiore was shocked by the events that transpired because she had no idea that defendant had a loaded handgun in the passenger compartment of their vehicle. (7T:130-12 to 21).

After defendant fled the scene and as he was traveling down Route 33, Ms. Fiore noticed a police officer was behind them. Her first thought was defendant was going to get arrested. She called him a psycho and he told her to shut up. Defendant then made a left turn into a gas station. When the attendant came up to the car, defendant told him, "never mind." After the police officer drove passed them, defendant drove to the other side of the gas station and exited. Defendant drove to his cousin's house and parked behind a horse trailer. Both he and Ms. Fiore fell asleep until they were awakened by police the next morning. (7T:130-24 to 132-10; 134-5 to 8).

After been startled awake, Ms. Fiore fully complied with police. When asked by police where was the gun that was fired, Ms. Fiore told them she did not fire a gun. When asked if anyone else fired a gun – if he [defendant] fired the gun, Ms. Fiore responded, "yes." (7T:135-3 to 12). It was at the Freehold Township Police Department that Ms. Fiore learned that the shot defendant fired killed somebody. (7T:136-2 to 21).

While defendant and Ms. Fiore were being questioned, an MCPO forensic unit was dispatched to the scene of the shooting on Route 33 to process the crime scene. All medical personnel had left. The Mazda Protégée

was positioned to the extreme left of the exit ramp and there was a clear skid mark that went from the passenger side tires straight back 52 feet. (66-6 to 22). The driver's door and the passengers front and rear doors were open and located on the rear passenger side was a child safety seat. The rear driver's side window had a bullet hole. There was broken glass throughout the inside of the car, as well as on the outside of the car. (5T:56-4 to 57-8; 62-13 to 16; 68-16 to 69-7). Blood, biological staining and brain matter were observed on the rear seat and the front passenger seat. The exterior of the vehicle was photographed and forensically processed. (5T:58-17 to 59-20; 68-16 to 81-18). Afterwards, it was towed from the scene to the evidence garage at the Monmouth County Prosecutor's Office. (5T:85-15 to 87-24). The bullet that entered the car through the rear passenger window was not recovered inside the vehicle, nor located within the surrounding area. (5T:79-13 to 19).

At approximately 10:36 a.m. on the morning of May 4, 2018, search warrants were obtained for both the Mazda Protégé and defendant's Chevy Impala. (5T:99-13 to 25). Four detectives were assigned to search the Impala. Two detectives were assigned to the interior compartment, one detective assigned to the trunk and a fourth assigned as the photographer who would determine what items of evidence would be collected and packaged. (5T:100-6 to 13).

In general, there were a significant number of personal items inside the Impala. Inside the trunk, on the very top, was a big blue bag filled with laundry. Underneath the laundry bag was more clothing. Everything in the trunk was removed and the items were placed on craft paper on the floor of the garage. As commonly found in most vehicles, there was a liner inside the

trunk with voids that are built into those areas. When the liner was removed and the voids inspected, two handguns were recovered. One was a silver revolver wrapped up in a t-shirt and the other one was a semi-automatic pistol inside of a case. (5T:101-5 to 102-25).

Other items found within trunk and passenger compartment of the car were a silver and black box filled with ammunition, various other bullets, discharged cartridges, a speed loader for the revolver, a .38 Special federal cartridge found in the front center arm rest, brass knuckles found in the driver's door pocket, a black knife with a sheath, a box of shotgun shells, also with discharged shells, and an empty beige handgun case found behind the driver's side rear passenger seat, and a disassembled STE smart phone on the front passenger floor, Sega game system, headphones, a work shirt with an EMS patch, a sandwich bag with suspected marijuana, and a Walgreens prescription bottle with defendant's name containing the generic drug for Adderall, which had 53 pills out of 120 pills remaining. All these items were photographed and placed into evidence. (5T:103-4 to 25; 108-13 to 117-2; 113-4 to 20; 114-14-115-13; 199-12 to 209-2; 6T:44-10 to 58-4; 76-10 to 13).

The revolver found wrapped inside the t-shirt was a Smith and Wesson .38 special six shot revolver. Inside the chamber were five bullets. Upon further examination of the handgun, it was determined that the sixth bullet had been fired because there was a depression in the primer indicating that that the primer had ignited the gun powder, causing an "explosion" that propelled the bullet out of the cartridge. (5T:109-12 to 111-4). The second handgun recovered was a Taurus International PT 140 pro, which was loaded, charged (magazine was inside the gun and a bullet was loaded inside the chamber) and

found inside a gun case. (5T:111-19 to 112-18).

Ms. Fiore was victim to defendant's very abusive behavior throughout their five-year relationship. After witnesses the shooting, she broke off the relationship. (7T:90-15 to 23; 193-20 to 22). Despite the breakup and while incarcerated pending trial, defendant sent Ms. Fiore a letter. This type of sentiment was not the normal during their relationship. (7T:137-22 to 139-23; 141-24 to 142-11). On July 3, 2018, defendant called Ms. Fiore from jail. (7T:149-14 to 20). After saying hello, defendant told her "there's a speculation that my bullet wasn't the bullet that hit that girl." Defendant claimed there was a "second shot fired." He asked, "Remember…you heard something while we were driving away, right? Ms. Fiore unequivocally stated, "No." Defendant then immediately changed the subject and asked her how she was doing and where she was living. (7T:153-4 to 154-24; see also; 169-7 to 21). Ms. Fiore tried to hang up, but went on to accuse defendant of cheating and lying to her. Defendant denied he did either. (7T:154-23 to 157-25; 160-1 to 162-25). When defendant mentioned his letter and that he wanted to marry her, Ms. Fiore replied, "Marrying me is, is a joke. That's a joke." When defendant asked why she thought it was a joke, Ms. Fiore responded, "Because it's not fucking true." Defendant told her "to just stop and tell me what's going on." (7T:160-10 to 19).

In between telling Ms. Fiore he loved her, he would interject his own theories about the shooting. He emphasized that gang members were following them that they were planning to shoot him. Ms. Fiore listened, but accused him of lying. When Ms. Fiore told defendant that "she [Sciasis Calhoun] didn't deserve to die." Defendant responded that it was an accident,

"[b]ut I did it out my window like, to scare them. I didn't know it was going to hit." He further tried to justify his actions. (7T:163-23 to 166-13). When he failed to convince her of his version of events, he changed gears and begged Ms. Fiore to answer his future calls and asked her if the Prosecutor had called her. He stated again that he loved her and that he would tell her the truth tomorrow when he called around the same time. The call ended. (7T:166-23 to 168-25).

The parties stipulated to certain facts. Pursuant to an affidavit from New Jersey State Trooper II, James Hern, a search of the New Jersey State Police Firearm Records was conducted to determine if defendant had a permit to carry a handgun, a permit to purchase a handgun, a firearms purchaser identification card, or permit for an assault weapon. He had none of the above. (8T:54-7 to 17). The parties also stipulated that if Delores Coniglio Rivera, a Forensic Scientist II, with the New Jersey State Police Office of Forensic Science were called to testify as a witness, she would be qualified as an expert and would testify that that on October 19, 2018, she compared the buccal swabs taken separately from inside the cheeks of Nicole Fiore and defendant to the swabs taken from the trigger and grip and all other areas of the .38 caliber Smith and Wesson revolver found in the truck of defendant's car. Neither were of sufficient quality and/or quantity for comparison purposes. Both stipulated affidavits were moved into evidence. (8T:55-10 to 56-11).

LEGAL ARGUMENT

POINT I

THE JURY VERDICT WAS NOT INCONSISTENT.

Despite the clear record announcing the verdict in this case, defendant

first argues that "the jury's completion of the verdict sheet indicated that not only did it find him guilty of purposeful murder, it also unanimously (and contradictorily) found he committed each lesser-included manslaughter offense." (Db 8). This entire argument centers upon appellate counsel's "belief" that a copy of the verdict sheet attached to a motion for new trial by trial counsel following the verdict – who is now deceased and cannot confirm or deny his post-conviction supposition – is the true copy of the verdict sheet filled out by the jury. (Da 34). This argument, supported only by a self-authenticating certification with admittedly no personal or direct knowledge as to who filled out the verdict sheet appended to his appeal, is wholly contradictory to the verdict announced in open court and thereafter confirmed by polling the jury. A verdict that was clearly stated on the record, thus leaves no room for confusion. As such, this argument is simply without merit.

The right to a unanimous verdict is firmly rooted in our rules of procedure and our decisional law. See R. 1:8-9 (providing that "[t]he verdict shall be unanimous in all criminal actions"); State v. Milton, 178 N.J. 421, 431, (2004); State v. Lipsky, 164 N.J. Super. 39, 45, 395 A.2d 555 (App. Div.1978) (explaining that New Jersey's "constitutional guarantee of a jury trial in criminal causes ... is violated unless the verdict is the product of 12 jurors ... who have deliberated together to reach a unanimous decision") (internal citations omitted). The fundamental nature of the right to a unanimous verdict demands that the verdict be more than a perfunctory tally. It must stand as an abiding assurance of carefully considered deliberations and a faithfully rendered verdict.

To ensure that no uncertainty remains about the verdict and its

unanimity, our court rules afford all parties the right to poll the jury after the foreperson has announced the verdict, but before the verdict has been officially recorded. Milton, 187 N.J. at 432 (citing R. 1:8-10.). Polling is a "'practice of long standing [that] requires each juror to answer for himself, thus creating individual responsibility, ***eliminating any uncertainty as to the verdict announced by the foreman***.'" State v. Vaszorich, 13 N.J. 99, (quoting State v. Cleveland, 6 N.J. 316, 322 (1951)), cert. denied, 346 U.S. 900, (1953); see R. 1:8-10 (emphasis added). Polling permits detection and resolution of confusion and disagreement and clarification of the precise nature of verdict. Milton, 178 N.J. at 433.

In the instant case, defendant's argument centers upon a copy of a verdict sheet he believes was submitted by trial counsel in his motion for new trial, as proof of an inconsistent verdict. (Da 28-30). However, there is overwhelming evidence on this record negating defendant's theory. First, the forewoman – in open court – announced the jurors had come to a unanimous verdict. (10T:9-13 to 17). Then, reading from the very verdict sheet defendant takes issue with in this appeal, the court asked how the jury found as to Count 1 of the indictment, "murder by purposefully and knowingly causing the death of Sciasia Calhoun," to which the forewoman responded, "Guilty." (10T:20 to 25). The court then specifically stated: "Okay, and following the instructions, you go to question 4." (10T:10-1 to 2). In doing so, the record clearly reflects not only that the jury followed the clearly delineated instructions on the verdict sheet and skipped over the questions related to the lesser-included offenses of aggravated manslaughter (question 2) and the lesser-included offense of reckless manslaughter (question 3) because they had found him guilty of

purposeful murder, but also that there was a complete understanding among all the jurors, parties, and the judge that based on their finding of guilt for purposeful murder, the jury did not convict defendant on the lesser-included charges.

The judge then continued down the verdict sheet. The forewoman pronounced defendant guilty as to question number 4 regarding count 2 – possession of a weapon for an unlawful purpose (10T:10-3 to 8); question 5 regarding count 3 – unlawful possession of a weapon (Smith & Wesson .38 revolver) (10T:10-9 to 16); question 6 regarding count 4 – unlawful possession of a weapon (Taurus 40 semiautomatic handgun) (10T:17 to 24); question 7 regarding count 5 – endangering another person (Herve Michel) (10T:10-25 to 11-5); and question 8 regarding count 6 – endangering another person (A.M.) (10TL11-6 to 11). The court then realized it skipped question 1A, following the verdict for purposeful murder and went back to ask if the jury believed the defendant committed the murder by his own conduct. The forewoman answered "Yes." (10T:11-12 to 19).

Most importantly, after the verdict was announced, the judge asked the forewoman to hand up to verdict sheet and asked that the jury be polled to confirm their verdict. (10T:11-20 to 23). When asked if the verdict announced was their verdict, each juror responded in the affirmative. And while juror number 5 and juror number 8 responded "here" instead of "yes," this does not indicate – in any way – that they were uncertain as to the verdict the forewoman announced, nor that there was any lack of unanimity in the verdict. (10T:12-1 to 22); see Milton, 178 N.J. at 433 (reasoning that "by asking whether the juror still agrees with the verdict, the trial court gives each juror

an opportunity to express his or her decision freely, unrestrained by pressure that may have beset the prior deliberations"). The judge then specifically stated: "***I have reviewed the verdict sheet. It is accurate as announced by the Foreperson.*** The verdict sheet has been marked as C-2, as a court exhibit. I'll also indicate that the juror handed the court officer a note which reads, we have a unanimous verdict. Nothing else." (10T:16-2 to 7) (emphasis added). The fact that the judge stated he reviewed the verdict sheet and it was "accurate as announced by the Foreperson" completely negates defendant's claim that his appended verdict sheet was the one filled out by the jury. It simply belies logic to believe that a seasoned criminal trial judge would allow a verdict sheet with every offense checked off to be admitted into evidence without any type of colloquy with the jury or the parties, especially in light of the judge's specific comments that he reviewed the verdict sheet handed to him. It is equally unbelievable that defendant's attorney would have glossed over such an issue following trial. On appeal, defendant finds support in the fact that the verdict sheet he asserts is the true copy was appended to trial counsel's brief for his motion for new trial. Yet, trial counsel made no mention of any issue with the verdict sheet the entirety of his argument to the court during that motion. (See 11T:3-15 to 9-11).

As the record makes abundantly clear, the jury convicted defendant of purposeful murder and did not render additional verdicts for the lesser-included offenses. The announcement of the verdict by the forewoman followed by the immediate polling of each juror – all recorded on CourtSmart and made part of this record – refutes defendant's argument entirely. In fact, contrary to defendant's assertions, once the jury announced that defendant was

guilty under question 1, he was not required to question the jurors regarding the lesser-included offenses in questions 2 and 3 since the finding of guilty on the more serious charge necessarily negated the need to do so. (See Db 12-13).

In that same vein, defendant's unsupported assertion that "a reasonable jury" may have convicted [defendant] of one of the lesser-included offenses based on "the statements by [defendant] that he never intended to actually hit the car but only scare the occupants, the improbable circumstances of the shooting, and the testimony surrounding [defendant's] mental health issues" is equally negated by the record. To be sure, this jury heard the testimony of defendant's violent behavior in the years, days and minutes before the shooting. They heard testimony and viewed the evidence as to his odd behavior (not mental illness – in fact there was no actual testimony that defendant suffered from any mental illness, nor did the State concede defendant suffered from any mental health issues). They heard testimony of his Adderall abuse leading up to the day of the shooting. They heard testimony of his abusive and controlling relationship with Ms. Fiore not only in the words of Ms. Fiore, but confirmed by his own words during his call to her from jail. Along with that evidence, the jury also heard powerful evidence from Ms. Fiore recounting the horrific events of the shooting where an innocent family was simply driving down the road and encountered defendant. The jury heard that in an unprovoked rage, defendant grabbed a gun, and fired a single shot out the window, which based on the sheer unfortunate circumnutates of the location, speed of the vehicles and the trajectory of the

bullet fired, struck the temple of Sciasia Calhoun and lodged inside her brain, ultimately killing her.

The record in this case demonstrates the verdict was based on the overwhelming evidence presented and does not, in any way, support an argument that this jury was confused and rendered an inconsistent verdict. There is simply no "adequate basis" to now look behind the jury verdict and infer, without a shred of viable evidence, that they jury believed defendant committed one of the lesser crimes. (Db 16). As such, defendant's conviction must stand.

POINT II

A JURY INSTRUCTION ON DIMINISHED CAPACITY WAS NOT REQUIRED.

Defendant next argues that the trial judge committed error by failing to charge diminished capacity because defendant's "severe mental health issues" were "uncontested" as "it was understood by all parties and the court that [defendant] would be making an issue of his psychological problems at trial with an eye towards a diminished capacity defense." He further contends that the basis for the instruction was clearly indicated in the record. (Db 16-17). First, defendant's understanding of the record misplaced. The State never agreed, nor ever stipulated that defendant suffered from any type of mental health issues. And while the State recognized that defendant may present evidence that he suffered from a mental illness at trial, this in no way equates to a concession that he had a mental illness. Second, defendant wholly failed to present a single shred of reliable evidence that he suffered from a mental disease or defect that caused the inability to form the required mental state –

purposeful – as required by law. As such, this argument has no merit.

A diminished capacity defense, recognized in N.J.S.A. 2C:4-2, provides in pertinent part that "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense." For diminished capacity to go to the jury, the record must contain competent, reliable evidence of the predicates for diminished capacity. State v. Breakiron, 108 N.J. 591, 617 (1987). Thus, a defendant asserting diminished capacity must present a diagnosis of an underlying mental disease or disorder. State v. Reyes, 140 N.J. 344, 364-365 (1995). Further, the mental disease or disorder must be of a kind that can prevent or interfere with the ability to form the mental state required for the offense. State v. Galloway, 133 N.J. 631, 647 (1993). Not every mental disease or disorder affects the ability to form the required state of mind. State v. Nataluk, 316 N.J. Super. 336, 344 (App. Div. 1998).

A jury instruction on diminished capacity is required only when (1) the defendant "has presented evidence of a mental disease or defect that interferes with cognitive ability sufficient to prevent or interfere with the formation of the requisite intent or mens rea," and (2) "the record contains evidence that the claimed deficiency did affect the defendant's cognitive capacity to form the mental state necessary for the commission of the crime." State v. Baum, 224 N.J. 147, 160 (2016) (quoting Galloway, 133 N.J. at 647). "[A]ll mental deficiencies, including conditions that cause a loss of emotional control," entitle a defendant to a jury instruction on diminished capacity "if the record

shows that experts in the psychological field believe that [the defendant's] kind of mental deficiency can affect a person's cognitive faculties...." Galloway, 133 N.J. at 647. Moreover, since the criminal code does not define "mental disease or defect," the New Jersey Supreme Court has determined that "whether 'a condition constitutes a mental disease or defect is one to be made in each case by the jury after the court has determined that the evidence of the condition in question is relevant and sufficiently accepted within the psychiatric community to be found reliable for courtroom use.'" Baum, 224 N.J. at 161 (quoting Galloway, 133 N.J. at 643).

Defendant's argument that the trial court committed reversable error by not instructing the jury on diminished capacity is both factually and legally without merit. First – as an initial matter – defendant's assertion that his "severe mental health issues" went uncontested is factually incorrect. At no time did the State concede or stipulate to the fact that defendant suffered from any type of mental illness. While the State, in its opening statement, addressed the fact that defendant had seen a psychiatrist *to get a prescription for Adderall* (3T:34-10 to 14); the fact that *based defendant's continued use of the internet*, he drove around Monmouth County believing people on the roadways were invading his space, tailing him and he became increasingly preoccupied with that narrative (3T:34-21 to 35-12); and that his brother told police that defendant "*had some issues* and was in Monmouth Medical Center the past weekend" (3T"41-2 to 8), these statements – in no way – were a concession by the State that defendant suffered from any type of mental illness, even in the most general sense.

What is more, the State alluding to the fact that jurors "may end up

considering some mental health defense of a diminished capacity because I've talked to you about some of the issues that were going on with defendant during the weeks before this horrible event" simply addressed the possibility – at the outset of any evidence being presented – that such evidence may be forthcoming by the defense and certainly was not a concession that defendant actually suffered from a mental illness. Indeed, the State followed up that statement by telling the jurors, "But, I'm going to ask you when you consider seriously and diligently as I know you will, considered all the evidence in this case, I submit that you'll be firmly convinced beyond a reasonable doubt that the defendant, Kader Mustafa, shot and killed knowingly and purposefully Sciasia Calhoun, a complete stranger, on that fateful night of May 3, 2018." (3T:49-14 to 20); (Db 19). As such, the State clearly recognized in its opening that defendant may bring forth evidence of diminished capacity, but certainly never conceded it existed. To be sure, an opening statement is not evidence, only a roadmap of possible evidence presented.

Contrary to defendant's assertion as to the "understanding of the parties," the actual understanding of the parties is clear from the record. Defendant prior to trial even commencing, made it clear that he had instructed his counsel to withdraw the insanity defense, thereby taking his defense for "severe mental health issues" off of the table. (See Db 16). As the judge stated on the record prior to opening statements, "It was indicated ***quite clearly going back for some time*** that [defendant] instructed his counsel that he did not want to pursue an insanity defense and that insanity defense was withdrawn...You'll recall our previous conversations in Court on prior occasion when Mr. Venturi had indicated that you have instructed him to

withdraw any insanity defense, is that right? To which defendant responded, "Yes, Judge." (3T:10-8 to 22) (emphasis added).

With respect to a diminished capacity defense, the "understanding" from everyone – the jurors, the parties and the court – at the outset and to which the record makes clear, was that jurors might hear about, and be presented with, evidence of diminished capacity. And while they were put on notice of this, defendant made a strategic decision to forego any expert testimony or admit any documentary evidence to support the assertion that he suffered from a mental illness, or a mental disease or defect. Rather, defendant rested his case and then argued that information of his mental illness was "organically" within the record and that was sufficient to support a diminished capacity charge to the jury. (9T:14-17 to 15-1). Defendant is incorrect.

In reviewing this matter, this Court must look at the obvious record and not at the indication's defendant suggests. As the trial court properly decided, diminished capacity cases – like insanity defense cases – have their genesis in expert testimony or at best, some documentary medical evidence indicating a diagnosis or naming a mental condition the defendant is or was suffering from at the time of the crime. Defendant presented no such evidence. (9T:19-23 to 20-4). No psychiatric expert ever testified, nor was there any documentary medical evidence admitted at trial. See N.J.S.A. 2C:4-2 (stating, defendant has the initial burden to introduce evidence of a mental disease or defect tending to show that he or she was incapable or forming the requisite intent – while the burden of proof to establish the mens rea of the offense remains with the State); see also, Baum, 224 N.J. at 161. As this record reflects, the only testimony elicited was that of defendant's bizarre behavior, which as properly

held by the trial court, did not rise to the level of demonstrating defendant suffered from a mental disease or defect. (10T:18-25 to 21-20).

In addition, defendant's assertion that the trial court's decision not to give the diminished capacity instruction because there was no "expert testimony" was error completely ignores the Court's analysis and decision in Baum, thus is legally misplaced. (Db 21). In Baum, the New Jersey Supreme Court reiterated its pervious holding in Galloway, that "despite the lack of a definition in the Code...whether a condition constitutes a 'mental disease or defect' is one to be made in each case by the jury *after the court has determined that the evidence of the condition in question is relevant and sufficiently accepted within the psychiatric community to be found reliable for courtroom use.*'" Baum, 224 N.J. at 161 (quoting Galloway, 133 N.J. at 643). Following its own recitation in Galloway, the Court also cited to N.J.R.E. 702 – the rule of evidence dealing with expert testimony. Notably, the rule of evidence the Court in Baum did not cite to was N.J.R.E. 701 – the rule of evidence dealing with lay person testimony. Therefore, the Supreme Court specifically mandating that evidence of a condition needs to be one that is sufficiently accepted within the psychiatric community and one to be found reliable in courtrooms is significant language that something more than lay testimony is necessary. (Db 19; 4T:85-19 to 23).

As such, defendant's brother telling a detective that defendant had mental health problems and had recently been hospitalized does not amount to evidence that would be sufficiently accepted by the psychiatric community to diagnose a mental illness. In fact, it is hearsay evidence that would not be admissible in the first place. Likewise, a "repeated mention" by detectives that

defendant was wrapped in tin foil with a tin foil hat and that he did this often is also not the type of evidence that would be sufficiently accepted by the psychiatric community to diagnose a mental illness. (Db 19-20). To be sure, there was also lay testimony explaining defendant's behavior. Ralph Fiore testified regarding defendant's extreme weight loss (5T:15-17 to 23). Nicole Fiore testified to defendant's obsessive exercise regimen. (7T:14 to 24). Further, testimony from Nicole Fiore – a self-employed hair stylist – opining that defendant's behavior was similar to that of her schizophrenic uncle is certainly not definitive evidence that defendant suffered from schizophrenia or any other similar mental health condition. It is simply her own observation of her boyfriend's behavior. (Db 20; 7T:194-25 to 195-3). Simply because a mental health condition was mentioned does not mean defendant suffered from it, nor does it mean the record is replete with evidence. More is required than opinions about bizarre behavior. As the trial court properly decided, charging the jury would on diminished capacity on a mental disease or defect that undiagnosed and for which there is no testimony would only serve to confuse the jury. (9T:18-22 to 22-1).

Similarly, defendant's attempt to liken the need for expert testimony necessary for a diminished capacity charges to that which is necessary to charge voluntary intoxication is also legally misplaced. The standard to charge a jury on voluntary intoxication is not whether a defendant is actually intoxicated, but rather whether a reasonable juror might so find." State v. R.T., 411 N.J. Super. 35, 46-47 (App. Div. 2009) (citing State v. Polk, 164 N.J. Super. 457, 462, (App.Div.1977) (citing State v. Frankland, 51 N.J. 221, (1968)). For diminished capacity, our case law makes it clear that a specific

finding of an actual mental disease or defect is a prerequisite that a court must determine prior to such information going to the jury. The two standards are not comparable.

Finally, the "heart of the case" was not his mental illness, but how the life of an innocent woman was cut short by a random single bullet to the head, fired by a complete stranger who was angry because the car behind him was "high beaming him." (See 7T:126-13 to 127-1). To be clear, defendant fully admitted to making the conscience decision to fire a shot out of his car window to "make some noise...because you seen [sic] how they were driving. They tried to cut me off when I went right. And then they stayed in front of me." (7T:166-9 to 17). But more importantly, defense counsel, in his opening and closing statements, did not argue that defendant's mental health issues were the "heart of the case." Rather defense counsel's arguments – under no uncertain terms – pointed the finger directly at Nicole Fiore as the shooter. (3T:50-22 to 51-5; 52-19 to 21; 53-21 to 54-3; 9T:29-23 to 30-24; 33-15 to 25; 37-14 to 25). Diminished capacity was not a key defense strategy.

For these reasons, the court was not required to charge the jury on diminished capacity. The jury was properly instructed on the mens rea, not only for murder, but also for the lesser included offenses. As such, there is no reversible error.

POINT III

THE EVIDENCE PRESENTED AT TRIAL WAS RELEVANT, THUS PROPERLY ADMITTED.

Under this point, defendant makes various arguments asserting that irrelevant, thus prejudicial evidence was allowed in front of the jury to

"portray him as a disturbed loner" (Db 25), "a violent and disturbed person" (Db 26), whose use of Adderall "drove him to delusions and caused him to commit the shooting" (Db 30), was degenerated by the State because he lived in his car (Db 35), and was prejudiced by his own words in a recorded jail call (Db 39). However, none of these arguments have any substantive merit.

A. The Items Recovered from Defendant's Vehicle were Relevant to the Crime Committed, Thus Properly Admitted into Evidence.

Relevant evidence, as defined by N.J.R.E. 401, is evidence that has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See also State v. Williams, 190 N.J. 114, 122-23 (2007); State v. Bakka, 176 N.J. 533, 545 (2003). Determination of whether evidence is relevant centers on "the logical connection between the proffered evidence and a fact in issue, i.e. whether the thing sought to be established is more logical with the evidence than without it." State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990); State v. Koskovich, 168 N.J. 448, 480 (2001); State v. Darby, 174 N.J. 509, 519 (2002). In short, relevant evidence must have probative value – a "tendency ... to establish the proposition that it is offered to prove." Darby, 174 N.J. at 520; Hutchins, 241 N.J. Super. at 358. Pursuant to N.J.R.E. 402, "all relevant evidence is admissible."

N.J.R.E. 403 provides an exception to N.J.R.E. 402, authorizing exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury, or (b) undue delay, waste of time, or needless presentation of cumulative evidence." The burden rests with the party seeking exclusion of evidence to "convince[e] the court that the factors favoring exclusion

substantially outweigh the probative value of the contested evidence." State v. Medina, 201 N.J. Super. 565, 580 (App. Div.), certif. denied, 102 N.J. 298 (1985); State v. Morton, 155 N.J. 383, 543 (1998), cert. denied, 532 U.S. 931, 121 S.Ct. 1380 (2001) (quoting State v. Carter, 91 N.J. 86, 106 (1982)). Keeping in mind that while "[t]he mere possibility that evidence could be prejudicial does not justify its exclusion," where the evidence's "probative value 'is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of jurors from a reasonable and fair evaluation' of the basic issues of the case," exclusion is appropriate. Morton, 155 N.J. at 453-54; State v. Bowens, 219 N.J. Super. 290, 296-97 (App. Div. 1987); State v. Covell, 157 N.J. 554, 568 (1999) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)); State v. E.B., 348 N.J. Super. 336, 345 (App. Div.), certif. denied, 174 N.J. 192 (2002).

The determination of admissibility under N.J.R.E. 403 falls within the broad discretion of the trial court. State v. Carter, 91 N.J. 86, 106 (1982); State v. Covell, 157 N.J. 554, 568-69 (1999); see also N.J.R.E. 104(a). It is the burden of the party seeking exclusion of evidence under N.J.R.E. 403 to convince "the court that the factors favoring exclusion substantially outweigh the probative value of the contested evidence." State v. Medina, 201 N.J. Super. 565, 580 (App. Div.), certif. denied, 102 N.J. 298 (1985); State v. Morton, 155 N.J. 383, 543 (1998), cert. denied, 532 U.S. 931, 121 S.Ct. 1380 (2001) (quoting Carter, 91 N.J. at 106). The trial court should consider undue prejudice to the State, "whose rights and those of the people it represents are also entitled to protection," when evaluating evidence under N.J.R.E. 403. State v. Wilbely, 122 N.J. Super. 463, 467 (App. Div.), rev'd on o.g., 63 N.J.

420 (1973); State v. Scherzer, 301 N.J. Super. 363, 468 (App. Div.), certif. denied, 151 N.J. 466 (1997). In fact, it is the duty of the trial court "to prevent the jury from considering evidence or information that would unduly prejudice either the State or the defense with respect to the central responsibility of the jury: determining criminal culpability." State v. Short, 131 N.J. 47, 61 (1993). See also State v. Blanton, 166 N.J. Super. 62, 72-73 (App. Div.), certif. denied, 81 N.J. 265 (1979).

Here, defendant asserts that the items removed from his vehicle had no material relation to the case and so he was significantly prejudiced. Defendant is incorrect. First and foremost, defendant committed this homicide from his vehicle. He fired the fatal shot from the driver's seat while chasing the victim down in her vehicle. Defendant was ultimately apprehended in his vehicle. The suspected handgun used to murder Sciasia Calhoun was found in the trunk of his vehicle. Therefore, as the trial court properly determined, defendant's vehicle was at the center of this investigation and was an integral part of the crime scene and all the items found within were relevant and material. (6T:65-16 to 23).

Second, the suspected murder weapon, along with another handgun was recovered in defendant trunk. It was located under piles of clothing and secreted under a hard liner, in a built-in void within the trunk, and found wrapped in a t-shirt. (5T:101-12 to 17; 102-17 to 25). Connected to those guns were complete and discharged bullets, discharged cartridges, a speed loader (a device that helps load a revolver entirely all at one time), more ammunition belonging to a shot gun consisting of a box of shotgun shells and spent ones, as well. Other weapons, such as brass knuckles and knives were also found

among the guns and ammunition. (5T:103-1 to 25) (emphasis added). The fact that all of these weapons and ammunition were found in defendant's vehicle where he fired a handgun that killed a woman is relevant and material evidence to the basic issues of the case. (6T:65-17 to 21). More specifically, defendant could have just placed the gun inside a door pocket, the center console, thrown in the backseat or on the floorboards – like the food wrappers and other personal items found inside the vehicle were found. But, defendant took the time to wrap his guns in a t-shirt and bury them under piles of clothes underneath a liner in a hole within the trunk. This evidence was very probative to defendant's knowing and purposeful actions the State was required to prove. Short, 131 N.J. at 61.

Third, defense counsel, in his opening statement, asserted it was impossible for defendant to have fired the shot that killed Sciasia Calhoun, so the fatal shot could only have come from the other person in the vehicle – Nicole Fiore. (3T:52-19 to 54-11). So, as the trial court properly decided, the fact that there are additional firearms and ammunition attributed to the defendant, including the flare gun found in defendant's lap when he was extracted from his vehicle by police, was relevant to disprove the assertion that Nicole Fiore was the shooter. (6T:66-1 to 5; 81-17 to 82-5).

As to the evidence of marijuana, defense counsel also used his opening statement to speak directly to defendant's mental capacity while also accusing Nicole Fiore of being a drug addict. (3T:50-19 to 51-2). As such, the admission of the marijuana found in the car was probative and relevant to the combat those assertions made by the defense. Likewise, the firearms purchaser identification card in someone else's name went specifically to

support the stipulation that defendant did not have, nor did he ever have, his own permit to carry a handgun, a permit to purchase a handgun, a purchaser identification card, or a permit for an assault weapon in the State of New Jersey. (8T:54-7 to 17).

In sum, the items recovered from defendant's vehicle were not improper evidence; therefore, did not facilitate improper arguments by the State. They were relevant and probative to material issues regarding state of mind and defendant's purposeful actions – like hiding the guns so they would not be in plain view and in the hopes that no one would find them, as well as proper evidence necessary to refute defendant's third-party guilt allegations. The fact that the evidence has the possibility to be prejudicial does not require its exclusion especially when the evidence was necessary for the jury to determine the culpability of the defendant. Accordingly, there is no reversible error. Morton, 155 N.J. at 453-54; Short, 131 N.J. at 61; see also Blanton, 166 N.J. Super. at 72-73.

B. The Arguments Made by the State in Summation were Proper, Thus There was No Prosecutorial Misconduct.

Defendant claims that the prosecutor made improper remarks in summation which infringed on his constitutional rights to due process and a fair trial. Defendant's argument is negated by the record. The prosecutor's remarks were fair comments on the evidence and were proper responses to defense counsel's summation remarks. Additionally, defendant did not object to all of the comments he now claims were improper, so the plain error standard applies to some of his claims. Defendant bears the burden of demonstrating plain error - i.e., error that was "clearly capable of producing an

unjust result." R. 2:10-2. The possibility of injustice must be so substantial as to "raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971). If a timely objection is not interposed, the remarks will generally be deemed harmless. State v. Timmendequas, 161 N.J. 515, 576 (1999), cert. denied, 534 U.S. 858 (2001); State v. Irving, 114 N.J. 427, 444 (1989).

In considering issues of prosecutorial misconduct, the reviewing court must first determine whether misconduct occurred. State v. Frost, 158 N.J. 76, 83 (1999). Where misconduct is identified, it does not constitute grounds for reversal unless it was so egregious that it deprived the defendant of a fair trial. State v. DiFrisco, 137 N.J. 434, 474 (1994), cert, denied, 516 U.S. 1129 (1996). Thus, to warrant reversal, a prosecutor's misconduct must constitute a clear infraction and "substantially prejudice the defendant's fundamental right to have a jury fairly evaluate the merits of his [or her] defense." State v. Roach, 146 N.J. 208, 219, cert. denied, 519 U.S. 1021 (1996).

Whether a prosecutor's misconduct denied defendant a fair trial requires consideration of both the "tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." Timmendequas, 161 N.J. at 575. A reviewing court will consider: (1) whether defense counsel made time and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Id. at 575-76.

Prosecutors must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence. State v.

Mahoney, 188 N.J. 359, 376, (2006), cert denied, 549 U.S. 995 (2006); State v. R.B., 183 N.J. 308, 330 (2005); State v. Smith, 167 N.J. 158, 178 (2001). Nonetheless, prosecutors, like defense attorneys, are afforded "considerable leeway, within limits, in making" their closing arguments. State v. Chew, 150 N.J. 30, 84 (1997), cert denied, 528 U.S. 1052 (1998); State v. Purnell, 126 N.J. 518, 540 (1992). Accord State v. Koskovich, 168 N.J. 448, 489 (2001). Indeed, a prosecutor is "entitled to sum up the State's case graphically and forcefully." State v. Feaster, 156 N.J. 1, 58 (1998), cert denied sub nom., Kenney v. New Jersey, 532 U.S. 932 (2001); See also State v. Chew, 150 N.J. at 84. If a prosecutor's arguments are based on the facts of the case and reasonable inferences therefrom, what is said in discussing them, by way of comment, denunciation or appeal will afford no grounds for reversal. Id. Additionally, remarks made during closing arguments must be judged in relation to the entire summation and the trial as a whole. State v. Johnson, 31 N.J. 489, 513 (1960).

In summation, the prosecutor properly outlined the evidence presented and made appropriate arguments based on that evidence, including defendant's use – and abuse – of Adderall mixed with his daily use of marijuana. This argument was especially proper when taken in context with defense counsel's argument to the jury accusing Nicole Fiore of being the drug-addicted, violent shooter. Defense counsel began with warning the jury not to let the State shift the burden of proof to the defense and then went on to say:

> The burden is theirs to prove that it wasn't Ms. Fiore and you all saw Ms. Fiore testify. She was hostile. She was antagonistic. She was angry. She has a history of violence. She has a history of drug abuse. She has a history of acting out violently. She has a

> history of having violent ideas and wanting to hurt people that were irritating her which made me glad that the Plexiglas shield was between us when I handed her the papers that she denied knowing about, she snatched them out of my hand. Because I wouldn't have been surprised if she came after me at that point. She goes into the Dollar Store and is irritated by a woman and slugs her. She kicks out the window of Kader's car and has to be forcibly removed. She's stealing from her parents to buy drugs and to the point where they have to kick her out. And she wants us to believe that all she was doing was taking change. So, I would suggest that she's the violent, abusive person in the relationship, not Kader as she claims without any proof whatsoever. Not Kader. [9T:30-3 to 24].

Then, later in his summation, defense counsel argued, "But the better shot, the clearer shot, and she shot at ranges too. She knows how to shoot a gun. And she's the one with the angry, violent temper. She has the cleaner or clearer shot of the two of them." (9T:33-22 to 25).

Since the defense strategy was to not only blame Nicole Fiore as the shooter, but to also characterize her as the drug addicted, violent abuser and "Not Kader," the State's response in summation was pointed at dispelling that argument and focusing the jury's attention on the actual testimony. The State countered, "You heard testimony that on the street [defendant] tried a drug that he liked, Adderall and he wanted it. He wanted it as part of his life." (9T:45-9 to 12). The State continued by pointing to specific testimony:

> And you heard testimony about the research that he did to try and get what he wanted. And he did. He ended up getting exactly what he sought from that doctor, Adderall. Adderall. … But I submit to you, ladies and gentlemen, that a reasonable view of the evidence in this case show that the Adderall, but more importantly, the abuse of Adderall, the use of it in ways that no one contemplated and no one should. And the demons that created inside the defendant, I submit to you is what lead to the tragedy of

Thursday May 3rd, of 2018. [9T:45-9 to 46-4].

As part of their burden, the State necessarily argued to the jury who defendant was on the day of the shooting. In other words, what was his state of mind prior to, during and after the shooting? The State argued, based solely on the testimony presented, that he drove around constantly in his Chevy Impala. The State explained how unfortunately that was his life because he was unemployed and living in his car. (9T:63-3 to 11). The State pointed to Nicole Fiore's testimony about defendant's daily habits. He exercised daily, used marijuana daily and used Adderall daily. Regarding defendant's Adderall use, the State recounted the testimony of Nicole Fiore – his constant companion – who detailed how much Adderall defendant took the day of the shooting. The State pointed to the bottle of Adderall found in his car, which listed the actual dosage defendant was to take and how the testimony of Ms. Fiore made clear that he took in more than he was prescribed on the day of the shooting. He took too many tablets at one time. He was abusing Adderall. The State reminded the jury that they heard no expert testimony about Adderall, but in any event, it was their job to talk and deliberate about how the impact that using drugs in a way that are not prescribed played a role in what happened. (9T:71-4 to 21; 72-19 to 73-10).

Importantly, the judge instructed the jury on voluntary intoxication, but clearly that defense was rejected by the jury. (Db 34). Defendant can hardly argue that he was denied a fair trial by the State's arguments regarding his use and abuse of Adderall and daily use of marijuana in summation, which were firmly supported by the testimony at trial, when the very existence of that evidence allowed for the jury to decide if he was voluntarily intoxicated.

Defendant's displeasure with the fact that the jury did not believe in that defense does not now equate to an unfair trial.

All of the State's arguments in summation were centered upon the testimony presented, the evidence admitted at trial, and reasonable inferences therein. Contrary to defendant's incorrect interpretation of this record, the State's arguments were not "complete inventions by the prosecutor." (Db 34); compare, Mahoney, 188 N.J. at 376; R.B., 183 N.J. at 330; Smith, 167 N.J. at 178. At no time during the State's summation did the prosecutor suggest, or describe the defendant as a "drug crazed maniac or a drug crazed psychotic maniac." (Db 33; 35). Such melodramatic characterization of the State's summation finds no support in this record.

Finally, defendant's citation to State v. Mazowski, 337 N.J. Super. 275 (App. Div. 2001), to stand for the proposition that the State first elicited testimony and then later argued during summation that defendant was a drug addict and that is why he committed murder is both factually and legally misplaced. First, the State never argued that defendant was a drug addict. The State argued that defendant took too much of his prescription. This was supported and based on the testimony of Nicole Fiore, who was with defendant that entire day and observed how many pills he took along with evidence of the actual prescription bottle with his left-over pills recovered from his vehicle. The State further argued that on the day of the shooting, defendant mixed his over-use of Adderall with marijuana. (9T:71-4 to 73-18). The only party to label someone a drug addict was defense counsel referencing Nicole Fiore in his summation. (9T:30-5 to 8). The State made no such argument about defendant.

Second, the issue in Mazowski was that the prosecutor made the improper argument (and improper assumption) that "all drug addicts need money," so necessarily that was the motive for the robbery. However, that court found there was no evidence presented at trial to support that argument in summation. Id. at 287. In the instant case, the State never argued that because defendant was a drug addict, he committed murder. Rather, the State recounted the testimony of defendant's over-use of Adderall throughout the day and his resulting escalation of paranoid and violent behavior. By doing so, the State directly countered defendant's assertion that Nicole Fiore was the out of control culprit in the Chevy Impala that fateful day. As such, the State's arguments and reasonable inferences therein were all factually supported by the evidence in the case. The State's arguments, judged in relation to the entire summation and the trial as a whole, was proper. Thus, there is no basis for reversal. State v. Johnson, 31 N.J. 489, 513 (1960).

C. The State did not Engage in Misconduct Regarding Defendant's Homelessness and Poverty.

Defendant, once again, mischaracterizes the record, only this time he asserts the State engaged in misconduct regarding his homelessness and exploited his poverty. In other words, defendant asserts the State told the jury that defendant committed murder because he was poor. This argument too, finds no support in this record.

To be sure, the State never elicited any testimony from any witness stating or even suggesting that defendant shot and killed Sciasia Calhoun because he was poor and living out of his vehicle. The State never elicited any testimony, nor did it make any arguments that defendant's poverty made him

"more likely to be violent, dangerous and engage in criminal activity." (Db 38). The fact that defendant was living in his vehicle was a necessary fact because the crime was committed from his vehicle. As such, it was elicited as a circumstance, not as a motive for the crime or to suggest that due to his homelessness, he had a propensity to commit the crime.

His passenger, Nicole Fiore, was a necessary witness because she was his constant companion, his girlfriend, and in the passenger's seat as a witness when he committed the crime. Importantly, as angry and accusatory as she was towards defendant in her testimony, she never once commented on their poverty or disparaged defendant for their living situation. Throughout the entire trial, at no time was defendant "demonized based on his status as a homeless person." (Db 38); See State v. Mathis, 47 N.J. 455, 471 (1966); State v. Stewart, 162 N.J. Super. 96, 100 (App. Div. 1978).

In its summation, the prosecutor properly confined his arguments regarding to the facts and evidence presented at trial. Mahoney, 188 N.J. at 376; R.B., 183 N.J. at 330; Smith, 167 N.J. at 178. Like his arguments above regarding the State labeling defendant as a "drug addict," defendant's arguments regarding poverty are a distorted characterization which find no support in this record. Accordingly, there is no basis for reversal.

D. The Jail Call was Properly Admitted.

Lastly under this point, defendant argues the jail call was "irrelevant and contained severely prejudicial statements by Ms. Fiore denigrating [defendant]." However, as the trial court properly determined, this argument has no merit for several reasons.

As an initial matter, defendant never requested the State, nor filed a motion to the court, to have the jail call redacted until the morning it was to be played to the jury. The call was part of discovery for three years, so it was "known to the defense for quite some time." (7T:177-4 to 17). Although defense counsel was not defendant's original attorney, he nevertheless had all the discovery in the case in plenty of time to make any necessary motions regarding this jail call. Defense counsel's failure to do so does not now equate to reversable error. In any event, the call was relevant and material to prove that defendant fired the shot that killed Sciasia Calhoun. As defense counsel opened his case accusing Nicole Fiore as the shooter, and continued with that assertion throughout the entire trial, the jail call, and defendant's admissions therein, directly rebutted this claim. As such, the call was probative to negate defendant's third-party allegations. N.J.R.E 401.

Second, except for defendant's admission to firing the shot that killed Sciasia Calhoun, nothing said in the call admitted to or alleged any violations of the law. (9T:178-1 to 18). The fact that Nicole Fiore was upset with defendant for various alleged indiscretions and accused him of not telling the truth did not constitute other crimes evidence. N.J.R.E. 404(b); (9T:178-10 to 18). Indeed, Ms. Fiore had already alluded to her troubled five-year relationship with defendant during direct examination, even testifying that after the shooting she was planning to leave him. (9T:134-17 to 21). Thus, this was not new or surprising information for the jury amounting to anything even remotely prejudicial.

Third, Ms. Fiore did not call defendant a liar to disparage him. To the contrary, Ms. Fiore called defendant a liar twice, each time after he tried to

change the facts and circumstances of the shooting in a failed attempt to convince her he was "scared for his life," that "those people were gang members," and how "they were probably going to shoot me and you," so it was basically not his fault. (See 9T:163-25 to 164-14; 165-22 to 166-22). Ms. Fiore responded, "You better start telling the mother fucking truth, man" (9T:164-11 to 14). Then, when defendant tried to convince her that "the car was following us. That car was following me. From Neptune. You had your headphones on," Ms. Fiore responded, "I don't know what's going on with you. You're lying so much. I mean (indiscernible) but my heart is broken for that girl that lost her life. I'm, my heart breaks for her." (9T:165-7 to 25).

Finally, the jail call was played during the State's direct examination. Therefore, Ms. Fiore was still on the witness stand and was subject to cross-examination regarding everything she said in the call. Defense counsel had ample opportunity to test the reliability and counter of all statements she made during the call regarding their relationship and his version of the events that evening. State v. Weaver, 219 N.J. 131, 151 (2014). (stating, "underlying a criminal defendant's 'right to confront his accusers' is the belief that subjecting testimony to cross-examination enhances the truth-discerning process and the reliability of the information"); State v. Branch, 182 N.J. 338, 348 (2005) (quoting California v. Green, 399 U.S. 149, 158 (1970) ("Cross-examination has frequently "been described as the 'greatest legal engine ever invented for the discovery of truth'")); State v. Hockett, 443 N.J. Super. 605, 619 (App. Div. 2016) (stating, "Cross-Examination necessarily includes the right to impeach or discredit a witness"). As all evidence is prejudicial, the admission of this particular evidence – the jail call – did not cause reversible error.

POINT IV

BASED ON THE FACTS AND CIRCUMSTANCES OF THIS CASE AND REVIEWING THE JURY INSTRUCTION AS A WHOLE, ANY ERROR IN THE INSTRUCTION WAS HARMLESS, THUS NOT CAPABLE OF PRODUCING AN UNJUST RESULT.

"Not every trial error in a criminal case requires a reversal of the conviction. If it is not of constitutional dimensions, it shall be disregarded by the appellate court 'unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .'" State v. McKinney, 223 N.J. 475, 496-497 (2015) (citing State v. LaPorte, 62 N.J. 312, 318-19 (1973) (quoting R. 2:10-2)). "The test of whether an error is harmless depends upon some degree of possibility that it led to an unjust verdict. The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Id. (citing State v. Bankston, 63 N.J. 263, 273 (1973)). "When the evidence of guilt is overwhelming, that evidential error may be found harmless beyond a reasonable doubt." State v. Burton, 309 N.J. Super. 280, 289 (App. Div.), certif. denied, 156 N.J. 407 (1998).

In a case where, as here, the trial judge correctly instructed the jury in other components of the charge, "[t]he test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." State v. Jackmon, 305 N.J. Super. 274, 299 App. Div. 1997) (alteration in original) (quoting State v. Sette, 259 N.J. Super. 156, 190-91 (App. Div.), certif. denied, 130 N.J. 597, 617 (1992)), certif.

denied, 153 N.J. 49 (1998). "[T]he key to finding harmless error in such cases is the isolated nature of the transgression and the fact that a correct definition of the law on the same charge is found elsewhere in the court's instructions." Ibid.

For example, in State v. Smith, a panel of this Court concluded that the judge "fully and accurately instructed the jury on the elements of attempt" even though the instruction was given "during an explanation of the law relating to another offense." 322 N.J. Super. 385, 399 (App. Div.), certif. denied, 162 N.J. 489 (1999). This Court held that, based on the defendant's testimony, the overwhelming evidence that established his guilt, and the "appearance elsewhere in the jury instructions of a proper charge[,] . . . the failure to define attempt in the robbery charge did not prejudice defendant's rights." Id. at 400.

Contrary to defendant's assertions, the jury received full and accurate instructions on the necessary definitions and elements for unlawful possession of a firearm, despite the court using the "other weapons" template. The use of a model jury charge does not equal a proper charge. A proper instruction requires the jury be told the elements of the crime the State must prove, the requisite mental state and all appropriate definitions. That is exactly what the jury was told in this case.

Under N.J.S.A. 2C:39-5(b) – Unlawful Possession of a Handgun – the first element the jury must be instructed on is that the State's exhibit – marked into evidence – is a handgun, or there was a handgun. (Pa 1); compare (Pa 5). The jury was properly instructed as to this element. In fact, the court specifically told the jury the State alleged that defendant possessed two

weapons, marked into evidence as S-9 and S-10, and then described those particular exhibits as "a Smith & Wesson 38 caliber revolver and a Taurus 40 caliber semi-automatic handgun..." (9T:159-1 to 21). This instruction fully comports with the first element under N.J.S.A. 2C:39-5(b). Also under this element, the court must instruct the jury as to the definition of a handgun. See (Pa 1). That definition was given to this jury. More specifically, immediately prior, in the instruction for possession of a weapon for an unlawful purpose, the court fully defined a firearm. (9T:153-5 to 12); compare (Pa 1). The fact that the definition appeared "elsewhere in the instructions of a proper charge" does not mean the instruction was improper or that the defendant was prejudiced. Smith, 322 N.J. Super. at 400.

The second element is that the defendant knowingly possessed the handgun. (Pa 1); compare (Pa 5). This jury was fully instructed on acting "knowingly," as well as complete definitions as to the types of possession. See (9T:154-11 to 155-7; 159-22 to 160-14; 160-25 to 162-1); (Pa 1-2); compare (Pa 5-6). In fact, inside the definition of knowingly, the court specifically identified the weapon to be a firearm, stating, "Thus, the person must know or be aware that he possesses the item, here ***two firearms*** and he must know what it is that he possesses or controls, in other words ***that they were firearms***." (9T:160-20 to 24) (emphasis added).

The full instruction for the final element, that the defendant did not have a permit to possess such a weapon, was also given. The parties stipulated to the fact that defendant did not have a permit. The stipulation was read to the jury at the time it was introduced into evidence. (8T:54-7 to 55-19). Then, in its final instructions and in describing the types of evidence the jury could

consider, the court referenced this earlier instruction, reiterated the exhibit number, and told the jury that they should treat stipulated facts as true, but "as with all evidence undisputed facts can be accepted or rejected by the jury in reaching a verdict." (9T:130-6 to 14).

Since this Court must look at the instruction, not in isolation, but as a whole, the fact that some of the explanation of the law occurred in other portions of the instruction does not equate to reversible error. Jackmon, 305 N.J. Super. at 299; (quoting Sette, 259 N.J. Super. at 190-91. In sum and substance, this jury was properly instructed on every element and necessary definition for second-degree possession of a weapon. The fact that the fourth-degree model jury charge template was used instead of the second-degree template amounts to nothing more than harmless error because the instructions – as given – were not capable of producing an unjust result, nor did they provide an avenue for the jury to come to a verdict they would not have otherwise come to. McKinney, 223 N.J. at 496-497 (citing LaPorte, 62 N.J. at 318-19 (quoting *R.* 2:10-2)). To be sure, it is undisputed that Sciasia Calhoun died from a gunshot wound to the head. To that end, there was overwhelming evidence of defendant's guilt, including defendant's own admission that he fired a shot from a handgun that killed Sciasia Calhoun. In other words, there was no question or possible confusion as to what type of "weapon" killed Sciasia Calhoun or that defendant was the one who possessed it.

However, even if this Court were to deem the instruction given was error, only the two charges for possession for a weapon would need to be reversed. See State v. Kille, 471 N.J. Super. 633, 648 (App. Div. 2022) (holding that reversal of the two weapons offenses due to a difference in the

written jury instructions and the verbal instructions given do not affect defendant's other conviction for aggravated manslaughter, which was affirmed); see also, State v. R.P., 233 N.J. 521 (2013) (holding that guilty verdict can be molded when defendant was given his day in court, all of the elements have been properly established and defendant has not established prejudice).

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE A LIMITING INSTRUCTION FOLLOWING THE STATE'S SUMMATION.

As stated under POINT III (B) above, reversal of a conviction based on the prosecutor's conduct is appropriate only if that conduct was "'so egregious that it deprived [the] defendant of a fair trial.'" State v. DiFrisco, 137 N.J. 434, 474 (1994) (quoting State v. Pennington, 119 N.J. 547, 565 (1990)), cert. denied, 516 U.S. 1129 (1996). Likewise, whether a prosecutor's misconduct denied defendant a fair trial requires consideration of both the "tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858 (2001). Defendant's argument that the lack of a limiting instruction following the State's summation deprived defendant of a fair trial is simply without any substantive merit.

Here again, the Prosecutor's remarks in summation were appropriately responsive to defense counsel's summation. More specifically, defense counsel, in speaking directly to aggravated manslaughter, stated that it requires "number one, that the person who did the shooting acted recklessly. Well,

that's an easy one. We can all agree on that. No if's, and's or but's, its reckless." (9T:40-11 to 18). He then went on to the "second element" being the extreme indifference to the value of human life and stated that death in this case was "highly improbable" and "there was much less than a 50 plus one percent chance that death would ensue." He went on to opine that it was "obviously reckless to go firing a gun in the direction of anything" and "so that would be reckless manslaughter on the part of whomever the shooter was." (9T:40-19 to 41-11).

In response to defense counsel's overly simplistic and matter-of-fact description of the crime committed in this case, the Prosecutor argued that manslaughter was not applicable to this case and focused the jury's attention on what it means to be reckless or engage in reckless conduct. First, the Prosecutor stated defendant could only be reckless if he was "aware of and consciously disregarded a substantial and unjustifiable risk that death will result from his conduct and that the death of Sciasia Calhoun was a mere possibility." (9T:90-1 to 10). Although he continued on using an example of Driving While Intoxicated (DWI), the context here is important because the Prosecutor then clarified, "That's not this case....[defendant] didn't consciously disregard anything. He consciously decided, not disregarded, he consciously decided that he was going to shoot the person who had the temerity to flash their brights [sic] in his rearview mirror. That's what he planned on doing. That's what he wanted to do. That's what he did." (9T:30-23 to 91-5). Placed in its proper context within the entire argument and with the fact that the jury was well aware of the jail call where defendant admitted to Nicole Fiore that he actually meant to shoot at Sciasia Calhoun's car

because it was following him – a call that was also played by the Prosecutor during summation (see 9T:95-12 to 20; see also, 7T:166-5 to 17) – this argument was a proper rebuttal to the defense suggestion that were "no if's and's or but's about it this case being "obviously reckless." (9T:40-19 to 41-11).

To be clear, the defense counsel's reckless manslaughter argument was not his linchpin argument. It was merely a failsafe argument in the event his previous arguments pointing the finger at Nicole Fiore failed. As such, the State's example of recklessness certainly did not deprive defendant of a fair trial. As the trial court stated in denying defendant's request for a limiting instruction, the Prosecutor's "artful or inartful" argument did not require a mistrial, nor a curative or limiting instruction. (9T:105-20 to 24). More importantly, after closing arguments, the judge fully instructed the jury on the law of manslaughter. (9T:142-12 to 147-1). The jury is presumed to have understood and followed those instructions, State v. Feaster, 156 N.J. 1, 65 (1998); See also State v. T.J.M., 220 N.J. 220, 237 (2015) (appellate courts "act on the belief and expectation that jurors will follow the instructions given them by the court"). The jury rejected manslaughter and convicted defendant of purposeful murder. His displeasure does not now amount to reversible error.

POINT VI

A LIMITED REMAND IS REQUIRED TO CORRECT ISSUES RELATED TO MERGER AND A YARBOUGH/TORRES ANALYSIS ONLY. A REMAND IS NOT REQUIRED TO ADDRESS AN ABILITY TO PAY HEARING, NOR THE COURT'S REFUSAL TO APPLY MITIGATING FACTOR FOUR.

In its instruction to the jury regarding Count Two of the indictment – second-degree possession of a weapon for an unlawful purpose, the trial court stated defendant's unlawful purpose in possessing the firearm was "[t]he shooting of Sciasis Calhoun and/or the firing a handgun in the direction of the vehicle that Sciasis Calhoun was driving." (9T:156-25 to 127-4). As such, the jury charge instructed that the purpose in possessing the handgun was to use it against the victim in the substantive offense. Accordingly, defendant's conviction for Count Two should have merge with the substantive offense of murder in Count One because there was no other evidence in the case that supported a separate unlawful purpose for the weapon. State v. Tate, 216 N.J. 300, 312-313 (2013) (citing State v. Diaz, 144 N.J. 628, 641 (1996)). Therefore, a limited remand is required to effectuate the merger and amend the judgment of conviction.

Likewise, in sentencing defendant to a consecutive term of imprisonment for Count Four – unlawful possession of a weapon, pursuant to N.J.S.A. 2C:39-5(b), the trial court did not engage in the required Yarbough analysis as required when imposing consecutive sentences. (See 9T:63-19 to 64-5); State v. Yarbough, 100 N.J. 627, 643-44 (1985). The trial court also did not analyze the fairness of the consecutive term imposed under the required Torres

analysis. Therefore, a limited remand is required in order to analyze the consecutive sentence under the required factors.

However, a remand is not required to conduct an ability to pay hearing. True that N.J.S.A. 2C:44-2(b) and (c)(2) requires a court to consider a defendant's ability to pay restitution before deciding whether to impose it, and its amount and method of payment. However, N.J.S.A. 2C:11-3c eliminates consideration of ability to pay where the defendant is convicted of murder, stating defendant "shall be required to pay restitution to the nearest surviving relative of the victim." (emphasis added). Moreover, "[t]he court shall not reduce a restitution award by any amount that the victim has received from the Violent Crimes Compensation Board, but shall order the defendant to pay any restitution ordered for a loss previously compensated by the Board to the Violent Crimes Compensation Board." N.J.S.A. 2C:44-2(c)(2) (emphasis added). Defendant did not dispute the amount of restitution, an amount of $24,886.57 confirmed by a lien letter from the Violent Crimes Compensation Office (11T:62-8 to 12), and this amount is a sum well within the $200,000 cap set by N.J.S.A. 2C:43-3(a)(1). The restitution order was correct and non-discretionary under applicable statutes, and an ability-to-pay hearing was not required.

Finally, the court did not err in refusing to give any weight to mitigating factor four. Once again, defendant's assertion that his alleged mental health issues were "undisputed" is a complete mischaracterization of this record. (Db 54). As argued a length above in POINT II, defendant's "focal point" was actually not his mental health because he outright instructed his attorney that there was to be no insanity defense and thereafter did not present a shred of

testimonial or documentary evidence that he suffered any type of mental illness or a diagnosis of any sort by any doctor or mental health expert. (See Db 54; compare 3T:10-8 to 22). Instead, defendant's strategy throughout the trial was to point the finger at Nicole Fiore as the shooter or at best, rely on being convicted of a lesser charge, as he argued in his closing.

Contrary to defendant's argument, the State's anticipation that the defense may introduce evidence of mental health issues does not equate to a concession that it existed. As the trial court stated in its analysis of mitigating factor four, defendant's bizarre behavior, in and of itself, was not evidence of a mental disease or defect that would excuse or justify his conduct in this case. Indeed, anyone can exhibit bizarre behavior and that alone is not a shield to criminal liability. (11T:60-7 to 15). For these reasons, the court properly determined that mitigating factor four simply did not apply to this defendant, nor was it supported by the record. A remand to reconsider this factor is not necessary or required.

CONCLUSION

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

Respectfully submitted,

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