
Supreme Court of New Jersey
DOCKET NO. 090662

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| STATE OF NEW JERSEY, | : | <u>Criminal Action</u> |
| Plaintiff-Petitioner, | : | On Certification Granted from a Final Order of the Superior Court of New Jersey, Appellate Division. |
| v. | : | |
| FRENCH G. LEE, | : | Sat Below: Hon. Lisa A. Firko, J.A.D. Hon. Avis Bishop-Thompson, J.A.D. Hon. Lorraine M. Augostini, J.A.D. |
| Defendant-Respondent. | : | |

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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TABLE OF CONTENTS

| | <u>PAGE</u> | |
|---|-------------|----|
| <u>PRELIMINARY STATEMENT</u> | 1 | |
| <u>STATEMENT OF FACTS AND PROCEDURAL HISTORY</u> | 4 | |
| A. <u>Factual Background.</u> | 4 | |
| B. <u>Introduction of Fingerprint Analysis.</u> | 6 | |
| C. <u>The Appellate Division’s Rulings.</u> | 9 | |
| <u>LEGAL ARGUMENT</u> | 13 | |
| <u>POINT I</u> | | |
| A HEARING ON FINGERPRINT EVIDENCE IS NEITHER REQUIRED NOR WARRANTED. | | 14 |
| A. <u>Because Fingerprint Evidence Has Long Been Treated As Reliable, Defendant Must Establish Some Material Change In Scientific Understanding About Its Reliability To Justify A Hearing.</u> | 14 | |
| B. <u>Defendant Failed To Make A Showing That Would Justify A New Hearing About The Reliability Of Fingerprint Evidence.</u> | 21 | |
| <u>POINT II</u> | | |
| THE PANEL INCORRECTLY ADDRESSED BOTH TRIAL ISSUES..... | | 28 |
| A. <u>The Trial Court Properly Exercised Its Discretion By Deciding Not To Voir Dire Jurors’ Opinions On The Reliability Of Print Evidence.</u> | 28 | |
| B. <u>The Trial Court Did Not Commit Plain Error In Allowing Babcock And Detective Burk To Testify About The Videos.</u> | 32 | |

PAGE

C. In Any Event, No Cumulative Error Supports Reversal Of
The Conviction. 38

POINT III

CARLTON WILL RESOLVE THE LEGALITY OF
DEFENDANT’S SENTENCE 41

CONCLUSION 43

TABLE OF AUTHORITIES

PAGE

CASES

Commonwealth v. Gambora, 933 N.E. 2d 50 (Mass. 2010) 24

Commonwealth v. Honsch, 226 N.E.3d 287 (Mass. 2024)..... 20

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)..... passim

Erlinger v. United States, 602 U.S. 821 (2024) passim

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)..... 15

Markham v. State, 984 A.2d 262 (Md. Ct. Spec. App. 2009)..... 21

People v. Daveggio, 415 P.3d 717 (Cal. 2018)..... 20

State v. Belton, 74 N.E.3d 319 (Ohio 2016)..... 20

State v. Biegenwald, 106 N.J. 13 (1987) 29

State v. Bragg, 260 N.J. 387 (2025) 37

State v. Burney, 255 N.J. 1 (2023) 14, 39

State v. Carlton, 480 N.J. Super. 311 (App. Div. 2024)..... 11, 12, 41

State v. Cary, 49 N.J. 343 (1967) 18

State v. Cerciello, 86 N.J.L. 309 (E. & A. 1914) 18

State v. Chavies, 247 N.J. 245 (2021) 14

State v. Favela, 323 P.3d 716 (Ariz. 2014)..... 20

State v. Fortin, 189 N.J. 579 (2007) 18

State v. Harris, 895 N.W.2d 592 (Minn. 2017)..... 20

| | |
|---|------------|
| <u>State v. Jenewicz</u> , 193 N.J. 440 (2008)..... | 15 |
| <u>State v. Jordan</u> , 147 N.J. 409 (1997) | 33 |
| <u>State v. Little</u> , 246 N.J. 402 (2021) | 8, 29, 30 |
| <u>State v. Lopez</u> , 78 A.3d 773 (R.I. 2013)..... | 31 |
| <u>State v. Macon</u> , 57 N.J. 325 (1971)..... | 38 |
| <u>State v. Maestas</u> , 299 P.3d 892 (Utah 2012)..... | 21 |
| <u>State v. Manley</u> , 54 N.J. 259 (1969)..... | 29, 30, 31 |
| <u>State v. Olenowski</u> , 253 N.J. 133 (2023) | passim |
| <u>State v. Olenowski</u> , 255 N.J. 529 (2023) | 16, 17, 23 |
| <u>State v. Pena</u> , 586 F.3d 105 (1st Cir. 2009) | 17, 18, 27 |
| <u>State v. Rosales</u> , 202 N.J. 549 (2010)..... | 15 |
| <u>State v. Rose</u> , No. K06-0545, 2007 Md. Cir. Ct. LEXIS 14 (Cir. Ct. Md. 2007)..... | 21 |
| <u>State v. Singh</u> , 245 N.J. 1 (2021) | 36 |
| <u>State v. T.J.M.</u> , 220 N.J. 220 (2015) | 38 |
| <u>State v. Wakefield</u> , 190 N.J. 397 (2007)..... | 38 |
| <u>State v. Watson</u> , 254 N.J. 558 (2023)..... | passim |
| <u>State v. Weaver</u> , 219 N.J. 131 (2014)..... | 38 |
| <u>State v. Williams</u> , 113 N.J. 393 (1988) | 32 |
| <u>State v. Winder</u> , 200 N.J. 231 (2009) | 29 |
| <u>United States v. Aceituno</u> , 699 F. Supp. 3d 179 (D.N.H. 2023) | 24 |

United States v. Baines, 573 F.3d 979 (10th Cir. 2009)..... 19

United States v. Crisp, 324 F.3d 261 (4th Cir. 2003)..... 19

United States v. Herrera, 704 F.3d 480 (7th Cir. 2013) 19

United States v. Llera Plaza, 179 F. Supp. 2d 492 (E.D. Pa. 2002),
vacated on reconsideration, 188 F. Supp. 2d 549 (E.D. Pa. 2002) 21

United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004)17, 19, 27

United States v. Sherwood, 98 F.3d 402 (9th Cir. 1996)..... 19

United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) 19

United States v. Straker, 800 F.3d 570 (D.C. Cir. 2015)..... 19

United States v. Ware, 69 F.4th 830 (11th Cir. 2023)..... 19, 24

United States v. Wright, No. 19-230,
2022 WL 3928391, at *6-10 (E.D. Pa. Aug. 31, 2022)..... 24

STATUTES

N.J.S.A. 2C:18-2(a)(1)..... 6

N.J.S.A. 2C:30-3(a)..... 9

N.J.S.A. 2C:43-6(b)..... 41

N.J.S.A. 2C:43-7 41

N.J.S.A. 2C:43-7(a)(4)..... 41

N.J.S.A. 2C:44-3 41

OTHER AUTHORITIES

Bradford T. Ulery et al., Accuracy and Reliability of Forensic Latent Fingerprint Decisions, 108 Proceedings of the Nat’l Acad. of Scis. 19 (2011)..... 26

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Bradford T. Ulery et al., Repeatability and Reproducibility of Decisions by Latent Fingerprint Examiners, 7 *PLOS ONE* 3 (2012) 26

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National Academy of Sciences, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2009) 6, 22

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President’s Council of Advisors on Science and Technology, Strengthening Forensic Science in the United States: A Path Forward (2016) 6, 23

Pressler & Verniero, Current N.J. Court Rules,
cmt. 1.2 on R. 1:8-3 (2021) 29

RULES

N.J.R.E. 104 39

N.J.R.E. 403 33

N.J.R.E. 602 33, 34

N.J.R.E. 701 33, 36

N.J.R.E. 701(a) 34

N.J.R.E. 702 15

R. 1:8-3 29

TABLE OF APPENDIX

Supreme Court Order Granting State’s Petition for Certification,
September 16, 2025..... Psa1

Defendant’s Rule 2:6-11(d) letter re: State v. Carlton,
March 10, 2025Psa2-3

State’s Rule 2:6-11(d) response letter re: State v. Carlton,
March 14, 2025Psa4-5

Igor Pacheco et al., Miami-Dade Research Study for the
Reliability of the ACE-V Process: Accuracy & Precision
in Latent Fingerprint Examinations (2014).....Psa6-84

TABLE OF CITATIONS

Db – Defendant’s Appellate Division brief
Da – Defendant’s Appellate Division appendix
Pb – State’s Appellate Division brief
Pa – State’s Appellate Division appendix
Ab – Dr. Adele Quigley-McBride Appellate Division amicus brief
IPAb – The Innocence Project Appellate Division amicus brief
Drb – Defendant’s Appellate Division reply brief
PAb – State’s Response to Dr. Adele Quigley-McBride Appellate Division amicus
brief
PIPAb – State’s Response to Innocence Project Appellate Division amicus brief
Paa – State’s Appellate Division amicus appendix
Pc – State’s petition for certification
Ppa – State’s petition for certification appendix
Psa – appendix to this supplemental brief
1T – transcript of motion, February 28, 2023
2T – transcript of jury selection, February 28, 2023
3T – transcript of trial, March 1, 2023
4T – transcript of trial, March 7, 2023
5T – transcript of trial, March 8, 2023
6T – transcript of trial, March 14, 2023
7T – transcript of trial, March 15, 2023
8T – transcript of sentencing, May 12, 2023
9T – transcript of sentencing, May 26, 2023
PSR – Pre-sentencing report

PRELIMINARY STATEMENT

New Jersey courts have allowed the admission of fingerprint analysis for more than a century. And courts around the country have similarly recognized that this kind of evidence is reliable, probative, and precisely of the type that a factfinder can consider. It should thus come as no surprise that a legion of case law from both state and federal jurisdictions allows fingerprint evidence to come before a jury without any need for a Daubert (or a Daubert-like) hearing, in the absence of new scientific research calling such evidence into question.

This case should have been yet another in that long series. As it often does, the State in this case sought to admit fingerprint testimony. And although defendant objected to that testimony, he agreed to forgo a hearing on that evidence in the trial court. The trial court sensibly declined to hold a hearing that defendant was not requesting, and it admitted the fingerprint evidence. While that should have been the end of the matter, the Appellate Division reversed and ordered a remand to conduct the very evidentiary hearing that even defendant himself had elected to forgo, regarding evidence that has long and commonly been used in our State. In the panel's view, State v. Olenowski compelled that result and forced the State to go through the time and expense of holding a hearing to establish what courts have already long recognized—that fingerprint analysis is sufficiently reliable to go before the factfinder.

But the Appellate Division badly misread Olenowski. In Olenowski, this Court imported the Daubert standard into New Jersey criminal jurisprudence. At the same time, this Court specifically recognized that when an existing methodology has previously been accepted as reliable, courts need not suddenly hold expensive and time-consuming Daubert hearings about those established methods unless a defendant establishes a sufficient change in the scientific understanding that undermines the method's reliability. But defendant here came nowhere close to making that showing—which is why no other court has barred the introduction of fingerprint evidence on such Daubert-based grounds. And the panel below did not suggest otherwise, rendering its opinion fatally flawed.

Not only should this Court reverse the Appellate Division's misreading of Olenowski and its grave misapplication to fingerprint analysis, it should also reverse two other errors the panel made in vacating defendant's convictions. First, the panel ruled that the trial court abused its discretion by declining to ask jurors at voir dire if "fingerprint analyses are reliable." But there was nothing close to abuse of discretion here: the trial court's ruling properly protected its evidentiary gatekeeping function, and ensured defendant did not use voir dire to improperly influence the jury about the reliability of fingerprint analysis.

Second, the Appellate Division found that the trial court admitted video-

narration testimony that it should have excluded under State v. Watson. But defendant did not object to that testimony when it was offered, meaning that further review should only have been for plain error. And there was no error (plain or otherwise) here. The relevant testimony was about an undisputed fact—that the two burglaries captured on video were committed by the same individual. Watson itself recognized that such video-narration evidence is proper in such circumstances. And given that the fact was undisputed, it surely could not have affected defendant’s substantial rights.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

A. Factual Background.

At about 4:00 a.m. on September 28, 2018, an intruder broke into the Wing King restaurant in Moorestown. Michael Babcock, the owner, arrived after receiving a notification from his security company. (5T7-1 to 17). Babcock reviewed the store's security footage, which revealed that the intruder climbed through the kitchen window near the pizza ovens, walked to the cash-register area, stole an unsecured bag of cash-register change money from atop a safe, and left. (5T9-11 to 10-13, 12-15 to 22, Pa1 at 00:31-00:48; Pa2 at 00:11-00:21).

Moorestown Detective Jason Burk responded to Wing King about thirty minutes later. (5T32-6 to 33-6). Burk testified that based on the video footage, the intruder "reached underneath" the cash register, "grabbed a bag[,] and walked out." (5T35-10 to 20; Pa1 at 00:37-00:48). At the scene, Burk detected a latent fingerprint on the face of a pizza oven, which he photographed, scaled, and processed. (5T36-12 to 37-10, 41-5 to 42-21; Pa3).

Two days later, overnight on September 30, 2018, the security company notified Babcock of a second break-in. (5T15-3 to 8). Babcock testified based on that night's footage that "the same individual ... decided to come back," but

¹ Because these sections are closely related, they are presented together for this Court's convenience.

he did not recognize the intruder. (5T16-21 to 17-3; Pa4 at 00:37-00:48). He noted that the intruder returned to the cash-register area but, this time, could not steal the change money because Babcock had precautionarily secured the change bag inside the safe. (5T18-11 to 19-25; Pa4 at 00:37-00:42; Pa5 at 00:04-00:30).

Detective Burk again responded to Wing King and reviewed the surveillance footage. He saw the intruder, without gloves, lift the cash register and fail to open it. (5T51-9 to 20, 53-10 to 24, 56-12 to 18; Pa5 at 00:04-00:30; Pa6). He also noted that in both videos, the intruder wore a distinctive “two-tone sweatshirt” with “dark-colored sleeve[s]” and a “light-colored chest and hood area.” (5T66-13 to 24, 67-11 to 19). And he noticed, in both videos, a “black object” on the intruder’s hip that “appeared to be a cell phone” or cell-phone case. (5T53-25 to 54-13, 67-20 to 68-22).

Examining the bottom of the cash register, Detective Burk retrieved four latent fingerprints. (5T63-1 to 8; Pa6). He submitted those prints, plus the September 28 print, to the State Biometric Unit Lab for comparison within the Automated Fingerprint Identification System (AFIS), the database of previously collected fingerprint samples—or, “exemplar prints”—maintained by the State. (5T63-19 to 15). The Lab retrieved defendant’s exemplar prints from AFIS, and both the latent and exemplar prints were provided to Burlington County Prosecutor’s Office Lieutenant Michael Wiltsey. (6T50-24 to 51-4). Wiltsey

then performed the fingerprint analysis called ACE-V, which stands for its four steps: Analysis, Comparison, Evaluation, and Verification. In doing so, Wiltsey concluded that each of the five latent prints originated from the same source as defendant's exemplar prints. (6T46-5 to 14, 52-23 to 56-21).

B. Introduction of Fingerprint Analysis.

In 2019, defendant was indicted in Burlington County on two counts of third-degree commercial burglary, N.J.S.A. 2C:18-2(a)(1) (counts one and two). (Da1 to 2). Before trial, defendant moved to exclude Lieutenant Wiltsey's fingerprint-analysis testimony. At oral argument, he relied on two reports: a 2009 National Academy of Sciences report, Strengthening Forensic Science in the United States: A Path Forward (NAS Report), and a 2016 report by the President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (PCAST Report). (1T7-2 to 13-2). Based on those reports, defendant argued ACE-V is "subjective," insufficiently repeatable, and risks confirmation bias, making it unreliable and thus inadmissible. (1T6-2 to 13-13).

When questioned by the trial court, defendant admitted that "courts, including the Third Circuit, ha[ve] held that the ACE-V method is reliable," and he failed to cite any contrary case. (1T19-4 to 19). He also told the court that he intended to cross-examine Lieutenant Wiltsey using the two reports and did

not plan to present his own expert on the motion to exclude or at trial. (1T20-19 to 21-15). The State then informed the court (without contradiction from defense counsel) that the parties had agreed, given that the issue had “been litigated many times before,” to forgo “a full Rule 104 hearing,” including “any testimony.” (1T21-20 to 22-4); see also (1T22-2 to 4) (explaining that the State wanted to “amplify the record” with the parties’ agreement that the hearing was unnecessary “should someone be reviewing this in the future”).

The trial court (The Honorable Richard J. Nosella, J.S.C.) denied defendant’s motion to preclude fingerprint-analysis evidence. (1T19-20 to 22-12). It explained that fingerprint-analysis evidence “has been accepted by the New Jersey [c]ourts for over [one-hundred] years” and that “numerous federal courts have found expert testimony on fingerprint identification based on the ACE-V method to be sufficiently reliable.” (1T20-3 to 18). Because the State established ACE-V’s ongoing reliability, and because defendant “presented [no]thing to the contrary,” including binding or persuasive precedent rejecting or questioning its reliability, the court admitted Wiltsey’s testimony. (1T22-5 to 12). The trial court further denied (in relevant part) defendant’s motion to preclude mention of a fingerprint match or identification. (1T29-2 to 8).

The matter proceeded to trial, and at voir dire, defendant requested that the court ask prospective jurors two related open-ended questions: “[d]o you

believe that fingerprint ... analyses are reliable,” and “why or why not?” (1T32-7 to 11). The State objected and argued that defendant’s proposed questions would improperly infuse the idea that jurors have “certain preconceived notions about the reliability of that evidence.” (1T32-10 to 33-2). He also pointed out that given the court’s expert-testimony instruction generally, “highlighting a specific narrow slice” of that testimony would be unnecessary. (1T33-11 to 20); see also (3T50-21 to 52-13; 31-19 to 33-10) (court’s expert testimony instruction). In response, defendant suggested that the open-ended questions be discussed at sidebar. (1T33-25 to 34-23). But the State explained that under State v. Little, 246 N.J. 402 (2021), “hearing multiple potential jurors discussing their thoughts on fingerprint evidence could potential[ly] indoctrinate jurors as to the outcome of the case.” (1T35-16 to 36-25). The court did not ask defendant’s proposed questions.

During the ensuing five-day trial, Lieutenant Wiltsey testified as an expert in fingerprint collection, preservation, comparison, and identification. (6T18-14 to 17, 21-11 to 13). He generally explained the ACE-V method and then demonstrated the specific procedure on each latent fingerprint, beginning with the four September 30 prints. (6T31-7 to 45-7). In total, Wiltsey found (1) twenty matching points of identification between a September 30 print and the

exemplar of defendant's right middle finger;² (2) eighteen matching points between a September 30 print and defendant's left ring finger; (3) nineteen matching points between a September 30 print and defendant's left middle finger; (4) twenty matching points between a September 30 print and defendant's right middle finger; and (5) twenty-six matching points between the September 28 print and defendant's right thumb. (6T55-7 to 73-13).

The jury ultimately convicted defendant of both third-degree burglary charges. (7T42-24 to 43-13; Da3). Based on the evidence presented to the jury, at sentencing the court found defendant guilty under Warrant 2018-183-0323, for a disorderly persons theft offense, N.J.S.A. 2C:30-3(a). (8T29-2 to 30-1). The trial court sentenced defendant to two concurrent discretionary extended prison terms of six years on each count with an extended two-year period of parole ineligibility, plus restitution and all statutory fines. (8T41-2 to 46-25; Da4 to 6). Two weeks later, the court held another hearing to "clarify some of [its] rulings" and further explain its reasoning. (9T3-18 to 23).

C. The Appellate Division's Rulings

On appeal, defendant raised several arguments. He contended that the trial court erred both by admitting Lieutenant Wiltsey's testimony and by

² As part of Wiltsey's demonstration for the jury, he identified fourteen more matching points, totaling thirty-four matching points between defendant's right middle finger and one of the September 30 latent prints. (6T67-7 to 68-8).

declining to ask potential jurors at voir dire, “Do you believe that fingerprint analyses are reliable, why or why not?” (Db7 to 39; Ppa25). Defendant also argued that Babcock and Detective Burk improperly testified that the surveillance footage showed the same intruder on both nights, (Db39 to 43)—testimony to which defendant did not object at trial, (5T16-21 to 17-3, 53-25 to 54-25, 66-1 to 69-6). Finally, on reply, he challenged the constitutionality of New Jersey’s persistent-offender statute under Erlinger v. United States, 602 U.S. 821 (2024). (Db44 to 49, Drb12 to 15).

The State responded that the trial court properly addressed the fingerprint-analysis evidence. It contended that the court rightly denied defendant’s motion to exclude—both substantively and because the parties agreed that a hearing was unnecessary. (Pb8-18). The State also maintained that the trial court properly exercised its discretion when it declined to voir dire prospective jurors on the reliability of fingerprint evidence. (Pb19 to 22). The State further argued that Babcock and Detective Burk testified properly because, as defendant conceded, there was no dispute as to whether the intruder on both nights was the same person. (Pb33 to 38). Finally, the State contended that the trial court properly exercised its discretion in imposing an extended-term sentence and discretionary

parole disqualifier in light of Erlinger.³ (Pb39 to 48).

The Appellate Division, in an unpublished opinion, reversed defendant's convictions. (Ppa1-37). The panel first held that the trial court abused its discretion by permitting admission of Lieutenant Wiltsey's fingerprint-related testimony "without the fundamental principles of ACE-V methodology being challenged beforehand," because that decision "fail[ed] to sufficiently adhere to" Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and State v. Olenowski, 253 N.J. 133 (2023) (Olenowski I). (Ppa24). The panel held that the trial court's rationale that fingerprint evidence "has been used for over 100 years" and "other courts have determined it to be reliable" did "not comport" with Olenowski and thus ordered the trial court "to conduct a Daubert hearing and to provide a detailed and complete factor-by-factor Daubert analysis." (Ppa25).

The panel also made trial-related holdings. It found that the trial court's failure to ask about fingerprint reliability during voir dire was also an abuse of

³ After briefing concluded, the Appellate Division published State v. Carlton, 480 N.J. Super. 311 (App. Div. 2024), holding Erlinger errors are not subject to plain- or harmless-error review, but permitting a jury to find persistent-offender elements on remand. In a Rule 2:6-11(d) letter, defendant argued that Carlton justified a remand for non-persistent-offender resentencing. (Psa2-3). The State informed the Appellate Division that it had petitioned for certification in Carlton and that the panel should affirm defendant's sentence under a plain-error standard. (Psa4-5). This Court has since granted the State's Carlton petition, and it heard oral argument in September 2025. Its decision is pending.

discretion—“a ‘serious error’ and a ‘significant component of the deficiencies’ at this trial in light of the significance of the fingerprint evidence.” (Ppa29). The panel directed the trial court, on remand, to question prospective jurors “on whether their knowledge, and perhaps preconceived notions about fingerprint evidence, may impact their ability to be fair and impartial jurors.” (Ppa29-30). And without discussing the plain-error review standard, the panel found that the trial court erred by admitting Babcock’s and Detective Burk’s testimony “that the suspect was the same individual depicted in the surveillance video footage” both nights, emphasizing that the intruder’s identity was a “key” issue at trial. (Ppa30-36). The panel also held that “[t]he cumulative effect of the inadmissible testimonies deprived defendant of a fair trial” and required that defendant’s convictions be vacated. (Ppa36). Finally, in a footnote, the panel held that defendant’s sentence violated Erlinger and Carlton. (Ppa36-37 n.4).

This Court granted the State’s petition for certification. (Psa1).

LEGAL ARGUMENT

This Court should reverse the Appellate Division's decision on several different grounds. As an initial matter, the trial court properly declined to hold a Daubert hearing before admitting fingerprint evidence. Decades of precedent in New Jersey and across the country recognizes the reliability and admissibility of this evidence. Defendant also presented no scientific studies that materially undermined that longstanding consensus and even conceded before the trial court that a full hearing was unnecessary to determine whether the evidence was admissible. Thus, on this record, a costly and time-consuming Daubert hearing is both unnecessary and unwarranted.

The Appellate Division also erred in its other holdings. The trial court did not abuse its discretion when, as part of voir dire, it declined to ask jurors about their views on the reliability of fingerprint evidence. That reasonable decision respected the judge's gatekeeping role on evidentiary issues and prevented voir dire from crossing the line from inquiry to advocacy. Nor did the trial court commit error (plain or otherwise) when it allowed unobjected-to testimony, based on the surveillance videos, that the intruder was the same person on both nights. That fact was undisputed at trial, and this Court's precedents recognize that reaffirming such an undisputed point does not invade the jury's role. In any event, neither alleged error—separately or in tandem—justified a new trial.

POINT I

A HEARING ON FINGERPRINT EVIDENCE
IS NEITHER REQUIRED NOR WARRANTED.

The panel incorrectly ordered a Daubert hearing on fingerprint evidence. If previously approved evidence is challenged, Olenowski requires a hearing only where the challenging party presents evidence of a material change in scientific reliability. That test applies here and should resolve the case. All jurisdictions considering the admissibility of fingerprint evidence—including New Jersey, for the past century—have consistently found it sufficiently reliable to be admissible in court. Yet defendant came nowhere close to challenging that evidence in a way that would trigger the need for a Daubert hearing. Indeed, defendant explicitly agreed to forgo a Rule 104 hearing since the admissibility of fingerprint evidence in general—and the ACE-V method specifically—is long settled and continuously upheld. That is fatal.

A. Because Fingerprint Evidence Has Long Been Treated As Reliable, Defendant Must Establish Some Material Change In Scientific Understanding About Its Reliability To Justify A Hearing.

This Court reviews a trial court’s evidentiary decisions under an abuse-of-discretion standard. State v. Burney, 255 N.J. 1, 20 (2023). “‘A court abuses its discretion when its decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.’” Ibid. (quoting State v. Chavies, 247 N.J. 245, 257 (2021)).

Under the New Jersey Rules of Evidence, an expert witness qualified “by knowledge, skill, experience, training, or education” may testify “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact” in understanding the evidence. N.J.R.E. 702. This Court has further explained that expert testimony is admissible under N.J.R.E. 702 when

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

[State v. Rosales, 202 N.J. 549, 562 (2010) (quoting State v. Jenewicz, 193 N.J. 440, 454 (2008)).]

This Court construes these requirements “liberally” based on the Rule’s “tilt in favor of the admissibility of expert testimony.” Ibid.

In Olenowski I, this Court provided further guidance on how to apply this principle. This Court shifted the standard of admissibility governing scientific testimony at criminal trials from its “general acceptance in [a] particular field,” outlined in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), to a “Daubert-type” standard. 253 N.J. at 139, 151-52. Daubert, in turn, requires only “appropriate validation—i.e., ‘good grounds’” for the expert’s opinion, not general acceptance in the field. 509 U.S. at 590. And this Court explained in Olenowski I that where an expert will testify to “scientific knowledge” that “will

assist the trier of fact to understand or determine a fact in issue,” Daubert requires a court to analyze four non-exhaustive factors:

(1) whether the scientific theory or technique can be, or has been, tested; (2) whether it “has been subjected to peer review and publication”; (3) “the known or potential rate of error” as well as the existence of standards governing the operation of the particular scientific technique; and (4) general acceptance in the relevant scientific community.

[Olenowski I, 253 N.J. at 147 (quoting Daubert, 509 U.S. at 593-94).]

Importantly, however, this Court also clarified a limit to Olenowski I’s holding: “[n]othing” in this Court’s decision “disturb[ed] prior rulings” based on the previous standard of general acceptance. Id. at 154. That is, while “new types of evidence should be assessed under the new standard” of reliability, any future “challenges to the admissibility of evidence that has previously been sanctioned” would require the challenger to show that “the scientific reliability underlying the evidence has changed.” Ibid. And when this Court applied its new reliability standard to Drug Recognition Experts in Olenowski II, the Court reiterated that “a change in the law” of admissibility is appropriate only when “new scientific research emerges that calls into question the wisdom” of prior precedent. State v. Olenowski, 255 N.J. 529, 582-83 (2023) (Olenowski II).

This limit on the need for re-examining existing principles makes sense. At Daubert hearings, the parties “present all relevant scientific and technical

evidence and published studies.” Id. at 582. And as this Court recognized, such presentations necessarily entail enormous records and accompanying efforts by parties and experts “to sift through the documentary exhibits presented.” Ibid. Since such a hearing requires the State and its taxpayers to undergo an enormous undertaking, courts should demand an exacting showing before requiring one. See Olenowski I, 253 N.J. at 154; Olenowski II, 255 N.J. at 582-83. Accord State v. Pena, 586 F.3d 105, 111 n.4 (1st Cir. 2009) (recognizing that trial judges do not abuse their discretion “by dispensing with a Daubert hearing if no novel challenge is raised” to the reliability of fingerprint evidence). Requiring every single long-approved piece of expert evidence to undergo new scrutiny in light of Olenowski I’s adjustment of methodology would be hugely burdensome.

Olenowski itself illustrates the significant burdens that can result if courts are too stringent about requiring Daubert hearings for long-accepted techniques. That case began with a routine traffic stop in February 2015, yet Olenowski II was not decided until November 2023, see id. at 561; the Special Master proceedings alone lasted forty-two days and included testimony from sixteen witnesses and hundreds of exhibits. Id. at 563. Similarly, in United States v. Mitchell, 365 F.3d 215, 220, 222 (3d Cir. 2004), the Third Circuit described the district court’s five-day Daubert hearing on whether fingerprint testimony was admissible which included testimony from eleven expert witnesses yielding

“nearly one[-]thousand pages of testimony and a similarly voluminous array of exhibits.” Before requiring such extensive proceedings for a long-accepted technique, courts should at a minimum require the challenger to establish some substantial showing that actually calls the established practice into question.

That principle applies here, where defendant is challenging fingerprint analysis. New Jersey courts have routinely admitted fingerprint evidence for over a century. See, e.g., State v. Cerciello, 86 N.J.L. 309, 313-15 (E. & A. 1914). And throughout the years, courts have reaffirmed the “unquestioned value” of such evidence, State v. Cary, 49 N.J. 343, 355 (1967), as well as its reliability, see State v. Fortin, 189 N.J. 579, 602 n.12 (2007) (“[T]he more points of comparison[,] the more reliable a fingerprint identification.”). If defendant wished to call that established practice—endorsed even by this Court—into question, he at a minimum needed to present cogent and material evidence about it that raised a genuine question about its reliability.

That is even truer given that New Jersey’s longstanding treatment of fingerprint evidence broadly accords with how numerous courts across the country have treated that evidence post-Daubert. These federal and state courts commonly find that trial judges need not hold a Daubert hearing before admitting such evidence. See, e.g., Pena, 586 F.3d at 110-11 (upholding trial court’s decision not to hold Daubert hearing before admitting fingerprint

testimony about the ACE-V method and recognizing consensus across jurisdictions on the method's reliability); United States v. Herrera, 704 F.3d 480, 485-87 (7th Cir. 2013) (finding no need for the trial judge to hold a Daubert hearing before admitting ACE-V fingerprint evidence); United States v. Spotted Elk, 548 F.3d 641, 663 (8th Cir. 2008) (finding Daubert hearing on print evidence unneeded where expert had extensive training and used acceptable methods). And federal courts have more generally recognized the reliability of fingerprint evidence, including its longstanding use. *See, e.g., United States v. Ware*, 69 F.4th 830, 847-48 (11th Cir. 2023) (collecting cases); United States v. Crisp, 324 F.3d 261, 266 (4th Cir. 2003) (same).⁴

The Third Circuit's decision in Mitchell is also instructive on this point. After an exhaustive analysis in a case where the district court had elected to hold a Daubert hearing, the Third Circuit held that fingerprint evidence "clear[ly] ... passes muster" under Daubert. 365 F.3d at 244. Among other findings, the court concluded that fingerprint analysis produces testable hypotheses, was

⁴ Even in those rare situations where trial judges have elected to engage in this kind of Daubert analysis, appellate courts have had no difficulty upholding their decisions to admit the evidence. *See, e.g., United States v. Straker*, 800 F.3d 570, 631-32 (D.C. Cir. 2015) (finding trial court did not abuse its discretion in admitting ACE-V print); United States v. Baines, 573 F.3d 979, 989-92 (10th Cir. 2009) (finding no abuse of discretion in admitting fingerprint evidence); United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996) (finding no error in admitting fingerprint evidence).

independently verifiable, rarely produced false positives, and was “generally accepted within the forensic[-]identification community ..., as demonstrated by the results of the FBI’s survey of state agencies.” Id. at 235-41. While the court declined to impose “a categorical rule,” it provided “strong guidance,” explicitly stating that there is no requirement to hold “extensive Daubert hearings in every case involving latent fingerprint evidence.” Id. at 246. It also explained that a court may limit “the scope of a Daubert hearing to novel challenges to the admissibility of latent fingerprint identification evidence—or even dispens[e] with the hearing altogether if no novel challenge was raised.” Ibid.

State high courts agree. See, e.g., Commonwealth v. Honsch, 226 N.E.3d 287, 304-05 (Mass. 2024) (noting the “established” reliability of ACE-V and approving judicial notice of same); People v. Daveggio, 415 P.3d 717, 748-50 (Cal. 2018) (affirming denial of hearing because fingerprint evidence “has for many years been universally accepted”); State v. Harris, 895 N.W.2d 592, 607-08, 608 n.36 (Minn. 2017) (naming fingerprints as a “most obvious” example of reliable circumstantial evidence as it is “based on sound science”); State v. Belton, 74 N.E.3d 319, 346-47 (Ohio 2016) (finding fingerprint-expert testimony properly admitted because “numerous federal and state courts have reached the same conclusion”); State v. Favela, 323 P.3d 716, 718-19 (Ariz. 2014) (“[E]xpert testimony on matching fingerprint evidence is admissible

because it is reliable.”); State v. Maestas, 299 P.3d 892, 934-36 (Utah 2012) (affirming admission of “widely accepted” fingerprint testimony).

Tellingly, a scholar recently reviewed 316 post-Daubert state and federal cases examining the admissibility of fingerprint evidence and found that not a single jurisdiction treats such evidence as inadmissible; the only two trial-court rulings concluding the opposite were reconsidered or vacated. See Brandon L. Garrett, Judging Fingerprint Experts, Duke L. Sch. Pub. L. & Legal Theory Series, at 6, 13-14, 36-37 (2024), <https://tinyurl.com/w5xsamy6>, (Ppa75, 76-77, 78-79).⁵ Given that Olenowski I made clear it was not calling into question the very sorts of expert evidence that had long and widely been approved absent a new evidentiary showing calling it into question, the widespread acceptance across 316 post-Daubert state and federal cases is striking indeed.

B. Defendant Failed To Make A Showing That Would Justify A New Hearing About The Reliability Of Fingerprint Evidence.

Because fingerprint evidence enjoys a longstanding record of reliability

⁵ See United States v. Llera Plaza, 179 F. Supp. 2d 492 (E.D. Pa. 2002), vacated on reconsideration, 188 F. Supp. 2d 549, 575 (E.D. Pa. 2002) (ultimately finding ACE-V “sufficiently reliable” to “satisfy[] the requirements of Rule 702” under Daubert); State v. Rose, No. K06-0545, 2007 Md. Cir. Ct. LEXIS 14 (Cir. Ct. Md. 2007) (Ppa80-95) (subsequently withdrawn); see also Markham v. State, 984 A.2d 262, 276 (Md. Ct. Spec. App. 2009) (recognizing “the long-standing consensus that fingerprint evidence is reliable, the absence of any suggestion that the ACE-V method of identification differs from that used in the past, and the lack of any reported decision holding that the ACE-V method is unreliable”).

and acceptance across courts, defendant was required to make a particularly sufficient showing that something had materially changed and that a Daubert hearing was needed. Instead, defendant entirely failed to show—and the Appellate Division failed to find—that the scientific reliability underlying fingerprint evidence has changed. See Olenowski I, 253 N.J. at 154. So no hearing is warranted.

Before the trial court, defendant expressly declined to present fingerprint-evidence testimony and agreed to forgo a Rule 104 hearing. Instead, he elected to support his argument solely with the 2009 NAS and 2016 PCAST Reports. (1T20-25 to 22-4). But those reports did nothing to carry his burden. He even admitted (as he must) that after the release of those reports approximately ten to fifteen years ago, no case had deemed fingerprint evidence unreliable. (1T19-4 to 19). And those reports did not displace the strong scientific consensus on the reliability of fingerprint evidence in such a way as to call into question whether the evidence is so problematic that it cannot even be presented to the factfinder.

Indeed, the PCAST Report concludes that “latent fingerprint analysis is a foundationally valid” forensic method that nonetheless can yield false positives on some occasions. PCAST Report at 9-10, <https://tinyurl.com/mn2dr6pn>; see also Db19 (defendant’s admission before the Appellate Division that the PCAST Report acknowledged “some foundational validity” in fingerprint analysis);

PCAST Report at 101-02, <https://tinyurl.com/mn2dr6pn>. (Ppa98 to 99). The report did not itself quantify that error rate, and the two studies it cited that had attempted such a quantification reported findings that cut against defendant: one estimated that the false positive rate was 1 in 604 (i.e., that the forensic method had over 99% accuracy), and the other estimated that the false positive rate was 1 in 24 (i.e. greater than 95% accuracy). See id. at 9-10 & n.24. By comparison, Olenowski II described a different forensic methodology as having a “high accuracy rate” when data showed that it was between 91% and 95% accurate. See 255 N.J. at 601. Defendant is free to emphasize the error rate in questioning an expert, but this high accuracy rate is no basis to dispute the very admissibility of this evidence or demand an unprecedented hearing.

The NAS Report hardly meets defendant’s burden either. That report (which, again, is sixteen years old, has not led courts to change their view about this evidence in the years since, and which even defendant did not say in the trial court was a basis for a new hearing) discusses how fingerprint analysis can sometimes have errors, and it rejects the claim that the method’s error rate is “zero.” NAS Report at 142, <https://tinyurl.com/46k68pym>. (Ppa103). But it does not show that these error rates are high enough that one should question whether the testimony is so unreliable that it cannot even go before a factfinder. As Massachusetts’s highest court explained, the NAS Report did not “question

the underlying theory which grounds fingerprint evidence” or “conclude that courts should no longer admit it,” and the report even “states ... there is scientific evidence supporting the theory that fingerprints are unique to each person and do not change over a person’s life.” Commonwealth v. Gambora, 933 N.E. 2d 50, 57-60 (Mass. 2010); see also NAS Report at 142-45, <https://tinyurl.com/46k68pym>. (Ppa103 to 106). That is no basis for a hearing on this kind of evidence either, let alone in a case in which defendant did not even ask for the hearing.

Accordingly, to the extent that any aspects of the PCAST and NAS Reports “cast doubt on the error rate of fingerprint analysis and comparison,” that criticism “go[es] to the weight that ought to be given fingerprint analysis, not to the legitimacy of the practice as a whole.” Ware, 69 F.4th at 848; see also id. (recognizing these reports make clear that “[t]he science could not possibly have been so unreliable as to be inadmissible”). And even since those reports were issued, the uniform consensus under Daubert deeming fingerprint evidence reliable has not wavered. See, e.g., United States v. Aceituno, 699 F. Supp. 3d 179, 189-93 (D.N.H. 2023); United States v. Wright, No. 19-230, 2022 U.S. Dist. LEXIS 156883, at *25-29 (E.D. Pa. Aug. 31, 2022). (Ppa117 to 127). Indeed, the only contrary authority of which the State is aware is the panel’s opinion here. (Ppa1 to 37); see R. 1:36-3. Because the science is unchanged, a

Daubert hearing under Olenowski would waste judicial and party resources.

Nor would any other evidence help defendant. Before the Appellate Division, defendant cited studies that he never presented to the trial court, including several purporting to undermine the accepted reliability of fingerprint-comparison techniques. (See Da10-76). But the Appellate Division neither cited nor implicitly referenced any of these studies in its opinion, noting only the PCAST and NAS Reports. (See generally Ppa1-37). And for good reasons. For one, no one can fault the trial court for failing to hold a Daubert hearing to respond to criticisms never presented to it. And more fundamentally, beyond the avalanche of jurisprudence from across the country upholding admissibility of this evidence, scientific studies continue to confirm that ACE-V is a reliable method of fingerprint analysis. See, e.g., Philip J. Kellman et al., Forensic Comparison and the Matching of Fingerprints: Using Quantitative Image Measures for Estimating Error Rates through Understanding and Predicting Difficulty, 9 PLOS ONE 5, 1, 10-13 (2014) (despite a three-minute time limit, fifty-six fingerprint examiners were “highly accurate” with a false-positive rate of 3%; the authors “suspect[ed] that error rates in forensic laboratory settings could well be lower”); Igor Pacheco et al., Miami-Dade Research Study for the Reliability of the ACE-V Process: Accuracy & Precision in Latent Fingerprint Examinations, at 1 (2014) (finding that a 3% false-positive rate by participants

from federal, state, and local law-enforcement agencies over 4,500 examinations constituted “a high degree of accuracy”⁶; Jason M. Tangen et al., Identifying Fingerprint Expertise, 22 Psychol. Sci. 8, 995 (2011) (concluding that trained, qualified examiners were far more accurate (0.68% false-positive rate) than novices with little training (55.18% false-positive rate)).⁷ (Pa161 to 164, 175 to 188; Psa6 to 85).

Because defendant failed to show that “the scientific reliability underlying [fingerprint] evidence has changed” and agreed to waive any Rule 104 hearing, there was no independent basis for the Appellate Division to sua sponte order a

⁶ This is an unpublished report conducted by the Miami-Dade Police Department Forensic Services Bureau using funding awarded by the National Institute of Justice within the United States Department of Justice. (Psa6).

⁷ The evidence goes on and on. See Matthew B. Thompson et al., Human Matching Performance of Genuine Crime Scene Latent Fingerprints, Law & Hum. Behav. at 1 (2014) (likewise finding that “qualified, court-practicing fingerprint experts were exceedingly accurate at discriminating prints compared with novices”); Bradford T. Ulery et al., Accuracy and Reliability of Forensic Latent Fingerprint Decisions, 108 Proceedings of the Nat’l Acad. of Scis. 19, at 7733 (2011) (finding that after 17,121 decisions on fingerprint matches from an AFIS-style database, examiners made correct identifications 99.8% of the time, with a false-positive rate of 0.1%); Bradford T. Ulery et al., Repeatability and Reproducibility of Decisions by Latent Fingerprint Examiners, 7 PLOS ONE 3, 1 (2012) (finding after a seven-month interval, examiners repeated 92% of their decisions on mated pairs and 86% of non-mated pairs, and examiners reproduced others’ decisions on 87% of mated pairs and 80% of non-mated pairs); Bradford T. Ulery et al., Factors Associated with Latent Fingerprint Exclusion Determinations, Forensic Sci. Int’l 275, 65 (2017) (determining that after 3,730 valid responses, identifications were correct 99.9% of the time, with a false-positive rate of 0.2%). (Pa85 to 160, 165 to 174).

Daubert hearing. See Olenowski I, 253 N.J. at 154. Where “no novel challenge [i]s raised,” a trial court does not abuse its discretion by declining to hold such a hearing. See Mitchell, 365 F.3d at 246; Pena, 586 F.3d at 111 n.4. Defendant presented his criticisms of fingerprint evidence at trial: opening argument, closing argument, and cross-examination were the proper mechanisms for defendant to raise his concerns. The trial court cannot have erred (let alone abused its discretion) in declining to instead hold a hearing on the admissibility of this evidence that defendant never even requested. This Court should therefore reverse the panel’s order to conduct a brand new Daubert hearing under Olenowski I.

POINT II

THE PANEL INCORRECTLY ADDRESSED
BOTH TRIAL ISSUES.

The Appellate Division incorrectly found two further trial errors. First, the trial court did not abuse its discretion by declining to ask jurors' perceptions of fingerprint evidence during voir dire. And second, by allowing Babcock and Detective Burk to testify to the undisputed fact that the intruder on both nights was the same person, the trial court did not commit any error at all, let alone plain error. Regardless, neither error, separately or in tandem, warrants a new trial. The panel's decision should be reversed.

A. The Trial Court Properly Exercised Its Discretion By Deciding Not To Voir Dire Jurors' Opinions On The Reliability Of Print Evidence.

The trial court correctly opted not to ask defendant's proposed open-ended voir-dire question regarding potential jurors' beliefs regarding the reliability of fingerprint analysis—and certainly did not abuse its discretion in so choosing. The panel's contrary decision invaded the trial court's evidentiary gatekeeping function and requires asking a question that risks indoctrinating jurors through questioning suggesting some unreliability of fingerprint-analysis evidence. This Court should reverse this aspect of the panel's decision as well.

Trial courts are given “reasonable latitude when conducting voir dire and, therefore, a reviewing court's examination should focus only on determining

whether ‘the overall scope and quality of the voir dire was sufficiently thorough and probing to assure the selection of an impartial jury.’” State v. Winder, 200 N.J. 231, 252 (2009) (quoting State v. Biegenwald, 106 N.J. 13, 29 (1987)). One corollary of that principle is that a trial court’s discretion to deal “‘with requests for specific inquiries of prospective jurors in the voir[-]dire examination is subject to reversal only on a showing of prejudice in that the voir[-]dire examination failed to afford the parties an opportunity to select an impartial and unbiased jury.’” Little, 246 N.J. at 413-14 (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2 on R. 1:8-3 (2021)). And because voir dire seeks to empanel a fair jury, trial judges exercising their considerable discretion must police the process to ensure that attorneys do not use it “to indoctrinate, to persuade, [or] to instruct” the jury about “legal principles that may or may not be involved” in the case. State v. Manley, 54 N.J. 259, 280 (1969); see also Little, 246 N.J. at 414 (stating that voir dire may not “improperly indoctrinate jurors as to the outcome they should reach in a given case”).

In service of that goal, trial courts should “scrutinize the language of a question proposed by counsel” and are permitted “to reject or reformulate that question if it crosses the line from inquiry to advocacy.” Little, 246 N.J. at 417. Even where the topic of questioning is a “legitimate area of inquiry,” the question must be “neutral” and “non-partisan.” Id. at 419-20. So “questions on

subjects usually covered in a court's charge should be supervised carefully and rarely allowed." Manley, 54 N.J. at 270. This helps avoid questions that "pledge jurors to a point of view or a result before they have heard any evidence, argument of counsel[,] or instructions of the court." Id. at 280-81.

The trial court's decision here was well within its discretion. The trial court is, of course, the evidentiary "gatekeeper[] who make[s] decisions about the reliability of expert testimony," Olenowski I, 253 N.J. at 148; see also id. at 154. And the court thoughtfully acted as gatekeeper with respect to fingerprint evidence by (1) denying defendant's motion to exclude; (2) granting in part and denying in part defendant's motion to limit Lieutenant Wiltsey's testimony and requiring him to qualify his testimony to a reasonable degree of probability; and (3) reconsidering and vacating its decision on the motion to limit, allowing defendant to cross-examine Lieutenant Wiltsey on the scientific certainty of his findings.⁸ Against this backdrop, the court thus reasonably determined that defense counsel's attempts to question jurors on their views of fingerprint evidence "crosses the line from inquiry to advocacy." Little, 246 N.J. at 417. Indeed, to inquire about the reliability of fingerprint evidence (whether in open court or at sidebar) risked influencing or indoctrinating jurors on that subject,

⁸ The panel made no specific ruling on defendant's argument regarding the trial court's reconsideration of its decision on the motion to limit.

which the court had—properly within its gatekeeping function—already found to qualify as admissible evidence. See Manley, 54 N.J. at 280-81.

That is all the more true in light of the fact that the court’s voir dire as a whole was probing, and each juror answered a host of questions by the trial court before confirming that they could try the case fairly and impartially. (2T15-12 to 125-15). Moreover, the trial court issued the model jury charges on fingerprint evidence and expert testimony during both its opening and closing instructions (including that the jury was permitted to reject Lieutenant Wiltsey’s expert opinion), which sufficiently informed the jury on how to analyze the fingerprint testimony and evidence before it. Cf. State v. Lopez, 78 A.3d 773, 779-80 (R.I. 2013) (holding that discretion was properly exercised to restrict voir dire on “reliability of eyewitness testimony” because the eyewitness was subject to cross-examination and jury was informed “about factors affecting the reliability of eyewitness identifications” by defendant’s closing argument and court’s jury instructions). Given this Court’s repeated direction that “questions on subjects usually covered in a court’s charge should be supervised carefully and rarely allowed,” Manley, 54 N.J. at 270, the trial court’s decision to not additionally ask about the reliability of fingerprint evidence during voir dire was eminently sensible and within its allowed discretion.

The Appellate Division’s contrary conclusion failed to explain how the

trial court abused its discretion or undermined the selection of an impartial jury. (See Ppa25 to 30, Ppa36). Its analysis was instead limited to a conclusory statement that “[t]he [trial] court’s refusal to question jurors was a ‘serious error’ and a ‘significant component of the deficiencies’ at this trial in light of the significance of the fingerprint evidence.”⁹ (Ppa29). It was error to reach such a conclusion without even explaining how the jury, under the facts here, may not have been impartial. And given everything explained above regarding why the trial court acted properly, a conclusory appellate statement that this decision was both an “error” and a “serious” one cannot withstand scrutiny.

B. The Trial Court Did Not Commit Plain Error In Allowing Babcock And Detective Burk To Testify About The Videos.

The Appellate Division committed another trial error too, this time as to

⁹ The Appellate Division provided no citation for the “serious error” and “significant component of the deficiencies” language that appeared in quotation marks in its opinion. To the extent this language came from State v. Williams, 113 N.J. 393, 417 (1988), that case is distinguishable. There, this Court found a “serious error” where a trial court had refused to ask “whether a juror would automatically impose the death penalty on a defendant found guilty of rape and murder,” which it held was “a significant component of the deficiencies” in that case. Ibid. In doing so, it noted that since a jury, not only a judge, could impose the death penalty, the trial court erred by failing “to inquire into whether any juror could consider the mitigation evidence if it was established that defendant was guilty of rape and murder,” which, in its view, “denied counsel and the trial court the tools with which to insure that the jury panel could fairly undertake its role in this case.” Ibid. Here, by contrast, it is the trial court rather than the jury that has the gatekeeping role of determining the admissibility of fingerprint evidence. The concerns animating Williams thus have no bearing here.

narration of video evidence. In the decision below, the panel held that testimony by Babcock and Detective Burk violated State v. Watson, 254 N.J. 558 (2023), and N.J.R.E. 701, 602, and 403, reasoning that these witness provided improper narration of video evidence when they testified (in effect) that surveillance video showed the same person had committed both burglaries. Because defendant did not contemporaneously object to this testimony at trial, this can only be grounds for reversal if it constituted plain error. See, e.g., State v. Jordan, 147 N.J. 409, 421 (1997). And here there was no error, let alone plain error.

The Watson Court found that video-narration testimony can sometimes “improperly intrude on the jury’s domain,” including when that testimony is just “running commentary” by someone whose sole knowledge of events comes from the video, or (in some circumstances) where a witness offers opinion testimony on a disputed matter. 254 N.J. at 603. At the same time, Watson recognized that testimony about video evidence can be proper in many situations, as it “can help jurors better understand video evidence and aid them in determining a fact in issue.” Id. at 602-03. Watson described one such situation as when “an investigator who carefully reviewed a video in advance” testifies in order to “draw attention to a distinctive shirt ... which a jury might otherwise overlook.” Id. at 604; see also id. at 601 (explaining that such testimony satisfies the “‘perception’ and ‘personal knowledge’ requirements” in the rules if it describes

“what the video depicts.” (citing N.J.R.E. 602, 701(a)). Watson also drew an important distinction between a witness offering narration testimony about factual issues “that are reasonably disputed,” which this Court viewed as intruding on the jury’s role, and video-narration testimony about matters that are not in dispute (or not disputed in good faith), which the Court indicated was acceptable. Id. at 603-05.¹⁰

Applying those principles here shows that the testimony was proper. First, it was undisputed that the same intruder burglarized Wing King on both nights; the sole dispute was who that individual was. Indeed, during his entire opening statement, defense counsel emphatically claimed “[t]hat man”—singular—was not defendant, and defense counsel never suggested there were multiple intruders. (4T58-6 to 9); see id. (“That man is not this man. That man is white, possibly Hispanic, definitely not [B]lack. That man is not this man. You don’t need an expert to tell you that.” (emphases added)). And in closing, counsel reaffirmed that straightforward acknowledgement:

That man is not this man. You don’t need an expert to tell you that. The prosecutor wants you to disregard common sense and your own two eyes. As you saw on the video, that man is white, possibly Hispanic,

¹⁰ Although the Watson decision repeatedly refers to “investigators” and appears to apply predominantly to police witnesses and “defense investigators,” see id. at 599-604, nothing about Watson’s logic suggests that otherwise acceptable narration testimony would be become unacceptable if relayed by a lay witness rather than an investigator.

definitely not [B]lack, definitely not [defendant]. The police saw that too. They reviewed the video and they developed a suspect. That suspect was white, possibly Hispanic.

[(7T5-14 to 21) (emphases added).]

Thus under Watson, video-narration testimony confirming that undisputed point was appropriate, and it surely was not plain error for the court to permit such testimony. After all, it is hard to see how narration on an undisputed point could ever impact defendant's substantial rights.

This was the sole relevant video-narration testimony. Indeed, Babcock and Detective Burk each testified to their belief that the intruder was the same person on both nights. Babcock stated that when he reviewed the September 30 footage, it “looked like the same individual that was there two days prior decided to come back.” (5T16-23 to 25). And Detective Burk told the jury that the intruder on September 30 wore “the same dark-colored sleeve, light-colored chest-and-hood-area sweatshirt” as on September 28. (5T67-11 to 19). Burk further explained that “[t]he sweatshirt ... appear[ed] to be a two-tone sweatshirt—the sleeves appear[ed] to be a different color than the body area which also appear[ed] to be the exact same clothing worn two nights prior.” (5T66-13 to 19). Burk also stated that the intruder wore the “[s]ame black object,” which he believed to be a cellphone or cellphone case, on the “same right hip, same location.” (5T68-12 to 69-6). Their narration did not say who

the person was; the witnesses merely highlighted that both showed the same person.

Further, Detective Burk properly testified about the shirt and black object worn by the intruder. This was the kind of testimony Watson allowed when permitting video-narration testimony to “draw attention to a distinctive shirt ... which a jury might otherwise overlook.” Id. at 604. And the admission of that testimony accords with N.J.R.E. 701, which permits lay testimony that “(a) is rationally based on the witness’s perception; and (b) will assist in understanding the witness’s testimony or determining a fact in issue.” Applying that Rule, this Court has found that a trial court properly admits testimony about similarities between the suspect’s apparel and apparel worn by a person in a surveillance video. See State v. Singh, 245 N.J. 1, 19-20 (2021); see also ibid. (recognizing that the jury was free to discredit that testimony, but the testimony was nonetheless helpful and admissible). The distinctiveness testimony here was in that same vein.

And it bears repeating: although these witnesses discussed both apparel and the fact that (as was undisputed) the video showed the same person on both occasions, neither witness identified defendant as the culprit—let alone while discussing the video itself. In other words, the parties agree there was a burglar, that the same burglar appeared on both videos, and that the burglar had these

distinctive apparel items; instead, the trial boiled down to the identity of that burglar. And on that score, these witnesses left the jury to decide the “issue of identity,” which even the Appellate Division identified as “key in this case.” (Ppa35). Babcock testified three separate times that he did not recognize the intruder from the surveillance footage and did not know defendant. (5T12-6 to 10, 16-23 to 17-3, 18-23 to 25, 21-3 to 16). And Detective Burk did not testify at all regarding the suspect’s identity. The jury was the sole arbiter of whether defendant committed the burglaries. So narration was not error, and it certainly could not have affected his rights given what was actually disputed.

But even if introduction of this evidence was error, and even if (contrary to how this trial actually played out) it went to some issue relevant to the central issues before the jury, there would still be no plain error here. The “plain error” standard is even more stringent than the “harmless error” standard, so reversal is only permissible on plain error review when the error is sufficiently serious that it was “clearly capable of producing an unjust result.” State v. Bragg, 260 N.J. 387, 404 & n.4 (2025). And in this case, the five separate fingerprints matching defendant’s which linked him to both crimes precludes a plain-error finding on the Watson testimony. After all, even if this testimony was relevant to some disputed issue (and it was not), there is no serious argument in this trial that the absence of this evidence would have changed the result given the

overwhelming evidence that went to the jury on defendant's identity. The panel thus incorrectly concluded that the video-narration testimony of the two witnesses—together or separate—was reversible error.

C. In Any Event, No Cumulative Error Supports Reversal Of The Conviction.

The Appellate Division also incorrectly found that, even assuming these two errors existed, cumulative error justified reversal. “[T]he predicate for relief for cumulative error must be that probable effects of the cumulative error was to render the underlying trial unfair.” State v. Wakefield, 190 N.J. 397, 538 (2007). “If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair.” State v. T.J.M., 220 N.J. 220, 238 (2015) (quoting State v. Weaver, 219 N.J. 131, 155 (2014)). Therefore, without error, there is nothing “sufficient to raise a reasonable doubt as to whether the error[s] led the jury to a result it otherwise might not have reached.” State v. Macon, 57 N.J. 325, 336 (1971).

The Appellate Division's decision was ambiguous as to whether its ruling on these voir-dire or Watson errors—without the Daubert error—would justify reversal. The Appellate Division first stated that the trial court's “refusal to question jurors was a ‘serious error’ and a ‘significant component of the deficiencies’ at this trial in light of the significance of the fingerprint evidence.” (Ppa29). With respect to Watson, the panel determined that the “cumulative

effect of the inadmissible testimonies deprived defendant of a fair trial.” (Ppa35-36). In the next paragraph, it stated that “the court’s failure to conduct a N.J.R.E. 104 hearing on the reliability of the fingerprint[-]analysis evidence as required by Olenowski and Daubert constitutes reversible error,” (Ppa36), indicating that the lack of hearing alone would have sufficed to remand for a new trial. But then it expressed that “[i]n combination,” all three errors required a new trial, (Ppa36). The Appellate Division then compounded the ambiguity by neither analyzing harmlessness nor discussing prejudice in the context of a plain-error analysis—whether as to any error specifically or to its cumulative-error holding. Compare, e.g., Burney, 255 N.J. at 29-31.

In any event, whichever errors the panel thought combined to “cumulative error” in this case falls short. If this Court agrees that none of the three “errors” were actually error, then of course this Court need not reach any questions as to cumulative error—because there are no errors to consider in tandem. Moreover, if this Court agrees that the Appellate Division was wrong as to the admissibility of the expert evidence under Olenowski I, then cumulative error falls easily: as detailed above, given the overwhelming strength of the fingerprint evidence in this case, it is impossible to see how the trial errors could have prejudiced the outcome of this trial, even when they are taken in tandem. Finally, for the reasons already expressed, neither the Watson nor the voir-dire errors could have

rendered the trial unfair, together or separately, or with the purported Daubert error. See id. at 29. Cumulative error therefore does not apply, and the Appellate Division again erred in vacating this conviction.

POINT III

CARLTON WILL RESOLVE THE LEGALITY
OF DEFENDANT’S SENTENCE.

The final aspect of the Appellate Division’s decision—the legality of the sentencing enhancement—will rise or fall with this Court’s forthcoming opinion in Carlton. At sentencing, the trial court found that defendant fit the criteria of a persistent offender under N.J.S.A. 2C:44-3 and sentenced him to concurrent discretionary extended prison terms of six years, with two years of parole ineligibility on each count. (8T41-2 to 7, 43-13 to 21). The trial court explained that defendant was eligible for an extended term as a persistent offender under N.J.S.A. 2C:44-3. (8T41-2 to 7). And at a hearing two weeks later, it further clarified its reasoning. (9T). It found that defendant committed fourth-degree criminal trespass in October 2013 and fourth-degree criminal sexual contact in June 2015, placing him within the ambit of the persistent-offender statute. (9T6-4 to 18, 7-5 to 13). The trial court thus deemed defendant eligible for a five-to-ten-year prison sentence pursuant to N.J.S.A. 2C:43-7(a)(4), and a parole-ineligibility period of no more than one-half of the aggregate prison sentence pursuant to N.J.S.A. 2C:43-6(b) and 2C:43-7. (9T7-16 to 8-18).

In a footnote, the Appellate Division found fault with this procedure under Erlinger, which issued after defendant was sentenced in this case. (Ppa36). And the panel cited its opinion in Carlton for the proposition that this kind of Erlinger

error necessitates reversal. But this Court subsequently granted certification in Carlton (No. 090241, certif. granted May 16, 2025), and it heard argument in September to decide whether Erlinger errors can be excused under ordinary harmless principles where defendant never disputed that he qualified as a persistent offender. And that will cover this case: given the ample proof in the record that defendant committed the predicate offenses at separate times—criminal trespass in October 2013 and a separate criminal sexual contact in June 2015, see PSR at 6—defendant never contested this issue below. If this Court holds in Carlton that a harmless analysis can be applied to Erlinger errors, that holding should control here, and would require the Court to conclude that any error in the trial court’s exercise of discretion by imposing a persistent-offender sentence was plainly harmless in this case.

CONCLUSION

This Court should reverse the Appellate Division's decision.

Respectfully submitted,

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